

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

BOBBY FLOYD AND : CONSOLIDATED UNDER
BARBARA FLOYD, : MDL 875
 :
 :
 Plaintiffs, :
 :
 : Transferred from the
 : Northern District of
 v. : California
 : (Case No. 10-01960)
 :
 :
 AIR & LIQUID SYSTEMS :
 CORPORATION, ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:10-CV-69379-ER
 Defendants. :

FILED

FEB - 8 2012

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this **6th** day of **February, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Velan Valve Corp. (Doc. No. 253) is **DENIED**.¹

¹ This case was originally filed in April of 2010 in California state court. It was thereafter removed to the United States District Court for the Northern District of California, and later transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Decedent Bobby Floyd has alleged exposure to asbestos while working aboard various Navy ships throughout his employment with the Navy (January 1953 to August 1972). Defendant Velan Valve Corp. ("Velan Valve") manufactured valves and steam traps that were used on Navy ships. Decedent died of mesothelioma in January of 2011. He was deposed 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 Velan Valve has moved for summary judgment, arguing that it is immune from liability by way of the government contractor defense. Plaintiffs contend that summary judgment is not warranted because there are genuine issues of material fact regarding the availability to Defendant of the government contractor defense.

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

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 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.).

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, 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 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.

D. 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 Velan Valve's Motion for Summary Judgment

A. Defendant's Argument

Velan Valve 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, Defendant provided warnings that conformed to the Navy's approved warnings, and the Navy had state-of-the-art knowledge about the hazards of asbestos. In asserting this defense, Velan Valve relies upon (1) the declarations of Admiral Roger B. Horne, Jr. and Captain Lawrence Stillwell Betts, who provide testimony that the Navy (a) had state-of-the-art knowledge of asbestos hazards at all times relevant to this action, and (b) issued reasonably precise specifications that governed the manufacture of products to be supplied to the Navy, along with (2) various military specifications that it contends are applicable to its products and which required asbestos but did not specify that warnings were to be included with those products (e.g., MIL-V-18110(SHIPS), MIL-V-22052(SHIPS), MIL-V-22094(SHIPS), MIL-T-960E(SHIPS), MIL-B-15071(SHIPS), and MIL-I-15024(SHIPS)).

B. Plaintiffs' Arguments

Plaintiffs argue that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because (1) Velan Valve has not demonstrated that its contractual duties were "precisely contrary" to its duties under state tort law, (2) there is evidence that manufacturers were not prevented from providing warnings, as reflected by the following: (i) the U.S. Government has taken the official position (in other litigation) that nothing prevented product manufacturers from warning of asbestos hazards, (ii) Adam Martin (a former packaging inspector and packaging specialist at military supplies depots)

has testified that he is not aware of anything in MIL-STD-129 that would have prevented manufacturers from warning, (iii) Captain Arnold Moore has provided an affidavit stating that, not only were manufacturers not prevented from providing warnings, but (a) the Navy utilized a collaborative process in which manufacturers were often consulted for input, (a) there are numerous military specifications that were applicable to Defendant's products that explicitly required warnings about, inter alia, asbestos hazards, and (c) there are numerous examples of manufacturers who did include warnings with products supplied to the Navy.

To contradict the declarations of Admiral Horne and Captain Betts that are relied upon by Velan Valve, Plaintiffs point to, inter alia, (3) the following specifications and other evidence, some of which are discussed in the affidavit of Captain Moore: (i) MIL-B-15071(SHIPS); (ii) MIL-M-15071C, (iii) MIL-M-15071G, (iv) a Navy Shipment Marking Handbook, (v) documents pertaining to the Navy's Uniform Labeling Program, including but not limited to SECNAV Instruction 5160.8, (vi) a Warning Labels Guide published by the Manufacturing Chemists Association (MCA), which was adopted as part of the Uniform Labeling Program (referred to by Plaintiffs as "Manual L-1"), (vii) MIL-STD-129, (viii) MIL-P-15024, (ix) MIL-STD-1341A, (x) NAVSUP Publication 4500, Consolidated Hazardous Item List ("CHIL"), (xi) Minimum Requirements for Safety and Industrial Health in Contract Shipyards ("Minimum Requirements"), (xii) OSHA regulations (as reflected in 29 CFR § 1910.1200(f), and (xiii) examples of instances in which several asbestos defendants appear to have provided warnings (and/or Material Safety Data Sheets (MSDS)) with products supplied to the Navy, and (xiv) excerpts of deposition testimony from various asbestos defense experts (e.g., Admiral David Sargent and Admiral Ben J. Lehman). Plaintiffs assert that these various pieces of evidence demonstrate that the Navy not only permitted but required warnings - and that the Navy relied upon manufacturers to communicate the hazards of their products.

Furthermore, Plaintiffs assert that the government contractor defense is not warranted because (4) Defendant Velan Valve cannot demonstrate what the Navy knew about the hazards of asbestos during the relevant time period. In making this argument, Plaintiffs cite to excerpts of testimony of various experts frequently relied upon by defendants (e.g., Captain Betts, Admiral Horne, Admiral Sargent, and Dr. Samuel Forman), which Plaintiffs contend support their assertion.



EDUARDO C. ROBRENO, J.

C. Analysis

Summary judgment in favor of Defendant Velan Valve on grounds of the government contractor defense is not warranted. Plaintiffs' opposition cites to testimony from various experts frequently utilized by asbestos defendants (some of whom are experts identified by Defendant Velan Valve in this case), various military specifications (such as MIL-STD-129, MIL-P-15024, MIL-STD-1341A, MIL-B-15071(SHIPS), MIL-M-15071C, MIL-M-15071G), SECNAV Instruction 5160.8, and other documents pertaining to Navy policy, which Plaintiffs contend indicate that (1) the Navy not only permitted but required manufacturers to include warnings pertaining to asbestos hazards, and (2) the Navy relied on manufacturers to communicate the hazards associated with the products they supplied to the Navy. This evidence is sufficient to create a genuine issue of material fact that precludes summary judgment because it creates factual issues regarding at least the first and second prongs of the Boyle test (i.e., whether the Navy approved reasonably precise specifications for the product at issue - including, specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue - and whether the warnings provided by Defendant Velan Valve conformed to the warnings approved by the Navy). Accordingly, summary judgment in favor of Defendant is not warranted and its motion is, therefore, denied.