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

IN RE ASBESTOS LITIGATION:	)	
	)	
HAROLD HOWTON and	)	
SHIRLEY HOWTON	)	C.A. No. N11C-03-218 ASB
	)	
Limited to: Crane Co.	)	
Cleaver-Brooks, Inc.	)	

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, JR., JUDGE

Plaintiff, Horold Howton, worked on various ships in the Navy. He served as a shipfitter and chief petty officer from 1958-1974. Plaintiff alleges asbestos exposure from Defendant Crane Co.'s ("Crane") valves and Defendant Cleaver-Brooks' boilers among others. Defendants move for summary judgment on product nexus grounds and assert the "component parts defense" as grounds for not owing a duty to Plaintiff for asbestos-containing parts added to their products after sale. Based on the reasoning below, the court finds Plaintiff has not made a *prima facie* case for product nexus with a Cleaver-Brooks original-asbestos containing part or component part. Accordingly, summary judgment is **GRANTED** as to Cleaver-Brooks. In regards to Crane summary judgment is **DENIED IN PART** as to product nexus with original asbestos-containing parts and **GRANTED IN PART** as to component parts not supplied by Crane because Crane is not liable under Maritime law for the asbestos-containing component parts added to its products after sale.

FACTS

Plaintiff, Harold Howton, served on several ships in the U.S. Navy. He worked primarily as a Shipfitter. Plaintiff's service on particular ships and their commission dates is as follows:

- Plaintiff served on the U.S.S. Cadmus from September 1958-June 1962 which was commissioned in April of 1946. The ship was in service for approximately 12 years before Plaintiff served on it.

- Plaintiff served on the U.S.S. Utina June 1962-March 1964 which was commissioned in January of 1946. The ship was in service for approximately 18 years before Plaintiff served on it.
- Plaintiff served on the U.S.S. General W.A. Mann March 1964-December 1965 which was commissioned in November of 1943. The ship was in service for approximately 21 years before Plaintiff served on it.
- Plaintiff served on the U.S.S. Markab January 1966-Summer 1966 which was commissioned in June of 1941. The ship was in service for approximately 25 years before Plaintiff served on it.
- Plaintiff served on the U.S.S. Zelima September 1969-May 1970 which was commissioned in July of 1946. The ship was in service for approximately 23 years before Plaintiff served on it.
- Plaintiff served on the U.S.S. Askari May/June 1970-May 1971 which was commissioned in March of 1945. The ship was in service for approximately 25 years before Plaintiff served on it.
- Plaintiff served on the U.S.S. Columbus June 1971-May 1974 and which commissioned in June of 1945. The ship was in service for approximately 26 years before Plaintiff served on it.

Plaintiff was the only product identification witness deposed in this matter.

Plaintiff was questioned about his knowledge about working on original parts while in the Navy. He testified that he never worked on a new ship. When asked about working on original equipment, he stated "I wouldn't have

any way of knowing that, but I doubt it. Thing was torn up too much to be original."[1]

Crane Facts

Plaintiff identified Crane as one of the manufacturers of valves on which he worked in the U.S. Navy. He removed, replaced, and repaired the valves. This involved removing and replacing gaskets which he believed contained asbestos. He believed the packing also contained asbestos. This work created dust. Plaintiff does not recall his work with Crane valves on a ship by ship basis, but testified he worked on them during his time with the Navy and remembers them specifically on the U.S.S. Cadmus. He believed the ships were World War II-era ships. Plaintiff did not know the prior maintenance history of the valves or whether he ever did work on original manufacturer's parts. He also did not know the manufacturer of the packing, gaskets, or insulation he removed and replaced.

Plaintiffs point to some documentation that indicates at least some of Defendant's valves contained asbestos, and Defendant admits as much in its discovery responses. They rely upon a few undated Crane documents and catalogues discussing valves and fittings produced by Crane. The record, however, contains no evidence of the specific types of valves on which Mr. Howton worked. He does not direct the court to any document in which Defendant requires or recommends asbestos containing replacement parts for

[1] Harold Howton Discovery Deposition June 8, 2011, at 71:4-6.

the valves on which Plaintiff worked. The documents also refer to some Crane component products that had one time contained asbestos. There is no evidence in the record that Crane component parts were added to the valves in question after sale.

