

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

BOBBY FLOYD AND : CONSOLIDATED UNDER
BARBARA FLOYD, : MDL 875

Plaintiffs,

FILED

FEB - 9 2012

v.

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

: Transferred from the
: Northern District of
: California
: (Case No. 10-01960)

AIR & LIQUID SYSTEMS
CORPORATION, ET AL.,

Defendants.

:
: E.D. PA CIVIL ACTION NO.
: 2:10-CV-69379-ER
:

ORDER

AND NOW, this **8th** day of **February, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant Foster
Wheeler LLC (Doc. No. 268) 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 Foster Wheeler LLC ("Foster Wheeler") manufactured boilers that were used on Navy ships. The alleged exposure pertinent to Defendant Foster Wheeler occurred during the following period of Decedent's work:

- USS Constellation - (July 1964 to May 1969) - worked in fire room (in a space combined with the engine room); supervisor in fire room; responsible for boilers and their associated machinery

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 Foster Wheeler has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification to support a finding of causation with respect to its product(s), (3) it is immune from liability by way of the sophisticated user defense, and (4) it is immune from liability by way of the government contractor defense. Foster Wheeler asserts that maritime law applies.

Plaintiffs contend that summary judgment is not warranted because (1) the bare metal defense is not available under maritime 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 they were distributed and/or asbestos-containing replacement parts supplied by Defendant, (3) there is sufficient product identification evidence, (4) Defendant has not met its burden of establishing that the sophisticated user defense applies, and even if it does, there are genuine issues of material fact surrounding its availability, and (5) there are genuine issues of material fact regarding the availability to Defendant 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 Foster Wheeler 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 Foster Wheeler's products occurred during the Decedent's work aboard a naval ship. Thus, Decedent's alleged exposure was during sea-based work. See Sisson, 497 U.S. 358. Therefore, Foster Wheeler 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))).

II. Defendant Foster Wheeler's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Defendant Foster Wheeler 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 Foster Wheeler does not dispute that it supplied boilers to the Navy (eight (8) to the particular ship at issue) with asbestos-containing gaskets inside and that it also supplied a second set of replacement gaskets for that equipment. Foster Wheeler argues, however, that there is no evidence that Decedent worked with or around any such original or replacement gaskets. Foster Wheeler has pointed to (1) evidence (including an affidavit of Admiral Roger B. Horne, Jr.) indicating that the ship was commissioned in October 1961 (several years before Decedent boarded it), as well as (2) testimony of Decedent himself that the gaskets were replaced at least every 1,000 hours (as the boiler tubes had to be accessed for cleaning with that frequency), such that Decedent would not have been exposed to the original gaskets supplied with the boiler.

B. Plaintiffs' Arguments

Bare Metal Defense

Plaintiffs assert that neither maritime law nor California law makes the bare metal defense available. Furthermore, Plaintiffs assert that, even if the bare metal defense is available, Defendant Foster Wheeler is liable for original asbestos-containing gaskets that were incorporated into its boilers and asbestos-containing replacement gaskets supplied for later use with its boilers, and to which Plaintiffs assert Decedent was exposed.

Product Identification / Causation

Plaintiffs allege that Decedent was exposed to original and/or replacement asbestos-containing gaskets in connection with boilers supplied to the USS Constellation. In support of these allegations, Plaintiffs cite to:

- Deposition Testimony of Decedent Mr. Floyd - Decedent testified that he changed gaskets on Foster Wheeler boilers aboard the USS Constellation; he testified that the gaskets would be removed and replaced (at least) every 1,000 hours, as was necessary to service the boiler tubes
- Deposition Testimony of Foster Wheeler 30b6 Witness J. Thomas Schroppe - Mr. Schroppe testified that Foster

Wheeler provided boilers to the USS Constellation, supplied asbestos-containing gaskets, ropes and block insulation for use in connection with its boilers aboard that ship, and sold replacement parts

- Deposition Testimony of Expert Arnold P. Moore - Expert Arnold Moore provides testimony that Foster Wheeler supplied asbestos-containing component parts (both original and replacement parts)

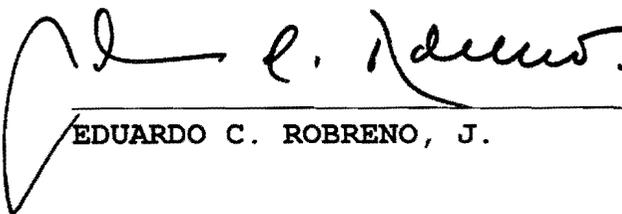
C. Analysis

To the extent that Decedent's alleged exposure pertains to asbestos-containing component parts used in connection with Foster Wheeler's products but not manufactured or supplied by Foster Wheeler, summary judgment is warranted. However, to the extent that the alleged exposure pertains to original asbestos-containing component parts or asbestos-containing replacement parts supplied by Foster Wheeler, 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 both original asbestos-containing gaskets incorporated into the boilers supplied by Foster Wheeler and asbestos-containing replacement gaskets supplied by Foster Wheeler for later use with its boilers. The Court now examines the evidence pertinent to each category of gaskets in turn.

a. Original asbestos-containing gaskets (and other asbestos-containing products)

It is undisputed that Defendant Foster Wheeler provided original asbestos-containing gaskets with the boilers it supplied to the USS Constellation. However, the undisputed evidence from Decedent's own testimony is that those original gaskets would have been removed and replaced within the first 1,000 hours of use (i.e., within forty-two (42) days). It is undisputed that the ship was commissioned in 1961, and that Plaintiff did not board the ship until 1964. Therefore no reasonable jury could conclude that the original gaskets would not have been removed and replaced years before Decedent ever boarded the ship. Although



EDUARDO C. ROBRENO, J.

there is evidence that Foster Wheeler also supplied asbestos rope and asbestos-containing block insulation, Plaintiffs have pointed to no evidence of exposure to asbestos from the rope or block insulation - and it does not appear from their briefing that Plaintiffs even allege exposure to these products. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to original asbestos-containing gaskets (or other products or component parts) manufactured and/or supplied by Foster Wheeler. Accordingly, summary judgment in favor of Foster Wheeler is warranted with respect to this alleged exposure.

b. Asbestos-containing replacement gaskets

It is undisputed that Defendant Foster Wheeler provided one set of replacement gaskets with the boilers it supplied to the USS Constellation. However, there is no evidence that those replacement gaskets were ever used or that Decedent was exposed to them. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos-containing replacement gaskets manufactured and/or supplied by Foster Wheeler. Accordingly, summary judgment in favor of Foster Wheeler is warranted with respect to this alleged exposure.

D. Conclusion

Applying maritime law, Defendant Foster Wheeler 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 Foster Wheeler could potentially be liable in light of this Court's ruling in Conner, 2012 WL 288364 (i.e., original asbestos-containing component parts or asbestos-containing replacement parts). Accordingly, summary judgment in favor of Defendant Foster Wheeler is warranted on all claims.