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

VALENT RABOVSKY and ANN RABOVSKY,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	
FOSTER WHEELER, LLC, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-03202-ER
Defendants.	:	

O R D E R

AND NOW, this **7th** day of **June, 2012**, it is hereby

ORDERED that the Motion for Summary Judgment of Defendant **Pennsylvania Electric Company** (Doc. No. 155) is **DENIED.**[1]

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[1] This case originated in Pennsylvania state court. In July of 2010, it was removed by a defendant to the Eastern District of Pennsylvania and became part of MDL-875.

Plaintiff Valent Rabovsky ("Plaintiff" or "Mr. Rabovsky") worked as a millwright at various power plants and steel mills throughout Pennsylvania, beginning in the 1950s. Defendant Pennsylvania Electric Company ("PECO") is the owner of a power plant in Keystone, Pennsylvania, where Plaintiff worked. Plaintiff has alleged that he was exposed to asbestos during his work there.

Plaintiff was diagnosed with mesothelioma and was deposed thereafter.

Plaintiff has brought claims against various defendants. Defendant PECO has moved for summary judgment, arguing that it is entitled to summary judgment because, with respect to the asbestos at issue, it owed no duty to Plaintiff, who was working on its premises as the employee of an independent contractor. 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 PECO'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. Duty of Employer/Premises Owner re: Independent Contractor/Invitee

Under Pennsylvania law, the standard of care a possessor of land owes to one who enters upon the land depends on whether the latter is a trespasser, licensee, or invitee. Emge v. Hagosky, 712 A.2d 315, 317 (Pa. Super. Ct. 1998) (citing Jones v. Three Rivers Mgmt Corp., 394 A.2d 546 (Pa. 1978)). Employees of

independent contractors are "invitees" who fall within the classification of "business visitors." Gutteridge v. A.P. Green Serv. Inc., 804 A.2d 643, 655 (Pa. Super. Ct. 2002). The duty that a possessor of land owes to business visitors is as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Summers v. Giant Food Stores, Inc., 743 A.2d 498, 506 (Pa. Super. Ct. 1999); Rudy v. A-Best Prod. Co., 870 A.2d 330, 333-34 (Pa. Super. Ct. 2005).

Pennsylvania law generally insulates property owners from liability for the negligence of independent contractors and places responsibility on the independent contractor (or its employees), since they are in control of the workplace, have expertise in the performance of the work, and are in the best position to protect themselves. Mentzer v. Ognibene, 597 A.2d 604, 609 (Pa. Super. Ct. 1991). However, under general premises liability, the landowner still has "a duty to warn an unknowing independent contractor of existing dangerous conditions on the landowner's premises where such conditions are known or discoverable to the owner." Colloi v. Phila. Elec. Co., 481 A.2d 616, 619 (Pa. Super. Ct. 1984). This duty is owed irrespective of whether the independent contractor exercises full control over the work and the premises entrusted to him as long as the existing dangerous condition is not obvious. Id. at 619-20; Hader v. Coplay Cement Mfg. Co., 189 A.2d 271, 277 (Pa. 1963).

However, the employer of an independent contractor (the owner of the premises) has no duty to warn the independent contractor or its employees of a condition that is at least as obvious to them as it is to him. Colloi, 481 A.2d at 620;

Repyneck v. Tarantino, 202 A.2d 105 (Pa. 1964). The owner of the property is also under no duty to protect the employees of an independent contractor from risks arising from or intimately connected with defects or hazards which the contractor has undertaken to repair or which are created by the job contracted. Colloi, 481 A.2d at 620; Celender v. Allegheny Cnty. Sanitary Auth., 222 A.2d 461 (Pa. Super. Ct. 1966).

In sum, whether a premises owner owes an independent contractor a duty to warn of dangerous conditions on the premises turns on whether the owner, at the time he enters into the contract with the independent contractor, possesses "superior knowledge," or information which places him in a superior position to appreciate the risk posed to the contractor or his employees by the dangerous conditions. Colloi, 481 A.2d at 620.

