

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

BARBARA LEWIS, as Personal : CONSOLIDATED UNDER  
Representative for the : MDL 875  
Estate of JOHN ROBERT LEWIS, :  
deceased, : Transferred from the  
 : Western District of  
Plaintiff, **FILED** : Washington  
v. : (Case No. 11-01300)  
APR - 4 2013 :  
TODD SHIPYARD CORPORATION ~~By~~ MICHAEL E. KUNZ, Clerk : E.D. PA CIVIL ACTION NO.  
ET AL., :                      Dep. Clerk : 2:11-67658-ER  
 :  
Defendants. :

O R D E R

AND NOW, this 2nd day of April, 2013, it is hereby  
ORDERED that the Motion for Summary Judgment of Defendant Todd  
Shipyards Corporation (Doc. No. 38) is **GRANTED in part; DENIED in  
part.**<sup>1</sup>

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<sup>1</sup> This case was transferred in September of 2011 from the  
United States District Court for the Western District of  
Washington to the United States District Court for the Eastern  
District of Pennsylvania as part of MDL-875.

Plaintiff Barbara Lewis alleges that Decedent John  
Lewis ("Decedent" or "Mr. Lewis") was exposed to asbestos while  
working as an insulator at Lockheed Shipyard between 1966 and  
1970. Defendant Todd Shipyards Corporation ("Todd Shipyards")  
built ships and performed maintenance and repair work aboard  
ships. The alleged exposure pertinent to Defendant Todd Shipyards  
occurred during Mr. Lewis's work aboard ships, including at least  
one ship at Todd Shipyards.

Plaintiff asserts that Mr. Lewis developed mesothelioma  
as a result of asbestos exposure. Mr. Lewis passed away before  
his deposition was taken. His brother, James Lewis, with whom he  
worked, was deposed in June of 2010.

Plaintiff brought claims against various defendants to  
recover damages for Mr. Lewis's alleged asbestos-related death.

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Defendant Todd Shipyards has moved for summary judgment arguing that (1) Plaintiff cannot establish that any product of Defendant's caused Decedent's illness, in part because a ship is not a "product," (2) even if a ship is a "product," it is entitled to summary judgment on grounds of the so-called "bare metal defense," (3) Plaintiff cannot establish that Defendant was negligent in any way that caused his illness, and (4) it is immune from liability by way of the government contractor defense.

Defendant contends that maritime law applies. Plaintiff does not specify what law she contends applies to her claims against Defendant Todd Shipyards.

## 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.

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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 Issues (Maritime versus State Law)

Defendant contends that maritime law applies. 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"

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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.

It is undisputed that the alleged exposures pertinent to Defendant Todd Shipyards occurred aboard a ship. 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 Todd Shipyards. See id. at 462-63.

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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",

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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.

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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.

G. A Navy Ship Is Not a "Product"

This Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 2012 WL 4717918, at \*9-10. As such, a shipbuilder defendant cannot face liability on a strict product liability claim. Id.

**II. Defendant Todd Shipyards' Motion for Summary Judgment**

Product Identification / Bare Metal Defense

Todd Shipyards argues that Plaintiff cannot establish her strict products liability claim against it because (1) Plaintiff cannot show that Todd manufactured a "product" (i.e., a ship is not a "product" for purposes of strict products liability law), and (2) Todd had no duty to warn about anything other than the ship itself (i.e., no duty to warn about the various products on it).

No Evidence of Negligence

Todd Shipyards argues that Plaintiff cannot establish her negligence claim against it because (1) Plaintiff cannot

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establish that Todd breached a legal duty of care owed to Decedent, and (2) Plaintiff cannot establish that Todd knew of the danger posed to Decedent at the time of the alleged exposure.

### Government Contractor Defense

Todd Shipyards 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, Todd Shipyards relies upon the affidavit of Admiral Roger B. Horne, Jr.

