STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 22, 2013]

ROSIE K. SWEREDOSKI, as Personal Representative of the Estate of DOUGLAS A. SWEREDOSKI, and Individually Recognized as Surviving Spouse	:	**C.A. No. PC 2011-1544**
v.	:	
ALFA LAVAL, INC., et al.	:	

DECISION

GIBNEY, P.J. In this asbestos case, Rosie K. Sweredoski (Plaintiff), as Personal Representative of the Estate of Douglas A. Sweredoski (Sweredoski), and Individually Recognized as Surviving Spouse, brings a Motion for Summary Judgment (the Motion) against Crane Co. (Defendant), Individually and as Successor to Chempump, Jenkins Bros., Weinman Pump Manufacturing Company, Pacific Steel Boiler Corporation, Thatcher Boiler, Chapman Valve Company, and Cochrane. Plaintiff argues that Defendant has failed to produce any evidence showing that it is entitled to assert the government contractor defense as an affirmative defense. Defendant opposes the Motion on two grounds. First, Defendant contends that the Motion should be denied because discovery is still ongoing and Plaintiff has not yet deposed several experts who will testify regarding the government contractor defense. Second, Defendant argues that even absent such depositions, it has already proffered evidence supporting all three prongs of the defense. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Sweredoski served in the United States Navy (the Navy) from 1964 to 1968. He spent approximately two years—1965 to 1967—aboard an aircraft carrier, the U.S.S. Independence (the Independence). During that time, Sweredoski worked for one year as a fireman and boiler operator in the ship's boiler rooms, replacing the packing and gaskets in steam valves allegedly designed and manufactured by Defendant. Both the packing and gaskets contained asbestos.

Plaintiff alleges that Sweredoski's exposure to these asbestos-containing products caused him to contract malignant mesothelioma, suffer severe mental and physical pain, and eventually die. Plaintiff alleges that Defendant knew or should have known of the dangers of asbestos exposure at the time Sweredoski served in the Navy. As such, Plaintiff asserts that the asbestos-containing steam valves were defectively designed, and Defendant owed Sweredoski a duty to warn him of the dangers of asbestos exposure but failed to do so. She seeks compensatory and punitive damages for Sweredoski's injuries, pain and suffering, medical expenses, and lost wages.

Plaintiff filed the instant Motion following this Court's May 22, 2013 Decision, allowing Defendant to amend its Answer to assert the government contractor defense as an affirmative defense. She argues that Defendant has failed to produce any reliable, admissible evidence regarding the applicability of the government contractor defense to the instant case. In particular, Plaintiff asserts that Defendant has failed to show that: (1) the Navy created or approved reasonably precise specifications for the steam valves installed on the Independence; (2) the steam valves conformed to those specifications; or (3) Defendant warned the Navy about the dangers of asbestos known to Defendant but not to the Navy.

Defendant responds that it has presented evidence supporting the three prongs of the defense. First, Defendant contends that it has produced testimonial evidence from its expert witnesses showing that the Navy developed precise specifications for all of the components it procured for its vessels, including high-pressure steam valves like those at issue here. Defendant maintains that the Navy solicited input from component manufacturers when devising these specifications, but ultimately chose the content of the specifications itself.

Second, Defendant argues that it has presented expert testimonial evidence demonstrating that it fully complied with all of the Navy's applicable specifications when manufacturing the steam valves. Defendant avers that, in fact, the Navy would not have accepted the valves had Defendant failed to satisfy the mandated requirements.

Third, Defendant asserts that it has shown, through the testimony of an expert witness, that the Navy had superior knowledge of the dangers of asbestos exposure at the time of the Independence's construction and service. Because of the Navy's superior knowledge of such risks, Defendant maintains, it was not required to warn the Navy about any dangers associated with asbestos exposure.

II

Standard of Review

Pursuant to Super R. Civ. P. 56(c),[1] our Supreme Court has held that "summary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most

[1] Rule 56(c) provides in pertinent part that:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

favorable to the non-moving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." Mutual Development Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 323 (R.I. 2012); Olamuyiwa v. Zebra Atlantek, Inc., 45 A.3d 527, 532 (R.I. 2012). "Conversely, summary judgment is not appropriate 'if there are any genuine issues of material fact or if the moving party cannot prevail as a matter of law.'" In re Estate of Dermanouelian, 51 A.3d 327, 331 (R.I. 2012) (quoting Narragansett Electric Co. v. Saccoccio, 43 A.3d 40, 44 (R.I. 2012)).

"The burden rests with the nonmoving party 'to prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Mutual Development Corp., 47 A.3d at 323; Olamuyiwa, 45 A.3d at 532. Thus, "by affidavits or otherwise, nonmoving parties have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact for trial." Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 839 (R.I. 2012). When considering a motion for summary judgment, a trial justice must "remain ever mindful . . . 'that summary judgment is an extreme remedy that warrants cautious application.'" Mutual Development Corp., 47 A.3d at 323 (quoting Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 557 (R.I. 2009)); Olamuyiwa, 45 A.3d at 533.

