

39 F.Supp.3d 1036
United States District Court,
W.D. Wisconsin.

Milton BOYER and Kathy Boyer, Plaintiffs,
v.
WEYERHAEUSER COMPANY, 3M Company,
Metropolitan Life Insurance Company, and
Owens-Illinois Inc., Defendants.

No. 14–cv–286–wmc. | Signed Aug. 22, 2014. |
Opinion Granting Reconsideration in Part Nov. 4,
2014.

Synopsis

Background: Former employee, who was allegedly exposed to asbestos while working at door manufacturing plant, brought action against former owner of the plant, manufacturer of masks for personal breathing protection in occupational settings, insurer, and licensor of fireproof door patent, alleging negligent and intentional nuisance, negligence, and strict liability. Owner moved to dismiss claims as barred by Wisconsin’s Worker’s Compensation Act (WCA), and licensor moved to dismiss for failure to state a claim.

Holdings: The District Court, [William M. Conley, J.](#), held that:

[1] WCA’s exclusivity provision barred employee’s claims against owner;

[2] employee could not assert negligence claim against licensor; and

[3] employee failed to state strict liability claim against licensor.

Motions granted.

West Headnotes (14)

- [1] **Damages**
🔑 Necessity of actual damage

Under Wisconsin law, punitive damages are not available absent liability for an underlying tort.

[Cases that cite this headnote](#)

- [2] **Workers’ Compensation**
🔑 Injuries not within acts

Exclusivity provision of Wisconsin’s Worker’s Compensation Act (WCA) barred former employee’s claims for negligent and intentional nuisance against door manufacturing plant’s former owner, arising from employee’s alleged exposure to asbestos; although employee alleged he was exposed to asbestos through asbestos fibers contaminating the home, auto, lunchroom and other locations, his alleged exposure was due in substantial part to his actions at work, such as cutting asbestos and cleaning up asbestos fibers, which he then transported in his hair, skin, and clothing to other locations. [W.S.A. 102.03\(1\)\(c\), \(2\)](#).

[Cases that cite this headnote](#)

- [3] **Workers’ Compensation**
🔑 What are injuries in course of employment in general

To “arise out of employment,” within meaning of Wisconsin’s Worker’s Compensation Act (WCA), an injury need not be caused by the employment; rather, an accident arises out of employment when by reason of employment the employee is present at a place where he is injured through the agency of a third person, an outside force, or the conditions of the location constituting a zone of special danger. [W.S.A. 102.03\(1\)\(e\)](#).

[Cases that cite this headnote](#)

[4]

Negligence

🔑 Elements in general

Under Wisconsin law, a negligence claim requires proof of four elements: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.

[Cases that cite this headnote](#)

create a product containing asbestos.

[Cases that cite this headnote](#)

[5]

Negligence

🔑 Necessity and Existence of Duty

Negligence

🔑 Foreseeability

For purposes of a negligence claim under Wisconsin law, “duty” is the obligation of due care to refrain from any act which will cause foreseeable harm to others.

[Cases that cite this headnote](#)

[8]

Products Liability

🔑 Persons Liable

To impose strict liability under Wisconsin law, the defendant must be engaged in the business of selling the alleged defective product.

[Cases that cite this headnote](#)

[9]

Products Liability

🔑 Persons Liable

Products Liability

🔑 Manufacturers in general; identification

Products Liability

🔑 Asbestos

Former employee, who was allegedly exposed to asbestos while working at door manufacturing plant, failed to state a strict liability claim against licensor of fireproof door patent under Wisconsin law, based on licensor’s manufacturing and selling of asbestos-containing door cores, absent allegations that employee’s former employer purchased or otherwise used licensor’s door cores in manufacturing its fireproof doors.

[Cases that cite this headnote](#)

[6]

Negligence

🔑 Duty as question of fact or law generally

Under Wisconsin law, whether there is a duty of care is a question of law for the court.

[Cases that cite this headnote](#)

[10]

Federal Civil Procedure

🔑 Discretion of court

Disposition of a motion for reconsideration is entrusted to the district court’s discretion.

[Cases that cite this headnote](#)

[7]

Negligence

🔑 Miscellaneous particular cases

Products Liability

🔑 Negligence or fault

Products Liability

🔑 Persons Liable

Products Liability

🔑 Asbestos

Under Wisconsin law, plaintiff cannot state a negligence claim based on party’s licensing of a technology, even if used by the licensee to

- [11] **Federal Civil Procedure**
🔑 Error by court, clerk, or jury
Federal Civil Procedure
🔑 Further evidence or argument

To prevail on a motion to alter or amend a judgment, the movant must present newly discovered evidence or establish a manifest error of law or fact. [Fed.Rules Civ.Proc.Rule 59\(e\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

- [12] **Federal Civil Procedure**
🔑 Error by court, clerk, or jury

A “manifest error” necessary to support a motion to alter or amend a judgment is not demonstrated by the disappointment of the losing party; it is the wholesale disregard, misapplication, or failure to recognize controlling precedent. [Fed.Rules Civ.Proc.Rule 59\(e\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

- [13] **Federal Civil Procedure**
🔑 Further evidence or argument

Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion.

[Cases that cite this headnote](#)

- [14] **States**
🔑 Unemployment compensation and workers’ compensation
Workers’ Compensation
🔑 Preemption

Wisconsin Workers Compensation Act’s

exclusive remedy provision was not preempted by the Clean Air Act and EPA regulations as applied to state tort claims for exposure caused by asbestos fibers remaining on work clothing outside of plaintiffs’ place of employment. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq; W.S.A. 102.03(2).

[Cases that cite this headnote](#)

Attorneys and Law Firms

*1038 [Michael P. Cascino](#), [James Nicholas Hoey](#), [Robert G. McCoy](#), Cascino Vaughan Law Offices, Ltd., Chicago, IL, for Plaintiffs.

