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

MARJORIE FOUNDS,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	Transferred from the Northern District of California (Case No. 11-02212)
v.	:	
FOSTER WHEELER LLC, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-67265-ER · Rule 10-69380
Defendants.	:	

O R D E R

AND NOW, this **10th** day of **December, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Huntington Ingalls Incorporated (No. 10-69380, Doc. No. 20) is **GRANTED in part; DENIED in part.**[1]

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[1] This case was transferred in August of 2011 from the United States District Court for the Northern District of California to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Marjorie Founds alleges that Decedent Donald Founds ("Decedent" or "Mr. Founds") was exposed to asbestos, inter alia, while working as a boiler tender in the US Navy. Defendant Huntington Ingalls Incorporated ("Huntington Ingalls") built ships. The alleged exposure pertinent to Defendant Huntington Ingalls occurred during Mr. Founds' work aboard:

- USS Intrepid (CV-11)

Plaintiff brought claims against various defendants to recover damages for Mr. Founds' alleged asbestos-related death. Defendant Huntington Ingalls has moved for summary judgment arguing that (1) Plaintiff cannot establish that Defendant (or any product of Defendant's) caused Decedent's illness, (2) it is entitled to summary judgment on grounds of the sophisticated user defense, and (3) it is immune from liability by way of the government contractor defense. The parties assert that maritime law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.).

2. State Law Issues (Maritime versus State Law)

Both parties assert that maritime law is applicable to Plaintiff's claims against Defendant. Where a case sounds in

admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009)(Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at 463-66 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson v. Ruby, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." See Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at *1 n.1 (E.D. Pa. Dec. 2, 2011)(Robreno, J.)(applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "'a potentially disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a

ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 799 F. Supp. 2d at 466; Deuber, 2011 WL 6415339, at *1 n.1. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69 (citing Grubart, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. See id. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

It is undisputed that the alleged exposures pertinent to Defendant Huntington Ingalls occurred aboard a ship. Therefore, these exposures were during sea-based work. See Conner, 799 F. Supp. 2d 455; Deuber, 2011 WL 6415339, at *1 n.1. Accordingly, maritime law is applicable to Plaintiff's claims against Huntington Ingalls. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by - and no duty to warn about hazards associated with - a product it did not manufacture or distribute. Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at *7 (E.D. Pa. Feb. 1, 2012)(Robreno, J.).

D. Product Identification/Causation Under Maritime Law

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he

suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375 (6th Cir. 2001). This Court has also noted that, in light of its holding in Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012)(Robreno, J.), there is also a requirement (implicit in the test set forth in Lindstrom and Stark) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. Abbay v. Armstrong Int'l., Inc., No. 10-83248, 2012 WL 975837, at *1 n.1 (E.D. Pa. Feb. 29, 2012)(Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. Id. at 376 (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F. App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988)(citing Restatement (Second) of Torts, § 402A (1965))).

E. Sophisticated User Defense Under Maritime Law

This Court has previously held that a manufacturer or supplier of a product has no duty to warn an end user who is "sophisticated" regarding the hazards of that product. Mack v. General Electric Co., No. 10-78940, 2012 WL 4717918, at *1, 6 (E.D. Pa. Oct. 3, 2012) (Robreno, J.). In doing so, the Court

held that the sophistication of an intermediary (or employer) – or the warning of that intermediary (or employer) by a manufacturer or supplier – does not preclude potential liability of the manufacturer or supplier. Id. at *6-8. As set forth in Mack, a "sophisticated user" is an end user who either knew or belonged to a class of users who, by virtue of training, education, or employment could reasonably be expected to know of the hazards of the product at issue. Id. at *8. When established, the defense is a bar only to negligent failure to warn claims (and is not a bar to strict product liability claims). Id.

F. A Navy Ship Is Not a "Product"

This Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 2012 WL 4717918, at *9-10. As such, a shipbuilder defendant cannot face liability on a strict product liability claim. Id.

II. Defendant Huntington Ingalls' Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Huntington Ingalls contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Mr. Founds' illness. Defendant argues that Plaintiff cannot establish his strict products liability claim against it because Plaintiff cannot show that Huntington Ingalls manufactured a "product" (i.e., a ship is not a "product" for purposes of strict products liability law). In addition, Defendant asserts that it has no duty to warn about and cannot be liable for injury arising from any product or component part that it did not manufacture, supply, or install.