The Pennsylvania Superior Court has provided guidance on determining whether a landowner has "superior knowledge" (as compared to an independent contractor or the contractor's employees) in the context of asbestos cases. In Chenot v. A.P. Green Services, it wrote:

> On the issue of a landowner's "superior knowledge" in asbestos cases, the Gutteridge case is particularly instructive. **In Gutteridge, the plaintiff offered evidence that the dangers of asbestos products were not obvious to him. The defendant landowner argued the hazards posed by asbestos in the workplace were equally known to the plaintiff's employer. The Court noted, however, that the defendant landowner had failed to substantiate this defense. Thus, the question of whether the independent contractor knew of the danger and failed to warn the plaintiff posed a material factual dispute.** Because the landowner's defense was that the plaintiff's employer knew of the hazards of asbestos, the landowner had to substantiate its defense with facts of record, which it had not done. The Court stated: "Appellant averred facts sufficient to place into material dispute the question of whether PECO, in its capacity **as landowner and not employer, violated its duty to Mr. Gutteridge, a business invitee, because it possessed superior knowledge concerning the hazards posed by invisible asbestos contamination. Consequently...the trial court erred in granting summary judgment to PECO.**" Id. at 660. Compare Rudy,

(holding summary judgment for landowner was proper where landowner presented evidence that plaintiff also had substantial knowledge of asbestos hazards through his union, employers, and co-workers) . . . .

Assuming Koppers' long-time NSC membership, Appellant created a genuine issue of material fact as to whether Koppers' knowledge of the presence and hazards of asbestos was superior to the that of the independent contractors who were employed at the Kobuta facility, which placed Koppers in a better position to appreciate the risk posed to decedent by the presence and use of asbestos in its Kobuta facility. See Gutteridge, 804 A.2d at 660 (relying in part on expert report to conclude plaintiff had created genuine issue of material fact on whether defendant landowner had "superior knowledge" of danger of asbestos).

Beazer, however, maintains Appellant did not establish Koppers was a member of the NSC or other industrial organizations. In her reply brief on appeal, Appellant responds that Beazer was derelict in answering discovery, which specifically asked whether Koppers had been a member of the NSC. By failing to respond to open discovery, in violation of several court orders, Beazer ensured the absence of this evidence in the record. Appellant states Beazer eventually did answer that it had been a member of the NSC since 1918. As such, Appellant concludes Beazer should be estopped from objecting to Appellant's reliance on what turns out to be an undisputed fact: Koppers' membership in the NSC.

Beazer also insists that Dr. Lemen's report did not specifically mention Koppers. Instead, Beazer contends the report referred exclusively to Ohio-Edison. Further, Beazer states Appellant's evidence does not address Koppers' knowledge or how its knowledge compared to Philip Carey's knowledge. **These disputes on appeal suggest that the court's grant of summary judgment in Beazer's favor might have been premature.**

Chenot, 895 A.2d 55, 64-66 (Pa. Super. Ct. 2006) (emphasis added).

Gutteridge outlines what sort of evidence is necessary to create a dispute of material fact with regard to "superior knowledge," as required to overcome a motion for summary judgment:

> PECO responds that it had no duty to warn because it was a landowner out of possession at the relevant times. This defense is not available to counter an allegation of "superior knowledge." A **landowner's duty to warn exists irrespective of whether an independent contractor exercises full control over the premises if the landowner possesses "superior knowledge,"** which places him in a better position to appreciate risks posed by a dangerous condition . . . . **Based on his review of the scientific literature and the warning bulletins issued by Pennsylvania, Dr. Lemen concluded that PECO should have acted to protect contractors**, such as Mr. Gutteridge, from the dangers of exposure to asbestos . . . . In this vein, **PECO argues that any hazards posed by asbestos in the workplace, whether in the form of visible or invisible dust, were equally well known to Mr. Gutteridge's employer, AT & T, as it was to PECO.** The question of whether AT & T knew of the danger and failed to warn Mr. Gutteridge poses an additional material factual dispute. As detailed above, Mr. Strom testified that it was general knowledge at the naval yard that asbestos was dangerous. However, **PECO has failed to substantiate that common knowledge at the naval yard was also common knowledge on PECO property** . . . . However, **we have determined that Appellant averred facts sufficient to place into material dispute the question of whether PECO, in its capacity as landowner and not employer, violated its duty to Mr. Gutteridge, a business invitee, because it possessed superior knowledge concerning the hazards posed by invisible asbestos contamination.** Consequently, we find that the trial court erred in granting summary judgment to PECO.

