

2019 WL 1580155 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
New York County

In Re: NEW YORK CITY ASBESTOS LITIGATION.
John B. Conklin and Nancy Conklin, Plaintiffs,
v.
American Biltrite, Inc., et al., Defendants.

No. 190287/2014.
April 12, 2019.

Trial Order

Present: [Manuel J. Mendez](#), Justice.

MOTION DATE 03/13/2019

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

*1 The following papers, numbered 1 to 8 were read on this motion for summary judgment by American Biltrite, Inc.:

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	1-4
Answering Affidavits -- Exhibits _____	5-6
Replying Affidavits _____	7-8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant American Biltrite, Inc.'s (hereinafter referred to as "ABI") motion for summary judgment pursuant to [CPLR § 3212](#) to dismiss plaintiffs' complaint and all cross-claims against it, is granted.

Plaintiff John Conklin was diagnosed with esophageal cancer, at age 61, on October 10, 2013. At his deposition over a course of four days - on October 7-8, 2014 and November 5-6, 2014 (Mot. Reinhardt Aff. Exh. A and Opp. Commerford Aff. Exh. 18) - he alleged that he was exposed to asbestos in a variety of ways from ABI's product, Amtico vinyl asbestos floor tile. Mr. Conklin alleges he was exposed to ABI's vinyl asbestos floor product by installing the tile and cleaning up after the work, when he was a construction worker on commercial and residential sites in and around New York City New Paltz, Kingston, and in Ulster County, New York from about 1974 through the mid 1980's (Mot. Reinhardt Aff., Exh. A, pgs. 128-132, 141-142, 174, 349-397, and 945).

Mr. Conkin specifically identified ten projects that he worked on where vinyl asbestos floor tile was used: (1) The Tariff - a bar in New Paltz - where he tiled around the wooden dance floor and tiled the rest of the floor; (2) The Pilgrimage - a bar in New Paltz - where he tiled the back of the bar and the hallway; (3) Black Creek Apartments - an apartment building in New Paltz - where he and one other person tiled kitchens forty to fifty units, and ten to twelve hallways; (4) Cherry Hill Plaza - a strip mall in New Paltz - where he tiled the floors in two of the twelve stores; (5) The Grand Finale - a bar located at West 72nd Street in New York City - where he tiled behind the bar and the bar room area, except for the dance floor; (6) two TCBY (frozen yogurt) locations in New Paltz and Kingston - where he tiled the front and kitchen areas; (7) Kingston Freeman Building in Kingston - where he tiled offices on the first floor; (8) the basement of a residence in Hurley; (9) Route 299 Liquor Store in New Paltz - where he tiled the store's entire floor; and (10) Hill Trangel a beer distributor in Tillson - where he tiled the entire retail section (Mot. Reinhardt Aff., Exh. A, pgs. 138-210 and 350-378). Mr. Conklin also testified that he was exposed to asbestos from vinyl floor tile installation at the World Trade Center during the construction of the North and South Towers, but did not identify Amtico with that construction (Mot. Reinhardt Aff., Exh. A, pgs. 117-118).

Mr. Conklin testified that he worked with ABI's Amtico vinyl asbestos floor tiles and about seven other brands manufactured by other companies. He identified Amtico, Azrock, Kentile, Pabco, Johns-Manville, Congoleum, Armstrong, Flintkote and GAF tiles, but could not state which specific tiles were used on any of the ten jobs (Mot. Reinhardt Aff., Exh. A, pgs. 138-210 and 350-378 and 381-384). He recalled the words "Vinyl Asbestos Tile" (VAT) was written on all the boxes of floor tiles that he used (Mot. Reinhardt Aff., Exh. A, pgs. 138-139, 15-151, 189-192 and 942). Mr. Conklin testified that Amtico was a brand of tiles he used on "a lot of jobs," and that he was able to identify them because he remembered the name from seeing it on a cardboard box. He recalled that the Amtico box opened from the sides and that there was an installation manual or brochure that he would glance through (Mot. Reinhardt Aff. Exh. A, pgs. 392-395 and 942-943). Mr. Conklin remembered that Amtico tiles were 12 × 12 inches. Mr. Conklin thought there might be an insert in the Amtico package but stated that most of the time he did not read it, he did not recall any warnings against sanding the Amtico vinyl asbestos floor tiles (Mot. Reinhardt Aff. Exh. A, pgs. 392-395 and 948-949).

