IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLARD BARTEL, Admrs. for GEORGE E. MURRAY, Deceased,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
v.	:	Transferred from the Northern District of Ohio (Case No. 95-14694)
A-C PRODUCT LIABILITY TRUST ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-37528-ER
Defendants.	:	

O R D E R

AND NOW, this **3rd** day of **September, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant United Fruit Company (ECF No. 72) is **GRANTED**.[1]

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[1] This case was transferred from the United States District Court for the Northern District of Ohio to the United States District Court for the Eastern District of Pennsylvania as part of MDL 875. The case is part of the Court's maritime docket ("MARDOC").

Plaintiff Willard Bartel (with others), Administrator for the Estate of George E. Murray ("Decedent" or "Mr. Murray"), asserts claims of negligence under the Jones Act and unseaworthiness under general maritime law for injuries Mr. Murray allegedly sustained while working aboard various vessels from 1943 to 1981. Plaintiff claims that Decedent was exposed to asbestos while working aboard various vessels and developed an asbestos-related disease as a result of his exposure to asbestos. Defendant United Fruit Company ("Defendant" or "United Fruit") is the alleged shipowner and employer of one vessel that Decedent served aboard:

- **BEN F. DIXON** (Apr. 1944 - Aug. 1944)

Defendant has moved for summary judgment, arguing that there is insufficient evidence to establish that Decedent was exposed to asbestos on any vessel owned by United Fruit and that asbestos exposure cannot be presumed. Decedent was not deposed.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

The parties agree that the case is governed by maritime law, and that there are Jones Act claims against Defendant. Because the claims all arise from alleged asbestos exposure aboard a vessel, it is clear that maritime law applies because the "connection" and "locality" tests are satisfied. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.); Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at *1 n.1 (E.D. Pa. Dec. 2, 2011) (Robreno, J.).

II. Defendant's Motion for Summary Judgment

A. Defendant's Arguments

Defendant argues that summary judgment is proper

because Plaintiff has failed to identify any co-workers who will testify as to Decedent's alleged exposure to asbestos-containing products while working aboard vessels owned and/or operated by Defendant. Defendant states that asbestos exposure cannot be presumed and that Plaintiff simply alleging that asbestos was present somewhere aboard a vessel that Decedent served on is insufficient to prove causation. Defendant cites to Jackson v. A-C Product Liab. Trust, 622 F. Supp. 2d 641, 644 (N.D. Ohio 2009), in support of this contention.

B. Plaintiff's Arguments

Plaintiff contends that Decedent was exposed to asbestos aboard the BEN F. DIXON and that Defendant is liable for his injuries arising from this exposure. In support of his assertion that he has identified sufficient evidence to survive summary judgment, Plaintiff cites to the following evidence:

- Coast Guard Records
  Plaintiff attaches coast guard records evidencing that Decedent served aboard the BEN F. DIXON from April 13, 1944 to August 10, 1944. Mr. Murray's "rating" (capacity in which he was employed) states "Oiler."

- Omnibus Exhibits
  Plaintiff attaches the following in support of his response:

  (1) Medical and scientific literature
  Asbestos disease amongst merchant marines was reported as early as 1918 and increased incidences of asbestos-related diseases were documented in various studies throughout the 1900s (Omnibus Exhibits A, B, C, D, and E). According to Dr. Irving Selikoff, "it was estimated that all vessels delivered before 1975 had extensive asbestos insulating materials aboard" and the materials were used throughout the living and machinery spaces (Omnibus Exhibit B). The asbestos became friable over time due to natural ship movement and vibrations and crew members would be exposed to these friable asbestos fibers (Omnibus Exhibits F, G, and H).

(2) **Expert testimony**
Plaintiff's expert, Troy Corbin, opines (Omnibus Exhibit I) that "merchant marines are exposed to asbestos from various common materials aboard ships." Mr. Corbin performed tape lifts and found the presence of asbestos fibers in crew's quarters where active abatement work was not in progress. Certain defendants' expert, Thomas McCaffery, opines that five to ten percent of the thermal asbestos insulation aboard a merchant vessel was in a deteriorated condition (Omnibus Exhibit J). Pathologist Dr. Victor Roggli states that a merchant marine is presumed to have an occupational history of asbestos exposure unless the merchant marine notes otherwise (Omnibus Exhibit K).

