

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

GRAMMER, et al., : CONSOLIDATED UNDER  
 : MDL 875  
Plaintiffs, :  
 :  
 : Transferred from the Central  
 : District of California  
v. : (Case No. 09-07599)  
 :  
 :

ADVOCATE MINES, LTD.,  
et al.,  
Defendants.

**FILED**

OCT 17 2012

E.D. PA CIVIL ACTION NO.  
2:09-92425

MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

O R D E R

**AND NOW**, this 16th day of **October, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Air & Liquid Systems Corp., successor by merger to Buffalo Pumps Inc. (ECF No. 199) is **DENIED**.<sup>1</sup>

---

<sup>1</sup> This case was filed in California state court on September 14, 2009. It was removed to the United States District Court for the Central District of California on October 20, 2009, and in December 2009 was transferred to the Eastern District of Pennsylvania as part of MDL 875. Plaintiffs allege that their Decedent, Kenneth H. Grammer, was diagnosed with, and has since died from, mesothelioma as a result of his exposure to Defendant's asbestos-containing products during his service in the U.S. Navy from 1956 to 1963.

**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

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.). 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). This is because, where a case sounds in admiralty, whether maritime law applies is not an issue of choice-of-law but is, instead, a jurisdictional issue. See id. Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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 meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69. 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 exposure pertinent to Defendant occurred during Decedent's work aboard a ship. Therefore, this exposure was during sea-based work. See Conner,

---

799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiffs' claims against Defendant. 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))).

## **II. Motion for Summary Judgment of Defendant Air & Liquid Systems Corp., successor by merger to Buffalo Pumps Inc.**

### **A. Defendant's Arguments**

Defendant argues that maritime law should apply, but that under either California or maritime law, Defendant is entitled to summary judgment because of the bare metal defense. Defendant also claims it is entitled to summary judgment on Plaintiff's punitive damages claim, as well as false representation and intentional tort claims, and Mrs. Grammer's loss of consortium claim.

### **B. Plaintiffs' Arguments**

Plaintiffs argue that the bare metal defense does not apply, and California law should apply to this case. Additionally, Plaintiffs agree that summary judgment should be denied on Plaintiffs' claims for punitive damages, loss of consortium, intentional torts and false representation claims. Plaintiffs cite to the following evidence.

Edward Fulton, who served alongside Mr. Grammer aboard the USS Pollux, testified that he personally recalled observing Mr. Grammer working with and repairing Buffalo pumps aboard the USS Pollux. (Fulton Dep. at 50-51, Pl.'s Ex. 2). Mr. Fulton testified that he and Ken Grammer removed gasket and packing material from Buffalo pumps approximately 25 to 50 times. (Id. at 52-53). Mr. Fulton testified that the Buffalo pumps had both flange gaskets as well as internal gaskets that both he and Ken Grammer removed and replaced during their tenure aboard the USS Pollux. (Id. at 51-54). Mr. Fulton explained that removing and replacing gaskets and packing created dusty conditions, leading Mr. Ken Grammer to breathe the generated dust. (Id. at 51-52).

AND IT IS SO ORDERED.



---

EDUARDO C. ROBRENO, J.

---

Furthermore, Mr. Fulton testified that as a boiler tender, both he and Mr. Grammer had access to technical and instruction manuals for the Buffalo pumps. (Id. at 56-58).

Plaintiffs additionally present evidence that Defendant admitted that it "on some occasions provided small numbers of gaskets and packing to certain customers along with other replacement parts for certain pumps." (Defendant Buffalo Pumps' Responses to Interrogatories, at Resp. No. 2, Pl.'s Ex. 68; see also Buffalo Pumps Invoice, Sept. 24, 1963 (documenting Buffalo's sale of asbestos sheet gaskets, MIL-P-17303, to the Navy), Pl.'s Ex. 69). Further, during the relevant time period, a Buffalo instruction bulletin stated: "Unless otherwise specified pumps are furnished with either graphited asbestos or plastic metallic packing. Replacement packing material may be obtained from the factory. Do not pack with bulk packing under any circumstances." (Buffalo Pumps Bulletin, No. 3321-A, at 9, 38, Pl.'s Ex. 75). This same bulletin advised users to "[p]ack stuffing box with good quality of long fibre graphited asbestos packing and renew when necessary." (Id. at 31, 36).

### C. Analysis

The alleged exposure pertinent to Defendant occurred during Decedent's work aboard a ship. Therefore, this exposure was during sea-based work, and maritime law applies.

Plaintiffs allege that Decedent was exposed to asbestos from pumps (or other products) manufactured and/or supplied by Defendant Buffalo Pumps. There is evidence that asbestos-containing Buffalo pumps were aboard this ship and may have been present in areas in which Decedent worked. There is evidence that Decedent was exposed on numerous occasions to respirable asbestos from original pumps, gaskets and packing supplied by Buffalo Pumps, as well as replacement gaskets and packing supplied by Buffalo Pumps. As such, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from gaskets and/or packing supplied by Buffalo Pumps, such that it was a "substantial factor" in the development of his illness. See Conner, 2012 WL 288364, at \*7; Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at \*1 n.1. Accordingly, summary judgment in favor of Defendant is not warranted. Anderson, 477 U.S. at 248.