UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LORETTA HOYT, Plaintiff, v. LOCKHEED SHIPBUILDING COMPANY, Defendant.	C12-1648 TSZ ORDER

THIS MATTER comes before the Court on Defendant Lockheed Shipbuilding Company's ("Lockheed") motion for summary judgment, docket no. 62. Having reviewed all papers filed in support of and in opposition to the motions, the Court enters the following order.

I. Background

Plaintiff Loretta Hoyt claims that she developed mesothelioma as a result of secondary or "take-home" exposure to asbestos. Her father, Victor Lodahl, was employed by Puget Sound Bridge and Dry Dock as a coppersmith from approximately 1948 to 1954. Id. at ¶¶ 6-7. During the course of his employment, Mr. Lodahl worked

with and around asbestos. Id. at ¶ 7. Plaintiff lived at home with her parents during this time period.

Plaintiff's ex-husband, Leroy Birkholz, was employed by Puget Sound Bridge and Dry Dock from approximately 1954 to 1958 as a pipefitter. Id. at ¶¶ 4-5. During the course of his employment, Mr. Birkholz worked with and around asbestos. Id. at ¶ 5. During this time period Plaintiff lived with Mr. Birkholz.

Plaintiff alleges that Mr. Lodahl and Mr. Birkholz brought home asbestos fibers on their hair, tools, and clothing at the end of the workday. Id. at ¶ 14. While she was living at home with her parents, Plaintiff's mother did the family's laundry in the basement. Hoyt Perpetuation Depo. at 14 (Couture Decl., Ex. 4). Plaintiff's bedroom was also in the basement and dust from her father's work clothes got into her bedroom. Id. at 15. During her marriage to Mr. Birkholz, Plaintiff did all of the couple's laundry. Birkholz Depo. at 20-21 (Couture Decl., Ex. 6). When she washed Mr. Birkholz's work clothes, she would shake them out before washing them because "they were dirty and dusty." Hoyt Perpetuation Depo. at 12 (Couture Decl., Ex. 4).

Plaintiff claims that her exposure to the asbestos that her father and ex-husband brought home on their clothes while they worked at Puget Sound Bridge and Dry Dock caused her to develop mesothelioma. She brings this action for damages for personal injuries against Lockheed Shipbuilding Company, the successor-in-interest to Puget Sound Bridge & Dredging Corporation. Id. at ¶ 15. She alleges that Defendant negligently failed to exercise its duty of care to provide its employees with a safe work

environment and that it was reasonably foreseeable that Lockheed's negligence would result in its employee's family members being exposed to asbestos. Id. at ¶¶ 13-14.

Lockheed moves for summary judgment on the grounds that it did not owe Plaintiff a duty of care and that injury to Plaintiff was not foreseeable at the time of exposure.

II. Standard

The Court shall grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. See Beard v. Banks, 548 U.S. 521, 529 (2006) ("Rule 56(c) 'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails 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.'")(quoting Celotex, 477 U.S. at 322)).

III. Discussion

In order to prevail in an action for negligence, a plaintiff must establish: (1) the existence of a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting injury. Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). The only element at issue in this motion for summary judgment is the existence of a duty.[1] Lockheed contends that it did not have a duty to the Plaintiff because (1) Washington Courts do not recognize a duty to prevent "take home" asbestos exposure, and (2) the harm to Plaintiff was not foreseeable because Lockheed did not have actual or constructive knowledge of the risk of cancer from "take-home" or "secondary" asbestos exposure during the time-frame that Plaintiff's father and ex-husband worked at Lockheed.

The existence of a legal duty is an issue of law to be decided by the court, Folsom v. Burger King, 135 Wn.2d 658, 671 (1998), and generally includes a determination of whether the harm was foreseeable. Rochon v. Saberhagen Holdings, Inc., 2007 WL 2325214, at *1 (Div. 1, 2007).

1. Does a corporation have a duty to prevent "take home" or secondary exposure to asbestos?

Plaintiff contends that under Washington law a corporation has a duty to prevent "take home" exposure to asbestos. She relies on Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649 (Div. 2, 2010) and Rochon v. Saberhagen Holdings, Inc., 2007 WL

[1] Lockheed does not contest for purposes of summary judgment that Plaintiff's father and ex-husband were exposed to asbestos attributable to Lockheed. Defendant's Motion for Summary Judgment at 5; Reply at 1-2.

