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

ERVIN BRINDOWSKI AND ALICE BRINDOWSKI,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
	:	Transferred from the Eastern District of
v.	:	Wisconsin
	:	(Case No. 10-00036)
ALCO VALVES, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-CV-64684-ER
Defendants.	:	

O R D E R

AND NOW, this **18th** day of **January, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant L&S Insulation Co. (Doc. No. 191) is **DENIED as to exposure alleged in connection with Contract No. 6232; GRANTED as to all other alleged exposure.**[1]

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[1] This case was transferred from the United States District Court for the Eastern District of Wisconsin to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiffs Alice Brindowski and Carol Richards ("Plaintiffs") are, respectively, the surviving spouse and administrator of the estate of Decedent Ervin Brindowski ("Decedent"). Decedent was in the Navy from 1942 until 1948. He also worked for the Ladish Company (Cudahy location) for approximately seven (7) months (in 1942) prior to his service in the Navy and again, as an electrician and electrical supervisor, for approximately thirty-four (34) years after his naval service (1948 to 1982). Decedent passed away in September of 2010 as a result of mesothelioma. He was deposed twice prior to his death, first in August 2009 and then again in August 2010.

Plaintiffs have brought claims against various defendants. Defendant L&S Insulation, Co. ("L&S") has moved for summary judgment, arguing that there is insufficient product

identification evidence to establish causation with respect to its product(s). The parties agree that Wisconsin law applies.

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

The parties have agreed that Wisconsin substantive law applies. Therefore, this Court will apply Wisconsin law in deciding L&S'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 Wisconsin Law

This Court has previously addressed the issue of product identification/causation under Wisconsin law. Dion v. Anchor Packing Co., 10-64681, 2011 WL 6026598 (E.D. Pa. Oct. 5,

2011)(Robreno, J.). In Dion, the Court wrote:

> Wisconsin applies the "substantial factor" test in deciding whether a defendant's negligence was a cause of a plaintiff's harm. The issue of causation is one for the jury. In order for defendant's negligence to be a cause of plaintiff's injury, such that defendant could be held liable for the injury, his negligence must have been "a substantial factor in producing the injury." Horak v. Building Servs. Indus. Sales Co., 309 Wis.2d 188, 750 N.W.2d 512, 517 (Wis. Ct. App. 2008) (quoting Jones v. Dane County, 195 Wis.2d 892, 537 N.W.2d 74, 84 (Wis. Ct. App. 1995)). In Wisconsin, "[t]he cause of an accident is not determined by its most immediate factor;" rather, "there may be several substantial factors contributing to the same result." Sampson v. Laskin, 66 Wis.2d 318, 224 N.W.2d 594, 597-98 (Wis. 1975).
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> "A mere possibility" of causation is not sufficient, and "when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced," then summary judgment must be granted for defendant. Zielinski v. A.P. Green Indus., Inc., 263 Wis.2d 294, 661 N.W.2d 491, 497 (Wis. Ct. App. 2003) (quoting Merco Distrib. Corp. v. Commercial Police Alarm Co., 84 Wis.2d 455, 267 N.W.2d 652, 655 (Wis. 1978)). When there is "no credible evidence upon which the trier of fact can base a reasoned choice between ... two possible inferences, any finding of causation" would be impermissibly based on speculation and conjecture. Merco, 267 N.W.2d at 655.
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> It follows that, as for product identification in the asbestos context, a defendant must be granted summary judgment when plaintiff's exposure to defendant's asbestos-containing products was a "mere possibility." Zielinski, 661 N.W.2d at 497. However, summary judgment must be denied when plaintiffs have presented "credible evidence from which a reasonable person could infer that [plaintiff] was exposed to [defendant's] products." Id.
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> Wisconsin courts have denied summary judgment when the record has established the following: plaintiff did the "type of work" that used asbestos; plaintiff's employer bought or "probably bought"

asbestos from defendant; and a reasonable jury could infer that plaintiff therefore used asbestos in his work. See Horak v. Building Servs. Indus. Sales Co., 309 Wis.2d 188, 750 N.W.2d 512, 516 (Wis. Ct. App. 2006) (citing Zielinski, 661 N.W.2d at 497–98); see also Lee v. John Crane, Inc., 2003 WL 23218095 at *2 (W.D. Wis. 2003) (citing Lockwood v. AC & S, Inc., 44 Wash. App. 330, 722 P.2d 826 (Wash. Ct. App. 1986) (requiring plaintiff to prove only that asbestos-containing product of defendant's was used at job site simultaneously with his employment)).

