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

PAULA ROBERTSON,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Northern District of
v.	:	California
	:	(Case No. 08-04490)
	:	
CARRIER CORPORATION,	:	E.D. PA CIVIL ACTION NO.
ET AL.,	:	2:09-64068-ER
	:	
Defendants.	:	

O R D E R

AND NOW, this **7th** day of **November, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Todd Shipyards Corporation (Doc. No. 99) is **GRANTED in part; DENIED in part.**[1]

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[1] This case was transferred in March of 2009 from the United States District Court for the Northern District of California to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Paula Robertson is the successor-in-interest to and wrongful death heir of John Robertson ("Decedent" or "Mr. Robertson"). Plaintiff alleges that Decedent was exposed to asbestos while serving in the Navy during the period 1962 to 1965. Defendant Todd Shipyards ("Todd" or "Todd Shipyards") built ships. The alleged exposure pertinent to Defendant Todd Shipyards occurred during Plaintiff's work aboard:

- USS Salisbury Sound (AV-13)

Plaintiff asserts that Decedent developed lung cancer as a result of asbestos exposure. He was deposed in October 2010.

Plaintiff brought claims against various defendants. Defendant Todd Shipyards has moved for summary judgment, arguing that (1) Plaintiff cannot establish that Defendant (or any product of Defendant's) caused Decedent's illness, (2) Plaintiff cannot establish that Defendant was negligent in any way that

caused his illness, (3) it is immune from liability by way of the government contractor defense, (4) it is entitled to summary judgment on grounds of the sophisticated user defense, and (5) Plaintiff's claims are barred by the Federal Tort Claims Act (FTCA).

Defendant contends that maritime law and California law each apply to different portions of Plaintiff's exposure. Plaintiff contends that maritime 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

1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In

matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.).

2. State Law Issues (Maritime versus State Law)

Plaintiff contends that maritime law applies to her claims against Defendant, and Defendant agrees that maritime law applies to at least some of Plaintiff's claims. 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 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 all of the alleged exposure pertinent to Todd Shipyards occurred aboard a ship during Decedent's Navy service. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Todd Shipyards. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has recently 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))).

E. Government Contractor Defense

To satisfy the government 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). 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. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011)(Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

F. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably

precise specifications as to warnings which were to be placed on defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010)(Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

G. Sophisticated User Defense Under Maritime Law

This Court has previously held that a manufacturer or supplier of a product has no duty to warn an end user who is "sophisticated" regarding the hazards of that product. Mack v. General Electric Co., No. 10-78940, 2012 WL 4717918, at *1, 6 (E.D. Pa. Oct. 3, 2012) (Robreno, J.). In doing so, the Court held that the sophistication of an intermediary (or employer) - or the warning of that intermediary (or employer) by a manufacturer or supplier - does not preclude potential liability of the manufacturer or supplier. Id. at *6-8. As set forth in Mack, a "sophisticated user" is an end user who either knew or belonged to a class of users who, by virtue of training, education, or employment could reasonably be expected to know of the hazards of the product at issue. Id. at *8. When established, the defense is a bar only to negligent failure to warn claims (and is not a bar to strict product liability claims). Id.

H. A Navy Ship Is Not a "Product"

This Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 2012 WL 4717918, at *9-10. As such, a shipbuilder defendant cannot face liability on a strict product liability claim. Id.

I. Federal Tort Claims Act (FTCA) - Employee vs. Contractor

The Federal Tort Claims Act (FTCA) constitutes a limited waiver of sovereign immunity, making the federal government liable to the same extent as a private employer for certain torts of "employees" acting within the scope of their employment (although it exempts certain intentional torts from that waiver). See United States v. Orleans, 425 U.S. 807, 813, 96 S. Ct. 1971, 1975 (1976). In addition to creating a cause of action against the federal government, the FTCA also limits a plaintiff's remedy for certain actions to that action against the

government permitted by the FTCA. See B&A Marine Co. v. American Foreign Shipping, Co., 23 F.3d 709, 712 (2d Cir. 1994). The Act provides, in pertinent part:

> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-
>
> (A) which is brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

28 U.S.C. § 2679(b) (emphasis added).

The Second Circuit has construed this provision and has discussed the definition of "employee" as used therein. In B&A Marine Co. v. American Foreign Shipping Co., a contractor sued a company (AFS) that had been hired by the United States (specifically, Maritime Administration (MARAD)). The Second Circuit affirmed the district court's grant of summary judgment, holding that the company (AFS) could not be sued, and that the United States should be substituted as the proper defendant, because it found that AFS was acting as an employee (rather than an independent contractor) and was acting in the scope of its employment. It explained:

