

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

MARA LYNNE ABBAY,	:	CONSOLIDATED UNDER
Plaintiff,	FILED	MDL 875
	:	
	FEB 29 2012	Transferred from the
v.	:	Western District of
	MICHAEL E. KUNZ, Clerk	Washington
	By _____ Dep. Clerk	(Case No. 10-01585)
	:	
ARMSTRONG INTERNATIONAL,	:	
INC., ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:10-CV-83248-ER
Defendants.	:	

O R D E R

AND NOW, this 28th day of **February, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Elliott Turbomachinery Company (Doc. No. 66) is **GRANTED**.¹

¹ This case was transferred in November of 2010 from the United States District Court for the Western District of Washington to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Mara Lynne Abbay (widow of and personal representative of the estate of decedent George Abbay ("Decedent" or "Mr. Abbay")) has alleged that Decedent was exposed to asbestos while working aboard Navy vessels throughout his period of service in the Navy (1962 to 1966) and also during post-Navy work as a rigger at the Puget Sound Naval Shipyard (1966 to 1993). Defendant Elliott Turbomachinery Company ("Elliott") manufactured turbines. The alleged exposure pertinent to Defendant Elliott occurred during the following period of Decedent's work:

- Puget Sound Naval Shipyard (1966 to 1972)

Mr. Abbay was diagnosed with mesothelioma in 2007 and died in October of 2008. He was not deposed in this litigation, but was deposed for eight (8) day in March 2007 in connection with an earlier action filed in 2007.

Plaintiff brought claims against various defendants. Defendant Elliott has moved for summary judgment, arguing that it is entitled to the bare metal defense and that there is insufficient product identification evidence to support a finding of causation with respect to its product(s).

Plaintiff contends that there is sufficient product identification evidence to support a finding of causation with respect to asbestos-containing insulation supplied by Elliott.

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 (Maritime Versus Washington Law)

As a preliminary matter, the Court must determine what law applies in deciding Defendant Elliott's motion. Several defendants in this action filed motions for summary judgment asserting that maritime law is applicable because of the

Decedent's service in the Navy aboard ships and the nature of his post-Navy work as a rigger at the Puget Sound Naval Shipyard ("PSNS"). Plaintiff contends that Washington law is applicable. In its briefing, Elliott cited to and relied upon Washington law. However, during oral argument, Elliott acknowledged that the test for application of maritime law was likely satisfied based upon the facts of the case. Because of the significant differences between the product identification standards applied under Washington law and maritime law, the outcomes of the summary judgment motions pending before the Court in this case are likely to differ based upon what law is applied. Therefore, the Court deems it appropriate to undertake an analysis of the applicability of maritime law, rather than relying upon Defendant's initial assertion that Washington law applies.

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 In re Asbestos Prods. Liab. Litig. (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, 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, doc. no. 81 (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).

(i) Exposure Arising During Navy Service (1962 to 1966)

It is undisputed that Decedent's alleged exposure during his period of Navy service was aboard ships. Therefore, this exposure was during sea-based work. See Sisson, 497 U.S. 358. Accordingly, maritime law is applicable to Plaintiff's claims arising from exposure alleged to have occurred during his service in the Navy. See Conner, 799 F. Supp. 2d at 462-63. (The Court notes that the alleged exposure pertinent to Defendant Elliott does not arise from Decedent's Navy service.)

(ii) Exposure Arising During Work at PSNS (1966 to 1972)

The evidence in the record indicates that Decedent worked as a rigger during his employment at PSNS. The parties

