

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

IN RE: ASBESTOS LITIGATION :
 :
Limited to: :
Ashworth, Sherman :
 : C.A. No. 09C-09-123 ASB

**UPON DEFENDANT PNEUMO ABEX, LLC’S
MOTION FOR SUMMARY JUDGMENT
GRANTED IN PART and DENIED IN PART**

This 14th day of February, 2011, it appears to the Court that:

1. Upon review of the parties’ filings and the record, the Court concludes that Plaintiff’s wrongful death claim, arising from her husband Sherman Ashworth’s death of mesothelioma, was timely filed, and that genuine factual disputes exist which preclude summary judgment in favor of Defendant Pneumo Abex, LLC (“Abex”) on the issue of liability. Pursuant to Delaware’s borrowing statute, Plaintiff cannot maintain her survival action, as the governing statute of limitations expired before she instituted this suit.

2. With regard to Abex’s argument that Plaintiff’s claims are time-barred, the parties have both urged misapplications of the relevant law. Plaintiff filed her Complaint on September 27, 2009. Abex submits for purposes of its motion that “the very latest Plaintiff’s decedent could have been aware that asbestos exposure caused his disease was September 6, 2007.” Plaintiff’s survival action, which derives from the underlying personal injury action that accrued to

Ashworth during his lifetime, would be subject to either a two-year limitations period under Delaware's statute of limitations for personal injury actions or a four-year limitations period under Utah law.¹ Section 78-B-105 of the Utah Code, which provides that "[i]f a person entitled to bring an action dies before the expiration of the statute of limitations and the cause of action survives, an action may be brought by his representatives after the expiration of the time and within one year from his death" is not implicated, as the Utah limitations period on the underlying claim did not expire prior to the filing of Plaintiff's Complaint. Nevertheless, the Court must apply Delaware's shorter limitations period, as required by Delaware's borrowing statute.² Accordingly, the limitation period applicable to Plaintiff's survival claim expired, at the latest, on September 6, 2009, five days before her Complaint was filed.

3. By contrast, Plaintiff's wrongful death claim was timely under Delaware and Utah law. As Abex correctly points out, Delaware and Utah both

¹ 10 Del. C. § 8119; UTAH CODE ANN. § 78B-2-307 (2008). The parties have each suggested that Utah's three-year limitations period for actions arising out of asbestos exposure would apply to this case; however, the statute upon which they rely is limited to claims against "any manufacturer of *any construction materials* containing asbestos and arising out of the manufacturer's providing of the materials, directly or through other persons, for use in construction of any building within the state." UTAH CODE ANN. § 78B-2-117 (2008) (emphasis added). Plaintiff's claims against Abex do not pertain to construction materials.

² 10 Del. C. § 8121 ("Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action."); see also *Burrell v. Astrazeneca LP*, 2010 WL 3106584, at *3-4 (Del. Super. Sept. 20, 2010).

require, as a condition precedent to the accrual of a wrongful death claim, that the decedent possessed a viable cause of action at the time of his death.³ Abex appears to interpret this condition precedent to mean that a qualifying survivor's wrongful death claim accrues at the time of the underlying wrong to the decedent. To the contrary, under Delaware and Utah law, the earliest that a wrongful death claim can accrue (if at all) is upon the death of the decedent.⁴ At the time of his death on September 27, 2007, Ashworth's personal injury claim was viable, assuming as previously discussed that it accrued on September 6, 2007. There is no issue of tolling under the discovery rule, and Plaintiff's wrongful death claim therefore accrued immediately upon Ashworth's death. Both Utah and Delaware apply a two-year limitations period to wrongful death claims,⁵ such that the statute of limitations expired on September 27, 2009. Thus, Plaintiff's wrongful death claim was instituted more than two weeks before the running of the limitations period under either state's law.

³ *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 332-33 (Utah 1997); *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1060-61 (Del. 1989).

⁴ *See Jensen*, 944 P.2d at 332 (“We have held that an action for wrongful death is an independent action accruing in the heirs of the deceased[.]”); *Milford Memorial Hosp., Inc. v. Elliott*, 210 A.2d 858, 860-61 (Del. 1965); *In re Asbestos Litig. (West Trial Group)*, 622 A.2d 1090, 1092 (Del. Super. 1992) (“[A] cause of action for wrongful death accrues when a *qualifying survivor* is chargeable with knowledge of a potential cause of action[.]” (emphasis added)).

⁵ 10 *Del. C.* § 8107; UTAH CODE ANN. § 78B-2-304(2) (2008).

4. Abex also contends that it is entitled to summary judgment on the issues of causation and product nexus. Abex's reliance upon *Holmstrom v. C.R. England, Inc.* for the proposition that an actor's conduct does not constitute a substantial factor in bringing about harm "if the harm would have been sustained even if the actor had not been negligent"⁶ is misplaced in the context of a multi-defendant, multi-exposure asbestos case, where the logic underpinning but-for causation does not apply. While Utah case law offers little guidance on the issue of causation in asbestos-exposure cases, the Court does not expect that the Utah Supreme Court would apply but-for causation to such claims if it were to address the issue.⁷

5. Considering the product nexus evidence in the light most favorable to Plaintiff, the Court finds that genuine issues of material fact preclude summary judgment in Abex's favor on the issue of liability, for the reasons set forth in Plaintiff's cogent responsive brief. The product identification testimony of Lee Ericksen suffices to create a jury question as to whether Ashworth was exposed to Abex asbestos-containing products incorporated into Rayloc brake products sold

⁶ 8 P.3d 281, 292 (Utah Ct. App. 2000).

⁷ See *Robinson v. All-Star Delivery, Inc.*, 992 P.2d 969, 972-73 (Utah 1999) (discussing with approval Restatement (Second) of torts § 433A cmt. i, which recognizes the possibility that multiple causes may combine to produce an injury with "each . . . a substantial factor in bringing about the harm"); *McCorvey v. Utah State Dep't of Transp.*, 868 P.2d 41, 45 (Utah 1993) ("[T]here can be more than one proximate cause or, more specifically, substantial causative factor, of an injury.").

by NAPA. Eriksen specifically recalled using Rayloc's Stopper product line at his garages on a regular basis, thereby distinguishing this case from the situation addressed by the Philadelphia Court of Common Pleas in *Weitz v. Pneumo Abex, LLC*, which involved less precise testimony describing "NAPA brakes."⁸ While Abex has presented evidence that it was not the exclusive supplier of the friction materials used in Rayloc's ES and Stopper 2 products, the deposition testimony of Paul LeCour and Charles Allen gives rise to a factual dispute regarding whether Abex was an exclusive supplier of asbestos-containing materials used in the Stopper line identified by Eriksen.⁹

6. For the foregoing reasons, Abex's Motion for Summary Judgment is hereby **GRANTED IN PART** as to Plaintiff's survival action, and **DENIED IN PART** as to her wrongful death claim.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve

⁸ Super. Ct. Docket No. 268 EDA 2008 (Phila. County Ct. C.P. 2008).

⁹ See *In re: Asbestos Litig. (Stevens)*, C.A. No. 05C-05-272 ASB (Del. Super. Sept. 22, 2006) (TRANSCRIPT).