

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

ALAN H. DONN, : CONSOLIDATED UNDER  
ET AL., : MDL 875  
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 :  
 Plaintiffs, : Transferred from the  
 : Southern District of  
 : New York  
 v. : (Case No. 10-00311)

**FILED**

A.W. CHESTERTON CO., INC. MAY - 8:2013 E.D. PA CIVIL ACTION NO.  
ET AL., : 2:10-62071-ER  
 :  
 Defendants. MICHAEL E. KUNZ, Clerk  
 By \_\_\_\_\_, Dep. Clerk

O R D E R

AND NOW, this 8th day of May, 2013, it is hereby  
ORDERED that the Motion for Summary Judgment of Defendant Foster  
Wheeler LLC (Doc. No. 57) is GRANTED.<sup>1</sup>

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<sup>1</sup> This case was transferred in March of 2010 from the United States District Court for the Southern District of New York to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that Decedent Alan Donn ("Decedent" or "Mr. Donn") was exposed to asbestos while serving in the Navy during the period 1957 to 1981. Plaintiff alleges that Defendant Foster Wheeler LLC ("Foster Wheeler") manufactured steam generators. The alleged exposure pertinent to Foster Wheeler occurred during Decedent's work aboard various submarines.

Plaintiff brought claims against various defendants to recover damages for Decedent's asbestos-related illness and death. Defendant Foster Wheeler has moved for summary judgment arguing that (1) there is insufficient product identification evidence to establish causation with respect to its products, (2) it is entitled to summary judgment on grounds of the bare metal defense, and (3) it is immune from liability by way of the government contractor defense. The parties assert that New York law applies.

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I. Legal Standard

A. Summary Judgment Standard

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

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

B. The Applicable Law

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

Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See Various

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Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011) (Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at 463-66 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson v. Ruby, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." See Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at \*1 n.1 (E.D. Pa. Dec. 2, 2011) (Robreno, J.) (applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "a potentially disruptive impact on maritime commerce," and that "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

#### Locality Test

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

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Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69 (citing Grubart, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. See id. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

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

C. Bare Metal Defense Under Maritime Law

This Court has recently held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by - and no duty to warn about hazards associated with - a product it did not manufacture or distribute. Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at \*7 (E.D. Pa. Feb. 1, 2012) (Robreno, J.).

D. Product Identification/Causation Under Maritime Law

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375 (6th Cir. 2001). This Court has also noted that, in light of its holding in Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012) (Robreno, J.), there is also a requirement (implicit in the test set forth in Lindstrom and Stark) that a plaintiff show that

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(3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. Abbay v. Armstrong Int'l., Inc., No. 10-83248, 2012 WL 975837, at \*1 n.1 (E.D. Pa. Feb. 29, 2012) (Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. Id. at 376 (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at \*4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour, 1991 WL 65201, at \*4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F. App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988) (citing Restatement (Second) of Torts, § 402A (1965))).

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

### A. Defendant's Arguments

#### Product Identification / Causation

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

With its reply, Defendant has also submitted objections to Plaintiff's evidence pertaining to product identification and causation.

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Bare Metal Defense

Foster Wheeler asserts the bare metal defense, arguing that it had no duty to warn about (and cannot be liable for) injury arising from any product or component part that it did not manufacture, supply, or install.

Government Contractor Defense

Foster Wheeler asserts the government contractor defense, arguing that it is immune from liability in this case, and therefore entitled to summary judgment, because the Navy exercised discretion and approved reasonably precise specifications for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy knew about the hazards of asbestos. In asserting this defense, Foster Wheeler relies upon the affidavits of Dr. Lawrence Stillwell Betts, Admiral Ben J. Lehman, General Thomas McCaffrey, and J. Thomas Schroppe (a company witness for Foster Wheeler).

**B. Plaintiff's Arguments**

Product Identification / Causation / Bare Metal Defense

Plaintiff contends that Defendant had a duty to warn of all foreseeable uses of its product, and that she has identified sufficient evidence to establish that Defendant's products were used with asbestos in a foreseeable manner. In support of Plaintiff's assertion that she has identified sufficient product identification/causation evidence to survive summary judgment, Plaintiff cites to the following:

- Deposition of Mr. Donn  
Plaintiff contends that Mr. Donn testified that, while working aboard submarines, he worked around Foster Wheeler steam generators on many occasions, and was present during the manipulation of asbestos-containing insulation used externally with those generators.
- Documents and Discovery Responses  
Plaintiff points to various documents and discovery responses of Foster

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Wheeler, which indicate that Foster Wheeler steam generators (and perhaps other equipment) was supplied for the submarines at issue.

Government Contractor Defense

Plaintiff contends that there are, at the very least, genuine issues of material fact as to whether Defendant is entitled to the government contractor defense. Plaintiff cites to various evidence in support of this assertion. See ECF Doc. No. 66.

**C. Analysis**

As a preliminary matter, the Court need not consider Defendant's objections to Plaintiff's evidence because the outcome of Defendant's motion is the same, regardless of whether or not the testimony is considered. Therefore, for purposes of this motion, the Court will consider all of Plaintiff's evidence.

Plaintiff alleges that Decedent was exposed to asbestos dust from insulation used in connection with Foster Wheeler steam generators (and possibly other equipment). There is evidence that Decedent worked around insulation used with Foster Wheeler steam generators (and possibly other equipment) on various submarines, and that this insulation was manipulated in his presence, such that dust was generated.

Importantly, however, there is no evidence that the insulation was manufactured or supplied by Foster Wheeler. (In fact, Plaintiff's theory of liability is that Defendant is liable because Foster Wheeler could foresee that its equipment would be used with external insulation manufactured and/or supplied by an entity other than Foster Wheeler). Therefore, even when construing the evidence in the light most favorable to Plaintiff, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from insulation (or any other product) manufactured or supplied by Defendant such that it was a "substantial factor" in the development of his illness. See Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at \*1 n.1.

With respect to asbestos to which Plaintiff may have been exposed in connection with Foster Wheeler equipment, but which was not manufactured or supplied by Defendant, the Court

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AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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has held that, under maritime law, Defendant cannot be liable. Conner, 2012 WL 288364, at \*7. Accordingly, summary judgment in favor of Defendant Foster Wheeler is warranted. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach Defendant's other arguments.