

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

ROBERT W. MILLSAPS,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Eastern District of
v.	:	Tennessee
	:	(Case No. 10-00358)
	:	
ALUMINUM COMPANY OF AMERICA,	:	E.D. PA CIVIL ACTION NO.
ET AL.,	:	2:10-84924-ER
	:	
Defendants.	:	

**FILED**

AUG - 8 2013

MICHAEL KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

O R D E R

**AND NOW**, this **7th** day of **August, 2013**, it is hereby **ORDERED** that the Motions to Strike (Doc. Nos. 116 and 143) and the Motion for Summary Judgment of Defendant Aluminum Company of America (Doc. No. 112) are each **DENIED**.<sup>1</sup>

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<sup>1</sup> This case was transferred in December of 2010 from the United States District Court for the Eastern District of Tennessee to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Robert Millsaps alleges that his wife, Brenda Millsaps ("Decedent" or "Mrs. Millsaps"), was exposed to asbestos brought home on the clothes of her father-in-law, John Millsaps, who worked for Defendant Aluminum Company of America ("Alcoa") from 1955 to 1957, and again from 1965 to 1996. Plaintiff alleges that Decedent was exposed to asbestos beginning at age 16, and was diagnosed with mesothelioma at age 46, shortly before she died from that illness.

Plaintiff brought claims against multiple defendants. Defendant Alcoa, the sole remaining defendant, has moved for summary judgment, arguing that (1) it owed no duty to Decedent, and (2) there is insufficient evidence to establish causation with respect to its product(s) - in part, Defendant contends, because Plaintiff intentionally destroyed crucial evidence such that other of Plaintiff's evidence should be excluded. The parties agree that Tennessee law applies.

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In connection with its motion for summary judgment, Defendant has filed a (1) motion to strike testimony of expert Vernon Rose and (2) motion to strike Plaintiff's affidavit.

## II. 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

When the parties to a case involving land-based exposure agree to application of a particular state's law, this Court has routinely applied that state's law. See, e.g., Brindowski v. Alco Valves, Inc., No. 10-64684, 2012 WL 975083, \*1 n.1 (E.D. Pa. Jan 19, 2012) (Robreno, J.). The parties agree that Tennessee substantive law applies. Therefore, this Court will apply Tennessee law in deciding Defendant'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).

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**III. Defendant Alcoa's Motion for Summary Judgment**

**A. Defendant's Arguments**

Spoliation of Evidence / Duty to Preserve Lung Tissue

Defendant Alcoa centers its motion for summary judgment on the contention that Plaintiff had a duty to preserve Decedent's lung tissue and that Plaintiff "destroyed" evidence by failing to preserve Decedent's lung tissue (by way of autopsy or otherwise). Defendant contends that it is entitled to summary judgment because of Plaintiff's spoliation of evidence, or that, at the very least, certain of Plaintiff's evidence should be stricken as a sanction for the alleged destruction of evidence. Defendant does not present any evidence that Plaintiff deliberately destroyed evidence. Defendant does not cite to any authority for its contention that Tennessee law required Plaintiff to preserve Decedent's lung tissue.

Motion to Strike Plaintiff's Affidavit

By way of separate motion (Doc. No. 143), Alcoa contends that Plaintiff's affidavit should be stricken because it (1) was submitted in connection with Plaintiff's "reply brief," (2) is internally inconsistent, (3) contradicts Plaintiff's prior testimony (i.e., is a "sham affidavit"), and (4) attempts to impermissibly introduce new character evidence (concerning the degree and sincerity of Plaintiff's religious nature and beliefs) that Defendant did not have a chance to explore during fact discovery. With respect to the last three points, Defendant's arguments pertain solely to its contention that Plaintiff intentionally destroyed evidence (by failing to preserve lung tissue from Decedent's body) and whether or not Plaintiff's religious beliefs impacted a decision regarding autopsy of Decedent.

Motion to Strike Testimony of Plaintiff's Expert (Vernon Rose)

In its summary judgment briefing, and by way of separate motion (Doc. No. 116), Alcoa contends that the testimony of Plaintiff's expert, Vernon Rose, should be stricken because it fails to meet the standards of Daubert and Federal Rule of Evidence 702.

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No Duty Owed to Decedent

Defendant Alcoa contends that it cannot be liable for Mrs. Millsaps's asbestos-related death because it owed no duty to her. Defendant acknowledges that Tennessee law recognizes a cause of action for "take-home" asbestos exposure, as set forth in Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 366-67 (Tenn. 2008). However, Defendant contends that it did not owe a duty to her because (1) Mrs. Millsaps did not live with John Millsaps (her father-in-law who is alleged to have brought home asbestos on his clothing), (2) prior to 1978, Mrs. Millsaps did not even know John Millsaps, and (3) after 1978, it was not foreseeable to Defendant that there was any risk of take-home exposure because (i) OSHA standards were in place and Plaintiff has failed to produce evidence that John Millsaps was exposed to asbestos levels that exceeded those permitted by OSHA standards, (ii) there were no epidemiological studies showing that (a) machinists (like John Millsaps) could be exposed to asbestos in amounts that were harmful, (b) nor any showing that household members of machinists or welders (who worked primarily with metal and aluminum) could be exposed to asbestos in amounts that were harmful.

