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

FRANK N. NETHKEN, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	
CSX TRANSPORATION, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:13-01544-ER
Defendants.	:	

O R D E R

AND NOW, this **12th** day of **November, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant CSX Transportation, Inc. (Doc. No. 64) is **GRANTED**.[1]

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[1] This case was filed in March of 2013 in the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiffs allege that Frank Nethken ("Plaintiff" or "Mr. Nethken") was exposed to asbestos while working for Defendant CSX Transportation, Inc. ("CSX"). He was diagnosed with asbestosis in 1987, and filed claims against CSX at that time. The parties thereafter entered into a settlement agreement and release ("the 1989 Release"), with Plaintiffs receiving $25,000 in connection with that agreement. Mr. Nethken later developed lung cancer, which he alleges was also a result of asbestos exposure that occurred while working for Defendant. He was diagnosed with lung cancer in 2012.

Plaintiffs brought claims against various defendants. Mr. Nethken was deposed in May of 2013. Defendant has moved for summary judgment, arguing that Plaintiffs' claims are barred by the 1989 Release.

The parties agree that, because the claims arise under FELA and the Boiler Inspection Act, federal 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 claims in this action arise under federal statutes (FELA and the Boiler Inspection Act). Therefore, Defendant's motion for summary judgment is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.).

C. Prior Releases on FELA

This Court has previously considered prior settlements and releases in connection with FELA claims. In Bludworth v. Illinois Central Railroad Co., 2011 WL 4916913 (E.D. Pa. Feb. 10, 2011)(Robreno, J.), the Court wrote:

Under FELA, 45 U.S.C. § 55, "[a]ny contract, rule, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

In Callen v. Pennsylvania R. Co., plaintiff brought claims under FELA, but had signed a release agreement stating that he was releasing "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me." 332 U.S. 625, 626, 68 S. Ct. 296, 92 L. Ed. 242 (1948). Plaintiff argued that the release agreement violated 45 U.S.C. § 55, in that it allowed the Pennsylvania Railroad Co. to exempt itself from liability. Id. at 630-31. The Court held that the release was properly considered at trial noting "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." Id. at 631. The Court also noted that the party attacking the release has the burden of showing that it is invalid. Id. at 630.

In Wicker v. Consolidated Rail Corp., the United States Court of Appeals for the Third Circuit interpreted "the scope of § 5 of FELA, and in particular, whether its bar of '[a]ny contract ... the purpose of which shall be to enable [an employer] to exempt itself' from FELA includes a general release of claims executed by an employee as part of a settlement." 142 F.3d 690, 695 (3d Cir. 1998). The court explained that, "[t]o be valid under FELA, a release must at least have been executed as part of a negotiation settling a dispute between the employee and the employer." Id. at 700. The court must evaluate the parties' intent at the time the agreement was made. Id. An employer may not require an employee to sign a release as a condition of employment in an attempt to evade liability. Id. The court held "that a release does not violate § 5 [45 U.S.C. § 55] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to

those risks which are known to the parties at the time the release is signed." Id. at 701.

The Wicker court further explained that a valid release agreement must inform the employee of the rights they are giving up by spelling out the "quantity, location, and duration of potential risks to which the employee has been exposed-for example topic exposure...." Id. A release is strong, but not conclusive evidence, of the parties' intent. Id. The court was concerned that boiler plate agreements with extensive lists including all hazards known to railroad employees would be held valid if the validity of the release depended on the language of the written release alone. Id. "[W]here a release merely details a laundry list of diseases or hazards, the employee may attack that release as boiler plate, not reflecting his or her intent." Id. The court ultimately held that the plaintiffs' releases, which were standard forms and did not indicate that the parties had discussed the rights they were giving up, were invalid under FELA. Id.

In Wicker, the plaintiffs signed general releases which purported to exempt the defendant from liability for all future claims, whether known or unknown, at the time that the agreement was signed. While the release agreement in this case is not as extensive as the ones in the Wicker case, the release clearly purports to extinguish Defendant's liability for all of Mr. Bludworth's future claims. Mr. Bludworth signed the release pursuant to the parties' settlement for claims related to Mr. Bludworth's hearing loss claims. There is no evidence that Mr. Bludworth was aware that he was at risk for developing asbestosis or being exposed to lead or any of the other substances named in his release agreement. The release agreement does not detail the quantities, locations, or duration in which Mr. Bludworth may have been exposed to asbestos. Rather, the release agreement seems to be just the kind of boiler plate agreement that the Wicker court was wary of. As there is no evidence that Mr. Bludworth understood that he was at risk of developing an asbestos-related disease at the time he signed the release agreement, Defendant's Motion for Summary Judgment is denied.

Bludworth, 2011 WL 4916913, at *1 n.1. See also Maynard v. Illinois Central Railroad Co., 2011 WL 4907756 (E.D. Pa. Feb. 10, 2011)(Robreno, J.)(same); Clayton v. BNSF Railway Co., 2012 WL 5389803 (E.D. Pa. Aug. 28, 2012) (Robreno, J.)(holding that release in connection with settlement of FELA claims pertaining to myelodysplasia syndrome for $12,500 did not bar future FELA claims pertaining to leukemia, where settlement did not evidence decedent's awareness of risk for developing leukemia or that he had been exposed to toxic substances as outlined in the release).

