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

ARMAND DEUBER, Plaintiff, v. ASBESTOS CORPORATION LIMITED, ET AL., Defendants.	CONSOLIDATED UNDER MDL 875 Transferred from the District of New Jersey (Case No. 10-02686) E.D. PA CIVIL ACTION NO. 2:10-CV-78931-ER

O R D E R

AND NOW, this **15th** day of **October, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant CBS Corporation (Doc. No. 89) is **GRANTED**; and the Motion of Plaintiff to Compel Deposition Testimony of CBS Corporate Representative (Doc. No. 82) is **DENIED** as moot.[1]

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[1] This case was originally filed on March 10, 2010 in the Superior Court of New Jersey, Middlesex County. It was removed by Defendant CBS Corporation to the United States District Court for the District of New Jersey on May 25, 2010. It was thereafter transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff's decedent, Armand Deuber ("Decedent" or "Mr. Deuber"), worked as a rigger (in a civilian capacity) at the Philadelphia Naval Shipyard for approximately 5 years (1967 or 1968 to 1973) and thereafter worked at DuPont in Deepwater, New Jersey for approximately twenty-three (23) years. The alleged exposure pertinent to Defendant CBS Corporation ("CBS") took place exclusively at the Philadelphia Naval Shipyard aboard the USS New Jersey. CBS (formerly known as Westinghouse Electric Corporation) manufactured turbines for use aboard Navy ships.

Mr. Deuber developed mesothelioma and died. He was deposed for three days prior to his death. A coworker (John DiTroia) was also deposed.

Defendant CBS has moved for summary judgment, contending that New Jersey (or possibly maritime) law applies. In contrast, Plaintiff contends that Pennsylvania (or possibly New Jersey) law applies and that maritime law is not applicable. Defendant CBS argues that it is entitled to summary judgment because (1) Plaintiff has failed to provide sufficient product identification evidence to establish causation with respect to its product (s), (2) it is immune from liability by way of the government contractor defense, and (3) it has no liability because the Navy's conduct in precluding its predecessor (Westinghouse) from unilaterally providing a warning as to asbestos hazards is a superseding, intervening cause of the mesothelioma under New Jersey law. CBS further asserts that (4) if maritime law is deemed to apply, then it is entitled to summary judgment on grounds of the bare metal defense.

Of relevance to Defendant CBS's motion for summary judgment, Plaintiff has filed a motion to compel the deposition of a second CBS corporate representative, as the representative originally noticed for deposition (James Gate) was unavailable during the discovery period due to health issues.

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 Versus Maritime Law

The parties disagree as to what law applies. 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.). 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). This is because, where a case sounds in admiralty, whether maritime law applies is not an issue of choice-of-law but is, instead, a jurisdictional issue. See id. Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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 exposure pertinent to Defendant CBS occurred during Decedent's work aboard a ship. 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. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has 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. 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-CV-412, 2008 WL 3834266, at *3 (E.D. Pa. Aug. 14, 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., 416 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 CBS's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Defendant CBS asserts that, under maritime law, it is entitled to summary judgment on grounds of the bare metal defense. Specifically, it contends that it is undisputed that Westinghouse did not manufacture, supply or install the asbestos-containing insulation that was affixed to its turbine on the USS New Jersey, and that it cannot be liable for any product that it did not manufacture or supply.

Product Identification / Causation

Defendant contends that, even under New Jersey law, Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness. Specifically, CBS asserts that the only products at issue are turbines supplied by Westinghouse that were installed aboard the USS New Jersey and that there is "no evidence" that the decedent was exposed to and inhaled asbestos dust from those turbines. It notes that (1) the decedent testified that he only worked on one turbine on the USS New Jersey and that there was no insulation on or inside it, (2) co-worker John DiTroia was not able to recall who manufactured the turbine at issue, and (3) Plaintiff's own expert report notes that numerous companies manufactured turbines that were in the engine rooms of the USS New Jersey. CBS asserts that any inference that decedent inhaled asbestos fibers from Westinghouse turbines would be speculative.

