Dugas v. 3m Co.

United States District Court for the Middle District of Florida, Jacksonville Division

July 1, 2016, Decided; July 1, 2016, Filed

Case No. 3:14-0cv-1096-J-39JBT

Reporter
2016 U.S. Dist. LEXIS 98672

MARSHA K. DUGAS, as Personal Representative of the Estate of Darryl S. Dugas, Plaintiff, v. 3M COMPANY, et al., Defendants.

Core Terms

engines, contractor, asbestos, military, summary judgment, warning, aircraft, air, government contractor, specifications, mesothelioma, quotations, exposure, parties

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Judges: BRIAN J. DAVIS, United States District Judge.

Opinion by: BRIAN J. DAVIS

Opinion

ORDER

THIS CAUSE is before the Court on Plaintiff's Amended Motion for Partial Summary Judgment on Defendant United Technologies Corporation's Government Contractor Affirmative Defense (Doc. 533: Ms. Dugas's Motion) and Defendant United Technologies Corporation's Motion for Final Motion for Summary Judgment (Doc. 535: UTC's Motion). UTC has responded in opposition to Ms. Dugas's Motion (Doc. 549), and Ms. Dugas has responded in opposition to UTC's Motion (Doc. 547). The Court also heard argument on the competing motions at the June 28, 2016 Final Pretrial Conference. Accordingly, the matters are ripe for review.

I. BACKGROUND

Ms. Dugas's Third Amended Complaint claims that UTC is liable under theories of negligence and strict liability for the allegedly defective warnings accompanying Pratt and Whitney TF-30 aircraft engines, and for the allegedly defective design of those engines. See generally (Doc. 564; Third Amended Complaint).[1] Ms. **[*4]** Dugas claims these defects lead to her husband Darryl Dugas being exposed to asbestos fibers during the late 1960's and early 1970's while serving in the United States Navy. Ms. Dugas further alleges that Mr. Dugas's exposure to asbestos caused him to develop malignant mesothelioma. Mr. Dugas and Ms. Dugas filed suit to recover for their damages. Unfortunately, Mr. Dugas passed away after filing suit. (Doc. 522). Ms. Dugas now maintains this suit as the representative of the Estate of Darryl Dugas.

In response to Ms. Dugas's allegations, UTC has asserted the military contractor defense as described in *Boyle v. United Technologies Corp., 487 U.S. 500 (1988)* and *Brinson v. Raytheon Co., 571 F.3d 1348 (11th Cir. 2009)*. UTC also contends that there is insufficient evidence to prove that Mr. Dugas was exposed to asbestos from an UTC aircraft engine that could have caused Mr. Dugas's mesothelioma. Ms. Dugas counters by asserting that UTC cannot prevail on the military contractor defense as a matter of law, and that there is sufficient evidence that an UTC aircraft engine caused Mr. Dugas's mesothelioma.

II. DISCUSSION

A. Standard of Review

Under *Rule 56 of the Federal Rules of Civil Procedure*, "[t]he court shall grant summary judgment if the movant shows **[*5]** that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P 56(a)*. The record to be considered on a motion for summary judgment may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." *Fed. R. Civ. P. 56(c)(1)(A)*. An issue is genuine when the evidence is such that a reasonable jury could return a verdict in favor of the nonmovant. See *Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996)* (quoting *Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993)*). "[A] mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment." *Kesinger ex rel. Estate of Kesinger*

[1] For purposes of this Order, Pratt and Whitney is an unincorporated division of UTC. (Doc. 535 at 1).

v. Herrington, 381 F.3d 1243, 1247 (11th Cir. 2004)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, (1986))*.

The party seeking summary judgment bears the initial burden of demonstrating to the Court, by reference to the record, that there are no genuine issues of material fact to be determined at trial. See *Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991)*. "When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995)* (internal citations and quotation **[*6]** marks omitted). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson, 477 U.S. at 248*. In determining whether summary judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995)* (citing *Dibrell Bros. Int'l, S.A. v. Banca Nazionale Del Lavoro, 38 F.3d 1571, 1578 (11th Cir. 1994))*.

As applied to this case, the Court recites the relevant material facts in a light most favorable to Ms. Dugas—the non-moving party—regarding Shell's position that this Court should find that Ms. Dugas cannot establish exposure to or causation by a Shell adhesive product. See *Brooks v. Cty. Comm'n of Jefferson Cty., Ala., 446 F.3d 1160, 1161-62 (11th Cir. 2006)*. The Court recites only the undisputed facts regarding the military contractor defense because both parties seek summary judgment on the issue. See United States v. Consol. City of Jacksonville, No. 3:12-CV-451-J-32MCR, 2015 WL 3618367, at *1 (M.D. Fla. June 9, 2015) ("explaining court may not resolve factual disputes or make credibility findings in reviewing cross-motions for summary judgment") (citing *Georgia State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs, 775 F.3d 1336, 1346-48 (11th Cir. 2015))*.

