

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

IN RE: ASBESTOS LITIGATION :
 :
 :
Limited to: :
Newman, Aaron :
 C.A. No. 10C-03-173 ASB

**UPON DEFENDANT AVOCET ENTERPRISE, INC.’S
MOTION FOR SUMMARY JUDGMENT
DENIED IN PART and MOOT IN PART**

This 15th day of March, 2011, it appears to the Court that:

Plaintiffs Aaron and Nancy Newman brought this personal injury action against various manufacturers and suppliers of allegedly asbestos-containing products, claiming that the defendants’ products caused Aaron Newman (“Newman”) to contract mesothelioma. Defendant Avocet Enterprises, Inc. (“Avocet”) has moved for summary judgment. By its motion, Avocet claims that Plaintiffs cannot establish any causal nexus between its products and Newman’s mesothelioma.

Upon review of the parties’ filings and the record, the Court concludes that summary judgment in Avocet’s favor would be inappropriate based upon Newman’s deposition testimony regarding his use of Avocet’s Ventbestos product. Newman’s testimony that he worked directly with Ventbestos “all the time” and “[a]ll through the years” from the time he was seventeen until the early 1980s, that he recalled the Ventbestos product as asbestos-containing, and that he used

Ventbestos in applications for which he considered asbestos appropriate,¹ suffices to create a genuine factual dispute as to causation. Under Georgia law, the plaintiff in an asbestos-exposure action must show that a particular defendant's product was "a contributing factor in bringing about the plaintiff's damages," which requires the plaintiff to establish that he was in proximity to the use of the defendant's asbestos-containing product.² Where a plaintiff offers evidence of product identification and proximity, as well as expert testimony supporting that his exposure to a particular defendant's product was a contributing factor to his injury, Georgia's causation standard does not require the plaintiff to recall a specific time, job, or incident during which he used the defendant's product.³

Furthermore, Avocet's failure to state in its motion that Georgia substantive law applied to this case, and its concomitant omission of Georgia authority from its opening brief, would provide an independent basis for denial of summary judgment. Causation is an element of the plaintiffs' claims, and thus a substantive

¹ Aaron K. Newman, Jr., Dep. Tr., May 4, 2010, at 25:22-24; 17:5-8. Avocet has disputed the admissibility of additional testimony from product identification witness Thomas Cooler, on the basis that Cooler's testimony about Avocet products was elicited by leading questions. Because Newman's testimony is admissible and more than adequate to raise a genuine factual dispute, the Court will not address the admissibility of Cooler's statements at this time.

² *John Crane, Inc. v. Jones*, 604 S.E.2d 822, 824-26 (Ga. 2004).

³ Avocet also states in its motion that Plaintiffs have failed to produce evidence as to strict liability, negligent and/or intentional conduct, and willful and wanton conduct. This "argument" is offered in a wholly conclusory fashion, and will not be considered at this stage in the case, particularly in view of Avocet's production of asbestos-containing products during the time period relevant to Plaintiffs' claims.

issue. Delaware procedural law, which Avocet correctly relied upon, places a burden upon the party seeking summary judgment to demonstrate that it is “entitled to a judgment as a matter of law.”⁴ That burden cannot be met where the moving party entirely ignores relevant authorities from the jurisdiction whose substantive law controls in favor of another jurisdiction’s more favorable standards.

Because Plaintiffs have withdrawn their claim of conspiracy against Avocet, the motion for summary judgment is **MOOT IN PART** as to the conspiracy allegation. For the foregoing reasons, summary judgment is **DENIED IN PART** as to Plaintiffs’ remaining claims.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve

⁴ Def. Avocet’s Mot. for Summ. J. 3 (quoting Del. Super. Ct. Civ. R. 56(c)).