

Finello v. Foster Wheeler LLC

United States District Court for the Eastern District of Pennsylvania

June 12, 2023, Decided; June 12, 2023, Filed

No. 18-cv-3584-JMY

Reporter

2023 U.S. Dist. LEXIS 101781 *

ANTHONY FINELLO Personal Representative of the Estate of ALFRED C. BRODERICK (deceased) & EILEEN BRODERICK (deceased), vs. FOSTER WHEELER LLC, et al.

Core Terms

asbestos, exposure, tiles, summary judgment motion, regularity, proximate, vinyl, asbestosis, causation, pulmonary, products, genuine, substantial factor, material fact, supplier, disease, movant, floor

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For KEELER/DORR-OLIVER BOILER CO., Defendant: JENNIFER ANNE MCGARRITY, Maron Marvel Bradley Anderson & Tardy LLC, PHILADELPHIA, PA.

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Judges: John Milton Younge, Judge.

Opinion by: John Milton Younge

Opinion

MEMORANDUM

Younge, J.

Currently before the Court is a Motion for Summary Judgment filed by Defendant, Union Carbide Corporation. (Motion for Summary Judgment "MSJ", ECF No. 142.) The Estate of Alfred C. Broderick and the Estate of Eileen Broderick (collectively referred to as "Plaintiffs") filed a response in opposition. (Response in Opposition "Opp.", ECF No. 152.) The Court finds this matter appropriate for resolution without oral argument. See [Fed. R. Civ. P. 78](#); L.R. 7.1(f). For the reasons set forth below, Defendant's Motion will be denied.

I. FACTS:

In March of 2018, Alfred Broderick was diagnosed with pulmonary asbestosis caused by inhalation of **asbestos**. Mr. Broderick and his wife commenced this product liability and negligence action in the Philadelphia [*8] Court of Common Pleas on July 19, 2018. *Broderick v. John Crane Inc., et al.*, Case No. 180702225 (July Term, 2018 No. 2225). Defendant, Foster Wheeler, LLC, then removed this action to this Court in the Eastern District of Pennsylvania in August of 2018. (Notice of Removal, ECF No. 1.)

Anthony Finello, acting as the administrator of the Estate for Alfred Broderick and Eileen Broderick, filed two suggestions of death on June 5, 2023 on behalf Plaintiffs. (Suggestion of Death, ECF No. 174 & 175.) The suggestion of death filed on behalf of Alfred Broderick establishes that he died on January 28, 2022. (*Id.*, Ex. A, ECF No. 174 page 5.) The suggestion of death filed on behalf of Eileen Broderick establishes that she died on December 24, 2021. (*Id.*, EX. A, ECF No. 175 page 5.) Along with the suggestions of death, Anthony Finello filed a motion to substitute himself as a party acting as administrator for decedents' estates which the Court granted on June 6, 2023. (Motion to Substitute Party, ECF No. 176; Order, ECF No. 177.)

In this litigation, Plaintiffs seek financial compensation for Mr. Broderick's alleged occupational exposure to

Defendants' **asbestos** containing products.¹ Mr. Broderick gave a videotaped trial deposition in this matter in September of 2018 in which he [*9] testified to occupational exposure to **asbestos**. (Broderick Deposition, Opp. MJS, Exhibit P-1; ECF No. 152-1.) Mr. Broderick alleged that he was exposed to Defendants' **asbestos** containing products when he served in the Navy aboard the *U.S.S. Cone* as a boiler tender from 1957 to 1961. (*Id.*) Mr. Broderick alleges further exposure to **asbestos** containing products when he worked as a maintenance worker for First National Stores from 1962 to 1985 (*id.* at 48), and finally as a forklift mechanic for Baker Left. (*Id.* at 49.)

