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 **12th** day of **January, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Rockbestos Surprenant Cable Corp. (Doc. No. 204) is **DENIED**.[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 Rockbestos Surprenant Cable Corp. (also known as RSCC Wire & Cable, Inc. and formerly known as Rockbestos) ("RSCC") 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 RSCC'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).

"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.

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.

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.
>
> 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 RSCC's Motion for Summary Judgment

RSCC argues that there is insufficient product identification evidence to support a jury finding of causation with respect to its products. Specifically, RSCC asserts that Plaintiffs have not offered any evidence to establish that Decedent worked with or around any RSCC products.

In response, Plaintiffs argue that there is sufficient evidence regarding RSCC's asbestos-containing products based upon (1) deposition testimony of Decedent, (2) deposition testimony of co-worker Clemens Jurglanis from another action (an action brought by Mr. Jurglanis, who is also now deceased as a result of mesothelioma, in which RSCC was a defendant), 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, while he was employed at Ladish, he worked with Clemens Jurglanis when he was working as a general electrician (prior to becoming a supervisor) in "1949,

1950." He testified that, when he left to become a supervisor (in 1958), Mr. Jurglanis became his replacement in the induction heating unit, doing the same work that he had been doing in the induction heating unit prior to being promoted.

ii. Deposition Testimony of Co-Worker Clemens Jurglanis

Mr. Jurglanis testified about doing work replacing and reconnecting wires of the feeder boxes located in the ceilings of the Ladish buildings that housed large furnaces (including Building 60). In his deposition, the only wire product brand that Mr. Jurglanis could recall was Rockbestos. He testified that the leads that came off the furnace blower motor were Rockbestos (which contained asbestos) and that "they always had Rockbestos." He also testified that Rockbestos wire was used with both the switchgears and generators at Ladish. He described exposure to asbestos as a result of working with/around the wiring. The relevant testimony follows:

Q: Are there **any other parts of switchgears that you believe contained asbestos** other than the contacts?
A: Well, they had **Rockbestos wire** coming in to feed the compensators.

. . . . .

Q: Were there any other asbestos component parts inside the furnace motor blowers?
A: Yes. Where they have the windings that go around, those are extra asbestos insulation in there.
Q: Other than the windings, were there **any other asbestos component parts inside of the furnace blower motor**?
A: The leads that come off were **Rockbestos**.
A: **They always had Rockbestos** because that would be the first thing to burn up if it touched metal.

. . . . .

Q: And you don't know **who installed or supplied any of the asbestos component parts** inside of the furnace blower motors; correct?
A: **Rockbestos is the only name I know.**

. . . . .

Q: What was the **brand name of the electric wire** that was used in the generators, if you know?
A: **Rockbestos is the only brand I know.**

. . . . .

Q: When that four-inch piece of material would come off

the wire, that wasn't dusty correct?
A: Well, if it was asbestos – **Rockbestos** it was.
Q: Okay. But this material, it's an encased material and it would come off in a four-inch piece of material that would fall to the ground, right?
A: No, usually it's boxed but there's **three layers of different insulation. The top part was Rockbestos asbestos** and then I don't know what the second one was but the other one was cambric cloth under there.

. . . . .

Q: So when you would trim this wire, you would score it with your knife and pull off the end, correct? Is that correct?
A: It would what?
Q: You would score it and then you would pull off the end, right?
A: Right, three layers.
Q: And that would take a matter of a few seconds to score the insulation and pull it off, correct?
A: Right.
Q: When I asked you if it was dusty, earlier you testified Transite when you cut that material, you were covered head to toe in dust, right?
A: Right.
Q: Working with the wire was nothing compared to that, correct?
A: **That was asbestos in the wire.**
Q: But it wasn't dusty head to toe.
A: Well, we were in a junction box.
Q: Right.
A: And your head and most of your body is in the junction box, so **when you drop it to the bottom of the junction box, that how you get your asbestos.**
Q: Okay. The material would fall to the bottom of the junction box.
A: Right.

(Dep. of Clemens Jurglanis, April 14-15, 2009, at 143:1-4, 200:6-15, 204:13-16, 506:5-15, 506:25-507:25, Ex. 4 to Doc. No. 215 (emphasis added).)

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.

Although it did not file a reply brief, Defendant contended during oral argument that the testimony of co-worker Jurglanis is inadmissible because it is hearsay and/or because Defendant did not have a reason to cross-examine Mr. Jurglanis about Decedent's work during his deposition in his own action. Defendant also contended at oral argument that, because Mr. Jurglanis took over Decedent's job after Decedent left that position (rather than the two men working together simultaneously), there is no basis from which to conclude that the information contained in the testimony of Mr. Jurglanis pertaining to his time in that role would also pertain to the earlier time period in which Decedent served in that role.

As a preliminary matter, the Court will address Defendant's challenge to the admissibility of co-worker Jurglanis's testimony. In light of the fact that Mr. Jurglanis is now deceased, his testimony would be admissible under an exception to the hearsay rule. See Fed. R. Evid. 804 (a)(4) and (b)(1). This Court has previously addressed under what circumstances the deposition testimony of a now-deceased witness in another case may be admissible in the instant case. Blackburn v. Northrup Grumman Newport News, No. 06-68004, 2011 WL 6016092 (E.D. Pa. Aug. 31, 2011)(Robreno, J.). In Blackburn, the Court wrote:

> Federal Rule of Evidence 804(b)(1) states that if the party offering evidence establishes that the declarant of a statement is deceased, the declarant's former testimony is not excluded under the general rule prohibiting the admission of hearsay. Cowley v. Acands, Inc., 2010 WL 5376338 at *3 (E.D. Pa. 2010) (Robreno, J.).

