

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROBERT E. EORIO, EXECUTOR OF
THE ESTATE OF MICHAEL EORIO,
DECEASED

Appellant

V.

GENERAL ELECTRIC COMPANY AND
CBS CORPORATION, SUCCESSOR-
IN-INTEREST TO WESTINGHOUSE
ELECTRIC CORPORATION

: IN THE SUPERIOR COURT OF
:
: PENNSYLVANIA

: No. 1247 EDA 2017

Appeal from the Order Entered March 17, 2017
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): February Term, 2015 No. 737

BEFORE: LAZARUS, J., OTT, J., and PLATT*, J.

MEMORANDUM BY LAZARUS, J.:

FILED JUNE 12, 2018

Robert E. Eorio (“Eorio”) appeals from the order, entered in the Court of Common Pleas of Philadelphia County, granting summary judgment in favor of General Electric Company (“GE”) and CBS Corporation (“CBS”). After review, we affirm based, in part, on the Honorable Arnold J. New’s well-reasoned opinion.

The trial court aptly summarized the facts and procedural history of this case, including the depositions of Michael Eorio and witness Andre Silvestry and the nature of various exhibits included in Eorio's memorandum in opposition to summary judgment. We hereby incorporate the trial court's recitation of the facts herein by reference. **See** Trial Court Opinion, 9/12/17,

* Retired Senior Judge assigned to the Superior Court.

at 1-15. For context, we include a brief summary of the facts and procedural history, which follows.

Michael Eorio worked as a railroad employee from 1972 to 2010 for various employers, including Lehigh Valley Railroad, Conrail, CSX, and Norfolk Southern. On September 18, 2013, Michael Eorio, then aged 63, learned he had lung cancer. Michael Eorio suspected he had contracted lung cancer from exposure to railroad equipment and various products containing asbestos. Michael Eorio and his former co-worker, Andre Silvestry, both alleged Michael Eorio's job duties frequently exposed him to GE and Westinghouse¹ products containing asbestos.

On February 4, 2015, Michael Eorio commenced his asbestos personal injury action in the Philadelphia Court of Common Pleas by filing a complaint against General Electric, CBS, and 33 other defendants. On April 24, 2016, Michael Eorio died from lung cancer. On January 10, 2017, GE and CBS filed separate motions for summary judgment. On January 27, 2017, Eorio filed a notice of death and substitution of successor statement pursuant to Pa.R.C.P. 2355 and 2352, respectively, making him party to Michael Eorio's personal injury suit in his capacity as executor of Michael Eorio's will.

On March 17, 2017, the trial court granted summary judgment in favor of GE and CBS. On April 5, 2017, Eorio timely appealed. Both Eorio and the

¹ Westinghouse purchased CBS in 1995, and renamed itself CBS Corporation in 1997.

trial court have complied with Pa.R.A.P. 1925. On appeal, Eorio raises the following issues:

1. Did the [trial court] commit an error of law when it ignored Pa.R.E. 701 and 702, and [U.S.] Supreme Court precedent, and ruled that Michael Eorio was not [] qualified to testify about the presence of asbestos products in his workplace because he did not have "certification"?
2. Did the [trial court] err by disregarding evidence of Michael Eorio's extensive exposure to dust from the asbestos components in [General Electrics'] products while working for decades on the railroad?

Brief of Appellant, at 4 (reordered for purpose of this appeal).

Eorio first claims that the trial court erred in ruling Michael Eorio was not qualified to testify regarding the presence of asbestos products in his work place. However, Eorio has waived this claim.

To preserve a claim for appellate review, an appellant must comply whenever the trial court orders appellant to file a statement of matters complained of on appeal; any issues not raised in the statement will be waived. ***Commonwealth v. McBride***, 957 A.2d 752 (Pa. Super. 2008);² ***see also Hess v. Fox Rothschild, LLP***, 925 A.2d 798, 803 (Pa. Super. 2007) (citation omitted) ("Any issue not raised in an appellant's Rule 1925(b) statement will be deemed waived for purposes of appellate review.").

² Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases. ***Lineberger v. Wyeth***, 894 A.2d 141 (Pa. Super. 2006).

General Electric objects to the absence of Eorio's Rules 701 and 702 claim in his Rule 1925(b) statement, arguing he waived this claim. We agree. Eorio's failure to raise this issue in his Rule 1925(b) statement deprived the trial court an opportunity to provide this Court with a reasoned basis for its summary judgment order as to this issue. Therefore, Eorio has waived this issue on appeal.

Next, Eorio argues the trial court ignored evidence of Michael Eorio's exposure to asbestos. Eorio's claim generally challenges the court's determination that he failed to raise a genuine issue of material fact regarding Michael Eorio's personal injury asbestos claim at the summary judgment level.

An order granting summary is subject to the following scope and standard of review:

Our standard of review on an appeal from the grant of a motion for summary judgment is well-settled. A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.

In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the nonmoving party bears the burden of proof on an issue, they may not merely rely on his pleadings for answers in order to survive summary judgment. Failure of a nonmoving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establish the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Krauss v. Trane U.S. Inc., 104 A.3d 556, 562-63 (Pa. Super. 2014) (citations omitted).

Additionally, the Courts of this Commonwealth have developed distinct summary judgment standards specific to asbestos cases.

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, 104 A.3d at 563.

