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

LAWRENCE PAYNE,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
v.	:	Southern District of Illinois
	:	(Case No. 11-00820)
A.W. CHESTERTON COMPANY,	:	
ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:11-67704-ER
Defendants.	:	

O R D E R

AND NOW, this **1st** day of **April**, 2013, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Union Carbide Corporation (Doc. No. 476) is **DENIED**.[1]

---

[1] This case was transferred in September of 2011 from the United States District Court for the Southern District of Illinois to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Lawrence Payne ("Plaintiff or "Mr. Payne") alleges, inter alia, that he was exposed to asbestos while working as a handyman at various residences from approximately 1969 to 1976. Defendant Union Carbide Corporation ("Union Carbide") mined asbestos that was used by other companies (such as Georgia-Pacific) in manufacturing joint compound. Plaintiff has alleged that he was exposed to asbestos supplied by Union Carbide while using Georgia-Pacific "Ready Mix" joint compound at various locations around Youngstown, Ohio.

Plaintiff asserts that he developed lung cancer as a result of his exposure to asbestos. Mr. Payne was deposed in May 2012.

Plaintiff brought claims against various defendants. Defendant Union Carbide has moved for summary judgment, arguing that there is insufficient evidence to establish causation with respect to its product(s). Defendant alleges that Ohio law applies to Plaintiff's claims, but asserts that summary judgment would be granted even if Illinois or maritime law is applied. Plaintiff alleges that Illinois law applies to his claims.

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

Defendant contends that Ohio law applies to Plaintiff's claims against it. Plaintiff contends that Illinois law applies to those claims. The alleged exposure to Georgia-Pacific product(s) (and the asbestos allegedly supplied by Union Carbide and used in connection therewith) occurred at various locations around Youngstown, Ohio. As such, these exposure occurred exclusively during land-based work (as opposed to sea-based work). See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.). Therefore, the Court must determine whether Illinois or Ohio state law is applicable to Plaintiff's claims against Defendant Union Carbide that arise from these alleged exposures. See id.; Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

In deciding what substantive law governs a claim based in state law, a federal transferee court applies the choice of law rules of the state in which the action was initiated. Van Dusen v. Barrack, 376 U.S. 612, 637-40 (1964)(applying the *Erie* doctrine rationale to case held in diversity jurisdiction and transferred from one federal district court to another as a result of defendant's initiation of transfer); Commissioner v. Estate of Bosch, 387 U.S. 456, 474-77 (1967)(confirming applicability of *Erie* doctrine rationale to cases held in federal question jurisdiction). Therefore, because this case was initiated in Illinois, Illinois choice of law rules must be used to determine what substantive law applies in this case.

Under Illinois law, "...a choice-of-law analysis begins by isolating the issue and defining the conflict. A choice-of-law determination is required only when a difference in law will make a difference in the outcome." Townsend v. Sears, Roebuck and Co., 227 Ill.2d 147, 155 (Ill. 2007).

The issue pertinent to Defendant Union Carbide's motion is whether the product identification and causation standards of Illinois and Ohio are at conflict such that the choice of law is outcome determinative. In order to establish causation for an asbestos claim under Illinois law, a plaintiff must show that the defendant's asbestos was a "cause" of the illness. Thacker v. UNR Industries, Inc., 151 Ill.2d 343, 354 (Ill. 1992). Illinois courts employ the "substantial factor" test in deciding whether a defendant's conduct was a cause of a plaintiff's harm. Nolan v. Weil-McLain, 233 Ill.2d 416, 431 (Ill. 2009)(citing Thacker, 151 Ill.2d at 354-55). Similarly, Ohio applies a "substantial contributing factor" test in asbestos actions. Ohio Rev. Code Ann. § 2307.96. As such, the substantive law chosen (between Illinois law and Ohio law) will not be outcome determinative. Therefore, the Court will apply Illinois substantive law to Plaintiff's claims, as the action was initiated in Illinois. See Van Dusen, 376 U.S. at 639.

C. Product Identification/Causation Under Illinois Law

This Court has previously considered the product identification/causation standard under Illinois law . In Krik v. BP America (No. 11-63473), it wrote:

> In order to establish causation for an asbestos claim under Illinois law, a plaintiff must show that the defendant's asbestos was a "cause" of the illness.

