

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

FILED

DEC 02 2011

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ARMAND DEUBER, : CONSOLIDATED UNDER
 : MDL 875
Plaintiff, :
 :
 : Transferred from the
 : District of New Jersey
v. : (Case No. 10-02686)
 :
 :
ASBESTOS CORPORATION LIMITED, :
ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:10-CV-78931-ER
Defendants. :

ORDER

AND NOW, this **2nd** day of **December, 2011**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant Crane
Co. (Doc. No. 103) is **GRANTED**.¹

¹ This case was originally filed on March 10, 2010 in the Superior Court of New Jersey, Middlesex County. It was removed by Defendant CBS Corporation to the United States District Court for the District of New Jersey on May 25, 2010. It was thereafter transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875. Decedent Armand Deuber worked as a rigger (in a civilian capacity) at the Philadelphia Naval Shipyard for approximately 5 years (1967 or 1968 to 1973) and thereafter worked at DuPont in Deepwater, New Jersey for approximately twenty-three (23) years. Mr. Deuber developed mesothelioma and died. Crane Co. manufactured valves for use aboard ships. The alleged exposure with respect to Defendant Crane Co. took place exclusively at the Philadelphia Naval Shipyard.

Plaintiff has brought claims against Defendant Crane Co., alleging that its products were a cause of decedent's mesothelioma. Crane Co. has moved for summary judgment, arguing that (1) maritime law applies, (2) Plaintiff has failed to provide product identification evidence sufficient to establish causation, (3) it is immune from liability by way of the government contractor defense, and (4) it is entitled to the bare metal defense, regardless of what law applies. Plaintiff contends that Pennsylvania law applies (or possibly New Jersey law) and

asserts that maritime law is not applicable.

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

Crane Co. asserts that maritime law is applicable with respect to its motion. 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., - F. Supp. 2d -, 2011 WL 3101810 (E.D. Pa. July 22, 2011) (Robreno, J.). A party seeking application of maritime law must establish that maritime jurisdiction is properly invoked. Id. at * 5.

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 * 5-8 (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, 2011 WL 3101810 at *9. 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 9-10. 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., 10-64625, doc. no. 81 (Aug. 2, 2011 E.D. Pa.) (Robreno, J.) (applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

It is undisputed that the alleged exposure to Defendant Crane Co.'s products occurred exclusively during the decedent's work at the Philadelphia Naval shipyard (for a period of approximately five (5) years). Defendant has specifically asserted that the decedent's work at this shipyard was "onboard U.S. Navy vessels on navigable water," and there is in the record extensive deposition testimony of decedent and a co-worker that indicates that the work performed there and resulting in the alleged exposure was work done aboard the docked ships (as opposed to in other areas of the shipyard not on the ship). Although Plaintiff has asserted in its brief that "Mr. Deuber's injury did not occur on navigable water" and that "[t]he vessels at issue were being constructed at the Philadelphia facility where Mr. Deuber worked as a civilian rigger," it is clear from the deposition testimony of decedent himself, along with the deposition testimony of his co-worker, that the alleged exposure occurred aboard ships docked at the shipyard and, thus, was sea-based work. See Sisson, 497 U.S. 358. Therefore, maritime law (rather than Pennsylvania (or New Jersey) state law) is applicable to the claims against Defendant Crane Co. and, thus, to its motion. See Conner, 2011 WL 3101810, at *5.

Maritime law is made up of an amalgam of federal and state law. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986). Substantive admiralty law applies to products liability claims. Id.

C. Product Identification / Causation

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). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F.App'x. at 375.

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 v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)). 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 Crane Co.'s Motion for Summary Judgment

Defendant Crane Co. argues that it is entitled to summary judgment because Plaintiff has failed to produce sufficient product identification evidence from which a jury could conclude that the decedent was exposed to its product or that its product was a substantial factor in the development of his mesothelioma. Specifically, Crane Co. asserts that there is "no evidence" that the decedent worked with or around a a single Crane Co. product - let alone an asbestos-containing product manufactured or supplied by Crane Co. It notes that (1) the decedent testified that he did not associate Crane Co. with his asbestos exposure, and (2) the co-worker John DiTroia was not able to testify that Crane Co. valves were present on any of the ships on which Mr. Deuber may have worked. In the alternative, Crane Co. argues that, even if decedent was exposed to asbestos from its valves (i.e., component parts associated with its valves), it is still entitled to summary judgment on grounds of the government contractor defense and/or bare metal defense.