> The Act defines "[e]mployee of the government" as including "officers or employees of any

federal agency," and "federal agency" is defined as including "corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C. § 2671. Thus, the FTCA explicitly excludes liability of the Government for the wrongful act or omission of an independent contractor. See, e.g., Logue v. United States, 412 U.S. 521, 526-27, 93 S. Ct. 2215, 2218-19, 37 L. Ed. 2d 121 (1973); Berkman v. United States, 957 F.2d 108, 111 (4th Cir. 1992). The court accordingly must determine: (1) whether the tortfeasors were acting in the role of employee of the Government or independent contractor, within the meaning of the FTCA, and (2) if they were employees, whether they were acting within the scope of their employment.

For purposes of the FTCA, the common law of torts and agency defines the distinction between an independent contractor (for whose torts the Government is not responsible) and an employee, servant or agent (for whose torts the Government is responsible). The Restatement (Second) of Agency provides helpful guidance. It defines a servant as "an agent employed by a master to perform service in his affairs whose ... performance of the service is controlled or is subject to the right to control by the master." Restatement (Second) of Agency § 2(2) (1958). **If the court determines that the wrongdoer is an agent or employee of the Government who committed a tort within the scope of the employment, then the plaintiff may not recover from the agent or employee, but ordinarily has a claim against the Government. If, on the other hand, the tortfeasor is not an agent or employee of the Government, or is an agent or employee but did not commit the wrongdoing in the scope of the employment, then the plaintiff has a cause of action against the agent or employee in his individual capacity, but not against the Government.**

I. Agency Status Under the FTCA

The district court concluded that [the named employee of AFS] and AFS were employees of the Government acting within the scope of their employment. B & A contends this was error and that there were

genuine issues of material fact for trial concerning AFS's agency. We reject this contention. As Marshall was an employee of AFS, **it is AFS's status with respect to the Government that is critical. The evidence presented to the district court on the motion for summary judgment showed as a matter of law that AFS was an agent of the Government, and not an independent contractor.**

In the first place, the contract between MARAD and AFS **expressly provided that AFS would serve "as [MARAD'S] agent, and not as an independent contractor."** By entering into this agreement, the Government was agreeing to make itself liable for AFS's torts committed within the scope of its agency. B & A points to no reason why the agreement should not be accepted at face value on this point.

Secondly, other details of the agreement confirm that it created an agency relationship. Courts have found it indicative of an agency relationship if the Government enjoys the "power 'to control the detailed physical performance of the contractor,' " Orleans, 425 U.S. at 814, 96 S. Ct. at 1976 (quoting Logue v. United States, 412 U.S. 521, 528, 93 S. Ct. 2215, 2219, 37 L. Ed. 2d 121 (1973)), or if the Government in fact supervises the "day-to-day operations." Orleans, 425 U.S. at 815, 96 S. Ct. at 1976. See also Logue, 412 U.S. at 528, 93 S. Ct. at 2220; Leone, 910 F.2d at 50. **The agreement required AFS "to manage and conduct the business for the United States in accordance with such directions, orders or regulations ... as the United States may from time to time prescribe...."** (emphasis added). The agreement further provided that a MARAD representative would monitor AFS's performance. These provisions unquestionably establish the Government's contractual authority to control AFS's performance in detail.

Third, the evidence of the working relationship between MARAD and AFS further confirmed that such power resided in the Government. The **affidavits of [named employee of AFS and supervisor], who was assigned by MARAD to supervise AFS's performance, clearly showed that MARAD instructed AFS**

> **in detail as to what actions it should take in advising B & A of its default.**
>
> Finally, **B & A submitted no evidence suggesting the existence of a triable issue of fact** on this point. Under the circumstances, the district court was completely justified in concluding that the "employee" status of AFS and Marshall had been established as a matter of law.

23 F.3d 709, 713-14 (2d Cir. 1994)(emphasis added).

The proponent of a claim of immunity bears the burden of establishing its entitlement to that immunity. See Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432, 113 S. Ct. 2167, 2168 (1993); Saint-Guillen v. U.S., 657 F. Supp. 2d 376, 380 (E.D.N.Y. 2009).