II. Defendant CSX's Motion for Summary Judgment

A. Defendant's Arguments

Defendant contends that Plaintiffs' claims are barred by the 1989 Release. It contends that a release executed as part of a settlement or compromise of a disputed liability is valid and enforceable under FELA, relying upon, inter alia, Callen v. Pennsylvania R.R. Co., 332 U.S. 625, 626 (1948), Wicker v. Consolidated Rail Corp., 142 F.3d 690, 700-01 (3d Cir. 1998), and Bludworth, 2011 WL 4916913, at *1 n.1. It also argues that Plaintiffs' then-undiagnosed asbestos-related conditions, including lung cancer, were known risks that may be released as part of a settlement of a FELA claim. Defendant asserts that the intent of the parties (including Mr. Nethken) to release all of Plaintiffs' future personal injury claims (including lung cancer) is clear from the plain language of the 1989 Release.

B. Plaintiffs' Arguments

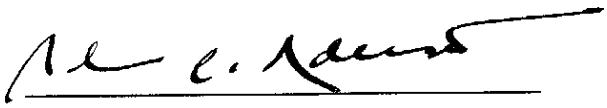
Plaintiffs argue that the 1989 Release does not bar their current claims because Mr. Nethken had not yet been diagnosed with lung cancer at that time. Plaintiffs rely upon the Third Circuit's decision in Wicker, which held that, while a release may be strong evidence of the parties' intent in releasing certain claims, it is not conclusive. Plaintiffs also rely upon, inter alia, the Supreme Court's decision in Callen and this Court's decision in Bludworth for the proposition that a boilerplate release that does not detail quantities, location, or duration of asbestos exposure does not bar future asbestos-related claims brought under FELA. Plaintiffs contend that Mr. Nethken did not intend to settle future asbestos-related lung cancer claims arising from his work at CSX, and cite to deposition testimony from him as to the validity of his current claim despite the 1989 Release that, "To my opinion it was never completely resolved."

C. Analysis

The 1989 Release purports to extinguish Defendant's liability for all future claims surrounding Mr. Nethken's work at CSX, including "all known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries, including cancer, arising from or contributed to by asbestos." Mr. Nethken signed the release pursuant to the parties' settlement for claims related to his diagnosis of asbestosis, in an amount of $25,000. It states that "a portion of the monies paid for [the release] is for risk, fear and/or possible future manifestation of either the effects of asbestos and/or injury or disease to the respiratory system." It is undisputed that, at the time of the 1989 Release, Mr. Nethken was aware that he had been exposed to asbestos. The 1989 Release acknowledges that Mr. Nethken was also aware that his disease was "permanent and may be progressive." In addition, the 1989 Release acknowledges an awareness of a possibility of "unanticipated . . . cancer" - and specifically identifies "cancer of the respiratory system" as a type of illness that the parties have anticipated could arise in the future.

The Court notes the relatively small amount accepted by Mr. Nethken in connection with the 1989 Release ($25,000). However, the amount of the settlement is not determinative of the outcome in and of itself. The language of the 1989 Release renders it distinguishable from that at issue in Bludworth, Maynard, and Clayton. In Clayton, the release did not evidence that the decedent was aware of his risk of developing leukemia (the illness underlying his second, post-release lawsuit), did not evidence any awareness on the part of the decedent that he had been exposed to "gases, chemicals . . . or any other alleged toxic substance" (as set forth in the release), and identified only an increased risk of "cancer" - a broad category of illnesses without any specificity as to the types of cancer for which he was at risk. In contrast, it is apparent from the 1989 Release that Mr. Nethken was aware at the time of the release that he had been exposed to asbestos, and was aware that there was a risk of developing cancer as a result of his asbestos exposure - including respiratory cancer in particular. Similarly, the facts surrounding Bludworth and Maynard are distinguishable from those surrounding Mr. Nethken because Mr. Bludworth and Mr. Maynard were settling hearing loss-related claims (not asbestos-related claims), and, unlike Mr. Nethken's 1989 Release, nothing in Mr. Bludworth's or Mr. Maynard's releases evidenced an awareness of the risk for developing an asbestos-related illness

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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in the future. As such, the Court has determined that the 1989 Release into which Mr. Nethken entered was not the kind of "boiler plate" agreement of which the Wicker court was wary. Therefore, in light of the fact that there is evidence that, at the time he signed the 1989 Release, Mr. Nethken was aware that he had been exposed to asbestos and was at risk of later developing another asbestos-related illness (including, specifically, respiratory cancer) in addition to his earlier asbestosis, summary judgment in favor of Defendant is warranted on grounds that Plaintiffs' lung cancer claims are barred by the 1989 Release. See Bludworth, 2011 WL 4916913, at *1 n.1 (citing Wicker (citing Callen)); Maynard, 2011 WL 4907756, at *1 n.1; Clayton, 2012 WL 5389803, at *1 n.1.

D. Conclusion

Summary judgment in favor of Defendant is granted because the claims now asserted by Plaintiffs were released by the 1989 Release.