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

IN RE: ASBESTOS LITIGATION	:	
	:	
Limited to:	:	
Davis, Wesley K.	:	C.A. No. 09C-08-258 ASB

UPON DEFENDANT CRANE CO.'S
MOTION FOR SUMMARY JUDGMENT
GRANTED

This 7th day of June, 2011, it appears to the Court that:

Plaintiff Wesley K. Davis was diagnosed with mesothelioma in June 2009. Davis asserts that his disease was caused by occupational exposures to asbestos-containing products. He has filed suit against various defendants for manufacturing, installing, or distributing products that he alleges exposed him to asbestos during his work as a machinist's mate in the U.S. Navy from 1965 to 1969 and as a flooring installer and equipment operator during the 1970s.

Davis's claims against moving defendant Crane Co. ("Crane") arise from his four-year naval service, almost the entirety of which he spent as a machinist's mate aboard the USS Holder.[1] The Holder was based out of Norfolk, Virginia. During his deposition, Davis recalled working extensively with Crane valves throughout his time on the Holder, where he worked in the forward engine room.[2]

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[1] The first three months of Davis's enlistment were spent in boot camp.

[2] Davis was also asked whether he associated the Crane brand name with pumps. He testified that the name "sounds familiar" but that he did not remember or was uncertain that he saw any

Davis stated that the forward engine room contained "in [the] neighborhood" of one thousand valves,[3] and that he worked with and around "hundreds" of Crane valves there.[4] Crane was the dominant valve brand in the engine room, with other brands making up only ten percent of the valves Davis performed work on or near.[5] Davis's duties included installing replacement valves, and he estimated that he performed up to forty or fifty installations of new Crane valves.[6] The new valves came with rope packing pre-installed, and "on occasion" the valves were packaged with pre-cut gaskets.[7] Davis testified that he generally did not need to add rope packing to the new valves he installed, but "on occasion, there was one or two valves, maybe" that leaked immediately or soon after installation.[8] In those

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Crane pumps on the Holder. He added that, "The only thing I can think of is it might have been on the fresh water pump." Wesley K. Davis, Discovery Dep. Tr., Mar. 4, 2010, at 57:1016. The parties have focused their arguments on Davis's work with Crane valves.

[3] Wesley K. Davis, Video Dep. Tr., Mar. 4, 2010, at 61:4-9.

[4] Wesley K. Davis, Discovery Dep. Tr. 63:10-18.

[5] *Id.*

[6] Wesley K. Davis, Video Dep. Tr. 60:17-25. During his discovery deposition, Davis provided a slightly lower estimate, indicating that he replaced "a little more" than ten valves. Wesley K. Davis, Discovery Dep. Tr. 75:6-14.

[7] Wesley K. Davis, Video Dep. Tr. 58:19-59:16; Wesley K. Davis, Discovery Dep. Tr. 74:15-75:2.

[8] Wesley K. Davis, Video Dep. Tr. 59:15-19.

instances, Davis explained, "we would have to pull the packing and just start all over and repack them."[9]

Davis's work on existing valves included changing gaskets and packing. Davis believed that the gasket and packing utilized were asbestos-containing, and that both activities exposed him to asbestos dust. Working with and installing Crane valves sometimes required Davis to disturb or remove external asbestos insulation applied to the valves and adjacent pipe lines.[10] Over his four years aboard the Holder, Davis testified that he changed valves, valve gaskets, and valve packing on "[a] little over a hundred" occasions.[11]

The USS Holder had been built in 1944, and Davis was unaware of the maintenance histories of any of the existing valves he encountered during his work. Davis identified Garlock, and not Crane, as the manufacturer of the replacement packing and gaskets he used.[12] He was unable to recall the brand or manufacturer of the external installation applied to the valves.[13]

Crane moves for summary judgment on the basis that Davis's testimony does not meet the product nexus standard under either maritime or Virginia law.

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[9] *Id.* at 59:18-19.

[10] Wesley K. Davis, Video Dep. Tr. 49:5-50:9.

[11] Wesley K. Davis, Discovery Dep. Tr. 66:8-17.

[12] Wesley K. Davis, Video Dep. Tr. 56:25-57:5; Wesley K. Davis, Discovery Dep. Tr. 71:11-15.

