

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

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

ORDER

AND NOW, this **28th** day of **February, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant IMO
Industries, Inc. (Doc. No. 79) is **GRANTED in part; DENIED in**
part.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 IMO Industries, Inc. ("IMO" or "IMO Industries") manufactured pumps (under the name DeLaval), which were supplied for use aboard ships. The alleged exposure pertinent to Defendant IMO 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 IMO 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). IMO also seeks partial summary judgment on all other claims (including civil conspiracy, spoliation, willful or wanton misconduct) on grounds of insufficient evidence.

Plaintiff contends that there is sufficient product identification evidence to support a finding of causation with respect to asbestos-containing insulation, gaskets, and/or packing supplied by IMO.

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 IMO'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. IMO does not specify what law it contends applies, but asserts that the outcome is the same regardless of whether Washington law or maritime law is applied. 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 assertion that choice of law is irrelevant.

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 IMO 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))).

E. Unsworn Declaration at the Summary Judgment Stage

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with particular parts of material in the record, such as an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that unsworn testimony "is not competent to be considered on a motion for summary judgment." Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1980)); see also Bock v. CVS Pharmacy, Inc., No. 07-CV-412, 2008 WL 3834266, at *3 (E.D. Pa. Aug. 14, 2008) (refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa.

2002) (finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment).

This Court has previously held that an unsworn declaration cannot be relied upon to defeat a motion for summary judgment. Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.) (citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005) (refusing to consider unsworn declaration of a lay witness)). It is true that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee's note; see also Ray v. Pinnacle Health Hosps., Inc., 416 F.App'x, at 164 n.8 (3d Cir. 2010) (noting that "unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the requirements of 28 U.S.C § 1746"). However, a declaration that is not sworn to under penalty of perjury or accompanied by an affidavit is not proper support in disputing a fact in connection with a motion for summary judgment. Burrell v. Minnesota Mining Manufacturing Co., No. 08-87293, 2011 WL 5458324 (E.D. Pa. June 9, 2011) (Robreno, J.) (refusing to consider expert reports when no timely sworn affidavits were provided with the reports and the reports were not sworn to under penalty of perjury).

II. Defendant IMO's Motion for Summary Judgment

A. Defendant's Arguments

IMO argues that there is insufficient product identification evidence to support a finding of causation with respect to its products. In particular, IMO argues that, even if it is assumed that Decedent was exposed to asbestos from its pumps, there is no evidence that it was an asbestos-containing component part for which it could be liable (i.e., an original or replacement component part manufactured or supplied by IMO).

IMO also seeks partial summary judgment on all claims other than Plaintiff's negligence and strict products liability claims (including civil conspiracy, spoliation, willful or wanton misconduct) on grounds of insufficient evidence.

In its reply brief, IMO moves to have Plaintiff's expert testimony of Christopher Lane stricken, contending that

it, inter alia, is not based on personal knowledge and generally lacks any foundation. It also opposes Plaintiff's motion to strike the testimony of expert Captain Wasson and IMO corporate representative Richard Salzmann, each of which it has submitted in support of its motion for summary judgment. With respect to Captain Wasson, Defendant asserts that it later obtained a properly sworn declaration from Captain Wasson that adopted and incorporated the content of the initial unsworn testimony. With respect to Mr. Salzmann, Defendant contends that since Mr. Salzmann was later deposed in the action such that Plaintiff could have inquired about the content of the unsworn report, that report should be deemed admissible.

B. Plaintiff's Arguments

Plaintiff argues that there is sufficient product identification evidence with respect to asbestos-containing insulation, gaskets, and/or packing that she contends was supplied by IMO 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 removed gasket materials from DeLaval pumps, and that he was present when others removed gasket material from DeLaval pumps (as close to the gasket material as if he was removing it himself). Decedent testified that the gasket removal process created lots of dust, which he breathed in. Decedent testified that he removed insulation ("lagging") from DeLaval pumps and was also present when others did so; he testified that this process created "massive amounts of dust" and that he breathed in this dust. Decedent testified that he also installed DeLaval pumps and that this process required working with gasket material.
- Deposition of IMO's 30b6 Witness (Richard Salzmann) - Mr. Salzmann testified in another action that IMO (1) manufactured and sold pumps with asbestos-containing gaskets and packing up until the 1980s, (2) provided spare (replacement) asbestos-containing gaskets and packing with some of its pumps, (3) later sold replacement asbestos-containing packing and gaskets for use with its pumps after their initial distribution, and (4) sold asbestos-containing thermal insulation to be used with its turbines.

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- Discovery Responses of Defendant - Defendant acknowledges in its discovery responses that it sold (1) replacement gaskets, some of which may have contained asbestos, and (2) replacement packing
 - Expert Declaration of Steven Paskal (Industrial Hygienist) - Dr. Paskal provides testimony that "virtually all gaskets of the type described by [Decedent] would have [been] comprised [of] approximately 85% asbestos;" he also provides medical expert testimony about causation
 - Expert Declaration of Dr. Samuel Hammar - Dr. Hammar provides medical expert testimony about causation
 - Expert Declaration of Christopher K. Lane (Navy expert) - Mr. Lane provides opinion testimony that, because of Decedent's job role, he more likely than not removed asbestos gaskets and insulation from DeLaval pumps; he also opined that the gaskets used with IMO's (DeLaval) pumps at PSNS would have come from IMO (whether as original or replacement parts)

Plaintiff has not responded to IMO's motion for partial summary judgment on all claims other than the negligence and strict liability claims.

