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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI) **Civil Action No. MDL 875**

This Document Relates To:

JOHN A. FADDISH and RUTH FADDISH, his wife

Plaintiff(s),

v.

BUFFALO PUMPS, et al.

Defendant(s).

Transferred from:

U.S. District Court for the Southern District of Florida, Palm Beach Division - Civil Action No. 08-80724

Eastern District of Pennsylvania Civil Action No. 09-70626

REPORT AND RECOMMENDATION
AS TO THE MOTION FOR SUMMARY JUDGEMENT OF
DEFENDANT CBS CORPORATION

BEFORE: April 30, 2010
Chief United States Magistrate Judge Thomas J. Rueter,
United States Magistrate Judge David R. Strawbridge, and
United States Magistrate Judge Elizabeth T. Hey

BY: Rueter, C.M.J.

John and Ruth Faddish, husband and wife, filed the present asbestos personal injury action on April 22, 2008, in the Circuit Court of the Fifteenth Judicial Circuit in and for West Palm Beach County, Florida, Case No. 50-2008-CA-011858. It was removed by several defendants to the United States District Court for the Southern District of Florida. On June 17, 2009, the case was transferred to this court pursuant to 28 U.S.C. § 1407 and consolidated as part of MDL-875 by the Judicial Panel on Multidistrict Litigation.[1] Ruth Faddish ("plaintiff")

[1] Ordinarily, in an action based on diversity of citizenship jurisdiction under 28 U.S.C. § 1332, the court must apply the substantive law of the state in which it sits, including its choice of law rules. See Klaxon v. Stentor Elec. Mfg. Co., Inc., 313 U .S. 487, 496 (1941); Chin

subsequently filed a Supplemental Complaint for Wrongful Death and Survival (Doc. 9) (the "Suppl. Compl.") after the death of her husband.[2]

Presently before the court is the motion for summary judgment of defendant, CBS

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v. Chrysler LLC, 538 F.3d 272, 278 (3d Cir. 2008). When a diversity action is transferred pursuant to 28 U.S.C. § 1407, however, the transferee court is obligated to apply the state substantive law as determined by the choice of law analysis required by the state in which the action was filed. See Ferens v. John Deere Co., 494 U.S. 516, 524-32 (1990) (evaluating applicable law after change of venue under 28 U.S.C. § 1404(a) and holding that transferee forum was required to apply law of transferor court, regardless of which party initiated transfer); Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (in cases where venue was changed under 28 U.S.C. § 1404(a) the transferee district court is obligated to apply the state law that would have been applied if there had been no change of venue). See also De George v. Am. Airlines, Inc., 338 Fed. Appx. 15 (2d Cir. 2009) ("When related cases filed in various federal districts have been consolidated for pre-trial purposes before one court under 28 U.S.C. § 1407(a), . . . , a transferee court applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed."), cert. denied, __U.S. __, 130 S. Ct. 1068 (2010). The court must therefore apply the choice of law rules of Florida, the state in which this case was filed.

Florida courts apply the "significant relationship" test to determine which state's laws apply. Connell v. Riggins, 944 So. 2d 1174, 1176-77 (Fla. 1st DCA 2006) (citing Bishop v. Fla. Specialty Paint Co., 389 So. 2d 999 (Fla.1980)). Generally, the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which has the most significant relationship to the occurrence and the parties. Id. The significant relationship test requires a court to analyze four main factors: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. Id. In accordance with this standard, the court will apply Florida law in deciding the substantive issues in the case at bar.

With regard to matters of procedure, the court will apply federal procedural law as interpreted by the United States Court of Appeals for the Third Circuit, the circuit in which this court sits. See In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1178 (D.C. Cir. 1987), aff'd, 490 U.S. 122 (1989). See also In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n.8 (3d Cir. 1993) (assuming without deciding that the law of the § 1407 transferee district controls federal questions); In re Auto. Refinishing Paint, 229 F.R.D. 482, 486-87 (E.D. Pa. 2005) (applying the transferee court's interpretation of federal law).

[2] Mr. Faddish was diagnosed with mesothelioma in October 2007 and passed away on January 26, 2009. (Doc. 131, Exs. A, B.)

Corporation[3] ("defendant"), filed pursuant to Fed. R. Civ. P. 56(b) (the "Motion"). (Doc. 104.) Plaintiff filed a response to defendant's motion (Doc. 131) ("Pl.'s Resp.") and defendant filed a reply thereto (Doc. 133) ("Def.'s Reply"). The Honorable Eduardo C. Robreno referred the Motion to this panel for a Report and Recommendation as to the issue of causation.[4] For the reasons that follow, the court recommends that defendant's Motion be **DENIED**.

