IN THE CIRCUIT COURT FOR BALTIMORE CITY

IN RE: BALTIMORE CITY ASBESTOS LITIGATION	*	**Trial Cluster**
	*	**Consolidation No. 24-X-16000054**
* * * * * * * *	* * * * *	
HENRY BOSTON, *et al.*,	*	
Plaintiffs,	*	
vs.	*	
ACandS, Inc. *et al.*,	*	
Defendants.	*	
* * * * * * * *	* * * * *	
Cases Affected:	*	
Henry Boston		**Case No. 24-X-09-000472**
Robert Hackman	*	**Case No. 24-X-15-000096**
		Case No. 24-X-05-000295
John Price	*	**Case No. 24-X-04-000699**
Robert Shiflett		**Case No. 24-X-07-000330**
Calvin Williams	*	**Case No. 24-X-99-001147**
		Case No. 24-X-15-000231
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MEMORANDUM OPINION & ORDER

The above-captioned matter came before the Circuit Court for Baltimore City, Part 30, on November 7, 2016. The Court heard arguments on motions, including Certain Defendants' Refiled Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence Adding Request for Hearing (TID 59677048), Plaintiffs' Opposition to Certain Defendants' Refiled Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence (TID 59677048) and Certain Defendants' Reply In Support of Their Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence and Objections

to Plaintiffs' Summary Judgment Evidence (TID 59792838). Upon consideration of the pleadings and arguments, and for the reasons stated herein, Certain Defendants' Refiled Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence (TID 59677048), is DENIED.

Questions Presented

For purposes of summary judgment, did Plaintiffs' smoking contribute to their lung cancer and/or did Plaintiffs assume the risk of lung cancer by smoking?

Facts

Plaintiff, Henry Boston worked at Bethlehem Steel Sparrows Point from 1949 to the mid-1970s in Baltimore, Maryland, where he alleges his asbestos exposure occurred. Boston smoked from 1951 to the 1980's. Boston was diagnosed with lung cancer in 2009, and is now deceased. Plaintiff, Robert Hackman, worked at Bethlehem Steel Sparrows Point from 1949 to 1985, in Baltimore, Maryland, where he alleges his asbestos exposure occurred. Hackman smoked from 1950-1986. In 2014, Hackman was diagnosed with Stage III lung cancer. Plaintiff, John Price worked at Bethlehem Steel Sparrows Point from 1952 to the 1970s, in Baltimore, Maryland, where he alleges his asbestos exposure occurred. Price smoked cigarettes from 1952 to 1991. Price was diagnosed with mouth cancer in 2002, and lung cancer in 2003. Price is now deceased. Plaintiff, Robert Shiflett, worked at Bethlehem Steel Sparrows Point from 1950 to the 1970s, in Baltimore, Maryland, where he alleges his asbestos exposure occurred. Shiflett smoked from 1947 to the 1982. Shiflett was diagnosed with lung cancer in 2006. Plaintiff, Calvin Williams, worked at Bethlehem Steel Sparrows Point from 1965 to 1979, in Baltimore, Maryland, where he alleges his asbestos exposure occurred. Williams smoked cigarettes from 1960 to the 1978. Williams was diagnosed with lung cancer in 2014.

Discussion

Certain Defendants are asking this Court to grant summary judgment in their favor because Plaintiffs assumed the risk and contributed to their lung cancer by smoking tobacco cigarettes. Defendants claim that the habit forming nature and danger of cigarette smoking has been "common knowledge" for more than 50 years. Defendants claim that despite the commonly known danger of cigarettes, Plaintiffs continued to smoke, and thus, assumed the risk and contributed to their lung cancer. Plaintiffs argue that they did not assume the risk of lung cancer because the causal connection between smoking and lung cancer was not "common knowledge" at the relevant time. Plaintiffs argue further that even if this Court finds that the link between smoking and lung cancer was "common knowledge," the synergistic effect of smoking and asbestos exposure was not, so Plaintiffs could not have knowingly assumed the risk or contributed to their increased chances of contracting lung cancer. The Court is persuaded by Plaintiffs' argument, and upon consideration of the pleadings and arguments, and for the reasons stated herein, Certain Defendants' Refiled Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence (TID 59677048), is denied.

