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

JOHN DELATTE, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	Transferred from the Northern District of Florida (Case No. 08-00206)
A.W. CHESTERTON CO., ET AL., ET AL.,	:	
	:	E.D. PA CIVIL ACTION NO. 2:09-69578
Defendants.	:	

O R D E R

AND NOW, this **25th** day of **February, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Viacom, Inc., f/k/a CBS Corp. f/k/a Westinghouse Electric Corp., filed on December 13, 2010 (doc. no. 145), is **GRANTED**.[1]

[1] Plaintiff, John Delatte, served as a machinist mate aboard the USS Beale, USS Richard E. Kraus, USS Stribling, USS Bon Homme, and USS Franklin D. Roosevelt while in the United States Navy. (Pl.'s Resp., doc. no. 176 at 1; Pl.'s Dep. at 25, 37, 221-22, 230.) Plaintiffs allege that as a result of exposure to Defendant's asbestos-containing products, John Delatte contracted asbestosis. (Pl.'s Resp. at 3.) This case was transferred to the United States District Court for the Eastern District of Pennsylvania on June 1, 2009. (Transfer Order, doc. no. 1.)

I. LEGAL STANDARD

A. Summary Judgment Standard

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed.

R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

B. The Applicable Law

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. The alleged exposures which are relevant to this motion occurred while Mr. Delatte was serving on various ships in the U.S. Navy. The parties' briefs assert arguments under Florida law, however, since Mr. Delatte's alleged exposures occurred aboard U.S. Navy ships in "navigable waters," maritime law applies in this case.

In In re Asbestos Products Liability Litigation, Magistrate Judge Strawbridge provided an extensive analysis of maritime law. No. 09-64399, 2011 WL 346822 (E.D. Pa. Jan. 3, 2011). Application of admiralty or maritime law is a question of subject matter jurisdiction under Article III of the U.S. Constitution, which grants federal courts the power to hear "all cases of admiralty and maritime jurisdiction." U.S. CONST., art. III, § 2. A party seeking to invoke that jurisdiction "must satisfy conditions both of location and of connection with maritime activity." Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1997). The "location test" requires that either "the tort occurred on navigable water" or that the "injury suffered on land was caused

by a vessel on navigable water." Id. In the context of a toxic tort case, the location test is resolved by consideration of whether the alleged exposures to the toxic substance occurred onboard a naval vessel on the navigable waters or not. See Lambert v. Babcock & Wilcox, Co., 70 F. Supp. 2d 877, 884 (S.D. Ind. 1999) (finding the location test "easily satisfied in this case since the alleged exposure occurred on a naval vessel in navigable water"); John Crane, Inc. v. Jones, 650 S.E.2d 851, 853-54 (Va. 2007) ("the location prong of the test is met in this case because the . . . inhalation of asbestos occurred while repairing and constructing ships. . ."); see also Bartel ex rel. Estate of Rich v. A-C Product Liability Trust, 561 F. Supp. 2d 600, 603-05 (N.D. Ohio 2006); Garlock Sealing Technologies, LLC v. Little, 620 S.E.2d 773, 776-77 (Va. 2005). Plaintiff's relevant alleged exposures in this case all occurred on ships in navigable water. Sisson v. Ruby, 497 U.S. 358, 362-63 (1990) (finding that a ship docked at a shipyard satisfies the location test). Accordingly, the location test is satisfied.

In order to satisfy the connection test, the incident must have been "of a sort with the potential to disrupt maritime commerce" and "the general character of the activity giving rise to the incident" must show a "substantial relationship to maritime activity." Grubart, 513 U.S. at 538-39. In applying the first prong of the connection test, the court is to consider the "incident" as described "with an intermediate level of generality" in order to determine whether it is within a class of incidents which have a *potential* effect on maritime commerce. Id. Here, the particular "incident" is Plaintiff's alleged exposures to asbestos products as a result of maintenance and operation of equipment aboard a naval vessel. Asbestos exposure is an unsafe working condition, and "unsafe working conditions aboard a vessel have consistently been held to pose a potentially disruptive impact upon maritime commerce." Lambert, 70 F. Supp. 2d at 884; see also Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379, 386 (7th Cir. 2001) ("injury to. . . crew [of a 'commercial boat'] disrupts its participation in maritime commerce.").

