

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

LAUREL ELDERKIN-GRAHAM & : CONSOLIDATED UNDER
BRUCE GRAHAM, : MDL 875
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 Plaintiffs, :
 :
 : Transferred from the
 : District of Maine
 v. : (Case No. 10-00387)
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 NEW ENGLAND INSULATION CO., :
 INC., ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:10-83243-ER
 Defendants. :

FILED

NOV 28 2011

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this **28th** day of **November**, **2011**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant
Kimberly-Clark Corporation (Doc. No. 46) is **DENIED**.¹

¹ This case was filed on or about November 3, 2010 in the United States District Court for the District of Maine on the basis of diversity. It was thereafter transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875. Plaintiff Laurel Elderkin-Graham is the great niece of decedent William Doucette. Plaintiff William Graham ("Mr. Graham") is the husband of Plaintiff Laurel Elderkin-Graham ("Mrs. Elderkin-Graham"). Mrs. Elderkin-Graham, who is approximately 56 years old, has contracted mesothelioma. She alleges that, during her childhood, she was exposed to asbestos that was brought home on the clothes of decedent William Doucette, who lived in an adjoining apartment above the barn connected to her home in the back, and whose clothes she helped launder during the time she lived in the home with him (from her birth in October of 1955 until October of 1963, at which point she was eight years old). Decedent was an iron worker (a "rigger") who worked in the vicinity of others who worked with asbestos-containing products, and it is undisputed that he did not work directly with asbestos-containing products; he worked assisting a crane that retrieved and delivered parts to be used in a paper-machine.

Plaintiffs have brought failure-to-warn claims under Maine state law, based on common law negligence and statutory strict liability. Plaintiffs assert that Defendant Kimberly Clark Corporation, successor to Scott Paper Company ("Kimberly Clark"), is liable as the owner of a premises in Maine at which the decedent worked (the Scott Paper facility in Winslow, Maine, sometimes referred to as the Waterville paper facility), where Plaintiff asserts decedent was exposed to asbestos that remained on his clothing and was brought home and laundered by Mrs. Elderkin-Graham, thus contributing to her mesothelioma. The parties do not dispute that Maine law applies. Kimberly Clark has moved for summary judgment, arguing that it is entitled to summary judgment because (1) Plaintiffs have failed to provide evidence of asbestos products on premises sufficient to establish causation, and (2) it had no duty to warn of asbestos-related hazards arising from bystander and/or "take-home" exposure.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. The alleged exposures which are relevant to this motion occurred in Maine and the parties have agreed that Maine law applies. Therefore, this Court will apply Maine law in deciding Kimberly Clark'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 Maine Law

As previously discussed by this Court in Powers v. FW Webb Co., 2011 WL 4912840 (E.D. Pa. March 10, 2011), the Maine Supreme Judicial Court has not yet determined the threshold of causation a plaintiff must prove to show that his or her exposure to defendant's asbestos product was a "substantial factor" in causing his or her injuries. Bessey v. Eastern Refractories, Docket No. CV-99-001 at 11 (Me. Super. Ct. 2002). Maine Superior Court decisions have articulated divergent standards.

In Bessey, the Maine Superior Court held that plaintiff must show that (1) defendant's conduct was a "substantial factor" in causing an asbestos-related disease; (2) that defendant's asbestos-containing product was present at the work site; and (3) that the plaintiff was in proximity when the asbestos-containing product was used. Id. at 11. The Bessey court declined to follow the "frequency, regularity, and proximity" test first applied in Lohrmann v. Pittsburg Corning Corp., 782 F.2d 1156 (4th Cir. 1996), which is followed by most states. Instead, the Bessey court adopted a broad view of proximity, requiring the plaintiff simply to show substantial exposure and that defendant's product was present at the work site. Id. at 15.

In 2007, three cases increased the burden on plaintiffs, requiring a showing that (1) defendant's asbestos-containing product was at the site where plaintiff worked; (2) that the plaintiff was in proximity; and (3) that the employee at issue inhaled asbestos from defendant's product. Campbell v. H.B. Smith Co., Docket No. CV-04-57, at 5-6 (Me. Super. Ct. 2007); see also Boyden v. Tri-State Packing Supply, et. al, Docket No. CV-04-452 (Me. Super. Ct. 2007) (same); Buck v. Eastern Refractories, Docket No. CV-04-15 (Me. Super. Ct. 2007) (same).