II. Defendant Todd Shipyards's Motion for Summary Judgment

A. Defendant's Arguments

Federal Tort Claims Act (FTCA)

Todd Shipyards contends that Plaintiff's claims are barred by the Federal Tort Claims Act because, under Executive Order 9400, signed by President Roosevelt on December 10, 1943, when Todd built the particular ship at issue, it was acting as an employee of the Navy. Defendant relies upon B&A Marine Co. v. American Foreign Shipping, Co., 23 F.3d 709, 713-14 (2d Cir. 1994), and argues that the Executive Order, along with Todd Shipyards' correspondence (both internal and with the Navy), confirm that, with respect to Los Angeles Shipbuilding and Drydock Corporation (where Todd built the ship at issue), Todd was acting not as an independent contractor for the Navy, but as an employee of the Navy. Todd contends that this entitles it to the protections of the Federal Tort Claims Act (specifically, 28 U.S.C. § 2679(b)(1)) because the alleged tort(s) at issue (defective warning/failure to warn) occurred while it was working as an employee of - and within the scope of its employment for - the Navy. Todd cites to the affidavit of Admiral Roger B. Horne, Jr. to support its contention that the alleged tort occurred while working as an employee of the Navy and within the scope of its employment.

The evidence submitted by Defendant is as follows:

- Executive Order 9400 (December 9, 1943) - The Order declares that "it is deemed essential that the shipyard of the Los Angeles Shipbuilding and Drydock Corporation, located at Los Angeles, California, be taken over for use and operation by the United States of America in order that it may be effectively operated in the construction, conversion and repair of vessels required by the United States." In it, President Franklin D. Roosevelt "authorize[s] and direct[s] the Secretary of the Navy to take possession of and operate the shipyard of the Los Angeles Shipbuilding and Drydock Corporation, in order effectively to construct, convert and repair vessels required by the United States and to do all things necessary or incidental to that end." It specifies that "[t]he Secretary of the Navy may exercise the authority herein conferred through and with the aid of such person or persons or instrumentalities as he may designate, and may select and hire such employees, including a competent civilian adviser or industrial relations, as are necessary to carry out the provisions of this order, and in furtherance of the purposes of this order, the Secretary of the Navy may exercise any existing contractual or other rights of the said corporation, and take such other steps as may be necessary or desirable."

  (Def. Ex. E, Doc. No. 100-1.)

- Letter from Navy to Todd Shipyards (July 7, 1944) This letter references a contract "made to take effect as of 10 July 1944 between the Government and you, which provides, among other things, for the acquisition, installation and completion of Additional Facilities at the Shipyards of Los Angeles Shipbuilding and Drydock Corporation, San Pedro California." The letter states that it is amending a letter of 22 June 1944 and specifies that "[i]t has been determined that it would facilitate the prosecution of the war for the Government to provide certain Additional

Facilities for your use in the operation of the plant at an estimated cost of $165,000, and that such additional Facilities should be covered by Article 8 of Contract Nobs-1708." The letter creates a "Schedule 3" to the contract that sets forth hourly rates for various workers, including "asbestos workers," who are to be paid within the range of 83 cents per hour to $1.50 per hour.

(Def. Ex. G, Doc. No. 100-1.)

- Internal Memos and Correspondence - Todd Shipyards has submitted three (3) pieces of internal correspondence/memoranda from July 1944, December 1944, and December 1943, which reference the contract between Todd and the Navy regarding the Los Angeles shipyard at issue. The most informative of these reads: "A year ago - December 8, 1943, to be exact - the Navy Department appointed the Todd Shipyards Corporation to manage and operate the L.A. Shipyard at San Pedro. The Navy had taken possession of the plant under Executive Order 9400." It notes that the ship at issue in this case (USS Salisbury Sound) is in the process of being completed at the shipyard's outfitting dock. The Todd Shipyards Corporation letterhead states "Operating under contract with the U.S. Navy Department plant of Los Angeles Shipbuilding and Drydock Corporation."

  (Def. Exs. F-G, Doc. No. 100-1.)

- Bill of Sale and Assignment - A bill of sale and assignment executed on January 7, 1946 reflect an agreement of December 10, 1945, by which the Los Angeles Shipbuilding and Drydock Corporation sold its "permit and leasehold interest" to Todd-Pacific Shipyards for $10.00.

  (Def. Ex. F, Doc. No. 100-1.)

- Affidavit of Admiral Roger B. Horne, Jr. - Defendant has submitted an affidavit of Admiral Horne, which states, in short, that the Navy exercised direct and detailed control over every

aspect of the building of the USS Salisbury Sound. Admiral Horne asserts that Todd was an "employee."