[13] Wesley K. Davis, Video Dep. Tr. 52:17-20.

According to Crane, Davis did not identify any asbestos-containing product that Crane manufactured or supplied, because the replacement packing and gaskets he utilized with Crane valves were made by Garlock and the external insulation was of an unknown brand. Crane denies that it can be held liable for failing to warn of dangers posed by asbestos products that were manufactured and supplied by another company. Therefore, Crane submits that Davis lacks any evidentiary basis to establish that its products were a substantial factor in causing his mesothelioma.

Davis's response argues that Crane has ignored testimony about the installation of new Crane valves on the Holder. Because Davis installed replacement Crane valves that were pre-packed with asbestos rope packing, he contends that he was exposed to asbestos directly supplied by Crane. Furthermore, Davis provides Crane catalogs advertising pre-formed asbestos gaskets and asbestos packing, which he contends corroborates his position that Crane distributed asbestos-containing products to the Holder.[14] This evidence, Davis urges, should support an inference that he was exposed to asbestos from Crane products and creates a genuine issue of material fact as to "whether or not Crane supplied the gaskets and/or packing."[15]

[14] Pl.'s Resp. to Def. Crane's Mot. for Summ. J., Ex. B.

[15] Pl.'s Resp. to Def. Crane's Mot. for Summ. J. 7.

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[16] Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.[17] If the proponent properly supports its claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[18] Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.[19]

Consistent with the Special Master's decision regarding the applicable substantive law, the Court will apply maritime law to Davis's claims against Crane. Maritime law permits products liability actions to be brought under both negligence and strict liability theories.[20] In a multi-defendant asbestos-exposure case, a plaintiff proceeding under either theory must prove causation by showing that he was exposed to the defendant's product, and that the product was a

[16] Super. Ct. Civ. R. 56(c).

[17] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

[18] *Id.* at 880.

[19] *Id.* at 879-80.

[20] *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986).

substantial factor in causing his injury.[21] The plaintiff must demonstrate exposure at a sufficient level that "an inference that the asbestos was a substantial factor in the injury is more than conjectural."[22]

Upon review of the record, the parties' arguments, and the case law, the Court finds that Davis has not established that exposures to asbestos-containing products for which Crane is responsible constituted a substantial factor in causing his mesothelioma. Davis's exposures to friable asbestos from packing or gaskets supplied by Crane were minimal, and he has not established that Crane bears liability for exposures to asbestos from packing, gaskets, or insulation that Crane neither manufactured nor supplied.

Davis suggests that "No analysis of [Crane's potential liability for products manufactured and supplied by] third parties is necessary; all this Court has to do is look at the testimony and evidence to see that Crane supplied asbestos containing materials in the form of gaskets, packing, and insulation."[23] What is lacking in Plaintiff's proof, however, is evidence of *sufficient exposure* to friable asbestos from products supplied by Crane *to the Holder*. It is not enough for Davis to prove that Crane was in the business of selling asbestos-containing products, nor even

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[21] *Lindstrom v. A-C Prod. Liability Trust*, 424 F.3d 488, 492 (6th Cir. 2005).

[22] *Id.* (quoting *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 376 (6th Cir. 2001)).

[23] Pl.'s Resp. to Def. Crane's Mot. for Summ. J. 8.

that Crane supplied asbestos-containing products used on the Holder. Although Davis testified to installing as many as forty to fifty new Crane valves, the new valves were pre-packed. The only discussion of applying gaskets to the new valves in Davis's testimony was his explanation that the new Crane valves were sometimes packaged with pre-cut gaskets. Nothing in Davis's testimony supports an inference that the standard installation process exposed him to friable asbestos.

Thus, the only non-conjectural evidence that Davis was exposed to an asbestos-containing product supplied by Crane is his testimony that he (or possibly his shipmates) had to repack "one or two" newly installed Crane valves due to leaks that became evident soon after their installation. Under maritime law, "proof of *substantial exposure* is required for a finding that a product was a *substantial factor* in causing injury."[24] One or two instances of removing relatively new packing simply does not qualify.