I. LEGAL STANDARD – MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, the discovery and the disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Furthermore, an issue is "genuine" if a reasonable jury possibly could hold in the nonmovant's favor on that issue. Boyle v. County of Allegheny Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). To demonstrate that no material facts are in dispute, the moving party must show that the non-moving party has failed to establish one or more essential elements of his or her case. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citing Celotex Corp. v. Catrett, 477 U.S. 317,

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[3] CBS Corporation (a Delaware corporation f/k/a Viacom, Inc.) is a successor by merger to CBS Corporation (a Pennsylvania corporation f/k/a Westinghouse Electric Corporation).

[4] In its Motion and reply brief, defendant also argues that it did not owe a duty of care to plaintiff (Mot. at 16-29) and raises the sophisticated purchaser defense (Mot. at 29-31). The court will not address these issues in this Report and Recommendation. In addition, the court will not grant plaintiff's request to strike the testimony of defendant's expert witnesses, James Gate and Samuel A. Forman, M.D. (Pl.'s Resp. at 16-17), because defendant timely disclosed these witnesses to plaintiff.

323-24, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986)). In analyzing the evidence, the court will view the facts in the light most favorable to the non-moving party and draw all inferences in that party's favor. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 286 (3d Cir. 2009).

Once the moving party has demonstrated that there is no genuine issue of material fact, the non-moving party must present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla." Hugh, 418 F.3d at 267 (citing Anderson, 477 U.S. at 251).

II. DISCUSSION

A. Plaintiff's claims

Plaintiff's claims are based on failure to warn causes of action. (Compl. ¶ 5.) Specifically, plaintiff raises claims for negligent failure to warn and strict liability failure to warn. Id. Plaintiff alleges that her husband's death as a result of mesothelioma was caused by and related to Mr. Faddish's exposure to asbestos-containing products manufactured, sold, and/or distributed by defendant while he served in the United States Navy aboard the USS Essex (CV-9) from 1958 until 1961. (Suppl. Compl. ¶¶ 3-5.)

Under Florida law, unless a "danger is obvious or known, a manufacturer has a duty to warn where its product is inherently dangerous or has dangerous propensities." Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133, 1139 (Fla. 4th DCA 2002) (citations omitted). A plaintiff who claims a negligent failure to warn must prove:

> that the manufacturer or seller knew, or by the exercise of reasonable care should have known, of the potential danger in the use of the product, and, in the reasonable course of business, should have been able to foresee the possible uses

> of the product as well as the potential damage or injury that might result from such use.

Advance Chem. Co. v. Harter, 478 So. 2d 444, 447 (Fla. 1st DCA 1985) (citing Tampa Drug Co. v. Wait, 103 So. 2d 603, 607 (Fla. 1958)). A claim for strict liability failure to warn must "encompass proof that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." Griffin v. Kia Motors Corp., 843 So. 2d 336, 339 (Fla. 1st DCA 2003) (internal citations and quotations omitted).

B. Causation under Florida law

To establish an asbestos claim under Florida law, a plaintiff must show that asbestos exposure from the defendant's product at issue was a substantial contributing factor to plaintiff's physical impairment. Fla. Stat. § 774.204(1) (2009); Reaves v. Armstrong World Indus., Inc., 569 So. 2d 1307, 1308-09 (Fla. 4th DCA 1990). On an appeal from a directed verdict in the defendants' favor, the court in Reaves analyzed whether there was sufficient evidence adduced at trial upon which the jury could properly rely in finding a verdict for the plaintiff. After reviewing the evidence presented by plaintiff, the court concluded that the proof of whose asbestos dust and who manufactured those products was speculative at best. Reaves, 569 So. 2d at 1309. The court instructed that the plaintiff must establish that he was exposed to the asbestos products of each defendant and that this exposure contributed substantially to producing the injury of which plaintiff complained.[5] Id.

