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

GREGORY A. LEGG,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Northern District of Alabama (Case No. 11-02189)
v.	:	
ARMSTRONG INTERNATIONAL, INC., et al.,	:	E.D. PA CIVIL ACTION NO. 2:11-67222-ER
Defendants.	:	

O R D E R

AND NOW, this **29th** day of **November, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Daniel International Corporation(Doc. No. 147) is **GRANTED in part; DENIED in part**, with leave to refile in the transferor court after remand.[1]

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[1] This case was transferred in August of 2011 from the United States District Court for the Northern District of Alabama to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that Decedent Billy Joe Legg ("Decedent" or "Mr. Legg") was exposed to asbestos, developed mesothelioma as a result of this exposure, and died from that illness. The alleged exposure pertinent to Defendant Daniel International Corporation ("Daniel") occurred during Decedent's work at the Monsanto Chemical Plant (formerly known as the Chemstrand plant) in Decatur, Alabama, where Decedent worked primarily in the "pilot plant" from 1955 to 1986.

Plaintiff brought claims against various defendants. Defendant Daniel has moved for summary judgment arguing that (1) Plaintiff's claims arising from asbestos exposure prior to May 19, 1979 are barred by Alabama's statute of limitations, and (2) Plaintiff's claims are barred by Alabama's statute of repose. The parties agree that Alabama 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

The parties agree that Alabama substantive law applies. Therefore, this Court will apply Alabama 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 Alabama Law

This Court has previously considered the product identification/causation standard under Alabama law. In Lewis v. Asbestos Corp., this Court wrote:

> The Supreme Court of Alabama has held that the identity of a manufacturer of a defective product

> may be proven by circumstantial evidence. Turner v. Azalea Box Co., 508 So. 2d 253, 254 (Ala. 1987). However, the defendant is entitled to summary judgment if this circumstantial evidence is based on mere speculation or conjecture. Id. Although the Supreme Court of Alabama has not addressed the issue of product identification in asbestos cases under Alabama law, it has held under maritime law that proof that defendant's asbestos-containing product caused plaintiff's injuries is an essential element to any claim based on asbestos exposure. See Sheffield v. Owens-Corning Fiberglass Corp., 595 So. 2d 443, 450-54 (Ala. 1992).

No. 10-64625, 2011 WL 5881184, at *1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). There has been no new, relevant precedent from appellate courts in Alabama since this Court addressed the issue.

D. Alabama's Statute of Limitations

This Court has previously addressed Alabama's statute of limitations. In Archer v. Mead Corp., the Court wrote:

> Under Alabama law, all claims for pre-1979 exposure to asbestos must be filed within one year of the last date of exposure. For any exposure to asbestos after May 17, 1980, the claim accrues upon discovery of an asbestos-related disease. Garrett v. Raytheon Co., 368 So.2d 516 (Ala.1979); Johnson v. Garlock, Inc., 682 So.2d 25 (Ala.1996); Henderson v. MeadWestvaco Corp., 23 So.3d 625, 629 (Ala.2009); see also Corley, 10-61113, doc. no. 86.
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> Two facts regarding the statute of limitations defense are undisputed: (1) Plaintiffs have alleged exposure to asbestos at [two jobsites] after 1979; (2) [Defendant] sold all of its interest in [those two jobsites] in 1974, and there is no evidence of [Defendant]'s involvement with [those two jobsites] after 1974.
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> [Defendant] argues that because it ceased all activity at these worksites in 1974, the pre-1979 "last exposure" rule applies. Plaintiffs respond that because they can show

post-1979 exposure to asbestos at these worksites, the discovery rule applies. The central question is whether the relevant date for statute of limitations purposes is the date on which the defendant's allegedly tortious activity occurred, or the date on which plaintiff suffered an injury and the claim accrued.