Defendant notes that the USS Intrepid was commissioned eleven years before Decedent worked aboard it. Therefore, Defendant concludes that Plaintiff cannot establish that Decedent was exposed to any insulation that was original to the ship. In addition, Defendant relies upon the affidavit of Dr. Robert Morgan who opines that there is no evidence of general or specific causation between asbestos and esophageal cancer (Decedent's disease).

In its reply, Defendant objects to Plaintiff's product identification/causation evidence. Defendant asserts that the

declaration of Mr. Robert Dougherty is inadmissible because Plaintiff refused to produce Mr. Dougherty for a deposition despite Defendant's issuance of a subpoena. Defendant also objects to the admissibility of the affidavits of Plaintiff's experts Charles Ay and Dr. David Schwartz.

Sophisticated User Defense

Huntington Ingalls asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because the Navy was a sophisticated user. In asserting this defense, it cites to Johnson v. American Standard, Inc., 43 Cal.4th 56 (Cal. 2008), and relies upon the affidavit of Captain Wesley Charles Hewitt to establish that the Navy had superior knowledge regarding the hazards of asbestos.

Government Contractor Defense

Huntington Ingalls asserts the government contractor defense, arguing that it is immune from liability in this case, and therefore entitled to summary judgment, because the Navy exercised discretion and approved reasonably precise specifications for the products at issue, Defendant provided warnings that conformed to the Navy's approved warnings, and the Navy knew about the hazards of asbestos. In asserting this defense, Huntington Ingalls again relies upon the affidavit of Captain Hewitt.

B. Plaintiff's Arguments

Product Identification / Causation

With respect to his strict products liability claim, Plaintiff contends that Defendant manufactured a product (i.e., that a ship is a "product" within the context of strict products liability law). Plaintiff contends that a ship is comparable to a mass-produced home. In support of this contention, Plaintiff cites to California caselaw: Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224 (Cal. App. 1969) and Price v. Shell Oil Co., 2 Cal.3d 245 (Cal. 1970). Plaintiff also cites to various cases from around the country, as well as comment d of Section 402A of the Restatement (Second) of Torts, which identifies, large vehicular and transportation products - including, inter alia, cars, airplanes, motor homes, and mobile homes - as being "products" subject to strict products liability law.

In addition, Plaintiff contends that the asbestos to which Decedent was exposed included insulation that was original to the ship (i.e., installed by Defendant). In support of this contention, Plaintiff asserts that the USS Intrepid was inactive from 1947 to 1952, and was recommissioned by Defendant between 1952 and 1953. Plaintiff notes that Decedent served on the USS Intrepid from 1954 to 1957.

In support of his assertion that he has identified sufficient evidence of product identification/causation to survive summary judgment, Plaintiff cites to the following evidence:

- Declaration of Robert Dougherty
  Mr. Dougherty worked with Mr. Founds on the USS Intrepid from 1954 to 1956. Mr. Dougherty asserted that he and Decedent removed and disturbed thermal insulation around pipes and steam lines on a daily basis in their capacity as boiler tenders. According to Mr. Dougherty, this process created visible dust which they breathed in. In addition, Mr. Dougherty stated that Mr. Founds worked around welders, riggers, and other repairmen who were removing and replacing thermal insulation. This also created visible dust which Mr. Founds inhaled. Mr. Dougherty also alleged that dust would fall from the insulation when the ship "vibrated violently." Mr. Founds was exposed to this dust while walking through the ship and while sleeping in the berthing compartments.

  Mr. Dougherty alleged that he could distinguish when the thermal insulation was original to the ship because of the repair patchwork in some of the areas. Mr. Dougherty stated that Mr. Founds breathed in dust that was attributed to original insulation because he did not wear a mask while working on the ship. In addition, Mr. Dougherty said that they were never warned regarding the hazards of asbestos.