Former testimony is:

> [t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the **party against whom the testimony is now offered**, or, in a civil proceeding, a predecessor in interest, **had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.**

Fed. R. Evid. 804(b)(1) (emphasis added).

Regarding the former testimony exception to the rule against hearsay, Fed. R. Evid. 804(b)(1), the burden is on the proponent of the evidence to prove that a defendant in the present case would have had an opportunity and similar motive to cross-examine a witness who was deposed in an earlier action. Kirk v. Raymark Indus., Inc., 61 F.3d 147, 166 (3d Cir. 1995). The similarity of motive requirement exists to ensure "'that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party.'" Id. (quoting United States v. Salerno, 937 F.2d 797, 806 (2d Cir. 1991)). In Kirk, the testimony of an expert witness who was called by a manufacturer of asbestos products in an earlier state action, was considered hearsay in a later, unrelated trial. Id. at 164–65. The plaintiff in the later action failed to establish that the defendant in the earlier action had a similar motive to cross-examine the witness. Id. at 166.

In Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978), the Third Circuit found that there was "sufficient community of interest" shared by the Coast Guard in an earlier case, and a plaintiff-coworker in a later case, when both cases involved an altercation that had occurred between the plaintiff and his co-worker (who had testified in the earlier case). Id. at 1185–86.

> In Cowley v. Acands, Inc., 2010 WL 5376338 (E.D. Pa. 2010) (Robreno, J.), this Court found that there was no "community of interest" between an earlier defendant and a defendant in a later case, such that a deponent's former testimony could not be used in a later case. Id. at *3. The earlier defendant was not a "predecessor in interest" because the deponent had previously testified as a co-worker witness in an asbestos matter, whereas in the later matter, the same witness was the plaintiff. Id. Therefore, if the later defendant had been present at the deposition in the earlier proceeding, the defendant would have the opportunity and motive to question the deponent about, for example, "when, specifically, he did work" aboard a certain line of ships. Id.

Blackburn, 2011 WL 6016092, at *1 n.1.

In this case, the two men did not work in the induction heating unit at the same time, so that Mr. Jurglanis would not have been able to testify about Decedent's experience in the induction heating unit. Rather, Mr. Jurglanis would only have been able to testify about his own experience in the induction heating unit. It is clear from Mr. Jurglanis's deposition testimony that he was in fact asked about his own experience there. Given that Defendant had the same motive and opportunity to cross-examine Mr. Jurglanis during his deposition in his own action as it would have had if Mr. Jurglanis had been deposed in the current action, the Court finds Mr. Jurglanis's testimony admissible. See id.; see also Fed. R. Evid. 804 (a)(4) and (b)(1).

Applying Wisconsin's liberal standard for product identification, the Court concludes that Plaintiffs have provided sufficient evidence from which a reasonable jury could conclude that Decedent's exposure to Defendant's asbestos-containing product was a "substantial factor" in the development of his mesothelioma. 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 evidence that, at least during the time period 1950 to 1958 (the minimum time period during which there is evidence that both Decedent and co-worker Jurglanis worked for Ladish), the leads that came off of the furnace blower motors at Decedent's worksite "always had Rockbestos." The present case is unlike Horak insofar as the evidence does not indicate with specificity the amount of Rockbestos supplied to the worksite by Defendant. However, applying a "totality of the circumstances" analysis as set forth in Zielinski, there is a basis in the evidence from which a reasonable jury could conclude, given the testimony of co-worker Jurglanis – who worked in the same facility as the Decedent for at least eight (8) or nine (9) years (and probably longer) in at least some of the same jobs and locations as Decedent – that Decedent was more likely than not exposed to the Defendant's asbestos-containing products.

Specifically, Decedent provided testimony to support a conclusion that he and co-worker Jurglanis experienced the same work environment and tasks for a significant period of time, both working as electricians and in the induction heating unit. Decedent testified that he worked with co-worker Jurglanis doing general electrician work in 1949 and/or 1950. He testified that, prior to being promoted to supervisor in 1958, he had been

working in the induction heating unit, and that Mr. Jurglanis replaced him in this role when he became a supervisor and did the same tasks that Decedent had been doing. There is evidence in the record that Mr. Jurglanis and Decedent worked in some of the same locations, including but not limited to Building 60. Mr. Jurglanis provided testimony that singled out Defendant's asbestos-containing product as the one "wire" product at the worksite that he could recall by name (suggesting its predominance there). Mr. Jurglanis testified that Defendant's asbestos-containing product was used in multiple applications (including furnace blower motors, switchgears, and generators) and that, for at least one of these applications (the leads coming off the furnace blower motors) the worksite "always had Rockbestos." He also testified about the means by which exposure to asbestos dust from the wires occurred.

In sum, there is sufficient evidence from which a reasonable jury could conclude that Decedent was exposed to dust from Defendant's asbestos-containing products in at least Building 60 and/or any location in which the "induction heating unit" was located, during at least some significant portion of the time period 1949 through 1958 (the years during which records indicate Decedent and Mr. Jurglanis both worked at the Ladish worksite). A reasonable jury could conclude that this exposure was a substantial factor in the development of his mesothelioma.

Although Mr. Jurglanis took over Decedent's position in the induction heating unit after Decedent (and they did not work together simultaneously), Mr. Jurglanis specified that the leads from the furnace blower motors "always had Rockbestos," and he worked at the facility dating back at least as far as 1949 or 1950 (prior to Decedent's time in the induction heating unit). Accordingly, summary judgment in favor of Defendant RSCC is not warranted and its motion is, therefore, denied. See Zielinski, 661 N.W.2d at 493-94; Horak, 750 N.W.2d at 513.