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

RICHARD CLOSE,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Northern District
v.	:	of California (Case No. 09-01269)
GENERAL ELECTRIC COMPANY, ET AL.,	:	
	:	E.D. PA CIVIL ACTION NO. 2:09-CV-70107-ER
Defendants.	:	

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AND NOW, this **30th** day of **March, 2012,** it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Northrop Grumman Shipbuilding, Inc. (Doc. No. 30) is **GRANTED.**[1]

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[1] This case was transferred in February 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.

Plaintiff Richard Close ("Plaintiff" or "Mr. Close") alleges that he was exposed to asbestos while working aboard various ships during his service in the Navy (1958 to 1962). Defendant Northrop Grumman Shipbuilding, Inc. ("Northrop Grumman") built ships. The alleged exposure pertinent to Defendant Northrop Grumman occurred during Mr. Close's work aboard:

- USS Ticonderoga (CVA-14)
- USS Coral Sea (CVAA-43)

Plaintiff asserts that he suffers "asbestos-related lung injuries." (Compl. ¶ 1.)

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Plaintiff brought claims against various defendants. Defendant Northrop Grumman has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification evidence to support a finding of causation with respect to it, (3) it is immune from

liability by way of the government contractor defense, and (4) it is immune from liability by way of the sophisticated user defense. Northrop Grumman contends that maritime law applies, but that it is also entitled to the sophisticated user defense under California law.

Plaintiff contends that (1) the bare metal defense is irrelevant to this case because (2) there is sufficient product identification evidence to support a finding of causation with respect to originally installed insulation, (3) there are genuine issues of material fact precluding summary judgment on grounds of the government contractor defense, and (4) Defendant is not entitled to the sophisticated user defense. Plaintiff contends that California 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 (Maritime versus State 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 Northrop Grumman 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 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). 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, 799 F. Supp. 2d at 466. 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 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.

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., No. 10-64625, 2011 WL 5881184, at *1 n.1 (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 pertinent to Defendant Northrop Grumman was aboard ships. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant Northrop Grumman. See Conner, 799 F. Supp. 2d at 462-63.

C. 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))).

D. Unsworn Declaration at the Summary Judgment Stage

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with particular parts of material in the record, such as an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that unsworn testimony "is not competent to be considered on a motion for summary judgment." Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir.

1989)(citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1980)); see also Bock v. CVS Pharmacy, Inc., No. 07-412, 2008 WL 3834266, at *3 (E.D. Pa. 2008)(refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa. 2002)(finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment).

This Court has previously held that an unsworn declaration cannot be relied upon to defeat a motion for summary judgment. Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.)(citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005)(refusing to consider unsworn declaration of a lay witness). It is true that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee's note; see also Ray v. Pinnacle Health Hosps., Inc., F.App'x, at 164 n.8 (3d Cir. 2010)(noting that "unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the requirements of 28 U.S.C § 1746"). However, a declaration that is not sworn to under penalty of perjury or accompanied by an affidavit is not proper support in disputing a fact in connection with a motion for summary judgment. Burrell v. Minnesota Mining Manufacturing Co., No. 08-87293, 2011 WL 5458324 (E.D. Pa. June 9, 2011)(Robreno, J.)(refusing to consider expert reports when no timely sworn affidavits were provided with the reports and the reports were not sworn to under penalty of perjury).

II. Defendant Northrop Grumman's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense / Product Identification / Causation

Northrop Grumman incorporates the bare metal defense into its challenge to Plaintiff's product identification evidence, arguing that it is entitled to summary judgment because there is no evidence that Decedent was exposed to any asbestos-containing product originally installed by Northrop Grumman (or its predecessors) and it cannot be liable for replacement parts installed after the ships' original construction.

First, Northrop Grumman argues that a ship is not a "product" within "the scope of the asserted strict products liability claims." (Def. Mem. at 5.)

Second, Northrop Grumman submits the declaration of expert John Graham, who asserts that, by the time Decedent boarded the ships at issue, "it is more likely than not that the majority of the originally installed thermal insulation, gaskets and packing would have been removed and replaced. It would have been impossible to identify originally installed, if any, thermal insulation, gaskets and/or packing that still existed." (Def. Ex. B., Doc. No. 27 ¶ 5.)

Northrop Grumman raises objections to - and challenges the admissibility of - two pieces of Plaintiff's evidence: (1) the declaration of expert Kenneth Cohen, and (2) the declaration of expert Charles Ay. (Def. Reply at 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.

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 cites to Johnson v. American Standard, Inc., 43 Cal.4th 56, 65 (2008).

B. Plaintiff's Arguments

Bare Metal Defense / Product Identification / Causation

Plaintiff contends that there is sufficient evidence that he was exposed to asbestos from insulation supplied by Defendant Northrop Grumman (i.e., installed by Northrop Grumman

on ships it built). In support of this contention, Plaintiff cites to the following evidence:

- Declaration of Plaintiff - Plaintiff states that he worked as an electrician in the Navy from 1958 to 1962, aboard various ships, including the Ticonderoga and the Coral Sea. He states that during the overhaul of the Ticonderoga, he saw pipefitters and laggers removing sections of insulated pipes and saw other trades cutting out sections of bulkhead insulation, both process that created "dust so thick [he] had to place [his] hand over [his] mouth." (Pl. Decl. ¶ 5.) He states that, during that overhaul, his work required him to go through narrow crawlspaces, squeezing past insulated pipes, which emitted dust as he moved against them. He states that, on the Coral Sea, his work installing wires required him to cut away sections of half-round pipe insulation and to clip and unclip wire bundles (within small work spaces), which disturbed the insulation and released visible dust. He states that, on both the Ticonderoga and Coral Sea, he slept in compartments, which contained insulated pipes and in which there was often fine white dust, which he and his berth mates swept up from the floor and the bunks. He states that both of these ships frequently fired their guns and launched aircraft with their catapults, which caused visible dust to enter the air.

- Declaration of Expert Kenneth Cohen - Mr. Cohen (a retired industrial hygienist) provides expert testimony that Plaintiff was exposed to asbestos dust from insulation originally installed by Defendant aboard the two ships at issue by way of the reentrainment process (in which settled asbestos fibers are disturbed and re-enter the air), despite the fact that both of the ships had undergone several overhauls prior to Plaintiff's service aboard them.

- Declaration of Expert Charles Ay - Mr. Ay's unsworn declaration provides expert testimony that (1) virtually all pipe insulation installed into the 1970s contained asbestos and (2) overhauls of

ships (including complete overhauls) did not result in removal of all insulation; rather sections of insulation were removed as necessary, but "much of the existing insulation was not removed."

Plaintiff argues that a ship is a product for purposes of strict products liability.

Plaintiff has also submitted objections to Defendant's evidence pertaining to product identification (expert affidavit of John Graham).

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendants on grounds of the government contractor defense is not warranted with respect to any of his claims/exposures because there are genuine issues of material fact regarding its availability to Defendants. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, (2) not demonstrated that the product at issue was "military equipment," and (3) 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, Plaintiff asserts that the government contractor defense is not warranted because (4) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (5) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or not use) and do not reflect a considered judgment by the Navy, (6) there is no military specification that precluded warning about asbestos hazards, and (7) 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, Plaintiff cites to(a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense (expert affidavit of Captain Wesley Hewitt).

Sophisticated User Defense

Plaintiff asserts 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 Plaintiff was a sophisticated user, and (2) Northrop Grumman is really arguing for a "sophisticated intermediary defense" (which is not recognized by California law), since Plaintiff merely worked on Navy ships as a (presumably) unsophisticated worker.

C. Analysis

As a preliminary matter, the Court notes, as it has before, that an expert report that it is not sworn, signed under penalty of perjury, or accompanied by an affidavit cannot be relied upon to defeat summary judgment. See Faddish, 2010 WL 4146108 at *6. See also Fowle, 868 F.2d at 67; Ray, F.App'x, at 164 n.8; Burrell, 2011 WL 5458324, at *1 n.1. Mr. Ay's expert affidavit was submitted without an affidavit, without any signature page, and without any indication that it was sworn or signed under penalty of perjury. Therefore, the Court did not consider it in deciding Northrop Grumman's motion for summary judgment.

