

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 T.G.

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	:	CIVIL ACTION NO. MDL 875
LIABILITY LITIGATION (No. VI)	:	
_____	X	
This Document Relates to	:	CIVIL ACTION
	:	
PETER CONSTANTINIDES and	:	NO. 09-70613
ELPIS CONSTANTINIDES, his wife	:	
Plaintiff	:	
	:	
v.	:	
	:	
ALFA LAVAL, INC., et al.,	:	
Defendants	:	
_____	X	

REPORT AND RECOMMENDATION
AS TO DEFENDANT VIAD COMPANY'S
MOTION FOR SUMMARY JUDGMENT

BEFORE:

April 26, 2010

Chief United States Magistrate Judge Thomas J. Rueter,
United States Magistrate Judge David R. Strawbridge, and
United States Magistrate Judge Elizabeth T. Hey

By: Strawbridge, M.J.

Peter and Elpis Constantinides, husband and wife, filed this asbestos personal injury action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida on August 11, 2008. Defendant Viad Company (alternatively "Viad" or "Defendant") removed the case to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §§ 1442(a)(1) and 1446(a) and (b). *See* Doc. 84, Ex. 2. The matter was transferred to the Eastern District of Pennsylvania on June 17, 2009 to be included in the multi-district Asbestos Liability Litigation (MDL 875). (Docs. 1, 2.) Presently before the Court is Viad's motion for summary judgment, filed on February 1, 2010 (Doc. 106) (hereinafter "Def.'s Mot. Summ. J."), Plaintiffs' response (Doc. 128)

(hereinafter “Pl. Resp. in Opp’n to Def.’s Mot. Summ. J.”), and Defendant’s reply (Doc. 130) (hereinafter “Reply”). The above referenced magistrate judges also heard extensive oral argument as to this motion on March 24, 2010. For the following reasons, we **RECOMMEND** that Viad’s motion be **GRANTED**.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs raise failure to warn claims based upon negligence and strict liability. (Doc. 81, Ex. A ¶¶ 5, 35-42, 45-58.) (hereinafter “Compl.”) They allege that Mr. Constantinides developed mesothelioma and other injuries as a result of his exposure to products, which were manufactured, sold and/or distributed by Viad’s alleged predecessor, Griscom- Russell Company (“Griscom-Russell”), while he served aboard the USS Iowa (BB-61) (“Iowa”) from 1954 to 1956.¹ (Compl. ¶¶ 41-42, 48-51.)

Peter Constantinides joined the U.S. Navy on August 18, 1954. (Doc.128, Ex. C at 5) (hereinafter “Military Records”). In November 1954, he began serving aboard the Iowa as a fireman apprentice. (Military Records at 6-7.) He was assigned to boiler room number two and he testified that his duty was “[t]o keep the room running, and to clean it up – down.” (Doc. 128, Ex. D at 10:18-20) (hereinafter “Harris Dep.”); (Doc. 128, Ex. B at 20:1-4) (hereinafter “Vol I, Dep. of Peter Constantinides.”) He testified that he cleaned the boilers, pumps and other machinery. *Id.* at 21. He

¹ In their complaint, Plaintiffs also alleged Mr. Constantinides was exposed to asbestos-containing products while serving on the USS Sperry (AS-12) from 1958 until 1959. *See* Compl. ¶ 7. However, in their response to Defendant’s motion, Plaintiffs contend that “after discovery was completed in this case on November 30, 2009, it was apparent that Mr. Constantinides’ exposure was limited to his service aboard the USS Iowa (BB-61). Therefore Plaintiffs do not make any argument in this Response relating to any exposure aboard the USS Sperry (AS-12).” (Pl. Resp. in Opp’n to Def.’s Mot. Summ. J. at 2 n.3.) We accept this as a withdrawal of the claims pertaining to the USS Sperry, and review Plaintiffs claim only in connection with Mr. Constantinides’ service aboard the Iowa.

also claimed that he was trained to perform maintenance work and that he changed the gaskets on motors and pumps. (Doc. 128, Ex. A at 54-57) (hereinafter “Discovery Dep. of Peter Constantinides”); (Vol I, Dep. of Peter Constantinides at 22-23.) He recalled that the boiler room was a dusty working environment. (*Id.* at 20-26.) Mr. Constantinides served aboard the Iowa until February 15, 1956. *See* Discovery Dep. of Peter Constantinides at 58:18-25.