*2 A general description was provided of how Mr. Conklin applied vinyl asbestos floor tiles, he stated that he would start in the center and work to the sides, and that he did all the cutting. Mr. Conklin testified that he would cut the vinyl asbestos tiles along the edges around any objects, like vents or outlets. He testified that he either borrowed a tile cutter from another contractor or used a razor knife to score and cut the tiles, and then he would sand off the edges to make them smooth which is when it created the dust (Mot. Reinhardt Aff., Exh. A, pgs. 385-386 and 389-391).

Mr. Conklin testified that he smoked no more than a pack of cigarettes a day from the early 1970's through between 2000 and 2004, when he switched to cigars. He smoked filtered cigars from 2004 through 2013 (diagnosis of his esophageal cancer). He testified that he was previously diagnosed with diverticulitis around 2012. He testified that he did not have any alcohol consumption related conditions like stomach or acid reflux problems (Mot. Reinhardt Aff., Exh. A, pgs. 221-222, 228, 232 and 810). He further testified that he was never diagnosed with acid reflux, never had a problem with heartburn, or a problem with swallowing and holding down food (Mot. Reinhardt Aff., Exh. A, pg. 809).

Plaintiffs commenced this action on August 22, 2014 to recover for damages resulting from Mr. Conklin's exposure to asbestos (See NYSCEF Doc. #1). The summons and complaint were subsequently amended on October 3, 2014 to add parties that included ABI (See NYSCEF Doc. # 30).

ABI now moves for summary judgment pursuant to [CPLR § 3212](#) to dismiss plaintiffs' complaint and all cross-claims against it. ABI argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that Amtico vinyl asbestos floor tiles caused Mr. Conklin's esophageal cancer.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New*

York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

ABI initially argues that plaintiffs bear the burden and could not find or failed to proffer any expert opinion or other evidence establishing general and specific causation, or that its product, Amtico vinyl asbestos floor tiles, caused Mr. Conklin's esophageal cancer. Plaintiffs in opposition provide the expert report and affidavit of Dr. Brent C. Staggs, M.D.. ABI concedes that it was initially unaware of Dr. Staggs report and had previously only received from plaintiffs, the expert report of Dr. Fabio Giron, M.D. which states an unsupported conclusion, "asbestos exposure is considered a risk factor for the development of esophageal cancer as well as exposure to tobacco smoke." (See Reinhardt Aff. in Reply, pg. 2, para. 7 and Mot. Reinhardt Aff., Exh. H).

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept., 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 A.D. 2d 79, 628 N.Y.S. 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept, 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept, 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3rdDept, 2017]). ABI must unequivocally establish that Mr. Conklin's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of his colon cancer (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept, 2014]).

*3 To the extent ABI attempts to "point to gaps," in plaintiffs' evidence, that fails to establish a prima facie basis for summary judgment.

ABI contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584[2006] and *Cornell v 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 762, 986 N.Y.S. 2d 389 [2014]), because plaintiffs are unable to establish general and specific causation. ABI argues that its experts: John W. Spencer, CIH, CSP (a certified industrial hygienist), his report prepared with Marc Plisko (a certified industrial hygienist) (Mot. Reinhardt Aff. Exh. B), the report from Dr. James D. Crapo, M.D., an internist (Mot. Reinhardt Aff. Exh. D), the report from Dr. Stanley Geyer, M.D., pathologist (Mot. Reinhardt Aff. Exh. E), and the report of Dr. Alan S. Livingstone M.D., F.A.C.S., F.R.C.S., a surgical oncologist (Mot. Reinhardt Aff., Exh. F), establish lack of causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiffs level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, 448, *supra*).

ABI argues that unlike amphibole asbestos, no causal relationship exists between the encapsulated chrysotile asbestos in Amtico floor tiles or any type of asbestos fibers, and the development of esophageal cancer, eliminating any general causation. ABI submits the expert affidavit and October 5, 2015 Summary Report of John W. Spencer, CIH, CSP (a certified industrial hygienist), prepared with Marc Plisko (a certified industrial hygienist) (Mot. Reinhardt Aft Exh. B), the affidavit and October 30, 2015 report from Dr. James D. Crapo, M.D., an internist (Mot. Reinhardt Aff. Exh. D),

the affidavit and October 9, 2015 report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. E), and the affidavit and August 24, 2015 report of Dr. Alan S. Livingstone, M.D., F.A.C.S., F.R.C.S., a surgical oncologist (Mot. Reinhardt Aff. Exh. F), to establish the lack of causation.

