

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

BOBBY FLOYD AND : CONSOLIDATED UNDER
BARBARA FLOYD, : MDL 875
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 Plaintiffs, :
 : **FILED** :
 : Transferred from the
 : Northern District of
 v. : FEB - 7 2012 : California
 : (Case No. 10-01960)
 :
 : **MICHAEL E. KUNZ, Clerk**
 : **By** ~~_____~~ **Dep. Clerk**
 AIR & LIQUID SYSTEMS :
 CORPORATION, ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:10-CV-69379-ER
 Defendants. :

ORDER

AND NOW, this 7th day of **February, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant General
Electric Co. (Doc. No. 256) is **GRANTED**.¹

¹ This case was originally filed in April of 2010 in California state court. It was thereafter removed to the United States District Court for the Northern District of California, and later transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Decedent Bobby Floyd has alleged exposure to asbestos while working aboard various Navy ships - and, for one assignment, on "shore duty," performing land-based work - throughout his employment with the Navy (January 1953 to August 1972). He has also alleged exposure to asbestos during the course of work for two private entities, in which he performed work on Navy ships and/or at a land-based machine shop, after he left the Navy: (1) RAM Enterprises, and (2) PacOrd. Defendant General Electric Company ("GE") manufactured turbines that were used on Navy ships. The alleged exposure pertinent to Defendant GE occurred during the follow periods of Decedent's work:

- USS Ranger (May 1957 to April 1962)
- USS Constellation (July 1964 to May 1969)

Decedent died of mesothelioma in January of 2011. He was deposed for eight (8) days prior to his death.

Plaintiffs have brought claims against various defendants, including, inter alia, strict products liability claims and negligent failure to warn claims. Defendant GE has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) it is immune from liability by way of the government contractor defense. GE asserts that maritime law applies.

Plaintiffs contend that summary judgment is not warranted because (1) the bare metal defense is not available under maritime law or California law, (2) even if the bare metal defense is available, there are genuine issues of material fact regarding Plaintiff's alleged exposure to original asbestos-containing component parts that were incorporated into Defendant's products at the time it was distributed and/or asbestos-containing replacement parts supplied by GE for later use with its products, and (3) there are genuine issues of material fact regarding the availability to Defendant GE of the government contractor defense. Plaintiffs assert that California law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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 (Maritime versus California Law)

Defendant GE has asserted that maritime law is applicable. 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 In re Asbestos Prods. Liab. Litig. (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., No. 09-67099, - F. Supp. 2d -, 2011 WL 3101810 (E.D. Pa. July 22, 2011) (Robreno, J.). A party seeking application of maritime law must establish that maritime jurisdiction is properly invoked. Id. at *5.

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 *5-8 (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, 497 U.S. 358 (1990). 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), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 2011 WL 3101810 at *9. 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. Id. at 9-10. 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.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure, the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., 10-64625, doc. no. 81 (E.D. Pa. Aug. 2, 2011) (Robreno, J.) (applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

It is undisputed that the alleged exposure to Defendant GE's products occurred exclusively during the Decedent's work aboard naval ships. Thus, Decedent's alleged exposure was during sea-based work. See Sisson, 497 U.S. 358. Therefore, GE has satisfied its burden in establishing that maritime law is applicable to the claims against it, and thus to its motion. See Conner, 2011 WL 3101810, at *5.

C. Bare Metal Defense under Maritime Law

This Court has recently adopted the so-called "bare metal defense" under maritime law, holding 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 (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). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F.App'x. at 375.

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 v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)). 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))).

III. Defendant GE's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Defendant GE asserts the bare metal defense, arguing that it is immune from liability in this case under the defense as a matter of law and that it is, therefore, entitled to summary judgment.

Product Identification / Causation

Defendant GE does not dispute that it supplied both main propulsion turbines and marine steam turbines for installation aboard each of the two ships at issue. Moreover, GE

acknowledges Plaintiffs' expert's assertion that its products (when distributed) contained asbestos-containing component parts - and Defendant GE does not contest this assertion. GE argues, however, that there is no evidence that Decedent worked with or around any marine steam turbine aboard either of the ships. Defendant provides an affidavit of Charles Cushing, Ph.D., which asserts that Decedent would not have been exposed to any asbestos-containing component parts that were manufactured or supplied by Defendant GE because (1) any such parts would have been removed and replaced before Decedent's arrival on the ships; and (2) no such replacement parts would have been supplied by GE because GE was never an approved manufacturer or supplier of gaskets to the Navy.

B. Plaintiffs' Arguments

Bare Metal Defense

Plaintiffs assert that the bare metal defense is not available under maritime law. Furthermore, Plaintiffs assert that, even if the bare metal defense is available, Defendant GE is liable for original asbestos-containing component parts that were incorporated into and supplied with its turbines and/or asbestos-containing replacement parts supplied by GE for later use with its turbines, and to which Plaintiffs assert Decedent was exposed.

Product Identification / Causation

(i) Insulation

Plaintiffs allege that Decedent was exposed to asbestos-containing insulation associated with GE's turbines aboard both ships at issue. Plaintiffs do not, however, allege that GE supplied that insulation; Plaintiffs concede instead that the insulation was put on the turbine after the turbine was distributed by GE.

