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

CHRISTINE P. PACE,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
v.	:	District of South Carolina
		(Case No. 11-02688)
3M COMPANY, ET AL.,	:	
		E.D. PA CIVIL ACTION NO.
Defendants.	:	2:11-67744-ER

AND NOW, this **11th** day of **April, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Bayer Cropscience, Inc. (Doc. No. 94) is **GRANTED.**[1]

---

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

Plaintiff Christine Pace alleges that William Pace ("Decedent" or "Mr. Pace") was exposed to asbestos while working as a marine machinist (and apprentice marine machinist) at the Charleston Naval Shipyard from 1971 to 1995. Plaintiff alleges that Defendant Bayer Cropscience, Inc. ("Bayer Cropscience") manufactured and sold asbestos-containing adhesives and mastics under the name Benjamin Foster. The alleged exposure pertinent to Defendant Bayer Cropscience occurred aboard various Navy ships and on land in two different machine shops.

Plaintiff asserts that Decedent developed mesothelioma as a result of his exposure to asbestos. Decedent was deposed in October of 2011.

Plaintiff brought claims against various defendants. Defendant Bayer Cropscience has moved for summary judgment, arguing that there is insufficient evidence to establish causation with respect to its product(s). The parties assert that South Carolina 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

The parties assert that South Carolina law applies. However, 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.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure, the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., No. 10-64625, 2011 WL 5881184, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.)(applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

i) Exposure Arising Aboard Ships

Plaintiff alleges exposure pertinent to Defendant that occurred aboard ships. Therefore, these alleged 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 Defendant that arise from this alleged exposure. See id. at 462-63.

ii) Exposure Arising On Land (Machine Shops 31 and 38)

Plaintiff alleges exposure pertinent to Defendant that occurred in two different machine shops on land (Shop No. 31 and Shop No. 38). Therefore, this exposure was during land-based work at the Charleston Naval Shipyard in Charleston, South Carolina. Accordingly, South Carolina state law is applicable to Plaintiff's claims against Defendant Bayer that arise from this alleged exposure. See Conner, 799 F. Supp. 2d 455.

C. 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))).

D. Product Identification/Causation Under South Carolina Law

This Court has previously addressed the standard for product identification under South Carolina law. In Blackmon v. Owens-Illinois, Inc., the Court wrote:

In Henderson v. Allied Signal, Inc., the Supreme Court of South Carolina explicitly adopted the "frequency, regularity, and proximity test." 644 S.E.2d 724, 727 (S.C. 2007) (citing Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986)). The court noted that, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." 644 S.E.2d at 727. The court held that mere presence of "static asbestos" does not equate to asbestos exposure. Id.

In Roehling v. National Gypsum Co., the United States Court of Appeals for 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.

No. 07-62975, 2011 WL 4790631 (E.D. Pa. Jan. 28, 2011).

II. Defendant Bayer Cropscience's Motion for Summary Judgment

A. Defendant's Arguments

Bayer Cropscience contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's mesothelioma.

In its reply brief, Bayer Cropscience argues that testimony from four (4) of Defendant's witnesses should be excluded because the witnesses were not properly disclosed and Defendant was not present at three (3) of those depositions.

B. Plaintiff's Arguments

In support of Plaintiff's assertion that she has identified sufficient evidence of exposure/causation/product identification to survive summary judgment, Plaintiff cites to the following evidence:

- Deposition of Mr. Pace
  Mr. Pace testified that he worked as a apprentice marine machinist at Charleston Naval Shipyard from approximately 1971 to 1975. In 1975, he became a journeyman machinist working on the "steam gang." From 1982 until about 1992, he worked in the nuclear power department aboard nuclear submarines. He worked as a machinist at the shipyard until about 1995. The majority of his career at Charleston Naval Shipyard was spent working on land in Machine Shop No. 38. He also worked for about a year in Machine Shop No. 31 (during his time as an apprentice).

  His duties at all of these locations included maintaining and repairing pumps and valves, including packing and repacking valves, and changing gaskets. He also worked on turbines and boilers. He did work with equipment used aboard at least twenty-five different Naval vessels. He testified that he worked around insulating pipe material, which he described as "chalky-looking substance." He testified that the majority of pipes were insulated.

  (Doc. No. 124, Exs. D-E.)

- Deposition Testimony of Leon Cash
  Mr. Cash worked at the shipyard from 1941-80. He testified in another action that Defendant's asbestos-containing glue was used any time insulation was applied at the shipyard. (For the reasons set forth below, this testimony will not be considered.)

  (Doc. No. 124, Ex. F.)

- Deposition Testimony of James Milwood
  Mr. Milwood worked at the shipyard during 1940-44, 1946-50, and again at some point until his retirement in 1975. He testified in another case that he recalled a fibrous adhesive being used extensively at the shipyard - and that it was used to insulated pumps and turbines. He identified the adhesive as "Benjamin Foster" and testified that it was used a lot. (For the reasons set forth below, this testimony will not be considered.)

  (Doc. No. 124, Ex. G.)

