

-
- PacOrd (September 1976 to 1998)- servicing products removed from Navy ships and brought back to a machine shop on land

Decedent died of mesothelioma in January of 2011. He was deposed for eight (8) days prior to his death.

Plaintiffs have brought claims against various defendants, including, inter alia, strict products liability claims and negligent failure to warn claims. Defendant Buffalo Pumps has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification to support a finding of causation with respect to its product(s), and (3) there is no evidence to support a claim of (a) false representation, (b) intentional tort (intentional failure to warn), or (c) punitive damages. Buffalo asserts that California law applies.

Plaintiffs contend that summary judgment is not warranted because (1) the bare metal defense is not available under California law, (2) even if the bare metal defense is available, there are genuine issues of material fact regarding Decedent's alleged exposure to original asbestos-containing component parts that were incorporated into Defendant's products at the time they were distributed and/or asbestos-containing replacement parts supplied by Defendant for later use with its products, (3) there is sufficient product identification evidence, and (4) there are genuine issues of material fact regarding their false representation and intentional tort claims. Plaintiffs (5) concede that summary judgment (on grounds of mootness) is warranted at this time on their punitive damages claims, as the Court has previously ruled that such claims are severed. Plaintiffs assert that California law applies.

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

The parties have agreed that California substantive law applies. Therefore, this Court will apply California law in deciding Buffalo's Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Bare Metal Defense Under California Law

The Supreme Court of California recently held that, under California law, a product manufacturer generally is not liable in strict liability or negligence for harm caused by a third party's products. O'Neil v. Crane Co., No. S177401, 2012 WL 88533 (Cal. Jan. 12, 2012). There, O'Neil, who formerly served on an aircraft carrier, brought products liability claims against Crane Co. and Warren Pumps, which manufactured equipment used in the ship's steam propulsion system. Pursuant to Navy specifications, asbestos insulation, gaskets, and other parts were used with the defendant manufacturer's equipment, some of which was originally supplied by the defendants. O'Neil, however, worked aboard the ship twenty years after the defendants supplied the equipment and original parts. There was no evidence that the defendants made any of the replacement parts to which O'Neil was exposed or, for that matter, that the defendants manufactured or distributed asbestos products to which O'Neil was exposed.

The court firmly held that the defendant manufacturers were not liable for harm caused by asbestos products they did not manufacture or distribute. O'Neil, 2012 WL 88533, at *5. With regard to the plaintiff's design-defect claim, the court noted that "strict products liability in California has always been premised on harm caused by deficiencies in the defendant's own product." Id. And that the "defective product . . . was the asbestos insulation, not the pumps and valves to which it was applied after defendants' manufacture and delivery." Id. at *7.

Similarly, the Court rejected the plaintiff's claim that the defendants are strictly liable for failure to warn of the hazards of the release of asbestos dust surrounding their products. The plaintiff asserted that the defendants were under a duty to warn because it was reasonably foreseeable that their products would be used with asbestos insulation. Nevertheless, the court held, "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." Id. at *16. Accordingly, the Court refused to hold the defendants strictly liable. Id. at *17.

And the O'Neil court conducted a similar analysis to the plaintiff's claim based on the defendants' negligent failure to warn. The court concluded that "expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." Id. at *19. Thus, as a matter of law, the court refused to hold the defendants liable on the plaintiff's strict liability or negligence claims.

D. Product Identification/Causation Under California Law

Under California law, a plaintiff need only show (1) some threshold exposure to the defendant's asbestos-containing product and (2) that the exposure "in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." McGonnell v. Kaiser Gypsum Co., Inc., 98 Cal. App. 4th 1098, 1103 (Cal. Ct. App. 2002); see also, Rutherford v. Owens-Illinois, 16 Cal. 4th 953, 977 n.11, 982-83 (Cal. Ct. App. 1997) ("proof of causation through expert medical evidence" is required). The plaintiff's evidence must indicate that the defendant's product contributed to his disease in a way that is

"more than negligible or theoretical," but courts ought not to place "undue burden" on the term "substantial." Jones v. John Crane, Inc., 132 Cal. App. 4th 990, 998-999 (Cal. Ct. App. 2005).

