

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

**FILED**

**OCT 19 2012**

OLIVER BROWN, : CONSOLIDATED UNDER  
 : MDL 875  
 :  
 Plaintiff, :  
 :  
 : Transferred from the  
 : Northern District of  
 v. : California  
 : (Case No. 09-4618)  
 :  
 ASBESTOS DEFENDANTS, : E.D. PA CIVIL ACTION NO.  
 et al., : 2:10-60090-ER  
 :  
 Defendants. :

**MICHAEL E. KUNZ, Clerk**  
**By \_\_\_\_\_ Dep. Clerk**

**ORDER**

**AND NOW**, this 18th day of **October, 2012**, it is hereby

**ORDERED** that the Motion for Summary Judgment of Defendant

**Metalclad Insulation Corporation** (Doc. No. 78) is **GRANTED**.<sup>1</sup>

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<sup>1</sup> This case was transferred in January of 2010 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 Oliver Brown alleges that he was exposed to asbestos while working as a marine machinist and marine machinist's helper at Mare Island Naval Shipyard during the period 1961 through 1969. Plaintiff claims that Defendant Metalclad Insulation Corporation ("Metalclad") supplied Unibestos thermal insulation. The alleged exposure pertinent to Defendant Metalclad occurred during Plaintiff's work aboard numerous vessels.

Plaintiff was diagnosed with an asbestos-related illness and brought claims against various defendants. Defendant Metalclad has moved for summary judgment (or, in the alternative, partial summary judgment), arguing that (1) it is immune from liability by way of the government contractor defense, (2) there is insufficient evidence to support Plaintiff's claim for false representation, (3) there is insufficient evidence to support Plaintiff's claim that it is liable as a premises owner and/or contractor, and (4) there is insufficient evidence to support

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Plaintiff's claim for punitive damages. The parties assert that California law applies to Plaintiff's claims for false representation, premises owner and/or contractor liability, and punitive damages.

## **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**

#### **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.).

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## 2. State Law Versus Maritime Law

The parties assert that California law applies. However, where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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.). Where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). This is because, where a case sounds in admiralty, whether maritime law applies is not an issue of choice-of-law but is, instead, a jurisdictional issue. See id. Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." See Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at \*1 n.1 (E.D. Pa. Dec. 2, 2011) (Robreno, J.) (applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop

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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, and includes those in "dry dock"), "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; Deuber, 2011 WL 6415339, at \*1 n.1. 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. Conner, 799 F. Supp. 2d 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.

It is undisputed that the alleged exposure pertinent to Defendant Metalclad occurred during Plaintiff's work aboard vessels. 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. 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;

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(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. 739 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 (E.D. Pa. Aug. 29, 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 dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (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 dispute as to any 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

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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. Punitive Damages

The Court has previously determined that the issue of punitive damages must be resolved at a future date with regard to the entire MDL-875 action and, therefore, all claims for punitive or exemplary damages are to be severed from the case and retained by the Court within its jurisdiction over MDL-875 in the Eastern District of Pennsylvania. *See, e.g., Ferguson v. Lorillard Tobacco Co., Inc.*, No. 09-91161, 2011 WL 4915784, at n.2 (E.D. Pa. Mar. 2, 2011) (Robreno, J.) (citing In re Collins, 233 F.3d 809, 810 (3d Cir. 2000) ("It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand."); In re Roberts, 178 F.3d 181 (3d Cir. 1999)).

**II. Defendant Metalclad's Motion for Summary Judgment**

**A. Defendant's Arguments**

Governmentor Contractor Defense

Metalclad asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendants for the products at issue, Defendant provided warnings that conformed to the Navy's approved warnings, and the Navy knew about asbestos and its hazards. In asserting this defense, Metalclad relies on evidence from consultant Dan H. Heflin, industrial hygienist Robert Strobe, and Rear Admiral Paul E. Sullivan, as well as MIL-I-24244.

False Representation

Metalclad argues that at least partial summary judgment is warranted on Plaintiff's false representation claim because

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Plaintiff does not have evidence to support such a claim at trial.

Premises Owner and/or Contractor Liability

Metalclad argues that at least partial summary judgment is warranted on Plaintiff's claims for liability of Defendant as a premises owner and/or contractor because Plaintiff does not have evidence to support such a claim at trial.

Punitive Damages

Metalclad argues that at least partial summary judgment is warranted on Plaintiff's punitive damages claims because Plaintiff has failed to identify any evidence that Defendant's conduct was malicious, oppressive, or fraudulent in any manner.

**B. Plaintiff's Arguments**

Governmentor Contractor Defense

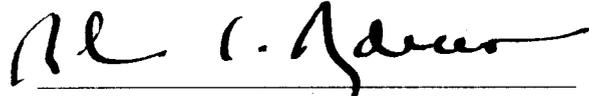
Plaintiff argues that summary judgment in favor of Defendants on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not proven that it was a contractor for the military, (2) not demonstrated that the product at issue was "military equipment," (e) 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), and (4) 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.

Plaintiff has not submitted evidence to contradict the evidence relied upon by Defendant.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense.

False Representation

Plaintiff does not respond to Defendant's argument that he does not have evidence to support his false representation claim at trial.



EDUARDO C. ROBRENO, J.

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Premises Owner and/or Contractor Liability

Plaintiff does not respond to Defendant's argument that he does not have evidence to support his claims for liability of Defendant as a premises owner and/or contractor to support such a claim at trial.

Punitive Damages

In response to Defendant's argument that he does not have evidence to support a claim for punitive damages, Plaintiff cites to California caselaw and various pieces of evidence which he contends indicate that Defendant's conduct satisfies the standard for punitive damages under California law.

**C. Analysis**

Defendant Metalclad has presented evidence sufficient to support a finding that it is entitled to the government contractor defense as set forth in Boyle. Plaintiff has not pointed to any evidence that contradicts (or even appears to be inconsistent with) Metalclad's evidence as to whether or not Metalclad is entitled to the defense. As such, Plaintiff has failed to raise a genuine dispute of material fact as to whether the Boyle test is satisfied with respect to Metalclad. See Faddish, 2010 WL 4146108 at \*8-9. Accordingly, summary judgment in favor of Defendant Metalclad on grounds of the government contractor defense is warranted. See id.; Anderson, 477 U.S. at 248-50.

In light of this determination, the Court need not reach any of Defendant's other arguments.