

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LESLIE JACK, et al.,

11 Plaintiffs,

12 v.

13 BORG-WARNER MORSE TEC,
14 LLC, et al.,

15 Defendants.

CASE NO. C17-0537JLR

ORDER DENYING PLAINTIFFS'
MOTION FOR
RECONSIDERATION AND
STAY

16 **I. INTRODUCTION**

17 Before the court is Plaintiffs Leslie Jack and David Jack's (collectively,
18 "Plaintiffs") motion for reconsideration and stay of the court's September 17, 2018, order
19 granting summary judgment to Defendant Union Pacific Railroad Company ("Union
20 Pacific"). (Mot. (Dkt. # 714); *see also* SJ Ord. (Dkt. # 706) at 22-26, 28-30.) Union
21 Pacific opposes the motion. (Resp. (Dkt. # 743).) The court has considered the motion,
22 the parties' submissions concerning the motion, other relevant portions of the record, and

1 the applicable law. Being fully advised,¹ the court DENIES Plaintiffs’ motion for
2 reconsideration and stay for the reasons set forth below.

3 **I. BACKGROUND**

4 The court extensively detailed the factual background of Plaintiffs’ claims against
5 Union Pacific in its order on the parties’ summary judgment motions. (*See* SJ Ord. at
6 4-7, 22-26, 28-30.) Here, the court recounts only those facts relevant to the instant
7 motion.

8 Plaintiffs allege that as a child and a teenager, Mr. Jack was exposed to asbestos
9 utilized by Union Pacific, his father’s employer. (*See* SAC ¶ 42B; Pl. MSJ Union Pacific
10 (Dkt. # 509) at 3.) Plaintiffs claim that Mr. Jack (1) was exposed to asbestos dust carried
11 home on his father’s work clothes (“secondary exposure claim”), and (2) suffered
12 bystander asbestos exposure when he accompanied his father to work on various
13 occasions between 1949 and 1952 (“bystander exposure claim”). (*See* SJ Ord. at 4-5; *see*
14 *also* Pl. MSJ Union Pacific at 3.) Union Pacific moved for summary judgment on
15 Plaintiffs’ secondary exposure claim on the ground that in and before 1955—the last year
16 Mr. Jack lived in his father’s home—the risks of secondary exposure to family members
17 of asbestos-exposed employees were not reasonably foreseeable. (Union Pacific MSJ
18 (Dkt. # 476) at 17-19.) Additionally, Union Pacific moved for summary judgment on
19 Plaintiffs’ bystander exposure claim on the ground that Plaintiffs could show neither that

20 //

21 _____
22 ¹ No party asked for oral argument, and the court finds this motion appropriate for
disposition without it. *See* Local Rules W.D. Wash. LCR 7(b)(4).

1 Mr. Jack was exposed to asbestos on Union Pacific premises nor that any such exposure
2 could have been a substantial factor in causing Mr. Jack’s mesothelioma. (*Id.* at 10-17.)

3 In opposing summary judgment on the secondary exposure claim, Plaintiffs relied
4 on Dr. Barry Castleman’s expert testimony on historical awareness of asbestos-related
5 hazards. (*See* Pl. SJ Resp. (Dkt. # 611) at 3-4, 6-7.) Plaintiffs argued that Dr.
6 Castleman’s deposition testimony showed that Union Pacific should have foreseen the
7 risks of secondary exposure during the years Mr. Jack accompanied his father to work.
8 (*See* Pl. SJ Resp. at 6-7.) Dr. Castleman testified that as early as 1913, some industrial
9 employers were aware that hazardous materials could cling to employees’ work clothes
10 and contaminate their homes. (*Id.* at 6 (citing Adams Decl. (Dkt. # 612) ¶ 2, Ex. I
11 (“Castleman Dep.”) at 19:21-21:16).) Additionally, Dr. Castleman testified that “in the
12 1950s,” Dr. Wilhelm Hueper, a leading authority on occupational cancer, encouraged
13 employers to “take protective measures to prevent . . . carcinogenic materials from going
14 home.” (*Id.* at 7 (citing Castleman Dep. at 22:7-21).)

