

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

STECYK, et al. : CIVIL ACTION
: :
v. : :
: :
BELL HELICOPTER TEXTRON, INC., : NO. 94-1818
et al. : :

MEMORANDUM

Rendell, J.

October 31, 1997

This litigation arises out of the crash of a V-22 Osprey aircraft during a ferry flight near Quantico, Virginia on July 20, 1992. The accident killed seven individuals, including plaintiffs' decedents working for Boeing Vertol Company ("Boeing") on the V-22 project. Plaintiffs have sued Bell Helicopter Textron, Inc., and Textron, Inc., ("Bell"), the contractor who worked with Boeing and the United States Government ("the Government") on the development of the V-22; General Motors ("GM"), who contracted with the Government to develop and build the V-22 engine and its related parts; and Macrotech Fluid Sealing ("Macrotech"), the manufacturer of a seal which is alleged to have been installed improperly on the plane that crashed.¹

In early 1996, the defendants filed motions for summary judgment, and by Order dated March 29, 1996, ("Order" or "1996 Order") and Memorandum Opinion dated April 1, 1996, I granted in part and denied in part those motions. See Stecyk v. Bell

¹ Boeing already paid workers' compensation to the plaintiffs and was not named in this lawsuit.

Helicopter, Inc., No. 94-CV-1818, 1996 WL 153555 (E.D. Pa. April 1, 1996). My Order dismissed the plaintiffs' strict liability and breach of warranty claims, refused to dismiss claims based on negligence, denied summary judgment based on the government contractor defense, and rejected defendants' assertion that they are immune from liability under Pennsylvania's workers' compensation law.

Having engaged in further discovery, defendants now move once again for summary judgment on many of these same grounds. Bell contends (1) that plaintiffs are barred from relief by Pennsylvania's workers' compensation statute, because Bell and Boeing created a joint venture which employed the plaintiff's decedents; (2) that Bell cannot, as a matter of law, be held liable in negligence for an aircraft that was still under development; and (3) that the government contractor defense bars several of plaintiffs' claims.² In a separate motion, GM offers evidence to show (1) that it owed no duty to plaintiffs' decedents because it had no responsibility for the airplane parts that allegedly caused the crash, and (2) that it too is immune from liability under the government contractor defense.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

² Macrotech has joined Bell's motion with respect to the negligence and government contractor defense issues.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, id. at 248, and all inferences must be drawn, and all doubts will be resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

On a motion for summary judgment, the moving party bears the initial burden of identifying for the Court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-49.

II. DISCUSSION

A. The Workers' Compensation Exclusivity Provision

I begin with Bell's argument that plaintiffs' decedents were employees of a Bell-Boeing joint venture that protects Bell from suit under Pennsylvania's workers' compensation law. As before, this issue presents two questions: First, was the relationship between Bell and Boeing a joint venture? Second, if so, was the joint venture the employer of plaintiffs' decedents within the meaning of the Pennsylvania workers' compensation statute?

1. The existence of a joint venture

In response to the first inquiry, Bell has now demonstrated that it was engaged in a joint venture with Boeing to develop the V-22. The Third Circuit has indicated that the essential elements of a joint venture include: (a) a joint proprietary interest in, and a right to mutual control over, the enterprise; (b) a contribution by each of the parties of capital, materials, services or knowledge; and (c) a right to participate in the expected profits. Richardson v. Walsh Constr. Co., 334 F.2d 334, 336 (3d Cir. 1964). In addition, the parties must have formed an express or implied agreement to participate in a common enterprise. Id. In my 1996 Order, I found that Bell had shown mutual control and mutual contributions, but had failed to demonstrate that Bell and Boeing shared profits or formed an

agreement for the development of the Osprey. Stecyk, 1996 WL 153555, at *10. However, Bell has now offered new evidence to support these elements of the joint venture test.

First, Bell has shown that it shared profits and losses with Boeing as part of the joint venture. Bell has submitted tax returns from 1985 through 1995 (excluding 1987), and partner Schedule K-1 returns from 1983 through 1995, which indicate that profits and losses were shared equally between the two corporations. See, e.g., Appendix of Exhibits to Memorandum of Law in Support of Motion of Defendants, Bell Helicopter Textron Inc. and Textron Inc., for Summary Judgment ("Bell App.") at Ex. I. In addition, both Robert C. Broadhurst, Boeing's Head of Contract Administration for the V-22 Program, and M.D. McCrary, Bell's Vice President of U.S. Government Contracts and Logistics, have testified under oath that profits and losses were split on a 50-50 basis. Id. at Exs. F, G. In response, Plaintiffs offer evidence that Bell and Boeing each performed a different number of man hours on the project. Plaintiff's Joint Opposition to Defendants' Motions for Summary Judgment ("Pl. Brief") at 9. Yet this is not probative of whether the two corporations actually split profits and losses, and it is far outweighed by the documents and deposition testimony indicating a profit-sharing arrangement.

Moreover, Bell has demonstrated that there was an actual agreement to participate in a joint enterprise. Bell and Boeing executed a "Teaming Agreement" which established a Joint

Program Office to be "the focal point" for the V-22 development program. Bell App. at Ex. D. This office employed up to thirty persons and performed marketing, financial, and other logistic operations for both Bell and Boeing. Id. And while plaintiffs are correct that "[o]ne office did not a joint venture make," Pl. Brief at 12, there is ample evidence of a joint venture located throughout the record. The defendants offer evidence that the presidents of Bell and Boeing executed Powers of Attorney which authorized company representatives to act on behalf of a joint venture, Bell App. at Ex. E; Bell and Boeing reported their income to the Internal Revenue Service as a partnership, id. at Ex. I; the Teaming Agreement provided for "equal division of effort in each phase of the [V-22] program," id. at Ex. D; and the U.S. Government itself dealt with Bell and Boeing as a "joint venture" working on the Osprey project, id. at Ex. B, p. 104. Therefore, I find that defendants have now presented sufficient evidence to demonstrate the existence of a joint venture between Bell and Boeing.

2. Whether the joint venture employed the plaintiffs' decedents

The second inquiry, namely, whether the joint venture was the employer of the deceased employees, is a thornier question. With limited exceptions, the Pennsylvania Workers' Compensation Act ("WCA") provides that employers are immune from being sued in tort for injuries suffered by an employee acting in

the course of his or her employment. 77 Pa. Cons. Stat. Ann. § 481(a) (West 1997)³; see also Hicks v. Arthur, 843 F. Supp. 949, 957 (E.D. Pa. 1996). Here, Bell argues that it is immune from suit under the WCA because the joint venture was the employer of plaintiffs' decedents.

However, plaintiffs maintain that Bell is not entitled to the protections of the WCA because the joint venture was not the employer of the decedents at the time of the V-22 crash. They argue that the joint venture did not exercise sufficient control over the manner of the decedents' employment to be considered an "employer" under Pennsylvania law.⁴

Both plaintiffs and defendants have cited a number of cases to support their positions, but the vast majority of these cases are of little help to my analysis, since I must focus in this diversity case on how the Pennsylvania Supreme Court would

³ Section 481(a) states: "The liability of an employer under this act shall be exclusive of any and all other liability to such employes [sic], his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108."

⁴ It is conceded that if the joint venture was clearly the employer, the individual joint venturers making up the venture would be protected by the exclusivity rule. Many of the cases relied upon by defendants involve these facts and this principle, but that is not the fact pattern before me.

decide the issue.⁵ See Kaplan v. Exxon Corp., Nos. 96-1495 & 96-1519, 1997 WL 590131, at *3 (3d Cir. Sept. 25, 1997) (writing that a court applying Pennsylvania law in a diversity case must "predict how the Pennsylvania Supreme Court would rule"). In fact, the cases offered by the parties are factually and legally inapposite. None of the cases relied upon involve a joint venture subject to Pennsylvania law where each venturer provided its own employees. Defendants cite primarily to Haas v. 653 Leasing Co., 425 F. Supp. 1305 (E.D. Pa. 1977) and Heavins v. Mobil Oil Exploration and Producing S.E., Inc., 913 F.2d 178 (5th Cir. 1990), but these cases involved claims for workers' compensation under the federal provisions of the Longshore and Harbor Workers' Compensation Act.⁶ Similarly, plaintiffs rely heavily on George v. GPU Nuclear Corp., 910 F. Supp. 180 (M.D. Pa. 1995), but George was a "borrowed servant" case that never addressed the Pennsylvania test for determining the liability of

⁵ Pennsylvania law applies to this action. Federal courts sitting in diversity and state courts in Pennsylvania have found that a tribunal should apply the law of the state under whose workers' compensation system the plaintiffs have collected benefits. See, e.g., Lewis v. Chemetron Corp., 448 F. Supp. 211, 213 (W.D. Pa. 1978); Elston v. Industrial Lift Truck Co., 216 A.2d 318 (Pa. 1966). Here, plaintiffs' decedents were Pennsylvania residents, and they have been receiving workers' compensation payments from Boeing through the Pennsylvania system. Exhibits to Defendants' 1996 Motion for Summary Judgment at Ex. 140.

⁶ As I noted in my 1996 Order, Haas is also distinguishable because plaintiffs are not seeking to hold Bell vicariously liable for the torts of the other co-venturer, as was the Haas plaintiff, nor are the companies here as closely related as the joint venturers in Haas. See Stecyk, 1996 WL 153555, at *11 n.11.

the parties in a joint venture. Therefore, I have undertaken my own investigation to try to determine how the Pennsylvania Supreme Court would analyze this issue -- would it follow those cases finding all joint venturers to be protected where employees further the work of the joint venture, or would the Pennsylvania Supreme Court look to the concept of "employer" under the WCA as requiring the existence of a master-servant, control-type relationship for each joint venturer? If the former, Bell is immune from suit by virtue of its involvement in a joint venture with Boeing. If the latter, based upon the record before me, Boeing would be the employer under the facts, and Bell would be a third party subject to suit under the WCA.

"In attempting to forecast state law, [I] must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." 2-J Corp. v. Tice, No. 96-1943, 1997 WL 604525, at *2 (3d Cir. Oct. 2, 1997) (quoting Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 117 (3d Cir. 1987)). Here, I find that the plain language of the statute, the relevant caselaw, and the definitive authorities on this topic inform my decision that Pennsylvania would adopt the master-servant control test to determine who should be deemed an "employer" for purposes of the workers' compensation bar.

I begin with the language of the WCA, which provides that workers' compensation is an employee's exclusive remedy against an employer. 77 Pa. Cons. Stat. Ann. § 481(a) (West 1997). The statute defines employer as "synonymous with master," id. at § 21, and in Pennsylvania the "essence . . . of the employer-employee status is the master-servant relationship." Mays v. Liberty Mutual Ins. Co., 323 F.2d 174, 177 (3d Cir. 1963). In determining whether such a relationship exists, the Pennsylvania courts consider a number of factors, including, inter alia, the nature of the work or occupation, whether a party supplies tools and equipment, whether the work is part of a party's regular business, and the right of the party to terminate employment at any time. See, e.g., Industrial Abrasives, Inc. v. Workmen's Compensation Appeal Bd. (Caceres), 630 A.2d 547, 548 (Pa. Commw. Ct. 1993). However, the overriding factor in every case is "the right to control the performance of the work." JFC Temps, Inc. v. Workmen's Compensation Appeal Bd. (Lindsay and G & B Packing), 680 A.2d 862, 865 (Pa. 1996). "[T]he right to control of the manner in which the work is accomplished is the most persuasive indication of the presence or absence of the employer/employee relationship." Southland Cable Co. v. Workmen's Compensation Appeal Bd. (Emmett), 598 A.2d 329, 331 (Pa. Commw. Ct. 1991). Thus, the issue here is whether the Pennsylvania Supreme Court would apply this same "right to control" test in the joint venture context, or whether it would

find that an employee of one party to a joint venture is an employee of all parties to the venture as a matter of law.

For at least three reasons, I find that Pennsylvania's highest court would likely use the control test in ascertaining the liability of each party in a joint venture. First, the Pennsylvania courts have consistently looked to elements of control as indicia of the employer/employee relationship in other cases involving joint or dual employment. See, e.g., Costigan v. Philadelphia Fin. Dep't Employees Local 696, 341 A.2d 456, 461 (Pa. 1975) (finding a joint employment relationship where control of the terms of employment was shared between the parties);⁷ Steamfitters, Local 449, AFL-CIO v. Pennsylvania Labor Relations Bd., 613 A.2d 155, 157 (Pa. Commw. Ct. 1992) (holding that the parties were joint employers because they both exercised control over the employees); Magaw v. Bloomsburg Heating Co., 178 A. 411, 412 (Pa. Super. Ct. 1935) (finding no joint employment or joint liability for workers' compensation because only one party controlled the decedent's terms of employment).

