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 **29th** day of **May, 2012**, it is hereby **ORDERED** that **Plaintiff**'s Motion to Strike Objections and Compel Discovery (Doc. No. 29) is **GRANTED in part; DENIED in part**; and the Motion for Summary Judgment of Defendant **Pratt & Whitney** (Doc. Nos. 18 and 36) is **GRANTED in part; DENIED in part.**[1]

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[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 Pratt & Whitney ("Pratt Whitney") manufactured aircraft engines. Plaintiff has alleged that Mr. Schwartz was exposed to asbestos from insulation that covered propeller controls, fuel lines, and engine controls during the following periods of his work:

- McGuire Air Force Base - 1957 to 1959
- Willow Grove Air Force Base - 1962-1967

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 Pratt Whitney has moved for summary judgment, arguing that (1) there is insufficient product identification evidence to establish causation with respect to its product(s), and (2) it is entitled to the bare metal defense. The parties agree that Pennsylvania law applies.

By motion filed in June of 2008 under Rule 37 of the Federal Rules of Civil Procedure (with a corresponding motion filed subsequently under Rule 56(d) when opposing Pratt Whitney's summary judgment motion), Plaintiff seeks discovery, including documents and a deposition of Pratt Whitney pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Specifically, Plaintiff seeks an order compelling evidence pertaining to the following topics, and striking Defendant Pratt Whitney's written objections thereto:

- C-118 aircraft engines (McGuire Air Force Base)
- C-119 aircraft engines (Willow Grove Air Station)

The parties agree that this discovery was timely sought and that Plaintiff's motion to compel was timely filed.

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 substantive law in deciding the pending motions. 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. However, the Supreme Court of Pennsylvania has made clear that a plaintiff cannot establish substantial factor causation merely by putting forth expert testimony opining that "each and every breath" of asbestos (or inhalation of a single or de minimis number of asbestos fibers) can cause injury. Betz v. Pneumo Abex, LLC, No. 38 WAP 2010, – A.3d – , 2012 WL 1860853, at * 22-25 (Pa. May 23, 2012); see also Gregg, 943 A.2d at 226 (referring to the "each and every exposure" theory as "a fiction").

II. Defendant Pratt Whitney's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Pratt Whitney argues that there is insufficient product identification evidence to support a finding of causation with respect to its products.

In an effort to identify the absence of a genuine dispute of material fact, Pratt Whitney provides a declaration of expert Graham White, who states that Pratt Whitney did not manufacture or supply engines for use with C-119-G aircraft, as these aircraft were powered by the engines of another manufacturer (Curtiss Wright).

Bare Metal Defense

Pratt Whitney argues that it is entitled to summary judgment because it cannot be liable for products or component parts that it did not manufacture, distribute, or sell.

Plaintiff's Motion to Compel

In response to Plaintiff's motion to compel additional discovery prior to the Court's ruling on the motion for summary judgment, Pratt Whitney argues that (1) with respect to discovery pertaining to C-118 aircraft, it has already produced an extensive collection of documents, and (2) with respect to discovery pertaining to C-119 aircraft, the documents sought by Plaintiff are not relevant because Decedent Mr. Schwartz testified that the particular model of aircraft for which he identified Pratt Whitney engines was the C-119-G; and Defendant has provided an expert affidavit stating that C-119-G aircraft were not powered by Pratt Whitney engines and were instead powered by the engines of another manufacturer.

In its summary judgment reply brief, Pratt Whitney argues that no amount of discovery could save Plaintiff's claims because Pennsylvania recognizes the so-called "bare metal defense" and it is undisputed that the only product at issue is insulation, which was not manufactured, distributed, or sold by Pratt Whitney. It also argues that Plaintiff's request for additional discovery is deficient under Rule 56(d), because it is not accompanied by an affidavit setting forth the basis for needing additional discovery.

B. Plaintiff's Arguments

Bare Metal Defense

Plaintiff argues that Pratt Whitney is liable for injuries arising from insulation used in connection with its aircraft engines because it knew that its engines were required to be covered with an asbestos-containing insulation.

Product Identification / Causation

In opposition to Defendant Pratt Whitney's motion for summary judgment, Plaintiff has identified the following evidence pertaining to Decedent's alleged exposure to asbestos-containing products used in connection with Pratt Whitney aircraft engines:

- Deposition Testimony of Plaintiff

  Mr. Schwartz testified that he worked as a propellor repairman at McGuire Air Force Base. He testified that, during his work there, he was exposed to asbestos on the engine controls (in the rear of the engine), which he often had to grab ahold of or rub against while inspecting the controls, that the asbestos was in the form of heavy cloth, that pieces would deteriorate and that it created dust from "deterioration fibers." When asked if he breathed any of that dust and fiber in, he answered, "I could possibly have, yes." He testified that the aircraft at McGuire were C-118.

