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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

ELLEN N. WHITING [FN1] vs. CBS CORPORATION & another. [FN2]

➔12-P-329➔

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

This appeal by the plaintiff is from a December 21, 2011, Superior Court summary judgment for the defendants CBS Corporation (CBS) and Crane Company (Crane) on the plaintiff's claim that her husband (Whiting) suffered from malignant mesothelioma as a result of his exposure to asbestos and products of the defendants during his service in the engine and boiler rooms aboard the U.S.S. Guadalcanal.

The plaintiff filed a complaint in the Superior Court on May 12, 2008. The defendants sought summary judgment. After a hearing, a Superior Court judge allowed summary judgment for the defendants without comment. We review the record de novo and may consider any ground supporting the judgment. *Jenzbar v. Long Bow Group Inc.*, 82 Mass. App. Ct. 648, 649 (2012). *Analysis.* To prove causation in an asbestos case, it is the plaintiff's principal burden to show that a defendant's product contained asbestos and that the victim was exposed to the asbestos in the defendant's product. *Morin v. AutoZone Inc.*, 79 Mass. App. Ct. 39, 42 (2011).

The products in issue are turbines, manufactured by Westinghouse, a predecessor of CBS, and valves, manufactured by Crane, or a predecessor, Chapman. Both products were installed in rooms with pumps, valves, and pipes which used gaskets, packing, and insulation containing asbestos.

Westinghouse supplied its turbines uninsulated. Any insulation was attached by the U.S. Navy or its shipbuilder according to military specifications when the ship was built in 1961. There is no direct evidence that Crane's valves were supplied with asbestos gaskets and packing, and although Crane sold products containing asbestos, such as gaskets, Crane never manufactured any materials or products containing asbestos. There was evidence that there were valves of as many as seven different manufacturers in the engine and boiler rooms.

The only evidence of Whiting's exposure to asbestos came from a shipmate, Thomas Tyler, who stated in a deposition that he could not recall Whiting working on the turbines, but he opined that Whiting would have removed and replaced asbestos gaskets and packing in Crane and Chapman valves and other equipment.

Accordingly, there is no evidence that Whiting's mesothelioma was caused by asbestos products manufactured by the defendants. Significantly, any insulation originally installed on the turbines or valves would have been removed and replaced from unknown sources in two overhauls in May to July, 1964, and November, 1966, to April, 1967; before Whiting served on the Guadalcanal from 1968 to 1972.

The defendants, 'unmet by countervailing materials,' have demonstrated that there is no evidence that Whiting's mesothelioma was caused by asbestos products manufactured or later supplied by the defendants, and have shown that the plaintiff 'has no reasonable expectation of proving an essential element of [her] case.' *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The defendants therefore are entitled to summary judgment.

Because of our decision, we do not address the other arguments raised by the plaintiff which involve issues beyond

the scope of this summary judgment. [FN3]

*Judgment affirmed.*

By the Court (Cypher, Katzmann & Milkey, JJ.),

Entered: February 14, 2013.


FN1. Individually and as executrix of the estate of Willis R. Whiting, Jr.

FN2. Crane Company.

FN3. We acknowledge a brief submitted by amici curiae: Massachusetts Chamber of Commerce, Coalition for Litigation Justice Inc., Chamber of Commerce of the United States of America, American Tort Reform Association, American Insurance Association, American Chemistry Council, and NFIB Small Business Legal Center.

We also acknowledge letters received from each of the parties after oral argument citing a number of cases from other jurisdictions.

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