

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



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTORIA LUND, individually and as successor-in-interest to WILLIAM LUND, deceased; DAVID LUND, an individual; and SHEILA LUND, an individual, as legal heirs of WILLIAM LUND, Deceased,)	Case No. CV 13-02776 DDP (VBKx)
Plaintiff,)	ORDER DENYING DEFENDANTS ELECTRIC BOAT CORPORATION AND GENERAL DYNAMICS CORPORATION'S MOTION FOR RECONSIDERATION
v.)	[Dkt. 852]
3M COMPANY a/k/a MINNESOTA MINING & MANUFACTURING COMPANY, et al.,)	
Defendants.)	

Presently before the court is Defendants Electric Boat Corporation and General Dynamics Corporation's ("Defendants") Motion for Reconsideration of the court's Order Denying Summary Adjudication of Plaintiff's Strict Liability Claims. (Dkt. 852.) Having considered the submissions of the parties, heard oral argument, and reviewed the evidence, the court DENIES the motion for reconsideration and adopts the following order.

1 **I. BACKGROUND**

2 The court has set forth the relevant background in a prior
3 memorandum of decision addressing Defendants' Motion for Summary
4 Judgment. (See Dkt. 845.) In brief, Plaintiffs, individually and as
5 legal heirs and representatives of William Lund's estate, brought
6 this action to recover for injuries suffered by Mr. Lund, a former
7 U.S. Navy Machinist Mate. (Dkt. 1, ¶ 8.) According to Plaintiffs,
8 Mr. Lund's injuries and mesothelioma diagnosis were attributable to
9 his exposure to asbestos dust and fibers during the construction
10 and maintenance of various U.S. Navy ships manufactured by
11 Defendants. (Id.) In particular, Plaintiffs allege that Mr. Lund
12 was exposed to asbestos while working "in the engineering spaces on
13 the USS Lafayette" at Electric Boat division's shipyard and while
14 working on the USS Gato at General Dynamics' shipyard. (Plaintiffs'
15 Responses to Special Interrogatories Propounded by Defendant
16 General Dynamics Corporation's, Set One, attached as Exhibit B to
17 the Declaration of Lisa M. Rickenbacher ("Plaintiffs' Special
18 Interrogatories Responses"), Dkt. 622-4, at 4:17-7:15.)

19 Plaintiffs filed this action in the Superior Court for the
20 County of Los Angeles, raising claims of negligence, breach of
21 express and implied warranties, strict liability in tort, and
22 premises owner/contractor liability. (See Dkt. 1.) The case was
23 removed to federal court and, on January 30, 2015, Defendants
24 General Dynamics and Electric Boat filed motions for summary
25 judgment on each of Plaintiffs' claims. (Dkt. Nos. 619 & 622.) On
26 March 1, 2016, the court denied Defendants' motions for summary
27 judgment in full. (Dkt. 829.) It later issued a Memorandum of
28 Decision ("Summ. J. Mem.") explaining its reasoning. (Dkt. 845.)

1 Among the issues raised in Defendants' Summary Judgment Motion
2 was whether a strict products liability claim could be brought
3 against shipbuilders, such as Defendants, who built custom ships
4 for the U.S. Navy. (Dkt. 622-1 at 6.) Relying on an out-of-circuit
5 district court case, Defendants argued that a Navy ship should not
6 be considered a "product" for purposes of a strict liability claim.
7 (Id. (citing Mack v. General Electric Co., 896 F. Supp. 2d 333, 345
8 (E.D. Pa. 2012)).) The court in Mack held that while strict
9 liability could be imposed on manufacturers of a ship's various
10 component products, it could not be imposed on the builder of the
11 ship itself. (Id.) Applied to the present case, the court
12 acknowledged that Mack presented persuasive authority but denied
13 summary judgment on the strict liability claims because it found
14 that there was a genuine issue of material fact as to the
15 involvement of other asbestos-containing products besides Navy
16 ships.

