I. ROBERT HORST, JR. and DIANE HORST, Plaintiffs vs. UNION CARBIDE CORPORATION, A.O. SMITH CORPORATION, AMERICAN STANDARD INC., BURNHAM, LLC, CARRIER CORPORATION, GEORGIA-PACIFIC, LLC, HAJOCA CORPORATION, HANSON PERMANENTE CEMENT, INC., KAISER GYPSUM COMPANY, INC., LENNOX INDUSTRIES, INC., THE MARLEY-WYLAIN COMPANY, PECORA CORPORATION, PEERLESS INDUSTRIES, INC., RHEEM MANUFACTURING COMPANY AND YORK INTERNATIONAL CORPORATION, Defendants	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY CIVIL ACTION - LAW NO. 15-CV 1903

notified 7-27-16

MAURI B. KELLY
LACKAWANNA COUNTY
2016 JUL 26 P 2:19
PROTHONOTARY
JUDICIAL RECORDS

ORDER

Defendants, Burnham, LLC ("Burnham"), Lennox Industries, Inc. ("Lennox") and the Marley-Wylain Company d/b/a Weil-McLain ("Weil-McLain"), have filed motions for partial summary judgment with respect to the punitive damages claims asserted by Plaintiffs, I. Robert Horst, Jr. and Diane Horst ("the Horsts"). (Docket Entry Nos. 145, 152, 157). The parties have submitted their supporting and opposing memoranda of law, (Docket Entry Nos. 159, 161, 163, 165-167), and consolidated oral argument was conducted on July 19, 2016. (Docket Entry Nos. 156, 158). Following the completion of oral argument, the motions for partial summary judgment were submitted for a decision.

Summary judgment is appropriate only where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Bailets v. Pennsylvania Turnpike Com'n, 123 A.3d 300, 304 (Pa. 2015); Rockwell v. Knott, 32 Pa. D. & C. 5th 157, 166 (Lacka. Co. 2013). The party moving for summary judgment bears the burden of proving the absence of a genuine issue of material fact and the entitlement to judgment as a matter of law. Stimmler v. Chestnut Hill Hospital, 602 Pa. 539, 554, 981 A.2d 145, 154 (2009); AJT Properties, LLC v. Lexington Ins. Co., 26 Pa. D. & C. 5th 302, 313 (Lacka. Co. 2012). When considering a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Gilbert v. Svnagro Cent. LLC, 131 A.3d 1, 10 (Pa. 2015); Brogan v. Rosenn, Jenkins & Greenwald, LLP, 35 Pa. D. & C. 5th 500, 512 (Lacka. Co. 2014).

However, "[w]here the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment." Verdini v. First Nat. Bank of Pennsylvania, 135 A.3d 616, 619 (Pa. Super. 2016); Moranko v. Downs Racing LP, 118 A.3d 1111, 1113 (Pa. Super. 2015) (*en banc*). The moving party may establish the right to summary judgment "by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action." Sass v. AmTrust Bank, 74 A.3d 1054, 1059 (Pa. Super. 2013), *app. denied*, 624 Pa. 675, 85 A.3d 484 (2014). The "failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the

entitlement of the moving party to judgment as a matter of law." Truax v Roulajc, 126 A.3d 991, 997 (Pa. Super. 2015) (*en banc*).

"Punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct." Sears, Roebuck & Co. v. 69th Street Retail Mall, L.P., 126 A.3d 959, 983 (Pa. Super. 2015). Wanton or reckless conduct "means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probably that harm would follow." Lomas v. Kravitz, 130 A.3d 107, 128-129 (Pa. Super. 2015); Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 961 (Pa. Super. 2013), *app. denied*, 622 Pa. 752, 79 A.3d 1099 (2013). But, "a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed." Hall v. Episcopal Long Term Care, 54 A.3d 381, 395 (Pa. Super. 2012), *app. denied*, 620 Pa. 715, 69 A.3d 243 (2013). "Thus, in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) [s]he acted, or failed to act as the case may be, in conscious disregard of that risk." Hutchison v. Luddy, 582 Pa. 114, 124, 870 A.2d 766, 772 (2005).

In asbestos litigation, the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania have held that the existence of medical articles and trade journal publications discussing the dangers of asbestos inhalation are insufficient to support a punitive damages claim absent some proof that the asbestos defendant knew or had reason to know of the content of that literature. *See* Martin v. Johns-Manville Corp., 508 Pa. 154,

177, 494 A.2d 1088, 1100 (1985) (Hutchinson, J., with one Justice concurring, and four other Justices concurring in the result); Moran v. G. & W. H. Corson, Inc., 402 Pa. Super. 101, 119, 586 A.2d 416, 425 (1991) (*en banc*); Smith v. Celotex Corp., 387 Pa. Super. 340, 346, 564 A.2d 209, 212 (1989). *Compare* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1092-93 (5th Cir. 1973) (articles in medical journals and industry publications establish knowledge in the asbestos industry of respiratory hazards related to asbestos exposure). Relying upon that appellate precedent, we granted the motions of Defendants, Trane US, Inc. f/k/a American Standard, Inc., Carrier Corporation, Peerless Industries, Inc., and Rheem Manufacturing Company, seeking partial summary judgment with respect to the Horsts' punitive damages claims since the record "in this case is devoid of any indication that the management of Trane, Carrier, Peerless, or Rheem knew or had reason to know of the articles or studies" cited by the Horsts and their epidemiology expert, Dr. Richard A. Lemen. Horst v. Union Carbide Corp., 2016 WL 1670272, at *26-27, 29 (Lacka. Co. 2016). However, based upon the internal company memoranda and other documentary evidence indicating that, prior to Mr. Horst's exposure to their joint compounds, executive and managerial representatives of defendants, Georgia-Pacific, LLC, and Kaiser Gypsum Co., Inc., had a subjective appreciation of the risk of harm presented by exposure to their asbestos-containing products, but nonetheless consciously disregarded that risk, those defendants' motions for partial summary judgment as to the Horsts' punitive damages claim were denied. Id. at *27-29. Burnham, Lennox and Weil-McLain filed their motions for partial summary judgment in the wake of our punitive damages ruling.

In an effort to create a triable issue of fact concerning Burnham's subjective appreciation of asbestos-related risks prior to Mr. Horst's alleged exposure to asbestos in 1970-1978, the Horsts have submitted the discovery deposition of Burnham's chief engineer of its commercial engineering department, Mr. Roderick G. Strohl, in Gordon Lewis v. Alfa Laval, Inc., Cause No. 2004-35053 (Harris Co. District Court, Texas). (Docket Entry No. 164, Exhibit 8 at pp. 5, 12). During that deposition on October 23, 2006, Mr. Strohl stated that he first formed concerns that "inhalation of excess amounts [of asbestos dust] can be dangerous...[p]robably in the 1970's." (Id. at p. 170). He further testified that he did not know whether Burnham complied with the Occupational Safety and Hazard Administration ("OSHA") regulations relating to asbestos during that same time period. (Id. at p. 179).

However, Mr. Strohl did not become employed with Burnham until 1984, six years after Mr. Horst's last alleged exposure to asbestos dust, and did not provide any testimony concerning Burnham's knowledge prior to 1984. (Id. at p. 10). The Horsts have presented no other evidence indicating that a Burnham representative had a subjective appreciation of the risk of harm from exposure to asbestos. The articles and literature cited by the Horsts' expert, as detailed in their opposing brief, (Docket Entry No. 164 at pp. 6-8), are insufficient to support a punitive damages claim under Martin, Moran and Smith. Therefore, Burnham's motion for partial summary judgment will be granted as to the Horsts' punitive damages claim.

In contrast, the Horsts have produced evidence that managerial representatives of Lennox and Weil-McLain were aware that asbestos reportedly caused lung diseases prior to and during the 1970-1978 period of Mr. Horst's alleged exposure. On November 6,

1968, the manager of Lennox's Design Experimentation Department, Mr. Gary O. Hanson, forwarded a letter to the manager of Occupational Environmental Control of Johns-Manville Corporation in which Mr. Hanson stated that Lennox was using "asbestos in a number of our products" and was "concerned about diseases of the lung which reportedly can result from breathing in the asbestos fiber, namely, pulmonary asbestosis and possible additional development of carcinomic tumors." (Docket Entry No. 160, Exhibit 10 at p. 1). Mr. Hanson requested information from Johns-Manville "relating to this problem," (Id.), and received a response on January 2, 1969, which enclosed a publication entitled "Asbestos and Human Health." (Docket Entry No. 160, Exhibit Nos. 11-12).

