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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JAY WANLASS, Plaintiff and Appellant, v. METALCLAD INSULATION CORPORATION, Defendant and Respondent.	A143616 (San Francisco County Super. Ct. No. CGC-12-276005)

Plaintiff Jay Wanlass filed suit against numerous defendants based on alleged exposure to friable asbestos. Defendant Metalclad Insulation Corp. (Metalclad) moved for summary judgment, which the trial court (the Honorable Teri Jackson) granted. Wanlass appeals from the judgment We affirm.

BACKGROUND

This is how Metalclad's motion below framed the background of the lawsuit and of its motion:

"In 1968, Metalclad . . . contracted with the United States Navy to supply insulation for stainless steel piping in the reactor compartment of four nuclear-powered submarines constructed at Mare Island Naval Shipyard . . . in Vallejo, California. Plaintiff asserts he was exposed to asbestos containing insulation while he was working as a machinist from approximately 1968 to 1980 at [Mare Island] aboard the USS *Drum*, USS *Guitarro*, USS *Hawkbill*, and USS *Pintado*, the submarines for which Metalclad

brokered the Unibestos at issue.[1] Plaintiff's claims are precluded under the government contractor defense, which shields military contractors from state tort law liability for defects in military equipment supplied to the United States. *Boyle v. United Techs. Corp.* (1988) 487 U.S. 500, 512; *Oxford v. Foster Wheeler* [*LLC*] (2009) 177 Cal.App.4th 700. Specifically, Metalclad meets the three elements of the government contractor defense: 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 the United States. . . . Since each of the elements of the government contractor defense is met, Metalclad's motion for summary adjudication should be granted as to Plaintiff's general negligence and strict liability manufacturing and design defect claims.

"In addition, Metalclad is entitled to summary adjudication of Plaintiff's claims for negligent and strict liability failure to warn, because it would have been impossible for Metalclad to warn Plaintiff of the hazards of Unibestos, and even if Metalclad had placed its own warning on the Unibestos, that warning would not have prevented Plaintiff's exposure and therefore the lack of warning by Metalclad was not the legal cause of his injury." (Fn. omitted.)

The same day that the judgment in favor of Metalclad was filed, another judgment was filed in favor of Metalclad after Judge Jackson had granted Metalclad's summary judgment motion against plaintiff Gary Kase. In both cases, the underlying orders by Judge Jackson granting the motions were filed on November 27, 2013. The orders are substantially identical. We quote the relevant language of the order in this case:

"Defendant has shown by admissible evidence and reasonable inference therefrom that Metalclad is not liable as a government contractor. The United States government approved precise specifications for the Metalclad-supplied Unibestos used aboard the USS *Guitarro*, USS *Pintado*, USS *Drum*, and USS *Hawkbill*; the Metalclad-supplied

[1] Wanlass also asserted he was exposed to asbestos from 1956 to 1964 while he was a machinist's mate in the Navy. He began work at Mare Island as a civilian in 1965. His work at various Bay Area refineries from 1990 to 1999 is not at issue here.

Unibestos conformed to the government's specification; and Metalclad had no duty to warn the government because the government was well aware of the potential hazards of asbestos. Further, Pittsburgh Corning, the manufacturer of the Unibestos supplied by Metalclad, provided warnings on the packaging of the Unibestos. Plaintiff's general negligence (excluding negligent failure to warn) and strict liability manufacturing and design defect claims are barred by the government contractor defense.

"With respect to Plaintiff's negligent failure to warn and strict liability failure to warn claims, . . . Metalclad has demonstrated that the Navy exercised full control over the specifications and uses for materials on board nuclear submarines at Mare Island Naval Shipyard, and that a warning was not required in the specifications by the Navy. Evidence was presented that Metalclad never took possession of the subject Unibestos. Metalclad presented uncontroverted evidence that a warning was provided on the boxes of Unibestos by the manufacturer Pittsburgh Corning, but that warning did not prevent Plaintiff from exposure.[2] Plaintiff submitted the declaration of a co-worker, Oliver Brown, but that declaration merely demonstrated that Mr. Brown had seen Unibestos in boxes on the dock next to the submarine, had not seen any warnings on those boxes, and would have taken action if he had seen warnings. What Plaintiff Wanlass saw, did not see, or would have done is left to speculation. As demonstrated by the Declaration of Dan Heflin, Jr., P.E. in support of Defendant's Reply papers, Plaintiff's citation to the *Naval Instruction for Uniform Labeling Program* is unavailing. By its own terms, the scope of the Instruction is for internal distribution of bulk materials within the Navy and it does not apply to outside manufacturers or suppliers. Furthermore, asbestos is not on the list of hazardous chemicals and substances to which the Instruction applies. Similarly, MIL-M-15071D (Ships), also cited by Plaintiff as evidence of a duty to warn,

[2] The manufacturer's warning stated: "This product contains asbestos fibers. If dust is created when this product is handled, avoid breathing the dust. If adequate ventilation control is not possible, wear respirator approved by the U.S. Bureau of Mines."

applies to equipment manuals, not to thermal insulation products, and is therefore irrelevant to the issues presented in this motion.

"Metalclad has therefore met its burden to show that a warning given by Metalclad would not have affected how the Unibestos was used by the Navy, or prevented Plaintiff's alleged exposure. As a matter of law, any failure to warn by Metalclad was not a substantial factor in causing Plaintiff's alleged exposure to asbestos from Unibestos insulation. *Huitt v. Southern California Gas Co*. (2010) 188 Cal.App.4th 1586, 1588."

Wanlass then commenced this timely appeal from the summary judgment.

DISCUSSION

The brief filed on behalf of Wanlass by Gary L. Brayton and Richard M. Grant, of Brayton Purcell LLP, is virtually identical to the one those same two attorneys filed in the *Kase* appeal, which was assigned to Division One of this District. So, too, are the briefs filed in the two cases by Lisa Lurline Oberg, Felicia Y. Feng, and Andrea J. Casalett of Dentons US LLP, together with Thomas M. Peterson and Deborah E. Quick of Morgan Lewis & Bockius LLP, on behalf of Metalclad.

The arguments Wanlass now advances concerning application of the government contractor defense enunciated in *Boyle v. United Technologies Corp*., *supra*, 487 U.S. 500, 512,[3] were decisively rejected by Division One in *Kase v. Metalclad Insulation Corp*. (2016) 6 Cal.App.5th 623, which was filed following the completion of briefing in this appeal. We directed the parties to provide supplemental briefing "on the applicability, if any," of the *Kase* opinion.

In his supplemental brief, Wanlass "submits that *Kase* should not be applicable to this matter for several reasons:

"1. The Court's opinion misstated a material fact.

[3] "Liability for design defects in military equipment cannot be imposed, pursuant to state law, 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."

"2. The Court reached an erroneous decision based upon a mistake in law.

"3. The decision was based upon an issue not specifically raised in the briefs or in the trial court.

"4. The Court affirmed the order [*sic*] of summary judgment on a ground not relied upon by the trial court.

"5. The Court failed to address a material issue.

"6. The Court found 'facts' by giving [*sic*] inferences to defendant's evidence, rather than reviewing the evidence in the light most favorable to Appellant along with all reasonable inferences therefrom, contrary to the Supreme Court's directives in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826.

"In this important matter regarding the 'government contractor defense', the Court was mistaken in its application of *Aguilar*, and was mistaken as to its factual and legal findings and conclusions. Its findings, and conclusions as a matter of law, are seemingly derived from evidence viewed in a light most favorable to defendant, and giving favorable inferences to that evidence.

"The issues here properly create questions for fact to be decided by a jury. The evidence is disputed and judgment should not be given as a matter of law.

"Finally, the *Kase* Court, apparently rejecting *In re Hawaii Federal Asbestos Cases* (1992) 960 F.2d 806, where it had only previously 'distinguished' it, has created new law in California on this issue, and should *not be* followed here."

Apart from minor variations in the last three paragraphs, these are the identical reasons set out in the petition for rehearing in *Kase*. Those reasons concern purported defects and weaknesses in the *Kase* opinion, and the manner in which the opinion was decided, that are only properly addressed to the source of that opinion. However, Division One found none of these grounds persuasive and denied the petition for rehearing.[4] Kase did not seek review by our Supreme Court.

[4] After advising the parties that we intended to do so, we took judicial notice of the record in *Kase*.

The *Kase* opinion comprehensively vindicated Judge Jackson's decision as to the scope of the government contractor defense to the same claims also made here by Wanlass. The opinion is thorough, its reasoning unanswerable. Because we cannot improve on *Kase*'s analysis, we adopt it as our own. We add only two points.

First, in part II.C "Failure to Warn Claims" of the *Kase* opinion, there is the following:

"The evidence on causation was uncontroverted. . . . Metalclad never had physical custody of the Unibestos. The order was shipped from the Pittsburgh Corning Texas facility by rail, directly to the naval shipyard [at Mare Island].

"Kase, for his part, never claimed to have seen any of the shipping containers for Unibestos. Rather, he realized seeing stored 'cardboard boxes' of Unibestos that were subsequently carried to the submarines on which he was working. He did not see any warnings on the individual boxes of insulation.

"Since the evidence is uncontroverted that Metalclad never had possession of the Unibestos and there is no evidence Kase ever saw a shipping container, the question as we see it is whether there is any substantial evidence raising a triable issue that Metalclad could have required Pittsburgh Corning to place a warning label on each box of the product before Pittsburgh Corning commenced doing so itself." (*Kase v. Metalclad Insulation Corp., supra*, 6 Cal.App.5th 623, 644–645.) The *Kase* court concluded there was no evidence on this point, only speculation by the plaintiff, "which does not, and cannot, raise a triable issue. (See *Burgueno v. Regents of the University of California* (2015) 243 Cal.App.4th 1052, 1057 ['[A] party " 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture . . . .' " ']."} (*Kase v. Metalclad Insulation Corp., supra*, at p. 646, fn. omitted.)

The evidence here is similar. Wanlass testified recalling seeing workers at the shipyard with "Unibestos" on their uniforms, but this memory he later conceded was "incorrect[]." Wanlass also testified that "he did not associate any product or service with Metalclad." Thus, Wanlass's causation evidence was no stronger than Kase's.

Second, Wanlass does not dispute that the Unibestos was manufactured by Pittsburgh Corning, not Metalclad; that Metalclad was simply the "broker[]" who procured Unibestos for the Navy from Pittsburgh Corning; and that Pittsburgh Corning provided warnings on the packages of Unibestos. Despite this limited relationship, Wanlass argues that Metalclad was nevertheless under an obligation to add its own warnings. But Wanlass is unable to produce one authority imposing a duty to warn upon a party that is in effect merely a shipping agent of a finished product manufactured by a third party and was never in physical possession of the finished product.

DISPOSITION

The summary judgment is affirmed.

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Richman, Acting P.J.

We concur:

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Stewart, J.

_____
Miller, J.