

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KIMBRA GOTTSCHALL, : CONSOLIDATED UNDER
ET AL., : MDL 875
 :
Plaintiff, :
 :
 : Transferred from the
 : Northern District of
v. : California
 : (Case No. 10-05096-CW)
 :
GENERAL ELECTRIC COMPANY, :
ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:11-CV-60035-ER
Defendants. :

ORDER

AND NOW, this **8th** day of **December, 2011**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant General
Dynamics Corp. (Doc. No. 44) is **GRANTED**.¹

¹ This case was originally filed on November 10, 2010 in the United States District Court for the Northern District of California. It was thereafter transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875. Federal jurisdiction in this case arises from diversity of citizenship (28 U.S.C. § 1332).

Decedent Robert Gottschall alleged exposure to asbestos while working aboard various Navy submarines manufactured by Defendant General Dynamics Corp. ("General Dynamics") throughout his employment with the Navy (1952 to late 1980s). Decedent died in April of 2010.

Plaintiffs (the representatives of Decedent's estate) have brought claims of negligence and strict liability (products liability) of both the survival and wrongful death variety, against various defendants. Defendant General Dynamics has moved for summary judgment, arguing that (1) it is immune from liability by way of the government contractor defense, and (2) it is immune from liability because the Navy was a sophisticated user of asbestos products. General Dynamics further asserts that Plaintiffs have not provided any evidence to show they are entitled to punitive damages such that it is at least entitled to partial summary judgment on this point.

In addition to refuting each of Defendant's arguments, Plaintiffs state that they have withdrawn their claims for punitive damages, such that Defendant's argument on this point is moot and contend (in a set of objections filed with their opposition) that the expert affidavits of Admiral Roger B. Horne, Jr. and Admiral David P. Sargent, Jr. are inadmissible and should not be considered by this Court in connection with Defendant's motion.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law

of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009) (Robreno, J.).

2. State Law Issues (California Law)

With respect to the remainder of the claims and defenses in this case, the parties have agreed that California law applies. Therefore, this Court will apply California law in deciding General Dynamics Corp.'s Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Sophisticated User Defense Under California Law

The California Supreme Court has adopted the sophisticated user defense. Johnson v. American Standard, Inc., 43 Cal.4th 56, 70 (2008). In short, the defense provides that when a potentially hazardous product is sold to a "sophisticated user," the law does not impose on the manufacturer a duty to warn. Id. at 65. This is because the failure to provide warnings about risks to sophisticated users "usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers." Id. at 65. The defense applies equally to strict liability and negligent failure to warn claims. Id. at 65 and 71.

Under the sophisticated user defense, the inquiry focuses on whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury. Id. at 71. The duty to warn is measured by what is generally known or should have been known to the "class of sophisticated users," rather than by the individual plaintiff's subjective knowledge. Id. at 65-66. The sophisticated user's knowledge of the risk is measured from the time of the plaintiff's injury, rather than from the date the product was manufactured. Id. at 74. Therefore, California's sophisticated user defense precludes liability against a manufacturer's failure to warn if the plaintiff belonged to a class of users who knew or should have known of the dangers at issue.

In Johnson, the Court discussed an asbestos products liability case decided in a federal court under diversity jurisdiction, in which the court predicted that California's Supreme Court would allow the defendant to assert the

sophisticated user defense when claims were brought against it by an employee of the Navy and the defendant asserted that the Navy was a sophisticated user with as much awareness of the hazards of asbestos as the defendant-manufacturer. Id. at 69 (citing In re Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982)). The California Supreme Court noted that it found the reasoning of the federal court persuasive. Id.

II. Defendant General Dynamics's Motion for Summary Judgment

General Dynamics asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because the Navy was a sophisticated user. In asserting this defense, it cites to Johnson, 43 Cal.4th 56, and relies upon the affidavits of Admiral Roger B. Horne, Jr., and Admiral David P. Sargent, Jr., to establish that the Navy had knowledge of asbestos hazards at the time of Decedent's alleged exposure such that it was a sophisticated user.