Thacker v. UNR Industries, Inc., 151 Ill.2d 343, 354 (Ill. 1992). In negligence actions and strict liability cases, causation requires proof of both "cause in fact" and "legal cause." Id. "To prove causation in fact, the plaintiff must prove medical causation, i.e., that exposure to asbestos caused the injury, and that it was the defendant's asbestos-containing product which caused the injury." Zickhur v. Ericsson, Inc., 962 N.E.2d 974, 983 (Ill. App. (1st Dist.) 2011)(citing Thacker, 151 Ill.2d at 354). Illinois courts employ the "substantial factor" test in deciding whether a defendant's conduct was a cause of a plaintiff's harm. Nolan v. Weil-McLain, 233 Ill.2d 416, 431 (Ill. 2009)(citing Thacker, 151 Ill.2d at 354-55). Proof may be made by either direct or circumstantial evidence. Thacker, 151 Ill.2d at 357. "While circumstantial evidence may be used to show causation, proof which relies upon mere conjecture or speculation is insufficient." Id. at 354

In applying the "substantial factor" test to cases based upon circumstantial evidence, Illinois courts utilize the "frequency, regularity, and proximity" test set out in cases decided by other courts, such as Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986). Thacker, 151 Ill.2d at 359. In order for a plaintiff relying on circumstantial evidence "to prevail on the causation issue, there must be some evidence that the defendant's asbestos was put to 'frequent' use in the [Plaintiff's workplace] in 'proximity' to where the [plaintiff] 'regularly' worked." Id. at 364. As part of the "proximity" prong, a plaintiff must be able to point to "sufficient evidence tending to show that [the defendant's] asbestos was actually inhaled by the [plaintiff]." This "proximity" prong can be established under Illinois law by evidence of "fiber drift," which need not be introduced by an expert. Id. at 363-66.

In a recent case (involving a defendant Ericsson, as successor to Anaconda), an Illinois court made clear that a defendant cannot obtain summary judgment by presenting testimony of a corporate representative that conflicts with a plaintiff's evidence pertaining to product identification - specifically noting that

it is the province of the jury to assess the credibility of witnesses and weigh conflicting evidence. See Zickuhr, 962 N.E.2d at 985-86. In Zickhur, the decedent testified that he worked with asbestos-containing Anaconda wire from 1955 to 1984 at a U.S. Steel facility, and that he knew it was asbestos-containing because the wire reels contained the word "asbestos" on them - and the word "asbestos" was also contained on the cable and its jacket. A co-worker (Scott) testified that, beginning in the 1970s, he had seen cable spools of defendant Continental (which had purchased Anaconda) that contained the word "asbestos" on them. A corporate representatives (Eric Kothe) for defendant Continental (testifying about both Anaconda and Continental products) provided contradictory testimony that Anaconda stopped producing asbestos-containing cable in 1946 and that the word "asbestos" was never printed on any Anaconda (or Continental) cable reel. A second corporate representative (Regis Lageman) provided testimony, some of which was favorable for the plaintiff; specifically, that Continental produced asbestos-containing wire until 1984, that asbestos-containing wires were labeled with the word "asbestos," and that, although defendant did not presently have records indicating where defendant had sent its products, U.S. Steel had been a "big customer" of a certain type of defendant's wire that contained asbestos.

After a jury verdict in favor of the plaintiff, Defendant appealed, contending that (1) there was no evidence that defendant's cable/wire contained asbestos, and (2) there was no evidence that defendant's cable/wire caused decedent's mesothelioma. The appellate court affirmed the trial court (and upheld a jury verdict in favor of the plaintiff), holding that the issues of whether the cable and wire decedent worked with contained asbestos, and whether the defendant's cable and wire were the cause of the decedent's mesothelioma, were questions properly sent to the jury for determination. The appellate court noted that "the jury heard the evidence and passed upon the credibility of the witnesses and believed the plaintiff's witnesses over... Kothe." Id. at 986.

2012 WL 2914244, at *1.

In connection with another Defendant's motion/argument in that same case (Krik), this Court also wrote:

> Defendant urges this Court to reconsider the standard previously set forth, arguing that Illinois courts employ the Lohrmann "frequency, regularity, and proximity" test in all cases, and not just those in which a plaintiff relies upon circumstantial evidence. Specifically, Defendant cites to Zickhur and Nolan in support of this argument. The Court has considered Defendant's argument and the cases upon which it relies.
>
> The Court reiterates that Thacker is a decision of the Supreme Court of Illinois that directly addresses the product identification standard for asbestos cases brought under Illinois law. In Thacker, the decedent had testified to opening bags of asbestos of a kind not supplied by the defendant and had testified that he did not recall seeing the defendant's product anywhere in the facility. The only evidence identifying the defendant's product was testimony of a co-worker that the defendant's product had been seen in a shipping and receiving area of the facility, although the co-worker had not witnessed the product in the decedent's work area. In assessing the sufficiency of the plaintiff's evidence, the Court applied the "frequency, regularity, and proximity" test, noting that "plaintiffs in cases such as this have had to rely heavily upon circumstantial evidence in order to show causation." 151 Ill.2d at 357. After discussing the Lohrmann "frequency, regularity, and proximity" test, the Thacker court set forth its rationale for applying the test to the evidence at hand, noting that "[t]hese requirements attempt to seek a balance between the needs of the plaintiff (by recognizing the difficulties of proving contact) with the rights of the defendant (to be free from liability predicated upon guesswork)." Id. at 359. This Court notes that the rationale of the Thacker court would not apply where a plaintiff relied upon direct evidence, as there would be no danger of "guesswork" and little (if any) difficulty of proving contact. The Court therefore concludes, as it has previously, that Thacker indicates that the "frequency, regularity, and proximity" test is applicable in cases in which a plaintiff relies on circumstantial evidence.

