

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

April 27, 2010

RE: Constantinides v. Alfa Laval, Inc., et al  
CA No. 09-70613

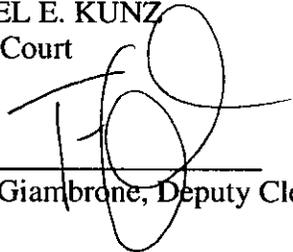
**NOTICE**

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Hey, United States Magistrate Judge Rueter, and United States Magistrate Judge Strawbridge on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

MICHAEL E. KUNZ  
Clerk of Court

By:   
Thomas Giambrone, Deputy Clerk

cc: Judge Hey  
Judge Rueter  
Judge Strawbridge  
Judge Robreno  
E-mailed to Counsel  
mailed to Counsel

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

IN RE: ASBESTOS PRODUCTS	:	
LIABILITY LITIGATION (No. VI)	:	MDL DOCKET NO. 875
	:	
	:	
	:	
PETER CONSTANTINIDES and ELPIS	:	EDPA No. 09-70613
CONSTANTINIDES, h/w	:	
	:	<i>Transferred from:</i>
v.	:	
	:	<i>U.S. District Court for the</i>
ALFA LAVAL, INC., et al.	:	<i>So. Distr. of Florida, Miami Div.,</i>
	:	<i>Civ. Action No. 08-22522</i>

**REPORT AND RECOMMENDATION**  
**ON DEFENDANT CBS CORPORATION'S**  
**MOTION FOR SUMMARY JUDGMENT**

BEFORE:  
THOMAS J. RUETER, CHIEF UNITED STATES MAGISTRATE JUDGE  
DAVID R. STRAWBRIDGE, UNITED STATES MAGISTRATE JUDGE  
ELIZABETH T. HEY, UNITED STATES MAGISTRATE JUDGE

BY: HEY, M.J. April 26, 2010

Plaintiffs Peter Constantinides and his wife, Elpis Constantinides (“Plaintiffs”), filed the present asbestos action on August 11, 2008, alleging negligence and strict liability claims against several defendants based on their failure to warn of the dangers associated with exposure to asbestos incorporated into their products and to which Mr. Constantinides was exposed while serving in the United States Navy aboard the USS Iowa (BB-61) from 1954 until 1956.<sup>1</sup> Presently before the court is a summary judgment

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<sup>1</sup>The matter was originally filed in the Southern District of Florida, Miami Division, but was transferred to the Eastern District of Pennsylvania as part of MDL 875

motion filed by Defendant CBS Corporation<sup>2</sup> (“Westinghouse”) (Doc. 99), Plaintiffs’ response thereto (Doc. 129), and Westinghouse’s reply (Doc. 131). For the reasons stated herein, we recommend that the motion be denied.<sup>3</sup>

**I. FACTUAL BACKGROUND**

Mr. Constantinides was diagnosed with asbestos-attributable mesothelioma in 2007. His only lifetime exposure to asbestos occurred during fifteen months he served on the USS Iowa from 1954 until 1956. Mr. Constantinides worked as a fireman’s apprentice and then fireman on the Iowa, and his main assignment was to one of the boiler rooms. The boiler room contained numerous pipes and machinery encased in external asbestos insulation and/or containing gaskets and other internal parts which were encased in asbestos. Although the precise dimensions of the boiler room are unknown, there is no question that the room was significant in size, that it was densely packed with asbestos-insulated equipment and pipes, and that it was hot and dusty.

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and docketed on June 17, 2009, in accordance with the terms of this court’s Administrative Order No. 11. See Doc. 1.

<sup>2</sup>CBS Corporation is a Delaware corporation formerly known as Viacom, Inc., and is a successor by merger to CBS Corporation, a Pennsylvania corporation formerly known as Westinghouse Electric Corporation. See Doc. 99 at 1, n.1. Additionally, B.F. Sturtevant Company was formerly owned by, and operated as a division of, Westinghouse. Id. For ease of reference, CBS Corporation and Sturtevant collectively will be referred to as Westinghouse.

