IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

GAIL A. ROBINSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM J. ROBINSON, et al.,

Plaintiff,

v.

FLOWSERVE, INDIVIDUALLY AND AS SUCCESSOR TO DUCOR PUMPS, GENERAL ELECTRIC, INC., GOULDS PUMPS, INC., TATA CHEMICALS PARTNERS,

Defendants.

Case No. 14–CV–161–ABJ

ORDER ON DEFENDANT GOULDS PUMPS, INC.'s MOTION FOR SUMMARY JUDGMENT

Defendant Goulds Pumps, Inc.'s (Goulds) Motion for Summary Judgment (Doc. No. 141) and Plaintiff's opposition thereto (Doc. No. 166) have come before the Court for consideration. The Court held an oral argument on February 26, 2015. Having considered the pleadings, the applicable law, the parties' written submissions, oral arguments, and materials offered in support of their respective positions, the Court FINDS and ORDERS as follows:

BACKGROUND

This case is about Decedent William Robinson's exposure to asbestos, which led to a diagnosis of mesothelioma on May 5, 2011 and eventually his death on March 29, 2012. Doc. 166-2, Exhibit 2. Decedent's wife, Gail Robinson, brings the following claims against Goulds:

(1) negligence, (2) strict liability, (3) breach of warranty, (4) fraudulent conduct, malice and gross negligence, (5) loss of consortium, and (6) pecuniary losses. Plaintiff asserts that while Decedent was employed at a soda ash plant in southwest Wyoming, Decedent encountered asbestos-containing products that Goulds designed, marketed, manufactured, distributed, supplied or sold that caused his mesothelioma.

This action originated in New Jersey on July 13, 2011 against numerous defendants for injuries purportedly caused by exposure to asbestos-containing products. Robinson filed Amended Complaints on August 10, 2011 and November 14, 2011. In September 2011, the MDL panel transferred the case to the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. Doc. 49. The MDL Panel remanded the case back to New Jersey in November 2013. Doc. 57. The District of New Jersey transferred this case to the District of Wyoming in August 2014. Doc. 102.

The relevant undisputed facts are as follows. Decedent worked at the soda ash plant between 1968 and 1999. Doc. 166-2, pp. 15-16. Decedent worked on the "pump house" maintenance crew, but also worked in other areas of the plant. Doc. 166-2, pp. 17-18, 20, 24.[1] One of Decedent's regular jobs at the plant was maintaining and repairing pumps at the soda ash plan, which included the replacement of gaskets and packing on the pumps, as well as cutting through insulation and scraping gaskets in order to access and maintain portions of the pump. Doc. 166-2, pp. 33-35, 79, 80-82. The process of maintaining these pumps created dust in the air that contained asbestos. Doc. 166-2, p. 56, 59, 60.

---

[1] Due to the nature of Plaintiff's exhibit organization, the Court will cite to its documents using PDF page numbers.

DISCUSSION

First, the Court will address the law regarding conflict of law followed by the standard of review. Next, the Court will outline the parties' arguments, perform the conflict of law analysis per issue, and discuss the substantive issues in the case.

1. Conflict of law analysis

When evaluating conflict of law issues, the Court must apply the substantive law of the transferor court's state. *See Benne v. Int'l Bus. Machines Corp.*, 87 F.3d 419, 423 (10th Cir.1996) ("The rule is settled that when a district court grants a venue change pursuant to 28 U.S.C. § 1404, the transferee court is obligated to apply the law of the state in which the transferor court sits."). The New Jersey District Court transferred the case to this Court. Therefore, this Court must apply New Jersey choice-of-law provisions. *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir.1996) ("where a case is transferred from one forum to another under 28 U.S.C. § 1404(a), as here, then the transferee court must follow the choice of law rules of the transferor court").

In cases involving tort claims, like the current case, New Jersey applies the "significant relationship" standard to choice of law issues. *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132, 143, 962 A.2d 453, 460 (2008). The "most significant relationship" test is a three-step analysis on an issue-by-issue basis. *Id.* The first step is to determine whether there is a conflict between the laws of the interested states. *Id.* If there is no conflict, then the forum state applies its own law to resolve the disputed issue. *Id.* The second step requires the Court to presume under Section 146 of the Restatement Second of Conflict of Law that the state in which the injury occurred is likely to have the predominant, if not exclusive relationship to the parties and issues

in the litigation. The third step is to apply the contact analysis outlined under Restatement Second Conflict of Laws, section 6, which includes weighing the following principles: "(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." *Id.* at 147. The Court must then apply the law of the state with the greatest interest in governing the particular issue. The Court will apply these conflict of law principles on an issue-by-issue basis below.

2. Standard of review

Summary judgment is appropriate where "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). A dispute of fact is genuine if a reasonable juror could resolve the disputed fact in favor of either side. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is material if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). When the Court considers the evidence presented by the parties, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn" in the non-movant's favor. *Anderson*, 477 U.S. at 255.

The party moving for summary judgment has the burden of establishing the nonexistence of a genuine dispute of material fact. *Lynch v. Barrett*, 703 F.3d 1153, 1158 (10th Cir. 2013). The moving party can satisfy this burden by either (1) offering affirmative evidence that negates an essential element of the nonmoving party's claim, or (2) demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *See* Fed. R. Civ. P. 56(c)(1)(A)–(B).

