



**LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge**

Date Nov. 3, 2017

Case No. 15CV187950

BRIAN KELLOGG, et al.
Plaintiff

Thomas Bevan
Plaintiff's Attorney

VS

GENERAL ELECTRIC CO., et al.
Defendant

P. Doran, J. Kristan, S. Luxton
Defendant's Attorney

This matter is before the Court on separate Defendant, Goulds Pumps, Inc., now known as Goulds Pumps, LLC's ("Goulds") Motion For Summary Judgment, filed June 16, 2016 and Plaintiff's Brief in Opposition, filed on October 11, 2016.

Separate Defendant, Goulds, Motion For Summary Judgment is not well-taken and is hereby DENIED.

See Judgment Entry.

IT IS SO ORDERED.

VOL _____ PAGE _____



JUDGE D. Chris Cook

cc: Bevan, Esq.
Doran, Esq.
Kristan, Jr., Esq. (Clark Ind. Insulation Co.)
Luxton, Esq. (Gould's Pumps, LLC)



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INTRODUCTION

This matter is before the Court on separate Defendant, Goulds Pumps, Inc., now known as Goulds Pumps, LLC's ("Goulds") Motion For Summary Judgment, filed June 16, 2016 and Plaintiff's Brief in Opposition, filed on October 11, 2016.

Non-oral hearing had October 31, 2017.

PROCEDURAL HISTORY

On November 10, 2015, the complaint at bar was filed against GE and eleven (11) other defendants, including Goulds.¹ The complaint alleges that Neal Kellogg ("Kellogg"), Plaintiff's decedent, was exposed to asbestos through his employment with the Cleveland Electric Illuminating Company ("CEI") in facilities located in Lorain, Cuyahoga, Lake, and Ashtabula counties.

Kellogg was employed by CEI between 1966 through 1993 and passed away, allegedly from mesothelioma, sometime after this suit was filed. The complaint alleges counts of negligence, breach of warranties, fraud, loss of consortium, and wrongful death. The complaint seeks compensatory damages, punitive damages, and attorney's fees.

Since the complaint was filed, the claims against almost all of the defendants have been resolved except for the claims against separate Defendant, General Electric Co.,

¹ This matter was originally filed in Lorain County Court of Common Pleas, then voluntarily dismissed pursuant to Civ. R 41(A). It was thereafter timely re-filed in Cuyahoga County Court of Common Pleas, which *sua sponte* transferred the case back to Lorain County.



separate Defendant, Clark Industrial Insulation Co. (Summary Judgment denied) and the claims against Goulds.

STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review for summary judgment in Ohio is well-settled. In *Slinger v. Phillips*, 2015-Ohio-357, at ¶9, the Ninth District stated, “This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). ‘We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party.’” Citing, *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011–Ohio–1519, ¶ 8.

Pursuant to Civ.R. 56(C), summary judgment is appropriate when: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, (1977).

To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, (1996). If the movant satisfies this burden, the nonmoving party “‘must set forth specific facts showing that there is a genuine issue for trial.’” *Id.* at 293, quoting Civ.R. 56(E).

Recently, the Ninth District Court of Appeals noted “Summary judgment proceedings create a burden-shifting framework. To prevail on a motion for summary judgment, the movant has the initial burden to identify the portions of the record demonstrating the lack of a genuine issue of material fact and the movant's entitlement to judgment as a matter of law. * * *In satisfying this initial burden, the movant need not offer affirmative evidence, but it must identify those portions of the record that support her argument. Once the movant overcomes the initial burden, the non-moving party is precluded from merely resting upon the allegations contained in the pleadings to establish a genuine issue of material fact. Civ.R. 56(E). Instead, it has the reciprocal burden of responding and setting forth specific facts that demonstrate the existence of a ‘genuine triable issue.’” *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, (1996); See, *McQuown v. Coventry Township*, Ninth Dist., 2017-Ohio-7151, CA 28202, Summit Cty,



at ¶ 10. See also: *Bank of New York Mellon v. Bridge*, Ninth Dist., Summit No. 28461, 2017 WL 4200614, 2017-Ohio-7686, at ¶ 8.

STATEMENT OF PERTINENT FACTS

As noted, *supra*, Kellogg was an employee of CEI for about 27 years. CEI is an electrical generating public utility with plants located in many counties in Ohio, including Lorain County. Kellogg worked (though not often) at the CEI facility located in Lorain County ("The Facility"). According to Kellogg's estate, he was exposed to asbestos through his employment with CEI and passed away, allegedly from mesothelioma, sometime after this suit was filed.

Goulds, the defendant at issue herein, allegedly supplied pumps to CEI that contained asbestos.

During his employment at CEI, Kellogg's duties involved, amount other things, working on and around pumps. According to Kellogg's deposition testimony and the testimony of his experts, Kellogg was exposed to asbestos when removing asbestos-containing insulation from the pumps. He was also exposed to asbestos from the pumps through the process of removal and replacement of gaskets and packing on the pumps.

Kellogg's estate maintains that he ultimately died from mesothelioma occasioned by his exposure to asbestos contained within or attendant to many products, materials, and implements at CEI that contained asbestos, including pumps made by Gould.

