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	:	CIVIL ACTION
RUTH FADDISH, Individually and as Personal Representative of the Estate JOHN FADDISH, Deceased Plaintiff	:	NO. 09-70626
v.	:	
BUFFALO PUMPS., et al. Defendants	:	

REPORT AND RECOMMENDATION
AS TO DEFENDANT ELLIOT COMPANY'S
MOTION FOR SUMMARY JUDGMENT

BEFORE: April 26, 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: Strawbridge, M.J.

John and Ruth Faddish, husband and wife, filed this asbestos personal injury action in the Circuit Court of the Fifteenth Judicial Circuit in and for West Palm Beach County, Florida on April 22, 2008. Defendant Elliot Company (alternatively "Elliot" or "Defendant") removed the case to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1442(a)(1). The matter was transferred to the Eastern District of Pennsylvania on June 17, 2009 to be included in the multi-district Asbestos Liability Litigation (MDL 875). (Docs. 1, 2.) On August 7, 2009, Ruth Faddish (alternatively "Ms. Faddish" or "Plaintiff") filed a "Supplemental Complaint for Wrongful

Death and Survival" due to her husband's death. (Doc. 9, ¶¶ 5, 35-42, 45-58.) (hereinafter "Compl.") Elliot filed an answer on August 17, 2009. (Doc. 18.)

Presently before the Court is Elliot's motion for summary judgment, filed on February 1, 2010 (Doc. 114) (hereinafter "Def.'s Mot. Summ. J"), Plaintiff response (Doc. 128) (hereinafter "Pl. Resp. in Opp'n to Def.'s Mot. Summ. J"), and Defendant's reply (Doc. 135) (hereinafter "Reply"). The above referenced magistrate judges also heard extensive oral argument as to this motion on March 24, 2010. For the following reasons, we **RECOMMEND** that the Defendant's motion be **GRANTED**.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff raises failure to warn claims based upon negligence and strict liability. (Compl. ¶¶ 5, 35-42, 45-58.) She alleges that her husband developed mesothelioma and other injuries as a result of his exposure to asbestos-containing products, which were manufactured, sold and/or distributed by Elliot, while he served aboard the USS Essex (CV-9) ("Essex"). (Compl. ¶¶ 13, 36, 48.)

John Faddish joined the U.S. Navy on February 19, 1958. (Doc.128, Ex. D at 2) (hereinafter "Military Records".) In May 1958, he began serving aboard the Essex as a fireman apprentice. (Military Records at 4-6.) Within six months he was promoted to fireman. (Doc. 128, Ex. C at 22-24) (hereinafter "Vol. I, Dep. of John Faddish".) He served aboard the Essex until approximately November 1961. (Military Records at 2); (Vol. I, Dep of John Faddish 21-22:4-6.) He did not serve on any other naval vessel. *See id.* at 23:1-5. In October 2007, he was diagnosed with mesothelioma. *See* Doc. 128, Ex. A. He died on January 26, 2009. *Id.* at Ex. B.

Mr. Faddish's deposition testimony reflects that he performed significant work in the engine room of the Essex, including "[m]aking sure all of the covering, all of the machinery [was] clean, no

dirt, no dust." (Vol. I, Dep. of John Faddish at 24:12-15.) He testified that, on a daily basis, he used a wet rag to wipe down "general machinery," "[g]enerators, turbines, . . . steam lines," "pumps" and "condensers." *Id.* at 25-29:19, 37-40. He claimed that he inhaled dust while he performed his cleaning duties. *Id.* He also testified that he would occasionally perform maintenance work at the instruction of petty officers on steam generators, turbines, and pumps, including the changing of gaskets and packing material. *Id.* at 31-38; *see* Doc. 128, Ex. E at 140:25 - 141:2 (hereinafter "Discovery Dep. of John Faddish").

Plaintiff's naval vessel expert, Arnold Moore, a retired Navy Captain, testified that at least one Elliot deaerator was in the engine room where Mr. Faddish was assigned. (Doc. 128, Ex. F at 141:17 - 186:23) (hereinafter "Moore Dep.") Mr. Moore also claimed that Elliot's instruction books specified the use of asbestos gaskets and packing material as well as insulation and lagging clips for external insulation to be placed on its equipment after delivery. (Moore Dep. at 169, 174-76.) He opined that, while Elliot did not supply external insulation with its deaerators, insulation would have been applied after delivery. (Moore Dep. at 175-86.) He also noted that "the documentation shows that asbestos was the primary material used for – particularly for insulation during the war, but it was also used in packing and gaskets in the war period and later." *Id.* at 150:3-7. Plaintiff's medical experts Drs. Steven Dikman, M.D. and Douglas Pohl, M.D. concluded that, within a reasonable degree of medical certainty, asbestos exposure caused Mr. Faddish's mesothelioma. *See* Doc. 128, Ex. H, I.