15 In opposing summary judgment on the bystander exposure claim, Plaintiffs relied
16 primarily on Mr. Jack’s recollections of the materials he observed on Union Pacific
17 premises. (Pl. SJ Resp. at 2-3, 5-6.) Mr. Jack testified that, on approximately six to eight
18 occasions, he observed his father and other workers cut, install, and remove what he later
19 believed to be cement piping and insulation. (*See* Pl. SJ Resp. at 2-3 (citing Adams Decl.
20 (Dkt. # 612) ¶ 2, Ex. C (“Jack Perp. Dep.”) at 18:17-31:12.) Notably, Plaintiffs’ response
21 did not directly address Union Pacific’s contention that Plaintiffs’ evidence was
22 insufficient to “establish their threshold burden of [asbestos] exposure” on Union Pacific

1 premises. (Union Pacific MSJ at 10; *see generally* Pl. SJ Resp.) Rather, Plaintiffs
2 summarily claimed that Mr. Jack “saw Union Pacific workers cutting asbestos-cement
3 pipe,” citing only Mr. Jack’s deposition testimony—which never positively identified
4 those materials as containing asbestos—for support. (Pl. SJ Resp. at 3 (citing Jack Perp.
5 Dep. at 20:13-21:22).) Plaintiffs did, however, attach to their response excerpts of the
6 deposition testimony of Dr. Carl Brodtkin, a physician of occupational medicine whom
7 Plaintiffs have retained as an expert witness. (*See* Adams Decl. (Dkt. # 612) ¶ 2, Ex. F
8 (“Brodtkin Dep.”).) In the deposition excerpts Plaintiffs provided, Dr. Brodtkin opined
9 that in light of the period of Mr. Jack’s father’s employment, as well as Mr. Jack’s
10 descriptions of the pipes and insulation he observed, Mr. Jack’s father likely worked with
11 asbestos-containing cement and insulation at Union Pacific. (Brodtkin Dep. at
12 140:11-141:13.) To support that opinion, Dr. Brodtkin cited the testimony of an industrial
13 hygienist who, for purposes of an unrelated case, documented asbestos use in the
14 Burlington Northern Santa Fe Railway system. (*Id.* at 137:10-139:5.) The industrial
15 hygienist upon whom Dr. Brodtkin relied, however, did not specifically document
16 asbestos use at Union Pacific during this period. (*See id.*)

17 In its order of September 17, 2018, the court granted Union Pacific’s motion for
18 summary judgment. (*See* SJ Ord. at 22-26, 28-30.) With respect to Plaintiffs’ secondary
19 exposure claim, the court found that no reasonable juror could conclude that Union
20 Pacific knew or should have known in and before 1955 of the risks that take-home

21 //

22 //

1 exposure posed to employees' family members.² (SJ Ord. at 26.) Because the harm Mr.
2 Jack allegedly suffered from secondary exposure was not foreseeable during the relevant
3 period, the court concluded that Plaintiffs' negligence claim against Union Pacific failed
4 as a matter of law. (*See id.* at 23-26.) In so concluding, the court emphasized Dr.
5 Castleman's testimony that as of 1955, there was "practically nothing in print" on the
6 hazards of secondary exposure. (*Id.* at 25 (quoting Castleman Dep. at 19:20).) As to
7 Plaintiffs' bystander exposure claim, the court found that the record did not reasonably
8 support the conclusion that Mr. Jack was actually exposed to asbestos when he
9 accompanied his father to work. (*Id.* at 29-30.) Even considering Dr. Brodtkin's opinion
10 testimony, the court concluded that Plaintiffs failed to adduce any evidence that located
11 asbestos-containing products at the Union Pacific workplaces Mr. Jack visited between
12 1949 and 1952. (*Id.*)

13 On September 21, 2018, Plaintiffs filed a motion for reconsideration and stay of
14 the court's summary judgment order. (*See Mot.*) Plaintiffs attached to the motion a
15 voluminous compilation of exhibits. (*See Breen Decl.* (Dkt. # 715) ¶ 2.) Of the 15
16 exhibits Plaintiffs submitted in support of the instant motion (*see id.*), just one
17 accompanied Plaintiffs' response to Union Pacific's motion for summary judgment (*see*
18 *Adams Decl.* (Dkt. # 612) ¶ 2.) Further, Union Pacific contends that "none of [these]

19 //

21 ² At summary judgment, for purposes of determining whether Plaintiffs' secondary
22 exposure claim survived as a matter of law, the court assumed that Mr. Jack's father was exposed
to asbestos on Union Pacific premises. (SJ Ord. at 22 n.16.)