Most recently, in 2009, two Maine Superior Court decisions devised an alternative test requiring the plaintiff to establish that (1) defendant's product was at the work site, (2) defendant's product contained asbestos, and (3) plaintiff had personal contact with asbestos from the defendant's product. Thomas v. Eastern Refractories Co., Inc., Docket No. CV-04-151 (Me. Super. Ct. 2009); Rumery v. Garlock Sealing Technologies, Inc., Docket No. CV-05-599 (Me. Super. Ct. 2009) (same). Under this approach, the question of whether the contact was "substantial" is left for the jury. Thomas at 4.

Therefore, it is unclear whether, under Maine law, plaintiff must simply show proximity to defendant's product (Bessey), inhalation of asbestos dust from defendant's product (Campbell, Boyden), or personal contact with asbestos from defendant's product (Thomas, Rumery).

D. Duty of Premises Owner Under Maine Law to Warn About Bystander and/or "Take-Home" Exposure

Under Maine law, the existence of a duty and the scope of that duty is a matter of law. See Alexander v. Mitchell, 930 A.2d 1016, 1020 (Me. 2007). Duty "involves the question of whether the defendant is under any obligation for the benefit of the particular plaintiff." Id. The existence and the scope of any such duty is a matter of policy, "dependent on recognizing and weighing relevant policy implications." Cameron v. Pepin, 610 A.2d 279, 282 (Me. 1992).

The courts of the various states generally recognize claims based upon bystander exposure. See Am.Jur.2d Products Liability § 609. However, the courts of some states recognize claims based upon "take-home" exposure while others do not - even though a foreseeability analysis is used in each instance. Compare, e.g., Martin v. Cincinnati Gas and Electric Co., 561 F.3d 439, 444-45 (6th Cir. 2009) (noting that Kentucky's Supreme Court recognizes a bystander claim, such as a child's exposure to asbestos brought home on the parent's clothes, in cases in which the defendant is aware of the hazards of bystander exposure because such exposure is reasonably foreseeable) with Carel v. Fibreboard Corporation, 74 F.3d 1248, 1996 WL 3917, at * 3-4 (10th Cir. 1996) (holding that an asbestos defendant has no duty to warn an asbestos user's spouse about the dangers of asbestos because the spouse is not a reasonably foreseeable user or consumer of the product). Courts that recognize claims for "take-home exposure" may refuse to do so in particular cases,

based on a fact-specific determination (as a matter of law) of foreseeability of the take-home exposure under the circumstances. See, e.g., Martin, 561 F.3d at 447 (recognizing the potential availability of bystander claims of the "take-home" variety but denying such a claim under circumstances in which there was no evidence that the employer-defendant had actual knowledge of the danger of such exposure).

Unlike the courts of other states, no court in Maine has addressed the duty of an asbestos defendant to warn about bystander and/or "take-home" exposure to asbestos (or other products). The Supreme Judicial Court of Maine has made clear, however, that "duty, while premised on foreseeability, rest[s] also on other policy considerations." Cameron, 610 A.2d at 279. These policy considerations include such things as "societal expectations regarding behavior and individual responsibility," as well as "'ideals of morals and justice, . . . and our social ideas as to where the loss should fall." Alexander, 930 A.2d at 1020 (internal citations omitted).

II. Defendant Kimberly Clark's Motion for Summary Judgment

Plaintiffs' claims involve alleged "take-home" exposure to asbestos from products at the Scott paper facility in Winslow, Maine (sometimes referred to as Waterville, Maine), which was transported into the home of Mrs. Elderkin-Graham on the clothes of the decedent, who Plaintiff asserts was exposed to this asbestos as a bystander at the facility.