Upon the court's request Crane provided supplemental briefing materials regarding the typical maintenance performed on naval ships during the relevant time period. Crane offered the deposition of Captain Arnold P. Moore which was taken in an unrelated case. One of the ships that Capt. Moore discussed was commissioned in June 1943 and the plaintiff in that case reported for duty onboard in September 1957.[2] In the intervening 14 years Capt. Moore explained all of the packing and most of the gaskets on the ship would have been replaced.[3] When equipment was overhauled, he "would have expected that the internal gaskets and packing were replaced at that point in time."[4] Crane also provided Wikipedia printouts, another website, and a Navy report giving information about the ships in question.

Cleaver-Brooks Facts

Plaintiff identified Cleaver-Brooks as one of the manufacturers of boilers he recognized from his time in the Navy. Testifying generally about boilers, Plaintiff recalled removing piping and valves from boilers which required removing insulation. He also recalled removing gaskets he believed contained

[2] Deposition of Arnold P. Moore April 8, 2010, at 70:5-6.
[3] *Id.* at 71:6-10, 73:12-15.
[4] *Id.* at 74:6-8.

asbestos. This work created dust. There is no evidence before the court of the prior maintenance history of the boilers or whether Plaintiff ever did work on original manufacturer's parts. He could not recall if he saw more than one Cleaver-Brooks boiler on the USS Cadamus or if he saw a Cleaver-Brooks boiler on any other ships. He testified he never worked as a boiler operator so he did not open boilers to work on them. He could not recall ever being around a Cleaver-Brooks boiler when it was open or while any work was being performed on one. He testified people in his job performed welding on boilers, but he could not recall if he ever welded a Cleaver-Brooks boiler.

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."[5] The question of whether a legal duty exists "is a question of law for the Court to determine."[6]

There was considerable discussion during oral argument about which party bears the burden on establishing that Plaintiff came in contact with original asbestos-containing parts to Crane valves, Warren pumps[7], and

[5] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).
[6] *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)).
[7] Plaintiffs withdrew their opposition to Warren Pumps motion for summary judgment after Warren Pumps' provided an expert report by retired Rear Admiral Roger B. Horne, Jr. titled "The likelihood of Mr. Harold Howton

Cleaver-Brook's boilers. Judge Slights examined the burden issue for Asbestos cases in *In re Abestos Litigation: Helm.*[8] The moving party bears the initial burden that the facts not in dispute support its claims.[9] In a properly supported motion, the burden then shifts to the non-moving party to show genuine issues of material fact.[10]

In assessing the non-moving party's burden the court considers, "'Whether a reasonable juror could find by a preponderance of the evidence that the plaintiff is entitled to a verdict-whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'"[11] Judge Slights further explained:

> The presumption afforded the non-moving party in the summary judgment analysis is not absolute. The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based. Where there is no precedent fact, there can be no inference; an inference cannot flow from the nonexistence of a fact, or from a complete absence of evidence as to the particular fact. Nor can an inference be based on surmise, speculation, conjecture, or guess, or on imagination or supposition.[12]

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 pump, valve, or boiler at

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receiving exposure to asbestos as a result of Warren Pumps responsibility while in the U.S. Navy" attached to its supplemental brief.

[8] *Helm*, 2007 WL 1651968 (Del. Super).

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

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

[11] *Helm*, 2007 WL 1651968, at *16 (quoting *Anderson v. Livery Lobby, Inc.*, 477 U.S. 242, 252 (1986) (internal citations omitted) (emphasis in original)).

[12] *Helm*, 2007 WL 1651968, at *16 (citations omitted) (internal quotations omitted).

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.

