DOCKET NO. CV 11- 5029478 S	:	SUPERIOR COURT
JOAN MAZZAIA, PERSONAL REP-RESENTATIVE OF THE ESTATE OF DONALD MAZZAIA, ET AL	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
A. O. SMITH CORP., ET AL	:	NOVEMBER 29, 2012

MEMORANDUM OF DECISION
RE: MOTION FOR SUMMARY JUDGMENT (Motion # 292.00)

FACTS

The plaintiff, Joan Mazzaia, the personal representative of the estate of Donald Mazzaia, alleges that the decedent Donald Mazzaia, was exposed to various asbestos-containing products while he worked in the United States Navy from 1959 to 1963 and that he suffered exposure from 1963 to 1979 while working in various capacities at General Dynamics/Electric Boat and Pfizer Corp. The operative complaint is the plaintiff's sixth amended complaint, filed on November 13, 2012. Generally, the complaint alleges that the decedent was exposed to, and inhaled and/or ingested, asbestos fibers and particles from various asbestos-containing products, which contributed to the decedent's mesothelioma and other asbestos-related pathologies. The plaintiff alleges that multiple defendants were responsible for the decedent's injuries.

Specifically, count one alleges a violation of the Connecticut Product Liability Act, General Statutes § 52-572m et seq., and the second count alleges a loss of consortium. The third count

all parties of record notified

claims that the various defendants' conduct was grossly negligent, wilful, wanton, malicious and outrageous because, since 1929, the defendants allegedly possessed medical and scientific data, as well as studies and reports, indicating that asbestos-containing products were hazardous to the health and safety of Donald Mazzaia and to all humans who were exposed. The fourth count claims negligence, pursuant to General Statutes § 52-577c (a), solely as to Skansa USA Building Inc. Count five asserts a wrongful death claim pursuant to General Statutes § 52-555.

On January 9, 2012, the defendant, Skansa, filed a motion for summary judgment accompanied by a memorandum of law. The defendant also filed numerous exhibits. In addition, the plaintiff has filed various memoranda in opposition to the defendant's summary judgment motion.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted 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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 303 A.3d 205 (2012). "Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue."

(Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11, 938 A.2d 576 (2008).

The defendant moves for summary judgment on the basis that it is a general contractor and a service provider, not a product seller as defined by General Statutes § 52-572m. It emphasizes that it never manufactured, sold, or distributed products of any kind, and that it cannot be held liable under the Connecticut Product Liability Act.

The plaintiff responds that the issue of whether the defendant is a product seller is an issue of fact. In addition, the plaintiff argues that because he has amended his complaint to allege that the defendant is liable under General Statutes § 52-577c, the statute that provides a limitation upon actions for damages caused by exposure to hazardous chemicals or pollutants, the defendant's summary judgment motion is not yet ripe for adjudication.

Count one alleges a violation of the Connecticut Product Liability Act, Section 52-572m (a), defines a "product seller" as "any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term 'product seller' also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products."

In support of its summary judgment motion, the defendant relies primarily upon several affidavits, including the affidavits of Lynn D. Shavelson, the defendant's corporate counsel and ethics and compliance officer; Gordon Althoff, the former executive vice president of the defendant's predecessor; and Jurgen Nebelung, a civil engineer employed by the defendant. The defendant has also submitted the contracts referred to in the affidavits, as well as other documentary evidence.

The affidavit of Lynn D. Shavelson attests to the following, W.J. Barney Corp. entered into a contract with Chas. Pfizer & Co., Inc. to build the Pfizer plant in Groton, Connecticut. This contract was effective from August 13, 1946 until July 12, 1977. According to the affidavit, in 1977, W.J. Barney and Pfizer entered into a new agreement for maintenance and general services concerning the Groton, Connecticut Pfizer plant. Both the 1946 and the 1977 contracts were in effect during the period of time the plaintiff alleges that the decedent, while employed at Pfizer, was exposed to asbestos. Subsequently, W.J. Barney entered into an asset purchase agreement with the defendant's subsidiary, Sordoni Skansa Construction Co. The agreement included the right to use the name "Barney" and included the purchase of the 1977 contract between W.J. Barney and Pfizer. The asset purchase agreement was neither a merger nor a consolidation between W.J. Barney and Sordoni Skansa. On March 29, 1996, W.J. Barney filed a Certificate of Dissolution and, on January 4, 1997, a Certificate of Incorporation was filed on behalf of an entity called "Barney Skansa Construction Company." Effective December 31, 2002, certain subsidiary corporations, Sordoni Skanska Inc., Barney Skansa Inc. and other U.S. corporations merged into the present day Skansa USA Building Inc.