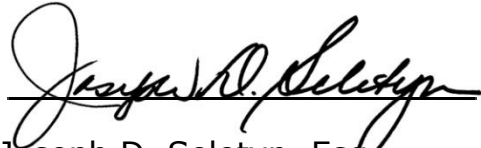
Following review of testimony from Michael Eorio and Silvestry as well as the exhibits attached to Eorio's memorandum in opposition of summary judgment, the trial court determined that Eorio failed to adduce evidence sufficient to create genuine issues of fact as to Michael Eorio's exposure to asbestos-containing GE and/or Westinghouse products. Specifically, the trial

court determined that it would require improper speculation to find that any GE or Westinghouse products or component parts with which Michael Eorio worked contained asbestos. **See id.** at 567-68 (where plaintiff presents no evidence that worker was exposed to particular asbestos-containing product made by manufacturer, as would be required to support worker's estate's asbestos product liability action against manufacturer, case could not survive summary judgment); **see Eckenrod v. GAF**, 544 A.2d 50, 53 (Pa. Super. 1988) (in absence of testimony which established that worker, who died from lung cancer, inhaled asbestos fibers shed by defendant's products, plaintiff could not recover in products liability action). **See also Toro v. Fitness International, LLC**, 150 A.3d 968, 977 (Pa. Super. 2016) (plaintiff cannot survive summary judgment when mere speculation would be required for jury to find in plaintiff's favor). We agree.

After review of the certified record, the parties' briefs and the relevant case law, we do not find the trial court committed an error of law or abused its discretion. Accordingly, we affirm based, in part, on Judge New's well-reasoned opinion. We direct the parties to attach a copy of the trial court's September 12, 2017 opinion to any future matters.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/12/18

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

**ROBERT EORIO, EXECUTOR OF THE
ESTATE OF MICHAEL A. EORIO,
deceased**

Plaintiff

v.

**GENERAL ELECTRIC COMPANY and
CBS CORPORATION, *et al***

Defendants

February Term, 2015

No. 0737

Superior Court No.

1247 EDA 2017

2017 SEP 12 11:13:37
CLERK OF COURT
JUDICIAL DISTRICT OF PHILADELPHIA

OPINION

Arnold L. New, J.

September 12, 2017

Appellant Robert Eorio, Executor of the Estate of Michael Eorio, (“Appellant”) appeals this court’s March 17, 2017 Orders granting Summary Judgment in favor of Appellees General Electric Company (“GE”) and CBS Corporation, successor by merger to Westinghouse Electric Corporation (“CBS” or “Westinghouse”) (collectively “Appellees”). As discussed herein below, this court’s Orders should be affirmed.

I. FACTS AND PROCEDURAL POSTURE

Michael Eorio (“Mr. Eorio”) commenced this action against 35 defendants on February 4, 2015. The Complaint contends Mr. Eorio contracted lung cancer from exposure to various asbestos-containing products while working from 1972 to 2010 as a communications and signalman railroad employee for Leigh Valley Railroad, Conrail, CSX and N&S. Mr. Eorio at plants in Harrisburg, Allentown, Bethlehem and Easton, Pennsylvania; the Manville plant in

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Manville, New Jersey; and the Union Carbide and GAP plants in Bound Brook, New Jersey. Mr. Eorio passed away on April 24, 2016. Appellant was substituted as Plaintiff on January 27, 2017.

On January 10, 2017, Appellees GE and CBS each filed a Motion for Summary Judgment. Appellant filed Answers thereto, and Appellees filed replies. This court granted Appellees' Motions for Summary Judgment by Orders dated and docketed on March 17, 2017.

On April 5, 2017, Appellant filed a Notice of Appeal of the aforementioned Orders. On August 11, 2017, this court issued an Order directing Appellant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On April 24, 2017, Appellant filed a timely 1925(b) statement, which forms the basis of this appeal as follows:

1. The [c]ourt did not consider the evidence in the light most favorable to [Appellant] drawing all possible inferences against granting of summary judgment. The [c]ourt erroneously exercised its discretion to make findings of fact which should have been left to the jury.
 - a. Eorio and his co-worker Silvestry drilled boards in Westinghouse boxes over 100 times and worked on 10 Westinghouse motors a year from 1972 until 1992, and worked with Westinghouse arc chutes, armstores, circuit breakers, contactors, relays, generators and arc boxes regularly and frequently.
 - b. These products contained asbestos and gave off asbestos dust which Eorio breathed.
 - c. Eorio regularly and frequently worked with GE arc chutes, switch boxes, wires, panels, motors contactors and generators, which products contained asbestos and gave off asbestos dust that he inhaled.

2. The [c]ourt failed to credit [Appellant's] evidence of admissions against interest by Westinghouse and GE that [Appellant] placed on the record. These admissions, interpreted in the length (*sic*) most favorable to [Appellant], proved that the Westinghouse and GE products contained asbestos at the time Eorio used the products.
3. The [c]ourt failed to credit the tests of asbestos release from the Westinghouse and GE products in the light most favorable to [Appellant].
4. To the extent that the [c]ourt may have relied on Kurns v. Railroad Friction, 132 S.C.T. 1261(2002) in granting summary judgment, the [c]ourt erred because Kurns only applies to locomotives. This case does not involve locomotives, so there is no pre-emption. See In re Asbestos Products Liability Litigation, 822 F.3d 125 (3rd Cir 2016).

Mr. Eorio's Deposition

Mr. Eorio was deposed on August 15, 2015 and testified to working with various Westinghouse and GE products. Portions of the deposition are attached at Exhibits "A" to Appellant's responses to the Motions for Summary Judgment.

Mr. Eorio first testified that he worked with Westinghouse clappers and clapper cases. Appellant's Exhibit "A", 26:1-6, 208:3-18, 209:5-21. Mr. Eorio worked on the clappers and clapper cases between 1972 and 1976 at the Oak Island yard in New Jersey. *Id.* at 214:4-215:16. He was able to identify Westinghouse as the manufacturer because the full name "Westinghouse" was on the boxes and the initials "WH" were on the clappers. *Id.* at 208:12-209:4. *Id.* at 29:1-6. Mr. Eorio was unaware of the model number or designation for the Westinghouse cases. *Id.* at 213:19-23. He knew the cases were installed around 1927 but did not know when they were manufactured. *Id.* at 2:1324-214:6.