A. Product Identification/Causation

Defendant Kimberly Clark argues that it is entitled to summary judgment because Plaintiffs have failed to produce evidence that demonstrates the required causal connection between Mrs. Elderkin-Graham's mesothelioma and any asbestos-containing product at the Scott Paper facility at issue during the relevant time period (1955 to 1963). Specifically, Kimberly Clark argues that (1) the testimony of co-worker Gerald Guiou is insufficient to establish asbestos exposure at its facility because Mr. Guiou was not able to testify with certainty as to when he worked at the facility at issue, and (2) the Social Security records of Mr. Guiou and decedent demonstrate that they did not work at the Scott Paper facility at the time identified by Mr. Guiou's unverified and unauthenticated (and thus inadmissible) Work History Report. In short, Kimberly Clark argues that any finding of causation by a jury would be improperly speculative.

In response, Plaintiffs point to testimony from co-worker Gerald Guiou that, at every location at which he worked with decedent Mr. Doucette, including the facility of Kimberly Clark's predecessor (Scott Paper), the decedent was exposed to asbestos dust in close proximity.

The Court concludes that the testimony of the decedent's co-worker (Mr. Guiou) provides sufficient identification to show that the decedent worked near and was exposed to asbestos-containing products at the Scott Paper facility, regardless of which of the divergent standards articulated by the Maine Superior Court is applied. Mr. Guiou testified as to proximity of the decedent to asbestos-containing products at the Scott Paper facility (as would be required under Bessey), inhalation by the decedent of asbestos dust at the Scott Paper facility (as would be required under Campbell or Boyden), and personal contact of the decedent with asbestos at the Scott Paper facility (as would be required under Thomas or Rumery). The pertinent testimony is as follows:

Q: Now, I want to turn your attention to **William Doucette**. **When did you first meet William Doucette?**

A: Well, '53 when I went into the union, he was already a member of the union. And we went to work in Wiscasset.

Q: And what was your relationship like? Were you friends?

A: Oh, yeah.

Q: Were you good friends?

A: Yes, yes.

Q: What kind of work did William Doucette do?

A: Well, he was more like a connector, putting up the iron and rigging. You had to work with a crane, picking up iron and putting it up on the building, stuff like that. But he worked inside around all the trades. You know, we worked inside.

Q: Okay. **This is a Work History Report, and it has your name on it at the top right here.**

A: Yeah.

Q: And it looks like what we're looking at are dates of different work jobs - different work sites, which employer you had, what plant you were at, and who you worked with. Is that something that you helped to prepare do you think?

A: Well, I guess I've answered questions about that, yeah.

Q: **Now do you remember any products that you came into contact with while you were working?**

A: Like what, asbestos?

Q: Well, what - what materials were you using? You said that you were -

A: **Well, we used iron. That's all, but we was working right beside of other people, you know, all them other trades.**

Q: Okay. Do you remember ever seeing the name of any product, the name of a manufacturer?

A: Oh, yeah, yeah. We knew who was working on the job, different contractors.

Q: But do you - **did you ever see a product that had the name of a company on it?**

A: Well, I don't know seeing the product but talked with **the guys that worked for the company.**

Q: **What company was that?**

A: Oh, **New England Refractors.**

Q: New England Refractors?

A: Yeah. Well, what is it? **New England** - it came out of Lewiston. **They handled the asbestos, covering pipes and - and things like that and boilers.**

Q: **Now, would William Doucette have been around those pipes and boilers?**

A: **Yes.**

Q: Do you know who the manufacturer of those pipe coverings was?

A: No.

Q: Okay. When you were working at the paper mill in **Waterville, was that Scott?**

A: Yes.

Q: **[D]o you have any specific memories of what Mr. Doucette was doing at that work site?**

A: Well, **he was doing the rigging and getting parts for the machine.**

Q: Getting parts for the machine?

A: Yeah.

Q: Okay. We're on this last one on the first page.

A: Yes.

Q: **The year is 1957. . . .**

Q: Okay. **Do you think you worked with William Doucette at that location?**

A: **Yes.**

Q: You do?

A: Yes.

Q: Okay. In that time frame?

A: Yes.

Q: Then the paper mill - **we talked about the paper mill in Waterville, Maine that you worked at. You were with Sanders. Is that right?**

A: Yes.