Mr. Spencer is employed as president of Environmental Profiles, Inc. (“EPI”) and Mr. Plisko is a senior project manager at EPI. Mr. Spencer's and Mr. Plisko's October 5, 2015 Summary Report concludes that there is a lack of causal relationship between encapsulated chrysotile asbestos and Mr. Conklin's esophageal cancer. The October 5, 2015 report relies on EPI testing of multiple products allegedly used by Mr. Conklin - including ABI's vinyl asbestos floor tiles - after multiple assumptions as to Mr. Conklin's exposure taken from his deposition testimony and plaintiffs' responses to interrogatories.

The October 5, 2015 report relies on reports and studies, including those performed by EPI, of ABI's Amtico vinyl asbestos floor tile for a risk and exposure assessment. The Summary Report explains the difference between friable and non-friable asbestos containing materials. It references materials and standards from the Environmental Protection Agency (“EPA”) and the Occupational Safety and Health Administration (OSHA), and states that encapsulated non-friable products, such as ABI's Amtico floor tile, pose a lesser potential of release of asbestos fibers. They conclude that Mr. Conklin's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, and would not have been considered a significant health risk by OSHA or the EPA, and that there are other potentially higher sources of exposure to asbestos, including: spray applied insulation, thermal insulation and joint compound. They further conclude that there are other potential sources of occupational and environmental exposure associated with Mr. Conklin's esophageal cancer other than asbestos, which should be considered and evaluated (See Mot. Reinhardt Aff. Exh. B).

*4 Dr. James D. Crapo's October 30, 2015 report determines that Mr. Conklin has bilateral calcified pleural plaques consistent with a history of working in commercial environments with asbestos exposures. Dr. Crapo also determines that the medical records show Mr. Conklin had chronic gastroesophageal reflux and was a smoker, which are the likely causes of his esophageal cancer. Dr. Crapo cites to the 2006 study of the Institute of Medicine which finds that the “evidence is inadequate to infer the presence or absence of a causal relationship between asbestos exposure and esophageal cancer.” Dr. Crapo concludes that “Mr. Conkin's esophageal cancer cannot be causally related to his occupational exposure.” Dr. Crapo further concludes that ABI products containing encapsulated chrysotile asbestos had a low fiber release and neither created a risk factor or contributed to Mr. Conklin's esophageal cancer (Mot. Reinhardt Aff. Exh. D).

Dr. Geyer's October 9, 2015 report relies in part on the testing performed by Mr. Spencer and Mr. Plisko, and an EPI report dated January 12, 2007. Dr. Geyer cites to the same 2006 report of the Institute of Medicine as cited by Dr. Crapo in his October 30, 2015 report, and the finding that there is “inadequate evidence to infer a causal relationship between asbestos exposure and cancer of the esophagus.” Dr. Geyer relies on a National Institute of Health (NIH) finding and a 1979 survey by the Naval Regional Medical Clinic in Hawaii, as establishing that the risk factors from Mr. Conklin being a male smoker with a history of gastroesophageal reflux disease significantly increased the risk of esophageal cancer. Dr. Geyer refers to occupational exposure levels allowed by OSHA, the World Health Organization (WHO) and the EPA, he concludes that to the extent Mr. Conklin had any chrysotile asbestos exposure from ABI's vinyl asbestos floor tiles it would be negligible, an insignificant health risk, and it played no role in the cause of Mr. Conklin's esophageal cancer (See Mot. Reinhardt Aff. Exh. E).

Dr. Livingstone's August 24, 2015 report relies on a review of Mr. Conklin's medical records and the notes from Memorial Sloan Kettering Cancer Center (hereinafter “MSKCC”) where Mr. Conklin was treated for his esophageal cancer; deposition testimony, plaintiffs' response to ABI's interrogatories, and plaintiffs' expert report of Dr. Giron. Dr. Livingstone states that “in the Western world adenocarcinoma of the esophagus is one of the most rapidly increasing types of cancer particularly in white males, and with his history of reflux and smoking, he (Mr. Conklin) is a prototypical patient for developing this malignancy.” (Mr. Reinhardt Aff., Exh F). Dr. Livingstone cites the 2010 report by the

International BEACON Consortium, published in the Journal of the National Cancer Institute, that confirms cigarette smoking is associated with a highly statistically increased risk of adenocarcinoma of the esophagus and gastroesophageal junction. He determines that while there is data showing asbestos exposure produces cancer of the lungs or other sites in the body, and produces mesothelioma, there are “no prospective randomized controlled trials showing an increased incidence of adenocarcinoma of the esophagus.” Dr. Livingstone concludes that Mr. Conklin's smoking history, and not his exposure to asbestos in ABI's vinyl asbestos floor tiles, increased his risk of developing esophageal cancer by 100% (Mot. Reinhardt Aff., Exh. F).

