

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

DONNA L. HAGEN,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	
	:	OCT - 9 2012
	:	Transferred from the
	:	District of New Jersey
v.	:	
	:	MICHAEL E. KUNZ, Clerk:
	:	By _____ Dep. Clerk
	:	(Case No. 06-4899)
	:	
BENJAMIN FOSTER COMPANY,	:	E.D. PA CIVIL ACTION NO.
et al.,	:	2:07-63346-ER
	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this 9th day of October, 2012, it is hereby
ORDERED that the Motions for Summary Judgment of Defendant
Westinghouse Electric Corporation (Doc. Nos. 73 and 157) are
GRANTED.¹

¹ This case was transferred in March of 2007 from the
United States District Court for the District of New Jersey to
the United States District Court for the Eastern District of
Pennsylvania as part of MDL-875.

Plaintiff Donna L. Hagen, individually and as executor
of the estate of Malcolm Hagen ("Decedent" or "Mr. Hagen"),
alleges that Decedent was exposed to asbestos while working as a
civilian employee as a helper to outside machinists at New York
Shipbuilding Corporation in Camden, New Jersey. Defendant
Westinghouse Electric Corporation (a predecessor to CBS
Corporation) ("Westinghouse") manufactured turbines (or turbine
generators). The alleged exposure pertinent to Defendant
Westinghouse occurred during Decedent's work aboard:

- USS Kitty Hawk (1958 - 1961)

Decedent was diagnosed with mesothelioma and died
thereafter. He was deposed prior to his death.

Plaintiff brought claims against various defendants. Defendant Westinghouse has moved for summary judgment, arguing that (1) there is insufficient product identification evidence to support a finding of causation with respect to its product(s), (2) it is immune from liability by way of the government contractor defense, and (3) Plaintiff cannot establish causation because of a superseding and/or intervening cause. The parties assert that New Jersey 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

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 Versus Maritime Law

The parties assert that New Jersey 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.). 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). This is because, where a case sounds in admiralty, whether maritime law applies is not an issue of choice-of-law but is, instead, a jurisdictional issue. See id. Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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.

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. Conner, 799 F. Supp. 2d at 467-69. 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 Westinghouse occurred during Decedent's work aboard a ship. 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 Defendant. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has 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 (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))).

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

F. 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 Westinghouse's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness.

Government Contractor Defense

Westinghouse asserts the government contractor defense, arguing that it is immune from liability with respect to alleged Navy-related asbestos exposure because (i) the Navy was involved in the decision of whether or not to include warnings on Westinghouse products and exercised discretion and approved the warnings supplied by Defendants for the products at issue, (ii) Defendants provided warnings that conformed to the Navy's approved warnings (i.e., conformed to the requirements of the relevant military specifications), and (iii) the Navy knew about asbestos and its hazards at all relevant times. In asserting this defense, Westinghouse relies upon on the affidavits of Dr.

Samuel Forman, Admiral Roger B. Horne, Jr., and Mr. James Gate (a company witness).

With its reply brief, Westinghouse has submitted objections to Plaintiff's evidence pertaining to the government contractor defense.

New Jersey Law Regarding Superseding and/or Intervening Cause

Defendant contends that, under New Jersey law, Plaintiff cannot establish causation because the Navy acted as a superseding and/or intervening cause when it precluded Defendant from providing warnings to Plaintiff.

B. Plaintiff's Arguments

Product Identification / Causation

In support of her assertion that she has identified sufficient evidence of exposure/causation/product identification to survive summary judgment, Plaintiff cites to the following evidence:

- Deposition Testimony of Decedent
Decedent testified that he was in the engine room on the USS Kitty Hawk "putting generators in." He testified that he worked in the engine room, boiler room, and all over the ship. He testified that there was a lack of ventilation in the rooms on the ship and that dust was visible in the air.

(Pl. Ex. A.)

- Deposition Testimony of Worker George Berglund, Sr.
Mr. Berglund worked at the same shipyard as Decedent during an overlapping period (1960 to 1961) and also helped with the construction of the USS Kitty Hawk. He worked as a pipefitter and testified that he would have worked around any equipment on the ship.

(Pl. Ex. C.)

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- Interrogatory Responses of Defendant
Plaintiff points to interrogatory responses of Defendant which indicate that Westinghouse sold turbine generators for use aboard the USS Kitty Hawk.

(Pl. Ex. H.)
 - Memorandum
Plaintiff points to a memorandum indicating that Westinghouse products (including turbine generators) were aboard the USS Kitty Hawk.

(Pl. Ex. F.)
 - Expert Report of Christopher Lane
Plaintiff points to an expert report of Christopher Lane, which indicates that turbines require insulation.

(Pl. Ex. D.)
 - Expert Report of Arnold Moore
Plaintiff points to an expert report of Arnold Moore, which indicates that asbestos gaskets and packing would have been used with the Westinghouse turbines at issue.

(Pl. Ex. E.)
 - Specifications and Blueprints
Plaintiff points to specifications and blueprints for Westinghouse turbines, which indicate that they would have been used with many asbestos products and/or component parts.

(Pl. Ex. G and I.)

Plaintiff argues that summary judgment in favor of Defendant Westinghouse on grounds of the government contractor defense is not warranted because there are genuine disputes of material fact regarding its availability to Westinghouse. To contradict the evidence relied upon by Westinghouse, Plaintiff points to, inter alia, various military specifications purported to have been issued by the Navy and applicable to the

Westinghouse products at issue (turbines), which Plaintiff contends indicate that the Navy not only would have permitted manufacturers like Westinghouse to include warnings with their products but required them to do so (e.g., MIL-STD-129, MIL-M-15071D).

Plaintiff has also objected to the evidence presented by Westinghouse pertaining to the government contractor defense.

New Jersey Law Regarding Superseding and/or Intervening Cause

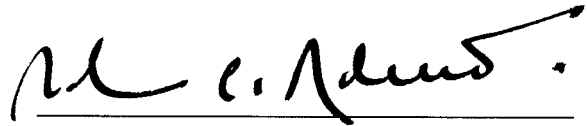
Plaintiff contends that summary judgment is not warranted on grounds of superseding and/or intervening cause because, contrary to Defendant Westinghouse's contention, the Navy did not prohibit it from providing warnings with its products.

C. Analysis

Plaintiff alleges that Decedent was exposed to asbestos from turbines (or turbine generators) manufactured by Defendant Westinghouse.

There is evidence that Decedent worked with or around generators being installed in the engine room of the USS Kitty Hawk. There is evidence that Westinghouse sold turbine generators for use aboard the USS Kitty Hawk. There is evidence that any Westinghouse turbine generators aboard that ship would have been used with asbestos-containing insulation, gaskets, and packing. There is evidence that the engine room was not well ventilated and that dust was visible in the air.

However, there is no evidence that Decedent was exposed to respirable asbestos from (or used in connection with) a turbine (or turbine generator) manufactured or supplied by Westinghouse. Moreover, there is no evidence that any asbestos to which he was exposed in connection with any turbine (or turbine generator) in the engine room was from asbestos-containing gaskets, packing, or insulation manufactured or supplied with the turbine (as opposed to such parts manufactured and supplied by an entity other than Westinghouse, even if for use in connection with a Westinghouse turbine). Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from any product manufactured or supplied by Defendant such that it was a "substantial factor" in the development of his illness. See Conner, 2012 WL 288364, at *7; Lindstrom, 424 F.3d at 492;

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EDUARDO C. ROBRENO, J.

Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1. Accordingly, summary judgment in favor of Defendant Westinghouse is warranted. Anderson, 477 U.S. at 248.

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