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

PAUL BARNES, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	Transferred from the Northern District of California (Case No. 09-00708)
GENERAL ELECTRIC COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:09-92342-ER
Defendants.	:	

O R D E R

AND NOW, this **21st** day of **June, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Northrop Grumman Shipbuilding, Inc. (Doc. No. 29) is **GRANTED**.[1]

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[1] This case was transferred in November 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 Paul Barnes ("Decedent" or "Mr. Barnes") allege that Decedent was exposed to asbestos while serving in the Navy in 1960. Defendant Northrop Grumman Shipbuilding, Inc. ("Defendant" or "Northrop Grumman"), which was previously known as Huntington Ingalls Incorporated, built ships. The alleged exposure pertinent to Defendant Northrop Grumman occurred during Decedent's work as a shipfitter aboard the following ship:

- USS Midway

In their Complaint and briefing, Plaintiffs also asserted that Decedent was exposed to "take home" asbestos from the clothes of his brother, who also worked on a ship built by Defendant. However, during oral argument, Plaintiffs informed the Court that they wished to withdraw all claims of "take home" exposure. Therefore, the Court need not consider those claims.

Plaintiffs assert that Decedent developed and died from an illness as a result of asbestos exposure. He was deposed in April of 2008.

Plaintiffs brought claims against various defendants. Defendant Northrop Grumman 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.

Defendant contends that California law applies, while Plaintiffs contend 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)

Defendant contends that maritime law applies. 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 Northrop Grumman occurred during Decedent's work as a shipfitter aboard ships. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiffs' claims against Northrop Grumman. 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 Northrop Grumman's Motion for Summary Judgment

A. Defendant's Arguments

Admissibility of Decedent's Deposition Testimony

Northrop Grumman argues that Decedent's deposition testimony should be ruled inadmissible as to Northrop Grumman because the deposition was taken in a different action (Decedent's state court action), to which Northrop Grumman was not a party. Defendant contends that Plaintiffs have failed to establish that any defendant present was a "predecessor in interest" under Rule 804(b)(1) of the Federal Rules of Evidence. Furthermore, Northrop Grumman asserts that there was no "unity of interest" among the Defendants and that other defendants at the deposition may even have had an interest in identifying Northrop Grumman as the entity responsible for some or all of Decedent's alleged exposure.

Product Identification / Causation

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

Defendant argues that the ship at issue was built and commissioned several years (approximately fifteen (15) years) prior to Decedent's work aboard it, and underwent several overhauls (including two (2) regular overhauls, four (4) restricted availabilities, and one (1) complex overhaul) before Decedent's work aboard it.

In support of this argument, Defendant provides the following evidence:

- Declaration of John Graham
  Mr. Graham states that because the USS Midway was fifteen (15) years old at the time of Decedent's work aboard it, it is more likely than not that the majority of the originally installed thermal insulation, gaskets and packing had been removed and replaced. He states that it would have been impossible to identify originally installed, if any, thermal insulation, gaskets and/or packing that still existed on the ship at the time of Decedent's work on it.

  (Doc. No. 29-2 at pp. 2-3.)

Government Contractor Defense

Northrop Grumman 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, Northrop Grumman relies upon the declaration of Retired U.S. Navy Captain Wesley Charles Hewitt.

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

Sophisticated User Defense

Northrop Grumman 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

Admissibility of Decedent's Deposition Testimony

During oral argument, as mentioned in their opposition brief, Plaintiffs contended that there were several parties to Decedent's previous action who would have been interested in obtaining testimony that Decedent did not board the USS Midway (including Garlock, IMO Industries, Buffalo Pumps, Crane Co., Plant Insulation Company, and Yarway Corporation). Plaintiffs state that the questioning at the deposition was "general" and not specific to any particular Defendant, contending, in essence, that the circumstances warrant admission of Decedent's deposition testimony under Rule 804(b)(1) of the Federal Rules of Evidence.