Government Contractor Defense

CBS asserts the government contractor defense, arguing that it is immune from liability with respect to alleged Navy-related asbestos exposure because (i) the Navy was involved in the decision of whether or not to include warnings on Westinghouse products and exercised discretion and approved the warnings supplied by Defendants for the products at issue, (ii) Defendants provided warnings that conformed to the Navy's approved warnings (i.e., conformed to the requirements of the relevant military specifications), and (iii) the Navy knew about asbestos and its hazards at all relevant times. In asserting this defense, Westinghouse relies upon on the affidavits of Dr. Samuel Forman, Admiral Roger B. Horne, Jr., and Mr. James Gate (a company witness).

With its reply brief, Westinghouse has submitted objections to Plaintiff's evidence pertaining to the government contractor defense.

New Jersey Law Regarding Superseding and/or Intervening Cause

Defendant contends that, under New Jersey law, Plaintiff cannot establish causation because the Navy acted as a superseding and/or intervening cause when it precluded Defendant from providing warnings to Plaintiff.

Unsworn Expert Evidence

Although CBS failed to raise this point in its briefing, it (along with other defendants) contended at oral argument that Plaintiff should not be permitted to rely on its expert evidence, as it was produced in a form that did not constitute "sworn testimony."

B. Plaintiff's Arguments

Bare Metal Defense

Presumably because it has taken the position that maritime law is not applicable to CBS's motion, Plaintiff has not addressed whether CBS is entitled to the bare metal defense under maritime law.

Product Identification / Causation

Plaintiff asserts that a reasonable jury could conclude from the evidence that Decedent's illness was caused by turbines manufactured by CBS (f/k/a Westinghouse) based on (1) deposition testimony of co-worker Mr. DiTroia about insulation removal on Westinghouse turbines on the USS New Jersy and a complete rip-out of equipment in the engine rooms on both the USS New Jersey and USS Saratoga, (2) testimony of Westinghouse company representative (James Duncan) linking CBS (f/k/a Westinghouse) to equipment aboard the USS New Jersey and USS Saratoga, and (3) the testimony of Plaintiff's expert (Captain Arnold P. Moore), linking CBS (Westinghouse) to the turbines aboard the USS New Jersey and USS Saratoga and describing the layout of the rooms containing this equipment.

In support of this contention, Plaintiff cites to evidence from three sources: (1) deposition testimony of decedent Mr. Deuber, (2) deposition testimony of coworker Mr. DiTroia, and (3) deposition testimony of Westinghouse company representative (James Duncan). The relevant excerpts are as follows:

- Decedent's Testimony

  Q: Do you remember when you began your work in the Philadelphia Navy yard?
  A: I don't know, '67, '68 or something like that.

. . .

Q: How long were you a rigger while you were at the Philly Navy Yard?
A: The whole time.
Q: Did you have the same responsibilities as a rigger the entire time you were there?
A: Yes.
Q: Generally, what were those responsibilities as a rigger at the Navy yard?
A: It was the rigger's duties, jobs, to move machinery and reinstall - the ship - can I elaborate?
Q: Yes. . . .
A: When the ship came in for overhaul, they took everything out of it. They called it rip out, believe it or not. It was a rip out period. We took all of the machinery out ... sent them to different shops; and then gradually after a period of time, they start trickling back and we would reinstall.
Q: Okay.
A: That on an 18 - two-year overhaul, say a destroyer, guided missile ship or something.
Q: So is it fair to say that as a rigger, you would be involved in the rip out of all the machinery on board a ship that came in for overhaul?
A: Yes.

. . .

Q: Do you believe that you came into contact with asbestos or asbestos-containing products while you were at the Philly Navy Yard?
A: Definitely.
Q: How do you believe you came into contact with asbestos product during that time period?
A: We used to beat asbestos off a machine with a hammer to get to it, to get to the lifting.

(Dep. of decedent Armand Deuber (Vol. I), April 27, 2010, at 53:11-57:25, Ex. 2 to Doc. No. 116 (emphasis added).)

Q: When you worked on the New Jersey, did you work on the engine room?
A: Yes.
Q: Did you work in the boiler room?
A: Yes.

