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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI) **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 LESLIE CONTROLS, INC.

BEFORE: May 21, 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, Leslie Controls, Inc. ("defendant"), filed pursuant to Fed. R. Civ. P. 56(b) (the "Motion"). (Doc.

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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. 126, Exs. A, B.)

108.) Plaintiff filed a response to defendant's motion (Doc. 126) ("Pl.'s Resp.") and defendant filed a reply thereto (Doc. 136) ("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. 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 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

[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. 172, 173, 174, 176, 181, 182.

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.[4] Id.

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 not shown that Mr. Faddish "was actually exposed to any asbestos contained in Leslie valves aboard the [USS] Essex."

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[4] 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).

(Mot. at 7-8.) Defendant argues that the testimony of plaintiff's expert witness, Arnold Moore, P.E., is comprised of impermissible inferences and fails to identify defendant's product as the source of Mr. Faddish's asbestos exposure. (Mot. at 8 at 4; Def.'s Reply at 3-4.) Defendant also avers that plaintiff has proceeded upon a theory of liability grounded in the mere presence of defendant's asbestos-containing product in Mr. Faddish's workplace and that plaintiff has failed to establish sufficient frequency of the use of the product and the regularity or extent of Mr. Faddish's employment in proximity thereto. (Mot. at 9-12.) Specifically, defendant contends that Mr. Faddish's exposure to asbestos from Leslie's pump governors on the USS Essex was neither frequent, nor regular. (Mot. at 11.) 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 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. 126, Ex. D.)[5] 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. 126, 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]

[5] 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. 126, 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.[6] (Faddish Video Dep. at 27:12-13, 16; 29-17:22; 39:15-16.) As part of the maintenance and repair work he performed, Mr. Faddish recalled replacing flanged gaskets which were connected to the steam piping system, some of which had to be scraped, thereby creating dust, and also recalled assisting with the replacement of packing on pumps. (Doc. 126, Ex. E. at 77:11-23; 78:9:12; 140:25-141:2) (hereinafter "Faddish Disc. Dep."). See also Faddish Video Dep. 38:6-25. At times, he performed "instructional maintenance" on gaskets and packing, under the supervision of petty officers. (Faddish Video Dep. at 32:12-25; 36:12-22; Faddish Disc. Dep. at 77:11:23.) The replacement of packing created airborne dust, some of which Mr. Faddish breathed. (Faddish Video Dep. 38:15-23.)

Mr. Faddish was unable to identify the manufacturers of the equipment in the engine rooms aboard the USS Essex. (Faddish Video Dep. at 47:20-24.) However, plaintiff's expert, Arnold Moore, P.E., a retired Captain of the U.S. Navy, testified regarding the identification of the products with which Mr. Faddish worked while serving in the engine room. (Doc. 126, Ex. F) (hereinafter "Moore Dep."). Based on his review of Mr. Faddish's testimony and of the naval records relating to the USS Essex, Mr. Moore identified four constant pressure pump governors manufactured by defendant that were installed on turbine driven lubricating oil

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[6] 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. 126, Exs. H, I.)

service pumps in the engine rooms on the USS Essex. (Moore Dep. at 256:17-20.) See also Doc. 131, Ex. F at 12-13 (hereinafter "Moore Report"). Defendant's products were connected to the steam piping system of the USS Essex with flanged gaskets. (Moore Dep. at 252:21-253:11, 258:25-259:6.) Defendant's specifications for its valves called for asbestos gaskets and packing. (Moore Report at 13.) Mr. Moore opined that "[b]ased on industry practice, the bodies of these governors were normally insulated with asbestos containing insulation and flanged steam piping connections to these governors usually contained gaskets with asbestos content." (Moore Report at 13.) Mr. Moore also testified that the pump governors would have required the gaskets and packing to be replaced several times during Mr. Faddish's service aboard the USS Essex. (Moore Dep. at 257:2-11.) Mr. Moore opined that it was probable, given the number of times that the gaskets and packing were replaced, that Mr. Faddish was present during at least some of the replacements and that it is likely that some asbestos material would have remained in the space. (Moore Dep. at 257:18-25.)

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 maintenance and repair work he performed, including the scraping of flanged gaskets that were connected to the steam piping system. 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 21st day of May, 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.[7] 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

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

IN THE UNITED STATES DISTRICT COURT
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ORDER

AND NOW, this day of , 2010, upon careful and independent consideration of the motion for summary judgment of defendant Leslie Controls, Inc. (Doc. 108), plaintiff's response (Doc. 126), and defendant's reply (Doc. 136), and after review of the Report and Recommendation authored by Chief Magistrate Judge Thomas J. Rueter on behalf of himself, Magistrate Judge David R. Strawbridge and Magistrate Judge Elizabeth T. Hey , it is hereby **ORDERED** that

1. The Report and Recommendation is **APPROVED** and **ADOPTED**; and

2. Defendant Leslie Controls, Inc.'s motion for summary judgment (Doc. 108) is **DENIED** as to those issues addressed in the Report and Recommendation.

BY THE COURT:

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EDUARDO C. ROBRENO, J.