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

GRAMMER, et al.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
	:	Transferred from the Central District of California
v.	:	(Case No. 09-07599)
	:	
ADVOCATE MINES, LTD., et al.,	:	E.D. PA CIVIL ACTION NO. 2:09-92425
Defendants.	:	

O R D E R

AND NOW, this **1st** day of **December, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Foster Wheeler (doc. no. 191) is **DENIED**.[1]

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[1] This case was filed in California state court on September 14, 2009. It was removed to the United States District Court for the Central District of California on October 20, 2009, and in December 2009 was transferred to the Eastern District of Pennsylvania as part of MDL 875. Plaintiffs allege that their Decedent, Kenneth H. Grammer, was diagnosed with, and has since died from, mesothelioma as a result of his exposure to Defendant's asbestos-containing products during his service in the U.S. Navy from 1956 to 1963.

I. Legal Standard

1. Applicable Law

Both Defendant and Plaintiff agree that California law should apply to this motion. See Pendergast v. American Optical Corp., 10-68061, doc. no. 164 (July 1, 2011 E.D. Pa.) (Robreno, J.) (where the parties agree as to which law applies, the MDL Court will apply that law.). As this case is Erie bound, this Court will apply California substantive law and federal procedural law in deciding Defendant's Motion for Summary Judgment. See 28 U.S.C. § 1332; Hanna v. Plumer, 380 U.S. 460, 465 (1965); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); King v. E.I. DuPont Nemours & Co., 741 F. Supp. 2d 699, 701 (E.D. Pa.

2010) (Robreno, J.).

2. Product Identification and Exposure Under California Law

Under California law, a plaintiff must show (1) some threshold exposure, and (2) that the exposure "in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." McGonnell v. Kaiser Gypsum Co., Inc., 98 Cal. App. 4th 1098, 1103 (Cal. Ct. App. 2002); see also Rutherford v. Owens-Illinois, 16 Cal. 4th 953, 982-83 (1997).

Plaintiff's evidence must indicate the defendant's product contributed to plaintiff's disease in a way that is "more than negligible or theoretical." Jones v. John Crane, Inc., 132 Cal. App. 4th 990, 998-99 (Cal. Ct. App. 2005). The standard is a broad one in that it requires only that the exposure be a "substantial factor," not a "but-for" cause. Lineaweaver v. Plant Insulation Co., 31 Cal. App. 4th 1409, 1415 (Cal. Ct. App. 1995). In Lineaweaver, the California Court of Appeals for the First District concluded that a "possible cause only become 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely that not that the injury was a result of its action. This is the outer limit of inference upon which as issue may be submitted to the jury." Id. at 1416 (emphasis added). Additionally, "[f]requency of exposure, regularity of exposure, and proximity of the asbestos product to a plaintiff are certainly relevant, although these considerations should not be determinative in every case." Id.

3. Bare Metal Defense under California Law

The Supreme Court of California has not yet addressed the "bare metal" defense, specifically. In Taylor v. Elliott Turbomachinery Co., Inc., the defendants supplied various products, including pumps and valves, to the Navy. 171 Cal. App. 4th 564, 571 (Cal. Ct. App. 2009). These products were incorporated with asbestos-containing packing, gaskets and insulation. Id. The asbestos-containing packing and gaskets were not manufactured by the defendants. Id. The court analyzed whether defendants owed plaintiff any duty of care under either a negligence or strict liability theory. Id. at 574. The court held that the defendants could not be strictly liable because under California law,

> a manufacturer has no duty to warn of defects in products supplied by others and used in conjunction with the manufacturer's product unless the manufacturer's product itself causes or creates the risk of harm[,] and manufacturers of non-defective component parts bear no liability when they simply build a product to a customer's specifications but do not participate in the integration of the component parts into the final product.

Id. at 575. The court found that defendants could not be held strictly liable "for failing to warn of the dangers inherent in the asbestos-containing materials that were used with their products." Id. at 579.