There is no basis from which a finder of fact could conclude without speculation that Davis's more routine work replacing old gaskets and old packing in existing Crane valves exposed him to Crane-supplied asbestos products. Davis estimated that the forward engine room contained approximately one thousand valves, ninety percent of which were Crane. He also estimated that he performed a gasket, packing, or valve replacement on roughly one hundred to two hundred

[24] *Lindstrom*, 424 F.3d at 492.

occasions, with valve replacements constituting forty or fifty of those jobs. He was not asked about any replacements of Crane valves performed by his shipmates in the forward engine room. The Holder had been in service for twenty years when Davis was first stationed there, and Davis did not know the maintenance history of the existing Crane valves he serviced. None of the deposition questioning explored whether Davis might have been the first to perform a routine packing or gasket replacement on any Crane valves, outside of the "one or two" occasions on which he re-packed a new valve upon or shortly after installation. Davis was also not questioned on the average useful life of the gasket or packing in the valves he serviced. Given the "hundreds" of Crane valves in Davis's immediate workplace, there is insufficient evidence for a jury to infer without impermissible speculation or guesswork that he removed used Crane-supplied gaskets or packing so often as to have experienced "substantial exposure."

Despite disclaiming the need for the Court to consider third-party asbestos products, Davis also cites cases that directly or indirectly address the issue of a manufacturer's liability for third-party replacement parts.[25] Although the Court is

[25] Plaintiff has relied in part upon the Court's July 2010 decision in *Urian v. Ford Motor Co.*, 2010 WL 3005539 (Del. Super. July 30, 2010), which held that Ford was not entitled to summary judgment under Pennsylvania law on a failure-to-warn claim where there were genuine factual disputes regarding Ford's knowledge of (1) the dangers of asbestos; (2) the necessity of using an asbestos-containing product to safely operate its vehicles; and (3) the need for asbestos-containing products to be used to repair and replace its brake linings. Following that decision, but prior to trial in the *Urian* case, the Coordinating Judge of the Philadelphia Court of Common Pleas Complex Litigation Center granted a motion for summary judgment in favor of Ford on an

not certain that Davis intends to advance the argument, the Court agrees with Crane that there is no basis in this case to impose liability upon it for Davis's exposures to asbestos packing, gaskets, and insulation it did not manufacture or supply. Existing maritime case law leaves open the possibility that a manufacturer could be held liable on a design defect theory for asbestos replacement parts it did not produce or distribute; however, 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 replacement parts was merely foreseeable or that the manufacturer's product originally incorporated asbestos parts.

In *Lindstrom v. A-C Product Liability Trust*, the Sixth Circuit Court of Appeals, applying maritime law, affirmed a trial court's grant of summary judgment in favor of defendant valve and pump manufacturers for claims that the defendants' products exposed the plaintiff to asbestos-containing replacement parts

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apparently indistinguishable failure-to-warn claim in *Novobilski v. Ford Motor Co.*, No. 4262 (Pa. Ct. Comm. Pl. Sept. 22, 2010). In *Novobilski*, Ford argued that under Pennsylvania law, it was "not liable for any alleged failure to warn, as Pennsylvania law does not permit imposing liability on the supplier of a product to warn of dangers inherent in a product it did not supply." On the basis of this development in Pennsylvania law, the Court permitted Ford to renew its motion in *Urian* and granted summary judgment less than a week before trial. Hr'g Tr., *In re Asbestos Litig. (Urian)*, C.A. No. 06C-09-246 (Del. Super. Nov. 3, 2010). Unfortunately, *Novobilski* did not come to the Court's attention in time for it to issue a written order, so the Court avails itself of this opportunity to point out that its July 2010 order denying summary judgment in *Urian* should no longer be considered good precedent—**a fact Plaintiff's counsel should well know**, having also served as counsel in the *Urian* case.

(including gaskets and packing) manufactured and supplied by other companies.[26] The plaintiff, a former merchant seaman, raised both design and manufacturing defect claims against several pump and valve manufacturers, including Henry Vogt Machine Company. There was evidence that Vogt's new valves were sold with pre-installed asbestos packing and with gaskets that contained encapsulated chrysotile asbestos.[27] The plaintiff presented testimony from a co-worker that packing on the valves generally needed to be replaced "a couple of times per year."[28] The same co-worker explained that replacement packing and gasket material was generally provided by the shipping company, and not the valve manufacturer, and no other evidence existed to identify Vogt as the manufacturer of replacement asbestos-containing parts for its valves.

