

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

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. The alleged exposures which are relevant to this motion occurred in Louisiana. Therefore, this Court will apply Louisiana law in deciding Defendant's Motion for Summary Judgment. 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).

1. Louisiana product identification and "substantial factor" analysis

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. MOTION FOR SUMMARY JUDGMENT OF CERTAINTeed CORPORATION, INC.

A. Application of the "substantial factor" test to Plaintiff's claims

1. Plaintiff's Alleged Exposure to Defendant's Asbestos at Atlas Sheet Metal Works, Hutches-Davidson, and Universal

Plaintiff has produced sufficient evidence to raise a genuine issue of fact as to whether he was exposed to asbestos attributable to Georgia-Pacific, and whether such exposure was a substantial causative factor in his disease.

As a child, Mr. Davidson's grandfather owned and operated a roofing and sheet metal business, Atlas Sheet Metal Works ("Atlas"), in Bossier City, Louisiana. Plaintiff's family lived a block away from Atlas, and his father worked for Atlas for approximately eight years. (Dep. of William Cleve Davidson, June 18, 2011, at 12-14, Pl.'s Ex. 1). Plaintiff recalled his father returning home from work with dust on his clothes, and he kept his clothes on through dinner time, even while playing with his son [Plaintiff]. (Id. at 15-16). Plaintiff recalled helping his mother with chores such as washing his father's dirty work clothing, and recalled seeing dust in the air and breathing it in. (Id. at 15-16).

Plaintiff recalled playing with flat insulation boards as a

child, which he testified were manufactured by Georgia-Pacific and Johns-Manville, among others. (Id. at 23). He recalled using the flat insulation while playing with a childhood friend to make walls of forts that they built out of roofing felt and insulation boards. (Dep. of William Cleve Davidson at 30, 62-63, June 23, 2010, Pl.'s Ex. 2).

Plaintiff testified that, in 1964 or 1965, his father stopped working at Atlas and created his own roofing company, Hutches-Davidson Roofing. (Davidson Dep. at 27, Pl.'s Ex. 1). Plaintiff was a roofing helper for his father, which required Plaintiff to unload trucks full of roofing products, hauling materials, and cutting materials. (Id. at 27-29). Additionally, Plaintiff was tasked with hoisting flat insulation panels onto the roof; "man-handling" them to get into stacks; and then, after they were installed, unwrapping the panels and bringing them over sheet by sheet. He also would help cut insulation that needed to be cut. (Id. at 30-32).

Plaintiff recalled that Georgia-Pacific and Johns-Manville were among the manufacturers of the flat insulation products that Plaintiff worked with at this time. (Id. at 30). When Plaintiff unwrapped packages of insulation, dust and fibers would be floating in the air, and he would breathe it in. (Id. at 34). He testified that he worked with insulation boards in this manner on a daily basis, sometimes for an entire workday.

In 1965 or 1966, Plaintiff's father closed Hutches-Davidson and opened a new roofing department for Universal Heating and Air Conditioning ("Universal"). (Dep. of Davidson at 39, Pl.'s Ex. 1). Plaintiff continued to work as a helper on weekends, during the summers and during school breaks. (Id. at 39-40). He estimated that he spent at least 75% of his time at Universal doing roofing work, approximately 15% doing HVAC work, and 10% doing sheet metal work. (Dep. of William Cleve Davidson at 164-65, June 18, 2010, Def.'s Ex. A). Some of the HVAC work involved installing ductwork. (Dep. of William Cleve Davidson at 68-69, July 20, 2010, Def.'s Ex. C).

Plaintiff recalled that at Universal, he would be in close proximity to drywall crews that were doing sanding work. He testified that there was visible "dust everywhere," and that he breathed in dust and also got it on his clothing. (Davidson Dep. at 60-62, Pl.'s Ex. 1). He recalled that Georgia-Pacific was one of the brands of drywall mud products used by the drywall crews. (Id. at 60). In fact, he said Georgia-Pacific and United States Gypsum were the brands used most frequently at Universal. (Dep.

of William Cleve Davidson at 157, July 26, 2010, Pl.'s Ex. 3).

Defendant admitted in answers to interrogatories that certain products that it manufactured, such as joint compound and laminating compound, contained asbestos. Additionally, "Some of the products known to have been sold through [Defendant's] Distribution Centers . . . include, but are not limited to asbestos cement board manufactured by Johns-Manville, various roofing products containing asbestos from various manufacturers," etc. (Def.'s Resp. to Interrogs. at 6-9, 11, Pl.'s Ex. 4).