Product Identification / Causation

Alcoa contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused the illness at issue. Defendant contends that, without Plaintiff's expert testimony and/or Plaintiff's affidavit, Plaintiff's evidence is clearly insufficient. Moreover, Defendant contends that, even if this evidence is not stricken, Plaintiff's evidence is still insufficient because (1) there is no proof that the products John Millsaps worked with contained asbestos, (2) there is no evidence regarding the amount of asbestos released from products with which he worked, and (3) there is no evidence that John Millsaps retained respirable asbestos fibers on his clothes until he got home from work.

**B. Plaintiff's Arguments**

Spoliation of Evidence / Duty to Preserve Lung Tissue

Plaintiff asserts that he had no duty to preserve Decedent's lung tissue and that any failure to do so does not constitute spoliation of evidence.

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Motion to Strike Plaintiff's Affidavit

For reasons set forth in Plaintiff's brief in opposition to Defendant's motion to strike (Doc. No. 149), and which the Court need not detail herein, Plaintiff contends that his affidavit is admissible and should not be stricken.

Motion to Strike Testimony of Plaintiff's Expert (Vernon Rose)

As set forth in detail in his opposition to Defendant's motion to strike (Doc. No. 129), Plaintiff contends the testimony of expert Vernon Rose is admissible and should not be stricken.

No Duty Owed to Decedent

Plaintiff relies upon Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 366-67 (Tenn. 2008) to support his contention that Defendant owed a duty to Decedent. Defendant in the present case was also a Defendant in Satterfield. The plaintiff in Satterfield, like John Millsaps in the present case, was an employee of Defendant Alcoa. Plaintiff contends that there is nothing in Satterfield that limits Defendant's duty regarding "take-home exposure" to immediate family members of employees, and that there is no distinction between Decedent in the present case and the daughter in Satterfield to whom the Tennessee Supreme Court held Defendant owed a duty.

Product Identification / Causation

Plaintiff contends that he has identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiff presents twenty-four (24) pages of briefing summarizing and citing to hundreds of pages of evidence, including the testimony of Alcoa employee John Millsaps (who Plaintiff alleges brought asbestos home on his work clothes) and many of his co-workers at Alcoa. The Court need not detail herein all of Plaintiff's cited evidence.

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### C. Analysis

#### Spoliation of Evidence / Duty to Preserve Lung Tissue

Defendant Alcoa centers its motion for summary judgment on the contention that Plaintiff had a duty to preserve Decedent's lung tissue and that Plaintiff "destroyed" evidence by failing to preserve Decedent's lung tissue (by way of autopsy or otherwise). Defendant does not present any evidence that Plaintiff deliberately took steps to destroy evidence. More importantly, Defendant does not cite to any authority for its contention that Tennessee law required Plaintiff to preserve Decedent's lung tissue. Defendant has therefore failed to establish that it is entitled to summary judgment on this basis, Anderson, 477 U.S. at 248-50, or that there is any reason for exclusion of Plaintiff's evidence on this basis. The Court notes that it is not aware of any jurisdiction in which preservation of lung tissue is required in an asbestos action.

#### Motion to Strike Plaintiff's Affidavit

Defendant Alcoa seeks to have Plaintiff's affidavit stricken for various reasons. The affidavit (and the alleged defects therein that Defendant contends render it inadmissible) pertain to Plaintiff's alleged spoliation of evidence and the alleged duty to preserve Decedent's lung tissue. Therefore, in light of the Court's above ruling pertaining to this issue, the Court need not address Defendant's request to have Plaintiff's affidavit stricken.

#### Motion to Strike Testimony of Plaintiff's Expert (Vernon Rose)

Defendant Alcoa contends that the testimony of Plaintiff's expert, Vernon Rose, should be stricken because it fails to meet the standards of Daubert and Federal Rule of Evidence 702. Defendant has not cited any authority under Tennessee law that requires Plaintiff to provide expert testimony to establish causation. For reasons further discussed below, Plaintiff has identified sufficient evidence to survive summary judgment without relying upon the expert testimony of Vernon Rose. As such, whether exclusion of this expert testimony is appropriate is not outcome-determinative with respect to Defendant's summary judgment motion. Therefore, as has been routine in this MDL, the Court will leave resolution of this issue for the trial judge. See, e.g., Bouchard v. CBS Corp., No. 11-66270, 2012 WL 5462612 (E.D. Pa. Oct. 2, 2012) (Robreno, J.).