The defendant also has submitted the affidavit of Gordon Althoff, the former executive vice president of Barney Skansa, Inc., now known as Skansa USA Building Inc., and he attests to the following. During the relevant time period, the various companies, including W.J. Barney, were all construction companies and acted as the "[g]eneral [c]ontractor" at Pfizer in Groton, Connecticut. The companies did not sell or distribute products or materials except when Pfizer directed them to sell off excess equipment or materials. Under the 1946 contract, W.J. Barney was

responsible for construction of buildings, equipment and line installations; repairs and alterations; and furnishing labor and materials. It was also responsible for preparing specifications and plans, obtaining permits and coordination of deliveries. W.J. Barney furnished all labor and materials for the performance of the work, but Pfizer had the option to purchase these items directly from vendors. A "[s]pecial [a]ccount" was set up, funded by Pfizer, to pay for costs, including the materials required, to carry out the contract. Pursuant to the 1946 contract, W.J. Barney also purchased products and materials using Pfizer's funds from the special account, but it never sold such products and materials to Pfizer.

The affidavit indicates that under the 1977 contract, W.J. Barney continued to provide all supervision, labor, equipment, materials, tools and incidentals required to perform equipment installation, relocation, modification, mechanical and technical services, routine maintenance, utility equipment operation and other required services. No special account was set up under this contract, rather, W.J. Barney was paid on a fee based on percentages with respect to wages and salaries of laborers and employees and reimbursed for costs associated with materials, equipment supplies, and subcontracts. Title to all work, materials, equipment tools or supplies purchased by W.J. Barney remained with Pfizer. Althoff's affidavit reiterates that, under the 1946 contract, "the Barney entities *purchased* numerous materials and products using Pfizer's funds from their 'Special Account.' W.J. Barney did not sell these products and materials to Pfizer. Beginning in 1977, W.J. Barney *purchased* materials and products for Pfizer and was reimbursed at cost by Pfizer. These materials and products were not sold to Pfizer." (Emphasis in original.)

In addition, the defendant has offered the affidavit of Jurgen Nebelung, a civil engineer employed by the defendant. This individual avers to the following, none of the "Barney companies" he worked for ever manufactured, sold, or distributed any products, nor were they in the product-selling business. In carrying out the terms of the Pfizer contracts, the materials that were purchased were billed to Pfizer, were utilized to build, construct and maintain Pfizer's Groton facility and were incidental to the contracts. All purchased products were used in the construction and the maintenance of Pfizer's facility. On occasion, Pfizer directed the reselling of surplus materials back to the vendors who had supplied them and the sale proceeds were paid back to Pfizer, or credited to Pfizer's account. Pfizer also directly purchased materials and equipment. Additionally, the defendant has submitted copies of the 1946 and the 1977 contracts.

Although the question of whether an entity is a product seller is determinable as a question of law; *Burkert* v. *Petrol Plus of Naugatuck, Inc.*, 216 Conn. 65, 71-72, 579 A.2d 65 (1990); the summary judgment movant shoulders the burden of demonstrating that no underlying genuine issues of material fact exist concerning this legal determination. See *Butler* v. *A.O. Smith Corp.*, Superior Court, judicial district of Fairfield, Docket No. CV 10 6011710, (January 24, 2012, *Bellis, J.*) (whether defendant a product seller under Connecticut product liability statute is factual question); *Aquarulo* v. *A.O. Smith Corp.,* Superior Court, judicial district of Fairfield, Docket No. CV 09 5024498, (December 30, 2011, *Bellis, J.*) (whether defendant a product seller ultimately determinable as question of law although factual questions may underlie such legal determination).

"When a Connecticut court is reviewing the principles governing a products liability action, it considers, inter alia, the legal principles set forth by the American Law Institute in the

Restatement of Torts. See, e.g., *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, 302 Conn. 123, 131, 25 A.3d 571 (2011). According to the Restatement (Third), Torts, Products Liability § 20, p. 284 (1998), 'One Who Sells or Otherwise Distributes,' in the context of commercial product sellers, '(a) include, but are not limited to, manufacturers, wholesalers, and retailers.' Subsection (b) further provides that one 'distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption.' Finally, subsection (c) states that '[o]ne also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).'" *Butler* v. *A.O. Smith Corp.*, supra, Superior Court, Docket No. CV 10 6011710.

The issue of whether rendering hybrid services--transactions involving sales and services--casts a defendant in the role of a product seller within the meaning of § 52-572m was addressed in *In re Bridgeport Asbestos Litigation*, Superior Court, judicial district of Fairfield, No Docket Number Provided, (June 24, 1998, *Thim, J.*) (22 Conn. L. Rptr. 391). In that case, the defendant, ACMAT Corp., entered into contracts with building owners and general contractors to perform fireproofing work. The plaintiff brought a product liability action against the defendant, and the defendant moved for summary judgment on the basis that it was not a product seller of asbestos fireproofing material and, therefore, not liable pursuant to § 52-572m. The court observed that § 52-572m failed to "give clear guidance as to how this hybrid sales-service transaction is to be labeled." Id, 392. In deciding the issue, the court examined the following factors: (1) the

defendant performed the fireproofing work pursuant to contracts it entered into with general contractors and building owners; (2) usually the defendant's bids included the cost of materials; (3) architects supplied the asbestos material specifications, which were set out in the defendant's contracts, under which it provided and applied the fireproofing material; (4) the cost of the fireproofing material was a percentage of the defendant's contract price; (5) the defendant bought the fireproofing material directly from manufacturers and the manufacturers shipped the bagged material to work sites and then billed the defendant and, finally, (6) the building owners and general contractors tendered payments to the defendant, which included the cost of the asbestos fireproofing material. Id., 391.