- Deposition Testimony of Thomas Stokes
  Mr. Stokes worked at the shipyard from 1954 to 1986. In a deposition in another case, he identified Benjamin Foster as being among the asbestos-containing materials used at the shipyard - and the only adhesive product he recalled being used there. (For the reasons set forth below, this testimony will not be considered.)

  (Doc. No. 124, Ex. H.)

- Deposition Testimony of Guy Lookabill, Sr.
  Mr. Lookabill testified that he worked with Decedent from 1972 to 1974 in Shop 38. He also testified that he worked with Decedent aboard ships, for approximately six hours per day. He testified that, while working on pumps and valves aboard ships, they worked around insulators who applied insulating piping materials on the steam systems nearby. He described this work as creating "a lot of dust" and testified that Decedent did not wear a mask or respirator. He testified that Decedent worked around insulating mud and mastics.

  (Doc. No. 124, Ex. I.)

- Deposition Testimony of Raymond Earl Lee
  Mr. Lee worked with Decedent at the shipyard from 1972 to 1993. He testified that Decedent was exposed to asbestos-containing mastics and muds while he worked at the shipyard, and that the insulation would cut nearby him while in the machine shop.

  (Doc. No. 124, Ex. J.)

C. Analysis

Motion to Strike Witness Testimony

As a preliminary matter, the Court considers Defendant Bayer Cropscience's objections to Plaintiff's reliance upon testimony from four (4) witnesses who Defendant contends were not properly disclosed (three of whom were deposed without Defendant's presence). Defendant has provided Plaintiff's written disclosures in this case, which were made pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure. The Court has reviewed the disclosures and has confirmed, as Defendant asserts, that none of the following witnesses were identified in those disclosures: (1) Leon Cash, (2) James Milwood, (3) Thomas Stokes, and (4) Guy Lookabill. Defendant asserts that it was not present for the deposition of the first three of these witnesses, though it concedes that it was present for Mr. Lookabill's deposition. Plaintiff has not responded (or sought leave to respond to) Defendant's request to have these witnesses' testimony excluded.

Because it is undisputed that Plaintiff failed to disclose the first three of the witnesses in this case (Mrs. Cash, Milwood, and Stokes), this evidence is excluded and will not be considered by the Court in deciding Defendant's motion. See Fed. R. Civ. P. 37(c). Although it appears that Plaintiff was remiss in failing to timely disclose Mr. Lookabill in her initial disclosures, Defendant's conceded presence at the deposition of Mr. Lookabill in this matter makes clear that Defendant was, at some point prior to the close of discovery, made aware that Mr. Lookabill was a witness in this action and given an opportunity to depose him. Therefore, the testimony of Mr. Lookabill will not be excluded and will instead be considered by the Court in deciding Defendant's motion. Having determined that the testimony of witnesses Cash, Milwood, and Stokes is excluded (such that Plaintiff may not rely on them in opposing Defendant's motion for summary judgment), the Court next considers the sufficiency of Plaintiff's remaining evidence.

Product Identification / Causation

Plaintiff alleges that Decedent was exposed to asbestos from Benjamin Foster adhesive used to apply insulation to pipes and other products at the Charleston Naval Shipyard. She alleges that this exposure occurred both aboard ships and in machine shops (on land). The Court examines the sufficiency of Plaintiff's evidence regarding each alleged source of exposure separately.

i) Exposure Arising Aboard Ships (Maritime Law)

Without the testimony of witnesses Cash, Milwood, and Stokes, there is no evidence that Plaintiff worked with or around any product manufactured or supplied by Defendant - much less that any such product contained asbestos. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed during his work aboard ships to asbestos from a product manufactured or supplied by Bayer such that it was a substantial factor in the development of his mesothelioma, because any such finding would be impermissibly conjectural. See Lindstrom, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant Bayer is warranted with respect to Plaintiff's claims arising from alleged exposure aboard ships. Anderson, 477 U.S. at 248-50.

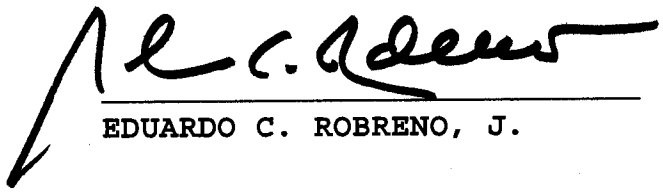
ii) Exposure Arising On Land (South Carolina Law)

Without the testimony of witnesses Cash, Milwood, and Stokes, there is no evidence that Plaintiff worked with or around any product manufactured or supplied by Defendant - much less that any such product contained asbestos. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed during his work aboard ships to asbestos from a product manufactured or supplied by Bayer such that it was a substantial cause of the development of his mesothelioma. See Henderson, 644 S.E.2d 724, 727. Accordingly, summary judgment in favor of Defendant Bayer is warranted with respect to claims arising from alleged land-based exposure. Anderson, 477 U.S. at 248-50.

D. Conclusion

Summary judgment in favor of Defendant Bayer is granted with respect to claims arising from all alleged sources of asbestos exposure because Plaintiff has failed to identify

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

---

sufficient evidence to support a finding of causation with respect to any product for which Defendant could be liable.