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

CAROLYN MULLIS,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Middle District of
v.	:	North Carolina (Case No. 12-00459)
	:	
ARMSTRONG INTERNATIONAL, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 12-60155-ER
Defendants.	:	

O R D E R

AND NOW, this **20th** day of **August, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Hino Motor Sales U.S.A., Inc.** (Doc. No. 163) is **GRANTED.**[1]

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[1] This case was transferred in May of 2012 from the United States District Court for the Middle District of North Carolina to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Carolyn Mullis is the executrix of the estate of Ronald Mullis ("Decedent" or "Mr. Mullis"). Plaintiff alleges that Decedent was exposed to asbestos while serving in the Navy and while working as a heavy truck and eighteen-wheeler tractor mechanic at Nalley Peterbilt dealership in North Carolina during the years 1982 to 1991. The alleged exposure pertinent to Defendant Hino Motor Sales U.S.A., Inc. ("Hino") occurred during Decedent's work at the following:

- Nalley Peterbilt Dealership - North Carolina (1982 - 1991)

Mr. Mullis was diagnosed with mesothelioma. He was not deposed in this action. He died in August 2011.

Plaintiff brought claims against various defendants. Defendant Hino has moved for summary judgment, arguing that there is insufficient product identification evidence to support a finding of causation with respect to its product(s). The parties agree that North Carolina 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

When the parties to a case involving land-based exposure agree to application of a particular state's law, this Court has routinely applied that state's law. See, e.g., Brindowski v. Alco Valves, Inc., No. 10-64684, 2012 WL 975083, *1 n.1 (E.D. Pa. Jan 19, 2012) (Robreno, J.). The parties agree that North Carolina law applies to Plaintiff's claims against Defendant. Therefore, this Court will apply North Carolina 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 North Carolina Law

The "frequency, regularity, and proximity" test originally set forth in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986), has been accepted by many courts as a threshold inquiry in asbestos personal injury litigation. See, e.g., Henderson v. Allied Signal, Inc., 373 S.C. 179, 644 S.E.2d 724, 727 (S.C. 2007); Jackson v. Anchor Packing Co., 994 F.2d 1295, 1301-03 (8th Cir. 1993)(applying Arkansas law); Slaughter v. Southern Talc Co., 949 F.2d 167, 171, n.3 (5th Cir. 1991)(applying Texas law and identifying various states and Circuits that have applied the Lohrmann "frequency, regularity, and proximity" test). Lohrmann was a decision by the Fourth Circuit interpreting Maryland law in the context of an asbestosis claim.

Recently, certain courts have modified or adjusted the Lohrmann test when applying it to cases involving mesothelioma (as opposed to asbestosis or other non-malignant diseases). See, e.g., Howard v. A.W. Chesterton Co., - A.3d - , 2011 WL 5111031, at *4 (Pa. Super. Oct. 28, 2011)(citing Gregg v. V-J Auto Parts Co., 596 Pa. 274, 289-90, 943 A.2d 216, 225 (2007)); Tragarz v. Keene Corp., 980 F.2d 411, 418-21 (7th Cir. 1992); Eagle-Picher Industries, Inc. v. Balbos, 326 Md. 179, 208-11, 604 A.2d 445, 459-60 (1992), aff'g in part, rev'g in part 84 Md. App. 10, 578 A.2d 228 (Md. Ct. Spec. App. 1990). This Court has previously predicted, in essence, that the North Carolina Supreme Court will adopt the Lohrmann "frequency, regularity, and proximity" test as the approach to be taken in determining the sufficiency of product identification evidence to support a finding of causation under North Carolina law. See Mattox v. American Standard, Inc., No. 07-73489, 2011 WL 5458154 (E.D. Pa. July 11, 2011)(Robreno, J.). In Mattox, this Court wrote:

> In Jones v. Owens-Corning Fiberglas Corp., the United States Court of Appeals for the Fourth Circuit, applying North Carolina law, cited to Lohrmann v. Pittsburgh Corning Corp. in finding that "the plaintiff in a personal injury asbestos case 'must prove more than a casual or minimum contact with products' containing asbestos in order to hold the manufacturer of that product liable." 69 F.3d 712, 716 (4th Cir. 1995) (quoting 782 F.2d 1156, 1162 (4th Cir. 1986)). The plaintiff must present "'evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the

> plaintiff actually worked.'" Id. The court noted that Lohrmann was decided under Maryland law, but that nothing indicated that there was any conflict between North Carolina and Maryland laws on these issues. 69 F.3d at 716 n. 2 (citing Wilder v. Amatex Corp., 336 S.E.2d 66, 68 (N.C. 1985)). The United States District Court for the Western District of North Carolina cited Jones and the Lohrmann test in Agner v. Daniel International Corp. where the court noted that "in any asbestos case, a plaintiff must '(1) identify an asbestos-containing product for which a defendant is responsible, (2) prove that he has suffered damages, and (3) prove that defendant's asbestos-containing product was a substantial factor in causing his damages.'" No. 3:98CV220, 2007 WL 57769 at *4-5 (W.D.N.C. 2007) (quoting Lindstrom v. AC Prods. Liab. Trust, 264 F. Supp. 2d 583, 587 (N.D. Oh. 2003), aff'd, 424 F.3d 488 (6th Cir. 2005); see also Mills v. ACANDS, Inc., No. 1:00CV33, 2005 WL 2989639 at *3 (W.D.N.C. 2005) (following Jones and Lohrmann)).