(ii) Gaskets and Packing

Plaintiffs allege that Decedent was exposed to original and/or replacement asbestos-containing parts (e.g., gaskets and packing) that were distributed by GE with the turbines it supplied to the Navy. In support of this allegation, Plaintiffs cite to:

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- Discovery responses of GE - GE concedes in its discovery responses that some of its turbines were supplied with asbestos-containing component parts (e.g., gaskets and packing)
 - Deposition Testimony of GE 30b6 Witness David Skinner - In his deposition, GE's 30b6 witness (David Skinner) testified that some of GE's turbines were supplied with asbestos-containing component parts (e.g., gaskets and packing) as required by the governing military specifications
 - Affidavit and Deposition Testimony of Capt. Arnold Moore - Capt. Moore provides testimony that discusses documents such as GE parts lists that indicate (1) (a) GE's main propulsion turbines were supplied to the Navy with original asbestos-containing component parts (e.g., gaskets and packing) for both of the ships at issue; (b) GE provided twenty-eight (28) spare asbestos gaskets for later use as replacements aboard the USS Constellation, and (2) GE's steam turbines were supplied to the Navy with original asbestos-containing component parts (e.g., gaskets and packing) for the USS Ranger; he provides testimony that these turbines were located in an area in which Decedent served (the main machinery room)

C. Analysis

To the extent that Decedent's alleged exposure pertains to asbestos-containing component parts used in connection with GE's products but not manufactured or supplied by GE, summary judgment is warranted as a matter of law. However, to the extent that the alleged exposure pertains to original asbestos-containing component parts or asbestos-containing replacement parts supplied by GE, summary judgment in favor of defendant is not warranted on grounds of the bare metal defense. This is the holding of the so-called bare metal defense adopted by this Court under maritime law. See Conner, 2012 WL 288364.

As this Court noted in Conner, the bare metal defense is more properly understood as a challenge to a plaintiff's prima facie case to prove the duty or causation element of its cause of action. Plaintiffs have alleged exposure to asbestos in connection with GE's product from three (3) different types of products: insulation, gaskets, and packing. The Court will

address each alleged source of exposure in turn, examining the duty and/or causation element of Plaintiffs' claims with respect to each source.

(i) Insulation

Although Plaintiffs allege exposure to asbestos-containing insulation used on the exterior of GE's turbines, they have not alleged that GE supplied the insulation (either as original insulation supplied with the turbines or as replacement insulation for later use with the turbines). Therefore, GE has no liability for - or duty to warn about - harms that may arise from this insulation. See Conner, 2012 WL 288364. Accordingly, summary judgment is warranted as to all claims arising from this alleged exposure (whether sounding in negligence or strict liability) as a matter of law. See id.

(ii) Gaskets

Plaintiffs have alleged exposure to both original asbestos-containing gaskets incorporated into the turbines supplied by GE and asbestos-containing replacement gaskets supplied by GE for later use with its turbines. Therefore, it cannot be said that liability for alleged harm arising from these products is precluded as a matter of law. See Conner, 2012 WL 288364. The Court now examines the evidence pertinent to each category of gaskets in turn.

a. Original asbestos-containing gaskets

Plaintiffs have provided evidence that GE supplied turbines with original asbestos-containing gaskets to both of the ships at issue. However, Plaintiffs have identified no evidence that Decedent was exposed to these gaskets (much less that he was exposed to asbestos that may have been disturbed on these gaskets). Construing the evidence in the light most favorable to Plaintiffs, the evidence demonstrates only that there were asbestos-containing gaskets in turbines in Decedent's workspace. It does not demonstrate that Decedent was exposed to these gaskets. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by original gaskets supplied by GE with its turbine(s). In other words, Plaintiffs have failed to identify a genuine issue of material fact regarding this alleged exposure. Accordingly, summary judgment in favor of GE is warranted with respect to this alleged exposure.

b. Asbestos-containing replacement gaskets

Although Plaintiffs have provided evidence that GE provided "spare" asbestos-containing gaskets for later use as replacements aboard the USS Constellation, there is no evidence that these replacement parts were ever used or that Decedent was exposed to them. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by replacement gaskets supplied by GE. In other words, Plaintiffs have failed to identify a genuine issue of material fact regarding this alleged exposure. Accordingly, summary judgment in favor of GE is warranted with respect to this alleged exposure.

(iii) Packing

Plaintiffs have alleged exposure to original asbestos-containing packing incorporated into the turbines supplied by GE with its turbines. (They have not alleged that GE supplied asbestos-containing replacement gaskets for later use with its turbines. Plaintiffs have provided evidence that GE supplied turbines with original asbestos-containing packing to both of the ships at issue. However, Plaintiffs have identified no evidence that Decedent was exposed to this packing (much less that he was exposed to asbestos that may have been disturbed on this packing). Construing the evidence in the light most favorable to Plaintiffs, the evidence demonstrates only that there was asbestos-containing packing in turbines in Decedent's workspace. It does not demonstrate that Decedent was exposed to this packing. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by original packing supplied by GE with its turbine(s). In other words, Plaintiffs have failed to identify a genuine issue of material fact regarding this alleged exposure. Accordingly, summary judgment in favor of GE is warranted with respect to this alleged exposure.

D. Conclusion

Applying maritime law, Defendant GE is not liable for harms arising from any product that it did not manufacture or supply. Conner, 2012 WL 288364, at *7. Plaintiffs have failed to provide evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos-containing component parts for which Defendant GE could potentially be liable in light of this Court's ruling in Conner, 2012 WL 288364 (i.e., original



EDUARDO C. ROBRENO, J.

asbestos-containing component parts or asbestos-containing replacement parts). Accordingly, summary judgment in favor of Defendant GE is warranted on all claims.