IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
KENNETH CARLTON	)	
	)	C.A. No. N10C-08-216 ASB
	)	
Limited to: Crane Co.	)	

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, JR., JUDGE

Plaintiff, Kenneth Carlton, served in the US Navy and worked at a Schenley Distillery as a boiler tender. Plaintiff alleges asbestos exposure from Defendant's, Crane Co. ("Crane"), valves, pumps, and steam traps. Defendant moves for summary judgment for product nexus, replacement parts, and punitive damages. Based on the reasoning below summary judgment is **GRANTED** as to product nexus with original asbestos-containing parts, **DENIED IN PART and GRANTED IN PART** as to replacement parts not supplied by Crane, and **DENIED** as to punitive damages.

FACTS

The relevant work history for this motion is that Plaintiff worked as a boiler tender in the US Navy from 1955-1958 and at the Schenley Distillery in Delano, California from 1959-1968. He served on board the USS Princeton, USS Neches, and USS Mattaponi. While in the navy Plaintiff recalled working on Crane pumps, valves, and steam traps which had been installed on these ships prior to Plaintiff's arrival. Plaintiff worked on the insulation, gaskets, and the packing of the valves which he contends exposed him to asbestos dust. The valves were installed on the ships before Plaintiff began working on them. He did not know the prior maintenance history of the valves or whether he ever worked on original Crane parts. He also did not know the manufacturer of the packing, gaskets, or insulation he removed and replaced except that he recalled John Crane as a manufacturer of replacement packing. Plaintiffs' expert, Capt.

Moore, testified he would not expect any of the pertinent gaskets and packing to be original at the time Plaintiff worked on them.

Plaintiff testified his work at the Schenley Distillery that was similar to that he did with the navy. Much of his testimony regarding the distillery was general. Initially in his discovery deposition Plaintiff testified he could not recall the manufacturer of any of the pumps or valves at the distillery.[1] Three months later when asked whether he had specific recollection of working on Crane valves at the distillery, he replied in the affirmative.[2] The plaintiff has provided no evidence, however, that those Crane valves contained asbestos or that he was exposed to asbestos dust from Crane products at the distillery.

STANDARD OF REVIEW

In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant summary judgment when "the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[3] The question of whether a legal duty exists "is always a question of law and never one for the jury."[4]

Judge Slights examined the burden issue for Asbestos cases in *In re Asbestos Litigation: Helm.*[5] The moving party bears the initial burden that the

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[1] Discovery Deposition Sept. 15, 2010, at 103:18-23.
[2] Discovery Deposition Dec. 15, 2012, at 713:1-5.
[3] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).
[4] *Yanmar Co. Ltd. v. Slater*, __ S.W.3d __, 2012 WL 309599, at *16 (Ark. 2012) (citations omitted).
[5] *Helm*, 2007 WL 1651968 (Del. Super).

undisputed facts support its motion.[6] In a properly supported motion, the burden then shifts to the non-moving party to show genuine issues of material fact.[7] This court later opined in a case similar to the one at bar:

> Where, as here, a motion for summary judgment is premised on an assumption that the plaintiff did not work on original asbestos-containing parts, the moving party must offer evidence supporting a reasonable inference that the original asbestos parts were no longer on the valve at the time the plaintiff worked on it. The mere age of the device, without more, is insufficient to support such an inference for purposes of summary judgment.[8]

PRODUCT NEXUS ANALYSIS

The parties stipulated that Arkansas substantive law applies to this case. The Arkansas Supreme Court has laid out the state's product nexus standard:

> We conclude that the "frequency, regularity, and proximity" test is the correct test to apply in this case, and we adopt it. Under this test, to survive a motion for summary judgment, [Plaintiff] was required to prove the following elements: (1) [Plaintiff] was exposed to a particular asbestos-containing product made by [Defendant], (2) with sufficient frequency and regularity, (3) in proximity to where he actually worked, (4) such that it is probable that the exposure to [Defendant's] products caused [Plaintiff's] injuries.[9]

Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could infer that Plaintiff worked on Crane products while with the navy, which contained asbestos-containing parts when sold to the navy. The first issue is whether those were original parts. Plaintiff has the burden *at*

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[6] *Id.* at *16 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1963)).

