
Plaintiff was diagnosed with mesothelioma in May of 2004. He asserts that he developed this disease as a result of asbestos exposure at the worksite of Defendant Trinity's predecessor.

Plaintiff brought claims against various defendants. Defendant Trinity has moved for summary judgment, arguing that there is insufficient product identification evidence to establish causation with respect to any product(s) for which it is responsible. The parties agree that Louisiana law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

The parties have agreed that Louisiana substantive law applies. Therefore, this Court will apply Louisiana substantive

law in deciding Defendant's motion. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Product Identification/Causation Under Louisiana Law

Louisiana adheres to the "substantial factor" test in determining "whether exposure to a particular asbestos-containing product was a cause-in-fact of a plaintiff's asbestos-related disease." Rando v. Anco Insulations Inc., 16 So. 3d 1065, 1091 (La. 2009) (citing Zimko v. American Cyanamid, 905 So. 2d 465 (La. App. 4th Cir. 2005), writ denied, 925 So. 2d (La. 2006)).

The substantial factor test incorporates both product identification and causation. That is, plaintiff must first show that he "was exposed to asbestos from defendant's product," and also must show "that he received an injury that was substantially caused by that exposure." Lucas v. Hopeman Bros., Inc., 60 So. 3d 690, 699-700 (La. App. 4th Cir. 2011) (quoting Vodanovich v. A.P. Green Indus., Inc., 869 So. 2d 930, 93 (La. App. 4th Cir. 2004)); see also Rando, 16 So. 3d at 1088.

The Louisiana Supreme Court has explained the relationship between product identification and causation as follows: the plaintiff must show "a **significant exposure** to the products complained of to the extent that it was a **substantial factor** in bringing about his injury." Id. (emphasis added) (quoting Asbestos v. Bordelon, Inc., 726 So. 2d 926, 948 (La. App. 4th Cir. 1998); Vodanovich v. A.P. Green Indus., Inc., 869 So. 2d 930, 933 (La. App. 4th Cir. 2004)).

In the asbestos context, plaintiff's evidence may be direct or circumstantial. Rando, 16 So. 3d at 1089 (citations omitted). The Louisiana Supreme Court has described the differences between direct and circumstantial evidence as follows:

A fact established by direct evidence is one which has been testified to by witnesses as having come under the cognizance of their senses. Circumstantial evidence, on the other hand, is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. . . . If circumstantial evidence is relied upon, that

evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty. This does not mean, however, that it must negate all other possible causes.

Id. at 1090 (internal citations omitted).

The Louisiana Supreme Court has recognized that a plaintiff's asbestos-related injury can have multiple causes, and that one defendant's asbestos products need only be a substantial factor, and not just **the** substantial factor, causing plaintiff's harm. In a case with more than one defendant, "[w]hen multiple causes of injury are present, a defendant's conduct is a cause-in-fact if it is a substantial factor generating plaintiff's harm." Id. at 1088 (emphasis added). An accident or injury can have more than one cause-in-fact "as long as each cause bears a proximate relation to the harm that occurs and it is substantial in nature." Id. The Louisiana Supreme Court specifically has recognized that "[m]esothelioma can develop after fairly short exposures to asbestos." Id. at 1091.

The court cited favorably a Fifth Circuit case in which the circuit court reasoned: "the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury. We think, therefore, that on the basis of strong circumstantial evidence the jury could find that each defendant was the cause in fact of some injury to [plaintiff]." Id. (quoting Borel v. Fibreboard Paper Prod.s Corp., 493 F.2d 1076, 1094 (5th Cir. 1973) (applying Texas law)); see also Held v. Avondale Indus., Inc., 672 So.2d 1106, 1109 (La. App. 4th Cir. 1996) (denying summary judgment when plaintiffs' expert opined that "there is no known level of asbestos which would be considered safe with regard to the development of mesothelioma," and when decedent had "even slight exposures" to asbestos containing products).

In Rando, the denial of summary judgment was upheld when plaintiff presented the following evidence. Plaintiff testified that he "thought" asbestos was being used at the construction project on which he was working, because high temperature lines were involved. 16 So.3d 1065 at 1089. The record showed that it was assumed that if a pipe held heat, it was insulated. The entire time plaintiff worked for his employer, other workers were cutting insulation near where he was working, and the air was dusty, with particles of insulation visible in the air that he breathed in. Plaintiff's expert

pathologist testified that, based on his medical records and deposition testimony, plaintiff's occupational exposure to asbestos caused his mesothelioma. Id. at 1089-91. Plaintiff's expert cellular biologist testified that cellular injury commences upon inhalation of asbestos fibers, which "increases the risk of developing cancer shortly after exposure to these asbestos fibers." Id. at 1091. A third expert testified that an "onlooker" was at risk for developing an asbestos-related disease even when he was not handling the products in question. Id.

The Louisiana Fourth Circuit Court of Appeal, in the 2011 decision of Lucas v. Hopeman Bros., Inc., applied the teachings of Rando in deciding whether plaintiffs' evidence of asbestos exposure was sufficient to overcome summary judgment motions of several defendants. 60 So. 3d at 693. Summary judgment was denied when the following evidence was presented: defendant Hopeman Brothers, Inc. cut and installed asbestos-containing wallboard on a ship on which decedent worked; and the decedent's co-worker testified that he remembered defendant installing "walls" while working in close proximity to the witness and the decedent. Id. at 698-99. On this evidence -- even without expert testimony -- the court found that "reasonable minds could differ as to whether the decedent's exposure to the asbestos-containing wallboard installed by [defendant] was a significant contributing factor" to his disease. Id.

