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

IN RE ASBESTOS LITIGATION:	)	
	)	
RALPH CURTIS WOLFE and	)	
JANICE WOLFE	)	C.A. No. N10C-08-258 ASB
	)	
Limited to: The William Powell Co.	)	

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, JR., JUDGE

Plaintiff, Ralph Curtis Wolfe, worked at Zidell Industries in Portland, Oregon from 1970-1973. Zidell disassembled World War II navy ships and reconditioned parts including valves. Plaintiff alleges asbestos exposure from Defendant's valves. Defendant moves for summary judgment on product nexus grounds and asserts the "bare metal defense" as grounds for not owing a duty to Plaintiff for asbestos-containing parts added to their products after market. Based on the reasoning below, the court finds Plaintiff has not made a *prima facie* case for product nexus and Defendant is not liable for the asbestos-containing component parts added to its products after sale under Oregon law. Therefore, summary judgment is **GRANTED.**

FACTS

Plaintiff, Ralph Curtis Wolfe, worked at Zidell Industries in Portland, Oregon from 1970-1973. The company dissembled World War II navy ships and reconditioned the parts including valves for sale. Zidell had facilities on the east and west sides of a river. The ships were disassembled on the west bank and parts were moved to the east bank for refurbishing. Plaintiff worked at the east bank facility.

Plaintiff cleaned and refurbished valves for resale. The reconditioning process was dusty and could have exposed assemblymen to asbestos. Plaintiff did not recall the manufacturers of the valves on which he worked. In fact, he offers no direct evidence he worked on a valve manufactured by Defendant. Plaintiffs identified Jack Piatt as a product identification witness. Mr. Piatt

worked for Zidell starting in 1969 and into 1970, a period which overlapped Plaintiff's employment for a few months. Mr. Piatt, however, did not know Plaintiff. Mr. Piatt participated in the breaking down of the ships and helped to categorize and store parts. When a customer put in an order for a part, the part was taken out of storage and sent to an assemblyman, such as Plaintiff, to be reconditioned. Mr. Piatt identified Crane, Powell, and Chapman as manufacturers of the valves on which he worked at Zidell.

Plaintiffs point to some documentation that indicates at least some of Defendant's valves contained asbestos. Defendant admits so much in interrogatories. The record, however, contains no evidence that the specific types of valves on which Plaintiff worked were among those that contained asbestos. It is also of note that the earliest date for any of these documents is 1954 and the ships in question were World War II vessels. Plaintiff does not direct the court to any document in which Defendant requires or recommends asbestos containing replacement parts for its products.

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."[1] The question of whether a legal duty exists "is a question of law for the Court to determine."[2]

PRODUCT NEXUS ANALYSIS

The parties appear to agree as to the product identification standard in Oregon. They each direct the court to *Griffin v. Allis-Chalmers Corporation Product Liability Trust.*[3] The *Griffin* court explained, "[t]o survive a motion for summary judgment in a products liability and negligence case involving asbestos, a plaintiff needs to establish the presence of the *defendant's asbestos* in the plaintiff's workplace; that fact is sufficient to create a jury question as to whether the presence of that asbestos played a role in the occurrence of the plaintiff's injuries."[4]

Viewing the evidence in the light most favorable to Plaintiff a reasonable jury could infer that he worked on Defendant's valves. However, there is no evidence in the record to support a finding that "Defendant's asbestos" was in Plaintiff's workplace. There is no evidence as to the type of valves on which Plaintiff actually worked; there is no evidence as to if they contained asbestos; and, most importantly, there is no evidence that Defendant's valve's original asbestos containing parts were present in Plaintiff's work area. In fact, logic suggests that the original valve packings were not in the valves which Plaintiff

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[1] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).
[2] *Riedel v. ICI Americas Inc.*, 968 A.2d, 17, 20 (Del. 2009) (citing *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001)); *see Simonetta v. Viad Corp.*, 197 P.3d 127, 131 (Wash. 2008) (en banc).
[3] 246 P3d. 483 (Or. App. 2010).
[4] *Id.* at 485 (citations and internal quotations omitted) (emphasis added).

refurbished. Plaintiff worked on the valves in the 1970's, but the ships from which the valves came were in service 30 years earlier during World War II. A finding that Plaintiff used Defendant's original asbestos-containing parts would therefore be purely based on speculation. Therefore, summary judgment is **GRANTED** on product nexus grounds.