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[5] Testimony of an expert witness on causation can be sufficient to raise a genuine issue of material fact, defeating a motion for summary judgment. Brown v. Glade and Grove Supply, Inc., 647 So. 2d 1033, 1036 (Fl. 4th DCA 1994). See also Ward v. Celotex Corp., 479 So. 2d 294, 296 (Fla. 1st DCA 1985) (testimony of co-workers that placed plaintiff near activities

C. Evidence of exposure to defendant's product

In the Motion, defendant argues that plaintiff has failed to establish a genuine issue of material fact on the issue of causation, because plaintiff has failed to establish that exposure to a Westinghouse product was a substantial factor in causing Mr. Faddish's injuries. (Mot. at 9-16; Def.'s Reply at 2-7.) Specifically, defendant argues that neither the testimony of plaintiff nor that of plaintiff's expert witness, Arnold Moore, raise a genuine issue as to Westinghouse-specific causation. In response, plaintiff contends that she provided sufficient evidence to raise a genuine issue of material fact with respect to the identification of defendant's asbestos-containing product. (Pl.'s Resp. at 4-5, 12-14.)

Mr. Faddish enlisted in the United States Navy in February 1958, began service aboard the USS Essex in May 1958 as a Fireman Apprentice, and was promoted to Fireman approximately six months later. (Doc. 131, Ex. D.)[6] As a Fireman Apprentice and Fireman aboard the USS Essex, Mr. Faddish was assigned to an engine room and was responsible for maintaining and cleaning the engine room, including the generators, "the turbines, the pumps, general machinery," and the steam lines. (Doc. 131, Ex. C at 22:12-13, 23:17-23, 24:10-11, 25:3, 25:18-20, 26:25) (hereinafter "Faddish Video Dep."). As a Fireman, Mr. Faddish cleaned using a bucket, water, soap and a rag. (Faddish Video Dep. at 26:19-22.) On a daily basis, Mr. Faddish was responsible for "making sure all of the coverings, all of the machinery . . .[was]

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where asbestos was used and identification of defendant as manufacturer sufficiently raised genuine issue of material fact precluding summary judgment in favor of manufacturer).

[6] Mr. Faddish served aboard the USS Essex until November 1961, at which time he was released from active duty and transferred to the Naval Reserves. (Doc. 131, Ex. D.) On February 18, 1964, Mr. Faddish was honorably discharged from the U.S. Navy. Id.

clean, no dirt, no dust." (Faddish Video Dep. at 24:14-15, 26:15-18, 39:2-14.) Mr. Faddish testified that the dust "had to come from the fitting, the top, from inside, everything floating around inside" the confines of the engine room, and that he breathed in such dust.[7] (Faddish Video Dep. at 27:12-13, 16; 29-17:22; 39:15-16.)

Specifically, Mr. Faddish testified that as part of his job duties, he was responsible for wiping dust from the outside of the turbines, generators, steam lines, pumps and condensers. (Faddish Video Dep. at 26:23-25; 30:10-31:3; 33:8-11; 34:20-35:8; 39:3-16; 40:13-19.) The turbines were externally insulated. (Faddish Video Dep. at 30:4-12.) See also Doc. 131, Ex. E at 192:13-194:2 (hereinafter "Faddish Disc. Dep."). Mr. Faddish also stood watch on the generators and turbines. (Faddish Video Dep. at 31:22-24; Faddish Disc. Dep. at 149:11-24.) Although he testified that he had "actually never seen . . . [a turbine] open," Mr. Faddish recalled performing "instructional maintenance" on the turbines, under the supervision of his superiors. (Faddish Video Dep. at 25:21-23; 32:12-25; 33:11; 35:21-36:22.) This included repacking pumps and replacing gaskets on the pumps (Faddish Video Dep. at 32:16-25), and replacing gaskets on steam turbines (Faddish Video Dep. at 35:21-36:22.)

There appears to be some confusion regarding Mr. Faddish's deposition testimony concerning turbines. At times during his deposition, Mr. Faddish testified regarding "turbines" without specifying a type of turbine. See e.g., Faddish Video Dep. at 25-26, 30-32, 35-36. In addition, Mr. Faddish was unable to identify the manufacturers of the equipment in the engine

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[7] Plaintiff also offered the reports of two medical experts, Douglas A. Pohl, M.D., Ph.D. and Steven H. Dikman, M.D., who opined, within a reasonable degree of medical certainty, that Mr. Faddish's occupational asbestos exposure was the cause of his malignant mesothelioma. (Doc. 131, Exs. I, J.)

rooms aboard the USS Essex. (Faddish Video Dep. at 47:22-48:12.) However, plaintiff's expert, Arnold Moore, P.E., a retired Captain of the U.S. Navy, testified as to identification of the products with which Mr. Faddish worked while serving in the engine room. (Doc. 131, Ex. G) (hereinafter "Moore Dep.").