The second prong requires us to define the "activity giving rise to the incident" and consider whether that activity is substantially related to traditional maritime activity. In defining the activity, we are to be guided "not by the particular circumstances of the incident, but by the

general conduct from which the incident arose." Sisson v. Ruby, 497 U.S. 358, 364 (1990). The activity in this case is best characterized as the sale and distribution of turbines for use aboard marine vessels. The turbines sold by Westinghouse were essential to running the various systems of the vessels on which they were installed, and Westinghouse sold them for that use. Additionally, Mr. Delatte's alleged exposures occurred during the installation and maintenance of those turbines, which was also necessary to ensure proper operation of the ships. The United States Supreme Court has uniformly and consistently held that ship repair is a maritime activity. John Baizley Iron Works v. Span, 281 U.S. 222, 232 (1930); Messel v. Foundation Co., 274 U.S. 427, 432 (1927); Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479, 480-81 (1923).

C. Product Identification under Maritime Law

In order to establish causation in 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 Product Liability Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 Fed. Appx. 371, 375 (6th Cir. 2001). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 Fed. Appx. at 375.

Maritime law incorporates traditional "substantial factor" causation principles, and courts often look to the Restatement of Torts (2nd) for a more helpful definition. The comments to the Restatement indicates that the word "substantial" in this context "denote[s] the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility." Restatement (Second) of Torts, § 431, Comment "a" (1965).

Accordingly, 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 v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)). 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).

D. Bare Metal Defense under Maritime Law

Under maritime law, a defendant is only legally responsible for component parts which it manufactured or distributed. Lindstrom v. A-C Product Liability Trust, 424 F.3d 488, 494-95 (6th Cir. 2005). Under maritime law, a defendant is not responsible for injuries caused by component parts which it neither manufactured nor distributed. See Salvatore Gitto v. A.W. Chesterton Co., Inc. (In re Asbestos Liability Litigation (No. VI)), No. 07-73417, 2010 WL 3359484 at *5 (E.D. Pa. June 30, 2010) (recognizing that, under maritime law, a defendant is not held legally responsible for replacement parts manufactured and distributed by others).

E. Federal 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 Eastern & Southern District New York Asbestos Litigation, 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, 2010 WL 3745297 at *11 (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. 2010 WL 3745297 at *11.

II. MOTION FOR SUMMARY JUDGMENT OF DEFENDANT VIACOM, INC. F/K/A CBS CORP. F/K/A WESTINGHOUSE ELECTRIC CORP.

Plaintiff, John Delatte, testified that Westinghouse turbines were present on the some of the ships he worked on, including the USS Franklin D. Roosevelt. (Pl.'s Dep. at 42.) Plaintiff also testified that he worked with packing. (Id. at 191.) He testified that the engine rooms were very dusty. (Id. at 150.) Defendant argues that it is entitled to summary judgment pursuant to the federal contractor defense and as there is no evidence of product identification.

Plaintiffs have presented evidence, through Mr. Delatte's own testimony, that Mr. Delatte was exposed to Westinghouse turbines while serving as a machinist mate. However, Plaintiffs have presented no evidence showing that Defendant manufactured or distributed any of the asbestos used to insulate these turbines. Under maritime law, Defendant is not liable for asbestos which was later incorporated into its products. Accordingly, Defendant's Motion for Summary Judgment is granted and this Court need not consider the federal contractor defense.

It is further **ORDERED** that judgment is entered in favor of Defendant Viacom, Inc., f/k/a CBS Corp. f/k/a Westinghouse Electric Corp. and against Plaintiffs.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.