

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 12.¹

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
 ambient levels from asbestos-containing refractory original to
 the Foster boilers but, it is virtually impossible for decedent to
 have avoided being exposed to asbestos dust from this original
 refractory.

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

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

24
 25 _____
 26 ¹ Foster Wheeler also argued in its motion that there was no triable issue as to Plaintiffs’ claim for
 27 punitive damages. See MSJ at 15–18. Nevertheless, Foster Wheeler acknowledged that the
 28 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.
 28

III. DISCUSSION

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

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

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

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



16 CHARLES R. BREYER
 17 United States District Judge