It is clear that the relevant date for statute of limitations purposes is the date of plaintiff's injury. The Alabama Supreme Court's decision in Henderson, 23 So.3d 625, is instructive on this point. The Henderson case involved the same defendant (Mead), the same worksite (CAPCO), and the same theories of liability (duty to provide a safe worksite and negligent inspection) as the instant cases. Plaintiff worked at CAPCO during the summers of 1971 and 1972 while he was in college. Id. at 627. Plaintiff asserted that Mead had "voluntarily assumed a duty to inspect the CAPCO plant and to ensure compliance with safety standards." Id. at 628. The Alabama Supreme Court, however, found that Plaintiff's claims were time-barred, because "based on the law as it then existed, [Plaintiff]'s claim of personal injury resulting from exposure to asbestos would have accrued in 1972, on the date of his last exposure to asbestos at CAPCO." Id. at 630. Therefore, in Henderson, Plaintiff's claim was time-barred, based on the last date of exposure to asbestos.

The instant cases are distinguishable from Henderson, because Plaintiffs here have raised at least a genuine issue of fact as to whether Plaintiffs were exposed to asbestos after 1979. Plaintiff Farrell Riggs and Plaintiff Alfred McGuffie worked at CAPCO until it closed in 1982. Plaintiff Charles Archer worked at National Cement until 2002. Under Alabama law, when a plaintiff shows post-1979 exposure to asbestos, his or her action does not "accrue" until the individual knew or should have known of an asbestos-related disease. Ala. Code 1975 § 6-2-30 (1993). As there is a genuine issue of material fact as to whether post-1979 exposure to asbestos occurred as

alleged, Mead is not entitled to summary judgment on this ground.

No. 09-70093, 2011 WL 3240827 (E.D. Pa. July 29, 2011) (Robreno, J.).

II. Defendant Daniels's Motions

A. Defendant's Arguments

Statute of Limitations / Causation

Daniel argues that, under Alabama law, Plaintiff's claims arising from asbestos exposure prior to 1979 are barred by a one-year statute of limitations. In support of this assertion, Daniel relies upon Henderson v. Meadwestvaco, 23 So.2d 625 (Ala. 2009), and Tyson v. Johns-Manville Sales Corp., 399 So.2d 263 (Ala. 1979). Daniel contends there is insufficient evidence to establish causation with respect to alleged asbestos exposure occurring after 1979.

Statute of Repose

Daniel argues that, under Alabama law, Plaintiff's claims of asbestos exposure are barred by the statute of repose. Daniel contends this is true because Plaintiff's claims accrued more than 13 years after substantial completion of "the work at issue in this case." (Mem. At 9.) In support of this assertion, Daniel cites to Alabama code § 6-5-221, and relies upon the following decisions: Baugher v. Beaver Const. Co., 791 So.2d 932, 934 n.1 (Ala. 2000).

B. Plaintiff's Arguments

Statute of Limitations

Plaintiff does not dispute that the statute of limitations bars claims arising from asbestos exposure occurring prior to May 19, 1979. Instead, Plaintiff argues that there is a genuine dispute as to whether Decedent experienced asbestos exposure for which Daniel is responsible after May 19, 1979.

Causation

In response to Defendant's assertion that there is insufficient evidence to establish causation with respect to any

conduct for which it is responsible after 1979, Plaintiff has identified the following evidence:

- Deposition Testimony of Owen Holland
  Mr. Holland worked at the Monsanto facility from 1967 to 1985. He testified that he recalled "Daniel's Construction" working as an outside contractor there in "the seventies and eighties" and that the work created "lots of dust."

  (Doc. No. 164-11 at 297-98.)

- Deposition Testimony of Richard Mays
  Mr. Mays worked at the Monsanto facility from 1963 to 1998. He testified that both "Daniel" and "Fluor Daniel" worked at the facility and that he was employed by both. He testified that at one point his check came from "Daniel" and at a later point (including when he left), his check came from "Fluor Daniel." He testified that while he was working for "Daniel," he was working with asbestos insulation, and that this work created dust. He testified that no masks or respirators were given to the employees to do this work. He testified that "in the late years" (which he previously identified as "the late '80s or in the 90s"), he ripped out insulation, while working for "Daniel." He testified that the insulation being removed was asbestos insulation. He explained how asbestos insulation could be identified. He testified that he worked in more than one area of the facility with or near Decedent. He testified that this work included insulation work.