[Joshua J. Metcalf](#), [Ruth F. Maron](#), [Tanya D. Ellis](#), Forman Perry Watkins Krutz & Tardy LLP, Jackson, MS, [Edward J. McCambridge](#), [Emily Zapotocny](#), Segal McCambridge Singer & Mahoney, Ltd., [Brian O’Connor Watson](#), [Edward M. Casmere](#), [Matthew John Fischer](#), Schiff Hardin LLP, Chicago, IL, [William P. Croke](#), Von Briesen & Roper, S.C., Milwaukee, WI, for Defendants.

OPINION AND ORDER

[WILLIAM M. CONLEY](#), District Judge.

Plaintiffs Milton and Kathy Boyer bring claims against defendants arising out of Milton’s exposure to asbestos and a related disease, malignant [mesothelioma](#). Before the court are two motions to dismiss. In the first motion, defendant Weyerhaeuser Company, the former owner of a door manufacturing plant where Milton Boyer worked and asbestos fireproofing products were produced, moves to dismiss the claims brought against it as barred by Wisconsin’s Workers’ Compensation Act. (Dkt. # 8.) In the second motion, defendant Owens–Illinois Company seeks dismissal of product liability claims premised solely on its licensing of a patent claiming a fireproof door. (Dkt. # 86.) For the reasons that follow, the court will grant both motions and dismiss Weyerhaeuser and Owens–Illinois as defendants.¹

***1039 ALLEGATIONS OF FACT²**

A. The Parties

Plaintiff Milton Boyer previously was employed at a door manufacturing plant in Marshfield, Wisconsin, where asbestos fireproofing products were manufactured and products containing asbestos were used in the manufacturing process. Plaintiff Kathy Boyer is his wife.

Defendant Weyerhaeuser Company is the former owner of the Marshfield plant. Weyerhaeuser is legally responsible for the conduct of Roddis Plywood Corporation, the former (former) owner and operator of the Marshfield plant. Defendant 3M designed, manufactured and sold masks for personal breathing protection in occupational settings, including the 3M 8710 mask. Defendant Metropolitan Life Insurance Company allegedly conspired to conceal information about the health hazards of asbestos from both individual end-users and industry. Finally, defendant Owens–Illinois sold licenses for a patent to manufacture fireproof doors, which in practice incorporated asbestos-containing cores. Owens–Illinois also manufactured, sold and designed asbestos products, including a fireproof door core under the brand name “Kaylo.”

B. Exposure to Airborne Asbestos Fibers

Plaintiffs allege that Milton Boyer “inhaled airborne asbestos fibers released during operations at the Marshfield plant as a result of the following:”

- a. his employment at the Marshfield plant beginning in or around 1973;
- b. asbestos fibers contaminating the home, auto, lunchroom, and other locations where non-work related activities were performed;
- c. asbestos fibers released from the Marshfield plant operations, which contaminated the surrounding community; [and]
- d. transport of asbestos fibers from the Marshfield plant to other locations.

(1st Am. Compl. (dkt. # 69) ¶ 14.) Plaintiffs allege that as a result of these exposures, Milton Boyer “suffered from the asbestos related disease malignant [mesothelioma](#).” (*Id.* at ¶ 16.)

In pleading negligent and intentional nuisance claims

against defendant Weyerhaeuser in particular, plaintiffs further allege that:

Weyerhaeuser, during operations to manufacture fire doors at the Marshfield plant beginning on the 1950s, caused asbestos fibers to be released and contaminate the air in various settings in which no work related activities were being conducted or the plaintiff was not engaged in worked related activities, including without limitation:

- a. the community surrounding the plant;
- b. homes and vehicles;
- c. landfills; and
- d. activities on the premises which were not work related.

(*Id.* at ¶ 43.) Plaintiffs also allege that “the operations of Weyerhaeuser’s Marshfield plant caused dangerous asbestos fibers to be transported to areas more distant through various means, including without limitation:”

- a. worker clothing, personal effects, hair and skin which had been contaminated by asbestos fibers at the plant; and

***1040** b. collecting, removing, hauling, and dumping asbestos waste materials.

(*Id.* at ¶ 44.)

JURISDICTION

The court has jurisdiction over this action pursuant to [28 U.S.C. § 1332](#). Plaintiffs Milton and Kathy Boyer are citizens of Wisconsin. (1st Am. Compl. (dkt. # 69) ¶ 1.) Defendant Weyerhaeuser Company is incorporated in the state of Washington, with its principal place of business in Washington. (*Id.*, Ex. A (dkt. # 69–1).) Defendant 3M Company is incorporated in the state of Delaware, with its principal place of business in Minnesota. (*Id.*) Defendant Metropolitan Life Insurance Company is incorporated in the state of Delaware, with its principal place of business in New York. (*Id.*) Finally, defendant Owens–Illinois, Inc. is incorporated in the state of Delaware, with its principal place of business in Ohio. (*Id.*) In light of the extent of plaintiff Milton Boyer’s injuries, the amount in controversy also exceeds \$75,000.

On the face of the amended complaint, plaintiffs purport

to name three other, unnamed insurance companies as defendants. The law is clear, however, that “because the existence of diversity jurisdiction cannot be determined without knowledge of every defendant’s place of citizenship, ‘John Doe’ defendants are not permitted in federal diversity suits.” *Howell, by Goerdt v. Tribune Entm’t Co.*, 106 F.3d 215, 218 (7th Cir.1997). The court, therefore, will dismiss these unnamed defendants. *See id.* Should plaintiffs learn the name of these insurance companies in a timely fashion and wish to add them as defendants—assuming their addition would not destroy complete diversity—plaintiffs may seek leave from the court to amend their complaint.

