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

MARJORIE REYNOLDS,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Northern District
v.	:	of California (Case No. 09-2806)
GENERAL ELECTRIC COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO. 5:09-CV-80025-ER
Defendants.	:	

O R D E R

AND NOW, this **30th** day of **March, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Northrop Grumman Shipbuilding, Inc. (Doc. No. 27) is **DENIED.**[1]

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[1] This case was transferred in August of 2009 from the United States District Court for the Northern District of California to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Marjorie Reynolds ("Plaintiff") alleges that Jack Reynolds ("Decedent" or "Mr. Reynolds") was exposed to asbestos while working aboard vessels during his service in the Navy (1957 to 1964). Defendant Northrop Grumman Shipbuilding, Inc. ("Northrop Grumman") built ships. The alleged exposure pertinent to Defendant Northrop Grumman occurred during Mr. Reynolds's work as a painter and supply man aboard:

- USS Ranger (CVA-61)

Plaintiff asserts that Decedent suffered "asbestos-related lung injuries." (Compl. ¶ 2.) He was deposed in 2009.

Plaintiff brought claims against various defendants. Defendant Northrop Grumman has moved for summary judgment, arguing that (1) a ship is not a "product" under California law, for purposes of strict products liability, (2) it is immune from liability by way of the government contractor defense, and (3) it

is immune from liability by way of the sophisticated user defense. Defendant has argued for the first time in its reply brief that summary judgment is warranted because (4) it is entitled to the bare metal defense, and (5) there is insufficient product identification evidence to support a finding of causation with respect to it. Northrop Grumman contends in its initial brief that California law applies; its reply brief asserts that maritime law applies.

Plaintiff contends that (1) a ship is not a "product" for purposes of strict products liability, (2) there are genuine issues of material fact precluding summary judgment on grounds of the government contractor defense, and (3) Defendant is not entitled to the sophisticated user defense. Plaintiff contends that California law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any 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 (Maritime versus State Law)

1. Procedural Matters

In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.). Therefore, in addressing the procedural matters herein, the Court will apply federal law as interpreted by the U.S. Court of Appeals for the Third Circuit. Id.

2. 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.).

3. State Law Issues (Maritime versus State Law)

Although Defendant Northrop Grumman has been inconsistent as to what law it contends applies, the Court notes that, as to some points, it has asserted that maritime law is applicable. When one party asserts that a case sounds in admiralty, the choice of law analysis begins with an examination as to whether or not maritime law is applicable. See Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). If it is determined that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id. Therefore, the Court will begin its choice of law analysis by examining the applicability of maritime law.

Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009)(Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at 463-66 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson v. Ruby, 497 U.S. 358 (1990). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "'a potentially disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 799 F. Supp. 2d at 466. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will meet the connection test necessary for the application of maritime law. Id. at 467-69. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure,

the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., No. 10-64625, 2011 WL 5881184, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.)(applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

It is undisputed that the alleged exposure pertinent to Defendant Northrop Grumman was aboard ships. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant Northrop Grumman. See id. at 462-63.

C. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) (citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 539 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146, 1154 (E.D. Pa. 2011) (Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law.

Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

D. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine issue of material fact as to whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d 1146 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine issue of material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010) (Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

E. Sophisticated User Defense Under Maritime Law

This Court has previously held that it will not grant summary judgment on grounds of the sophisticated user defense when maritime law applies because maritime law has not recognized this defense. Prange v. Alfa Laval, Inc., No. 09-91848, 2011 WL 4912828, at *1 (E.D. Pa. July 22, 2011)(Robreno, J.).

F. New Arguments Raised In A Summary Judgment Reply Brief

The Third Circuit has recently stated:

> A summary judgment movant must provide the nonmoving party with notice and a reasonable opportunity to respond. See generally, Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments ... so long as the losing party was

on notice that she had to come forward with all of her evidence."). **There is cause for concern where a movant presents new arguments or evidence for the first time in a summary judgment reply brief, particularly if the District Court intends to rely upon that new information in granting summary judgment to the movant.** See, e.g., Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1164 (10th Cir. 1998)("[W]hen a moving party advances in a reply new reasons and evidence in support of its motion for summary judgment, the nonmoving party should be granted an opportunity to respond."); Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996)(a District Court should not consider new evidence raised in the reply to a motion for summary judgment without giving the nonmoving party an opportunity to respond); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 410 (1st Cir. 1985)("[T]he nonmoving party ... should have had an opportunity to examine and reply to the moving party's papers before the court considered them in its decision process.").

Here, the District Court accepted Appellees' argument that Ward, 334 Fed. Appx. at 491-92, is dispositive of [the non-movant]'s claims. Appellees raised this argument for the first time in a reply brief. **Neither the Federal Rules of Civil Procedure nor the District Court's local rules permitted [the non-movant] to file a sur-reply.** See Fed. R. Civ. P. 56(c)(1); W.D. Pa. L. Civ. R. 56. Accordingly, [the non-movant] had no meaningful opportunity to present arguments or evidence in opposition to the decisive issue.