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

#### Product Identification / Bare Metal Defense

Plaintiff does not directly respond to Defendant's arguments regarding her strict products liability claim (i.e., that a ship is not a "product" within the context of strict products liability law). However, in support of his assertion that he has identified sufficient evidence of product identification/causation to survive summary judgment, Plaintiff cites to the following evidence:

- Declaration of James Lewis (Brother)  
Mr. Lewis provides testimony that, for approximately two weeks in about 1959, he and Decedent breathed in dust from asbestos-containing insulation, cloth, and mud on a ship at Todd Shipyards and that employees of Todd Shipyards who were sweeping up debris on the floor around them exposed them to this.

(Pl. Ex. 5, Doc. No. 47-4.)

- Declaration of Expert Charles Ay  
Mr. Ay provides expert testimony, the substance of which need not be detailed herein.

(Pl. Ex. 6, Doc. No. 47-4.)

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- Declaration of David Schwartz, M.D.  
Dr. Schwartz provides expert testimony that the alleged asbestos exposure was a significant contributing factor to the development of Decedent's illness.

(Pl. Ex. 7, Doc. No. 47-5.)

- Declaration of Richard Cohen, M.D., M.P.H.  
Dr. Cohen provides expert testimony that Todd Shipyards knew of the hazards of asbestos by 1943.

(Pl. Ex. 8, Doc. No. 47-6.)

### No Evidence of Negligence

Plaintiff contends that Todd owed him a duty of reasonable care under the circumstances, which included taking steps to prevent him from being exposed to respirable asbestos fibers, that Todd breached that duty when its employees removed asbestos-containing pipe insulation within close proximity to him. Plaintiff cites to evidence (from expert Richard Cohen) that Todd Shipyards knew of the hazards of asbestos as early as 1943 (prior to the time of the alleged exposure at issue).

### 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, and (2) 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 (3) there is no evidence that the Navy required asbestos to be used in products, (4) there is no evidence that the Navy required unsafe handling practices for asbestos (i.e., precluded warning about asbestos hazards), and (5) Defendant cannot demonstrate that it warned the Navy about the dangers of asbestos known to it but not to the Navy.

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To create a genuine dispute of material fact, Plaintiff quotes a decision of this Court regarding testimony of one of Defendant's expert witnesses (Dr. Forman), who testified that the Navy did not know about the hazards of asbestos until the early 1970s. Presumably to contradict the evidence relied upon by Defendant, Plaintiff attaches (although fails to cite in its brief or or substantively discuss) (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which are routinely relied upon by plaintiffs in the MDL (including counsel for Plaintiff in other cases) as evidence that the Navy not only permitted but expressly required warnings.

Plaintiff has also submitted objections to Defendant's evidence that Plaintiff perceives pertains to the government contractor defense (expert declarations of Admiral Horne, Dr. Salot, and Dr. Gots).

### **C. Analysis**

As a preliminary matter, the Court notes that it has considered Plaintiff's objections to Defendant's evidence and has determined that they are without merit. The Court will therefore consider Defendant's evidence in deciding its motion.

#### Product Identification / Bare Metal Defense

Plaintiff alleges that Decedent was exposed to asbestos from insulation aboard a ship manufactured by Defendant Todd Shipyards. However, this Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 2012 WL 4717918, at \*9-10. As such, a shipbuilder defendant such as Todd Shipyards cannot face liability on a strict product liability claim. Id. Accordingly, summary judgment in favor of Defendant Todd Shipyards is warranted with respect to Plaintiff's claims against it sounding in strict product liability. Anderson, 477 U.S. at 248.

The Court next considers, separately, Defendant's potential liability and/or entitlement to summary judgment with respect to Plaintiff's claims sounding in negligence.