⁷ Costigan has since been criticized because of changes to the law that were at issue in the case. See, e.g., Ellenbogen v. County of Allegheny, 388 A.2d 730, 732-33 (Pa. 1978). However, Costigan's basic principle remains good law; in the absence of a legislative directive, the courts still look for indicia of control to determine joint employment. See Board of Governors of the State System of Higher Educ. v. Commonwealth of Pa., 514 A.2d 223, 228 (Pa. Commw. Ct. 1986) (using "direct control over the employment relationship" as a factor in determining joint employment), appeal denied by, Association of Pa. State College and Univ. Faculties v. Pennsylvania Labor Relations Bd., 527 A.2d 545 (Pa. 1987).

Second, the leading authority on workers' compensation law indicates that control is a critical element of employment relationships in a joint venture. Larson's Workers' Compensation Law cautions that in joint employment cases, including those involving joint ventures, it "is important . . . to insist that all the elements of joint employment be present." 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 48.44 (1997). "[T]he mere advancing of one potential employer's interests, accompanied even by some sharing in payment, is not enough in the absence of some element of control." Id. (emphasis added).

Third, several other states have already applied the control test in similar joint venture contexts. In Kalnas v. Layne of N.Y. Co., 414 A.2d 607 (N.J. Super. Ct. App. Div. 1980), a New Jersey court held that a member of a joint venture could be held liable for its own negligence when sued by an employee of the other venturer, despite the exclusivity provision in the state's workers' compensation law, where the joint venture did not exert control over the plaintiff so as to be considered his "employer." Kalnas expressly rejected the notion that all joint venturers should be considered employers as a matter of law, and held instead that "[w]hether each joint venturer can be deemed the employer of all the employees engaged in the work of the joint enterprise must clearly depend on the particular facts and circumstances surrounding the joint venture." Id. at 609. And, the court said, the most critical factors in this determination

include the existence of a master-servant relationship and other indicia of control. Id. I find this reasoning especially persuasive, since New Jersey law defines "employer" exactly the same as Pennsylvania law; both statutes declare that "employer" is "synonymous with master." Compare N.J. Stat. Ann. § 34:15-36 (West 1997) with 77 Pa. Cons. Stat. Ann. § 21 (West 1997). Therefore, Kalnas strongly suggests that Pennsylvania would also require a showing of control to establish immunity for a joint venture defendant. See also Bulgrin v. Madison Gas & Elec. Co., 373 N.W.2d 47, 52 (Wis. Ct. App. 1985) (holding that the "better reasoned cases support" using the control test in the joint venture context), review denied, 378 N.W.2d 291 (Wis. 1985).

Admittedly, several state courts have held that all the members of a joint venture are employers of all those engaged in the venture's work as a matter of law. See, e.g., Mitchell v. A.F. Roosevelt Ave. Corp., 207 A.D.2d 388, 389 (N.Y. App. Div. 1994); Lawler v. Dallas Statler-Hilton Joint Venture, 793 S.W.2d

27, 35 (Tex. App. 1990).⁸ However, while these cases appear to broaden the concept of who qualifies as an "employer," there is nothing that would permit me to assume that Pennsylvania would abandon its practice of equating employer status with control in this instance.⁹ The control test is the dominant means for interpreting the employment relationship under Pennsylvania law; it has been used in other joint and dual employment cases in Pennsylvania; it is employed by other courts in states with similar laws; and its use in the joint venture context has never been questioned by a Pennsylvania court. Consequently, I find that Pennsylvania would likely require each member of a joint

⁸ I note that the court in Lawler set forth a list of cases purporting to show that the majority of states have adopted the view that each member of a joint venture or partnership is an employer of all those working on the project as a matter of law. 793 S.W.2d at 31-32. However, a careful reading of those decisions indicates otherwise. Many of the cases, including the Pennsylvania decision in Greenya v. Gordon, 133 A.2d 595 (Pa. 1957), hold that employees of a joint venture or partnership cannot sue individual partners or joint venturers in tort. Yet that presupposes that an employment relationship with the joint venture or partnership is clear. In Greenya, for example, it had already been established that the plaintiff was an employee of the partnership. Id. Here, that is an issue that becomes relevant if the control test applies, because, as noted above, it is conceded that if the Bell-Boeing joint venture is the employer, each co-venturer is protected. Many of the cases cited to support Lawler's holding are distinguishable.