Mattox, 2011 WL 5458154, at *1 n.1. In Mattox, the Court granted summary judgment in favor of the defendant because plaintiffs had not provided evidence of frequency of exposure to the Defendant's asbestos-containing product. The decedent in that case suffered from mesothelioma.

This Court has previously considered and rejected arguments that it should follow the lead of those courts that have undertaken an adjustment of the Lohrmann "frequency, regularity, and proximity" test in cases involving mesothelioma. In Coble and Morgan, the Court wrote:

> Given that the movement to adjust this standard is still in its infancy, and no North Carolina state or federal court has addressed the issue, this Court stands by its prediction that the North Carolina Supreme Court, if faced with this issue, would adopt the "frequency, regularity, and proximity" test as formulated by the Fourth Circuit Court of Appeals. See Mattox, 2011 WL 5458154, at *1 n.1.

Coble v. 3M, No. 10-64613, 2011 WL 7573806, at *1 (E.D. Pa. Dec. 22, 2011)(Robreno, J.); Morgan v. 3M, No. 10-84925, 2011 WL 7573811, at *1 (E.D. Pa. Dec. 22, 2011)(Robreno, J.). As there has been no new caselaw from North Carolina on this point since the time of this Court's decisions in Coble and Morgan, the Court sees no reason to deviate from its earlier prediction.

II. Defendant Hino's Motion for Summary Judgment

A. Defendant's Arguments

Defendant contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness.

B. Plaintiff's Arguments

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

- Deposition Testimony of Rufus Stevenson (Co-Worker)
  Mr. Stevenson testified that he worked with Decedent at Nalley Peterbilt from 1982 to 1991. He testified that he oversaw the work of Decedent about 50% to 75% of the time. He testified that Decedent performed work on Hino trucks, which would have included removing and installing engine gaskets, clutches, and brake shoes, in a manner which could create airborne dust.

  (Pl. Ex. 2.)

- Deposition Testimony of George Daniels (Hino Corporate Representative)
  Plaintiff cites deposition testimony of Hino corporate representative George Daniels, who states that Nalley Peterbilt was a dealer of Hino trucks some time after 1983 or 1984. He states that all Hino trucks were provided with asbestos brakes until model year 1992, and that many trucks also contained asbestos clutches and/or asbestos-containing engine head gaskets. He states that Hino sold replacement parts to customers, including asbestos brakes until 1991 or 1992. He states that Hino trucks were designed for use with asbestos-containing brake shoe linings. He also confirms that, if Decedent was working

on a Hino truck prior to 1992, it is possible that he was exposed to asbestos as a result of the work.

(Pl. Ex. 3.)

- Expert Testimony of Steven Paskal
  Plaintiff relies upon a report and declaration of expert and industrial hygienist Steven Paskal, who opines, without any personal knowledge of Decedent's asbestos exposure, that, because many of the gaskets and friction material in the 1980s and even 1990s contained asbestos, Decedent "likely" was exposed to significant levels of asbestos as a result of his work as a truck mechanic.

  (Pl. Ex. 4.)

- Expert Testimony of Dr. James Millette
  Plaintiff relies upon a report and declaration of Dr. Millette who states that work with gaskets and brakes often resulted in asbestos exposure. Without having any personal knowledge of the exposure of Decedent to asbestos-containing gaskets or brakes, Dr. Millette opines that, "Mr. Mullis was exposed to varying levels of asbestos fibers in his breathing zone during his work with brakes and by other individuals doing similar work in his vicinity at the Nalley Peterbilt facility."

  (Pl. Ex. 5.)

- Scientific Studies
  Plaintiff cites to scientific studies that she contends confirm that significant levels of asbestos dust can be placed into the air as a result of scraping gaskets; and that the same can be true as a result of brake work - such as manipulating asbestos-containing brakes, or blowing out dust from the brakes - and can be found as far as 20 feet away from the work and for as long as 14 minutes afterward.

(Pl. Exs. 6, 7 and 8.)

- EPA Guidance
  Plaintiff contends that the EPA's Guidance for Preventing Asbestos Disease Among Auto Mechanics indicates that brake linings and clutch facings often contain asbestos, and that servicing brakes can release asbestos fibers by, among other ways, the use of compressed air, and that there is no known level of asbestos exposure below which health effects do not occur.

  (Pl. Ex. 9.)