The standard is a broad one, and was "formulated to aid plaintiffs as a broader rule of causality than the 'but for' test." Accordingly, California courts have warned against misuse of the rule to preclude claims where a particular exposure is a "but for" cause, but defendants argue it is "nevertheless. . . an insubstantial contribution to the injury." Lineaweaver v. Plant Insulation Co., 31 Cal. App.4th 1409, 1415 (Cal. Ct. App. 1995). Such use "undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby." Mitchell v. Gonzales, 54 Cal. 3d 1041, 1053 (Cal. 1991).

In Lineaweaver, the California Court of Appeals for the First District concluded that "[a] possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.'" 31 Cal. App.4th at 1416. Additionally, "[f]requency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case." Id.

II. Defendant Buffalo's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Defendant Buffalo asserts the bare metal defense, arguing that it is immune from liability in this case under the defense as a matter of law and that it is, therefore, entitled to summary judgment.

Product Identification / Causation

Defendant Buffalo does not dispute that it supplied pumps for use aboard various Navy ships and that some pumps may have been supplied with original asbestos-containing gaskets and packing. Buffalo argues, however, that there is no evidence that Decedent was exposed to any asbestos-containing product or component part that Buffalo manufactured or distributed.

Miscellaneous Claims (False Representation and Intentional Tort)

Buffalo argues that summary judgment is warranted with respect to Plaintiffs' false representation and intentional tort claims because there is no evidence to support these claims.

Punitive Damages Claim

Buffalo argues that summary judgment is warranted with respect to Plaintiffs' punitive damages claim because there is no evidence to support this claim.

B. Plaintiffs' Arguments

Bare Metal Defense

Plaintiffs assert that the bare metal defense is not available under California law. Furthermore, Plaintiffs assert that, even if the bare metal defense is available, Defendant Buffalo is liable for original asbestos-containing component parts that were incorporated into and supplied with its pumps and/or asbestos-containing replacement parts supplied by Buffalo for later use with its pumps, and to which Plaintiffs assert Decedent was exposed.

During oral argument, Plaintiffs asserted that, even under the California Supreme Court's recent ruling in O'Neil, 2012 WL 88533, Defendant Buffalo is liable for asbestos-containing component parts that were used with its pumps but that it did not manufacture or supply because Buffalo's product manuals indicate that its pumps required (or "called for") the use of defective (i.e., asbestos-containing) component parts in order to operate. In asserting this argument, Plaintiffs rely upon footnote 6 of O'Neil. See 2012 WL 88533, at *7 n.6.

Product Identification / Causation

Plaintiffs allege that Decedent was exposed to original and/or replacement asbestos-containing parts (gaskets and packing) that were supplied by Buffalo to the Navy in (or for later use with) its pumps. In support of this claim, Plaintiffs cite to:

- Deposition Testimony of Decedent Mr. Floyd - Mr. Floyd testified that he was exposed to asbestos dust as a result of changing gaskets and packing on Buffalo pumps

"numerous times" during his post-Navy work (1975-1998)