Summary judgment is not appropriate in this case because there is a genuine dispute of material fact concerning Plaintiffs' knowledge about the danger of lung cancer associated with smoking. Summary judgment is only proper when the motion and response show that there is no genuine dispute as to any material fact, and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. Md. Rule 2-501(f).The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact. *Medical Mut. Liab. Ins. Soc'y v. Mutual Fire, Marine and Inland Ins. Co.*, 37 Md. App, 706 (1977). Once the movant meets this showing, the burden shifts to the non-moving party to identify "with particularity the material facts that are disputed." Md. Rule 2-501(b). A material fact is one "the

resolution of which will somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98 (1985). A dispute as to a non-material fact will not preclude the entry of summary judgment. *Id.* The nonmoving party must do more than simply show there is some metaphysical doubt as to the material facts. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 728 (1993). Summary judgment is not appropriate in this case, because there is a genuine dispute concerning the material fact of when Plaintiffs possessed knowledge and appreciated the danger of smoking.

I. The Defenses Of Assumption Of The Risk And Contributory Negligence Both Require Factual Determinations About The Plaintiffs' Level Of Knowledge And Appreciation Of The Increased Risk Of Lung Cancer Associated With Smoking.

Defendants are requesting summary judgment regarding the defenses of assumption of the risk and contributory negligence. In order to prove assumption of the risk, Defendants must demonstrate that the plaintiff: "(1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger." *ADM Partnership v. Martin*, 348 Md. 84 (1997). "The doctrine of assumption of risk rests upon an intentional and voluntary exposure to a known danger and, therefore, consent on the part of the plaintiff to relieve the defendant of an obligation of conduct toward [him] and to take [his] chances from harm from a particular risk." *Rogers v. Frush*, 257 Md. 233, 243 (1970). For a plaintiff to voluntarily assume a risk there must exist "the willingness of the plaintiff to take an informed chance…." *Schroyer v. McNeal*, 323 Md. 275, 283 (1991). "There can be no restriction on the plaintiff's freedom of choice either by the existing circumstances or by coercion emanating from the defendant." *ADM P'ship*, 348 Md. at 92.

A successful contributory negligence defense requires similar proof. "Before the doctrine of contributory negligence can be successfully invoked it must be demonstrated that the injured party acted… with knowledge and appreciation, either actual or imputed, of the danger of injury

which his conduct involves. *Menish v. Polinger Co.*, 277 Md. 553, 560–561 (1976). The defendant holds the burden of proving contributory negligence, and, although that burden is slight, the defendant must offer more than a "mere scintilla of evidence, ... more than surmise, possibility, or conjecture that [plaintiff] has been guilty of negligence*" Rosenthal v. Mueller*, 124 Md.App. 170, 174 (1998) (*quoting Fowler v. Smith*, 240 Md. 240, 246–47 (1965)). Contributory negligence is ordinarily a question of fact to be decided by a jury. *McQuay v. Schertle*, 126 Md.App. 556, 569 (1999). A trial court should only take the issue of contributory negligence from the jury if no reasonable person could find in favor of the plaintiff. *McQuay v. Schertle*, 126 Md.App. 556, 569 (1999)(*citing Campfield v. Crowther*, 252 Md. 88, 92 (1969).

In this case, the defenses of assumption of the risk and contributory negligence both require factual determinations about the plaintiffs' knowledge and appreciation of the increased risk of lung cancer associated with smoking cigarettes. To succeed on an assumption of the risk defense, Defendants must prove that Plaintiffs had knowledge of the risk of contracting lung cancer from smoking cigarettes at the time they started smoking, that each Plaintiff appreciated that risk despite conflicting public information in the media coverage, and finally that each Plaintiff, possessing adequate knowledge and appreciate of the risk of lung cancer, voluntarily confronted the risk anyway. Similarly, to succeed on a contributory negligence defense, the Defendants must prove that Plaintiffs smoked with knowledge and appreciation, either actual or imputed, of the danger of lung cancer. Each of these defenses requires a factual inquiry into when Plaintiffs acquired the knowledge that smoking can cause lung cancer. If Plaintiffs did not know about the link between smoking and lung cancer before they started smoking, or the link was not objectively "common knowledge," the defenses of assumption of the risk and contributory negligence are inapplicable.

