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 California (Case No. 12-00131)
v.	:	
ARVIN MERITOR, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:12-60143-ER
Defendants.	:	

O R D E R

AND NOW, this **22nd** day of **October**, **2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Hennessy Industries, Inc. (Doc. No. 286) is **GRANTED**; and the Motion to Strike of Plaintiffs (Doc. No. 389) is **DENIED**.[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 Hennessy Industries, Inc. ("Hennessy") is successor to Ammco Tools, Inc., which manufactured brake grinding machines. The alleged exposure pertinent to Defendant Hennessy 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 Hennessy 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) it is entitled to summary judgment on grounds of the so-called "bare metal defense," (3) Plaintiffs' claims for false representation and "intentional tort" fail as a matter of law, and (4) it is, at the very least, entitled to partial summary judgment on Plaintiffs' claim for punitive damages.

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 Hennessy's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation / Bare Metal

Hennessy 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 cannot be liable for harm caused by asbestos in a product it neither manufactured nor sold. It also argues that the "Tellez-Cordova exception" to the general rule set forth by the California Supreme Court's decision in O'Neil is not applicable to the factual scenario presented by its product. By way of supplemental brief filed on July 10, 2013, Defendant cites to new legal authority, which it contends indicates it cannot be liable in this case: Sanchez v. Hitachi Koki Co., No. B245050, 2013 Cal. App. LEXIS 534 (Cal. Ct. App. July 9, 2013)

False Representation and "Intentional Tort" Claims

Hennessy contends that it is entitled to summary judgment on Plaintiffs' claims for false representation and "intentional tort" because Plaintiffs' evidence is insufficient to support a finding of causation on the part of any product for which it is liable.

Punitive Damages Claim

Hennessy contends that, at the very least, it is entitled to partial summary judgment on Plaintiffs' punitive damages claim because Plaintiffs evidence is insufficient to establish "malice, fraud, or oppression" as is required.

Plaintiffs' Motion to Strike

In response to Plaintiffs' motion to strike its supplemental brief, Defendant asks the Court to consider the

supplemental brief (which cites to new legal authority issued the previous day: Sanchez, No. B245050, 2013 Cal. App. LEXIS 534) and to deem it to contain an implicit request for leave to file it.

B. Plaintiffs' Arguments

Product Identification / Causation / Bare Metal

Plaintiffs contend that the "Tellez-Cordova exception" discussed in O'Neil is applicable because Defendant's product created asbestos hazards when "used as intended" because it was designed and intended to be used to grind asbestos-containing brake linings.

Plaintiffs contend that they have identified sufficient product identification/causation evidence to survive summary judgment under the "Tellez-Cordova exception" discussed in O'Neil. In support of this assertion, Plaintiffs cite to the following evidence:

- Deposition of Plaintiff Richard Bell
  Plaintiff Richard Bell testified that he worked with Ammco grinders during his time in the Army and while working at Grand Auto. He testified that he used the grinders to grind asbestos-containing brakes, and that this work involved respirable dust.

  (Doc. Nos. 317-1 and 317-2, Pls. Exs. B-D)

- Declaration of Plaintiff Richard Bell
  In his declaration, Plaintiff Richard Bell states that he worked with Hennessy brake grinders during the 1960s, 1970s, and 1970s during his work in the Army and at Grand Auto Supply, and that all of the brakes he grinded with Ammco brake grinders has asbestos-containing brake liners. He states that the grinding process created respirable dust from the brakes.

  (Doc. No. 310-3)

- Deposition of Bill Inman
  Richard Bell testified that he saw Plaintiff Richard Bell in proximity to others working

with Ammco grinders in 1953 while grinding asbestos-containing brakes. He testified that he was not aware of any brakes at the time that were not asbestos-containing, and that this work created very dusty conditions.

(Doc. No. 317-2, Pls. Ex. E)

- 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. 317-3, Pls. Ex. F)

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

False Representation and "Intentional Tort" Claims

Plaintiffs contend that, under California law, there is sufficient evidence to support - and that there are triable issues of material fact regarding - their false representation and "intentional tort" claims against Defendant.

Punitive Damages Claim

Plaintiffs contend that there is sufficient evidence to support - and triable issues of fact regarding - their punitive damages claim against Defendant.

Plaintiffs' Motion to Strike

Plaintiffs contend that Defendant's supplement brief citing to new legal authority should be stricken because Defendant did not seek leave of Court to file it. In addition, they contend that the new authority does not render Defendant free of liability in this case as it suggests because it is inapposite to the facts and issues at hand.

C. Analysis

For purposes of deciding Defendant Hennessy'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 Hennessy's motion are admissible. Because Defendant Hennessy'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 Hennessy's product and, rather, provides testimony about other products used in connection with Hennessy's product.

Plaintiffs allege that Mr. Bell was exposed to asbestos from brakes and brake linings ground in Ammco grinders (for which Hennessy is responsible). Plaintiffs have presented evidence that Mr. Bell ground asbestos-containing brakes in Ammco 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.