1 exhibits were identified in any pretrial discovery response or initial disclosures.” (Resp.
2 at 9.) If these representations are accurate, they represent potentially sanctionable
3 conduct by Plaintiffs’ lawyers.

4 II. ANALYSIS

5 A. Standards Governing Motions for Reconsideration

6 Motions for reconsideration are disfavored. Local Rules W.D. Wash. LCR
7 7(h)(1). The court will ordinarily deny such motions unless the moving party
8 demonstrates (1) manifest error in the prior ruling, or (2) new facts or legal authority
9 which could not have been brought to the court’s attention earlier with reasonable
10 diligence. *Id.* A party may not raise as a basis for reconsideration arguments or facts that
11 it reasonably could have raised but did not raise prior to the contested ruling. *See Marlyn*
12 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)
13 (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)) (“A
14 motion for reconsideration ‘may not be used to raise arguments or present evidence for
15 the first time when they could reasonably have been raised earlier in the litigation.’”); *see*
16 *also Castello v. City of Seattle*, No. C10-1457MJP, 2011 WL 219671, at *4 (W.D. Wash.
17 Jan. 24, 2011) (“[B]ecause this is an entirely new argument, there can be no question of
18 ‘manifest error in the prior ruling;’ the Court cannot have ruled in error on an argument
19 never before raised.”).

20 B. Plaintiffs’ Secondary Exposure Claim

21 Plaintiffs argue that the court committed manifest error in granting Union Pacific’s
22 motion for summary judgment on Plaintiffs’ secondary exposure claim for two reasons:

1 (1) the court overlooked pertinent evidence in Dr. Castleman’s expert report, and (2) the
2 court’s conclusion on the foreseeability of the risks of secondary exposure is inconsistent
3 with other authority. (Mot. at 6-7.)

4 Plaintiffs first contend that the court’s order “did not address a variety of evidence
5 discussed at pages 11-12 of [Dr.] Castleman[’s] report.” (Mot. at 6-7.) Significantly,
6 Plaintiffs did not cite to or submit Dr. Castleman’s report when opposing Union Pacific’s
7 motion for summary judgment. (*See generally* Pl. SJ Resp; Adams Decl. (Dkt. # 612)
8 ¶ 2.) Union Pacific, rather, attached the report to its reply. (*See* Moore Decl. (Dkt.
9 # 635), ¶ 2, Ex. A (“Castleman Rep.”).)³ In moving for reconsideration, Plaintiffs do not
10 acknowledge that they failed to submit Dr. Castleman’s report on their own accord. (*See*
11 *generally* Mot. at 6-7.) In effect, they now seek a second bite at the apple on the basis of
12 evidence they neglected at the summary judgment phase. *See Trade Assoc., Inc. v.*
13 *Fusion Tech., Inc.*, No. C09-5804RJB, 2011 WL 13195953, at *1 (W.D. Wash. Mar. 15,
14 2011) (“Neither the Local Civil Rules nor the Federal Rule of Civil Procedure, which
15 allow for a motion for reconsideration, is intended to provide litigants with a second bite
16 at the apple.”).

17 In any event, the evidence Plaintiffs highlight does not provide a basis for
18 reconsideration. Plaintiffs’ motion draws attention to two documents featured in Dr.
19 Castleman’s report: (1) a scientific article, published in 1946, that recommended that

21 ³ Plaintiffs previously submitted Dr. Castleman’s report in conjunction with a *Daubert*
22 motion (*see* Adams Decl. (Dkt. # 564) ¶ 2, Ex. A), as the court acknowledged in its order on
summary judgment (*see* SJ Ord. at 17).

