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it is entitled to summary judgment based upon the sophisticated user defense, and (3) Plaintiff's claims are preempted by OSHA.

## **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**

3M contends that Pennsylvania substantive law applies. Plaintiff contends that Arizona substantive law applies, as he contends Arizona has the greatest interest in the outcome of the case. 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 3M.

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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). The parties agree that Plaintiff's alleged exposure pertinent to Defendant 3M occurred during two distinct periods of different types of work (land-based work at GM and sea-based work during Plaintiff's Navy service). Therefore, the Court will consider these periods of exposure separately in determining what law(s) applies.

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

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.

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

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). 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

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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 the alleged exposure pertinent to Defendant 3M that occurred during Plaintiff's period of Navy service was aboard ships (either at sea or during construction at the shipyard). 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 3M that arise from this alleged exposure. See Conner, 799 F. Supp. 2d at 462-63. The Court will therefore apply maritime law with respect to this alleged exposure in deciding 3M's motion.

## **II. Defendant 3M'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. Under maritime law, a plaintiff who alleges that a product was defective must provide proof that the product was not safe and caused injury to the plaintiff. See Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375-76 (6th Cir. 2001); Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at \*3 (E.D. Pa. Feb. 1, 2012) (Robreno, J.). This is true regardless of whether the claim sounds in negligence or strict liability. Stark, 21 F. App'x at 375-76; Conner, 2012 WL 288364, at \*3.

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Plaintiff alleges that Defendant 3M is liable for his lung cancer because 3M masks provide a false sense of security and do not actually protect completely against asbestos hazards. Plaintiff's claims governed by maritime law are based only on alleged asbestos exposure during his Navy service (i.e., not alleged exposure during his work at GM). However, logic dictates that if Plaintiff was exposed to asbestos at times when he was not wearing a 3M mask, then it will be impossible for him to prove that 3M masks caused his lung cancer. Plaintiff alleges that he was exposed to asbestos both during his service in the Navy and during his work at GM. Plaintiff conceded at his deposition in this case that he doesn't recall whether masks or respirators were available for use when he began working at GM in 1973. (Def. Ex. B, Doc. No. 138-1, pages 225-26.) Plaintiff also testified that he did not know when masks or respirators did become available. (Id.) He also testified that he could not remember how often he would have worn a mask. (Id.) Most importantly, Plaintiff testified at a deposition in connection with a previous action that he did not wear a mask during his service in the Navy. (Def. Ex. C., Doc. No. 138-1, page 86.) Therefore, even if it is true, as Plaintiff alleges, that 3M masks are defective because they create a false sense of security, Plaintiff will be unable to establish that his lung cancer was caused by asbestos to which he was exposed during his Navy service while wearing and relying on a 3M mask. Accordingly, there is no genuine dispute of material fact pertaining to Plaintiff's claims arising from sea-based exposure and summary judgment in favor of Defendant 3M is warranted on these claims. See Stark, 21 F. App'x at 375-76; Conner, 2012 WL 288364, at \*3; Anderson, 477 U.S. at 248.