

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	)	
	)	
ALLEN T. and TOMMIE	)	
HOOFFMAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N12C-04-243 ASB
	)	
AIR & LIQUID CORP., <i>et al.</i> ,	)	
	)	
Defendants.	)	

Submitted: January 21, 2014

Decided: February 14, 2014

OPINION

*Upon Defendants FMC Corporation's and Goulds Pumps, Inc.'s
Motions for Summary Judgment,
GRANTED.*

A. Dale Bowers, Esquire, Newport, Delaware, Of Counsel, Weitz & Luxenberg, P.C., New York, New York, Attorney for Plaintiffs.

Neal C. Glenn, Esquire, Daniel P. Daly, Esquire, Kelly Jasons McGowan Spinelli Hanna & Reber, L.L.P., Wilmington, Delaware, Attorneys for Defendant FMC Corporation and its former Chicago Pump and Northern Pump businesses.

Robert S. Goldman, Esquire, Phillips Goldman & Spence, P.A., Wilmington, Delaware, Attorney for Defendant Goulds Pumps, Inc.

WALLACE, J.

I. Introduction

Plaintiffs Allen T. and Tommie Hoofman filed this asbestos action against numerous defendants, including Defendant FMC Corporation (“FMC”), on behalf of its former Chicago Pump (“Chicago”) and Northern Pump (“Northern”) businesses, and Defendant Goulds Pumps, Inc. (“Goulds”), alleging wrongful exposure to Defendants’ asbestos-containing products between 1958 and 1990. Defendants now move for summary judgment, asserting (1) that Maritime law applies to Plaintiffs’ claims, and (2) that under either Maritime or Arkansas law, they are entitled to judgment as a matter of law. Following a hearing on January 9, 2014, the Court reserved its decision on these Defendants’ motions for summary judgment and requested the Parties submit further briefing on the applicability of Maritime law. Having reviewed the Parties submissions and representations at oral argument, the Court hereby **GRANTS** Defendants’ motions for summary judgment. In doing so, the Court need not and does not reach the issue of applicable law.

II. Factual Background

Mr. Hoofman has been diagnosed with what he alleges is asbestos-related lung cancer. From 1963 to 1982 he served in the United States Navy, performing maintenance and service on pumps, valves, engines, and turbines as a fireman and

a machinist mate both on shore and aboard various Navy ships.¹ Mr. Hoofman testified that he believes he encountered asbestos during the removal of insulation materials on lines that ran to pumps, and during the removal and replacement of flange gaskets and packing.

Mr. Hoofman was deposed on June 26, 2012. He recalled the names of pumps he encountered while working on Navy ships, including Chicago and Goulds, but he could not identify any instance when, or location where, he worked on either a Chicago or Goulds pump.² At that time he also could not name any brand of packing material he worked with. But he was able to identify Flexitallix as a brand of replacement gaskets used by the Navy.³

Also of note, at age 9 Mr. Hoofman started smoking approximately 1 to 2 packs of cigarettes per day. Beginning in 1972, his smoking increased to an average of 2 packs per day.⁴

¹ Mr. Hoofman described his naval work history as follows: preventative maintenance on the USS Raleigh; work in proximity to mud and lagging materials on the USS Sierra; maintenance work on pumps on the USS Waldron; machinist mate duties, including main feed pumps repair on the USS Plymouth Rock; compensate pump work and pump rebuilding on the USS Davis. *See* Pltfs' Ans. Brf. at 1-4.

² Deposition of Allen T. Hoofman, June 26, 2012 (Ex. 1 to Pltfs' Ans. Brf.) at 132.

³ *Id.* at 23; 136-37.

⁴ *Id.* at 23-24.

III. Standard of Review

Summary judgment is warranted pursuant to Superior Court Rule 56 where the movant can show that no material issues of fact exist such that movant is entitled to judgment as a matter of law.⁵ When moved for summary judgment, the Court must view all facts and draw all reasonable inferences in the light most favorable to the non-moving party.⁶

IV. Discussion

A. Plaintiffs have not met the product nexus standard under either Maritime or Arkansas law.

In their motions for summary judgment, Defendants request that this Court apply Maritime law rather than Arkansas law. Despite having filed a motion to establish Arkansas law as the applicable law in this action,⁷ Defendants claim they reserved the right to assert Maritime law, and now wish the Court to determine whether Arkansas or Maritime law should apply.⁸

⁵ Super. Ct. Civ. R. 56; *Smith v. Advanced Auto Parts, Inc.*, 2013 WL 6920864, at *3 (Del. Super. Ct. Dec. 30, 2013); *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁶ *Nutt v. A.C. & S., Inc.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986).

⁷ *See In Re: Asbestos Litigation (Hoofman, Allen)*, Del. Super. Ct., C.A. No. 12C-04-243, Boyer, M. (Oct. 11, 2013) (ORDER).

⁸ To the extent Plaintiffs contend that Defendants should be prohibited from exercising their reserved right to request that Court apply Maritime law at this stage, that contention is rejected. Considering this Court's prior applicable-law order, summary judgment is the appropriate time to make such application.

The Court, however, is not satisfied that the record here is sufficiently developed such that the Court could engage in the fact-intensive analysis required to determine whether the injury occurred on navigable waters, whether the tort would have an effect on maritime commerce, and whether there exists a relationship between the activity giving rise to the tort and traditional maritime activity.⁹ The Court, however, need not resolve the applicable law question. As explained below, in light of the evidence developed, Plaintiffs have not sustained their burden to demonstrate that any material issue of fact remains to be determined by a jury as to whether any asbestos-containing products manufactured by Defendants caused Mr. Hoofman's lung cancer. This is so whether the Court applied the Maritime or Arkansas standard.

1. Plaintiffs cannot meet the “substantial exposure” requirement under Maritime law.

The Maritime standard, as articulated by the Sixth Circuit Court of Appeals, requires Plaintiffs to demonstrate that (1) Mr. Hoofman was exposed to Defendants' products, and (2) Defendants' products were a substantial factor in

⁹ See *Conner v. Alfa Laval, Inc.*, 2011 WL 3101810, at *4-5 (E.D. Pa. July 22, 2011) (adopting the modern standard articulated in *Grubert v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 530 (1995), and requiring “a party seeking to invoke federal admiralty jurisdiction . . . over a tort claim [to] satisfy conditions both of location and of connection with maritime activity”); see also *Mazzaia v. A.O. Smith Corp.*, 2013 WL 1224024, at *2 (Conn. Super. Ct. Mar. 7, 2013) (“The party invoking maritime jurisdiction . . . must make an evidentiary showing in order to demonstrate, by a preponderance of the evidence, that at least some of the alleged exposure occurred on a vessel on navigable waters.”).

causing Mr. Hoofman's injuries.¹⁰ "[E]vidence of substantial exposure for a substantial period of time . . . provide[s] a basis for the inference that the product was a substantial factor in causing the injury."¹¹ In contrast, "a mere showing that [D]efendant's product was present somewhere at plaintiff's place of work is insufficient."¹²

Even viewing the evidence presented in the light most favorable to Plaintiffs, the Court concludes that under the Sixth Circuit's articulation of the Maritime standard, there remain no genuine questions of material fact; FMC and Goulds are entitled to judgment as a matter of law.¹³ While Mr. Hoofman identified Chicago¹⁴ as a brand of pumps he recalled from his time in the Navy, he was unable to specify any type of Chicago pump he worked with or any location where he worked with a Chicago pump.¹⁵ Plaintiff was similarly unable to provide any specific information concerning his work on Goulds' pumps.¹⁶

¹⁰ *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 492 (6th Cir. 2005).

¹¹ *Id.*

¹² *Id.*

¹³ *See* Super. Ct. Civ. R. 56.

¹⁴ Mr. Hoofman offered no testimony regarding Northern Pump's products.

¹⁵ Q: Can you tell me any particular ship you served on where you have a recollection of there being a Chicago Pump?

A: I just remember the name is – I couldn't tell you, no.

Q: Couldn't tell me a ship?

In essence, Mr. Hoofman argues that: (1) his scant recall of the names of brands of pumps is sufficient proof that he may have worked with, and was in fact exposed to, asbestos-containing components of those brand-name pumps; and (2) his period of Naval service was so extensive as to permit the inference that those specific pumps were a substantial factor in his alleged asbestos-related lung cancer. At trial, Plaintiffs would rely on their medical expert's testimony that Mr. Hoofman's lung cancer was caused by asbestos, and that "all of the exposures to an asbestos-containing product from which respirable asbestos fibers were released

A: No, I couldn't.

Q: Can you tell me if you would associate that name with any particular type of pump? I mean, what would the function of that pump be?

A: I'm not sure. I just remember the name.

Deposition of Allen T. Hoofman, June 26, 2012 (Ex. A to FMC's Rep. Brf.) at 149-150.

¹⁶ Q: All right. Am I right that you can't tell me on what ship or ships –

A: No.

Q: – you worked on a Gould's [sic] pump?

A: No, I cannot tell you that.

Q: All right. And am I also correct that you can't tell me exactly what work you did on the condensate pumps, the Gould's [sic] pumps?

A: No, I can't.

Deposition of Allen T. Hoofman, June 26, 2012 (Ex. A to FMC's Rep. Brf.) at 151.

into the breathing zone of plaintiff, above background level of asbestos, . . . was a substantial contributing factor to the development of [Mr. Hoofman]'s disease.”¹⁷

While such evidence might present a material issue of fact as to whether asbestos caused Mr. Hoofman's lung cancer, Mr. Hoofman's limited recollection coupled with Plaintiffs' experts' generalized testimony is insufficient to support the inference that the source of that exposure was either Defendants' products.¹⁸ Maritime law requires a plaintiff to demonstrate something more than a product's mere presence on his or her worksite.¹⁹ Without evidence of the time and place of his alleged work on and exposure to pumps manufactured by FMC or Goulds, Mr. Hoofman can prove neither that any FMC or Goulds pumps he may have worked on even contained asbestos²⁰ nor that that purported asbestos exposure was a substantial factor in causing his injury.

¹⁷ E.g., Report of James A. Strauchen, M.D., Apr. 17, 2013 (Ex. J to FMC's Op. Brf.) at 2.

¹⁸ See *Lindstrom*, 424 F.3d at 492.

¹⁹ See *id.*

²⁰ Plaintiffs contend that Mr. Hoofman is qualified to testify to the contents of Defendants' products and that his subjective belief that he worked with asbestos is admissible to prove the products he worked with actually contained asbestos. In support, Plaintiffs point to *Taska v. Cleaver-Brooks, Inc.*, 2011 WL 379326, at *1 (Del. Super Ct. Jan. 13, 2011), in which the Court denied a motion for summary judgment based on testimony of the plaintiff's product identification witness. The Court determined that witness was qualified to testify to the contents of the defendant companies' products because of his specific familiarity with the products. *Id.* That witness testified that he had received on-the-job training, had observed the specific asbestos products in use, and had observed asbestos-remediation efforts. *Id.* Unlike in *Taska*, however, Plaintiffs here have failed to produce a valid product identification of either Defendants' products.

2. Plaintiffs cannot meet Arkansas’s “frequency, regularity, proximity” test.

Arkansas has adopted the *Lohrmann* “frequency, regularity and proximity” test.²¹ To survive this motion for summary judgment under Arkansas’ *Chavers* test, Plaintiffs must show: “(1) Mr. [Hoofman] was exposed to a particular asbestos-containing product made by [Defendants]; (2) with sufficient frequency and regularity, (3) in proximity to where he actually worked, (4) such that it is probable that the exposure to [Defendants]’ products caused Mr. [Hoofman]’s injuries.”²² The fourth element of the *Chavers* test “consider[s] the application of the first three elements in deciding whether a causal connection exists between [Mr. Hoofman]’s exposure and his injuries.”²³

The Court has already noted that Mr. Hoofman himself was unable to identify a time or place where he would have worked on Defendants’ pumps.²⁴ Nor has Mr. Hoofman presented a product identification witness who would testify to the presence of Defendants’ pumps in proximity to Mr. Hoofman’s various work spaces. As discussed above, Mr. Hoofman’s sparse testimony regarding his recall

²¹ *Chavers v. General Motors Corp.*, 79 S.W.3d 361, 369 (Ark. 2002); *see Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986).

²² *Chavers*, 79 S.W.3d at 369.

²³ *Green v. AlphaPharma, Inc.*, 284 S.W.3d 29, 42 (Ark. 2008).

²⁴ *See, e.g.*, Deposition of Allen T. Hoofman, June 26, 2012 (Ex. A to FMC’s Rep. Brf.) at 149-150.

of Defendants' products' names cannot sustain an inference that any of Defendants' asbestos-containing products were present with such frequency, regularity and proximity to Mr. Hoofman to be considered a probable cause of Mr. Hoofman's injuries.²⁵

B. Plaintiffs' remaining claims are dismissed.

Having failed to meet the product nexus standard under either Maritime or Arkansas law, Plaintiffs cannot sustain their remaining claims against either FMC or Goulds.

IT IS SO ORDERED.

/s/ Paul R. Wallace
PAUL R. WALLACE, JUDGE

cc: All counsel via File & Serve

²⁵ Compare *Chavers*, 79 S.W.3d at 370 (upholding lower court's grant of summary judgment to defendant brake manufacturers who admittedly manufactured some asbestos-containing brakes during the time period plaintiff was a "shade-tree mechanic," because plaintiff either could not identify defendants' products, or failed to demonstrate frequent and regular exposure to defendants' products), with *Green*, 284 S.W.3d at 38-43 (reversing lower court's grant of summary judgment where plaintiffs raised material questions of fact regarding the frequent, regular, and proximate arsenic exposure, because causation is a question of fact to be determined by the jury).