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

FRANK J. WILLIAMS, JR.	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Eastern District of Louisiana (Case No. 12-02318)
v.	:	
LOCKHEED MARTIN CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:09-70101-ER
Defendants.	:	

O R D E R

AND NOW, this **23rd** day of **June, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **The Boeing Company** (Doc. No. 381) is **GRANTED**.[1]

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[1] This case was transferred in June of 2009 from the United States District Court for the Northern District of Ohio to the United States District Court for the Eastern District of Louisiana as part of MDL-875.

Plaintiffs allege that Frank Williams, Jr. ("Decedent" or "Mr. Williams") was exposed to asbestos from various products during his work as an engineer for Lockheed Martin in Louisiana (including at the NASA Michoud Assembly Facility) during the period 1974 to 1993. Mr. Williams developed an asbestos-related illness and died from that illness.

Plaintiffs have brought claims against various defendants. Defendant Boeing Company has moved for summary judgment arguing that (1) there is insufficient evidence to support a finding of causation with respect to any product(s) or conduct for which it could be liable, and (2) Plaintiffs' wrongful death claims are barred by Louisiana's one-year statute of limitations.

Plaintiffs' oppositions generally contend that the Court does not have subject matter jurisdiction over this case and that removal pursuant to the government contractor defense was not proper. Plaintiffs have also filed a separate motion for

partial summary judgment, seeking dismissal of the government contractor defense, as asserted by Defendant Lockheed Martin.

The parties agree that Louisiana law applies.

II. 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

1. Procedural Matters (Federal Law)

In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.). Therefore, in addressing the procedural matters herein, the Court will apply

federal law as interpreted by the Third Circuit Court of Appeals. Id.

2. State Law Issues (Substantive Law)

The parties agree that Louisiana substantive law applies. Therefore, this Court will apply Louisiana law in deciding each 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).

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.

D. Amendments to Pleadings

Amendments to pleadings are governed by Rules 15 and 16 of the Federal Rules of Civil Procedure. Rule 15 permits parties to amend their pleadings only once as a matter of course, within 21 days after service of the initial complaint or the filing of a responsive pleading or motion. Fed. R. Civ. P. 15(a)(1). All further amendments require the leave of the court which it should "freely give . . . when justice so requires." Id. R. 15(a)(2). If, however, a motion to amend is filed after the Court ordered deadline for amendments has passed, the moving party must demonstrate good cause for the amendment. Id. R. 16(b)(4). "Good cause" under Rule 16(b) focuses on the diligence of the party seeking the modification of the scheduling order. See Fed. R. Civ. P. 16, Advisory Committee Note (1983) ("the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension").

III. Defendant's Motion for Summary Judgment

A. Defendant's Arguments

Causation

Defendant Boeing Company contends that Plaintiffs' evidence is insufficient to establish causation with respect to any product or conduct for which it could be liable.

Wrongful Death Claims Are Time-Barred (Statute of Limitations)

Defendant Boeing Company asserts that Plaintiffs' wrongful death claims are barred by Louisiana's one-year statute of limitations because they were not filed until February of 2013 (approximately four years after Decedent's January 2009 death). In support of this assertion, Boeing relies upon: (1) Guidry v. Theriot, 377 So.2d 319, 322 (La. 1979); (2) Walls v. American Optical Corp., No. 98-0455, 740 So.2d 1262, 1270 (La. 1999); (3) Ducre v. Afine Safety Appliances Co., 634 F. Supp. 696, 699 (E.D. La. 1986); and (4) La. Civ. Code Art. 2315.2(B).

