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 GENERAL ELECTRIC COMPANY

BEFORE: June 2, 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, General Electric Company ("GE" or "defendant"), filed pursuant to Fed. R. Civ. P. 56(b) (the

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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. 129, Exs. A, B.)

"Motion"). (Doc. 105.) Plaintiff filed a response to defendant's motion (Doc. 129) ("Pl.'s Resp.") and defendant filed a reply thereto (Doc. 138) ("Def.'s Reply").[3] 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, 323-24, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986)). In analyzing the evidence, the court will view

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[3] Pursuant to the court's Order dated March 25, 2010 (Doc. 141) granting plaintiff leave to conduct depositions of defendant's expert witnesses, the parties supplemented the summary judgment record with the following submissions: Docs. 158, 168, 169, 170, 171, 175.

[4] In its Motion and reply brief, defendant also argues that it had no duty to warn of dangers from products of other third-party manufacturers (Mot. at 18-30) and raises the government contractor defense (Mot. at 30-61). The court will not address these issues in this Report and Recommendation.

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

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 GE product caused Mr. Faddish's injuries. (Mot. at 9-12.) In addition, defendant argues that even if Mr. Faddish was exposed to asbestos from a GE product, plaintiff cannot prove that such exposure was a substantial contributing factor in causing Mr. Faddish's mesothelioma. (Mot. at 13-18.) In response, plaintiff contends that she provided sufficient evidence to raise a genuine issue of material fact whether Mr. Faddish's exposure to a GE product was a substantial contributing factor to his injury. (Pl.'s Resp. at 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. 129, 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. 129, Ex. C at 22:12-13, 23:17-23, 24:10-11, 25:3, 25:3-20, 26:25, 28:23-25) (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] clean, no dirt, no dust." (Faddish Video Dep. at 24:14-15, 26:15-18, 29:1-15, 39:2-14.) Mr. Faddish testified that the dust "had to come from the fitting, the top, from inside, everything

[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. 129, Ex. D.) On February 18, 1964, Mr. Faddish was honorably discharged from the U.S. Navy. Id.

floating around inside" the confines of the engine room. (Faddish Video Dep. at 27:12-13, 16; 29:17-22; 39:15-16.) Mr. Faddish testified that he cleaned dust from the generators on a daily basis and that he breathed in such dust.[7] (Faddish Video Dep. at 27:22-29:22, 33:18-25.) Mr. Faddish also testified that the generators, and the turbines attached thereto, were insulated. (Faddish Video Dep. at 28:16-22.) See also Doc. 129, Ex. E at 194:3-19 (hereinafter "Faddish Disc. Dep.") As part of his duties as a Fireman aboard the USS Essex, Mr. Faddish recalled assisting his supervisors with the maintenance of the steam generators. (Faddish Video Dep. 32:12-15.) Mr. Faddish testified that he was present when repairs were performed on a generator, although he may not have personally performed such repairs. (Faddish Disc. Dep. at 100:19-101:4.) At times, he performed "instructional maintenance" on gaskets and packing with regard to the steam generators, under the supervision of petty officers. (Faddish Video Dep. at 36:12-22.) Mr. Faddish was also assigned to stand watch on the "generator gang," which required that he monitor the gauges on the generator. (Faddish Disc. Dep. at 81:16-19, 149:17-24.)

Mr. Faddish was unable to identify the manufacturers of the equipment in the engine rooms aboard the USS Essex. (Faddish Video Dep. at 47:22-24.) However, plaintiff's expert, Arnold Moore, 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. 129, Ex. F) (hereinafter "Moore Dep."). Based on his review of Mr. Faddish's testimony and of the naval

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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. 129, Exs. H, I.)

records relating to the USS Essex, Mr. Moore identified four GE service generators which were driven by GE steam turbines that were installed on the USS Essex.[8] (Moore Dep. at 25:18-21.) See also Doc. 131, Ex. F at 13 (hereinafter "Moore Rep."). In his report, Mr. Moore noted that GE's specifications for the generators and turbines called for both asbestos and non-asbestos gaskets and packing. (Moore Rep. at 12.) Mr. Moore also opined that, during the time Mr. Faddish served aboard the USS Essex, asbestos containing materials were the most commonly utilized materials for, inter alia, insulation, gaskets and packing in pumps, 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.)

The court acknowledges that there may be certain inconsistencies in Mr. Faddish's testimony regarding his work on defendant's product aboard the USS Essex.[9] However, the court

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[8] There were four GE generators aboard the USS Essex. It appears from Mr. Faddish's testimony that there was one generator in the engine room to which he was assigned and the other generators were located elsewhere on the ship. See Faddish Disc. Dep. at 96:1-101:20. See also Moore Rep. at 12 ("One of these generators was located in #1 engine room, one in the forward auxiliary machinery room and one each in fire rooms #3 and #4.").

[9] For example, in response to a query whether he had performed instructional maintenance on a steam generator, Mr. Faddish answered that he "did not recall." (Faddish Disc. Dep. at 97:9-13.) However, during the series of questions from the same defense attorney, Mr. Faddish clarified that he "did not instruct anybody." (Faddish Disc. Dep. at 99:9-13.) When asked again whether there was any other work that he did to the generator, other than standing

has reviewed the evidence as a whole, including, inter alia, Mr. Faddish's testimony from the Discovery Deposition and the Video Deposition, Mr. Moore's deposition testimony, and Mr. Moore's opinions in the Moore Report. Viewing the evidence 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 a GE product 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, maintenance, and repair work he performed and/or observed on GE's generator and turbine. 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 2nd day of June, 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.[10] The parties may file objections to this Report and Recommendation.

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watch or cleaning it, Mr. Faddish also testified that he observed repairs on the steam generator in the engine room to which he was assigned. (Faddish Disc. Dep. at 100:13-101:20.)

[10] Judges Strawbridge and Hey join in this 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