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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (No. VI)	:	Consolidated Under MDL DOCKET NO. 875
WILLIAM AND CAROL CURTIS	:	
v.	:	Civil Action No. 10-cv-2863
BORG-WARNER CORP., ET AL.	:	Case originally filed in the Eastern District of Pennsylvania

O R D E R

AND NOW, this **8th** day of **August, 2011**, it is hereby **ORDERED** that Defendant Borg-Warner Corporation's Motion for Summary Judgment (doc. no. 25) filed on June 3, 2011 is **DENIED.**[1]

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[1] Plaintiffs, William Curtis and Carol Curtis, commenced the instant action in the Philadelphia Court of Common Pleas on May 12, 2010, alleging injuries due to asbestos exposure. On September 3, 2009, Plaintiff William Curtis ("Mr. Curtis") was diagnosed with lung cancer. The case was subsequently removed to the Eastern District of Pennsylvania and became a part of MDL 875 In Re: Asbestos on June 12, 2010. Mr. Curtis was deposed on June 17, 2010.

Mr. Curtis was employed as a parts clerk at Goldring Motors in Brooklyn, New York from 1960-1967. Goldring Motors was an official dealership for Dodge and Volvo automobiles, and had a mechanics division. (Pl.'s Resp., at 2.)

Mr. Curtis was not a mechanic at Goldring Motors, but alleges that he physically handled parts and equipment. Defendant Borg-Warner Corporation ("Borg-Warner") supplied asbestos-containing parts for clutches to Chrysler from 1936 through 1980. (Pl.'s Resp., doc. no. 29, at 19.) Additionally, Mr. Curtis testified that he recalled Borg-Warner clutches being

one of the products he handled that were installed into non-Chrysler vehicles. (Curtis Disc. Dep. at 61 and 62.)

I. LEGAL STANDARD

A. Summary Judgment Standard

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

B. Product Identification under Pennsylvania Law

Borg-Warner states that "[s]ince Mr. Curtis' alleged exposure to Borg-Warner products occurred in New York, the substantive law of New York must apply." (Def.'s Mot., doc. no. 25, at 5.) However, without a choice of law analysis, and in the absence of any briefing on the issue, the Court will apply Plaintiffs' choice of Pennsylvania law to the instant matter.

Under Pennsylvania law, a plaintiff must establish, as a threshold matter, "that [his or her] injuries were caused by a product of the particular manufacturer or supplier." Eckenrod v. GAF Corp., 544 A.2d 50, 52 (citing Wible v. Keene Corp., No. 86-4451, 1987 WL 15833 at *1 (E.D. Pa. Aug. 19, 1987)(in order to defeat defendant's motion, plaintiff must present evidence showing that he or she was exposed to an asbestos product supplied by defendant)). Beyond this initial requirement, a plaintiff must further establish that they worked with a certain defendant's product with the necessary frequency and regularity, and in close enough proximity to the product, to create a genuine issue of material fact as to whether that specific product was a substantial factor (and thus the proximate cause) of plaintiff's asbestos related condition. Eckenrod, 544 A.2d at 52-53.

In addition to articulating the "frequency, regularity and proximity" standard, Eckenrod also held that "the mere fact that appellees' asbestos products came into the facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered." Id. at 53. Gregg v. VJ Auto Parts, Co., 943 A.2d 216 (Pa. 2007), further upheld the discretion of the trial court in evaluating the evidence presented at the trial stage, ruling that

> we believe it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's . . . asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

Id. at 227. The Gregg court adopted a fact sensitive approach regarding the sufficiency of product identification evidence. Moreover, "the plaintiff's exposure to each defendant's product should be independently evaluated when determining if such exposure was a substantial factor in causing the plaintiff's injury." Tragarz v. Keene Corp., 980 F.2d 411, 425 (7th Cir. 1992)(discussed by Gregg court in setting out the product identification criteria in Pennsylvania).

C. Borg-Warner's Motion for Summary Judgment

Borg-Warner asserts that it is entitled to summary judgment because Mr. Curtis testified that he would never have to clean Borg-Warner clutches, and there is no evidence that his handling of Borg-Warner clutches created airborne asbestos fibers. (Def.'s Mot., doc. no. 25, at 12)(citing Video Dep. at 82; Disc. Dep. at 63.)

Plaintiffs do not dispute that Mr. Curtis did not clean Borg-Warner clutches. Plaintiffs describe Mr. Curtis's exposure to Borg-Warner clutches as follows: "Mr. Curtis would open the box when he received it to confirm it contained the proper type of clutch," and when the mechanics were finished with a clutch, "the used clutch would be returned in a box from a mechanic . . . Mr. Curtis had to open the box to confirm the old clutch was present, because the old clutch had to be returned to the parts dealer in order for Goldring Motors to receive its deposit money back." (Pl.'s Resp., doc. no. 29, at 16.) Mr. Curtis recalled ordering clutches on twenty (20) to thirty (30) occasions during his time at Goldring Motors. (Mr. Curtis Disc. Dep. at 60.)

Plaintiffs aver that this process exposed Mr. Curtis to airborne asbestos fibers, based on an asbestos fiber study conducted by Borg-Warner in reference to its newly-manufactured clutches in 1972. The study asserted that:

> After thoroughly observing the operations associated with the manufacturing of the completed clutches, it is felt that a significant amount of the total asbestos exposure is coming from the loose fibers that are on the clutch facings. This observation is borne out somewhat by the clutch facing inspector received while checking several new pallets of facings (sample #1). While working in an area that is considerably cleaner than the general work table in the assembly area, he received an exposure that his higher than most other employee's exposure. (Pl.'s Resp., doc. no. 29, at 18.)

Plaintiffs aver that this raises at least a genuine issue of material fact as to whether Mr. Curtis was exposed to dust in his dealings with Borg-Warner clutches. Borg-Warner stated that this study was related to exposure during manufacturing, and is inapplicable to the type of

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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exposures that would be experienced by mechanics. However, on its face, the study supports the conclusion that "loose fibers on clutch facings" of new clutches can result in "significant" exposure to asbestos. As Mr. Curtis was responsible for opening new boxes of Borg-Warner clutches, and ordered clutches on twenty (20) to thirty (30) occasions, there remains a genuine issue of material fact as to whether Borg-Warner's asbestos-containing clutches were a substantial contributing factor to Mr. Curtis's asbestos-related disease.

Under these circumstances, summary judgment is denied.