In Zielinski, the Court of Appeals of Wisconsin reversed the lower court's grant of summary judgment for defendant. 661 N.W.2d at 493–94. The court found that issues of material fact existed with respect to the following issues: 1) whether defendant sold or supplied asbestos-containing products to decedent's employer; and 2) whether decedent was exposed to asbestos-containing products supplied by defendant while he worked for employer. Id. Regarding the first issue, plaintiff presented the testimony of one of decedent's co-workers, as well as the testimony of an expert, an engineer. Both witnesses referred to approved vendor lists that had come from the employer, which indicated that defendant's asbestos-containing product was purchased by the employer. Id. at 494–496. Regarding the second issue, the court considered the "totality of the circumstances surrounding the work of masons at [the employer] and the products they generally used." Id. at 497. Decedent was a mason, and the testimony of his co-worker (also a mason) that both men performed refractory work on furnaces was enough to raise an issue of fact as to whether decedent was exposed to defendant's asbestos-containing product and whether it was a substantial factor in causing his injury. Id. at 497–498.

In Horak, the Court of Appeals of Wisconsin reversed the lower court's grant of summary judgment for defendant, when there was evidence in the form of sales records that defendant had supplied asbestos material to plaintiff's employer. 750 N.W.2d at 513. Although defendant was not the employer's "main supplier" of asbestos materials, the sales records indicated that defendant supplied thousands of pounds of asbestos insulation materials to the employer during

> the time when plaintiff was employed there. Id. at 514. Moreover, even though plaintiff did not testify in this case, his co-worker testified that the employer had only-three or four employees, and that plaintiff's job duties included installing asbestos installation, which released dust into the air. Id. That the employer purchased asbestos from defendant created a reasonable inference that the employer used defendant's asbestos. Also, the small size of the company created a reasonable inference that plaintiff used at least some of defendant's asbestos. Id. at 516-17. Therefore, summary judgment was denied and the question of whether defendant's asbestos was a cause of plaintiff's cancer became one for the jury. Id. at 517.
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> In sum, Wisconsin courts have found that when plaintiffs have presented "credible evidence from which a reasonable person could infer that [plaintiff] was exposed to" defendant's asbestos-containing products, then summary judgment must be denied, and the question of causation must be given to a jury.

Dion, 2011 WL 6026598, at *1 n.1.

II. Defendant L&S Insulation Co.'s Motion for Summary Judgment

A. Defendant's Motion

Defendant L&S argues that there is insufficient product identification evidence to support a jury finding of causation with respect to its products. Specifically, L&S contends that, at best, Plaintiffs may be able to show that L&S was an insulation contractor that did a very limited amount of insulation work at Ladish at some point during Decedent's employment there. Defendant contends that Plaintiffs cannot prove that Decedent ever came into contact with any insulation utilized by an outside insulation contractor at Ladish, much less that any such insulation contained asbestos and/or that it was a substantial factor in the development of his mesothelioma. In particular, L&S points to deposition testimony in which Decedent testified that he never worked in the vicinity of an L&S employee.

B. Plaintiffs' Argument and Evidence in Opposition

In response, Plaintiffs argue that there is sufficient evidence regarding L&S's asbestos-containing products based upon

(1) deposition testimony of Decedent, (2) L&S contract ledgers from the time period 1952 to 1960, and (3) a report by medical expert Jerrold L. Abraham, M.D. A summary of the evidence is as follows:

i. Deposition Testimony of Decedent

Decedent testified that he worked as an electrician in all areas of the multi-building facility at the Ladish Company's facility at Cudahy during the time period 1948 to 1982. Of particular relevance for product identification purposes regarding L&S:

- Decedent testified to having worked, inter alia, in Building 66 of the Cudahy plant.

- He testified that he worked during and in proximity to the rebuilding of furnaces in Building 66, which occurred "maybe every fix, six months because everything would fall apart," which he estimated included "30, 40" times participating in that rebuilding.

- He also testified to having worked in close proximity to asbestos-containing insulating materials surrounding the steam and water lines in the tunnel connecting Building 66 to another building.

ii. L&S Insulation Contract Ledgers

Plaintiffs have identified contract ledgers of Defendant L&S, which reflect sales and provision to Ladish of numerous products during the time period August 1952 to May 1960, which were delivered to and/or installed in specific locations/buildings where Decedent testified he worked. Ten (10) of these contracts do not provide any indication that there was asbestos in the associated product. However, the ledgers indicate that two (2) contracts involved asbestos-containing products:

- **Contract No. 4195** - indicates "Corrugated Asbestos Board" in August of 1952, but does not specify a particular location within the Ladish facility.

- **Contract No. 6232** - indicates that L&S performed "Corrugated Asbestos Board Work" in Building 66 in January of 1959.

iii. Expert Report of Jerrold Abraham, MD

Plaintiffs have noted that they intend to have Jerrold Abraham, M.D. testify as an expert at trial. They attach to their opposition papers a signed but unsworn report from Dr. Abraham, which states that it is his expert opinion that brief, low level, intermittent and indirect exposure to asbestos is sufficient to cause mesothelioma. The court notes, as it has previously, that an unsworn expert report cannot be relied upon to defeat a motion for summary judgment. See Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.)(citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005)); Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339 (E.D. Pa. Dec. 2, 2011) (Robreno, J.). Therefore, the Court did not consider this evidence in deciding Defendant's motion.

C. Defendant's Arguments and Evidence Submitted in Reply

In its reply brief, Defendant argues that there is no basis from which a reasonable jury could conclude that any insulation that may have been supplied by it contained asbestos, and that 95% of its insulation work prior to 1971 involved fiberglass (rather than asbestos) insulation. It notes that only two (2) of the twelve (12) contracts identified by Plaintiffs specify that an asbestos product was involved. It also notes that those contracts (Nos. 4195 and 6232) involved corrugated asbestos board work, and that L&S utilized corrugated asbestos on roofing contracts (and, therefore, presumably not near Decedent). Defendant also contends that corrugated asbestos board is not friable (meaning that it could not have released loose asbestos fibers into the air) unless it is sawed or otherwise disturbed.

D. Analysis

The Court concludes that summary judgment in favor of Defendant L&S is warranted as to all but one source of Decedent's alleged exposure to asbestos. The Court concludes that summary judgment is not warranted with respect to the corrugated asbestos board associated with contract No. 6232 because there is a genuine issue of material fact as to whether this product was solely on the roof of Building 66 or also inside of Building 66. If this asbestos product was only on the roof, then Defendant L&S is entitled to summary judgment. However, if it was used in places other than the roof, a reasonable jury could conclude that Decedent was exposed to asbestos from Defendant's product such that this exposure was a "substantial factor" in the development

of his mesothelioma. See Zielinski, 661 N.W.2d at 493-94; Horak, 750 N.W.2d at 513. The Court's reasoning is as follows:

i. Ten (10) Contracts That Do Not Specify Asbestos Was Involved

It is undisputed that there is no evidence in the record that asbestos was associated with ten (10) of the twelve (12) contracts upon which Plaintiffs rely for product identification. Accordingly, there is no basis from which a reasonable jury could conclude that any exposure by Decedent to the products associated with these contracts could have been a substantial factor in causing his injury. See Zielinski, 661 N.W.2d at 493-94; Horak, 750 N.W.2d at 513. Therefore, the Court concludes that summary judgment is warranted with respect to exposure alleged to have arisen in connection with the products associated with these ten (10) contracts. See Fed. R. Civ. P. 56(a).

ii. Contract No. 4195 (Corrugated Asbestos Board)

It is undisputed that there is no evidence in the record regarding the location at the Ladish facility of the corrugated asbestos board associated with Contract No. 4195. Accordingly, there is no basis from which a reasonable jury could conclude that Decedent was exposed to this product, such that it could have been a substantial factor in causing his injury. See Zielinski, 661 N.W.2d at 493-94; Horak, 750 N.W.2d at 513. Therefore, the Court concludes that summary judgment is warranted with respect to exposure alleged to have arisen in connection with the product associated with this contract. See Fed. R. Civ. P. 56(a).

iii. Contract No. 6232 (Corrugated Asbestos Board Work)

With respect to the asbestos-containing product associated with Contract No. 6232, the Court must address two types of challenges by Defendant. First, Defendant makes the general assertion that there is insufficient evidence to support a finding of causation as to the corrugated asbestos board supplied and/or installed by Defendant during his work inside of Building 66. Second, Defendant attempts to identify the absence of a genuine issue of material fact by pointing to an affidavit submitted with its reply brief. The Court addresses each of these contentions in turn.

a. The Sufficiency of Plaintiff's Product Identification Evidence

Applying Wisconsin's liberal standard for product identification at the summary judgment stage, the Court concludes that there is sufficient evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos as a result of the use and/or installation of corrugated asbestos board identified in Contract No. 6232. See Zielinski, 661 N.W.2d at 493-94; Horak, 750 N.W.2d at 513.