Goulds' defends on the propositions that 1) Kellogg cannot prove that he was exposed to products manufactured by Goulds (pumps), and, 2) that if he was in fact exposed to such products, that the exposure was not a substantial factor in causing his mesothelioma and death.

ANALYSIS

RC 2307.96 & *HORTON v. HARWICK*

The parties agree that the analysis of a multi-party asbestos case for summary judgment purposes begins with a review of RC 2307.96, "Asbestos claim – multiple defendants – substantial factor test." This statute became effective in September, 2004, and is ostensibly a General Assembly "correction" of the Ohio Supreme Court decision in *Horton v. Harwick Chemical*, 73 Ohio St.3d 679, 1995-Ohio-286.



The syllabus of *Horton* stands for two propositions of law: the first, that “. . . a plaintiff has the burden of proving exposure to the defendant’s product and that the product was a substantial factor in causing the plaintiff’s injury.” This pronouncement of law was substantially unchanged by RC 2307.96 and at Section (A) remains the law today. “If a plaintiff in a tort action alleges any injury or loss . . . resulting from exposure to asbestos . . . the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.” RC 2307.96(A).

The second proposition of law, embodied in the syllabus of *Horton* at two (2), states, “A plaintiff need not prove that he was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a substantial factor in causing his injury.” *Horton*, syllabus 2. This proposition of law was modified by RC 2307.96 which now requires the trier of fact to consider a four-factor test in determining whether or not exposure to a particular defendant’s asbestos “. . . was a substantial factor in causing plaintiff’s injury or loss . . .” RC 2307.96(B)(1-4).

Quite simply, the gravamen of Goulds’ pump defense is two-fold: first, Goulds argues that Kellogg cannot prove that he “was exposed to a product manufactured by Goulds,” and second, that any exposure that Kellogg may have suffered by a Goulds product was not “a substantial factor in causing [his] mesothelioma and death.”

These arguments are not well-taken.

First, contra Goulds’ assertion, there is evidence in the record that Kellogg was exposed to Goulds pumps and that these pumps contained asbestos. At multiple times throughout his deposition, Kellogg testified that he was aware of the presence of Goulds’ pumps:

A. Yeah, well, like we talked about, the Worthington pumps, **Gould** pumps. (Kellogg deposition, Pg. 219, Lns. 19-20, emphasis added.)

* * *

A. That not too side – not too far out of sight of the control room, I’am pretty sure there was two little pumps, and they were possibly **Gould**. (*Id.* at Pg. 233, Lns. 5-7, emphasis added.)

* * *



A. More times than not they would have brought the brand, piece of – replacing equipment, so if it was a **Goulds** pump, they would try to buy packing sets for that particular **Goulds** pump.

(*Id.* at Pg. 236, Lns. 6-9, emphasis added.)

* * *

Moreover, CEI produced a series of documents in response to Kellogg's discovery requests that identify five (5) Goulds brand pumps including the "Filter Backwash," "Cation Feed," "Anion Feed (Degasifier)," "M.B. Feed (Regeneration)," and, "Spare Cation or Anion Feed," all in use at CEI's facility. (See Exhibit "12," Appendix 1. "Tabulation of Equipment – Lake Shore Unit #18, Pg. -x-.")

In addition, Plaintiff's industrial hygiene expert, Steven Paskal ("Paskal"), opined that Kellogg was subject to numerous asbestos exposures "while working at CEI." (See Affidavit of Steven Paskal.) And, that Kellogg ". . . had substantial exposures to numerous asbestos-containing products while performing his duties at CEI[,] including exposure to ". . . boilers, turbines, valves, **pumps**, and other devices." (*Id.* Emphasis added.)

The sworn testimony by Kellogg and Affidavit by Paskal are uncontroverted by any evidence or testimony posited by Goulds. Accordingly, Goulds has not satisfied its affirmative burden of setting forth specific facts, or lack thereof, that demonstrate the absence of a "genuine triable issue." *State ex rel. Zimmerman, supra.*

Regarding Goulds second proposition of law, that if Kellogg was in fact exposed to an asbestos-containing product it manufactured, the exposure was not a substantial factor in causing his mesothelioma and death.

This argument, whether true or not, is of no matter. As urged by Kellogg, RC 2307.96 lays-out a four (4) part analysis to determine ". . . whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss . . ." RC 2307.96(B). Significantly, the statute places on ". . . **the trier of fact** . . ." not the court, the duty to make this determination. *Id.*

Accordingly, in a case such as this, where the plaintiff has produced uncontroverted evidence that he was exposed to a product containing asbestos during his employment, whether or not that exposure was a "substantial factor" in causing his injury or loss is a question of fact for the jury (or court) and is inapposite for summary disposition.



CONCLUSION

After review of the pleadings, Affidavits, depositions, and other Civ. R 56(E) materials, and consideration of the relevant statutes and case law supplied by the parties, the Court finds that there are genuine issues of material fact in dispute and that summary judgment must be denied.

Case set for telephonic Case Management Conference on **Tuesday, December 12, 2017 @ 1:30 p.m.** Plaintiff shall initiate the teleconference with opposing counsel for the remaining parties on the line at 440-329-5425.

IT IS SO ORDERED.

JUDGE D. Chris Cook