
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 agree that New Jersey substantive law applies. Therefore, this Court will apply New Jersey 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 New Jersey Law

This Court has previously considered the product identification/causation standard under New Jersey law. In Lewis v. Asbestos Corp., (No. 10-64625), this Court wrote:

To maintain an asbestos action in New Jersey, a plaintiff must "provide sufficient direct or circumstantial evidence from which a jury could conclude that plaintiff was in close proximity to, and inhaled, defendant's asbestos-containing product on a frequent and regular basis." Kurak v. A.P. Green Refractories Co., 689 A.2d 757, 761 (N.J. Super. Ct. App. Div. 1997) (quoting Sholtis v. American Cyanamid Co., 568 A.2d 1196, 1208 (N.J. Super. Ct. App. Div. 1989)). In order to meet this "frequency, regularity and proximity test," plaintiff must do more than "demonstrate that a defendant's asbestos product was present in the workplace or that he had 'casual or minimal exposure' to it." Kurak, 689 A.2d at 761 (quoting Goss v. American Cyanamid Co., 650 A.2d 1001, 1005 (N.J. Super. Ct. App. Div. 1994)). In addition to meeting the "frequency, regularity, and proximity test," plaintiff must establish causation by presenting "competent evidence, usually supplied by expert proof" showing that there is a nexus between exposure to defendant's product and plaintiff's condition. Kurak, 689 A.2d at 761.

2011 WL 5881183, * 1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.).

D. Presumption Re: Warning Defect Under New Jersey Law

This Court has previously addressed the presumption regarding warning defect claims that exists under New Jersey law. In Lewis v. Asbestos Corp., (No. 10-64625), this Court wrote:

In Coffman v. Keene Corp., the plaintiff claimed that an asbestos manufacturer's failure to place warnings on its asbestos-related products was a proximate cause of the plaintiff's development of asbestosis. 628 A.2d 710, 715 (N.J. 1993). The court recognized that, "[c]ausation is a fundamental requisite for establishing any product-liability action. The plaintiff must demonstrate so-called product-defect causation—that the defect in the product was a proximate cause of the injury." Id. at 716 (citing Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179 (N.J. 1982); Vallillo v. Mushkin Corp., 514 A.2d 528 (N.J. App. Div. 1986)). "When the alleged defect is the failure to provide warnings, a plaintiff is required to prove that the absence of a warning was a proximate cause of his harm." 628 A.2d at 715 (citing Campos v. Firestone Tire & Rubber

Co., 485 A.2d 305 (N.J. 1984)). The court adopted a "heeding presumption" in products liability failure to warn cases that the plaintiff "would have followed an adequate warning had one been provided, and that the defendant in order to rebut that presumption must produce evidence that such a warning would not have been heeded." 628 A.2d at 720. Evidence that the plaintiff was aware of the dangers associated with the defendant's product or that the plaintiff would have disregarded the warnings had they been provided may rebut this heeding presumption. *Id.* at 721. The court held that "to overcome the heeding presumption in a failure-to-warn case involving a product used in the workplace, the manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning." *Id.* at 724.

2011 WL 5881181, * 1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.).

II. Defendant Goulds Pumps's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Goulds Pumps argues that there is insufficient product identification evidence to support a jury finding of causation with respect to any product(s) for which it is liable.

In its reply brief, Goulds contends that Plaintiffs should be precluded from seeking liability against it for products manufactured or supplied by its predecessor (Morris Pumps, Inc.) because Plaintiffs identified Morris pumps for the first time in their opposition papers. (Reply brief (ECF No. 156) at 10.)

Bare Metal Defense

Defendant Goulds Pumps asserts that it is entitled to summary judgment on grounds of the "bare metal defense," and contends that New Jersey law would recognize the defense. In support of this assertion, it relies upon the unpublished decision in Mystrena/Fayer v. A.W. Chesterton Co., MID-L-4208-10 (N.J. Super. Ct. May 8, 2012) (McCormick, J.).

B. Plaintiffs' Arguments

Product Identification / Causation

In response to Defendants' assertion that there is insufficient product identification evidence to establish causation with respect to its product(s), Plaintiffs have identified the following evidence:

- Deposition of Decedent

Decedent testified that he began working at the Allied Chemical plant in 1968 when it was new, and that it hadn't yet begun to operate at the time he started. He testified that Allied Chemical later became General Chemical. He testified that he believed he was exposed to asbestos from gaskets, packing, and insulation used with pumps, valves, turbines, steam traps, and pipes. He testified that removal of packing from pumps and valves was done with a packing puller, which looked like a corkscrew; and that this process left packing on the floor which - when walked on and pushed around after it dried - created dust. He testified that removal of gaskets required scraping them off with a putty knife and brushing with a steel brush - a process that created dust. He testified that maintenance on pumps, such as repacking them, required removing and disturbing insulation, and that this was a process that created dust. He testified that all of the gaskets used around heat contained asbestos, and that this was generally all of the gaskets at the plant (with perhaps an occasional rubber gasket).

(Doc. No. 145-1, Pl. Ex. 6 at 48-50; Ex 10 at 15, 53-54, 61-63, 72-83, 86, 110, 128-30, 201; Ex. 11 at 274-85.)

- Deposition of Co-Worker Jack Jereb

Mr. Jereb (a co-worker) testified that he and Decedent began working together at the Allied Chemical plant on the same day in 1961, when it first opened, and that they worked together on the dayshift for 31 years. He testified that the plant was new and had not yet become operational, and that all of the equipment there at that time

(including, specifically, pumps and valves) was new. He testified that he and Decedent changed the gaskets and packing on pumps on a regular basis (which he specified meant that every day something was done on pumps or valves). He testified that changing the gaskets involved removing gaskets with a scraper and wire brush, and that this process created dust from the gaskets. He testified that insulation would have to be removed from pumps and that this was done by scraping it with a wire brush, which would create dust "off the flange." He testified that he knew from his training in the industry that the gaskets, packing, and insulation were made of asbestos. He testified that it was necessary to use asbestos gaskets, packing, and insulation because "everything got hot." He testified that removal of insulation created dust that could be breathed by someone working on or near the equipment from which the insulation was removed. Mr. Jereb specified that he saw Decedent working on or near pumps when gaskets, packing, and insulation were removed/changed from pumps. He testified that he saw Decedent making gaskets out of sheet material with a ball peen hammer. When asked to identify the manufacturer of the pumps, Mr. Jereb answered that there were "so many," but that he recalled Durco and Morris. He also stated that BorgWarner sounded familiar. Mr. Jereb testified that no warnings were given about asbestos in the various products and that no dust masks or respirators were given to the employees.

(Doc. No. 145-1, Pl. Ex. 9 at 12-19, 26-27, 47-48, 142-43.)

- "Fixed Capital Historical Register"
Plaintiffs point to a "Fixed Capital Historical Register" pertaining to Allied Chemical equipment, which indicates that there were at least some Goulds pumps at the Allied Chemical plant in January of 1973.

(Doc. No. 145-1, Pl. Ex. 12.)

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- Various Documents
Plaintiffs point to documents which they contend indicate that Goulds's purchased Morris pumps and continued to manufacture and sell them.

(Doc. No. 145-5, Pl. Ex. 21 at 3; Ex. 22 at 11.)
 - Correspondence Dated November 28, 1990
Plaintiffs point to correspondence dated November 28, 1990, from Goulds Pumps which appears to indicate that Goulds was affiliated with Morris Pumps. Plaintiffs contend this indicates that Goulds continued to manufacture and sell the Morris pumps line after purchasing it in 1981. (See Def. Mem. at 6, ECF No. 149-1.)

(Doc. No. 145-1, Pl. Ex. 12.)
 - Various Documents
Plaintiffs point to documents which they contend indicate that Goulds's specifications for its pumps included asbestos gaskets and packing, and that Goulds sold this asbestos-containing gasket and packing material with its pumps.

(Doc. Nos. 145-3 and 145-4, Pl. Ex. 14 at 3; Ex. 15 at 10, 23; Ex. 16 at 11.)
 - Deposition Testimony of Corporate Representative (Bruce Conner)
Plaintiffs point to deposition testimony (from another case) of Goulds Pumps corporate representative Bruce Conner, who testified that, during the period 1968 to 1978, he " would think most [of the pumps manufactured by Goulds] would have had asbestos-containing gaskets at least."

(Doc. No. 145-4 and 145-5, Pl. Ex. 18 at 26.)
 - Medical Expert Report
Plaintiffs point to an expert report of Dr. Jacqueline Moline regarding causation.

(Doc. No. 145-9, Pl. Ex. 29.)

Bare Metal Defense

Plaintiffs contend that New Jersey law would not recognize the "bare metal defense." In support of this assertion, Plaintiffs cite to: (1) Seeley v. Cincinnati Shaper Co., 256 N.J. Super 1, 18 (N.J. App. 1992), (2) Feldman v. Lederle Laboratories, 97 N.J. 429, 456 (N.J. 1984), (3) Molino v. BF Goodrich, 617 A.2d 1235, 1240 (N.J. App. 1992), (4) Lally v. Printing Machinery Sales, 240 N.J. Super. 181, 185 (N.J. App. 1990), (5) Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 410 (N.J. 1972), (6) Lamendola v. Mizell, 115 N.J. Super. 514, 518 (N.J. Super. Ct. Law Div. 1971), and (7) Porch/Ritchie v. Foster-Wheeler, CAM-L-5053, 05 (N.J. Super. Ct. Law Div Feb. 15, 2008) (hearing transcript only; no written decision).

C. Analysis

As a preliminary matter, the Court rejects Defendant's contention that "for the first time in their Opposition, Plaintiffs also contend that Goulds Pumps is somehow liable for 'Morris Pumps'." (Def. Reply at 10.) The Complaint in this action (attached by Defendant as an exhibit to its motion) states that, "[f]or purposes of this Complaint, Goulds Pumps shall include the present business entity, as well as all of its predecessor corporations and entities as applicable." (ECF No. 111 at 26 (Ex. A at ¶ 21).) A fair reading of the Complaint indicates that Goulds was provided with notice that Plaintiffs were seeking to hold it liable for, inter alia, products manufactured by its predecessors. Plaintiffs have provided evidence that Goulds Pumps LLC purchased Morris Pumps, Inc. in 1981. Goulds argues now that this evidence (consisting of public records) should be excluded because it was not produced by Plaintiffs during discovery. However, Goulds fails to point to any discovery request in which it requested those documents. The Court deems the Complaint sufficient to have placed Goulds on notice that Morris pumps may be at issue in this case. In the absence of any discovery request by Defendant requesting the documents, Plaintiffs had no obligation to produce to Goulds documents that were not only public documents equally available to Goulds, but were in fact more readily available to Goulds (as they were documents pertaining to Goulds's own corporate history). Having addressed this contention, the Court next examines the sufficiency of Plaintiffs' evidence pertaining to Goulds and/or Morris pumps.

Plaintiffs have alleged that Goulds pumps is liable for exposure to asbestos arising from gaskets, packing, and

insulation used in connection with pumps manufactured and/or supplied by Defendant Goulds (including Morris pumps). The Court examines the evidence pertaining to each alleged source of exposure separately:

(i) Gaskets

There is evidence that Decedent was exposed to respirable asbestos dust from gaskets used in connection with pumps manufactured and/or supplied by Defendant Goulds. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that Decedent's responsibilities for maintaining the pumps at the plant began when the pumps were brand new (as originally supplied) - such that a reasonable jury could conclude that at least some of this exposure arose from the gaskets originally installed on the pumps supplied by Goulds. There is evidence that this exposure was a substantial factor in the development of Decedent's illness. Therefore, a reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from gaskets supplied by Defendant Goulds such that it was a substantial factor in the development of his illness. See Kurak, 689 A.2d at 761; Anderson, 477 U.S. at 248-50. Accordingly, summary judgment in favor of Defendant is not warranted with respect to alleged exposure arising from gaskets. Anderson, 477 U.S. at 248-50.