#### No Evidence of Negligence

Defendant Todd Shipyards contends that it is entitled to summary judgment on Plaintiff's negligence claims because (1) Plaintiff cannot establish that Todd breached a legal duty of

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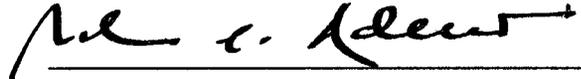
care owed to Decedent, and (2) Plaintiff cannot establish that Todd knew of the danger posed to Decedent at the time of the alleged asbestos exposure. As a matter of law, and at the very least, Defendant owed Plaintiff a duty of reasonable care under the circumstances. See Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 813-15, 121 S. Ct. 1927, 1929-31 (2001); East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866, 106 S. Ct. 2295, 2299 (1986) (citing Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632, 79 S.Ct. 406, 410 (1959)); Hess v. U.S., 361 U.S. 314, 323, 80 S. Ct. 341, 348 (1960) (citing Kermarec). There is evidence that Defendant's employees performed "clean-up" work during Decedent's time on the ship - and in close proximity to him - such that Defendant's employees' conduct caused Decedent to be exposed to asbestos. Plaintiff asserts that Defendant failed to take reasonable care to protect Decedent (i.e., failed to warn him of the hazards of asbestos that it installed and/or disturbed or to take other precautions to protect him from that hazard).

Plaintiff has provided evidence that Defendant knew of the hazards of asbestos at the time of Decedent's work on the ship (and the exposure at issue). Defendant has not provided any evidence that it warned Decedent about the hazards of - or took any precautions to protect him from the dangers of - the asbestos to which Plaintiff alleges Defendant's employees exposed him. Therefore, Defendant has not identified the absence of a genuine dispute of material fact regarding whether Defendant breached its duty of care, because a reasonable jury could conclude from the evidence that (1) Todd failed to use reasonable care (e.g., failed to take adequate safety measures, such as providing warnings or breathing protection), and that (2) this failure was a proximate cause of Decedent's asbestos-related illness. Accordingly, summary judgment in favor of Defendant Todd Shipyards is not warranted on this basis. Anderson, 477 U.S. at 248-50.

#### Government Contractor Defense

Plaintiff has identified an apparent inconsistency in testimony of Defendant's expert (Dr. Forman) regarding the date on which the Navy became aware of the hazards of asbestos. Plaintiff has also attached evidence that her counsel routinely argues (in other cases) contradicts (or at least appears to be inconsistent with) Todd Shipyards' evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with asbestos-containing products.

AND IT IS SO ORDERED.

  
EDUARDO C. ROBRENO, J.

Specifically, Plaintiff has attached (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which counsel for Plaintiff routinely contends (in other cases) indicates that the Navy not only permitted but expressly required warnings. The Court notes that (1) citation to and discussion of other caselaw is not the same as attaching evidence or discussing the alleged inconsistencies in evidence in the present record, and (2) the failure of Plaintiff's counsel to discuss in its brief the significance of the evidence attached with the brief reflects poorly on Plaintiff's counsel (especially where the evidence and issue have routinely been handled by Plaintiff's counsel in briefing in dozens, if not hundreds, of other cases). Rule 56 permits the Court to consider materials which, even though they are not cited by the responding party, are part of the record. See Fed. R. Civ. P. 56(c)(3). The Court concludes that, because the "standard" evidence to oppose Defendant's assertion of the government contractor defense appears in the record of this case (having been attached to the Plaintiff's response to the motion for summary judgment), it raises genuine issues of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Todd Shipyards. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment on grounds of the government contractor defense is not warranted. See Anderson, 477 U.S. at 248-50.

#### D. Conclusion

Defendant Todd Shipyards is entitled to summary judgment with respect to Plaintiff's strict product liability claims because a Navy ship is not a "product" within the meaning of strict product liability law.

With respect to Plaintiff's remaining negligence-based claims, Defendant Todd Shipyards has not established that it is entitled to summary judgment on either of the other bases it has asserted. First, Defendant has failed to identify the absence of a genuine dispute of material fact with respect to Plaintiff's negligence claim. Second, Plaintiff has produced evidence to controvert Defendant's proofs regarding the availability to Defendant of the government contractor defense. Accordingly, with respect to Plaintiff's negligence-based claims, summary judgment in favor of Defendant Todd Shipyards is not warranted.