UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EVELYN CONERLY HUTCHINS, ET AL.	CIVIL ACTION
VERSUS	NO: 19-11326 c/w 21-369
ANCO INSULATIONS, INC., ET AL.	SECTION: "J"(5)

ORDER

Before the Court are two motions for summary judgment **(Rec. Docs. 362 and 365)** filed by Plaintiffs, Evelyn Conerly Hutchins, Derek Hutchins, and Dolan Hutchins in this case. Both motions are opposed by Defendant, Huntington Ingalls, Inc. ("Avondale") (Rec. Doc. 459) and Third-Party Plaintiff, Continental Insurance Company (Rec. Docs. 425 and 432). Plaintiffs have also filed replies. The Court heard oral argument on May 17, 2023 and took these motions under advisement. The Court now considers each of the motions and legal memoranda in turn, as well as the record and applicable law.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs allege that the decedent, Raymond Hutchins, Jr. ("Mr. Hutchins"), was exposed to asbestos while aboard vessels owned and operated by his employer, Lykes Bros. Steamship Company. ("Lykes Bros.") Mr. Hutchins allegedly worked aboard multiple Lykes Bros. vessels which were built by Avondale Shipyard pursuant to contracts with the United States Maritime Administration (MARAD). Originally, Plaintiffs filed suit in state court against more than 30 defendants, including

Huntington Ingalls, Avondale's successor. In response, on June 21, 2019, Huntington Ingalls removed the case to federal court, asserting federal officer jurisdiction. Subsequently, on February 24, 2020, Plaintiff filed a separate suit in state court against Continental, Lykes Bros.' alleged insurer. Continental removed the case to this Court on February 19, 2021, also asserting federal officer jurisdiction, and this new case was subsequently consolidated with the original case. Plaintiffs have now moved for summary judgment against numerous Defendants, arguing that there is no evidence that Mr. Hutchins was exposed to asbestos manufactured, sold, or supplied by any of the Defendants named in these motions.

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing FED. R. CIV. P. 56); *see Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). When assessing whether a dispute as to any material fact exists, a court considers "all of the evidence in the record but refrains from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.,* 530 F.3d 395, 398 (5th Cir. 2008). All reasonable inferences are drawn in favor of the nonmoving party, but a party cannot defeat summary judgment with conclusory allegations or unsubstantiated assertions. *Little*, 37 F.3d at 1075. A court ultimately must be

satisfied that "a reasonable jury could not return a verdict for the nonmoving party." *Delta*, 530 F.3d at 399.

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would 'entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264-65 (5th Cir. 1991). The nonmoving party can then defeat the motion by either countering with sufficient evidence of its own, or "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party." *Id.* at 1265.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim. *See Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See id.* at 324. The nonmovant may not rest upon the pleadings but must identify specific facts that establish a genuine issue for trial. *See id.* at 325; *Little*, 37 F.3d at 1075.

Under Louisiana law, in an asbestos exposure case, the claimant must show that (1) "he had significant exposure to the product complained of," and that (2) the exposure to the product "was a substantial factor in bringing about his injury." *Rando v. Anco Insulations, Inc.*, 16 So. 3d 1065, 1091 (La. 2009) (quoting *Asbestos v.*

Bordelon, Inc., 726 So. 2d 926, 948 (La. App. 4 Cir. 1998)). The plaintiff bears the burden of proof on both elements. *Vodanovich v. A.P. Green Indus., Inc.*, 869 So. 2d 930, 932 (La. App. 4 Cir. 2004). When there are multiple causes of injury, "a defendant's conduct is a cause in fact if it is a substantial factor generating plaintiff's harm." *Adams v. Owens-Corning Fiberglas Corp.*, 923 So. 2d 118, 122 (La. App. 1 Cir. 2005) (citing Vodanovich, 969 So. 2d at 932).

"Because there is a medically demonstrated causal relationship between asbestos exposure and mesothelioma, every non-trivial exposure to asbestos contributes to and constitutes a cause of mesothelioma." *Labarre v. Bienville Auto Parts, Inc.*, No. 21-89, 2022 WL 293250, at *3 (E.D. La. Feb. 1, 2022) (citing *McAskill v. Am. Marine Holding Co.*, 9 So. 3d 264, 268 (La. App. 4 Cir. 2009)). Thus, as the Fifth Circuit has explained, "[e]ven if the plaintiff was only exposed to asbestos for a 'short period for an employer[,] and he had longer exposure working for others, it cannot be said the relatively short asbestos exposure was not a substantial factor in causing his mesothelioma.'" *Williams v. Boeing Co.*, 23 F.4th 507, 512 (5th Cir. 2022) (quoting *Rando*, 16 So. 3d at 1091). To defeat a motion for summary judgment in an asbestos case, the non-movant "need only show that a reasonable jury could conclude that it is more likely than not that [plaintiff] inhaled defendant's asbestos fibers, even if there were only 'slight exposures.'" *Id.* (citing *Held v. Avondale Indus., Inc.*, 672 So. 2d 1106, 1109 (La. App. 4 Cir. 1996)). The same causation standard (the substantial factor test) is used in cases involving product liability defendants and premises owner defendants. *Thomas v. A.P. Green Indus., Inc.*, 05-1064, pp. 22-23 (La. App. 4 Cir.

5/31/06), 933 So.2d 843, 860 (citing *Zimko v. American Cyanamid*, 2003-0658, p. 26 (La. App. 4 Cir. 6/8/05), 905 So.2d 465, 485, *writ denied*, 2005-2102 (La. 3/17/06), 925 So.2d 538).