OPINION

I. Weyerhaeuser’s Motion to Dismiss

^[1] Weyerhaeuser posits two bases for dismissing plaintiffs’ complaint. First, Weyerhaeuser contends that plaintiff’s claims of negligent and intentional nuisance—the sole claims alleged against Weyerhaeuser³—are barred by the exclusivity provision of Wisconsin’s Workers’ Compensation Act (“WCA”), [Wis. Stat. § 103.03\(2\)](#). Second, defendant contends that plaintiffs’ allegations fail to meet the requirement of [Federal Rule of Civil Procedure 8](#). Because the court finds that plaintiffs’ claims are barred by the WCA, the court need not reach the second basis for dismissal.

A. Overview of Wisconsin’s Workers Compensation Act

[Wisconsin Statute § 102.03\(1\)](#) defines employer liability where the following applicable “conditions” occur:

- (a) Where the employee sustains an injury.
- (b) Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter.
- (c)1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.

2. Any employee going to and from his or her employment in the ordinary and usual way, while on the premises of the *1041 employer, or while in the immediate vicinity of those premises if the injury results from an occurrence on the premises; ...

...

- (e) Where the accident or disease causing injury arises out of the employee’s employment.

...

Subsection (2) of the same statute provides that “Where such conditions exist the right to the recovery of compensation under this chapter shall be the *exclusive* remedy against the employer, any other employee of the same employer and the worker’s compensation insurance carrier.” [Wis. Stat. § 102.03\(2\)](#) (emphasis added).

Because it was the parties’ focus in briefing Weyerhaeuser’s motion to dismiss, the court will also focus on the requirements that (1) “the employee is performing service growing out of and incidental to his or her employment” under [§ 102.03\(1\)\(c\)](#) 1; and (2) “the accident or disease causing injury arises out of the employee’s employment,” [§ 102.03\(1\)\(e\)](#). *See Johnson v. Hondo, Inc.*, 125 F.3d 408, 418 (7th Cir.1997) (“In order for employer liability under the Worker’s Compensation Act to be triggered, the injured employee at the time of injury had to have been ‘performing service growing out of and incidental to his or her employment’ and ‘the accident or disease causing injury [must have arisen] out of the employment.’”) (citing *Weiss v. City of Milwaukee*, 208 Wis.2d 95, 105, 559 N.W.2d 588, 591 (1997)).

B. Analysis

^[2] Anticipating plaintiffs’ response, defendant’s opening brief focused on the “dual persona” exception to the WCA exclusivity provision. (Def.’s Opening Br. (dkt. # 9) 7–1 (discussing *Henning v. Gen. Motors Assembly*, 143 Wis.2d 1, 419 N.W.2d 551, 552 (1988)).) In their opposition brief, however, plaintiffs contend that the WCA does not govern plaintiffs’ injuries because the injury was not sustained while plaintiff was “performing service growing out of and incidental to his or her employment” and because “[p]laintiff’s community exposures and take-home exposures do not as a matter of law ... arise from the ‘course of employment.’” (Pls.’ Opp’n (dkt. # 85) 3.)

With respect to whether Boyer’s injury was sustained while he was performing service growing out of and incidental to his employment, this requirement is easily met by the facts as plead. As the Wisconsin Supreme Court explained in *Weiss*, 208 Wis.2d at 105, 559 N.W.2d at 591:

[P]erforming service growing out of and incidental to

his or her employment is used interchangeably with the phrase course of employment. Both phrases refer to the time, place, and circumstances under which the injury occurred.

An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he [or she] is fulfilling his [or her] duties or engaged in doing something incidental thereto.

(internal citations and quotation marks omitted; alterations in original); see also *Goranson v. Dep't of Industry, Labor & Human Relations*, 94 Wis.2d 537, 548, 289 N.W.2d 270, 276 (1980) (“The phrase ... ‘course of employment’ refers to the time, place and circumstances of the accident in relation to the employment.”).

Here, the alleged cause of injury is exposure to asbestos fibers. Plaintiffs assert in their opposition brief that the alleged “exposures occurred during plaintiff’s activities outside the workplace” (Pls.’ Opp’n (dkt. # 85) 3), but the allegations in the complaint—at least some of them—directly *1042 contradict that assertion (see, e.g., 1st Am. Compl. (dkt. # 69) ¶ 14 (“Plaintiff inhaled airborne asbestos fibers released during operations at the Marshfield plant as a result of ... his employment at the Marshfield in or around 1973.”).) Although plaintiffs also allege that Boyer was exposed to asbestos through “asbestos fibers contaminating the home, auto, lunchroom and other locations,” the facts as alleged lead to the inescapable conclusion that this exposure was due in substantial part to Boyer’s actions at work (e.g., cutting asbestos, cleaning up asbestos fibers, etc.), which he then transported in his hair, skin and clothing to other parts of the plant, areas immediately surrounding work, his car, home and other places where he regularly spent time.

^[3] The requirement that the injury must arise out of the employment is also easily met. To arise out of employment, the injury need not be “caused by the employment,” although plaintiff’s allegations arguably meet that higher burden. Rather, “an accident arises out of employment when by reason of employment the employee is present at a place where he is injured through the agency of a third person, an outside force, or the conditions of the location constituting a zone of special danger.” *Cutler-Hammer, Inc. v. Indus. Comm’n*, 5 Wis.2d 247, 254, 92 N.W.2d 824, 828 (1958); see also *Weiss*, 208 Wis.2d at 107, 559 N.W.2d at 593 (“The ‘arising out of’ language of § 102.03(1)(e) refers to the causal origin of an employee’s injury.”) (citing *Goranson*, 94 Wis.2d at 549, 289 N.W.2d at 276). So, too, here.

