

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

SUSAN J PALUMBO, Executrix for the	:	November Term 2019
Estate of FRANK BOSANAC, deceased,	:	
and BARBARA BOSANAC,	:	Case No. 1665
individually,	:	
	:	
Plaintiffs,	:	Commerce Program
	:	
v.	:	
	:	Appellate No. 2838 EDA 2024
AMPCO-PITTSBURGH f/k/a	:	
AMPCO-PITTSBURGH SECURITIES	:	
CORPORATION,	:	
SUCCESSOR/PARENT	:	
CORPORATION OF PITTSBURGH	:	
FORGINGS, et al.	:	
Defendants.	:	

OPINION

Fletman, J.

December 2, 2024

This is an appeal from this Court’s order dated and docketed November 6, 2023 (the “November 6 Order”), granting the motion for summary judgment of defendant SECO/Warwick Corporation and dismissing all claims and cross-claims against SECO/Warwick Corporation; and this Court’s order dated and docketed December 5, 2023 (the “December 5 Order”), denying plaintiff’s Motion for Reconsideration of the Court’s November 6, 2023, order granting summary judgment for SECO/Warwick Corporation. The November 6 Order and the December 5 Order should be affirmed.¹

¹ Plaintiffs Susan J Palumbo, executrix for the estate of Frank Bosanac, deceased, and Barbara Bosanac, individually (collectively, “the Bosanacs”), also identified an “order” of September 12, 2024, as one of the subjects of the pending appeal. No order was entered on that date. Instead, the Court issued a Trial Work Sheet that marked the case settled as to all nonbankrupt parties except the Manville Fund without prejudice and dismissed the action against the Manville Fund

The Bosanacs filed a Notice of Appeal of this Court's orders on December 7, 2023. Dkt. at 12/7/2024. The Superior Court, however, quashed that appeal because it was filed before any final order in the case. Dkt. at 6/7/2024. The Bosanacs filed another appeal of this Court's orders on October 10, 2024, after entry of the September 12, 2024, Trial Work Sheet, marking the case settled as to all parties except the Manville Fund, and dismissing the case against the Manville Fund without prejudice. Dkt. at 10/10/2024. This Court's November 6 Order and December 5 Order should be affirmed for the reasons set forth in the opinion dated February 1, 2024, which is adopted and incorporated by reference and attached as Exhibit A to this filing.

BY THE COURT:


ABBE F. FLETMAN

without prejudice to being reopened as an arbitration matter. The Trial Work Sheet was signed by Judge Joshua Roberts. Docket ("Dkt.") at 9/12/2024. The Bosanacs did not include the marking of the case as settled and dismissed among the issues on appeal identified in their Statement of Matters Complained of on Appeal. Dkt. at 11/26/24. This issue, therefore, has been waived. *See* Pa.R.App.P. 1925(b). To the extent further discussion is warranted, it will be addressed by Judge Roberts in a separate opinion.

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

SUSAN J PALUMBO, EXECUTRIX FOR
THE ESTATE OF FRANK BOSANAC,
DECEASED, AND BARBARA BOSANAC,
INDIVIDUALLY

Plaintiffs,

v.

AMPCO PITTSBURGH, et al.,

Defendants.

NOVEMBER TERM 2019

NO. 1665

3200 EDA 2023

FILED

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JUDICIAL RECORDS
FIRST JUDICIAL DISTRICT
PHILADELPHIA

OPINION

Abbe F. Fletman, J.

February 1, 2024

Plaintiffs Susan J. Palumbo, executrix for the estate of Frank Bosanac, and Barbara Bosanac, his wife, appealed from the Court's order granting summary judgment against plaintiffs and in favor of defendant SECO/Warwick Corporation ("SECO/Warwick"). Plaintiffs also have appealed the Court's denial of their motion for reconsideration of the order granting summary judgment. For the reasons set forth below, this Court respectfully requests that the Superior Court affirm these rulings.

Procedural History

Plaintiffs' decedent, Frank Bosanac, and his wife, Barbara Bosanac, initiated this asbestos action by filing a complaint on November 13, 2019. Trial Docket ("Dkt.") at 11/13/19. Mr. Bosanac was diagnosed with mesothelioma in July 2019, allegedly as a result of exposure to asbestos. (Plaintiff's Complaint at pg. 7 ¶ 6, Dkt. at 11/13/19). On September 23, 2020,

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plaintiffs filed a Suggestion of Death for Mr. Bosanac and a Praecipe to Substitute as plaintiffs Susan J. Palumbo, executrix for Mr. Bosanac's estate, and Barbara Bosanac. Dkt. at 9/23/20. Plaintiffs filed an amended complaint on November 4, 2020, adding SECO/Warwick as a defendant. (*Id.* at 11/4/20, Plaintiffs' Amended Complaint at pg. 5).

Plaintiffs contend that Mr. Bosanac was regularly exposed to asbestos when he worked as a bricklayer removing and installing asbestos-containing firebrick, including in furnaces manufactured by Sunbeam Equipment Corporation ("Sunbeam"). (Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment at pg. 3, Dkt. at 12/21/22). Plaintiffs further contend that SECO/Warwick was liable for Mr. Bosanac's asbestos-related injury as a successor-in-interest to Sunbeam. *Id.* at 8.

SECO/Warwick filed its motion for summary judgment on September 16, 2022. Dkt. at 9/16/22. After a response and a reply, the Court granted SECO/Warwick's motion on November 6, 2023. *Id.* at 11/6/23. On November 16, 2023, plaintiffs filed a motion for reconsideration of the Court's order, *id.* at 11/16/23, which the Court denied on December 5, 2023. *Id.* at 12/5/23. Plaintiffs filed their notice of appeal on December 7, 2023. *Id.* at 12/7/23. The Court filed an order pursuant to Rule 1925(b)(3) of the Pennsylvania Rules of Civil Procedure, requiring plaintiffs to file a concise statement of errors complained of on appeal. *Id.* at 1/4/23. Plaintiffs timely filed their statement on January 25, 2024. *Id.* at 1/25/24. Plaintiffs assert that newly discovered evidence supports their claims that: (1) Mr. Bosanac was exposed to asbestos from Sunbeam furnaces; (2) SECO/Warwick was Sunbeam's successor, and (3) plaintiffs' claims are not barred by the Statute of Repose. (Plaintiffs' Statement of Matters Complained of on Appeal, Dkt. at 1/25/24).

FACTS

Mr. Bosanac was not deposed before his death. Plaintiffs instead offered the deposition testimony of Mr. Bosanac's co-worker, Gilbert Davis. Mr. Davis worked with Mr. Bosanac at Pittsburgh Forgings in Coraopolis, Pennsylvania beginning in 1969. (Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment at Ex. F, Transcript of Deposition of Gilbert Davis, 12/10/18 at 9:19-10:10, Dkt. at 12/21/22). Mr. Bosanac remained at the plant until it closed in the late 1990s. *Id.* at 11:8-13. Mr. Bosanac was a bricklayer and Mr. Davis testified he would work as Mr. Bosanac's helper four to five times per month. *Id.* at 11:23-12:18. Mr. Bosanac and Mr. Davis would repair the furnaces at Pittsburgh Forgings. There were about 25 furnaces at the plant and Mr. Bosanac worked on all of them. *Id.* at 13:7-14:1. When repairing furnaces Mr. Bosanac would knock the old bricks out with a wedge. *Id.* at 15:15-16:24. Once the old bricks were removed, Mr. Bosanac would install new bricks using mortar. Mr. Davis identified the manufacturer of the new bricks as A.P. Green and testified that, to the best of his belief, they contained asbestos. *Id.* at 17:15-18:7. He provided no reasons in support of this belief.

Mr. Bosanac would also occasionally "patch" the furnaces with new bricks. (Davis Deposition at 20:1-24). As part of this process, Mr. Bosanac used insulation that Mr. Davis believed contained asbestos. *Id.* at 22:2-7. Mr. Davis did not explain the basis of this belief.

Mr. Davis and Mr. Bosanac also worked making what Mr. Davis described as a "shield" for the furnaces. (Davis Deposition at 23:11-19). To install a shield, they would use a mortar product. This was a dry material that came in a bag and Mr. Davis recalled the manufacturer of the product was called "Narco." *Id.* at 23:20-24:15. Mr. Davis believed the Narco material contained asbestos but did not explain the basis of this belief. *Id.* at 27:2-15.