PRODUCT NEXUS ANALYSIS

Special Master Boyer held Maritime law is the governing substantive law in this case.[13] The causation standard under Maritime law applies to both strict liability and negligence claims. Plaintiff must show "(1) that the plaintiff was exposed to the defendant's product and (2) that the product was a substantial factor in causing the plaintiff's injury."[14] Plaintiff must make this showing for each defendant.

Crane Co.

Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could infer that Plaintiff worked on and/or around Crane valves, which contained asbestos-containing parts when sold to the Navy. The issue as to Crane under product nexus is whether those were original parts. The issue of Crane's liability for non-original or component parts is discussed in the duty analysis of this opinion. Defendant claims there is no evidence that they were original parts and it should not be required to prove a negative. It relies primarily on three facts. Plaintiff boarded each of the ships more than a decade after initial commission, he did not know the maintenance histories of

[13] *In re Asbestos Howton*, C.A. 11C-03-218 ASB, at 6 (Del. Super. Mar. 13, 2012) (Boyer, S.M.), *appeal filed*.
[14] *Conner v. Alfa Laval, Inc.*, __ F.Supp.2d__, 2012 WL 288364, at *3 (E.D.P.A. 2012) (citing *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005) (citations omitted)).

the valves, and when asked if he worked on original equipment he stated he would have no way of knowing, but he doubted it.

Plaintiffs counter that those facts are insufficient for Defendant to meet its initial burden. Plaintiffs point the court to the undisputed fact that Defendant worked on Crane valves and the somewhat disputed fact Crane valves originally contained asbestos. Viewing the evidence in the light most favorable to Plaintiff, the court finds at least some of the Crane valves with which Plaintiff came in contact originally contained asbestos. This is a "precedent fact" from which an inference can be drawn.[15]

Plaintiff has the burden at 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.[16] The court has already found for purposes of this motion that at least some of Defendant's valves originally contained asbestos and Plaintiff came in contact with those valves years later. Defendants suggest the valves original parts must have been changed in the intervening time, but do not offer sufficient facts in this record to support that claim. In considering a motion for summary judgment Defendant's are not entitled to that inference. Defendant is not being asked to prove a negative. Defendant attempted to establish facts that its valves would have been changed in its supplemental brief.

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

Defendant offered Wikipedia printouts, another website article, a Navy report, and the testimony of Captain Arnold P. Moore in an unrelated case. The Wikipedia[17] printouts do not contain sufficient information regarding overhauls for the ships in question for the court to conclude that the original asbestos containing parts must have been replaced prior to Plaintiff working on them. The testimony of Capt. Moore is also insufficient as to that point. Defendants provided excerpts of Capt. Moore's deposition in which he discusses the U.S.S. Vogelsong, U.S.S. Sigourney, and U.S.S. Randall, none of which were ships on which Plaintiff served.

Defendants ask this court to consider Capt. Moore's deposition about ships not at issue in this case, his testimony about the maintenance history of those ships, website articles discussing the general history of the ships in question here, and a report on the U.S.S. Cadamus's June 1958 inspection; and then conclude that Plaintiff did not come into contact with original asbestos-containing parts from Crane Valves during his time in the Navy. But the court has today held that the defendant bears the burden of showing that the original asbestos-containing parts were removed prior to Plaintiff's exposure to the valves. The absence of proof to the contrary by Plaintiff is therefore not pertinent here. Accordingly, summary judgment is **DENIED** on product nexus grounds as to Crane.

[17] The court finds printouts from Wikipedia, which can be edited by the public, of minimal valve because it does not contain the editorial controls of other published work. The court is also concerned about the website's ability to be manipulated as has been done my some political campaigns in recent years.