  Mr. Schwartz testified that he worked first as a propellor repairman (1962-65) and then as a crew chief (1965-67) at Willow Grove Air Station. He testified that, during his work at Willow Grove, he worked with approximately forty-one (41) C-119 aircraft. He testified that the engines on these were manufactured by Pratt Whitney and that the name was on them. He testified that the engine controls and fuel lines were covered with asbestos cloth. He testified that he was exposed to asbestos from this cloth covering the controls and lines on Pratt Whitney engines. He testified that during his time as a propellor repairman, he inspected the engine controls about once a week for approximately three (3) years. He testified that this work involved disturbing the asbestos, which was sometimes deteriorated, and would crumble and create dust. When asked if he breathed in that dust, he answered, "I could possibly have, yes." He testified that, during his work as a crew chief, he inspected controls while the aircraft were being repaired, which occurred "just about every time" the aircraft flew. He testified that he believed he experienced more asbestos exposure

during his work as a crew chief than he did during his work as a propellor repairman.

(Pl. Exs. A-B, Doc. Nos. 28-4 and 28-5, Deps. of Joseph Schwartz, April 26, 2005, at pp. 15-49 (Ex. A) and 71-75 (Ex. B).)

- Declaration of Defendant's Expert
  Plaintiff points to the declaration of defense expert Graham White, who acknowledges C-118 aircraft engines were Pratt Whitney engines and that some C-119 aircraft had Pratt Whitney engines. The declaration indicates that all of the C-118 and C-119 planes were cargo planes.

  (Pl. Ex. C, Doc. No. 28-6.)

- Letter of Defense Counsel
  Plaintiff points to a letter of defense counsel dated November 15, 2007, which states that Pratt Whitney supplied engines for C-119A, C-119B, and C-119C aircraft.

  (Pl. Ex. E, Doc. No. 28-9.)

Plaintiff's Motion to Compel

Plaintiff argues that additional discovery is needed to properly oppose Defendant's motion because Defendant has failed to produce a deponent pursuant to Rule 30(b)(6), as well as documents requested by Plaintiff during discovery.

With respect to discovery pertaining to C-118 aircraft, Plaintiff's counsel concedes that Defendant has produced a large number of documents. During oral argument, Plaintiff's counsel informed the Court that he is not seeking additional documents pertaining to C-118 aircraft but that he still wishes to depose Pratt Whitney on this topic, pursuant to Rule 30(b)(6).

With respect to discovery pertaining to C-119 aircraft, Plaintiff's counsel concedes that Decedent testified that the only C-119 plane he worked on (or around) was a C-119-G. Plaintiff's counsel concedes that Defendant has provided an affidavit of an expert (described by Plaintiff's counsel as a naval historian) stating that Pratt Whitney engines were never used on C-119-G aircraft. However, Plaintiff's counsel contends

that Decedent may have misspoken when he identified the model as a C-119-G, and Decedent's testimony that he worked on aircraft that contained Pratt Whitney engines is sufficient to make relevant to the case the documents pertaining to other C-119 models (C-119-A, C-119-B, C-119-C, etc.).

C. Analysis

The Court will consider Plaintiff's motion to compel in conjunction with Defendant Pratt Whitney's motion for summary judgment in determining whether additional discovery is appropriate.

C-118 Aircraft

With respect to C-118 aircraft, the Court finds that Plaintiff is entitled to a deposition of Pratt Whitney pursuant to Rule 30(b)(6), as Plaintiff's deposition notice was timely served, the testimony sought from Pratt Whitney regarding C-118 aircraft is relevant, and Plaintiff's motion to compel was timely filed. Therefore, Plaintiff's motion to compel is granted in this regard; Defendant's motion for summary judgment is denied without prejudice as to alleged asbestos exposure arising from C-118 aircraft. See Fed. R. Civ. P. 26(b)(1) and 56(d); Anderson, 477 U.S. at 248.

A scheduling order regarding this discovery and the filing of additional motions will issue by separate order.

C-119 Aircraft

With respect to C-119 aircraft, the Court finds that the discovery sought by Plaintiff is not relevant. Decedent testified that he worked on (or around) forty-one (41) C-119 aircraft while working at Willow Grove Air Station and that all off these C-119 were the same model, which he testified was a C-119-G (as opposed to other models, such as C-119-A, C-119-B, etc.). (Def. Ex. A, Doc. No. 30-4, page 71.) Plaintiff's counsel contends that Decedent may have misspoken when he identified the model as C-119-G, and argues that Decedent may have intended to identify C-119-C (as C and G look alike) or another model of the C-119. However, this assertion is based upon speculation. There is no basis for concluding that the model was anything other than C-119-G and because Mr. Schwartz is now deceased, it is not possible to obtain any further clarification regarding his testimony. Accordingly, no reasonable jury could conclude that

Decedent Mr. Schwartz was exposed to asbestos in connection with a model of C-119 aircraft other than a C-119-G. For this reason, Plaintiff's motion to compel is denied with respect to C-119 aircraft; Defendant's motion for summary judgment is granted as to alleged asbestos exposure arising from C-119 aircraft. See Fed. R. Civ. P. 26(b)(1) and 56(d); Anderson, 477 U.S. at 248.

D. Conclusion

Plaintiff's motion to compel is granted as to a deposition of Pratt Whitney pursuant to Rule 30(b)(6) regarding C-118 aircraft; it is denied as to all other discovery sought.

Defendant Pratt Whitney's motion for summary judgment is granted as to alleged asbestos exposure arising from C-119 aircraft; it is denied without prejudice as to alleged asbestos exposure arising from C-118 aircraft.

A scheduling order regarding additional permitted discovery and the filing of additional motions will issue by separate order.