In Horak, the court held that, although there was no direct evidence that the employer (or its predecessor) used any of the Defendant's asbestos during the time period in which exposure was alleged, it would be reasonable for a jury to conclude there was the requisite exposure of the Decedent to the Defendant's product because there was evidence that Defendant supplied large quantities of asbestos for intended use during the time period of alleged exposure, the employer's worksite was small, and Decedent was one of a small number of individuals employed at the worksite to install asbestos during that time period. This was true despite the fact that there was also evidence in the record that companies other than Defendant had supplied asbestos to the worksite during that time period and Defendant was not the main supplier of asbestos.

In Zielinski, the court examined the sufficiency of evidence to establish causation with respect to a defendant's asbestos-containing product (assuming that the jury could conclude that the product was in fact supplied to the workplace) and considered the "totality of the circumstances" surrounding the work of a particular category of workers and the products they generally used . Id. at 497. Decedent in Zielinski was a mason, and the testimony of his co-worker that both men performed refractory work on furnaces was deemed sufficient evidence from which a reasonable jury could conclude that decedent was exposed to defendant's asbestos-containing product and that it was a substantial factor in causing his injury. Id. at 497–498.

The present case is similar to Horak insofar as Plaintiffs have identified contract ledgers indicating that asbestos-containing products were supplied and/or installed by Defendant at the Ladish facility in August 1952 and January 1959 – and, at least with respect to the product supplied in 1959, within a particular area of Ladish's facility where Decedent specifically testified he worked (Building 66). The present case is unlike Horak insofar as the evidence does not indicate the

amount of asbestos supplied. However, applying a "totality of the circumstances" analysis as set forth in Zielinski, there is evidence from which a reasonable jury could conclude that, given the Decedent's testimony regarding his work as a supervisor of electricians, he was more likely than not exposed to the Defendant's asbestos-containing product and that it was a substantial factor in causing his injury.

Specifically, Decedent testified that he worked as a supervisor during the time period 1958 to 1982 and that, during this period, he was present on a daily basis and on the scene with the electricians, working "all over" the complex, including but not limited to Building 66 and the tunnel connecting Building 66 to another building (which was "maybe six, seven feet wide and probably about eight feet high... It was very congested in the tunnels"). He testified that, as part of his job as a supervisor, he would be physically present to oversee the installation of insulation products, and that, during these installations "there was dust all over." He testified that these installation projects would take him into the boiler room, in the tunnels going from one building to another, and that they did so on a daily basis. He testified that he would work around a variety of tradesmen other than electricians (furnace men, steamfitters, and hydraulic men). Decedent testified that there would be "dust in the air there everyday that [he] was out in the plant at Ladish" and that he was "probably" breathing the dust from this work every day. He testified that the furnaces were located in Building 66 and that "the inside [of the furnaces] was all blankets of asbestos, all through [the] whole unit." He testified that these furnaces would have to be rebuilt approximately every five to six months. He also testified that, during his time as a supervisor, he had to supervise electricians who worked alongside bricklayers, who re-bricked the asbestos-laden furnaces, which required taking out the linings, which resulted in a lot of dust being in the air.

In sum, Plaintiff has identified sufficient evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos as a result of the use and/or installation of corrugated asbestos board identified in Contract No. 6232 in 1959 or thereafter, as a result of his work as a supervisor of electricians and that it was a substantial factor in causing his injury. Accordingly, with respect to the asbestos-containing product associated with Contract No. 6232, summary judgment in favor of Defendant L&S is not warranted on grounds of insufficient product identification evidence and Defendant's motion is, therefore, denied as to the exposure alleged in

connection with Contract No. 6232. See Zielinski, 661 N.W.2d at 493-94; Horak, 750 N.W.2d at 513.

b. Defendants Have Not Identified the Absence of a Genuine Issue of Material Fact

In its briefing, Defendant L&S makes three (3) efforts to demonstrate the absence of a genuine issue of material fact regarding Decedent's alleged exposure to asbestos in connection with the product Defendant supplied and/or installed under Contract No. 6232. In the context of the present motion, the burden is on Defendant to show the absence of a genuine issue of material fact. Anderson, 477 U.S. at 250. In light of this principle, the Court will now address each of Defendant's arguments that there is no genuine issue of material fact.