Once the moving party satisfies this initial burden, the nonmoving party must support its contention that a genuine dispute of material fact exists either by (1) citing to particular materials in the record, or (2) showing the moving party's cited materials do not establish the absence of a genuine dispute. *See id.* The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, to survive a summary judgment motion, the nonmoving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Further, when opposing summary judgment, the nonmoving party cannot rest on allegations or denials in the pleadings but must set forth specific facts showing that there is a genuine dispute of material fact for trial. *See Travis v. Park City Mun. Corp.*, 565 F.3d 1252, 1258 (10th Cir. 2009).

3. Causation

a. Goulds' argument

Goulds argues that summary judgment is proper under Wyoming or New Jersey law. New Jersey law requires proof of exposure to a defendant's product. "To present a prima facie case of medical causation, a plaintiff must satisfy the 'frequency, regularity, and proximity test.'" *Hughes v. A.W. Chesterton Co.*, 435 N.J. Super 326, 89 A.3d 179, 184. "Even if plaintiffs are able to show that asbestos-containing products supplied by defendant were used in the plan, such evidence is insufficient for the imposition of strict liability without actual proof linking the exposure of plaintiffs to those products." *Id.* at 190 (citations and internal quotations omitted).

Goulds argues that Plaintiff cannot show that Decedent performed or was near Goulds' pumps with sufficient "frequency, regularity, and proximity" to justify liability.

Goulds contends that Wyoming has not adopted the "frequency, regularity and proximity test," but requires proof of harm caused by Defendant's product before product liability can be found. In support of its argument, Goulds relies on *Killian v. Caza Drilling, Inc.*, 200 WY 42, 131 P.3d 975, 985, in which the Wyoming Supreme Court stated that "in order to qualify as a legal cause, [the defendant's] conduct must be substantial factor in bringing about the plaintiff's injuries." Goulds cites the *Johnson* case, in which Judge Skavdahl noted that the "frequency, regularity, and proximity standards is undoubtedly a more refined approach to asbestos causation than Wyoming has applied. However, it is only that — a refinement of the substantial factor requirement for proving causation." *Johnson v. Allis-Chalmers Corp. Prod. Liabl. Trust*, 11 F. Supp. 3d. 1119, 1126 (D. Wyo. 2014). Goulds argues that this creates a false conflict because the result would be the same under Wyoming and New Jersey laws.

Goulds goes on to argue that under Wyoming law, a plaintiff must show that the product caused him or her physical harm, but in this case Plaintiff can only speculate about what caused harm to the Decedent. Goulds contends that summary judgment is proper under Wyoming law "where the causal connection between defendant's acts and plaintiff's damage is almost entirely subject to conjecture and speculation." *DeWald v. State*, 719 P.2d 643, 651 (Wyo. 1986) (citation omitted). Goulds argues that there is no hard evidence that Decedent worked on a Goulds pump, that he did any task that would release asbestos from a Goulds pump, or that he was in the immediate vicinity when anyone else performed specific and limited tasks during which asbestos would be released.

b. Plaintiff's argument

Plaintiff argues that in response to a similar summary judgment motion filed by Goulds, Judge Robreno found that "Plaintiffs have presented sufficient evidence to support a finding of causation with respect to original gaskets and packing supplied by Goulds in its pumps" with relation to the mesothelioma claims made related to Decedent. Judge Robreno denied Goulds' motion for reconsideration of that decision. Plaintiff urges that this is Goulds' third bite at the apple on the same issues, and Goulds failed to assert that there is new evidence that, with reasonable diligence, it could not have presented to Judge Robreno.

Plaintiff contends that in order to bring the motion on a tabula rasa, Goulds would need to show an intervening change in controlling law, new evidence previously unavailable, and the need to correct clear error or to prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Plaintiff contends that Goulds failed to show that it met any of the elements to bring the motion again. Plaintiff contends that all evidence in support of the motion was available at the time of the original motion, or at least not alleged to have been newly discovered and previously unavailable, that all the cases in support of the total summary judgment motion were in existence when Judge Robreno decided, and that Judge Robreno's decision was not in clear error or a manifest injustice.

Plaintiff concedes that Judge Robreno's motion did not decide Goulds' partial motion for summary judgment argument and Judge Robreno granted Goulds permission to refile the partial summary judgment motion in the transferor court on the issue of whether Goulds can be held legally responsible for asbestos-containing replacement insulation which it did not supply (as opposed to the original insulation which it did supply).

c. Analysis

First, the Court finds that a conflict of law analysis is not necessary for this issue because of Judge Robreno's prior decision, as discussed in detail below. Before the Eastern District of Pennsylvania transferred this case back to the District Court in New Jersey, Defendants filed a Motion for Summary Judgment that contained similar arguments to those contained in Goulds' instant motion. Doc. 166-1, p. 64–74. Judge Robreno held that:

> There is evidence the Decedent was exposed to respirable asbestos dust from gaskets used in connection with pumps manufactured and/or supplied by Defendant Goulds. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that Decedent's responsibilities for maintaining the pumps at the plant began when the pumps were brand new (as originally supplied) – such that a reasonable jury could conclude that at least from of this exposure arose from the gaskets originally installed on the pumps supplied by Goulds. There is evidences that this exposure was a substantial factor in the development of Decedent's illness. Therefore, a reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from gaskets supplied by Defendant Goulds such that it was a substantial factor in the development of his illness. . . . Accordingly, summary judgment in favor of Defendant is not warranted with respect to alleged exposure arising from gaskets.
>
> In light of this determination, and for purposes of summary judgment, the Court need not reach the issue of whether Defendant is liable for any alleged exposure arising from replacement gaskets that were used with Goulds (or Morris) pumps but were not manufactured or supplied by Goulds (i.e. Whether New Jersey law recognizes the so-called "bare metal defense.").

Id. at 72. Judge Robreno made identical findings related to packing. *Id.* at 72–3. Regarding insulation, however, Judge Robreno held that "the so-called 'bare-metal defense' is unsettled under New Jersey law and deemed it appropriate to remand the issue for a court in New Jersey to decide. The Court gave Defendant leave to refile in the transferor court after remand with respect to claims arising from alleged exposure to products and/or replacement/component parts used in connection with Defendant's pumps but not manufactured or supplied by Defendant (i.e.,

insulation and replacement gaskets and/or packing). *Id.* at 74. Goulds filed a *Motion for Reconsideration*, which Judge Robreno denied. The District of New Jersey never considered the "bare metal defense" before transferring the case to Wyoming.

After the District of New Jersey transferred the case to this Court, the Court held a status conference with all remaining parties. After hearing the parties' arguments during the status conference, the Court granted limited permission for some parties to file Motions for Summary Judgment. The Court specifically granted Goulds permission to file a partial motion for summary judgment on the issue of replacement parts, in essence a partial motion for summary judgment on the "bare metals defense." The Court did not give Goulds permission to file a motion for summary judgment on the issue of causation and the evidence regarding whether Plaintiff worked with or around a Goulds pump. Regardless of this Court's ruling allowing only limited motions for summary judgment and Judge Robreno's prior ruling, Goulds reasserted this argument in the instant motion.

Based on the "law of the case doctrine," the Court will not reconsider the issue of causation that Judge Robreno already addressed. Under both Wyoming law and New Jersey law, the law of the case doctrine that calls for judges to follow unreversed decisions made in the case by the same court or a higher court regarding questions of law. *McCarrell v. Hoffmann-La Roche, Inc.*, No. A-4481-12T1, 2015 WL 4726495, at *11-12 (N.J. Super. Ct. App. Div. Aug. 11, 2015); *Lyden By & Through Lyden v. Winer,* 913 P.2d 451, 454 (Wyo. 1996). The Court finds that Defendant failed to present any sound reasoning for the Court to consider the issue of causation anew. Accordingly, the Court denies Goulds Motion for Summary Judgment based on causation and defers to Judge Robreno's prior ruling.

4. Strict liability

a. Conflict of law analysis

In Judge Robreno's opinion described above, he noted that the parties agreed that New Jersey law applied to the case and therefore avoided doing a complicated conflict of law analysis. Although the Court deferred to his substantive decision in the ruling earlier in this order, the Court will not defer to his choice of law decision. Judge Robreno's conflict of law decision lacked any substantive analysis regarding the conflict of law issues. Moreover, at that time in the case, Judge Robreno would not have been deciding whether Wyoming law or New Jersey law applied because Wyoming was not yet involved in the case. Accordingly, the Court will perform a separate conflict of law analysis. For these reasons, the Court finds that the law of the case doctrine is inapplicable to the conflict of law issue presented to the Court.

Turning to the conflict of law analysis, there is no Wyoming law on the bare metal defense. The parties have both identified the relevant New Jersey law for the Court. Thus, the Court faces the situation of evaluating whether there is a conflict between Wyoming and New Jersey law when there is no Wyoming law on point. The Court has two options: assume there is no conflict due to the lack of Wyoming law or make an *Erie*-guess to predict how the Wyoming Supreme Court may rule to determine whether a conflict exists. On this point, the Court finds the holding in *Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.* persuasive. 2014 IL 116389, 10 N.E.3d 902. In *Bridgeview*, the Illinois Supreme Court held that federal court decisions that made *Erie*-guesses as to Indiana state law were insufficient to establish a conflict of law between Illinois and Indiana law. *Id.* at 906. ("Because a federal district court's *Erie* prediction is not state law, such a prediction cannot, by itself, establish a conflict between state laws."). Finding *Bridgeview* persuasive, the Court will not attempt to make an *Erie*-guess

to determine whether a conflict exists. Instead, in the absence of Wyoming law on point, the Court finds that a conflict cannot exist. Thus, the Court will apply the law of the forum state, Wyoming. *Act I, LLC v. Davis*, 2002 WY 183, ¶ 11, 60 P.3d 145, 149 (Wyo. 2002). The Court will inevitably have to make an *Erie*-guess, but it will be to predict substantive Wyoming law, not to establish a conflict.

b. Goulds' bare metal defense argument

Goulds asks, in the alternative, that if Court finds that a total grant of summary judgment inappropriate per its arguments outlined above, that the Court grant partial summary judgment. Goulds asks the Court to find that Goulds is not liable for harms from products that Goulds did not put into the stream of commerce including insulation and aftermarket, replacement gaskets and packing. Goulds explains that this theory is often referred to as the "bare metal defense" because bare metal equipment does not cause asbestos-related disease. Goulds contends that this is not really a defense, but "a challenge to the plaintiff's prima facie case to prove duty or causation."

Goulds argues that if New Jersey law applies the Court should apply *Hughes v. A.W. Chesterton Co.*, 435 N.J. Super 326, 89 A.3d 179 (App. Div. 2014). In *Hughes*, the court held that Goulds was not liable for harms from replacement gaskets or packing sold by others. The Court rejected the plaintiffs' argument in the absence of proof they were exposed to an asbestos-containing product manufactured or sold by Goulds that causation may be proved by proximity to Goulds' product. Therefore, the court concluded the plaintiffs failed to make a prima facie showing of causation.