Mr. Davis identified one of the manufacturers of furnaces at Pittsburgh Forgings as “Sunbeam.” (Davis Deposition at 14:10-15). Mr. Davis testified that Pittsburgh Forgings had four Sunbeam furnaces over the course of time when he worked there. *Id.* at 108:21-109:21. The Sunbeam furnaces were “heat treat” furnaces and Mr. Bosanac did brick work on these furnaces. *Id.* at 28:13-20. Mr. Bosanac would work on a Sunbeam furnace whenever it required repair. Mr. Davis estimated this was twice a month. *Id.* at 14:20-15:9.

In their brief in opposition to summary judgment the plaintiffs offered, in addition to Mr. Davis’s testimony, several documents intended to show that Mr. Bosanac would have been exposed to asbestos from working on Sunbeam furnaces at Pittsburgh Forgings. Plaintiffs offered two unauthenticated documents purporting to show that defendant “sold asbestos containing parts to Pittsburgh Forgings during the time frame that Mr. Bosanac worked there.” (Plaintiffs’ Response in Opposition to Defendant’s Motion for Summary Judgment at pg. 6, ¶3, Dkt. at 12/21/22). The first is a shipping order with letterhead reading “Sunbeam Equipment Corporation.” (Plaintiffs’ Response in Opposition to Defendant’s Motion for Summary Judgment at Ex. G, Dkt. at 12/21/22). The handwritten portions of the document are not fully legible. The customer line appears to read “Pittsburgh Forgings” and one of the purchased items appears to include the phrase “asbestos rope.” Plaintiffs represented to the Court that this document is dated 1977 but the date section of the order is completely illegible. The second document is represented by plaintiffs to be a “diagram of a furnace.” (Plaintiffs’ Response in Opposition to Defendant’s Motion for Summary Judgment at Ex. H, Dkt. at 12/21/22). The attached document is a hand-drawn image of a circular structure. Underneath the drawing is an arrow pointing to one portion of the structure with a note that reads “½ Dia. Asbestos Rope, 47 ¼ lg. approx. Cement in place[.]” The drawing is dated “8/24/78.” *Id.*

In its motion for summary judgment, SECO/Warwick attached several documents intending to show that the products used by Mr. Bosanac did *not* contain asbestos. The first is a copy of answers to interrogatories provided by A.P. Green Industries, Inc. in 1986. (Defendant's Motion for Summary Judgment Ex. F, *In Re Asbestos Litigation*, Oct. Term 1986 No. 0002 (Phila. Ct. of Common Pleas), Dkt. at 9/16/22). Mr. Davis had testified that A.P. Green manufactured the bricks that Mr. Bosanac used to repair furnaces at Pittsburgh Forgings. The document includes a chart purportedly listing every asbestos-containing product ever manufactured by A.P. Green. A.P. Green maintained that in every case it stopped using asbestos in these products by the year 1972. *Id.* at 11. SECO/Warwick maintained that this shows the "firebrick" used by Mr. Bosanac could not have contained asbestos. But none of the names of the listed products indicates that they are firebricks. *Id.*

The second document is an unauthenticated copy of what appears to be a catalog produced by the NARCO company showing that NARCO sold several varieties of mortar products. (Defendant's Motion for Summary Judgment Ex. G at pgs. 1-8, Dkt. at 9/16/22). Mr. Davis had testified that "Narco" was the manufacturer of the mortar he used at Pittsburgh Forgings. The third document is a copy of answers to interrogatories provided by NARCO in a case in Texas in 1994. In its answers NARCO provided a list of all asbestos-containing products it had ever manufactured. (Defendant's Motion for Summary Judgment Ex. H, Defendant NARCO's Responses to Interrogatories at pg. 36, *In Re Asbestos Litigation* ((Texas Dist. Ct., Bexar County 1994), Dkt. at 9/16/22)). Some of the brand names found in the catalog in Exhibit G are not found in the list of asbestos-containing products identified by NARCO in Exhibit H. SECO/Warwick argues that it can therefore be deduced that the NARCO mortar used by Mr. Bosanac might not have contained asbestos.

Discussion

A. The Court Properly Granted SECO/Warwick's Motion for Summary Judgment

The Court properly granted summary judgment because plaintiffs failed to produce any cognizable evidence that Mr. Bosanac was exposed to asbestos from any furnaces manufactured by Sunbeam. Summary judgment is warranted when "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.Civ.Pro. 1035.2(2).