<sup>3</sup>The Honorable Eduardo C. Robreno referred the motion to this panel for a Report and Recommendation solely as to issues raising product identification and causation. All other issues are reserved to Judge Robreno. We heard oral argument on March 24, 2010.

Mr. Constantinides performed daily work in the boiler room such as cleaning and maintenance of the pumps, valves and other machinery. This activity created airborne dust, which Mr. Constantinides inhaled without the benefit of a mask or respirator to protect himself. Pl. Video Dep. Vol. I at 20-26. He identified the pipes and lines in the boiler room as a source of the dust. Id. at 21. Mr. Constantinides occasionally repaired pumps and motors by removing and replacing gaskets and bearings, and he was assigned for two to three weeks to learn to operate the ship's generators and breathed in dust from the generators. Pl. Video Disc. Dep. at 56-59, 62-64, 66-68; Pl. Video Dep. Vol I at 29-32. According to a co-worker, Robert Harris, Mr. Constantinides also spent about ten days cleaning and scraping the packing from valves and then repacking them, and breathed in the dust this work created. Harris Dep. at 11-15.

Plaintiffs have retained Arnold P. Moore, PE, a retired naval captain and professional engineer with experience in the repair and overhaul of Navy ships. See Moore Report at 1. Mr. Moore explained that each boiler room on the Iowa "included two boilers, six forced draft blowers, a deaerating feed water tank, numerous steam driven and electric motor driven pumps as well as pump governors, steam traps and valves." Id. at 4, 9. The turbines that ran the blowers – which were "B. F. Sturtevant steam turbine driven forced draft blowers"<sup>4</sup> – would likely have had internal and external

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<sup>4</sup>Westinghouse's counsel explained during oral argument that the forced draft blowers "basically take air and blow [it] at a high speed into the boiler to ensure combustion." N.T. 03/24/10 at 8, 17.

asbestos insulation, and the flanged steam piping connections for the blower usually contained asbestos gaskets. Id. at 7; Moore Dep. at 120, 123. The boiler room also contained a Sturtevant steam turbine to drive a fire and flushing pump, and each of the engine rooms contained two Westinghouse service generators driven by Westinghouse steam turbines, all of which would have had internal and external asbestos insulation. Moore Report at 9, 11.

Finally, Plaintiffs rely on medical expert Jerrold L. Abraham, M.D., who opined in a one-page report that asbestos exposure caused Mr. Constantinides' mesothelioma. See Abraham Report at 1.

## II. LEGAL STANDARDS

### A. Standard for Summary Judgment

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the

moving party has met its initial burden, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). “Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact.” Boykins v. Lucent Techs., Inc., 78 F. Supp.2d 402, 408 (E.D. Pa. 2000). The evidence presented must be viewed in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255; Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

**B. Applicable Florida Law**<sup>5</sup>

The present motion challenges the sufficiency of the evidence on the causation element of Plaintiffs’ cause of action. To establish an asbestos claim under Florida law, a plaintiff must show that asbestos exposure from the defendant’s product at issue was a substantial contributing factor to plaintiff’s physical impairment. Fla. Stat. § 774.204(1) (2009); Reaves v. Armstrong World Indus., Inc., 569 So. 2d 1307, 1308-09 (Fla. 4th DCA 1990). On an appeal from a directed verdict in the defendants’ favor, the court in Reaves analyzed whether there was sufficient evidence adduced at trial upon which the jury could properly rely in finding a verdict for the plaintiff. After reviewing the evidence presented by plaintiff, the court concluded that the proof of whose asbestos dust and who manufactured those products was speculative at best. Reaves, 569 So. 2d at 1309. The

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<sup>5</sup>The parties agree that Florida law applies to decide Westinghouse’s motion and we will therefore not engage in a choice of law analysis.

court instructed that the plaintiff must establish that he was exposed to the asbestos products of each defendant and that this exposure contributed substantially to producing the injury of which plaintiff complained. Id.