In response, Plaintiff points to testimony from a co-worker (Mr. DiTroia) about work involving valves that was performed by the decedent aboard the USS New Jersey, USS Luce, USS Saratoga, and USS Farragut during the course of overhauls. The testimony pertinent to Defendant Crane Co. is as follows:

Decedent's Testimony

Q: Do you remember when you began your work in the Philadelphia Navy yard?

A: I don't know, '67, '68 or something like that.

Q: **How long were you a rigger while you were at the Philly Navy Yard?**

A: **The whole time.**

Q: Did you have the same responsibilities as a rigger the entire time you were there?

A: Yes.

Q: **Generally, what were those responsibilities as a rigger at the Navy yard?**

A: **It was the rigger's duties, jobs, to move machinery and reinstall - the ship - can I elaborate?**

Q: Yes. . . .

A: **When the ship came in for overhaul, they took everything out of it. They called it rip out, believe it or not. It was a rip out period.**

We took all of the machinery out . . . sent them to different shops; and then gradually after a period of time, they start trickling back and we would reinstall.

Q: Okay.

A: That on an 18 - **two-year overhaul**, say a destroyer, guided missile ship or something.

Q: **So is it fair to say that as a rigger, you would be involved in the rip out of all the machinery on board a ship that came in for overhaul?**

A: **Yes.**

Q: **Do you believe that you came into contact with asbestos or asbestos-containing products while you were at the Philly Navy Yard?**

A: **Definitely.**

Q: How do you believe you came into contact with asbestos product during that time period?

A: **We used to beat asbestos off a machine with a hammer to get to it, to get to the lifting.**

Q: **Do you recall the names of any of the ships in which you were involved in overhauling as a rigger?**

A: **The Luce, USS Luce, L-u-c-e.**

Q: L-u-c-e. Okay. Do you recall the names of any other ships?

A: I wish I could, no.
Q: **By the way, did this ship come in for an overhaul?**
A: **The Luce did, yes.**
Q: Do you know when it came in for an overhaul?
A: No.
Q: **Do you remember how long it was at the yard for the overhaul?**
A: **Probably 18 months.**

(Dep. of decedent Armand Deuber (Vol. I), April 27, 2010, at 53:11-64:24, Ex. 1 to Doc. No. 93 (emphasis added).)

Q: Okay. And **when you worked on the Luce during the overhaul, did you work in the engine room?**
A: **The engine room and the boiler room.**
Q: The **valves** that you told us about on the ships, **was there insulation on those valves?**
A: **Yes.**
Q: Did that **insulation need to be knocked off** when an overhaul was taking place?
A: **Yes.**
Q: **Do you believe the insulation that you had to knock off the valves was asbestos?**
A: **Yes.**

(Dep. of decedent Armand Deuber (Vol. II), April 29, 2010, at 304:11-302:12, Ex. 2 to Doc. No. 93 (emphasis added).)

Q: **Do you recall the names of any of the ships you worked on while at the Philadelphia shipyard?**
A: Before we talked about the Luce and the Jersey, these are all **USS Luce, USS New Jersey, USS Dahlgren.** Gee, there was a bunch of them.
Q: **What type of work did you perform on the USS Luce?**
A: We - **It was like an 18 month, almost two year overhaul. We took everything out and sent it to the shops, all the machinery, all the pumps, all the - anything that was big had to be handled by the riggers, big valves, relief valves on boilers, a lot of booster pumps, fuel pumps, feed pumps, bilge pumps, all kinds of crap like that had to come out of the bilges out the top of the boiler, out the side of the hole of the ship.**

Q: **And when you were performing work as a rigger during your overhaul on the Luce, do you believe you were exposed to asbestos?**

A: **Oh, yes.**

(Dep. of decedent Armand Deuber (Vol. III), May 6, 2010, at 27:16-28:23, Ex. 3 to Doc. No. 93 (emphasis added).)

Co-Worker's Testimony

Q: Do you recall the years you worked with Mr. Deuber at the Philadelphia Shipyard?