Replacing component parts of the Westinghouse clapper required Mr. Eorio to remove the component parts and drill holes for wiring. *Id.* at 29:21-24; *see also* 30:1-31:8 attached at Exhibit “A” to Defendant Ingersoll-Rand Company’s reply in support of its Motion for Summary Judgment¹. The clappers had insulation between them to prevent arcing between clapperboards. *Id.* at 26:16-27:20, 34:14-24. The drilling caused what Mr. Eorio called “asbestos dust” to fly around, and Mr. Eorio breathed in the dust. *Id.* at 31:4-16. Removing and replacing the components also created dust which Mr. Eorio inhaled. *Id.* at 33:9-34:4. Mr. Eorio had to repair clappers in this manner approximately once a week over a period of four years. *Id.* at 32:7-19. Additionally, if circuits had to be reset, Mr. Eorio drilled holes in the backing, which created dust. *Id.* at 35:10-13. Otherwise, pulling out components and replacing them without drilling created a light dust. *Id.* at 35:13-16.

About a dozen times between 1972 and 1976, Mr. Eorio helped workers at the Allentown plant by examining and repairing clapper boxes and boards in the same manner as described above. *Id.* at 35:17-37:24. Dust was also created during this process. *Id.* at 37:14-15. Mr. Eorio breathed in the dust. Appellant’s Exhibit “A” at 38:1-4.

According to Mr. Eorio, the insulation and backing board component parts in the Westinghouse clapper casings contained asbestos. *Id.* at 35:1-4, 211:14-23. However, Mr. Eorio never saw any manuals, product literature, specifications or any other writing indicating that the Westinghouse cases contained asbestos. *Id.* at 216:1-217:4. He never saw any writings at all for

¹ Though Appellant’s brief in response to CBS’s Motion for Summary Judgment references pages 30-37 of the deposition transcript, these pages are neither attached by Appellant’s nor CBS’s filings here. Instead, pages 30-37 are attached to Defendant Ingersoll-Rand Co.’s reply in support of its Motion for Summary Judgment. The court attached these pages hereto to complete the record.

the Westinghouse cases. *Id.* at 216:21-24. Mr. Eorio further did not see writing on the boards themselves that said “asbestos”, nor did he see lab test results showing Westinghouse products in general contained asbestos. *Id.* at 213:16-18, 219:19-24. Instead, Mr. Eorio believed that the insulation and backing boards were made of asbestos because he was told so and trained by his foreman and supervisor about asbestos and its content in these component parts. *Id.* at 27:23-28:2-24, 202:4-8, 212:23-11.

Second, Mr. Eorio testified to working with Westinghouse and GE switches and switch boxes/cases, which controlled the direction of the tracks. *Id.* at 38:15-23, 39:19-41:1. As to Westinghouse, Mr. Eorio had to maintain the Westinghouse cases and switches on a monthly basis. *Id.* at 58:20-59:5. This required Mr. Eorio to drill holes for new circuits, wherein he would be “breathing in asbestos...” *Id.* at 59:11-21. Switches also had to be removed and replaced. *Id.* at 61:11-20. However, Mr. Eorio stated “[w]ith the switches it wasn’t as bad because you only have a small part of any kind of asbestos only where the controller box was...” *Id.* at 61:23-62:2. Over the years, Mr. Eorio worked on over 100 Westinghouse cases. *Id.* at 60:22-61:9.

Mr. Eorio believed the backing boards in the Westinghouse switch cases contained asbestos. *Id.* at 218:12-21. However, the Westinghouse switch cases did not have any warning labels about the dangers of asbestos. *Id.* at 60:14-19. Mr. Eorio also never saw anything or any writing that indicated the cases contained asbestos. *Id.* at 218:24-219:13. Again, Mr. Eorio never saw any lab test results showing Westinghouse products contained asbestos. *Id.* at 219:19-24

Between 1972 and the late 1980’s, Mr. Eorio also worked with GE switches and boxes at Leigh Valley. *Id.* 197:15-198:6. Mr. Eorio worked on GE switch cases over 100 times on a

regular basis at a rate of two to three times per week. *Id.* 69:5-70:10. Mr. Eorio knew GE was the manufacturer because the words “GE Electronics” was written on the cases. *Id.* at 194:17-195:6. GE also made the contents inside the cases. *Id.* at 196:8-11. He did not know model numbers for the switchgears or cases or when they were purchased or manufactured. *Id.* at 197:4-13. When Mr. Eorio upgraded circuitry in the GE cases, Mr. Eorio had to drill holes into the walls to run wires. *Id.* at 67:22-68:7, 199:10-200:2.

According to Mr. Eorio, the board backings and walls inside the GE switch cases contained asbestos. *Id.* at 67:16-2, 68:8-9, 199:5-10. However, the GE cases did not have any warning labels saying asbestos was dangerous. *Id.* at 70:14-18. Between 1972 and the late 1980’s while at Lehigh Valley, neither he nor the railroad tested the boards in the GE case for asbestos. *Id.* 201:7-202:3. Mr. Eorio also did not see any manuals, literature, specifications or any writing saying the GE cases contained asbestos. *Id.* at 205:12-206:23. Mr. Eorio never saw laboratory test results saying the GE products contained asbestos. *Id.* at 219:19-24. Instead, like the clappers, Mr. Eorio believed the boards contained asbestos because he was trained by his foreman about asbestos and the foreman told Mr. Eorio the boards contained asbestos. *Id.* 202:7-11, 8-9. The foreman, however, never told Mr. Eorio the basis for his belief that the boards contained asbestos. *Id.* at 203:3-12. Mr. Eorio did not know if his foreman had any certification that qualified him to identify asbestos in the workplace. *Id.* at 202:21-203:2. Mr. Eorio himself never took classes on how to identify asbestos nor did he receive any type of certificate for asbestos content detection. *Id.* at 202:4-20.