Plaintiffs’ naval vessel expert, Arnold Moore, a retired Navy Captain, testified that boiler room number two included two fuel oil heaters manufactured by Griscom-Russell. (Doc. 128, Ex. E at 113:6-12) (hereinafter “Moore Dep.”) Mr. Moore also testified that the oil heater would have been insulated, and that while “there were suitable [insulation] materials that were not asbestos” at the temperatures involved, (Moore Dep. at 118-19), “the documentation shows that asbestos was the primary material used” for insulation as well as packing and gaskets. *Id.* at 150:3-7. In addition, Plaintiffs’ medical expert Dr. Jerrod Abraham concluded that, within a reasonable degree of medical certainty, asbestos exposure caused Mr. Constantinides’ mesothelioma. (Doc. 128, Ex. G.)

Defendant now moves for summary judgment.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The moving party bears the initial burden of demonstrating the absence of a genuine issue of any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has done so, the party opposing the motion “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 586 (1986) (citation omitted). Rather, the responding party must “set out specific facts showing a genuine issue for trial.” FED. R. CIV. P. 56(e)(2). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587.

II. DISCUSSION

Defendant moves for summary judgement on two grounds, asserting: (1) that Plaintiffs provide no evidence that Mr. Constantinides was exposed to asbestos from fuel oil heaters manufactured by Griscom Russell or that these products were a substantial contributing factor to his injuries (Def.’s Mot. Summ. J. at 9-12), and (2) that Viad is not the successor-in-interest to Griscom-Russell (*id.* at 20).² In that we conclude that there is no issue of material fact and Defendant is entitled to judgment as a matter of law with respect to causation, we do not pass upon Defendant’s second argument.

To sustain an asbestos claim under a negligence or strict liability theory,³ a plaintiff must

² In their Reply, Viad also asserts that the Plaintiff’s response should be stricken in that it was filed one day later than this Court’s February 17, 2010 Order. (Reply at 3.) We, however, accept Plaintiffs’ late submission.

³ While this case was originally filed in Florida state court and Plaintiffs’ assert they are Florida residents, the alleged asbestos exposure occurred, in large part, while Mr. Constantinides was serving “on the high seas or navigable waters.” *See East River Steamship v. TransAmerica Delaval, Inc.*, 476 U.S. 858, 863-64 (1986) (stating that maritime jurisdiction arises where injury occurs on navigable waters). A choice of law question is therefore presented as to whether Florida law or maritime law controls. We address this question using Florida choice of law rules in that a transferee court involved in multi-district litigation is required to “apply the same state substantive law, including choice of law rules, that would have been applied in the jurisdiction in which the case was filed.” *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993).

Under Florida law, a substantive conflict analysis is unnecessary and Florida law will apply where there is a “false conflict.” *Pycsa Panama, S.A. v. Tensar Earth Tech., Inc.*, 625 F. Supp. 2d 1198, 1218-19 (S.D. Fla. 2008) (applying Florida law). A “false conflict” exists where the law of the interested jurisdictions are the same. *Id.* With respect to proximate cause, Florida

establish that he or she was exposed to the defendant's product and that this exposure was a substantial contributing factor to plaintiff's physical impairment. Fla. Stat. § 774.204(1) (2009); *Reaves v. Armstrong World Industries, Inc.*, 569 So. 2d 1307, 1308-09 (Fla. 4th Dist. Ct. App. 1990). On an appeal from an order setting aside a jury verdict for plaintiff and directing a verdict for defendants, the *Reaves* court considered whether plaintiff had demonstrated that his injury was caused by exposure to the defendant's product. *Id.* The court held that plaintiff's "proof of whose asbestos dust and who manufactured those products was speculative at best[,]" and that the jury "necessarily and impermissibly stacked inferences upon inferences" to reach its liability verdict. *Id.* at 1309. The court instructed that the plaintiff was required to establish that he was exposed to the asbestos products of each defendant and that this exposure contributed substantially to producing his injury. *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 (Fla. 4th Dist. Ct. App. 1994). *See also Ward v. Celotex Corp.*, 479 So. 2d 294, 296 (Fla. 1st Dist. Ct. App. 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).

