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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONALD VARNEY AND MARIA  
VARNEY, husband and wife,

Plaintiffs,

v.

AIR & LIQUID SYSTEMS  
CORPORATION; et al.,

Defendants.

CASE NO. C18-5105 RJB

ORDER GRANTING DEFENDANT  
WEIR VALVES & CONTROLS  
USA, INC.’S MOTION FOR  
SUMMARY JUDGMENT

This matter comes before the Court on the Motion for Summary Judgment of Defendant Weir Valves & Controls USA, Inc. d/b/a Atwood & Morrill Co., Inc.’s (“Weir Valves”). Dkt. 363. The Court is familiar with the records and files herein and all documents filed in support of and in opposition to the motion.

For the reasons stated below, Weir Valves’ Motion for Summary Judgment (Dkt. 219) should be granted.

1 **I. BACKGROUND**

2 The above-entitled action was commenced in Pierce County Superior Court on February  
3 2, 2018. Dkt. 1, at 2. Notice of removal from the state court was filed with this Court on  
4 February 12, 2018. Dkt. 1.

5 In the operative complaint, Plaintiffs allege that Plaintiff Donald Varney (“Mr. Varney”),  
6 now deceased, was exposed to asbestos while working as a marine machinist at the Puget Sound  
7 Naval Shipyard and Hunter’s Point Naval Shipyard, and through personal automotive exposure  
8 and from his father’s automotive exposure. Dkt. 342, at 5. “Plaintiffs claim liability based upon  
9 the theories of product liability, including not but limited to negligence, strict product liability  
10 ..., conspiracy, premises liability, the former RCW 49.16.030, and any other applicable theory of  
11 liability, including, if applicable, RCW 7.72 et seq.” Dkt. 342, at 5; *see generally* § II(D), *infra*.

12 Mr. Varney passed away from mesothelioma on February 8, 2018 (Dkt. 220-1), before  
13 being deposed (Dkt. 245-2). On December 7, 2018, one day before his passing, Mr. Varney  
14 apparently signed an affidavit purportedly identifying several asbestos-containing materials that  
15 he worked with and that were manufactured by various defendants. Dkt. 342.

16 Dr. John Maddox, Plaintiffs’ causation expert in this matter, reviewed Mr. Varney’s  
17 medical records and his aforementioned affidavit. Dkt. 309, at 4. Dr. Maddox, relying, in part, on  
18 Mr. Varney’s affidavit, opined that Mr. Varney’s “lethal malignant pleural mesothelioma was  
19 caused by his cumulative asbestos exposures to a variety of component exposures.” Dkt. 313-11,  
20 at 4.

21 Numerous defendants, in their respective motions for summary judgment and in  
22 additional briefs, raised issues regarding the admissibility of Mr. Varney’s affidavit and Dr.  
23 Maddox’s opinion. *See, e.g.*, Dkts. 217; 219; 237; 257; 281; 285; 363; 378; 380; 382; and 384.

1 They argued that the affidavit, and Dr. Maddox’s opinion relying thereon, were inadmissible as  
2 evidence. *Id.*

3 The Court invited additional briefing regarding the admissibility of Mr. Varney’s  
4 affidavit and Dr. Maddox’s opinion. Dkt. 255. Upon review of the additional briefing, the Court  
5 ordered that an evidentiary hearing be held to determine the admissibility of the affidavit and  
6 opinion. Dkt. 300. After a mini-trial lasting more than two days, the Court held that the affidavit  
7 and opinion are inadmissible as evidence regarding summary judgment motions and at trial. Dkt.  
8 361, at 1.

9 Weir Valves argues that, because the affidavit and opinion are inadmissible, pursuant to  
10 FRCP 56, “there is no evidence supporting any of plaintiffs’ ... claims ... or ‘any other  
11 applicable theory of liability.’” Dkt. 363, at 2.

## 12 **II. DISCUSSION**

### 13 **A. SUMMARY JUDGMENT STANDARD**

14 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
15 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
16 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is  
17 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
18 showing on an essential element of a claim in the case on which the nonmoving party has the  
19 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of  
20 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for  
21 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
22 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some  
23 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(d). Conversely, a genuine dispute over a  
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1 material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
2 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby,*  
3 *Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*  
4 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

5         The determination of the existence of a material fact is often a close question. The court  
6 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
7 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*  
8 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor  
9 of the nonmoving party only when the facts specifically attested by that party contradict facts  
10 specifically attested by the moving party. The nonmoving party may not merely state that it will  
11 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial  
12 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
13 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not  
14 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990).