A: Not exactly.

Q: Would you be able to provide us an estimate of the time frame in which you worked with Mr. Deuber?

A: Sometime between 1966 and approximately 1980.

Q: Did you ever have an opportunity to work as a rigger with Mr. Deuber at the Philadelphia Shipyard?

A: More as an apprentice than a rigger.

Q: When you were working as an apprentice, what was Mr. Deuber's job title or classification?

A: He was a rigger first class?

Q: So then as an apprentice would it be accurate to say your job was to assist him in rigging duties, learning the job or the trade?

A: That is correct.

Q: **As an apprentice assisting Mr. Deuber, could you describe for us exactly what your job duties were?**

A: We assisted in all - **I assisted in all phases of the assignment, whether it be hanging the gear, prepping for the gear removal, and then assisted during the actual removal of the equipment.**

Q: **When equipment was being worked on by yourself and Mr. Deuber, would any of that work take place in the engine room of ships?**

A: **Yes.**

Q: Did you ever have to do any **work on equipment in the boiler room of ships?**

A: **Yes.**

Q: **Do you recall the names of any of the ships you worked on with Mr. Deuber?**

A: Only a few of the larger ones. We worked on the

Saratoga when it first came in around '68, on the **battleship New Jersey** when they recommissioned it, which was between '68 and '70. We worked on the Benua and the Carleton, we worked on **the Farragut**, I believe. I worked on some ships - it is hard to remember all of them.

Q: **Do you recall working with Mr. Deuber on the Luce at all?**

A: **Yes.**

Q: When you worked with Mr. Deuber **on the Saratoga**, can you describe for us the work that was being done on that ship?

A: **That ship was having a complete overhaul from top to bottom so we worked in various spaces. Sometimes we were assigned to the engine room, fire room, other times we may be up in the super structure with the arresting gear or electronics room.**

Q: Did you **ever have to work in the boiler room on the Saratoga?**

A: **Yes.**

Q: **Focusing on the engine room of the Saratoga**, could you describe for us the type of work you were doing at that time?

A: There was **a complete rip-out. We removed** various pieces of equipment and piping to include **valves**, pumps, et cetera, to be removed to send to the shop to be overhauled.

Q: **The process of cutting off this insulation, did that create dust?**

A: **Yes.**

Q: **Were you and Mr. Deuber present while this insulation was being cut creating the dust?**

A: **Yes.**

Q: And did that dust get on your clothes?

A: Yes.

Q: Did it get on Mr. Deuber's?

A: Yes.

Q: And do you believe you breathed in that dust?

A: Yes.

Q: **And do you believe Mr. Deuber breathed in that dust?**

A: **Yes.**

Q: **Let me ask you a general question here with regard to**

the **Saratoga**. While the dust was in the air from these various processes you testified to, did you witness Mr. Deuber breathing?

A: **Yes.**

Q: **You saw him breathing in the engine room?**

A: **Yes.**

Q: **You saw him breathing in the boiler room?**

A: **Yes.**

Q: Moving on to the **New Jersey**, and you said you worked on that ship, I believe between '68 and '70?

A: **Yes.**

Q: Could you tell us what type of job that was on the New Jersey?

A: That was another **complete overhaul**, putting the ship back in service, required cutting holes in the sides of the ship, **removing various components from engine rooms, boiler rooms, electronic rooms, pump rooms** to be shipped off the ship and refurbished.

Q: **Did you work directly with Mr. Deuber on the New Jersey?**

A: **Yes.**

Q: And were you working with Mr. Deuber in the **engine room** on the New Jersey?

A: **Yes.**

Q: Were you working with Mr. Deuber in the **boiler room** on the New Jersey?

A: **Yes.**

Q: What type of work was being performed in the **engine room on the New Jersey?**

A: **Rip out all** major pumps, equipment, **valves**, piping. We also removed ventilation ducts.

Q: Were any other tradesmen working on the turbine on the New Jersey while you and Mr. Deuber were working in the engine room?

A: **Yes.**

Q: What were the other tradesmen? What were their classification or jobs?

A: **Machinists.**

Q: What were they doing to the turbine on the New Jersey while you and Mr. Deuber were working in the engine room?

A: **Prepping for removal.**

Q: And what did that process entail?