Admittedly, sometimes the “arises out of” requirement may diverge from the “performing services” requirement. See, e.g., *Goranson*, 94 Wis.2d at 550, 555, 289 N.W.2d at 276–77, 279 (holding that driver was in course of employment at time of injury but the accident did not arise out of his employment because “the injuring force was purely personal to him”). Here, however, the injury—exposure to asbestos fibers—arose out of Boyer’s employment because of certain “conditions of the location constituting a zone of special danger.” As explained above, while exposure may have extended beyond the workplace due to fibers on clothing, in cars, at home and elsewhere, the injury still “arose out of his employment.” Indeed, although not the focus of the parties, another provision of the Workers’ Compensation Act expressly states as much: “Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee’s employment.” Wis. Stat. § 102.03(1)(f); see also *Consol. Papers, Inc. v. Dep’t of Indus., Labor & Human Relations*, 76 Wis.2d 210, 223, 251 N.W.2d 69, 76 (1977) (recognizing that “occupational diseases” arise out of employment).

Still, to avoid this seemingly inevitable holding, plaintiffs attempt to draw an analogy to situations where an employee is injured while laundering his uniform at home or in an accident commuting from his home to his place of employment. (Pls.’ Opp’n (dkt. # 85) 11.) However, the injured individuals in those situations were not performing employment services by doing laundry at home or even driving to work. See, e.g., *McRae v. Porta Painting, Inc.*, 2009 WI App 89, ¶ 9, 320 Wis.2d 178, 769 N.W.2d 74 (“[T]he typical employee going to or from work is not covered until he or she reaches the employer’s premises. An employee going to work is ordinarily in the prosecution of his or her own business, not performing services incidental to employment.”) (internal citations and quotation marks omitted); *Gibbs Steel Co. v. Indus. Comm’n*, 243 Wis. 375, 379, 10 N.W.2d 130, 131 (1943) (rejecting workers’ compensation claim where injury was sustained slipping on a bath mat because *1043 sleeping and bathing are “requirements of ordinary life and not of any particular employment”).

This court’s finding that the alleged injury occurred while plaintiff was performing service of employment and arose out of that employment appears consistent with all case law examining this issue, at least as identified by the parties. For example, in *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir.1981), *rev’d on other grounds*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Tenth Circuit reversed the district court’s denial of defendant’s motion for judgment notwithstanding the verdict, finding that Oklahoma’s Workers’ Compensation

Act provided the exclusive remedy for injuries caused by exposure to radiation from plutonium found at plaintiff's apartment, where plaintiff was an employee of a nuclear fuel processing plant operated by defendants. In so holding, the court reviewed the evidence of plaintiff's exposure to plutonium and found that "all the plutonium found in her body came from her working with and around plutonium." *Id.* at 918. The fact that her apartment—and in particular, her bathroom, kitchen and bedroom—was contaminated, did not alter the court's finding that the injury occurred in the course of her employment, finding "a logical nexus between Silkwood's injury and her work." *Id.* at 919.

Similarly, in two state court cases involving tort claims premised on injury to employees caused by asbestos fibers remaining on clothing outside of the place of employment, courts rejected these claims as barred by workers' compensation laws. See *Acevedo v. Consolidated Edison Co. of N.Y.*, 189 A.D.2d 497, 499, 596 N.Y.S.2d 68 (N.Y.App.Div.1993) (affirming trial court's exclusion of tort claims premised on employee's exposure to asbestos fibers remaining on clothing after they had returned home because "any damage resulting from such harm will clearly have arisen out of plaintiffs' employment and is governed exclusively by the Workers' Compensation Law"); *Swanson v. Simpson Timber Co.*, No. B244266, 2013 WL 5469261, at *8 (Cal.Ct.App. Oct. 2, 2013) (unpublished) (finding so-called "secondary asbestos exposure" claim barred by the workers' compensation act because: (1) the injury "is derivative as it is depending upon the compensable injury arising from and in the course of and scope of Swanson's employment;" and (2) "Swanson's secondary self-exposure from the asbestos fibers and dust on his works clothes would not have occurred if he were not exposed to asbestos in the course and scope of his employment").

Plaintiffs' attempt to distinguish these cases is entirely unpersuasive. While different states' workers' compensation laws govern, the substantive provisions are similar to those in *Wis. Stat. § 102.03*, and similarly limit remedies to those available under the respective workers' compensation laws. See, e.g., *Silkwood*, 667 F.2d at 916 (describing "arising out of and in the course of employment" and "exclusive" liability provisions in Okla. Stat. Ann. tit. 85); *Acevedo*, 189 A.D.2d at 500, 596 N.Y.S.2d 68 (describing Section 11 of New York's Wisconsin Compensation Law as providing the "sole and exclusive remedy [of] any accidental injury arising out of and in the course of employment"); *Swanson*, 2013 WL 5469261, at *8 (describing California's workers compensation act as covering injuries "arising out of and

in the course of the employment" and limiting recovery to that system).

Finally, plaintiffs persist in arguing that inhalation of fibers did not occur until "after fibers are transported off the premises ... during non-employment activities such as laundering clothes, other household activities, *1044 in areas contaminated by asbestos fibers, or riding in the car." (Pls.' Opp'n (dkt. # 10–11).) This theory of liability is implausible given plaintiffs' allegation that Milton Boyer was exposed to asbestos *during* his employment. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.").⁴

Because there is no way for plaintiffs to "unring" this bell by amendment, the court will grant Weyerhaeuser's motion to dismiss plaintiffs' causes of actions asserted against it, and will dismiss Weyerhaeuser from this action with prejudice. See, e.g., *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir.2008) ("A plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits."); *Edwards v. Snyder*, 478 F.3d 827, 830 (7th Cir.2007) ("A complaint can also allege too much; a plaintiff may unwittingly plead himself out of court by alleging facts that preclude recovery."); see also *Rohler v. TRW, Inc.*, 576 F.2d 1260, 1266 (7th Cir.1978) (explaining that permission to amend may be refused if it is "apparent on the fact of [plaintiff's] initial complaint" that "plaintiff cannot state a claim upon which relief can be granted").