Plaintiffs in opposition rely on the February 9, 2019 report of Brent C. Staggs, M.D., a board certified pathologist (Opp. Commerford Aff., Exh. 19), which incorporates his April 15, 2016 affidavit (Opp. Commerford Aff., Exh. 20).

Dr. Staggs' April 15, 2016 Affidavit cites to multiple articles, reports, and studies in support of his claim that all asbestos fibers, including chrysotile asbestos fibers like the ones found in ABI vinyl asbestos tiles, are causally linked to cancer in other sites of the body (Opp. Comerford Aff., Exh. 20). Dr. Staggs' April 15, 2016 Affidavit relies on reports from the WHO, OSHA, the EPA, the United States Department of Health and Human Services, and the International Agency for Research on Cancer (IARC) (Opp. Comerford Aff., Exh. 19).

*5 Dr. Staggs February 9, 2019 report incorporates the studies, reports and findings from the the April 15, 2016 Affidavit, as support for his conclusion that, “Exposure to chrysotile and amphibole asbestos is known to cause primary esophageal adenocarcinoma”(Opp. Commerford Aff., Exh. 19). Dr. Staggs further concludes that Mr. Conklin's esophageal adenocarcinoma is from cumulative exposure to each company's asbestos containing products (Opp. Comerford Aff., Exh. 19). It is plaintiffs' contention that Dr. Staggs is including ABI's Amtico vinyl asbestos floor tile as part of the cumulative exposure.

ABI's argument that summary judgment is warranted under [Cornell v. 360 West 51st Street Realty, LLC, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 \[2014\]](#) because plaintiffs are unable to establish general causation, is unavailing. In [Cornell, 22 NY3d 762, supra](#), the defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' expert, Dr. Staggs, is relying on some of the same scientists and scientific organizations as the defendants' experts in support of general causation.

ABI's experts John W. Spencer, Marc Plisko, Dr. James D. Crapo, M.D., Dr. Stanley Geyer, M.D. and Dr. Alan S. Livingstone, M.D., F.A.C.S., F.R.C.S. rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos or any form of asbestos fiber and colon cancer. Plaintiffs' expert, Dr. Brent C. Staggs, M.D. also relies on studies and reports in part from the same scientific organizations, OSHA, EPA and the WHO, to establish that plaintiff's exposure to chrysotile asbestos fibers can cause cancer. These conflicting affidavits raise credibility issues on general causation (See [Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 215 N.E. 2d 341, 268 N.Y.S. 2d 18 \[1966\]](#), [Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 \[1st Dept., 2015\]](#) and [Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 \[2011\]](#)).

Special Causation:

ABI states that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause Mr. Conklin's esophageal cancer, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, “exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;” “[c]omparison to the exposure levels of subjects of other studies could be helpful,

provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" ([Parker v. Mobil Oil Corp.](#), 7 N.Y. 3d 434, 448, 857 N.E. 2d 11114, 824 N.Y.S. 2d 584 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see [Parker v. Mobil Oil Corp.](#), 7 N.Y. 3d 434, *supra* at 448]). In turn, the Appellate Division in the case [In re New York City Asbestos Litigation](#), 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

In making a comparative exposure analysis, the October 5, 2015 Summary Report by Mr. Spencer and Mr. Plisko cites their study performed at EPI. Mr. Spencer and Mr. Plisko rely on data from an eight hour time weighted assessment of Mr. Conklin's exposure, that included cutting, sanding, and installation of ABI's Amtico vinyl asbestos floor tiles containing chrysotile asbestos. They cut the ABI vinyl asbestos floor tiles using a "Guillotine cutter, utility knife, scribe score and snap break, shears (heat and cut, no heat and cut) and linoleum knife." They calculate and created tables reflecting exposure similar to that of Mr. Conklin (Mot. Reinhardt Aff. Exh. B, Tables 9 and 10). They determine that Mr. Conklin averaged 0.000076 f/cc-yr cumulative exposure from cutting, sanding and installation of ABI Amtico floor tile. The report further determines that Mr. Conklin's exposure to encapsulated asbestos in ABI's Amtico vinyl asbestos floor tile would have been negligible and below ambient exposure levels (Mot. Reinhardt Aff., Exh. B).