(Doc. No. 99-3.)

Product Identification / Causation

Todd Shipyards argues that Plaintiff cannot establish his strict products liability claim against it because (1) Plaintiff cannot show that Todd manufactured a "product" (i.e., a ship is not a "product" for purposes of strict products liability law), and (2) Plaintiff has no evidence that Todd Shipyards failed to provide a warning, caused a design defect, caused a manufacturing defect, or otherwise caused his illness. Specifically, it argues that (a) Todd had no duty to warn about anything other than the ship itself (i.e., no duty to warn about the various products on it), and (b) Plaintiff cannot prove that there were no warnings on the ship.

In connection with its reply brief, Todd submitted objections to, inter alia, the declaration of Plaintiff's expert, Charles Ay.

No Evidence of Negligence

Todd Shipyards argues that Plaintiff cannot establish her negligence claim against it because (1) Plaintiff cannot establish that Todd breached a legal duty of care owed to Decedent, and (2) Plaintiff cannot establish that Todd's conduct was the legal or proximate cause of his alleged injury.

Government Contractor Defense

Todd Shipyards asserts the government contractor defense, arguing that it is immune from liability in this case, and therefore entitled to summary judgment, because the Navy exercised discretion and approved reasonably precise specifications for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy knew about the hazards of asbestos. In asserting this defense, Todd Shipyards relies upon the affidavits of Admiral Roger B. Horne, Jr., and Dr. Ronald Gots.

With its reply brief, Todd Shipyards has submitted objections to Plaintiff's evidence pertaining to the government contractor defense.

Sophisticated User Defense

Todd Shipyards asserts that Plaintiff's failure to warn claims are barred by the sophisticated user defense. Todd Shipyards asserts that it had no duty to warn either Plaintiff or the Navy because both were sophisticated as to the hazards of asbestos. With respect to the Navy, Todd Shipyards cites to an affidavit of Admiral Horne as evidence of the Navy's sophistication. With respect to Plaintiff, Todd Shipyards provides no evidence of Plaintiff's sophistication (either as an individual or as a member of a class or trade) and instead relies upon California caselaw in asserting that "sophistication" is imputed to Plaintiff as a matter of law by virtue of the fact that he was a member of "the specialized trade of shipbuilding and/or repair." (Def. Mem. at 39.)

B. Plaintiff's Arguments

Federal Tort Claims Act (FTCA)

Plaintiff contends that there is no evidence to support Defendant's claim that it was an employee of the Navy (as opposed to an independent contractor) when building the ship at issue. Plaintiff argues that a determination of whether an entity is an employee or an independent contractor turns on (1) the specific terms of the contract with the government, and (2) the control the government exerts pursuant to the contract. Plaintiff notes that Defendant has not attached its contract, and argues that the Executive Order and internal correspondence submitted by Todd are insufficient to establish that it was an employee of the Navy, as opposed to an independent contractor.

In discussing the difference between an employee and an independent contractor, Plaintiff cites to Logue v. United States, 412 U.S. 521, 526-527 (1973), which sets forth the "common-law distinction" between the two, and which was relied upon by the court in B&A Marine Co. v. American Foreign Shipping, Co., 23 F.3d 709, 713 (2d Cir. 1994).

Product Identification / Causation

With respect to her strict products liability claim, Plaintiff contends that Defendant manufactured a product (i.e., that a ship is a "product" within the context of strict products liability law). Plaintiff contends that a ship is comparable to a mass-produced home. In support of this contention, Plaintiff

cites to California caselaw: Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224 (Cal. App. 1969) and Price v. Shell Oil Co., 2 Cal.3d 245 (Cal. 1970). Plaintiff also cites to various cases from around the country, as well as comment d of Section 402A of the Restatement (Second) of Torts, which identifies, large vehicular and transportation products - including, inter alia, cars, airplanes, motor homes, and mobile homes - as being "products" subject to strict products liability law.

Plaintiff also contends that the asbestos to which Decedent was exposed included thermal pipe insulation that was original to the ship (i.e., installed by Defendant).