II. Owens–Illinois' Motion to Dismiss

Defendant Owens–Illinois moves to dismiss plaintiffs' claims for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. While plaintiffs generally allege product liability claims against Owens–Illinois sounding in negligence and strict liability (1st Am. Compl. (dkt. # 69) Counts I and II), the foundation for both claims is Owens–Illinois' role as licensor of a fireproof door patent. (*Id.*) Consistent with governing case law, therefore, Owens–Illinois attached *Patent No. 2,593,050* to its motion to dismiss, which claims a fireproof door or panel comprising, in part, "a core of inorganic, rigid, fireproof, light weight material of a substantially uniform apparent density and consistency throughout..." (O–I's Mot. to Dismiss, Ex. A (dkt. # 86–1) 4:35–38.)⁵ The patent claims do not require asbestos as the core, though asbestos is mentioned in the specification.

A. Negligence

^[4] ^[5] ^[6] ^[7] A negligence products liability claim requires proof of four elements: “(1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.” *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 55, 245 Wis.2d 772, 629 N.W.2d 727 *1045 (quoting *Morden v. Cont’l AG*, 2000 WI 51, ¶ 45, 235 Wis.2d 325, 611 N.W.2d 659). The first element is “the obligation of due care to refrain from any act which will cause foreseeable harm to others.” *Id.* Whether there is a duty of care is a question of law for the court. *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 236 Wis.2d 435, 459, 613 N.W.2d 142, 154 (2000) (“[T]he existence of a duty presents a question of law.”). Accordingly, plaintiffs’ negligence claim turns on whether the licensing of a patent which claims a fireproof door and specifies use of asbestos at its core “foreseeably creates an unreasonable risk to others.” *Bittner v. Am. Honda Motor Co., Inc.*, 194 Wis.2d 122, 148, 533 N.W.2d 476, 486 (1995). As a matter of law, the court concludes that plaintiffs cannot state a negligence claim based only on a party’s licensing of a technology, even if used by the licensee to create a product containing asbestos.

This conclusion is consistent with a line of cases rejecting similar product liability claims premised on the licensing of a patent alone. *See, e.g., In re Celotex Corp.*, 487 F.3d 1320, 1338 (11th Cir.2007) (rejecting products liability claim based on defendant being nothing “more than a mere licensor” of a patent concerning “a variety of formulation of insulation, some that do not contain asbestos and some that do”); *Smith v. Wyeth, Inc.*, 657 F.3d 420, 424 (6th Cir.2011) (holding, consistent with its view of the majority of courts addressing this issue, that “manufacturer of a name-brand drug has no duty to patients who ingested only a generic version of the drug manufactured by the name-brand drug company’s competitors”).

In response, plaintiffs cite to *Dolin v. SmithKline Beecham Corp.*, No. 12 C 6403, — F.Supp.3d —, —, 2014 WL 804458, at *5 (N.D.Ill. Feb. 28, 2014), for support. While the district court rejected the majority review in that case, denying summary judgment to defendant despite being the licensor of a patent, it did so based on the defendant’s role in drafting the design and language of the warning label. As such, the defendant’s conduct extended beyond mere licensing of a patent. Plaintiffs would also make much of the fact that Wisconsin courts adopted the minority opinion in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 103 (1928), including that “[e]veryone owes to the

world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.” *Hornback v. Archdiocese of Milwaukee*, 2008 WI 98, ¶ 22, 313 Wis.2d 294, 752 N.W.2d 862. In contrast, the majority view limited the duty to the “particular victim,” whose risk is foreseeable. *Id.* Whatever the import of that distinction generally, however, it is immaterial to plaintiffs’ claim here. Whether owed to others at large or particular victims, the duty still turns on the foreseeability of risk, and courts have repeatedly dismissed negligence claims because the injury was not foreseeable to a defendant who played no role in the manufacturing, marketing or use of the product. *See, e.g., Geboy v. TRL, Inc.*, 159 F.3d 993, 1000 (7th Cir.1998) (rejecting negligence claim brought under Wisconsin law against a “party who is in the chain of distribution, but have never assembled, inspected nor used the product”); *Rolph v. EBI Cos.*, 159 Wis.2d 518, 536–37, 464 N.W.2d 667, 674 (1991) (rejecting negligence claim against reconditioner for failing to correct design defects created by manufacturers); *Pelnar v. Rosen Sys., Inc.*, 964 F.Supp. 1277, 1284 (E.D.Wis.1997) (rejecting negligence claim on public policy grounds asserted against an auction company).

B. Strict Liability

^[8] Plaintiffs’ strict liability claim against Owens–Illinois is similarly flawed. *1046 To impose strict liability under Wisconsin law, the defendant must be “engaged in the business” of selling the alleged defective product. *Geboy v. TRL, Inc.*, 159 F.3d 993, 999 (7th Cir.1998); *see also St. Clare Hosp. of Monroe, Wis. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis.2d 750, 757, 437 N.W.2d 228, 231 (Ct.App.1989) (strict liability “is imposed only on manufacturers, distributors and sellers—those who place or maintain the product in the stream of commerce”). In *Geboy*, the Seventh Circuit rejected a strict liability claim against the broker of used products, explaining that “[t]he application of strict liability in tort is premised on certain public policy considerations which assumes that the manufacturer/seller is in the paramount position to distribute the costs of the risks created by the defective product he is selling.” *Id.*; *see also Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 56, 245 Wis.2d 772, 629 N.W.2d 727 (the focus of a strict liability claim, in contrast to a negligence claim, is “not on the defendant’s conduct, but on the nature of the defendant’s product”).

