

With the exception of the Cherrywood Street home, where Foucha specifically recalled using Georgia-Pacific joint compound, he could not identify any particular brand of joint compound used on any specific project. Although he originally testified that he worked with Georgia-Pacific and Bondex joint compound on the Richland Road garage-conversion project, and that he thought the Georgia-Pacific and Bondex brands were used by his father at the St. Tammany Parish Camp, he later admitted that he did not remember which brand he used on any particular project, or even whether he worked with joint compound to any extent at Richland Road or St. Tammany Parish Camp. He could not testify as to the percentage of time one brand may have been used versus the other. In fact, he had no real way of knowing which brand was used because his father repackaged the mixtures in buckets without labels.

Georgia-Pacific did not begin manufacturing joint compound until it purchased Bestwall Gypsum Co. and their product lines in 1965. From 1965 until 1973, Georgia-Pacific joint compounds contained some asbestos, but by May 1977, Georgia-Pacific did not produce, manufacture, or distribute any asbestos-containing products.

Georgia-Pacific has moved for summary judgment on the basis that Plaintiffs cannot establish exposure to any asbestos-containing Georgia-Pacific products. In support of its position, Georgia-Pacific submits that the only evidence

that Foucha personally used Georgia-Pacific joint compound, or was otherwise around it when it was being used, was during renovations to the Cherrywood Street home in the 1990s. Since its joint compound did not contain asbestos during that time period, Georgia-Pacific contends it is entitled to summary judgment.

Georgia-Pacific concedes that plaintiff also testified that Georgia-Pacific joint compound was one of the brands that his father generally used on renovation projects in the 1960s, but asserts that such testimony does not support Plaintiffs' claims against Georgia-Pacific. It maintains that there is no logical link between the fact that Foucha's father used Georgia-Pacific on some renovation projects in the 1960s and Foucha's claimed exposures from that joint compound. Since there is no evidence that Georgia-Pacific was used, as opposed to Bondex, Georgia-Pacific argues that it would require speculation to reach the conclusion that Plaintiff was exposed to Georgia-Pacific joint compound.

In response, Plaintiffs urge that Foucha identified Georgia-Pacific as a manufacturer of joint compound that exposed him to asbestos and further argue, conclusorily, that they have "come forward with more than sufficient evidence of exposure to asbestos-containing products to defeat summary judgment." The details and identification of the "more than sufficient evidence" are not in any way explained in Plaintiffs' brief.

Upon consideration of 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.¹ Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.² If the proponent properly supports its claims, the burden “shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.”³ 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.⁴

Under Louisiana substantive law, which the parties agree applies here, the plaintiff in a multi-defendant asbestos-exposure action must establish that the defendant’s product was a substantial factor in causing his disease.⁵ A defendant’s product will not be considered a substantial contributing factor to the development of asbestos-related disease unless the plaintiff can show “frequent” and “regular” exposure to asbestos from the product.⁶

¹ Super. Ct. Civ. R. 56(c).

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

³ *Id.* at 880.

⁴ *Id.* at 879-80.

⁵ *Abadie v. Metro. Life Ins. Co.*, 784 So.2d 46, 90 (La. Ct. App. 2001).

⁶ *Asbestos v. Bordelon, Inc.*, 726 So.2d 926, 948-49 (La. Ct. App. 1998).

As a central element of their case, Plaintiffs must be able to establish that Foucha was exposed to asbestos from Georgia-Pacific products. Foucha's testimony that he did not remember which brand he used on any particular project or the extent to which he worked with Georgia-Pacific joint compound on the two renovation projects that were done in the 1960s cannot be the basis for the Court to conclude that Foucha was exposed to asbestos from Georgia-Pacific's product as opposed to Bondex, unless such a conclusion could be based on pure conjecture. Delaware courts do not allow a plaintiff to proceed against a defendant based on speculative exposure to that defendant's product.⁷ Georgia-Pacific correctly notes that a plaintiff's conflicting testimony cannot create a genuine issue of material fact.⁸ This principle is subject to the caveat that product identification testimony in asbestos cases sometimes includes understandable and reconcilable self-corrections or developments as witnesses' memories are plumbed. In this case, however, the conflicts in Foucha's testimony reveal that his identification of Georgia-Pacific as a brand of joint compound with which he worked in the 1960s was speculative, and they therefore do not establish a genuine factual dispute.

Since Plaintiffs' evidence does not support a conclusion that Foucha was exposed to asbestos from Georgia-Pacific's products without speculation, it

⁷ See *In re Asbestos Litig.*, 509 A.2d 1116, 1117-18 (Del. Super. 1986).

⁸ See *Wilson v. A. P. Green Indus.*, 807 A.2d 922, 926-27 (Pa. Super. Ct. 2002).

