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 WARREN PUMPS LLC'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. The matter was removed to the United States District Court for the Southern District of Florida and then, on June 17, 2009, transferred to the Eastern District of Pennsylvania 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 Mr. Faddish's death on January 26, 2009. (Doc. 9, ¶¶ 5, 35-42, 45-58.)

(hereinafter "Compl.".)

Presently before the Court is Defendant Warren Pumps LLC's (alternatively "Warren" or "Defendant") motion for summary judgment, filed on February 1, 2010 (Doc. 111) (hereinafter "Def.'s Mot. Summ. J."), Plaintiff's response (Doc. 130) (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 Defendant's motion be **GRANTED in part** and **DENIED in part** consistent with the recommendations in this report.

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 Warren, 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.130, 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. 130, 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. 130, 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, reported that at least seven pumps manufactured by Warren were in the engine room where Mr. Faddish was assigned. (Doc. 130, Ex. F at 9-11) (hereinafter "Moore Report".) Mr. Moore also claimed that Defendant's instruction books and Naval documentation reflect that the Warren pumps utilized asbestos gaskets and packing, and that one in particular was insulated with "*85% magnesia and 15% asbestos fiber*." (Moore Report at 9-11) (emphasis in original); (Doc. 130, Ex G at 94:10-16) (hereinafter "Moore Dep."); *see also Id.* at 150:3-7. Mr. Moore also noted that Mr. Faddish's testimony reflected that "he repacked pumps and replaced gaskets in pumps under the direction of more senior petty officers while he served on the Essex." (Moore Report at 9-11); *see* Moore Dep. at 97:15-20. 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.

I. Legal Standard

Under Federal Rule of Civil Procedure 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 a jury finding that asbestos fibers from a Warren product caused the decedent's injuries, (Mot. Summ. J. at 9-11); and (2) that Warren is not a successor-in-interest of the Quimby Pump Company ("Quimby").[1] (*Id.* at 11-13.) We address each argument in turn.

A. Causation

To sustain an asbestos claim under a negligence or strict liability theory,[2] a plaintiff must

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[1] Defendant also asserts that Plaintiff provides no evidence that asbestos from a Quimby pump cause his injuries in any event. (Mot. Summ J. at 11-13.) In that we conclude that Defendant is entitled to summary judgment as to successor liability, we do not pass upon this argument.

[2] 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 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." *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993).

Under Florida law, a substantive conflict analysis is unnecessary and Florida law will

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 plaintiff had demonstrated that his injury was caused by exposure to the defendant's products. *Id.* The court held that 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.* 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 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 evidence that Decedent performed work on a

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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.

Warren pump" or "that Decedent was in close proximity to others when they were working on a Warren pump – much less evidence that Decedent inhaled asbestos fibers released from a Warren pump as a result of his work." (Def's Mot. Summ. J. at 9.) Defendant further asserts that Mr. Faddish did not recognize Warren's name and only specifically mentioned working on "booster pumps" and replacing "flanged gaskets," which were not manufactured or supplied by Warren. (*Id.* at 10); (Reply at 3-4.) Based upon this testimony, Defendant claims it was "rank speculation" for Plaintiff's expert, Mr. Moore, "to suggest that Decedent could have worked on other types of pumps[.]"[3] (Def's Mot. Summ. J. at 9.)

We conclude that there is a genuine issue of material fact with respect to causation and recommend that Defendant's motion be denied in this respect. While there may be no *direct evidence* that Mr Faddish worked on a Warren pump – which is not surprising given the time period between his service aboard the Essex and this litigation – Mr. Faddish's testimony does not preclude a reasonable juror from inferring that his performance of instructional maintenance and cleaning of "pumps" included Warren pumps and that his exposure to asbestos during the course of this work substantially contributed to his injuries. *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.) Although he was only able to recall a "[b]ooster pump" specifically, he noted that "[o]nce again, I can't give you too much information. I don't remember." (Vol. I, Dep. of John Faddish at 37:10-16.) Further, he

[3] Defendant also contends that Plaintiff's claim must fail to the extent she is asserting that Warren is responsible for Mr. Faddish's exposure to asbestos dust that happened to land on the surface of its pumps. (Reply 7-8.) As reflected in our analysis, however, we do not need to pass upon this issue to determine Plaintiff has presented sufficient evidence to defeat Defendant's motion.

testified that:

> [W]e would fit [packing material], and *I forget what pumps they were*, but we would put [packing] in to keep steam and keep the pressure inside the pumps or the unit. The packing material was flexible, silverish in color by about a quarter inch and there were several layers on top of one another, and we would tighten that down to avoid leakage.

(Vol. I, Dep. of John Faddish at 38:7-13) (emphasis added.) He claimed that the replacement of packing materials on these pumps, created dust which he inhaled. (*Id.* at 38-39) Plaintiff's expert reported asbestos was included in the packing, gaskets, and insulation utilized in connection with Warren pumps aboard the Essex. (*Id.* at 38-39); (Moore Report at 9-11.) Viewed in a light most favorable to Plaintiff, we conclude that this evidence raises a fact question for trial.

B. Successor-In-Interest of Quimby Pump Company

Defendant contends it is not the successor-in-interest of Quimby. (Def's Mot. Summ. J. at 5-8, 11-13); s*ee* Compl. ¶ 26. Plaintiff does not respond to this argument, and our independent review of the record reflects that the undisputed facts establish that Defendant is entitled to judgement as a matter on law with respect to this issue.[4]

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[4] In 1943, H.K. Porter Company, Inc. ("H.K. Porter"), a Pennsylvania Corporation, purchased Quimby. *See* Def's Mot. Summ. J., Ex. 8A. In 1947, Quimby was liquidated and "the assets and liabilities were assumed by H.K. Porter Company., Inc." (*Id.* at Ex. 8B at 4); *see id.* at 8C (reflecting Quimby's November, 1947 certificate of dissolution). In 1950, Warren, a Delaware Corporation, purchased the Quimby Pump division of H.K. Porter, but did not expressly assume any of Quimby's liabilities. *See* Def's Mot. Summ. J., Ex. 8D, 8E.

Under Delaware and Pennsylvania law, as well as Florida law, successor liability can be imposed after an asset transfer only where: (1) the purchaser expressly or impliedly assumes liabilities; (2) the transaction amounts to a "*de facto* merger;" (3) the transaction serves as a "continuation" of the transferor company; or (4) the transaction is a fraudulent attempt to avoid liability. *See Pennsylvania Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 308-09 (3d Cir. 1985); *Bernard v. Kee Mfg. Co.,* Inc., 409 So.2d 1047, 1049 (Fla. 1982); *Corporate Property Associates 8, L.P. v. Amersig Graphics, Inc.*, Civ. No. 13241, 1994 WL 148269 at *4-5 (Del. Ch. 1994). Defendant contends that there is no evidence that any of these exceptions are present in

III. CONCLUSION

We conclude that a genuine issue of material fact exists as to causation, and therefore recommend that Defendant's motion be denied as to this issue. We also conclude, however, that Defendant's motion should be granted with respect to its second argument, as the record includes no evidence that would suggest Warren is a successor-in-interest to Quimby. As such, Defendant is entitled to judgment as a matter of law in this respect.

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 in part** and **DENIED in part** consistent with the recommendations in this report and with respect to the issues that are within the scope of Judge Robreno's referral order.

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.

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connection with Warren's purchase of H.K Porter's Quimby division. *See* Def's Mot. Summ. J. at 12-13. After a careful review of Warren's motion and the summary judgment record, we agree that no genuine issue of material fact exists and that Defendant is entitled to judgment as a matter of law in this respect.

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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