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

GERALD L. HOFFEDITZ, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	Transferred from the District of New Jersey (Case No. 09-00257)
v.	:	
AM GENERAL, LLC, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:09-70103
Defendants.	:	

O R D E R

AND NOW, this **28th** day of **July, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendants Arvin-Meritor, Inc. and Rockwell International Corp. (doc. no. 60) is **DENIED.**[1]

[1] Plaintiffs filed this action on November 5, 2008 in the New Jersey Superior Court after Gerald Hoffeditz was diagnosed with mesothelioma on or about May 5, 2008. This case was removed to the United States District Court for the District of New Jersey on or about January 16, 2009. This case was transferred to the United States District Court for the Eastern District of Pennsylvania on or about June 10, 2009 as part of MDL-875. Plaintiffs allege that Mr. Hoffeditz was exposed to asbestos when he worked as a mechanic and heavy equipment repairer and helper at the Letterkenny Army Depot in Chambersburg, Pennsylvania. Additionally, Plaintiffs allege that Mr. Hoffeditz was exposed to asbestos-containing material when he performed maintenance on his personal automobiles. Plaintiffs assert that Mr. Hoffeditz was exposed to asbestos in axles, parking brakes, and transfer cases manufactured by Arvin-Meritor, Inc. and Rockwell International Corp. on 2½ and 5 ton military trucks manufactured by AM General LLC while working at the Letterkenny Army Depot. Defendants assert that they are entitled to summary judgment pursuant to the sophisticated user and government contractor defenses.

I. LEGAL STANDARD

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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

Plaintiffs filed their claim in New Jersey; however, all of Mr. Hoffeditz's alleged exposures occurred in Pennsylvania and the parties agreed to follow Pennsylvania law for purposes of this motion. This Court will therefore apply Pennsylvania law.

1. Sophisticated User Defense under Pennsylvania Law

In Phillips v. A-Best Products Co., the Supreme Court of Pennsylvania, in dicta, noted that the sophisticated user defense, Restatement (Second) of Torts § 388, may apply to strict liability claims. 665 A.2d 1167, 1170 (Pa. 1995). As the court resolved the case on other grounds, it noted that "[a]n analysis of whether a § 388 defense may be raised in a strict liability action must thus await a future case." Id. at 1172. After Phillips, the United States District Court for the Eastern

District of Pennsylvania noted that the "sophisticated user defense is available only in cases involving negligent failure to warn, and not in products liability actions premised on strict liability." Alexander v. Morning Pride Mfg., Inc., 913 F. Supp. 362, 371-72 (E.D. Pa. 1995).

2. Government Contractor Defense

To satisfy the federal contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications and; (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). The third prong may also be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) (citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. Hagen, 739 F. Supp. 2d at 783.

II. MOTION FOR SUMMARY JUDGMENT OF ARVIN-MERITOR, INC. AND ROCKWELL INTERNATIONAL, CORP.

As to the sophisticated user defense, Defendants argue that the Army was aware of the dangers of asbestos and thus it was reasonable for Defendants to rely on the Army to warn its personnel of these dangers. (Def.'s Mot. Summ. J. at 2.) Plaintiff asserts that Pennsylvania has not recognized the sophisticated user defense.

As to the government contractor defense, Defendants cite to the testimony of Mr. Ketcham and Mr. Rink. Defendants present

evidence that government contractors, such as Defendants, worked closely with the Army to construct products in accordance with government specifications. (Id. at 3-4.) The Army ran tests on Rockwell products and these products were different from axles, transfer cases, and parking brakes which Rockwell sold commercially. (Id. at 4-5.) The Army developed training manuals used by personnel who maintained military vehicles and "[t]hese manuals contained safe work practices that were to be followed and warned of potential health and safety hazards, including working with and around asbestos-containing products." (Id. at 5.) OSHA published warnings about the dangers of asbestos in 1972, so the Army was aware of these dangers at least by that time. (Id.) Rockwell was not aware of these dangers until the 1970s and Arvin-Meritor was unaware of these dangers until the late 1970s. (Id. at 5-6.) The Army had complete control over warnings, including asbestos-related warnings. (Id. at 6.)

Plaintiff presents evidence to refute Defendant's evidence as to the government contractor defense. Plaintiff asserts that Mr. Ketcham's declaration, which Defendant relies on, is insufficient to entitle Defendant to summary judgment. Colonel Stoddart did not testified as to whether the Army ever required the use of asbestos in Defendants products or whether the Army specified warnings for asbestos. (Pl.'s Resp. at 16.) Defendant "has failed to produce a single Army specification that even mentions the use of warnings in general - let alone a specification that deals specifically with asbestos-containing brake or gasket related warnings. . . ." (Id. at 18.) Plaintiff presents evidence that Defendant was a member of various trade associations and had greater knowledge about the dangers of asbestos than the Army.

As to the sophisticated user defense, Pennsylvania has not explicitly recognized this defense for failure to warn claims premised on strict liability. Moreover, even if this defense was recognized in Pennsylvania for strict liability claims, Plaintiff has raised a genuine issue of material fact as to whether the Army or Defendants had greater knowledge about the dangers of asbestos. Accordingly, Defendant's Motion for Summary Judgment is denied as to the sophisticated user defense.

As to the first prong of the government contractor defense, Defendant has presented evidence that the Army had specifications for Defendants products and that these included specifications concerning warnings. Plaintiff argues that Defendants cannot

point to any specification that dealt with warnings. As to the second prong of the Boyle test, Plaintiff argues that since no Army specification dealt with warnings, Defendants cannot show that they conformed to any specification which required that they place or not place warnings on their products. As to the last prong of the Boyle test, Defendant points to evidence that the Army was aware of the dangers of asbestos at least by 1972, when OSHA publicized warnings about the dangers of asbestos. Plaintiff points to evidence that the Defendants were members of the various trade associations and would have been aware of the dangers of asbestos prior to this time. Accordingly, Defendants is not be entitled to summary judgment on these issues since Plaintiff has raised a genuine issue of material fact under the first prong of the Boyle test that the Army did not provide reasonably precise specifications as to warnings on Defendants' products. As to the third prong, Plaintiff has also raised a genuine issue of material fact as to whether Defendants had greater knowledge than the Army about the dangers of asbestos.

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AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.