

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

CARLTON L. SMITH and LUCILLE SMITH,) ASBESTOS
)
) C.A. No.: N12C-06-286 ASB
Plaintiffs,)
)
v.)
)
ADVANCED AUTO PARTS, INC., et al.,) TRIAL BY JURY OF TWELVE
) DEMANDED
Defendants.)

Submitted: July 8, 2013
Decided: January 24, 2014

Upon Defendant Western Auto Supply Company’s Motion for Summary Judgment
GRANTED

Kara Hager, Esquire, Napoli Bern Ripka Shkolnik LLP, Wilmington, Delaware, *Attorney for Plaintiffs Carlton L. Smith and Lucille Smith.*

Peter J. Faben, Esquire, Wilbraham, Lawler & Buba, Wilmington, Delaware, *Attorney for Defendant Western Auto Supply Company.*

DAVIS, J.

INTRODUCTION

This is a products liability action brought by Plaintiffs Carlton and Lucille Smith against multiple defendants including Defendant Western Auto Supply Company (“Western Auto”). The Complaint contends that Mr. Smith was exposed to asbestos-containing automotive parts including engines, gaskets, brakes and/or clutches while performing shadetree automotive work from 1966 to 2006. Western Auto is an automotive parts retailer. The Smiths allege that Mr. Smith was exposed to asbestos-containing products that he purchased at a Western Auto store

while performing personal automotive work and developed lung cancer as a result of this exposure.

Unrelated to the claims against Western Auto, the Complaint also alleges occupational exposure while Mr. Smith was working as welder for Bakers Equipment from 1966 to 1968, as a laborer for Shipment Rittmen from 1968 to 1970 and as a welder for Stanley Smith & Sons from 1970 to 1995. For the reasons stated in this Opinion, Defendant Western Auto's Motion for Summary Judgment is **GRANTED**.

PROCEDURAL BACKGROUND

Mr. and Ms. Smith filed the Complaint on June 6, 2013. Western Auto filed its response on April 9, 2013. On April 11, 2013, this Court determined that the South Carolina substantive law governed this case. Western Auto filed their Motion for Summary Judgment on June 3, 2013. The Smiths filed a Brief in Opposition to the Motion on June, 24, 2013. Western Auto filed a Reply Brief supporting its Motion on July, 8 2013.

The Motion was scheduled to be heard on October 22, 2013; however, the parties agreed to have the Motion rescheduled due to an overabundance of asbestos motions to be heard on that date. The Court heard oral arguments on the Motion on October 29, 2013. At the conclusion of the hearing on the Motion, the Court took the matter under advisement.

FACTUAL BACKGROUND

In a deposition taken on October 3, 2012, Mr. Smith stated that he purchased automotive parts at a Western Auto store.¹ After explaining that the brands of brakes he would install were “[p]robably Bosch and Bendix,”² Mr. Smith stated that he would usually get them at NAPA or

¹ After oral arguments the parties provided a complete version of the Discovery Deposition of Carlton Smith taken on October 3, 2012. The Deposition was in two documents: a 45 page transcript (hereinafter Deposition 1) and a 236 page transcript (hereinafter Deposition 2).

² Deposition 1 at 31:21-23.

Western Auto.³ Then, after discussing that he worked with Mr. Gasket and Victor gaskets, Mr. Smith testified that he would buy those gaskets from “Standard Parts and Western Auto.”⁴

Mr. Smith also mentioned a number of other automotive part stores in his deposition. In fact, at numerous points in his deposition Mr. Smith was asked to name all of the automotive parts stores he made purchases at and failed to mention Western Auto:

Q. Have you told us today about all the retailers from whom you purchased parts for use on vehicles?

A. Well, through the years I have purchased from Auto Zone, Advanced Auto, and that’s – that’s pretty much - - and Standard Parts.

Q. So those are the only places? There is nothing else?

A. That’s pretty much it. Usually you’re going to pick one of the three of those.⁵

Q. All right. Are there any other stores at which you purchased friction products besides Auto Zone? Any other stores besides Auto Zone?