  (Doc. No. 23-7, Ex. 9)

- Declaration of Expert Charles Ay
  Mr. Ay stated that the USS Intrepid was recommissioned by Defendant from 1952 to 1953. Mr. Ay asserted that Defendant was responsible for reinstalling the thermal insulation on pipes and equipment throughout the USS Intrepid during the recommissioning. Given the time period, Mr. Ay opined that "all or virtually all of the thermal insulation installed throughout [the] USS Intrepid...was more likely than not asbestos thermal pipe insulation." In addition, Mr. Ay opined that "at least 80 percent of the asbestos insulation disturbed aboard the USS Intrepid during Mr. Founds's service aboard the ship was originally installed asbestos thermal insulation or asbestos insulation installed during the USS Intrepid's conversion and recommissioning." Mr. Ay based his expert opinion, inter alia, on the time period, his research and work as an asbestos consultant, and his knowledge of asbestos-containing materials aboard US Navy vessels. Thus, Mr. Ay concluded that "Mr. Founds was more likely than not exposed to asbestos fibers from asbestos-containing thermal insulation installed aboard the USS Intrepid during its original construction, conversion and recommissioning by [Defendant]."

  (Doc. No. 23-5, Ex. A)

- Declaration of Expert David Schwartz, M.D.
  Dr. Schwartz stated in his declaration that each and every non-trivial exposure to asbestos, above background, was a substantial contributing factor in the development of Decedent's disease.

  (Doc. No. 23-8)

Sophisticated User Defense

Plaintiff asserts that Huntington Ingalls is not entitled to summary judgment on grounds of the sophisticated user defense because, (1) Huntington Ingalls has not adduced evidence that Decedent was a sophisticated user, and (2) Huntington

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Ingalls is really arguing for a "sophisticated intermediary defense" (which Plaintiff contends is not recognized by California law), since Decedent merely worked on Navy ships as a (presumably) unsophisticated worker.

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, and (2) not demonstrated a genuine significant conflict between state tort law and fulfilling its contractual federal obligations (i.e., that its contractual duties were "precisely contrary" to its duties under state tort law). Furthermore, Plaintiff asserts that the government contractor defense is not warranted because (3) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (4) there is no military specification that precluded warning about asbestos hazards, and (5) Defendant cannot demonstrate what the Navy knew about the hazards of asbestos relative to the knowledge of Defendant, nor that the Navy knew more than it did at the time of the alleged exposure.

To contradict the evidence relied upon by Defendant, Plaintiff cites to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warnings.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense (the affidavit of Captain Hewitt).

C. Analysis

Product Identification / Causation

Plaintiff alleges that Decedent was exposed to asbestos aboard a ship manufactured by Defendant Huntington Ingalls, and that Huntington Ingalls is liable for his illness because at least some substantial portion of that asbestos was installed on the ship by Defendant. However, this Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 2012 WL 4717918, at *9-10. As such,

a shipbuilder defendant such as Huntington Ingalls cannot face liability on a strict product liability claim. Id. Accordingly, summary judgment in favor of Defendant Huntington Ingalls is warranted with respect to Plaintiff's claims against it sounding in strict product liability. Anderson, 477 U.S. at 248.

The Court notes that this ruling does not preclude Defendant's potential liability with respect to Plaintiff's claims sounding in negligence, and that Defendant has not sought summary judgment with respect to those claims.

Government Contractor Defense

Plaintiff has pointed to evidence that contradicts (or at least appears to be inconsistent with) Huntington Ingalls's evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with asbestos-containing products. Specifically, Plaintiff has pointed to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning. This is sufficient to raise genuine issues of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Huntington Ingalls. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted.

Sophisticated User Defense

Defendant Huntington Ingalls asserts that it is not liable for Plaintiff's injuries because the Navy was sophisticated as to the hazards of asbestos. The Court has previously held that the sophistication of an intermediary (or employer), such as the Navy - or the warning of that intermediary (or employer) by a manufacturer or supplier - does not preclude potential liability of the manufacturer or supplier. Mack, 2012 WL 4717918, at *6-8. Therefore, summary judgment in favor of Defendant is not warranted on grounds of the sophisticated user defense. See Anderson, 477 U.S. at 248-50.

D. Conclusion

Summary judgment in favor of Defendant is warranted with respect to Plaintiff's strict liability claims because a ship is not a "product" for purposes of application of strict product liability law.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

With respect to Plaintiff's remaining negligence-based claims, Defendant Huntington Ingalls has not established that it is entitled to summary judgment on any of the other bases it has asserted. First, Plaintiff has produced evidence to controvert Defendant's proofs regarding the availability to Defendant of the government contractor defense. Second, summary judgment in favor of Defendant on grounds of the sophisticated user defense is not warranted because the sophistication of the Navy does not preclude potential liability of Defendant. Accordingly, with respect to Plaintiff's negligence-based claims, summary judgment in favor of Defendant is not warranted.