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 **23rd** day of **September, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Union Carbide Corp. (doc. no. 16) is **GRANTED** in part and **DENIED** in part.[1]

[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. Plaintiff alleges routine exposure to asbestos-containing joint compound products during his time as a helper at Universal Heating and Air Conditioning ("Universal"), and during the construction of his parents' lake home on Lake Bistineau. Defendant Union Carbide Corp. ("Union Carbide") was a supplier of raw asbestos materials to manufacturers who used the asbestos in other products, such as joint compounds.

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 CERTAINTEED CORPORATION, INC.

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

1. Plaintiff's alleged exposure to asbestos attributable to Union Carbide 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 U.S. Gypsum and 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 Union Carbide asbestos. Plaintiff testified that National Gypsum and 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 as to whether National Gypsum and Georgia-Pacific compounds were used at the lake house.

2. Plaintiff's alleged exposure to asbestos attributable to Union Carbide at Universal

In approximately 1965 or 1966, Plaintiff's father opened a new roofing department for Universal. (Dep. of William Cleve Davidson at 39, June 18, 2010, Pl.'s Ex. 1). Plaintiff worked as a helper at Universal on weekends, in the summers and during school breaks. (Id. at 39-41). This was between 1965 or 1966 and 1971. (Id. at 56).

He worked in the air conditioning and sheet metal department

approximately up to 25% of the time he spent at Universal. (Id. at 39-41). As a helper in the air conditioning and sheet metal department, Plaintiff often was in close proximity to sheetrock crews installing and finishing walls of buildings. (Id. at 56-57, 62). Plaintiff estimated that he was around sheetrock crews two to three times per week while, eight hours per day, while working at Universal. (Id. at 62-63). He testified that he was exposed to dust from joint compounds that the crews used. (Id. at 57-62). Specifically, sheetrock crews had to mix joint compounds by pouring dry mix into buckets, adding water, and mixing the compound, which was a "very dusty process." (Id. at 57). Crews would later have to sand the "mud," or joint compound, that they applied to joints; this was also a dusty process. (Id. at 61-62).

Plaintiff recalled seeing the names of the following manufacturers on drywall mud products during his time at Universal: Georgia-Pacific; United States Gypsum; National Gypsum; and Bondex. (Id. at 60).

Summary judgment is granted regarding Plaintiff's alleged exposure at Universal to asbestos in Georgia-Pacific joint compound, because although evidence shows that all Georgia-Pacific All Purpose dry mix joint compound contained Union Carbide asbestos fiber between 1974 and 1975 or 1976, Plaintiff does not allege exposure during that time period. Rather, he alleges exposure from working at Universal from 1965 or 1966 until 1971. During other time periods, Georgia-Pacific did not get asbestos fibers exclusively from Union Carbide; they also obtained asbestos fibers from other raw materials suppliers. Plaintiff did not identify either Union Carbide or Calidria in his testimony, and there is no other evidence that creates an issue of fact as to whether all Georgia-Pacific joint compounds even contained asbestos, and if so, whether that asbestos could be attributable to Union Carbide and not another supplier.

However, summary judgment is denied regarding Plaintiff's alleged exposure to Union Carbide asbestos in National Gypsum products during his time at Universal. Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether he was exposed to Union Carbide asbestos in National Gypsum products, and whether this was a substantial causative factor in his development of mesothelioma. Plaintiff testified unequivocally that he remembered National Gypsum brand products being present at Universal, and he remembered dust being emitted when he or other workers in the vicinity worked around the product. He breathed in the dust, and this happened over a period of several years during his childhood and adolescence.

Moreover, beginning in approximate 1969, National Gypsum obtained is raw asbestos fibers exclusively from Union Carbide. (See Dep. of Donald R. Doty at 96-97, March 13, 2007, Pl.'s Ex. 21).

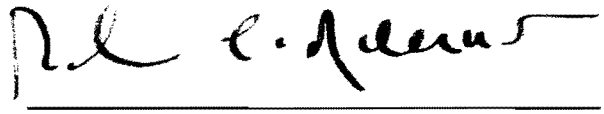
Plaintiff presented testimony of a causation expert, Dr. David A. Schwartz, and of an industrial hygienist, William M. Ewing. Mr. Ewing concluded that exposure to asbestos-containing products such as Union-Carbide's would have increased Plaintiff's risk of developing mesothelioma. (Aff. of Ewing at 6, 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.

Therefore, at least for the period of 1969 (when National Gypsum began using exclusively Union Carbide asbestos) until Plaintiff stopped working at Universal, Plaintiff has presented enough evidence to raise a genuine issue of fact as to whether he was exposed to Union Carbide asbestos fibers and whether this was a substantial causative factor in his development of mesothelioma.

III. CONCLUSION

For the reasons discussed above, summary judgment is granted in part, regarding 1.) Plaintiff's alleged exposure to Union Carbide asbestos at Universal, and 2.) his alleged exposure to Union Carbide asbestos in Georgia-Pacific products. Summary judgment is denied in part, regarding Plaintiff's alleged exposure to asbestos in National Gypsum products.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.