The Sixth Circuit held that the facts "[compelled] the conclusion that any asbestos that [the plaintiff] may have been exposed to in connection with a Henry Vogt product would be attributable to some other manufacturer."[29] Relying upon its earlier decision in *Stark v. Armstrong World Industries, Inc.*,[30] the *Lindstrom* Court therefore found that summary judgment was appropriate because Vogt

[26] 424 F.3d at 495.

[27] *Id.* at 494.

[28] *Id.*

[29] *Id.* at 495.

[30] 21 Fed. Appx. at 381.

"cannot be held responsible for material 'attached or connected' to its product on a claim of a manufacturing defect."[31]

Although the *Lindstrom* decision appears primarily to address liability for third-party products on a manufacturing defect theory, the opinion in *Stark* offers guidance in the design defect arena. In *Stark*, a former merchant marine brought maritime actions against various manufacturers of equipment and products that contained or were used with asbestos insulation and other asbestos components.[32] The plaintiff's suit included product liability claims against two boiler manufacturers, CE and Foster Wheeler, for exposures to asbestos insulation attached to the defendants' products. The external insulation was manufactured by third parties. The *Stark* Court noted that "although CE and Foster Wheeler could not be responsible for a *manufacturing* defect under these circumstances, one could argue that a *design* defect claim might exist, if the defective attachments manufactured by others were part of the boiler design and were rendered unsafe due to that design."[33] Nevertheless, the Sixth Circuit found that the plaintiff "completely failed to make a design defect argument" by neglecting to present "expert testimony, personal testimony, or record evidence of a design flaw of the

[31] *Lindstrom*, 424 F.3d at 495.

[32] 21 Fed. Appx. at 373.

[33] *Id.* at 381 (emphasis in original).

type discussed."[34] The *Stark* Court affirmed the district court's decision to grant summary judgment in favor of both boiler manufacturers.

The Washington Supreme Court drew upon *Lindstrom* as well as numerous other authorities in *Braaten v. Saberhagen Holdings*,[35] which held that a manufacturer was not subject to liability for failure to warn of the danger of exposure to asbestos contained in external insulation, replacement gasketing, or replacement packing that was manufactured and distributed by third parties and "installed in or connected to" its products after installation.[36] As the *Braaten* Court explained, strict liability is premised in part upon placing the burden of accidental injury upon those who market the injury-causing products and can treat the resulting cost as a production cost against which liability insurance can be obtained.[37] In view of that policy consideration, the *Braaten* Court concluded that "[i]t does not comport with principles of strict liability to impose on manufacturers the responsibility and costs of becoming experts in other manufacturers' products."[38]

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[34] *Id.*

[35] 198 P.3d 493 (Wa. 2008).

[36] *Id.* at 504

[37] *Id.* at 501.

[38] *Id.* at 502.

With regard to negligence claims, the *Braaten* decision noted that the duty to warn of a hazardous product, as articulated in the Restatement (Second) of Torts § 388,[39] is generally imposed only upon those in the chain of distribution of the product.[40] The *Braaten* Court viewed the relevant "product" for § 388 purposes as the replacement or external product itself, and cited with approval decisions from various jurisdictions concluding "that there is no 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*."[41]

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[39] RESTATEMENT (SECOND) OF TORTS § 388 provides as follows:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

[40] *See Simonetta v. Viad Corp.*, 197 P.3d 127, 132-33 (Wash. 2008) (discussing and collecting cases). *Wilkerson v. Am. Honda Motor Co.*, 2008 WL 162522 (Del. Super. Jan. 17, 2008), cited by Davis, is in accord. In *Wilkerson*, this Court found that the plaintiffs' claims against a gasket manufacturer survived summary judgment where there were genuine factual disputes regarding whether the use of the defendant's gaskets involved removal and replacement of previously-installed asbestos gaskets; whether the defendant "knew or should have known, *based on the understanding of its own product*" that installing *its gaskets* created a risk of asbestos exposure; and whether it was reasonably foreseeable that the use of its gaskets would lead to asbestos-related disease. *Id.* at *2 (emphasis added).

[41] *Braaten*, 198 P.3d at 502 (emphasis added) (collecting cases).

