

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

BARRY KELLY and,  
MOLLY KELLY,

Plaintiffs,

v.

CBS CORPORATION,  
ET AL.,

Defendants.

: CONSOLIDATED UNDER  
: MDL 875  
:  
:

: Transferred from the  
: Northern District of  
: California  
: (Case No. 11-03240)

**FILED**

AUG 18 2014

MICHAELE KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

: E.D. PA CIVIL ACTION NO.  
: 2:11-67269-ER ✓  
:

**O R D E R**

**AND NOW**, this 18th day of **August, 2014**, it is hereby  
**ORDERED** that the Motion for Summary Judgment of Defendant Air &  
Liquid Systems Corporation (Doc. No. 209) is **GRANTED**.<sup>1</sup>

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<sup>1</sup> This case was transferred in August 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 Barry Kelly ("Mr. Kelly") alleges that he was exposed to asbestos while serving as a propulsion assistant in the Navy. Defendant Air & Liquid Systems Corporation (hereinafter "Buffalo" or "Buffalo Pumps") manufactured and supplied pumps (under the name Buffalo Pumps), which were used aboard vessels. The alleged exposure pertinent to Defendant Buffalo Pumps occurred during Mr. Kelly's work aboard:

- USS Downes (DE-1070) - 1973 to 1975

Plaintiff brought claims against various defendants. Defendant Buffalo has moved for summary judgment, arguing that (1) there is insufficient evidence to establish causation with respect to any product for which it can be liable, (2) it has no duty to warn about any product or component part that it neither manufactured nor supplied. (3) It also asserts that it is entitled to summary judgment on Plaintiff's punitive damages claim. The parties assert that maritime law applies.

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**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 maritime law applies. 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

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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

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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 Plaintiff's alleged exposure to Defendant's product(s) occurred while aboard a ship. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant. See id. 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., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at \*7 (E.D. Pa. Feb. 1, 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 v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012) (Robreno, J.), 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)).

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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 Buffalo Pumps's Motion for Summary Judgment**

### **A. Defendant's Arguments**

#### Product Identification / Causation / Bare Metal Defense

Defendant Buffalo Pumps argues that Plaintiff's product identification evidence is insufficient and that, under maritime law, it has no duty to warn about and cannot be liable for injury arising from any product or component part that it did not manufacture or supply.

#### Punitive Damages

Defendant contends that punitive damages are not proper because Plaintiff has not established that Defendant acted with malice, fraud, or oppression.

### **B. Plaintiff's Arguments**

#### Product Identification / Causation / Bare Metal Defense

In support of his assertion that he has identified sufficient evidence of product identification/causation to survive summary judgment, Plaintiff cites to the following evidence:

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- Declaration of Plaintiff  
Plaintiff provides testimony that he was exposed to respirable dust from gaskets and packing used with a single electric fire Buffalo pump, and from the gasket of a single Buffalo evaporator pump aboard the USS Downes. He specified that the gaskets and packing were the original components supplied by Buffalo with the pump.

(Pl. Ex. A, Doc. No. 225-1.)

- Declaration of Expert John Fenig  
Mr. Fenig provides opinion testimony based on his experience working in the Navy. He opines that the gaskets and packing used with the Buffalo pump at issue contained asbestos. He explains that the basis for this opinion is that the pumps were high pressure pumps.

(Pl. Ex. B, Doc. No. 225-1.)

Moreover, Plaintiff contends that her claims are not barred by any "bare metal defense" because Defendant is liable for foreseeable modifications to its products.

#### Punitive Damages

Plaintiff contends that there are triable issues of material fact regarding punitive damages.

### **C. Analysis**

#### Product Identification / Causation / Bare Metal Defense

Plaintiff alleges that he was exposed to asbestos from gaskets and/or packing material supplied by Buffalo and used in connection with a Buffalo pump aboard a ship. Although there is evidence that Plaintiff was exposed to respirable dust from the original gasket and packing used with a single Buffalo electric fire pump, and the original gasket used with a single Buffalo evaporator pump, as well as evidence (based on the time period and type of pump at issue) that these gaskets and packing contained asbestos, maritime law requires more than a "mere minimal exposure" to support a finding of causation. Lindstrom,

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AND IT IS SO ORDERED.

  
EDUARDO C. ROBRENO, J.

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424 F.3d at 492. As such, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from a product manufactured and/or supplied by Defendant such that it was a substantial factor in the development of his illness. See Lindstrom, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted on this basis. Anderson, 477 U.S. at 248-50.

In light of this determination, the Court need not reach the issue of punitive damages.

**D. Conclusion**

Summary judgment in favor of Defendant on grounds of insufficient evidence of product identification/causation is granted because, under maritime law, Plaintiff has failed to identify sufficient evidence to support a finding of causation with respect to gaskets and packing supplied by Defendant with its pump.