The Court next considers Defendant's objections to the affidavit of expert Kenneth Cohen, which was submitted by Plaintiff. Defendant Northrop Grumman argues that the testimony of Mr. Cohen is inadmissible because it contains assertions that are not based on personal knowledge. The Court has reviewed Mr. Cohen's declaration, which contains, inter alia, the following assertions:

- "I have reviewed the Dictionary of Naval Fighting Ships ("DANFS") entries for the TICONDEROGA and the CORAL SEA. The entries indicate that the Newport News & Shipbuilding Company built both the TICONDEROGA, which launched in 1944, and the CORAL SEA, which launched in 1946. According to the entry, both of these ships underwent several overhauls prior to the plaintiff's service aboard them. During each of these overhauls, **the removal of asbestos-containing materials including, but not limited to, insulation, gaskets, packing, bulkhead insulation, and flooring, would release asbestos fibers into the air.** As described above, these asbestos-fibers would eventually settle

within the ship and re-enter the air upon being disturbed." (Decl. of Charles Ay ¶ 18, Pl. Ex. 2, Doc. No. 35-2 (emphasis added.))

- **"Based upon my review of the above documents, I can state it is more likely than not that asbestos fibers from the originally-installed insulation were released into the air from maintenance and overhauls performed aboard the TICONDEROGA and the CORAL SEA**. Those fibers were re-entrained into the air by the work of other trades in proximity to Mr. Close, the movement of Mr. Close and others throughout the ship, and the vibration of the ship, especially vibrations from the guns being fired and the catapults launching aircraft. **Asbestos fibers from the original insulation would have spread throughout the ships via reentrainment.** Based upon my knowledge of the behavior of asbestos fibers in air, **I can state it is more likely than not that Mr. Close breathed in these fibers when he served aboard the TICONDEROGA and the CORAL SEA and therefore was exposed to asbestos as a result of Northrop Grumman Shipbuilding, Inc."** (Decl. of Charles Ay ¶ 21, Pl. Ex. 2, Doc. No. 35-2 (emphasis added).)

The Court notes that Mr. Cohen's opinion is premised on the assumption that the insulation originally installed on the ships at issue contained asbestos. His declaration does not purport to be proof in itself that the insulation contained asbestos (i.e., he does not assert that he has personal knowledge that the insulation contained asbestos). Rather, he states that the removal of any asbestos-containing materials during the course of an overhaul would have resulted in the release of asbestos fibers into the air. (See Decl. of Charles Ay ¶ 18.) Importantly however, he does not identify any evidence that there was asbestos-containing insulation installed in either of the ships at issue. Accordingly, there is no basis for Mr. Cohen's ultimate conclusions that "it is more likely than not that asbestos fibers from the originally-installed insulation were released into the air from maintenance and overhauls performed aboard the TICONDEROGA and the CORAL SEA" and that "it is more likely than not that Mr. Close breathed in these fibers when he served aboard the TICONDEROGA and the CORAL SEA and therefore was exposed to asbestos as a result of Northrop Grumman Shipbuilding, Inc."

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Therefore, Mr. Cohen's opinion testimony does not meet the requirement of Federal Rule of Evidence 702(b), which requires that expert testimony be based on "sufficient facts or data." Fed. R. Evid. 702(b). Accordingly, the Court has determined that it is inadmissible and cannot be considered in deciding Defendant Northrop Grumman's motion for summary judgment. See Fed. R. Civ. P. 56(c)(requiring that evidence used to oppose a motion for summary judgment be admissible). The Court now examines the admissible evidence in the record.

There is evidence that Plaintiff was exposed to dust from insulation. There is evidence that asbestos dust released from insulation years earlier can lead to exposure by way of "reentrainment." However, without the declarations of Mr. Ay and Mr. Cohen (which, as explained, cannot be considered by the Court), there is no evidence in the record that the insulation to which Plaintiff was exposed contained asbestos. Therefore, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from insulation supplied/installed by Northrop Grumman such that it was a substantial factor in causing his injuries. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376; Abbay, 2012 WL 975837, at *1 n.1. Accordingly, summary judgment in favor of Defendant Northrop Grumman is warranted.

In light of this determination, the Court need not reach Plaintiff's objections to Defendant's expert evidence. It also need not reach any of Defendant's other arguments.