

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

THOMAS S. RIDDLE and : CONSOLIDATED UNDER
GLORIA F. RIDDLE, : MDL 875
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 Plaintiffs, :
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 v. :
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 FOSTER WHEELER, LLC, : E.D. PA CIVIL ACTION NO.
 : 2:11-cv-00318-ER
 Defendants. :
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O R D E R

AND NOW, this **24th** day of **May, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant **Foster
Wheeler, LLC** (Doc. No. 186) is **GRANTED**.¹

¹ This case originated in Pennsylvania state court. In January of 2011, it was removed to the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Thomas Riddle was born in Tennessee, grew up in Indiana. He served in the Navy from 1960 to 1969, during which period he spent most of his time aboard ships, but spent a few months living in Pennsylvania. After being discharged from the Navy, he returned to Indiana, where he worked at a General Motors ("GM") plant for approximately 32 years. After retiring from GM in 2005, Plaintiff moved to Arizona, where he now resides. Defendant Foster Wheeler, LLC ("Foster Wheeler") manufactured boilers. The alleged exposure pertinent to Defendant Foster Wheeler occurred during Plaintiff's service in the Navy aboard the following ship:

- USS America (CV-66) - 1964 to 1969

Plaintiff was diagnosed with lung cancer in 2010. He was deposed for two days in March of 2011.

Plaintiff has brought claims against various defendants. 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 evidence to establish causation with respect to its product(s), and (3) it is immune from liability by way of the government contractor defense. Foster Wheeler contends that Pennsylvania law applies. Plaintiff also contends that Pennsylvania 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

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.).

C. 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.

D. 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.

II. Defendant Foster Wheeler's Motion for Summary Judgment

As a preliminary matter, the Court notes that Plaintiff's "Supplemental Brief in Opposition to Motion for Summary Judgment of Foster Wheeler" (Doc. No. 245) has not been considered by the Court, as it was filed without leave of Court just four (4) days before the hearing on Defendant's motion, and over five (5) months after the deadline for Plaintiff's opposition brief. (See Doc. No. 34.)

Foster Wheeler asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendants for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy's knowledge about asbestos and its hazards was commensurate with the state-of-the-art in America. In asserting this defense, they rely on military specifications (MIL-T-15071B (effective August 16, 1954), MIL-M-15071C (effective September 10, 1957), MIL-T-15071D (dated June 6, 1961), and MIL-I-15024 (effective September 19, 1952)), and the affidavits of Dr. Lawrence Stillwell Betts, Admiral Ben J. Lehman, Commander Thomas F. McCaffery, and J. Thomas Schroppe (a company witness for Foster Wheeler).

Plaintiff has submitted evidence that contradicts Defendant's proofs as to the government contractor defense, including military specifications, deposition testimony and/or affidavits of experts Adam Martin, Captain Arnold P. Moore, Jr., and Captain William A. Lowell. (Plaintiff has argued that, where the expert testimony is in the form of deposition testimony, it is the same as an affidavit for purposes of summary judgment.)

However, Plaintiff has conceded that (1) much (if not all) of the evidence was obtained from the docket of another case (or cases) to which Plaintiff was not a party - including Willis, No. 09-91449, and (2) Plaintiff has not retained (or disclosed) in this case the experts whose evidence was submitted to oppose Defendant's motion for summary judgment on grounds of the government contractor defense. As a result, Plaintiff does not have experts who are available to testify at trial to oppose Defendant's argument pertaining to the government contractor defense. Consequently, the expert affidavits (and deposition testimony that Plaintiff contends is, in essence, an affidavit) do not satisfy the requirements of Federal Rule of Civil Procedure 56(c)(4), which requires that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The Court therefore finds that Plaintiff in this case sits in the position of the plaintiff in Faddish, lacking evidence that will suffice to oppose Defendant's motion for summary judgment on grounds of the government contractor defense. Accordingly, Defendant Foster Wheeler's motion for summary judgment on grounds of the defense is granted.