Also in 2009, a separate panel of the California Court of Appeal, in O'Neil v. Crane Co., disagreed with the Taylor decision and found that the "component parts defense" did not apply to manufacturers of pumps and valves. 177 Cal. App. 4th 1019, 1026 (Cal. Ct. App. 2009). The O'Neil court noted that defendants' products were intended to be used with insulation and packing. These manufacturers, unlike traditional component manufacturers, supplied manuals and had the ability to warn the users of the potential dangers of using such products. Id. at 1030. On December 23, 2009, the Supreme Court of California granted a petition for review of O'Neil. 223 P.3d 1. As this is an unsettled area of state law, the Court will not rule on it, but rather will remand the issue to the transferor court to decide, under the guidance of the forthcoming decision by the California Supreme Court in O'Neil. See Faddish v. CBS Corp., No. 09-70626, 2010 U.S. Dist. LEXIS 116362 (E.D. Pa. Oct. 22, 2010) (Robreno, J.).

4. 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).

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 issue of material fact as to whether it is entitled to the government contractor defense. Compare Willis v. BW IP International Inc., 2011 WL 3818515 at *1 (E.D. Pa. Aug. 26, 2011) (Robreno, J.) (addressing defendant's burden at the summary judgment stage), with Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770 (E.D. Pa. 2010) (Robreno, J.) (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not shown the absence of a genuine issue of 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.

5. Sophisticated User Defense under California Law

The California Supreme Court's decision in Johnson v. American Standard, Inc. noted that when a potentially hazardous product is sold to "sophisticated users," the law does not impose on the manufacturers a duty to warn, because sophisticated users already know, or should know, of those potential hazards. 43 Cal. 4th 56, 70 (Cal. 2008). The focus of the defense is whether the user of the product belonged to the "class of sophisticated users" who knew or should have known about the product's hazards. Id. at 65-66.

California has adopted Section 388 of the Restatement Second of Torts. Persons v. Salomon North America, Inc., 217 Cal. App. 3d 168, 175 (Cal. Ct. App. 1990); see also Faddish v. CBS Corp., 2010 WL 4159238 (E.D. Pa. 2010) (Robreno, J.) (declining to grant defendant's motion for summary judgment based on the sophisticated intermediary defense under Florida law, when Florida had adopted Section 388). This Court has said that,

> Under the Second Restatement's approach, whether a sophisticated purchaser discharges a manufacturer's duty to warn depends on numerous factors, including (1) the dangerous nature of the product (2) the form in which it is used (3) the type of warnings given (4) the burden

imposed and (5) the likelihood that the warnings will be adequately communicated to the foreseeable users of the product.

Faddish, 2010 WL 4159238 at *5 (citing Union Carbide Corp. v. Kavanaugh, 879 So.2d 42, 45 (Fl. Ct. App. 2004)).

II. Motion for Summary Judgment by Defendant Foster Wheeler

A. Product Identification and Exposure Under California Law

Plaintiff produced the deposition testimony of Decedent's brother Robert Grammer (the "witness"), who worked with Decedent for approximately ten months aboard the USS Ashtabula. The witness testified that there were four Foster Wheeler boilers aboard the Ashtabula. (Dep. of Grammer at 13, 19, Pl.'s Ex. 1). The witness knew that all four were manufactured by Foster Wheeler because each boiler contained a brass nameplate which the crew was required to keep polished. (Id. at 19-20). The nameplate stated "Foster Wheeler" written in block letters. (Id. at 132). The witness testified that the pressure rating of the boilers was 450 pounds. (Id. at 132). Some of the work that the witness and Decedent performed on the boilers included: tube cleaning, fireside scraping, refractory repair, burner repairs, feed vale repairs, oil valve and water feed valve repairs, steam supply and exhaust valve repairs, fuel transfer pump and feed pump repair, water feed pump repair and bilge and ballast pump repair. (Id. at 20). The witness testified that he and Decedent both worked on these boilers almost every day. (Id. at 19).

The witness said that Decedent spent about forty percent of his time at work working on the boilers. (Id. at 133). The witness testified that all four of the Foster Wheeler boilers were insulated. (Id. at 20). The insulation was located between the paneling of the exterior of the boilers. (Id. at 134-135). The witness personally saw Decedent remove insulation and/or refractory materials from the Foster Wheeler boilers. (Id. at 21).