The court observed that the defendant was "clearly within the chain of distribution because it supplied the asbestos fireproofing material that was used in the fireproofing process." *In re Bridgeport Asbestos Litigation*, supra, 22 Conn. L. Rptr. 392. It noted that "[t]oday, the concept of product liability extends beyond traditional product sales and now generally encompasses liability for harm caused by product defects to some nonsale commercial transactions involving the distribution of products." (Internal quotation marks omitted.) Id., citing the Restatement (Third), Torts, Products Liability § 20, supra. Ultimately, the court held that "[a] trier of fact, whether court or jury, could reasonably conclude that a sale was a significant part of the transaction. A triable issue of fact exists." Id.

In another recent Superior Court decision, involving the issue of whether a contractor was a product seller, the court examined the relationship between the contractor and the product at issue. In *South Methodist Church* v. *Joseph Gnazzo Co.* Superior Court, judicial district of

Tolland, Docket No. CV 09 5005030, (December 23, 2011, *Sferrazza, J.*) (53 Conn. L. Rptr. 182). the plaintiff sought to hold the defendant, a contractor, liable as a product seller under Connecticut's product liability statute. The contractor purchased and installed precast stone to the facade of the plaintiff's church, and the court determined that the contractor was not a product seller, emphasizing that "there must be a greater nexus between a contractor and a product than the mere fact that the contractor obtained and used the product during construction in order to satisfy the definition of 'product seller' under the [Connecticut Product Liability Act]." Id., 153.

In the present case, the defendant submitted evidence that the 1946 and the 1977 contracts entered into between the defendant and Pfizer were contracts for the performance of general services related to the construction, maintenance and repairs of the Pfizer facility located in Groton, Connecticut. The cost of purchased items were either billed directly to Pfizer or the defendant was reimbursed by Pfizer for the cost of its purchases. Pfizer directed the resale of surplus materials back to the supplying vendors and the sale proceeds were paid back to Pfizer, or credited to its account. Title to all work, material, equipment, tools and supplies remained in Pfizer. These facts are distinguishable from the facts in *In re Bridgeport Asbestos Litigation*, supra, 22 Conn. L. Rptr. 391, particularly concerning Pfizer's retention of title in the purchased products, the direct and/or reimbursable billing and payment procedures between the defendant and Pfizer set forth in the contracts, as well as the resale back to the original vendors only at the direction of Pfizer, which received the proceeds from the resale.

Accordingly, the court finds that the defendant has met its burden by establishing the nonexistence of all genuine issues of material fact underlying the legal issue of its status as a

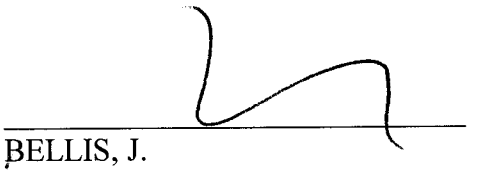
"product seller" with respect to § 52-572m. Therefore, the burden shifts to the to the plaintiff to establish such an issue.

The plaintiff alleges that the decedent was exposed to asbestos-containing products through his employment while working in the United States Navy from 1959 to 1963 and while working in various capacities at General Dynamics/Electric Boat and Pfizer Corp. from 1963 to 1979. The plaintiff emphasizes that the decedent had testified as to the presence of W.J. Barney at the Pfizer site. The plaintiff also has submitted evidence from other asbestos cases that she claims implicates W.J. Barney in the distribution, contracting, procurement, supply and installation of asbestos-containing products at the Pfizer facility. The court has reviewed this evidence, however, and finds that the plaintiff merely has provided plans delineating the locations of, and instructions regarding, various product installations, and invoices denoting sales and shipment of various products to W.J. Barney in Groton, Connecticut. Some of the sales were made to an entity entitled A C & S, located in Wethersfield, Connecticut, with shipment to "A C & S c/o W.J. Barney, Pfizer Inc., Groton, Conn." The plaintiff has not met its burden to refute the defendant's showing on its motion for summary judgment. The plaintiff's evidence fails to raise a genuine issue of material fact as to whether the relationship between the defendant and the alleged asbestos-products was such that the defendant should be classified as a "product seller" for purposes of § 52-572m.

The court determines that there are no genuine issues of material fact underlying the legal determination as to whether this defendant was a "product seller." The defendant's evidence demonstrates that the nexus between the defendant and the products it purchased, pursuant to its contracts with Pfizer, does not satisfy the definition of a "product seller" under Connecticut's

product liability statute. In addition, the plaintiff has failed to raise a genuine issue of material fact.

As stated previously, count one alleges a violation of the Connecticut Product Liability Act, count two alleges a claim for a loss of consortium, based upon the facts alleged in the first count, and count five claims wrongful death, also based upon the allegations contained in the first count. Accordingly, based upon the analysis set forth in this opinion, the court grants the defendant's motion for summary judgment as to counts one, two and five of the plaintiff's sixth amended complaint.



BELLIS, J.