IN RE: PERSONAL INJURY	*	**IN THE**
AND WRONGFUL DEATH	*	**CIRCUIT COURT**
ASBESTOS LITIGATION	*	**FOR BALTIMORE CITY**
* * * * * * * * * * * * *		
ROBERT BLAKE, *et al.*,	*	**JULY 10, 2018 MESOTHELIOMA**
Plaintiffs	*	**TRIAL CLUSTER (M184)**
v.	*	**CONSOLIDATED CASE NO.**
ACandS, INC., *et al.*	*	**24X17000372**
Defendants	*	
* * * * * * * * * * * * *		
CASE AFFECTED:		
ROLAND EIBL	*	**CASE NO.: 24X17000226**
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DECISION AND ORDER

Pending before the Court are the dismissal motions of Defendants General Electric and Campbell McCormick invoking Maryland's statute of repose, Md. Code Ann., Cts. & Jud. Proc. § 5-108. Defendants would bar Plaintiff Eibl's claim for personal injury damages accrued upon his 2017 diagnosis of pleural mesothelioma. The Court has considered those arguments with the instruction of the Court of Appeals in *Duffy v. CBS Corp.*, 458 Md. 206, 182 A.3d 166 (2018), Plaintiffs' pleadings (TID 60669272, 60826234, 60995096) and the parties' motion papers, with exhibits, including: General Electric's Motion for Summary Judgment (TID 61203832), Plaintiff

Eibl's Opposition (TID 61293834), General Electric's Reply (TID 61317935), General Electric's Supplemental Reply (TID 61878417), Plaintiff's Supplemental Opposition (TID 61979714), General Electric's further Reply (TID 62006219); and Defendant Campbell McCormick's Motion to Dismiss (TID 61060753), Plaintiff's Opposition (TID 61146811), Campbell McCormick's Reply (TID 61181373), and Plaintiff's Supplemental Opposition (TID 62030456). The Court heard oral arguments on May 29, 2018.

Upon determining, in the circumstances described below and as matters of undisputed fact,[1] that Plaintiff Eibl's personal injury arose at the time alleged as his last exposure to asbestos-containing products at Turbine-Generator Unit 1, Calvert Cliffs Nuclear Plant in October 1974, and applying the clear and unequivocal statutory language of § 5-108(a), the Court will deny Defendants' Motions in pertinent part. Md. Code Ann., Cts. & Jud. Proc. § 5-108. Plaintiff's personal injury claims are not barred by the statute of repose as revised in 1973 and effective at the time of Plaintiff Eibl's last exposure in 1974. The Court also finds no need to consider retroactive application of § 5-108(b) (effective July 1, 1979 as to architects or engineers; effective July 1, 1980 as to contractors), or §5-108(d)(2)(ii) (effective July 1, 1991 as to certain asbestos manufacturers or suppliers).

1. Plaintiff Eibl allegedly was exposed to asbestos while working as a painter at Calvert Cliffs Nuclear Plant (Unit 1) between 1971 and October 1974, causing his pleural mesothelioma diagnosed on February 28, 2017. Plaintiff claims personal injury damages on theories of strict liability and negligence (especially failure to warn) against Defendants General Electric and Campbell McCormick. (Short Form Complaint, TID 60669272).

[1] The Court treated both motions as motions for summary judgment after allowance for discovery and opportunity for briefing pertinent to motions according to Rule 2-501. *See* Rule 2-322(c).

2. Defendant General Electric allegedly manufactured, sold and supplied asbestos-containing products, including asbestos thermal insulation, incorporated into its steam turbine installed at BGE's Calvert Cliffs Nuclear Plant in the early 1970's. (*E.g.*, Second Amended Short Form Complaint at ¶66, TID 61606649).
3. Defendant Campbell-McCormick allegedly sold, distributed, supplied and installed asbestos-containing products, including thermal insulation products at Calvert Cliffs Nuclear Plant from February 1971 through 1974. (*Id*. at ¶¶65, 65-B).
4. On or about July 1969, General Electric contracted with Baltimore Gas and Electric Company (BGE) to manufacture, deliver, and provide technical direction of installation of a steam turbine and generator unit, the "Turbine-Generator Unit No. 1" at the Calvert Cliffs Nuclear Power Plant, with accessories. The contracting parties anticipated General Electric's shipment on and after May 1971 and installation as an improvement to the BGE real property and power plant at Calvert Cliffs. ("Contract Proposal and Specifications" attached as Exhibit 5 to Plaintiff's opposition, TID 61293834). Standard Turbine Accessories were included in the base price of $24 Million, e.g., 'heat-retention material, in accordance with factory specification, consisting of . . . plastic insulating cement and/or block insulation . . . where required . . . . Preformed segmental pipe insulation . . . .' *See also* General Electric's 'General Specifications for Heat Retention Material' (Exhibit 6 to Plaintiff's Opposition, TID 61293834).
5. As of April 1973, the Bechtel Power Corporation subcontract with Campbell-McCormick, Inc. informed the fabrication and application of 'Thermal Insulation supplied by General Electric in strict accordance with Bechtel documents and General Electric specifications for installing insulations in Unit 1. (Exhibit 9 to Plaintiff's

Opposition, TID 61293834). Heat retention materials for installation by Campbell-McCormick were furnished according to specification by, e.g., Johns-Manville Sales Corporation and Eastern Refractories (General Electric Reply, Exhibits 1, 2, 4, TID 61317935).

6. General Electric's entire turbine-generator installation at Calvert Cliffs is an improvement to real property, without distinction or exclusion of the heat retention materials, thermal insulation, and other accessories installed or affixed during construction. *See, e.g., Burns v. Bechtel*, 212 Md. App. 237, 247, *cert. denied*, 434 Md. 312 (2013); *Rose v. Fox Pool Corp*, 335 Md. 351, 375-377 (1994).
7. At Calvert Cliffs Nuclear Plant, Unit 1 became operational in May 1975, and the entire plant was substantially completed in March 1977 and operational in April 1977.
8. Maryland's statute of repose was first enacted in 1970, instructing that "[n]o action to recover damages for . . . bodily injury . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought more than twenty years after the said improvement was substantially completed." (Maryland Code Article 57, §20). The statute "simply provided that, under the specified circumstances, no cause of action could be brought." *Rose v. Fox Pool Corp.*, 335 Md. 351, 365 (1994). The statute, by its terms, did "not apply to any cause of action arising on or before June 30, 1970."
9. The statute "was modified as part of the code revision project when the Courts and Judicial Proceedings Article was enacted effective January 1, 1974." *Id*. Recodified to become §5-108(a), by special session of the General Assembly in 1973, revised language instructed that "no cause of action for damages accrues . . . when . . . personal injury . . .

resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use."[2]

10. The statute, as effective in 1970 and as modified in 1973, did not specify, on its face, any class or category of defendant.[3] Subsequent amendments were effective in 1979 as to claims against any architect or professional engineer and 1980 as to contractors. Section 5-108(b) now provides that a cause of action for damages against an architect or engineer or contractor "does not accrue . . . . for damages incurred when . . . personal injury . . . , resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use."

11. Clear and unequivocal statutory language in both subsections 5-108(a) and (b) reflects the statutory purpose[4] of providing that personal injury occurring more than a certain number of years after and following from a defective or unsafe condition is not actionable; a cause of action for damages for such personal injury does not accrue if the personal injury occurs later than a certain number of years after the completed improvement.

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[2] The 1973 revisions added a new subsection: "(c) A cause of action for an injury . . . accrues when the injury or damage occurs." The Revisor's note—and the *Duffy* opinion—explained that the subsection "is drafted so as to avoid affecting the period within which a wrongful death action may be brought." Laws of Maryland, Special Session 1973, Ch.1 (HB 2) at p. 211.

[3] The 1973 Revisor's Note reported: "It is believed that this is an attempt to relieve builders, contractors, landlords, and realtors of the risk of latent defects in design, construction, or maintenance of an improvement to realty manifesting themselves more than 20 years after the improvement is put in use." Laws of Maryland, Special Session 1973, Ch.1 (HB 2) at p. 211.

[4] Addressing each of the 1970, 1974, 1979, and 1980 versions and amendments to Maryland's statute of repose, "[i]t is clear, given the plain language of the statute and its stated purpose, that the General Assembly intended for the statute to apply prospectively to actions that arose *and/or* accrued after its effective date." *Duffy v CBS Corp.*, 458 Md. 206, 182 A.3d 166, 180 (2018) (emphasis in original).

12. In an action to recover damages for injuries related to asbestos exposure, the Court of Appeals instructs use of the "exposure approach" for determining when the cause of action arises. *Duffy v. CBS Corp.*, 458 Md. 206, 182 A.3d 166, 176-80 (2018); *John Crane, Inc. v. Scribner*, 369 Md. 369, 394 (2002). In *Duffy*, the Court applied the *Scribner* analysis to determine whether plaintiff's injury occurred before or after the effective date of the 1970 statute of repose and specifically held: "when determining whether a plaintiff's injury relating to asbestos exposure arose prior to the effective date of the statute of repose, the date of the Plaintiff's last exposure to asbestos-containing products applies." 182 A.3d at 176.

13. Plaintiff Eibl's last exposure to asbestos-containing products in the turbine-generator Unit 1 at Calvert Cliffs was October 1974, after the effective date of the original statute of repose and as amended effective January 1, 1974 in §5-108(a). However, Plaintiff Eibl's personal injury occurred—his cause of action arose—as of October 1974.[5] The statute of repose would bar claims for damages if and when Plaintiff's personal injury occurred more than 20 years after 1977. Section 5-108(a) does not serve to bar claims for causes arising or personal injury occurring sooner than 20 years after the Calvert Cliffs plant became operational. The statutory bar in § 5-108(a) would apply to Plaintiff Eibl's claims against General Electric and Campbell-McCormick if his personal injuries had occurred or arose after 1997.

14. The "accrual" of Plaintiff Eibl's claims does not affect whether or when his injury occurred or a cause of action arose. Accrual may determine application of the discovery

[5] "It is the date of [Plaintiff's] injury—not the date of discovery of his cause of action—that guides our analysis because '[i]f there is no injury, there is no cause of action.'" *Duffy*, 182 A.3d at 177, quoting *Scribner*, 369 Md. at 391-92.

rule and discovery of injury and potential causes of action. The Court of Appeals in *Duffy* reiterated: "in situations involving the latent development of disease, a plaintiff's cause of action accrues when he ascertains, or . . . should have ascertained the nature and cause of his injury." *Duffy*, 182 A.3d at 181, quoting *Harig v. Johns-Manville Prods. Corp*, 284 Md. 70, 83 (1978). For Plaintiff Eibl, the diagnosis of his pleural mesothelioma in 2017 "put him on notice that he had suffered an injury on a prior date and, therefore, may have causes of action that came into being as a result of his injury." *Duffy*, 182 A.3d at 177.

Accordingly, for reasons stated and otherwise appearing in the record, it is on this 4th day of June, 2018, hereby

ORDERED that the General Electric Motion for Summary Judgment (TID 61203832) and the Campbell-McCormick Motion to Dismiss (TID 61060753) are **DENIED in pertinent part**, such that Plaintiff Eibl's claims are not barred by Maryland's Statute of Repose. It is further

ORDERED that the Defendants' Motions for Summary Judgment relating to substantial factor causation shall be heard with oral argument on or after June 5, 2018.

_/s/_ PAMELA J. WHITE_____
Judge Pamela J. White, Part 7
Circuit Court for Baltimore City