  (Doc. No. 164-7 at 5-22, 35-43, 62, and 85.)

- Deposition Testimony of David Barnett
  Mr. Barnett testified that "Daniel" employees worked at the Monsanto facility and that other contracting companies' employees would use Daniel branded equipment.

  (Doc. Nos. 164-3 (at 77) and 164-4 (at 148-52).

- Deposition Testimony of Ray Weeks
  Mr. Weeks worked with Decedent at the Monsanto plant from 1966 through 1996. He testified that

employees of Fluor Daniel and Daniel International both worked at the facility and did the same work. He specified that this work continued from the 1960s into the 1980s. He testified that it was his understanding that "Daniel International came after Fluor dropped out." He testified that Decedent was in close proximity to where Fluor Daniel employees were working, and explained how the open design of the building allowed dust from upper floors to come down into lower floors.

(Doc. No. 164-6 at 11, 47-51, and 118.)

- Expert Report of Richard Hatfield
  Mr. Hatfield provides expert testimony opining that Decedent was exposed to asbestos from the insulation installed and removed at the Monsanto facility.

  (Doc. Nos. 163 and 164-8 at 5-6 and 10-12.)

- Interrogatory Responses of Defendant
  Plaintiff points to interrogatory responses of Defendant from another action, which indicate that Defendant contracted with Monsanto for construction services in 1980, 1985, and 1987.

  (Doc. No. 164-9.)

Plaintiff contends that the Alabama Supreme Court has adopted the "fiber drift theory" such that a reasonable jury could infer that Decedent was exposed to asbestos for which Defendant is responsible by virtue of that asbestos having been in the general work area of Decedent - even "considerable distances" from where the asbestos originated. (Opp. at 6-7.) Plaintiff contends that, in Sheffield, the Alabama Supreme Court cited approvingly an Eleventh Circuit decision in which the Eleventh Circuit "found credible asbestos exposure where the contended airborne asbestos fibers entered the window of the plaintiff's work area from a shipyard three to four hundred feet away from [the] plaintiff." (Opp. At 6-7, citing Hoffman v. Allied Corporation, 912 F.2d 1379 (11th Cir. 1990).)

In short, Plaintiff contends that mere evidence of presence at the Decedent's worksite of asbestos for which Defendant is responsible is sufficient to survive summary judgment. Plaintiff

contends that, in Sheffield, the Alabama Supreme Court adopted the Washington state rule set forth in Lockwood v. AC&S, 744 P.2d 605 (Wash. 1987).

Statute of Repose

Plaintiff contends that Alabama's construction statute of repose is not applicable to this case because it only applies to claims based on defects or deficiencies in the construction of an improvement to real property. Plaintiff (1) asserts that Alabama courts have never considered the statute in an asbestos case, and (2) contends that the asbestos exposure was not a result of a defect or deficiency. Plaintiff asks this court to look to a case from the Iowa Supreme Court regarding what he contends is a similar statute of repose under Iowa law: Buttz v. Owens-Corning Fiberglass Corporation, 557 N.W.2d 90 (Iowa 1996).

C. Analysis

Statute of Limitations

The parties agree that the applicable Alabama statute of limitations bars claims arising from asbestos exposure occurring prior to May 19, 1979. Therefore, these claims are, barred. See also Archer v. Mead, 2011 WL 3240827, at *1. Additionally, in accordance with this Court's earlier ruling, Plaintiff's claims arising from exposure during the period May 19, 1979 to May 19, 1980 are also barred. See id. Accordingly, summary judgment in favor of Defendant is granted with respect to these claims. See Anderson, 477 U.S. at 248-50.