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

- Deposition Testimony of Decedent
  Decedent testified that he worked aboard the USS Salisbury Sound from February of 1962 until 1965, as a fireman apprentice, which involved doing "all types of repair work in the engine room and fire room, cleanup, [and] work[] on every piece of equipment in the fire room and engine room." He specified that he spent the majority of his time in the engine room (fourteen (14) hours per day, six (6) days per week), and approximately 40% of this time working on pumps, including removing and replacing insulation. Decedent testified that the pumps were originally installed by Todd Shipyards, and that he knew many of these pumps were the originals because of maintenance records on the ship. He testified that he worked around others who worked in the engine room disturbing and removing insulation and gaskets, and that he was responsible for cleaning up after them, and assisting them by standing within a foot or so of them. He testified that some of this insulation was from high temperature applications. He testified that the ship once went into port for repairs and that Todd Shipyards performed the work, including removing insulation from areas of the ship,

including the berthing spaces. He testified that "all" the insulation on the ship contained asbestos. He testified that at least some of this insulation was the original insulation installed when the ship was built, and that he believed this because of "the amount of paint on it."

(Pl. Ex. A, Doc. No. 111-1, pp. 31-63 and 78-82.)

- Declaration of Expert Charles Ay
  Mr. Ay states in his declaration that he worked as an insulator aboard the same ship on which Decedent worked (USS Salisbury Sound) while it was undergoing an overhaul at the Long Beach Naval Shipyard during the "early 1960s." He states that, during regular overhauls, pipe insulation was only removed as necessary to complete projects, and much of the existing insulation was not removed. He opines that "there were approximately 80,000 feet of insulated pipe aboard [the ship at issue, and that] of that 80,000 feet of insulation, approximately 25 percent, or 20,000 feet of that insulated pipe was in the engineering spaces in which the decedent testified to spending the majority of his time.... Nearly all of that insulation contained asbestos." He opines that,"while some of the original asbestos-containing pipe insulation aboard the USS Salisbury Sound would have been removed during prior repairs, 80 percent of the originally-installed asbestos-containing thermal insulation would have remained all throughout the ship."

  Mr. Ay states that "it is my opinion that the insulation Mr. Robertson described seeing removed aboard the USS Salisbury Sound, including the insulation removed from the main steam line and from the upper end of the steam drum, contained asbestos" and "Mr. Robertson was exposed to respirable asbestos fibers from asbestos-containing pipe insulation far above ambient levels during

his work aboard the USS Salisbury Sound." He also concludes that, "[g]iven the fact that workers commonly remove only the insulation necessary to perform their work, the presence of thousands and thousands of feet of asbestos-containing insulation originally installed on the ship and Mr. Robertson's testimony that he saw, just during the work that the USS Salisbury Sound underwent at Todd Shipyard, it is more likely than not that he was exposed to respirable asbestos fibers, far above ambient levels, from asbestos-containing pipe insulation installed on the USS Salisbury Sound during its original construction."

(Pl. Ex. C, Doc. No. 111-2 ¶¶ 25-32.)

- Declaration of Expert Herman Bruch, M.D. Dr. Bruch states in his declaration that each and every occupational exposure to asbestos, above background, given sufficient minimum latency, was a substantial contributing factor in the development of Mr. Robertson's disease.

(Pl. Ex. D, Doc. No. 111-3, ¶ 27.)

No Evidence of Negligence

Plaintiff contends that Todd owed Decedent a duty of reasonable care under the circumstances (which included taking steps to prevent Decedent from being exposed to respirable asbestos fibers), that Todd breached that duty by failing to warn of the various asbestos-containing products aboard its ship, and that this was a proximate cause of Decedent's death.

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, and (2) not demonstrated a genuine significant conflict between state

tort law and fulfilling its contractual federal obligations (i.e., that its contractual duties were "precisely contrary" to its duties under state tort law). Furthermore, Plaintiff asserts that the government contractor defense is not warranted because (3) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (4) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or not use) and do not reflect a considered judgment by the Navy, (5) there is no military specification that precluded warning about asbestos hazards, and (6) Defendant cannot demonstrate what the Navy knew about the hazards of asbestos relative to the knowledge of Defendant, nor that the Navy knew more than it did at the time of the alleged exposure.

To contradict the evidence relied upon by Defendant, Plaintiff cites to(a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warnings.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense (expert affidavits of Admiral Horne and Dr. Gots).

Sophisticated User Defense

Plaintiff cites to a previous decision of this Court in asserting that maritime law does not recognize a sophisticated user defense.