⁹ Nor do the policies behind workers' compensation advance the decision-making process, because while the WCA serves to provide comfort and certainty for an employer in the workplace, there exists a formidable countervailing policy to permit suits by individual employees against third parties. As the Third Circuit has written, the WCA "must be liberally construed in order to effectuate its remedial purpose, but its scope cannot be extended in a manner which would destroy either the employee's common-law rights against third persons, or the common-law conception of third persons." Mays, 323 F.2d at 177.

venture to exercise sufficient control over an employee in order to qualify for immunity as an "employer" under the WCA.

With these principles in mind, and since there has been no showing that Bell or the joint venture either had or exerted the right to control the employees that Boeing brought to the project, I will deny Bell's motion for summary judgment on this issue.

B. Liability for Negligence Claims

Defendants next contend that they cannot, as a matter of law, be held liable in negligence for injuries sustained in the crash of an aircraft that was still under development. In my earlier Order, I found that the experimental nature of the V-22 did not bar plaintiffs' negligence claims because, unlike strict liability, negligence "is not dependent upon a product being placed in the stream of commerce but rather upon a duty owed by one party to another which was breached and caused injury." Stecyk, 1996 WL 153555, at *9. Defendants now renew their objections to this finding by arguing that products liability in negligence arises only at the point that a product is marketed and sold to consumers.

Defendants still have not explained why negligence claims should be precluded when an accident involves an experimental product. They cite to no clear authority to support this assertion, and their arguments continue to ignore the critical differences between strict liability and negligence. As

I explained in an August 16, 1996, Order denying defendants' motion for reconsideration on this very same issue, negligence requires a risk-utility analysis distinct from the principles which underlie strict liability. While strict liability protects vulnerable consumers from aggressive commercial tactics, negligence provides a broader cause of action involving distinct elements of proof of duty, care, and causation. Therefore, even if defendants cannot be held strictly liable for their use and manufacture of the V-22, they may be liable in negligence, because they may have owed a basic duty of care in testing, flying, and developing this aircraft for all potential users, including the plaintiffs' decedents.¹⁰

In fact, defendants' own case supports this proposition. Defendants claim that Trimpey Tire Sales and Serv., Inc. v. Stine, 403 A.2d 108 (Pa. 1979), shows that the plaintiff must be a consumer of a finished product to recover damages under a negligence theory. But this is not what Trimpey holds.

¹⁰ Contrary to defendants' assertion, policy arguments also do not support disallowing a negligence cause of action. While it may be socially undesirable to hold manufacturers strictly liable during the testing stages of a product, because liability without fault for experimental items could chill incentives to design new goods, the same cannot be said for negligence claims, which require a showing of fault and a failure to exercise reasonable care. Requiring defendants to use reasonable care, even when exposing employees to unfinished products which could cause them harm, protects potential users in a way that is consistent with the basic tenets of products liability law that are already in place. It is thus highly unlikely that manufacturers would be deterred from developing new products merely because the law imposes some minimum standard of reasonable care during the testing stage.

Trimpey merely states that a plaintiff must be "a user or consumer" in order to state a negligent manufacture claim. Id. at 109 (emphasis added). It says nothing about whether a product need be in its final form for liability to attach. Thus, Trimpey does not show that negligence products liability requires that plaintiff be a "consumer" of a final product; rather, it too indicates that the plaintiff may obtain relief by being a mere "user" of a good.¹¹ Here, then, where plaintiffs' decedents were "users" of a product, albeit one still being tested while the decedents were riding in it during a ferry flight, I am not prepared to say that the law forbids a cause of action against the defendants for negligent manufacture and failure to warn.

C. The Government Contractor Defense

Defendants' third argument is that the government contractor defense bars plaintiffs' claims. In Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988), the United States Supreme Court established the following three-prong test for the government contractor defense:

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the

¹¹ Trimpey accents the defendants' dilemma, because, as was the case in earlier motions, defendants are unable to cite to a single opinion that directly speaks to the issue of whether a "stream of commerce" requirement exists in the negligence arena.

equipment that were known to the supplier but not to the United States.

In my previous Order, I denied defendants' motion for summary judgment on this defense, after finding "an absence of, and genuine issues of material fact with respect to, evidence supporting defendants' contention" that the design of several V-22 parts could qualify under the first prong of Boyle as "reasonably precise specifications which were approved by the government as a result of a specific process of give and take." Stecyk, 1996 WL 153555, at *6. In separate motions by Bell and GM, the defendants have now offered hundreds of additional pages of evidence on this issue, and they urge me once again to invoke the defense as a matter of law. However, all that remains clear from the parties' voluminous submissions is that there are still far too many genuine issues of material fact, and I cannot recognize the government contractor defense as viable at this summary judgment stage.

