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

IN RE ASBESTOS LITIGATION:	)	
	)	
THOMAS MILSTEAD	)	C.A. No. N10C-09-211 ASB
	)	
Limited to: Crane Co.	)	

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, JR., JUDGE

Plaintiff, Thomas Milstead, worked in the United States Navy as a machinist mate from 1965-1969. He alleges asbestos exposure stemming from Defendant, Crane Co.'s, valves. Defendant moves for summary judgment on conspiracy[1], punitive damages, product nexus grounds and asserts it did not owe a duty to Plaintiff for asbestos-containing replacement parts added to its products after sale. Based on the reasoning below summary judgment is **DENIED** as to original asbestos-containing parts manufactured by Defendant, summary judgment is **GRANTED** as to replacement parts because under Maryland law a manufacturer does not owe a duty to warn for asbestos-containing replacement parts, and summary judgment is **DENIED** as to punitive damages.

FACTS

Plaintiff served in the navy from 1965-1969 and served onboard the USS Independence. This ship was commissioned in 1959. He stood watch over the machinery in main machine room number one and repaired broken machinery. This included working on valves. He was also present for at least one overhaul of the ship. Crane, Jenkins, and Chapman all provided valves for the USS Independence and because of subsequent business combinations Crane is liable for Jenkins and Chapman products as well as its own. There is no direct evidence of Plaintiff working on valves for which Crane is responsible. However, there is evidence that Crane was responsible for approximately 100-

[1] This motion was **GRANTED** for the reasons stated at oral argument.

200 valves in main machine room number one and Plaintiff worked on and around valves in that room. Plaintiffs' expert, Captain William Lowell, testified that original packing and gaskets for auxiliary pumps would likely have been removed before Plaintiff ever boarded the ship. However, he did not testify *in this case* that that was the case for valves and there is nothing in the record before the court to suggest he testified to that effect in other cases in regards to the USS Independence.[2] There is no evidence in the record establishing Defendant as the manufacturer or seller of the asbestos-containing replacement parts.

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 a question of law for the Court to determine."[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

[2] Defense counsel directs the court to a deposition of Capt. Lowell in a different case for proposition that the original parts had to have been removed before Plaintiff came in contact with them. That case dealt with different ships and a different Plaintiff. As such, the court will not extrapolate that opinion to this plaintiff on this ship.
[3] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).
[4] *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)).
[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 has further 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 Maryland Court of Appeals recently provided the product nexus standard in asbestos cases in *Reiter v. Pneumo Abex, LLC.*[9] The court explained:

> Whether the exposure of any given bystander to any particular supplier's product will be legally sufficient to permit a finding of substantial-factor causation is fact specific to each case. The finding involves the interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace. This requires an understanding of the physical characteristics of the workplace and of the relationship between the activities of the direct users of the product and the bystander plaintiff. Within that context, the factors to be evaluated include the nature of the product, the frequency of its use, the proximity, in distance and in time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product.[10]

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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] 8 A.3d 725, 732 (Md. 2010).
[10] *Id.* (quoting *Eagle-Picher Indus. v. Balbos*, 604 A.2d 445, 460 (Md. 1992)) (internal citation omitted).

In Maryland a plaintiff need not actually work on asbestos-containing product. Depending on the proximity being a bystander can be sufficient.[11] The sheer number of Defendant's valves present in main machinery room number one and Plaintiffs job description is circumstantial evidence of exposure with sufficient proximity, regularity, and frequency for summary judgment purposes. Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could infer that Plaintiff worked around Defendant's vales and that the valves had asbestos-containing parts and packing in/around them. Based on the record currently before the court, there is not evidence from which the court can conclude that the asbestos-containing components of Defendant's valves on this ship would have been replaced prior to Plaintiff being around them. There is therefore a genuine issue of material fact as to that issue. While it may well be the case that all the original parts were removed prior to Plaintiff boarding the ship, the court is limited to the record before it and the non-moving party is not entitled to that inference. Therefore, summary judgment is **DENIED** on product nexus grounds for Defendant's original asbestos-containing parts.

REPLACEMENT PARTS ANALYSIS

The court considered this issue in another opinion in this case issued the same day as this opinion.[12] Namely, whether under Maryland law a

[11] *Balbos*, 604 A.2d at 461.

[12] *In re asbestos litig. Milstead v. Superior-Lidgerwood-Mundy Corp.*, C.A. No. N10C-09-211 ASB (Del. Super. May 31, 2012) (Parkins, J.).

manufacturer is liable for asbestos-containing replacement parts added to its products after sale. The court found, "liability does not attach for replacement parts under a failure to warn theory in strict liability and negligence as well as strict liability design defect theory."[13] For the reasons stated in that opinion, summary judgment is **GRANTED** as to replacement parts.

PUNITIVE DAMAGES

Defendant moved for summary judgment on punitive damages asserting in conclusory fashion that Plaintiffs have not made a sufficient showing as to willful and wanton conduct. Notably Defendant does not even discuss the standard for punitive damages to be applied in this case. Plaintiffs responded to Defendant's assertion that 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. In its reply Defendant did not answer to Plaintiffs' argument and, indeed, Defendant made no mention whatsoever of the punitive damages claim.

Defendant's argument to supply any argument or citation to authority is fatal to its contention that Plaintiffs' claim for summary judgment should be dismissed. The Delaware Supreme Court has opined that "[t]he failure to cite *any* authority in support of a legal argument constitutes a waiver of the issue on appeal."[14] This court has also explained before

[13] *Id.* at 9.
[14] *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (emphasis in original).

> 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.[15]

Accordingly, Defendant's motion for summary judgment for punitive damages is hereby, **DENIED.**

CONCLUSION

As explained above summary judgment is **DENIED** as to original asbestos-containing parts manufactured by Defendant, summary judgment is **GRANTED** as to replacement parts because under Maryland law a manufacturer does not owe a duty to warn for asbestos-containing replacement parts, and summary judgment is **DENIED** as to punitive damages.

IT IS SO ORDERED.

Dated: May 31, 2012

Judge John A. Parkins, Jr.

[15] *Gonzalez v. Caraballo,* 2008 WL 4902686, at *3 (Del. Super.) (Parkins, J.).