The Lucas court affirmed the grant of summary judgment for other defendants, however. One defendant, CBS, supplied asbestos-containing wallboard to Hopeman Brothers. However, because there were also many other companies who supplied similar wallboard to Hopeman Brothers, and because there was no testimony regarding CBS's product in particular (such as testimony about the brand name of CBS's product), plaintiffs failed to show that the decedent was exposed to CBS's product in particular, and that it was a cause in fact of the decedent's injury. Id. at 699-701. Summary judgment was granted for another defendant, Foster Wheeler, when there was no direct or circumstantial evidence that: asbestos was used in the defendant's insulators that were present at the decedent's workplace; decedent was present near such insulators; or dust was emitted from work done on the insulators. Id. at 701-02. Finally, summary judgment was granted for defendant Reilly Benton when there was no testimony placing decedent "around asbestos fibers emanating from a product Reilly Benton sold and/or supplied" to decedent's employer. Id. at 702.

II. Defendant Trinity's Motion for Summary Judgment

A. Defendant's Arguments

Defendant argues that (1) Plaintiff's evidence is insufficient to establish that Plaintiff was exposed to any asbestos product at the Equitable Shipyard, and, (2) even if he can establish that there was some exposure, it is insufficient to establish the "regular" and "substantial" exposure required under Louisiana law.

B. Plaintiff's Arguments

In support of his assertion that he has identified sufficient evidence of exposure/product identification/causation to survive summary judgment, Plaintiff cites to the following evidence:

- Deposition of Plaintiff
Plaintiff testified that he worked at the Equitable Equipment Company for several months in approximately 1968 to 1969, working on average three (3) to four (4) days per week for approximately four (4) to six (6) hour shifts. He testified that his work there was "welding and plugging." He testified that he worked up in the girders and that there were workers removing piping with insulation (or lagging), which he described as "old rotten stuff." Plaintiff testified that he believed the piping was steam piping but that he was not sure. He explained that he believed this because, "[u]sually, in reality, nobody puts insulation on water pipes. So I would expect it to be something to do with hot pressure, you know, or hot steam." He testified that he was present when lagging was being removed from piping, that this work would create dusty conditions, and that he breathed this dust. He testified that there was always dust present while he was working, but that there was "extreme dust, say in maximum dust" about "fifty percent of the time." He testified that workers were removing lagging and creating dust during this fifty (50) percent of time that there

was "extreme dust." Plaintiff explained that the dust resulted from "beating" the insulation off of the pipes, and removing insulation in order to access portions of the pipe. He testified that he did not wear a respirator during this work. He testified at multiple times during the deposition that he breathed in this dust.

(Doc. No. 64-2, pp. 79-82, 87, 89, 124-34, 138, 141, 147-48.)

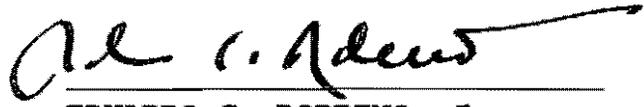
- Affidavit of Expert John Maddox, M.D.
Dr. Maddox relies upon the deposition testimony of Plaintiff in concluding that Plaintiff's exposure to asbestos from insulation during his work as a welder for Equitable was a significant contributing factor in the development of his mesothelioma.

(Doc. No. 64-3, pp. 3, 6-7, 22-23, 27-28.)

C. Analysis

Plaintiff alleges that he was exposed to asbestos from insulation while working at Defendant Trinity's premises (the Equitable shipyard). There is evidence that Plaintiff worked at that premises and was exposed to and inhaled large quantities of dust from insulation used on piping about half of the time during his work there over the period of several months. Importantly, however, there is no evidence from anyone with personal knowledge as to whether there was asbestos in the dust that Plaintiff inhaled there. The Court notes that Dr. Maddox's opinion is premised on the assumption that the dust to which Plaintiff was exposed contained asbestos. Dr. Maddox does not purport to have personal knowledge that the insulation (or the dust from it) contained asbestos.

To the extent that Dr. Maddox is providing an opinion that the insulation more likely than not contained asbestos, based upon his own experience during the relevant time period, and/or Plaintiff's belief that the piping on which it was used was a high temperature application (e.g., steam piping), the Court notes that such testimony would be impermissibly speculative, as there is no way to determine whether the insulation contained asbestos. Moreover, Dr. Maddox does not



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suggest that it is not possible that the insulation was non-asbestos containing insulation. In this regard, the present case is distinguishable from Rando because, in that case, (1) the plaintiff provided testimony that he "thought" asbestos was being used at the construction project on which he was working, because high temperature lines were involved, and (2) the record showed that high temperature asbestos insulation was specified for use at the jobsite. 16 So.3d 1065 at 1089. By contrast, Plaintiff here does not provide any testimony that he believes the insulation contained asbestos, and there is no evidence that the insulation used at the worksite contained asbestos. Therefore, even when construing the evidence in the light most favorable to Plaintiff, no reasonable jury could conclude from the evidence that he was exposed to asbestos from insulation at Defendant Trinity's worksite such that it was a "substantial factor" in bringing about his illness, because any such finding would be impermissibly conjectural. See Rando, 16 So. 3d at 1088; Lucas, 60 So. 3d at 701-02. Accordingly, summary judgment in favor of Defendant is warranted. Anderson, 477 U.S. at 250.