Defendant contends that Plaintiffs have failed to establish that Mr. Constantinides worked

law and maritime law are essentially identical. *Compare Singleton Stone v. Amquip Corp.*, Civ. No. 98-cv-4691, 2000 WL 1448817 at *3 (E.D. Pa. Sep. 29, 2000) (applying "substantial contributing factor" test in products liability case under maritime law) *with Reaves v. Armstrong World Industries, Inc.*, 569 So. 2d 1307, 1309 (Fla. 4th Dist. Ct. App. 1990) (applying "substantial contributing factor" in asbestos case). We therefore conclude that Florida law governs our consideration of Defendant's motion as it relates to causation.

“with or around [Defendant’s product;]” that the “product actually contained asbestos;” that it was “used or handled in a manner that it released respirable fibers;” or that “there was sufficient quantity of respirable asbestos fiber released to reasonably infer that Mr. Constantinides inhaled sufficient quantity of fibers to be a substantial contributing causal factor to his asbestos related disease.” (Def’s Mot. Summ. J. at 11, 12-13, 16.) Therefore, according to Defendant, viewing the facts in the light most favorable to Plaintiffs, “they have not and can not meet their burden of proof.” (*Id.* at 12); *see* Reply 6-10.

In response, Plaintiffs contend that Mr. Constantinides’ testimony reflects that he cleaned all of the machinery in the boiler room of the Iowa, including the fuel oil heaters,⁴ and that he breathed in dust while performing these duties. (Pl. Resp. in Opp’n to Def.’s Mot. Summ. J. at 12); *see* Vol. I, Dep. Peter Constantinides at 20:1-4, 21:12-20, 22-26. Plaintiffs further assert that Mr. Moore’s testimony reflects that two fuel oil heaters were in the boiler room and that this product “called for numerous gaskets and external asbestos insulation” and that Mr. Moore testified that asbestos was the primary material used in external insulation. (*Id.* at 13) (citing Moore Dep. at 113:6-12, 115:1-116:5, 119:3-16, 150:3-7.) They assert that this evidence, along with medical expert Dr. Jerrod Abraham’s opinion that asbestos exposure caused his mesothelioma, raises a genuine issue of material fact as to causation exists. (*Id.*)

We conclude that Defendant is entitled to summary judgment.⁵ Although Mr. Constantinides

⁴ Plaintiff actually asserts that “Mr. Constantinides in fact recalls working on all the machinery, which includes deaerating feed tanks, within boiler room number two.” (Pl. Resp. in Opp’n to Def.’s Mot. Summ. J. at 12.) We assume, however, that Plaintiff meant to reference the fuel oil heaters, as deaerating feed tanks are not the subject of Viad’s motion.

⁵ Defendants assert that Plaintiffs are unable to identify an asbestos-containing product attributable to Viad, as required under both negligence and strict liability theories. *See Pulte*

testified to wiping down the outside of the machinery in the boiler room and performing certain cleaning and maintenance work in the room that housed two Griscom Russell fuel oil heaters, *See* Vol. I, Dep. Peter Constantinides at 20:1-4, 21:12-20, 22-26, there is no evidence that these products were ever opened, repaired, or subject to maintenance during his service aboard the Iowa. Indeed, there is no testimony from Mr. Constantinides or his fellow shipmates making reference to a fuel oil heater, let alone any general handling of the product that would support a reasonable inference that dust would have been discharged into the air. The only indication that any work may have been done on these products was Mr. Moore's testimony that he would "expect" that the filters would occasionally be changed and that they "would require "infrequent[]" maintenance, "but [he] would not speculate as to the specific frequency." (Moore Dep. at 115, 117.)