II. There Is A Dispute Of Material Fact As To When Plaintiffs Had Adequate Knowledge Of The Dangers Of Smoking To Constitute Contributory Negligence Or Assumption Of The Risk.

Both the defense of contributory negligence and the defense of assumption of the risk require knowledge and appreciation of danger on the part of the Plaintiffs. Plaintiffs and Defendants have presented conflicting factual information concerning when it was "common knowledge" that smoking causes lung cancer. Whether Plaintiffs possessed adequate knowledge and appreciation of the danger of lung cancer to constitute contributory negligence or assumption of the risk is a factual question that should be presented to the jury.

Plaintiffs argue and present evidence that 1) many consumers failed to grasp the addictive nature of cigarettes through the 1990s and 2) the link between smoking and lung cancer was not common knowledge during the relevant time period. Plaintiffs argue that cigarettes are addictive but through the 1990s, the Cigarette Industry, government and major media contributed to consumers', like the Plaintiffs, failure to grasp the addictive nature of cigarettes. As recently as 1994 heads of US tobacco companies testified before congress that nicotine was not addictive. Tobacco companies publically denied the addictiveness of nicotine while simultaneously employing technological means to enhance the addictive impact of nicotine which created a dissonance in consumers' minds.

Plaintiffs also argue that the link between smoking and lung cancer was not common knowledge until after the 1960s. Tobacco officials testified before congress in 1965 that "it has not been established that smoking causes lung cancer or any other disease," and in 1969 American Tobacco placed a full page advertisement in the New York Times states that claims liking smoking to lung cancer were "bum rap." In 1984, R.J. Reynold mounted an aggressive advocacy campaign denying cigarettes caused any disease. This conflicting media information

clearly had an effect on consumers as a 1981 Federal Trade Commission Report found that smokers lacked adequate information as to the nature and extent of the health risk of smoking. Cigarette labels did not mention the causal link between smoking and lung cancer until 1985. *Gilboy v. Am, Tobacco Co.*, 582 So. 2d. 1263, 1266 (La. 1991). The Sixth Circuit found in *Tompkin v. American Brands*, 219 F.3d 566, 572–73 (6th Cir. 2000), "in enacting the 1966 Labeling Act and in its successive amendments in 1969 and 1984, Congress may have implicitly recognized that the link between smoking and lung cancer was not 'common knowledge.'"

Defendants present a completely contrary factual timeline concerning the addictive nature and cigarettes and their link to lung cancer. Defendants argue that it was common knowledge that cigarettes were dangerous and addictive by the 1900s, and it was common knowledge that cigarettes caused lung cancer by the 1950s. Defendants cite *Austin v. State of Tennessee*, 179 U.S. 343 (1900), where the Supreme Court takes judicial notice about danger of cigarettes in 1900. The Court states,

> [Cigarettes'] deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing [cigarettes'] use as fraught with great danger.
> …
> There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true.

Austin v. State of Tennessee, 179 U.S. 343, 348; 67 (1900). As early as the 1950s, Defendants cite various references in the media which allude to the connection between smoking and lung cancer. Examples include: the *Readers Digest* which ran a story in 1952 entitled, "Cancer by the Carton," *The Baltimore Sun* which ran a story in 1952 on a famous British Doctor's study that

concluded smoking caused lung cancer, *CBS News* which hosted a program in 1955 that examined the connection between smoking and lung cancer, and many more. Defendants argue that consumers' knowledge of the connection is evidenced by a multitude of studies, including a 1954 Gallup Poll that found 90% of participants had heard or read that smoking may cause lung cancer.

When the dangerous nature and effects of smoking, specifically lung cancer, became "common knowledge" is far from undisputable. Defendants cite references to the dangers of cigarettes that date back to the 1600s, while Plaintiffs cite references denying a connection between smoking and lung dating into the late 1980s and 1990s. There is clearly a genuine dispute concerning the material fact of when Plaintiffs knew, and when it was "common knowledge," that smoking caused lung cancer. Summary judgment on the basis of assumption of the risk and contributory negligence is not appropriate and the issue should be decided by the jury.

