

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

TERRY CARDARO and : CONSOLIDATED UNDER  
JO ANN CARDARO, : MDL 875  
: :  
Plaintiffs, : :  
: : Transferred from the  
: : Eastern District of  
v. : Louisiana  
: (Case No. 11-00876)  
: :  
**FILED:**  
AEROJET GENERAL CORP. : E.D. PA CIVIL ACTION NO.  
ET AL., : 2:11-66763-ER  
: :  
Defendants. **MICHAELE KUNZ, Clerk**  
By \_\_\_\_\_ **Dep. Clerk**

O R D E R

AND NOW, this 27th day of July, 2012, it is hereby  
ORDERED that the Motion for Summary Judgment of Defendant **Foster  
Wheeler Energy Corporation** (Doc. No. 52) is **DENIED**.<sup>1</sup>

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

Plaintiff Terry Cardaro alleges that he was exposed to asbestos while serving as a welder in the Navy. Defendant Foster Wheeler Energy Corporation ("Foster Wheeler") manufactured boilers. The alleged exposure pertinent to Defendant Foster Wheeler occurred during the following period of Plaintiff's work aboard the following vessels:

- Navy service (welder) - 1969 to 1977:
  - USS L.Y. Spear (while docked at Norfolk Naval Shipyard in Virginia)

Plaintiff was diagnosed with mesothelioma in May of 2004. Plaintiff asserts that he developed this disease as a result of exposure to asbestos from insulation used in connection with Defendant Foster Wheeler's boilers.

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Plaintiff brought claims against various defendants. Defendant Foster Wheeler has moved for summary judgment, arguing that (1) Plaintiff's claims are barred by the Virginia statute of limitations, and (2) it is immune from liability by way of the government contractor defense. Defendant Foster Wheeler contends that, because the ship at issue was docked in a "federal enclave" in Virginia, Virginia law applies. Plaintiff contends that Louisiana law applies.

## I. Legal Standard

### A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

### B. The Applicable Law

#### 1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law

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of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009) (Robreno, J.).

2. State Law Issues (Maritime versus State Law)

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

Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011) (Robreno, J.).

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

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disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

#### Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 799 F. Supp. 2d at 466; Deuber, 2011 WL 6415339, at \*1 n.1. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

#### Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will 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.

It is undisputed that the alleged exposure pertinent to Defendant Foster Wheeler occurred during Plaintiff's work as a welder aboard a Navy vessel docked at the Norfolk Naval Shipyard. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Foster Wheeler. See id. at 462-63.

Defendant contends that because the ship on which Plaintiff's alleged exposure occurred was docked at the Norfolk Naval Station, which Defendant contends was a federal enclave, Virginia substantive law applies. However, the cases Defendant has cited with respect to application of Virginia state law to

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events at the Norfolk location involved an injury that arose or occurred on land - as opposed to the exposure alleged by Plaintiff, which occurred upon a ship (i.e., navigable waters). See, e.g., Western Union Telegraph Company v. Chiles, 214 U.S. 274 (1909); United States v. Rowe, 599 F.2d 1319 (4th Cir. 1979); see also Pratt v. Kelly, 585 F.2d 692 (4th Cir. 1978) (cited by Plaintiff). Therefore, in the case at hand, even assuming that Defendant's assertion that the shipyard at which the ship was docked was a federal enclave - an issue this Court need not reach - maritime law is still applicable because Plaintiff's alleged exposure did not occur on the grounds of the shipyard and, instead occurred exclusively on navigable waters.

C. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) (citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011) (Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at \*1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law.

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Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

D. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably 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**

A. **Defendant's Arguments**

Virginia Statute of Limitations

Foster Wheeler argues that, because the alleged exposure occurred aboard a ship docked at the Norfolk Naval Station/shipyard in Virginia (which Foster Wheeler contends is a "federal enclave"), the case is governed by Virginia law. Foster Wheeler cites to decisions of the Supreme Court (Western Union Tel. Co. v. Chiles, 214 U.S. 274, 275 (1909)) and the Fourth Circuit (States v. Rowe, 599 F.2d 1319, 1320 (4th Cir. 1979)) - each of which it contends acknowledge that Norfolk Naval Station is a federal enclave subject to federal jurisdiction. Foster Wheeler also cites to decisions of three (3) district courts for the proposition that "[w]here a plaintiff's claims are based on toxic exposure on board a Navy vessel, federal enclave jurisdiction extends to vessels stationed at a federal enclave,

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including those that remain in the water.” (Pl. Mem. at 6.) These cases are: Corley v. Long-Lewis, Inc., 688 F. Supp. 2d 1315, 1328 (N.D. Ala. 2010), Fung v. Abex Corp., 816 F. Supp. 569, 571 (N.D. Cal. 1992); and In re Welding Rod Products, 2005 WL 147081 (N.D. Ohio Jan. 13, 2005).

Foster Wheeler contends that the Virginia statute of limitations bars Plaintiff’s claims.

#### Government Contractor Defense

Foster Wheeler asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by it for the products at issue, it provided warnings that conformed to the Navy’s approved warnings, and the Navy knew about asbestos and its hazards. In asserting this defense, Foster Wheeler relies upon on the affidavits of Admiral Ben J. Lehman, and J. Thomas Schroppe (a company witness).

#### **B. Plaintiff’s Arguments**

##### Virginia Statute of Limitations

Plaintiff contends that statutes of limitations are procedural in nature and are, therefore, dictated by the law of the forum state. Therefore, according to Plaintiff, the applicable statute of limitations is that of Louisiana state law (which Defendant has not asserted as a defense in this case).

##### Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are, at the very least, genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant could have warned about asbestos hazards associated with its product(s) had it chosen to do so.

To contradict the evidence relied upon by Defendant, Plaintiff cites to, inter alia, (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which (as discussed by expert Captain Arnold Moore) Plaintiff contends indicates that the Navy not only permitted but expressly required warning. Plaintiff also cites to (c) evidence that, in 1976, Foster Wheeler did include warnings with the products it supplied, which Plaintiff contends



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establishes that Foster Wheeler could have warned about asbestos at any time.

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

**C. Analysis**

Virginia Statute of Limitations

The Court has determined that Plaintiff's claims against Defendant (and thus Defendant's motion regarding those claims) are governed by maritime law. When maritime law applies, the applicable statute of limitations is that set forth under maritime law. See Nelson v. A.W. Chesterton Co., No. 10-69365, 2011 WL 6016990, at \*1 (E.D. Pa. Oct. 27, 2011) (Robreno, J.); see also Mendez v. Ishikawajima-Harima Heavy Industries Co., 52 F.3d 799, 801 (9th Cir. 1995). The Virginia statute of limitations is therefore inapplicable. Defendant has not suggested that any other statute of limitations might be applicable to bar Plaintiff's claims. Therefore, Defendant's motion for summary judgment on grounds of the Virginia statute of limitations is denied.

Government Contractor Defense

Plaintiff has pointed to evidence that contradicts (or at least appears to be inconsistent with) Foster Wheeler's evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with asbestos-containing products. Specifically, Plaintiff has pointed to, inter alia, (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning. This is sufficient to raise genuine issues of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Foster Wheeler. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment on grounds of the government contractor defense is not warranted.