17 Defendants then filed this Motion for Reconsideration. (Dkt.
18 852.)

19 **II. LEGAL STANDARD**

20 Under Central District of California Local Rule 7-18, a party
21 may seek reconsideration of a decision on any motion on the grounds
22 of:

23 (a) a material difference in fact or law from that
24 presented to the Court . . . that . . . could not have been
25 known to the party moving for reconsideration at the time
26 of such decision, or (b) the emergence of new material
27 facts or a change of law occurring after the time of such
28 decision, or (c) a manifest showing of a failure to
consider material facts presented to the Court before such
decision.

1 C.D. Cal. L.R. 7-18. A motion for reconsideration may not,
2 however, "in any manner repeat any oral or written argument made in
3 support of or in opposition to the original motion." Id.

4 **III. DISCUSSION**

5 Defendants' Motion for Reconsideration raises only a single
6 issue: does the Ninth Circuit's decision in McIndoe v. Huntington
7 Ingalls, Inc., 817 F.3d 1170 (9th Cir. 2016), which was decided
8 after the court issued its summary judgment order, require
9 reconsideration of the court's prior determination that Defendants
10 were not entitled to summary judgment on Plaintiff's strict
11 liability claims.

12 **A. The McIndoe Decision**

13 In McIndoe, the Ninth Circuit confronted the question of
14 whether a Navy warship was a "product" for purposes of holding a
15 shipbuilder "strictly liable for defects in materials originally
16 installed on the ships they built." Id. at 1173. The case, brought
17 by the legal heirs of James McIndoe, raises a markedly similar fact
18 pattern to the present case. In the 1960s, James McIndoe served on
19 two U.S. Navy ships that contained pipe insulation made from
20 asbestos. Id. at 1172. During McIndoe's service, "[he] was
21 allegedly present during maintenance work involving the removal of
22 pipe insulation that causes asbestos fibers to float in the air he
23 breathed." Id. McIndoe eventually died from complications related
24 to mesothelioma. Id. His heirs brought suit against the companies
25 responsible for building the ships involved, arguing that McIndoe's
26 exposure to asbestos on the ships contributed to his death. Id. One
27 of the claims raised by McIndoe's heirs relied on a theory of
28 strict products liability.

1 According to the Ninth Circuit, resolving the strict liability
2 question required determining whether Navy warships were "products"
3 in the context of a products-liability claim brought under maritime
4 law. Quoting the Restatement of Torts, the court explained that a
5 "product" subject to strict liability is "'tangible personal
6 property *distributed commercially* for use or consumption.'" Id. at
7 1173 (quoting Restatement (Third) of Torts: Prods. Liab. § 19(a)
8 (Am. Law Inst. 1998) (emphasis in original)). Based on this
9 definition, the Ninth Circuit concluded that "warships that were
10 never 'distributed commercially'" did not constitute products for
11 the purpose of a strict liability claim. Id. The court further
12 explained that allowing such a broad theory of liability would be
13 inconsistent with the goal of "plac[ing] responsibility on the
14 party most able to prevent harm" Id. Specifically, the court noted
15 that "a ship built under government contract may not even be
16 designed by the builder" and that the "shipbuilder[] does not
17 manufacture—and has little ability to control the quality of—the
18 many thousands of component parts installed on each ship." Id. at
19 1173-74.

20 **B. "Products" at Issue in the Court's Prior Decision**

21 As an initial matter, it is important to clarify that the
22 court's prior decision regarding strict liability did not turn on a
23 determination of whether a Navy ship constituted a "product" for
24 purposes of stating a claim for strict products liability against
25 the manufacturer of a Navy ship. Indeed, the court's prior decision
26 explained that Mack v. General Electric Co., 896 F. Supp. 2d 333,
27 345 (E.D. Pa. 2012), which stood for precisely that proposition,
28 was persuasive authority and further noted that "Plaintiffs

1 apparently do not challenge it." (Summ. J. Mem. 5-6.) Instead, the
2 court denied summary judgment on the grounds that there was a
3 "genuine issue of material fact as to the involvement of other
4 asbestos-containing products besides the Navy ships." (Id. 6.)

