

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PAUL W. GEHRT,	:	CONSOLIDATED UNDER
	:	MDL 875
	:	
Plaintiff,	:	
	:	Transferred from the
	:	Central District
v.	:	of Illinois
	:	(Case No. 96-02071)
	:	
ACANDS, INC., ET AL.,	:	
	:	
Defendants.	:	E.D. PA CIVIL ACTION NO.
	:	2:08-CV-92066-ER

**ORDER**

**AND NOW**, this 3rd day of **April, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant CBS Corporation (Doc. No. 159) is **GRANTED in part; DENIED in part.**<sup>1</sup>

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<sup>1</sup> This case was transferred in December of 2008 from the United States District Court for the Central District of Illinois to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Paul Gehrt ("Plaintiff") served in the Navy from 1965 to 1969, worked as a journeyman electrician for various contractors from about 1969 until 1980, and then worked as an electrician for the University of Illinois from 1981 until 2005. Defendant CBS Corporation, a successor corporation to Westinghouse Electric Corporation, ("Westinghouse") manufactured switchgear, wiring, Micarta board, and motors. Plaintiff has alleged that he was exposed to asbestos from Westinghouse products during his work at the following:

- Navy service
- University of Illinois

Plaintiff was diagnosed with lung cancer and has brought claims against various defendants. Defendant Westinghouse has moved for summary judgment, arguing that there is insufficient product identification evidence to support a finding of causation with respect to its product(s). The parties agree that Illinois law applies.

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**I. Legal Standard**

**A. Summary Judgment Standard**

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

**B. The Applicable Law**

The parties have agreed that Illinois substantive law applies. Therefore, this Court will apply Illinois law in deciding Westinghouse's Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

**C. Product Identification/Causation Under Illinois Law**

In order to establish causation for an asbestos claim under Illinois law, a plaintiff must show that the defendant's asbestos was a "cause" of the illness. Thacker v. UNR Industries, Inc., 151 Ill.2d 343, 354 (Ill. 1992). In negligence actions and strict liability cases, causation requires proof of both "cause

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in fact" and "legal cause." Id. "To prove causation in fact, the plaintiff must prove medical causation, i.e., that exposure to asbestos caused the injury, and that it was the defendant's asbestos-containing product which caused the injury." Zickhur v. Ericsson, Inc., 2011 WL 5578910, at \*6 (Ill. App. (1st Dist.) 2011) (citing Thacker, 151 Ill.2d at 354).

Illinois courts employ the "substantial factor" test in deciding whether a defendant's conduct was a cause of a plaintiff's harm. Nolan v. Weil-McLain, 233 Ill.2d 416, 431 (Ill. 2009) (citing Thacker, 151 Ill.2d at 354-55). Proof may be made by either direct or circumstantial evidence. Thacker, 151 Ill.2d at 357. "While circumstantial evidence may be used to show causation, proof which relies upon mere conjecture or speculation is insufficient." Thacker, 151 Ill.2d at 354.

In applying the "substantial factor" test to cases based upon circumstantial evidence, Illinois courts utilize the "frequency, regularity, and proximity" test set out in cases decided by other courts, such as Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986). Thacker, 151 Ill.2d at 359. In order for a plaintiff relying on circumstantial evidence "to prevail on the causation issue, there must be some evidence that the defendant's asbestos was put to 'frequent' use in the [Plaintiff's workplace] in 'proximity' to where the [plaintiff] 'regularly' worked." Id. at 364. As part of the "proximity" prong, a plaintiff must be able to point to "sufficient evidence tending to show that [the defendant's] asbestos was actually inhaled by the [plaintiff]." This "proximity" prong can be established under Illinois law by evidence of "fiber drift," which need not be introduced by an expert. Id. at 363-66.

## **II. Defendant Westinghouse's Motion for Summary Judgment**

### **A. Defendant's Arguments**

Westinghouse argues that there is insufficient product identification evidence to support a finding of causation with respect to its products. Westinghouse asserts that there is no evidence that (1) Plaintiff was exposed to asbestos from a Westinghouse product with any frequency or regularity, or with the requisite proximity, or (2) any such exposure was significant enough in the context of his lifelong accumulation of asbestos exposures to be a "substantial factor" in causing his illness (as opposed to a non-actionable "de minimis" exposure).

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**B. Plaintiff's Arguments**

In response to the motion of another defendant (General Electric Company) to strike his declaration on grounds that it (1) contains new allegations (pertaining to asbestos exposure during Plaintiff's Navy service), and (2) is unsworn, Plaintiff voluntarily withdrew all claims of alleged exposure arising from his Navy service and submitted an amended declaration that is sworn under penalty of perjury.