PLAINTIFFS' MOTIONS

Plaintiffs have filed numerous, virtually-identical motions for summary judgment. Each of Plaintiffs' motions presents the reverse of a typical motion for summary judgment. In each of these instances, Plaintiffs' have moved for summary judgment as to their own claims against the Defendants, arguing that there is no evidence that Mr. Hutchins was exposed to asbestos that was manufactured, sold, or supplied by any of these entities. In most if not all of these cases, it appears that Plaintiffs have already settled with these Defendants. Continental Insurance Company, the alleged insurer of Mr. Hutchins' employer, Lykes Bros., has opposed each of Plaintiffs' motions, arguing that there are genuine issues of material fact as to whether Mr. Hutchins was exposed because of the Defendant and whether this exposure was a substantial contributing factor to his mesothelioma. Continental also argues that Plaintiffs are merely trying to preclude the allocation of comparative fault and maximize their recovery against Lykes Bros. and its insurer, Continental. Avondale has also opposed many of Plaintiffs' motions, again asserting that there are genuine issues of material fact.

1. *Motion for Partial Summary Judgment as to Eagle-Picher* (Rec. Doc. 362)

Plaintiffs argue that "none of the evidence in this case establishes that Mr. Hutchins worked with or around products for which Eagle-Picher is responsible, much less that any product allegedly sold, supplied and/or distributed by any settling Defendant or non-party was a source of his asbestos exposures." (Rec. Doc. 362, at 4).

Continental and Avondale have opposed this motion. (Rec. Doc. 425 and 459). Both Continental and Avondale rely, in part, on Plaintiffs' claims to the Eagle-Picher Asbestos Settlement trust. The Court has already ruled at the oral argument on May 17, 2023 that all evidence related to these claim forms should be excluded under Federal Rule of Evidence 408. Therefore, all that remains is to consider whether the remaining evidence presented by Continental and Avondale is sufficient to establish a genuine issue of material fact as to whether Mr. Hutchins was exposed to asbestos by Eagle-Picher and whether this exposure was a substantial factor in causing his mesothelioma.

Continental cites to the testimony of Burnett L. Bordelon who stated that Eagle-Picher supplied their Eagle Super 66 insulating cement to Avondale for 25 to 30 years. (Rec. Doc. 425, at 2). Mr. Bordelon also testified that the *Margaret Lykes* and *Allison Lykes* were constructed at Avondale in 1964. *Id.* Continental reasons that "it follows that [Mr. Hutchins] could have been exposed to asbestos through Eagle-Picher's insulation products.

Avondale points to the testimony of Philip Gravois who was an Avondale insulator who worked on the construction of Lykes vessels. (Rec. Doc. 459, at 7). Mr. Gravois testified that Eagle-Picher's Super 66 cement was the primary insulation cement used on the ships he worked on at Avondale. (Gravois Deposition, Rec. Doc. 459-17, at 7).

In reply, Plaintiffs argue that Avondale should be judicially estopped from introducing evidence that Eagle-Picher asbestos was aboard Lykes ships since Mr. Burnett Bordelon, Avondale's corporate representative had already testified in 1983 that there was no way to identify what specific brands were used aboard a particular vessel. However, the Court finds no need to address this argument. Neither the testimony of Mr. Bordelon nor the testimony of Mr. Gravois is sufficient to create a genuine issue of material fact as to Mr. Hutchins' alleged exposure. Neither Continental nor Avondale has presented testimony from anyone that worked with Mr. Hutchins that establishes that he worked with or around Eagle-Picher's cement.

Therefore, the Court finds that Plaintiffs' *Motion for Partial Summary Judgment as to Eagle-Picher* **(Rec. Doc. 362)** should be **GRANTED.**

2. *Motion for Partial Summary Judgment as to Fibreboard* (Rec. Doc. 365)

Plaintiffs again argue that "none of the evidence in this case establishes that Mr. Hutchins worked with or around products for which Fibreboard is responsible, much less that any product allegedly sold, supplied and/or distributed by any settling Defendant or non-party was a source of his asbestos exposures." (Rec. Doc. 365, at 4).

Continental and Avondale both oppose this motion. (Rec. Docs. 432 and 459). Like with Plaintiffs' motion regarding Eagle-Picher, the Court has already determined that all evidence regarding Plaintiffs' claims to the trust administering asbestos claims against Fibreboard should be excluded. Therefore, all that remains is to evaluate any additional evidence of exposure submitted in opposition to Plaintiffs' motion. Continental does not cite any additional evidence beyond these trust claim documents. Avondale's opposition only contains one sentence in which they state that "Avondale insulator Philip Gravois, who worked on every one of the Lykes ships, testified that Pabco pipe covering was, in fact, applied to steam pipes during the construction of those ships." (Rec. Doc. 459, at 8). Needless to say, this is not sufficient evidence to establish a genuine issue of material fact. The mere fact that Fibreboard's Pabco Pipe Covering was used in the construction of Lykes ships does not show where this product was used, how it was used, whether Mr. Hutchins ever worked with it, or even that it was still on the Lykes ships during the time periods Mr. Hutchins was aboard. Therefore, the Court finds that

Plaintiffs' *Motion for Partial Summary Judgment as to Fibreboard* **(Rec. Doc. 365)** should be **GRANTED.**

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that Plaintiffs' Motions for Partial Summary Judgment **(Rec. Docs. 362 and 365)** are **GRANTED**.

New Orleans, Louisiana, this 18th day of May, 2023.

CARL J. BARBIER
UNITED STATES DISTRICT JUDGE