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.	:	

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 York International Corp., filed on October 19, 2010 (doc. no. 160), 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 YORK INTERNATIONAL CORP.

In his deposition, Mr. Anderson was asked,

Q: Do you think it might be some names of some other companies that you just don't recall right now that you did see but you just don't recall?

A: Yeah. I know there's another one that made the cases. I can't remember what it is at the moment.

Q: Did - would it help you if I called out some names to you to refresh your memory possibly?

A: Might.

Defense counsel: Objection, leading.

Q: Can you tell me whether or not you recall the name "York International"?

Defense counsel: Objection, improper refresh.

A: The name is familiar. I think "York" was air compressors. I think that's what they made.

Q: Do you think you ever personally worked on a York air compressor?

Defense counsel: Objection, leading.

A: They were refrigerated air compressors. They were full of oil and they don't work like a regular air compressor. But I think that's what they made.

Q: So it is fair to say you've worked around a York International --

Defense counsel: Objection. Misstates testimony.

Q: Did you ever see those compressors ever rehabbed or maintenance, any maintenance done on them?

A: Yeah, they had maintenance on all - they're all of the compressors on all of the stores.

Q: What would they have to do to do maintenance on a York Compressor?

Defense counsel: Objection, vague. Objection, speculation.

A: Most generally they don't have any maintenance other than making sure that they were full of oil, unless something happened in the soft work and they stopped producing the Koldaire that they needed for the debris.

Q: Did those York compressors have gaskets in them, too?

A: Yeah. You would have to tear the face of it off and tear them apart, the interior and redo the gaskets.

Q: In the course of that work, would you see any kind of dust created?

Defense counsel: Objection to foundation, form.

A: From gaskets and stuff, yes.

Q: All right. Would you be in the area of that dust?

A: Yes.

Q: Do you believe, based on - do you believe that you breathed any of that dust?

A: Yes.

(Anderson Dep., April 23, 2007 at 118-20.)

Defendant asserts that while Plaintiff has presented evidence that York manufactured and sold heating, cooling and air handling equipment and commercial refrigeration equipment, there is no evidence that York ever manufactured or sold air compressors. Defendant submits the affidavit of Frederick Ziffer, a former York employee. (Ziffer aff., doc. no. 162.) Mr. Ziffer avers that, "York never made or supplied any air compressors of any type. Instead, York manufactured or supplied refrigeration and air conditioning equipment, which included compressors as a component of the units. Those compressors compressed refrigerants, such an ammonia or Freon, for cooling purposes. The refrigeration and air conditioning compressors do not compress air, and could not be used for the same purpose as air compressors." (Id. § 4.) However, in its answers to interrogatories, York admitted that its "Applied Systems Division and its predecessors sold compressors, air conditioning and refrigeration equipment." (Interrog. No. 43, Doc. No. 209-2.) York also admitted that some of its products contained asbestos. (Interrog. No. 31.)

In his deposition, Mr. Anderson testified that he worked with York International Corp. air compressors and that he inhaled asbestos dust when he worked with these compressors. Mr. Anderson identified York International Corp. in his deposition only after his attorney asked him a leading question. In the deposition, Defense counsel objected to the 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.

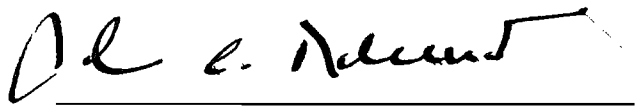
In order to determine whether Defendant's objection should be sustained, this Court must first determine whether plaintiff's counsel in fact asked leading questions. "A leading question is one that suggests to the witness the answer desired by the examiner." 1 McCormick on Evid. § 6. The court must consider 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 York International Corp., Mr. Anderson was able to testify about his exposure to York International Corp. products. Despite the fact that Mr. Anderson responded to a leading question to identify York International Corp., this Court will consider Mr. Anderson's product identification testimony. The credibility of Mr. Anderson's testimony identifying York International Corp. should be submitted to a jury.

Defendant has presented evidence, through the deposition of Mr. Ziffer, that York International Corp. did not manufacture the air compressors which Mr. Anderson testified about in his deposition. In response, Plaintiff has pointed to Defendant's answers to interrogatories where Defendant admitted that York's Applied Systems Division did manufacture compressors. 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 York came after a leading question, however, as examined above, in the interests of justice, the Court will consider this evidence. As to the other factors, Mr. Anderson testified that he tore gaskets off of York compressors, that dust was released into the air in this process, and that he breathed in that dust. Accordingly, viewing the evidence in the light most favorable to Plaintiff, Plaintiff has raised a genuine issue of material fact as to whether exposure to York International Corp. asbestos-containing products was a substantial factor in causing Mr. Anderson's development of mesothelioma.

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

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.