^[9] As alleged, Owens–Illinois is not a “seller” and there is no “product” sold by Owens–Illinois. While plaintiffs also allege that Owens–Illinois “manufactured, sold, and designed asbestos products, including without limitation fire door cores,” referred to by the brand name “Kaylo”

(1st Am. Compl. (dkt. # 69) ¶ 6), plaintiffs fail to allege that Boyer's former employer purchased or otherwise used Owens-Illinois' Kaylo door cores in manufacturing its fireproof doors. Absent such an allegation,⁶ plaintiffs do not state a viable strict liability claim premised on the manufacturing and selling of Kaylo door cores against Owens-Illinois under Wisconsin law. However, on the unlikely chance plaintiffs can allege that Owens-Illinois sold Kaylo door cores to Boyer's former employer for use during his employ, the court will grant plaintiffs 30 days to file an amended complaint.

ORDER

IT IS ORDERED that:

- 1) defendant Weyerhaeuser Company's motion to dismiss (dkt. # 8) is GRANTED. Count III and IV of plaintiffs' first amended complaint are dismissed with prejudice and defendant Weyerhaeuser is dismissed from this action;
- 2) defendant Owens-Illinois Inc.'s motion to dismiss (dkt. # 86) is GRANTED. Counts I and II of plaintiffs' first amended complaint premised on Owens-Illinois's role as a licensor are dismissed with prejudice;
- 3) plaintiff may have until September 22, 2014, to file an amended complaint alleging specific facts necessary to state a claim for strict liability against Owens-Illinois, provided they can do so in good faith; and
- 4) defendant Owens-Illinois's motion for relief under [Wis. Stat. § 802.025](#) (dkt. # 52) is DENIED AS MOOT.

OPINION AND ORDER ON RECONSIDERATION

In opinions dated August 22, 2014, this court granted motions to dismiss filed by defendants Weyerhaeuser Company and Owens-Illinois Inc. in the above-captioned cases, all of which arise out of plaintiffs' alleged injuries from asbestos exposure. *1047 In that opinion, the court (1) dismissed all claims against Weyerhaeuser Company, finding them barred by the exclusive remedy provision of the Wisconsin Workers Compensation Act, [Wis. Stat. § 103.03\(2\)](#); and (2) dismissed all claims based on plaintiffs' patent licensing theory against Owens-Illinois

Inc., finding them meritless as a matter of law. The court further found that any proposed amendment of plaintiff's claims against Weyerhaeuser and Owens-Illinois based on the patent licensing theory would be futile, but allowed plaintiffs to re-plead in good faith any claims against Owens-Illinois premised on its sale of asbestos door cores to which the individual plaintiffs were exposed. (8/22/14 Opinion & Order ('286 dkt. # 94).)

Plaintiffs move for reconsideration of this opinion and order. These motions will be denied because they either (1) rehash arguments that were previously raised and rejected in their original oppositions to defendants' motions to dismiss, or (2) raise new arguments that could have been asserted in their oppositions and have since been waived, but, even if considered, do not warrant reconsideration.¹

In addition to these motions for reconsideration, each plaintiff has filed proposed second amended complaints, containing additional allegations about (1) community exposure relevant to plaintiffs' claims against Weyerhaeuser; and (2) their respective dates of employment with Weyerhaeuser and/or Roddis (the company which previously operated the factory where plaintiffs worked) as compared to the dates of Owens-Illinois's sale of fire-proof door cores. In light of these new allegations, the court will grant the motions for leave to amend to: (1) all plaintiffs to proceed on nuisance claims against Weyerhaeuser limited to the alleged community exposure to asbestos that is demonstrably separate and distinct from their exposures during the course of their employment; and (2) plaintiffs Prust and Seehafer to proceed on strict liability and negligence claims against Owens-Illinois limited to its sale of the asbestos door cores under the brand name "Kaylo" to plaintiffs' employer during the 1940s and 1950s.²

OPINION

I. Motions for Reconsideration

^[10] ^[11] ^[12] ^[13] Disposition of a motion for reconsideration is entrusted to the district court's discretion. *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir.1996) (citing *Billups v. Methodist Hosp.*, 922 F.2d 1300, 1305 (7th Cir.1991)). To prevail on a motion to alter or amend under [Rule 59\(e\)](#), the movant must present newly discovered evidence or establish a "manifest error of law or fact." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000).³ "A 'manifest error' is not demonstrated by the disappointment of the

losing party. It is the ‘whole sale disregard, misapplication, *1048 or failure to recognize controlling precedent.’ ” *Id.* (quoting *Sedrak v. Callahan*, 987 F.Supp. 1063, 1069 (N.D.Ill.1997)). Accordingly, “[r]econsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion.” *Caisse Nationale de Credit Agricole*, 90 F.3d at 1270. Plaintiffs’ motions for reconsideration fall well short of this admittedly high bar.

A. Dismissal of Claims against Weyerhaeuser

^[14] Plaintiffs posit several arguments in support of their motion for reconsideration of the court’s dismissal of claims against Weyerhaeuser, most of which the court rejects out of hand. *First*, plaintiffs argue that the court erred in failing to recognize that Weyerhaeuser’s reliance on Wisconsin Workers Compensation Act’s exclusive remedy provision is preempted by the Federal Clean Air Act and EPA regulations. (Boyd Br. on Weyerhaeuser Claims (‘286 dkt. # 100) 3 (discussing *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir.2013)).) There are at least two problems with this argument. As an initial matter, plaintiffs failed to raise the argument in response to Weyerhaeuser’s motions to dismiss, and there is no reason why it could not have been raised at that time. *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir.1995) (“[A] motion to alter or amend a judgment is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment.”). An even larger problem, were this court inclined to consider the merits of the argument, is that it is nonsensical.

Here, plaintiffs are seeking to assert *state tort claims* against Weyerhaeuser, not a Federal Clean Act claim or some other federal environmental claim. As such, whether a federal statutory claim preempts a state tort claim has no import whatsoever on state claims for exposure caused by asbestos fibers remaining on work clothing outside of plaintiffs’ place of employment. The court, therefore, affirms its holding that any tort claim premised on exposure to asbestos fibers arising out of employment are barred by the exclusive remedy provision of Wisconsin’s Workers Compensation Act, [Wis. Stat. § 103.03\(2\)](#).