III

Analysis

A

The Government Contractor Defense and Design Defect Claims

"[The government contractor] defense protects government contractors from tort liability that arises as a result of the contractor's 'compliance with the specifications of a federal

government contract.'" Getz v. Boeing Co., 654 F.3d 852, 860 (9th Cir. 2011) (quoting In re Hanford Nuclear Reservation Litigation, 534 F.3d 986, 1000 (9th Cir. 2008)); see Kerstetter v. Pacific Scientific Co., 210 F.3d 431, 435 (5th Cir. 2000) (noting that "[g]overnment contractor immunity is derived from the government's immunity from suit where the performance of a discretionary function is at issue"). In the design defect context, the defendant establishes the government contractor defense by presenting evidence satisfying three elements: "(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."[2] Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988).

1

Reasonably Precise Design Specifications

The defendant meets the first prong of the defense when it shows that the government "actually [chose the] design feature [in question]." Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir. 1989); see 63A Am. Jur. 2d Products Liability § 1364 at 668 (noting that the defendant fulfills the first prong "where evidence indicates that the government provided the contractor with extremely precise specifications [for the product at issue] . . ."). When the

[2] In formulating this test, the United States Supreme Court found that the "[d]isplacement [of state law] will occur . . . where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and the operation of state law.'" Boyle, 487 U.S. at 507 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). The Court identified "the procurement of equipment by the United States [as] an area of uniquely federal interest . . . ." Boyle, 487 U.S. at 507. It reasoned that when a government contractor provides military equipment to the government pursuant to a procurement contract, the "independent contractor performing its obligation under [the] contract . . . obliviously implicate[s] the same [uniquely federal] interest . . . ." Id. at 505. Thus, when the government exercises its discretion in selecting the equipment's design features, the contractor deserves the same immunity from tort liability that the government receives when it performs such discretionary decision-making in other contexts. See id. at 509-512.

government merely approves a design created by the defendant instead of adopting its own, the defendant must show that "the government's approval . . . [was] more than a cursory 'rubber stamp' approving the design." Getz, 654 F.3d at 861 (citing Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 748 (9th Cir. 1997)). "Rather, approval must result from a 'continuous exchange' and 'back and forth dialogue' between the [defendant] and the government." Getz, 654 F.3d at 861 (quoting Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 585 (9th Cir. 1996)); see Kleemann v. McDonnell Douglas Corp., 890 F.2d 698, 701 (4th Cir. 1989) (finding that "[w]here . . . the [government] was intimately involved at various stages of the design and development process, the required government approval of the alleged design defect is more likely to be made out"). In evaluating whether the government approved "reasonably precise specifications" for a product's design, a court should consider such factors as the government's "examin[ation of the proposed design], evaluation from time to time, [and] criticism and . . . testing [of the product design] . . . ." Kerstetter, 210 F.3d at 435; see 63A Am. Jur. 2d Products Liability § 1379 at 682.

Defendant has produced the affidavit of its designated corporate witness, Anthony D. Pantaleoni (Pantaleoni), showing that it manufactured and delivered high-pressure steam valves to the Navy pursuant to government contracts. See Pantaleoni Aff. at 2 ¶ 4. Pantaleoni testified that the design of such valves was governed by a set of detailed specifications devised by the Navy. See id. at 2 ¶ 5. He stated that these specifications contained precise requirements for all components of the valves, including methods of construction, composite materials, and packing instructions. See id.

Defendant has also produced the affidavit of its expert witness, Rear Admiral David P. Sargent, Jr. (Sargent), demonstrating that the Navy was intimately involved in the design process

of the components it procured for its vessels. Sargent testified that the Navy developed a comprehensive series of design specifications for the constituent components of its vessels called Military Specifications (MILSPECs). See Sargent Aff. at 10 ¶ 25. He stated that component manufacturers provided input for these specifications, but Navy engineers controlled the content and actually drafted the MILSPECs for all commissioned vessels. See id. at 10-11 ¶ 27. Sargent testified that each MILSPEC contained precise, detailed descriptions of all of a component's design elements, including product dimensions, chemical and metallurgical content, performance and testing standards, and labeling and shipping requirements. See id. at 10 ¶ 26. Sargent testified that among others, the Navy drafted MILSPECs for the high-pressure steam valves that it procured. See id. at 11 ¶ 27.

Defendant has proffered copies of MILSPECs for high-pressure steam valves in use at the time of the Independence's construction and service. See MILSPEC # 45V17 at 1-12; MILSPEC # 45V19 at 1-7; MILSPEC # 22052D at 1-14. MILSPEC # 45V19, for example, provides extensive design specifications for high-pressure steam valves with diameters of one-quarter inch to one inch, inclusive. See MILSPEC # 45V19 at 1. With regard to the construction materials designated for the valves, MILSPEC # 45V19 lists precise metallurgical details —including constituent materials and composition—for eighteen distinct valve parts. See id. at 3 ¶ E-2. The MILSPEC provides comprehensive engineering descriptions for each of eighteen identified valve parts. See id. at 4. For example, it states that "[v]alves shall have bolted bonnets. The joint faces for bonnet flanges shall be male and female and shall have (f2) finish . . . . The yoke shall be fitted with a bushing threaded to suit the system." See id. at 4 ¶ E-8. These written design specifications are accompanied by engineer's drawings of the valves displaying the prescribed dimensions of their constituent parts. See id. at 7.

MILSPEC # 22052D contains extensive design specifications for high-pressure steam valves with diameters of two and one-half inches and larger. See MILSPEC # 22052D at 1. Like MILSPEC # 45V19, it mandates the valves' precise dimensions, composition, performance and testing standards, and, in a detailed chart, particular materials and constituent structure. See id. at 3-9. The chart requires the manufacturer to use asbestos-containing products for the valve's "gaskets" and "packing." See id. at 3, Table I. According to Sargent, the Navy expressly chose asbestos as the principal insulating material for high-pressure, high-temperature components like the steam valves at issue here. See Sargent Aff. at 14-15 ¶ 36; 16 ¶ 37.

Sargent testified that once the MILSPEC for a particular component was drafted and approved by the Navy, the component's manufacturer developed production drawings using the MILSPEC's mandated specifications before beginning the manufacturing process. See id. at 12 ¶ 29. Sargent testified that the manufacturers were required to extensively test their products during the design and production phases in conformance with Navy regulations. See id. at 11 ¶ 29. According to Sargent, government inspectors supervised these tests throughout to ensure compliance with design specifications before the products were shipped to naval yards for installation. See id. at 11-12 ¶ 29. The testing procedures described by Sargent are listed in the text of MILSPECs # 45V17 and # 45V19. See MILSPEC # 45V17 at 11 ¶¶ F-1, F-2, F-3, F-4; MILSPEC # 45V19 at 5 ¶¶ F-1, F-2, F-3.

This evidence raises triable issues of fact concerning whether the Navy actually chose the specific design features of the high-pressure steam valves at issue here, including the use of asbestos-containing packing and gaskets. See Butler, 89 F.3d at 585-86 (finding that the defendant met the first prong of the government contractor defense in a design defect case because it demonstrated that the government "provided [the defendant] with extremely precise

specifications and painstakingly reviewed [the defendant's] conformance therewith"); cf. Trevino, 865 F.2d at 1486-87 (upholding the district court's determination that the defendant failed to establish the first prong of the defense as to the plaintiff's design defect claims, where the evidence showed that the government required only "general performance standards" for the defendant's product and merely "rubber-stamped" the product's ultimate design). Moreover, such evidence raises issues of fact regarding whether the Navy participated in sustained back-and-forth, design-related discussions with Defendant and engaged in regular performance testing of the valves. See Stout, 933 F.2d at 336 (determining that the defendant satisfied the first prong in a design defect case by presenting evidence showing that "the [government] thorough[ly] review[ed] . . . the design . . . [by engaging in] critical design reviews [and requiring] the production of prototype models tested and evaluated for months by the [government] for its actual performance"). Thus, summary judgment is not appropriate with respect to the first prong of the government contractor defense. See Pichardo v. Stevens, 55 A.3d 762, 767-68 (R.I. 2012); See Brinson v. Raytheon Co., 571 F.3d 1348, 1354-57 (11th Cir. 2009); Stout v. Borg-Warner Corp., 933 F.2d 331, 335-36 (5th Cir. 1991).

2

Conformity to the Design Specifications

To meet the second prong of the government contractor defense in the design defect context, the defendant must demonstrate that its product's design actually conformed to the government's specifications. See Getz, 654 F.3d at 864; see Lewis v. Babcock Industries, Inc., 985 F.2d 83, 89 (2nd Cir. 1993) (determining that the defendant must show that the government "received exactly what it sought"). "As a matter of law, satisfaction of this [second] element of the government contractor defense requires accurate conformity with specifications or

government approval of the delivered product." Machnik v. Buffalo Pumps, Inc., 506 F. Supp. 2d 99, 103 (D. Conn. 2007); see Getz, 654 F.3d at 865 (recognizing that the second prong "does not depend upon satisfaction of some general performance goal," but requires strict adherence to the government's specifications). The defendant must show that it delivered to the government a product precisely meeting the design specifications created or adopted by the government. See Kleemann, 890 F.2d at 703 (quoting Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1317 (11th Cir. 1989) and finding that "a product conforms to reasonably precise specifications if it satisfies 'an intended configuration' even if it 'may produce unintended and unwanted results'"); 63A Am. Jur. 2d Products Liability § 1366 at 670 (stating that a contractor satisfies the second prong when it demonstrates that "its product met the government specifications in all material respects"). "[W]here the procurement process involves a continuous exchange between the contractor and the government, the process itself becomes persuasive evidence of the product conformity to precise specifications." Brinson, 571 F.3d at 1357 (quoting Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371, 1378 (11th Cir. 1997)) (quotation marks omitted).