The *Braaten* decision emphasized that it did *not* address the issue of "whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design."[42] Thus, by implication, the *Braaten* Court did not consider the fact that several of the defendants' products contained asbestos parts as originally supplied to be tantamount to a design specification or requirement.

While *Braaten* did not address maritime law, it offers a much more thorough explanation than the *Lindstrom* opinion of the arguments for limiting or excluding manufacturers' liability for dangers arising from products manufactured and distributed by other entities. *Braaten*'s rationale also suggests that a plaintiff could present a triable issue as to design defect liability where a defendant's product design specifies asbestos-containing replacement or additional parts. In such a case, concerns about unfairly saddling the defendant manufacturer with the expense and risk of becoming an expert in another's products seem greatly minimized; the defendant has arguably assumed that very role, and has also apparently contemplated and intended the ongoing use of asbestos parts with its product.

[42] *Id.* at 504.

In *Kummer v. Allied Signal, Inc.*,[43] the District Court for the Western District of Pennsylvania found a design defect claim based upon a manufacturer's specifications for the use of asbestos insulation viable under maritime law. The plaintiff in *Kummer* alleged that her husband, a former naval machinist's mate who died of mesothelioma, was exposed to asbestos from insulation applied to a Westinghouse turbine aboard the USS Noble. The turbine had not been manufactured with asbestos insulation, nor was there any evidence that Westinghouse supplied the insulation. The plaintiff, however, provided evidence of specifications exchanged between the Navy and Westinghouse for the turbine's design and manufacture that explicitly required the use of asbestos-containing materials, including asbestos insulation.[44] In addition, the plaintiff's evidence documented Westinghouse's awareness of the health hazards associated with asbestos exposure at the time the turbine was made. Based upon *Stark*'s brief discussion of the proof necessary to proceed on a design defect claim involving the use of a third party's product, the district court held that the plaintiff had presented "evidence of a design defect" and rejected the defendant's contention that it was

[43] 2008 WL 4890175 (W.D. Pa. Oct. 31, 2008).

[44] *Id.* at *4.

entitled to summary judgment because it had not manufactured or supplied the asbestos insulation.[45]

Turning to the case under consideration, Davis has not provided the evidence to establish the factual prerequisites necessary under *Lindstrom*, *Stark*, and *Kummer* to hold Crane liable for his exposures to other manufacturers' asbestos-containing replacement parts. There 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 Holder.[46] The only evidence before the Court regarding replacement parts establishes that *Garlock* replacement packing and gaskets were used on the Crane valves that Davis serviced.[47] Consistent with *Lindstrom* and *Braaten*, the Court declines to hold that Crane

[45] *Id.* at *3-4.

[46] Moreover, the catalog excerpts show that Crane sold non-asbestos gaskets and packing.

[47] This fact materially distinguishes Davis's case from *Pease v. A.W. Chesterton Co.*, C.A. No. 2:09-62581 (E.D. Pa. Jan. 14, 2011), which Davis raised in his brief. In *Pease*, the District Court for the Eastern District of Pennsylvania denied summary judgment for Crane Co. where product-identification witnesses had testified that "Crane" supplied allegedly asbestos-containing valve gaskets and packing to which the plaintiff had been exposed. *Id.* at 4-5. Although Crane Co. raised the bare metal defense, a factual issue existed regarding the identity of the replacement parts supplier, as the testimony was unclear as to whether "Crane Co." or "John Crane" was being identified. *Id.* The *Pease* Court did not need to directly resolve the viability of Crane Co.'s bare metal defense, because it held that there was evidence from which a jury could conclude that Crane Co. supplied asbestos-containing replacement packing and gaskets. Here, by contrast, Davis's testimony was clear that Crane Co. was the manufacturer of the valves he installed and serviced, whereas the replacement packing and gaskets were made by Garlock.

became liable for exposures to other manufacturers' asbestos products by supplying asbestos gaskets and packing with its new valves without providing any specifications, instructions, or recommendations regarding replacement parts or insulation.

For the foregoing reasons, Plaintiff has not shown that asbestos-containing products supplied by Crane were a substantial factor in causing his mesothelioma, nor has he provided evidence of a design defect that would render Crane liable for his exposures to other manufacturers' asbestos-containing replacement parts or insulation. Accordingly, Crane's motion for summary judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge