IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARIE RIPP, individually and as
Special Administrator for the Estate
of JOSEPH G. RIPP,

Plaintiffs,

v.

JOHN CRANE, INC.,

Defendant.

OPINION AND ORDER

90-C-849-C

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Plaintiff Marie Ripp and her husband, Joseph Ripp, filed this civil suit in 1990, alleging that Joseph Ripp developed asbestosis and lung cancer as the result of exposure to asbestos from products manufactured by various defendants. (Joseph Ripp is now deceased.) The following year, this action was transferred to the Eastern District of Pennsylvania as part of multidistrict litigation pursuant to 28 U.S.C. § 1407. In 2002, the judicial panel on multidistrict litigation transferred the case back to this court after completion of the "coordinated or consolidated pretrial proceedings." In the interim, the panel had dismissed all of the defendants with the exception of defendant John Crane, Inc. Diversity jurisdiction is present under 28 U.S.C. § 1332.

Presently before the court is defendant's motion for summary judgment. In addition, defendant has filed a motion to strike plaintiff's experts and a motion to compel plaintiff to answer defendant's interrogatories. Although plaintiff did not respond to defendant's motion for summary judgment, I must still determine whether the undisputed facts demonstrate that defendant is entitled to summary judgment. Doe v. Cunningham, 30 F.3d 879, 883 (7th Cir. 1994). Because there are no facts showing that defendant's products caused Joseph Ripp to contract asbestosis or lung cancer, I will grant defendant's motion for summary judgment. I will deny defendant's discovery motions as moot.

For the sole purpose of deciding this motion, I conclude that the following facts are material and undisputed.

UNDISPUTED FACTS

Plaintiff Marie Ripp is a resident of the State of Wisconsin. Defendant John Crane, Inc. is a Delaware corporation with its principal place of business in Illinois. It manufacturers gaskets and packing products.

Joseph Ripp, plaintiff's husband, worked as a pipefitter in Wisconsin. While working, Joseph Ripp breathed in dust from asbestos-containing products, including pipe insulation. He worked inside heating and air conditioning ducts and occasionally mixed asbestos-containing material. Both of these activities would involve breathing in asbestos fibers.

Joseph Ripp may have used gaskets and packing products manufactured by defendant. Defendant's products are covered in graphite and do not produce any dust when cut.

OPINION

Plaintiff has alleged that defendant acted negligently in failing to prevent Joseph Ripp's exposure to harmful amounts of asbestos. In Wisconsin, negligence has four elements: (1) a duty of care; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; (4) an actual loss or damage as a result of the injury. Dixon ex rel. Nikolay v. Wisconsin Health Organization Insurance Corp., 2000 WI 95, ¶ 21, 237 Wis. 2d 149, 612 N.W.2d 721. In its motion for summary judgment, defendant focuses on the second and third elements, arguing that plaintiff's claim fails as a matter of law because plaintiff has not produced admissible expert testimony that defendant's products were defective or that they caused plaintiffs' injuries. In addition, defendant contends that it is entitled to summary judgment because plaintiff has failed to identify any products of defendant that were the source of "dust-like" particles.

To establish causation in a negligence action, a plaintiff does not have to show that the defendant's negligence was the only, or even the primary, cause of the plaintiff's injury. Hicks v. Nunnery, 2002 WI App 87, ¶ 34, 253 Wis. 2d 721, 643 N.W.2d 800. Rather, a plaintiff may recover if the defendant's conduct was a "substantial factor" in producing the

injury. Id. Some courts have modified the causation element in asbestos cases because of the difficulty in proving that a particular product caused a plaintiff's injuries. See, e.g., Blackstone v. Shook & Fletcher Insulation Co., 764 F.2d 1480 (11th Cir. 1985) (requiring plaintiff to prove only that he was exposed to asbestos-containing products of defendant); Lockwood v. AC & S, Inc., 722 P.2d 826 (Wash. Ct. App. 1986) (requiring plaintiff to prove only that asbestos-containing product of defendant was used at job site simultaneous with his employment). Although courts in Wisconsin have not addressed this issue directly, in the few cases addressing asbestos-related issues, the courts have not indicated that the traditional negligence analysis should be altered in an asbestos case. See Northridge Co. v. W.R. Grace Co., 162 Wis. 2d 918, 471 N.W.2d 179 (1991) (plaintiff alleged that defendant had contaminated its building with asbestos; in determining whether plaintiff stated claim upon which relief could be granted, court stated that test was whether complaint contained allegation that defendant's product was unreasonably dangerous and caused physical harm; court did not create special definition for "cause"); Anderson v. Combustion Engineering, Inc., 2002 WI App 143, 256 Wis. 2d 389, 647 N.W.2d 460 (upholding jury verdict finding liability for asbestos exposure without identifying separate causation test).

Even assuming, however, that it is still an open question whether Wisconsin will adopt a more permissive causation test for asbestos cases, I conclude that I must grant defendant's motion for summary judgment. Under any causation test, "plaintiff still must

produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product." Peerman v. Georgia-Pacific Corp., 35 F.2d 284, 287 (7th Cir. 1994). A reasonable jury could make this inference "only if it is shown that the defendant's product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the asbestos dust might have been inhaled by plaintiff." Id. Plaintiff has pointed to no evidence in the record that defendant's product produced *any* dust that could have contributed to a case of asbestosis or lung cancer. Thus, plaintiff has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 477 U.S. 317, 322, 324 (1986). Accordingly, plaintiff's claim against defendant must be dismissed. Because plaintiff has failed to propose any facts establishing causation or breach by defendant of its duty of care, it is unnecessary to decide whether plaintiff has produced admissible expert testimony or whether plaintiff should be compelled to answer to defendant's interrogatories.

ORDER

IT IS ORDERED that

1. Defendant John Crane, Inc.'s motions to strike plaintiff Marie Ripp's experts and to compel discovery are DENIED as moot.

2. Defendant's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 20th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge