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

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

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 Trane US, Inc. f/k/a American Standard, Inc., filed on October 20, 2010 (doc. no. 180), is **GRANTED**.[1]

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[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.) Plaintiff alleges that Mr. Anderson was exposed to Kewanee boilers for which American Standard is liable.

In January of 1970, American Standard sold the assets and liabilities of Kewanee Boiler to Kewanee Boiler Corp. n/k/a Oakfabco, Inc. As part of the agreement, Oakfabco agreed to defend, indemnify, and hold American Standard harmless against any and all liabilities, claims or suits arising from or related to any sales of Kewanee boilers for which Trane otherwise would

be liable. Oakfabco was separately served in this action. On October 21, 2009, Oakfabco was dismissed from this case. The New York Court of Appeals has found that Oakfabco is contractually liable for pre-1970's Kewanee boilers.

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).

C. Product Identification Standard under Utah Law

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).

D. Court of Appeals of New York Decision Holding OakFabco, Inc. Liable for Kenawee Boilers

In American Standard, Inc. v. OakFabco, Inc., the Court of Appeals of New York addressed whether OakFabco, who bought Kenawee in 1970, should be held liable for tort claims stemming from exposure of Kewanee boilers sold prior to 1970 when the injuries occurred after 1970. 927 N.E.2d 1056, 1056-57 (N.Y. 2010). In 1970, American Standard, Inc. sold its Kewanee Boiler division to Kewanee Boiler Corp., now known as OakFabco, Inc. Id. at 1057. The asset purchase and sale agreement stated that OakFabco, Inc. was acquiring the Kewanee Boiler division "subject to all debts, liabilities, and obligations connected with or attributable to such business and operations." Id. The court held that, according to the language of the parties' agreement, OakFabco., Inc., the buyer, did assume tort liability for injuries caused by exposure to asbestos from Kewanee boilers. Id. The court found that the lower court erred by enjoining OakFabco, Inc. from ever relitigating this issue and noted that "[i]t may well be that our decision today will preclude OakFabco from relitigating the issue we decide, in the sense that any attempt to relitigate it should be rejected; but OakFabco should not be enjoined from arguing otherwise." Id. at 1058-59.

II. MOTION FOR SUMMARY JUDGMENT OF TRANE US, INC. F/K/A AMERICAN STANDARD, INC.

In his deposition, Mr. Anderson was asked,

Q: And then to move on, let me ask you this in the relation to the names of some of those boilers you might possibly remember or might possibly refresh your recollection? Can you tell me whether or not you recall the name "Kewanee"?

Defense counsel: Objection, leading.

A: Yes.

Q: Why do you recall the name "Kewanee"?

A: Yeah, I heard of the boilers, yes.

Q: Sorry. I hope I'm not shouting in your ear now.

A: No. I'm fine.

Q: But do you associate the name Kewanee with some of these package boilers that you personally worked on?

A: I associate it with the package boilers, yes. I couldn't say that I've worked on one; but as many boilers I've worked on, I would say yes.

Q: On the Kewanee boilers, did you - to the best of your knowledge, did you ever have to hook one up?

A: I would say yes.

Q: And would you have used the gasket material? Is it probably you would have used the gasket material in the same way?

A: Same way. All of them hooked up basically the same way.

(Anderson Dep. 105-06.)

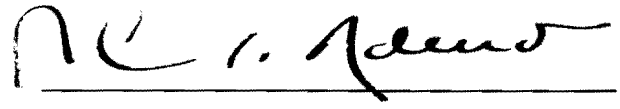
Defendant relies on the decision of the Court of Appeals of New York in asserting that it is not the proper party to this lawsuit. Collateral estoppel does not apply here since Plaintiff was not a party to the case in New York and applying collateral estoppel does not comport with due process. This Court finds that while the Court of Appeals of New York's decision provides guidance, in that, pursuant to the asset purchase and sale agreement, American Standard may be able to seek indemnity from Oakfabco, this does not mean that Plaintiff should be foreclosed from litigating this claim that Mr. Anderson was exposed to Kenawee boilers.

In his deposition, Mr. Anderson testified that he installed pre-insulated boilers. Mr. Anderson did not repair any boilers, but merely hooked gas lines up to pre-insulated boilers using gaskets, which were not supplied by the boiler manufacturers. In addition, any asbestos present in the boilers was encapsulated. Mr. Anderson did not indicate that he was exposed to any asbestos dust when installing the boilers. Mr. Anderson testified that he installed 20-30 boilers over the course of his 40 year career. Understandably, Mr. Anderson could not provide any information as

to which sites he was working at when he installed any particular brand of boiler and could not specify the frequency with which he worked with any brand of boiler. Plaintiff has provided no co-worker testimony or documentary evidence to supplement Mr. Anderson's testimony. Mr. Anderson is now deceased. 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 Mr. Anderson's identification of Kewanee boilers came after a leading question and Plaintiff has presented no other product identification evidence. The type of asbestos, assuming that the Kewanee boilers that Mr. Anderson installed contained asbestos, was encapsulated asbestos. The location of any alleged exposures is unclear since Mr. Anderson could not pinpoint any time that he worked with a Kewanee boiler. There is no evidence that asbestos fibers were released into the air when Mr. Anderson installed boilers. After consideration of these factors, this Court finds that Plaintiff has failed to raise a genuine issue of material fact as to whether exposure to Kewanee asbestos-containing boilers was a substantial factor in causing Mr. Anderson's development of mesothelioma. This Court need not consider that Mr. Anderson identified Kewanee only after being asked a leading question because even considering Mr. Anderson's product identification testimony, Defendant's Motion for Summary Judgment is granted.

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

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.