Thus, it is unclear how, without speculating, a reasonable juror could conclude that asbestos fibers were released from this product, such that these fibers could be a substantial contributing factor to his injuries. *See Reaves*, 569 So. 2d at 1308-09 (holding that plaintiff must demonstrate

Home Corp. v. Ply Gem Indus. Inc., 804 F. Supp. 1471, 1484-85 (M.D. Fla. 1992) (applying Florida law); *Conley v. Boyle Drug Co.*, 570 So.2d 275, 279 (Fla. 1990). In response, Plaintiffs assert that the fuel oil heaters manufactured by Defendant's alleged predecessor "called for numerous gaskets and external asbestos insulation." *See* Pl. Resp. in Opp'n to Def.'s Mot. Summ. J. at 13 (citing Moore Dep. at 119:3-16.) Although Plaintiffs cite Mr. Moore's deposition for this proposition, his testimony does not include any discussion of asbestos gaskets or insulation in connection with fuel oil heaters. Indeed, his only testimony on this issue reflected that this product did not necessarily require asbestos insulation, given its temperature of operation. *See* Moore Dep. 118-119. In his expert report, however, which is not attached to either Parties submission, Mr. Moore does assert that it was "probable" that asbestos sheet gaskets were used in the fuel oil heaters and that it was "likely" that they were insulated with an asbestos-containing product. *See* Doc. 103, Ex. G at 8. While we accept for the purposes of this motion that Mr. Moore's expert report provides basis for a reasonable juror to infer that the fuel oil heaters may have included certain asbestos-containing products, we nevertheless conclude that there is no genuine issue of material fact as to causation.

that he was exposed to the asbestos products of each defendant *and* that this exposure contributed substantially to producing plaintiff's injury) (emphasis added.) Evidence that Mr. Constantinides may have wiped down the exterior of Grisom Russell's fuel oil heaters and performed other duties in a room that included this product does not provide basis to reasonably infer that the substantial contributing factor standard, as articulated in *Reaves*, is satisfied. We therefore conclude there is no genuine factual issue as to causation and that Defendant is entitled to judgment as a matter of law.

III. CONCLUSION

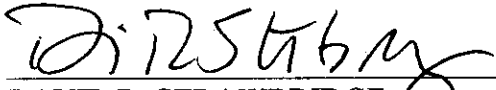
Defendant is entitled to summary judgment. We do not consider the evidence adduced by Plaintiffs to provide reasonable basis for a fact-finder to conclude that Mr. Constantinides was exposed to asbestos fibers from the product of Viad's alleged predecessor, Griscom-Russell, such that these asbestos fibers could be a substantial contributing factor to his injury. In that no factual issue exists as to an element of Plaintiff's claims, Defendant is entitled to judgment as a matter of law.

Our recommendation follows.

RECOMMENDATION

AND NOW, this ^{26th} day of April, 2010, upon consideration of Defendant's motion for summary judgment (Doc. 106), Plaintiffs filed a response (Doc. 128), and Defendant's reply (Doc. 130), it is respectfully **RECOMMENDED** that Defendant's motion be **GRANTED** with respect to the issues that are within the scope of Judge Robreno's referral order. Any party may file an objection to this Report and Recommendation within fourteen (14) days of being served a copy thereof. *See* Local R. Civ. Pro. 72.1.

BY THE COURT:



DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

Chief United States Magistrate Judge Thomas J. Rueter and United States Magistrate Judge Elizabeth T. Hey join in this Recommendation.

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

IN RE: ASBESTOS PRODUCTS	:	CIVIL ACTION NO. MDL 875
LIABILITY LITIGATION (No. VI)	:	
_____	X	
This Document Relates to	:	CIVIL ACTION
	:	
PETER CONSTANTINIDES and	:	NO. 09-70613
ELPIS CONSTANTINIDES, his wife	:	
Plaintiff	:	
	:	
v.	:	
	:	
ALFA LAVAL, INC., et al.,	:	
Defendants	:	
_____	X	

ORDER

AND NOW, this day of , 2010, upon independent review of Defendant Viad Company's motion for summary judgment (Doc. 106), Plaintiff s' response (Doc. 128), and Defendant's reply (Doc. 130), and after careful consideration of the Report and Recommendation authored by United States Magistrate Judge David R. Strawbridge on behalf of himself, Chief United States Magistrate Judge Thomas J. Rueter and United States Magistrate Judge Elizabeth T. Hey it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**.
2. Defendant's motion for summary judgment is **GRANTED** as to those issues addressed in the Report and Recommendation.

BY THE COURT:

EDUARDO C. ROBRENO, J.