Plaintiff presented testimony of a causation expert, Dr. David A. Schwartz, and of an industrial hygienist, William M. Ewing. Mr. Ewing concluded that exposure to asbestos-containing products such as Defendant's would have increased Plaintiff's risk of developing mesothelioma. (Aff. of Ewing at 6, 12, Pl.'s Ex. 7). Dr. Schwartz concluded that each of Plaintiff's exposures constituted a substantial contributing factor in his development of the disease. (Aff. of Schwartz at 6, 12, Pl.'s Ex. 7). Both experts' testimony mirrors the expert testimony given in Rando, in which case one expert testified as to the increased risk of developing cancer after inhaling asbestos dust, and another testified that the asbestos plaintiff inhaled was a substantial factor in causing his disease. Here, with or without Mr. Ewing's testimony as to increased risk of developing an asbestos-related disease, a matter which, although referred to in Rando, has not been expressly adopted by the Louisiana Supreme Court, Dr. Schwartz's testimony about substantial factor causation would be sufficient for Plaintiff to overcome summary judgment on the issue of causation.

In sum, Plaintiff identified Defendant's name and products, testified that these products with which he worked and played released dust, and testified that he breathed in such dust. He has also introduced expert testimony regarding substantial factor causation. Plaintiff has therefore presented enough evidence to raise an issue of fact as to whether he was exposed to Defendant's asbestos products at Atlas, Hutches-Davidson and Universal, and whether such products were a substantial factor in causing his mesothelioma.

2. Plaintiff's alleged exposure to asbestos attributable to Georgia-Pacific at the construction of the lake home

Defendant's Motion for Summary Judgment is granted in part with regard to Plaintiff's alleged exposure to Union Carbide

asbestos during the construction of his parents' lake house. Under Louisiana law, a "plaintiff must establish his claim to a reasonable certainty[;] mere possibility, and even unsupported probability, are not sufficient to support a judgment in plaintiff's favor." Vodanovich, 869 So. 2d at 934.

Plaintiff alleges exposure to Georgia-Pacific joint compound during the construction of his parents' lake house between approximately 1970 and 1975. The main section of the house was built in approximately 1970. (Dep. of William Cleve Davidson at 16-20, July 26, 2010, Pl.'s Ex. 2). The walls and ceilings were sheetrock, and were covered with paneling or a Formica product. (Id. at 16-20). Plaintiff assisted in finishing the sheetrock, a process that took up to two days. (Id. at 21).

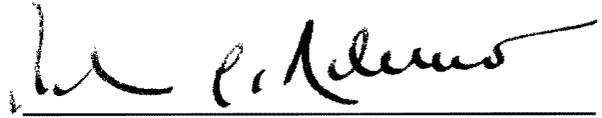
In about 1971, the house was expanded, also with sheetrock that was finished and covered with paneling. (Id. at 29-30). It took about three days to finish the sheetrock; Plaintiff testified that he was around during one or two days of this process, and he helped to sand part of a wall. (Id. at 29-32).

Around 1972, there was another expansion of the house with which Plaintiff occasionally helped. He assisted with sheetrock installation; muddling; insulation work; and roofing work for a total of about two days. He did not recall the name brands or manufacturers of any wallboard, sheetrock, or joint compounds used during this particular renovation. (Id. at 33-40).

Plaintiff remembered that "the brands that were common that we used" during the home construction included Georgia-Pacific. (Id. at 25-26). However, he based this testimony on his knowledge of the products that were "generally available" at the time; he did not "recall seeing a certain brand on the floor fixing to be mixed at a certain point in any of the construction." (Id.).

Although Plaintiff testified to being in the vicinity and helping with construction for certain periods of time, during which the work area would often be dusty and often would cause him to breathe in dust, Plaintiff has not succeeded in identifying Georgia-Pacific asbestos. Plaintiff testified that Georgia-Pacific joint compound would be used during construction of the lake house, but he clarified that he did not specifically remember seeing such brand names at the house. Rather, he assumed that they would have been there because those were the brand names he believed were common and widely available. There were no other witnesses to testify as to Plaintiff's exposure at the beach house. This is not enough to create an issue of fact

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

as to whether Georgia-Pacific compounds were used at the lake house.

III. CONCLUSION

Summary judgment is granted in part and denied in part. It is granted regarding Plaintiff's alleged exposure to Defendant's asbestos during the construction of his parents' lake home, as Plaintiff could not remember which brands of asbestos-containing construction materials were used; rather, he speculated as to which products were used based on the brands he believed to be widely available at the time.

Summary judgment is denied regarding Plaintiff's alleged exposure to asbestos attributable to Georgia-Pacific during his childhood at Atlas, and during his time as a helper at Universal and at Hutches-Davidson, because Plaintiff has provided sufficient evidence to raise an issue of fact as to whether Plaintiff was exposed to Georgia-Pacific asbestos in insulation boards and whether it was a substantial causative factor in his development of mesothelioma.