Defendant now moves for summary judgment.

II. LEGAL STANDARD

Under Federal Rule of Civil 56(c), summary judgment is appropriate where "the pleadings, the discovery and 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." The moving party bears the initial burden of demonstrating the absence of a genuine issue of any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has done so, the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). Rather, the responding party must "set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e)(2). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587.

II. DISCUSSION

Defendant moves for summary judgement on two grounds, asserting: (1) that Plaintiff can provide no evidence to support an inference that asbestos fibers from an Elliot product caused the decedent's injuries, (Mot. Summ. J. at 6-12); and (2) that Elliot had no duty to warn of the dangers associated with the asbestos-containing materials that were incorporated into its product, (*id* at 12-13). In that we conclude there is no issue of material fact and Defendant is entitled to judgment with respect to causation, we do not pass upon Defendant's second argument.

To sustain an asbestos claim under a negligence or strict liability theory,[1] a plaintiff must

[1] While this case was originally filed in Florida state court and Plaintiff asserts that she and her husband were Florida residents, the alleged asbestos exposure occurred, in large part, as Mr. Faddish was serving "on the high seas or navigable waters." *See East River Steamship v. TransAmerica Delaval, Inc.*, 476 U.S. 858, 863-64 (1986) (stating maritime jurisdiction arises where injury occurs on navigable waters). A choice of law question is therefore presented as to whether Florida law or maritime law controls. We accept, and Defendant concedes, that we should address this question using Florida choice of law rules in that a transferee court involved in multi-district litigation is required to "apply the same state substantive law, including choice of law rules, that would have been applied in the jurisdiction in which the case was filed."

establish that he or she was exposed to the asbestos products of the defendant and that this exposure was a substantial contributing factor to plaintiff's physical impairment. Fla. Stat. § 774.204(1) (2009); *Reaves v. Armstrong World Industries, Inc.*, 569 So. 2d 1307, 1308-09 (Fla. 4th Dist. Ct. App. 1990). On an appeal from a directed verdict for the defendants, the *Reaves* court considered whether the plaintiff had demonstrated that his injury was caused by exposure to the defendant's products. *Id.* The court held that the plaintiff's "proof of whose asbestos dust and who manufactured those products was speculative at best[,]" and that the jury "necessarily and impermissibly stacked inferences upon inferences" to render a liability verdict. *Id. Id.* at 1309. The court instructed that the plaintiff was required to establish that he was exposed to the asbestos products of each defendant and that this exposure contributed substantially to producing his injury. *Id.*

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 (Fla. 4th Dist. Ct. App. 1994). *See also Ward v. Celotex Corp.*, 479 So. 2d 294, 296 (Fla. 1st Dist. Ct. App.1985) (testimony of co-workers that placed plaintiff near activities

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Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993).

Under Florida law, a substantive conflict analysis is unnecessary and Florida law will apply where there is a "false conflict." *Pycsa Panama, S.A. v. Tensar Earth Tech., Inc.,* 625 F. Supp. 2d 1198, 1218-19 (S.D. Fla. 2008) (applying Florida law). A "false conflict" exists where the law of the interested jurisdictions are the same. *Id.* With respect to proximate cause, Florida law and maritime law are essentially identical. *Compare Singleton Stone v. Amquip Corp.*, Civ. No. 98-cv-4691, 2000 WL 1448817 at *3 (E.D. Pa. Sep. 29, 2000) (applying "substantial contributing factor" test in products liability case under maritime law) *with Reaves v. Armstrong World Industries, Inc.*, 569 So. 2d 1307, 1309 (Fla. 4th Dist. Ct. App. 1990) (applying "substantial contributing factor" in asbestos case). We therefore conclude that Florida law governs our consideration of Defendant's motion as it relates to causation.

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

Defendant contends that Plaintiff "has no lay or expert testimony that *any* asbestos fibers were released from [Elliot's] deaerating feed tanks on the USS ESSEX, let alone that the decedent inhaled any such asbestos fibers causing decedent's mesothelioma." (Def's Mot. Summ. J. at 8) (emphasis in original.) Defendant further asserts that, although Mr. Faddish worked in the engine room where Elliot's product was located, "there is no record evidence that [he] worked with or near a deaerating feed tank *when any asbestos fibers were released or produced*" and it is "undisputed that *no* work was performed on, or repairs made to, the deaerating feed tanks while the decedent was aboard" the Essex. *Id.* (emphasis in original.) Therefore, according to Defendant, there is no demonstrable nexus between decedent's injuries and exposure to respirable asbestos from an Elliot product, and it would be "rank speculation" for a jury to conclude that he performed work on a deaerator which generated asbestos dust. (Reply at 6.)