A few examples of the disputed facts in the record will suffice to show the inappropriateness of summary judgment here. First, Bell contends that the Government approved reasonably precise specifications for the upper nacelle "fire zone" design. It presents deposition testimony showing that the Government held numerous Preliminary and Critical Design Reviews ("PDR" and "CDR," respectively) to approve defendants' designs of the V-22. It also offers the depositions of Ray Schleicher ("Schleicher"), Deputy V-22 Program Manager, and Roger Vehorn ("Vehorn"), a

former Navy engineer on the Osprey project, which indicate that the Government questioned whether the upper nacelle should be designated a fire zone, that Bell and Boeing submitted a written response to this inquiry, and that the Navy subsequently approved that response. Memorandum of Law in Support of Motion of Defendants, Bell Helicopter Textron Inc. and Textron Inc., for Summary Judgment ("Bell Brief") at 38; Bell App. at Exs. B, O, P, R, and S. However, plaintiffs offer directly conflicting evidence on this same approval process. They offer depositions to show that PDR and CDR reviews did not represent final approval of airplane designs, but rather only signaled approval of the process by which the program was operating. See, e.g., Exhibits to Plaintiffs' Joint Opposition to Defendants' Motions for Summary Judgment ("Pl. Ex.") at Exs. 3, 17. In addition, plaintiffs show that Schleicher admitted that the Government's role was simply to monitor the progress of V-22 development to ensure that deadlines were being met. Id. at Ex. 17. This supports my 1996 finding that the first prong of Boyle has not been satisfied, because "defendants have not demonstrated that the government approval of these designs was substantive as opposed to procedural." Stecyk, 1996 WL 153555, at *5 n.4. Thus, genuine issues of material fact still exist as to whether

the Government approved defendants' specifications for the upper nacelle.¹²

The same can be said for the rest of Bell's contentions as to the approval of various aspects of the plane. For example, Bell offers depositions to show that the Government approved the design of the horizontal firewall after Bell and Boeing provided Government employees with detailed information regarding its size and location. Bell Brief at 41; Bell App. at Exs. O, B. Yet plaintiffs' evidence demonstrates that the diagrams Bell submitted to the Government never even depicted the holes drilled into the firewall that allegedly contributed to the passage of heat to the upper nacelle. Pl. Brief at 35; Pl. Ex. at Exs. 10, 21, 29. Plaintiffs also note that while defendants rely heavily upon the deposition of Gerald P. Smith ("Smith"), the Group Engineer responsible for the design of the V-22 FSD nacelle, Smith was unable during his deposition to name a single person or document that could verify Government approval. Pl. Ex. at Ex. 7, pp. 118-19. In fact, Smith admitted that he was just assuming the Government had approved the firewall design because someone

¹² Here, as elsewhere, the defendants are also unable to point to any final drawings that the Government may have approved. All of defendants' evidence is from contradicted deposition testimony, which is simply not enough to prove Government "approval" of the V-22 as a matter of law.

at Bell told him that approval had been granted.¹³ Id.

Therefore, in reviewing Bell's record in this case, I cannot say that no reasonable jury could find for the plaintiffs; the evidence before me presents disputed issues of material fact as to whether the V-22 designs were ever "approved" during a process of give and take between the defendants and the Government, as required by the first prong of Boyle.¹⁴

The same dilemma exists with respect to GM's request for immunity under the government contractor defense. GM offers more documents, affidavits, and depositions to show that the

¹³ Likewise, Bell's remaining two arguments are contested. To support the claim that the design of the air inlet centerbody was approved by the Government, Defendants rely primarily upon the deposition of Owen Kaiser ("Kaiser"), Bell's Chief of Power Plant Design during the V-22 project, who testified that the design of the centerbody was accepted by the Government as part of a CDR. Bell Brief at 43; Bell App. at Ex. P, p. 44. However, plaintiffs note that Kaiser did not always receive full information, Pl. Ex. at Ex. 16, pp. 84-91, and they show that he conceded under oath that the Government was never provided with critical design options such as whether the inlet should have a drain or an aspirator. Id. at pp. 93-94. Defendants also offer evidence to show that the Government approved the decision to use composite material for the interconnect driveshaft. Yet plaintiffs maintain that whether a composite material was used is irrelevant to their design defect claims. Pl. Brief at 23. Moreover, the one document which defendants cite to show Government approval of the composite material is unpersuasive. Bell Brief at 45. The Verification of Dan McCrary, Bell App. at Ex. R, may speak generally about the approval process, but it says nothing about whether the Government specifically approved the use of composite materials in the interconnect driveshaft.

¹⁴ Although I only reach the first prong of the Boyle test, I note that plaintiffs' arguments also raise concerns as to the test's third prong, because they show that genuine issues of material fact may still exist as to whether defendants adequately warned the Government of the risks of certain features on the V-22.

Government approved its designs of the V-22 engine and related parts. However, as they did with Bell's motion, plaintiffs have adequately met their burden to demonstrate that genuine issues of fact still remain as to whether GM is subject to the protections of contractor immunity.

GM relies heavily on the affidavits of Samuel Thrasher ("Thrasher"), GM's Chief Project Engineer for the V-22 engine, John Arvin ("Arvin"), a member of the V-22 engine project team, and John Grusha ("Grusha"), the Navy's Project Engineer on the Osprey Program, to demonstrate that the Government approved a Model Spec of the engine after prolonged exchanges of information and lengthy discussions with Government representatives. See Memorandum of Law of Defendant General Motors Corporation In Support of its Motion for Summary Judgment ("GM Brief") at 39, 43. GM argues that this evidence shows beyond dispute that the Government approved reasonable specifications of the V-22 in accordance with the first prong of Boyle.

However, plaintiffs present sufficient evidence to counter these facts. First, they show that Grusha admitted under oath that the Government merely specified performance requirements during its reviews of GM's work, that the Government did not review all the design drawings, and that it did not "try to go through all the details of the engine" during the review process. Pl. Ex. at Ex. 23, pp. 76-77. This alone could allow a reasonable jury to find that the Government was exercising procedural, deferential review inconsistent with the "give and

take" process mandated by Boyle. Furthermore, plaintiffs offer evidence to show that Government decision-makers were not informed of reports of leaking oil or of incidents where oil had accumulated within the inlet housing. Pl. Brief at 46. In addition, plaintiffs present testimony that Grusha, one of the Government's chief engineers on the V-22 engine project, was never even aware of critical decisions involving temperatures and pressures within the torquemeter housing, nor familiar with the seals on the torquemeter shaft. Pl. Ex. at Ex. 23. Consequently, triable issues of fact still remain as to whether the Government approved GM's design in accordance with the demands of the government contractor defense.¹⁵

D. Whether GM Owed a Duty to Plaintiffs' Decedents

Finally, I address GM's contention that as a matter of law it owed no duty to plaintiffs' decedents. GM argues that it had no responsibility for the non-engine parts in the V-22, thus absolving the company of liability. Plaintiffs have raised sufficient questions regarding the scope of GM's

¹⁵ Plaintiffs also contend that GM is not entitled to contractor immunity because the defense relates only to design defects, and GM has committed non-design negligence here. Pl. Brief at 39. However, several circuits have expanded Boyle beyond design defects and have applied its protections to claims alleging manufacturing defects and failures to warn. See, e.g., Snell v. Bell Helicopter Textron Inc., 107 F.3d 744, 749 (9th Cir. 1997) (manufacturing defect); In re Joint E. and S. Dist. of N.Y. Asbestos Litig., 897 F.2d 626, 629 (2d Cir. 1990) (failure to warn). Therefore, plaintiffs' argument is not dispositive of GM's motion.

responsibilities, including evidence of a joint decision-making process, such that if the jury were to accept plaintiffs' version of the facts, a judge could find that GM owed a duty to the decedents.¹⁶

GM offers evidence to show that its Full Scale Development ("FSD") contract with the Government confined GM's responsibility to the V-22 engine. It maintains that it had no responsibility for the non-engine parts that allegedly caused the fatal crash, including the 617/619 seals and the environmental/donut seal on the engine-aircraft interface. GM quotes language from the FSD contract, and from an Interface Control Document ("ICD") executed by the parties,¹⁷ to show that its contractual responsibility was constrained in this manner. In addition, GM cites, inter alia, to a deposition by John Grusha, who stated that GM could just "walk away" after manufacturing the engine and torque-meter shaft, because it was Bell's sole responsibility to ensure that the V-22 interface system worked correctly. GM Brief at 15-16; Exhibits of General Motors in Support of Motion for Summary Judgment ("GM Ex."), Vol. II, at Ex. 17, pp. 171-74.