Q: And you did say **you remember Mr. Doucette at that job -**

A: **Yes.**

Q: - is that correct? Do you remember the name of the paper mill, what it was called at the time you worked there?

A: **Scott Paper.**

Q: **In Waterville?**

A: Yes. Well, **actually it's in Winslow.**

Q: Okay. The location of the mill was in Winslow?

A: Yeah.

Q: Was there also one in Waterville?

A: No.

A: It was just - people just called it the Waterville - Waterville paper.

Q: But it really was in Winslow?

A: No. It was in Winslow, yeah.

Q: Okay. **I'm going to ask you if you think you were exposed to asbestos at the Scott Paper mill in Winslow.**

A: **Yes.**

Q: And do you think Mr. Doucette would have been exposed to asbestos?

A: Yes.

Q: Do you remember the names of any products or manufacturers at the Scott Paper Winslow location that you associate with asbestos?

A: I don't remember.

Q: The first one is 1 - **January to December of '57 where you worked for Sanders Engineers at the paper mill in Winslow, right? That's what it says anyway?**

A: Yeah.

Q: Okay. And do you remember how long you worked in Winslow?

A: I don't remember.

Q: Mr. Guiou, you described various facilities where you worked with William Doucette between the years '55 and 1963. Do you have a belief that you were exposed to asbestos during those times at those facilities?

A: Yes, yes.

Q: What is that belief?

A: Well, the pipe coverers was always around where we was working.

Q: So your answer is that, yes, you believe you were exposed to asbestos?

Q: Do you have a belief as to whether Mr. Doucette was exposed to asbestos during those years at those -

A: Yes.

Q: And what is that belief?

A: Well, like myself, they was using that asbestos covering right around where we were working.

Q: What types of trades were working around you?

A: Well, pipe coverers, pipe fitters, electricians, laborers, carpenters. That's about it, I guess.

Q: Do you have any idea what these various trades - what types of products they would have been working with?

A: Well, pipe fitters was always working with asbestos.

Q: You described a company or you named a company called New England Refractors. Is there another name that that company - that you associate with that company?

A: New England Insulators.

Q: What type of work did New England Insulators do?

A: Well, they - they furnished material for covering pipes and covering the boilers.

Q: Do you know the name, brand or manufacturer of any of the insulation materials that they provided?

A: Well, I think it was - Mansfield was some of it. Corning, that's the one that I remember.

Q: . . . Is it fair to say that New England Refractors is the same as New England Insulation?

A: Yes.

Q: When you and Mr. Doucette were on the same job at the same time, can you tell us **what percentage of the time you and him would be working together?**

A: Oh, probably **half the time.**

Q: About 50 percent of the time.

A: Yeah.

Q: How often at the end of a work day would you see Mr. Doucette and say, hey, I'll see you later, see you tomorrow?

A: I think you have to say that again. I'm - I don't understand.

Q: **Did you typically see Mr. Doucette at the end of the work day?**

A: **Yes.**

Q: Did you ever see him leave work wearing a different set of clothing that he was wearing?

A: No.

Q: **So he always wore his work clothes home?**

A: **Yes, yes.**

Q: Now, you had mentioned that New England Insulation or New England Refractors was on some of these sites? Were they - are you aware of New England Insulation being involved at the Wicasset mill?

A: Well, yeah, I remember them being there.

Q: And how do you know they were there?

A: Well, you talk with people, and they tell you who they're working for.

Q: So let me make sure I understand you. You spoke with people who were employees of New England Insulation?

A: Yes.

Q: **Do you know what the people - the employees of New England Insulation were doing on the site?**

A: Well, they was more or less furnishing material for the **pipefitters there and the boiler makers for the boilers.**

Q: Okay. And now Cutler, the radar station in Cutler, do you know if New England Insulation had a presence there?

A: No. I don't remember that.

Q: **How about the Winslow Scott Paper factory?**

A: **Yes. I remember them -**

Q: You remember them -
A: - **bringing in materials.**
Q: Okay. And did you learn about it - at Winslow did you learn about it the same way, hearing people talk?
A: Yes.

