

United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GERALDINE HILT, as Wrongful Death  
Heir, and as Successor-in-Interest to  
ROBERT HILT, Deceased, and  
KRISHNA TINDALL, SHERLYN  
HILT, KIMBERLY CRAWFORD,  
DARPHINE ROLAND, as Legal Heirs  
of ROBERT HILT, Deceased,

Plaintiffs,

v.

FOSTER WHEELER LLC (FKA  
FOSTER WHEELER CORPORATION),  
et al.,

Defendants.

Case No. 11-cv-02367-CRB

**ORDER DENYING FOSTER  
WHEELER’S MOTION FOR  
SUMMARY JUDGMENT**

Plaintiffs brought this case to recover damages for harm allegedly caused by Defendants’ asbestos-containing products. In 2014, the Eastern District of Pennsylvania granted summary judgment in favor of Defendant Foster Wheeler LLC (“Foster Wheeler”). Order Granting Summary Judgment (dkt. 48, Ex. A) at 7. All other defendants were subsequently dismissed through settlements or voluntary dismissals. Final Judgment (dkt. 26). Plaintiffs appealed the order granting summary judgment. Notice of Appeal (dkt. 27). On appeal, the Ninth Circuit reversed the Eastern District of Pennsylvania and remanded the case to this Court “to consider any remaining grounds in Foster Wheeler’s motion for summary judgment.” Hilt v. Foster Wheeler, LLC, 690 Fed. Appx. 482, 483 (9th Cir. Apr. 26, 2017). Having done so, the Court DENIES Foster Wheeler’s motion for summary judgment, for the reasons discussed below.

1           **I.       BACKGROUND**

2           **A.       Factual Background**

3           Between 1965 and 1972, Decedent Robert Hilt (“Hilt” or “Decedent”) worked as a  
4 laborer and machinist at Hunters Point Naval Shipyard in San Francisco. See Plts.’ Special  
5 Interrogatory Responses (dkt. 48, Ex. B, attached therein as Ex. B), No. 1. During that  
6 time, Hilt worked aboard a number of different ships, including the USS Bradley and the  
7 USS Constellation. See id. According to Hilt, he worked “down in the boiler room” on  
8 both ships for at least several months, within two to three feet of the boilermakers, who  
9 were removing asbestos-containing firebrick and refractory materials from the boilers.  
10 Hilt Depo. Vol. I (dkt. 48, Ex. C, attached therein as Ex. A) at 42:2–44:2, 47:11–49:20.  
11 The removal of these materials created “lots of dust” that “floated around quite a bit.” Id.  
12 at 43:1–8. The record indicates that the boilers installed on the USS Bradley and the USS  
13 Constellation, near which Hilt worked, were Foster Wheeler boilers. See Plts.’ Special  
14 Interrogatory Responses, Nos. 1 and 3. The insulation and refractory materials utilized in  
15 Foster Wheeler boilers contained asbestos. See Sworn Statement of Arthur Christenson  
16 (Foster Wheeler’s Person Most Knowledgeable) (dkt. 48, Ex. C, attached therein as Ex. I)  
17 at 143. In 2008, Hilt was diagnosed with malignant mesothelioma; he passed away two  
18 years later as a result of the disease. See Raybin Decl. (dkt. 48, Ex. C, attached therein as  
19 Ex. K), Ex. 2.

20           **B.       Procedural Background**

21           Plaintiffs commenced this action in 2011, bringing tort claims to recover damages  
22 against various defendants. See FAC (dkt. 48, Ex. B, attached therein as Ex. A). Upon the  
23 case’s transfer to the Eastern District of Pennsylvania, Defendant Foster Wheeler moved  
24 for summary judgment on November 5, 2012. See MSJ (dkt. 48, Ex. B). In its motion,  
25 Foster Wheeler asserted two bases on which summary judgment should be granted. First,  
26 Foster Wheeler argued that Plaintiffs had proffered “no evidence establishing that  
27 Decedent was exposed to asbestos from any Foster Wheeler product.” Id. at 9. Second,  
28 Foster Wheeler contended that even if Plaintiffs had provided evidence that Hilt had

1 worked around Foster Wheeler products, Plaintiffs had not overcome the “bare metal”  
2 defense—that is, they had failed to “submit evidence that Foster Wheeler manufactured,  
3 sold or supplied the actual asbestos-containing component parts (e.g., gasket, packing or  
4 insulation material) to which [Hilt] was exposed.” Id. at 12.<sup>1</sup>

5 In their opposition, Plaintiffs noted that “defendant’s motion only raises the issue of  
6 exposure to asbestos-containing component parts for which it is liable. No other issues are  
7 properly before this Court.” Opp. (dkt. 48, Ex. C) at 2. Among other materials, Plaintiffs  
8 submitted declarations from asbestos consultant Charles Ay and physician Dr. Daniel  
9 Raybin. See Ay Decl. (dkt. 48, Ex. C, attached therein as Ex. J); Raybin Decl. Based on  
10 his experience and review of Hilt’s deposition testimony, Mr. Ay concluded:

11 Because the USS Bradley (FF-1041) and USS Constellation  
12 (CVA-64) were relatively new ships when decedent worked  
13 aboard them, not only is it more likely than not that decedent  
14 was exposed to and inhaled respirable asbestos fibers in  
15 concentrations orders of magnitude above background or  
16 ambient levels from asbestos-containing refractory original to  
17 the Foster boilers but, it is virtually impossible for decedent to  
18 have avoided being exposed to asbestos dust from this original  
19 refractory.

