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

SHIRLEY JOYCE TALBOT,	:	
	:	CONSOLIDATED UNDER
Plaintiff,	:	MDL 875
	:	
	:	Transferred from the Southern
	:	District of Florida
v.	:	(Case No. 94-06801)
	:	
ALLIEDSIGNAL, INC., ET AL	:	
	:	E.D. PA CIVIL ACTION NO.
	:	09-70499
Defendant.	:	

O R D E R

AND NOW, this **15th** day of **December, 2010**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendants Genuine Parts Co. and National Automotive Parts Association, filed on October 28, 2010 (doc. no. 14), is **DENIED**.[1]

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[1]Plaintiffs, Frederick and Shirley Talbot, filed this action in Broward County, Florida on July 23, 1994. (Def.'s Mot. Summ. J., doc. no. 14 at 2). This case was removed to the United States District Court for the Southern District of Florida on August 23, 1994. (Id.). This case was transferred to the Eastern District of Pennsylvania as part of MDL 875 on June 17, 2009. (Transfer Order, doc no. 1). Plaintiffs bring this action under theories of strict liability, negligent failure to warn, and include a claim for loss of consortium on the behalf of Shirley Talbot. (Def.'s Mot. Summ. J. at 2). Frederick Talbot passed away from mesothelioma in 1994. Id. at 1.

Genuine Parts Co. ("GPC") distributed automotive aftermarket products, including brakes, under the Rayloc name. (Pl.'s Reply Br., doc. no. 18 at 8). Rayloc provided asbestos-containing brakes to National Automotive Parts Association ("NAPA") Distribution Centers. (Id.; Huff Depo.). NAPA Distribution

Centers supplied NAPA retail outlet stores with these brakes. Id. NAPA would be printed on some of the boxes. Id.

According to Plaintiff's Answers to Interrogatories, Frederick Talbot was exposed to asbestos-containing brakes when he worked as an automobile mechanic at Talbot's Auto Service in Springfield, Massachusetts from 1953 until 1970. (Pl.'s Reply Br., doc. no. 18 at 2; Pl.'s Interrogs., doc. no. 18-1 at 6). Frederick Talbot came into contact with asbestos-containing products when he was installing, repairing, or removing brakes, clutches, and brake linings. (Pl.'s Reply Br. at 2; Pl.'s Interrogs. at 7).

Frederick Talbot's son, John Talbot, testified that his Uncle Patrick owned Talbot'S Auto Service. (Talbot Depo., doc. no. 18-3 at 12). John Talbot worked at the shop in the summers of 1956 and 1957. (Id. at 14, 17). John Talbot identified Bendix and NAPA brakes as being present at Talbot's Auto Service, but testified that he could not specifically recall Frederick Talbot using either Bendix or NAPA brakes. (Id. at 15-17). There were no mechanics other than Patrick and Frederick Talbot working in the shop. (Id. at 14). John Talbot testified that his uncle died in 1959 which left his father, Frederick Talbot, alone in the shop. (Id. at 24.) John Talbot visited the shop on a regular basis on Saturdays from 1960-1966 to help his father with the work at the shop and witnessed his father changing brakes on several occasions. (Id. at 23-24). John Talbot could not recall what specific brand of brakes Frederick Talbot worked with. (Id. at 25). John Talbot had difficulties estimating a number of times he witnessed Frederick Talbot doing a brake job, but estimated that it would be more than twenty (20) times but less than one hundred (100) times. (Id. at 39). He testified that, "[i]t was a fairly common procedure for them to do it, so I would estimate that I really observed and noticed probably one or two a week. It was a rather common procedure, but I can't give you exact numbers." (Id. at 41). John Talbot testified that he recalled picking up NAPA products, including brake shoes, from the Ferrara store quite often. (Id. at 85). John Talbot was not aware of any brake products which would be used at the shop other than Bendix and NAPA products. Id. at 160.

At oral argument, the parties argued under the assumption that Florida law applied to Plaintiff's claims. Plaintiff's counsel asserted that since Frederick Talbot was a resident of Florida at the time the case was filed, Florida law should apply. However, the alleged exposures took place in Massachusetts. This

Court must determine whether Florida or Massachusetts law should apply here. In a diversity action, the Court "must apply the choice of law rules of the forum state to determine what substantive law will govern." Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). This action was commenced in the Southern District of Florida, so this Court will look to Florida choice of law rules. In determining whether Florida or Massachusetts law should apply, this Court must determine whether there is a true conflict between the laws of Florida and Massachusetts on this issue or merely a false conflict. Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc. 625 F. Supp. 2d 1198, 1218 (S.D. Fla. 2008) (citing Tune v. Philip Morris, Inc., 766 So.2d 350, 352-53 (Fla. Dist. Ct. App. 2000)). A false conflict may exist if the laws of the different states "are (1) the same, (2) different but would produce the same outcome under the facts of the case, or (3) when the policies of one state would be furthered by application of its laws while the policy of the other state would not be advanced by the applications of its laws." 766 So.2d at 353. If a false conflict exists, then the forum state would apply Florida law. 625 F. Supp. 2d at 1219 (citing Cavic v. Grand Bahama Dev. Co., 701 F.2d 879, 882 (11th Cir. 1983)). A comprehensive conflict analysis is only required if there is a true conflict. 625 F. Supp. 2d at 1219 (citing 766 So.2d at 352). As will be detailed below, Florida courts follows the "substantial contributing factor" test. Massachusetts courts also follow the substantial contributing factor test. See O'Connor v. Raymark Industries, Inc., 518 N.E.2d 510, 512 (Mass. 1988). Accordingly, application of either Florida or Massachusetts law in this case would lead to the same result. Therefore, as there is a false conflict, this Court will look to Florida law, the law relied on by both parties in this case, in deciding Defendant's Motion for Summary Judgment.