Assuming arguendo this Court determined that Plaintiffs did have knowledge about the link between smoking and lung cancer, Defendants' summary judgment motion would still fail, because Plaintiffs did not have knowledge of the synergistic relationship between smoking and asbestos exposure. "The medical literature is clear that the synergistic effect of cigarette smoking and exposure to asbestos fibers by inhalation or ingestion consistently results in a greater cumulative risk for asbestos-related disease than the combined additive risks from either. In short, smoking makes an individual more susceptible to the asbestos-related diseases which result from exposure to asbestos fibers." 60 Am. Jur. Trials 73 (Originally published in 1996) (citing Hammond et al., Asbestos Exposure, Cigarette Smoking, and Death Rates, 330 Ann NY Acad Sci 473 (1979); Morgan et al., Occupational Asbestos Exposure, Smoking, and Laryngeal

Carcinoma, 271 Ann NY Acad Sci 309 (1976); Selikoff et al., Asbestos Exposure, Smoking, and Neoplasia, 204 JAMA 106 (1968).) The Court of Appeals recognized the synergistic effect of asbestos and tobacco exposure in *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 356–57 (2014), finding, "while there are many variables that go into the causal effects of tobacco and asbestos exposure, there is evidence that the effect is multiplicative in nature, which we are satisfied is indicative of an indivisible injury." People who smoke are significantly more likely to contract lung cancer if they are also exposed to asbestos.

While there is no Maryland appellate precedent on the issue of synergy, many other federal courts have found that there can be no assumption of risk or contributory negligence unless plaintiffs were warned or otherwise objectively made aware, not only of the dangers of cigarette smoking, but also of the synergistic role played by dual exposure to tobacco and asbestos. *See Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 721 (4th Cir. 1995) ("In our view, [defendant's] only possibility of prevailing on its contributory negligence defense requires proof that [plaintiffs] were given . . . a warning [concerning the synergistic effect of cigarette smoking and asbestos exposure]"); *See also McClure v. Owens Corning Fiberglas Corp.*, 698 N.E.2d 1111, 1120 (Ill. App. 1998), rev'd on other grounds, 720 N.E.2d 242 (Ill. 1999) ("If [plaintiff] had been aware of the studies indicating that those with asbestosis are at an increased risk of lung cancer when they continue to smoke, and . . . continued to smoke anyway, perhaps contributory negligence would have been an issue. There was no such evidence in this case."); *and Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 658 (E.D. Tex. 1990), aff'd in part, vacated in part, 151 F.3d 297 (5th Cir. 1998) ("For smoking to be considered contributory negligence, it must be shown that the plaintiff had subjective knowledge of the synergistic

relationship between the asbestos-related disease and smoking and appreciated the danger of continued smoking.")

Assumption of the risk and contributory negligence require knowledge and appreciation of the risks associated with one's conduct and voluntary action despite full comprehension of the risk. Full comprehension of the risk of lung cancer in this case is impossible because there is no evidence that Plaintiffs had actual or constructive knowledge of the synergistic effect of cigarette smoke and asbestos exposure. Even if Plaintiffs were aware of the risk of contracting lung cancer linked with cigarette smoking, Plaintiffs were not aware that that risk was compounded when coupled with asbestos exposure. In order for Plaintiffs to have assumed the risk or contributed to their lung cancer they would have had to understand that exposure to asbestos increased the already present risk of lung cancer from smoking and declined to quit smoking despite that increased risk. Summary judgment is not appropriate because Defendants have not presented evidence that Plaintiffs knew of the synergistic relationship between asbestos and tobacco.

Conclusion

For the reasons stated, Certain Defendants' Refiled Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence (TID 59677048) is DENIED.

/s/ Shannon E. Avery
The Honorable Shannon E. Avery
Judge, Circuit Court for Baltimore City
Case No. 24x16000054

cc: All Counsel of Record
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