Mr. Broderick testified to multiple instances of **asbestos** exposure throughout his career which included an instance in the late 1960s or early 1970s when he helped build a security office inside of a warehouse for First National Stores. (*Id.* 151-152, 169.) Mr. Broderick testified that he was responsible for laying vinyl **asbestos** tiles in the security office which entailed cutting, breaking, and cleaning up dust from the vinyl **asbestos** floor tiles that he identified as bearing the name Kentile. (*Id.* 155, 169.) The Plaintiffs assert that Defendant Union Carbide was the sole, exclusive supplier of Calibide **asbestos** fiber for use in Kentile vinyl **asbestos** tiles between 1966 until [*10] 1969. (Opp., Ex. P-10, ECF No. 152-3 page 27.) The Plaintiffs further aver that Union Carbide continued to be a major supplier of raw **asbestos** in the years following 1969 up and until 1986. (*Id.*)

In opposition to Union Carbide's motion for summary judgment, Plaintiffs produced expert reports written by board-certified pulmonologist, James C. Giudice M.D. as well as board-certified specialist in occupational medicine, Arthur L. Frank, M.D. (Expert Reports, Response SJM, Ex. P-2 & P-3, ECF No. 152-1 page 29 - 30.) Both Doctors specifically reference Mr. Broderick's alleged exposure to Kentile vinyl **asbestos** tiles when rendering the opinion that occupational exposure to **asbestos** was a substantial factor in Mr. Broderick's development of pulmonary asbestosis. (*Id.*)

II. LEGAL STANDARD:

Summary Judgment is appropriate if the movant shows

¹Defendant Union Carbide is one of seven defendants who have moved for summary judgment. Plaintiffs' Complaint alleges exposure to products made or sold by 30 different companies.

"that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a). Liberty Mut. Ins. Co. v. Sweeney*, 689 F.3d 288, 292 (3d Cir. 2012). To defeat a motion for summary judgment, there must be a factual dispute that is both genuine and material. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Dee v. Borough of Dunmore*, 549 F.3d 225, 229 (3d Cir. 2008). A material fact is one that "might affect the outcome of the suit under the governing law[.]" *Anderson*, 477 U.S. at 248. A dispute over a material [*11] fact is "genuine" if, based on the evidence, "a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant bears the initial burden of demonstrating the absence of a genuine dispute of a material fact. *Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 146 (3d Cir. 2016). When the movant is the defendant, they have the burden of demonstrating that the plaintiff "has failed to establish one or more essential elements of her case." *Burton v. Teleflex Inc.*, 707 F.3d 417, 425 (3d Cir. 2013). If the movant sustains their initial burden, "the burden shifts to the nonmoving party to go beyond the pleadings and come forward with specific facts showing that there is a genuine issue for trial." *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015) (internal quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

At the summary judgment stage, the court's role is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249; *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007). In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. See *Horsehead Indus., Inc. v. Paramount Commc'ns, Inc.*, 258 F.3d 132, 140 (3d Cir. 2001). Nonetheless, the court must be mindful that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

III. DISCUSSION [*12] :

Defendant Union Carbide focuses its attack on the causation aspects of the legal theories advanced by Plaintiffs. Defendant argues that Plaintiffs present no evidence to establish Mr. Broderick's regular, frequent,

and proximate exposure to its **asbestos**, or that any alleged exposure was a substantial factor in causing his pulmonary asbestosis. Union Carbide specifically argues that Plaintiffs are unable to meet their burden because (1) Defendant was only one of several suppliers of **asbestos** for the products at issue; (2) there is no evidence that Mr. Broderick's exposure to any **asbestos** for which it could be liable was more than "de minimis," and (3) it argues that Plaintiffs lack expert testimony that the products at issue were a substantial contributing factor in Mr. Broderick's development of pulmonary asbestosis.

In [Eckenrod v. GAF Corp., 375 Pa. Super. 187, 192, 544 A.2d 50 \(1988\)](#), the Pennsylvania Superior Court ruled that a plaintiff - **asbestos** litigant - who relies on circumstantial evidence is required to establish exposure to a defendant's product on a regular, frequent and proximate basis to support a jury's finding that defendant's product was substantially causative of the disease. The Pennsylvania Supreme Court endorsed the use of the [*13] frequency, regularity and proximity requirement for **asbestos** litigants in [Gregg v. V-J Auto Parts Co., 596 Pa. 274, 943 A.2d 216 \(Pa. December 28, 2007\)](#). In [Gregg](#), the Pennsylvania Supreme Court further defined the terms "frequency, regularity and proximity" by citing to language used by the Illinois federal court of appeals in [Tragarz v. Keene Corp., 980 F.2d 411 \(7th Cir. 1992\)](#), as follows:

[The factors should be] applied in an evaluative fashion as an aid in distinguishing cases in which the plaintiff can adduce evidence that there is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which likelihood is absent on account of only casual or minimal exposure to the defendant's product. Further, [Tragarz](#) suggests that the application of the test should be tailored to the facts and circumstances of the case, such that, for example, it's application should become "somewhat less critical" where the plaintiff puts forth specific evidence of exposure to a defendant's product. Similarly, under [Tragarz](#), the frequency and regularity prongs become "somewhat less cumbersome" in cases involving diseases that the plaintiff's competent medical evidence indicates can develop after only minor exposures to **asbestos** fibers. We agree with [Tragarz](#) Court's approach and adopt it here.

[Gregg v. V-J Auto Parts Company, 943 A.2d at 225-226.](#)

In [Rost v. Ford Motor Co., 637 Pa. 625, 151 A.3d 1032 \(Pa. 2016\)](#), the Pennsylvania Supreme [*14] Court enumerated "two basic precepts" regarding expert causation testimony. [Id. at 1044](#). "First, expert testimony based upon the notion that 'each and every breath' of **asbestos** is substantially causative of mesothelioma will not suffice to create a jury question on the issue of substantial factor causation." [Id.](#) "Second, to create a jury question, a plaintiff must adduce evidence that exposure to defendant's **asbestos**-containing product was sufficiently 'frequent, regular, and proximate' to support a jury's finding that defendant's product was substantially causative of the disease." [Id.](#) Where there is exposure to multiple sources of **asbestos** that satisfy the "frequency, regularity, and proximity" test, when "coupled with competent medical testimony establishing substantial factor causation, it is for the jury to decide the question of substantial causation." [Id.](#) Plaintiffs have no obligation to eliminate every other potential cause of the disease. [Id.](#) Ultimately, where an expert opines within a reasonable degree of medical certainty that the exposures by the defendant's products were sufficient, in and of themselves, to cause the disease, comparison of the plaintiff's other occupational exposures [*15] is unnecessary. [Id. at 1048-49.](#)

In terms of product identification, the Court gives credits to Mr. Broderick's testimony that he laid Kentile vinyl **asbestos** floor tiles while building an office space in the late 1960s or early part of the 1970s. (Broderick Deposition page 175.) Mr. Broderick testified to being in an enclosed space when breathing dust created by cutting and cleaning up after the installation of the floor tiles. ([Id.](#) at 43.) Mr. Broderick testified to labeling and/or packaging that identified the floor tiles as Kentile vinyl **asbestos** tiles. ([Id.](#) at 169.) The Court further credits the evidence presented by Plaintiffs to establish that Union Carbide was Kentile's exclusive supplier of **asbestos** fiber for its **asbestos** vinyl flooring from 1966 through 1969, and evidence to establish that Union Carbide remained a main supplier thereafter through the relevant time. (Response to Interrogatories, Opp., Ex. P-10; Purchase Order, Ex. 11, ECF No. 152-4.)

To overcome Union Carbide's motion for summary judgment, Plaintiff comes forward with expert reports written by James C. Giudice M.D. and Arthur L. Frank, M.D. (Expert Reports, Response SJM, Ex. P-2 & P-3, ECF No. 152-1 page 29 - 30.) These Doctors [*16] opine to a reasonable degree of medical certainty that Union Carbide Corporation's **asbestos** fibers were a factual and proximate cause of Mr. Broderick's pulmonary asbestosis. ([Id.](#)) Therefore, issues of material

fact remain on the question of causation, or the question of whether Mr. Broderick's purported exposure to Defendant's **asbestos** played a substantial factor in his pulmonary asbestosis diagnosis.

IV. CONCLUSION:

For these reasons, the motion for summary judgment filed by Defendant Union Carbide is denied.

BY THE COURT:

/s/ John Milton Youngue

Judge John Milton Youngue

ORDER

AND NOW, this 12th day of June 2023, upon consideration of the Motion for Summary Judgment (ECF No. 142) filed by Defendant Union Carbide Corporation, and all papers submitted in support thereof and in opposition thereto, it is hereby **ORDERED** that said Motion shall be **DENIED** for the reasons set forth in the accompanying memorandum entered by the Court.

BY THE COURT:

/s/ John Milton Youngue

Judge John Milton Youngue

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