Q: Can you tell us what other areas of the New Jersey you worked on during the course of your one year onboard that ship?
A: We worked on almost every compartment.

(Dep. of decedent Armand Deuber (Vol. II), April 29, 2010, at 305:2-17, Ex. 3 to Doc. No. 116 (emphasis added).)

Q: Do you recall the names of any of the ships you worked on while at the Philadelphia shipyard?
A: Before we talked about the Luce and the Jersey, these are all USS Luce, USS New Jersey, USS Dahlgren. Gee, there was a bunch of them.

(Dep. of decedent Armand Deuber (Vol. III), May 6, 2010, at 27:16-21, Ex. 1 to Doc. No. 116 (emphasis added).)

- Co-Worker DiTroia's Testimony

Q: Do you recall the years you worked with Mr. Deuber at the Philadelphia Shipyard?
A: Not exactly.
Q: Would you be able to provide us an estimate of the time frame in which you worked with Mr. Deuber?
A: Sometime between 1966 and approximately 1980.

. . .

Q: Did you ever have an opportunity to work as a rigger with Mr. Deuber at the Philadelphia Shipyard?
A: More as an apprentice than a rigger.
Q: When you were working as an apprentice, what was Mr. Deuber's job title or classification?
A: He was a rigger first class?
Q: So then as an apprentice would it be accurate to say your job was to assist him in rigging duties, learning the job or the trade?
A: That is correct.
Q: As an apprentice assisting Mr. Deuber, could you describe for us exactly what your job duties were?
A: We assisted in all - I assisted in all phases of the assignment, whether it be hanging the gear, prepping for the gear removal, and then assisted

during the actual removal of the equipment.

Q: When equipment was being worked on by yourself and Mr. Deuber, would any of that work take place in the engine room of ships?

A: Yes.

Q: Did you ever have to do any work on equipment in the boiler room of ships?

A: Yes.

. . .

Q: The work that you would perform in the engine room, did that involve work on or around turbines?

A: Yes.

. . .

Q: Do you recall the names of any of the ships you worked on with Mr. Deuber?

A: Only a few of the larger ones. We worked on the Saratoga when it first came in around '68, on the battleship New Jersey when they recommissioned it, which was between '68 and '70. We worked on the Benua and the Carleton, we worked on the Farragut, I believe. I worked on some ships - it is hard to remember all of them.

. . .

Q: When you worked with Mr. Deuber on the Saratoga, can you describe for us the work that was being done on that ship?

A: That ship was having a complete overhaul from top to bottom so we worked in various spaces. Sometimes we were assigned to the engine room, fire room, other times we may be up in the super structure with the arresting gear or electronics room.

Q: Did you ever have to work in the boiler room on the Saratoga?

A: Yes.

Q: Focusing on the engine room of the Saratoga, could you describe for us the type of work you were doing at that time?

A: There was a complete rip-out. We removed various pieces of equipment and piping to include valves, pumps, et cetera, to be removed to send to the shop to be overhauled.

. . .

Q: The process of cutting off this insulation, did that create dust?
A: Yes.
Q: Were you and Mr. Deuber present while this insulation was being cut creating the dust?
A: Yes.
Q: And did that dust get on your clothes?
A: Yes.
Q: Did it get on Mr. Deuber's?
A: Yes.
Q: And do you believe you breathed in that dust?
A: Yes.
Q: And do you believe Mr. Deuber breathed in that dust?
A: Yes.
Q: Let me ask you a general question here with regard to the Saratoga. While the dust was in the air from these various processes you testified to, did you witness Mr. Deuber breathing?
A: Yes.
Q: You saw him breathing in the engine room?
A: Yes.
Q: You saw him breathing in the boiler room?
A: Yes.

. . .