- Deposition Testimony of Buffalo's Vice President, Terrance William Kenny - Mr. Kenny testified that Buffalo sold pumps containing asbestos gaskets from the 1940s to the 1980s and that he was not aware of any time therein that Buffalo sold any pumps without packing or gaskets
- Discovery Responses of Defendant - Plaintiffs point to discovery responses of Defendant, which state that "on some occasions [Buffalo] provided small numbers of gaskets and packing to certain customers along with other replacement parts for certain pumps"
- Instruction Bulletin of Defendant - Plaintiffs point to a document which they refer to as a "Buffalo instruction bulletin," which states: "Unless otherwise specified, pumps are furnished with either graphited asbestos or plastic metallic packing. Replacement packing material may be obtained from the factory."
- Deposition Testimony of Buffalo's 30b6 Witness, Martin Kraft - Plaintiffs point to deposition testimony of Mr. Kraft, which Plaintiffs contend confirms that Defendant did in fact supply replacement parts, including gaskets and packing, to the U.S. Navy and to shipyards
- Expert Declaration of Captain Arnold Moore - Plaintiffs cite to testimony from Captain Moore that Plaintiffs assert "represents important evidence that Mr. Floyd likely encountered original gaskets and packing materials while overhauling these pumps [during his post-Navy work at RAM and PacOrd]" because "Captain Moore stated that '[t]hese ships were built in the late 1960s and early 1970s and it is likely that these pumps were manufactured with asbestos sheet gaskets to seal pump casings and asbestos packing to seal pump shafts'." (Pl.'s Opp. (Doc. No. 289) at 22.)
- Expert Declaration of Captain William Lowell - Plaintiffs cite to testimony from Captain Lowell that discusses documents that Captain Lowell asserts demonstrate that Buffalo pumps were aboard several vessels which Decedent serviced during his post-Navy work with RAM and PacOrd

Miscellaneous Claims (False Representation and Intentional Tort)

With respect to the claim for false representation, Plaintiffs assert that, "[u]nder California law, a misrepresentation claim under Section 402B [of the Restatement (Second) of Torts] is 'one of strict liability for physical harm to the consumer, resulting from a misrepresentation of the character or quality of the chattel sold, even though the misrepresentation is an innocent one, and not made fraudulently or negligently.'" (Pl. Opp. (Doc. No. 288) at 6.)

Plaintiffs assert that each of the false representation and intentional tort claims turns on a duty on the part of the defendant to warn of or disclose information about the hazards of asbestos. (Pl. Opp. (Doc. No. 288) at 6-7.) Plaintiffs assert that there is sufficient evidence to create genuine issues of material fact regarding Defendant's liability as to these claims.

Punitive Damages Claim

Plaintiffs assert that, since this Court has previously ruled that punitive damages claims will be severed, summary judgment is warranted with respect to this claim on grounds of mootness, to be dealt with by the Court at a future date.

C. Analysis

To the extent that Decedent's alleged exposure pertains to asbestos-containing component parts used in connection with Buffalo's pumps but not manufactured or supplied by Buffalo, summary judgment is warranted. However, to the extent that the alleged exposure pertains to original asbestos-containing component parts or asbestos-containing replacement parts supplied by Buffalo, summary judgment in favor of defendant is not warranted on grounds of the bare metal defense. This is the holding of the so-called bare metal defense recently recognized and applied by the California Supreme Court. See O'Neil, 2012 WL 88533.

The Court has considered Plaintiffs' argument, made during oral argument on Defendant's motion, that Defendant is liable for asbestos-containing component parts that were used with its pumps but that it did not manufacture or supply because its pumps required (or "called for") the use of defective (i.e., asbestos-containing) component parts in order to operate. However, the Court rejects this argument because California law

does not provide for such liability, and notes that footnote 6 of O'Neil is dictum.

As this Court has noted, the bare metal defense is more properly understood as a challenge to a plaintiff's prima facie case to prove the duty or causation element of its cause of action. See Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at *1 n.2 (E.D. Pa. Feb. 1, 2012) (Robreno, J.) (discussing the bare metal defense under maritime law). Plaintiffs have alleged exposure to asbestos from original gaskets and packing supplied with Buffalo's pumps and asbestos-containing replacement gaskets or packing supplied by Buffalo for later use with its pumps. The Court now examines the evidence pertinent to each source of alleged exposure in turn.

a. Original asbestos-containing gaskets and packing

It is undisputed that Buffalo supplied pumps to which Decedent was exposed. There is evidence that Buffalo's pumps may have been provided with original asbestos-containing component parts (gaskets and/or packing). Plaintiffs have provided evidence that Decedent was exposed to asbestos as a result of his work changing gaskets and packing on these pumps. However, there is no evidence that Decedent was exposed to asbestos from original asbestos-containing component parts supplied by Buffalo with its pumps (as opposed to replacement parts later installed in the pumps after they were supplied to the Navy). Even construing the evidence in the light most favorable to Plaintiffs, the evidence demonstrates only that Decedent was exposed to asbestos-containing gaskets and packing in Buffalo pumps. It does not demonstrate that Buffalo manufactured or supplied the asbestos-containing gaskets and/or packing to which Decedent was exposed. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by original gaskets or packing supplied by Buffalo with its pumps.