(3) **Testimony of other merchant marines**
Plaintiff attaches the testimony of various merchant marines who state that they and their coworkers suffered from extensive, frequent, and regular exposure to asbestos throughout their careers (Omnibus Exhibits L, M, N, O, P, Q, R, and S). Plaintiff attaches testimony describing the various duties each merchant marine was charged with based on their rating. According to this testimony, oilers took temperature readings on all of the machinery and reported these in a logbook (Omnibus Exhibit V). Crew members were also exposed in the sleeping quarters, the passageways, the galley, and the mess hall (Omnibus Exhibits DD and EE).

Plaintiff alleges that this evidence shows that all merchant marines, including Decedent, were exposed to high levels of asbestos on a frequent basis.

- Decedent's Medical Report
Plaintiff attaches the medical report of Dr. John A. Pella (Exhibit 2). The report reads as follows under the heading "Social History:"

> He has a cigarette smoking history a pack per

> day for over 30 years, but quit 10 years ago. He worked as an engineer in [sic] on ships much of his life and [sic] significant exposure to asbestos from insulating materials.

Plaintiff also alleges that he has identified witnesses to testify regarding asbestos exposure aboard the vessels on which Decedent served. These witnesses are allegedly identified because they served aboard the same vessels and at the same time as Decedent. Plaintiff cites to "Exhibit 3" in support of this assertion. Plaintiff asserts that Defendant did not depose his witnesses and cannot meet its initial burden necessary to obtain summary judgment. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986).

With respect to the product identification and causation standard in the context of a general maritime asbestos claim, Plaintiff contends that in order to maintain an action for negligence or strict liability he must prove that "(1) [Decedent] was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury [Decedent] suffered." Lindstrom v. A.C. Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005) (citing Stark v Armstrong World Indus., Inc., 21 F. App'x 371, 375 (6th Cir. 2001)). However, with respect to claims against Defendant under the Jones Act, Plaintiff contends that the causation standard is incorporated from the Federal Employers Liability Act ("FELA") and is "slight causation" (as opposed to "substantial factor causation"). Plaintiff contends the caselaw makes clear the burden of proof to establish causation under a FELA case (and, by incorporation, a Jones Act case) is "relaxed" or "featherweight" and can be satisfied by purely circumstantial evidence. See Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508 (1957).

C. Analysis

Defendant argues that summary judgment is proper because Mr. Murray is deceased and thus unable to testify, and Plaintiff fails to identify any co-workers who will testify as to Decedent's alleged exposure to asbestos-containing products while working aboard vessels owned and/or operated by Defendant. Defendant states that asbestos exposure cannot be presumed merely because Plaintiff has alleged that asbestos-containing materials were used on Defendant's vessels. See Jackson, 622 F. Supp. 2d at 645.

In support of its motion for summary judgment, Defendant points to Plaintiff's supplemental witness disclosure See ECF No. 72-2, Ex. 2. Defendant asserts that Plaintiff's supplemental witness disclosure fails to identify any witness who will testify as to Decedent's alleged exposure on a vessel owned or operated by United Fruit. A review of Plaintiff's supplemental witness disclosure confirms Defendant's assertion. The supplemental witness disclosure lists the names of various defendants. Under each defendant, Plaintiff has listed the names of various co-workers. Next to each co-worker, Plaintiff has designated whether that particular witness is (1) "Available to Testify;" (2) "Not Available;" or (3) "Will Supplement." Plaintiff has also identified whether the particular witness has provided a sworn statement. Importantly, absent from Plaintiff's supplemental witness disclosure is any percipient witness available to testify as to Decedent's alleged exposure to asbestos attributable to Defendant United Fruit. Indeed, "United Fruit" does not appear in any form on Plaintiff's supplemental witness disclosure.

In response to Defendant's motion, Plaintiff attaches coast guard records evidencing that Decedent served aboard the BEN F. DIXON from April 13, 1944 to August 10, 1944. See ECF No. 88-1, Ex. 1. In his response, Plaintiff alleges that Defendant United Fruit Company was the owner/employer of the BEN F. DIXON. Plaintiff also attaches the same supplemental witness disclosure submitted by Defendant. See ECF No. 88-3, Ex. 3. Again, United Fruit is not identified anywhere in this supplemental witness disclosure. An "Index to Witness Declarations" for Decedent is also included. This index identifies (1) "William O. Anglin" as a witness available to testify about "Crane Co." and the vessel "BUENA VISTA;" and (2) "Romulo L. Diaz Sr." as a witness available to testify about "Keystone Shipping Company" and the vessel "HENRY L. ELLSWORTH." Plaintiff also submits the sworn statements of Mr. Anglin and Mr. Diaz. Mr. Anglin's sworn statement does not identify "United Fruit" as an employer, nor does he identify the BEN F. DIXON as a vessel that he served aboard. Similarly, Mr. Diaz's sworn statement does not identify "United Fruit" as an employer, nor does he identify the BEN F. DIXON as a vessel that he served aboard. Accordingly, the evidence submitted by Plaintiff does not appear to refute Defendant's claim that Plaintiff has failed to identify any co-worker who will testify as to Decedent's alleged exposure to asbestos-containing products while working aboard vessels owned and/or operated by Defendant.

In his papers, Plaintiff alleges that the Defendant must "discharge the burden the Rules place upon him" and cannot do so without supporting its motion in any way. Plaintiff asserts that he is not obligated to "depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit." Celotex, 477 U.S. at 328 (White, J. concurring). Here, as demonstrated by Defendant, Plaintiff has not identified any witness that United Fruit could depose. Therefore, the argument that Defendant has not "shifted the burden" is not applicable here.

Accordingly, the only evidence Plaintiff has submitted in support of his assertion that Decedent was exposed to asbestos on the BEN F. DIXON are the "Omnibus Exhibits" and a medical report. The medical report is not vessel or defendant specific. The report merely notes that Decedent was exposed to asbestos while working as an engineer on ships. Similarly, the Omnibus Exhibits are not vessel, defendant, or even case specific. Plaintiff asserts that the Court can infer from the Omnibus Exhibits that all merchant marines, including Decedent, were exposed to asbestos-containing materials while serving aboard all vessels, including the BEN F. DIXON. Further, Plaintiff asserts that the caselaw makes clear that even purely circumstantial evidence is sufficient to support a jury finding of causation in a Jones Act case. See Rogers, 352 U.S. at 508 (obligating an employer to pay damages even though proof was entirely circumstantial and noting that "[c]ircumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence"). Moreover, under the Jones Act, Plaintiff contends that the causation standard is "relaxed" or "featherweight."

The Court, however, need not determine whether, under the Jones Act, the causation standard is "relaxed" or "featherweight" because even under this relaxed standard Plaintiff has failed to present any evidence that Decedent was actually exposed to asbestos on a vessel owned or operated by Defendant. In comparison, in Casey v. A-C Product Liability Trust, No. 11-30219, ECF No. 76 (E.D. Pa. Aug. 4, 2014) (Robreno, J.), this Court denied a moving shipowner's motion for summary judgment because Plaintiff presented specific testimony - in the form of Plaintiff's own sworn statement - that he was exposed to asbestos on the defendant's vessel. In this case, even if a reasonable jury could conclude that the vast majority of merchant

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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marines were exposed to respirable asbestos aboard any given vessel, in the absence of **any** evidence (circumstantial or direct) pertaining specifically to Mr. Murray's service on the BEN F. DIXON, a reasonable jury could not conclude that Mr. Murray was exposed to respirable asbestos on the BEN F. DIXON. Under the standard asserted by Plaintiff, "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, **with reason**, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." Rogers, 352 U.S. at 506-07 (emphasis added). Here, no "fair-minded [juror] could reach [this] conclusion[] on the evidence" presented by Plaintiff. Id. at 508. Accordingly, summary judgment in favor of Defendant must be granted. See Anderson, 477 U.S. at 248-50.