2325214 (Div. 1, 2007). Lockheed argues that it did not owe Plaintiff a duty of care because she was not an employee or an invitee. Lockheed relies on cases from several other jurisdictions to support its position and argues that, to the extent Arnold suggests otherwise, the Court should conclude that Arnold was wrongly decided.

Because the existence of a common law duty is an issue of state law, the task of this Court is to predict how the Washington State Supreme Court would rule on this question. "'In the absence of [a decision from the Washington State Supreme Court], a federal court must predict how the highest state court would decide the issue, using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.'" Arizona Elec. Power Coop., Inc. v. Berkeley, 59 F.3d 988, 991 (9th Cir. 1995) (quoting In re Kirkland, 915 F.2d 1236, 1239 (9th Cir. 1990)). "However, where there is no convincing evidence that the state supreme court would decide differently, 'a federal court is obligated to follow the decisions of the state's intermediate appellate courts.'" Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996) (quoting Kirkland, 915 F.2d at 1239). For the following reasons, the Court concludes that the Washington State Supreme Court would recognize an employer's duty to take reasonable precautions to protect employee's family members from "take-home" exposure to asbestos.

The issue of whether a company may be liable for "take home" or secondary exposure to asbestos is not an issue of first impression in Washington. In Arnold v. Saberhagen Holdings, Inc., the plaintiffs sued Lockheed and others for asbestos-related injuries stemming from Ruben Arnold's work as an insulation contractor for Lockheed in

the 1960s. 157 Wn. App. 653. The claims were twofold. First, Ruben's estate asserted a primary liability claim for Ruben's exposure to asbestos at Lockheed after he passed away from mesothelioma. Second, Ruben's wife and son asserted injuries from "take home exposure" to asbestos, claiming that Ruben brought home asbestos fibers on his work clothing and exposed them to the dangerous substance.[2] Id. at 653. The plaintiffs asserted that Lockheed "owed common law and statutory or regulatory duties both to [Ruben] and to his family members at home to protect them from the hazards of exposure to asbestos on the premises." Id. at 654.

After the trial court granted summary judgment dismissing the plaintiffs' claims against Lockheed, the Court of Appeals reversed. The focus of the Court's analysis was on Lockheed's duty to Ruben as a landowner and as a general contractor. Id. at 661. However, the Court reversed the summary judgment dismissal of the wife and son's claims for "take-home exposure," concluding that there were material issues of fact for trial. Id. at 653 ("We affirm the trial court's grant of summary judgment to Lockheed with regard to Daniel's primary exposure claim, but reverse with regard to the Arnolds' other claims."), 671. In so holding, the Court concluded that Lockheed "owed common law and statutory or regulatory duties both to [Ruben] ***and to his family members at***

[2] Daniel Arnold, Ruben's son, also brought a claim for direct exposure to asbestos based on his work as an insulator at a Lockheed shipyard for a period in 1979-80. During this period, Daniel wore a protective suit and a respirator. Arnold, 240 F.3d 165. The Court of Appeals affirmed the summary judgment dismissal of Daniel's direct exposure claim. Id. at 174. As a result, only Daniel's claim arising from secondary exposure was addressed in the appellate court's decision.

home to protect them from the hazards of exposure to asbestos on the premises." Id. at 654 (emphasis added).

The Washington State Court of Appeals also addressed the issue of liability for "take home" exposure to asbestos in Rochon v. Saberhagen Holdings. In that case, the Washington State Court of Appeals addressed the same issue raised in the present motion for summary judgment: whether Washington law recognizes an employer's duty of care to prevent secondary or "take home" exposure to asbestos. 2007 WL 2325214 (Div. 1, 2007). There, the plaintiff's husband was exposed to asbestos at work and the plaintiff allegedly inhaled asbestos fibers while laundering her husband's clothing and developed mesothelioma as a result. Id., at *1. The plaintiff brought a claim for personal injury against her husband's employer under a general negligence theory, arguing that the employer breached its duty of care by failing to prevent her "take home" exposure to asbestos. The trial court dismissed plaintiff's claim, concluding that the defendant did not owe her a duty of care. Id. The court of appeals reversed, concluding that the cause of the plaintiff's illness was the employer's own affirmative act of operating its factory in an unsafe manner. Id. at *3. Thus, the Court reasoned, the employer "had a duty to prevent injury from an unreasonable risk of harm that it itself created." Id.

In reaching this conclusion, the Court rejected the defendant's argument that "employer liability does not extend to employees' spouses and homes, and premises liability does not extend outside of the premises." Id. The Court also rejected the argument that extending a duty to employers in "take home" exposure cases "will expose employers to endless litigation." Id. at *4. The Court concluded that liability was

sufficiently limited because liability only extends if the victim "proves that his or her injury was a foreseeable consequence" of the employer's actions. Id. at *5.

Although Rochon is an unpublished decision, it also provides guidance as to the result that the Washington State Supreme Court would likely reach if faced with the same question. The Court notes that Rochon relies on the Court of Appeal's published decision in Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784 (Div. 1, 2005). In that case, the plaintiff alleged claims in negligence and strict product liability against the manufacturer of asbestos insulation. Id. at 787. Plaintiff claimed that he was exposed to asbestos fibers that his father brought home on his clothing and tools from his work as an insulator at an oil refinery and that he developed lung cancer as a result of the exposure. Id. The trial court dismissed plaintiff's claim on summary judgment, concluding that a household member was not a "user" of the product. Id. The Court of Appeals reversed, holding that a household member may be a product user if his exposure was reasonably foreseeable. Id. at 793. While Lunsford involved claims against a manufacturer rather than an employer for "take home" exposure to asbestos and is therefore not directly on point on whether a duty existed in the present case, the court's analysis is nevertheless helpful. The decision demonstrates, as a factual matter, that a family member may be a foreseeable victim of asbestos exposure in a negligence action premised on "take home" exposure.

Lockheed argues that Arnold and Rochon are not good law, resting its position on the Washington Supreme Court's opinion in Simonetta v. Viad Corp., 165 Wn.2d 341 (2008). However, Simonetta does not require a different result. In Simonetta, a former

Navy machinist brought an action against the manufacturer of an evaporator used for the desalinization of seawater. After the evaporator was shipped to the Navy, it was insulated with asbestos products manufactured by another company. Plaintiff claimed that he was required to remove the asbestos insulation and then reinsulate the machine in order to service it. He alleged that he contracted lung cancer as a result of his exposure to asbestos in this manner and that the manufacturer of the evaporator was liable in negligence for failure to warn of the danger. After the trial court dismissed plaintiff's claim, concluding that the evaporator itself did not produce the injury even though the defendant manufacturer knew or should have known that its product would be insulated with asbestos, plaintiff appealed. Id. at 346-47. The Court of Appeals reversed, concluding that the manufacturer had a duty to warn. Defendant appealed and the Washington State Supreme Court granted review. Id. at 347.

On appeal, the Washington Supreme Court addressed the issue "of whether under the common law a manufacturer can be held liable for failure to warn of the hazards of another manufacturer's product." Id. at 345. The Court concluded that because the manufacturer was not within the chain of distribution of the dangerous product, it had no duty to warn the plaintiff of the dangers associated with asbestos insulation. Id. at 363. In reaching its conclusion, the Court noted in a footnote that it agreed with the Court of Appeals that "[f]oreseeability does not create a duty but sets limits once a duty is established." Id. at 349 n.4. Lockheed argues based on this statement that the Supreme Court would not follow Rochon and Arnold, because those cases recognize foreseeability as relevant in determining whether a party has a duty to prevent harm.

This Court does not read the Supreme Court's footnote in Simonetta as a wholesale rejection of the relevance of foreseeability to the analysis of whether a party owes a duty of care in a particular situation. The foreseeability of injury was not disputed in that case. The issue was whether the manufacturer had a duty to warn workers like Simonetta "of a known danger." Simonetta v. Viad Corp., 137 Wn. App. 15, 23, 151 P.3d 1019 (Wash. App. Div. 1, 2007). The fact that the "foreseeability of injury" plays a role in determining whether a party has a duty to protect others from a risk of harm is supported by numerous other opinions from the Washington Supreme Court. See, e.g., Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002) (whether a duty exists depends, in part, on whether the harm that occurred was foreseeable); Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992) (whether a municipality owes a duty in a particular situation generally includes a determination of whether the incident that occurred was foreseeable); King v. City of Seattle, 84 Wn.2d 239, 248, 525 P.2d 228 (1974) ("foreseeability of the risk of harm to the plaintiff is an element of the duty question"); Berglund v. Spokane County, 4 Wn.2d 309, 321, 103 P.2d 355 (1940) (whether county owed duty to negligent driver was a question of foreseeability). There is no indication in Simonetta that the Supreme Court intended to overrule these prior decisions. Lockheed's argument that foreseeability plays no role in the determination of whether a duty exists is not consistent with existing case law in Washington.

Defendant also cites to a number of cases from other jurisdictions where the court concluded that there was no duty to protect the plaintiff from "take home" or secondary asbestos exposure. See, e.g., Holdhampf v. A.C. & Sons, Inc. (In re New York City

Asbestos Litigation), 5 N.Y.3d 486, 493-96 (2005); CSX Tranp., Inc. v. Williams, 278 Ga. 888 (2005); Adams v. Owens-Illinois, Inc., 119 Md. App. 395 (1998). The Court concludes that these cases are not persuasive. "[W]here there is no convincing evidence that the state supreme court would decide differently, 'a federal court is obligated to follow the decisions of the state's intermediate appellate courts.'" Lewis, 87 F.3d at 1545 (quoting Kirkland, 915 F.2d at 1239).

Here, Plaintiff contends that Lockheed owed her a duty to "exercise reasonable care to protect others from an unreasonable risk of harm arising out of its own affirmative act of operating its shipyard in an unsafe manner." Response at 17. This is consistent with the Court's holding in Rochon that a party has a duty to prevent unreasonable risk of harm to others from his or her own actions. 2007 WL 2325214, at *3; see also Restatement Second of Torts, § 302 cmt. a ("Anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."). While recognizing that the Washington Supreme Court has not addressed the issue of whether an employer owes a duty to the family members of its employees to protect them from "take home" exposure to asbestos, the Court concludes that the Washington Supreme Court would acknowledge this duty under the state common law. This conclusion is supported by the Washington State Court of Appeals decisions in Arnold and Rochon holding that an employer has a duty to prevent a plaintiff's injury from "take home" exposure to asbestos. Arnold, 157 Wn. App. 653; Rochon, 2007 WL 2325214, at *4. It is also supported by the thoughtful reasoning of the Tennessee Supreme Court in Satterfield v. Breeding Insulation Co.,

holding that an employer has a duty to use reasonable care to prevent exposure to asbestos fibers by persons who come into close regular contact with its employees contaminated work clothes over an extended period of time. 266 S.W.3d 347, 352 (2008). Lockheed has not provided "convincing evidence" that the state supreme court would reach a different conclusion than the Court of Appeals did in Arnold and Rochon.

2. Was the risk of Plaintiff developing mesothelioma from secondary asbestos exposure foreseeable at the time of exposure?

The second issue raised by Lockheed is whether injury to the Plaintiff was foreseeable. Negligence is conduct that "'falls below the standard established by law for the protection of others against unreasonable risk.'" Hunsley v. Giard, 87 Wn.2d 424, 435 (1976) (quoting W. Prosser, Handbook of the Law of Torts § 43, at 250 (4th ed.1971)). Generally, an actor's conduct falls below the standard of care if it "involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger.'" Id. If a defendant cannot reasonably foresee any injury as the result of his action, the person who created the risk generally does not have a duty to prevent it. Parrilla v. King County, 138 Wn. App. 427, 157 P.3d 879 (2007); accord Rochon, 2007 WL 2325214, at *1-2. "Foreseeability is used to limit the scope of the duty owed because actors are responsible only for the foreseeable consequences of their acts." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 477 (1998) (citing Burkhart v. Harrod, 110 Wn.2d 381, 395 (1988).

In order for harm to be foreseeable, a plaintiff must demonstrate that the defendant knew or should have anticipated an unreasonable risk of danger to the plaintiff or others

in his class. See, e.g., Lockwood v. AC & S, Inc., 44 Wn. App. 330, 366 (1986) (In a products liability action brought on a theory of negligence, a plaintiff must prove that the defendant knew or should have anticipated an unreasonable risk of danger to him or others in his class); J.N. v. Bellingham Sch. Dist., 74 Wn. App. 49, 58 (1994) (Wrongful activities are foreseeable "only if the [defendant] knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.'"); Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 451-52 (1967) (affirming trial court's dismissal of premises liability slip-and-fall claim where there was no evidence that store employees knew or should have known of the slippery condition). Normally, foreseeability is an issue for the trier of fact and the Court will decide foreseeability as a matter of law only where reasonable minds could not differ. Id. (citing Christen v. Coates, 113 Wn.2d 479, 492 (1989)).

In the present case, Lockheed contends that it did not owe a duty to the Plaintiff because the risk of developing mesothelioma from secondary or "take home" exposure to asbestos was not foreseeable in the period of 1948-1958. Lockheed contends that, while the risk to its employees from asbestos exposure may have been foreseeable in the 1950s, the risk to Plaintiff was not foreseeable because the first epidemiological studies tying lung cancer to "take home" asbestos exposure did not appear in the medical literature until the 1960s.[3] Lockheed points to several decisions from other jurisdictions where

[3] The Parties' dispute when the first study was published that would have put Lockheed on "notice" of the risk of "take home" asbestos exposure. Plaintiff argues that a 1960 article by Dr. J.C. Wagner in the British Journal of Industrial Medicine, in which he detailed mesothelioma case studies in South Africa,

courts have concluded that the risk of harm from "take-home" asbestos exposure was not foreseeable until, at the earliest, the publication of epidemiological studies in the 1960s linking mesothelioma to household exposure to asbestos dust. See, e.g., Martin v. Cincinnati Gas & Electric Co., 561 F.3d 439, 444-45 (6th Cir. 2009) (holding that "without any published studies or any evidence of industry knowledge of bystander exposure there is nothing" to support charging defendant with knowledge of risk of "take home" exposure during the period from 1951-63); Exxon v. Altimore, 256 S.W.3d 415, 425 (2008) (reversing award of damages based on secondary exposure that occurred between 1942-1972 because plaintiff failed to present evidence of knowledge of risk to family members of asbestos workers during the relevant time-frame); Alcoa v. Behringer, 235 S.W.3d 456, 460-61 (2007) (not foreseeable in the 1950s to an ordinary employer that used, but did not manufacture, asbestos that intermittent, non-occupational exposure to asbestos could put people at risk of contracting serious illness). This Court conducted an independent review of the case law, and found no case in which a court has concluded that the risk of "take home" exposure was foreseeable in the 1950s.

Plaintiff responds that Lockheed "knew or should have known" of the risk of "take home" exposure during the 1950s because asbestos was a known workplace hazard and the general risk of developing lung cancer from asbestos exposure was well documented

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warned of the risk of secondary exposure. Castleman Decl. at 7. Defendant contends that the first published study of lung cancer resulting from secondary or "take home exposure" was published in 1965 by Newhouse and Thompson. This is a dispute without a difference in the present case because Plaintiff's exposure occurred prior to the publication of either the Wagner study or the Newhouse and Thompson study.

in the medical community at that time. As evidence that Lockheed had knowledge of the risk posed by asbestos exposure in the 1950s, Plaintiff points to the minutes from the Pacific Coast Shipyard Safety Conference attended by Lockheed in 1945, which indicate that the topic of occupational risk from asbestos insulation was covered. See Couture Decl., Ex. 15. In addition, she points to the 1952 Walsh Healy Public Contracts Act ("Act"), which was incorporated into Lockheed's contracts with the United States Navy, Couture Decl., Exs. 16-17, and lists asbestos as a potentially harmful workplace dust and contains various regulations aimed at reducing exposure. Id. Finally, Plaintiff provides the expert report of Dr. Barry Castleman. Castleman Report (Couture Dec., Ex. 19). Dr. Castleman provides an extensive overview of the medical literature concerning asbestosis and asbestos related cancers and opines that the "hazard of asbestos exposure to families of the workers was scientifically knowable before 1954 when Mrs. Hoyt's ex-husband, Mr. Birkholz, began bringing asbestos home on his clothes from his work at the Lockheed shipyard." Id. at 14.