Repairing the Foster Wheeler boilers often required maintenance of the "hot spots," or areas of the exterior of the boiler which became dangerously hot due shifting of the insulation behind it. (Id. at 21). In order to make the necessary repairs, the witness and Decedent would need to remove the side panels of the boiler, pull out damaged insulation that was

inside, and then replace the insulation. (Id. at 21). The process of repairing the "hot spots" would sometimes have to be done two or three times a day. (Id. at 22-23). In order to remove the insulation, the men would pull the insulation out of the boilers with their hands. (Id. at 23). Pulling out the old insulation would create dust which the men inhaled. (Id. at 23-25).

Decedent also had to remove insulation from the paneled doors of the boiler. (Id. at 25). Removing the old insulation would have to happen every time the panels were removed, approximately once a week. (Id. at 25-26). The old insulation would stick to the doors and so Decedent would have to scrape the insulation off with a putty knife or something similar. (Id. at 25). Scraping the insulation created dust in the air which the men would have inhaled. (Id. at 26-27).

The witness also testified that he and Decedent also had to work with the refractory brick in the boilers. (Id. at 27, 29). In order to work on the refractory, they would crawl inside the boiler and "begin chipping all of the cement between the bricks and pull the bricking out, clean the -- the back walls, which involved wire brushing it down... And then you begin to "rebuild that brick wall from the bottom up again using new refractory and new cement." (Id. at 28). The men would use pneumatic chisels, sledgehammers and pneumatic wire brushes to break apart the refractory material. (Id. at 29). The process of tearing down the refractory created dust in the enclosed spaces which the men inhaled. (Id. at 30-31). It was "[j]ust dusty all over in there." (Id. at 31).

In addition, the cement used for replacing the refractory was in a dry form. (Id. at 32). It came in 30 lb bags. (Id. at 141). The witness had seen Decedent making the cement for the refractory work, which required dumping the dry bag into a mixing tub, a process that created visible dust that the men inhaled. (Id. at 31-34).

Further, Foster Wheeler's corporate representative was deposed, and testified that the Foster Wheeler boilers in question contained asbestos-containing components such as gaskets, rope, cement, brick, and cushions. (See Dep. of J. Thomas Schroppe at 18, 61, 63, 75-76, 82-83, Pl.'s Ex. 28). Additionally, Plaintiff has presented bills of materials outlining the asbestos products used in the boilers. (See Pl.'s Exs. 22, 33, 34).

This is sufficient evidence from which a reasonable jury could find that Decedent had some threshold exposure, and that the exposure was a substantial factor in contributing to Decedent's risk of developing asbestos-related cancer. McGonnell, 98 Cal. App. 4th at 1103.

B. Bare Metal Defense

Foster Wheeler's corporate representative was deposed, and testified that the Foster Wheeler boilers in question contained asbestos-containing components such as gaskets, rope, cement, brick, and cushions. (See Dep. of J. Thomas Schroppe at 18, 61, 63, 75-76, 82-83, Pl.'s Ex. 28). Additionally, Plaintiff has presented bills of materials outlining the asbestos products used in the boilers. (See Pl.'s Exs. 22, 33, 34).

However, this issue will be remanded, as this is an unsettled area of California law.

C. Government Contractor Defense

Defendant has produced evidence regarding the government's involvement in the design and manufacture of products such as valves and sealing materials to be used on Navy ships. For example, Admiral Sargent wrote that the Navy developed specifications used in the contract design package and that thousands of military specifications were developed for various materials, equipment, components, books, manuals and label plates. (See Sargent Aff., Def.'s Ex. C; Sargent Report, Def.'s Ex. D). Admiral Sargent was deposed in this matter, and he said, inter alia, that he had never seen health-related warnings in technical manuals. (See Sargent Dep. at 78-81, Def.'s Ex. H). Additionally, Defendant's corporate witness, Anthony Pantaleoni, confirmed that Crane Co. complied with applicable government specifications in providing products to the government. (See Pantaleoni Aff., Def.'s Ex. E). Defendant further provides examples of Military Specifications, such as Mil-V-22052D, which sets forth the information that manufacturers must include on valve label plates. (Def.'s Br. at 7-8, doc. no. 180).

Plaintiff has produced evidence that the Navy did not prevent product manufacturers from warning of asbestos hazards; that other manufacturers did warn about their asbestos-containing products; and that there is evidence that the Navy knew of the hazards of asbestos. For example, Plaintiff presents the affidavit of Navy Captain Arnold Moore, who testified that "[t]he

Navy relied heavily upon its equipment manufacturers to identify hazards associated with their products. The hazards associated with exposure to asbestos and asbestos containing materials and equipment were not exempt." (Moore Aff. at ¶ 12, Pl.'s Ex. 3). Additionally, Captain Moore opined that the Navy did not prohibit equipment manufacturers from providing precautions or hazard warnings in their instruction manuals. (Id. at ¶ 15).

Furthermore, Captain Moore discussed the Navy's adoption in 1956 of a Uniform Labeling Program, that included within the definition of a toxic hazard any material that could give off a harmful dust during handling or operations, and that suggested stringent precautionary measures. (Id. at ¶ 24; see also Pl.'s Exs. 21, 23).

Plaintiff further presents the expert report of Navy Captain Francis Burger, who opined that based on his experience as a contractor and Navy engineer, manufacturers of asbestos-containing equipment supplied to the Navy played an active role in developing Military Specifications. (Burger Report at 4, Pl.'s Ex. 8).

Plaintiff also presents examples of Military Specifications discussing warnings for various products. (Pl.'s Br. at 31-36, doc. no. 215).

In Willis v. BW IP International Inc., 09-91449 (E.D. Pa. Aug. 26, 2011) (Robreno, J.), this Court found that defendants had not shown the absence of a genuine issue of 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.

Willis is instructive for the present case. Here, Plaintiffs have submitted sufficient evidence, including affidavits, controverting Defendant's affidavits and other evidence. Summary judgment is therefore denied regarding the government contractor defense.

D. Sophisticated User Defense

To support its assertion that the sophisticated user defense applies in this case, Defendant claims that:

> There can be no question that the United States

> Navy was a sophisticated user of asbestos-containing products as early as the 1920s. Since that time, the United States Navy recognized that the inhalation of asbestos fibers in sufficient amounts could result in pulmonary disease and had an active program that was consistent with the state of the art knowledge in science and medicine to identify hazardous exposures and control recognized health effects.

(Def.'s Br. at 27, doc. no. 191). Defendant presents the declarations of two experts, Lawrence Stilwell Betts and Frank E. Gomer, Ph.D., who opined as such. (Def.'s Exs. J, L).

However, Plaintiff points to other evidence that raises a genuine issue of material fact as to whether the Navy knew or should have known the dangers of asbestos such that the sophisticated user defense could apply. For example, Admirals Sargent and Lehman each testified that they had not been made aware of the hazards of asbestos until the late 1970s. (Dep. of Admiral David P. Sargent, Jr. at 96-97, Pl.'s Ex. C; Dep. of Ben J. Lehman at 64-66, Pl.'s Ex. E). Additionally, Dr. Forman testified that the Navy was actually misinformed regarding the dangers of asbestos because it relied on the 1946 Fleisher-Drinker Report that incorrectly concluded that asbestos was not a significant hazard. (Dep. of Samuel A. Forman at 42, Pl.'s Ex. D).

III. Conclusion

Given that the parties agree that California law should apply here, summary judgment is denied, because Plaintiff has presented sufficient evidence from which a reasonable jury could find that Decedent had some threshold exposure to asbestos attributable to Defendant, and that the exposure was a substantial factor in contributing to Decedent's risk of developing mesothelioma. Additionally, Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether the government contractor and sophisticated user defenses should apply. The issue of the bare metal defense is remanded to be addressed by the transferor court, given that the issue of the bare metal defense is unsettled in California and is currently pending before the California Supreme Court.

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AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.