In light of this ruling, the Court need only consider the sufficiency of Plaintiff's evidence regarding alleged asbestos exposure occurring after May 19, 1980. The Court next considers this issue.

Causation

Plaintiff alleges that Decedent was exposed to asbestos as a result of the conduct of Daniel employees in handling insulation, which Plaintiff contends they "controlled and installed." (Pl. Opp. at 2.) There is evidence that "Fluor Daniel" and "Daniel" employees both did work that involved disturbing asbestos, which created dust. There is evidence that some of this asbestos-disturbing work was done in the 1980s. There is evidence that Decedent worked in close proximity to

"Fluor Daniel" employees who were disturbing insulation. There is also evidence that the structural design of the area in which Decedent worked would have allowed dust fibers to travel easily from upper floors to lower floors.

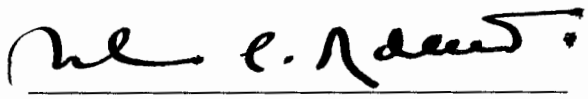
As an initial matter, there is a genuine issue of material fact as to whether testimony regarding "Fluor Daniel" refers to Defendant Daniel. There is no direct evidence that Decedent breathed asbestos dust as a result of the work of "Fluor Daniel" or "Daniel" employees. However, if Plaintiff is correct that Alabama law recognizes the "fiber drift theory" discussed in Sheffield, it is likely that, under Alabama law, Defendant would not be entitled to summary judgment. (This depends on how much proximity - or lack thereof - Alabama law would require under the "fiber drift theory.") Because the Alabama Supreme Court's decision in Sheffield applied maritime law, rather than Alabama law, it is not clear whether that court would recognize the "fiber drift theory" under Alabama law, or how much proximity it would require. As such, Alabama law on this issue is not settled. Rather than predict what the Supreme Court of Alabama would do, the Court will remand this issue for determination by the transferor court, as a court situated in Alabama is closer to - and has more familiarity with - Alabama law and policy. See, e.g., Faddish v. CBS Corp., No. 09-70626, 2010 WL 4159238 (E.D. Pa. Oct. 22, 2010) (Robreno, J.). Accordingly, summary judgment in favor of Defendant on grounds of insufficient evidence of causation is denied, with leave to refile in the transferor court after remand. See Anderson, 477 U.S. at 248-50.

If Alabama law deems Plaintiff's evidence regarding post-May 19, 1980 exposure sufficient to survive summary judgment, Defendant could still be entitled to summary judgment if Alabama's statute of repose bars claims arising from this exposure. Therefore, the Court next considers this issue.

Statute of Repose

Defendant contends that Alabama's statute of repose (appearing as Alabama code § 6-5-221) bars Plaintiff's claims. No appellate court in Alabama has addressed the statute of repose in the context of an asbestos claim. Therefore, this Court is not able to discern whether Alabama, like many states, deems the statute inapplicable to claims arising from latent illnesses, such as asbestos-related diseases. Moreover, Alabama law has not determined whether the asbestos exposure at issue in this case constitutes a "defect" or "deficiency" such that the statute

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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could potentially be applicable. As such, Alabama law surrounding this statute is not settled. Rather than predict what the Supreme Court of Alabama would do in deciding the applicability of the statute of repose, the Court will also remand this issue for determination by the transferor court. See id.

D. Conclusion

Summary judgment in favor of Defendant is granted with respect to claims arising from alleged asbestos exposure occurring prior to May 19, 1980 because they are barred by the Alabama statute of limitations.

Summary judgment in favor of Defendant is denied (with leave to refile in the transferor court) with respect to claims arising from alleged asbestos exposure occurring after May 19, 1980 because Alabama law regarding causation (specifically, whether Alabama law recognizes the "fiber drift theory") and the statute of repose is unsettled. Rather than predict how the Alabama Supreme Court would rule on these issues, the Court deems it appropriate to remand the case for determination of these issues by the transferor court.