IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM CLEVE DAVIDSON	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	
	:	Transferred from the Eastern
	:	District of Louisiana
v.	:	(Case No. 28:1332)
	:	
HSBC HOLDINGS PLC, et al.,	:	
	:	E.D. PA CIVIL ACTION NO. 11-66764
Defendants.	:	

O R D E R

AND NOW, this **22nd** day of **September, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Beazer East, Inc. (doc. no. 13) is **DENIED**.[1]

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[1] Plaintiff William Cleve Davidson filed this case in Louisiana state court, and it was removed on April 29, 2011 to the United States District Court for the Eastern District of Louisiana and subsequently transferred to the Eastern District of Pennsylvania as part of MDL-875.

Defendant Beazer East, Inc. ("Beazer") is a successor to Koppers Company, Inc. Plaintiff has alleged that he was exposed to asbestos as a result of Koppers roofing felts and Koppers flashing material, and that this exposure was a substantial contributing factor in his development of malignant mesothelioma.

At least as long ago as 1962, and possibly before then, Koppers manufactured roofing systems requiring the use of asbestos felts. (See, e.g., Koppers Built Up Roofing Specifications Manuals for Architects and Engineers, 1962, 1964, 1966, 1968, 1969, 1970, Pl.'s Ex.s 7-13).

Defendant argues that Plaintiff could neither identify Koppers asbestos, nor provide causation evidence. Any evidence of Plaintiff's exposure is speculative, especially because he never saw the word "asbestos" on any felts he worked with.

Plaintiff argues that he has presented sufficient evidence to raise a genuine issue of material fact as to whether he was exposed to asbestos attributable to Defendant and whether it was a substantial contributing factor to his mesothelioma. As discussed infra, Plaintiff identified Koppers as a brand he saw both at his grandfather's business and as a roofing helper working for his father. He also testified to being exposed to dust at the workplace and at home.

I. LEGAL STANDARD

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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

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 BEAZER EAST, INC.

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

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. 3). 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).

Additionally, Plaintiff recalled playing on an almost daily basis at the Atlas warehouse as a child, from about 1955 through the early 1960s. (Id. at 17-19). He said that there, he played directly with roofing products, including building "forts" with asbestos felts. (Id. at 17-19; Dep. of William Cleve Davidson, June 23, 2011, at 33-34, Pl.'s Ex. 5).

Both Plaintiff and his childhood playmate, Gary Bruce Gibbs, testified that they remembered playing with Koppers felts, specifically, in the Atlas warehouse. (Davidson Dep. at 22-23, Pl.'s Ex. 3; Dep. of Gary Bruce Gibbs, January 25, 2011, at 37, Pl.'s Ex. 4).

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. 3). Plaintiff was a roofing helper for his father, which required Plaintiff to unload trucks full of roofing products, hauling materials, and cutting materials. His work involved hauling felts, including felts Koppers felts. (Id. at 27-29). He remembered Koppers representatives coming to the business and speaking to his father. (Id. at 161-62).

In 1965 or 1966, Plaintiff's father closed Hutches-Davidson and opened a new roofing department for Universal Heating and Air conditioning. (Id. at 39). Plaintiff continued to work as a helper on weekend, during the summers and during school breaks. (Id. at 39-40). His responsibilities included hauling Koppers roofing felts up ladders and assisting in installation of those felts. (Id. at 41-42). Plaintiff testified that Universal specialized in roofing for commercial buildings, and that one building could require perhaps 150 rolls of felt weighing 60 pounds each, and 100 base sheets weighing 30 pounds each. (Id. at 48-19). Plaintiff recalled Koppers roofing products becoming more popular during the time he worked at Universal, as his father was friends with the Koppers salesman. (Id. at 43).

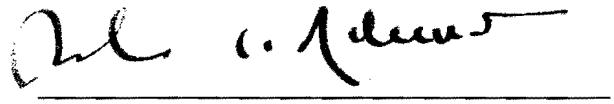
Additionally, Plaintiff testified that he saw dust coming from the felts with which he worked, and that they had a "dry fibrous surface . . . and just rubbing them releases fibers." (Id. at 28-29).

It is undisputed that some, if not most or all, of Koppers' roofing felts and other roofing products contained asbestos during the same periods that Plaintiff was exposed to such products. (See, e.g., Koppers Built Up Roofing Specifications Manuals, 1962, 1964, 1966, 1968, 1969, 1970, Pl.'s Ex.s 7-13).

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 felts such as Koppers 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.

Plaintiff's evidence in this case is stronger than in certain other cases in which Louisiana courts have denied summary judgment. For example, unlike in Lucas, Plaintiff here produced expert testimony of causation. See Lucas, 60 So. 3d at 698-99. The Lucas court granted summary judgment to other defendants when the plaintiffs could not produce direct or circumstantial evidence that the defendants' products contained asbestos, and/or that the decedent was exposed to dust from the defendants' products. See id. at 699-702. Here, Plaintiff has provided enough evidence that certain Koppers felts contained asbestos, and that he was exposed to dust from such products, to raise an issue of fact as to whether Plaintiff was exposed to asbestos from Koppers and whether it was a substantial factor in causing his mesothelioma.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

III. CONCLUSION

In sum, Plaintiff unequivocally identified Koppers, at several points in during his testimony, as a manufacturer of many of the roofing products to which he was exposed as a child and as an adult. It is undisputed that some, if not most or all, of Koppers' roofing felts and other roofing products contained asbestos during the same periods that Plaintiff was exposed to such products. Plaintiff testified as to the dust that came off of the Koppers products he worked with. He was around the products for several years during his childhood, and regularly during school breaks and on weekends during his adolescence. All of this is sufficient to create an issue of fact as to whether Plaintiff has significant exposure to asbestos manufactured or distributed by Defendant, and whether such exposure was a substantial contributing factor to his mesothelioma.