

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

ROBERT HENRY,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Northern District of
	:	California
v.	:	(Case No. 08-04416)
	:	
GENERAL ELECTRIC COMPANY	By MICHAEL E. KUNZ, Clerk	E.D. PA CIVIL ACTION NO.
ET AL.,	Dep. Clerk	2:09-64058-ER
	:	
Defendants.	:	

**FILED**

DEC -3-2012

O R D E R

AND NOW, this 3rd day of December, 2012, it is hereby ORDERED that the Motion for Summary Judgment of Defendant Bath Iron Works (Doc. No. <sup>14</sup>30) is GRANTED in part; DENIED in part.<sup>1</sup>

<sup>1</sup> This case was transferred in March of 2009 from the United States District Court for the Northern District of California to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Robert Henry alleges that he was exposed to asbestos aboard two (2) ships built by Defendant Bath Iron Works ("Bath Iron") during his service in the Navy as a boiler tender during the period 1970 to 1974. The alleged exposure pertinent to Defendant Bath Iron occurred during Plaintiff's work aboard the following:

- USS Southerland (DD-743)
- USS Edson (DD-946)

Plaintiff was diagnosed with an asbestos-related disease. He asserts that he developed this disease as a result of his asbestos exposure aboard the above ships.

Plaintiff brought claims against various defendants. Defendant Bath Iron has moved for summary judgment, arguing that (1) it is immune from liability by way of the government contractor defense, (2) it is entitled to summary judgment on

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grounds of the sophisticated user defense, and (3) it is entitled to partial summary judgment on Plaintiff's punitive damages claims. The parties assert that California 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.).

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2. State Law Issues (Maritime versus State Law)

The parties assert that California 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).

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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.

It is undisputed that the alleged exposure pertinent to Defendant Bath Iron occurred during Plaintiff's work for the Navy as a boiler tender aboard ships built by Bath Iron. 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 Bath Iron. See id. at 462-63.

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 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.

#### D. 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

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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.

E. Sophisticated User Defense Under Maritime Law

This Court has previously held that a manufacturer or supplier of a product has no duty to warn an end user who is "sophisticated" regarding the hazards of that product. Mack v. General Electric Co., No. 10-78940, 2012 WL 4717918, at \*1, 6 (E.D. Pa. Oct. 3, 2012) (Robreno, J.). In doing so, the Court held that the sophistication of an intermediary (or employer) - or the warning of that intermediary (or employer) by a manufacturer or supplier - does not preclude potential liability of the manufacturer or supplier. Id. at \*6-8. As set forth in Mack, a "sophisticated user" is an end user who either knew or belonged to a class of users who, by virtue of training, education, or employment could reasonably be expected to know of the hazards of the product at issue. Id. at \*8. When established, the defense is a bar only to negligent failure to warn claims (and is not a bar to strict product liability claims). Id.

II. **Defendant Bath Iron's Motion for Summary Judgment**

A. **Defendant's Arguments**

Government Contractor Defense

Bath Iron 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, Bath Iron relies upon the affidavits of Admiral Roger B. Horne, Jr. and Admiral David P. Sargent, Jr.

In connection with its reply brief, Defendant has submitted objections to Plaintiff's evidence pertaining to the government contractor defense.

Sophisticated User Defense

Bath Iron asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because

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the Navy was a sophisticated user. In asserting this defense, it cites to Johnson v. American Standard, Inc., 43 Cal.4th 56 (Cal. 2008), and relies again upon the affidavits of Admiral Sargent and Admiral Horne to establish that the Navy "had state of the art knowledge regarding the potential risks associated with exposure to asbestos and asbestos-containing products."

#### Punitive Damages

Bath Iron argues that it is entitled to at least partial summary judgment because Plaintiff has no evidence to support a claim of punitive damages.

#### Admissibility of Defendant's Evidence

In response to Plaintiff's contention that Defendant did not disclose Admiral Sargent or Admiral Horne as witnesses, Defendant attaches an email between counsel and contends that the email represents the parties' stipulation to extend the expert discovery deadline.

### **B. Plaintiff's Arguments**

#### Admissibility of Defendant's Evidence

Plaintiff argues that Defendant did not make a timely disclosure of Admiral Sargent or Horne as witnesses and should, therefore, be precluded from relying upon their affidavits.

#### Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, (2) not demonstrated that the product at issue was "military equipment," and (3) not demonstrated a genuine significant conflict between state tort law and fulfilling its contractual federal obligations (i.e., that its contractual duties were "precisely contrary" to its duties under state tort law). Furthermore, Plaintiff asserts that the government contractor defense is not warranted because (4) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (5) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or

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not use) and do not reflect a considered judgment by the Navy, (6) there is no military specification that precluded warning about asbestos hazards, and (7) Defendant cannot demonstrate what the Navy knew about the hazards of asbestos relative to the knowledge of Defendant, nor that the Navy knew more than it did at the time of the alleged exposure.

To contradict the evidence relied upon by Defendant, Plaintiff cites to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense (expert affidavits of Admiral Horne and Admiral Sargent).

#### Sophisticated User Defense

Plaintiff asserts that Bath Iron is not entitled to summary judgment on grounds of the sophisticated user defense because, (1) Bath Iron has not adduced evidence that Plaintiff was a sophisticated user, and (2) Bath Iron is really arguing for a "sophisticated intermediary defense" (which is not recognized by California law), since Plaintiff merely worked on Navy ships as a (presumably) unsophisticated worker.

#### Punitive Damages

Plaintiff does not respond to Defendant's argument regarding punitive damages.

### **C. Analysis**

#### Admissibility of Defendant's Expert Evidence

As a preliminary matter, the Court has determined that Defendant's expert evidence (affidavits of Admiral Horne and Admiral Sargent) will not be excluded on grounds that they were not timely disclosed. Although the parties do not dispute that these witnesses were not disclosed in accordance with the Court's scheduling order, the email between counsel (submitted by Defendant) indicates that the parties stipulated to extend expert disclosure dates. Plaintiff has not argued that he has suffered prejudice as a result of the late disclosure of Defendant's experts, and it appears that Plaintiff instead agreed to allow that late disclosure. Therefore, in light of the lack of

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prejudice to Plaintiff and the fact that this expert evidence is crucial to Defendant's defenses, the Court will not exclude it. See Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904-05 (3d Cir. 1977) (overruled on other grounds).

The Court notes also that it has considered the remainder of the parties' objections to the evidence submitted in connection with their briefing and has determined that they are without merit. Therefore, the Court will not exclude any evidence in deciding Defendant's motion.

#### Government Contractor Defense

Plaintiff has pointed to evidence that contradicts (or at least appears to be inconsistent with) Bath Iron's evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with asbestos-containing products. Specifically, Plaintiff has pointed to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning. This is sufficient to raise genuine issues of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Bath Iron. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted.

#### Sophisticated User Defense

Defendant Bath Iron asserts that it is not liable for Plaintiff's injuries because the Navy was sophisticated as to the hazards of asbestos. The Court has previously held that the sophistication of an intermediary (or employer), such as the Navy - or the warning of that intermediary (or employer) by a manufacturer or supplier - does not preclude potential liability of the manufacturer or supplier. Mack, 2012 WL 4717918, at \*6-8. Therefore, summary judgment in favor of Defendant is not warranted on grounds of the sophisticated user defense. See Anderson, 477 U.S. at 248-50.

#### Punitive Damages

Defendant Bath Iron's motion for partial summary judgment as to Plaintiff's claims for punitive damages was unopposed by Plaintiff. Therefore, partial summary judgment in favor of Defendant is granted with respect to these claims. See Local R. Civ. P. 7.1(c); Fed. R. Civ. P. 56(c).

E.D. PA NO. 2:09-64058-ER

AND IT IS SO ORDERED.

  
EDUARDO C. ROBRENO, J.

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**D. Conclusion**

Defendant's expert evidence will not be excluded, despite having been untimely disclosed, because Plaintiff has not argued or demonstrated any resulting prejudice. Defendant's motion for summary judgment on grounds of the government contractor defense is denied because Plaintiff has submitted evidence to contradict Defendant's proofs as to its entitlement to the defense. Defendant's motion for summary judgment on grounds of the sophisticated user defense is denied because the sophistication of the Navy does not preclude potential liability of Defendant. Defendant's motion for partial summary judgment as to Plaintiff's claims for punitive damages is granted as unopposed.