

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

IN RE: ASBESTOS LITIGATION :
:
Limited to: :
Gordon, Melvin Carl : C.A. No. N10C-08-307 ASB

UPON DEFENDANT DANA COMPANIES, LLC'S MOTION FOR
SUMMARY JUDGMENT

GRANTED

This 16th day of November, 2011, it appears to the Court that:

1. Plaintiff Melvin C. Gordon (“Gordon”) was diagnosed with mesothelioma in 2010, which led to his death in June 2011. Before his death, Gordon and his wife Carol Ann Gordon initiated this lawsuit against various manufacturers and suppliers of allegedly asbestos-containing products that Plaintiffs claim caused Gordon’s mesothelioma.

2. Plaintiffs allege a host of occupational and non-occupational exposures to asbestos. Gordon worked for nearly forty years at the Coffeyville Refinery (“the refinery”) in Coffeyville, Kansas. Gordon also performed significant automotive repair work on personal vehicles and farm equipment, which brought him into contact with brakes, clutches, gaskets

and engine components. Plaintiffs' specific claims against Defendant Dana Companies, LLC ("Dana"), the successor to Victor Gasket Manufacturing Company, arise from Gordon's automotive repair hobby.

3. Beginning in 1958 and continuing throughout his life, Gordon occasionally performed vehicle maintenance repair jobs for family and friends. Gordon, who was deposed several months before his death, estimated that he performed fifty brake jobs in his life.¹ Similarly, Gordon estimated that he had performed roughly fifty clutch jobs.² He testified, however, that he would have performed "considerably more" gasket jobs because of his engine overhaul work and estimated that the total number of gasket jobs ranged between fifty and seventy-five.³ Gordon explained that any engine work more significant than a minor tune-up would involve the use of gaskets.⁴ Gordon worked with exhaust manifold gaskets, which were all asbestos in the early years, intake manifold gaskets, which Gordon said "wouldn't necessarily... have any asbestos in them," though he also said his "feeling" was that "they probably did."⁵ Gordon also worked with side panel

¹ Melvin C. Gordon, Video Dep. Tr., 59: 15-21.

² *Id.* at 60: 4-5.

³ *Id.* at 60: 24-25.

⁴ *Id.* at 91: 20-22.

⁵ *Id.* at 92: 1-6.

gaskets and tappet gaskets, which he described as made of cork, and later, paper.⁶

4. Gordon testified that he used “[a] lot of Victor gaskets, especially in the early years.”⁷ Though he said he used gaskets supplied by other manufacturers, including Fel-Pro, he described Victor as “the main one.”⁸ Gordon purchased Victor gaskets as part of a Victor engine overhaul package, which included everything he needed to perform an overhaul.⁹ Gordon could clearly recall the Victor name on the package and on the gaskets themselves.¹⁰ All of the Victor gaskets that Gordon used were pre-formed.¹¹ Installing a new gasket was a simple procedure that only required putting the new gasket down on the bolts and rebolting the piece of equipment, a process that Gordon said would take less than a minute¹². Gordon testified, however, that removing a gasket with a wire wheel or scraper could take up to an hour.¹³

⁶ *Id.* at 92: 6-14.

⁷ *Id.* at 92: 17-18.

⁸ *Id.* at 92: 18-20.

⁹ *Id.* at 92:23 – 93: 10.

¹⁰ *Id.* at 93: 13-15.

¹¹ Melvin C. Gordon Discovery Dep. Tr., Jan. 14, 2011, 406: 12-22; 17-18.

¹² *Id.* at 407: 18.

¹³ Gordon Video Dep. Tr. at 95:3-97:23.

5. Gordon could only recall removing a Victor gasket from a vehicle on one occasion, when he overhauled a 1957 Ford.¹⁴ He could not identify any other specific occasion where he had used a Victor gasket, nor was he able to identify the manufacturer of gaskets that he used to repair farm equipment.¹⁵ On cross-examination, he was unable to say whether he used Victor or Fel-Pro gaskets a greater percentage of the time.¹⁶

6. In its motion for summary judgment, Dana argues that Plaintiffs have not produced sufficient evidence that Gordon was exposed to asbestos-containing Victor gaskets to show that Victor gaskets were a substantial factor in causing Gordon's mesothelioma, as required by Kansas law. Since Gordon could only identify one type of Victor gasket he used as containing asbestos, and since he also worked with gaskets produced by other manufacturers, Dana argues that it is entitled to summary judgment because Gordon may never have handled a Victor gasket containing asbestos at all. Furthermore, Dana submits that, even if it could be established that Gordon only used Victor asbestos-containing gaskets, Plaintiffs still would not be able to prove exposure because there is no evidence that Gordon was exposed to any respirable or friable dust from the gaskets. Finally, Dana

¹⁴ Gordon Discovery Dep. Tr. at 398: 1-3 (“I can say with confidence that the ’57 Ford I had, had Victor gaskets on it more than once.”)

¹⁵ *Id.* at 398: 9-17.

¹⁶ *Id.* at 399: 8-11.

contends that, even if such exposures could be established, there is no evidence that they were in an amount and frequency sufficient to establish causation under Kansas' heightened causation statute.