5 In the Motion for Reconsideration, Defendants argue that
6 Plaintiffs have since admitted in discovery that the only products
7 at issue in the case are the USS Lafayette and USS Gato, both Navy
8 ships. (Defendants' Motion for Reconsideration 6.) In support,
9 Defendant's cite to Plaintiffs' Responses to Special
10 Interrogatories where Plaintiffs explain that their claims against
11 Defendants are premised on the fact that, while working on the USS
12 Lafayette and the USS Gato, Defendants' personnel "regularly
13 installed various forms of asbestos-containing insulation in
14 Decedent's immediate presence and vicinity." (Plaintiffs' Special
15 Interrogatories Responses at 21:9-24:3; Exhibit C to the
16 Declaration of Lisa M. Rickenbacher in support of General Dynamic's
17 Mot. for Summ. J., ECF No. 619-4, at 21:9-24:3.) The interrogatory
18 response further explains that Mr. Lund was also on the boat during
19 test-firing of missiles, which heavily shook the submarine and
20 resulted in dust being shaken loose from the insulation. (See
21 Plaintiffs' Special Interrogatories Responses at 22:7-13.)

22 This purported admission does not justify reconsidering the
23 court's prior determination that there was a triable issue
24 concerning the involvement of "other asbestos-containing products,"
25 actually manufactured by the Defendants, under the requirements of
26 Local Rule 7-18. (See Summ. J. Mem. 6.) It is not "a material
27 difference in fact . . . from that presented to the Court" given
28 that the assertions come directly from the evidence submitted with

1 Defendants' prior Motion for Summary Judgment nor was there a
2 manifest "failure to consider material facts." Furthermore, even
3 reexamining the interrogatory responses identified by Defendants,
4 does not lead to the conclusion that the statements constitute an
5 admission that the only products at issue in this case are the Navy
6 ships.

7 In the Opposition to the Motion for Reconsideration,
8 Plaintiffs reiterate that their case is premised not just on the
9 allegation that Defendants manufactured the Navy ships at issue but
10 also that they manufactured the piping insulation that was
11 installed on the ship.¹ (Opposition to Defendants' Motion for
12 Reconsideration 7.) In support, Plaintiffs identify excerpts from
13 the deposition of Defendants' 30(b)(6) witness who admits that
14 insulation "would be prefabricated, premanufactured, or precut"
15 before it was installed. (Deposition of Bradford Heil, attached as
16 Exhibit B to Declaration of Josiah Parker at 82:23-83:2.)
17 Defendants contend that this statement "does not establish that
18 defendants 'manufacture' anything." (Defendants' Reply to Motion
19 for Reconsideration 7 n.1.)² While the court recognizes that this
20 evidence does not prove Defendants manufactured the insulation at
21 issue in the case, it does find that there continues to be a

22
23 ¹ The parties have not adequately developed the issue of when
24 a product is properly considered "manufactured" as opposed to
merely "prefabricated" or "precut."

25 ² Defendants also challenge reliance on this evidence on the
26 grounds that the testimony was not presented in support of the
27 original Opposition to Defendants' Motion for Summary Judgment.
28 (Defendants' Reply to Motion for Reconsideration 7 n.1.). But the
deposition of Defendants' 30(b)(6) witness took place on March 27,
2015, approximately one month after Plaintiffs' opposition was due,
and thus could not reasonably have been expected to be included in
the original Opposition.

1 triable issue of fact regarding whether other asbestos-containing
2 products were "manufactured" by the Defendants. Specifically, there
3 is a triable question of whether Defendants manufactured the
4 insulation, and thus might still be held liable under a theory of
5 strict products liability.

