

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

MARY CHARLENE HAYS, ET AL., : CONSOLIDATED UNDER  
: MDL 875  
: :  
Plaintiffs, : :  
: : Transferred from the Southern  
: : District of Florida  
v. : (Case No. 09-81881)  
: :  
A.W. CHESTERTON, INC., ET AL., :  
By MICHAEL J. : E.D. PA CIVIL ACTION NO.  
: 2:09-93728-ER  
Defendants. :

**ORDER**

**AND NOW**, this **27th** day of **October, 2011**, it is hereby  
**ORDERED** that the Motion for Summary Judgment of Foster Wheeler  
(doc. no. 219) is **DENIED**.<sup>1</sup>

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<sup>1</sup> Plaintiff, the personal representative of decedent William Hays, filed this case on October 5, 2009 in state court in Florida, alleging that Mr. Hays developed mesothelioma as a result of exposure to asbestos-containing materials during his career in the Navy and at non-Navy locations in Florida from 1959 until approximately 1998, and asserting, *inter alia*, failure to warn and strict liability claims. In November of 2009, this case was removed to the United States District Court for the Southern District of Florida. This case was subsequently transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875. Federal jurisdiction in this case is based on federal officer jurisdiction under 28 U.S.C. § 1442. Foster Wheeler has moved for summary judgment, claiming it is immune from liability on the basis of the government contractor defense.

**I. LEGAL STANDARD**

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine

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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. 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; (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, 539 F. Supp. 2d at 783 (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. 539 F. Supp. 2d at 783. This Court has previously

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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., No. 09-91449 (E.D. Pa. Aug. 29, 2011) (Robreno, J.); Dalton v. 3M Co., No. 10-64604 (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.

C. Government Contractor Defense at the 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 issue of material fact as to whether it is entitled to the government contractor defense. Compare Willis v. BW IP International Inc., 2011 WL 3818515 at \*1 (E.D. Pa. Aug. 26, 2011) (Robreno, J.) (addressing defendant's burden at the summary judgment stage), with Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770 (E.D. Pa. 2010) (Robreno, J.) (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 issue of 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 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.

**II. Defendant Foster Wheeler's Motion for Summary Judgment**

In support of its motion, Foster Wheeler provided the affidavits of experts (Admiral Benjamin J. Lehman, Dr. Lawrence Stilwell Betts, and Commander Thomas McCaffery) and a company witness (J. Thomas Schroppe), as well as several Military

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Specifications purported to have been issued by the Navy and pertinent to the Foster Wheeler products at issue (boilers), a Navy handbook, a Navy report, and correspondence between the Navy and Foster Wheeler.

Plaintiff has pointed to evidence that contradicts or appears to be inconsistent with Foster Wheeler's proffered evidence, such that there are genuine issues of fact regarding the first and third prongs of the Boyle test. For example, with respect to the first prong, Plaintiff points to a paragraph of one of Foster Wheeler's own exhibits (Mil Spec MIL-I-15024(SHIPS), Exhibit J to Foster Wheeler's motion), which Plaintiff contends demonstrates that product manufacturers like Foster Wheeler (rather than the Navy) were the parties who held the authority to exercise discretion as to what safety-related warnings would be placed on their products. Plaintiff has also pointed to the testimony of another defendant's expert (Warren Pumps's expert, James Delaney) stating that the Navy never provided training regarding asbestos, despite the fact that the Navy provided training about other health hazards in the workplace (suggesting that, if the Navy knew about asbestos-related health hazards, the Navy was not responsible for warning about them, such that the responsibility must have belonged to someone else (i.e., the manufacturer)).

With respect to the third prong of the Boyle test, Plaintiff has pointed to the testimony of another defendant's expert (Admiral David P. Sargent, Jr., proffered by Crane Co. and Warren Pumps), who testified that, even as late as the mid-1960's, the Navy was not fully aware of the cancer hazard posed by asbestos (whereas Foster Wheeler's expert testified that the Navy was aware of asbestos hazards as early as the 1920's) and that commanding officers did not become aware of the hazards until the mid-to-late 1970's. Plaintiff has attached as an exhibit a document that was referenced by Foster Wheeler's expert (Dr. Betts) and has argued that the document was discussed in a misleading way by Dr. Betts to suggest a certain state of the Navy's knowledge about asbestos hazards when, in fact, according to Plaintiff's interpretation, the document indicates that the Navy's knowledge was much less extensive than Dr. Betts suggests and, further, disclaims the knowledge therein as being knowledge held by the Navy as a holistic organization. Plaintiff also points to the testimony of Warren Pumps's expert, James Delaney, with respect to this third prong of the Boyle test, stating that the Navy never provided training regarding asbestos despite the fact that the Navy provided training about other health hazards

AND IT IS SO ORDERED.



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EDUARDO C. ROBRENO, J.

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in the workplace (suggesting that the Navy did not know about asbestos-related hazards).

In sum, by pointing to evidence that contradicts (or at least appears to be inconsistent with) Foster Wheeler's evidence in support of its motion, Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether Foster Wheeler is entitled to the government contractor defense. Accordingly, summary judgment on grounds of the government contractor defense is not warranted and Foster Wheeler's motion is therefore denied.