A: Again, unbolting, **removing valves.**

Q: During the time you and Mr. Deuber were working in the **engine room on the New Jersey**, did you witness any type of tradesmen removing any insulation form the turbines?

A: Yes.

Q: What type of trades would have been responsible for that insulation?

A: The ladders.

Q: Can you describe the **process of the ladders removing the insulation** off of those turbines?

A: At that time it was just cutting, removed.

Q: What would they cut it with?

A: A knife.

Q: **Did the process of cutting that insulation off of the turbine create dust?**

A: **Yes.** Sometimes they used a handsaw.

Q: Would the dust created from the removal of insulation off the turbine which created dust, would that dust get on your clothes?

A: Yes.

Q: **Would it get on Mr. Deuber's clothes?**

A: **Yes.**

Q: Did you breathe some of that dust in?

A: Yes.

Q: **Did you witness Mr. Deuber breathe in the engine room on the New Jersey when this insulation was being removed?**

A: **Yes.**

Q: Did you perform work with Mr. Deuber in the **boiler room** on the **Luce**?

A: Yes.

Q: Do you recall **any other areas of the shp that you worked with Mr. Deuber on the Luce?**

A: **Pump rooms, electronic rooms.**

Q: What type of work were you performing with Mr. Deuber in the **engine room of the Luce?**

A: **Removal of unspecified equipment, pumps, motors, valves, piping, ventilation duct.**

Q: You talked about the **valves on the Luce.** Were those **insulated** the same way you previously testified on the Saratoga?

A: Yes.

Q: Was the process of removing that insulation the same as

what you previously testified to? [I.E. DUSTY]

A: Yes.

Q: And do you recall the name of the manufacturer of any of those valves?

A: No, sir.

Q: With regards to the boiler room, did you have an opportunity to **work with Mr. Deuber in the boiler room of the Luce?**

A: **Yes.**

Q: What type of work were you doing **in the boiler room of the Luce?**

A: Again, **removing equipment, pumps, valves, piping.** I don't recall if we did a boiler overhaul on that ship.

Q: Do you recall any **parts of the ships where you worked with Mr. Deuber?**

A: We worked in various areas, **engine room, pump rooms, boiler rooms, electronics rooms.** On those smaller **ships** you weren't assigned to a specific room so there was a group of riggers assigned to the ship and **we basically worked the whole ship.**

Q: When you were working with Mr. Deuber on the **Farragut,** did that involve work in the **engine room?**

A: Yes.

Q: Did that involve work in the **boiler room?**

A: Yes.

Q: Did that involve work on **valves?**

A: Yes.

Q: The work that was performed by you and Mr. Deuber in the boiler room on the **Farragut,** did that involve **work directly on the boiler itself?**

A: Yes, at times.

Q: Could you describe for us what **type of work you and Mr. Deuber were doing with regards to the boiler on the Farragut?**

A: At a minimal **removing** soot blowers and inspection doors on the boilers, piping and **valves that contained insulation.**

Q: **During the course of your work on the Farragut do you believe any of the work on the valves exposed you and**

Mr. Deuber to asbestos?

A: **Yes.**

Q: **And what type of work was being performed on the valves that you believe exposed you and Mr. Deuber to asbestos?**

A: **Removal of the valves to be removed form the ship for overhaul.**

Q: Were these valves insulated?

A: With pads at times, yes.

Q: These valves were on the boilers?

A: yes.

Q: Were there also valves that needed to be removed on the turbine?

A: Yes.

Q: Do you recall ever working on **valves manufactured by a company called Crane?**

A: **Yes.**

(Dep. of co-worker John Albert Ditroia, February 26, 2011, at 12:8-67:3, Ex. 1 to Doc. No. 115 (emphasis added).)

While the testimony of the decedent and the co-worker identifies the decedent as having worked frequently with valves aboard the USS Luce, USS Saratoga, and USS New Jersey (including, specifically, in the engine room and boiler room) that were insulated with asbestos, the testimony does not identify the specific valves which were present in these ships.

Plaintiff seeks to fill the gap by relying on the report of an expert (Captain Arnold P. Moore), who identified specifically the valves manufactured by Defendant Crane Co. as being present on the USS Luce and USS Saratoga, as well as in the engine room on the USS New Jersey (and, in particular on the boilers there), while the decedent worked aboard these ships, and as having been insulated with asbestos.

