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

JOSEPH SCHWARTZ and LENORA SCHWARTZ,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	
ABEX CORP., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:05-cv-02511-ER
Defendants.	:	

O R D E R

AND NOW, this **23rd** day of **May, 2012**, it is hereby

ORDERED that the Motion for Summary Judgment of Defendant **Honeywell International, Inc.** (Doc. No. 37) is **DENIED.**[1]

---

[1] This case originated in Pennsylvania state court. In May of 2005, it was removed by a defendant to the Eastern District of Pennsylvania and became part of MDL-875.

Plaintiff Lenora Schwartz is the personal representative of the estate of Joseph Schwartz ("Decedent" or "Mr. Schwartz"). Mr. Schwartz was employed as a propeller mechanic and crew chief. Defendant Honeywell International, Inc. ("Honeywell") is a successor in interest to Allied Signal, Inc., which was a successor in interest to Bendix Corporation, which manufactured, inter alia, brakes. Plaintiff has alleged that Mr. Schwartz was exposed to asbestos from the following Bendix brakes during the following periods of his work:

- C-119 aircraft brakes - 1965 - 1967
- Commercial truck brakes - 1962 - 1967
- Consumer brakes (personal vehicle) - 35 years

Mr. Schwartz was diagnosed with mesothelioma. He was deposed in April of 2005 and died in February of 2006.

Plaintiff has brought claims against various defendants. Defendant Honeywell has moved for summary judgment,

(1) arguing that there is insufficient product identification evidence to establish causation with respect to its product(s), and (2) asserting, in essence, in response to Plaintiff's contention otherwise, that it is entitled to summary judgment because Pennsylvania law recognizes the so-called "bare metal defense." The parties agree that Pennsylvania 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 Pennsylvania substantive law applies. Therefore, this Court will apply Pennsylvania law in deciding Honeywell'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 Pennsylvania Law

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., 375 Pa. Super. 187, 544 A.2d 50, 52 (Pa. Super. Ct. 1988)(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 the plaintiff was exposed to 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., 596 Pa. 274, 943 A.2d 216 (Pa. 2007), further upheld the discretion of the trial court in evaluating the evidence to be 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. Id. at 225. 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).

In two more recent decisions, the Superior Court of Pennsylvania has reiterated the Gregg holding that "[t]he frequency, regularity and proximity test is not a rigid test with

an absolute threshold necessary to support liability," and that application of the test "should be tailored to the facts and circumstances of the case; for example, its application should become 'somewhat less critical' where the plaintiff puts forth specific evidence of exposure to a defendant's product." Linster v. Allied Signal, Inc., 21 A.3d 220, 223-24 (Pa. Super. 2011); Howard v. A.W. Chesterton Co., 31 A.3d 974, 979 (Pa. Super. 2011). Linster and Howard have each further clarified that "the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases, like mesothelioma, which can develop after only minor exposures to asbestos fibers." Id.

II. Defendant Honeywell's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Honeywell argues that there is insufficient product identification evidence to support a finding of causation with respect to its products. Honeywell contends that Pennsylvania law applies the "frequency, regularity, and proximity" test in all cases. Defendant attaches a declaration of Joel Charm, corporate representative, who discusses phasing out asbestos in the 1980s.

Bare Metal Defense

With respect to component parts and/or replacement parts (e.g., discs), Honeywell argues that it is entitled to summary judgment because there is no evidence that it manufactured or supplied any of the parts at issue. Although Honeywell does not rely upon any specific case law in essentially asserting the so-called "bare metal defense," it responds to Plaintiff's reliance on Chicano v. General Electric Co., 2004 WL 2250990 (E.D. Pa. 2004), contending that it is "premature" because "Plaintiff must first produce evidence that clearly demonstrates that Plaintiff worked with sufficient regularity and frequency and in close proximity to asbestos-containing products attributable to Honeywell." (Reply at 4.)

B. Plaintiff's Arguments

Bare Metal Defense

Plaintiff argues that Honeywell is liable for injuries arising from asbestos used in connection with its brakes (e.g.,

asbestos-containing lining, discs, blocks) because these component parts were part of its larger finished "brake assembly." In support of this argument, in her brief filed in October of 2010 Plaintiff cites Chicano, Berkowitz v. A.C. & S., Inc., 288 A.D.2d 148, 149 (N.Y. App. Div. 2001), and Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 46 (Wash. Ct. App. 2007).

Product Identification / Causation

Plaintiff has identified the following evidence pertaining to Mr. Schwartz's exposure to potentially asbestos-containing products and/or component parts of Bendix:

- Deposition Testimony of Plaintiff
  Mr. Schwartz testified that, during the years 1965 to 1967, he worked with and around others changing brakes on C-119 aircraft at Willow Grove Air Force Base "dozens of times." He testified that this process involved disassembling the brake and relining it. He testified that each C-119 had two sets of brakes, and that they were disc brakes (as opposed to shoe brakes). He testified that he believed these brakes contained asbestos. He testified that Bendix was the supplier of brakes to Willow Grove Air Force Base and that he knew this because the Air Force technical manuals said they were Bendix – and did not identify any other manufacturer of aircraft brakes. He testified that there was a manual specific to the C-119 that listed Bendix as the brake manufacturer. He also testified that the brakes had the name "Bendix" marked right on them. He testified that when he and co-workers would remove the old brake assemblies to replace the brakes, they used tools and a mallet, and that he did not ever wear a mask or any type of facial protection. He testified that the process of removing brakes created dust and that he breathed in that dust.

