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

SALLY GROS VEDROS, et al.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	Transferred from the Eastern District of Louisiana (Case No. 11-01198)
v.	:	
NORTHROP GRUMMAN SHIPBUILDING, INC., et al.,	:	E.D. PA CIVIL ACTION NO. 2:11-67281-ER
Defendants.	:	

O R D E R

AND NOW, this **31st** day of **January, 2013**, it is hereby **ORDERED** that the Motions for Summary Judgment (and/or Partial Summary Judgment) of Defendants Continental Insurance Co. (Doc. No. 49); American Employers Insurance Company, Eagle Inc., and OneBeacon America Insurance Company (Doc. No. 53); McCarty Corporation (Doc. No. 54); Hopeman Brothers, Inc. (Doc. No. 55); CBS Corporation(Doc. No. 57); Foster-Wheeler LLC (Doc. No. 58); General Electric Company (Doc. No. 59); American Employers Insurance Company, American Motorists Insurance Company, Albert Bossier, Jr., J. Melton Garrett, Northrop Grumman Shipbuilding, Inc., and OneBeacan American Insurance Company (Doc. No. 60); Albert Bossier, Jr., J. Melton Garrett, and Northrop Grumman Shipbuilding, Inc. (Doc. No. 61); American Employers Insurance Company, American Motorists Insurance Company, Albert Bossier, Jr., J. Melton Garrett, and OneBeacan American Insurance Company

(Doc. No. 63); Bayer Cropscience, Inc. (Doc. No. 64); Plaintiffs (Doc. No. 68); and Maryland Casualty Company (Doc. No. 74) are **DENIED**, with leave to refile in the transferor court after remand.[1]

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

Plaintiffs allege that their mother, Sally Vedros (who was alive when the action was commenced)("Decedent" or "Mrs. Vedros") was exposed to asbestos in two ways: (1) asbestos brought home on the clothes of her father (Alton Vedros), which she laundered regularly, while he worked as a welder at the Avondale Shipyard in New Orleans (Northrop Grumman's main shipyard) during the period 1943 to 1976, and (2) asbestos to which Mrs. Vedros was directly exposed while she worked in the purchasing department of the shipyard during the period 1960 to 1963. Mrs. Vedros developed mesothelioma and died from that illness.

Plaintiffs have brought claims against various defendants. Various defendants ("Defendants") have moved for summary judgment arguing that (1) there is insufficient evidence to support a finding of causation with respect to any product for which it is liable, and (2) with respect to certain defendants, the "bare metal defense" entitles them to summary judgment. Some of the Defendants have also sought summary judgment on grounds that (3) Louisiana law does not recognize a substantive tort for civil conspiracy, (4) Louisiana law does not recognize a cause of action for fraud in personal injury and death cases, (5) (a) Louisiana law does not afford strict liability claims against executive officer defendants, and, even if it did, (b) the alleged executive officer defendants did not have ownership or custody ("garde") of the allegedly defective asbestos products, (6) Defendants cannot face strict liability as a premises owner because there was no defect inherent or permanent in the Avondale land or building (i.e., premises), and (7) under Louisiana law, the third-party fault of the asbestos product manufacturers is a complete bar to any strict liability. The parties agree that Louisiana 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

Most of the parties agree that Louisiana substantive law applies. Some Defendants assert that maritime law applies to at least some of Plaintiffs' claims. 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.

Some of the alleged exposures at issue occurred aboard ships, and some of the alleged exposure at issue occurred on land. See Conner, 799 F. Supp. 2d 455. Accordingly, it is likely that maritime law is applicable to certain of Plaintiff's claims against Defendants, while Louisiana law is applicable to other of Plaintiff's claims against Defendants. See id. at 462-63. It will also be necessary to determine what law applies to Plaintiff's claims of "take-home" exposure.

