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

ROBERT BAKER,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Northern District of
v.	:	California
	:	(Case No. 11-01646)
	:	
HOPEMAN BROTHERS, INC.,	:	E.D. PA CIVIL ACTION NO.
ET AL.,	:	2:11-63924-ER
	:	
Defendants.	:	

O R D E R

AND NOW, this **2nd** day of **July, 2012**, it is hereby

ORDERED that the Motion for Summary Judgment of Defendant Paccar, Inc. (Doc. No. 114) is **DENIED.**[1]

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[1] This case was transferred in April of 2011 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.

Plaintiff Robert Baker alleges that he was exposed to asbestos from brakes during his career as a mechanic, working at various locations throughout California. Defendant Paccar, Inc. ("Paccar") manufactured trucks, including Peterbilt and Kenworth trucks. The alleged exposure pertinent to Defendant Paccar occurred during the following period of Plaintiff's work:

- Diamond T Trucks (1964)

Plaintiff asserts that he developed asbestosis and pleural disease as a result of asbestos exposure. He was deposed in an earlier action in 2001, and in the present action in 2011.

Plaintiff brought claims against various defendants. Defendant Paccar has moved for summary judgment, arguing that (1) it is entitled to summary judgment on grounds of the bare metal defense, (2) there is insufficient product identification evidence to establish causation with respect to its product(s). 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

The parties have agreed that California substantive law applies. Therefore, this Court will apply California law in deciding Paccar'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. Bare Metal Defense Under California Law

The Supreme Court of California recently 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. 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. 53 Cal. 4th at 347. 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." 53 Cal. 4th 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." 53 Cal. 4th 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." 53 Cal. 4th at 361. Accordingly, the Court refused to hold the defendants strictly liable. 53 Cal. 4th at 362.

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." 53 Cal. 4th 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.

D. 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 Ca1. 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 Ca1. 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.

II. Defendant Paccar's Motion for Summary Judgment

A. Defendant's Arguments

Paccar contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness. Specifically, Paccar argues that it cannot be liable for injury arising from any product or component part that it did not place into the stream of commerce.

In connection with its reply brief, Paccar submitted objections to Plaintiff's expert declarations (the declarations of Mr. Ay and Dr. Schonfeld).

B. Plaintiff's Arguments

Plaintiff contends that she has identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiff cites to the following evidence:

- Declaration of Plaintiff
  Plaintiff's declaration states that he worked at Diamond T Trucks in approximately 1964 as a mechanic. It states that he worked on Peterbilt, Kenworth, and Mack trucks while at Diamond T, and describes the process of performing brake replacement jobs on Peterbilt trucks at least three to four times, and assisting others in performing brake replacements. He specifies that the process involved blowing out the left over brake dust.

  Plaintiff specifies: "I knew the brakes were original to these Peterbilt trucks because of the way they looked. There were no scratches on the parts and they did not look like they were worked on before. I also knew the difference between original brakes and replacement brakes because on the lining there were OEM numbers and the length of the OEM numbers used about 8 to 10 digits whereas aftermarket companies did not use 8 to 10 digit numbers on their parts."

  Plaintiff states that he also assisted in brake replacement work on a Kenworth truck,

as well as clutch replacements on Peterbilt trucks.

(Pl. Ex. A, Doc. No. 120-1, ¶¶ 15-18.)

- Declaration of Expert Charles Ay
Mr. Ay's declaration provides the following pertinent testimony:

20. Based upon my training and experience as an insulator, asbestos consultant, researcher of asbestos products, and inspector, I have knowledge as to how one can be exposed to asbestos during the handling and use of various types of asbestos products such as brakes and clutches. The use of asbestos in brake and clutch materials dates back prior to the 1930s. Asbestos is used in the manufacture of drum brake linings and brake blocks because of its thermal stability, reinforcing properties, flexibility, resistance to wear, and relatively low cost. Because of these advantages, and because no other substance that could be used as filler in brake linings could replicate them all, asbestos continued to be used as the preferred substance for drum brakes through the end of the 1980s.

21. I am familiar with and knowledgeable regarding the basic design and configuration of "drum brake" systems used in automobiles from at least 1940 to 1990. I have personally performed brake inspection and the replacement of brake linings of numerous automobiles with drum brakes. I have also observed experienced brake/automotive mechanics perform many brake servicing and brake lining replacements of automobiles with drum brakes. Additionally, I have reviewed numerous publications that instruct users how to service drum brakes and replace brake linings.