7. In response, Plaintiffs presented essentially the same evidence as Dana: that Gordon worked with Victor gaskets on vehicle maintenance work over a period of forty-seven years, and that until 1988, some of Victor's gaskets contained asbestos. Plaintiffs urge that this quantity of evidence, viewed in the light most favorable to the Plaintiffs, permits an inference that Gordon was exposed to asbestos from Dana products. Moreover, Plaintiffs urge that Kansas law imposes a less stringent burden of proving causation on plaintiffs in mesothelioma cases, such that a plaintiff can establish that a defendant's product was a substantial factor in causing his illness with a relatively small amount of evidence.¹⁷ Here, Plaintiffs argue that the inference of exposure to asbestos from Victor gaskets is sufficient to establish that Victor gaskets were a substantial factor in Gordon's illness.

¹⁷ The Court previously rejected Plaintiffs' argument that mesothelioma is treated differently under Kansas law in *In re Asbestos Litig. (Haas)*, C.A. No. 10C-05-245 ASB (Del. Super. Jun. 9, 2011) (TRANSCRIPT). Finding no change in Kansas law since its previous ruling, the Court declines to revisit this issue.

8. When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.¹⁸ Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.¹⁹ If the proponent properly supports its claims, the burden “shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.”²⁰ Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.²¹

9. The parties agree that Kansas substantive law applies to this case. Under Kansas’ Silica and Asbestos Claims Act,²² a plaintiff in an asbestos case bears the burden of establishing that exposure to asbestos from the defendant’s product was a *substantial factor* in the plaintiff’s illness.²³ The court determines whether the product was a substantial factor according to the following four-factor test:

¹⁸ Super. Ct. Civ. R. 56(c).

¹⁹ *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

²⁰ *Id.* at 880.

²¹ *Id.* at 879-80.

²² KAN. STAT. ANN. Ch. 60, art. 49.

²³ KAN. STAT. ANN. §60-4907(a) (2011).

- (1) The manner in which the plaintiff was exposed.
- (2) The proximity to the plaintiff when the exposure occurred.
- (3) The frequency and length of the plaintiff's exposure; [and]
- (4) [A]ny factors that mitigated or enhanced the plaintiff's exposure.²⁴

In essence, this statute codifies the well-known “frequency, regularity, proximity” test of *Lohrmann v. Pittsburgh Corning Co.*²⁵ Indeed, this Court recently suggested that the Kansas statute may in fact impose a heightened version of the *Lohrmann* test.²⁶

10. *Lohrmann* itself operates as a *de minimis* rule, intended to prevent plaintiffs from holding defendants liable where the plaintiff can only demonstrate casual or minimal contact with the defendant's product.²⁷ This Court recently held that a plaintiff need not demonstrate specific dates or times of exposure to survive summary judgment under *Lohrmann*.²⁸ This Court also recently granted summary judgment to Fel-Pro, a gasket manufacturer, in a case involving personal automotive repairs under Arkansas' version of the *Lohrmann* test where none of the plaintiff's witnesses could connect the deceased plaintiff, to any particular asbestos-containing product manufactured by the defendant.²⁹ The Court noted that

²⁴ KAN. STAT. ANN. §60-4907(b)(2011)

²⁵ 782 F.2d 1156, 1163 (4th Cir. 1986).

²⁶ *In re: Asbestos Litig. (Haas)*, C.A. No. 10C-05-245 ASB (Del. Super. Jun. 9, 2011) (TRANSCRIPT).

²⁷ *See, e.g., Chavers v. General Motors Corp.*, 79 S.W.3d 361, 368 (Ark. 2002).

²⁸ *In re: Asbestos Litig. (Bowser)*, C.A. No. N10C-05-104 ASB (Jun. 3, 2011).

²⁹ *In re: Asbestos Litig. (Pelzel)*, C.A. No. 10C-05-205 ASB (Del. Super. Aug. 17, 2011).

the *Pelzel* plaintiff had failed to carry its summary judgment burden of identifying any evidence from which a jury could reasonably infer that the plaintiff was exposed to asbestos from gaskets manufactured or supplied by the defendant.

11. Upon review of the record in this case and Kansas law, the Court finds that Plaintiffs have failed to carry their burden of producing evidence that would show that exposure to asbestos-containing Victor gaskets was a substantial factor in Gordon's illness. Dana carried its initial burden of establishing the non-existence of material issues of fact by highlighting the absence of direct evidence that Gordon received significant asbestos exposure from a Victor product. The burden then shifted to Plaintiffs, who have failed to identify any evidence from which a jury could reasonably infer that Gordon was exposed to asbestos from Victor gaskets regularly and frequently over an extended period of time.

12. Plaintiffs rely on the understandably hazy recollections of Gordon and an article asserting that Dana manufactured asbestos-containing products until 1988. At best, this evidence permits only a weak inference that Gordon may have been exposed to asbestos from a Victor product. Even assuming that Plaintiffs had shown that Gordon was exposed to an asbestos-containing Victor product, there is a lack of evidence of frequent or

regular exposure to asbestos in a Victor product over an extended period of time. Gordon estimated that he performed at most seventy-five gasket repair jobs total and estimated that he might spend an hour removing and replacing a gasket. Over the course of a lifetime, this averages out to a little over an hour per year that Gordon spent replacing automotive gaskets. This Court has already held that Kansas law does not permit a less stringent application of the *Lohrmann* standard in mesothelioma cases.³⁰ Accordingly, the Court holds that Plaintiffs have not submitted evidence by which a reasonable jury could find that exposure to Victor gaskets was a substantial factor in causing Gordon's mesothelioma. Dana's motion for summary judgment is therefore GRANTED.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

Peggy L. Ableman, Judge

Original to Prothonotary

cc: All counsel via File & Serve

³⁰ *In re: Asbestos Litig. (Haas)*, C.A. No. 10C-05-245 ASB (Del. Super. Jun. 9, 2011) (TRANSCRIPT).