III. Defendants' Motions for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation / Bare Metal Defense

Defendants argue that there is insufficient product identification evidence to support a jury finding of causation with respect to any product(s) for which they are liable. Specifically, Defendants assert that there is no evidence that (1) Plaintiff was exposed to asbestos from any such product, or that (2) Plaintiff's father was exposed to asbestos from any such product. (3) Some of the defendants also argue that Louisiana law requires a showing of "frequency, regularity, and proximity" of asbestos exposure in order for the exposure to be deemed a "substantial factor" in causing a plaintiff's illness.

Defendants (1) CBS Corporation, (2) Foster Wheeler LLC, and (3) General Electric Company assert that they are entitled to summary judgment on grounds of the so-called "bare metal defense."

No Cause of Action for (1) Fraud or (2) Conspiracy

Some of the Defendants argue that (1) Louisiana law does not recognize a substantive tort for civil conspiracy, (2) Louisiana law does not recognize a cause of action for fraud in personal injury and death cases. With respect to the fraud issue, Defendants assert that "[a] cause of action for fraud arises only out of a vice of consent for a contract, and the plaintiffs have not alleged - nor does any evidence in the record show - that the decedent had a contract with any of the Avondale Interests." (Def. Mem. at 2-3.)

No Strict Liability for Executive Officer Defendants

Some of the Defendants argue that Louisiana law does not allow strict liability for executive officers. Defendants rely upon Rando v. Anco Insulations, Inc., 16 So.3d 1065, 1084 (La. 2009), which they state approves the reasoning of Loescher v. Parr, 324 So.2d 441, 447 (La. 1974). Defendants also cite Canter v. Koehring Co., 283 So.2d 716, 721 n.6 (La. 1973), which they contend makes clear that "in order to establish executive officer liability there must be proof of 'personal, actual, or constructive knowledge of the alleged defect at the time of the accident'." (Def. Mem. at 3.) Defendant asserts that, under Louisiana law, any liability of an executive officer must be based only in negligence (not strict liability).

Moreover, these Defendants contend that, even if executive officers can be liable, the alleged Defendant-executive officers cannot be liable because they did not have the requisite ownership or custody (of the asbestos products) required by law. In support of this contention, Defendants rely primarily upon: (1) Louisiana Civil Code ("La. C.C.") Art. 2317 and 2322, (2) Loescher, (3) Haydel v. Hercules Transport, Inc., 654 So.2d 408, 415 (La. App. (1st Cir.) 1995).

No Strict Liability on a Premises Owner Theory

Some Defendants argue that they cannot be liable in strict liability on a premises owner theory of liability because there was no defect inherent or permanent in the Avondale land or building (i.e., premises). Defendants contend that, under Louisiana law, it is well-established that a hazardous substance on the premises does not constitute a defect in the premises for

purposes of strict liability. Defendants rely primarily upon: (1) La. C.C. 2322 and (2) Collins v. Christophe, 479 So.2d 537, 542 (La. App. (1st Cir.) 1995), writ denied, 483 So.2d 1021 (La. 1986).

Strict Liability Barred by 3rd Party (Manufacturers') Liability

Some Defendants argue that, under Louisiana law, the manufacturer defendants' liability precludes their strict liability (i.e., is a bar to any strict liability on their part). In support of this assertion, Defendants rely primarily upon: (1) Home Ins. Co. Of Illinois v. Nat'l Tea Co., 577 So.2d 65, 76 (La. App. (1st Cir.) 1990), aff'd in part, rev'd in part on other grounds, 588 So.2d 361 (La. 1991), (2) Loescher, and (3) Arceneaux v. Domingue, 365 So.2d 1330, 1335 (La. 1978).

B. Plaintiff's Arguments

Product Identification / Causation / Bare Metal Defense

In response to Defendants' assertion that there is insufficient product identification evidence to establish causation with respect to any product(s) for which they are potentially liable, Plaintiffs contend that they have identified sufficient evidence to survive summary judgment.

Plaintiffs do not specifically address Defendants' argument regarding the "bare metal defense," contending generally, instead, that there is sufficient product identification/causation evidence to survive summary judgment.