B. Plaintiffs' Arguments

Wrongful Death Claims Are Time-Barred (Statute of Limitations)

Plaintiffs contend that, according to the Federal Rules of Civil Procedure (Rule 15) and Louisiana law, Plaintiffs' Second Amended Supplemental Petition relates back to the date of the initial filing of the petition in state court and, therefore, is not time-barred. Plaintiffs rely upon the following timeline of events in an effort to demonstrate their wrongful death claims are not time-barred:

- 11/12/2008 - Plaintiff (now Decedent) filed suit.
- 1/1/2009 - Plaintiff (now Decedent) died of mesothelioma
- 2/6/2009 - Plaintiffs filed first Motion to Remand in La. federal court (E.D. La.) - Pls say this advised court and defense of intent to amend
- 6/12/2009 - Case transferred to E.D. Pa.
- 6/2/2010 - AO12 - Plaintiffs say they advised court and defense counsel of intent to amend
- 2/11/2011 - MTD of Defendant Lockheed acknowledges notice of death
- 5/8/2012 - Court substitutes Plaintiffs for Decedent
- 1/25/2013 - First Amended Petition filed
- 2/4/2013 - Second Amended Petition filed (with leave)

In short, Plaintiffs contend that, under Louisiana's fact-pleading theory, their February 6, 2009 Motion to Remand and their January 25, 2013 First Amended Petition were more than sufficient to institute their wrongful death suits against Defendants. Specifically, they contend that they did not file a "survival action" to the exclusion of their wrongful death action - and, instead, claimed any and all damages owed them as a result of Decedent's death, which they contends is sufficient, as demonstrated by Biggs v. Hatter, 32 So.3d 355 (La. Ct. App. (2d Cir.) 2010).

They also contend that, under the Federal Rules of Civil Procedure (Rule 15(c)-(d)), the amendment related back to the date of the filing of the initial state-filed petition and is therefore not time-barred because (1) all claims arose out of Decedent's exposure to asbestos during his employment tenure at Lockheed and MAF, (2) all Defendants were on notice about Plaintiffs (who are the children of Decedent) in 2009 (before the filing of the First or Second Amended Petition) because Plaintiffs had already been substituted by the Court, and

(3) there is no prejudice to Defendants because (a) Plaintiffs are not new or unrelated parties (merely substituted parties), (b) the Second Amended Petition was filed long before the end of discovery (such that each Defendant had ample time to prepare to fully defend itself against wrongful death claims), and (c) the facts pertaining to the wrongful death and survival claims are so related that the evidence Defendants will use for one is essentially identical to that for the other.

Causation

Plaintiffs contend that their evidence is sufficient to establish causation with respect to injury caused by Defendant Boeing, as custodian of the facility at which Decedent worked (and the asbestos thereon), and also as a designer, improver, and installer of asbestos products on the facility. That evidence is summarized in pertinent part below:

- 1976 Proposal
  Plaintiffs identify a document entitled "Preventive/Corrective Maintenance, Minor In-Plant Construction and Rearrangement/Alteration Services, Part I Technical Proposal, Boeing Aerospace Company Field Operations and Support Division, (which they refer to as the "1976 Proposal"), which they contend indicates that Boeing planned, designed and implemented a $15 million brick and mortar modification program, in which it operated and maintained 1.2 million square feet of facilities, including air conditioning, communications, electrical systems, elevators, services, etc. - and under which it had as many as approximately 7,000 employees. Plaintiffs contend the document indicates that during 1975 and 1976, Defendant also provided security, fire protection, maintenance, transportation, training, mail, telecommunications, etc. for the facility. Plaintiffs note that none of the workers at the facility (working under Boeing) were ever identified as "asbestos workers" or as having had asbestos training, despite the fact that there was asbestos in or on many components of the building, including pipes, HVAC systems, etc.

  (Pl. Ex. 5, Doc. Nos. 382-5 to 382-9)

- Invitation for Bids
  Plaintiffs point to a NASA document from 1963 requesting bids for construction of the engineering building (which Boeing later handled), which identified four different classifications of asbestos workers.

  (Pl. Ex. 6, Doc. Nos. 382-10 to 382-11)

- 1980 Contract
  Plaintiffs point to a contract dated May 1, 1980, between Boeing and Martin Marietta, which provides for Boeing to perform preventive and corrective maintenance and operation of the facility, as well as in-plant construction and rearrangements and alterations. Plaintiffs note that the description of Boeing's responsibilities is similar, if not identical, to those described in the 1976 Proposal.

  (Pl. Ex. 7, Doc. No. 382-12)

- A&E Contracts List
  Plaintiffs point to a contracts list, which they contend indicates that Boeing was responsible for the design, approval, and installation of substantial amounts of asbestos at the facility.