Testimony of an expert witness on causation can be sufficient to raise a genuine issue of material fact, defeating a motion for summary judgment. Brown v. Glade and Grove Supply, Inc., 647 So. 2d 1033, 1036 (Fl. 4th DCA 1994); see also Ward v. Celotex Corp., 479 So. 2d 294, 296 (Fla. 1st DCA 1985) (testimony of co-workers that placed plaintiff near activities where asbestos was used and identification of defendant as manufacturer sufficiently raised genuine issue of material fact precluding summary judgment in favor of manufacturer).

### **III. DISCUSSION**

Defendant Westinghouse argues that it is entitled to summary judgment because Plaintiffs have failed to establish that exposure to a Westinghouse product caused Mr. Constantinides' injuries. See Doc. 99 at 2, 8-15, Doc. 131 at 2-7.<sup>6</sup> Plaintiffs counter that they have raised a genuine issue of material fact as to the issue of specific causation. See Doc. 127 at 12-14. We agree with Plaintiffs.

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<sup>6</sup>This issue is raised in section I of Westinhouse's memorandum in support of its motion. Westinghouse also argues in sections II and III that Westinghouse owed no duty of care to Plaintiffs because it did not design, manufacture, supply or install the asbestos on its products, and that it has no liability under Florida's sophisticated purchaser defense. See Doc. 99 at 16, 29. As these issues are outside the scope of Judge Robreno's referral order, they are not addressed in this Report and Recommendation.

To begin with, Mr. Constantinides contracted mesothelioma as a result of his asbestos exposure during his fifteen months serving on the U.S.S. Iowa. Thus, his exposure took place during a period that was concentrated in both time and place. While he could not identify a Westinghouse product on the Iowa, his testimony together with that of Mr. Harris and Mr. Moore is sufficient to allow a jury to make that connection. Mr. Constantinides did regular cleaning work on all of the machinery in the boiler room, which would have included the six Sturtevant draft blowers and the Sturtevant steam turbine. All of this equipment was insulated inside and out with material containing asbestos. Additionally, Mr. Constantinides recalled being trained for a two to three week period on the ship's generators and breathing in dust from the generators. Although he did not identify Westinghouse as the manufacturer of the generators, there were two Westinghouse generators with Westinghouse steam turbines in each of the engine rooms on the Iowa that were insulated with asbestos, and defendant has not pointed to uncontested evidence establishing that he was trained on some other generators. See Moore Report at 9, 11.

Thus, when viewed in the light most favorable to the non-moving party for purposes of summary judgment, see Anderson, 477 U.S. at 255, the evidence is sufficient to find that Plaintiffs have raised a genuine issue of material fact regarding the question of whether asbestos exposure from Westinghouse equipment was a substantial

contributing factor to Mr. Constantinides' illness. See Fla. Stat. § 774.204(1) (2009); Reaves, 569 So. 2d at 1308-09.

Accordingly, we make the following:

**RECOMMENDATION**

AND NOW, this 26th day of April 2010, it is RESPECTFULLY RECOMMENDED that the summary judgment motion of Defendant CBC Corporation be DENIED with respect to the issues that are within the scope of Judge Robreno's referral order. The parties may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.<sup>7</sup>

BY THE COURT:

  
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ELIZABETH T. HEY  
UNITED STATES MAGISTRATE JUDGE

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<sup>7</sup>Chief Magistrate Judge Rueter and Magistrate Judge Strawbridge join in this determination.

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS	:	
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	:	<i>Civ. Action No. 08-22522</i>

**ORDER**

AND NOW, this            day of            , 2010, upon careful and independent consideration of Defendant CBS Corporation's motion for summary judgment (Doc. 99), Plaintiffs' response (Doc. 129), and Defendant's reply (Doc. 131), and after review of the Report and Recommendation authored by Magistrate Judge Elizabeth T. Hey on behalf of herself, Chief Magistrate Judge Thomas J. Rueter, and Magistrate Judge David R. Strawbridge, it is hereby ORDERED that:

1. The Report and Recommendation is approved and adopted; and
2. Defendant CBS Corporation's motion for summary judgment (Doc. 99) is DENIED as to the issues addressed in the Report and Recommendation.

BY THE COURT:

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EDUARDO C. ROBRENO, J.