Second, plaintiffs contend that the court erred because “[h]arm caused by exposures to asbestos in violation of DNR regulations against visible emissions cannot be precluded by WCA exclusivity.” (Boyd Br. on Weyerhaeuser Claims (‘286 dkt. # 100) 5.) This argument fails as well. Like plaintiff’s federal preemption argument, plaintiffs could have made this argument in

opposition to defendant’s motions to dismiss and failed to do so for no good reason. Moreover, plaintiffs fail to develop or offer any support for the proposition that a regulation defining hazardous substances upends the well-defined, exclusive remedy provision of the Wisconsin Workers Compensation Act. Finally, to the extent that plaintiffs now seek to establish liability based on *community* exposure to asbestos, something entirely separate from plaintiffs’ original claim of exposure during the course of their employment, the court addresses that request below as part of plaintiffs’ motions for leave to proceed on a second amended complaint.

Third, plaintiffs argue that the court failed to construe allegations contained in their first amended complaint in the light most favorable to plaintiffs and, in any event, that they should be granted leave to amend that complaint. In their first amended complaints, plaintiffs alleged this notion of “community” exposure to asbestos *1049 in a vague, conclusory manner. Accordingly, the court found these allegations failed to meet the requirements of [Federal Rule of Civil Procedure 8](#). (8/22/14 Opinion & Order (‘286 dkt. # 94) 12 n. 4.) The court finds no error in this determination, although it is willing to revisit the statement that plaintiff could not “unring” that bell based on new allegations about community exposure.

Specifically, in the proposed second amended complaints, each plaintiff essentially alleges with sufficient detail that they experienced measurably, causally distinct exposure to asbestos from their jobs based on Weyerhaeuser’s release of asbestos fibers into the community via ambient air, in landfills, etc. (*See, e.g.*, Boyer Proposed Am. Compl. (‘286 dkt. # 99–2) ¶ 23.) While the court is highly skeptical that plaintiffs will ultimately be able to untangle their multiple exposures to asbestos on the job from community exposures in a manner that would permit a reasonable jury to award separate damages for community exposure, the court nonetheless finds that plaintiffs’ allegations meet the minimum requirements of [Rule 8](#) and will allow them to pursue nuisance claims against Weyerhaeuser based solely on plaintiffs’ exposure to asbestos *not* arising from their employment. In all other respects, plaintiffs’ motions for reconsideration of the court’s decision on Weyerhaeuser’s motions to dismiss are denied.

B. Dismissal of Claims against Owens–Illinois

Plaintiffs’ motion for reconsideration of this court’s finding that any claim premised on Owens–Illinois’ licensing of a patent merely rehashes arguments already made in opposition to Owens–Illinois’ motions to dismiss and fails as a matter of law. Having already addressed and

rejected these arguments, the court sees no basis for doing so again.

In fairness, plaintiffs do cite to a new case for support, albeit one that was issued *prior* to plaintiffs' filing of their oppositions to Owens–Illinois' motions to dismiss. See *Quirin v. Lorillard Tobacco Co.*, 17 F.Supp.3d 760 (N.D.Ill.2014). But to the extent *Quirin* is on point at all—notably, it does not concern the liability of a patent licensor—it is consistent with the court's original opinion and order. In that case, the district court held that a duty to warn “attaches only when the manufacturer incorporated the asbestos-containing material into its product.” *Id.* at 770, at *8. Here, too, the court allowed an opening for negligence and strict liability claims based on Owens–Illinois' manufacturing and sale of the Kaylo asbestos door core to Roddis, plaintiffs' employer and Weyerhaeuser's predecessor.

In the proposed second amended complaints, plaintiffs now allege that “O–I designed, manufactured, and sold Kaylo core to Roddis [Weyerhaeuser's predecessor] during the late 1940s into the late 1950s.” (Pecher Proposed 2nd Am. Compl. ('147 dkt. # 69–2) ¶ 66.)⁴ Plaintiffs Pecher, Prust, Seehafer and Sydow each commenced employment at Roddis in the 1950s. (See Pecher Proposed 2nd Am. Compl. ('147 dkt. # 69–2) ¶ 23 (1953 to 2000); Prust Proposed 2nd Am. Compl. ('143 dkt. # 64–2) ¶ 23 (1958 or 1959 to 1978); Seehafer Proposed 2nd Am. Compl. *1050 ('161 dkt. # 80–2) ¶ 31 (March 1955 to May 1955 and 1963 to 1999); Sydow Proposed 2nd Am. Compl. ('219 dkt. # 81–2) ¶ 23 (1947 to 1951 and 1953 to 1990).) In contrast, plaintiffs Boyer and Masephol did not commence their employment until the 1970s, well after Owens–Illinois stopped selling its Kaylo door cores to Roddis and/or Weyerhaeuser. (See Boyer Proposed 2nd Am. Compl. ('286 dkt. # 99–2) ¶¶ 67 (1973 to 1983); Masephol Proposed 2nd Am. Compl. ('186 dkt. # 91–2) ¶ 19 (1973 to 1979).)⁵

Based on these facts, therefore, the court will allow Prust and Seehafer to proceed on strict liability and negligence claims against Owens–Illinois based on plaintiffs' exposure to Owens–Illinois's Kaylo door cores.⁶ In all other respects, plaintiffs' motions for reconsideration of the court's decision on Owens–Illinois's motions to dismiss are denied.

Footnotes

¹ Owens–Illinois also filed a motion to order plaintiffs' compliance with [Wis. Stat. § 802.025](#), a new state statute requiring disclosure of asbestos trust claims, among other provisions. (Dkt. # 52.) Because the court grants Owens–Illinois' motion to dismiss, it need not reach the merits of this motion, and accordingly, will deny it as moot.