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No Duty Owed to Decedent

Defendant Alcoa contends that it cannot be liable for Mrs. Millsaps's asbestos-related death because it owed no duty to her. Defendant notes that Decedent did not even meet John Millsaps (who worked for Defendant) until 1978 such that Defendant could not foresee any harm to Decedent prior to 1978, and that, even after the two met, Defendant did not owe such a duty to her because, Decedent did not live with John Millsaps (who worked for Defendant), and it was not foreseeable to Defendant that there was any risk of take-home exposure because (i) OSHA standards were in place and Plaintiff has failed to produce evidence that John Millsaps was exposed to asbestos levels that exceeded those permitted by OSHA standards, (ii) there were no epidemiological studies showing that (a) machinists (like John Millsaps) could be exposed to asbestos in amounts that were harmful, (b) nor any showing that household members of machinists or welders (who worked primarily with metal and aluminum) could be exposed to asbestos in amounts that were harmful.

The Court finds the facts of the present case indistinguishable from those in Satterfield with respect to the duty owed by Defendant and the potential liability of Defendant. Nothing in Satterfield requires that a person subjected to "take-home" asbestos exposure be a resident of the same household as the Defendant's employee in order for there to be a duty of care owed by the Defendant to that person. Rather, Satterfield specifically holds that the class of "foreseeable" people to whom a Defendant such as Alcoa owes a duty includes "persons who regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of Alcoa's employees." 266 S.W.3d at 367. Plaintiff has presented evidence (which Defendant does not dispute) that Decedent regularly spent time at the home of John Millsaps (for regular visits, including entire weekends with overnight stays, and longer stays in the summer), that Decedent would regularly hug John Millsaps while he was still in his work clothes, and that Decedent regularly did laundry in the home of John Millsaps, including laundering the clothing of John Millsaps, which involved shaking out dust from his clothes in the process. Plaintiff has presented evidence (discussed more fully below) from which a reasonable jury could conclude that the clothes of John Millsaps with which Decedent came into contact were asbestos-contaminated as a result of being at the Alcoa facility. As such, it is clear that Decedent Mrs.

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Millsaps is within the class of foreseeable people to whom Defendant owed a duty. Moreover, Nothing in Satterfield requires Plaintiff to present evidence of asbestos levels in relation to OSHA standards, or to provide epidemiological studies showing that certain classes of workers (or their household members) were at risk of being exposed to asbestos. Rather, Satterfield makes clear that the duty extends broadly to others in regular contact with the work clothes of "Alcoa's employees." Id. Defendant has failed to identify any way in which the facts of the present case are different from those in Satterfield such that Satterfield is not applicable. As such, summary judgment in favor of Defendant Alcoa is not warranted on this basis. See Anderson, 477 U.S. at 248-50; Satterfield, 266 S.W.3d 346, 366-67.

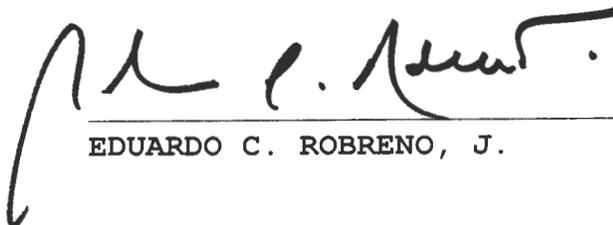
#### Product Identification / Causation

Defendant contends that Plaintiff's evidence is insufficient to establish causation because (1) there is no proof that the products John Millsaps worked with contained asbestos, (2) there is no evidence regarding the amount of asbestos released from products with which he worked, and (3) there is no evidence that John Millsaps retained respirable asbestos fibers on his clothes until he got home from work. As an initial matter, the Court notes that Defendant has failed to identify any source requiring Plaintiff to establish the amount of asbestos released from products with which John Millsaps works. It is clear from Satterfield that there is no such requirement and that, in fact, an employee need not have brought home asbestos from a product with which he or she directly worked. 266 S.W.3d 346, 366-67. In a "take-home" exposure case brought against an employer defendant (as opposed to a product manufacturer defendant), it is irrelevant which product(s) at the employer's worksite contained asbestos, as the employer faces potential liability for all asbestos at its worksite that is carried home on the clothes of its employees. See id.

The Court has reviewed Plaintiff's extensive evidence pertaining to respirable asbestos brought home on the clothes of John Millsaps. Plaintiff has identified sufficient evidence from which a reasonable jury could conclude that Decedent was exposed to respirable asbestos brought home from the Alcoa facility on the clothes of John Millsaps (including from products with which he worked). Accordingly, summary judgment in favor of Defendant Alcoa is not warranted. See Anderson, 477 U.S. at 248-50; 266 S.W.3d 346, 366-67.

E.D. Pa. No. 2:10-84924-ER

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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**D. Conclusion**

Defendant's motion to strike Plaintiff's Affidavit is denied as moot.

Defendant's motion to strike the testimony of Plaintiff's expert (Vernon Rose) is denied with leave to refile in the transferor court.

Summary judgment in favor of Defendant Alcoa is denied because Defendant has failed to establish that it owed no duty to Decedent, Defendant has failed to establish that Plaintiff had (or violated) a duty to preserve Decedent's lung tissue in order to support his asbestos-related claims, and Plaintiff has identified sufficient evidence to support a finding of causation with respect to "take-home" asbestos exposure under Tennessee law.