

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

IN RE ASBESTOS LITIGATION:)

Donald Bruce)

Limited to: Pneumo Abex, LLC)

C.A. No. N10C-01-196 ASB

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, JR., JUDGE

Plaintiff alleges that he was exposed to asbestos while working in a variety of jobs during his career. Relevant to this motion is his time spent working at three gas stations in the 1960's, when Plaintiff alleges, he was exposed to asbestos dust from Defendant's brakes at those stations. Defendant, Pneumo Abex, LLC ("Abex"), argues there is no evidence in the record that Plaintiff was exposed to asbestos from Abex brakes and, even if he was, it was not to a sufficient degree to survive summary judgment under Massachusetts law. The question before the court is whether a reasonable jury could find that Plaintiff was exposed to Defendant's asbestos containing products sufficient to meet the Massachusetts' standard. For the reasons set forth in the opinion, the motion for summary judgment is **DENIED**.

FACTS

Between 1966-1968 Plaintiff worked at three service stations in Massachusetts as an attendant and mechanics' assistant. For at a least six month period Plaintiff worked at two Shell stations, Church's and Forbes, where he assisted mechanics. Specifically relevant to this motion, Plaintiff assisted in the installation of brakes and the clean up of the work areas afterwards.

In depositions Plaintiff's testimony varied as to how often he assisted in brake changes at the Shell stations. When initially deposed by his counsel, Plaintiff testified mechanics performed about three brake jobs a day while he

was present.¹ In his discovery deposition his testimony morphed upon questioning from different attorneys. He initially testified that he assisted in approximately twenty to twenty-five brake jobs a week.² Later he stated he assisted in approximately ten brake jobs a week.³ Still later he agreed with a question stating that he assisted with approximately two to three brakes jobs per week.⁴ The testimony of three brake jobs a day is consistent with ten or more brake jobs a week for someone working part-time as Plaintiff did. In taking the testimony in the light most favorable to Plaintiff, as the court must do at this stage, the court finds that Plaintiff assisted in at least ten brake jobs a week over this six month stretch. Counsel has not presented the court with any evidence in the record that Plaintiff recanted his earlier testimony when he agreed with the two to three brake jobs a week number or that he was presented with the varied testimony and given a chance to clear it up.

Plaintiff identified three brake manufactures used at the Shell stations. He recalled using Bendix, Napa, and Abex brakes.⁵ When asked to explain how he recalled the name Abex, Plaintiff responded, “I just remember seeing it on the box.”⁶ He was then asked, “Do you recall how often you saw the name on a box” and he responded, “A few different times.”⁷ The court inquired during oral argument if there was any follow up on what a few different times meant and counsel informed the court there was not.

¹ Bruce Trial Deposition, April 29, 2010, 22:4-6.

² Bruce Discovery Deposition, April 29, 2010, at 117:11-14.

³ *Id.* at 157:3-5.

⁴ *Id.* at 213:5-10.

⁵ Bruce Trial Deposition, April 29, 2010, 21:16-19.

⁶ Bruce Discovery Deposition, April 29, 2010, at 152:12-13.

⁷ *Id.* at 152-16-18.

It is not in dispute that Abex brakes contained asbestos during the time period at issue or that the type of work Plaintiff did with brakes exposed him to dust. Plaintiff testified that he scuffed up the brakes resulting in dust. He also testified to being exposed to dust during the installation process. Moreover Plaintiff testified it was his job to sweep up after the mechanics were done for the day exposing him to the dust from the ground. This motion turns on whether there is evidence the dust in question came from Abex brakes to a sufficient amount.

Analysis

The seminal Massachusetts case on asbestos product identification is *Welch v. Keene, Corp.*, which both parties cited.⁸ Post briefing, but pre argument in this motion, the Massachusetts Appeals Court applied *Welch* to a summary judgment motion. The Court explained,

To prove causation in an asbestos case, the plaintiff must establish (1) that the defendant's product contained asbestos (product identification), (2) that the victim was exposed to the asbestos in defendant's product (exposure), and (3) that such exposure was a substantial contributing factor in causing harm to the victim (substantial factor).⁹

Defendant's motion focuses on the second prong of this test.

The first issue before the court is whether there is sufficient evidence for the court, on a motion for summary judgment, to conclude that a reasonable trier of fact could find that Plaintiff was exposed to asbestos from Abex brakes

⁸ 575 N.E.2d 766 (Mass. App. 1991).

⁹ *Morin v. Autozone Northeast, Inc.*, 943 N.E.2d 495, 499 (Mass. App. Ct. 2011) (citing *Welch*, 575 N.E.2d at 769).

while working at the Shell stations. “It is enough . . . to reach the jury that [Plaintiff] show that [he] worked with, or in close proximity to, the defendants’ asbestos products.”¹⁰ Plaintiff testified that Abex was one of three brake manufacturers that he recalled assisting with at the Shell stations. He testified that he scuffed brakes, assisted with installation, and cleaned up after installation. All of which he claims exposed him to asbestos dust. A reasonable trier of fact could find Plaintiff was exposed to asbestos from Abex brakes and he worked with or in close proximity to them.

The court next must determine whether the exposure to Abex’s brakes was of a degree that it satisfies Massachusetts’ exposure standard. The *Morin* court further clarified, “[P]laintiff must produce evidence of a degree of exposure greater than ‘insignificant or de minimis.’”¹¹ Defendant argued Plaintiff’s reference to seeing Abex boxes a few times meant that he was only exposed to asbestos from Abex brakes a few times and that was insufficient under the Massachusetts’ standard. However, the evidence in the record is not that clear. Plaintiff testified to assisting in hundreds of brake jobs and Abex being one of three brakes used in the stations. There is no evidence of the use of those three manufacturer’s brakes in percentage terms. Viewing the facts in the light most favorable to Plaintiff, a reasonable trier of fact could conclude Plaintiff worked with Abex brakes more than a few times and that he was further exposed to the asbestos dust of Abex brakes during the clean up

¹⁰ *Morin*, 943 N.E.2d at 502 (quoting *Welch*, 575 N.E.2d at 769) (citing *Roehling v. National Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225, 1228 (4th Cir. 1986)).

¹¹ *Morin*, 943 N.E.2d at 499-500 (quoting *Welch*, 575 N.E.2d at 770).

process even for brakes he did not assist with installing. This is more than *de minimis*.

In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant summary judgment when “the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.”¹² For purposes of summary judgment, Plaintiff has shown he was exposed to asbestos dust from Defendant’s brakes to a sufficient amount to meet the Massachusetts’ standard. Accordingly, Defendant’s motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

Dated: February 21, 2012

Judge John A. Parkins, Jr.

¹² *Bantum v. New Castle County Co-Tech Educ. Ass’n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).