6 **C. Applying McIndoe to "Products" at Issue**

7 It does not appear that McIndoe disturbs the basis of the
8 court's prior decision but, out of an abundance of caution, the
9 court clarifies the effects of the McIndoe decision on the present
10 strict liability claims. Defendants argue that, in light of
11 McIndoe, Plaintiffs can no longer maintain a strict products
12 liability claim against Defendants on the grounds that Defendants
13 manufactured the ships at issue in the case or installed the
14 component parts.

15 Plaintiffs raise a number of responses that attempt to narrow
16 the scope of McIndoe's holding and suggest that it does not
17 preclude their precise claims. First, they argue that McIndoe only
18 holds that shipyard contractors cannot be held responsible for
19 installing defective products "when their primary role in doing so
20 is building the ship" and not when it is merely maintaining the
21 ship. (Opp'n 2-3.) Thus, if Defendants installed asbestos-
22 containing insulation when building the ship, there would be no
23 claim for strict liability. But here, where Defendants installed
24 the defective insulation as part of maintaining the ship, there is
25 still a claim. This distinction finds no support in the McIndoe
26 decision. Indeed, McIndoe himself was not exposed to asbestos
27 during shipbuilding but instead during periods of maintenance. 817
28 F.3d at 1172.

1 Plaintiffs then argue that McIndoe does not disturb pre-
2 existing Ninth Circuit precedent that shipyard contractors can be
3 held strictly liable for supplying certain defective parts. (Opp'n
4 5.) All but one of the cases Plaintiffs rely on concern commercial
5 ships and not vessels built specifically for the Navy. Given that
6 McIndoe turned expressly on the fact the warships "were never
7 'distributed commercially,'" the court cannot conclude that the
8 ships at issue in this case are not squarely the sort McIndoe held
9 were not "products" for the purposes of a strict products liability
10 claim.

11 Plaintiffs do identify one case that involves a manufacturer
12 building a craft for a military contract. See McKay v. Rockwell
13 International Corp., 704 F.2d 444 (9th Cir. 1983). Plaintiffs state
14 that under McKay, "shipyard contractors can be held strictly liable
15 for defective products that injure navy serviceman." (Opp'n 6.)
16 McKay does not stand for so broad a proposition. Rather McKay,
17 which involved a liability claim against the manufacturer of an
18 ejection system for military aircrafts, concluded that strict
19 liability is not available against a military supplier where the
20 "United States established, or approved, reasonably precise
21 specifications for the allegedly defective military equipment." 704
22 F.3d at 451. This holding is consistent with McIndoe's explanation
23 that the goal of strict liability is not advanced where the
24 defective ship "may not even be designed by the builder but instead
25 by the government itself or another outside professional." 817 F.3d
26 at 1174.

27 Applying McIndoe to the facts of this case, the court
28 concludes that Defendants cannot be held strictly liable for

1 manufacturing the Navy ship at issue in this case because the ships
2 are not "products" in the sense required to state such a claim.
3 McIndoe does not preclude the possibility that a manufacturer of a
4 specific defective product, even when that product is supplied to
5 the military, might still be held responsible under strict products
6 liability. As the Ninth Circuit explained in McIndoe, its decision
7 was based in part on the consideration that "the shipbuilder does
8 not manufacture—and has little ability to control the quality
9 of—the many thousands of component parts installed on each ship."
10 517 F.3d at 1174. This is not so where the shipyard contractor has
11 actually manufactured a specific asbestos-containing product, and
12 thus could control the quality of the product. Therefore, McIndoe
13 does not require revising the court's prior order to the extent
14 that there continues to be a triable issue of fact whether
15 Defendants manufactured specific products, rather than assembling a
16 collection of component parts into a ship.

17

18 **IV. CONCLUSION**

19 For the reasons set forth above, the court DENIES Defendant's
20 Motion for Reconsideration.

21

22 IT IS SO ORDERED.

23

24

25 Dated: August 1, 2016



26

DEAN D. PREGERSON
United States District Judge

27

28