In its opposition, Plaintiff moves to have the testimony of defense expert Captain Wasson and IMO corporate representative Richard Salzman stricken for various reasons, including that the declaration of each witness was not sworn, accompanied by an affidavit, nor signed under penalty of perjury.

C. Analysis

As a preliminary matter, the Court denies Defendant's motion to strike Plaintiff's expert's testimony. Having reviewed the arguments contained therein, it is apparent that the challenged testimony is admissible.

Plaintiff's motion to exclude the testimony of Defendant's witnesses (expert Captain Wasson and IMO corporate representative Richard Salzman) is granted. This Court has previously held that an unsworn declaration that is not accompanied by a sworn affidavit or signed under penalty of

perjury cannot be relied upon to defeat a motion for summary judgment. Faddish, 2010 WL 4146108 at *6; see also Fowle, 868 F.2d at 67; Ray, 416 F.App'x, at 164 n.8; Burrell, 2011 WL 5458324, at *1 n.1. The testimony of both of these witnesses submitted with Defendant's motion for summary judgment was unsworn and was not accompanied by a sworn affidavit or signed under penalty of perjury. Although Defendant asserts in its brief that it later obtained a properly sworn declaration from Captain Wasson that adopted and incorporated the content of the initial unsworn testimony, Defendant has not submitted such evidence to this Court. Although Defendant is correct that it may rely upon the sworn deposition testimony of Richard Salzmann (an excerpt of which was submitted by Defendant with its reply brief), that deposition testimony does not render the unsworn declaration admissible. Accordingly, the declarations of Captain Wasson and Richard Salzmann may not be relied upon in connection with Defendant's summary judgment motion and the Court therefore will not consider them in deciding that motion.

In addition, the Court grants Defendant IMO's motion for summary judgment on all claims other than the negligence and strict liability claims, as Plaintiff has not opposed this motion. The Court turns now to address the merits of Defendant's motion for summary judgment on Plaintiff's negligence and strict liability claims.

Plaintiff has alleged exposure to asbestos-containing insulation, gaskets, and/or packing used in conjunction with IMO pumps. 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 IMO is liable because it supplied the insulation, gaskets, and packing that were used in connection with its pumps and to which Plaintiff alleges Decedent was exposed. The Court will address the evidence as to each type of component part separately.

(i) Insulation

There is evidence that Decedent was exposed to insulation used in connection with IMO pumps. There is evidence that Decedent breathed in dust created by the process of removing insulation from IMO pumps. There is evidence that IMO sold asbestos-containing thermal insulation to be used with its turbines. However, there is no evidence that the insulation to which Decedent was exposed in connection with IMO pumps was

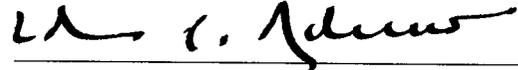
supplied by IMO. Furthermore, there is no evidence that the insulation to which Decedent was exposed in connection with IMO pumps contained asbestos. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to insulation manufactured or supplied by IMO such that it was a substantial factor in the development of Decedent's mesothelioma. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376. Accordingly, summary judgment in favor of Defendant IMO is warranted with respect to alleged exposure to asbestos from insulation.

(ii) Gaskets

There is evidence that Decedent was exposed to dust from gaskets used in connection with IMO pumps. There is evidence that IMO supplied both original and replacement asbestos-containing gaskets with some of its pumps. There is evidence that the gaskets used with the IMO pumps at issue more likely than not would have contained asbestos. There is evidence from expert Christopher Lane that any gasket used with the IMO pumps at issue would have been supplied by IMO (whether an original or replacement gasket). This is sufficient evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos-containing gaskets manufactured or supplied by IMO (whether as original or replacement parts), and that this exposure 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 IMO is not warranted with respect to alleged exposure to asbestos from gaskets.

(iii) Packing

There is evidence that IMO supplied both original and replacement asbestos-containing packing with some of its pumps. However, unlike the evidence pertaining to gaskets, Decedent did not testify about packing, and Plaintiff has not submitted any expert testimony opining that Decedent was, more likely than not, exposed to asbestos-containing packing supplied by IMO. As a result, there is no evidence that Decedent was exposed to packing (or asbestos from packing) used in connection with IMO pumps. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from packing manufactured or supplied by IMO such that it was a substantial factor in the development of Decedent's mesothelioma. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376. Accordingly, summary judgment



EDUARDO C. ROBRENO, J.

in favor of Defendant IMO is warranted with respect to alleged exposure to asbestos from packing.

D. Conclusion

Defendant's motion to strike the expert testimony of Christopher Lane is denied. Plaintiff's motion to strike the declaration testimony of expert Captain Wasson and IMO corporate representative Mr. Salzmman is granted. Defendant's motion for summary judgment is granted as to all claims other than Plaintiff's strict liability and negligence claims. With respect to Plaintiff's negligence and strict liability claims, summary judgment is granted in favor of Defendant IMO with respect to all claims arising from alleged exposure to insulation or packing; however, summary judgment is denied with respect to all claims arising from alleged exposure to gaskets.