In light of this determination, and for purposes of summary judgment, the Court need not reach the issue of whether Defendant is liable for any alleged exposure to asbestos arising from replacement gaskets that were used with Goulds (or Morris) pumps but were not manufactured or supplied by Goulds (i.e., whether New Jersey law recognizes the so-called "bare metal defense").

(ii) Packing

There is evidence that Decedent was exposed to respirable asbestos dust from packing used in connection with pumps manufactured and/or supplied by Defendant Goulds. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that Decedent's responsibilities for maintaining the pumps at the plant began when the pumps were brand new (as originally supplied) - such that a reasonable jury could conclude that at least some of this exposure arose from the

packing originally installed on the pumps supplied by Goulds. There is evidence that this exposure was a substantial factor in the development of Decedent's illness. Therefore, a reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from packing supplied by Defendant Goulds such that it was a substantial factor in the development of his illness. See Kurak, 689 A.2d at 761; Anderson, 477 U.S. at 248-50. Accordingly, summary judgment in favor of Defendant is not warranted with respect to alleged exposure arising from packing. Anderson, 477 U.S. at 248-50.

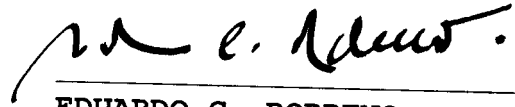
In light of this determination, and for purposes of summary judgment, the Court need not reach the issue of whether Defendant is liable for any alleged exposure to asbestos arising from replacement packing that was used with Goulds (or Morris) pumps but was not manufactured or supplied by Goulds (i.e., whether New Jersey law recognizes the so-called "bare metal defense").

(iii) Insulation

There is evidence that Decedent was exposed to respirable asbestos dust from insulation used in connection with pumps manufactured and/or supplied by Defendant Goulds. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that this exposure was a substantial factor in the development of Decedent's illness. However, there is no evidence that this insulation was manufactured or supplied by Defendant (as insulation "originally" applied externally to the pump or as replacement insulation later applied). Plaintiffs contend that Defendant is liable for this insulation because it specified and/or recommended that asbestos-containing insulation was to be used with its pumps. Under this theory, Defendant is only liable for this exposure if New Jersey law does not recognize the so-called "bare metal defense."

The Court has reviewed New Jersey law on this issue (as cited by the parties) and has determined that it has not been fully and squarely addressed by any appellate court in New Jersey in the context of asbestos litigation. As such, there is no clear and settled statement of New Jersey law on the issue. Whether New Jersey law recognizes this defense (i.e., whether New Jersey law holds a pump manufacturer liable for injury arising from asbestos-containing insulation that the manufacturer specified and/or recommended for use in connection with its pump, but which

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

it did not manufacture or supply) is a matter of policy. A court situated in New Jersey is closer to - and has more familiarity with - New Jersey law and policy. As such, rather than predicting what the Supreme Court of New Jersey would do, the Court deems it appropriate to remand this case such that a court in New Jersey may decide this issue. See, e.g., Faddish v. CBS Corp., No. 09-70626, 2010 WL 4159238 (E.D. Pa. Oct. 22, 2010) (Robreno, J.). Accordingly, summary judgment in favor of Defendant is denied with respect to claims arising from alleged asbestos exposure stemming from insulation, with leave to refile in the transferor court after remand.

D. Conclusion

Summary judgment in favor of Defendant Goulds Pumps is denied with respect to claims arising from alleged asbestos exposure stemming from gaskets and packing, as Plaintiffs have presented sufficient evidence to support a finding of causation with respect to original gaskets and packing supplied by Goulds with its pumps.

Summary judgment in favor of Defendant Goulds Pumps is denied with respect to claims arising from alleged asbestos exposure stemming from insulation, as New Jersey law on the so-called "bare metal defense" is unsettled and the Court deems it appropriate to remand the issue for a court in New Jersey to decide.

Defendant has leave to refile in the transferor court after remand with respect to claims arising from alleged exposure to products and/or replacement/component parts used in connection with Defendant's pumps but not manufactured or supplied by Defendant (i.e., insulation and replacement gaskets and/or packing).

ENTERED

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CLERK OF COURT