A. Yeah.

Q. I think you have answered this before.

A. Yeah. Advanced Auto and Standard Parts.⁶

Q. All right. Do you remember where you purchased the Victor gasket kits?

A. Standard Parts, Advance and Auto Zone.⁷

Later, Mr. Smith was asked about his purchases more specifically. Mr. Smith stated that he could not recall the first or last time he made a purchase from Western Auto.⁸ Mr. Smith further stated that he could not recall any specific purchases from Western Auto of brake pads or shoes, clutches, or gaskets.⁹

PARTIES’ CONTENTIONS

Western Auto contends that the Smiths have failed to establish that Mr. Smith was exposed to a specific asbestos-containing product, sold by Western Auto, on a regular basis.

³ *Id.* at 32:3-5.

⁴ *Id.* at 37:1-19.

⁵ *Id.* at 130:20-131:4.

⁶ *Id.* at 172:24-173:4.

⁷ *Id.* at 158:1-3.

⁸ Deposition 2 at 228:3-7.

⁹ *Id.* at 228:8-14.

Western Auto points out that, in his deposition, Mr. Smith did not recall purchasing a brake, clutch or gasket from Western Auto. Western Auto argues that Mr. Smith did, however, identify other suppliers from which he bought automotive parts. Further, Western Auto points out that Mr. Smith stated that he usually went to one of three stores to purchase automotive parts, none of which were a Western Auto store.

Western Auto argues that although Mr. Smith stated that he performed 40-50 brake jobs throughout his lifetime, he did not establish that those brake jobs were performed using brakes purchased from Western Auto. Likewise, Western Auto argues that although Mr. Smith mentioned performing gasket work once a week, he did not show that the gaskets he used were purchased at a Western Auto, as opposed to another automotive parts store. Western Auto avers that Mr. Smith has not shown even one purchase of brakes or gaskets from a Western Auto Store. Further, Western Auto maintains that it did not sell brakes manufactured or supplied by Bosch and Bendix nor Mr. Gasket and Victor gaskets, during the relevant time period.

The Smiths argue that Western Auto has not provided any evidence that the brakes, clutches and gaskets it supplied did not contain asbestos. The Smiths therefore contend that, at the very least, there remains a triable issue of material fact as to whether or not Western Auto products contained asbestos. The Smiths also assert that their claims meet South Carolina's causation requirements. The Smiths argue that Mr. Smith's testimony that he performed 40-50 brake jobs throughout his lifetime meets the frequency requirement of South Carolina Law. Likewise, the Smith's argue that Mr. Smith's testimony that he performed gasket work once a week meets the frequency requirement as well. The Smiths maintain that, viewing the evidence in the light most favorable to the non-moving party, there is sufficient evidence to show that

exposure to asbestos-containing products from Western Auto was a substantial contributing factor to Mr. Smith's lung cancer.

STANDARD OF REVIEW

The Court may grant a motion for summary judgment made pursuant to Superior Court Civil Rule 56 where the movant can show from the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, that no material issues of fact exist so that the movant is entitled judgment as a matter of law.¹⁰ In considering a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party.¹¹ The Court should deny summary judgment where, “a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”¹²

However, to survive summary judgment, a plaintiff's claim must be based on more than mere speculation. “The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based.”¹³ An inference cannot be based on “surmise, speculation, conjecture, or guess, or on imagination or supposition.”¹⁴

In an asbestos cause of action, to establish proximate causation, “the plaintiff must introduce evidence which allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.”¹⁵ In

Lohrmann v. Pittsburgh Corning Corp., the court applied a standard for evaluating the

¹⁰ Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹¹ *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

¹² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

¹³ *In re Asbestos Litig.*, C.A. No. N10C-12-011 ASB, 2012 WL 1408982 at *2 (Del. Super. Apr. 2, 2012) (quoting *In re Asbestos Litig.*, CIV.A. 01C-11-239, 2007 WL 1651968 at *16 (Del. Super. May 31, 2007)).