The standard for making out a prima facie case in an asbestos action is well established:

In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. Therefore, a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. Summary judgment is proper when the plaintiff has failed to establish that the defendants' products were the cause of plaintiff's injury.

* * *

Whether direct or circumstantial evidence is relied upon, our inquiry, under a motion for summary judgment, must be whether plaintiff has pointed to sufficient material facts in the record to indicate that there is a genuine issue of material fact as to the causation of decedent's disease by the product of each particular defendant. Whether a plaintiff could successfully get to the jury or defeat a motion for summary judgment by showing circumstantial evidence depends upon the frequency of the use of the product and the regularity of plaintiff's employment in proximity thereto.

Krauss v. Trane U.S. Inc., 104 A.3d 556, 563 (Pa. Super. 2014) (quoting *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52-53 (Pa. Super. 1988)).

In his deposition Mr. Bosanac's co-worker Gilbert Davis identified three products used in Sunbeam furnaces that he believed contained asbestos: bricks, insulation, and mortar.

(Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment at Ex. F, Transcript of Deposition of Gilbert Davis, 17:15-23, 19:4-15, 21:16-22:7, Dkt. at 12/21/22.). Plaintiffs provided no evidence that any of these products contained asbestos apart from Mr. Davis's stated belief that they did. Mr. Davis testified that he was not trained in identifying asbestos. He specifically affirmed that he could not tell the difference between a brick that contained asbestos and one that did not by looking at it. *Id.* at 77:9-18. He did not testify to seeing labels on the products in question indicating that they contained asbestos. He provided no other basis for his belief that the products contained asbestos. The Superior Court has held that an individual's belief that a product contains asbestos is insufficient; there must be evidence to support that belief. *See Krauss v. Trane U.S. Inc.*, 104 A.3d 556, 567 (Pa. Super. 2014); *see also Gibson v. W.C.A.B. (Armco Stainless & Alloy Products)*, 861 A.2d 938, 945 (Pa. 2004).

Apart from Mr. Davis's testimony, plaintiffs offered only the two documents described above to establish that Mr. Bosanac worked with asbestos-containing products found in Sunbeam furnaces, *e.g.*, an alleged order form showing the delivery of asbestos rope to Pittsburgh Forgings and a diagram of a Sunbeam furnace showing that it contained asbestos rope. (Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment Exs. G, H, Dkt. at 12/21/22). These documents were unauthenticated and could not be considered by the Court. *See* Pennsylvania Rules of Civil Procedure 1035.3 (requiring a response to summary judgment be based on "evidence in the record"); Pennsylvania Rules of Civil Procedure 1035.1 (defining "record" as "pleadings", "depositions, answers to interrogatories, admissions and affidavits" and "reports signed by an expert witness that would, if filed, comply with Rule 4003.5(a)(1)"); *Welsh v. National Railroad Passenger Corporation*, 154 A.3d 386, 395 (Pa. Super. 2017). Even if they were to be considered, they are insufficient to satisfy plaintiffs' burden. There is no indication

on either the order form or diagram that they refer to any product Mr. Bosanac ever worked on. Furthermore, both refer only to asbestos “rope.” Mr. Davis never testified to working with rope. Having failed to provide any evidence that Mr. Bosanac was exposed to asbestos from furnaces manufactured by SECO/Warwick or its purported predecessor, SECO/Warwick was entitled to judgment as a matter of law.¹

B. The Court Properly Denied Plaintiffs’ Motion for Reconsideration

After the Court issued its ruling granting summary judgment to SECO/Warwick, the plaintiffs filed a motion for reconsideration that sought to have the Court consider additional evidence not presented on the original motion. (Defendant’s Motion for Reconsideration at pg. 3, Dkt. at 11/16/22). While the Superior Court has written, “Generally, we do not allow new evidence to be presented in a motion for reconsideration...,” *Ford-Bey v. Professional Anesthesia Services of North America, LLC*, 229 A.3d 984, 990 (Pa. Super. 2020), in an earlier case this court has suggested that consideration of new evidence by the trial court is discretionary. *See Bollard & Associates, Inc. v. H & R Industries, Inc.*, 161 A.3d 254, 256 (Pa. Super. 2017) (“a trial court **may** also properly refuse to consider new evidence presented for the first time in a motion for reconsideration”) (emphasis added). For the reasons explained below, the Court declined to exercise its discretion to receive plaintiffs’ purported new evidence.