1 workers handling carcinogenic materials such as asbestos be provided with showers and
2 rooms for storing street clothes, and (2) a United States Department of Labor document,
3 issued in 1952, that required that federal contractors be provided facilities to prevent the
4 transfer of harmful substances from work clothes to street clothes. (Mot. at 7 n.22 (citing
5 Castleman Rep. at 11-12).)⁴ The court already considered these authorities and found
6 them unpersuasive. (See SJ Ord. at 25 (citing Castleman Rep. at 11-12).) Neither of
7 these documents addresses the risks of secondary exposure to the families of asbestos-
8 exposed workers; and neither casts doubt on Dr. Castleman’s own admission that if in
9 1955 Union Pacific wanted to research the hazards of secondary exposure, it would have
10 found “practically nothing in print.” (See SJ Ord. at 25 (quoting Castleman Dep. at
11 19:20).) The court remains persuaded that no reasonable juror could charge Union
12 Pacific with constructive knowledge of the risks of secondary exposure at a time when
13 scientific and public health experts had yet to draw causal links between workers’ direct
14 exposure and family members’ illnesses. (See SJ Ord. at 26.)

15 Second, Plaintiffs assert that the court’s analysis is “inconsistent” with two
16 non-binding authorities: *Kesner v. Superior Court of Alameda County*, 384 P.3d 284
17 (Cal. 2016) and *Olivio v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006). (Mot. at 7
18 n.23.) Because Plaintiffs failed to cite these cases at summary judgment (*see generally*
19 Pl. SJ Resp.), they do not merit consideration here (*see* Local Rules W.D. Wash. LCR
20 7(h)(1)). Moreover, both cases are distinguishable from Plaintiffs’ claims. The *Kesner*

21
22 ⁴ The court cites the page number at the lower right-hand corner of Dr. Castleman’s report.

1 court considered allegations of take-home exposure dating after 1973. *See* 384 P.3d at
2 289. And *Olivio* implicated secondary exposure claims that stretched from the 1940s to
3 the 1980s. *See* 895 A.2d at 1149. In sum, Plaintiffs provide no reason for the court to
4 reconsider its conclusion that the “weight of existing law” provides that the dangers of
5 secondary asbestos exposure were not foreseeable in and before 1955. (SJ Ord. at 26
6 (citing *Hoyt v. Lockheed Shipbuilding Co.*, No. C12-1648TSZ, 2013 WL 3270371, at *7
7 (W.D. Wash. Jun. 26, 2013), *aff’d sub nom. Hoyt v. Lockheed Martin Corp.*, 540 F.
8 App’x 590 (9th Cir. 2013).)

9 Because Plaintiffs have not shown that the court committed “manifest error,” *see*
10 Local Rules W.D. Wash. LCR 7(h)(1), the court declines to reconsider its ruling granting
11 Union Pacific’s motion for summary judgment on Plaintiffs’ secondary exposure claim.

12 **C. Bystander Exposure Claim**

13 Plaintiffs challenge the court’s ruling on the bystander exposure claim on multiple
14 grounds. First, Plaintiffs argue that “the [c]ourt’s conclusion that Dr. Brodkin’s opinion
15 [on the likelihood of asbestos use at Union Pacific] could not survive a *Daubert*
16 challenge” was manifest error because the court did not afford Plaintiffs notice and an
17 opportunity to respond. (Mot. at 2.) Relatedly, Plaintiffs contend that they did not have
18 cause to submit additional evidence of asbestos use at Union Pacific because Union
19 Pacific “did not challenge Dr. Brodkin’s opinions on the asbestos content of products on
20 UP premises.” (*Id.* at 3.) Finally, Plaintiffs argue that “Dr. Brodkin’s evidence together
21 with Mr. Jack’s testimony was sufficient to defeat [Union Pacific’s] motion.” (*Id.* at 5.)
22 The court addresses these arguments in turn.

