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

IN RE ASBESTOS LITIGATION:	)	
	)	
ROBERT MCGHEE	)	C.A. No. N10C-12-114 ASB
	)	
Limited to: SPX Cooling	)	

ORDER

Plaintiffs allege exposure to asbestos from several manufacturers' products caused Robert McGhee to develop mesothelioma. Defendant, SPX Cooling formerly known as Marley Cooling Technologies Inc., moved for summary judgment based on North Carolina's improvement to real property statute of repose, superseding negligence, and punitive damages. For the reasoning explained below, summary judgment is **DENIED.**

STATUTE OF REPOSE ANALYSIS

Defendant argues the improvement to real property statute of repose[1] bars Plaintiffs claims. Plaintiffs counter that case law carves a latent disease exception out of the statute. While courts have found a latent disease exception for the *product liability* statute of repose, no court has determined whether a latent disease exception exists for the improvement to real property statute of repose.

[1] N.C.G.S.A. §1-50.

The North Carolina Supreme Court in *Wilder v. Amatex Corporation*[2] recognized that latent disease cases are different from other kinds of injuries when considering procedural limitations.[3] The court explained "[b]oth the Court and the legislature have long been cognizant of the difference between diseases on the one hand and other kinds of injury on the other from the standpoint of identifying legally relevant time periods."[4] Applying the *Wilder* decision to the North Carolina product liability statute of repose, several federal courts have found a latent disease exception to that statute of repose.

Whether a latent disease exception applied to the product liability statute of repose was first considered in *Gardner v. Asbestos Corporation, Ltd.*[5] The court held that the product liability statute of repose did not apply to diseases[6], reasoning that the *Wilder* decision made clear "the State Supreme Court does not consider disease to be included within a statute of repose directed at personal injury claims unless the Legislature expressly expands the language to include it."[7]

Shortly thereafter, the Fourth Circuit applying North Carolina law came to the same conclusion in three unanimous decisions.[8] More

---

[2] 336 S.E.2d 66 (N.C. 1985).
[3] *Id.* at 71 (noting the court was not addressing a statute of repose).
[4] *Id.*
[5] 634 F.Supp. 609 (W.D.N.C. 1986) (analyzing a former version of the statute in which the only difference from the current statute is the number of years for which the statute takes to run).
[6] *Id.* at 613.
[7] *Id.* at 612.
[8] *See Burnette v. Nicolet, Inc*, 818 F.2d 1098 (4th Cir. 1986); *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30 (4th Cir. 1986); *Silver v. Johns-Manville Corp.*, 789 F.2d 1078 (4th Cir. 1986).

recently Judge Robeno came to the same conclusion applying North Carolina law.[9] The court is aware of a contrary decision from the Northern District of Indiana in *Klien v. Depuy, Inc.*[10] Nonetheless the court is persuaded by the majority of decisions on this issue—that is that there is a latent disease exception to the product liability statute of repose.

The remaining question is whether this analysis of the product liability statute of repose applies to the improvement to real property statute of repose. "In construing statutes, '[i]t is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law."[11] The *Gardner* court's reasoning that "the State Supreme Court does not consider disease to be included within a statute of repose directed at personal injury claims unless the Legislature expressly expands the language to include it"[12] applies equally to this statute. After the aforementioned decisions recognizing a latent disease exception, the legislature has amended this statute five times and made no attempt to address the common law latent disease exception. Moreover, in the legislature's most recent amendment the bill stated "[n]othing in this act is intended to change existing law relating to product liability actions based upon disease."[13] Therefore, it appears to

[9] *See Brackett v. Abex Corp.*, 2011 WL 4907749 (E.D.Penn.) (ORDER) (analyzing the current version of the statute).
[10] 476 F.Supp.2d 1007 (N.D.Ind. 2007).
[11] *Wilder*, 336 S.E.2d at 73 (quoting *State v. Benton*, 174 S.E.2d 793, 804 (1970)).
[12] *Gardner*, 634 F.Supp. at 612.
[13] N.C.G.S.A. §1-50 (commentary quoting S.L. 2009-420 §3).

the legislature intended that the common law exception apply to the improvement to real property statute of repose. Accordingly, the court finds a latent disease exception exists to the improvement to statute of repose and summary judgment is therefore **DENIED.**

SUPERSEDING NEGLIGENCE

Defendant also moves for summary judgment because it argues that General Electric's disregard of OSHA guidelines was a superseding negligence and therefore it is entitled to summary judgment as a matter of law. Defendant correctly asserts the North Carolina Supreme Court has recognized the proposition that superseding negligence can be found as a matter of law.[14] However in that case the Supreme Court was reviewing a directed verdict, not a summary judgment decision.

Defendant directs the court to one decision for the proposition that such a motion can be granted at summary judgment.[15] The court allowed for this possibility under limited circumstances:

> Since proximate cause is an inference of fact . . . [i]t is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. The question of intervening and concurring negligence is also ordinarily for the jury. Only if the court is able to determine from the undisputed facts that the defendants' negligence was remote, and not a proximate cause of the injury, does the question become one of law for the court.[16]

---

[14] *See Adams v. Mills*, 322 S.E. 2d 164, 172-73 (N.C. 1984).
[15] *See Hester v. Miller*, 255 S.E.2d 318, 321 (N.C. App. 1979).
[16] *Id.* at 321 (internal citations and quotation marks omitted).

In *Hester* the appeals court actually reserved the granting of summary judgment because there was a genuine issue of material fact as to proximate cause.[17] Turning to the instant case, the court at this stage cannot determine proximate cause as a matter of law because the facts are in dispute and therefore the court cannot find as a matter of law that Defendant's alleged negligence was remote and General Electric's negligence superseded it. Accordingly, summary judgment is **DENIED** as to superseding negligence.

PUNITIVE DAMAGES

Plaintiffs have established that there is a genuine issue of material fact as to whether Defendant acted willfully and wantonly. Therefore summary judgment is **DENIED** as to punitive damages.

IT IS SO ORDERED.

_____
John A. Parkins, Jr.
Superior Court Judge

Dated: May 16, 2012

oc: Prothonotary
cc: All counsel via e-file

[17] *Id.*