B. Factual Background

Mr. Dugas began his service in the United States Navy on January 10, 1967. (Doc. 615.1 at 10). Following his successful completion of basic **[*7]** training for service in the Navy, Mr. Dugas was assigned to be an aviation structural mechanic or metal-smith ("AMS"). Id. His job duties were general aircraft maintenance, which included documenting and repairing defects. Id. at 20-21. The Navy first sent Mr. Dugas to the Keflavik Air Base in Iceland, where he was stationed until sometime in 1968. (Doc. 615.4 at 2). While stationed in Keflavik, Mr. Dugas removed cement panels from "old World War II barracks" to allow for their remodeling. (Doc. 615.1 at 22). The removal of the cement panels required the use of hammers and saws, which created dust that circulated through the air, though Mr. Dugas did not know what was in the cement panels. Id. While tearing out the panels, Mr. Dugas used a "little white paper thing[] that you put on and pinch your nose . . . [that] had an elastic band around it that [he] would always hook [o]n [his] ears []." Mr. Dugas could not recall the brand or name of the mask he used, but he did not think that the mask protected him from dust exposure. Id. at 23.

Following his stay in Keflavik, the Navy sent Mr. Dugas to Cecil Field in Jacksonville during the last part of 1968, where he remained until the first part of 1970. (Doc. 615.1 **[*8]** at 29); (Doc. 615.4 at 3). Mr. Dugas then spent most of 1970 on the USS Franklin D. Roosevelt ("FDR"). (Doc. 615.3 at 15). During his time at Cecil Field and aboard the USS FDR, Mr. Dugas was a part of the "VA-15," where he inspected, maintained, and repaired the exterior of A-7 aircraft. (Doc. 615.1 at 30-31). Mr. Dugas testified that the repair of the A-7 aircraft sometimes involved the use of the epoxy adhesive known as "934." Id. at 31; (see also Doc. 545.5 at 7). Use of the adhesive involved multiple steps, which included mixing the adhesive with the curing agent, and applying the mixture. Id. at 31-32. The mixture would harden as it dried. Id. Mr. Dugas would file the mixture to keep the surface smooth and consistent, which created a "dusty [environment]—something that you didn't want to be breathing in." (Doc. 615.1 at 32-33). Even with his wearing of "little white masks," Mr. Dugas did not "feel too safe . . . ." Id.

In addition to maintaining the skins of airframes, Mr. Dugas also assisted with the removal and re-installation of the Pratt and Whitney TF-30 engines which coupled with the A-7 airframes. (Doc. 615.1 at 35). When the engines were removed from the airframe, Mr. Dugas would inspect and **[*9]** clean the vacant engine bays. Id. at 39. This would sometimes involve the use of compressed air inside the engine bay which would cause airborne debris. Id. at 39-

40. Mr. Dugas's testimony is supported by Wray Emrich's testimony that Mr. Dugas used compressed air to clean engine bays (Doc. 632.1 at 14-15). He also testified that other people used compressed air on the engines and in Mr. Dugas's presence. Id. at 15.[2]

The Pratt and Whitney TF-30 engines sold before and during the time Mr. Dugas served in the Navy contained asbestos-laden: components, heat shields, gaskets, loop clamp grommets, cushioned loop clamps, thermocouple cables, and packing. (Doc. 547.6 at 7-9). Some of the asbestos containing parts, were intended to be "consumable", in that they would breakdown over time and be replaced with identical Pratt and Whitney replacement parts. (Doc. 629.1 at 47). UTC knew that asbestos was hazardous by 1952 (Doc. 617.16-17), but UTC did not include warnings with its Pratt and Whitney TF-30 engines that asbestos composed parts of the engine. (Doc. 629.1 at 46). UTC is unable **[*10]** to produce contracts for the sale of its TF-30 engines to the military. (Doc. 547.17 at 2-3). Moreover, not all of the asbestos-containing parts were necessarily required to be included with the TF-30 engines, nor is it clear that the Navy knew the parts contained asbestos. See (Doc. 629.1 at 42); see also (Doc. 629.1 at 38; Sumner Depo. (explaining that the he had never witnessed the "continuous back-and-forth" between UTC and the Navy and that he had no evidence of it ever occurring regarding the use of asbestos)). Yet, the Navy may have still reviewed and approved UTC's use of asbestos in its engines. (Doc. 654 at 10-11 (citing Doc. 611.1 at 18; McCaffery Depo.)); see also (Doc. 535 at 4 ¶ 21; Sumner Depo.). Similarly, Mr. McCaffery testified that "[asbestos warnings] [are] not prohibited . . . I would say . . . the standard for a warning is so high that a warning about asbestos-containing materials would not have been permitted."). (611.1 at 26).