Although Crane Co. failed to raise this point in its briefing, it (along with other defendants) contended at oral argument that Plaintiff should not be permitted to rely on its expert evidence, as it was produced in a form that did not constitute "sworn testimony." In response, Plaintiff contended that counsel did not believe that an affidavit was required and instead believed that an expert report would be sufficient for purposes of opposing the summary judgment motion. See Tr. of Oral Arg. at 65-66. Because Plaintiff had an opportunity to

respond and Plaintiff neither objected nor requested additional time to respond, the Court will consider this contention even though it was not previously raised in the briefing.

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with particular parts of material in the record, such as an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that an unsworn expert report "is not competent to be considered on a motion for summary judgment." Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1980)); see also Bock v. CVS Pharmacy, Inc., No. 07-CV-412, 2008 WL 3834266, at *3 (E.D. Pa. 2008) (refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa. 2002) (finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment).

This Court has previously held that an unsworn expert report cannot be relied upon to defeat a motion for summary judgment. Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.) (citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005)). In Faddish, unlike this case, although the Court determined that the unsigned expert report could not be relied upon to defeat summary judgment, the Court instead relied upon deposition testimony of the expert, which the Court permitted, noting that such testimony is sworn testimony. In the case at hand, given that the expert report submitted was merely signed and not supported by affidavits or sworn declarations, it is "not competent to be considered" in support of Plaintiff's Opposition to Defendant Crane Co.'s Motions for Summary Judgment. Fowle, 868 F.2d at 67.

It is true that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee's note; see also Ray v. Pinnacle Health Hosps., Inc., F.App'x, at 164 n.8 (3d Cir. 2010) (noting that "unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the requirements of 28 U.S.C § 1746"). However, an expert report that is not sworn to under penalty of perjury or accompanied by

an affidavit is not proper support in disputing a fact in connection with a motion for summary judgment. Burrell v. Minnesota Mining Manufacturing Co., No. 2:08-87293, 2011 WL 5458324 (E.D. Pa. June 9, 2011) (Robreno, J.) (refusing to consider expert reports when no timely sworn affidavits were provided with the reports and the reports were not sworn to under penalty of perjury). Because the expert report submitted by Plaintiff in this case was not sworn to under penalty of perjury, see 28 U.S.C. § 1746, the amendment to Federal Rule of Civil Procedure 56 does not save Plaintiff's expert report.

The Court further notes that, when given an opportunity to respond to Defendants' request that the Court not consider Captain Moore's expert report, Plaintiff did not seek leave of the Court to make a supplemental submission with an affidavit or to provide other sworn testimony (such as the sworn deposition testimony of the expert) in order to cure the deficiency. The justification given by Plaintiff's counsel was that it believed that an expert report was sufficient for purposes of the summary judgment motion and that an affidavit was not necessary. The Court rejects this justification for the failure to comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), and notes again that the Court has previously ruled that an "unsworn statement" cannot be relied upon to defeat a motion for summary judgment. Accordingly, since Plaintiff did not comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), the expert report of Captain Moore is "not competent" to be considered in support of Plaintiff's Opposition to Defendant Crane Co.'s Motion for Summary Judgment.

Without the expert report of Captain Moore, Plaintiff has no evidence that the valves to which the decedent was exposed were manufactured by Defendant Crane Co. or that any such valves contained asbestos or asbestos-containing parts. Although the decedent's co-worker did testify that he recalled working around Crane Co. valves, he did not testify when or where this occurred and did not give any testimony that the decedent worked around Crane Co. valves. As such, it would be unsupported speculation for a jury to conclude from this testimony that the decedent was exposed to asbestos from a Crane Co. product. Accordingly, as there is no product identification evidence pertaining to this Defendant, its motion for summary judgment is granted. In light of the Court's determination on this issue, it need not reach Crane Co.'s arguments that it is entitled to the bare metal defense or the government contractor defense.

E.D. PA NO. 2:10-78931-ER

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Eduardo C. Robreno, J.", written in a cursive style. The signature is positioned above a horizontal line.

EDUARDO C. ROBRENO, J.