Cleaver-Brooks

Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could infer that Plaintiff worked around/on boilers which contained asbestos-containing parts when sold to the Navy. However under the Maritime product nexus standard Plaintiff must show "(1) that the plaintiff was exposed to the *defendant's product* and (2) that the product was a substantial factor in causing the plaintiff's injury."[18] Plaintiff can not recall working on a Cleaver-Brooks boiler or being around one while it was open. The undisputed facts support a finding for Defendant as a matter of law in this instance. The burden then shifts to Plaintiff.[19] Plaintiff has not offered evidence sufficient to create a genuine issue of material fact as to whether Plaintiff was exposed to asbestos from a Cleaver Brooks boiler regardless of the original parts issue. Accordingly, without speculating a reasonable jury could not find Plaintiff was exposed to asbestos from a Cleaver-Brooks boiler or that it was a substantial factor in causing his injury.[20] Therefore, summary judgment is **GRANTED** as to Cleaver-Brooks.

DUTY ANALYSIS

The *Conner* court considered whether "Defendants are liable for injuries caused by asbestos products manufactured by others but used with

[18] *Conner*, 2012 WL 288364, at *3 (citing *Lindstrom*, 424 F.3d at 492) (citations omitted)).
[19] *Helm*, 2007 WL 1651968, at *16 (citing *Brzoska*, 668 A.2d at 1364).
[20] *Helm*, 2007 WL 1651968, at *16.

Defendants' products."[21] In examining the theory behind product liability the court explained "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."[22] 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."[23] The court adopted *Lindstrom* court's reasoning and 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.[24]

Thus under Maritime law manufacturers have no duty to warn of asbestos products added to their products after sale.

This court previously examined this issue under a design defect cause of action in *In re Asbestos Litigation Wesley K. Davis*.[25] 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

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[21] *Conner*, 2012 WL 288364, at *1.
[22] *Id.* at *6.
[23] *Id.* at *7 (citations omitted).
[24] *Id.* (noting the court considered a failure to warn claim).
[25] 2011 WL 2462569 (Del. Super) (applying maritime law).

more than that the use of asbestos-containing parts was merely foreseeable or that the manufacturer's product originally incorporated asbestos parts."[26] 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.'"[27] Judge Ableman was presented with a similar set of documents in *Davis* regarding Crane Co. products as the court was presented in this case and she determined

> [t]here is no evidence that Crane specified, required, or even recommended that asbestos-containing packing, gaskets, or insulation be used with its valves aboard the Holder. The catalog pages provided by Plaintiff are irrelevant, as they are undated and Davis has provided no evidence that the products they depicted were used on the [ship in question].[28]

Judge Ableman granted summary judgment.[29]

Under Maritime law Defendants are not liable under a failure to warn claim for asbestos-containing products added to their products after sale.[30] Plaintiff has not provided evidence in the record that any of the defendants specified, required, or recommended asbestos-containing products be added to their products on which Plaintiff actually worked. Accordingly, summary judgment is **GRANTED** as to Crane on the issue of whether Defendants owe a duty to Plaintiff for non-original, asbestos-containing parts added to their products after sale.

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[26] *Id.* at *3.
[27] *Id.* at *4 (quoting *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 381 (6th Cir. 2001)); *see Kummer v. Allied Signal, Inc.*, 2008 WL 4890175, at *3-4 (W.D. Pa. 2008).
[28] *Davis*, 2011 Wl 2462569, at *5; *see Stark*, 21 Fed. Appx. at 381; *In re Asbestos Litigation Parente*, 2012 WL __, C.A. No. N10C-11-140 ASB, at 3 (Del. Super. Mar. 2, 2012) (Parkins, J.) (analyzing similar documents and finding them irrelevant).
[29] *Davis*, 2011 Wl 2462569, at *6.
[30] *Conner*, 2012 WL 288364, at *7.

CONCLUSION

The court finds under Maritime law Defendant does not owe a duty Plaintiff for asbestos-containing parts used with or added to its products after sale. The court also finds as a matter of law that Plaintiff cannot meet the product nexus standard regarding exposure to original parts as to Cleaver-Brooks. Accordingly, Cleaver Brooks' motion for summary judgment is **GRANTED.** In regards to Crane summary judgment is **DENIED IN PART** on product nexus grounds for original asbestos-containing parts and **GRANTED IN PART** as to the component parts supplied by other manufacturers.

IT IS SO ORDERED.

Dated: April 2, 2012

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Judge John A. Parkins, Jr.