IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
PHYLLIS MELTON	)	C.A. No. N10C-06-123 ASB
	)	
Limited to: Arkema Inc.	)	

MEMORANDUM OPINION

Appearances:

A. Dale Bowers, Esquire
Law Office of A. Dale Bowers, P.A.,
Newport, Delaware
Counsel for Plaintiff Phyllis Melton

Paul A. Bradley, Esquire
Antoinette D. Hubbard, Esquire
Maron Marvel Bradley & Anderson, P.A.
Wilmington Delaware
Counsel for Defendant Arkema Inc.

JOHN A. PARKINS, JR., JUDGE

Plaintiff alleges that she was exposed to asbestos when she used Jelenko's asbestos tape[1] to line metal investment rings used in the fabrication of prosthetic teeth. She initially testified she used Jelenko tape in dental hygienist school at Aquinas Junior College and Vanderbilt University from 1971-1973 and while working as a dental assistant in Atlanta from 1973-1984. In a second deposition she recanted her earlier testimony about using Jelenko asbestos tape. Jelenko now argues that there is no evidence that Plaintiff was exposed to its product and therefore summary judgment should be granted.

One of the issues arises from contradictory testimony in Plaintiff's deposition. There are two issues before the court. First, whether there is evidence in the record creating a genuine issue of material fact as to Plaintiff's asbestos exposure in dental hygienist school. Second, whether there is evidence in the record that Plaintiff used asbestos tape sold by Defendant to a sufficient degree to withstand a motion for summary judgment.

FACTS

The practice in asbestos cases pending in this court is for plaintiffs' counsel to first take a deposition of the plaintiff. Later, often the same day, the parties take a discovery deposition of the plaintiff. Plaintiffs in asbestos cases are often gravely ill, and this seemingly backward deposition procedure helps ensure that the plaintiff's trial testimony is preserved for trial.

[1] Defendant, Arkema Inc., is the successor in interest to Jelenko, which sold the tape in question.

At her trial deposition Plaintiff testified that Jelenko asbestos tape was used at dental hygienist school: "we had Kerr and Dentsply, Ransom & Randolph, and Jelenko are the only ones that I'm aware of that we ever used."[2] But in her discovery deposition which commenced later that morning, Plaintiff offered markedly different testimony:

> Q: Do you associate the name Jelenko with any products you saw at the Dental Hygienist School?
>
> A: No.
>
> Q: When you told your attorney on the video tape that you remember those three names from Dental Hygienist School were you mistaken?
>
> A: I may have been mistaken. I saw them at the practice I worked in for almost 12 years.[3]

Plaintiff counsel did not inquire further during counsel's subsequent examination.

Plaintiff also testified regarding her exposure while she worked for Dr. Smithloff. She was asked to breakdown the suppliers of dental tape by the amount used in the office. In reference to Jelenko's tape, she stated "I think they, they had it occasionally, like a roll. But I'm trying to think, because there was something else that we ordered a lot of from Jelenko. I have to think about it for a minute. But it wasn't tape."[4] Later when asked if she ever

[2] Trial Deposition of Phyllis P. Melton, Aug. 24, 2010, at 12:6-8.
[3] Discovery Deposition of Phyllis P. Melton, Aug. 24, 2010, at 67:9-16.
[4] *Id.* at 80:20-24.

personally used a roll of Jelenko's asbestos tape, she agreed that she was not sure.[5]

Analysis

The first issue before the court is whether there is sufficient evidence for the court, on a motion for summary judgment, to conclude that a reasonable trier of fact could find that Plaintiff was exposed to Jelenko asbestos tape while in dental hygienist school. This requires the court to consider the quantum of evidence necessary to create a "genuine" dispute of material fact for purposes of summary judgment.

Not all disputes of fact will defeat a motion for summary judgment. Rule 56 provides summary judgment be granted if "there is no *genuine* issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[6] This means that something more than a scintilla of evidence must exist in order to defeat a summary judgment motion. As United State Supreme Court has explained, "'[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 reasonably could find for the plaintiff.'"[7]

In the instant case Plaintiff has not adduced sufficient evidence to create a factual issue. It is true that during her trial deposition Plaintiff testified that she was exposed to Jelenko asbestos-containing tape at dental hygienist

[5] *Id.* at 137: 16-19.
[6] Superior Court Rule of Civil Procedure 56(c) (emphasis added).
[7] *Smiley v. Taylor*, 2008 WL 5206811, at *2 (Del. Super) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

school. Later, in her discovery deposition, she recanted that testimony says she was mistaken. Although her testimony may contain a scintilla of evidence that she was exposed in dental hygienist school in is not the quantum of evidence which would allow a reasonable trier of fact to conclude she was.

Plaintiff disputes the above reasoning, citing two Delaware Supreme Court cases for the proposition that a contradiction in testimony creates a genuine issue of material fact. Both cases are distinguishable and do not persuade this court that the above reasoning is erroneous. Plaintiff refers the court to *In re Asbestos Litigation Collins*[8] for the proposition that "[c]ontradictory answers . . . in the discovery record also serve[] to furnish the basis for consideration of motions for summary judgment."[9] However, the fact at issue in the Court's ruling in *Collins* was when the plaintiff was on notice of having an asbestos related disease. The testimony in question was of plaintiff's "subjective belief" was not verified by the medical records.[10] The disconnect between the plaintiffs testimony and the medical records served as the basis for denying summary judgment.[11] Plaintiff also directs the court to *Froio v. Du Pont Hosp. for Children.*[12] In *Froio*, the court found that the expert witness did not "repudiate her opinion," but rather "equivocated" as to her opinion.[13] Nonetheless, here opinion regarding the standard of care was sufficient to defeat summary judgment. This case is different from the two cases cited by

[8] 673 A.2d 159 (Del. 1996).
[9] *Id.* at 161 n.1.
[10] *Id.* at 163.
[11] *See id.* at 164.
[12] 816 A.2d 784 (Del. 2003).
[13] *Id.* at 787.

Plaintiff. The issue in question is factual in nature, not based on opinion. Here Plaintiff does not juxtapose her subjective beliefs and medical records. It is a simple factual question of which the only relevant evidence comes from Plaintiff.

The second issue is whether there is sufficient evidence of exposure in Atlanta to satisfy Georgia's causation standard. The Georgia Supreme Court addressed the causation standard in the asbestos context in *John Crane, Inc. v. Jones.*[14] Georgia does not require the exposure be a substantial factor.[15] However, proximate cause is still an essential element of Plaintiff's case.[16] An individual defendant's tortuous conduct just be "a contributing factor in bringing about the plaintiff's damages."[17] A jury cannot "award damages for a de minimis exposure to asbestos."[18]

In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant summary judgment when "the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[19] Taking the evidence in the light most favorable to Plaintiff, she has shown at most that she could have come across Jelenko's tape occasionally, maybe one roll, while working at Dr. Smithloff's practice. She could not state that she had in fact ever used it. At best the evidence of

---

[14] 278 Ga. 747 (Ga. 2004).
[15] *Id.* at 748.
[16] *Id.* at 751.
[17] *Id.* at 748.
[18] *Id.* at 750 (citing *John Crane, Inc. v. Jones*, 262 Ga.App. 531, 533 (Ga. App. 2003)).
[19] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).

Plaintiff's exposure to Jelenko's tape is *de minimis*. Accordingly, Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Dated: February 2, 2012

_____
Judge John A. Parkins, Jr.