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===== Start of Answer #1 (1340 words) =====

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MEMORANDUM

TO: Christopher Schroeder

FROM: -

DATE: July 2015

RE: Memorandum of Points and Authorities in Response to Opposition to Motion
for Summary Judgment - Belton Company

**A. PLAINTIFF ASSERTS THERE IS A TRIABLE ISSUE OF MATERIAL FACT
AS TO CAUSATION BASED ON NEGLIGENT INSULATION WORK AT THE
MARTINVILLE POWERHOUSE**

Plaintiff claims there was negligent insulation work at the Martinville Powerhouse and that negligent insulation caused the injury.

In *Norris v. Crane Company, 2008*, the court held that to prevail against a motion for summary judgment, the party must prove various material facts by a preponderance of the evidence, including causation in order to prevail against a motion for summary judgment. Causation can be proven if the following factors

are met:

(1) plaintiff was exposed to asbestos for which D was responsible; and Plaintiff was employed by CG&E as an electrician from 1961 to 1993. In 2012, he was diagnosed with mesothelioma. Despite various claims by the Plaintiff, he has been unsuccessful in proving that Defendant exposed him to asbestos while employed. There is some evidence to show that Defendant designed Collin PowerHouse structures and participated in the removal of

In his deposition, Plaintiff states that although he saw employees whom he believed worked for Belton working at Martinville Powerhouse on boiler modifications and boiler outages, he did not know for sure if they were in fact Belton's employees. Plaintiff isn't even sure when or if he was exposed to asbestos.

Therefore it is unlikely that the Plaintiff will be able to prove that if he was exposed to asbestos it was the responsibility of the Defendant.

(2) the exposure operated as a substantial factor in bringing about the injury

Here, Plaintiff's medical condition cannot be attributed to the exposure of to insulation that covered boilers within one place of employment when Plaintiff worked at two different locations where he could have been exposed. In *Andrews v. Foster Wheeler, 2010*, the court held that without exposure there can be no causation. Additionally the court held that evidence cannot be too speculative.

Here, Plaintiff has claimed that he was exposed to insulation that likely caused his medical condition but that he could have avoided the exposure had he "removed" himself from the site. Additionally, he says he always stayed 45 to 50 feet away.

Lastly, he says he was not sure when any insulation that was being worked on had been installed or indeed whether it contained asbestos.

Therefore, the Plaintiff has failed to prove that the Defendant was responsible for his specific injury.

B. PLAINTIFF ASSERTS THAT THERE IS A TRIABLE ISSUE OF MATERIAL FACT AS TO CAUSATION BASED ON NEGLIGENT INSULATION WORK AT THE COLLINS POWERHOUSE

Plaintiff asserts that because Defendant did not negate exposure to Plaintiff at the Collins Powerhouse in his motion for summary judgment, he therefore admits to exposure.

In response to a motion for summary judgment, the court held in *D'Amico v. Board of Medical Examiners* that a declaration by a party in opposing a summary judgment motion that contradicts a prior statement cannot raise a triable issue of material fact. The only exception is that the party must offer an explanation about the contradiction.

Here, Plaintiff's response raises a triable issue that Defendant is now also liable for the exposure to asbestos in Collin Powerhouse. That statement is a triable issue because if Plaintiff's condition is due to the exposure of either PowerHouse then it essence Plaintiff is claiming that the Defendant is liable for either place of employment. This addition is a triable issue that cannot be asserted by a declaration unless there has been a credible explanation.

Here, at his deposition, Plaintiff asserted that Belton has no presence at the Collin Powerhouse because he exclusively said he had presence only at the

Martinville Powerhouse. Along with his response he submits three declarations by Wilson, Donald and Charles Nye.

In order for Plaintiff to succeed in raising this issue, he must provide a credible explanation as to why he left out Collin Powerhouse. The court in *D'Amico* stated that additional evidence would not bear on the triable issue if there was not an explanation by the Plaintiff as to a valid explanation.

Here, Plaintiff alludes that the complaint asserts that Defendant is liable for causation on both Powerhouses but he does not clarify or does not explain why he failed to bring the issue up until the motion for summary judgement.

The court in *Andrews v. Foster Wheeler* had a similar situation and claimed that Plaintiff's admission of not knowing whether the Defendant was a part of the cause would have been saved if he had responded by interrogations. Again Plaintiff had the opportunity to address the reason why he failed to address the issue but instead brings in expert evidence.

Since plaintiff failed to assert a credible explanation, the court should find that Plaintiff can no longer raise the issue that Defendant is also liable for exposure of Collins Powerhouse.

**C. THERE IS A TRIABLE ISSUE OF MATERIAL FACT AS TO CAUSATION
BASED ON PROFESSIONALLY NEGLIGENT DESIGN OR BUILDING OF
BOTH THE COLLINS POWERHOUSE AND THE MARTINVILLE
POWERHOUSE**

Collins Powerhouse

Plaintiff was employed at Collins Powerhouse from 1961 to 1985, 24 years
Plaintiff submits a declaration by Donald Rance, a prior co-worker from 1961 to

1966 in support of his claim that Belton was the designer and builer of this location but cannot positively confirm that Belton was really there.

There is no evidence that Defendant was the designer of Collins Powerhouse. Plaintiff forgets that the burden falls on him to show the court that causation exists and he has failed to do so. He also quotes Defendant stating that Wilson was exposed to a "very heavy dust". Plaintiff would like to infer that that heavy dusting contained asbestos without any credible evidence.

Additionally he offers a declaration by Charles Nye, an asbestos consultant that the insulation during between 1961 and 1966 contained asbestos. In *Rutherford v. Owens-Illinois*, the court held that to pass the threshold of asbestos responsibility, the Plaintiff must produce non-expert evidence.

Here, Plaintiff has failed to provide evidence of Defendant's involvement in the exposure that caused him to suffer from mesothelioma. He presents an expert declaration to show that during that time asbestos was part of the insulation process. However, expert testimony is not admissible until he has met the threshold issue of causation. Here, he has not.

Therefore a triable issue of causation does not exist for Collins Powerhouse.

Martinville Powerhouse

Plaintiff was employed at Martinville Powerhouse from 1985 to 1993, 8 years. Plaintiff asserts that persons whom he believed were Belton employees worked on boiler modifications and boiler outages that sometimes involved ripping out insulation. In his deposition, Plaintiff states that although he saw employees whom he believed worked for Belton working at Martinville Powerhouse on boiler modifications and boiler outages, he did not know for sure if they were in fact Belton's employees.

It is very likely that another company caused used asbestos in the insulation and thus the Defendant cannot be held liable for causation of asbestos from Martinville Powerhouse.

Plaintiff points to the Declaration by Donald Rance showing that he identified Belton as designer and builder of both Powerhouses but in fact, the declaration does not. Donald Rance's declaration is a former employee that may not have this kind of knowledge. His declaration specifically states that he is not even positive that Belton was the designer of Martinville Powerhouse and then goes on to say he isnt positive that Donald was even a part of Collin Powerhouse either.

Plaintiff has failed to prove causation by non-expert evidence to either Collins or Martinville Powerhouse. The evidence he brings up is too speculative and therefore does not suffice to survive a motion for summary judgment.

CONCLUSION: The court should grant the motion for summary judgment because Plaintiff has failed to establish causation by the Defendant to either Collins Powerhouse or Martinville Powerhouse.

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END OF EXAM