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

EDGAR SIMPSON, Plaintiff, v. KAISER VENTURES, LLC, ET AL., Defendants.	FILED JUL 24 2012 MICHAEL E. KUNZ, Clerk By_____Dep. Clerk	CONSOLIDATED UNDER MDL 875 Transferred from the Northern District of California (Case No. 08-04489) E.D. PA CIVIL ACTION NO. 2:09-64065-ER

O R D E R

AND NOW, this **23rd** day of **July, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Kaiser Ventures LLC** (Doc. No. 18) is **GRANTED**.[1]

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[1] This case was transferred in March 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 Edgar Simpson alleges that he was exposed to asbestos aboard ships built by Defendant Kaiser Ventures LLC ("Kaiser" or "Kaiser Ventures"), while working as a welder for Willamette Iron & Steel in the "1950s and early 1960s." The alleged exposure pertinent to Defendant Kaiser Ventures occurred during Plaintiff's work aboard the following:

- Marine Adder
- Marine Lynx
- Marine Phoenix

Plaintiff was diagnosed with asbestosis. He asserts that he developed this as a result of asbestos exposure aboard the ships identified above. He was deposed the present action in November of 2010 and, in an earlier action, in August of 2008.

Plaintiff brought claims against various defendants. Defendant Kaiser Ventures has moved for summary judgment, arguing

that (1) there is insufficient product identification evidence to establish causation with respect to any product(s) for which it is responsible, and (2) it is immune from liability by way of the government contractor defense. Plaintiff contends that California law applies. Defendant does not make clear what law it contends applies and instead cites both to cases decided under California law as well as cases decided under maritime law.

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)

Both parties assert that California law applies with respect to at least certain portions of Plaintiff's claims and Defendant's motion. However, where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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 almost always meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69 (citing Grubart, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. See id. 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 exposure pertinent to Defendant Kaiser Ventures occurred during Plaintiff's work as a welder aboard various 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 Kaiser Ventures. 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.

II. Defendant Kaiser Ventures's Motion for Summary Judgment

A. Defendant's Arguments

Exposure / Causation / Product Identification

Kaiser Ventures argues that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness. In particular, Defendant argues that a ship is not a "product" within the meaning of strict products liability law. In support of this argument, Defendant cites to: (1) Cryolife, Inc. v. Superior Court, 110 Cal. App. 4th 1145, 2 Cal. Rptr. 3d 396 (2003) (citing Restatement (Third) of Torts § 19), for the proposition that a product is defined as "tangible personal property distributed commercially for use or consumption," and (2) Stark, for the proposition that "it is not 'axiomatic' that large, ocean-going vessels should be treated as equivalent to normal 'products' for all purposes." (Mot. at 7.)

Defendant also argues that, even if a ship is a "product," because several years had passed between the time each ship at issue was built and Plaintiff's alleged exposure aboard it, Plaintiff cannot establish that any asbestos to which he was exposed was from original asbestos installed by Defendant.

In connection with its reply brief, Kaiser Ventures submitted objections to the declarations of Plaintiff's experts, Charles Ay and Kenneth Cohen.

Government Contractor Defense

Kaiser Ventures 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, Kaiser Ventures relies upon the affidavit of retired Naval officer James Delaney.

B. Plaintiff's Arguments

Exposure / Causation / Product Identification

In support of his assertion that he has identified sufficient evidence of exposure/causation/product identification to survive summary judgment, Plaintiff cites to the following evidence:

- Deposition of Plaintiff
  Plaintiff testified that, for approximately two and a half months in early 1956 (and possibly also in 1952), while employed by Willamette Iron & Steel, he worked as a welder aboard the Marine Adder, Marine Phoenix, and Marine Lynx. He testified that, while he was doing welding work on these ships, other workers around him were tearing out "everything" on the ship, including pipe insulation. He testified that the insulation on the pipes "had to be asbestos." He described the insulation as "old insulation." He testified that he worked around the "garbage they left" even after the tear-out work was completed. Plaintiff testified that he did not wear any sort of breathing protection while working aboard the ships. He testified multiple times that he believed he was exposed to asbestos from insulation on the pipes on the ships.

  (Doc. No. 20-2, pp. 9-37.)

- Declaration of Expert Charles Ay
Mr. Ay, an asbestos consultant, provides the following pertinent testimony:

23. While parts of the thermal pipe insulation would be impacted by overhaul repair work on the ships, not all of the original thermal insulation would be replaced during these early overhauls. Typically, a portion of the thermal insulation would remain on board the ships for decades because the ships' pipes were usually repaired in sections.