  (Pl. Ex. 8, Doc. No. 382-13)

- Engineering Report
  Plaintiffs point to a report which they contend indicates that there were asbestos hazards in Building 103, and that multiple repair and surveying projects were undertaken on this building during the period in which it was under Boeing's custody.

  (Pl. Ex. 9, Doc. No. 382-14)

- Various Documents
  Plaintiffs point to numerous documents which they contend indicate that asbestos was used at the facility during the time of Boeing's custody there, some of which indicate Boeing was

identified by name as the party deciding to install the asbestos.

(Pl. Exs. 10 to 12, Doc. Nos. 382-15 to 382-17)

- Affidavit of Co-Worker George Stemley
  Decedent's co-worker, George Stemley, worked at the Michoud Assembly Facility from 1963 to 1993. He provides testimony that Decedent worked primarily as a design engineer on the second floor of Building 350, although he also frequently visited building 351 and the cafeteria, and sometimes visited Buildings 101, 102, and 103, and possibly others. He states that Decedent worked almost exclusively on a computer, performing calculations, and that his work related exclusively to the External Tank ("ET") project. Mr. Stemley states that there was insulation on some of the electrical wires and equipment in the ET. He states that, to the best of his knowledge, there was never asbestos in the ET. Mr. Stemley provides testimony that, during the mid-to-late 1980s, there was asbestos abatement work on the second floor of Building 350. He states that he witnessed workers working in protective gear near employee work areas.

  (Pl. Ex. 13, Doc. No. 382-18)

- Declaration and Expert Report of K. Barton Farris, M.D., M.P.H.
  Dr. Farris states that, given the date of Decedent's asbestos-related diagnosis and death, it is "likely that at least some of his causative exposure to asbestos fell in the range of 1968 to 1978." He states that it is his opinion that Decedent's exposures to asbestos at the Michoud facility were substantial contributing factors in the causation of Decedent's mesothelioma.

  (Pl. Exs. 1 and 2, Doc. Nos. 382-1 and 382-2)

- Affidavit and Expert Reports of Frank Parker
  Mr. Parker provides expert testimony that the asbestos in the facility would have been deteriorating by the time Decedent worked there,

and that his employment would have exposed him frequently to above-average ambient background levels of asbestos (as a result of maintenance and repair work occurring in the facility in buildings in which he worked/visited).

(Pl. Exs. 3, 4, 16, 17, and 21, Doc. Nos. 382-3, 382-4, 382-21, 382-22, 382-26)

C. Analysis

Wrongful Death Claims Are Time-Barred (Statute of Limitations)

Defendant Boeing contends that Plaintiffs' wrongful death claims are barred by Louisiana's statute of limitations. Plaintiffs claim that, according to the Federal Rules of Civil Procedure (Rule 15) and Louisiana law, Plaintiffs' Second Amended Supplemental Petition relates back to the date of the initial filing of the petition in state court and, therefore, is not time-barred.

The Court rejects Plaintiffs' argument that relation back should be permitted - and, instead, grants Defendants' motions as to wrongful death claims. Decedent died January 1, 2009 (more than 5 years ago). Plaintiffs did not seek to amend until they filed their opposition to Defendants' summary judgment motions - although they acknowledge they had an intent to amend in February 2009 and June 2010 (when they filed their motion to remand in E.D. La. and their AO12 Order in June 2010). Plaintiffs make arguments as to why Defendants will not be prejudiced by this. However, they have not shown anything that approaches "good cause" for failing to make the amendments they intended to make as far back as 2009 and 2010, or any reason that "justice so requires" this Court to permit them to do so. See Fed. R. Civ. P. 15(a)(2). Accordingly, Defendant is entitled to partial summary judgment on this basis as to wrongful death claims. The Court next considers the sufficiency of Plaintiffs' causation evidence with respect to their survival claims.

