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

THOMAS S. RIDDLE and GLORIA F. RIDDLE,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	
FOSTER WHEELER, LLC,	:	E.D. PA CIVIL ACTION NO. 2:11-cv-00318-ER
Defendants.	:	

O R D E R

AND NOW, this **24th** day of **May**, **2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Crane Co.** (Doc. No. 184) is **GRANTED.**[1]

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[1] This case originated in Pennsylvania state court. In January of 2011, it was removed to the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Thomas Riddle was born in Tennessee, grew up in Indiana. He served in the Navy from 1960 to 1969, during which period he spent most of his time aboard ships, but spent a few months living in Pennsylvania. After being discharged from the Navy, he returned to Indiana, where he worked at a General Motors ("GM") plant for approximately 32 years. After retiring from GM in 2005, Plaintiff moved to Arizona, where he now resides. Defendant Crane Co. ("Crane Co.") manufactured valves. The alleged exposure pertinent to Defendant Crane Co. occurred in the Navy and also during his work in Indiana for GM.

Plaintiff was diagnosed with lung cancer in 2010. He was deposed for two days in March of 2011.

Plaintiff has brought claims against various defendants. Defendant Crane Co. has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification evidence to establish causation with respect to its product(s), and (3) it is

immune from liability by way of the government contractor defense. Crane Co. contends that maritime (and possibly also Indiana) law applies. Plaintiff contends that Arizona 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 (State Law vs. Maritime Law)

Crane Co. contends that maritime, and possibly also Indiana, substantive law applies. Plaintiff contends that Arizona substantive law applies. However, Plaintiff conceded during oral argument that, if Indiana substantive law applies, his land-based exposure claims are barred by Indiana's statute of repose. Plaintiff also conceded that, if Pennsylvania choice of law rules apply (as set forth in Norman v. Johns-Manville Corp., 406 Pa. Super. 103, 108-11 (Pa. Super. Ct. 1991)), then Indiana law applies to land-based claims. Having established these concessions, the Court next determines what substantive law applies to claims against Crane Co.

Defendant Crane Co. has asserted that maritime law is applicable with respect to 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
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> 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.
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> Connection Test
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> 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.

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

(i) Claims Arising From Sea-Based Exposure (Navy)

It is undisputed that the alleged exposure pertinent to Defendant Crane Co. that occurred during Plaintiff's period of Navy service was 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 Crane Co. that arise from exposure during his Navy service. See Conner, 799 F. Supp. 2d at 462-63.

(ii) Claims Arising From Land-Based Exposure (GM)

It is undisputed that the alleged exposure pertinent to Crane Co. that occurred during Plaintiff's post-Navy civilian work at GM occurred on land. Therefore, the alleged exposure pertinent to this defendant was during land-based work. See Conner, 799 F. Supp. 2d 455. Because the parties disagree as to what state's law governs land-based claims, the Court will next determine which state's law applies.

In deciding what substantive law governs a claim based in state law, a federal transferee court applies the choice of law rules of the state in which the action was initiated. Van Dusen v. Barrack, 376 U.S. 612, 637-40 (1964)(applying the *Erie* doctrine rationale to case held in diversity jurisdiction and transferred from one federal district court to another as a result of defendant's initiation of transfer); Commissioner v. Estate of Bosch, 387 U.S. 456, 474-77 (1967)(confirming applicability of *Erie* doctrine rationale to cases held in federal question jurisdiction). Therefore, because this case was initiated in Pennsylvania, Pennsylvania choice of law rules must be applied in determining what substantive law to apply to this case. For the sake of clarity, the Court notes further that, for purposes of a choice of law analysis, a statute of repose is substantive in nature. DePaolo v. Dept. of Public Welfare, 865 A.2d 299 (Pa. Cmwlth. 2009); see also Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., – U.S. – , 130 S. Ct. 1431, 1471 (2010)(citing Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)(holding that statutes of limitations are matters of substantive law in diversity suits)).

The Superior Court of Pennsylvania has previously set forth the choice of law analysis for an asbestos case, and it did so in Norman. Therefore, Norman governs the choice of law issue in this case. As noted herein, Plaintiff has conceded that, if Pennsylvania choice of law rules apply (as set forth in Norman), then Indiana substantive law applies to Plaintiff's claims arising from land-based exposure. Therefore, Indiana substantive law applies to these claims. Plaintiff also conceded that if Indiana substantive law applies, the claims arising from land-based exposure are barred. Therefore, Plaintiff's claims arising from land-based exposure are dismissed.

C. 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.

D. 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.

II. Defendant Crane Co.'s Motion for Summary Judgment

The Court has determined in its choice of law analysis that the only claims not barred by Indiana's statute of repose are those arising from alleged sea-based exposure, which are thus governed by maritime law. Defendant's assertion of the government contractor defense pertains to Plaintiff's claims governed by maritime law.

Crane Co. asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendants for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy knew about asbestos and its hazards. In asserting this defense, Crane Co. relies upon on the affidavits of Dr. Samuel Forman, Admiral David Sargent, and Anthony Pantaleoni (a company witness).

Plaintiff has submitted evidence that contradicts Defendant's proofs as to the government contractor defense, including military specifications, deposition testimony and/or affidavits of experts Adam Martin, Captain Arnold P. Moore, Jr. and Captain William A. Lowell. (Plaintiff has argued that, where the expert testimony is in the form of deposition testimony, it is the same as an affidavit for purposes of summary judgment.) However, Plaintiff has conceded that (1) much (if not all) of the evidence was obtained from the docket of another case (or cases) to which Plaintiff was not a party – including Willis, No. 09-91449, and (2) Plaintiff has not retained (or disclosed) in this case the experts whose evidence was submitted to oppose Defendant's motion for summary judgment on grounds of the government contractor defense. As a result, Plaintiff does not have experts who are available to testify at trial to oppose Defendant's government contractor defense. Consequently, the expert affidavits (and deposition testimony that Plaintiff

contends is, in essence, an affidavit) do not satisfy the requirements of Federal Rule of Civil Procedure 56(c)(4), which requires that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The Court therefore finds that Plaintiff in this case sits in the position of the plaintiff in Faddish, lacking evidence that will suffice to oppose Defendant's motion for summary judgment on grounds of the government contractor defense. Accordingly, Defendant Crane Co.'s motion for summary judgment on grounds of the defense is granted and Plaintiff's claims arising from alleged exposure during sea-based work (i.e., governed by maritime law) are dismissed.