In response, Plaintiff contends that she has provided sufficient evidence to raise a genuine issue of material fact as to causation. (Pl. Resp. in Opp'n to Def.'s Mot. Summ. J. at 12-14.) Specifically, she contends that Mr. Faddish's testimony reflects that he was responsible for cleaning the machinery in the engine room of the Essex on a daily basis and that he breathed in dust while performing these duties. *Id.* at 12 (citing Vol. I, Dep. John Faddish at 24:12-15, 29:1-19, 33:18-25, 38:-39, 40:13-19.) She asserts that Mr. Moore's testimony establishes that at least one Elliot deaerator was in the engine room and that Elliot products would have included asbestos gaskets and packing as well as insulation and lagging clips to hold external insulation into place. *Id.* at 12-13 (citing Moore Dep. at 169:5-10, 175-76, 185-86.) Moore also testified that asbestos was the primary

material used to make insulation. (*Id.* at 150:3-7, 175-86.) Plaintiff claims that this evidence, along with Dr. Dikman and Dr. Pohl's opinion that asbestos exposure caused his mesothelioma, raises a jury question with respect to causation. (Pl. Resp. in Opp'n to Def.'s Mot. Summ. J. at 14.)

We conclude that Defendant is entitled to summary judgment. While Plaintiff has adduced evidence that could reasonably support the inference that Mr. Faddish may have wiped down the exterior of an Elliot deaerator and cleaned and performed instructional maintenance work on other equipment in the engine room that housed the deaerator, *see* Vol. I, Dep. John Faddish at 24:12-15, 29:1-19, 33:18-25, 38:-39, 40:13-19, the evidence fails to establish that any maintenance or repair work was performed on the Elliot product during decedent's service aboard the Essex. Indeed, when Mr. Moore was asked if a deaerator was among the products that would require routine maintenance in the engine room – including taking apart piping, insulation, and gaskets – he responded that it would only receive maintenance in response to a specific problem. (Moore Dep. at 147-48, 154-57.) Further, his review of the Navy records and deposition testimony did not reflect any reported problems with the deaerators during the time that Faddish was aboard the Essex. (*Id.* at 154-57.)

Thus, it is unclear how, without speculating, a rational juror could conclude that asbestos fibers from an Elliot product were liberated into the air, let alone could be said to be a substantial contributing factor to Mr. Faddish's injury. *See Reaves*, 569 So. 2d at 1308-09 (holding that plaintiff must demonstrate that he was exposed to the asbestos products of each defendant *and* that this exposure contributed substantially to producing plaintiff's injury) (emphasis added.) Evidence that Mr. Faddish may have wiped down the exterior of an asbestos-containing Elliot product and performed other duties in a room that included this product does not provide a basis to reasonably

infer that the substantial contributing factor standard, as articulated in *Reaves*, is satisfied. We therefore conclude that there is no genuine issue of material fact as to this issue and that Defendant is entitled to judgment as a matter of law.

III. CONCLUSION

We conclude that the evidence in the summary judgment record does not provide reasonable basis for a fact-finder to conclude that Mr. Faddish was exposed to asbestos fibers from an Elliot product, such that these asbestos fibers were a substantial contributing factor to his injury. Defendant is therefore entitled to judgment as a matter of law.

Our recommendation follows.

RECOMMENDATION

AND NOW, this 26th day of April, 2010, upon consideration of Defendant's motion for summary judgement (Doc. 114), Plaintiff's response **(**Doc. 128), and Defendant's reply (Doc. 135) it is respectfully **RECOMMENDED** that Defendant's motion be **GRANTED** with respect to the issues that are within the scope of Judge Robreno's referral order. Any party may file an objection to this Report and Recommendation within fourteen (14) days of being served a copy thereof. *See* Local R. Civ. Pro. 72.1.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

Chief United States Magistrate Judge Thomas J. Rueter and United States Magistrate Judge Elizabeth T. Hey join in this Recommendation.

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

April 27, 2010

RE: Faddish v. Buffalo Pumps, 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 David R. Strawbridge, 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 David R. Strawbridge

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(11/07)