

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

THOMAS HALL, : CONSOLIDATED UNDER
 : MDL 875
Plaintiff, :
 : Transferred from the
 : Southern District of New York
v. : (Case No. 11-03400)
 :
A.W. CHESTERTON COMPAN **FILED** : E.D. PA CIVIL ACTION NO.
ET AL., : 2:11-66335-ER
 :
Defendants. :
MAY - 7 2013:

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk
O R D E R

AND NOW, this 6th day of May, 2013, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant FMC
Corporation (Doc. No. 41) is GRANTED.¹

¹ This case was transferred in June of 2011 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 Thomas Hall ("Plaintiff or "Mr. Hall")
alleges that he was exposed to asbestos while serving in the U.S.
Navy from 1966 to 1969. Defendant FMC Corporation, sued for
products manufactured by its former businesses (Peerless Pump and
Northern Pump) ("FMC"), manufactured pumps. The alleged exposure
pertinent to Defendant FMC occurred while Plaintiff was working
as a boilertender aboard the following ships:

- USS Oklahoma City
- USS Hanson

Plaintiff asserts that he developed mesothelioma as a
result of his exposure to asbestos. He was deposed in July and
September of 2012.

Plaintiff brought claims against various defendants.
Defendant FMC has moved for summary judgment, arguing that there
is insufficient evidence to establish causation with respect to
its product(s). The parties assert that New York 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

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

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.

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.

Plaintiff's alleged exposures to Defendant's products occurred aboard ships. 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 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))).

II. Defendant FMC's Motion for Summary Judgment

A. Defendant's Arguments

Defendant FMC contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Mr. Hall's mesothelioma.

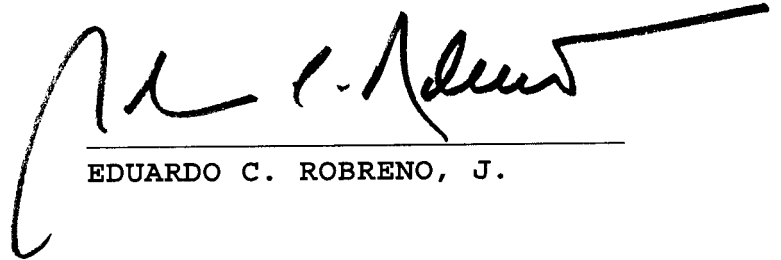
B. Plaintiff's Arguments

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

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- Deposition Testimony of Plaintiff
Mr. Hall testified that he was exposed to respirable dust from gaskets, packing, and insulation used in connection with pump aboard at least two different ships, including one ship that was in dry dock undergoing an overhaul. This dust came both from performing maintenance and repair work on the pumps, and from dust on the floor that was disturbed when Mr. Hall swept it up.
 - Testimony of Captain Arnold P. Moore
Captain Moore states that Naval records confirm that Northern pumps were supplied for use aboard at least one of the ships at issue, and that they were supplied with asbestos-containing packing.
 - Deposition Testimony of Corporate Representative
Plaintiff cites to testimony of Northern's corporate representative, in which he contends there is testimony that Northern supplied pumps with asbestos-containing components, and that it sold asbestos-containing packing for use with its pumps.
 - Naval Documents
Plaintiff cites to Naval documents, which he contends indicate that Northern supplied braided asbestos packing with its pumps.

C. Analysis

Plaintiff alleges that he was exposed to asbestos from gaskets, packing, and insulation that were used in connection with Northern and/or Peerless pumps for which FMC is liable. There is evidence that Mr. Hall worked with pumps aboard the ships at issue. There is evidence that he was exposed to dust as a result of gaskets, packing, and insulation used in connection with pumps. There is evidence that the packing used with Northern pumps contained asbestos. There is evidence that Northern sold supplied some asbestos-containing packing for use with its pumps.



EDUARDO C. ROBRENO, J.

Importantly, however, there is no evidence that Mr. Hall was exposed to asbestos dust from any gasket, packing, or insulation manufactured or supplied by Northern or Peerless (or that he was ever exposed to any gaskets, packing, or insulation in connection with a Northern or Peerless pump). Therefore, no reasonable jury could conclude from the evidence that he was exposed to asbestos from a product manufactured or supplied by Northern or Peerless such that it was a substantial factor in the development of his mesothelioma, because any such finding would be based on conjecture. See Lindstrom, 424 F.3d at 492.

With respect to asbestos-containing products (or component parts) to which Plaintiff may have been exposed in connection with Northern or Peerless pumps, but which were not manufactured or supplied by Northern or Peerless, the Court has held that, under maritime law, Defendant (on behalf of its former business(es) Northern or Peerless) cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant FMC is warranted. Anderson, 477 U.S. at 248-50.