Plaintiff responds to Defendant's assertion that there is insufficient product identification evidence in two parts. First, Plaintiff argues that the "frequency, regularity, and proximity" test is not applicable because he is relying upon direct (rather than circumstantial) evidence. Second, he argues that there is sufficient evidence regarding Westinghouse switchgear (including disconnects, starters, and breakers (which include "arc chutes")), wiring, and Micarta board. In support of this argument, he relies upon (1) deposition testimony of Plaintiff, (2) a declaration of Plaintiff, (3) deposition testimony of Westinghouse corporate representative Raymond McMullen from (i) an August 2007 deposition in another case, and (ii) a January 2012 deposition in this case, (4) various Westinghouse drawings/pictures, (5) various Westinghouse catalogs, and (6) a declaration of expert industrial hygienist Stephen Kenoyer (part of which is joint authored with expert Kenneth Garza). A summary of the evidence relevant to the analysis is as follows:

- Deposition Testimony of Plaintiff  
Plaintiff testified that he worked with "a lot" of Westinghouse products while employed for 27 years at the University of Illinois, including starters, disconnects, and switch gear. Plaintiff testified that his work tearing out old Westinghouse switchgear included breaking up the Micarta board in order to remove the copper bus, and removing all wiring and tape. Plaintiff's job included cleaning switchgear, including the disconnect breakers - by cleaning them and then vacuuming them out. When asked what brand of switchgear this involved, Plaintiff answered "Westinghouse, mostly." The only Westinghouse product Plaintiff associated with asbestos was Bakelite that was in starters and disconnects. Plaintiff testified that he did not know whether Westinghouse

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manufactured or supplied this Bakelite and testified that he did not know what company may have done so. He testified that his work with Bakelite did not involve manipulating or disturbing it and that he did not associate his work with Bakelite with being a process that involved asbestos. (Pl. Ex. 1, Doc. No. 215-3.)

- Declaration of Plaintiff

Plaintiff provides testimony (by sworn declaration executed February 9, 2012) that:

- Plaintiff spent six months to a year with a crew doing breaker testing and repair on Westinghouse switch gear, much of it badly deteriorated, in a dozen or so buildings at the University of Illinois. Much of this work required him to get inside the switch gear and to strip wire to hook it up to the disconnects. (Decl. of Plaintiff ¶ 8.)
- Plaintiff worked for a month at the University tearing out old Westinghouse switch gear at the flooded engineering building. That work included breaking up the insulation fiber board or Micarta board in order to remove the copper bus. It also included removing all of the wiring and tape. (Decl. of Plaintiff ¶ 10.)
- Plaintiff worked with Westinghouse Micarta board to mount switches and relays, which required pre-drilling the Micarta board. He recalls seeing Westinghouse on the shipping container. (Decl. of Plaintiff ¶ 11.)

(Pl. Am. Ex. 2, Doc. No. 241-2.)

- Deposition Testimony of Westinghouse 30b6 Witness  
Mr. Ray McMullen (a Westinghouse corporate representative) testified at a deposition in 2007 in another case that certain "arc chutes" about which he was being questioned (in connection with drawings being shown to him) contained two "asbestos boards," and some asbestos rope and asbestos rope packing. (Pl. Ex. 4, Doc. No. 215-6, Dep. of Ray McMullen, Aug. 30, 2007, pages 14-23.)

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Although Plaintiff contends that Mr. McMullen testified that the wiring of arc shields were asbestos covered, the exhibit to which he cites does not contain this evidence, and the Court has not been able to locate this testimony.

Plaintiff contends that Mr. McMullen testified that "asbestos AVA wire was used in all switchgear." Although the exhibit to which he cites does not contain this evidence, because the Court came across this evidence in connection with another case to be heard at this hearing, it has located the testimony at page 36 of Exhibit 3. (Pl. Ex. 3, Doc. No. 215-5, Dep. of Ray McMullen, Jan. 5, 2012, 36:8-9.) This testimony is from a January 2012 deposition in this case.

Plaintiff points to the following pieces of testimony from Mr. McMullen's deposition:

- Mechanical damage can cause deterioration of the asbestos wire and damage the asbestos insulation, even with wires and switch gears running 600 volts or less.
- Wiring leaving the switchgear would have been much higher voltage.
- At higher voltages, there is a danger of "corona" (an electrical discharge) that causes charring of switchgear insulation.
- There is no voltage cut-off to determine which switchgear would contain asbestos (i.e, asbestos could have been in switchgear of any voltage).
- Switchgear in all large industrial buildings would have arc chutes made from asbestos.
- Breakers Plaintiff worked on could have contained asbestos.