ORDER

IT IS ORDERED that:

1) plaintiffs' motions for leave to file reply briefs ('286 dkt. 114, 115; '186 dkt. 104, 106; '147 dkt. # 75; '143 dkt. 78, 79; '161 dkt. # 95, 96; 219 dkt. # 94) are GRANTED;

2) plaintiffs' motions for reconsideration based on this court's decisions granting defendant Weyerhaeuser's motions to dismiss ('286 dkt. # 99; '186 dkt. # 90; '147 dkt. # 69; '143 dkt. # 64; '161 dkt. # 80; '219 dkt. # 81) are GRANTED IN PART AND DENIED IN PART as set forth above;

3) plaintiffs Pecher's and Sydow's motions for reconsideration based on this court's decisions granting defendant Owens–Illinois' motions to dismiss ('147 dkt. # 70; '219 dkt. # 82) are DENIED AS MOOT;

4) plaintiffs Prust's and Seehafer's motions for reconsideration based on this court's decisions granting defendant Owens–Illinois' motions to dismiss ('143 dkt. # 65; '161 dkt. # 81) are GRANTED IN PART AND DENIED IN PART as set forth above;

5) plaintiffs Boyer's and Masephol's motions for reconsideration based on this court's decision granting defendant Owens–Illinois' motions to dismiss ('286 dkt. # 100; '186 dkt. # 91) are DENIED and the clerk of court is directed to terminate Owens–Illinois as a defendant in those two actions; and

6) plaintiffs' proposed second amended complaints filed in each of the abovelisted actions are now deemed the operative pleadings and defendants' respective answers to those complaints are due on or before 21 days, except as expressly excused in this opinion and order.

- 2 The court assumes the following facts as alleged, viewed in a light most favorable and conceding all reasonable inferences to plaintiffs. See *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 493 (7th Cir.2011).
- 3 Plaintiffs also seek punitive damages (Count VIII) against all defendants, but those damages are not available absent liability for an underlying tort. See, e.g., *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶ 7, 337 Wis.2d 544, 807 N.W.2d 666 (explaining that under Wisconsin law, punitive damages are only available based on proof of underlying cause of action and actual damages).
- 4 To the extent plaintiffs rely on general allegations of asbestos exposure from landfills or in the air within the larger community—in other words, exposure entirely unrelated to his employment—plaintiffs’ allegations do not meet the plausibility requirements of Rule 8. For example, the complaint contains no allegations that Boyer lived near the plant or its transportation routes, close to a landfill containing asbestos or ambient air with high asbestos content. Moreover, the theory that Milton Boyer’s injury was caused by asbestos fibers entirely unrelated to his employment is not plausible, given plaintiffs’ allegation that he was exposed to asbestos through and as a direct byproduct of his employment. See *Bell Atl.*, 550 U.S. at 555, 127 S.Ct. 1955.
- 5 “Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to his claim.” *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998) (internal citation and quotation marks omitted). Here, plaintiffs refer to a patent and the patent is central to plaintiffs’ product liability claims asserted against Owens–Illinois.
- 6 While outside the purview of a motion to dismiss, Owens–Illinois represents that it was out of the business of manufacturing door cores more than a decade before Boyer’s exposure to asbestos alleged in this action. (Owens–Illinois’s Reply (dkt. # 93) 2.) As a result, it appears that plaintiffs cannot in good faith make such an allegation.
- 1 The one caveat to that denial is that the court will treat plaintiffs’ motions for leave to amend discussed below as extensions of their motions for reconsideration to the extent necessary to or implicit in plaintiffs’ request for relief.
- 2 Owens–Illinois did *not* move to dismiss Pecher and Sydow’s complaints, and therefore the court did *not* dismiss any claims against Owens–Illinois in those actions. Despite this, these plaintiffs *still* filed motions for reconsideration. Since there is nothing to reconsider, the court will deny those motions as moot.
- 3 Consistent with the parties, the court considers plaintiffs’ motions under Rule 59(e), without expressing an opinion as to its applicability. (See Boyer Br. on Weyerhaeuser Claims (‘286 dkt. # 100) 1 n. 1; Weyerhaeuser Opp’n (‘286 dkt. # 113) 1; Owens–Illinois Opp’n (‘286 dkt. # 103) 1–2.)
- 4 Curiously, Boyer’s proposed amended complaint alleges that O–I sold the Kaylo core to Roddis “during the late 1940s into the *early* 1950s.” (Boyer Proposed 2nd Am. Compl. (‘286 dkt. # 99–2) ¶ 75 (emphasis added).) While it is not clear why this complaint alleges that O–I ceased selling its door core in the early 1950s, rather than the late 1950s, the distinction is not material to Boyer’s claim since his employment with Weyerhaeuser/Roddis did not begin until the 1970s.
- 5 Indeed, by the time Boyer and Masephol began their employment, Owens–Illinois was no longer licensing the patent for producing fire-proof doors. (See Boyer Proposed 2nd Am. Compl. (‘286 dkt. # 99–2) ¶ 79 (licensing ended in 1969)).
- 6 Owens–Illinois argues that the dangers of asbestos were not known until at least the 1960s, after it ceased selling the Kaylo door cores to Roddis, and therefore the dangers were not foreseeable at the time Owens–Illinois sold Kaylo door cores to Roddis. (Owens–Illinois’ Opp’n (‘286 dkt. # 103) 6–13.) Recognizing that this argument extends beyond the contours of the pleading stage, Owens–Illinois suggests that the court convert plaintiffs’ motion to a motion for summary judgment. (*Id.* at 4–5 n. 1.) The court declines this invitation and will take up whether the risk was foreseeable, and any other defenses, at a later stage.