C. Analysis

1. Military Contractor Defense and Learned Intermediary Defense

The common issue addressed by both Ms. Dugas's Motion and UTC's Motion is the military contractor defense. In Boyle, the Court explained that the military contractor **[*11]** defense would apply to bar assigning liability to military contractors "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *487 U.S. at 512*. The purpose behind the doctrine is to insulate from financial liability government contractors who produced equipment for the Government in the Government's stead because the costs associated with that liability would ultimately be passed on to the Government. *Brinson, 571 F.3d at 1353* (quoting *Boyle, 487 U.S. at 511-12*). While both parties agree to the legal description of the military contractor defense and that the issue should be decided as a matter of law, the parties come to divergent conclusions as to the results produced by application of the law to these facts.
a. Approval of Reasonably Precise Specifications

The first element of the military contractor defense requires that the United States approved reasonably precise specifications. *Brinson, 571 F.3d at 1351*. "'This condition requires the existence of two factors: reasonably precise specifications and government approval of them.'" *Brinson, 571 F.3d at 1351* (quoting *Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1371, 1377 (11th Cir. 1997)*, abrogated **[*12]** on other grounds by *155 F.3d 1343 (11th Cir. 1998))*. The military contractor defense does not apply when the government "merely approve[d] imprecise or general guidelines" and the contractor retained the discretion over "the design feature" in question. *Brinson, 571 F.3d at 1351-52* (internal quotations and citations omitted); accord *Getz v. Boeing Co., 654 F.3d 852, 863 (9th Cir. 2011)* (The court found that the first element of the military contractor defense had been met because it was clear that the Army carefully scrutinized, tested, and made changes to the design at issue) (internal citation omitted); see also *Trevino v. Gen. Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir. 1989)* ("If the government contractor exercised the actual discretion over the defective feature of the design, then the contractor will not escape liability via the government contractor defense . . . ."). Stated in its simplest forms, "the military contractor defense is available only when the defendant demonstrates with respect to its design and manufacturing decisions that the government made me do it." *Brinson, 571 F.3d at 1351* (internal quotations and citation omitted). Indeed,

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[2] It is unclear whether Mr. Emrich's testimony supports the proposition that Mr. Dugas himself used the compressed air. (See Doc. 632.1 at 15).

where a contractor "could comply with both its contractual obligations and the state-prescribed duty of care[,]" the military contractor defense does not preclude liability. *Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487, 1490 (11th Cir. 1990)* (internal quotations and citation omitted).

On the record before the **[*13]** Court, it is not clear whether the Government meaningfully reviewed, considered, and approved UTC's use of asbestos in its TF-30 engines. Likewise, as to UTC's ability to invoke the military contractor defense in context of the Plaintiff's failure to warn claim, the Court finds that there is enough evidence that a reasonable jury could decide either that UTC was prevented from including a warning with its TF-30 engines or that it was not. And, while UTC has presented sufficient evidence that the Navy knew of the dangers of asbestos, (Doc. 535.12 at 78, 102, and 106), and Plaintiff does not dispute this evidence, the Court is unable to conclude that UTC was reasonable in relying on the Navy to pass that information on to the foreseeable users. See *Aubin v. Union Carbide Corp., 177 So. 3d 489, 514 (Fla. 2015)* ("[T]he learned intermediary doctrine is not a complete defense . . . the intermediary's level of education, knowledge, expertise, and relationship with the end-users is informative, but not dispositive, on the issue of whether it was reasonable for the manufacturer to rely on that intermediary to relay the warning to end users.") (internal quotations and citation omitted) (emphasis added).

2. Exposure to EPON 934 and Causation of Mesothelioma

[*14] UTC takes the position that Plaintiff cannot offer evidence that Mr. Dugas was exposed to asbestos from TF-30 aircraft engines. However, it is undisputed that Mr. Dugas worked with and around the TF-30 engines. It is also undisputed that the engines came with a multitude of asbestos containing components. Some of these components were anticipated to deteriorate, and their deterioration created a dusty working environment. (Doc. 632.1 at 14; Emrich Depo.). This exposure, in light of the opinions of Doctors Holstein and Maddox is sufficient to establish Mr. Dugas was exposed to respirable asbestos fibers which caused his mesothelioma.[3]

Accordingly, after due consideration, it is

ORDERED:

1. Plaintiff's Amended Motion for Partial Summary Judgment on Defendant United Technologies Corporation's Government Contractor Affirmative Defense (Doc. 533) is **DENIED**.

2. Defendant United Technologies Corporation's Final Motion for Summary Judgment (Doc. 535) is **DENIED**.

DONE and **ORDERED** in Jacksonville, Florida this *1st* day of July, 2016. **[*15]**

/s/ Brian J. Davis

BRIAN J. DAVIS

United States District Judge

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[3] Taking the evidence in a light most favorable to Plaintiff, Mr. Dugas would not have been protected from asbestos by wearing a 3M 8500 dust mask. (Doc. 627.1 at 7 and 22).