Third, Mr. Eorio testified to working with Westinghouse crossing track circuit boxes and their inside components. *Id.* at 53:8-11, 207:10-13, 218:217:21-24. He would drill holes in the board backings to run wires for re-circuiting work and the drilling created dust. *Id.* at 55:12-22.

Mr. Eorio's head would be inside the box when doing this work and he would breathe in the dust. *Id.* at 55:21-24, 56:11-13. He claimed the insulation and back boarding within the Westinghouse circuit boxes contained asbestos. *Id.* at 54:19-55:8, 18, 218:1-8. However, there were no warning labels about asbestos on the circuit box, on the equipment inside the box or on the boards. *Id.* 56:14-56:5. Mr. Eorio also never saw anything or any writing that indicated the crossing cases contained asbestos. *Id.* at 218:24-219:13. Again, Mr. Eorio never saw laboratory test results showing Westinghouse products contained asbestos. *Id.* at 219:19-24

While Mr. Eorio stated to also working with GE generators and motors, he did not associate insulation or asbestos with these GE products. *Id.* at 65:13-67:1, 204:9-205:10.

Lastly, Mr. Eorio testified generally to have worked on wiring cables which he had to pull out and replace. *Id.* at 190:9-10. He was not yet working at the railroad when the old wiring cables were originally installed. *Id.* at 190:9:13. Therefore, Mr. Eorio could not identify the packaging or reels the old wires or cables came in and he did not know the National Electric Code designations. *Id.* at 190:14-191:17. Nevertheless, Mr. Eorio believed the wires contained asbestos because the men from C&J cabling who made the old C&J cables told Mr. Eorio they contained asbestos. *Id.* at 192:3-15. He could not personally state whether the wiring contained asbestos. *Id.* at 192:22-193:2. There is no testimony or other evidence provided establishing that the wiring or cables were manufactured by Westinghouse or GE.

Importantly, portions of the attached deposition transcript reveal that Conrail, another defendant in this action, took over the railroad around 1976. *See Id.* at 37:19-21, 215:19-20. Mr. Eorio testified that in addition to knowing about the asbestos content of Appellees' products based on statements made by his foreman and/or supervisor, Mr. Eorio also believed Appellees' products contained asbestos because Conrail learned the late 1980's that asbestos was harmful

and thereafter required its workers to wear masks. *Id.* at 68:14-20, 200:22-201, 205:22-206:1. Mr. Eorio attended safety training meetings held by Conrail which discussed the dangers of asbestos and other chemicals. *Id.* at 220:3-221:5. However, Conrail never showed Mr. Eorio any laboratory results indicating GE or Westinghouse products that Mr. Eorio worked on contained asbestos. *Id.* at 219:19-22:3.

Andre Silvestry's Deposition

Appellant also provides the deposition of Mr. Eorio's co-worker, Andre Silvestry, taken in December 2016. Portions of the deposition transcript are attached at Exhibit "B" and Exhibit "G" to in opposition to Appellees' Motions for Summary Judgment.

Mr. Silvestry testified that he and Mr. Eorio worked together with various Westinghouse and GE products. First, Mr. Silvestry stated that they worked on repairing Westinghouse and GE motors located inside compressors manufactured by Ingersoll-Rand. Exhibit "B" at 38:4-17, 131:2-12. Mr. Silvestry and Mr. Eorio worked together ten times per year on Westinghouse motors and 20 times per year on GE motors. *Id.* at 179:18-180:6. Repairs required removing and replacing motors in addition to changing motor brushes which had attached pads. *Id.* at 130:21-131:1, 132:23-133:6, 134:17-20, 180:7:17, 186:19-187:6. The pads had to be moved to get to the brushes, and moving the pads created dust which Mr. Silvestry was sure he and Mr. Eorio inhaled. *Id.* at 181:4-18, 187:17-24.

According to Mr. Silvestry, the pads "were asbestos." *Id.* at 132: 21-133:6. However, he had no knowledge as to whether the pads or the motors were actually made of asbestos. *Id.* at 189:9-90:1. While the pads were made of some sort of fiber material, there was no writing on the pads at all, let alone writing that indicated there was asbestos. *Id.* at 133:7-24. Mr. Silvestry did not know who manufactured the pads or if the old pads he removed contained asbestos. *Id.*

at 154:21-155:4. Mr. Silvestry also did not know if the brushes themselves contained asbestos because there was no writing or tags indicating asbestos content. *Id.* at 134:21-135:2. He did not believe that anything else in connection with the motors contained asbestos. *Id.* at 135:48. There were no warning labels on the GE motors about the dangers of asbestos. *Id.* at 188:2-6. Mr. Silvestry believed the Westinghouse motors contained asbestos because that is what he was told. *Id.* at 108:7-10.

