Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Rebutting The 'But This Is Asbestos' Line In Pa.

*Law360, New York (March 03, 2015, 11:55 AM ET) --*

Michael L. Haslup

A party is entitled to summary judgment where there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. In order for a plaintiff to defeat a motion for summary judgment, he or she must present admissible evidence that there is a dispute as to a material fact that must be decided by the trier of fact. This fundamental standard is clear and well-known. The type of evidence needed to overcome a motion for summary judgment, however, is often far from obvious.

The general rules regarding summary judgment apply to all product liability cases, regardless of the product involved. However, courts have fashioned standards specific to toxic tort cases, and particularly asbestos litigation. Regardless of the standards developed in the context of asbestos cases, a plaintiff must still demonstrate with admissible evidence a dispute of material fact as to whether a defendant can be held liable for the plaintiff's alleged injuries. Co-worker affidavits are a vehicle commonly employed by plaintiffs to carry that burden. A recent decision from the Superior Court of Pennsylvania examined this practice and provided a helpful reminder and reinforcement of evidentiary principles that have equal application and importance in asbestos litigation as in any other civil litigation. See Krauss v. Trane U.S. Inc., 104 A.3d 556 (Pa. Super. Ct. 2014).

**Summary Judgment Standard in Asbestos Litigation**

Many jurisdictions have developed summary judgment standards specific to asbestos litigation. The standard is usually some variant of the well-known "frequency, regularity, proximity" standard first articulated by the Fourth Circuit in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (4th Cir. 1986). It acknowledges the challenges faced by plaintiffs and defendants in cases involving exposures that occurred, if at all, 30 or more years before trial. This standard, and the evidence offered to satisfy it, have arguably sometimes led to a departure from the required burden of proof in civil litigation. Traditional tort principles require that plaintiffs prove more than the mere fact that they were exposed to a risk; plaintiffs bear the burden of proving actual causation by a preponderance of the evidence.

The "frequency, regularity, proximity" test provides that when a plaintiff alleges multiple sources of

exposure to asbestos, the plaintiff must present evidence: (1) of exposure to a "specific product" attributable to the defendant; (2) "on a regular basis over some extended period of time"; (3) "in proximity to where the plaintiff actually worked"; and (4) such that it is probable that the exposure to the defendant's product caused plaintiff's injuries. Lohrmann, 782 F.2d at 1162-63. Pennsylvania adopted the "frequency, regularity, proximity" test in Eckenrod v. GAF Corp., 544 A.2d 50, 52 (Pa. Super. Ct. 1988) (In order to defeat a motion for summary judgment, "a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product."). Subsequent decisions from the Supreme Court of Pennsylvania have refined the standard.

In Gregg v. V-J Auto Parts, Company, 943 A.2d 216, 226 (Pa. 2007), the court adopted the approach utilized by the Seventh Circuit in Tragarz v. Keene Corp., 980 F.2d 411 (7th Cir. 1992). This approach calls for the test to be tailored to the facts and circumstances of the case and places less emphasis on certain prongs of the test where there is specific evidence of exposure to a defendant's product and/or medical evidence indicating that the plaintiff's disease can develop after only minor exposure. Gregg, 943 A.2d at 225. The Gregg court summarized its holding by explaining "we believe that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury." Id. at 227.

Additionally, in Betz v. Pneumo Abex LLC, 44 A.3d 27, 30 (Pa. 2012), the Supreme Court of Pennsylvania rejected the much-criticized "each and every exposure" theory of causation and affirmed the trial court's decision to preclude its use in asbestos cases. Subsequently, the Supreme Court of Pennsylvania indicated that the following principles apply to all asbestos cases involving a dose-responsive disease:

(1) the "theory that each and every exposure, no matter how small" is not viable to establish a defendant's liability; (2) proof of de minimus exposure to a product is insufficient to establish causation; (3) an expert must make "some reasoned, individualized assessment of a plaintiff's or decedent's exposure history" in opining about substantial-factor causation of the asbestos disease; and (4) summary judgment "is an available vehicle" for challenging de minimus exposure.

Howard v. A.W. Chesterton, Co., 78 A.3d 605, 608 (Pa. 2013) (per curiam) (Howard III).

**Krauss v. Trane**

In Krauss v. Trane U.S. Inc., 104 A.3d 556 (Pa. Super. Ct. 2014), the Superior Court of Pennsylvania further articulated the scope of evidence required to satisfy the "frequency, regularity, proximity" standard. Krauss is a products liability action brought by the deceased worker's estate against several manufacturers alleging asbestos exposure from those manufacturers' products. Krauss was employed in the bricklaying trade throughout Louisiana with various employers between 1978 and 1983. Because the decedent was not deposed before his death, the plaintiff relied on several sources of evidence, one of which was an affidavit submitted by the decedent's co-worker, Mike Morgan. The plaintiff attached Morgan's affidavit as "Exhibit A" to her responses to motions for summary judgment filed by several defendants, including Georgia-Pacific LLC; Foster Wheeler LLC; CBS Corporation (Westinghouse); Goulds Pumps Inc.; Zurn Industries and Trane US Inc. f/k/a American Standard. The affidavit in question provided as follows:

I, Mike Morgan, being first duly sworn, depose and state as follows:

1) I knew and worked with Henry (Hank) Krauss in the bricklaying trade.
2) I worked with Hank Krauss at numerous job sites, including Borden Chemical in Geismer, Louisiana, Kaiser Aluminum and Chemical Company in Baton Rouge Gramercy, Louisiana, Freeport Chemical Convent, Louisiana and AgraCo in Donaldsville, Louisiana between 1978 and 1983. Each of these jobs lasted approximately one week or longer.
3) At our job sites there were boilers manufactured by American Standard, Foster Wheeler and Zurn.
4) We worked at sites where there were turbines manufactured by General Electric and Westinghouse.
5) There were a number of products manufactured by Georgia[-]Pacific including joint compound and other adhesive products.
6) We used Kaiser Gypsum cement, particularly at the Kaiser Aluminum and Chemical plants.
7) I am familiar with Goulds Pumps. Their large industrial pumps were at some of the facilities where Hank Krauss and I worked.
8) All of the boilers, turbines and pumps were insulated with heat-resistant asbestos products to the best of my knowledge and belief.
9) The use of all the above-mentioned products created a great deal of visible dust. That dust got on our clothing, in our hair and in our lungs. We breathed in that dust and were never given any warning that the inhalation of asbestos fibers could be hazardous to our health.

Further, the Affiant sayeth not.

Krauss, 104 A.3d at 565-66.

The trial court granted each of the defendants' motions for summary judgment and the plaintiff appealed. With the principles of the "frequency, regularity, proximity" standard in mind, the Superior Court of Pennsylvania analyzed whether Morgan's affidavit was sufficient to defeat a motion for summary judgment. The plaintiff claimed that the affidavit was sufficient on its own to raise genuine issues of material fact concerning Krauss's frequent, regular, and proximate exposure to asbestos. Morgan was not offered as an expert witness and did not possess the requisite credentials to be qualified as such. See Krauss, 104 A.3d at 567-68. Therefore, the opinions offered in his affidavit, and in those of the vast majority of other co-worker affidavits, must be viewed with regard to the rules governing lay witness opinions. Rule 701 of the Pennsylvania Rules of Evidence governs the admissibility of opinion testimony by lay witnesses and provides as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) Rationally based on the witness's perception;
(b) Helpful to clearly understanding the witness's testimony or to determine a fact in issue; and
(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The Supreme Court of Pennsylvania has held that "the proponent of technical lay opinion testimony must show that the testimony is based on sufficient personal experience or the specialized knowledge of the witness [and] [w]ithout meeting the requirements of Rule 701, the lay opinion is not 'rationally based on the perception of the witness' or truly 'helpful' to the jury." Gibson v. Workers' Comp. Appeal Bd. (Armco Stainless & Alloy Prods.), 861 A.2d 938, 945 (Pa. 2004). In Krauss, the court noted that Morgan's affidavit provided no

specific evidence that Krauss was exposed to a product manufactured by a particular manufacturer at a particular worksite. Krauss, 104 A.3d at 566-67. The affidavit also failed to establish with any certainty that the products described in the affidavit contained asbestos and provided "no **specific evidence** upon which he based his determination that these boilers, turbines, and pumps were insulated with asbestos products." Id. at 567 (emphasis in original).

The court ultimately found that Morgan's statements in his affidavit that the products at issue contained asbestos were not based on his actual knowledge, as is required by Pa.R.E. 701 and relevant case law. "Instead, Mr. Morgan's affidavit reflects only his presumption and belief that these multiple products contained asbestos. Such statements are insufficient to show that there exists a genuine issue of fact as to the existence of asbestos in these products." Id. at 568. A jury must rely on competent evidence to find in the plaintiff's favor. Speculative statements are not competent evidence, and summary judgment is appropriate when "mere speculation would be required for the jury to find in plaintiff's favor." Id. In Krauss, the court found that Morgan's affidavit was "based solely on speculation and conjecture," and therefore provided an insufficient basis to survive summary judgment. Id.

In addition to Morgan's lack of foundation, the Krauss court rejected the affidavit for its failure to satisfy the "frequency, regularity, proximity" standard. Morgan did not identify the length of time that he and Krauss were exposed to the alleged asbestos-containing products, but rather stated generally that each job lasted "approximately one week or longer." Krauss, 104 A.3d at 568. The affidavit also did not identify the proximity to the alleged asbestos-containing products with which Krauss worked. Accordingly, the court concluded that the affidavit failed to establish the required causal connection between Krauss' disease and any of the individual manufacturer's products and therefore did not create a genuine issue of material fact precluding the entry of summary judgment. Id.

**Application to Future Cases**

The Krauss decision is significant in that it reaffirms that traditional legal principles apply to asbestos cases, notwithstanding the application of a unique "frequency, regularity, proximity" standard to motions for summary judgment. In cases where a plaintiff alleges injury after exposure to asbestos from multiple products, a defendant may only be held liable if the plaintiff proves by a preponderance of the evidence that exposure to that specific defendant's product was a "substantial factor" in causing the plaintiff's injury. Krauss serves as a reminder to practitioners that the speculative nature of many co-worker affidavits may make them unreliable, and thus inadmissible in opposition to a motion for summary judgment. Permitting such affidavits to defeat summary judgment could result in exactly the jury speculation that summary judgment is designed to avoid. If such affidavits were permitted in asbestos cases, the bounds of potential liability may be far-ranging. The Krauss decision provides a useful framework for exclusion of similar affidavits in other jurisdictions across the country that utilize these common summary judgment and evidentiary standards.

—By Michael L. Haslup and Kevin J. Penhallegon, Miles & Stockbridge PC

*Michael Haslup is a principal and Kevin Penhallegon is an associate in Miles & Stockbridge's Baltimore office.*