1 In their motion for reconsideration, Plaintiffs misconstrue the court’s treatment of
2 Dr. Brodkin’s opinion on the likelihood of asbestos use at Union Pacific. Contrary to
3 Plaintiffs’ assertion, the court did not discount Dr. Brodkin’s testimony on the basis of a
4 *sua sponte* challenge under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
5 Rather, as the body of the court’s order makes clear, the court considered Dr. Brodkin’s
6 opinion testimony in conjunction with Plaintiffs’ other evidence of exposure. (*See* SJ
7 Ord. at 28-30.) Even in light of Dr. Brodkin’s opinion, the court concluded, Plaintiffs’
8 evidence was insufficient to raise a reasonable inference that Mr. Jack was actually
9 exposed to asbestos on Union Pacific premises. (*See id.*) The court also suggested that
10 Dr. Brodkin’s opinion testimony lacked sufficient factual foundation to ensure its
11 survival under Federal Rule of Evidence 702, but did not reach this issue in a dispositive
12 sense. (*See id.* at 30 n.18.) In short, the court neither subjected Dr. Brodkin’s opinion to
13 a *Daubert* analysis nor excluded it from consideration; it simply concluded that Dr.
14 Brodkin’s opinion, along with Plaintiffs’ other exposure evidence, was too imprecise to
15 establish a “reasonable connection” between Mr. Jack’s injury and Union Pacific’s
16 conduct. (SJ Ord. at 30 (quoting *Lockwood v. AC & S, Inc.*, 744 P.2d 605, 612 (Wash.
17 1987).)

18 The court rejects as meritless Plaintiffs’ argument that they were entitled to
19 “notice of a challenge to evidence from Dr. Brodkin and an opportunity to respond.”
20 (Mot. at 2.) Plaintiffs should have foreseen that the court would examine the sufficiency
21 of their exposure evidence, including Dr. Brodkin’s testimony, at the summary judgment
22 phase. To begin, Union Pacific’s motion for summary judgment expressly disputed that

1 Plaintiffs' evidence showed that Mr. Jack was exposed to asbestos on Union Pacific
2 premises. (*See* Union Pacific MSJ at 10 (“Union Pacific disputes that Plaintiffs can
3 establish their threshold burden of exposure.”); *id.* at 15 (“[T]here is no evidence proving
4 [Mr. Jack’s] father actually worked with asbestos containing products as part of his
5 regular job duties.”); *id.* at 16 (“[T]here is no admissible evidence in this case that Mr.
6 Jack’s father worked with/around asbestos while employed by Union Pacific.”).)
7 Moreover, Washington law makes clear that a plaintiff in an asbestos suit cannot
8 establish proximate causation without first showing that the plaintiff was actually
9 exposed to asbestos as a result of the defendant’s conduct. *See, e.g., Lockwood*, 744 P.2d
10 at 612-613. In sum, Plaintiffs’ suggestion that they were blindsided by the court’s ruling
11 on the exposure issue rings hollow. The court thus declines to consider the reams of new
12 evidence Plaintiffs submit here. *See Marlyn Nutraceuticals, Inc.*, 571 F.3d at 880; Local
13 Rule W.D. Wash. LCR 7(h)(1). Plaintiffs’ effort to more clearly define Dr. Brodkin’s
14 testimony and locate asbestos on Union Pacific premises (*see* Breen Decl. (Dkt. # 715)
15 ¶ 2, Ex. A, C-O) comes too late.

16 Finally, the court turns to Plaintiffs’ argument that “Dr. Brodkin’s evidence
17 together with Mr. Jack’s testimony was sufficient to defeat [Union Pacific’s] motion.”
18 (Mot. at 5.) On this point, Plaintiffs offer no evidence or authority that the court did not
19 consider at the summary judgment phase. Aside from Mr. Jack’s recollections, Dr.
20 Brodkin’s deposition testimony was the only evidence Plaintiffs furnished to support
21 their claim that Mr. Jack’s father worked with asbestos at Union Pacific. (*See* Pl. SJ
22 Resp. at 3 (citing Brodkin Dep. at 135:12-136:3, 137:10-18, 138:20-139:8,

1 140:11-141:13).⁵ In the deposition excerpts Plaintiffs submitted, Dr. Brodtkin referenced
2 just one specific authority when explaining his opinion on probable asbestos use at Union
3 Pacific: a survey of a different railway system conducted in the 1980s for purposes of
4 other litigation. (*See* Pl. SJ Resp. at 3 (citing Brodtkin Dep. at 135:12-136:3, 137:10-18,
5 138:20-139:8, 140:11-141:13).)⁶ This survey did not document asbestos use at Union
6 Pacific during the relevant period. (*See* Brodtkin Dep. at 138:20-139:8.) More generally,
7 Plaintiffs adduced no specific facts that located asbestos on Union Pacific premises at any
8 point in Mr. Jack’s lifetime. (*See* SJ Ord. at 29-30; *see also generally* Pl. SJ Resp.) The
9 court properly concluded that absent such facts, Plaintiffs could not satisfy their threshold

10 //

11 _____
12 ⁵ In their response to Union Pacific’s motion, Plaintiffs also provided a photograph of an
13 unidentified asbestos-cement pipe (Adams Decl. (Dkt. # 612) ¶ 2, Ex. D) and a photograph of a
14 hand-drawn cartoon commemorating Mr. Jack’s father’s retirement, which shows him digging
15 for a leaky underground pipe (*id.* ¶ 2, Ex. E). Neither of these exhibits situated asbestos on
16 Union Pacific premises.

17 ⁶ In their motion for reconsideration, Plaintiffs argue that “Dr. Brodtkin referenced, both
18 in his report submitted to the [c]ourt and in his deposition, medical/industrial hygiene articles
19 that discuss widespread use of asbestos in myriad applications in the railroad industry in the
20 relevant time period.” (Mot. at 4.) But at summary judgment, Plaintiffs failed to provide the
21 court with the parts of Dr. Brodtkin’s deposition that discuss those articles. (*See* Adams Decl.
22 (Dkt. # 612) ¶ 2, Ex. F (containing only pages 10-13 and 134-141 of Dr. Brodtkin’s deposition;
submitted in opposition to motion for summary judgment); *see also* Breen Decl. (Dkt. # 715) ¶ 2,
Ex. B (containing pages 150-153 of Dr. Brodtkin’s deposition, which discuss the industrial
hygiene articles; submitted in support of motion for reconsideration).) Plaintiffs do not explain
why they could not have submitted these portions of Dr. Brodtkin’s deposition earlier, and the
court declines to consider them. *See* Local Rules W.D. Wash. LCR 7(h)(1). Although Plaintiffs
submitted Dr. Brodtkin’s voluminous report at summary judgment, they failed to identify where
Dr. Brodtkin relied on the above-mentioned articles. (*See generally* Pl. Resp. SJ.) As the court
has previously noted, “judges are not like pigs, hunting for truffles buried in briefs.” *Indep.*
Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) (quoting *United States v.*
Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)). Even if Plaintiffs had specifically identified where
the articles featured in Dr. Brodtkin’s report, without further explanation, the report’s bare-bones
references (*see* Adams Decl. (Dkt. # 612) ¶ 2, Ex. H) would have been of little help to the court.

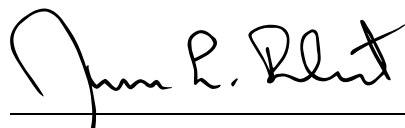
1 burden to show that Mr. Jack was exposed to asbestos as a result of Union Pacific's
2 conduct. (*See* SJ Ord. at 29-30.)

3 In sum, Plaintiffs have not shown that the court committed "manifest error" in
4 granting Union Pacific's motion for summary judgment on the bystander exposure claim.
5 *See* Local Rules W.D. Wash. LCR 7(h)(1). Accordingly, the court declines to reconsider
6 its ruling.

7 **III. CONCLUSION**

8 For the foregoing reasons, the court DENIES Plaintiffs' motion for
9 reconsideration and stay of its order granting summary judgment to Union Pacific (Dkt.
10 # 714).

11 Dated this 30th day of September, 2018.

12
13 

14 The Honorable James L. Robart
15 U.S. District Court Judge
16
17
18
19
20
21
22