First, Defendant argues that there is no genuine issue of material fact because Decedent did not recall ever working around L&S employees. However, the fact that Decedent did not recall working around Defendant's employees does not remove from the case the prospect that Decedent was exposed to asbestos as a result of the corrugated asbestos board Defendant supplied and/or installed. Decedent testified specifically about working in the area in which the L&S installation product was installed in 1959 (Building 66, where contract ledgers indicate the work under Contract No. 6232 was performed). Exposure to asbestos dust from the product(s) L&S installed could have occurred either at the time of installation or after the product was installed, during the disturbance of such products either by L&S employees or any other employees whose work required such disturbance. Therefore, a reasonable jury could conclude that Decedent was exposed to asbestos as a result of the corrugated asbestos board supplied and/or installed by Defendant during his work inside of Building 66. In other words, there is a genuine issue of material fact as to whether Decedent was exposed to asbestos as a result of the use and/or installation of corrugated asbestos board identified in Contract No. 6232. Pignataro, 593 F.3d at 268. Accordingly, summary judgment in favor of Defendant is not warranted on this basis. Anderson, 477 U.S. at 247-48.

Next, Defendant L&S points to an affidavit from its current President, which states that "[c]orrugated asbestos board utilized and installed at Ladish Company in Cudahy, Wisconsin was a product utilized on roofing jobs." However, Defendant's assertion that corrugated asbestos board was a product used on roofing jobs does not remove from the case the prospect that the corrugated asbestos board it supplied and/or installed to

Building 66 under Contract No. 6232 was used in a location other than the roof (either in addition to or instead of the product being on the roof). It appears that, at least at some time in the past, corrugated asbestos board was used in the industry in furnaces. See Monitor Stove & Range Co. v. L.J. Mueller Furnace Co., 254 F. 62 (7th Cir. 1918)(discussing use of corrugated asbestos board in furnaces)). Although Defendant's affidavit states that corrugated asbestos board was used and installed on roofing jobs, it does not state that this product was used and/or installed only on the roof. In light of the fact that Decedent testified to having worked around furnaces and furnacemen, and that asbestos dust was released into the air as a result of the rebuilding of these furnaces every five to six months, a reasonable jury could conclude that Decedent was exposed to asbestos as a result of the corrugated asbestos board supplied and/or installed by Defendant during his work inside of Building 66. In other words, there is a genuine issue of material fact as to whether Decedent was exposed to asbestos as a result of the use and/or installation of corrugated asbestos board identified in Contract No. 6232. Pignataro, 593 F.3d at 268. Accordingly, summary judgment in favor of Defendant is not warranted on this basis. Anderson, 477 U.S. at 247-48.

Finally, Defendant points to the affidavit of its President, for the assertion that corrugated asbestos board was not friable unless sawed or otherwise disturbed. However, this does not eliminate from the case the prospect that the corrugated asbestos board supplied and/or installed by L&S was sawed or otherwise disturbed, such that its asbestos fibers were released into the air. There is testimony in the record about work occurring in Building 66 that did involve disturbance of various products – and, in particular, disturbance of asbestos-laden furnaces in Decedent's presence, and from which he testified he was exposed to airborne asbestos dust. In light of this fact and additionally because, at least at some time in the past, corrugated asbestos board was used in the industry in furnaces, a reasonable jury could conclude that Decedent was exposed to asbestos as a result of the corrugated asbestos board supplied and/or installed by Defendant during his work inside of Building 66. In other words, there is a genuine issue of material fact as to whether Decedent was exposed to asbestos as a result of the use and/or installation of corrugated asbestos board identified in Contract No. 6232. Pignataro, 593 F.3d at 268. Accordingly, summary judgment in favor of Defendant is not warranted on this basis. Anderson, 477 U.S. at 247-48.

E. Conclusion

Summary judgment is granted in favor of Defendant L&S with respect to all exposure alleged by Plaintiff except for that alleged in connection with the "corrugated asbestos board work" identified in Contract No. 6232. With respect to this contract, there is a genuine issue of material fact as to whether this product was solely on the roof of Building 66 or also inside of Building 66. If the jury concludes at trial that this asbestos product was used only on the roof, then Defendant L&S is entitled to judgment as a matter of law. However, if the jury concludes that it was used in places other than the roof, it could also conclude that Decedent was exposed to asbestos from it and that it was a "substantial factor" in the development of his mesothelioma such that Defendant L&S has liability in this action.