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

JAMMIE C. TYNDALL, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
	:	Transferred from the District of South Carolina
v.	:	(Case No. 10-00343)
ARMSTRONG INTERNATIONAL, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-67428-ER
Defendants.	:	

O R D E R

AND NOW, this **2nd** day of **December, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Georgia Pacific LLC** (Doc. No. 55) is **GRANTED**; its second and separate Motion for Summary Judgment (Doc. No. 67) is **DENIED** as moot.[1]

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[1] This case was transferred in May of 2010 from the United States District Court for the District of South Carolina to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiffs allege that James ("Jimmy") Carawan ("Decedent" or "Mr. Carawan") was exposed to asbestos during (1) his work aboard a tugboat that ran along the Eastern seaboard (as a deckhand, first mate, and, ultimately, captain), and also (2) his home construction work in North Carolina. Mr. Carawan developed mesothelioma and died from that illness. The alleged exposure pertinent to Georgia Pacific occurred in North Carolina.

Plaintiffs brought claims against various defendants in South Carolina federal court. Defendant Georgia Pacific LLC ("Georgia Pacific") has moved for summary judgment, arguing that there is insufficient product identification evidence to support a finding of causation with respect to its product(s) (Doc. No. 55), and has again moved separately for summary judgment, arguing that Plaintiff's claims are barred by the South Carolina door-closing statute (Doc. No. 67).

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 the alleged exposure pertinent to Defendant occurred in North Carolina. Therefore, this Court will apply North Carolina law in deciding its Motion for Summary Judgment regarding the sufficiency of Plaintiffs' evidence of exposure to Defendant's product(s) and its alleged role in causing Decedent's asbestos-related illness. See Conner v. Alfa-Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.); 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.

Defendant argues that this court should apply a less stringent standard than that set forth in Lohrmann because Decedent's illness was mesothelioma (rather than asbestosis). 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 Georgia Pacific's Motion for Summary Judgment

A. Defendant's Arguments

In its first motion, Defendant contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness.

In its second and separate motion (filed approximately three months after its first motion), Defendant contends that Plaintiff's claims (which were filed in federal court in South Carolina) are barred by the South Carolina door-closing statute, as set forth at S.C. Code Ann. § 15-5-150.

B. Plaintiffs' Arguments

Plaintiffs contend that the Court should apply a less stringent test than the "frequency, regularity, and proximity" test set forth in Lohrmann because Decedent dies of mesothelioma (not asbestosis, as was the case in Lohrmann). However, Plaintiffs contend that, even under the "frequency, regularity, and proximity" test, they have still identified sufficient evidence of product identification/causation to survive summary judgment.

In support of this assertion, Plaintiffs cite to a lengthy list of evidence. For purposes of deciding Defendant's motion for summary judgment, the Court need only address the evidence pertinent to frequency, regularity, and proximity of Decedent's alleged exposure to Defendant's product(s), a summary of which follows:

- Deposition Testimony of Joyce Carawan
  Mrs. Carawan (Decedent's widow) testified that Decedent was exposed to dust from Georgia Pacific joint compound (which came in buckets, was mixed, and then sanded after application) while installing drywall in three different rooms of their house in North Carolina, during a time period spanning approximately 1967 to 1974. She testified that he did this work when he was home from his work on the tugboat, and that his schedule was to be away on the tugboat for twenty days and then home for ten days.

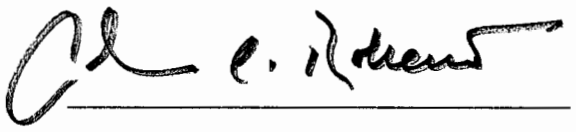
(Pl. Ex. A.)

In response to Defendant's second and separate motion for summary judgment, Plaintiffs acknowledge that: (1) under South Carolina's door-closing statute, a non-resident plaintiff may not bring an action against a non-resident corporation unless the cause of action arose within the state, (2) the claim against Defendant did not arise in South Carolina (because there is no evidence of asbestos exposure from one of Georgia Pacific's products in South Carolina), and (3) neither any party to this action nor Decedent was a resident of South Carolina at the time of the filing of this action there (or any time before or after). However, Plaintiffs contend that the statute does not preclude their claims against Defendant because: (1) there is supplemental jurisdiction conferred by the federal claims against other Defendants (over which this Court has federal jurisdiction) and/or (2) under Fourth Circuit precedent, set forth in Szanty v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), federal interests in allowing the claim(s) to go forward against Defendant outweigh South Carolina's state interests in application of its door-closing statute, such that the claims should not be barred.

C. Analysis

Plaintiffs allege that Decedent was exposed to asbestos from Georgia Pacific joint compound that he used in installing drywall during ongoing construction of their home during the period beginning in approximately 1967 and ending in approximately 1974. There is evidence that Decedent was exposed to airborne dust from Georgia Pacific compound. There is evidence that he was in proximity to the product and the dust created from it. However, although there is evidence that Decedent performed the drywall work in all three rooms himself (with the help of Mrs. Carawan), there is no evidence that the exposure occurred with frequency or regularity. In fact, the evidence indicates that this work was done gradually in intermittent intervals over the course of the better part of a decade. Therefore even assuming that the joint compound at issue contained asbestos (an issue this Court need not reach), no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from Defendant's product with the frequency and regularity necessary under North Carolina law to be deemed a substantial factor in the development of his illness, because any such conclusion would be based solely on speculation. Jones, 69 F.3d at 716 (quoting Lohrmann, 782 F.2d at 1162); Agner, 2007 WL 57769

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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at *4-5. Accordingly, summary judgment in favor of Defendant is warranted. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach Defendant's argument regarding the South Carolina door-closing statute, and need not determine whether it even would have considered Defendant's second and separate motion for summary judgment (which was filed approximately three months after its first motion for summary judgment) or whether Defendant's defense regarding the South Carolina door-closing statute (set forth in its second motion) was waived by its failure to raise it in its first motion. See Chet Adams Co. v. James F. Pedersen Co., 307 S.C. 33, 37, 413 S.E.2d 827, 829 (S.C. 1992) (noting the requirement under South Carolina law that, "[i]n order to raise an issue as to the capacity of a party to sue, a party must have a specific negative averment to that effect," and holding that, by not asserting the defense soon enough, the defendant therein waived its defense that the South Carolina door-closing statute deprived plaintiff of the capacity to bring claims against it).