

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

CHRISTINE P. PACE, : CONSOLIDATED UNDER  
 : MDL 875  
Plaintiff, :  
 :  
 :  
 :  
v. : **FILED** : Transferred from the  
 : District of South Carolina  
APR 12 2013 : (Case No. 11-02688)  
 :  
3M COMPANY, ET AL., : **MICHAEL E. KUNZ, Clerk**  
By \_\_\_\_\_ : **Dep. Clerk**  
Defendants. : E.D. PA CIVIL ACTION NO.  
 : 2:11-67744-ER

O R D E R

AND NOW, this 11th day of April, 2013, it is hereby  
ORDERED that the Motion for Summary Judgment of Defendant Foster  
Wheeler Energy Corporation (Doc. No. 101) is **GRANTED**.<sup>1</sup>

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<sup>1</sup> This case was transferred in October of 2011 from the  
United States District Court for the District of South Carolina  
to the United States District Court for the Eastern District of  
Pennsylvania as part of MDL-875.

Plaintiff Christine Pace alleges that William Pace  
("Decedent" or "Mr. Pace") was exposed to asbestos while working  
as a marine machinist (and apprentice marine machinist) at the  
Charleston Naval Shipyard from 1971 to 1995. Plaintiff alleges  
that Defendant Foster Wheeler Energy Corporation ("Foster  
Wheeler") manufactured boilers. The alleged exposure pertinent to  
Defendant Foster Wheeler occurred aboard various Navy ships.

Plaintiff asserts that Decedent developed mesothelioma  
as a result of his exposure to asbestos. Decedent was deposed in  
October of 2011.

Plaintiff brought claims against various defendants.  
Defendant Foster Wheeler has moved for summary judgment, arguing  
that there is insufficient evidence to establish causation with  
respect to any product(s) for which it could be liable. The  
parties assert that South Carolina law applies.

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## 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

The parties assert that South Carolina 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

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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). 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 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.

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### Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69 (citing Grubart, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. See id. 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.

The alleged exposure pertinent to Defendant Foster Wheeler occurred aboard ships. Therefore, these alleged exposures were during sea-based work. See Conner, 799 F. Supp. 2d 455; Deuber, 2011 WL 6415339, at \*1 n.1. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant. See id. at 462-63.

### C. 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). This Court has also noted that, in light of its holding in Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012) (Robreno, J.), 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. Abbay v. Armstrong Int'l., Inc., No. 10-83248, 2012 WL 975837, at \*1 n.1 (E.D. Pa. Feb. 29, 2012) (Robreno, J.).

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

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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 Foster Wheeler's Motion for Summary Judgment

### A. Defendant's Arguments

Foster Wheeler contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's mesothelioma.

In its reply brief, Foster Wheeler argues that deposition testimony from two (2) of Defendant's witnesses should be excluded because Defendant was not present at those depositions and was not a party to the case in which each deposition was taken.

### B. Plaintiff's Arguments

In support of Plaintiff's assertion that she has identified sufficient evidence of exposure/causation/product identification to survive summary judgment, Plaintiff cites to the following evidence:

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- Affidavit of Mr. Pace  
Mr. Pace provided testimony that he worked as a machinist at Charleston Naval Shipyard from 1972 to 1975. His duties included repairing, replacing, and overhauling pumps, valves, turbines, and boilers. The affidavit states that he worked with and around asbestos-containing products for more than 5 years prior to 1982, and that the cutting, handling and application of these products created visible dust, which he inhaled.

(Doc. No. 120, Ex. A.)

- Deposition Testimony of Raymond McDaniel  
Mr. McDaniel worked as a machinist at the shipyard from approximately 1954 to 1987. He testified in another case that Foster Wheeler boilers were present upon various ships and were worked on aboard those ships during the time period in which Decedent worked as a machinist.

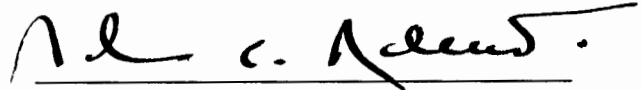
(Doc. No. 120, Ex. C.)

- Deposition Testimony of Jesse Massalon, Jr.  
Mr. Massalon also worked at the shipyard. In a deposition in another case, he testified that he worked on "one of the old tenders that was kind of outmoded" and that it had Foster Wheeler boilers on it.

(Doc. No. 120, Ex. D.)

- Deposition Testimony of Guy Lookabill, Sr.  
Mr. Lookabill testified that he worked with Decedent from 1972 to 1974 in Shop 38. He also testified that he worked with Decedent aboard ships, for approximately six hours per day. He testified that he and Decedent worked on and around asbestos-containing products on boilers. He testified that Decedent did not wear a mask or respirator during his work.

(Doc. No. 120, Ex. E.)



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- Deposition Testimony of Raymond Earl Lee  
Mr. Lee worked with Decedent at the shipyard from 1972 to 1993. He testified that he and Decedent worked in boiler rooms, on and around boilers.

(Doc. No. 120, Ex. F.)

### C. Analysis

As a preliminary matter, the Court notes that it is not necessary to consider in detail Defendant's request to have certain witnesses' testimony excluded because, even if the testimony is considered by the Court, Plaintiff's evidence is insufficient to survive summary judgment.

Plaintiff alleges that Decedent was exposed to asbestos from Foster Wheeler boilers. There is evidence that Decedent worked with and around boilers aboard ships. There is evidence that Foster Wheeler boilers were present on at least some ships at the shipyard. There is also evidence that Decedent worked on and around asbestos-containing products on boilers. Importantly, however, there is no evidence that Decedent worked with or around a Foster Wheeler boiler, much less that such worked exposed him to respirable asbestos. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from a product manufactured or supplied by Foster Wheeler such that it was a substantial factor in the development of his mesothelioma, because any such finding would be conjectural. See Lindstrom, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant Foster Wheeler is warranted. Anderson, 477 U.S. at 248-50.