Causation

Decedent worked at the NASA Michoud Assembly Facility from 1974 to 1993. Plaintiffs have presented evidence that Boeing planned, designed and implemented a $15 million brick and mortar modification program at the NASA Michoud Assembly Facility, in which it operated and maintained 1.2 million square feet of

facilities, including air conditioning, communications, electrical systems, elevators, services, etc. - and under which it had as many as approximately 7,000 employees. Their evidence indicates that during 1975 and 1976, Defendant also provided security, fire protection, maintenance, transportation, training, mail, telecommunications, etc. for the facility - and that this work by Boeing continued until at least 1980 and some time thereafter. There is evidence that, as early as 1963, there was asbestos at the facility. There is evidence that Boeing was responsible for the design, approval, and installation of substantial amounts of asbestos at the facility thereafter. Plaintiffs have presented evidence that there were asbestos hazards in Building 103, and that multiple repair and surveying projects were undertaken on this building during the period in which it was under Boeing's custody. There is evidence that Decedent worked primarily as a design engineer on the second floor of Building 350, and that he also frequently visited building 351 and the cafeteria, and sometimes visited Buildings 101, 102, and 103 (and possibly others). There is also evidence that, during the mid-to-late 1980s, there was asbestos abatement work on the second floor of Building 350 - and that there were workers working in protective gear near employee work areas.

Importantly, however, there is no evidence that Decedent was exposed to respirable asbestos at the facility. Although the evidence indicates that Decedent worked primarily on the second floor of Building 350, he worked at the facility for over twenty years, and there is no evidence as to which portion of this period was in Building 350 (or whether it was perhaps during this whole period). Moreover, although there is evidence that, during the mid-to-late 1980s there was asbestos abatement work in Building 350, there is no evidence that Decedent was working nearby (or in that building at all) when that work was performed. Although the evidence makes clear that there was asbestos throughout the facility during and prior to Decedent's work there, there is no evidence that Decedent was ever exposed to respirable asbestos dust at any location in the facility.

Although the Louisiana Supreme Court has made clear in Rando that a Plaintiff may prevail by relying upon circumstantial evidence, the evidence presented by Plaintiffs here is distinguishable and is insufficient to support a finding of causation. In Rando, the evidence indicated that the entire time the 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.

Although the plaintiff was not certain that asbestos was being used, there was some basis for a reasonable belief that the pipe insulation at issue contained asbestos (the fact that it was high temperature piping). In contrast, in the case at hand, although it is known that there was asbestos at the facility, there is no evidence that Mr. Williams was exposed to respirable asbestos dust. The evidence that he "primarily" worked in Building 350 during a period of over 20 years is not sufficiently specific to allow a reasonable jury to conclude that he was exposed to respirable asbestos dust from a particular asbestos abatement project that took place on a given occasion in that building. In fact, the Rando court made clear that, "If circumstantial evidence is relied upon, that evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty." 16 So. 3d at 1091. The evidence that Decedent primarily worked in Building 350 does not exclude the possibility that he was not working there during the asbestos abatement project. Any conclusion to the contrary would be impermissibly speculative. See Lucas, 60 So. 3d at 699-700.

Similarly, the evidence presented with respect to the defendant who survived summary judgment in Lucas is distinguishable from that in the case at hand. In Lucas, there was evidence that the defendant installed asbestos-containing wallboard on a ship on which decedent worked, along with co-worker testimony that defendant had been installing "walls" while working in close proximity to the witness and the decedent. Id. at 698-99. In contrast, as explained already above, there is no evidence in the case at hand that Mr. Williams was ever in close proximity to respirable asbestos dust anywhere at the facility. As such, Defendant Boeing cannot be liable for Decedent's asbestos-related illness because no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos at the Michoud Assembly Facility such that it was a substantial factor in the development of Decedent's illness. See Anderson, 477 U.S. at 248-50. Accordingly, summary judgment in favor of Defendant is warranted as to Plaintiffs' survival claims (as well as their wrongful death claims).

D. Conclusion

Defendant Boeing is entitled to summary judgment on Plaintiffs' wrongful death claims because those claims are barred by Louisiana's statute of limitations.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Defendant Boeing is entitled to summary judgment on Plaintiffs' survival claims (as well as their wrongful death claims) because Plaintiffs have failed to identify sufficient evidence to support a finding of causation with respect to any product or conduct for which Defendant could be liable.