DUTY ANALYSIS[5]

The final issue the court must consider is as a matter of Oregon law whether Defendant owes a duty to Plaintiff for non-original, asbestos-containing parts added to its products after sale. Plaintiffs argue, "Defendant is liable . . . under a design defect theory" based on Oregon law adopting the Restatement (Second) of Torts, §402A.[6] This is a matter of first impression in Oregon, but the court finds several rulings from other jurisdictions helpful in resolving this issue. The parties, who were given an opportunity to supplement their briefings after oral argument, disagree as to the majority rule. Plaintiffs assert "[t]he majority position is that a party is liable for the foreseeable and intended consequences of its product."[7] They refer the court to opinions and orders from the Northeast and Mid-Atlantic to support their assertion. Defendant, on the other hand, argues the majority position is that liability does

[5] Litigants often refer to this as the "bare-metal defense." The court views this as a challenge to Plaintiff's prima facie case to prove duty.
[6] Plaintiff's Memorandum of Law in Opposition to Defendant William Powell Co. Inc.'s Motion for Summary Judgment, at 9 (citing Or. Rev. Stat. §30.920(3)).
[7] Letter from Plaintiff Feb. 14, 2012, at 1.

not attach. It relies upon recent decisions of the California Supreme Court and the federal courts.[8]

This court previously examined this issue in detail in *In re Asbestos Litigation Wesley K. Davis*.[9] In considering a design defect theory Judge Ableman concluded, "case law decided under both maritime and other sources of law strongly suggests that the plaintiff proceeding upon such a theory must show more than that the use of asbestos-containing parts was merely foreseeable or that the manufacturer's product originally incorporated asbestos parts."[10] She recognized an argument could be made "'that a *design* defect claim might exist, if the defective attachments manufactured by others were part of the . . . design and were rendered unsafe due to that design.'"[11] However, she granted summary judgment because there was no evidence that Defendant "specified, required, or even recommended that asbestos-containing packing, gaskets, or insulation be used with its valves" on the ship at issue.[12]

Plaintiffs direct the court to *Hoffeditz v. AM General, LLC*.[13] in which summary judgment on this theory was denied. That case is distinguishable from the case at hand. The *Hoffeditz* court based it decision on a finding that Plaintiffs presented evidence of Defendant's knowledge that the replacement parts for Defendant's product had to contain asbestos.[14] Specifically, Plaintiffs

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[8] Letter from Defendant Feb. 10, 2012, at 1.
[9] 2011 WL 2462569 (Del. Super) (applying maritime law).
[10] *Id.* at *3.
[11] *Id.* at *4 (quoting *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 381 (6th Cir. 2001)).
[12] *Davis*, 2011 Wl 2462569, at *5; *see Stark*, 21 Fed. Appx. at 381.
[13] C.A. No. 2:09-00257 (E.D. Pa. July 29, 2011) (ORDER) (applying Pennsylvania law) (noting the analysis was based on a failure to warn claim).
[14] *Id.* at 5.

produced a memorandum showing Defendant designed its vehicles to use asbestos-containing friction materials and "was aware that non-asbestos-containing brakes could not be used in its vehicles unless it redesigned its braking systems."[15]

More recently, the same judge who authored *Hoffeditz* had occasion to consider a factual pattern similar to the instant case in *Conner v. Alfa Laval, Inc.*[16] The *Conner* court decision was directed for publication and offers more analysis of the issue than *Hoffeditz*. The court considered whether "Defendants are liable for injuries caused by asbestos products manufactured by others but used with Defendants' products."[17] The court reviewed the Restatement (Second) of Torts §402(A) and determined "various courts that have considered the issue have similarly noted that this policy weighs against holding manufacturers liable for harm caused by asbestos products they did not manufacture or distribute because those manufacturers cannot account for the costs of liability created by the third parties' products."[18] The court held

> a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute. This principle is consistent with the development of products-liability law based on strict liability and negligence, relevant state case law, the leading federal decisions, and important policy considerations regarding the issue.[19]

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[15] *Id.*
[16] __ F.Supp.2d__, 2012 WL 288364 (E.D.P.A. 2012) (applying maritime law).
[17] *Id.* at *1.
[18] *Id.* at *7 (citations omitted).
[19] *Id.* (noting the court considered a failure to warn claim).

The theory behind product liability is based "on the principle that a party in the chain of distribution of a harm-causing product should be liable because that party is in the best position to absorb the costs of liability in the cost of production."[20]

Public policy is an important consideration in analyzing issues of duty. "[T]he legal concept of duty of care is necessarily rooted in often amorphous public policy considerations."[21] It "generally depends on mixed considerations of logic, common sense, justice, policy, and precedent."[22]

Notably states around Oregon apply the majority trend on this issue. The Washington Supreme Court considered this issue in the companion cases *Braaten v. Saberhagen Holdings*[23] and *Simonetta v. Viad Corporation*[24]. The *Braaten* court considered a failure to warn claim by a pipefitter on a navy ship.[25] The court recognized that the Restatement (Second) of Torts §402(A) "appl[ies] to 'those in the chain of distribution."[26] The court further noted the majority rule nationwide is that "a 'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products'; '[t]he law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products.'"[27] Plaintiffs