C. Analysis

Federal Tort Claims Act (FTCA)

In order for Defendant to be entitled to summary judgment on grounds of the FTCA, Defendant must have been working as an "employee" of the Navy, rather than as an "independent contractor." See 28 U.S.C. § 2679(b); B&A Marine, 23 F.3d at 713-14. The determination of status as an employee or an independent contractor is a legal determination for the court, on which the Defendant bears the burden of proof. See B&A Marine, 23 F.3d at 713 (legal determination for the court); Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432, 113 S. Ct. 2167, 2168 (1993)(burden of proof); Saint-Guillen v. U.S., 657 F. Supp. 2d 376, 380 (E.D.N.Y. 2009) (same).

The determination as to whether a party is an "employee" under the FTCA depends largely upon two considerations: (1) the power of the Government "to control the detailed physical performance of the contractor," and (2) whether the Government in fact supervises the "day-to-day operations." See Orleans, 425 U.S. at 815, 96 S. Ct. at 1976. See also Logue, 412 U.S. at 528, 93 S. Ct. at 2220; Leone, 910 F.2d at 50; B&A Marine, 23 F.3d at 713-14. The Court next considers the evidence presented by Defendant in an effort to establish that Todd was working as an employee of the United States Navy, as opposed to working for it as an independent contractor.

There is evidence that Todd was "appointed" by the Navy to "manage and operate" the shipyard in Los Angeles where the USS Salisbury Sound was being built. There is evidence that the U.S. Government provided additional facilities for Todd to use in building ships and informed it as to how much various workers were to be paid, including asbestos workers. However, the evidence does not make clear whether the wage rates for these workers were being determined by the Navy (as opposed to being information provided to Todd at its own request); nor does it make clear whether these workers were paid directly by the Navy (as opposed to being paid by Todd as employees of Todd acting as the independent contractor of the Navy). As such, this information does not provide meaningful insight into whether the Government "control[led] the detailed physical performance of the contractor" or supervised the "day-to-day operations" of the contractor. See Orleans, 425 U.S. at 815, 96 S. Ct. at 1976. See also Logue, 412 U.S. at 528, 93 S. Ct. at 2220; Leone, 910 F.2d at 50; B&A Marine, 23 F.3d at 713-14.

There is evidence from Admiral Horne that Todd would have had to comply with detailed military specifications in building the ship at issue (which he estimates was already fifty percent (50%) complete at the time Todd took over the building of it, at which time he opines the materials for the ship would have already been ordered, such that Todd had no real decision-making role in the construction of the ship). However, neither the existence of military specifications regarding the building of ships for the Navy - nor the fact that Todd may not have been involved in decision making regarding the materials to be used in building the ship at issue - establishes that Todd was working for the Navy as an employee, as opposed to an independent contractor. The existence of military specifications does not establish that the Navy supervised day-to-day operations at the shipyard, or that it exercised sufficient control over the general work process at the shipyard to render Todd an employee (as opposed to an independent

contractor). See Orleans, 425 U.S. at 815, 96 S. Ct. at 1976. See also Logue, 412 U.S. at 528, 93 S. Ct. at 2220; Leone, 910 F.2d at 50; B&A Marine, 23 F.3d at 713-14.

The Court therefore concludes that the evidence submitted by Todd does not suffice to establish as a matter of law that it was a Navy employee. See Antoine, 508 U.S. at 432; Saint-Guillen, 657 F. Supp. 2d at 380. Accordingly, summary judgment in favor of Defendant Todd Shipyards on grounds of immunity pursuant to § 2679(b) of the Federal Tort Claims Act is not warranted. See 28 U.S.C. § 2679(b); B&A Marine, 23 F.3d at 713-14.

The Court notes that the facts of the case relied upon by Defendant are distinguishable in several significant ways. First, in B&A Marine, the contract at issue expressly provided that the entity would serve "as [the government's] agent, and not as an independent contractor." In the case at hand, there is no such explicit indication in any of the evidence submitted by Defendant (which does not include a copy of Todd's contract with the Navy).

Second, in B&A Marine, the agreement required the entity "to manage and conduct the business for the United States in accordance with such directions, orders or regulations . . . as the United States may from time to time prescribe," and provided that the government would monitor the entity's performance. The Court found that "these provisions unquestionably establish the Government's contractual authority to control [the entity's] performance in detail." By contrast, in the case at hand, the internal memo of Todd Shipyards states only that "the Navy Department appointed the Todd Shipyards Corporation to manage and operate the L.A. Shipyard at San Pedro," but does not provide any indication that the United States would be providing directions, orders, regulations, or other prescriptions concerning how the shipyard was to be managed or operated. While Admiral Horne's affidavit indicates that the Navy exercised great control over the design of the ships built by Todd, it does not indicate that the Navy exercised great control over the day-to-day management and operation of the shipyard. Moreover, there is evidence from Plaintiff (submitted in connection with the government contractor defense) to suggest that the very aspect of the work that was core to the alleged tort at issue (provision of warnings about asbestos hazards aboard the ships built) was not controlled by the Navy.