Defendant has presented evidence demonstrating that it complied with all of the Navy's precise design specifications when fulfilling its valve procurement contracts. Sargent testified that pursuant to naval procurement contracts, component manufacturers were required to satisfy the applicable MILSPECs in all material respects for the Navy to accept the components upon delivery. See Sargent Aff. at 11 ¶ 28. Sargent testified that, in fact, the Navy continuously monitored the manufacturers' compliance with the MILSPECs throughout the design and production processes. See id. at 11 ¶ 29. Such compliance monitoring included extensive, Navy-conducted component testing. See id.; MILSPEC # 45V17 at 11 ¶¶ F-1, F-2, F-3, F-4; MILSPEC # 45V19 at 5 ¶¶ F-1, F-2, F-3. As such, Sargent testified, the procured "[e]quipment could not

have been installed aboard Navy vessels unless it was first determined by the Navy to be in conformity with all applicable Navy specifications." See Sargent Aff. at 12 ¶ 29.

The text of the proffered MILSPECs shows that the valve manufacturers were required to strictly comply with the enumerated design specifications. MILSPEC # 45V19 requires contractors to adhere precisely to the steam valve's specified design criteria unless explicit approval to deviate from the design is obtained from the Navy. See id. at 2 ¶¶ C-1, C-2, C-3. Similarly, MILSPEC # 45V17—providing design specifications for a variety of shipboard steam, oil, and water service valves—mandates manufacturer compliance with the design specifications for each type of valve listed therein. See MILSPEC # 45V17 at 4-10. For example, MILSPEC # 45V17 requires manufacturers of "Class I Gate Valves" to "conform in every particular to [the enumerated design specifications], except those ordered in steel, which shall conform to [other enumerated design specifications]." See id. at 4 ¶ E-1a. This language is substantially similar to that for the other types of valves listed in MILSPEC #45V17. See id. at 5-10.

This evidence raises material issues of fact regarding whether the steam valves fitted to the Independence fully complied with all mandated design specifications. See Carley v. Wheeled Coach, 991 F.2d 1117, 1125-26 (3rd Cir. 1993) (determining the defendant met the second prong of the government contractor defense in a design defect case by demonstrating that "the [product] was manufactured according to the government's specifications, and that [the manufacturer] performed tests and measurements on [the product] indicating that [the product met] the government's requirements . . ."); Kleemann, 890 F.2d at 701-04. Such evidence also raises factual issues concerning whether the Navy's extensive testing of the valves throughout the design and production processes—and eventual acceptance of the valves—ensured product conformance with design specifications. See Brinson, 571 F.3d at 1357-58 (finding sufficient

evidence satisfying the second prong of the test, where the defendant showed that "engineers representing the government reviewed drawings to ensure that the 'as-built' configuration of the [product] complied with its design documentation"); Kleemann, 890 F.2d at 702-03 (noting that the continuous back-and-forth design process between the government and the defendant contractor is "persuasive evidence of product conformity to precise specifications"). The second prong of the military contractor defense therefore survives summary judgment here. See Pichardo, 55 A.3d at 767-68; Brinson, 571 F.3d at 1354-57; Kleemann, 890 F.2d at 701-04.

3

Warning of Dangers Known to Defendant but Not to the Government

The defendant fulfills the third prong of the defense when it shows that it "warned the United States 'about the dangers in the use of the [product] that were known to the contractor but not to the United States.'" Getz, 654 F.3d at 865 (quoting Boyle, 487 U.S. at 512). The defendant "is only responsible for warning the government of dangers about which it has actual knowledge." Getz, 654 F.3d at 865 (quoting Kerstetter, 210 F.3d at 436); see Trevino, 865 F.2d at 1487. In fulfilling its duty to warn the government of the product's dangers, the defendant need only "warn the United States," not any specific person within the government. See Tate v. Boeing Helicopters, 140 F.3d 654, 660 (6th Cir. 1998); 63A Am. Jur. 2d Products Liability § 1379 at 682. The warning, however, "must be communicated to the United States in a reasonably effective manner." Tate, 140 F.3d at 660. The contractor also meets this prong by demonstrating that the government had the same or superior knowledge of the dangers posed by the product's design as the defendant. See Lewis, 985 F.2d at 89-90; Stout, 933 F.2d at 336-37.