This is not inconsistent with the holding of Lohrmann. See Lohrmann, 782 F.2d at 1162.

Defendant argues that the decision of the Supreme Court of Illinois in Nolan makes clear that the "frequency, regularity, and proximity" test is applicable in all cases, regardless of whether a plaintiff is relying on direct or circumstantial evidence. Nolan, however, did not directly address the product identification standard for asbestos cases under Illinois law. Rather, the question considered by the court was whether the trial court erred in excluding from trial all evidence of a plaintiff's exposure to asbestos from other manufacturers' products when a sole defendant was remaining at trial. Nolan, 233 Ill.2d at 428. In deciding that issue, the court rejected the intermediary appellate court's conclusion that, when the "frequency, regularity, and proximity" test is met, legal causation has been established. Although it is true that Nolan makes reference to the Lohrmann test without clarifying that it is only applicable in cases based upon circumstantial evidence, the Nolan court was not deciding whether the trial court had applied the proper product identification standard, and it cannot be fairly or accurately said that Nolan sets forth the Illinois standard for product identification, nor that it stands for the proposition that the "frequency, regularity, and proximity" test is applicable in all cases. Nothing in Nolan indicates that the Supreme Court of Illinois intended to alter the standard it set forth in Thacker.

Finally, the Court has considered Defendant's argument that Zickhur indicates that the "frequency, regularity, and proximity" test is applicable in all cases, regardless of the type of evidence relied upon by a plaintiff. As an initial matter, the Court notes that a decision from an intermediary appellate court will not, by itself, displace a rule of law issued by the highest court of the state. However, Zickhur does not contradict Thacker. Rather, the Zickhur court makes clear that the "frequency, regularity, and proximity" test is not always applicable - noting that "the 'frequency, regularity and proximity' test may be used...[and] that a plaintiff can show exposure to defendant's asbestos" with it. 962 N.E.2d at 986

(emphasis added). Moreover, while it is true that Zickhur involved some pieces of direct evidence, it is worth noting that the court's resolution of the issue of the sufficiency of the evidence to withstand a motion for a directed verdict turned on its analysis of circumstantial evidence, in the context of direct and conflicting evidence presented by parties on both sides of the case. Therefore, it cannot be fairly or accurately said that Zickhur sets forth the Illinois standard for product identification, nor that it stands for the proposition that the "frequency, regularity, and proximity" test is applicable in all cases.

2012 WL 2914246, at *1.

II. Defendant Union Carbide's Motion for Summary Judgment

Product Identification / Causation

Union Carbide contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Mr. Payne's lung cancer. In support of its assertion that Plaintiff's evidence fails to establish that Union Carbide supplied the asbestos used in the Georgia-Pacific joint compounds allegedly used by Mr. Payne, Defendant asserts the following:

- Union Carbide did not sell Calidria asbestos to Georgia-Pacific for use in its joint compounds until 1970.
- Johns-Manville and Phillip Carey also supplied asbestos to Georgia-Pacific during the relevant time period.
- Calidria was not used in any "generally-available" premixed Georgia-Pacific joint compound manufactured in Chicago prior to February 1974.
- Asbestos-free formulations of Georgia-Pacific premixed joint compound were available from the Chicago plant from 1974 to 1977.
- Georgia-Pacific Ready Mix was first packaged in plastic pails in 1978.

- Plaintiff only testified to purchasing four buckets of Georgia-Pacific joint compound in the 1970s.

In support of these assertions, Defendant Union Carbide relies on various affidavits, depositions, and interrogatory responses. Union Carbide admits that Georgia-Pacific's Chicago facility was the most likely plant to have manufactured the Georgia-Pacific joint compound used by Mr. Payne in the Youngstown, Ohio area.