Third, in B&A Marine, the entity seeking protection of the FTCA submitted an affidavit of the very governmental official who was assigned to supervise the entity's work, and that official

provided testimony that the government "instructed AFS in detail as to what actions it should take in advising B&A of its default." Although Defendants in the present case have an affidavit of Admiral Horne that is in some ways comparable, Admiral Horne does not purport to have been involved in or present for the specific transaction at issue with Defendant Todd Shipyards and does not address the level of detail of instruction that the Navy provided regarding the way in which the shipyard was to be managed and operated.

Finally, in B&A Marine, the court specifically noted that its decision was based in part on the fact that the plaintiff had not submitted any evidence to contradict the defendant's evidence, such that "[u]nder the circumstances, the district court was completely justified in concluding that the 'employee' status of [the entity] had been established as a matter of law." By contrast, Plaintiff in the present case has presented evidence (submitted in connection with the government contractor defense) to suggest that the aspect of the work that was core to the alleged tort(s) at issue (provision of warnings regarding the hazards of asbestos on the ships being built at the shipyard) was not controlled by the Navy. Moreover, unlike the evidence submitted in B&A Marine, the evidence submitted by Todd Shipyards in the present case (even if uncontroverted) is not sufficient to satisfy its burden in establishing that it was an employee of the Government such that it is entitled to immunity. See Antoine, 508 U.S. at 432; Saint-Guillen, 657 F. Supp. 2d at 380. As such, Defendant Todd Shipyards is not entitled to summary judgment on grounds that it was an employee of the government within the meaning of the FTCA. See Anderson, 477 U.S. at 250.

Admissibility of Plaintiff's Evidence

As a preliminary matter, before assessing the sufficiency of Plaintiff's evidence, the Court must determine whether the testimony of expert Charles Ay is admissible. Unlike the testimony submitted by Mr. Ay to oppose the motions of other Defendants in this case, the testimony submitted with respect to Defendant Todd Shipyards is based on personal knowledge and is, therefore, not unduly speculative and lacking in foundation. Mr. Ay worked as an insulator on the ship at issue during the relevant time period. (Decedent was aboard the USS Salisbury Sound in 1962 to 1965 and Mr. Ay was aboard it in the "early 1960s".) Therefore, the testimony of Mr. Ay in opposition to the motion of Todd Shipyards is not inadmissible. Accordingly, the Court will consider it in deciding Todd's motion.

The Court has considered Defendant's other objections to Plaintiff's evidence and finds that they are without merit. Accordingly, none of Plaintiff's evidence will be stricken for purposes of deciding Defendant Todd Shipyards's motion.

Product Identification / Causation

Plaintiff alleges that Decedent was exposed to asbestos from insulation aboard a ship manufactured by Defendant Todd Shipyards. However, this Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 2012 WL 4717918, at *9-10. As such, a shipbuilder defendant such as Todd Shipyards cannot face liability on a strict product liability claim. Id. Accordingly, summary judgment in favor of Defendant Todd Shipyards is warranted with respect to Plaintiff's claims against it sounding in strict product liability. Anderson, 477 U.S. at 248.

The Court next considers, separately, Defendant's potential liability and/or entitlement to summary judgment with respect to Plaintiff's claims sounding in negligence.

No Evidence of Negligence

Defendant Todd Shipyards contends that it is entitled to summary judgment on Plaintiff's negligence claims because (1) Plaintiff cannot establish that Todd breached a legal duty of care owed to Decedent, and (2) Plaintiff cannot establish that Todd's conduct was the legal or proximate cause of his alleged injury. As a matter of law, Defendant owed Plaintiff a duty of reasonable care under the circumstances. See Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 813-15, 121 S. Ct. 1927, 1929-31 (2001); East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866, 106 S. Ct. 2295, 2299 (1986) (citing Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632, 79 S.Ct. 406, 410 (1959)); Hess v. U.S., 361 U.S. 314, 323, 80 S. Ct. 341, 348 (1960) (citing Kermarec). There is evidence that Defendant not only installed some of the original insulation (and other asbestos-containing products) at issue, but that it later performed insulation removal and replacement work during Decedent's time on the ship such that Defendant's employees' conduct caused Decedent to be exposed to asbestos. Plaintiff asserts that Defendant failed to take reasonable care to protect Decedent (i.e., failed to warn him of the hazards of asbestos that it installed and/or disturbed or to take other precautions to protect him from that hazard).