Defendant has produced the declaration of its expert witness, Dr. Samuel A. Forman, (Forman), showing that the Navy was aware of the dangers of asbestos exposure before it

procured steam valves for the Independence. Forman testified that the Navy recognized the dangers of asbestos exposure, and formulated what it considered to be "appropriate protective measures," as early as 1922. See Forman Decl. at 11 ¶ 27. Forman identified scientific studies conducted by the Navy in 1939 and 1941 which expanded the Navy's knowledge of the effects of asbestos exposure on its servicemen. See id. at 12 ¶ 30; 13 ¶ 31. He testified that in 1943, the Navy promulgated a series of "Minimum Requirements for Safety and Industrial Health in Contract Shipyards" which "identified asbestos-related disease as a potential hazard of shipyard work [and] explain[ed] that exposure could result from handling, sawing, cutting, molding and welding rod salvage around asbestos or asbestos mixtures." See id. at 15 ¶¶ 36-37. According to Forman, "at least by the early 1940s, the Navy had become a leader in the field of occupational medicine relating to, among other things, asbestos dust inhalation exposure." Id. at 10-11 ¶ 26. The Navy's interest in accumulating and controlling asbestos-related knowledge continued throughout the 1950s, 1960s, and 1970s. See id. at 16-22.

Additionally, Forman testified that the Navy was committed to maintaining supervisory control over its knowledge of occupational hazards, including asbestos exposure. See id. at 22 ¶ 54. The Navy viewed such knowledge as "a strategic advantage" in managing its workplaces. See id. at 23 ¶ 54. In order to protect this "strategic advantage" and remain the final decision-maker with regard to naval workplace safety, the Navy "rejected participation from manufacturers in its efforts to alert its personnel to potential asbestos hazards in Navy operations." See id. at 23 ¶¶ 56-57.

Such evidence raises factual issues concerning whether the Navy had the same or superior knowledge of the dangers of asbestos exposure as Defendant at the time it procured high-pressure steam valves for the Independence. See Lewis, 985 F.2d at 89-90 (determining the

defendant met the third prong of the government contractor defense in the design defect context by showing that "[b]ecause of its experience with the [product], the [government] had greater knowledge of the problem than [the defendant] had"); Trevino, 865 F.2d at 1487 (finding that because "both [the defendant] and the Navy knew [of the dangers of the product's design,] . . . liability of [the defendant] could not be based upon non-disclosure of these dangers"). This evidence also creates issues of fact as to whether Defendant, because of the Navy's superior knowledge of the dangers of asbestos exposure posed by components such as asbestos-containing high-pressure steam valves, "need[ed] . . . to communicate [to the Navy product] warning[s] for the government contractor defense to apply." Stout, 933 F.2d at 336-37; see Harris v. Rapid Am. Corp., 532 F. Supp. 2d 1001, 1006 (N.D. Ill. 2007) (finding that because the government had knowledge of the dangers of asbestos exposure superior to that of the defendant, "[the defendant] was not required to warn the [government] of the dangers of asbestos . . ."). As such, summary judgment is denied as to the third prong of the government contractor defense. See Pichardo, 55 A.3d at 767-68; Lewis, 985 F.2d at 89-90; Trevino, 865 F.2d at 1487-88.

B

The Government Contractor Defense and Failure-to-Warn Claims

While the United States Supreme Court adopted the government contractor defense in the design defect context in Boyle v. United Technologies Corp., 487 U.S. 500, 510-12 (1988), "[i]t is well established that the government contractor defense . . . may operate to defeat a state failure-to-warn claim" as well. Oliver v. Oshkosh Trucking Corp., 96 F.3d 992, 1003 (7th Cir. 1996); see In re Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626, 629 (2nd Cir. 1990) (recognizing that the defense applies in failure-to-warn cases because "[j]ust as with conflicting federal and state design requirements, the existence of conflicting

federal and state warning requirements can undermine Government's ability to control military procurement"); 63A Am. Jur. 2d Products Liability § 1379 at 681. "It is also well established, however, that a defendant may not defeat a state failure-to-warn claim simply by establishing the elements of the government contractor defense with respect to a plaintiff's design defect claim." Oliver, 96 F.3d at 1003; see Tate, 55 F.3d at 1156 (noting that "[s]imply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings that ought to accompany the product"). Instead, the defendant must satisfy the following three factors to establish the government contractor defense in the failure-to-warn context: "(1) the federal government exercised discretion and approved warnings for the product; (2) the warnings the defendant provided about the product conformed to the federal government specifications; and (3) the defendant warned the federal government about dangers known to the defendant but not the government." Jowers v. Lincoln Electric Co., 617 F.3d 346, 352 (5th Cir. 2010); see Oliver, 96 F.3d at 1003-04 (finding same).

1

Reasonably Precise Warning Specifications

The defendant satisfies the first prong of the defense in the failure-to-warn context when it demonstrates that "the government cho[se] its own warnings . . . ." Oliver, 96 F.3d at 1004; Tate, 55 F.3d at 1157 (finding that "where the government . . . actually determines for itself the warnings to be provided, [the first prong is likely satisfied] because the government exercised its discretion"); see also 63A Am. Jur. 2d Products Liability § 1379 at 682. The defendant may also meet the first prong by showing "that the United States approved 'reasonably precise specifications' for the equipment supplied by the [defendant], including the appropriate wording of any warnings regarding a potential hazard." O'Connell v. Foster Wheeler Energy Corp., 544

F. Supp. 2d 51, 55 (D. Ma. 2008). In meeting the second prong, the defendant "must demonstrate that the government's 'approv[ing] reasonably precise specifications' thereby limit[ed] the [defendant's] 'ability to comply with its duty to warn.'" Getz, 654 F.3d at 866 (quoting Snell, 107 F.3d at 749). Such approval must "go beyond merely 'rubber stamping' the [defendant's] choice [of a warning]." Oliver, 96 F.3d at 1004; see Tate, 55 F.3d at 1157. At the same time, "[s]eparate evidence of a dialogue between the government and the contractor is needed when the government approves rather than prepares a warning because the government's mere acceptance of a manufacturer's warning does not establish its interest in that particular warning."[3] Jowers, 617 F.3d at 353; see Kerstetter, 210 F.3d at 435; 63A Am. Jur. 2d Products Liability § 1379 at 682.

Defendant has presented testimony demonstrating that the Navy prohibited valve manufacturers from providing asbestos-related warnings in the valves' service manuals or on label plates affixed to the valves. Sargent testified that the Navy developed two principal classes of operational manuals for its servicemen: (1) shipboard training documentation and (2) shipboard technical documentation. See Sargent Aff. at 20-22 ¶¶ 47-55. The training manuals were devised by Navy officials to teach naval servicemen skills and tactics necessary to function efficiently aboard the Navy's myriad vessels. See id. at 20-21 ¶ 49. Such documentation "included general information about equipment and systems [but not information] on any specific make or model." Id. at 21 ¶ 49.

[3] Moreover, the defendant may—but need not—show that "it was prohibited or prevented by the federal government from warning about the dangers of asbestos." Ellis v. Pneumo Abex Corp., 798 F. Supp. 2d 985, 991 (C.D. Ill. 2011); see Oliver, 96 F.3d at 1004. The touchstone under the first prong is "government discretion [in choosing or approving a warning], rather than dictation . . . ." Getz, 654 F.3d at 867; see Tate, 55 F.3d at 1157.

Sargent testified that the technical manuals were devised to inform naval servicemen about the operation, maintenance, and repair of particular shipboard equipment. See id. at 21 ¶¶ 50, 52; 22 ¶ 52. These manuals were typically written by Navy officials, but, sometimes, component manufacturers developed them under the Navy's direction. See id. at 22 ¶ 54; 23 ¶ 57. When a component's technical manual was provided by the manufacturer, the manufacturer was required to word the manual according to specifications listed in the underlying component's MILSPEC. See id. at 23 ¶ 57; 24 ¶ 59. Sargent testified that the Navy engaged in "detailed review and feedback" of the technical manuals provided by the manufacturers. See id. at 24 ¶¶ 59, 60. He stated that manufacturers "were not permitted, under the specifications . . . to include any type of warning or caution statement in the instruction books or technical manuals, beyond those required and approved by the Navy without prior discussion and approval by the Navy." Id. at 24 ¶ 60. According to Sargent, the Navy would not have allowed component manufacturers to place asbestos-related warnings in technical manuals or documentation provided with valves procured during the 1940s, 1950s, and 1960s. See id. at 36 ¶ 63; 27 ¶¶ 66, 67. Sargent testified that, in fact, "the terms "Note,' 'Caution,' and 'Warning,' when used in Navy equipment technical manuals, refer[red] specifically to safe operating and maintenance procedures and not to any more generic health related issues [like asbestos]." Id. at 28 ¶ 70.

One of the proffered MILSPECs, # 22052D, contains language requiring valve manufacturers to provide instruction and maintenance manuals with the valves designed pursuant to the MILSPEC. See MILSPEC # 22052D at 10 ¶ 3.6.2. It states that the manuals are meant to inform Navy servicemen about valve operation, maintenance, overhaul, and repair. See id. at 10 ¶ 3.6.2(c). MILSPEC # 22052D requires the valve manufacturers to describe in the manuals

appropriate procedures for visually inspecting valve wear and damage, disassembling and reassembling the valves, and removing and replacing consumable components like packing and gaskets. See id. at 10 ¶ 3.6.2(c); 11 ¶ 3.6.2(d). Significantly, the MILSPEC mandates that the manuals "shall contain, or refer to, only the limited disassembly and reassembly required to accomplish each operation." Id. at 11 ¶ 3.6.2(d). No mention is made of product warnings, asbestos-related or otherwise.

With regard to label plates affixed to components procured by the Navy, Sargent testified that their configuration and content was also dictated by specifications listed in the MILSPECs. See id. at 23 ¶ 58. Component manufacturers would not have been able to deviate from the label plate specifications without prior discussion with and approval by the Navy. See id. at 23-24 ¶ 58. Navy officials reviewed and approved these label plates before accepting delivery of the products. See id. at 27 ¶ 68. Sargent testified that the Navy would not have allowed component manufacturers to place asbestos-related warnings on component label plates during the 1940s, 1950s, and 1960s. See id. at 26 ¶ 63; 27 ¶ 67. Forman testified to the same fact. See Forman Decl. at 24 ¶ 59.

MILSPEC # 45V19 contains specifications relating to valve label plates. See MILSPEC # 45V19 at 4 ¶ E-15. The MILSPEC requires that "[e]ach valve shall have distinctly stamped, or equivalent, on one side of the body, the 'size,' 'H.P,' '600,' and in the case of globe valves, the position of the seat, for identification." Id. The manufacturer's name and trademark are also allowed, space permitting. See id. The specification does not contain any text concerning asbestos-related or other warnings.

This evidence raises triable issues of fact concerning whether the Navy exercised its discretion in choosing the content and placement of warnings in the operational manuals for

—and on the label plates of—the steam valves installed on the Independence. See Getz, 654 F.3d at 867 (determining that the defendant satisfied the first prong of the government contractor defense in the failure-to-warn context to avoid summary judgment, in demonstrating that "the [government], not the [defendant], selected which warnings to include in the [operation] manual . . ."); Harris, 532 F. Supp. 2d at 1006 (finding that the defendant met the first prong of the defense by showing that "[the government] had complete control over the nature of the warnings used on all naval equipment and that contractors were not permitted to deviate from the precise specifications"). Such evidence also raises factual issues regarding whether the Navy engaged in substantial dialogue with Defendant when it chose and approved warnings—asbestos-related or otherwise—included by Defendant in the valves' operational manuals and on their label plates. In Kerstetter, 210 F.3d at 438, a wrongful death case involving the allegedly defective ejection system of a Navy training aircraft, the court reasoned that "[a]lthough the [ejection system's] manual contained no express evaluation of a warning of the specific hazard [at issue in the case], the government contractor defense applie[d] because the [government] exercised discretion in approving warnings in the . . . manual"; see also Hilbert v. McDonnell Douglas Corp., 529 F. Supp. 2d 187, 199 (D. Ma. 2008) (noting that in the failure-to-warn context, the defendant can satisfy the first prong by demonstrating that "the government and the [defendant] . . . engag[ed] in a back-and-forth as to the content of . . . the warnings . . ."). Therefore, the first prong of the defense survives summary judgment. See Pichardo, 55 A.3d at 767-68; Getz, 654 F.3d at 867; Kerstetter, 210 F.3d at 438.

2

Conformity to the Warning Specifications

With regard to the second prong of the defense in failure-to-warn cases, the defendant must demonstrate that the provided warning actually conformed to the government's specifications. See Getz, 654 F.3d at 864-65 (acknowledging that the second prong "does not depend upon satisfaction of some general performance goal," but requires strict adherence to the government's specifications); Lewis, 985 F.2d at 89 (determining that the defendant must show that the government "received exactly what is sought"). The defendant meets this prong when it shows that it delivered the precise warning created or approved by the government. See Tate, 140 F.3d at 659 (finding that the defendant satisfied the second prong of the test because "the [warning] approved by the government was identical to the manual actually provided to the [product's end users]"); cf. Jowers, 617 F.3d at 354 (determining that the defendant failed to satisfy the second prong because it altered the warning chosen by the government at its own initiative before affixing it to the product). The defendant may also satisfy this prong "if it can demonstrate that 'any deviation from the government's specifications would likely have resulted in rejection of the equipment.'" O'Connell, 544 F. Supp. 2d at 55 (quoting Nesbiet v. General Electric Co., 399 F. Supp. 2d 205, 212 (S.D.N.Y. 2005)); see also Hilbert v. McDonnell Douglas Corp., 529 F. Supp. 2d 187, 198 n.11 (D. Ma. 2008). "Extensive government involvement in the design, review, development and testing of a [warning], as well as extensive acceptance and use of the [warning] following production, is evidence that the [warning] generally conformed with the government-approved specifications." Kerstetter, 210 F.3d at 435-36; see Brinson, 571 F.3d at 1357-58.