Gutteridge, 804 A.2d at 658-660 (citations omitted)(emphasis added).

II. Defendant PECO's Motion for Summary Judgment

A. Defendant's Arguments

Duty of Premises Owner re: Business Visitors

PECO contends that, under Pennsylvania law, it had no duty to warn Plaintiff (a business visitor/invitee) because it is in a separate line of business than Plaintiff's employer and did not know of any asbestos dangers present in the turbines and gaskets on its premises and could not have reasonably discovered a risk of harm to Plaintiff. Defendant contends that Plaintiff and his employer were in a position to evaluate any present dangers because of their expertise in the millwright industry and, therefore, would discover or realize the asbestos danger, or would fail to protect himself against it, absolving Defendant of any premises liability. In support of this assertion, Defendant relies on Colloi v. Phila. Elec. Co., 481 A.2d 616 (Pa. Super. Ct. 1984) (citing Restatement (Second) Torts § 343), Chenot v. A.P. Green Serv., Inc., 895 A.2d 55 (Pa. Super. Ct. 2006), and Gutteridge v. A.P. Green Serv. Inc., 804 A.2d 643 (Pa. Super. Ct. 2002).

Duty of Employer to Warn Independent Contractor

PECO contends that, under Pennsylvania law, because Plaintiff worked for an independent contractor on its premises and because Plaintiff created the hazardous conditions through his own work on each premises, it owed no duty to Plaintiff and cannot be liable for any injuries he suffered during the course of that work. Defendant also contends that it did not have knowledge of any existing asbestos danger that was superior to the knowledge of Plaintiff (or his employer) on this matter, such that Defendant would have been in a position to better appreciate the risk of asbestos exposure posed to Plaintiff. In support of this assertion, Defendant relies on Chenot v. A.P. Green Serv., Inc., 895 A.2d 55 (Pa. Super. Ct. 2006), Gutteridge v. A.P. Green Serv. Inc., 804 A.2d 643 (Pa. Super. Ct. 2002), and Celender v. Allegheny Cnty. Sanitary Auth., 222 A.2d 461 (Pa. Super. Ct. 1966).

B. Plaintiff's Arguments

Duty of Premises Owner re: Business Visitors

Plaintiff contends that Defendant PECO had a duty to warn all business visitors not only against known and obvious dangers, but also against those that were unknown to business visitors and might have been discovered through the exercise of reasonable care by Defendant. Plaintiff contends that he was not aware of the harmful risks of asbestos exposure, that the danger of asbestos exposure was unknown to him, and that the presence of asbestos, in some instances, was not obvious to him because the asbestos powder was invisible to the eye. In support of this argument, Plaintiff relies on Colloi v. Phila. Elec. Co., 481 A.2d 616 (Pa. Super. Ct. 1984). Plaintiff cites the following evidence in the record:

- Deposition of Plaintiff
  Plaintiff testified that, at the time of his work at Defendant's premises, he did not know anything about asbestos being harmful to his health.

  (Pl. Ex. A, Doc. No. 126-1, Dep. of Valent Rabovsky (Vol. II) at 178:7-16.)