[7] *Helm*, 2007 WL 1651968, at *16 (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)).

[8] *In re Asbestos: Howton*, C.A. No. N11C-03-218 ASB, at 7-8 (Del. Super Apr. 2, 2012) (Parkins, J.).

[9] *Chavers v. Gen. Motors Corp.*, 70 S.W.3d 361, 369 (Ark. 2002) (citing *Jackson v. Anchor Packing Co.*, 994 F.2d 1295 (8th Cir. 1993)).

trial of establishing that Plaintiff worked with original asbestos-containing products manufactured by Defendant and was thus exposed to asbestos. However, at this stage the initial burden rests with Defendant to show the undisputed facts support a finding in its favor as a matter of law.[10] The court finds for purposes of this motion that at least some of Defendant's products originally contained asbestos and while in the navy Plaintiff came in contact with those products years later. Plaintiff's own expert witness testified that he would not expect original asbestos-containing parts to still be in the Crane products by the time Plaintiff worked on them. Accordingly, Defendant has met its burden of showing that the original asbestos-containing parts were removed prior to Plaintiff's exposure to the valves and a reasonable jury could not find otherwise without speculating.

The evidence is less clear as to whether Plaintiff actually worked on Crane products at the distillery. He testified initially that he could not recall. Three months later he responded yes when counsel asked if he worked on any Crane products at the distillery. Assuming for the purposes of this motion that he may have worked on Crane products at the distillery, there is no evidence in the record to establish that he was exposed to asbestos from those products as required under Arkansas law. The court is not aware of any specific evidence that the Crane products on which Plaintiff may have worked at the distillery contained asbestos. In order to find that was the case, the court would have to rely on general testimony that Plaintiff's work at the distillery was similar to his

[10] *Helm*, 2007 WL 1651968 at *16 (citing *Moore*, 405 A.2d at 680; *Ebersole*, 180 A.2d at 470).

work with the navy. This would require the court to speculate that the Crane products at the distillery contained asbestos and Plaintiff was exposed to Crane original asbestos-containing products, which is not permitted to do.

A reasonable jury could not find by a preponderance of the evidence without speculating that Plaintiff came in contact with an original "asbestos-containing product made by [Defendant]" in the navy or at the distillery and certainly could not find it happened "with sufficient frequency and regularity" to meet the Arkansas product nexus standard.[11] Accordingly, summary judgment is **GRANTED** as to product nexus with original parts.

DUTY ANALYSIS

Arkansas courts have not addressed the specific issue before the court—namely, whether Crane owes a duty to Plaintiff for asbestos-containing replacement parts added to its products after sale. Therefore, the court must predict how the Arkansas Supreme Court would rule on this issue.

A. STRICT LIABILITY

Plaintiffs bring claims sounding in negligence and strict liability. The Arkansas legislature adopted strict liability in products liability cases.[12] In adopting the Restatement, the legislature "broadened the scope of strict liability in two important respects: by substituting 'supplier' for 'seller' and injury to

[11] *Chavers*, 70 S.W.3d at 369.
[12] *See Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128, 131 (Ark. 1983).

'persons and property' for 'users' or 'consumers.'"[13] However, the issue at bar does not fall under the strict liability statute for suppliers. The statute requires "[t]he supplier is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise disrupting the product,"[14] but Defendant here did not supply the asbestos-containing product at issue which was added to its product after sale. Accordingly, under Arkansas law Defendant cannot be held strictly liable for company's replacement parts added to its products after sale and summary judgment is **GRANTED IN PART.**