Defendant has produced testimonial evidence showing that the Navy would not have accepted valve operational manuals or valve label plates had Defendant not complied with all applicable specifications. Sargent testified that the Navy controlled the content of component operational manuals through MILSPECs and a thorough review process. See Sargent Aff. at 22 ¶¶ 54-55; 23 ¶ 57; see also MILSPEC # 22052D at 10 ¶ 3.6.2. Pursuant to this review process, the Navy required component manufacturers to produce draft copies of operational manuals for "feedback" from naval officials. See Sargent Aff. at 24 ¶ 59. Such feedback was provided to ensure that the manuals conformed to the required specifications and adhered to the Navy's standardized documentation format. See id. at 24 ¶ 60; 25 ¶¶ 60-62. Draft manuals had to be approved by the Navy before they were printed for inclusion with their associated components. See id. at 24 ¶ 59.

Similarly, Sargent testified that the content and configuration of component label plates was controlled by the MILSPECs. See id. at 23-24 ¶ 58; 27 ¶ 60. MILSPEC # 45V19, for example, contains precise label plate specifications for high-pressure steam valves with diameters between one-quarter-inch and one inch, inclusive. See MILSPEC # 45V19 at 4 ¶ E-15. These label plates were intended to inform servicemen of the function and capabilities of the product, not to warn them of dangers posed by the product. See Sargent Aff. at 23 ¶ 58; 25 ¶ 62; 26 ¶¶ 62-63. Sargent testified that the Navy would not have accepted components if they did not conform precisely to applicable MILSPECs in all material respects, including label plate content and configuration. See id. at 12 ¶ 29.

Such evidence raises material factual issues regarding whether the Navy's thorough review and acceptance processes for the content of component operational manuals and label plates ensured that the Independence's valves conformed to applicable warning specifications.

See Getz, 654 F.3d at 867 (finding that the defendant fulfilled the second prong of the government contractor defense in the failure-to-warn context because "the [defendant] deliver[ed] . . . the Operator's Manual" to the government after the government chose the content of included warnings and conducted a discretionary review process); Machnik, 506 F. Supp. 2d at 103-04 (determining that the defendant presented evidence satisfying the second prong of the defense because the defendant showed that "any material[s] supplied [by the defendant] that were not entirely consistent with the [government's] extensive specifications probably would have been rejected"). Thus, summary judgment is not appropriate with respect to this prong. See Pichardo, 55 A.3d at 767-68; Getz, 654 F.3d at 867; Machnik, 506 F. Supp. 2d at 103-04.

3

Warning of Dangers Known to Defendant but Not to the Government

The third prong of the defense requires the defendant to show that it "warned the United States 'about the dangers in the use of the [product] that were known to the contractor but not to the United States.'" Getz, 654 F.3d at 865 (quoting Boyle, 487 U.S. at 512). The defendant need only demonstrate that it warned the government of dangers about which it had actual knowledge. See Getz, 654 F.3d at 865; Oliver, 96 F.3d at 1001. While the defendant is not required to warn any specific person within the government to satisfy this prong, such warning must be communicated to the government "in a reasonably effective manner." Tate, 140 F.3d at 660.

Because Defendant has presented sufficient evidence to meet the third prong of the defense with respect to Plaintiff's claim that the Independence's asbestos-containing steam valves were defectively designed, such evidence necessarily satisfies the third prong as to Plaintiff's claim that Defendant should have warned the valves' users of the dangers of asbestos exposure as well. See Ruppel v. CBS Corp., 701 F.3d 1176, 1186 (7th Cir. 2012) (finding that

because "the third element [of the defense] in [failure-to-warn cases] mirrors the third [prong in design defect cases], [the defendant] satisfie[d the third prong] because there is nothing [the defendant] knew about asbestos that the Navy did not"); Oliver, 96 F.3d at 1104. Therefore, Defendant has raised triable issues of fact concerning whether the Navy had the same or superior knowledge of the dangers of asbestos exposure as Defendant. See Getz, 654 F.3d at 867; Machnik, 506 F. Supp. 2d at 104. Summary judgment is not appropriate here. See Pichardo, 55 A.3d at 767-68; Ruppel, 701 F.3d at 1186; Oliver, 96 F.3d at 1104.

IV

Conclusion

After reviewing the evidence presented by Defendant, this Court finds that the government contractor defense survives summary judgment with respect to Plaintiff's design defect and failure-to-warn claims. Defendant has shown that the Navy exercised substantial discretion in creating design and warning specifications for the steam valves it procured for its vessels, and engaged in thorough reviews of the valves and related operational manuals throughout the design and production phases. Defendant has demonstrated that the Navy would not have accepted the steam valves or their manuals had Defendant failed to conform to the Navy's precise design and warnings specifications in all respects. Defendant has shown that the Navy had knowledge of the dangers of asbestos exposure equal to or greater than the knowledge of Defendant at the time of the Independence's construction. Accordingly, Plaintiff's Motion is denied.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Rosie K. Sweredoski, et al. v. Alfa Laval, Inc., et al.
CASE NO:	PC 11-1544
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 22, 2013
JUSTICE/MAGISTRATE:	Presiding Justice Alice Bridget Gibney
ATTORNEYS:	
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