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

ROBERT MODLEY,	:	
	:	CONSOLIDATED UNDER
Plaintiff,	:	MDL 875
	:	
	:	Transferred from the Southern
	:	District of West Virginia
v.	:	(Case No. 06-00213)
	:	
	:	
20TH CENTURY GLOVE CORP.	:	
OF TEXAS, ET AL.	:	E.D. PA CIVIL ACTION NO.
	:	2:07-62874
Defendants.	:	

O R D E R

AND NOW, this **18th** day of **November, 2010**, it is hereby **ORDERED** that Defendant Crane Co.'s Motion for Summary Judgment, filed on September 2, 2010 (doc. no. 150) is **DENIED.**[1]

[1] Plaintiff, Robert Modley, filed this case against various defendants in the Circuit Court of Kanawha County, West Virginia alleging injuries caused to Franklin Modley due to occupational asbestos exposure. (Def.'s Mot. Summ. J., doc. no. 147 at 3). The case was subsequently removed to federal court on the basis of federal officer jurisdiction and transferred to the Eastern District of Pennsylvania as part of MDL 875 in March of 2007. (Transfer Order, doc. no. 1). In May of 2005, Franklin Modley was diagnosed with pleural mesothelioma. (Pl.'s Reply Br., doc. no. 154 at 2). Franklin Modley passed away due to mesothelioma on September 10, 2006. (Id.). Doctors Gaziano and Mark testified that Mr. Modley contracted mesothelioma due to occupational asbestos exposure. (Pl.'s Reply Br. at 3).

Plaintiff alleges that Franklin Modley was exposed to asbestos while serving in the United States Navy from 1954 to 1957. (Pl.'s Rely Br. at 1). Mr. Modley worked as a boiler tender in the U.S. Navy aboard the USS Robert F. Keller (DE-419), the USS Allen M. Sumner (DD-692), and the USS Shenandoah (AD-26).

(Pl.'s Fact Sheet at 8). Mr. Modley served 21 months on the USS Keller as a boiler tender. (Def.'s Mot. Summ. J. at 5; Modley Depo., doc. no. 157-1 at 27-28, 33-37, 59). Mr. Modley testified that he would go to the engine room on the USS Keller where the turbines were located, but did not recall working on the turbines. (Id. at 136-38, 223-28). Mr. Modley served on the USS Sumner for a little over two years as a boiler tender. (Id. at 59-62). Mr. Modley served on the USS Shenandoah for about a month visiting various departments on the ship. (Id. at 76-79). Mr. Modley did not identify any Crane Co. products during his deposition.

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).

In oral argument, Defendant contended that maritime law may apply to this matter. Plaintiff has not asserted that maritime law should apply to this case. Also, the majority of the United States Courts of Appeals, including the Fourth Circuit, have held

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that maritime jurisdiction in unavailable to shipyard workers in asbestos actions. See Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985); Woessner v. Johns-Manville Sales Corp., 757 F.2d 634 (5th Cir. 1985); Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984); Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984); Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984); Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir. 1983); Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983), cert. denied 464 U.S. 864 (1983); Owens-Illinois v. United States District Court, 698 F.2d 967 (9th Cir. 1983). Jurisdiction in this case is based on diversity of citizenship. Therefore, this Court will apply West Virginia law.

In Morningstar v. Black and Decker Manufacturing Co., the Supreme Court of Appeals of West Virginia set out a test for strict tort liability based on design defectiveness, structural defectiveness, and failure to warn. 253 S.E.2d 666, 682 (W. Va. 1979). The court determined that, "'a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.'" (Id. at 677 (quoting Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963)). The Supreme Court of Appeals of West Virginia did not adopt § 402A of the Restatement Second of Torts which requires that the product at issue be unreasonably dangerous. 253 S.E.2d at 680. In Ilosky v. Michelin Tire Corp., the Supreme Court of Appeals of West Virginia again emphasized that in order to prevail in a strict liability action for failure to warn, plaintiff must show that a defect existed which made the product not reasonably safe, and that the defect was the proximate cause of his or her injuries. 307 S.E.2d 603, 610 (W. Va. 1983).

While Morningstar and Ilosky do not specifically address the asbestos context, in In re State Public Building Asbestos Litigation, the Supreme Court of Appeals of West Virginia cited Morningstar as the appropriate standard to apply in the asbestos context. 454 S.E.2d 413, 422 (W. Va. 1994). The court held that in order to determine whether defendant's asbestos-containing products were defective, the trial court judge should have applied the Morningstar test. In order to establish strict liability in tort, plaintiff must show that the product involved is defective in the sense that it is not reasonably safe for its intended use. (Id.).

