

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

IN RE: ASBESTOS LITIGATION :

Limited to: :

Foucha, Raymond :

C.A. No. N10C-05-042 ASB

**UPON DEFENDANT CERTAINTEED CORP.'S  
MOTION FOR SUMMARY JUDGMENT  
GRANTED**

This 31st day of May, 2011, it appears to the Court that:

Plaintiff Raymond Foucha ("Foucha") was diagnosed with mesothelioma in February 2010. Foucha and his wife, Sussanah Foucha, filed this action against various defendants that they allege are responsible for exposing Foucha to asbestos products and thereby causing his mesothelioma. Plaintiffs' claims against CertainTeed Corp. ("CertainTeed") relate to non-occupational roofing work in Louisiana in the mid- to late-1960s. During his deposition, Foucha testified to using CertainTeed roofing shingles while assisting his father with roof repairs on three different occasions: (1) replacing a combined ten-foot-by-ten-foot area of roofing on the family's "camp" house after Hurricane Betsy in 1965; (2) replacing the roof on a shed at the family's primary residence after Hurricane Betsy; and (3) re-shingling a smaller area of the "camp" house roof that was damaged by Hurricane Camille in 1969.

Foucha described the CertainTeed shingles that he and his father used during these repair jobs as long rectangles with three “separate pieces” or “tabs” on them.<sup>1</sup> Foucha recollected that the shingles were asphalt-based seal tab shingles.<sup>2</sup> He believed they were asbestos-containing based upon “common knowledge” that “a lot of shingles” during that time period utilized asbestos, although he conceded that he had no personal knowledge as to the asbestos content of the CertainTeed shingles.<sup>3</sup>

CertainTeed has moved for summary judgment on the basis that Plaintiffs cannot establish exposure to any asbestos-containing CertainTeed products. In support of its position, CertainTeed submits an affidavit from its associate general counsel, Charles B. Blakinger, provided for a Pennsylvania asbestos case. Blakinger states that CertainTeed’s three-tab shingles were asbestos-free except for a period from 1973 to 1974, when CertainTeed produced a three-tab fiberglass shingle that included asbestos.<sup>4</sup> Blakinger also notes that CertainTeed sold another manufacturer’s asbestos-containing asphalt shingling from 1966 to 1972, but those

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<sup>1</sup> Raymond Foucha, Discovery Dep., July 13, 2010, at 174:13:19.

<sup>2</sup> *Id.* at 174:20-22; 175:24-176:2.

<sup>3</sup> *Id.* at 182:20-183:13.

<sup>4</sup> Charles B. Blakinger Aff. ¶¶ 6, 8.

shingles were not three-tab shingles and would not match the physical description of a three-tab shingle.<sup>5</sup>

In response, Plaintiffs argue that Foucha identified the CertainTeed shingles as asbestos-containing during his deposition and emphasize that CertainTeed “manufactured and sold a number of asbestos-containing roofing products” during the period of Foucha’s alleged exposures.<sup>6</sup> According to Plaintiffs, Foucha’s deposition testimony satisfies the applicable substantial factor causation standard, because it demonstrates that he “was exposed to asbestos from CertainTeed shingles on numerous occasions.”<sup>7</sup>

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.<sup>8</sup> Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.<sup>9</sup> If the proponent properly supports its claims, the burden “shifts to the non-moving party to demonstrate that there are material

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<sup>5</sup> *Id.* ¶ 5.

<sup>6</sup> Pls.’ Opp’n to Def. CertainTeed’s Mot. for Summ. J. 2.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> Super. Ct. Civ. R. 56(c).

<sup>9</sup> *E.g., Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

issues of fact for resolution by the ultimate fact-finder.”<sup>10</sup> Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.<sup>11</sup>

The parties agree that Louisiana substantive law applies to this case. Under Louisiana law, the plaintiff in a multi-defendant asbestos-exposure action must establish “that the defendant’s asbestos-containing product was a substantial factor in causing his alleged disease.”<sup>12</sup> A plaintiff may satisfy this burden “by simply showing that he was actively working with asbestos-containing materials.”<sup>13</sup>

Here, Plaintiffs have shown (and CertainTeed has conceded) that Foucha worked directly with CertainTeed shingles. However, Plaintiffs lack evidence from which a fact-finder could reasonably infer that Foucha was exposed to an *asbestos-containing* CertainTeed product. During his deposition, Foucha described working with a three-tab asphalt shingle on all three roofing projects for which he recalled using CertainTeed shingles. Because each project occurred soon after a major hurricane, Foucha’s testimony is unusually specific in placing the

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<sup>10</sup> *Id.* at 880.

<sup>11</sup> *Id.* at 879-80.

<sup>12</sup> *McAskill v. Am. Marine Holding Co.*, 9 So.3d 264, 268 (La. Ct. App. 2009); *see also Vodanovich v. A.P. Green Indus., Inc.*, 869 So.2d 930, 932 (La. Ct. App. 2004).

<sup>13</sup> *McAskill*, 9 So.3d at 268.

repair work in the years from 1965 to 1969. Even allowing for the possibility that the shingles may have been purchased before 1965, both Blakinger's affidavit and CertainTeed's interrogatory responses indicate that none of the three-tab asphalt shingles manufactured or sold by CertainTeed through 1972 contained asbestos. Plaintiffs' opposition brief does not dispute or even address this evidence, but rather highlights interrogatory responses establishing that CertainTeed manufactured *other* asbestos-containing roofing products. Contrary to Plaintiffs' position, the asbestos content of CertainTeed roofing products that were not identified by Foucha is irrelevant.

As a central element of their case, Plaintiffs must be able to establish that Foucha "was exposed to asbestos from the defendant's products."<sup>14</sup> Foucha's belief that the CertainTeed three-tab shingles he used were asbestos-containing is speculation based upon "common knowledge" about shingles *generally*; CertainTeed presented evidence that this "knowledge," even if admissible, would not apply to the particular product at issue in this case. CertainTeed's showing shifted the burden to Plaintiffs to demonstrate the existence of a material factual dispute. Because Plaintiffs' evidence is insufficient to support a reasonable inference that Foucha was exposed to asbestos from CertainTeed three-tab

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<sup>14</sup> *Vodanovich*, 869 So.2d at 932 ("To prevail, a plaintiff in an asbestos case must show, by a preponderance of the evidence, that he was exposed to asbestos from the defendant's products, and that he received an injury that was substantially caused by that exposure.").

shingles, they have not met that burden. Accordingly, Defendant CertainTeed Corp.'s Motion for Summary Judgment is hereby **GRANTED**.

**IT IS SO ORDERED.**

/s/  
**Peggy L. Ableman, Judge**