Goulds further contends that if Wyoming law applies that the Wyoming Supreme Court would recognize the bare metal defense because of substantial factor causation and because

Wyoming follows Restatement section 402A, discussed in length below. Goulds urges that limiting a product's liability to harm caused by its own products is consistent with Wyoming law on the "substantial factor" causation that is a necessary element of any tort. Substantial factor is defined as "that cause which in natural and continuous sequence, unbroken by a sufficient intervening cause produces the injury, without which the result would not have occurred." *Killian*, 131 P.3d at 985. A substantial factor is not present if the product only created a condition or occasion for the harm to occur. *Id.* Goulds argues that but-for causation is not enough. Accordingly, Goulds explains that it is not liable for the harms resulting from the asbestos-containing products of others and Goulds did nothing more than furnish the condition or occasion for the use of asbestos-containing gaskets, packing, and insulation manufactured and supplied by parties other than Goulds.

Next, Goulds focuses on Restatement 402A, the first element of which states, "that the sellers were engaged in the business of selling *the product that caused the harm.*" Restatement 2d of Torts § 402 A; *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986). Goulds cites cases from other jurisdictions that relied on 402A to determine that manufacturers of equipment, including pumps, are not liable for injuries sustained by exposure to asbestos in products manufactured by others. Goulds asserts that the Court should follow the majority of courts that have decided that a manufacturer is only liable for the products it puts into the stream of commerce.

c. Plaintiff's argument

With regard to the partial motion for summary judgment, Plaintiff contends that Judge Robreno refrained from ruling on the partial motion for summary judgment issue because it had not been squarely addressed by any appellate court in New Jersey in the context of asbestos

litigation, and thus found that Goulds could refile on this issue in the transferor court. Plaintiff agrees that since Robreno's opinion, *Hughes* affirmed *Mystrena* (which was consolidated with other asbestos cases regarding the same issues). Plaintiff, however, argues that nothing in *Hughes* disagrees or overrules the determination in *Mystrena* that "a negligence action may arise in certain circumstances such as when the manufacturer specified the use of asbestos replacement parts or such parts were required for the operation of the device." Plaintiff contends that in *Mystrena,* the New Jersey court found that questions of genuine material fact consistently arose where it could be determined that the original manufacturer or supplier "required or specified the use of asbestos replacement parts, [or where] such parts were necessary for the operation of the device or some other similar set of facts." Plaintiff further urges that there were no issues of material fact in *Mystrena* because plaintiff presented no facts that asbestos parts were specified, required, or necessary to the operation of Goulds' pumps. Plaintiff asserts that in the instant case it has alleged such facts. As such, Plaintiff contends that there are material issues of fact as to whether Goulds required the use of asbestos containing products with its pumps.

d. Analysis

The Court must first outline the general premise of the bare metal defense— it is an argument that a manufacturer cannot be liable for products or component parts that the manufacturer did not manufacture or supply. The Wyoming Supreme Court has never addressed the "bare metal defense." In fact, the Wyoming Supreme Court has considered very few asbestos cases, most of which deal with workers' compensation claims and statute of limitations. Thus, this Court will need to take an *Erie*-guess and predict Wyoming state law on the issue of whether Wyoming would adopt the bare metal defense.

The Tenth Circuit has recently described when and how to make an *Erie*-guess as follows:

> In an area of unsettled law, "we 'must ... attempt to predict how [Wyoming's] highest court would interpret [the issue].' *Squires v. Breckenridge Outdoor Educ. Ctr.*, 715 F.3d 867, 875 (10th Cir.2013); *see Pehle v. Farm Bureau Life Ins. Co.*, 397 F.3d 897, 901 (10th Cir.2005) ("Because Wyoming has not directly addressed this issue, this court must make an *Erie*-guess as to how the Wyoming Supreme Court would rule."). We may 'consider all resources available' in doing so, 'including decisions of [Wyoming] courts, other state courts and federal courts, in addition to the general weight and trend of authority.' *In re Dittmar,* 618 F.3d 1199, 1204 (10th Cir.2010) (internal quotation marks omitted).
>
> 'Under our own federal jurisprudence, we will not trouble our sister state courts every time [an unsettled legal question in a diversity action] comes across our desks. When we see a reasonably clear and principled course, we will seek to follow it ourselves.' *Pino v. United States,* 507 F.3d 1233, 1236 (10th Cir.2007); *accord Colony Ins. Co. v. Burke,* 698 F.3d 1222, 1236 (10th Cir.2012). We see such a clear and principled path here.

Cornhusker Cas. Co. v. Skaj, 786 F.3d 842, 852 (10th Cir. 2015).

At this time, contrary to Defendant's argument, the Court finds that there is not a clear majority opinion on the bare metal defense. *Schwartz v. Abex Corp.*, No. 2:05-CV-02511-ER, 2015 WL 3387824, at *13 (E.D. Pa. May 27, 2015) ("In short, having reviewed the appellate authority nationwide on this issue, it appears there is no clear majority rule—and that courts permitting some liability on the part of product manufacturers for injury from other entities' component parts utilize different rules and rationales for doing so.")[2] Further, Court was unable to find any relevant opinions by the courts that it usually relies on for guidance. The Court, however, finds the logic outlined recently by Judge Robreno in *Schwartz v. Abex Corp.* very

---

[2] *See also* Mixed Results for Bare Metal Defense in Asbestos Cases Around the Country, Jason A. Botticelli, March 12, 2015, available at http://gsriskmitigationblog.com/mixed-results-for-bare-metal-defense-in-asbestos-cases-around-the-county/.

persuasive. 2015 WL 3387824. The Court will follow the analysis provided in *Schwartz* and apply relevant Wyoming law.

In *Schwartz*, Judge Robreno took an *Erie*-guess to predict how the Pennsylvania Supreme Court would rule on the issue of the bare metal defense. The *Schwartz* analysis focuses on Section 402A of the Restatement (Second) of Torts, which Wyoming adopted in *Ogle v. Caterpillar Tractor Co., and Wyoming Machinery Co.*, 716 P.2d 334 (Wyo. 1986). Section 402A states in pertinent part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement, Second, Torts § 402A (1965). The *Schwartz* court identifies that in the context of the bare metal defense, courts have construed and applied Section 402A differently. Some courts have construed it to hold that a manufacturer has no duty to warn about hazards presented by component parts used with its products that it did not supply or manufacture and other courts have held that a manufacturer can still potentially be liable for injuries arising from (and have a duty to warn about dangers presented by) component parts used with its products even if the manufacturer did not supply or manufacture the component parts. *Schwartz* at *4. To predict how Pennsylvania would construe 402A, the *Schwartz* court looked to the following four factors:

(1) Whether the state supreme court applies section 402A to negligence claims in addition to strict liability claims. If the court finds that section 402A governs only strict liability claims, the court has to perform a separate analysis as to the viability of a plaintiff's negligence cause of action under common law.

(2) How the state supreme court defines the term "product." The *Schwartz* Court gives a few examples: (1) if a valve or pump is considered to be one product and the component part (gasket or packing) is separate, then it may be that the pump manufacturer need only warn of the risks associated with the pump, not the component part; (2) A pump manufacturer may need to only warn of the risks associated with the pump as it was originally placed into the stream of commerce, but need not warn of the of the hazards associated with replacement parts; and (3) If the product is defined to be a "pump with gasket and/or packing" then Section 402 A can be construed to indicate that the manufacturer has a duty to warn of the hazards associated with the pump and the component parts.

(3) How the state supreme court construes the substantial change provision of section 402A(1)(b).

(4) How the court construes section 402A to include the concept of "knowledge" and/or foreseeability.

Schwartz at *4 –*8.

Unlike the *Schwartz* court, this Court does not have the benefit of state supreme court decisions reviewing the bare metal defense or discussing liability in asbestos cases. This Court, however, must still make an educated and developed *Erie*-guess. In preparing this opinion, this Court looked to many out-of-state opinions as well as numerous Wyoming Supreme court opinions. The Court adopts the *Schwartz* court's thorough discussion and analysis of doctrinal trends in appellate courts on the bare metal defense. *Id.* at *10 –*13. Based on its analysis below, applying the four factors identified above, the Court predicts that the Wyoming Supreme Court would adopt the bare metal defense and hold that manufacturers are not strictly liable

aftermarket replacement parts that the manufacturer did not manufacture or supply, but the manufacturer is liable for any incorporated component part that is part of the product sold at the time it entered into the stream of commerce.

Under Wyoming law, the elements of a strict products liability claim are as follows:

(1) that the sellers were engaged in the business of selling the product that caused the harm;

(2) that the product was defective when sold;

(3) that the product was unreasonably dangerous to the user or consumer;

(4) that the product was intended to and did reach the consumer without substantial change in the condition in which it was sold; and

(5) that the product caused physical harm to the plaintiff/consumer.

Rohde v. Smiths Medical, 2007 WY 134, ¶ 18, 165 P.3d 433, 437 (Wyo.2007) (quoting *Ogle v. Caterpillar Tractor Co.,* 716 P.2d 334, 344 (Wyo.1986)).

Reviewing the first *Schwartz* factor, the Court finds that when applying Section 402A, it is clear that Wyoming recognizes that strict liability and negligence are separate claims, and Section 402A governs strict liability claims alone. *Sims v. Gen. Motors Corp.,* 751 P.2d 357, 360 (Wyo. 1988) ("In *Ogle v. Caterpillar Tractor Co.,* Wyo., 716 P.2d 334 (1986), we held that the doctrine of strict liability in tort was a valid cause of action in Wyoming independent from those actions against a manufacturer or seller for negligence or breach of warranty."). In *Ogle*, the Court explains the policy behind adopting Section 402A, which clarifies that a negligence claim is separate from a strict liability claim:

> There are many products liability cases in which the plaintiff must essentially show negligence in order to prove that a product is defective. And there are cases where the doctrine of res ipsa loquitur can provide the missing link to an otherwise solid negligence case. Under these circumstances, the strict liability

> action is unnecessary to ensure that the deserving plaintiff is made whole. There are cases, however, in which the negligence action proves inadequate. For instance, when a person is injured by a defect that causes the wheel of a car to come apart, it may be practically impossible to establish that the manufacturer's negligence caused the failure. Let us assume that 5,000,000 wheels for automobiles were manufactured and one was defective. The manufacturing, inspection, and testing procedures may have exceeded engineering standards. Due care was exercised and yet there was one defective wheel. Thus, there may have been an entire absence of negligence in the total manufacturing and sale of the product, yet a totally innocent person was injured when the defective wheel came apart. On these facts, that person justly ought to have a claim. But he can recover only if strict liability has been adopted and the fault requirement discarded. Manufacturers and distributors can easily and efficiently apportion the injured person's loss among themselves and ultimately among their customers, and that is better than affording no relief to the person injured. W. Prosser, The Assault upon the Citadel, supra, at 1116–1117.
>
> The problems with the negligence cause of action when applied to products have been recognized for many years and courts and legislatures long ago responded by creating a cause of action in breach of warranty. E.g., §§ 34–21–230 through 34–21–235, W.S.1977. Whenever strict liability in tort is suggested, those opposing the doctrine argue that the warranty action is adequate in products cases.
>
> . . .
>
> In summary, the cause of action for strict liability in tort is necessary because of the inadequacies of breach of warranty actions when applied to claims in tort for personal injury.

Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 342-44 (Wyo. 1986).

The Wyoming Supreme Court went on to adopt Section 402A as the standard. Through the quoted section above, the Wyoming Supreme court infers that the standard for the newly recognized strict liability claim is structured to be more easily met than the standard for a negligence or a breach of warranty claim. Accordingly, this Court will have to analyze the viability of a plaintiff's negligence cause of action under common law separately below.

Second, the Court reviewed Wyoming case law for guidance on the definition of product under Wyoming law. When discussing whether electricity is a product, the Wyoming Supreme Court stated, "[a] 'product' is anything made by human industry or art." *Wyrulec Co. v. Schutt*,

866 P.2d 756, 760-61 (Wyo. 1993) (holding that electricity does not meet the definition of product because it is a service.) Aside from this broad definition, the Court was unable to locate any additional Wyoming law that further scrutinizes the definition of product. As such, the Court will look to Black's Law Dictionary for guidance. Black's Law Dictionary (7th ed. 1999) defines product as "something that is distributed for use or consumption and that is usu. (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that passed through a chain of commercial distribution before ultimate use or consumption."

The Court construes this definition to mean that an aftermarket replacement part (gasket, insulation, etc.), which is not part of the original fabrication or processing of the product, is not part of the product by definition. This is consistent[3] with the second element of a strict liability claim that "the product was defective **when sold"** and the inference of defect rule, comment g to Section 402A, as discussed in *Rohde.*

> The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition **at the time that it left the hands of the particular seller** is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

> From the language in comment g, it is clear that section 402A, supra, applies only when the product is shown to have been unreasonably dangerous at the time it left the seller's hands.

---

[3] It is also consistent with the *Schwartz* court's discussion of the definition of strict products liability in Black's Law Dictionary (7th ed. 1999)—the definition requires that "the product at issue was, at some point, in the "hands" of the defendant." *Schwartz* at *17. It

Rohde v. Smiths Med., 2007 WY 134, ¶ 19, 165 P.3d 433, 437-38 (Wyo. 2007) (emphasis added). The focus of Wyoming law seems to be the state of the product at the time it left the seller or manufacturer's hands. *Rohde*, 2007 WY 134, ¶ 18 (Wyo. 2007) ("As the strict liability elements demonstrate, a plaintiff must show the product was defective when the seller sold it." (citing *Campbell v. Studer, Inc.*, 970 P.2d 389, 392 (Wyo.1998); *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 64 (Wyo.1989))). Accordingly, the Court predicts that when applying Section 402A, the Wyoming Supreme Court would construe the term product in a way that an aftermarket component part of a pump is not the manufacturer's product because it is an addition to the product after it left the manufacturer's hands. Like in *Schwartz*, "this construction of the term—where the aftermarket component part (such as external insulation, replacement gaskets, or replacement packing) is a separate 'product' from the manufacturer's product (such as a pump, valve, turbine, boiler, or engine). . . precludes [strict liability] for the product manufacturer when the asbestos injury was caused by asbestos in the aftermarket component part— a part that was never in the control of the product manufacturer." *Schwartz* at *17.

The question, however, remains whether a component part that the manufacturer does not manufacture but incorporates into the pump before distribution is part of the product. There is no Wyoming Supreme Court or federal court decision construing Wyoming law on a whole-product manufacturer's liability, based on negligence or strict liability, for an incorporated component part. The following statement from *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 581 (Wyo. 1992) sheds light on this issue:

> "It is a well settled principle that a manufacturer is under a non-delegable duty to make a product that is reasonably safe; it may not delegate that duty to the dealer, user or purchaser of the product." *Simpson v. General Motors Corp.*, 118 Ill.App.3d 479, 74 Ill.Dec. 107, 111, 455 N.E.2d 137, 141 (1983), *aff'd* 108 Ill.2d 146, 90 Ill.Dec. 854, 483 N.E.2d 1 (1985). Therefore, under strict liability, **all the**

> **parties in the chain of distribution are held liable despite their exercise of due care.** *Ogle,* 716 P.2d at 342.

(emphasis added).

The following discussion by the Wyoming Supreme Court in *Ogle* does the same:

> When a defective article enters the stream of commerce and an innocent person is hurt, it is better that the loss fall on the **manufacturer, distributor or seller** than on the innocent victim. This is true even if the entities in the chain of production and distribution exercise due care in the defective product's manufacture and delivery. They are simply in the best position to either insure against the loss or spread the loss among all the consumers of the product.

Ogle, 716 P.2d at 342.

Under *Ogle*, the whole-product manufacturer is still strictly liable for incorporated component parts at the time of sale because the manufacturer is a seller or distributor of the component part that it incorporated into its whole-product. And under *Schneider*, **all parties** in the chain of distribution are liable. The whole-product manufacturer is distributing the component parts in its pump. Based on this, the Court predicts the Wyoming Supreme Court would hold that a manufacturer of the pump is liable for the whole product including the component parts incorporated into the whole product at the time of distribution regardless of whether the manufacturer manufactured them.

In this case, for example, Goulds describes its pumps as follows:

> Pumps regularly contain gaskets and packing. Gaskets and packing wear out and are replaced. Rabinovitz dec., ¶ 3. Goulds supplied its pumps with internal gaskets and packing, but not flange gaskets or insulation. Conner dec., ¶¶ 4-6. Thus, decedent could only have encountered gaskets and packing supplied by Goulds the first time gaskets and packing were removed from a pump. . . . The gaskets and packing in some pumps, depending on the application and other factors, contained asbestos. Conner dec., ¶ 4.

The pumps in this case included internal gaskets and packing. Regardless of who manufactured the gaskets and packing, the component parts were included in the pump when Goulds sold it,

and thus Goulds can be held liable for their defects. Whether Goulds can seek equitable indemnity from the original manufacturer of the component part is not a question before this Court at this time and does not alter Goulds' liability for its whole product if the whole product remained substantially unchanged.

This finding is consistent with the finding in *Ford Motor Co. v. Wood*, a Maryland case, in which the Court discussed "assembler's liability" and held regarding a vehicle manufacturer that it "may be held liable in damages for defective component parts manufactured by another only if the [] manufacturer incorporated the defective component into its finished product." 119 Md. App. 1, 34, 703 A.2d 1315, 1331 (1998) abrogated on different grounds by *John Crane, Inc. v. Scribner*, 369 Md. 369, 800 A.2d 727 (2002). It is also consistent with New Mexico law. *Pac. Indem. Co. v. Therm-O-Disc, Inc.*, 476 F. Supp. 2d 1216, 1228 (D.N.M. 2006) (applying New Mexico state law) (stating "Products liability applies to the supplier of a component part that causes injury if, when incorporated into the finished product, the component part is substantially unchanged or is in a condition in which it could have been reasonably expected to have been used.").

Next, still following the *Schwartz* court's factors, the Court reviewed Wyoming law on substantial change. The Wyoming case law, however, does not include a thorough discussion of the definition of "substantial change." This factor, per the *Schwartz* court, seems to depend heavily on the court's interpretation of the term "product." This Court predicted above that Wyoming would hold an aftermarket part is not part of the product when it leaves the seller's hands. As such, like in *Schwartz*, the Court predicts the Wyoming Supreme Court would hold

that since an aftermarket part was never in the control of the product manufacturer, its addition to the product would be a substantial change.[4]

Finally, the Court looks to the fourth factor—knowledge and foreseeability under section 402A. The *Schwartz* Court states that because 402(1)(b) employs the term "expected to", it can be construed to include liability for certain known or foreseeable circumstances surrounding the use of a manufacturer's product." Under Wyoming law,

> Even if a product is defective, unmerchantable or negligently manufactured, the seller may not be liable for a plaintiff's injuries which are caused by unforeseeable alterations in the product rather than the original defects. See Annot., 41 A.L.R.3d 1251 (1972). In the context of strict liability, this defense has been explicitly codified in Restatement, Second, Torts § 402A(1)(b) which provides that a manufacturer or seller is liable under 402A only if his product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 345 (Wyo. 1986). The Wyoming Supreme Court never truly expounds on the meaning of "expected to." Based on the court's comments in *Ogle*, it seems that expected to and foreseeably may be used interchangeably. The Court has already predicted that Wyoming would find that the use of an aftermarket part is a substantial change to the product. The Court finds that the Wyoming Supreme Court, taking into consideration the policies behind strict liability, the definition of product, and the substantial change provision of 402A, would find that a manufacturer of a product that includes replaceable component parts is not liable in ***strict liability*** for the aftermarket parts. To hold otherwise, would allow

---

[4] "Material alterations, like other issues of proximate cause, are ordinarily "'left to the jury for its factual determination.'" *Ogle*, 716 P.2d at 345–46. The Court, however, finds pursuant to its finding that the definition of product excludes aftermarket replacement parts, this issue need not go the jury.

foreseeability alone to be sufficient to create strict liability claim and impose an almost absolute liability for all manufacturers that sell products with replaceable components.

In sum, the Court predicts that the Wyoming Supreme Court would adopt the bare metal defense and hold that manufacturers are not strictly liable for aftermarket replacement parts that the manufacturer did not manufacture or supply, but the manufacturer is liable for any incorporated component part that is part of the product sold at the time it entered into the stream of commerce. Accordingly, the Court will recognize and apply the bare metal defense in this case. This recognition only says that Goulds is not liable to respond in damages in strict liability for products that others manufactured and incorporated into or used with Goulds' product after the product left Goulds' hands. This defense does not defeat strict liability for the claims that stem from the product and incorporated component parts as Goulds sold them. Accordingly, the Court grants summary judgment on Plaintiff's strict liability claims against Goulds for aftermarket and replacement parts for use with Goulds' pumps that Goulds did not manufacture or supply to Decedent's employer. Plaintiff's strict liability claims for products that Goulds manufactured or incorporated into its products prior to sale remain.

5. Negligence Claim

As discussed above, the Wyoming Supreme Court has explicitly stated that the claims for negligence and strict liability are separate claims. Under Wyoming law, "a "manufacturer is required to exercise reasonable care in the planning, designing, and manufacturing of a product in order to ensure that it is reasonably safe to use." *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 64-65 (Wyo. 1989) (citing *Caterpillar Tractor Co. v. Donahue,* 674 P.2d 1276, 1280 (Wyo. 1983)).

