IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARVA ANDERSON,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the District of Utah
v.	:	(Case No. 09-01534)
FORD MOTOR CO., ET AL.,	:	
	:	E.D. PA CIVIL ACTION NO. 2:09-69122
Defendants.	:	

FILED
APR 29 2011
MICHAEL E. KUNZ, Clerk
By_____Dep. Clerk

O R D E R

AND NOW, this **27th** day of **April, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant SEPCO, filed on October 20, 2010 (doc. no. 179), is **DENIED.**[1]

[1] Plaintiffs filed this action on October 1, 2008 in the Third Judicial District of Salt Lake County, Utah. (Def.'s Mot. Summ. J., doc. no. 45 at 3.) This case was removed to the United States District Court for the District of Utah and was subsequently transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL 875 on October 22, 2008. (Transfer Order, doc. no. 1.)

Joseph Anderson worked primarily as a pipefitter at various locations and job sites from 1950 until 1990. (Pl.'s Resp., doc. no. 209 at 2.) Mr. Anderson was diagnosed with mesothelioma on October 10, 2005. (Id.) Mr. Anderson passed away due to mesothelioma on June 7, 2008. (Id.)

I. LEGAL STANDARD

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott

Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. The alleged exposures which are relevant to this motion occurred while Mr. Anderson worked at various jobsites in Utah. Therefore, this Court will apply Utah substantive law in deciding Defendant's Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

In McCorvey v. Utah State Department of Transportation, the Supreme Court of Utah held that in order to establish proximate causation, a plaintiff must prove that the defendant's conduct "was a substantial causative factor leading to his injury." 868 P.2d 41, 45 (Utah 1993) (citing Mitchell v. Pearson Enter., 697 P.2d 240, 246 (Utah 1984); Hall v. Blackham, 417 P.2d 664, 667 (Utah 1966); Restatement (Second) of Torts § 431(a) (1965)). The plaintiff bears the burden of proving causation and "[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Weber v. Springville City, 725 P.2d 1360, 1367 (Utah 1986).

In the asbestos context, the District Court of the Third Judicial District in and for Salt Lake County, Utah has

recognized that "there is no causation standard in Utah for asbestos exposure cases, other than the non-specific causation standard generally applicable to all cases in Utah." Sortor v. Asbestos Defendants, No. 040909899 (March 12, 2006). In this memorandum decision, Judge Iwasaki noted that, "the issue of causation is very fact sensitive and, accordingly, each case must stand on its own." Id. at 4. The court held that,

> plaintiffs have the burden of proving that plaintiff had or has an asbestos related injury, that plaintiff was exposed to an asbestos containing product manufactured by defendant, and that the exposure to the asbestos containing product was a substantial factor in causing the injury. The applicability of the Lohrmann considerations in the substantial factor analysis depends upon the facts in evidence and, presumably, will vary from case to case.

Id. In a subsequent memorandum decision clarifying the Sortor decision, Judge Iwasaki refused to require plaintiffs to establish a dosage or exposure requirement in order meet the substantial factor test. In re: Asbestos Litig., No. 01090083 (Sept. 6, 2007). Judge Iwasaki stated,

> [w]hile the Court foresees arguments regarding dosage will be made in connection with the "substantial factor" analysis, such will, by necessity, be subject to other considerations such as, 'the nature of the disease, the quality of the evidence presented, the types of asbestos involved, the location, how they were handled, as well as if and how they were released into the air,' just to name a few.

Id. at 6 (quoting Court's Memorandum Decision of March 12, 2006).

II. MOTION FOR SUMMARY JUDGMENT OF SEPCO

In his deposition, Mr. Anderson was asked,

Q: And can you tell me whether or not you recall the name Setco?

Defense counsel: Objection, leading.

A: Just Setco made packing, too.

Q: And did you ever personally use Setco packing?

A: Yes.

Q: Did you do you use it more than once in your career?

A: Yes.

Q: How often do you think you used Setco packing? If you recall.

A: It's hard to tell. It all depends on what the company would buy at the time. They would buy packing and deals and everything else for all of the pumps, an extra one. So they had them stored. So if you needed a seal or a packing, you would use that and then notify them and they would replace it, the company itself. I didn't do any of the buying.

(Anderson Dep. at 78-79.)

Q: And did you have to somehow put cut our manipulate the new Setco packing to pack that into a pumping valve?

A: Yes. You would have to cut it to size to go around the stern of the valve. If the stern of the valve was two inches round, you would have to cut it jut exactly the right distance to go around it.

Q: And did you see any dust and debris created, did you see anything created when you would do that?

A: It would break the braiding and stuff loose and sometimes have some of the braiding of the rope come loose, yeah.

Q: In the area where you worked with this Setco packing, did you ever have to clean up that area?

A: Yes.

Q: How did you clean it up?

A: With a dust pan and a little broom.

Q: And when you cleaned up that area, did you see any dust created?

A: Yes, I think so.

Q: Did you breathe that dust?

A: Yes.

Q: Did you breathe it every time you would clean up where you worked with the Setco packing?

A: Yes.

