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

DONALD BELL, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	Transferred from the Northern District of California (Case No. 12-00131)
ARVIN MERITOR, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:12-60143-ER
Defendants.	:	

FILED
OCT -4 2013
MICHAEL E. KUNZ, Clerk
By_____ Dep. Clerk

O R D E R

AND NOW, this **4th** day of **October, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Bear Automotive Service Equipment Company (filed by SPX Corporation) (Doc. No. 288) is **GRANTED**.[1]

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[1] This case was transferred in April of 2012 from the United States District Court for the Northern District of California to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiffs Donald Bell ("Mr. Bell") and Sumiko Bell ("Mrs. Bell") allege that Mr. Bell was exposed to asbestos, inter alia, while working as an automobile mechanic. Defendant Bear Automotive Service Equipment Company ("Bear") manufactured brake grinding machines. The alleged exposure pertinent to Defendant Bear occurred at Fremont Grand Auto and Newark Grand Auto during the time period 1978 to 1985.

Plaintiffs assert that Mr. Bell developed lung cancer as a result of his asbestos exposure. Mr. and Mrs. Bell were deposed in July of 2012.

Plaintiffs brought claims against various defendants. Defendant Bear has moved for summary judgment, arguing that (1) there is insufficient product identification evidence to support a finding of causation with respect to any product(s) for which

it is responsible because it never manufactured any asbestos-containing product, and, moreover, there is no evidence that any product Mr. Bell ground in its machines contained asbestos, (2) there is no evidence that Mr. Bell has an illness caused by asbestos, and (3) Plaintiffs' claim for false representation fails as a matter of law. The parties agree that California law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any 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

When the parties to a case involving land-based exposure agree to application of a particular state's law, this Court has routinely applied that state's law. See, e.g., Brindowski v. Alco Valves, Inc., No. 10-64684, 2012 WL 975083, *1 n.1 (E.D. Pa. Jan. 19, 2012) (Robreno, J.). The parties have agreed that California substantive law applies. Therefore, this

Court will apply California 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/Causation Under California Law

Under California law, a plaintiff need only show (1) *some* threshold exposure to the defendant's asbestos-containing product and (2) that the exposure "in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." McGonnell v. Kaiser Gypsum Co., Inc., 98 Cal. App. 4th 1098, 1103 (Cal. Ct. App. 2002); see also, Rutherford v. Owens-Illinois, 16 Cal. 4th 953, 977 n.11, 982-83 (Cal. Ct. App. 1997) ("proof of causation through expert medical evidence" is required). The plaintiff's evidence must indicate that the defendant's product contributed to his disease in a way that is "more than negligible or theoretical," but courts ought not to place "undue burden" on the term "substantial." Jones v. John Crane, Inc., 132 Cal. App. 4th 990, 998-999 (Cal. Ct. App. 2005).

The standard is a broad one, and was "formulated to aid plaintiffs as a broader rule of causality than the 'but for' test." Accordingly, California courts have warned against misuse of the rule to preclude claims where a particular exposure is a "but for" cause, but defendants argue it is "nevertheless. . . an insubstantial contribution to the injury." Lineaweaver v. Plant Insulation Co., 31 Cal. App. 4th 1409, 1415 (Cal. Ct. App. 1995). Such use "undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby." Mitchell v. Gonzales, 54 Cal. 3d 1041, 1053 (Cal. 1991).

In Lineaweaver, the California Court of Appeals for the First District concluded that "[a] possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.'" 31 Cal. App. 4th at 1416. Additionally, "[f]requency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case." Id.

D. Bare Metal Defense Under California Law

The Supreme Court of California has held that, under California law, a product manufacturer generally is not liable in strict liability or negligence for harm caused by a third party's products. O'Neil v. Crane Co., 53 Cal. 4th 335, 266 P.3d 987 (Cal. 2012). There, O'Neil, who formerly served on an aircraft carrier, brought products liability claims against Crane Co. and Warren Pumps, which manufactured equipment used in the ship's steam propulsion system. Pursuant to Navy specifications, asbestos insulation, gaskets, and other parts were used with the defendant manufacturer's equipment, some of which was originally supplied by the defendants. O'Neil, however, worked aboard the ship twenty years after the defendants supplied the equipment and original parts. There was no evidence that the defendants made any of the replacement parts to which O'Neil was exposed or, for that matter, that the defendants manufactured or distributed asbestos products to which O'Neil was exposed.

The court firmly held that the defendant manufacturers were not liable for harm caused by asbestos products they did not manufacture or distribute. Id. at 362-66. With regard to the plaintiff's design-defect claim, the court noted that "strict products liability in California has always been premised on harm caused by deficiencies in the defendant's own product." Id. at 348. And that the "defective product . . . was the asbestos insulation, not the pumps and valves to which it was applied after defendants' manufacture and delivery." Id. at 350-51.

Similarly, the Court rejected the plaintiff's claim that the defendants are strictly liable for failure to warn of the hazards of the release of asbestos dust surrounding their products. The plaintiff asserted that the defendants were under a duty to warn because it was reasonably foreseeable that their products would be used with asbestos insulation. Nevertheless, the court held, "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." Id. at 361. Accordingly, the Court refused to hold the defendants strictly liable. Id. at 362-63.

And the O'Neil court conducted a similar analysis to the plaintiff's claim based on the defendants' negligent failure to warn. The court concluded that "expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would

exceed the boundaries established over decades of product liability law." Id. at 365. Thus, as a matter of law, the court refused to hold the defendants liable on the plaintiff's strict liability or negligence claims.

II. Defendant Bear's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation / Bare Metal

Bear contends that Plaintiffs' evidence is insufficient to establish that any product for which it is responsible caused Mr. Bell's illness. Specifically, it contends that it never manufactured any asbestos-containing grinding machine and cannot be liable for harm caused by asbestos in a product it neither manufactured nor sold. It also argues, in the alternative, that there is no evidence that any product Mr. Bell ground in a Bear grinding machine contained asbestos.

Medical Evidence of Asbestos Illness

Bear contends that there is insufficient evidence that Mr. Bell's illness was caused by asbestos, and argues instead that the evidence indicates his illness was caused by smoking cigarettes.

False Representation Claim

Bear contends that there is insufficient evidence (and, in fact, no evidence) to establish Plaintiffs' claim for false representation.

B. Plaintiffs' Arguments

Product Identification / Causation / Bare Metal

Plaintiffs contend that they have identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiffs cite to the following evidence:

- Deposition of Plaintiff Richard Bell
  Plaintiff Richard Bell testified that he worked with Bear grinders during the 1970s and early 1980s at Grand Auto. He testified

that he used the grinders to grind asbestos-containing brakes, and that this work involved respirable dust.

(Doc. Nos. 299-1, Pls. Exs. B, C, and D)

- Declaration of Plaintiff Richard Bell
In his declaration, Plaintiff Richard Bell states that he worked with Bear brake grinders during the 1970s at Grand Auto Supply, and that all of the brakes he grinded with Bear brake grinders has asbestos-containing brake liners. He states that the grinding process created respirable dust from the brakes.

(Doc. No. 297-3)

- Declaration of Expert Charles Ay
Mr. Ay states that, at the time of the alleged exposure, virtually all brake lining materials contained 25% to 40% chrysotile asbestos. Mr. Ay opines (without having any personal knowledge of Mr. Bell's exposure to any type of product) that Mr. Bell was more likely than not exposed to hazardous asbestos during his work with brake linings.

(Doc. No. 299-2, Pls. Ex. E)

In connection with their opposition, Plaintiffs have submitted objections to some of Defendant's evidence.

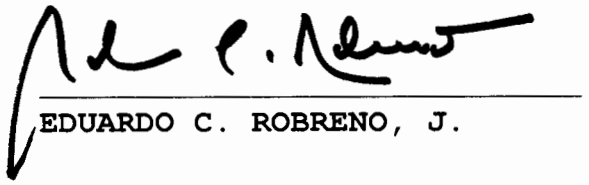
Medical Evidence of Asbestos Illness

Plaintiffs contend that there is sufficient medical evidence to support their claims against defendant for asbestos-related illness.

False Representation Claim

Plaintiffs contend that, under California law, there are triable issues of material fact regarding their false representation claim.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

C. Analysis

For purposes of deciding Defendant Bear's motion for summary judgment, the Court considers the testimony of expert Charles Ay, without deciding which portions (if any) of his testimony submitted in opposition to Bear's motion are admissible. Because Defendant Bear's motion will be granted even if the evidence is deemed admissible, the Court need not reach this issue and declines to do so. The Court notes that Mr. Ay does not provide testimony about Defendant Bear's product and, rather, provides testimony about other products used in connection with Bear's product.

Plaintiffs allege that Mr. Bell was exposed to asbestos from brakes and brake linings ground in Bear grinders. Plaintiffs have presented evidence that Mr. Bell ground asbestos-containing brakes in Bear grinders, and was exposed to respirable dust from these brakes during that work. Importantly however, "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." O'Neil, 53 Cal. 4th at 361. Therefore, as a matter of law, Defendant Bear cannot be liable (in negligence or strict liability) for harm arising from asbestos in brakes that it did not manufacture - even if it was foreseeable that its grinding machines would be used with asbestos-containing brakes in a manner that could lead to an asbestos-related injury. Id. at 361, 362-66. Accordingly, summary judgment in favor of Defendant Bear is warranted. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach any other arguments, as Plaintiffs are unable to establish the causation requisite to Plaintiffs' other claims.

D. Conclusion

Summary judgment in favor of Defendant Bear is warranted on all of Plaintiffs' claims against it.