22. Based on my knowledge and experience, I can state that "drum brakes" universally

followed the same basic design and operating principles. The operation of drum brakes is relatively simple: Friction is created between a moving and stationary object until the automobile either slows down or comes to a stop. Thus, when a driver presses on a brake pedal, it causes the brake shoe 9which is stationary in relation to the rotating brake drum and wheel) to press against a brake drum. (The brake drum is attached to the wheel of the vehicle and is turning.) When the shoe touches the drum, friction is created. The harder the brake is pressed, the greater the friction created between the shoe and the drum. Thus, the car is either slowed or stopped. When the brakes are operated, the brake linings are pressed against the brake drum. This causes the brake linings to wear down. The wear process creates dust and debris, which collects in the drum and around the brake assembly, which surrounds the brake assembly, shoes, and linings. Because brake linings contained asbestos, the dust generated by the wear process also contained asbestos.

. . . . .

24. Based on my knowledge, research and experience as described above, I can state that the Paccar brakes Mr. Baker worked on in the early 1960's would necessarily have required the use of asbestos-containing parts, both as to original brake lining and as to any replacement linings. The uniformly expressed view in the authorities referenced above–consistent with my own experience–is that as of the 1960's, and well beyond, there was no available alternative to asbestos-containing linings as a friction material. Such brake assemblies were designed to use asbestos material. Besides the unanimity of opinion that there were no available alternatives to asbestos at the time, my opinion is further reinforced by the observation in the OSHA document referenced

above that *if* an asbestos substitute were developed it would require re-testing and re-qualification before it could be utilized in a specific brake application. . . .

. . . . .

26. Based on my asbestos training, education, and experience in the trades as an insulator, personal testing of thermal pipe insulation and other materials for the presence of asbestos, review of the literature, career in asbestos detection and abatement, and Mr. Baker's declaration, it is my opinion that the brakes and clutches Mr. Baker described working with and around other removing and replacing the same, contained asbestos.

27.Based on my asbestos training, education, and experience in the trades as an insulator, personal testing of thermal pipe insulation and other materials for the presence of asbestos, review of the literature, career in asbestos detection and abatement, and Mr. Baker's declaration, it is my opinion that Mr. Baker was exposed to respirable asbestos fibers from the removal and replacement of asbestos-containing brakes and clutches far above ambient levels during his work at Diamond T as describe above, especially while it involved an air compressor to blow out all the asbestos fibers collected in the brake drum as described by Mr. Baker.

(Pl. Ex. B, Doc. No. 120-1, ¶¶ 20-22, 24, 26-27.)

- Declaration of Alvin J. Schonfeld, D.O.
  Dr. Schonfeld states "to a reasonable degree of medical certainty" that "each exposure that was above ambient levels contributed to the total dose of asbestos suffered by that person. Therefore, it is my opinion, based on all of the information, records, and other evidence that I have reviewed, as well as my

> education, training, and experience in pulmonary diseases and diseases of the chest, that each and every one of Mr. Baker's exposures to respirable asbestos, within the latency period and that were above ambient air levels, would, on a more likely than not basis, have been a substantial factor in his asbestosis and pleural disease." He stated that the work Plaintiff performed on Peterbilt truck brakes as he described were, on a more likely than not basis, a substantial factor in his asbestosis and pleural disease."
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> (Pl. Ex. C, Doc. No. 120-2, ¶¶ 25-27.)

C. Analysis

Admissibility of Plaintiff's Evidence

As a preliminary matter, the Court notes that it has considered Defendant's objections to Plaintiff's evidence and has determined that they are without merit. Therefore, the Court will consider Plaintiff's evidence in deciding Defendant's motion.

Product Identification / Causation

Plaintiff alleges that he was exposed to asbestos from brakes in trucks manufactured by Defendant Paccar. There is evidence that, in approximately 1964, Decedent was exposed to dust as a result of the changing of brakes that were original to Peterbilt trucks. There is evidence that these brakes contained asbestos, and that changing the brakes would result in exposure to respirable asbestos fibers. There is evidence that, "to a reasonable degree of medical certainty," the work Plaintiff performed on Peterbilt truck brakes as he described were, "on a more likely than not basis," a substantial factor in his asbestosis and pleural disease. Therefore, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from original brakes installed in a Peterbilt truck manufactured by Defendant Paccar and that, in reasonable medical probability, this exposure was a substantial factor in contributing to the aggregate dose of asbestos Plaintiff inhaled or ingested, and hence, to Plaintiff's risk of developing asbestos-related cancer. McGonnell, 98 Cal. App. 4th at 1103; see also, Rutherford, 16 Ca1. 4th at 977 n.11, 982-83; Jones, 132

Cal. App. 4th at 998-999. Accordingly, summary judgment in favor of Defendant Paccar is not warranted. Anderson, 477 U.S. at 248.