No Cause of Action for (1) Fraud or (2) Conspiracy (Louisiana Law)

With respect to the fraud claims, Plaintiffs argue that their fraud claim arises in tort (not contract as Defendants argue), and that, under Louisiana Civil Code article 1953, "[f]raud may also result from silence or inaction." (Pl. Opp. at 4.) Plaintiffs assert that Defendants' silence as to asbestos, hazards of it which it was aware constituted fraud. Plaintiffs rely upon Bunge Corp. v. GATX Corp., 557 So.2d 1376, 1383 (La. 1990). Plaintiffs cite to evidence from (1) a Defendant's corporate representative (Danny Joyce) as to Defendants' knowledge of asbestos hazards dating back as far as the 1940's, and (2) Defendants' former executive (Ollie Gatlin) as to Defendants' knowledge of asbestos hazards dating back as far as the 1960's.

With respect to the alleged conspiracy claims (construed by some Defendants to be present in the Complaint), Plaintiffs state that they are not bringing conspiracy claims.

No Strict Liability for Executive Officer Defendants

Plaintiffs argue that Louisiana law allows strict liability claims against executive officers. They rely upon Thomas v. W&W Clarklift, Inc., 444 So.2d 1300, 1303 (La. App. (4th Cir.) 1984). Further, they contend the executives can be liable merely as individuals (without regard to their status as executives) because they were "custodians" for the asbestos products/items that injured Decedent. For this, they cite Thomas, Loescher, and Fonseca v. Marlin Marine Corp., 410 So.2d 674 (La. 1981). Plaintiffs further contend that they are not required to show any defendant's knowledge of the defect (because it is a strict liability claim), and that this is made clear by Summerville v. La. Nursery Outlet, Inc., 676 So.2d 238, 240 (La. App. (1st Cir.) 1996).

No Strict Liability on a Premises Owner Theory

Plaintiffs argue that Defendants (both the corporation and the executive officers) are liable for defects on their premises under La. C.C. 2317 and/or 2322, which they contend impose strict liability based upon status as an owner or custodian (rather than based on personal fault). Furthermore, Plaintiffs assert that the executive are not only liable for the exposure that occurred on the premises, but also for Decedent's exposure at home (doing laundry) as a result of the asbestos on their premises. They cite Zimko.

Strict Liability Barred by 3rd Party (Manufacturers') Liability

Plaintiffs argue that third party fault is not a defense to strict liability. They contend that the fault of a third party is only a defense in situations where that third party was the sole cause of the harm. In support of their argument, Plaintiffs rely primarily upon: (1) Loescher, (2) Shipp v. City of Alexandria, 395 So.2d 727 (La. 1981), and (3) Myers v. Burger King Corp., 638 So.2d 369, 378 (La. App. (4th Cir.) 1994).

C. Analysis

This MDL Court is charged under 28 U.S.C. § 1407 to coordinate or consolidate (i.e., simplify) pre-trial issues.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Section 1407(a). While the MDL Court has the power to decide summary judgment motions, the Court exercises discretion concerning whether summary judgment motions should instead be adjudicated by the transferor court. See Section 1407(b). This Court, in exercising that discretion, has generally proceeded to adjudicate issues raised on summary judgment, except when (1) state law is unsettled and, as a foreign court, would have to predict how the state's highest court would resolve issues that are unsettled or novel, or (2) as a matter of judicial economy, the issues could be best addressed by the transferor court, as the court closer to the parties and the issues involved.

The Court has determined that this case falls under the second of the exceptions delineated above because there are numerous parties raising complicated issues of law and fact which are interconnected and about which this Court lacks experience and familiarity. Although not all of the issues presented are unsettled, the Court deems it appropriate to remand the entire case rather than running the risk that, in deciding some but not all issues raised, it would alter the parties' positions in the case, affecting the outcome with respect to some parties. By doing so, the Court will avoid prematurely creating a "law of the case" on an issue potentially interrelated with other issues it has not decided.

In short, the case will be remanded in its entirety to the transferor court in Louisiana. Accordingly, the parties' motions for summary judgment are denied, with leave to refile in the transferor court after remand. See, e.g., Faddish v. CBS Corp., No. 09-70626, 2010 WL 4159238 (E.D. Pa. Oct. 22, 2010) (Robreno, J.).