According to Appellees, "[i]f [the non-movant] had any other 'new' evidence to present at summary judgment to distinguish his case from—and escape the effect of— Ward, it was incumbent upon him to present it." Appellees overlook that [the non-movant] was not afforded the opportunity to do so. **Fundamental fairness demands that [the non-movant] should have had notice and a meaningful opportunity to respond prior to the award of summary judgment on grounds raised for the first time in Appellees' reply brief.**

> To the extent [the non-movant] wishes to present arguments and evidence in opposition to the decisive summary judgment issue, the District Court should consider them in the first instance. **Accordingly, we will vacate the District Court's order** and remand this matter for further proceedings.

Alston v. Forsyth, 379 F.App'x 126, 129 (3d Cir. 2010)(footnote omitted)(emphasis added).

The local rules of this Court provide that "[t]he Court may require or permit briefs or submissions if the Court deems them necessary," E.D. Pa. Loc. R. Civ. P. 7.1(c). The rules governing MDL-875 cite this provision of the E.D. Pa. local rules and indicate that a reply brief is the last permitted brief in summary judgment briefing in the MDL (and would not be permitted were it not a right of the parties). See Motion Procedure No. 6, at http://www.paed.uscourts.gov/mdl875p.asp#MotionProcedures (last visited Mar. 30, 2012).

II. Defendant Northrop Grumman's Motion for Summary Judgment

A. Defendant's Arguments

A Ship Is Not A Product Under California Law

Northrop Grumman asserts that, under California law, a U.S. Navy ship is not a "product" and workers or seaman working on the ship should not be considered "consumers" such that products liability law (i.e., strict liability) should apply. In support of this position it cites to Peterson v. Superior Court, 10 Cal.4th 1185 (Cal. 1995). It contends that a ship is much more like a building or custom-built property (as opposed to a mass-produced commercial product), for which strict liability claims are not applicable.

Government Contractor Defense

Northrop Grumman asserts the government contractor defense, arguing that it is immune from liability in this case, and therefore entitled to summary judgment, because the Navy exercised discretion and approved reasonably precise specifications for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy knew about the hazards of asbestos. In asserting this defense, Northrop Grumman relies upon the declarations of Retired

U.S. Navy Admiral Roger B. Horne, Jr. and Retired U.S. Navy Commander James P. Delaney.

Sophisticated User Defense

Northrop Grumman asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because the Navy was a sophisticated user, possessing the most advanced information regarding asbestos hazards. In asserting this defense, it cites to Johnson v. American Standard, Inc., 43 Cal.4th 56, 65 (2008).

Bare Metal Defense / Product Identification / Causation

For the first time in its reply brief, Northrop Grumman asserts that Plaintiff has insufficient product identification evidence, incorporating the bare metal defense into its challenge. Specifically, it argues that it is entitled to summary judgment because there is no evidence that Decedent was exposed to any asbestos-containing product originally installed by Northrop Grumman (or its predecessors) and it cannot be liable for replacement parts installed after the ship's original construction.

B. Plaintiff's Arguments

A Ship Is A Product Under California Law

Plaintiff argues that a ship is a product for purposes of strict products liability under California law. In support of this argument, she cites to Kriegler v. Eichler Homes, Inc., 269 Cal.App.2d 224 (Cal. App. 1969) and Price v. Shell Oil Co., 2 Cal.3d 245 (Cal. 1970). Plaintiff contends that a ship is comparable to a mass-produced home.

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendants on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, (2) not demonstrated that the product at issue was "military equipment," and (3) not demonstrated a genuine significant conflict between state tort law and fulfilling its contractual federal obligations

(i.e., that its contractual duties were "precisely contrary" to its duties under state tort law). Furthermore, Plaintiff asserts that the government contractor defense is not warranted because (4) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (5) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or not use) and do not reflect a considered judgment by the Navy, (6) there is no military specification that precluded warning about asbestos hazards, and (7) Defendant cannot demonstrate what the Navy knew about the hazards of asbestos relative to the knowledge of Defendant, nor that the Navy knew more than it did at the time of the alleged exposure.

To contradict the evidence relied upon by Defendant, Plaintiff cites to(a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense (expert affidavits of Admiral Horne and Commander Delaney).

Sophisticated User Defense

Plaintiff asserts that Northrop Grumman is not entitled to summary judgment on grounds of the sophisticated user defense because, (1) Northrop Grumman has not adduced evidence that Plaintiff was a sophisticated user, and (2) Northrop Grumman is really arguing for a "sophisticated intermediary defense" (which is not recognized by California law), since Plaintiff merely worked on Navy ships as a (presumably) unsophisticated worker.

Bare Metal Defense / Product Identification / Causation

Because Defendant only raised the bare metal defense and product identification challenge for the first time in its reply brief, Plaintiff has not had an opportunity to respond to these arguments.

C. Analysis

The Court considers the merits of each of Defendant Northrop Grumman's arguments for summary judgment (along with Plaintiff's opposing argument) in turn.