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:

- Deposition Testimony of Decedent
  Decedent testified that he worked aboard the USS Midway and worked largely in the engine room/ boiler room. He testified to working around bulkhead insulation and pipe insulation, including during times when it was being removed. He testified that he worked around others removing gaskets from pumps. He testified that this work removing insulation and gaskets created dust in the engine room and that he inhaled it. When asked whether he knew who installed the insulation or whether it was the original insulation installed during the ship's construction, he testified that he did not know.

  (Pl. Ex. C, Doc. No. 32-1, pp. 261, 294-335.)

- Declaration of Expert Charles Ay
  Mr. Ay states in his declaration that he has tested samples of thermal pipe insulation installed into the 1970s and has consistently found them to contain asbestos. He states that, "based upon my research and testing, I can state that virtually all pipe insulation installed into the 1970s contained asbestos."

  Mr. Ay states that, during ship overhauls, pipe insulation was only removed as necessary to complete projects, and much of the existing insulation was not removed.

  Mr. Ay also concludes that, "[b]ased on my asbestos training, education, and experience in the trades as an insulator, personal testing, review of the literature, career in asbestos detection and abatement, my knowledge of the changes the Midway was undergoing at Hunter's Point Naval Shipyard in 1960, and Mr. Barnes's work aboard the

> Midway, it is my opinion that the decedent would have been exposed to respirable asbestos fibers during his work aboard the Midway. Further, given the amount of time that has passed between the building of the ships, the fact that insulators commonly remove only the insulation necessary to perform their work, and Mr. Barnes's testimony regarding his work aboard the Midway, it is more likely than not that the decedent was exposed to asbestos from insulation originally-installed on [it]."
>
> (Pl. Ex. D, Doc. No. 32-1 ¶¶ 17-24.)

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 Northrop Grumman is not entitled to summary judgment on grounds of the sophisticated user defense because, (1) Northrop Grumman has not adduced evidence that Decedent was a sophisticated user, and (2) Northrop Grumman 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

Admissibility of Decedent's Deposition Testimony

The parties disagree as to whether the deposition testimony of Decedent from an earlier action (to which Defendant Northrop Grumman was not a party) is admissible against Northrop Grumman in the present action. The Court finds that Plaintiffs have not established that the defendants present at Decedent's deposition in the earlier action had a motive to develop testimony that was sufficiently similar to that of Northrop Grumman's to permit Decedent's testimony to be used against Northrop Grumman in the present action. This is particularly true because identification of the product(s) at issue is a key component for establishing liability of a manufacturer in this action, such that a defendant at the deposition who could face potential liability for the same (or a similar) product as could Northrop Grumman (such as, for example the supplier of replacement insulation or gaskets for the ship) would undoubtedly have had a motive to obtain testimony that identified Northrop Grumman as the party liable for Decedent's injuries (i.e., a directly conflicting motive). Accordingly, Decedent's deposition testimony is inadmissible with respect to the claims against Northrop Grumman. Having established this, the Court next considers the sufficiency of Plaintiffs' admissible evidence for withstanding Northrop Grumman's motion for summary judgment.

Product Identification / Causation

Plaintiffs allege that Decedent was exposed to asbestos installed aboard a ship manufactured by Defendant Northrop

Grumman (USS Midway), and that Northrop Grumman is liable for his illness because the asbestos was installed by it.

It is undisputed that Defendant built the ship at issue. There is expert opinion testimony from Mr. Ay that virtually all insulation installed at the time of Decedent's work aboard the USS Midway contained asbestos, and that at least some of the insulation present on the ship at the time of Decedent's work was original insulation installed by the shipbuilder.

Importantly, however, there is no evidence from anyone with personal knowledge as to whether the insulation to which Decedent may have been exposed contained asbestos, or whether (or which portions of) the insulation on the ship was original insulation installed (i.e., supplied) by Defendant. (The Court notes that this would be true even if Decedent's deposition testimony from the previous action had been deemed admissible.) The opinion of Plaintiffs' 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 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, 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 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 Northrop Grumman is warranted. Anderson, 477 U.S. at 248.

The Court notes for the sake of clarity that, in granting Northrop Grumman'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.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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