In response, Plaintiffs assert that General Dynamics is not entitled to summary judgment on grounds of the sophisticated user defense because (1) General Dynamics has not adduced evidence that Decedent was a sophisticated user, (2) General Dynamics is really arguing for a "sophisticated intermediary defense" (which is not recognized by California law), since Decedent merely worked on Navy ships as a (presumably) unsophisticated worker, and (3) any policy determination to expand California law to provide a defense under the facts and circumstances (i) is not properly carried out by an MDL court and (ii) involves a fact-specific determination properly handled by a jury and, thus, precluding summary judgment. Plaintiffs attempt to distinguish Johnson by noting that the plaintiff in Johnson was a certified technician clearly shown to be a sophisticated user, whereas Defendant General Dynamics has provided no evidence that Decedent was sophisticated but instead argues that the Navy was sophisticated.

Additionally, in connection with their opposition to General Dynamics's motion, Plaintiffs filed objections to the affidavits of Admiral Horne and Admiral Sargent, seeking to have them stricken. Plaintiffs argue that these affidavits are irrelevant, confusing, lacking in foundation, speculative, unreliable, lacking in personal knowledge, based on unauthenticated documents that are hearsay, and, therefore, not admissible as either expert testimony or lay testimony.

As a preliminary matter, the Court has determined that Plaintiffs' argument that the affidavits of Admiral Horne and Admiral Sargent should be stricken fails. Both this Court and courts across the country have routinely allowed asbestos defendants to rely upon virtually identical affidavits of Admiral Horne and Admiral Sargent in connection with both removal proceedings and motions for summary judgment on the basis of the government contractor defense. See, e.g., Willis v. BW IP Intern, Inc., - F. Supp. 2d - , 2011 WL 3818515, at *6-7 (E.D. Pa. Aug. 29, 2011) (Robreno, J.) (Horne and Sargent affidavits deemed admissible in connection with defendants' motions for summary judgment); Dalton v. 3M Co., 2011 WL 5881011 (E.D. Pa. Aug. 2, 2011) (Robreno, J.) (Sargent affidavit deemed admissible and not impermissibly speculative in connection with defendant's motion for summary judgment); Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 781 (E.D. Pa. 2010) (Robreno, J.) (considering Horne affidavit in connection with defendants' opposition to plaintiff's motion to remand and noting the widespread consideration by courts across the country of affidavits from defendants' experts regarding the government contractor defense that are virtually identical in each instance). The Court has considered Plaintiffs' objections to the affidavits of Admiral Horne and Admiral Sargent and concludes that they are admissible and may be relied upon by Defendant in making its motion for summary judgment.

Decedent's alleged exposure occurred during the time period 1952 through the late 1980s. The affidavit of Admiral Horne indicates that the Navy had state-of-the-art knowledge regarding asbestos hazards, that it had at least some knowledge of the hazards of asbestos by 1950 and that, by early 1971, it had taken affirmative steps to implement a detailed and comprehensive plan for controlling asbestos hazards. Plaintiffs have submitted no evidence to contradict the assertions in the affidavit of Admiral Horne that the Navy was aware of the hazards of asbestos at the time of the Decedent's alleged exposure. Instead, Plaintiffs assert that Defendant has adduced no evidence that Decedent was a sophisticated user and that the Navy's sophistication is irrelevant because the Navy was an "intermediary" and California does not recognize a "sophisticated intermediary user" defense. Plaintiffs' argument fails because of the Johnson court's explicit approval of the reasoning of the federal court in In re Related Asbestos Cases. 43 Cal.4th at 69-70.



EDUARDO C. ROBRENO, J.

In In re Related Asbestos Cases, the plaintiff was an insulator and shipyard worker employed by the Navy. The Court allowed the manufacturer defendant's assertion of the sophisticated user defense on grounds of the Navy's having knowledge of asbestos-related hazards, without even considering the level of sophistication of the individual plaintiff. 543 F. Supp. at 1150-52. In Johnson, the court affirmed the trial court's grant of summary judgment in favor of the defendant manufacturer because it presented undisputed evidence that the plaintiff/sophisticated user "could reasonably be expected to know of the hazard" at issue. 43 Cal.4th at 74. The case at hand is indistinguishable with respect to the facts of In re Related Asbestos Cases and Johnson, when taken together. Accordingly, in the instant case, summary judgment in favor of Defendant General Dynamics is warranted because Plaintiffs have not disputed evidence presented by General Dynamics that the Navy knew of the hazards of asbestos prior to the time of Decedent's alleged exposure (beginning in approximately 1952) and that the Navy had state-of-the-art knowledge of the hazards of asbestos. Johnson, 43 Cal.4th at 74. In light of the Court's determination on this issue, it need not reach the other arguments presented by the parties.