In an attempt to establish that Decedent must have been exposed to original asbestos-containing component parts supplied by Buffalo, Plaintiffs cite to an excerpt from an expert report of Captain Moore stating that ships serviced by Decedent during his work in 1975 to 1998 (i.e., his post-Navy work at RAM and PacOrd) were built during the late 1960s and early 1970s. Plaintiffs characterize this testimony as "important evidence that Mr. Floyd likely encountered original gaskets and packing materials while overhauling these pumps [during his post-Navy work at RAM and PacOrd]." However, importantly, Captain Moore

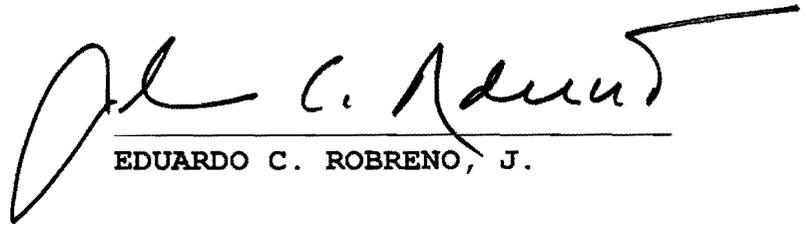
did not opine in his report that this conclusion could be drawn from the fact that the ships were built in the late 1960s and early 1970s, and Plaintiff's characterization of the expert testimony is not in and of itself evidence. Decedent did not testify as to when he serviced any of the "numerous" Buffalo Pumps at issue, nor did he specify on which ship(s) these pumps were located. Given that Decedent's testimony merely indicates that he serviced "numerous" Buffalo Pumps during a time period spanning twenty-three (23) years, no reasonable jury could conclude from the evidence (in the absence of expert testimony or other evidence to the contrary) that Decedent was more likely than not exposed to asbestos-containing products originally supplied with Buffalo's products. Accordingly, summary judgment in favor of Defendant Buffalo is warranted with respect to this alleged exposure.

b. Asbestos-containing replacement gaskets and packing

Plaintiffs have provided evidence that Buffalo may have sometimes supplied its customers with asbestos-containing replacement gaskets and/or packing. However there is no evidence that any such replacement parts were aboard any ship on which Decedent worked, or that Decedent was exposed to any such parts that may have been supplied and used aboard a ship on which he worked. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by replacement gaskets or packing supplied by Buffalo. Accordingly, summary judgment in favor of Defendant Buffalo is warranted with respect to this alleged exposure.

With respect to Plaintiffs' false representation and intentional tort claims, the Court notes that Plaintiffs contend in their briefing that these claims turn on the existence of a duty on the part of Defendant to warn of or disclose the hazards associated with asbestos used in connection with its products. However, the California Supreme Court has made clear that Buffalo cannot be liable for harms caused by - and has no duty to warn about hazards associated with - products it did not manufacture or supply, or products it manufactured or supplied but for which there is no evidence of exposure of the Decedent. See O'Neil, 2012 WL 88533. Therefore, Plaintiffs' theory of liability on these claims fails and summary judgment in favor of Defendant Buffalo is warranted with respect to each of these claims.

In light of the Court's rulings herein, the issue of punitive damages is now moot.



EDUARDO C. ROBRENO, J.

D. Conclusion

Applying California law, Defendant Buffalo is not liable for harms arising from any product that it did not manufacture or supply. O'Neil, 2012 WL 88533, at *5. Plaintiffs have failed to provide evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos-containing component parts for which Defendant Buffalo could potentially be liable in light of the California Supreme Court's recent ruling in O'Neil, 2012 WL 88533 (i.e., original asbestos-containing component parts or asbestos-containing replacement parts). Accordingly, summary judgment in favor of Defendant Buffalo is warranted on all claims.