B. Plaintiff's Arguments

Product Identification / Causation

In support of Plaintiff's assertion that he has identified sufficient evidence of exposure/causation/product identification to survive summary judgment, Plaintiff cites to, inter alia, the following evidence:

- Deposition Testimony of Plaintiff
  Mr. Payne performed odd jobs as a handyman at various houses from approximately 1969 to 1976. Part of his duties as a handyman involved performing repairs to drywall. Mr. Payne testified that he exclusively used Georgia-Pacific joint compound as his drywall cement. He purchased the joint compound from a hardware or construction supply store. The joint compound came as a pre-mixed product in a five gallon plastic bucket.

  Mr. Payne testified that the condition of the air around him was "very dusty" when the Georgia-Pacific joint compound was sanded. Mr. Payne testified to breathing in the resulting dust. Jobs could last several days and sometimes required two or three applications and sanding of the joint compound. Mr. Payne testified that he performed drywall repairs approximately two or three times a week for approximately five or six years (between approximately 1969 and 1976).

  (Doc. No. 505-2, Ex.'s A and B)

- Deposition Testimony of Georgia-Pacific Consultant (William Lehnert) from 2001
  Mr. Lehnert is familiar with product formulas for Georgia-Pacific joint compound products. Mr. Lehnert testified that asbestos "SG-210" was the designation for Union Carbide supplied asbestos in any given Georgia-Pacific product formulation. SG-210 was used in Georgia-Pacific joint compound products from December 29, 1969 to May 4, 1977.

  According to Mr. Lehnert, the Chicago plant furnished joint compounds for the Midwest. The asbestos-containing joint compounds produced by the Chicago plant included: "All Purpose, bedding compound, topping compound and Ready Mix." "Ready Mix" joint compound was a pre-mixed, paste-like product that came packaged in a metal or plastic pail. The Ready Mix line was the only line of Georgia-Pacific joint compounds that came packaged in pails or buckets. The Ready Mix joint compound produced at the Chicago plant contained SG-210 asbestos between October 21, 1970 and May 4, 1977. Mr. Lehnert testified that all of the "general formula" Ready Mix produced at the Chicago plant would have contained Union Carbide asbestos during this time frame. Special formula Ready Mix was produced without Union Carbide asbestos between 1974 and 1976 but was only distributed by specific request.

  (Doc. No. 505-3, Ex. C)

C. Analysis

Plaintiff alleges that he was exposed to asbestos from Union Carbide supplied asbestos from approximately 1969 to 1976. Plaintiff has identified sufficient product identification evidence pertaining to his alleged exposure to asbestos supplied by Union Carbide and contained in Georgia-Pacific's "Ready Mix" joint compound.

Mr. Payne testified that he used Georgia-Pacific pre-mixed joint compound approximately two to three times a week

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

between approximately 1969 and 1976. Plaintiff testified that this product was packaged in a five gallon plastic bucket. Plaintiff testified that he sanded the joint compound, and that this created airborne dust. Plaintiff testified to breathing in the resulting dust. There is testimony from Georgia-Pacific consultant William Lehnert that Georgia-Pacific "Ready Mix" joint compound was the only Georgia-Pacific product that came packaged in a pail or bucket. There is evidence that, from approximately 1970 to 1977, the general formula Ready Mix product purchased in the Youngstown area contained asbestos supplied by Union Carbide.

Defendant is correct that there is evidence that there may have been asbestos-free versions of Georgia-Pacific's Ready Mix available at some point between 1974 and 1976. However, the testimony asserts that these products were for special purpose Ready Mix products that were provided to customers only by specific request. Plaintiff testified to purchasing his Georgia Pacific products from local hardware and construction supply stores. There is no evidence or testimony that Mr. Payne purchased or requested a specific or special purpose Ready Mix formula. Moreover, much of Plaintiff's alleged exposure occurred after 1970 (the year in which Ready Mix began to contain asbestos) and prior to 1974 (the year at which some asbestos-free versions of that mix became available at special request). Therefore, when construing the evidence in the light most favorable to Plaintiff, as this court is required to do in deciding Defendant's motion, there is evidence that Mr. Payne was exposed to asbestos dust attributable to Georgia-Pacific joint compound that contained asbestos provided by Union Carbide from at least 1970 to 1974 (and more likely than not through 1976).

In light of Plaintiff's testimony regarding the duration and frequency with which he used Georgia-Pacific joint compound, a reasonable jury could conclude from the evidence that Plaintiff was exposed to an asbestos-containing product supplied by Union Carbide such that it was a "substantial factor" in the development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Therefore, summary judgment in favor of Union Carbide is not warranted. Id.; Anderson, 477 U.S. at 248.