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- Breakers Plaintiff described working on (with an ebony backplate) would have been asbestos-containing (i.e., the backplate would have contained asbestos).

(Pl. Mem. at 7-8, citing Pl. Ex. 4 (which appears instead as Ex. 3), Doc. No. 215-5, pages 18-19, 36-38, 78-79, 83-84, and 94-95.)

- Westinghouse Drawings/Pictures  
Plaintiff points to three (3) drawings/pictures that were produced by Westinghouse in another case, which he contends illustrate how "arc chutes" are assembled and opened during the inspection and cleaning process. (Pl. Mem. at 5, citing Pl. Exs. 5-7, Doc. Nos. 215-7, 215-8, and 215-9.)
- Westinghouse Catalogs  
Plaintiff points to five (5) catalogs that were produced by Westinghouse in another case, which he contends demonstrate that:
  - More than ten (10) different contact areas must be cleaned for each arc chute.
  - Westinghouse's product manuals call for using compressed air to blow out dust from the arc chutes during cleaning and inspection.
  - "Insulation" is identified in the manuals as a primary source of the dust to be cleaned out of arc chutes.
  - The use of asbestos parts by Westinghouse continued until at least 1976.
  - The manuals recommend cleaning of arc shields by abrasive techniques such as sand papers, sand blasting, or electric drills with abrasive discs.

(Pl. Mem. at 6, citing Pl. Exs. 8-12, Doc. Nos. 215-10, 215-11, 215-12, 215-13, and 215-14.)
- Expert Report of Stephen Kenoyer (w/Kenneth Garza)  
Mr. Kenoyer (a certified industrial hygienist)

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provides expert opinion (some of which was provided in a joint report authored with expert Kenneth Garza) testimony that:

- Significant exposure to asbestos includes the installation, removal, cutting, manipulation, repairing, or in any way disturbing of an asbestos-containing product in such a manner that airborne asbestos fiber concentration is released above background concentration.
- When these asbestos products were installed, removed, cut, manipulated, repaired, or in any way disturbed, workers and bystanders were exposed to significant airborne concentrations of asbestos.
- Pulling asbestos wire through conduit pipe "will cause significant release of asbestos fibers into the air."
- Stripping asbestos wire and cable will also cause elevated levels of asbestos fibers in the air.

(Pl. Ex. 14, Doc. No. 215-16.)

### **C. Analysis**

As a preliminary matter, the Court notes that Plaintiff voluntarily withdrew his Navy exposure claims as to Westinghouse. Therefore, the Court need only consider allegations of asbestos exposure arising during Plaintiff's work for the University of Illinois. The Court turns next to the merits of Westinghouse's motion for summary judgment on grounds of insufficient evidence of product identification and/or causation.

Plaintiff has alleged that he was exposed to asbestos in connection with Westinghouse switchgear (including disconnects, starters, breakers (which contain "arc chutes")), wiring, and Micarta board. Plaintiff is relying primarily on circumstantial evidence to establish causation. Therefore, he will need to satisfy the "frequency, regularity, and proximity" test in order to satisfy the "substantial factor" test. Thacker, 151 Ill.2d at 359. Keeping this test in mind, the Court will examine the evidence with respect to each alleged source of asbestos exposure separately:

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(i) Switchgear

There is evidence that Plaintiff worked with Westinghouse switchgear, which Plaintiff appears to categorize into the following subgroups: disconnects, starters, and breakers (which contain "arc chutes"). There is evidence that asbestos AVA wire was used in this switchgear. The Court examines evidence pertaining to disconnects, starters, breakers, and wire separately below.

(a) Disconnects

There is evidence that Plaintiff worked with Westinghouse disconnects at the University of Illinois, including work cleaning them and vacuuming them out. There is evidence that asbestos-containing Bakelite was present in these disconnects. However, Plaintiff specifically testified that his work did not involve any disturbance of the Bakelite and that he did not associate his work with Bakelite with being a process that involved asbestos. Furthermore, there is no evidence to suggest that this Bakelite was disturbed or damaged in any way such that there would be asbestos-containing dust from the Bakelite that Plaintiff may have cleaned or vacuumed. Therefore, there is no evidence that Plaintiff's exposure to the Westinghouse disconnects resulted in exposure to respirable asbestos fibers. Accordingly, no reasonable jury could conclude from the evidence that Plaintiff was exposed to an asbestos-containing disconnect of Westinghouse's such that it was a "substantial factor" in the development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Summary judgment in favor of Defendant Westinghouse is therefore warranted with respect to alleged asbestos exposure from disconnects. See id.; Anderson, 477 U.S. at 248.

