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

DALE M. SHELLY,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	Transferred from the Northern District of California (Case No. 11-05597)
v.	:	
ASBESTOS CORPORATION LTD., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-67799-ER
Defendants.	:	

O R D E R

AND NOW, this **26th** day of **September, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Huntington Ingalls Incorporated (Doc. No. 52) is **GRANTED.**[1]

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[1] This case was transferred in December of 2011 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 Dale Shelly ("Plaintiff" or "Mr. Shelly") alleges that he was exposed to asbestos, inter alia, while serving in the Navy during the period 1964 to 1973. Defendant Huntington Ingalls, Inc. (f/k/a Northrop Grumman Shipbuilding, Inc., and hereinafter "Huntington Ingalls") built ships. The alleged exposure pertinent to Defendant Huntington Ingalls occurred during Plaintiff's work aboard:

- USS Enterprise (CVN-65)
- USS Ranger (CV-41)

Plaintiff brought claims against various defendants to recover for his asbestos-related illness. Defendant Huntington Ingalls has moved for summary judgment arguing that (1) it cannot be liable on any product liability claim because a ship is not a "product," (2) Plaintiff has no evidence of exposure for which Defendant is liable, (3) Plaintiff has no evidence of compensable injury, (4) it is immune from liability by way of the government contractor defense, and (5) it is entitled to summary judgment on grounds of the sophisticated user defense.

Defendant contends that California or maritime law applies. Plaintiff also contends that California or 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

The parties assert that either maritime law or California law applies. 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.

It is undisputed that the alleged exposures pertinent to Defendant occurred aboard a ship. Therefore, these 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. See id. at 462-63.

C. 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 v. General Electric Co., 896 F. Supp. 2d 333, 345 (E.D. Pa. 2012) (Robreno, J.). As such, a shipbuilder defendant cannot face liability on a strict product liability claim. Id.

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, 842 F. Supp. 2d 791, 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))).

II. Defendant Huntington Ingalls's Motion for Summary Judgment

"Products Liability"

Huntington Ingalls argues that, as a shipbuilder, it cannot be liable on a strict product liability claim because a Navy ship is not a "product."

Exposure / Causation

Huntington Ingalls argues that Plaintiff has no evidence of asbestos exposure for which it is liable.

No Evidence of Compensable Injury

Huntington Ingalls argues that Plaintiff has no evidence of a compensable injury, and that the evidence suggests that Plaintiff is not injured.

Government Contractor Defense

Huntington Ingalls 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, Huntington Ingalls relies upon the affidavit of Captain Wesley Charles Hewitt.

Sophisticated User Defense

Huntington Ingalls asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because the Navy was a sophisticated user. In asserting this defense, it cites to, inter alia, Johnson v. American Standard, Inc., 43 Cal.4th 56 (Cal. 2008), and relies upon the affidavit of Captain Wesley Charles Hewitt to establish that the Navy had superior knowledge regarding the hazards of asbestos.

B. Plaintiff's Arguments

"Products Liability"

In response to Defendant's argument that it can face no strict liability in a product liability case, Plaintiff argues that a Navy ship should be considered a "product."

Exposure / Causation

Plaintiff contends that he was exposed to asbestos from insulation aboard each of the ships at issue and that Defendant is liable for injuries arising from this exposure. In support of his assertion that he has identified sufficient evidence to survive summary judgment, Plaintiff cites to various pieces of evidence, which is summarized here only in pertinent part:

- Declaration of Dale Shelly
  Mr. Shelly states that he was exposed to respirable asbestos dust from insulation aboard each of the ships at issue, and that he inhaled this dust on each ship. He states that he believes much of the insulation was original. He describes the insulation as white and chalky, and identifies some of it as being used on steam pipes. Mr. Shelly specifies that he worked aboard the USS Ranger for approximately one year during major work on the ship at some point during the period 1964 to 1973. He states that he worked on the USS Enterprise approximately five (5) to seven (7) separate times, for a total of about three (3) to six (6) months, during the period 1964 to 1973.

  (Pl. Ex. A, Doc. No. 61-1.)

- Declaration of Expert Charles Ay
  Mr. Ay provides expert testimony, opining that approximately 80% of the insulation on the ships at issue would have been original insulation at the time of Plaintiff's alleged exposure. Mr. Ay states that he worked aboard the USS Ranger in the "early to mid-1970s," and the USS Enterprise in the "late 1970's." He states that he saw asbestos insulation aboard these ships.

  (Pl. Ex. B, Doc. No. 61-1.)

No Evidence of Compensable Injury

Plaintiff contends that although he is still somewhat active, he has significant injury and disability as a result of his alleged asbestos exposure. He cites to medical evidence in the record providing diagnoses of more than one asbestos illness.

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. 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 explicitly permitted (and perhaps even required) warnings.