Q: Moving on to the New Jersey, and you said you worked on that ship, I believe between '68 and '70?
A: Yes.
Q: Could you tell us what type of job that was on the New Jersey?
A: That was another complete overhaul, putting the ship back in service, required cutting holes in the sides of the ship, removing various components from engine rooms, boiler rooms, electronic rooms, pump rooms to be shipped off the ship and refurbished.
Q: Did you work directly with Mr. Deuber on the New Jersey?
A: Yes.
Q: And were you working with Mr. Deuber in the engine room on the New Jersey?
A: Yes.

Q: Were you working with Mr. Deuber in the boiler room on the New Jersey?
A: Yes.

. . .

Q: What type of work was being performed in the engine room on the New Jersey?
A: Rip out all major pumps, equipment, valves, piping. We also removed ventilation ducts.
Q: Were any other tradesmen working on the turbine on the New Jersey while you and Mr. Deuber were working in the engine room?
A: Yes.
Q: What were the other tradesmen? What were their classification or jobs?
A: Machinists.
Q: What were they doing to the turbine on the New Jersey while you and Mr. Deuber were working in the engine room?
A: Prepping for removal.
Q: And what did that process entail?
A: Again, unbolting, removing valves.
Q: During the time you and Mr. Deuber were working in the engine room on the New Jersey, did you witness any type of tradesmen removing any insulation form the turbines?
A: Yes.
Q: What type of trades would have been responsible for that insulation?
A: The laggers.
Q: Can you describe the process of the laggers removing the insulation off of those turbines?
A: At that time it was just cutting, removed.
Q: What would they cut it with?
A: A knife.
Q: Did the process of cutting that insulation off of the turbine create dust?
A: Yes. Sometimes they used a handsaw.
Q: Would the dust created from the removal of insulation off the turbine which created dust, would that dust get on your clothes?
A: Yes.
Q: Would it get on Mr. Deuber's clothes?
A: Yes.
Q: Did you breathe some of that dust in?

A: Yes.
Q: Did you witness Mr. Deuber breathe in the engine room on the New Jersey when this insulation was being removed?
A: Yes.
Q: Do you recall the manufacturer of the turbine on the New Jersey?
A: I do not.

. . .

Q: Were you and Mr. Deuber present when the turbine was put back into the New Jersey?
A: Yes.
Q: And was the process of putting that turbine back in the New Jersey the same as the Saratoga?
A: Yes, basically.

. . .

Q: After the turbine had been installed do you recall any type of insulation being applied?
A: Yes.
Q: Was the insulation that was being applied to the turbine on the New Jersey the same type of insulation you described for us as on the Saratoga?
A: Yes.
Q: Do you believe it was the same type of material that was used?
A: Yes.
Q: Would that also include the mortar type material you described for us?
A: Yes.
Q: Was the process of fixing it the same as on the Saratoga?
A: Yes.
Q: And as a result of that process was dust released, as you described for us, on the Saratoga?
A: Yes.
Q: The dust that was released, did that get onto your person the same as you testified on the Saratoga?
A: Yes.
Q: Did it get on to Mr. Deuber as you testified on the Saratoga?
A: Yes.

(Dep. of co-worker John Albert DiTroia, February 26, 2011, at 12:8-38:25, Ex. 4 to Doc. No. 116 (emphasis added).)

- Westinghouse Company Representative (James Duncan) Testimony

  James Duncan, the corporate representative for CBS in this case testified that Westinghouse supplied turbines for both the USS New Jersey and USS Saratoga that were designed to be used with asbestos insulation.

  (See Dep. of James Duncan, April 27, 2011, at 79-80, 99, 101-103, 106-110, Ex. 5 to Doc. No. 116 (emphasis added).)

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant Westinghouse on grounds of the government contractor defense is not warranted because there are genuine disputes of material fact regarding its availability to Westinghouse. To contradict the evidence relied upon by Westinghouse, Plaintiff points to, inter alia, various military specifications purported to have been issued by the Navy and applicable to the Westinghouse products at issue (turbines), which Plaintiff contends indicate that the Navy not only would have permitted manufacturers like Westinghouse to include warnings with their products but required them to do so (e.g., MIL-STD-129, MIL-M-15071D).

Plaintiff has also objected to the evidence presented by Westinghouse pertaining to the government contractor defense.