15         **B. WASHINGTON STATE SUBSTANTIVE LAW APPLIES**

16         Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in  
17 diversity jurisdiction apply state substantive law and federal procedural law. *Gasperini v. Center*  
18 *for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

19         **C. SUMMARY JUDGMENT ANALYSIS**

20             1. Washington Products Liability Standard

21             “Generally, under traditional product liability theory, the plaintiff must establish a  
22 reasonable connection between the injury, the product causing the injury, and the manufacturer of  
23 that product. In order to have a cause of action, the plaintiff must identify the particular  
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1 manufacturer of the product that caused the injury.” *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235,  
2 245–47 (1987) (quoting *Martin v. Abbott Laboratories*, 102 Wn.2d 581, 590 (1984)).

3 Because of the long latency period of asbestosis, the plaintiff’s  
4 ability to recall specific brands by the time he brings an action will  
5 be seriously impaired. A plaintiff who did not work directly with  
6 the asbestos products would have further difficulties in personally  
7 identifying the manufacturers of such products. The problems of  
8 identification are even greater when the plaintiff has been exposed  
9 at more than one job site and to more than one manufacturer’s  
10 product. [] Hence, instead of personally identifying the  
11 manufacturers of asbestos products to which he was exposed, a  
12 plaintiff may rely on the testimony of witnesses who identify  
13 manufacturers of asbestos products which were then present at his  
14 workplace.

15 *Id.* (citations omitted).

16 *Lockwood* prescribes several factors for courts to consider when “determining if there is  
17 sufficient evidence for a jury to find that causation has been established”:

- 18 1. Plaintiff’s proximity to an asbestos product when the exposure occurred;
- 19 2. The expanse of the work site where asbestos fibers were released;
- 20 3. The extent of time plaintiff was exposed to the product;
- 21 4. The types of asbestos products to which plaintiff was exposed;
- 22 5. The ways in which such products were handled and used;
- 23 6. The tendency of such products to release asbestos fibers into the air depending on their  
24 form and the methods in which they were handled; and
7. Other potential sources of the plaintiff’s injury.

*Id.* at 248–49.

## 2. Washington Products Liability Analysis

Plaintiffs have not offered evidence admissible for summary judgment establishing a  
reasonable connection between Mr. Varney’s mesothelioma, products manufactured by Weir

1 Valves, and Weir Valves itself. Plaintiffs have pointed to historical evidence showing that Weir  
2 Valves' valves were supplied with asbestos-containing gaskets and packing and that it sold them  
3 without warning of the dangers of asbestos exposure. *See* Dkt. 392, at 2–9. However, crucially,  
4 Plaintiffs have not offered admissible evidence showing, even viewed in a light most favorable  
5 to Plaintiffs, that Weir Valves or products that it manufactured caused, or a were a substantial  
6 factor that caused, Mr. Varney's mesothelioma.

7         Despite the Court's April 17, 2019 ruling excluding this evidence, the Plaintiffs  
8 apparently still seek to use Mr. Varney's affidavit and Dr. Maddox's report to establish causation  
9 and a reasonable connection between Mr. Varney's mesothelioma, Weir Valves' products, and  
10 Weir Valves. *See* Dkt. 392, at 2–4. They state that they “refer to these documents not only in the  
11 hope that they Court will reconsider its decision to exclude [them,] but also to ensure the record  
12 is complete for appellate purposes.” *Id.*, at 2. The Plaintiffs maintain that there is “considerable  
13 circumstantial evidence that Mr. Varney was exposed to asbestos attributable to Weir” Valves.  
14 Dkt. 392, at 10. The Plaintiffs then point to portions of Mr. Varney's affidavit, where he  
15 “declared before his death that he was regularly exposed to asbestos dust generated from the  
16 removal and replacement of gaskets and packing associated with valves and pumps . . . [that] the  
17 work . . . [was] . . . very dusty. . . [and that it] created dust which Mr. Varney regularly  
18 breathed.” *Id.* The Plaintiffs assert that Weir Valves' corporate representative confirmed it  
19 “sold, shipped and manufactured valves which used asbestos-containing gaskets and asbestos  
20 packing.” *Id.* They note that their “causation expert Dr. Maddox has opined that Mr. Varney's  
21 repetitive, high, and prolonged exposures to asbestos gaskets and packing were sufficient to  
22 cause Mr. Varney's mesothelioma.” *Id.* The Plaintiffs argue that a reasonable jury could  
23 conclude that Mr. Varney was exposed to asbestos products supplied by Weir Valves. *Id.*, at 9.