Sophisticated User Defense

Plaintiff asserts that Huntington Ingalls is not entitled to summary judgment on grounds of the sophisticated user defense because (1) Huntington Ingalls has not adduced evidence that Plaintiff was a "sophisticated user," and (2) Huntington Ingalls is really arguing for a "sophisticated intermediary defense" (which Plaintiff contends is not recognized by maritime law).

C. Analysis

"Products Liability"

Plaintiff alleges that he was exposed to asbestos from insulation aboard several ships manufactured by Defendant Huntington Ingalls. However, this Court has held that a Navy ship is not a "product" for purposes of application of strict product liability law. Mack, 896 F. Supp. 2d at 345. As such, a shipbuilder defendant such as Huntington Ingalls cannot face liability on a strict product liability claim. Id. Accordingly, summary judgment in favor of Defendant 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.

Exposure / Causation

Defendant Huntington Ingalls contends that it is entitled to summary judgment on Plaintiff's negligence claims because Plaintiff cannot establish that he was exposed to asbestos for which Defendant is liable. Plaintiff has provided evidence that he was exposed to respirable dust from chalky, white insulation aboard the USS Ranger and the USS Enterprise, some of which was used on steam piping. He states that he believes some of the insulation on each ship was the insulation originally installed on the ship. Plaintiff's testimony is that he worked aboard the USS Ranger for approximately one year during

major work on the ship at some point during the period 1964 to 1973. He states that he worked on the USS Enterprise approximately five (5) to seven (7) separate times, for a total of about three (3) to six (6) months, during the period 1964 to 1973. Plaintiff has also presented opinion testimony from expert Charles Ay that approximately 80% of the insulation on the ships at issue would have been original insulation at the time of Plaintiff's alleged exposure. Mr. Ay states that he worked aboard the USS Ranger in the "early to mid-1970s," and the USS Enterprise in the "late 1970's."

(i) Exposure Aboard the USS Ranger

Importantly, however, there is no evidence that Mr. Ay was on the USS Ranger at the same time as Plaintiff or after Plaintiff's alleged exposure thereon. This is because both Plaintiff's and Mr. Ay's testimony as to the dates of alleged exposure on the ship is vague and spans a period of several years. With respect to the USS Ranger, Plaintiff states that he was exposed during a period of approximately one (1) year at some point during the period 1964 to 1973. Mr. Ay states that he was aboard this ship in the "early mid-1970s." Given this evidence, it is entirely possible that Mr. Ay was aboard the ship prior to Plaintiff's alleged exposure thereon. Plaintiff relies solely on Mr. Ay's testimony to establish that the insulation he was exposed to contained asbestos. However, it cannot be concluded from the evidence that the asbestos-containing insulation which Mr. Ay saw on the ship was still the same insulation (as opposed to replacement) to which Plaintiff was exposed. This is particularly true in light of the fact that Mr. Ay concedes that approximately 20% of the insulation would have been replacement insulation at the time of Plaintiff's alleged exposure. Moreover, although Plaintiff states that some of the insulation was original to the ship, there is no evidence that this particular insulation (or any of the insulation to which he was exposed) contained asbestos. In short, the evidence does not establish that Plaintiff was exposed to respirable asbestos insulation aboard the ship. As such, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos aboard this ship such that it was a substantial factor in the development of his illness, because any such finding would be based on conjecture. See Conner, 842 F. Supp. 2d at 801; Lindstrom, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted with respect to Plaintiff's claims against it sounding in negligence and arising from this source of alleged exposure. Anderson, 477 U.S. at 248-50.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

(ii) Exposure Aboard the USS Enterprise

With respect to the USS Enterprise, Plaintiff states that he was exposed on approximately five (5) to seven (7) separate occasions, for a total of about three (3) to six (6) months, during the period 1964 to 1973. Mr. Ay states that he was aboard the USS Enterprise in the "late 1970s." Although Mr. Ay states that he saw asbestos insulation aboard this ship (which would have been after Plaintiff's alleged exposure), he concedes that approximately 20% of the insulation would have been replacement insulation at the time of Plaintiff's exposure. In addition, although Plaintiff states that some of the insulation appeared to be the original insulation, there is no evidence that this particular insulation (or any other insulation to which he was exposed) contained asbestos. In short, the evidence does not establish that Plaintiff was exposed to respirable asbestos insulation aboard the ship. As such, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos aboard this ship such that it was a substantial factor in the development of his illness, because any such finding would be based on conjecture. See Conner, 842 F. Supp. 2d at 801; Lindstrom, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted with respect to Plaintiff's claims against it sounding in negligence and arising from this source of alleged exposure. Anderson, 477 U.S. at 248-50.

In light of this determination, the Court need not reach any of Defendant's other arguments.

D. Conclusion

Summary judgment in favor of Defendant is warranted with respect to all of Plaintiff's claims against it.