B. NEGLIGENCE

Turning to the negligence claim Defendants direct the court to several cases in other jurisdictions regarding this issue, but as to Arkansas law Defendant relies completely on the product nexus standard in *Chavers*. The *Chavers* court required a showing that "[Plaintiff] was exposed to a particular asbestos-containing product *made by [Defendant]*."[15] However, the court was considering product nexus and not duty. This court would have to take that statement out of context to find it stood for the proposition that no duty was owed in this case. Plaintiffs direct the court to two Arkansas Supreme Court cases[16] for the proposition that Arkansas depends solely on a foreseeability analysis in determining whether a duty is owed and thus Defendant owed a

[13] *Id.*
[14] A.C.A. § 4-86-102(a)(1).
[15] *Chavers v. Gen. Motors Corp.*, 70 S.W.3d 361, 369 (Ark. 2002) (citing *Jackson v. Anchor Packing Co.*, 994 F.2d 1295 (8th Cir. 1993)).
[16] *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715 (Ark. 2003); *Jordan v. Adams*, 533 S.W. 2d 210 (Ark. 1976).

duty in this case for the asbestos-containing products added to its product after sale.

The Arkansas Supreme Court considered duty in *Jordan v. Adams*. In that case Defendant threw a purse containing a loaded gun which discharged injuring the plaintiff. The court relied on foreseeability analysis in considering duty. In considering foreseeability the court looked at whether the defendant could "foresee an appreciable risk of harm to others."[17] The court found the jury could have inferred Defendant should have known the gun may have been in the purse and therefore the resulting injury was foreseeable.[18] The court upheld the verdict.[19]

Plaintiffs also direct the court to the Supreme Court's decision in *Coca-Cola Bottling Co. of Memphis, Tennessee v. Gill* which is a product liability case. The *Gill* court discussed the *Jordan* decision and applied some of its reasoning to the defendant who had delivered one of its concession trailers for a school event.[20] The plaintiff was injured by an electrical shock from the trailer.[21] The court engaged in foreseeability analysis in its determination of duty.[22] Based on the cases presented by the parties and the court's independent research, the court finds when considering duty under a traditional negligence claim Arkansas law relies on foreseeability analysis and not public policy grounds as many other jurisdictions do. The court cannot find as a matter of law based on

[17] *Jordan*, 533 S.W.2d. at 213 (quoting *Cobb v. Indian Springs, Inc.*, 522 S.W.2d 383, 388 (Ark. 1975)).
[18] *Id.* at 215.
[19] *Id.*
[20] *Gill*, 100 S.W.3d at 718.
[21] *Id.*
[22] *Id.* at 724-25.

the current record that Defendant did not "foresee an appreciable risk of harm to others"[23] from other manufacturers' replacement parts. Accordingly, summary judgment is **DENIED IN PART** as to the negligent failure to warn claim for replacement parts.

PUNITIVE DAMAGES

Defendant moved for summary judgment on punitive damages asserting Plaintiffs have not made a sufficient showing as to willful and wanton conduct. Plaintiffs assert Defendant knew or should have known about the dangerousness of asbestos at the relevant time and continued to sell products without warnings in reckless disregard of the consequences. The Delaware Supreme Court has explained, "The failure to cite *any* authority in support of a legal argument constitutes a waiver of the issue on appeal."[24] This court has explained before

> These principles apply with equal force to papers filed in this Court . . . [I]n all but the simples motions, counsel is required to develop a reasoned argument supported by pertinent authorities . . . Counsel are on notice that henceforth this Judge will summarily deny any motion filed by a represented party involving a question of law or the application of law to fact in which the party does not meet this standard.[25]

Defendant did not offer any authority to support its argument. Accordingly, Defendant's motion for summary judgment for punitive damages is hereby, **DENIED.**

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[23] *Jordan*, 533 S.W.2d at 213 (quoting *Cobb*, 522 S.W.2d at 388).
[24] *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (emphasis in original).
[25] *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super.) (Parkins, J.).

CONCLUSION

Based on the reasoning above summary judgment is **GRANTED** as to product nexus for original asbestos-containing parts, **DENIED IN PART AND GRANTED IN PART** as to the replacement parts supplied by other manufacturers, and **DENIED** as to punitive damages.

IT IS SO ORDERED.

Dated: June 1, 2012

Judge John A. Parkins, Jr.