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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (No. VI)	:	Consolidated Under MDL DOCKET NO. 875
TYLER	:	
v.	:	Case No. 10-67422
VARIOUS DEFENDANTS	:	Transferred from the District of Columbia

ORDER

AND NOW, this **1st** day of **July, 2011**, it is hereby **ORDERED** that Defendant Union Carbide Corporation's Motion for Summary Judgment (doc. no. 291) filed on February 7, 2011 is **GRANTED**.[1]

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[1] Decedent, John Tyler, was diagnosed with mesothelioma in October 2009. (Pl.'s Resp. to Defendant Honeywell's Mot., doc. no. 374, at 2.) He filed the instant action in the Superior Court of the District of Columbia on December 31, 2009, alleging that various defendants' asbestos-containing products caused his injuries. (Id.) He subsequently passed away. The case was removed to federal court on March 3, 2010, and transferred to the Eastern District of Pennsylvania as part of MDL 875 In Re: Asbestos on May 11, 2010.

Plaintiff's claims against Defendant Union Carbide ("Union Carbide") arise out of Decedent's employment in the U.S. Navy Reserve from approximately 1956-1980. (Def.'s Mot., doc. no. 291, at 5.) During his time in the reserve, he worked at Fort Belvoir in Virginia as a machinist, where he testified that he worked with "Bakelite," which Plaintiff asserts is a trade name for a product attributable to Union Carbide. (Id.) Bakelite is a hard plastic material that was used to make night vision equipment, telescopes, rifle mounts, and electrical components at Fort Belvoir. (Pl.'s Resp., doc. no. 373, at 3.) Decedent testified that he would obtain Bakelite from the stock room, and be present when it was cut by the "saw man," or would cut it himself, and that the air would be dusty. (Id. at 3-4). After cutting, he would have to prep the material and the prepping

process also created dust. (Id.) Decedent was also responsible for cleaning the dust from the area and the machines. (Id.)

I. DISCUSSION

Union Carbide asserts that Virginia law should be applied to the claims against it, as all alleged exposures to Union Carbide products occurred in Virginia. Plaintiff does not object to the application of Virginia law. Therefore, Virginia law applies to the claims against Union Carbide.

A. Legal Standard

Summary judgment is appropriate if there are no genuine issues of 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.

1. Product Identification Standard Under Virginia Law

The state of Virginia has not adopted the "frequency, regularity, and proximity" standard that is utilized by many

jurisdictions in asbestos cases. Rather, under Virginia law, a plaintiff must prove that a defendant's actions were both the actual and proximate cause of the alleged injuries, under traditional tort liability principles.

A proximate cause of an event is that "act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." Sugarland Run Homeowners Assoc. v. Halfmann, 535 S.E.2d 469, 472 (Va. 2000)(internal citations omitted). Generally, the issue of proximate cause is a question of fact to be resolved by a jury, unless reasonable minds could not differ, and it then becomes a question of law. Id. When there are two or more potential causes of a plaintiff's injury, "and it is impossible to determine in what proportion each contributed to the injury, either or both are responsible for the whole injury." Dickenson v. Tabb, 156 S.E.2d 795, 801 (Va. 1967); see also Sullivan v. Robertson, 639 S.E.2d 250, 255 (Va. 1007)("If separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury.").

In the context of products liability cases, to overcome summary judgment when there are multiple possible causes of an injury, a plaintiff "must link the defendant's act to the injury by proving specific causation and may not rely on mere speculation and conjecture." McCauley v. Purdue Pharma L.P., 331 F. Supp. 2d 449, 462 (W.D. Va. 2004). Plaintiff "must fail if it appears from the evidence just as probable damages were caused by one as by the other because the plaintiff must make out his case by a preponderance of the evidence." McCauley v. Purdue Pharma L.P., 331 F. Supp. 2d 449, 462 (W.D. Va. 2004)(quoting Cape Charles Flying Serv. Inc. v. Nottingham, 47 S.E.2d 540, 544 (Va. 1948).

B. Union Carbide's Motion for Summary Judgment

Union Carbide asserts that the trade name "Bakelite" encompassed several products, some of which were asbestos-containing, and some of which were not. (Def.'s Mot., doc. no. 291, at 10.) Bakelite could refer to "phenolic resins," which were never asbestos-containing, or to "phenolic molding compounds," some of which are asbestos-containing, until about

1974. (Id.) Additionally, Union Carbide asserts that, as early as the 1920s, "bakelite" became a generic name for plastic products, regardless of the manufacturer, and that Plaintiff has failed to raise a genuine issue of fact as to whether the "bakelite" referred to in Decedent's, and his co-worker's, testimony, was indeed manufactured by Union Carbide.

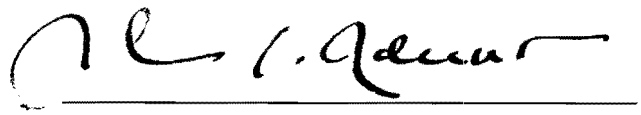
In response, Plaintiff points to testimony from Decedent and his co-worker that they specifically recalled the name "Bakelite" being printed on a professionally-manufactured sticker that was attached to the product. (Pl.'s Resp., doc. no. 373, at 6.) Plaintiff asserts that, while a generic reference to "bakelite" might not be sufficient, both Decedent and his co-worker testified to working with the brand-name, labeled product. (Id. at 9.) It is undisputed that Union Carbide owned the trade name "Bakelite" from 1939-1975, which covers most of the period that Decedent was employed at Belvoir.

Plaintiff has raised at least an issue of fact as to whether the product to which Decedent was exposed was brand-name Bakelite. However, the problem remains that not all brand-name Bakelite was asbestos-containing. There is nothing in the record to indicate that the Bakelite at Belvoir was the asbestos-containing variety, and therefore no way, absent speculation, for a jury to ascertain that Bakelite was a source of Decedent's asbestos exposure.

At oral argument, Plaintiff's counsel asserted that they had taken the deposition of William Longo, Ph.D., and that he could provide expert testimony regarding the likelihood that Decedent was exposed to asbestos-containing Bakelite, based on the type of equipment that the Bakelite was used for. Additionally, Plaintiff's counsel stated that Dr. Longo could provide testimony regarding the percent of Bakelite that was asbestos-containing, providing support for the assertion that Decedent was exposed to asbestos-containing Bakelite. However, Plaintiff's counsel conceded that this expert testimony was omitted from responsive briefing, as a result of human error. Plaintiff's counsel requested additional time to amend their response so that expert testimony establishing exposure to asbestos-containing Bakelite could be presented to the Court.

However, the Court declines to permit additional or amended briefing in the instant case. On May 4, 2011, Magistrate Judge Rueter entered an Order denying Defendants' Motion to

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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exclude the testimony of Plaintiff's expert, and giving the parties until June 8, 2011 to file supplemental briefing. (See doc. no. 431.) On May 26, 2011 a hearing on all pending dispositive motions was set for June 24, 2011. (See doc. no. 437.) At no point did Plaintiffs' counsel submit additional briefing, or request additional time to do so. Rather, during the hearing, counsel drew the Court's attention to the omission, and asked for additional time. Under these circumstances, and in the interest of the efficient administration of MDL 875 and preservation of judicial resources, the Court declines to extend the deadline for additional briefing.

The record presented contains no evidence that Plaintiff was exposed to the asbestos-containing Bakelite variety. Under these circumstances, Union Carbide is entitled to summary judgment.