The "Asbestos and Human Health" article indicates that it is a summary of "the known facts about health problems associated with occupational exposure to asbestos dust, and the research being conducted to identify and reduce these health risks." (Docket Entry No. 160, Exhibit 12 at p. 1). The summary stated that "[t]he lungs of workers known to have repeated exposure to the inhalation of asbestos fiber over a period of months or years contain myriads of small microscopic sized structures composed of fiber coated with layers of protein and iron pigment." (Id. at pp. 2-3). It reported that "[f]or workers who handle asbestos fibers in...some building and insulation trades, the industry shares with doctors, public health officials and others involved in industrial medicine a concern about possible health effects from excessive on-the-job exposure to asbestos dust." (Id. at p. 4). More importantly, the publication forwarded from Johns-Manville confirmed that "investigators have associated a frequency of cases of mesothelioma with exposure to asbestos in certain geographic locations." (Id. at p. 5).

Under the subheading "Industrial Hygiene and Preventive Medicine," Johns-Manville claimed in that paper that it "continually strives to eliminate dust exposure" and invested "in equipment and techniques to prevent the inhalation of asbestos dust." (Id. at p. 6). It specifically referenced the installation of "filters and ventilators" and "dust-collecting devices," as well as the use of "individual respirators" where indicated. (Id.). The report cited to studies indicating "that where dust control measures have been taken the risks of lung diseases have been reduced." (Id.). Lennox's counsel conceded at the time of oral argument that Lennox did not place asbestos-related warnings on its products, but maintained that there was "no reason to warn." (Transcript of Proceedings on 7/19/16 at p. 34). Based upon the documentary proof submitted, there is a genuine issue of material fact whether Lennox management had a subjective appreciation of the risk of harm from asbestos exposure, but acted or failed to act in conscious disregard of that risk. As a result, Lennox's motion for partial summary will be denied.

The Horsts' punitive damages claim against Weil-McLain is premised largely upon the deposition of Weil-McLain's corporate representative, Paul H. Schuelke, P.E., in Messerschmidt v. Carrier Corporation, Case No. 10 CV 21090 (Milwaukee Co., Wisconsin). (Docket Entry No. 162, Exhibit 2). Mr. Schuelke's testimony suggests that Weil-McLain knew as of 1972 that asbestos caused lung diseases, (Id. at p. 59), but did not include any warnings on its asbestos cement or rope at that time. (Id. at pp. 62-63). In 1974, OSHA cited Weil-McLain for maintaining asbestos levels that "were above acceptable limits" and for failing to conduct "dust monitoring for asbestos" in compliance with OSHA's regulations that were published in 1972. (Id. at pp. 63-64). In fact, "[e]ven after Weil-McLain was citied by OSHA in 1974, Weil-McLain never provided warnings

on the boilers themselves that contained asbestos." (Id. at p. 65). Nor did they provide any safety instructions for dismantling or removing Weil-McLain boilers containing asbestos. (Id. at p. 69).

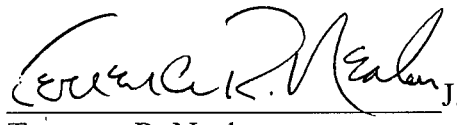
The testimonial evidence produced by the Horsts is sufficient to establish factual issues regarding Weil-McLain's subjective appreciation of the risks posed by asbestos exposure, and its action or inaction in conscious disregard of that risk, prior to and during the time of Mr. Horst's alleged asbestos exposure. Thus, Weil-McLain's motion for partial summary judgment will likewise be denied.

AND NOW, this 26th day of July, 2016, upon consideration of the motions of Defendants, Burnham LLC, Lennox Industries, Inc., and Marley-Wylain Company d/b/a Weil-McLain, for partial summary judgment as to plaintiffs' claims for punitive damages, the exhibits and memoranda of law submitted by the parties, and the oral argument of counsel on July 19, 2016, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. "Defendant, Burnham LLC's Motion for Partial Summary Judgment as to Plaintiffs' Claims for Punitive Damages" is GRANTED; and

2. "Defendant, Lennox Industries, Inc.'s Motion for Partial Summary Judgment as to Plaintiffs' Claim for Punitive Damages" and the "Motion for Partial Summary Judgment of Defendant, Marley-Wylain Company d/b/a Weil-McLain, as to Plaintiffs' Claim for Punitive Damages" are DENIED.

BY THE COURT:



J.

Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. C. P. 236 (a) and (d) by transmitting time- stamped copies via electronic mail to:*

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