  Mr. Schwartz testified that he changed brakes on his personal family vehicles for approximately thirty-four (34) years (from age 19 to 54, or from approximately 1959 to 1993). He testified that he did this approximately once every year and a half, and that he "usually" used Bendix brakes because they were a reputable brand and that the brakes

contained asbestos. He testified that he knew the brakes contained asbestos because it said so on the box. He testified that removing brakes was a "dirty, messy job" and that he breathed in the dust while he did it.

Mr. Schwartz testified that he did his own brake work on three tractors/trucks that he owned, and that he generally did this "maybe twice a year." He testified that he changed brakes on his '78 Ford truck "maybe four times" (during 1984 to 1986), using Bendix brakes at least two of these times, and that he believed the brakes had asbestos, though he wasn't sure – and that this involved changing brakes on ten wheels each time. He testified that removing brakes created dust, which he would clean up with a brush. Later, Mr. Schwartz testified that the brakes he changed on his tractor trucks after 1984 did not contain asbestos.

(Def. Exs. A-1 and A-2, Doc. No. 37-1, Deps. of Joseph Schwartz, April 26, 2005, at pp. 24-49 (Ex. A-1) and 49-61 (Ex. A-2).)

- Parts Breakdown - Air Force Document
  Plaintiff points to an Air Force document entitled "Illustrated Parts Breakdown" for USAF Series C-119G and C-119J, which has a "revised" date of February 1, 1959, and which includes Bendix as a vendor and contains two listings of Bendix "Brake Assy" on its "Group Assembly Parts List."

  (Pl. Ex. A, Doc. No. 40-1.)

- Discovery Responses of Defendant
  Plaintiff points to discovery responses of Defendant from another case which indicate that it manufactured asbestos-containing aircraft brake linings for three military aircraft, and that it manufactured asbestos-containing brake linings, disc brake pads, clutch facings, and brake blocks for brakes and/or brake shoes for cars and trucks.

  (Pl. Ex. B, Doc. No. 40-1.)

C. Analysis

Plaintiff alleges that he was exposed to asbestos from Bendix brakes during his work on aircraft, tractors/trucks, and his personal vehicles. The Court examines evidence pertaining to each source of alleged exposure separately:

a. Aircraft Brakes

There is evidence that Plaintiff was exposed to asbestos dust from disc brakes removed from C-119 aircraft at Willow Grove Air Station. There is evidence that the brake parts removed (as well as those that were installed as replacements) were Bendix. There is evidence that this process created dust and that Plaintiff breathed in this dust. Therefore, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from Bendix aircraft brakes such that it was a substantial factor in the development of his mesothelioma. See Gregg, 943 A.2d at 224-25; Linster, 21 A.3d at 223-24; Howard, 31 A.3d at 979. Accordingly, summary judgment in favor of Defendant Honeywell is not warranted with respect to this alleged exposure. Id.; Anderson, 477 U.S. at 248.

Because Plaintiff has identified evidence of asbestos exposure arising from products manufactured and/or supplied by Bendix, the Court need not reach the issue of the bare metal defense under Pennsylvania law with regard to this alleged exposure.

b. Personal Vehicle Brakes

There is evidence that Plaintiff was exposed to asbestos dust from brake shoes removed from his personal vehicles. There is evidence that the brake shoes removed (as well as those that were installed as replacements) were Bendix. There is evidence that the removal process created dust and that Plaintiff breathed in this dust. Therefore, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from Bendix brake shoes as a result of his work on his personal vehicles such that it was a substantial factor in the development of his mesothelioma. See Gregg, 943 A.2d at 224-25; Linster, 21 A.3d at 223-24; Howard, 31 A.3d at 979. Accordingly, summary judgment in favor of Defendant Honeywell is not warranted with respect to this alleged exposure. Id.; Anderson, 477 U.S. at 248.

Because Plaintiff has identified evidence of asbestos exposure arising from products manufactured and/or supplied by Bendix, the Court need not reach the issue of the bare metal defense under Pennsylvania law with regard to this alleged exposure.

c. Tractor/Truck Brakes

There is evidence that Plaintiff was exposed to dust from brakes removed from his tractors/trucks. There is evidence that the brakes removed (as well as those that were installed as replacements) were Bendix. There is evidence that they contained asbestos. There is evidence that the removal process created dust and that Plaintiff breathed in this dust. Although Plaintiff testified that any such work performed after 1984 did not involve asbestos, his work on tractors/trucks was not limited to post-1984 work. Therefore, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from Bendix brakes as a result of his work on his tractors/trucks such that it was a substantial factor in the development of his mesothelioma. See Gregg, 943 A.2d at 224-25; Linster, 21 A.3d at 223-24; Howard, 31 A.3d at 979. Accordingly, summary judgment in favor of Defendant Honeywell is not warranted with respect to this alleged exposure. Id.; Anderson, 477 U.S. at 248.

Because Plaintiff has identified evidence of asbestos exposure arising from products manufactured and/or supplied by Bendix, the Court need not reach the issue of the bare metal defense under Pennsylvania law with regard to this alleged exposure.