SECO/Warwick filed its motion for summary judgment in September 2022. Plaintiffs filed their response in December 2022. The Court granted SECO/Warwick’s motion for summary judgment on November 6, 2023. Jury selection was set to begin on November 9, 2023,

¹ In its motion for summary judgment, SECO/Warwick also argued that it is not the successor to any entity that manufactured furnaces under “Sunbeam” name and is not the successor to Sunbeam Equipment Corporation. SECO/Warwick also argued that plaintiffs’ claims are barred by the Statute of Repose, 42 Pa. C.S. §5536. Because the lack of evidence that Mr. Bosanac was exposed to asbestos from any source is fatal to plaintiffs’ case, the Court granted summary judgment on this basis alone.

with trial to commence on November 13, 2023.² Plaintiffs filed their motion for reconsideration on November 16, 2023. Reconsideration was allegedly justified because plaintiffs had discovered new evidence relevant to their case. But the record demonstrates that the evidence was *not* new.

In their motion for reconsideration, plaintiffs provided an affidavit from one of plaintiffs' counsel, F. Alexander Eiden. Mr. Eiden stated that sometime in September 2023 he had discovered the existence of a prior Philadelphia asbestos case, *Myers v. ABB, Inc. et al.*, Sept. Term 2018, No. 1359, that revealed new evidence relevant to plaintiffs' claims. (Plaintiffs' Motion for Reconsideration Ex. 1 at pg. 2 ¶11, Dkt. at 11/16/23). Two depositions taken in this case, those of Donald Snyder and Paul Huber, allegedly show that Sunbeam furnaces required asbestos to work properly. Plaintiffs allege that access to the Snyder deposition provided them with new evidence that should have been included in SECO/Warwick's prior documents production. These documents apparently consist of "purchase orders and invoices for the asbestos containing materials that Defendant used in manufacturing their furnaces as well as the requirement that asbestos was necessary in order for Defendant's heater to function properly." (Plaintiffs' Motion for Reconsideration at pg. 9 ¶3, Dkt. at 11/16/23).

Plaintiffs also claimed to have discovered new evidence related to successor liability. After discovering this evidence, the plaintiffs commissioned a new expert report, which was completed on October 30, 2023. The report is from a "Material Scientist Consultant" named William B. Egland, M.S., P.G. (Defendant's Motion for Reconsideration at Ex. 11, Dkt. at 11/16/23). Plaintiffs also assert that new documents, including schematics for Sunbeam furnaces, were produced by SECO/Warwick on October 30, 2023. According to plaintiffs, the

² SECO/Warwick was the last remaining defendant in the case, so after summary judgment was granted in its favor, the case did not proceed to trial.

late discovery of this evidence was the necessary result of inadequate discovery responses provided by SECO/Warwick in answers to interrogatories and requests for production served on July 23, 2021. Plaintiffs had asked SECO/Warwick to provide the name and caption of any case involving “any alleged injury caused by exposure to asbestos from Defendant’s products.” SECO/Warwick objected that this request was overly broad and unduly burdensome and did not provide the name of *Myers* or any other case.

At no time in the two-and-a-half years after this allegedly deficient response was rendered did plaintiffs file any discovery motion. Even if the Court would have considered the delay excusable in light of supposed wrongdoing by SECO/Warwick, the Eiden affidavit makes clear that plaintiffs discovered the existence of the *Myers* case sometime in September 2023, nine months after the summary judgment motion was fully briefed, and at least a month before the Court’s summary judgment ruling. Plaintiffs neither sought leave to amend their response to the motion nor asked the Court to defer ruling on the motion so that an amendment could be made. Jury selection was set to begin on November 9, 2023, and a ruling was plainly imminent, yet plaintiffs failed to act until after summary judgment was granted.

The “new” evidence that plaintiffs argue justified reconsideration of the Court’s order granting summary judgment was not new but was belatedly discovered by plaintiffs. The Court properly declined to vacate the judgment to accommodate plaintiffs’ delay. The Court respectfully requests that the orders granting summary judgment and denying reconsideration be affirmed.

BY THE COURT:

ASSC F. [Signature]

J.