> In pursuing a theory of negligent design or manufacture, the conduct of the maker or seller is in question. On the other hand, in pursuing a theory of strict liability, the focus is on the product itself. *Beck,* 593 P.2d 871; *Gonzales v. Caterpillar Tractor Co.,* 571 S.W.2d 867 (Tex.1978), on remand 599 S.W.2d 633 (Tex.Civ.App.1980). Pursuant to the theory of strict products liability, a seller or distributor can be liable for injury or loss resulting from a defective product that entered the stream of commerce in the absence of fault, while, under a negligence theory, fault on the part of the manufacturer, designer, or distributor is an element that must be established for an injured party to recover. *Greenman v. Yuba Power Products, Inc.,* 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963); *Phillips v. Kimwood Machine Co.,* 269 Or. 485, 525 P.2d 1033 (1974). Also see *East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986).

McLaughlin v. Michelin Tire Corp., 778 P.2d 59, 64-65 (Wyo. 1989). "Unlike traditional strict liability claims, a claim for failure to provide adequate warnings incorporates some negligence components in determining whether a warning is necessary and/or whether the warnings provided were adequate." *Rohde v. Smiths Med.*, 2007 WY 134, ¶ 32, 165 P.3d 433, 441 (Wyo. 2007). "If the product itself is not defective but may be unreasonably dangerous if it is used improperly, a plaintiff may show a 'defect' by establishing that the manufacturer failed to warn about dangers associated with the product." *Rohde*, 2007 WY 134, ¶ 32. "The manufacturer is not required to warn of unknown or unforeseeable risks." *Jacobs v. Dista Products Co.,* 693 F. Supp. 1029, 1034 (D. Wyo. 1988) (applying Wyoming law and discussing prescription drug manufacturers).

The Wyoming Supreme Court when looking to foreseeability has stated that "the essence of [foreseeability of harm to plaintiff][5] is, for all practical purposes, a consideration of proximate cause." *Killian v. Caza Drilling, Inc.,* 2006 WY 42, ¶ 20, 131 P.3d 975, 985 (Wyo. 2006) (also

---

[5] Although the Wyoming Supreme Court's focus is on foreseeability of harm to the plaintiff in these cases, and this Court's focus is on the foreseeability of the circumstances surrounding the use of a manufacturer's product by the consumer, the Court finds the Wyoming Supreme Court's discussions analogous.

stating, "The ultimate test of proximate cause is foreseeability of injury."). "In order to qualify as a legal cause, the [defendant's] conduct must be a substantial factor in bringing about the plaintiff's injuries." *Id.* (quoting *Turcq v. Shanahan,* 950 P.2d 47, 51 (Wyo.1997)).

> [I]f the conduct is "that cause which in natural and continuous sequence, unbroken by a sufficient intervening cause produces the injury, without which the result would not have occurred," it must be identified as a substantial factor in bringing about the harm. If, however, it created only a condition or occasion for the harm to occur, then it would be regarded as a remote, not a proximate, cause, and would not be a substantial factor in bringing about the harm.

Id. (quoting *Lemos v. Madden,* 28 Wyo. 1, 200 P. 791, 793 (1921)). "An intervening cause is one that comes into being after a defendant's negligent act has occurred, and if it is not a foreseeable event it will insulate the defendant from liability. It is reasonably foreseeable if it is a probable consequence of the defendant's wrongful act or is a normal response to the stimulus of the situation created thereby." *Id.* (citing *Buckley v. Bell,* 703 P.2d 1089, 1091–92 (Wyo.1985)).

Based on these principles, the Court predicts that the Wyoming Supreme Court would hold a product manufacturer liable in negligence for failing to warn about asbestos hazards of aftermarket parts used with its product which it neither manufactured nor supplied if the manufacturer: (1) knew that its product would be used with an asbestos-containing component part, (2) knew asbestos was hazardous, and (3) failed to provide an adequate and reasonable warning. Under Wyoming law, the manufacturer is liable for the design of his product and has a duty to warn about foreseeable or known risks. The Court finds that if the three elements outlined above are satisfied, the manufacturer did not merely create the condition or occasion for exposure to asbestos, but designed a product that required or specified the use of a known-to-be hazardous aftermarket replacement part or additional part.

The Court further finds that there are disputed issues of material fact as to whether Goulds (1) knew that its consumers would use its pumps with asbestos-containing component

parts, (2) knew asbestos was hazardous, and (3) failed to provide an adequate and reasonable warning. Accordingly, the Court finds that it will not grant summary judgment on Plaintiff's negligence claim against Goulds regarding parts that Goulds manufactured or supplied or those that Goulds did not manufacture or supply but it specified, required, or were necessary to the operation of its pumps.

CONCLUSION

For the reasons discussed above, the Court denies Goulds' motion for summary judgment based on its causation argument previously ruled on by Judge Robreno. The Court further concludes that pursuant to its *Erie*-guess, the bare metal defense protects Goulds from Plaintiff's strict liability claim for defective aftermarket component parts and replacement parts that Goulds did not manufacture, supply, or incorporate into its pump design at the time the pump entered the stream of commerce. And finally the Court concludes that all of Plaintiff's other claims against Goulds remain. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment (Doc. 141) shall be and hereby is, GRANTED regarding Plaintiff's strict liability claim against Goulds for defective aftermarket component parts and replacement parts that Goulds did not manufacture, supply, or incorporate into its pump design at the time the pump entered the stream of commerce. It is further

ORDERED that Gould's Motion for Summary Judgment (Doc. 141) shall be and hereby is, DENIED with regard to the remainder of Plaintiff's claims not specifically identified above.

Dated this 9th day of October, 2015.

Alan B. Johnson
United States District Judge