(Id. at 79-80.) In answers to interrogatories from another asbestos case, SEPCO admitted that it manufactured, sold, and distributed asbestos-containing products as part of its fluid sealing lines, including gaskets and packing. Defendant asserts Mr. Anderson never identified SEPCO in his deposition. (Def.'s Mot. Summ. J., doc. no. 179 at 6.) Defendant alleges that pursuant to Federal Rule of Civil Procedure 32(d)(4), since the 2007 deposition transcript was reviewed by Plaintiff's counsel to prepare Plaintiff's April 8, 2008 Notice of Exposure Evidence Against Defendants, it is too late to now contest the deposition testimony. (Id. at 7-8.) Plaintiff contends that the name SEPCO was improperly transcribed at "Setco" in the deposition. (Pl.'s Resp. at 4.)

Federal Rule of Civil Procedure 32(d)(4) reads, "[a]n objection to how the officer transcribed the testimony-or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition-is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known." This Court finds that, in the interests of justice, Mr. Anderson's testimony should be considered as identifying SEPCO. Setco was never a defendant in this case and Setco was not present at the deposition. SEPCO has not shown that it suffered prejudice because the deposition transcript read Setco. SEPCO was present at the deposition and has not shown that it was misled into believing that Mr. Anderson did not identify SEPCO in his testimony. Mr. Anderson's deposition was videotaped, so the issue of whether Mr. Anderson identified SEPCO in his deposition can be submitted to a jury.

The Court must consider the fact that, even accepting that Mr. Anderson identified SEPCO, in his deposition, he did so only after his attorney asked him a leading question. Under Federal Rule of Evidence 611(c), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary

to develop the witness' testimony." The rationale behind the rule prohibiting the use of leading questions on direct examination is that the leading question may "induce a false memory in the witness of facts the witness did not perceive." Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6168.

In United States v. Carboni, the United States Court of Appeals for the Eighth Circuit held that the district court did not abuse its discretion in permitting the use of leading questions on direct examination. 204 F.3d 39, 45 (8th Cir. 2000). The court noted that counsel only asked leading questions after repeated attempts to elicit the same information through the use of non-leading questions and that, therefore, pursuant to Federal Rule of Evidence 611(c), the use of leading questions was "'necessary to develop the witness' testimony.'" Id. In United States v. Templemann, the United States Court of Appeals for the Eighth Circuit found that the trial court did not abuse its discretion by permitting the prosecutor to ask leading questions on direct examination since the questions were not so suggestive as to cross "'the fine line between stimulating an accurate memory and implanting a false one.'" 965 F.2d 617, 618 (8th Cir. 1992) (quoting United States v. McGovern, 499 F.2d 1140, 1142 (1st Cir. 1974)). The Templemann court noted that the jury still had the ability to weigh the credibility of the testimony. 965 F.2d at 618.

In order to determine whether Defendant's objection should be sustained, this Court must first determine whether plaintiff's counsel in fact asked leading questions. "A leading question is one that suggests to the witness the answer desired by the examiner." 1 McCormick on Evid. § 6. The court must consider not just the form of the question, but also the content and context of it. Id. Here, Plaintiff's counsel's identification of Defendant's product may have suggested to Mr. Anderson that he should testify that he worked with the product. On the other hand, the question was not leading in the traditional sense. After it was clear that Mr. Anderson could not recall the names of any other specific manufacturers, Plaintiff's counsel refreshed his memory by identifying specific manufacturers. Mr. Anderson was unable to identify specific products among the large number of products he worked with and Plaintiff's counsel merely provided names to prompt Mr. Anderson's memory of which products he worked with.

Even if the questions were in fact leading, the rule against the use of leading questions on direct examination is liberally construed and it is in the discretion of the trial court to allow in such evidence if the interests of justice so require. 98 C.J.S. Witnesses § 417; Commonwealth v. Reaves, 110 A. 158, 159 (Pa. 1919) (citing Gantt v. Cox & Sons Co., 48 A. 992 (Pa. 1901)). Mr. Anderson is now deceased, so the only evidence of exposure comes from the leading question Plaintiff's counsel asked Mr. Anderson. While Plaintiff should not be permitted to survive summary judgment on the basis of this leading questioning, the Court must take into account that Mr. Anderson was sickly at the time of his deposition. Also, after Plaintiff's counsel mentioned SEPCO or Setco, as it was transcribed, Mr. Anderson was able to testify about his exposure to SEPCO products. Despite the fact that Mr. Anderson responded to a leading question to identify SEPCO, this Court will consider Mr. Anderson's product identification testimony. The credibility of Mr. Anderson's testimony identifying SEPCO should be submitted to a jury.

In his deposition, Mr. Anderson testified that he worked with SEPCO packing material and that he inhaled dust when he worked with this packing material. In applying the substantial factor test, this Court considers the factors enumerated by Judge Iwasaki in his March 12, 2006 memorandum decision. As to the nature of the disease, Mr. Anderson passed away due to his development of mesothelioma. The quality of the evidence presented in this case is not strong since the only product identification evidence is from Mr. Anderson's testimony where he identified SEPCO only in response to leading questions. Also, Mr. Anderson could not provide evidence as to any specific site where he worked with SEPCO packing material. Mr. Anderson testified that he was exposed to dust when he worked with SEPCO packing material and that he inhaled this dust. Viewing the evidence in the light most favorable to Plaintiff, since Plaintiff has presented evidence that Mr. Anderson was exposed to dust from SEPCO packing material, Plaintiff has raised a genuine issue of material fact as to whether exposure to SEPCO packing material was a substantial factor in causing Mr. Anderson's development of mesothelioma. Accordingly, Defendant's Motion for Summary Judgment is denied.

E.D. PA NO. 2:09-69122

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.