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[20] *Conner*, 2012 WL 288364, at *6.
[21] *Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000).
[22] *Simonetta*, 197 P.3d at 131 (rejecting foreseeability analysis as part of duty analysis).
[23] 198 P.3d 493 (Wash. 2008) (en banc).
[24] 197 P.3d at 138 (Defendant "was not in the chain of distribution of the dangerous product, [therefore] we conclude not only that it had no duty to warn under negligence, but also that it cannot be strictly liable for failure to warn.".
[25] *Braaten*, 198 P.3d at 495.
[26] *Id.* at 497 (quoting *Seattle—First Nat'l Bank v. Tabert*, 542 P.2d 774 (Wash. 1975)).
[27] *Braaten*, 198 P.3d at 498 (quoting 3 John D. Hodson & Richard E.Kay, *American Law of Products Liability* §32:9 (3d eds. 2004)); (citing 63A Am. Jur. 2d *Products Liability* §1127 (1997)).

in *Braaten*, as here, argue that Defendant's products specified asbestos-containing parts and thus liability should attach. But there, as here, Defendant did not recommend or instruct the navy to use asbestos-containing insulation.[28] The court also "consider[ed] whether under common law products liability or negligence principles the manufacturers were required to warn of the danger of exposure to asbestos in packing and gaskets in their products if they originally included in their products asbestos containing packing or gaskets manufactured by others."[29] They are not so required. The court ruled "there is not duty to warn of dangers associated with replacement parts, where the manufacturer did not design or manufacture the replacement parts, even if the replacement part is virtually the same as the original part."[30]

The Idaho Supreme Court has not reached the issue at hand; however Judge Ableman did address this issue under Idaho law.[31] She reviewed non-asbestos related Idaho tort cases focusing on duty requirements, and concluded:

> Given Idaho's existing case law and the persuasive weight of decisions from other jurisdictions declining to impose a duty, the Court concludes that Idaho would likely find that a defendant is not subject to a duty to warn or protect against hazards arising from a product it did not manufacture, distribute, or sell, even if the defendant's product incorporated component parts that posed similar risks and would require replacement.[32]

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[28] *Braaten*, 198 P.3d at 500.
[29] *Id.* at 501.
[30] *Id.* at 502 (citing *Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986)).
[31] *In re: Asbestos Litig. Arland Olson*, 2012 WL 322674 (Del. Super. 2011) (ORDER).
[32] *Id.* at *2.

The California Supreme Court recently addressed the issue at hand in *O'Neil v. Crane Co.*[33] The court considered the question: "When is a product manufacturer liable for injuries caused by adjacent products or replacement parts that were made by others and used in conjunction with the defendant's product?"[34] In answering the question, the court held "that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products."[35] Defendants in the case were Crane Co. and Warren, who both manufactured pumps and valves for the navy vessels on which the plaintiff had worked.[36]

The court also directly addressed the design defect issue. The court ruled that the record does not

> support plaintiffs' claim that defendants' products were defective because they were "designed to be used" with asbestos-containing components. The products were designed to meet the Navy's specifications. Moreover, there was no evidence that defendants' products *required* asbestos-containing gaskets or packing in order to function. Plaintiffs' assertion to the contrary is belied by evidence that defendants made some pumps and valves without asbestos-containing parts. As alternative insulating materials became available, the Navy could have chosen to replace worn gaskets and seals in defendants' products with parts that did not contain asbestos. Apart from the Navy's specifications, no evidence showed that the design of defendants' products required the use of asbestos components, and their mere compatibility for

[33] 266 P.3d 987 (Cal. 2012).
[34] *Id.* at 991.
[35] *Id.*
[36] *Id.*

> use with such components is not enough to render them defective.[37]

The record appears to have been more developed in the California case, than the case at hand. Plaintiff here is even further removed from the original products. The navy vessels in question had been decommissioned and sent away to be used for scrap pieces before Plaintiff ever came in contact with any of the parts.

The court recognizes that several of the cases cited in this opinion as well as several of the cases cited by each party are grounded in a failure to warn claim and Plaintiff's argument here is based on a design defect claim. The public policy arguments that duty should not extend from failure to warn cases are still persuasive here. Additionally, most of the decisions base their analysis in part on analysis of the Restatement (Second) of Torts §402(A). Plaintiff relies on 402(A) as incorporated in the Oregon statute for their design defect claim. Moreover, Judge Ableman's decision in *Davis* and the California Supreme Court's decision in *O'Neil*, addressed more fully above, are directly on point for the design defect issue. Finally, the court finds it significant that California, Washington, and Idaho[38] law support a finding that no duty exists. Given that Plaintiffs have presented no evidence that Defendant required or even recommended that asbestos containing parts be used with its products, the court finds Defendant does not owe a duty to Plaintiff. Therefore, summary judgment is **GRANTED** on the issue of whether Defendant owes a duty to

[37] *Id.* at 996 (emphasis in original).
[38] Applied by a Delaware judge.

Plaintiff for non-original, asbestos-containing parts added to its products after sale.

CONCLUSION

The court finds under Oregon law Defendant does not owe a duty Plaintiff for asbestos-containing parts used with or added to its products after sale and Plaintiff was not exposed to original asbestos-containing parts of Defendant's products. Accordingly, Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Dated: February 28, 2012

Judge John A. Parkins, Jr.