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

JAMMIE C. TYNDALL, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
	:	Transferred from the District of South Carolina (Case No. 10-00343)
v.	:	
CHRISTOPHER H. WILLIS, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-67428-ER
Defendants.	:	

O R D E R

AND NOW, this **2nd** day of **December, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Lufkin Industries, Inc.** (Doc. No. 62) is **GRANTED**; its Amended Motion for Summary Judgment (Doc. No. 79) is **DENIED** as moot.[1]

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[1] This case was transferred in May of 2010 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.

Plaintiffs allege that James ("Jimmy") Carawan ("Decedent" or "Mr. Carawan") was exposed to asbestos during (1) his work aboard a tugboat that ran along the Eastern seaboard (as a deckhand, first mate, and, ultimately, captain), and also (2) his home construction work in North Carolina. Mr. Carawan developed mesothelioma and died from that illness. The alleged exposure pertinent to Defendant Lufkin Industries, Inc. ("Lufkin") occurred aboard the tugboat, including while it was docked outside of Charleston, South Carolina for repairs.

Plaintiffs brought claims against various defendants in South Carolina federal court. Defendant Lufkin has moved for summary judgment, arguing that (1) there is insufficient product identification evidence to support a finding of causation with respect to its product(s), and (2) Plaintiffs' claims are barred by the South Carolina door-closing statute.

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

Although the parties agree that the alleged exposure pertinent to Defendant occurred aboard a tugboat traveling along the Eastern seaboard (including while the boat was docked for repair work), the parties agree that South Carolina substantive law applies to this case. 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.

The alleged exposure pertinent to Defendant occurred aboard a ship. Therefore, this exposure was 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 Plaintiffs' claims against Defendant. See Conner, 799 F. Supp. 2d at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has 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., 842 F. Supp. 2d 791, 801 (E.D. Pa. 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, 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. 198)(citing Restatement (Second) of Torts, § 402A (1965))).

II. Defendant Lufkin's Motion for Summary Judgment

A. Defendant's Arguments

In its first motion, Defendant contends that Plaintiffs' evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness.

Also in this motion, Defendant contends that Plaintiffs' claims (which were filed in federal court in South Carolina) are barred by the South Carolina door-closing statute, as set forth at S.C. Code Ann. § 15-5-150.

Approximately three months after the filing of its first motion, Defendant filed an "Amended Motion for Summary Judgment." However, this motion sets forth no new arguments or evidence and merely "reaffirms and incorporates" the previous motion. (Am. Mot. at 3.)

B. Plaintiffs' Arguments

Plaintiffs contend that they have identified sufficient evidence of product identification/causation to survive summary judgment. In support of this assertion, Plaintiffs cite to a lengthy list of evidence, which the Court need not detail herein. In short, Plaintiffs concede (at least implicitly) that there is no specific evidence that Decedent worked directly with or was exposed to a clutch from Lufkin reduction gear (which was used in engines on the ship) on any particular occasion (much less that any such exposure was to an original clutch supplied by Defendant with the reduction gear, as opposed to a replacement clutch manufactured and supplied by another entity). Instead, Plaintiffs rely generally on evidence that (1) Decedent worked aboard the tugboat for over twenty years, (2) the tugboat was small and relatively cramped, with confined spaces - especially the engine room, (3) Decedent and others walked through the engine room regularly, usually three to four times per day, (4) there was visible dust in the air in the engine room, (5) engines with Lufkin reduction gear were aboard the ship (and in the engine room), (6) Lufkin reduction gear (used in the engines) had asbestos-containing clutches, and (7) maintenance and repair work must have been done on the engines, including clutch removal and replacement work, which would have created respirable dust, to which people on the boat would have been exposed.

In response to Defendant's argument regarding the South Carolina door-closing statute, Plaintiffs acknowledge that, under the statute, a non-resident plaintiff may not bring an action against a non-resident corporation unless the cause of action arose within the state. They also acknowledge that neither any party to this action nor Decedent was a resident of South Carolina at the time of the filing of this action there (or any time before or after). However, Plaintiffs contend that the statute does not preclude their claims against Defendant because: (1) at least part of the claim(s) against Defendant arose in South Carolina (while the ship was docked there for repair work), and, even if this were not the case, (2) there is supplemental jurisdiction conferred by the federal claims (including Jones Act claims) against certain Defendant(s) (over which this Court has federal jurisdiction) and/or (3) under Fourth Circuit precedent, set forth in Szanty v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), federal interests in allowing the claim(s) to go forward against Defendant outweigh South Carolina's state interests in application of its door-closing statute, such that the claims should not be barred.

C. Analysis

To begin, the Court concludes that Plaintiffs' claims against Defendant are not barred by the South Carolina door-closing statute. The claims pertinent to Defendant are common law negligence (and other tort) claims. (See Am. Compl. ¶¶ 45-79, ECF Doc. No. 37.) All of the alleged exposure pertinent to Defendant arose aboard a tug boat at sea (including a period where it was docked outside of South Carolina for repair work). Therefore, the claims are maritime common law negligence claims, subject to maritime law. See Conner, 799 F. Supp. 2d 455; Deuber, 2011 WL 6415339, at *1 n.1.

The Supremacy Clause of the United States Constitution states:

> **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;** and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land;** and the Judges in every State shall be bound thereby, **any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**

U.S. Const. Art. VI, cl. 2 (emphasis added). Federal common law (including general maritime law) is created pursuant to the powers conferred upon federal courts by Article III of the Constitution. See U.S. Const. Art. III, § 2, cl. 1; see also American Dredging Co. V. Miller, 510 U.S. 443, 446, 455, 114 S. Ct. 981, 984, 989 (1994). Federal common law claims are thereby subject to the protections of the Supremacy Clause. See U.S. Const. Art. VI, cl. 2 and Art. III, § 2, cl. 1; see also County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 240-41, n.13, 105 S. Ct. 1245, 1254-55 (1985). Accordingly, the South Carolina door-closing statute cannot and does not preclude Plaintiffs from filing their federal claims in a federal court in South Carolina (or anywhere else). Having established that the statute does not bar Plaintiffs' claims, the Court next considers the sufficiency of Plaintiffs' evidence regarding product identification/causation.

Plaintiffs allege that Decedent was exposed to asbestos from clutches used in Lufkin reduction gear (which were used in engines aboard the tugboat) on which Decedent worked from 1972 to 1994. There is no evidence that Decedent was exposed to dust from

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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a clutch in Lufkin reduction gear on any particular occasion (much less that any such exposure was to an original clutch supplied by Defendant with the engine, as opposed to a replacement gasket manufactured and supplied by another entity). Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from a product manufactured or supplied by Defendant such that it was a substantial factor in the development of his mesothelioma, because any such finding would be based on conjecture. See Lindstrom, 424 F.3d at 492. The fact that Decedent was present in the same area where repair work on engines (which contained Lufkin reduction gear) was performed is insufficient to raise a genuine dispute of material fact regarding alleged exposure to asbestos-containing clutches for which Defendant Lufkin is liable. Accordingly, summary judgment in favor of Defendant is warranted. Anderson, 477 U.S. at 248.

In light of this determination, Defendant's "Amended Motion for Summary Judgment" (albeit lacking in any new substantive arguments) is moot, and the Court need not determine whether, as a matter of procedure, Defendant was permitted to file an amended motion three months after the filing of its initial motion.