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479

F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

The Florida Supreme Court has not articulated a standard of causation necessary to survive summary judgment in asbestos cases, and lower Florida courts have rejected the "frequency, regularity, and proximity" test, which has been adopted in many courts throughout the nation. Rather, under Florida law, a plaintiff must simply show that a defendant's product was a "substantial contributing factor" to the injury that occurred in order to bring a claim in Florida courts. Asbestos and Silica Compensation Fairness Act, FLA. STAT. § 774.204(1).

The traditional method of establishing causation in negligence cases requires the plaintiff to "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result." Gooding v. University Hospital Bldg, Inc., 445 So. 2d 1015 (Fla. 1984)(quoting Prosser, LAW OF TORTS § 41 (4th Ed. 1971)). In West v. Caterpillar Tractor Co., Inc., the Supreme Court of Florida ruled that, "[i]n order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages." 336 So.2d 80, 87 (Fla. 1976).

In Ward v. Celotex Corp., Mr. Ward sued several asbestos manufacturers, including BEH, alleging that exposure to their asbestos-containing products caused his development of

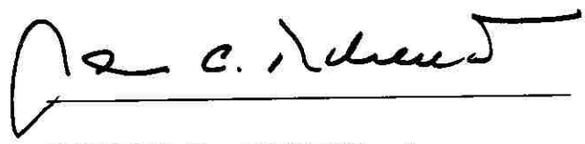
asbestosis. 479 So.2d 294, 295 (Fla. Dist. Ct. App. 1985). Mr. Ward testified that he was exposed to asbestos-containing products while working at the Naval Air Rework Facility in Jacksonville from 1965 until 1983, but he was unable to identify any asbestos manufacturers. Id. Three coworkers identified BEH products as being present at different locations in the facility and recalled working with Mr. Ward, but they could not recall Mr. Ward specifically working with BEH products. Id. The court denied Defendant's motion for summary judgment citing to the strong circumstantial evidence that placed Mr. Ward near activities where asbestos was used and testimony establishing that some asbestos used in those activities was manufactured by BEH. Id. at 296.

In Reaves v. Armstrong World Industries, Inc., Plaintiff Reaves alleged that he was exposed to various defendants asbestos-containing products while working as a laborer at a plant. 569 So.2d 1307, 1308 (Fla. Dist. Ct. App. 1990). Plaintiff presented evidence that Mr. Hudson, a co-worker, saw Mr. Reaves on occasion and that Mr. Hudson handled many of the defendant's asbestos-containing products. Plaintiff presented evidence that Mr. Garrison, another employee at the plant, handled asbestos-containing products. Id. at 1309. Another employee testified that the plant was enormous and estimated that it covered forty (40) acres. Id. at 1308. The court noted that the plaintiff had the burden of proving that it is more likely than not that defendant's products were a substantial factor in causing plaintiff's injuries. Id. at 1309. The mere possibility of causation, based on conjecture or speculation, would not be sufficient to satisfy plaintiff's burden. Id. The court found

> that the inference of exposure to asbestos; as the basis for the inference of plaintiff's being in close proximity to Hudson and/or Garrison at the time they were using defendants' specific products; as the basis for the further inference that the negligence of these defendant in failing to place warning labels on packaging caused said exposure; as the basis for the ultimate proximate causation inference that Reaves would not have contracted asbestos absent the negligence of these defendants, constitutes the type of compounding inference on inference prohibited under the case law of the state of Florida.

Id. at 1309-10 (internal citations omitted). The court granted Defendant's motion for a directed verdict. Id. at 1310. The court

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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recognized Florida's line of summary judgment cases that allowed coworker testimony for product identification, but noted that the burden is on the plaintiff to prove that he or she can survive a directed verdict. Id. For summary judgment, the burden is on the defendant. Id. However, the court noted that even if this was decided under the summary judgment standard, plaintiff had not presented enough evidence to survive summary judgment. Id.

In summary, the Court of Appeals of Florida has liberally applied the substantial contributing factor test allowing plaintiff to survive summary judgment based on strong circumstantial evidence of exposure through co-worker testimony, but has not permitted plaintiff to survive a directed verdict with evidence requiring many inferences as to causation.

Plaintiff has presented evidence, through the deposition of John Talbot, Frederick Talbot's son, that Frederick Talbot was one of two mechanics at the shop from 1953 until 1959 and was the sole mechanic at the shop from 1959 until 1970. Plaintiff has presented evidence that Frederick Talbot frequently changed brakes at the shop and that NAPA brakes were used at the shop. Due to the small size of the shop, it is reasonable to make the inference that Frederick Talbot was exposed to NAPA asbestos-containing brakes. While the Reaves court said that liability could not be based on inferences and speculation, the plant in Reaves took up forty (40) acres, so it would require engaging in sheer speculation to conclude that the Reaves plaintiff was exposed to a certain defendant's asbestos-containing product based on co-worker testimony. Here, by contrast, Plaintiff has presented evidence that Frederick Talbot was the sole mechanic at the shop for ten (10) years, NAPA brakes were used at the shop, and Frederick Talbot frequently repaired, removed, and installed brakes. Under these circumstances, Plaintiff has raised a genuine issue of material fact as to whether NAPA brakes were a substantial contributing factor to Frederick Talbot's development of mesothelioma. Accordingly, NAPA's Motion for Summary Judgment is denied. As GPC distributed NAPA brakes, GPC's Motion for Summary Judgment is also denied.