Second, Mr. Silvestry testified that the two men worked together on Westinghouse and GE heavy duty fuse panels/panel boards. *Id.* at 82:16-20, 166:7-167:21, 188:15-189:1. Over the years, they worked together on the panel boards at least 100 times. *Id.* at 182:10-18. Mr. Silvestry stated Mr. Eorio's work on the panels included replacing fuses about four or five times, but Mr. Silvestry did not know if Mr. Eorio came in contact with or was exposed to asbestos during this work. *Id.* at 168:17-169:12, 189:2-8. Mr. Silvestry never saw any paperwork for the fuse panel and he did not know if it or any of its components were tested for asbestos. *Id.* at 169:19-170:23. According to Mr. Silvestry, the panel boards were in a closed box, and inside was dust or powder which would come out when opened. *Id.* at 182:20-183:16. However, Mr. Silvestry had no idea where the dust came from or what it was made of. *Id.* at 190:6-13. The equipment was mounted on what Mr. Silvestry stated was asbestos boards. *Id.* at 183:22-184:4. At times Mr. Eorio had to drill holes in the boards to replace power boxes, and "powder would just go all over the place". *Id.* at 184:6-185:3. However, there were no warning labels of asbestos on any Westinghouse or GE equipment. *Id.* at 185:12-19. Mr. Silvestry did not know the maintenance history for panels as well. *Id.* at 190:13-19.

Finally, Mr. Silvestry recalls Mr. Eorio worked on Westinghouse and GE generators which also required replacing motor brushes. Exhibit "G" at 111:20-22, 171:20-172:1, Exhibit

“B” at 190:20-191:2. Mr. Silvestry did not know whether Mr. Eorio was exposed to asbestos from either the Westinghouse or GE generators. Exhibit “B” at 172:2-4, 190:20-191:2. He never saw any railroad or product paperwork indicating GE generators contained asbestos components. *Id.* at 172:24-173:5. In fact, Mr. Silvestry testified that throughout his career with Mr. Eorio, Mr. Silvestry never saw any specifications from GE or Westinghouse for any product. *Id.* at 178:12-17.

Though not attached here, portions of Mr. Silvestry’s deposition testimony are attached to the filings for the Motion for Summary Judgment filed by Allen-Bradley, another defendant in this action. These portions are relevant to Mr. Silvestry’s knowledge of asbestos content.² The testimony reveal that in the 1990’s the railroad provided a training course about asbestos for its employees. *See* Exhibit “B” to Allen-Bradley’s Motion for Summary Judgment at 45:17-46:7. At the course, Mr. Silvestry stated they were shown pictures of products to lookout for that contained asbestos, including boards, protective panels and pipe wrapping. *Id.* at 46:16-47:19. However, the presenters only spoke about generic products in general and did not provide any specific company manufacturer names. *Id.* at 47:10-48:5. No brand names were mentioned. Appellant’s Exhibit “B” to response to Westinghouse Motion for Summary Judgment at 190:2-5. Further, a review of the testimony reveals that none of the types of GE or Westinghouse product discussed above were discussed at the course. In fact, Mr. Silvestry specifically testified that the GE and Westinghouse fuse panel boxes were not discussed during the training course. *Id.* at 170:1-4.

² The court attached these pages hereto to complete the record.

Appellant's Remaining Exhibits

To defeat summary judgment, Appellant includes several other exhibits in opposition to Appellees' Motions for Summary Judgment. In response to Westinghouse, Appellant attaches at Exhibit "C" two types of documents, the first being a 1985 letter from CBS's East Pittsburgh plant with a subject line of "Atlantic Electronic Co., Air Circuit Breakers-Asbestos." The letter states that "prior to 1977 all type DH and DHP breaker arc chutes were built with asbestos rope spacers between the ceramic places of the interrupter stack assembly." *Id.* Further, some of the DH and DHP arc chutes...may have some pieces of asbestos cement board in them. *Id.* The second document of Exhibit "C" is a 1978 untitled document which seems to show that Westinghouse manufactured asbestos insulated cable/wire.

Appellant's Exhibit "D" is a compilation exhibit. The first document includes portions of unidentified and undated interrogatory responses from Westinghouse. The responses concern the asbestos content of Westinghouse transformers and brake assemblies, neither of which were identified by Mr. Silvestry or Mr. Eorio.

The second document is also Westinghouse responses to interrogatories which are undated and from an unidentified litigation. The responses list asbestos-containing products that Westinghouse believed to have manufactured during the relevant time period of that litigation, including, of relevance here, arc chutes on DHP breaker assembly, circuit breakers, generators, arc shields, motors and motor insulating materials and switchgears. However, the response also provides that not all variations of these products contained asbestos. The relevant time period for that litigation is additionally unknown.

The third document is a 1993 friability study Westinghouse asbestos paper, an SM contactor Arc Chute and an MM10 Contactor. The study revealed that respirable asbestos fibers

were created from scraping, filing, sanding or stapling these products. Further, air samples collected at Westinghouse's East Pittsburgh plant from 1973 to 1979 showed that asbestos containing arc chutes and micarta were capable of releasing respirable asbestos.

Finally, Appellant produced Exhibit "E" an Affidavit of Arthur L. Frank, MD, PhD, a professor of Public Health at Drexel University and Chair of Environmental & Occupational Health. The Affidavit is not case specific and makes no reference to either Mr. Eorio, GE or Westinghouse. Instead, the Affidavit speaks generally about levels of asbestos exposure and resulting diseases.

Appellant also provides additional exhibits in response to GE's Motion for Summary Judgment. First, Exhibit "B" and "C" are duplicates of Exhibits "C", "D" and "E" attached in response to Westinghouse's Motion for Summary and explained above. Further, the documents attached at Exhibit "B" here concern Westinghouse, not GE.

Exhibit "D" is also a compilation exhibit. The first document is a 1951 GE pamphlet indicating GE made asbestos-containing wire and cables, sealing and filling compounds and cements and adhesives. The pamphlet also shows that GE supplied various Johns-Manville asbestos containing products, none of which were mentioned by Mr. Eorio or Mr. Silvestry.