The Supreme Court of Appeals of West Virginia has never expressly adopted the Lohrmann test, but the Fourth Circuit referred to the Lohrmann test when deciding an appeal from the United States District Court for the Southern District of West Virginia. In White v. Dow Chemical Co., plaintiff sued various manufacturers alleging that Mr. White died of leukemia due to exposure to herbicides and pesticides manufactured by defendants. 2009 U.S. App. LEXIS 7483 **2 (4th Cir. 2009). Plaintiff presented testimony from co-workers who worked in similar positions as Mr. White, but these co-workers never saw Mr. White working with herbicides. (Id. at 11-13). Plaintiff, Mr. White's wife, testified that Mr. White would come home from work smelling of diesel fuel. (Id. at 14). The court granted defendant's motion for summary judgment holding that, while circumstantial evidence can be sufficient to create a genuine issue of material fact, plaintiff had not presented enough evidence in this case. (Id. at 20-22). The court noted that under West Virginia law, "[i]n toxic exposure cases, providing adequate evidence of exposure is required to prove the element of causation and survive a motion for summary judgment." (Id. at 17 (citing Tolley v. ACF Industries, 575 S.E.2d 158, 168-69 (W. Va. 2002); Tolley II, 617 S.E.2d at 512-13)). The court cited Lohrmann and held that in order to establish the requisite level of exposure, plaintiff "must demonstrate the amount, duration, intensity, and frequency of exposure." 2009 U.S. App. Lexis 7483 ** 18.

In Roehling v. National Gypsum Co., the Fourth Circuit decided an appeal from the Eastern District of Virginia. 786 F.2d 1225 (4th Cir. 1986). Plaintiff sued various defendants alleging that he developed mesothelioma due to exposure to their asbestos-containing products. (Id. at 1226). The Court held that direct evidence of exposure is not required in order for plaintiff to survive a motion for summary judgment. (Id. at 1228). The evidence need only establish that plaintiff "was in the same vicinity as witnesses who can identify the products causing the asbestos dust and that all people in that area, not just the product handlers, inhaled." (Id.).

In summary, as to product identification, the Supreme Court of Appeals of West Virginia has not required plaintiff to present direct evidence of exposure to survive summary judgment, but has required strong circumstantial evidence of (1) a defect which made the product at issue not reasonably safe; (2) that the defect was the proximate cause of plaintiff's injuries; and (3) a showing of an adequate level of exposure. See Illosky, 307 S.E.2d

at 610; White, 2009 App. LEXIS 7483 at 17-18.

In addition, the Supreme Court of Appeals of West Virginia has not specifically addressed the "bare metal" defense, but has generally addressed a manufacturer's duty to warn. In Ilosky v. Michelin Tire Corp., plaintiff purchased a used automobile equipped with Michelin radial tires on the rear axle and either radial or conventional tires on the front axle. 307 S.E.2d 603, 607 (W. Va. 1983). After purchasing the car, plaintiff took the car to a mechanic and had the tires switched so that the Michelin radial tires were on the front axle and the conventional tires were on the rear axle. (Id.). The mechanic did not warn plaintiff that mixing tire types can cause the automobile to be unstable. (Id.). Plaintiff's daughter crashed the automobile as a result of the tires. (Id. at 608). Michelin provided warnings about mixing tires to direct purchasers, but not to consumers who purchased used cars equipped with Michelin tires. (Id.). The court noted that,

> for the duty to warn to exist, the use of the product must be foreseeable to the manufacturer or seller. . . . 'A manufacturer must anticipate all foreseeable uses of his product. In order to escape being **unreasonably** dangerous, a **potentially** dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe.

(Id. at 609-10 (quoting Smith v. United States Gypsum Co., 612 P.2d 251, 254 (Okl. 1980)). The court found that Michelin could be held strictly liable for failing to provide warnings since it was aware of the hazards created by mixing tires. (Id. at 610). Michelin had taken steps to warn against such use, and thus it was clearly foreseeable to Michelin that its tires could and had been used in this way. (Id.).

As discussed above as to product identification, the Supreme Court of Appeals of West Virginia has yet to address what evidence plaintiff must present in order to survive summary judgment in an asbestos case. Here, even under the more stringent Lohrmann standard, Plaintiff has raised a genuine issue of material fact as to whether Mr. Modley was in close proximity to Crane Co. valves which were incorporated with asbestos on a frequent and regular basis.

Mr. Modley served on the USS Sumner for a little over two years. Allan Mack worked with Mr. Modley as part of the engineering department in the boiler room on the USS Sumner. (Mack Depo., doc. no. 157-2 at 21-23, 33-35, 40-41). Mr. Mack testified that most of the big valves on the USS Sumner were manufactured by "Crane." (Mack Depo., doc. no. 150-3 at 86). Mr. Schulrud, Mr. Modley's shipmate on the USS Keller testified that he was stationed in the engine room and that Mr. Modley was in the boiler room, but they cross-trained, meaning they switched rooms in order to learn what went on in each room. (Schulrud Depo., doc. no. 157-2 at 12). Mr. Schulrud testified that he repacked and repaired Crane Co. valves aboard the USS Keller. (Id. at 124). Mr. Schulrud testified that boiler tenders worked with valves. (Id. at 128). Mr. Schulrud testified that "Crane" manufactured the packing material used to repair valves. (Id. at 135). This testimony creates a genuine issue of material fact as to whether Mr. Modley was exposed to Crane Co. valves on a frequent basis while working in the boiler rooms on the USS Sumner and the USS Keller. Therefore, as to product identification, Defendant's motion for summary judgment is denied.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

As to the "bare metal" defense, as the MDL transferee court, this Court is reluctant to predict the outcome of an issue which is unsettled under West Virginia law. See Gitto v. A.W. Chesteron Co., Inc., 2010 WL 3322714 (E.D. Pa. Aug. 19, 2010). Therefore, the Defendant's Motion for Summary Judgment on the issue of the "bare metal" defense is denied without prejudice and remanded to the transferor court for it to determine whether West Virginia recognizes the "bare metal" defense.