Plaintiff has provided evidence that Defendant knew of the hazards of asbestos at the time the ship was built (as well as the time of Decedent's work on the ship). Defendant has not provided any evidence that it warned Decedent or took any precautions to protect him from the dangers of any asbestos that it supplied (i.e., installed) or that it was not aware of the hazards of asbestos at that time. Therefore, Defendant has not identified the absence of a genuine dispute of material fact regarding whether Defendant breached its duty of care, because a reasonable jury could conclude from the evidence that (1) Todd failed to use reasonable care (e.g., failed to take adequate safety measures, such as providing warnings), and that (2) this failure was a proximate cause of Decedent's asbestos-related illness. Accordingly, summary judgment in favor of Defendant Todd Shipyards is not warranted on this basis. Anderson, 477 U.S. at 248-50.

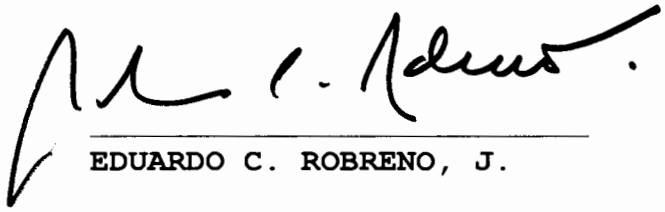
Government Contractor Defense

Plaintiff has pointed to evidence that contradicts (or at least appears to be inconsistent with) Todd Shipyard's evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with asbestos-containing products. Specifically, Plaintiff has pointed to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warnings. This is sufficient to raise genuine issues of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Todd Shipyards. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment on grounds of the government contractor defense is not warranted. See Anderson, 477 U.S. at 248-50.

Sophisticated User Defense

Defendant Todd Shipyards asserts that it is not liable for Plaintiff's injuries because both Plaintiff and the Navy (on whose ships he was exposed to asbestos while working as a civilian) were both sophisticated as to the hazards of asbestos. It is true that this Court has previously held that a manufacturer or supplier of a product has no duty to warn an end user who is "sophisticated" regarding the hazards of that product. Mack, 2012 WL 4717918, at *1, 6. However, Defendant Todd has presented no evidence that Plaintiff knew - or belonged to a class of users who, by virtue of training, education, or employment could reasonably be expected to know - of the hazards of the asbestos-containing product at issue. Defendant's assertion that Plaintiff's "sophistication" is imputed

AND IT IS SO ORDERED.



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by virtue of the fact that he was a member of "the specialized trade of shipbuilding and/or repair" - without any evidence in support of this assertion - is insufficient under maritime law to establish that Plaintiff was a sophisticated user of the asbestos-containing products which gave rise to his injury.

Moreover, the Court has previously held that the sophistication of an intermediary (or employer), such as the Navy - or the warning of that intermediary (or employer) by a manufacturer or supplier - does not preclude potential liability of the manufacturer or supplier. Id. at *6-8. Therefore, despite the fact that Defendant has presented evidence that the Navy was sophisticated as to the hazards of asbestos, summary judgment in favor of Defendant Todd Shipyards is not warranted on grounds of the sophisticated user defense. See Anderson, 477 U.S. at 248-50.

D. Conclusion

Defendant Todd Shipyards is entitled to summary judgment with respect to Plaintiff's strict product liability claims because a Navy ship is not a "product" within the meaning of strict product liability law.

With respect to Plaintiff's remaining negligence-based claims, Defendant Todd Shipyards has not established that it is entitled to summary judgment on any of the other bases it has asserted. First, Defendant has failed to satisfy its burden of establishing that it was an "employee" of the government as defined in the Federal Tort Claims Act such that it would be entitled to immunity on that basis. Second, Defendant has failed to identify the absence of a genuine dispute of material fact with respect to Plaintiff's negligence claim. Third, Plaintiff has produced evidence to controvert Defendant's proofs regarding the availability to Defendant of the government contractor defense. Finally, Todd Shipyards has not presented evidence to establish that Plaintiff was a sophisticated user of the asbestos-containing products at issue as is required to support the sophisticated user defense under maritime law. Accordingly, with respect to Plaintiff's negligence-based claims, summary judgment in favor of Defendant Todd Shipyards is not warranted.