

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

ELIZABETH TAYLOR, : CONSOLIDATED UNDER
ET AL., : MDL 875
 :
Plaintiffs, :
 :
 : Transferred from the
 : Northern District of
v. : California
 : (Case No. 10-03382)
 :
FOSTER WHEELER, LLC, : E.D. PA CIVIL ACTION NO.
ET AL., : 2:10-80824-ER
 :
Defendants. :

O R D E R

AND NOW, this **2nd** day of **July, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant Todd
Shipyards Corp. (Doc. No. 47) is **GRANTED**.¹

¹ This case was transferred in September of 2010 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 Elizabeth Taylor (with others) has brought
this action as wrongful death heir and successor-in-interest to
Benjamin Taylor ("Decedent" or "Mr. Taylor"). Plaintiff alleges
that Mr. Taylor was exposed to asbestos while serving as a boiler
tender in the Navy during the period 1958 to 1974. Defendant Todd
Shipyards ("Todd" or "Todd Shipyards") built ships. The alleged
exposure pertinent to Defendant Todd Shipyards occurred during
Plaintiff's work aboard:

- USS Waddell (DDG-24)

Plaintiff asserts that Decedent developed lung cancer
as a result of asbestos exposure. Mr. Taylor was not deposed in
this action because he died in August of 2009 and this action was
not brought until February of 2011.

Plaintiff brought claims against various defendants.
Defendant Todd Shipyards has moved for summary judgment, arguing

that (1) Plaintiff cannot establish that Defendant (or any product of Defendant's) caused Decedent's illness, (2) Plaintiff cannot establish that Defendant was negligent in any way that caused his illness, (3) it is immune from liability by way of the government contractor defense, and (4) it is entitled to summary judgment on grounds of the sophisticated user defense.

Defendant contends that maritime law, California law, and Washington law each apply to different portions of Decedent's exposure. Plaintiff contends that maritime 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 Issues (Maritime versus State Law)

Plaintiff contends that maritime law applies to her claims against Defendant, and Defendant agrees that maritime law applies to at least some of Plaintiff's claims. 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.

It is undisputed that all of Decedent's alleged exposure pertinent to Todd Shipyards occurred during his service in the Navy as a boiler tender, while aboard a ship (either at sea or while docked for maintenance and repairs). 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 Todd Shipyards. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has recently 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 Todd Shipyards's Motion for Summary Judgment

A. Defendant's Arguments

Exposure / Causation / Product Identification

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), and (2) Plaintiff has no evidence that Todd Shipyards failed to provide a warning, caused a design defect, caused a manufacturing defect, or otherwise caused his illness. Specifically, it argues that (a) 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), and (b) Plaintiff cannot prove that there were no warnings on the ship.

In connection with its reply brief, Todd submitted objections to, inter alia, the declaration of Plaintiff's expert, Charles Ay.

No Evidence of Negligence

Todd Shipyards argues that Plaintiff cannot establish her negligence claim against it because (1) Plaintiff cannot establish that Todd breached a legal duty of care owed to Decedent, and (2) Plaintiff cannot establish that Todd's conduct was the legal or proximate cause of his alleged injury.

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 affidavits of Admiral Roger B. Horne, Jr., and Dr. Ronald Gots.

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

Sophisticated User Defense

Todd Shipyards asserts that Plaintiff's failure to warn claims are barred by the sophisticated user defense.

B. Plaintiff's Arguments

Exposure / Causation / Product Identification

With respect to its strict products liability claim, Plaintiff contends that Defendant manufactured a product (i.e., that a ship is a "product" within the context of strict products liability law). Plaintiff contends that a ship is comparable to a mass-produced home. In support of this contention, Plaintiff cites to California caselaw: Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224 (Cal. App. 1969) and Price v. Shell Oil Co., 2 Cal.3d 245 (Cal. 1970). Plaintiff also cites to various cases from around the country, as well as comment d of Section 402A of the Restatement (Second) of Torts, which identifies large vehicular and transportation products - including, inter alia, cars, airplanes, motor homes, mobile homes - as being "products" subject to strict products liability law.

Plaintiff also contends that the asbestos to which Decedent was exposed included thermal pipe insulation that was original to the ship (i.e., installed by Defendant).

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:

- Declaration of Expert Charles Ay
Mr. Ay states in his declaration that he worked as an insulator aboard the same ship on which Decedent worked (USS Waddell) at some point in time during his time at the Long Beach Naval Shipyard (1960 to 1981). He states that, because of the time period, virtually all pipe insulation aboard the ship would have contained asbestos. He states that installing, removing, cutting, and/or disturbing asbestos insulation would have resulted in respirable asbestos fibers, and that, due to the vibrations of the ship, "it is [his] expert opinion that during his time

aboard the WADDELL, respirable asbestos fibers were more likely than not released in the air that [Decedent] necessarily inhaled."

Mr. Ay opines that, because Decedent boarded the ship approximately one (1) month after it was commissioned, "nearly 100 percent of the original thermal insulation was still present." He also opines that, "it is more likely than not that a significant amount of originally installed asbestos thermal pipe insulation was released throughout the WADDELL during Mr. Taylor's time aboard it in 1964-65, via the mechanisms described above, including the normal expansion, contraction and vibration of the ship; the movement and contact of various persons aboard the ship passing by such insulation; and workers who swept up the various areas of the ship swept."

(Pl. Ex. 5, Doc. No. 49-8, ¶¶ 11, 19, 21-23, 27-33.)

- Declaration of Richard Cohen, M.D., M.P.H.
Dr. Cohen provides expert opinion testimony that Defendant would have known of the hazards of asbestos at the time of Decedent's exposure.

(Pl. Ex. 6, Doc. No. 49-9.)

- Declaration of Expert David Schwarz, M.D.
Dr. Schwarz produces expert testimony regarding medical causation.

(Pl. Ex. 7, Doc. No. 49-12.)

No Evidence of Negligence

Plaintiff contends that Todd owed him a duty of reasonable care under the circumstances, which included taking steps to prevent Decedent from being exposed to respirable asbestos fibers, that Todd breached that duty by failing to warn of the various asbestos-containing products aboard its ship, and that this was a proximate cause of Decedent's death.

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) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (4) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or not use) and do not reflect a considered judgment by the Navy, (5) there is no military specification that precluded warning about asbestos hazards, and (6) 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 warnings.

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

Sophisticated User Defense

Plaintiff cites to a previous decision of this Court in asserting that maritime law does not recognize a sophisticated user defense.

C. Analysis

Plaintiff alleges that Decedent was exposed to asbestos aboard a ship manufactured by Defendant Todd Shipyards, and that Todd Shipyards is liable for his illness because the asbestos was installed by Defendant. There is evidence that Decedent worked aboard the USS Waddell.

There is expert opinion testimony from Mr. Ay that this insulation likely contained asbestos, and that the overwhelming majority of insulation present on the ship at the time of Decedent's work was original insulation installed by the shipbuilder. There is also expert opinion testimony from Mr. Ay that Decedent would have necessarily inhaled asbestos of dust from the insulation.

Importantly, however, there is no evidence from anyone with personal knowledge as to whether Decedent inhaled asbestos dust from original insulation installed (i.e., supplied) by Defendant. The opinion of Plaintiff's expert, Mr. Ay, while based on experience, is yet impermissibly speculative. See Lindstrom, 424 F.3d at 492 (quoting Harbour, 1991 WL 65201, at *4). Therefore, even when construing the evidence in the light most favorable to Plaintiff, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from original insulation installed by Defendant such that it was a "substantial factor" in the development of his illness, because any such finding would be impermissibly conjectural. See Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1.

With respect to asbestos to which Plaintiff may have been exposed aboard the ship, but which was not manufactured or supplied (e.g., installed) by Defendant, the Court has held that, under maritime law, Defendant cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant Todd Shipyards is warranted. Anderson, 477 U.S. at 248.

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