Although GM has presented powerful evidence as to a division of responsibilities between itself and Bell, there are

¹⁶ Whether GM owed a duty to the plaintiffs is ultimately a question of law to be determined by the judge. See In re TMI, 67 F.3d 1103, 1117 (3d Cir. 1995).

¹⁷ The ICD was written to "define the interface requirements between Bell-Boeing and [GM] in regard to integrating" GM's turboshaft engine into Bell-Boeing's V-22 tiltrotor airframe. GM Brief at 11.

simply too many disputed issues in the record to conclude that GM owed no duty to plaintiffs' decedents as a matter of law. First, the fact remains that GM built the torquemeter shaft through which the oil leaked and ultimately caused an explosion. This shaft was plugged into Bell's gearbox and was encased in a housing from which the donut seal was removed. Pl. Brief at 41. As a result, a reasonable jury could find that GM shared some joint responsibility for the cause of the accident. GM attempts to dispute this by walking a fine line between what it calls "functional interfacing" and "integration," and arguing that it was responsible only for the former, but I find that any difference in the responsibilities that these terms connote is too obscure to warrant summary judgment. GM admitted at oral argument that it provided Bell with information on integrating its engine into the airframe, and stated that it worked on integration design changes while considering how to best alter the design of the engine. Transcript of Proceedings Before the Honorable Marjorie O. Rendell, 9/22/97 ("Oral Arg.") at 71. Thus, it is reasonable to believe that a jury could find that GM shared information and worked with Bell to design the integrated areas that malfunctioned on the V-22, thus supporting the existence of a duty on its part.

Furthermore, plaintiffs provide several depositions which raise genuine issues of material fact as to GM's role in the accident. Among the most persuasive are statements from Owen Kaiser ("Kaiser"), Bell's former Chief of Power Plant Design, and

Jeff Berlin ("Berlin"), a senior Bell engineer. Kaiser said that an "interface" existed at the point where Bell's seal connected with GM's torquemeter shaft, and he admitted under oath that this interface created a "joint responsibility between the two companies to interact, communicate, [and] do what was needed to fulfill" their obligations. Pl. Ex. at Ex. 16, p. 190 (emphasis added).¹⁸ Likewise, Berlin admitted that, because Bell's seal fit onto GM's torquemeter shaft, "there would have to be some communication on the interface on fitting into that specific" design. Pl. Ex. at Ex. 26, pp. 55-56. Therefore, there is sufficient evidence in the record to support a finding of joint responsibility and overlapping control between GM and the other manufacturers.

Finally, I note that GM's attempt to support summary judgment with references to the language of the ICD is unpersuasive. There is little doubt that the ICD is a critical document in this case, but it is far too ambiguous to support a judgment in favor of GM as a matter of law. Even GM admits that the document "is written in a form that's not particularly easy," Oral Arg. at 68, and I find that some provisions of the ICD even

¹⁸ Defendants incorrectly argue that this quote is out of context. Kaiser may have hesitated in answering, but he clearly agreed with the notion that both Bell and GM had a responsibility to work together. See also Pl. Ex. at Ex. 16, p. 218. And even though Kaiser stated on cross-examination that GM was not responsible for the design and manufacture of Bell parts, GM Ex., Vol. II, at Ex. 19, p. 198, this only reinforces my finding that genuine issues of material fact exist as to whether GM shared responsibility for this accident.

appear to support the plaintiffs' cause. For example, the ICD itself states that it "defines requirements and documents agreements reached between Bell-Boeing . . . and Allison [GM] . . . on items affecting the airframe/engine interface," "defines the interface requirements between Bell-Boeing and Allison," and "describes the engine physical, functional, performance, environmental, usage, maintenance, support, safety, test and evaluation interface with the tiltrotor airframe." GM Ex., Vol. I, at Ex. 2, pp. 1-1, 1-2. Therefore, viewing the evidence in the light most favorable to plaintiffs, I cannot say that no reasonable jury could find that GM was liable. On the contrary, the record in this case contains genuine issues of material fact which can best be resolved by a jury at trial.

Accordingly, the Motions for Summary Judgment filed by Defendants Bell Helicopter Textron Inc. and Textron Inc., Macrotech Fluid Sealing, and General Motors Corporation should be DENIED.