(b) Starters

There is evidence that Plaintiff worked with Westinghouse starters at the University of Illinois. There is evidence that asbestos-containing Bakelite was present in these starters. However, Plaintiff specifically testified that his work did not involve any disturbance of the Bakelite and that he did not associate his work with Bakelite with being a process that involved asbestos. Therefore, there is no evidence that Plaintiff's exposure to the Westinghouse starters resulted in exposure to respirable asbestos fibers. Accordingly, no reasonable jury could conclude from the evidence that Plaintiff

was exposed to an asbestos-containing starter of Westinghouse's such that it was a "substantial factor" in the development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Summary judgment in favor of Defendant Westinghouse is therefore warranted with respect to alleged asbestos exposure from starters. See id.; Anderson, 477 U.S. at 248.

(c) Breakers/Arc Chutes

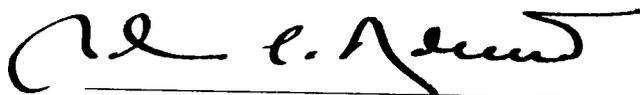
There is evidence that Plaintiff worked with Westinghouse breakers and "arc chutes." There is evidence that breakers Plaintiff worked on could have contained asbestos. There is evidence that the breakers Plaintiff described working on contained asbestos (i.e., asbestos-containing ebony backplates). There is evidence from Westinghouse's corporate representative that some Westinghouse "arc chutes" contained asbestos (boards, rope, and packing). There is evidence that switchgear in all large industrial buildings would have "arc chutes" made from asbestos. There is evidence that insulation was a primary source of the dust to be cleaned out of arc chutes. However, there is no evidence that the asbestos-containing breakers (backplates) or "arc chutes" were disturbed in such a way that they would have released respirable asbestos dust. Furthermore, there is no evidence that the insulation that created dust that was a primary source of dust involved in Plaintiff's clean-up work contained asbestos - or that it was manufactured or supplied by Westinghouse. Accordingly, no reasonable jury could conclude from the evidence that Plaintiff was exposed to an asbestos-containing breaker (or "arc chute") of Westinghouse's such that it was a "substantial factor" in the development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Summary judgment in favor of Defendant Westinghouse is therefore warranted with respect to alleged asbestos exposure from breakers and/or "arc chutes." See id.; Anderson, 477 U.S. at 248.

(ii) Wiring

There is evidence that, for at least six months (and perhaps a year), Plaintiff worked doing breaker testing and repair on Westinghouse switch gear, much of it badly deteriorated, in a dozen or so of the campus buildings at the University of Illinois - which, significantly, required him to get inside the switch gear and to strip wire to hook it up to the disconnects. (Pl. Decl. ¶ 8.) There is evidence that mechanical damage can cause deterioration of asbestos wire. There is evidence from Westinghouse's corporate representative (Ray

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AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

McMullen) that "asbestos AVA wire was used in all [Westinghouse] switchgear." There is expert evidence that stripping asbestos wire and cable will also cause elevated levels of asbestos fibers in the air. Therefore, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from the AV wire in Westinghouse switchgear, during his work (of which there is evidence of frequency, regularity, and proximity) such that it was a "substantial factor" in the development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Accordingly, summary judgment in favor of Defendant Westinghouse is not warranted with respect to alleged asbestos exposure from wiring. See id.; Anderson, 477 U.S. at 248.

(iii) Micarta Board

There is evidence that Plaintiff worked with Micarta board in connection with his work on Westinghouse switchgear at the University of Illinois, including work breaking up the Micarta board and "pre-drilling" it. There is evidence that Westinghouse supplied (and possibly manufactured) this Micarta board, as Plaintiff provided testimony that he recalls seeing Westinghouse on the shipping container. However, there is no evidence that this Micarta board contained asbestos. Accordingly, no reasonable jury could conclude from the evidence that Plaintiff was exposed to Westinghouse Micarta board such that it was a "substantial factor" in the development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Summary judgment in favor of Defendant Westinghouse is therefore warranted with respect to alleged asbestos exposure from Micarta board. See id.; Anderson, 477 U.S. at 248.

**D. Conclusion**

With respect to alleged exposure arising from switchgear (including disconnects, starters, and breakers/arc chutes) and Micarta board, summary judgment is granted in favor of Defendant Westinghouse.

With respect to alleged exposure arising from wiring, summary judgment in favor of Defendant Westinghouse is denied.