New Jersey Law Regarding Superseding and/or Intervening Cause

Plaintiff contends that summary judgment is not warranted on grounds of superseding and/or intervening cause because, contrary to Defendant Westinghouse's contention, the Navy did not prohibit it from providing warnings with its products.

Unsworn Expert Evidence

In response to Defendant's request that the Court not consider Plaintiff's unsworn expert evidence, Plaintiff contended

that counsel did not believe that an affidavit was required and instead believed that an expert report would be sufficient for purposes of opposing the summary judgment motion. See Tr. of Oral Arg. at 65-66.

C. Analysis

Unsworn Expert Evidence

Because Plaintiff had an opportunity to respond and Plaintiff neither objected nor requested additional time to respond, the Court will consider this contention even though it was not previously raised in the briefing.

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 an unsworn expert report "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-CV-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 expert report 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)). In Faddish, unlike this case, although the Court determined that the unsigned expert report could not be relied upon to defeat summary judgment, the Court instead relied upon deposition testimony of the expert, which the Court permitted, noting that such testimony is sworn testimony. In the case at hand, given that the expert report submitted was merely signed and not supported by affidavits or sworn declarations, it is "not competent to be considered" in support of Plaintiff's Opposition to Defendant CBS's Motion for Summary Judgment. Fowle, 868 F.2d at 67.

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, an expert report 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. 2:08-87293, 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). Because the expert report submitted by Plaintiff in this case was not sworn to under penalty of perjury, see 28 U.S.C. § 1746, the amendment to Federal Rule of Civil Procedure 56 does not save Plaintiff's expert report.

The Court further notes that, when given an opportunity to respond to Defendants' request that the Court not consider Captain Moore's expert report, Plaintiff did not seek leave of the Court to make a supplemental submission with an affidavit or to provide other sworn testimony (such as the sworn deposition testimony of the expert) in order to cure the deficiency. The justification given by Plaintiff's counsel was that it believed that an expert report was sufficient for purposes of the summary judgment motion and that an affidavit was not necessary. The Court rejects this justification for the failure to comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), and notes again that the Court has previously ruled that an "unsworn statement" cannot be relied upon to defeat a motion for summary judgment. Accordingly, since Plaintiff did not comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), the expert report of Captain Moore is "not competent" to be considered in support of Plaintiff's Opposit to Defendant CBS's Motion for Summary Judgment.

Having determined that Plaintiff's expert evidence not be considered, the Court next considers the sufficiency Plaintiff's other evidence.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Product Identification / Causation / Bare Metal Defense

Plaintiff alleges that Decedent was exposed to asbestos from turbines (or turbine generators) manufactured by Defendant Westinghouse. There is evidence that Westinghouse turbines were present aboard the USS New Jersey and USS Saratoga, and were insulated with asbestos insulation. There is specific testimony from co-worker DiTroia that he and Mr. Deuber were exposed to dust from asbestos-containing products insulation from turbines on the USS New Jersey, which he witnessed Mr. Deuber inhale. CBS's representative (Mr. Duncan) provides testimony that the turbines supplied by Westinghouse would have been covered with asbestos-containing insulation and would have been designed to be covered with insulation. There is evidence from co-worker DiTroia that "all" of the equipment on the ship (including the Westinghouse insulated turbines) was removed (as it was a complete overhaul of the ship).

Importantly, however, there is no evidence that Westinghouse manufactured or supplied the insulation that was used to cover its turbines (or that Mr. Deuber was exposed to asbestos from any other asbestos-containing product or component part manufactured or supplied by Westinghouse). Therefore, no reasonable jury could conclude from the evidence that Mr. Deuber was exposed to asbestos from a product manufactured or supplied by Defendant CBS (or its predecessor, Westinghouse) such that it was a substantial factor in the development of his mesothelioma. See Conner, 2012 WL 288364, at *7; 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 CBS is warranted. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach any of CBS's other arguments.

Moreover, in light of the Court's determination on this motion, Plaintiff's motion to compel the deposition of a second 30b6 witness on behalf of Defendant CBS is denied as moot.