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

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| COREY STEWART, ET AL., | : | CONSOLIDATED UNDER MDL 875 |
| Plaintiffs, | : | |
| | : | Transferred from the Western District of North Carolina |
| v. | : | |
| AKRON GASKET & PACKING ENTERPRISES, ET AL., | : | E.D. PA CIVIL ACTION NO. 2:12-60164-ER |
| Defendants. | : | |



**O R D E R**

**AND NOW**, this **7th** day of **November, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Daniel International Corporation** (Doc. No. 140) is **DENIED.**[1]

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

Plaintiff Corey Stewart alleges that Charles Stewart, Jr. ("Decedent" or "Mr. Stewart") was exposed to asbestos while working at the General Tire Plant in North Carolina during the years 1972 and 1975 to 1994. Defendant Daniel International Corporation ("Daniel") was a general contractor which built the tire plant, installed asbestos-containing tire presses, and, later, performed maintenance and repair work at the facility.

Mr. Stewart died from mesothelioma in July of 2010. He was not deposed in this action.

Plaintiff brought claims against various defendants. Defendant Daniel has moved for summary judgment, arguing that there is insufficient evidence to support a finding of causation for which it can be liable. 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 Daniel's Motion for Summary Judgment

### A. Defendant's Arguments

Defendant contends that Plaintiff's evidence is insufficient to establish causation for which it can be liable. Defendant asserts that, under North Carolina law, a general contractor cannot be held liable for injury arising from work it performed in constructing a facility once that facility has been turned over to - and accepted by - the facility owner.

### B. Plaintiff's Arguments

Plaintiff contends that Defendant is liable under North Carolina law not only for its work (including product installation) in constructing the facility at which Decedent worked, but also for asbestos exposure Decedent experienced as a result of maintenance and repair work (specifically, removal and installation of asbestos insulation) that Defendant later performed at the facility in proximity to Decedent, years after construction of the facility was completed. In support of his assertion that he has identified sufficient evidence of product identification/ causation to survive summary judgment, Plaintiff cites to the following evidence:

- Deposition Testimony of Carl Dry (Co-Worker)
  Mr. Dry worked at the facility from 1985 to 2006 and was one of Decedent's co-workers. He testified that, during his first six months of work at the facility (in 1985), Daniel contract workers were present "many times," doing "a lot" of work during the day shift in the area in which he and Decedent worked (the calendar area), including removing asbestos insulation. He testified that these workers did not block off their work area and that Decedent worked within 50 feet of the insulation work. He specifically recalled a period of about one week in which the workers removed external asbestos insulation from the calendering equipment. He also saw them install asbestos insulation there.

  (Pl. Exs. 3-4, Doc. Nos. 162-3 and 162-4.)

- Deposition Testimony of Robert Proctor (Co-Worker)
  Robert Proctor, a co-worker of Decedent, worked with him in the calendaring department. He testified that Decedent was present when contract workers removed and installed asbestos insulation in his vicinity. In particular, he recalled a four-month period (some time during 1974 to 1978) in which he and Decedent worked on the same calendaring machine and during which contract workers were present on at least two different occasions and were disturbing asbestos insulation within ten to twelve feet of where he and Decedent worked.

  (Pl. Ex. 5, Doc. No. 162-5.)

- Deposition Testimony of Theordarit Buck (Corporate Representative)
  Mr. Buck, Daniel's corporate representative, testified that Daniel built the facility during the period 1966 to 1968 and that, when it did, it installed asbestos insulation there. He also testified that Daniel had a maintenance contract with the facility for the period 1975 to 1985.

  (Pl. Ex. 6, Doc. No. 162-6)

**C. Analysis**

The operative complaint in this action (Plaintiff's Amended Complaint, Doc. No. 49-2) sets forth claims against Defendant for "Negligence" and "Failure to Warn." Plaintiff alleges that Decedent was exposed to asbestos as a result of asbestos-containing insulation installed by - and later maintained by - Daniel workers during his work at the tire facility. There is evidence that Decedent was in the vicinity when these workers did "a lot" of work that disturbed asbestos insulation (specifically, removal of the insulation) on "many occasions," and that this work occurred during multiple separate periods of maintenance/repair work. A reasonable jury could conclude that this testimony establishes that Decedent's exposure to respirable asbestos dust disturbed by Daniel workers occurred with the requisite frequency, regularity, or proximity.

**AND IT IS SO ORDERED.**

**EDUARDO C. ROBRENO, J.**

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Therefore, a reasonable jury could conclude that Decedent was exposed to asbestos from conduct for which Defendant is liable 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 not warranted. Anderson, 477 U.S. at 248.

Because the evidence relied upon by Plaintiff pertaining to the work/conduct of Defendant in performing maintenance/repair work is sufficient to establish either of the pertinent claims stated against Defendant in the operative complaint, for purposes of deciding Defendant's motion, the Court need not specifically address the contention that Defendant could also be liable as a supplier of asbestos-containing products to the tire facility. Therefore, it declines to do so.