The second document includes GE's undated responses to interrogatories from a separate unidentified litigation. The responses state that GE's Wire and Cable Business Division manufactured electrical wire and cable products, a small percentage of which contained encapsulated chrysotile. However, GE ceased all sales and production of chrysotile containing wire by October of 1980. The responses also state that GE's switchgears were not made from asbestos-containing products as the term is commonly understood. The switchgears at times may have contained components, including arc chutes and circuit breakers, which depending on

various factors such as the time period, may have contained some quantity of encapsulated chrysotile.

The last document included in Exhibit “D” is a GE pamphlet for Deltabeston Magnet Wire which was insulated with bonded asbestos fibers.

Exhibit “E” contains portions of a 1984 deposition transcript of a former GE developing engineer, Nicholas Arone, from an unrelated 1981 litigation. The relevant testimony shows that starting in 1938, Mr. Arone was involved in GE’s production of arc chutes by creating circuit breakers wherein asbestos cement composition supplied by Johns-Manville was used to fit the device. *Id.* at 7:4-8:6, 9:11-15, 11:15-16. Around 1943, the process changed to using molded asbestos cement blocks produced by GE. *Id.* at 11:17-24, 15:14-15, 29:6-16.

At Exhibit “F”, Appellant attaches another set of GE’s undated responses to interrogatories from a separate unidentified litigation. The responses state that GE’s control panels were typically made of metal and not made from asbestos-containing products as the term is commonly understood. However, the control panels at times may have contained components which contained some quantity of encapsulated chrysotile. The responses also state that some of GE’s control panels may have been equipped with arc chutes, some of which at times may have contained some quantity of encapsulated chrysotile.

Finally, Exhibit “H” includes portions of a deposition transcript of a Frank Frongione from an unrelated 2003 action. In relevant part, Mr. Frangione testified to learning about the asbestos content of arc chutes in the 1980’s when asbestos was removed from line breakers, contactors, control group covers motors and motor generators. *Id.* at 114: 10-21. He also spoke of asbestos lumber board being mounted to non-electronic panels. *Id.* at 165:25-166:6.

However, it is unclear from the testimony attached if Mr. Frangione is associated with GE and in what capacity Mr. Frangione is being deposed. GE is not mentioned in the transcript.

II. STANDARD OF REVIEW

Appellant failed to establish a *prima facie* case against Appellees GE and Westinhouse, and therefore this court's granting of Appellees' Motions for Summary Judgment was proper and should be affirmed.

A. Summary Judgment Standard

Pa.R.C.P. 1035.2 sets forth the rule for motions for summary judgment:

Rule 1035.2 Motion

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

- (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
- (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, 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.

The Note to Pa.R.C.P. 1035.2 is also instructive:

Note: Rule 1035.2 sets forth the general principle that a motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law.

The evidentiary record may be one of two types. Under subparagraph (1), the record shows that the material facts are undisputed, and, therefore, there is no issue to be submitted to a jury.

An example of a motion under subparagraph (1) is a motion supported by a record containing an admission. By virtue of the admission, no issue of fact could be established by further discovery or expert report.

Under subparagraph (2) the record contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to a jury. The motion in this instance is made by a party who does not have the burden of proof at trial and who does not have access to the evidence to make a record which affirmatively supports the motion. To defeat this motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense.

Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. See *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932); *Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989).

In addition, the Explanatory Comment -1996 of Pa.R.C.P. 1035.2 provides, in pertinent part:

Explanatory Comment – 1996

* * *

Rule 1035.2 Motion

The essence of the revision set forth in new Rule 1035.2 is that the motion for summary judgment encompasses two concepts: (1) the absence of a dispute as to any material fact and (2) the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. The former rule was unclear as to whether it encompassed the type of motion which is based upon a record which is insufficient to sustain a prima facie case. New Rule 1035.2(2) is explicit in authorizing such a motion.

This type of motion provided by Rule 1035.2(2) is not new to Pennsylvania practice. In *Godlewski v. Pars Mfg. Co.*, 408 Pa. Superior Ct. 425, 597 A.2d 106 (1991) Judge Hester wrote:

It is clear that if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicated that the plaintiff is unable to satisfy an element of his cause of action. See *Eckenrod v. GAF Corp.*, *supra* (wherein, by approving grants of summary judgment on motions that were based upon the failure of the plaintiffs to satisfy an element necessary to their case, we impliedly utilized this principle)

. . . . The purpose of the rule is to eliminate cases prior to trial where a party cannot make out a claim or defense after relevant discovery has been

completed; the intent it not to eliminate meritorious claims prematurely before relevant discovery has been completed.

See also Miller v. Sacred Heart Hospital, 753 A.2d 829, 833 (Pa. Super. 2000); *Eaddy v. Hamaty*, 694 A.2d 639 (Pa. Super. 1997).

As the Pennsylvania Supreme Court noted, the appellate standard of review of an order granting or denying a motion for summary judgment is well established:

We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Abrams v. Pneumo Abex Corporation, 981 A.2d 198, 203 (Pa. 2009), *citing Pappas v. Asbel*, 768 A.2d 1089, 1095 (Pa. 2001).

Once a motion for summary judgment is made and is properly supported, the non-moving party may not simply rest upon the mere allegations or denials in his or her pleadings. *Samarin v. GAF Corporation*, 571 A.2d 398, 402 (Pa. Super. 1989); Pa.R.C.P. 1035.3. Thus, once the motion for summary judgment is properly supported, the burden is upon the non-movant to disclose evidence that is the basis for his or her argument resisting summary judgment. *Id.* (Citations omitted.)

In *Ertel v. Patriot-News Company*, 674 A.2d 1038, 1042 (Pa. 1996), the Pennsylvania Supreme Court held that in a summary judgment case, the nonmoving party must adduce sufficient evidence on an issue essential to his case on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Asbestos Products Liability

To survive summary judgment specifically in an asbestos products liability case, a plaintiff must produce evidence he frequently and regularly inhaled asbestos fibers shed by the defendant's product. *Eckenrod v. GAF Corp.*, 375 Pa. Super. 187, 191 (Pa.Super. 1988); *Gregg v. V-J Auto Parts, Co.*, 596 Pa. 274, 279 (2007). The plaintiff must identify an asbestos-containing product attributable to the particular defendant. *Id.* at 289-90. Then, the plaintiff must show his contact with that product was of a nature to give rise to a reasonable inference he inhaled asbestos fibers shed therefrom. *Eckenrod*, 375 Pa. Super. at 191; *Fisher v. Sexauer*, 2012 Pa. Super. 111 (Pa.Super. 2012); *Wright v. Allied Signal, Inc.*, 2008 Pa. Super. 289 (Pa.Super. 2008). Further, Pennsylvania courts have repeatedly held that the *Eckenrod* frequency and regularity prongs should be applied in a "somewhat less cumbersome" fashion in cases involving diseases like mesothelioma which can develop following only minor exposures to asbestos fibers. *Gregg* 596 Pa. at 290 (Pa. 2007); *Weible v. Allied Signal, Inc.*, 963 A.2d 521, 527 (Pa.Super. 2008); *Krauss v. Trane U.S. Inc.*, 104 A.3d 556, 564 (Pa.Super. 2014).

Contrary to the assertions contained in Appellant's 1925(b) Statement, this court properly granted the Motions for Summary Judgment filed by Appellees GE and Westinghouse, as discussed below.

III. ANALYSIS

Appellant has failed to adduce sufficient evidence that Mr. Eorio was exposed to asbestos dust shed from a product or product component attributable to GE or Westinghouse. While there is sufficient evidence to raise a genuine issue of fact as to whether 1) Mr. Eorio was in contact with GE or Westinghouse products or component parts, 2) said products or components shed dust which Mr. Eorio inhaled, and 3) Mr. Eorio's exposure was regular, frequent and proximate, when

viewing the record in the light most favorable to the non-moving party, it would require improper speculation to find that any GE or Westinghouse product or component part with which Mr. Eorio actually worked contained asbestos. *Krauss v. Trane U.S. Inc.*, 104 A.3d 556 (Pa. Super. 2014)

There is insufficient evidence on the record to establish that the GE and Westinghouse products and/or component parts contained asbestos. Appellant relies on various sources to establish asbestos content in the products: 1) Mr. Eorio's subjective belief informed by his foreman and/or supervisor, employees from C&J Cabling and statements from Conrail, 2) the testimony of Mr. Silvestry, and 3) the various miscellaneous exhibits. These sources, neither individually nor jointly, represent sufficient proofs to create a genuine issue of fact as to the asbestos content of the GE and Westinghouse products Mr. Eorio encountered.

First, the evidence presented shows that Mr. Eorio had no personal knowledge as to whether the Westinghouse or GE products contained asbestos. None of the products themselves had any writing, warnings or other indication that they contained asbestos and Mr. Eorio never read any manuals, literature, specifications or laboratory results showing the products contained asbestos. Mr. Eorio was also not trained and never obtained any certification to identify asbestos. As Mr. Eorio lacked the adequate knowledge, training, and experience concerning the chemical identification of asbestos, his layperson testimony is too speculative and therefore impermissible under *Krauss*, 104 A.3d at 569.

Further, Mr. Eorio's personal belief that the products contained asbestos was premised upon being told as much by others. As to the statements from the foreman and/or supervisor, they did not tell Mr. Eorio their basis for believing the products contained asbestos, nor is there evidence that the foreman and/or supervisor had specialized training to identify asbestos. These statements are hearsay and therefore insufficient as a matter of law. *Samarin* makes it clear that

such hearsay testimony is inadmissible and insufficient to create a genuine issue of fact at the summary judgment stage. 571 A.2d at 402-403.

Similarly, C&J cabling company employees told Mr. Eorio the wiring and cables he worked on contained asbestos. These statements are inadmissible hearsay under *Samarin*. There is also no evidence that the wiring or cables were manufactured by GE or Westinghouse.

Lastly, Mr. Eorio believed the GE and Westinghouse products he worked with were made with asbestos based on Conrail's warnings about the dangers of asbestos. However, there is no evidence that Conrail was specifically referring to GE or Westinghouse products. Mr. Eorio also did not identify who made these statements or how they were conveyed to him. Any such statements are therefore also inadmissible under *Samarin*. Further, though Conrail is a party, Conrail's statements cannot be admitted under the party-opponent hearsay exception, which states:

(25) Admission by a Party Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Pa.R.E. 803(25). Here, Appellant is attempting to use Conrail's statement against GE and Westinghouse. However, the statement was not Appellees' own statement as required by subsection (A). Further, under subsection (B), Appellees did not adopt the statement or the belief in its truth. There is no evidence GE or Westinghouse authorized Conrail to make the statement or that Conrail was their agent as required under subsection (C) and (D). There is also no evidence that Conrail was a coconspirator pursuant to subsection (E). Therefore, Conrail's statement concerning the hazards of asbestos does not fall within the party admission exception

to the hearsay rule. As there is no other basis for Mr. Eorio's belief that the GE and Westinghouse products contained asbestos, Mr. Eorio's testimony is insufficient to raise a genuine issue of fact as to the products contained asbestos.

Second, Mr. Silvestry's testimony is likewise insufficient to prove asbestos content. Initially, Mr. Silvestry had no personal knowledge as to whether the products and/or component parts he identified Mr. Eorio working with contained asbestos. Mr. Silvestry never saw or read any writings, paperwork, tags, specifications, warnings or lab results proving the products contained asbestos. Instead, Mr. Silvestry was informed of asbestos content by "others", including the railroad at the 1990's training course. However, such statements are inadmissible hearsay under *Samarin*. Mr. Eorio specifically testified that the railroad presentation only identified products generally and did not specify GE or Westinghouse products, let alone any product brand name. The statements made by the presenters also cannot be verified. Accordingly, Mr. Silvestry's testimony simply does not support any finding of asbestos-containing GE or Westinghouse products and/or component parts that Mr. Eorio was exposed to.

Third, Appellant's remaining miscellaneous exhibits fail to introduce sufficient evidence of asbestos-content. The court will begin with exhibits attached in opposition to Westinghouse's Motion for Summary Judgment. Initially, many of these exhibits speak to the asbestos content of products not identified as being used by Mr. Eorio. For instance, at Exhibit "C", the initial document speaks of the asbestos content of Westinghouse DH and DHP arc chutes, ropes and cement boards. Assuming that the insulation Mr. Eorio worked with to prevent arcing in Westinghouse clappers was in fact arc chutes, there is no evidence that Mr. Eorio worked with DH or DHP arc chutes. Also, the DH and DHP arc chutes discussed in the document relate to breakers, not clappers or clapper cases. Clappers are not mentioned in this document. Mr. Eorio further

did not testify to working with ropes or cement boards. The other document to Exhibit “C” discusses asbestos insulated cable/wire. However, there is no evidence that the wire or cable Mr. Eorio testified to working with was manufactured by Westinghouse or GE.

At Exhibit “D”, the first set of unidentified interrogatory responses discusses Westinghouse transformers and brake assemblies, neither of which were identified as being used by Mr. Eorio. Also, there is no evidence that Mr. Eorio worked with Westinghouse asbestos paper, micarta, or the specific SM Arc Chute or MM10 contactor models examined in the 1993 friability study. Though the study revealed that Westinghouse “asbestos containing arc chutes” could release respirable asbestos, this fact does not prove that the Westinghouse arc chutes Mr. Eorio came in contact with contained asbestos. Again, this analysis is based on the assumption that arc chutes are synonymous with the insulation Mr. Eorio testified to being in contact with.

The remaining documents attached in opposition to the Westinghouse Motion for Summary Judgment also do not prove asbestos content in the identified Westinghouse products. At Exhibit “D”, the other unidentified interrogatory responses provide that some, but *not all variations* of Westinghouse DHP arc chutes, circuit breakers, generators, arc shields, motors, motor insulating material and switchgears contained asbestos. Such evidence is speculative and inadequate to overcome summary judgment. *See Krauss, supra*, at 570 (noting “the answers to interrogatories provide, [the defendant] manufactured numerous products that may or may not have contained asbestos. The evidence simply does not present a jury with a genuine issue of material fact”). Lastly, Dr. Frank’s affidavit at Exhibit “E” does not prove that the identified Westinghouse products contained asbestos but instead speaks generally about the effects of asbestos and its resulting diseases. Neither, GE, Westinghouse or Mr. Eorio are mentioned by Dr. Frank.

The remaining exhibits attached in opposition to GE's Motion for Summary Judgment likewise fail to prove asbestos content in the identified GE products. To begin, Exhibit "B" relates to Westinghouse and not GE products and Exhibit "C" is the same affidavit from Dr. Frank discussed above. Both fail to prove asbestos content in the GE products Mr. Eorio worked with.

Exhibit "D" provides evidence of asbestos content in GE wires, cables, sealing and filling compounds, cements and adhesives. However, neither Mr. Eorio nor Mr. Silvestry identified these as GE products that Mr. Eorio came in contact with. Again, though Mr. Eorio stated to have worked with wires and cables, there is no evidence that such products were manufactured by GE.

Exhibits "E" and "H" are both attached in an attempt to prove asbestos content in the GE arc chutes Mr. Eorio was in contact with. However, Mr. Eorio did not testify to working with arc chutes in circuit breakers as set forth in Exhibit "E", but with arc-preventing insulation in clappers. Mr. Eorio also did not make any statement regarding asbestos cement. Though the testimony of Mr. Frangione in Exhibit "H" speaks of asbestos content in arc chutes, there is no mention of GE in the deposition and it is unclear if Mr. Frongione is a GE representative. Exhibit "H" is therefore insufficient and unreliable.

Lastly, the interrogatory responses at Exhibits "D" and "F" state that GE switchgears and control panels were not made from asbestos-containing, *but at times*, depending on the time period, *may* have contained component parts with some quantity of encapsulated chrysotile. These interrogatory responses are also impermissibly speculative and insufficient proof of asbestos content under *Krauss*.

Even collectively, the above proofs do not support a finding that the products Mr. Eorio was exposed to contained asbestos. All sources fail to establish that any of the GE or Westinghouse products and/or component parts Mr. Eorio worked with contained, or even more likely than not

contained, asbestos. Appellant's claims cannot overcome this fatal flaw in its case, and therefore the grant of Summary Judgment was appropriate.

IV. CONCLUSION

As Appellant failed to adduce facts sufficient to create genuine issues of fact as to Mr. Eorio's exposure to any asbestos-containing GE or Westinghouse product, this court's Order granting Appellees Motions for Summary Judgment should be affirmed.

BY THE COURT:



ARNOLD L. NEW, J.