According to Mr. Moore's testimony and report, there were several different turbines manufactured by defendant, that were installed upon the USS Essex and on which Mr. Faddish worked. See Moore Dep. at 127-32. Based on his review of Mr. Faddish's testimony and of the naval records relating to the USS Essex, Mr. Moore identified, inter alia, main propulsion steam turbine sets and main reduction gears that were manufactured by defendant and installed in the engine rooms on the USS Essex. (Doc. 131, Ex. F at 9 (hereinafter "Moore Report"); Moore Dep. at 127-28). According to Mr. Moore, these usually contained asbestos sheet gaskets as specified by Westinghouse and were normally insulated with asbestos material. (Moore Rep. at 9.) The asbestos gaskets would often adhere to surfaces during use and had to be scraped off when machinery was opened. (Moore Rep. at 9.) Taken in the context of the entire discussion, Mr. Moore interpreted Mr. Faddish's testimony as indicating that Mr. Faddish assisted in the maintenance of the main propulsion turbines, including the replacement of gaskets. (Moore Rep. at 9 (citing Faddish Video Dep. at 35-36)). Mr. Moore also identified the main condenser circulating pumps driven by Westinghouse steam turbines that were installed on the Essex and identified the main condensate pumps as driven by Westinghouse turbines. (Moore Rep. at 9-10.) Mr. Moore noted that the steam valves provided with the Westinghouse steam turbines likely contained asbestos stem packing and the turbines would have been insulated with asbestos materials based on industry practices when the USS Essex was built.

(Moore Rep. at 9.) Similarly, asbestos sheet gaskets were used in the Westinghouse turbine driver for the main condensate pump. (Moore Rep. at 9.) Mr. Moore interpreted Mr. Faddish's testimony as representing that Mr. Faddish repacked pumps and replaced gaskets in pumps as part of the instructional maintenance on the main condenser circulating pumps, and on the main condensate pumps, driven by defendant's steam turbines. (Moore Rep. at 9-10 (citing Faddish Video Dep. at 32).)

In his report, Mr. Moore noted that, during the time Mr. Faddish served aboard the USS Essex, asbestos containing materials were the most commonly utilized materials for, insulation, gaskets and packing for pumps, valves, turbines, and other machinery and components. (Moore Rep. at 13-14.) Mr. Moore indicated that gaskets and packing were "wear items" that were regularly replaced and if an asbestos-containing part was an original component, it was replaced with the same type of part. (Moore Rep. at 14.) Accordingly, Mr. Moore opined that "it is more likely than not that the pumps, valves and other machinery and equipment installed on ESSEX during her construction and still present during Mr. Faddish's service contained asbestos packing and gaskets and were insulated with asbestos insulation materials." (Moore Rep. at 14.)

Viewing these facts in the light most favorable to plaintiff and drawing all inferences in plaintiff's favor, the court concludes that plaintiff has presented sufficient evidence showing that there is a genuine issue for trial. Mr. Moore's testimony and report place Mr. Faddish in the presence of defendant's products in the engine room of the USS Essex. Mr. Faddish's testimony establishes that he inhaled dust that was created, at least in part, during the cleaning and maintenance and repair work he performed on gaskets and packing. This evidence

provides a reasonable basis to infer that defendant's asbestos-containing product was a substantial contributing factor to Mr. Faddish's injury, in accordance with the Reaves standard. Thus, plaintiff has provided sufficient evidence to raise a genuine issue of material fact as to causation.

III. CONCLUSION

Accordingly, the court recommends that defendant's Motion be denied.

R E C O M M E N D A T I O N

AND NOW, this 30th day of April, 2010, upon consideration of defendant's Motion, plaintiff's response thereto, and defendant's reply, it is respectfully recommended that defendant's Motion be **DENIED** with respect to the issues that are within the scope of Judge Robreno's referral order.[8] The parties may file objections to this Report and Recommendation. See Loc. R. Civ. P. 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

_/s/ Thomas J. Rueter_____
THOMAS J. RUETER
Chief United States Magistrate Judge

[8] Judges Strawbridge and Hey join in this recommendation.

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

May 10, 2010

RE: Faddish, et al. v. Buffalo Pumps, Inc., et al.
CA No. 09-cv-70626

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Thomas J. Rueter, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge**.

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

MICHAEL E. KUNZ
Clerk of Court

By: *Michele Helmer*
Michele Helmer, Deputy Clerk

cc: Courtroom Deputy to Judge Eduardo C. Robreno
Courtroom Deputy to Judge Thomas J. Rueter

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(11/07)