
Plaintiff brought claims against various defendants. Defendant Warren 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). In the alternative, Warren 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 Warren.

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 Warren'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. Warren contends that maritime law 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 the outcome will be the same if the Court applies Washington law as requested by Plaintiff.

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 Warren 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 Warren's Motion for Summary Judgment

A. Defendant's Arguments

Warren argues that there is insufficient product identification evidence to support a finding of causation with respect to its products. In particular, Warren 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 Warren).

In the alternative, Warren 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, Warren moves to have portions of Plaintiff's expert testimony of Christopher Lane stricken, contending that it, inter alia, is not based on personal knowledge and generally lacks any foundation.

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 Warren 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 with "lots and lots" of Warren pumps on various ships; he testified that he worked with Warren pumps on "most vessels." He testified that he installed new Warren pumps and also removed many Warren pumps. He specifically recalled installing a new Warren pump on the AOE Denver. Decedent specifically testified that he believed that the gaskets for the new Warren pumps were wired to the pump for installation, testifying that "most of it all came with their own gaskets." He testified that he used a wire brush or scraper to remove asbestos gaskets from Warren's pumps, that this process created dust, and that he inhaled that dust. He also testified that he observed others removing and scraping gaskets from Warren pumps, and was either helping them or holding the pump steady for them, standing within a foot or two of the dust. Decedent testified that he also fabricated new gaskets for Warren pumps, a process which created lots of dust, which he breathed. He testified that the gaskets he removed from Warren pumps were asbestos gaskets. Decedent testified that he knew the Warren pumps were made by Warren because the brand name was on the pump, and also because Warren's pumps had a distinctive shape. Decedent testified that he worked on turbine-powered Warren pumps and that, on these pumps, the whole "turbine side" of the pump was covered in insulation, which he had to remove; he testified that the insulation was either white or silver in color.

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- Trial Testimony of Carl Mangold (PSNS Industrial Hygiene) - Mr. Mangold was head of the industrial hygiene branch of the medical department for PSNS. In 1970, he published a document called, "Asbestos Exposure and Control at Puget Sound Naval Shipyard." Mr. Mangold testified during a 2004 trial in another case that gaskets that were used in the Navy up until the mid-1970's contained asbestos.
 - Deposition of Warren's 30b6 Witness (Roland Doktor) - Mr. Doktor testified that Warren (1) sold pumps with asbestos-containing gaskets and packing up until 1985 or 1986 and (2) supplied asbestos-containing insulation with certain pumps, (3) provided spare (replacement) asbestos-containing gaskets and packing with some of its pumps at the time of supply, and (4) later sold replacement asbestos-containing packing and gaskets for use with its pumps after their initial distribution
 - 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 the gaskets and packing used with Warren's pumps at PSNS would have contained asbestos and would have come from Warren (whether as original or replacement parts); he also opined that, because of Decedent's job role, he was, more likely than not, exposed to asbestos from gaskets supplied by Warren. Mr. Lane opined that any insulation used with Warren's pumps would have contained asbestos.

Plaintiff has stated that she does not oppose Warren's alternative motion for partial summary judgment on all claims other than the negligence and strict liability claims.

C. Analysis

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

In addition, the Court grants Defendant Warren's motion for summary judgment on all claims other than the negligence and strict liability claims, as Plaintiff does not oppose 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 Warren 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 Warren 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 Warren pumps. There is evidence from expert Christopher Lane that any insulation used with the Warren pumps at issue would have contained asbestos. There is evidence that Warren supplied asbestos-containing insulation with some of its pumps. There is also evidence that Decedent installed some new Warren pumps. However, Plaintiff has identified no evidence that Decedent's installation of new Warren pumps involved pumps supplied with insulation. Furthermore, there is no evidence that the insulation to which Decedent was exposed in connection with a Warren pump (after its initial installation) was supplied by Warren. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to insulation manufactured or supplied by Warren 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 Warren is warranted with respect to alleged exposure to asbestos from insulation.

(ii) Gaskets

There is evidence that Decedent was exposed to asbestos from gaskets used in connection with Warren pumps. There is evidence from multiple sources that any gasket used with the Warren pumps at issue would have contained asbestos. There is evidence that Warren supplied both original and replacement asbestos-containing gaskets with some of its pumps. There is evidence from expert Christopher Lane that any gasket used with the Warren pumps at issue would have contained asbestos and would have been supplied by Warren (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 Warren (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 Warren is not warranted with respect to alleged exposure to asbestos from gaskets.

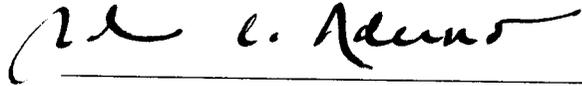
(iii) Packing

There is evidence that Warren supplied both original and replacement asbestos-containing packing with some of its pumps. There is evidence from expert Christopher Lane that any packing used with the Warren pumps at issue would have contained asbestos and would have been supplied by Warren (whether original or replacement packing). 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 Warren. As a result, there is no evidence that Decedent was exposed to packing (or asbestos from packing) used in connection with Warren pumps. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from packing manufactured or supplied by Warren 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 Warren 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. Defendant's motion for summary

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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 Warren 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.