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

WILLIAM R. JOHNSON,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the District of
v.	:	South Carolina
	:	(Case No. 10-01185)
AW CHESTERTON COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-CV-83257-ER
Defendants.	:	

O R D E R

AND NOW, this **12th** day of **January, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Dana Holding Corp. (Doc. No. 40) is **DENIED.**[1]

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[1] This case was transferred from the United States District Court for the District of South Carolina to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff William Johnson ("Plaintiff") was employed by the Navy from approximately 1963 until 1968. He worked as a diesel engineman aboard various Navy ships and alleges asbestos exposure arising from this work.

Plaintiff was ultimately diagnosed with lung cancer, as reflected in a pathology report dated April 19, 2007. During his deposition, Plaintiff testified that he did not learn he had lung cancer until "Thanksgiving of 2006," at which time he received an x-ray for a shoulder injury and was told he had a spot on his lung. The relevant testimony is as follows:

> Q: When did you first start having symptoms that you would associate with your lung cancer?
> A: Never had any.
> Q: How did that come about?
> A: I tore my rotator cuff –
> Q: Right.
> A: – Thanksgiving of '06.
> Q: Right.

A: And I came in to Charleston, went to V.A. I told them I had something in my shoulder turned loose on me. And they said, "Well, let's x-ray you." And they x-rayed me, they picked up the top of my right lung. And the technician that read the x-rays caught it. And when I came back in the room, the doctor – had two doctors in the room, one was an orthopedic surgeon and one was a lung doctor. And the orthopedic surgeon told me, said "Yes, sir. You've got a torn rotator cuff," he said, "but that ain't your problem." He said, "You've got lung problems." And then the lung doctor took over. I had a spot about the size of a 50 cent piece up on this top lobe.

Q: So were you having any shortness of breath or any problems like that?

A: Nothing. Nothing.

. . . . .

Q: It says April 2006 is when you had the surgery.

A: No, sir. No, sir. It was April 2007. April 16 when they busted my back.

Q: So this would be a misprint, an error – a clerical error in the progress notes?

A: I didn't even know I had cancer in '06 until Thanksgiving.

(Dep. of William R. Johnson, May 23, 2011, at 117:16 - 118:15, 148:5-12, Ex. 3 to Doc. No. 40.)

Plaintiff filed this action on April 12, 2010. Defendant Dana Holding Corp. ("Dana Holding") has moved for summary judgment, arguing that discovery in this case has revealed that Plaintiff's claims are barred by the statute of limitations. The parties agree that South Carolina law applies.

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. Statutes of limitations are matters of substantive law in diversity suits. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., – U.S. – , 130 S. Ct. 1431, 1471 (2010)(citing Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)). The parties have agreed that South Carolina substantive law applies. Therefore, this Court will apply South Carolina substantive law in deciding Dana Holding'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 multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." In Re Asbestos Prods. Liabl. Litig. (No. VI), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009).

C. Procedural Matters Regarding Statutes of Limitations

The statute of limitations defense is an affirmative defense, on which the Defendant carries the burden of proof. See Robinson v. Johnson, 313 F.3d 128 (3d Cir. 2002). This Court has

previously noted that, "[t]ypically, the determination of whether a plaintiff's claim is barred by the statute of limitations involves issues of fact and therefore, the statute of limitations is normally addressed at the summary judgment stage or at trial." Kiser v. A.W. Chesterton Co., 770 F. Supp. 2d 745, 747 (E.D. Pa. 2011)(Robreno, J.). It is only where the facts are undisputed that a court may address the statute of limitations as a matter of law. See id. (citing Zankel v. Temple University, 245 F.App'x 196, 198 (3d Cir. 2007)).

D. South Carolina's Statute of Limitations

The statute of limitations applicable to Plaintiff's claims is three (3) years. See S.C. Code Ann. § 15-3-530(5)(Supp. 1999). The statute requires that a personal injury action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." Id.

South Carolina's statute of limitations on personal injury actions was addressed by the Supreme Court of South Carolina in Snell v. Columbia Gun Exchange, 276 S.C. 301, 278 S.E.2d 333, 334 (1981). In Snell, the court construed the language of § 15-3-530 and held that:

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

Id.