- Minutes of FMSI Asbestos Study Committee Meeting (February 16, 2973)
  Plaintiff contends that these meeting minutes indicate that the Friction Materials Standards Institute (FMSI) acknowledged that asbestos exposures can occur from merely opening boxes of new friction products.

  (Pl. Ex. 10.)

- Scientific Studies Re: Brake Linings
  Plaintiff cites scientific studies, which she contends confirm that merely touching asbestos-containing brake linings and removing them from the boxes can release asbestos fibers into the breathing zone of workers.

  (Pl. Exs. 11, 12, and 13.)

- Scientific Studies Re: Compressed Air
  Plaintiff cites scientific studies, which she contends confirm that the use of compressed air can generate significant levels of airborne asbestos dust.

  (Pl. Exs. 14 and 15.)

C. Analysis

Plaintiff alleges that Decedent was exposed to asbestos from engine gaskets, clutches, and brakes used in Defendant's trucks during his work as a heavy-duty truck and tractor mechanic at Nalley Peterbilt. The Court examines the evidence pertaining to each alleged source of asbestos exposure separately:

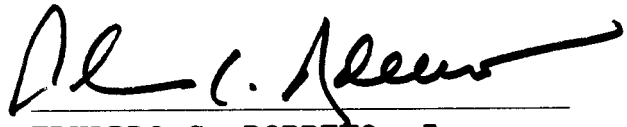
(i) Engine Gaskets

There is evidence that Decedent was exposed to respirable dust from engine gaskets during the time period 1982 to 1991 with some regularity. There is evidence that Decedent worked on Hino trucks, including work that required removing and installing engine gaskets. There is evidence that Defendant manufactured trucks that used asbestos-containing gaskets. There is evidence that Defendant sold replacement gaskets. There is evidence that gaskets often contained asbestos during the 1980s and into the 1990s. However, there is no evidence that Decedent was ever exposed to respirable dust from an engine gasket manufactured or supplied by Defendant Hino (as opposed to a replacement gasket manufactured and supplied by another entity) - or that he was exposed to dust from any gasket that contained asbestos - much less that such exposure occurred with the requisite frequency, regularity, or proximity. Therefore, no reasonable jury could conclude that Decedent was exposed to asbestos from an engine gasket manufactured or supplied by Defendant such that it was a substantial factor in the development of his illness. Jones, 69 F.3d at 716 (quoting Lohrmann, 782 F.2d at 1162); Agner, 2007 WL 57769 at *4-5. Accordingly, summary judgment in favor of Defendant is warranted with respect to this alleged source of exposure. Anderson, 477 U.S. at 248.

(ii) Clutches

There is evidence that Decedent was exposed to respirable dust from clutches during the time period 1982 to 1991 with some regularity. There is evidence that Decedent worked on Hino trucks, including work that required removing and installing clutches. There is evidence that Defendant manufactured trucks that used asbestos-containing clutches. There is evidence that sold replacement clutches. There is evidence that clutches often contained asbestos during the 1980s and into the 1990s. However, there is no evidence that Decedent was ever exposed to respirable dust from a clutch manufactured or supplied by Defendant Hino (as

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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opposed to a replacement clutch manufactured and supplied by another entity) - or that he was exposed to dust from any clutch that contained asbestos - much less that such exposure occurred with the requisite frequency, regularity, or proximity. Therefore, no reasonable jury could conclude that Decedent was exposed to asbestos from a clutch manufactured or supplied by Defendant such that it was a substantial factor in the development of his illness. Jones, 69 F.3d at 716 (quoting Lohrmann, 782 F.2d at 1162); Agner, 2007 WL 57769 at *4-5. Accordingly, summary judgment in favor of Defendant is warranted with respect to this alleged source of exposure. Anderson, 477 U.S. at 248.

(iii) Brakes

There is evidence that Decedent was exposed to respirable dust from brakes during the time period 1982 to 1991 with some regularity. There is evidence that Decedent worked on Hino trucks, including work that required removing and installing brakes. There is evidence that Defendant manufactured trucks with asbestos-containing brakes, and that this occurred as late as 1992. There is evidence that Defendant sold replacement brakes. There is evidence that brakes often contained asbestos during the 1980s and into the 1990s. However, there is no evidence that Decedent was ever exposed to respirable dust from a brake manufactured or supplied by Defendant Hino (as opposed to a replacement brake manufactured and supplied by another entity) - or that he was exposed to dust from any brake that contained asbestos - much less that such exposure occurred with the requisite frequency, regularity, or proximity. Therefore, no reasonable jury could conclude that Decedent was exposed to asbestos from a brake manufactured or supplied by Defendant such that it was a substantial factor in the development of his illness. Jones, 69 F.3d at 716 (quoting Lohrmann, 782 F.2d at 1162); Agner, 2007 WL 57769 at *4-5. Accordingly, summary judgment in favor of Defendant is warranted with respect to this alleged source of exposure. Anderson, 477 U.S. at 248.