Duty of Employer to Warn Independent Contractor

Plaintiff contends that Defendant's duty to warn existed regardless of whether Plaintiff's employer (an independent contractor) exercised full control over the premises, because Defendant had "superior knowledge" of the dangers of asbestos exposure and was in a better position to appreciate the risks posed by such exposure through its membership in various industrial organizations. Plaintiff also contends that Defendant has not met the burden that Pennsylvania law places on it as a premises owner-defendant to show that Plaintiff or his employer knew as much or more than Defendant knew of the dangers of asbestos exposure. In support of this argument, Plaintiff relies upon Chenot v. A.P. Green Serv., Inc., 895 A.2d 55 (Pa. Super. Ct. 2006), Gutteridge v. A.P. Green Serv. Inc., 804 A.2d 643 (Pa. Super. Ct. 2002), and Colloi v. Phila.Elec. Co., 481 A.2d 616 (Pa. Super. Ct. 1984) (citing Restatement (Second) Torts § 343). Plaintiff cites the following evidence in the record:

- Pennsylvania Department of Health ("PDOH"), Division of Occupational Health, Occupational Health News and Views, Fall 1963
  Stating that pneumoconiosis is the most serious occupational health problem in Pennsylvania.

  (Pl. Ex. G, Doc. No. 167-7.)

- PDOH, Division of Occupational Health, Occupational Health News and Views, Winter 1964-65
  Reporting about an asbestos conference discussing the incidence of cancer among asbestos workers.

  (Pl. Ex. H, Doc. No. 167-8.)

- Reports and Transactions of the National Safety Council ("NSC") (October 1934 to 1957)
  Warning of marked correlation between asbestos employment and lung cancer.

  (Pl. Exs. I-O, Doc. No. 167-9 – 167-15.)

C. Analysis

Under Pennsylvania law, Plaintiff, as an employee of an independent contractor working for Defendant PECO on its premises, was an invitee of Defendant. See Gutteridge, 804 A.2d at 655. Therefore, whether Defendant owed Plaintiff a duty to warn of asbestos hazards on its premises depends upon whether PECO, at the time it entered into the contract with Plaintiff's employer (the independent contractor), possessed "superior knowledge," or information which placed him in a better position than Plaintiff (or Plaintiff's employer) to appreciate the risk posed by the asbestos. Colloi, 481 A.2d at 620.

It is undisputed that during Plaintiff's time working on its premises, PECO did not warn Plaintiff of asbestos hazards. There is evidence in the record that Plaintiff did not know of the hazards of asbestos at the time of his work on PECO's premises. There is evidence in the record that Defendant did know of those hazards at that time. Defendant contends that Plaintiff's employer had expertise regarding the hazards of asbestos, and knew at least as much as PECO did on the subject. Although no such evidence was identified by PECO in its briefing,

during oral argument, its counsel noted that Plaintiff's employer (the independent contractor Westinghouse) was listed as a recipient on one of Plaintiff's own pieces of evidence regarding knowledge of asbestos hazards.

The Court has reviewed the record and has identified this evidence in a "National Safety News" publication from September of 1935 (Pl. Ex. K, Doc. No. 167-11). This document identifies Westinghouse in a section entitled "Buyers Service." Although this document provides evidence to suggest that Plaintiff's employer (independent contractor Westinghouse) may have had knowledge of asbestos hazards, there is nothing in the document that clearly establishes this, or that establishes the extent of any such knowledge. By contrast, Plaintiff has identified multiple pieces of evidence from multiple sources, each providing evidence of such knowledge on the part of PECO. As such, when construing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that PECO possessed superior knowledge to Plaintiff (or his employer, Westinghouse) regarding asbestos hazards, such that PECO violated its duty to Plaintiff as a landowner. See Chenot, 895 A.2d at 64-66; Gutteridge, 804 A.2d at 658-60. Therefore, Defendant PECO has not identified the absence of a genuine dispute of material fact. See Chenot, 895 A.2d at 64-66; Gutteridge, 804 A.2d at 658-60. Accordingly, summary judgment in favor of Defendant PECO is not warranted. Id.; Anderson, 477 U.S. at 248.