agree that the job of a rigger consists primarily of performing the "heavy lifting" of removing equipment from aboard ships and transporting it to work areas off the ship (including, sometimes, unbolting or disassembling equipment), and moving equipment onto ships (including, sometimes, installing the equipment aboard the ship). In the course of this work, a rigger would be exposed to other types of workers who were working nearby, particularly onboard the ships on which equipment was being placed or removed by the rigger. In the course of his deposition, Decedent discussed alleged exposure to Defendants' products as having been aboard ships. Although it is possible that some exposure to asbestos from a Defendant's product may have occurred during the course of the Decedent's job duties that were not carried out aboard the ship, the record indicates (and the parties appear to agree) that the primary allegations of exposure to Defendant's products pertain to exposure occurring while onboard ships. Thus, the Court concludes that Decedent's alleged exposure at PSNS was during sea-based work, see Sisson, 497 U.S. 358, such that maritime law is applicable to Plaintiff's claims arising from exposure alleged to have occurred during his work there. See Conner, 799 F. Supp. 2d at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has recently adopted the so-called "bare metal defense" under maritime law, holding that a manufacturer has no liability for harms caused by - and no duty to warn about hazards associated with - a product it did not manufacture or distribute. Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012) (Robreno, J.).

D. Product Identification/Causation Under Maritime Law

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F.App'x 371, 375 (6th Cir. 2001). The Court notes that, in light of its recent holding in Conner, 2012 WL 288364, there is also a requirement (implicit in the test set forth in Lindstrom and Stark) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged.

Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F.App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or Decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. Id. at 376 (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural." Id. (quoting Harbour, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F.App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988) (citing Restatement (Second) of Torts, § 402A (1965))).

II. Defendant Elliott's Motion for Summary Judgment

A. Defendant's Arguments

Elliott argues that there is insufficient product identification evidence to support a finding of causation with respect to its products. In support of its motion, Elliott submits an expert report of a Captain Charles Wasson. Elliott contends in its briefing that Captain Wasson's affidavit establishes that Elliott did not manufacture or supply turbines on board any of the ships identified by Decedent "or indeed, any of the ships in the shipyard." (Mot. at 7.)

B. Plaintiff's Arguments

Plaintiff argues that there is sufficient product identification evidence with respect to asbestos-containing insulation that she contends was supplied by Elliott and to which

she contends Decedent was exposed. In support of this assertion, Plaintiff points to the following evidence:


- Deposition testimony of Decedent - Decedent testified that he worked installing new turbines aboard ships during his work at the Puget Sound Naval Shipyard; he testified that he worked removing turbines from ships there during overhauls. He testified that all turbines were covered in insulation (which he referred to as "lagging"). He identified Elliott as one of two manufacturers whose turbines he encountered while working at the shipyard. He clarified that he knew a turbine was an Elliott turbine because there were nameplates on the equipment. He testified that he removed insulation from Elliott turbines. He testified that removal of insulation created dust that he breathed in. He testified that the insulation contained asbestos. He testified that he breathed dust specifically from insulation on Elliott turbines.
- Discovery Responses of Defendant - Defendant's discovery responses from another action state that it manufactured turbines and that these turbines were sometimes supplied with asbestos-containing insulation

In addition, Plaintiff has filed objections to the expert report of Captain Charles Wasson submitted by Defendant Elliott.

C. Analysis

Plaintiff has alleged exposure to asbestos-containing insulation used in conjunction with Elliott turbines. This Court has held that a manufacturer cannot be liable for injuries arising from products that it did not manufacture or supply. Conner, 2012 WL 288364, at *7. However, in this case, Plaintiff alleges that Defendant Elliott is liable because it supplied the insulation that was used in connection with its turbines. Plaintiff has identified evidence that Decedent installed turbines on various ships, and that he removed asbestos-containing insulation from turbines on various ships (including, specifically, Defendant Elliott's turbines). Plaintiff has also identified evidence that Defendant sometimes supplied asbestos-containing insulation with its turbines (that was for use in conjunction with its turbines). However, there is no evidence that the Elliott turbines that Decedent installed were among

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

those turbines with which Elliott also supplied insulation. Furthermore, there is no evidence that any asbestos-containing insulation to which Decedent was exposed on Elliott turbines (after their installation) was insulation that Elliott supplied with the turbine (as opposed to being insulation that was supplied by another company for use in conjunction with the Elliott turbine). Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from insulation supplied by Defendant Elliott (with its turbines) such that it was a substantial factor in the development of his mesothelioma. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376. Accordingly, summary judgment in favor of Defendant Elliott is warranted.

In light of this determination, the Court need not reach Plaintiff's objections to the expert report of Captain Wasson.