In Hinson v. Owens-Illinois, Inc., 677 F. Supp. 406 (D.S.C. 1987), the court addressed the running of the statute of limitations in an asbestosis case. The plaintiff in Hinson was treated for respiratory and chest problems beginning in 1974. Plaintiff's medical records from a hospitalization lasting from January 10-13, 1978 indicated: "This 53-year-old while married male insulation firm executive with known chronic lung disease, due to asbestosis has had a chronic cough since 1974.... Impression: Asbestosis, both lungs." Plaintiff's discharge

summary dated February 7, 1978 stated that plaintiff would be followed annually for "tumor due to his asbestosis." The physician in the case testified that he had discussed his findings with plaintiff in January of 1978, pointing out to him that "his lung disease was partially due to asbestos." Although the physician was not certain he has used the term asbestosis during the discussion in January of 1978, he was sure he had explained to plaintiff that he had scarring in his lungs due to asbestos inhalation. The plaintiff testified that he did not recall the physician informing of this; he testified that, on January 29, 1978, shortly after his release from the hospital, he received a cat scan of his thorax that plaintiff acknowledged showed "undeniably, really asbestosis." The plaintiff contended that his cause of action accrued upon his receipt of a definitive diagnosis in August of 1981. The defendant contended that the plaintiff had notice of his cause of action at some point prior to September 24, 1979 (the earliest date on which Plaintiff's action could have been timely, under the then-six-year-long statute of limitations). The court stated:

> In view of the above facts and circumstances and viewing all evidence and inferences therefrom in a light most favorable to the plaintiff, the court concludes that a person of common knowledge and experience would be "on notice that some right of his has been invaded or that some claim against another party might exist," at the latest, by January 29, 1978. Therefore, the statute of limitations in this case began to run at the very latest on January 29, 1978.

677 F. Supp. at 411 (quoting Snell, 276 S.C. 301).

In Grillo v. Speedrite Products, Inc., 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (S.C. App. Ct. 2000), the Court of Appeals of South Carolina denied summary judgment after determining that there was a genuine issue of material fact as to "when a reasonable person [in the plaintiff's situation] would have been on notice that he might have a cause of action against" the defendant. 340 S.C. at 508. Grillo involved an ink user diagnosed with an illness that arose from toxic solvent exposure. The court held that:

> The fundamental test . . . in determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. Stated differently, "a cause of action accrues at

> the moment when a plaintiff has the legal right to sue on it."

340 S.C. at 502 (quoting Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962)). It also stated that:

> A key element in the reasonable diligence test is "notice." The fact that an injured party may not comprehend the full extent of the damage is immaterial. . . . Under section 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another.

Id. at 503 (citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996) and Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994))(internal citations omitted). In reaching its decision, the court considered Hinson and implicitly approved of the reasoning of Hinson in the context of an asbestos case.

II. Defendant Dana Holding's Motion for Summary Judgment

The parties agree that the statute of limitations applicable to Plaintiff's claims is three (3) years. See S.C. Code § 15-3-530(5). The parties dispute the date on which the limitations period began to run.

Defendant Dana Holding argues that Plaintiff's claims are barred by South Carolina's statute of limitations. Specifically, Defendant cites to Plaintiff's deposition testimony to argue that Plaintiff learned he had lung cancer on "Thanksgiving of 2006." Defendant argues that, because Plaintiff did not file this action until April 12, 2010, it is barred by South Carolina's three (3) year statute of limitations.

In response, Plaintiff concedes that he learned there was a spot on his lung on Thanksgiving of 2006, as a result of an x-ray he received for an unrelated shoulder injury. Plaintiff argues, however, that, because he did not receive the pathology report with the official medical diagnosis (i.e., "medical proof") until April 19, 2007, the limitations period did not begin running until that time. Therefore, Plaintiff contends that his action was timely filed.

The Court concludes that Defendant Dana Holdings has not carried its burden in establishing the absence of a genuine issue of material fact regarding the asserted untimeliness of Plaintiff's claim. See Robinson, 313 F.3d 128. In short, there is a factual issue as to when the Plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action." § 15-3-530.

Although plaintiff testified retrospectively during his May 2011 deposition that he "didn't even know [he] had cancer in '06 until Thanksgiving," this testimony is ambiguous and susceptible to more than one reasonable interpretation. It is unclear from this testimony what Plaintiff knew about his condition on Thanksgiving of 2006. When viewing the deposition testimony in its totality, the Court is unable to conclude that Plaintiff knew of his lung cancer at that time, as it is also plausible that this testimony intended to convey that he had learned of the spot on his lung at that time – which, by May 2011, turned out to be cancer. Given that there is no other evidence in the record (e.g., medical reports or deposition testimony of his treating physician) that supports Defendant's reading of Plaintiff's deposition testimony that Plaintiff learned of a cancer diagnosis prior to April 19, 2007, there is a genuine issue of material fact and Defendant's motion is, therefore, denied. See Grillo, 340 S.C. at 503; Kiser, 770 F. Supp. 2d at 747.