Plaintiff argues that the risk to her was foreseeable because Washington case law has long held that foreseeability does not require knowledge of the specific harm, but rather that "the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant." Christen v. Lee, 113 Wn.2d 479, 492 (1989) (internal quotation omitted); see also Bergland v. Spokane Cnty, 4 Wn.2d 309, 320 (1940) (holding that "if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present."); Rikstad v. Holmberg, 76 Wn.2d 265 (1969) ("[P]ertinent inquiry is not

whether the actual harm was of a particular kind which was expectable. Rather the question is whether the actual harm fell within a general field of danger which should have been anticipated."). Plaintiff contends that because the risk of harm to Lockheed's employees was known in the 1950s, "take home" exposure fell within the "general field of danger."

The Court concludes that the risk of danger from "take home" asbestos exposure to family members of Lockheed employees was not foreseeable in the 1950s. Although Plaintiff's situation is sympathetic, the evidence that Plaintiff proffers to support Lockheed's knowledge of the risk of "take home" asbestos exposure in the 1950s is insufficient to create a material issue of fact for trial. There is no evidence that Lockheed had actual knowledge of the danger of secondary or "take home" exposure until the 1960s. The first case study of non-occupational asbestos exposure was published by Newhouse and Thompson in 1965. Alcoa, 235 S.W.3d at 461. Because there is no evidence of actual knowledge, the question is whether the Defendant should have known of the risk: "that is, was such a risk foreseeable to them based on 'common knowledge at the time and in the community.'" Martin, 561 F.3d at 445 (quoting Restatement (Second) of Torts § 289(a)).

Plaintiff has not proffered any evidence that the risk of "take home" exposure was foreseeable based on common knowledge at the time and in the community. The regulations that Plaintiff cites only address occupational exposure and do not make any mention of bystander exposure. The first regulations that expressly mandated restrictions on allowing asbestos to be carried home on workers clothing were the Occupational

Safety and Hazard Administration regulations instituted in 1972. Alcoa, 235 S.W.3d at 461.

Dr. Castleman's expert report is also insufficient to demonstrate that foreseeability of harm to the plaintiff during the time-frame of her exposure. Dr. Castleman offered the same testimony in Martin v. Cincinnati Gas & Electric Co., agreeing that the first published studies showing a risk of mesothelioma from "take-home" exposure were not published until the 1960s, but testifying that the risk of bystander exposure to family members was "knowable" beginning in the 1950s. 561 F.3d at 444-45. This Court agrees with the Martin court that "it is insufficient that the danger was merely knowable—the knowledge has to have been available to the defendant." Id. at 445. As in Martin, there has been no showing here of any general knowledge of bystander exposure in the industry during the 1950s. Id.

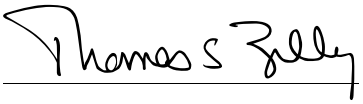
The evidence that Plaintiff cites in opposition to Defendant's motion for summary judgment supports the conclusion that in the 1950s Lockheed knew or had constructive knowledge that asbestos exposure caused lung disease in workers with prolonged exposure. However, nothing that Plaintiff cites could lead a reasonable trier of fact to conclude it was foreseeable that the wife of a Lockheed employee might contract lung cancer as a result of being exposed to asbestos carried home on the clothes of her husband. For this reason, the Court concludes that there is no genuine issue of material fact and Defendant's motion should be granted.

IV. Conclusion

The Court concludes that the Washington Supreme Court would recognize that an employer has a duty to prevent "take home" exposure to asbestos if harm to an employee's family member was reasonably foreseeable. In the present case, Plaintiff has failed to raise a genuine issue of material fact whether Lockheed knew or should have known of the risk posed by "take home" exposure to asbestos during the 1950s when Plaintiff's exposure occurred. Because the risk of harm to the Plaintiff was not reasonably foreseeable to Lockheed, the Court GRANTS the Defendant's motion for summary judgment, docket no. 62, and dismisses the case with prejudice.

IT IS SO ORDERED.

Dated this 26th day of June, 2013.



THOMAS S. ZILLY
United States District Judge