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

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

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 Carquest Corporation (Doc. No. 282) 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 Carquest Corporation ("Carquest") manufactured automobile brakes. The alleged exposure pertinent to Defendant Carquest 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 Carquest 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, and (2) Plaintiffs' claim for loss of consortium is barred by the applicable statute of limitations.

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., No. S177401, 2012 WL 88533 (Cal. Jan. 12, 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. O'Neil, 2012 WL 88533, at *5. 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. 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 *7.

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 *16. Accordingly, the Court refused to hold the defendants strictly liable. Id. at *17.

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 *19. 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 Carquest's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation / Bare Metal

Carquest contends that Plaintiffs' evidence is insufficient to establish that any product for which it is responsible caused Mr. Bell's illness. In support of its motion, Defendant relies upon the declaration of Arthur Lottes, who was employed by Carquest.

Loss of Consortium (Statute of Limitations)

Carquest contends that Plaintiffs' loss of consortium claim is barred by California's two-year statute of limitations for personal injury actions because this case was filed more than two years after Mr. Bell's October 2005 diagnosis of lung cancer.

B. Plaintiff's 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:

- Depositions of Co-Worker Ernesto Rodriguez
  Plaintiffs contend that co-worker Mr. Rodriguez provides testimony that Mr. Bell worked with Carquest brakes during the time period 1978 to 1985, and that this work exposed him to respirable dust from the brakes.

  (Doc. No. 301-1, Pls. Exs. A and B)

- Deposition of Co-Worker Terry Ruiz
  Plaintiffs contend that co-worker Mr. Ruiz provides testimony that Mr. Bell worked with Carquest brakes during the time period 1978 to 1985, and that this work exposed him to respirable dust from the brakes.

  (Doc. No. 301-1, Pls. Ex. C)

- 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. He also 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 Defendant's product.

  (Doc. No. 301-1 and 301-3, Pls. Ex. D)

In connection with its opposition, Plaintiff has submitted objections to the declaration of Defendant's witness, Mr. Lottes, contending that it is inadmissible because it contradicts prior testimony by Mr. Lottes (i.e., that it is a "sham affidavit"). (Doc. No. 301-2, Pls. Ex. G.)

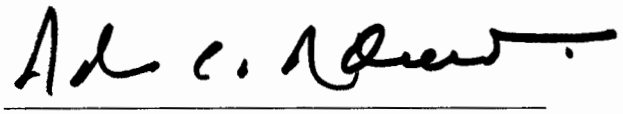
Loss of Consortium (Statute of Limitations)

Plaintiffs contend that Defendant is not entitled to summary judgment on Mrs. Bell's loss of consortium claim because Defendant has failed to establish that Mrs. Bell knew or should have known that Mr. Bell's lung cancer was caused by asbestos more than two years prior to the filing of this action.

C. Analysis

Plaintiffs do not dispute that Mr. Ay has no personal knowledge of Mr. Bell's alleged exposure. It is true that an expert need not have personal knowledge provided the expert has a sufficient factual basis for the opinion. See Fed. R. Evid. 702. Here, Mr. Ay's opinion is not based on sufficient facts regarding the products to which Mr. Bell was exposed, or the asbestos content of any product which Mr. Bell was exposed. As such, the Court concludes that Mr. Ay's opinion testimony that Mr. Bell was more likely than not exposed to asbestos as a result of his work with Defendant's brakes is impermissibly speculative and does not meet the requirements of Federal Rule of Evidence 702(b), which requires that expert testimony be based on "sufficient facts or data." Fed. R. Evid. 702(b). Therefore, Mr. Ay's opinion testimony on this point is inadmissible and will not be

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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considered. The Court considers instead the sufficiency of Plaintiff's admissible evidence.

Plaintiffs allege that Mr. Bell was exposed to asbestos from Carquest brakes. Plaintiffs have presented evidence that Mr. Bell worked with Carquest brakes and was exposed to respirable dust from these brakes during that work. They have presented evidence that, at the time of the alleged exposures, "virtually all" brake lining materials contained 25% to 40% chrysotile asbestos. Importantly however, there is no evidence that any of the Carquest brakes with which Mr. Bell worked contained asbestos. Implicit in the assertion that "virtually all" brake lining materials at the time contained asbestos is the admission that at least some brake lining materials at the time did not contain asbestos. As such, no reasonable jury could conclude from the admissible evidence that Mr. Bell was exposed to asbestos from a product manufactured or supplied by Defendant because any such finding would be impermissibly conjectural. McGonnell, 98 Cal. App. 4th at 1103; see also, Rutherford, 16 Cal. 4th at 977 n.11, 982-83; Jones, 132 Cal. App. 4th at 998-999. Accordingly, summary judgment in favor of Defendant Carquest is warranted. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach any of the parties' other arguments.

D. Conclusion

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