Plaintiffs contend that the "Tellez-Cordova exception" discussed in O'Neil is applicable because Defendant's product created asbestos hazards when "used as intended" because it was designed and intended to be used to grind asbestos-containing brake linings. However, it is clear from the O'Neil court's discussion surrounding this exception that it is not applicable to the factual scenario at hand. In distinguishing Tellez-Cordova, the O'Neil court wrote:

> Tellez-Cordova developed lung disease from breathing toxic substances released from metals he cut and sanded and from abrasive discs on the power tools he used. (Tellez-Cordova, supra, 129 Cal. App. 4th at p. 579, 28 Cal. Rptr. 3d 744.) He sued manufacturers of these tools, arguing they were "specifically designed" to be used with abrasive discs for grinding and sanding metals, and it was therefore reasonably foreseeable that toxic dust would be released into the air when the tools were used for their intended purpose. (Id. at p. 580, 28 Cal. Rptr. 3d 744.) Relying on Garman v. Magic Chef, Inc., supra, 117 Cal. App. 3d 634, 173 Cal. Rptr. 20, and Powell v. Standard Brands Paint Co., supra, 166 Cal. App. 3d 357, 212 Cal. Rptr. 395, the tool

manufacturers argued California law imposed no duty on them to warn of hazards in the product of another. (Tellez-Cordova, at p. 585, 28 Cal. Rptr. 3d 744.) The tools themselves released no hazardous dust; the dust came from the abrasive discs that were attached to the tools and the metals they contacted. However, the Court of Appeal remarked that this argument "misse[d] the point," because the intended purpose of the tools was to abrade surfaces, and toxic dust was a foreseeable by-product of this activity. According to the complaint's allegations, "the tools had no function without the abrasives which disintegrated into toxic dust," and "the abrasive products were not dangerous without the power of the tools." (Ibid.)

The facts in Tellez-Cordova differed from the present case in two significant respects. First, **the power tools in Tellez-Cordova could only be used in a potentially injury-producing manner. Their sole purpose was to grind metals in a process that inevitably produced harmful dust.** In contrast, the normal operation of defendants' pumps and valves did not inevitably cause the release of asbestos dust. This is true even if "normal operation" is defined broadly to include the dusty activities of routine repair and maintenance, because **the evidence did not establish that defendants' products needed asbestos-containing components or insulation to function properly.** It was the Navy that decided to apply asbestos-containing thermal insulation to defendants' products and to replace worn gaskets and packing with asbestos-containing components. Second, it was the action of the power tools in Tellez-Cordova that caused the release of harmful dust, even though the dust itself emanated from another substance. Tellez-Cordova is arguably an example of a "case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn [citation]." (Rastelli, supra, 582 N.Y.S.2d 373, 591 N.E.2d at p. 226.) The same is not true here. The asbestos dust that injured O'Neil came from thermal insulation and replacement gaskets and packing made by other manufacturers. Nothing about defendants' pumps and valves caused or contributed to the release of this dust. The Court of Appeal here characterized Tellez-Cordova as holding

"that a manufacturer is liable when its product is necessarily used in conjunction with another product, and when danger results from the use of the two products together." **In this case, neither requirement was met. Defendants' pumps and valves were not "necessarily" used with asbestos components,** and danger did not result from the use of these products "together." The hazardous dust to which O'Neil was exposed resulted entirely from work performed on asbestos products that defendants did not manufacture, sell, or supply. **The Court of Appeal's extension of Tellez-Cordova beyond its unique factual context could easily lead to absurd results. It would require match manufacturers to warn about the dangers of igniting dynamite, for example.**

Moreover, as noted, **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. Were it otherwise, manufacturers of the saws used to cut insulation would become the next targets of asbestos lawsuits.** Recognizing a duty to warn was appropriate in Tellez-Cordova because there the defendant's product was intended to be used with another product for the very activity that created a hazardous situation. **Where the intended use of a product inevitably creates a hazardous situation, it is reasonable to expect the manufacturer to give warnings.** Conversely, where the hazard arises entirely from another product, and the defendant's product does not create or con-tribute to that hazard, liability is not appropriate. We have not required manufacturers to warn about all foreseeable harms that might occur in the vicinity of their products. "From its inception, ... strict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user. [Citations.]" (Daly v. General Motors Corp., supra, 20 Cal.3d at p. 733, 144 Cal.Rptr. 380, 575 P.2d 1162.)

53 Cal. 4th at 360-61 (emphasis added).

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

In the case at hand, Defendant's grinder could have been used in a non-injurious manner (e.g., with products other than asbestos-containing brake linings, including asbestos-free brake linings). Although it is true that brake linings themselves would not have released respirable dust had the asbestos therein not been disturbed by the grinder (or some other cause of disturbance), the facts of the case at hand are still distinguishable from those in Tellez-Cordova because there are many ways the grinder could be used without creating asbestos hazards. The Court finds that the use of Defendant's grinder with brake linings is akin to the use of matches to light dynamite - a scenario in which the California Supreme Court made clear a match manufacturer could not be held liable for harm caused by the dynamite it lit. Id. Therefore, as a matter of law, Defendant Hennessy 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. O'Neil, 53 Cal. 4th at 361, 362-66. Accordingly, summary judgment in favor of Defendant Hennessy 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. Therefore, Plaintiffs' motion to strike is denied as moot.

D. Conclusion

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