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

SARA JANE MILLER, As Executrix of the Estate of Harold E. Miller,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	Transferred from the Eastern District of New York
v.	:	(Case No. 04-00452)
A.W. CHESTERTON COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:07-67107-ER
Defendants.	:	

O R D E R

AND NOW, this **14th** day of **May, 2012,** it is hereby

ORDERED that the Motion for Summary Judgment of Defendant Crane Co. (Doc. No. 96) is **GRANTED**.[1]

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[1] This case was transferred in July of 2007 from the United States District Court for the Eastern District of New York to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Sara Jane Miller is the executrix of the estate of Harold Miller ("Decedent" or "Mr. Miller"). Mr. Miller worked as a fireman, machinist's mate, and electronics technician in the Navy from 1946 until 1948, prior to joining the Marine Corps in 1950. Defendant Crane Co., ("Crane Co.") manufactured valves. Plaintiff has alleged that Decedent was exposed to asbestos from valves during his Navy service aboard the following ships:

- USS Wyoming (BB-32)(decommissioning)
- USS Mississippi (BB-41/AG-128)(recommissioning)

Mr. Miller was diagnosed with asbestosis in 2001 and was subsequently diagnosed with lung cancer in November of 2002. He was deposed for one day in April of 2011, just prior to his death in May of 2011.

Plaintiff has brought claims against various defendants. Defendant Crane Co. has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification evidence to establish causation with respect to its product(s), and (3) it is immune from liability by way of the government contractor defense. Crane Co. contends that maritime law applies. Plaintiff contends that state law (either New York or Virginia law) applies because the ships at issue were in "dry dock."

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

Defendant Crane Co. has asserted that maritime law is applicable with respect to some of Plaintiff's claims. 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. 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 Crane Co. occurred during Plaintiff's service in the Navy aboard ships that were in "dry dock" for decommissioning or recommissioning. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455; Deuber, 2011 WL 6415339, at *1 n.1. Accordingly, maritime law is applicable to Plaintiff's claims against Crane Co. See Conner, 799 F. Supp. 2d 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))).

II. Defendant Crane Co.'s Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Crane Co. argues that it is entitled to summary judgment because it cannot be liable for products or component parts that it did not manufacture or supply.

Product Identification / Causation

Crane Co. argues that there is insufficient product identification evidence to support a finding of causation with respect to its product(s).

Government Contractor Defense

Crane Co. asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendants for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy knew about asbestos and its hazards. In asserting this defense, Crane Co. relies upon on the affidavits of Dr. Samuel Forman, Admiral David Sargent, and Anthony Pantaleoni (a company witness).

B. Plaintiff's Arguments

Bare Metal Defense

Plaintiff argues that Crane Co. is not entitled to the protections of the bare metal defense. Specifically, Plaintiff contends that the case is governed by New York law and that New York law does not recognize the defense. Plaintiff also argues (in a brief submitted prior to this Court's ruling in Conner) that, even if maritime law applies, Lindstrom is not the "final word" on maritime law on the bare metal issue and does not require the Court to recognize the defense under maritime law.

Product Identification / Causation

Plaintiff has identified the following evidence pertaining to Mr. Miller's exposure to potentially asbestos-containing products and/or component parts used in connection with Crane Co. valves:

- Deposition Testimony of Mr. Miller
  Mr. Miller testified that he worked with Crane Co. valves during the de-commissioning of the USS Wyoming and re-commissioning of the USS Mississippi. He testified that he believed he was (or may have been) exposed to asbestos in connection with this work by way of (1)

> insulation, while the valves were being insulated (by others) or when he had to remove the insulation to perform work on the valves, (2) packing, while he was changing packing in the valves or replacing the valves, and (3) gaskets, while he was changing the gaskets in the valves or replacing the valves. He testified that removal of the insulation created a lot of dust, which he breathed in.
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> (Pl. Ex. DEC-2, Doc. 99-127, Dep. of Harold Miller, April 15, 2011 at pp. 60-81, 158-161, 200-201.)

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because the Navy never precluded warnings about asbestos hazards, and, instead, specifications pertaining to warnings left the nature of warnings to the determination of manufacturers, with some explicit requirements that the manufacturer warn.

To contradict the evidence relied upon by Crane Co., Plaintiff cites to, inter alia, (1) an expert affidavit of Captain Arnold P. Moore, (2) various iterations of MIL-15071 (Ships), and (3) documents that Plaintiff describes as "Foster Wheeler drawings," each of which Plaintiff attaches as an exhibit and contends, together, indicate that the Navy permitted and even expressly required warnings from manufacturers, leaving the discretion to warn largely to the manufacturer.

C. Analysis

Plaintiff alleges that Mr. Miller was exposed to asbestos from insulation, gaskets, and packing used in connection with Crane Co. valves. The Court examines the evidence pertaining to each alleged source of asbestos exposure separately:

Insulation

Although there is evidence that Mr. Miller was exposed to asbestos from insulation used in connection with Crane Co. valves, Plaintiff does not allege that this insulation was manufactured or supplied by Crane Co. Moreover, there is no

evidence in the record that it was manufactured or supplied by Crane Co. Therefore, no reasonable jury could conclude from the evidence that Mr. Miller was exposed to asbestos from insulation manufactured or supplied by Crane Co. such that it was a "substantial factor" in the development of his illness. 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 insulation used in connection with Crane Co. valves but not manufactured or supplied by Crane Co., the Court has held that, under maritime law, Crane Co. cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant Crane Co. is warranted with respect to this alleged exposure. Anderson, 477 U.S. at 248.

Gaskets

Although there is evidence that Mr. Miller was exposed to asbestos from gaskets used in connection with Crane Co. valves, Plaintiff does not allege that these gaskets were manufactured or supplied by Crane Co. Moreover, there is no evidence in the record that they were manufactured or supplied by Crane Co. Therefore, no reasonable jury could conclude from the evidence that Mr. Miller was exposed to asbestos from gaskets manufactured or supplied by Crane Co. such that it was a "substantial factor" in the development of his illness. 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 gaskets used in connection with Crane Co. valves but not manufactured or supplied by Crane Co., the Court has held that, under maritime law, Crane Co. cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant Crane Co. is warranted with respect to this alleged exposure. Anderson, 477 U.S. at 248.

Packing

Although there is evidence that Mr. Miller was exposed to asbestos from packing used in connection with Crane Co. valves, Plaintiff does not allege that this packing was manufactured or supplied by Crane Co. Moreover, there is no evidence in the record that it was manufactured or supplied by Crane Co. Therefore, no reasonable jury could conclude from the evidence that Mr. Miller was exposed to asbestos from packing manufactured or supplied by Crane Co. such that it was a "substantial factor" in the development of his illness. 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 packing used in connection with Crane Co. valves but not manufactured or supplied

by Crane Co., the Court has held that, under maritime law, Crane Co. cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant Crane Co. is warranted with respect to this alleged exposure. Anderson, 477 U.S. at 248.

In light of these determinations, the Court need not reach Defendant's argument pertaining to the government contractor defense.