1 To the extent that the Plaintiffs move for reconsideration of the April 17, 2019 order  
2 excluding Mr. Varney’s affidavit and Dr. Maddox’s report, the motion should be denied. Aside  
3 from being untimely, (under W.D. Wash. Local Rule 7 (h)(2) motions for reconsideration are to  
4 be filed within 14 days after the order to which they relate, and this motion was filed on May 6,  
5 2019 – 5 days too late), pursuant to Local Rule 7 (h)(1), “motions for reconsideration are  
6 disfavored. The court will ordinary deny such motions in the absence of a showing of manifest  
7 error in the prior ruling or a showing of new facts or legal authority which could not have been  
8 brought to its attention earlier.” The Plaintiffs fail to make such a showing. They do not point to  
9 “a manifest error in the prior ruling,” or to “new facts or legal authority which could not have  
10 been brought to [the court’s] attention earlier.” Mr. Varney’s affidavit and Dr. Maddox’s  
11 opinion are inadmissible as evidence in regard to summary judgment or at trial.

12 In the absence of Mr. Varney’s affidavit and Dr. Maddox’s opinion as evidence in regard  
13 to summary judgment, and in consideration of the *Lockwood* factors above, there is nothing the  
14 Court can use to determine whether there is sufficient evidence for a jury to find that causation—  
15 a necessary element of Plaintiffs’ claim—has been established.

16 Therefore, the Court should grant Weir Valves’ Motion for Summary Judgment (Dkt.  
17 237) and dismiss Weir Valves from this case.

#### 18 **D. OTHER POSSIBLE CLAIMS**

19 The operative complaint’s causes of action are vague. *See* Dkt. 342, at 5 (“Plaintiffs  
20 claim liability based upon the theories of product liability, including not but limited to  
21 negligence, strict product liability ..., conspiracy, premises liability, the former RCW 49.16.030,  
22 and any other applicable theory of liability, including, if applicable, RCW 7.72 et seq.”). Many  
23 theories or claims can be gleaned therefrom, but, in response to Weir Valves’ Motion for  
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1 Summary Judgment, Plaintiffs apparently limit their discussion of claims and theories to just  
2 Washington products liability. *See* Dkt. 392, at 9–12. In this order, the Court has done the same.  
3 *See* § (II)(C), *supra*.

4 Plaintiffs’ vague complaint and limited discussion are problematic. For example, in  
5 Defendant Warren Pumps, LLC’s (“Warren”) Motion for Summary Judgment, filed on April 24,  
6 2019, and noted for May 17, 2019, Warren appears to couch its arguments principally in  
7 maritime law. *See* Dkt. 378. Warren appears to discuss Washington products liability law only as  
8 an alternative theory of the Plaintiffs. *See* Dkt. 378.

9 In the instant motion, Weir Valves’ discussion appears limited to Washington products  
10 liability, causation and *Lockwood*. Dkt. 363. With the exception of Warren, the defendants  
11 moving for summary judgment appear to have couched their arguments in Washington products  
12 liability, focusing primarily on the *Lockwood* factors above.

13 Regardless, causation is an essential element under either Washington products liability  
14 or maritime-based tort law (see, e.g., *Lockwood*, 109 Wn.2d at 235; *Lindstrom v. A-C Product*  
15 *Liability Trust*, 424 F.3d 488, 492) (6th Cir. 2005)), and Plaintiffs have not offered evidence  
16 showing that causation has been established. *See* § II(c)(2), *supra*.

#### 17 **E. ADDITIONAL COMMENTARY**

18 The Court’s order here is a sad one. Mr. Varney passed away from mesothelioma, likely  
19 as a result of his work at the shipyards. Given the circumstances of his passing, it appears that  
20 there is no evidence to support a claim available against the industry in which Mr. Varney  
21 worked. The Court cannot find causation without evidence, and there is none here, under the  
22 Federal Rules of Evidence.

### 23 **III. ORDER**

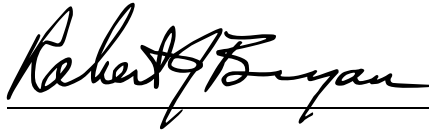


1 Therefore, it is hereby **ORDERED** that:

- 2 • To the extent that the Plaintiffs move for reconsideration of the April 17, 2019  
3 order excluding Mr. Varney's affidavit and Dr. Maddox's report (Dkt. 392), the  
4 motion should be denied.
- 5 • Defendant Weir Valves & Controls USA, Inc. d/b/a Atwood & Morrill Co., Inc.'s  
6 Motion for Summary Judgment (Dkt. 363) is **GRANTED**; and
- 7 • Weir Valves & Controls USA, Inc. d/b/a Atwood & Morrill Co., Inc. is  
8 **DISMISSED** from the case.

9 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
10 to any party appearing pro se at said party's last known address.

11 Dated this 13<sup>th</sup> day of May, 2019.

12 

13 ROBERT J. BRYAN  
14 United States District Judge