24. Given the time period, my research and work as an asbestos consultant, my knowledge of asbestos-containing materials used on board U.S. Navy vessels, my years of work on ships at Long Beach Naval Shipyard from 1960-1981, and my review of the above-referenced documents, it is my expert opinion that it is more likely than not that at least part of the original thermal pipe insulation on the USS Marine Adder, USS Marine Phoenix, and USS Marine Lynx was disturbed in Mr. Simpson's presence in 1956. This is especially so given that these three ships were laid down beginning in approximately 1944, less than 15 years prior to when Mr. Simpson worked on board.

(Doc. No. 20-2, pp. 48-49, ¶¶ 23-24.)

- Declaration of Expert Kenneth Cohen
Mr. Cohen (a certified industrial hygienist) has provided expert testimony opining that (1) asbestos from insulation to which Plaintiff was exposed aboard the ships at issue included original insulation, (2) this was true at least in part because of the phenomena of (a) resuspension, (b) fiber drift, and (c) fiber persistence - each of which, in short, would have caused asbestos fibers from the insulation originally installed on the ship to remain on the ship

and circulating in the air for as long as "even twelve years after that thermal insulation was originally installed on those ships." Mr. Cohen's testimony ultimately concludes with the statement that (3) "in my opinion, because hazardous levels of asbestos fiber and dust released, discharged and emitted from . . . asbestos-containing thermal insulation would have been resuspended and circulated throughout the ships by a number of activities, including overhaul and repair work, sweeping, cleaning, walking and vibration-generating movements within the ship, Mr. Simpson breathed the asbestos dust and fibers released from originally installed asbestos-containing thermal insulation disturbed, repaired, and removed from the pipes on these ships, increasing his risk of developing an asbestos-related disease."

(Doc. No. 20-3, pp. 1-11, ¶¶ 11-15, 17, 19, 30-31.)

Government Contractor Defense

Plaintiff argues 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. Plaintiff contends that Defendant has (1) not demonstrated that the product at issue was "military equipment," 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, Plaintiff asserts that the government contractor defense is not warranted because (3) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (4) there is no military specification that precluded warning about asbestos hazards, and (5) 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 retired Naval officer James Delaney).

C. Analysis

Plaintiff alleges that Decedent was exposed to asbestos aboard a ship manufactured by Defendant Kaiser Ventures, and that Kaiser Ventures is liable for his illness because the asbestos was installed (i.e., supplied) by Kaiser Ventures. It is undisputed that Kaiser Ventures built the Marine Adder, Marine Phoenix, and Marine Lynx, and that each of these ships was built approximately eleven (11) or twelve (12) years prior to his work aboard them. Plaintiff's deposition testimony provides evidence that he worked aboard each of these three ships, working around others who were removing pipe insulation (and around debris from that insulation after its removal). He provides testimony that this insulation contained asbestos, and that he did not wear any breathing protection during his work aboard the ships. Plaintiff testified that the insulation was "old."

There is expert opinion testimony from Mr. Ay and Mr. Cohen that Plaintiff was more likely than not exposed to asbestos fibers from originally-installed insulation - despite the fact that approximately eleven (11) or twelve (12) years had passed between the time they were laid down and the time of Plaintiff's work aboard them (during which time the ships may have undergone overhauls) - as (1) much of the insulation on a ship is not removed during the course of an overhaul, and/or (2) asbestos fibers from the installation and/or removal of the original insulation would have remained aboard the ship and circulating in the air by way of resuspension, fiber drift, and/or fiber persistence.

Importantly, however, there is no evidence from anyone with personal knowledge as to whether (or which portion(s) of) insulation on the ship was original insulation installed (i.e., supplied) by Defendant. The opinions of Plaintiff's experts, Mr. Ay and Mr. Cohen, while based on experience, are yet impermissibly speculative as to this point. See Lindstrom, 424

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

F.3d at 492 (quoting Harbour, 1991 WL 65201, at *4). Moreover, with respect to the possibility of exposure to original insulation by way of resuspension, fiber drift, and/or fiber persistence, the Court notes that there is no way to determine whether Plaintiff was actually exposed to any original asbestos fibers that were circulating throughout the ship by way of those methods. As such, the Court finds that the testimony of expert Mr. Cohen, while based on experience, is also impermissibly speculative as to this theory. 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 Plaintiff, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from original insulation 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 Plaintiff may have been exposed aboard the ship, but which was not manufactured or supplied (e.g., 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 Kaiser Ventures is warranted. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach Defendant's argument regarding the government contractor defense.