20 Ay Decl. ¶ 36. Based on his medical training, experience, and review of the record, Dr.  
21 Raybin concluded that “the dust from the asbestos-containing refractory cement from the  
22 Foster boilers that decedent breathed in, as a result of his work with and around Foster  
23 boilers . . . , was a substantial factor in causing decedent’s asbestos-related disease.”  
24 Raybin Decl. ¶ 18.

25 In its reply, Foster Wheeler argued that the court should discredit Mr. Ay’s and Dr.  
26 Raybin’s opinions because both Mr. Ay and Dr. Raybin lacked personal knowledge, and  
27 therefore had no foundation, to form their opinions. See Reply (dkt. 48, Ex. D) at 11–14.

28 <sup>1</sup> Foster Wheeler also argued in its motion that there was no triable issue as to Plaintiffs’ claim for punitive damages. See MSJ at 15–18. Nevertheless, Foster Wheeler acknowledged that the punitive damages claim had been severed and was not to be considered at the summary judgment stage. Id. at 15 n.1; see also Kovary v. Honeywell Int’l, Inc., MDL No. 875, 2011 U.S. Dist. LEXIS 151830, at \*11–12 (E.D. Pa. Nov. 30, 2011) (“Punitive damages claims are severed from Plaintiffs’ other claims in MDL-875, and therefore the Court need not address such claims at this stage.”).

1           The Eastern District of Pennsylvania granted summary judgment in favor of Foster  
2 Wheeler. In doing so, the court noted that Foster Wheeler’s motion contained two  
3 arguments:

4           Product Identification / Causation

5           Foster Wheeler contends that Plaintiff’s evidence is insufficient  
6 to establish that any product for which it is responsible caused  
7 Decedent’s asbestos-related injury. Defendant has also  
8 submitted objections to Plaintiff’s evidence pertaining to  
9 product identification and causation (the declarations and  
10 reports of Charles Ay and Dr. Daniel Raybin).

11           Bare Metal Defense

12           Foster Wheeler asserts the bare metal defense, arguing that,  
13 under both maritime and California law, it had no duty to warn  
14 about and cannot be liable for injury arising from any product  
15 or component part that it did not manufacture or supply.

16           Order Granting Summary Judgment at 5–6. With respect to the product identification  
17 argument, the court concluded, “There is evidence that [Hilt] was exposed to respirable  
18 asbestos dust from insulation used in connection with Foster Wheeler boilers while aboard  
19 the USS Bradley and USS Constellation.” Id. at 7. Importantly, however, the court found  
20 that Mr. Ay’s opinion was “impermissibly speculative” and decided that “no reasonable  
21 jury could conclude from the evidence that [Hilt] was exposed to asbestos from original  
22 insulation manufactured or supplied by Defendant such that it was a ‘substantial factor’ in  
23 the development of his illness, because any such finding would be impermissibly  
24 conjectural.” Id. The court therefore granted summary judgment in favor of Foster  
25 Wheeler. Id. Subsequently, all other defendants were dismissed, and Plaintiffs appealed.  
26 See Final Judgment; Notice of Appeal.

27           In its answering brief to the Ninth Circuit on October 12, 2016—four years after its  
28 original summary judgment motion—Foster Wheeler raised for the first time the argument  
that “[t]he record is devoid of any evidence from which an inference of regular, frequent or  
systemic exposure to any Foster Wheeler product could be drawn.” Def.’s Appellate Brief  
(No. 15-17301, dkt. 30) at 29. Thus, Foster Wheeler argued, “No genuine issue of material  
fact exists regarding whether Mr. Hilt’s alleged exposure to asbestos from Foster Wheeler  
boilers was a ‘substantial factor’ in causing his injuries.” Id. at 27 (capitalization

1 modified). The Ninth Circuit reversed the holding of the Eastern District of Pennsylvania,  
2 finding that Mr. Ay’s expert opinion “was sufficient to create a genuine issue of material  
3 fact as to whether Robert Hilt was exposed to asbestos fibers from insulation supplied by  
4 Foster Wheeler.” Hilt, 690 Fed. Appx. at 483. The Ninth Circuit, however, declined to  
5 address the “substantial factor” issue and remanded the case to this Court, writing:

6 The district court did not determine whether there was a  
7 genuine issue of material fact that Hilt’s alleged exposure to  
8 asbestos-containing boiler insulation was a “substantial  
9 contributing factor in causing his injuries.” McIndoe v.  
10 Huntington Ingalls Inc., 817 F.3d 1170, 1174 (9th Cir. 2016),  
and we decline to address this issue in the first instance.  
Accordingly, we vacate the order granting summary judgment  
and remand to the district court to consider any remaining  
grounds in Foster Wheeler’s motion for summary judgment.

11 Id.

12 On remand, Foster Wheeler requested leave to file a supplemental motion for  
13 summary judgment. See Request to File Supplemental MSJ (dkt. 48). The Court denied  
14 the request because it had before it the full briefing on Foster Wheeler’s motion and found  
15 that supplemental briefing would not be helpful in complying with the circuit court’s  
16 instructions. See Order Denying Request to File Supplemental MSJ (dkt. 51) at 2. As  
17 directed, the Court has considered “any remaining grounds in Foster Wheeler’s motion for  
18 summary judgment.” See Hilt, 690 Fed. Appx. at 483.

19 **II. LEGAL STANDARD**

20 Summary judgment is appropriate “if the movant shows that there is no genuine  
21 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
22 Fed. R. Civ. P. 56(a). A fact is material if it could affect the outcome of the case under the  
23 governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute of  
24 material fact is genuine if the evidence, viewed in the light most favorable to the  
25 nonmoving party, “is such that a reasonable jury could return a verdict for the nonmoving  
26 party.” Id. In determining whether there is a genuine issue for trial, the court does not  
27 weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. Id. at 249.  
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1           **III.   DISCUSSION**

2           Maritime law governs this case. See Order Granting Summary Judgment at 2–4.  
3           To establish causation under maritime law, Plaintiffs must show that (1) Hilt was exposed  
4           to asbestos-containing material manufactured or supplied by Foster Wheeler, and (2) such  
5           exposure was a substantial contributing factor in causing his injury. McIndoe v.  
6           Huntington Ingalls Inc., 817 F.3d 1170, 1174 (9th Cir. 2016) (citing Lindstrom v. A-C  
7           Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005)); see also Order Granting Summary  
8           Judgment at 4–5.

9           In its motion for summary judgment, Foster Wheeler argued two bases for granting  
10          summary judgment: (1) a lack of evidence that Hilt had been exposed to asbestos from a  
11          Foster Wheeler product, and (2) a lack of evidence that Foster Wheeler manufactured,  
12          sold, or supplied the actual asbestos-containing materials to which Hilt was exposed. See  
13          MSJ at 9–15; Opp. at 2; Order Granting Summary Judgment at 5–6. With respect to the  
14          first basis, the Eastern District of Pennsylvania found that “[t]here is evidence that [Hilt]  
15          was exposed to respirable asbestos dust from insulation used in connection with Foster  
16          Wheeler boilers while aboard the USS Bradley and USS Constellation.” Order Granting  
17          Summary Judgment at 7. The Court agrees. See Hilt Depo. Vol. I at 42:2–44:2, 47:11–  
18          49:20; Plts.’ Special Interrogatory Responses, Nos. 1 and 3. Thus, there is a genuine issue  
19          of material fact as to whether Hilt was exposed to asbestos from Foster Wheeler boilers,  
20          and Foster Wheeler’s first argument is not a basis on which summary judgment can be  
21          granted. See Anderson, 477 U.S. 250–51.

22          With respect to Foster Wheeler’s second contention—the “bare metal” defense—  
23          Plaintiffs have proffered a declaration from Charles Ay, who concluded that it was “more  
24          likely than not that [Hilt] was exposed to and inhaled respirable asbestos fibers in  
25          concentrations orders of magnitude above background or ambient levels from asbestos-  
26          containing refractory original to the Foster boilers.” Ay Decl. ¶ 36. Mr. Ay based this  
27          conclusion on his experience as an insulator in the shipyard industry, his review of ship-  
28          specific documents showing that the USS Bradley and USS Constellation were

1 commissioned shortly before Hilt worked aboard them, and Hilt’s deposition testimony  
2 indicating that, while aboard the USS Bradley and USS Constellation, Hilt worked in  
3 close proximity to Foster boilers on a daily basis for several months. Id. ¶¶ 30–35. Mr.  
4 Ay’s testimony is “sufficient to create a genuine issue of material fact as to whether Robert  
5 Hilt was exposed to asbestos fibers from insulation supplied by Foster Wheeler.” Hilt, 690  
6 Fed. Appx. at 483 (emphasis added). Accordingly, there is a genuine issue of material fact  
7 as to whether Foster Wheeler is entitled to the “bare metal” defense. This second—and  
8 remaining—contention is also not a basis on which to grant summary judgment. See  
9 Anderson, 477 U.S. 250–51. There are no other “remaining grounds in Foster Wheeler’s  
10 motion for summary judgment.” See Hilt, 690 Fed. Appx. at 483.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Foster Wheeler’s motion for summary judgment (dkt. 48,  
13 Ex. B) is DENIED.

14 **IT IS SO ORDERED.**

15 Dated: April 2, 2018



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CHARLES R. BREYER  
United States District Judge

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