

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

PAULINE SMITHSON, ET AL.,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiffs,	:	
	:	
v.	:	Transferred from the
	:	Northern District of
	:	California
	:	(Case No. 08-05439)
GENERAL ELECTRIC COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:09-65605-ER
Defendants.	:	

FILED

JUN 21 2012

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this **21st** day of **June, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Newport News Shipbuilding and Dry Dock Company (Doc. No. 36) is **GRANTED**.¹

¹ This case was transferred in April 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.

Plaintiffs, the legal heirs of Calvin Smithson ("Decedent" or "Mr. Smithson") allege that Decedent was exposed to asbestos while serving in the Navy aboard a ship built by Defendant Newport News Shipbuilding and Dry Dock Corporation, successor corporation of Northrop Grumman Shipbuilding, Inc., now known as Huntington Ingalls Incorporated ("Defendant" or "Newport News") in the period 1963 to 1966. The alleged exposure pertinent to Defendant Newport News occurred during Decedent's work aboard the following ship:

- USS Cabildo (LSD-16)

Plaintiffs assert that Decedent developed and died from an illness as a result of asbestos exposure. He was not deposed prior to his death.

Plaintiffs brought claims against various defendants. Defendant Newport News has moved for summary judgment, arguing that (1) Plaintiffs cannot establish that Defendant (or any product of Defendant's) caused Decedent's illness, (2) it is immune from liability by way of the government contractor defense, and (3) it is entitled to summary judgment on grounds of the sophisticated user defense.

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.).

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).

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 asbestos exposure pertinent to Newport News occurred 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 Newport News. 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))).

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.

G. Sophisticated User Defense Under Maritime Law

This Court has previously held that it will not grant summary judgment on grounds of the sophisticated user defense when maritime law applies because maritime law has not recognized this defense in situations involving an intermediary, such as the Navy. Prange v. Alfa Laval, Inc., No. 09-91848, 2011 WL 4912828, at *1 (E.D. Pa. July 22, 2011) (Robreno, J.).

II. Defendant Newport News's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Newport News argues that Plaintiffs cannot establish their strict products liability claim against it because (1) Plaintiffs cannot show that Newport News manufactured a "product" (i.e., a ship is not a "product" for purposes of strict products liability law), (2) Plaintiffs have no evidence that Newport News caused Decedent's illness, and (3) Plaintiffs have no evidence that any asbestos to which Decedent was exposed was originally installed by Newport News.

Specifically, Defendant argues that there is no evidence that any asbestos to which Decedent may have been exposed on the ships at issue was asbestos supplied (i.e., installed) by Newport News. In support of this argument, Defendant provides the following expert evidence:

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• Declaration of John Graham

Mr. Graham states that it is his opinion that Decedent would not have been exposed to any originally installed asbestos products during his work aboard the USS Cabildo because the ship had undergone numerous overhauls and restricted availabilities, such that "it is more likely than not that the majority of the originally installed thermal insulation, gaskets and packing had been removed and/or replaced during the...overhauls."

(Def. Ex. B, Doc. No. 36-2.)

Government Contractor Defense

Newport News 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, Newport News relies upon the declaration of Retired U.S. Navy Captain Wesley Charles Hewitt.

With its reply brief, Newport News has submitted objections to Plaintiffs' evidence pertaining to the government contractor defense.

Sophisticated User Defense

Newport News asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because the Navy was a sophisticated user, possessing the most advanced information regarding asbestos hazards. In asserting this defense, it relies upon Johnson v. American Standard, Inc., 43 Cal.4th 56, 65 (2008). Although it does not specifically cite to this evidence with regard to this argument, Defendant is presumably relying again upon the declaration of Captain Hewitt, who asserts that the Navy had state-of-the-art knowledge of asbestos hazards (and knew about asbestos hazards by at least the early 1950s).

B. Plaintiffs' Arguments

Product Identification / Causation

With respect to its strict products liability claim, Plaintiffs contend that Defendant manufactured a product (i.e., that a ship is a "product" within the context of strict products liability law). Plaintiffs contend that a ship is comparable to a mass-produced home. In support of this contention, Plaintiffs cite 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).

In support of their assertion that they have identified sufficient evidence of product identification/causation to survive summary judgment, Plaintiffs cite to the following evidence:

- Decedent's Military Records
Plaintiffs have provided military records pertaining to Decedent, which show that he worked aboard the USS Cabildo working, inter alia, in charge of refrigeration and air conditioning and standing watch in an engine room.

(Pl. Ex. 1, Doc. No. 38-1.)
- Declaration of Expert Charles Ay
Charles Ay served aboard the USS Cabildo as an insulator in the "early 1960s." He states in his declaration that he personally observed thousands and thousands of lineal feet of asbestos-containing pipe insulation throughout the ship. He opines that "more likely than not, merely being aboard the USS Cabildo exposed Decedent Calvin Smithson to respirable asbestos fiber emitted from thermal insulation materials on the ship." He states that this is true because of work aboard the ship, as well as things like vibrations on the ship that would disturb asbestos fibers.

(Pl. Ex. 2, Doc. No. 38-1 ¶¶ 21-27.)

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- Declaration of Expert Kenneth Cohen
Mr. Cohen (a certified industrial hygienist) states in his declaration that, based upon information contained in expert Charles Ay's declaration, it is more likely than not that Decedent was exposed to asbestos from originally installed insulation aboard the ship at issue by way of "re-entrainment."

(Pl. Ex. 3, Doc. No. 38-1 ¶¶ 21-24.)
 - Declaration of Expert Richard Bordow, M.D.
Dr. Bordow examined Decedent prior to his death. He provides evidence regarding medical causation.

(Pl. Ex. 4, Doc. No. 38-2.)

In connection with their opposition, Plaintiffs have submitted objections to the declaration of John Graham.

Government Contractor Defense

Plaintiffs argue 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. Plaintiffs contend 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, Plaintiffs assert 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, Plaintiffs cite to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiffs contend indicates that the Navy not only permitted but expressly required warnings.

Plaintiffs have also submitted objections to Defendant's evidence pertaining to the government contractor defense (expert affidavit of Captain Hewitt).

Sophisticated User Defense

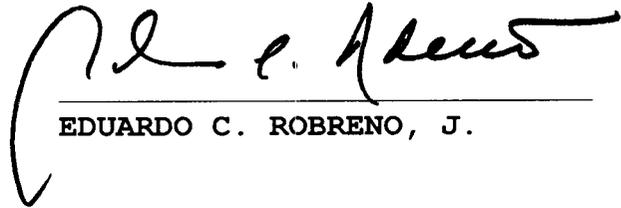
Plaintiffs assert that Newport News is not entitled to summary judgment on grounds of the sophisticated user defense because, (1) Newport News has not adduced evidence that Decedent was a sophisticated user, and (2) Newport News is really arguing for a "sophisticated intermediary defense" (which is not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

C. Analysis

Plaintiffs allege that Decedent was exposed to asbestos from a ship manufactured by Defendant Newport News, and that Newport News is liable for his illness because the asbestos was installed by Newport News.

There is evidence that Decedent worked aboard the USS Cabildo, including in the engine room, during the time period 1963 to 1966. It is undisputed that Defendant built these submarines. There is evidence that in the "early 1960s," there were thousands and thousands of lineal feet of asbestos-containing pipe insulation throughout the ship.

There is expert opinion testimony from Mr. Ay that, more likely than not, merely being aboard the USS Cabildo exposed Decedent Calvin Smithson to respirable asbestos fiber emitted from thermal insulation materials on the ship. There is expert opinion testimony from Mr. Cohen that it is more likely than not that Decedent was exposed to asbestos from originally installed insulation aboard the submarines at issue by way of "re-entrainment." Importantly, however, there is no specific evidence from someone with personal knowledge that Decedent was exposed to respirable dust from any product, asbestos or otherwise. There is no evidence that he inhaled such dust. The opinions of Plaintiffs' experts (Mr. Ay and Mr. Cohen), while based on experience, are impermissibly speculative. See Lindstrom, 424



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F.3d at 492 (quoting Harbour, 1991 WL 65201, at *4). Therefore, even when construing the evidence in the light most favorable to Plaintiffs, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from any product manufactured or supplied (i.e., installed) by Defendant such that it was a "substantial factor" in the development of his illness. See Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1.

Moreover, with respect to asbestos to which Decedent may have been exposed aboard the ship, but which was not manufactured or supplied (i.e., 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 Newport News is warranted. Anderson, 477 U.S. at 248.

The Court notes for the sake of clarity that, in granting Newport News's motion, it has not decided whether a ship is a "product" or whether a shipbuilder has a duty to warn of the hazards associated with various products aboard the ships it builds.

In light of the Court's determination above, it is not necessary to reach Defendant's other arguments.