¹⁴ *In re Asbestos Litig.*, C.A. No. N10C-12-011 ASB, 2012 WL 1408982 at *2 (Del. Super. Apr. 2, 2012) (quoting *In re Asbestos Litig.*, CIV.A. 01C-11-239, 2007 WL 1651968 at *16 (Del. Super. May 31, 2007)).

¹⁵ *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986).

sufficiency of evidence of exposure in asbestos litigation. “To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.”¹⁶

In *Henderson v. Allied Signal, Inc.*, the South Carolina Supreme Court adopted the *Lohrmann* “frequency, regularity and proximity” test for determining whether exposure is actionable.¹⁷ As this is a *de minimis* rule “a plaintiff must prove more than a casual or minimum contact with the product.”¹⁸ A plaintiff must meet this standard in order to present the issue of causation to a jury or withstand summary judgment.

DISCUSSION

The Court holds that the Smiths’ claims against Western Auto are too speculative to survive summary judgment. Mr. Smith mentions Western Auto with respect to two types of automotive parts. Mr. Smith testified that he purchased Mr. Gasket and Victor gaskets at “Standard parts and Western Auto.”¹⁹ With regards to brakes Mr. Smith testified that he would “usually get them at NAPA or Western Auto.”²⁰ However, when Mr. Smith was later asked to name all of the retailers from which he purchased auto parts; Mr. Smith stated that he only purchased parts from three stores – Auto Zone, Advanced Auto and Standard Parts.²¹ Mr. Smith did not mention Western Auto at all.

Mr. Smith was asked to name any stores from which he bought friction products.²² Mr. Smith again named the same three parts stores, failing to mention Western Auto. Mr. Smith was

¹⁶ *Id.* at 1162-63.

¹⁷ *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007).

¹⁸ *Lohrmann*, 782 F.2d at 1162.

¹⁹ Deposition 1 at 37:7-24.

²⁰ Deposition 1 at 32:3-5.

²¹ *Id.* at 130:20-131:4.

²² *Id.* at 172:24-173:4.

also asked to recall any retailer from which he purchased Victor gaskets. For the third time, Mr. Smith mentioned the same three auto parts retailers and failed to name Western Auto.

Finally, Mr. Smith could not identify any purchases from Western Auto with any degree of certainty. Mr. Smith could not specifically recall purchasing any brake pads, clutches or gaskets from Western Auto.²³ Nor could Mr. Smith recall the first or last time he made a purchase from Western Auto.²⁴

The Smiths, to survive summary judgment, must base their claims against Western Auto on more than mere speculation. As stated above, the Court must decline to draw an inference for the Smiths if the record does not contain facts upon which the inference reasonably can be based. Moreover, the Court cannot base an inference on surmise, speculation, conjecture, or guess, or on imagination or supposition.

Based on the record, the Court holds that it cannot reasonably infer that Mr. Smith was exposed to a product purchased from Western Auto frequently and regularly enough to satisfy the *Lohrmann* standard. Mr. Smith indicated he primarily used three retailers when purchasing automotive parts. Mr. Smith did not indicate that he regularly purchased parts from Western Auto and in fact failed to mention Western Auto when asked to recall every store that he used to purchase automotive parts. The Court holds that it would be entirely speculative to infer that Mr. Smith purchased and worked with a specific product from Western Auto regularly and, further, that he was exposed to asbestos from that product on a regular and frequent basis. Therefore the Smiths claims against Western Auto cannot satisfy the *Lohrmann* standard.

²³ *Id.* at 228:8-14.

²⁴ Deposition 2 at 228:3-7.

CONCLUSION

Based on the above arguments, viewing the evidence in the light most favorable to the non-moving party, the Smiths have failed to present sufficient evidence to permit a jury finding that exposure to an asbestos-containing product attributable to Western Auto was a substantial cause of Mr. Smith's lung cancer. Therefore, Defendants Genuine Parts Company and National Automotive Parts Association's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Eric M. Davis

Eric M. Davis

Judge