Q: ... Now, you have said that **you believe that the pipe coverings contained asbestos, correct?**
A: **Yes.**

Q: Okay. Now, **how close would you say you came to these pipe coverings?**
A: **Within ten (10) feet.**

Q: ... Did the - **putting on of the pipe covering over the pipes, did that create dust?**
A: **Yes.** I guess, probably.
Q: Probably or you remember it?
A: Oh, I remember that one.
Q: **Was this dust that you would get on yourself?**
A: **Yes.**
Q: **Do you have any memory of that dust getting on Mr. Doucette?**
A: **Well, yeah, he was right there with us.**
Q: Okay.
A: **Everybody got a load of that.**

(Dep. of co-worker Gerald Guiou, March 9, 2011, at 10:16-180:21, Ex. 4 to Doc. No. 50 (emphasis added).)

Defendant Kimberly Clark has not pointed to the absence of a genuine issue of material fact. Although Kimberly Clark asserts that the Social Security earnings statements of the decedent appear to confirm that he did not work for the employer at issue (Sanders Construction, also referred to as Sanders Engineering) at the time the coworker's testimony and the "unverified Work History sheet" of decedent indicate he worked there (1959), the Social Security earnings statements for decedent and Mr. Guiou indicate that they both worked for Sanders Construction locations in 1954, 1955, 1956, and 1957. Mr. Guiou testified that he witnessed the decedent's exposure to asbestos at the Scott Paper facility. He also testified that this exposure may well have been in 1957. In fact, it is evident from a review of the entire transcript of Mr. Guiou's deposition that he does not recall the exact dates of his location at particular

facilities, but, instead, recalls generally the time period in which he worked with Mr. Doucette at the Scott Paper facility and other facilities. Nothing about the Social Security earnings statements eliminates a genuine issue of material fact as to whether decedent was exposed to asbestos at the Scott Paper facility during 1954, 1955, 1956, and/or 1957. Accordingly, summary judgment in favor of Defendant Kimberly Clark on the basis of insufficient identification of asbestos at its facility to establish causation is not warranted and Kimberly Clark's motion is therefore denied as to this argument.

B. Duty to Warn About Bystander and/or "Take-Home" Exposure

Defendant Kimberly Clark also argues that, even if there were asbestos-containing products at its facility, to which the decedent was exposed, it had no duty to warn about "take-home" exposure because the state-of-the art knowledge at the time did not indicate there was any asbestos-related risk to household members of asbestos workers and, thus, Kimberly Clark had no knowledge at that time of the risks of "take-home" exposure. Therefore, it argues, it is entitled to judgment on these claims as a matter of law.

In response, Plaintiffs argue that Kimberly Clark had a duty to warn about the hazards of asbestos because information was readily available in the published literature since at least the 1930s to show that asbestos causes lung disease in exposed workmen and their families, such that Kimberly Clark's predecessor should have known about and warned about the hazards of asbestos at the time of Mrs. Elderkin-Graham's alleged exposure. To support this, Plaintiffs point to the expert report of David Ozonoff, M.D., who opines that asbestosis was well known as a disease entity by 1930 and a cause of lung cancer by 1949.

Although Kimberly Clark failed to raise this point in its briefing, it contended at oral argument that Plaintiffs should not be permitted to rely on their expert evidence, as it was produced in a form that did not constitute "sworn testimony."

No court in Maine has addressed the duty of an asbestos defendant to warn about bystander and/or "take-home" exposure to asbestos. Any prediction by this Court as to how a Maine court would rule on Kimberly Clark's potential liability (i.e., the availability of a cause of action) with respect to bystander exposure and/or "take-home" exposure would require this Court to



A handwritten signature in black ink, appearing to read "Eduardo C. Robreno, J.", is written above a horizontal line.

EDUARDO C. ROBRENO, J.

engage in policy considerations in place of Maine's courts on significant matters such as Maine's "societal expectations" and "ideals of morals." See Alexander, 930 A.2d at 1020. Rather than create Maine state policy on these discretionary matters, the Court concludes that the case should be remanded to the transferor court. Accordingly, Kimberly Clark's motion for summary judgment is denied as to this argument, with leave to file in the transferor court. In light of this determination, the Court need not reach Kimberly Clark's argument that Plaintiffs' expert evidence is inadmissible.