*6 Mr. Spencer's and Mr. Plisko's report concludes that: (1) Mr. Conklin's work with and around products other than ABI's vinyl asbestos floor tiles could have exposed him to levels greater than ambient/background levels; (2) plaintiffs have not provided any scientifically reliable and relevant industrial hygiene exposure assessment of Mr. Conklin's exposure to Amtico products; (3) if Mr. Conklin performed tasks involving ABI's Amtico vinyl asbestos floor tiles the work performed would have resulted in no exposure above today's occupational health standards and guidelines; (4) ABI's Amtico vinyl asbestos floor tiles are non-friable, encapsulated products and any exposure to asbestos would not be considered by OSHA or the EPA to present a significant health risk; and (5) there are other potential sources of exposure associated with esophageal cancer which would need to be considered and properly evaluated (See Mot. Reinhardt Aff. Exh. B).

Dr. Crapo's October 30, 2015 report assesses Mr. Conklin's smoking history, pathology, asbestos exposure history, chest radiographs and pulmonary function studies. Dr. Crapo provides a detailed assessment of Mr. Conklin's pulmonary function studies from 2014 as showing they were within normal limits. Dr. Crapo determines that Mr. Conklin developed bilateral calcified pleural plaques, which is consistent with asbestos exposure, but that epidemiologic studies have shown there is no causal relationship to his esophageal cancer. Dr. Crapo relies on Mr. Spencer's and Mr. Plisko's October 5, 2015 Summary Report concluding that Mr. Conklin has no evidence of an asbestos related disease. Dr. Crapo further concludes that encapsulated chrysotile asbestos in ABI's vinyl asbestos floor tiles would not be a source of significant asbestos exposure and would neither create or contribute to the risk of Mr. Conklin developing esophageal cancer (Mot. Reinhardt Aff. Exh. D).

Dr. Geyer's October 9, 2015 report relies on the findings in the October 5, 2015 report of Mr. Spencer and Mr. Plisko, Mr. Conklin's medical records, plaintiffs' responses to ABI's interrogatories and Mr. Conklin's deposition testimony. Dr. Geyer states that the asbestos chrysotile fibers in ABI's floor tiles were firmly encapsulated in a non-friable matrix that limited their escape into the air. Dr. Geyer determines that potential chrysotile asbestos encountered by Mr. Conklin as part of his work with ABI's Amtico vinyl asbestos floor tiles resulted in negligible and insignificant exposure that was indistinguishable from ambient measurements and did not cause his esophageal cancer. Dr. Geyer concludes that Mr. Conklin's esophageal cancer was caused by his 30 year history of smoking, being male and gastroesophageal reflux disease; not the minimal exposure to asbestos dust from ABI's vinyl asbestos floor tile (See Mot. Reinhardt Aff. Exh. E).

Dr. Livingstone's August 24, 2015 report cites to the November 8, 2013 notes of Dr. Geoffrey Ku, one of Mr. Conklin's two treating doctors, which reflect a history of gastroesophageal reflux disease for 4-5 years, and after quitting cigarettes, the smoking of two to three cigars per day until October of 2013 (about eight or nine years). Dr. Livingstone's report

states that Mr. Conklin's CT scans show pleural plaques consistent with exposure to asbestos, but that neither Dr. Ku or Dr. James Huang, the two treating doctors from MSKCC, suggested a relationship between exposure to asbestos and the development of the esophageal cancer. The August 24, 2015 report states that Dr. Ku's November 8, 2013 notes specifically identifies the increasing incidence of esophageal adenocarcinoma because of acid reflux disease and obesity. Dr. Livingstone further notes that MSKCC's pulmonary function tests were normal and the pathology report on the specimen taken from Mr. Conklin's tumor makes no mention of asbestos particles. Dr. Livingstone concludes that Mr. Conklin's esophageal cancer is most likely caused by his smoking of cigarettes, and is unrelated to any possible asbestos exposure.

*7 Plaintiff's expert, Dr. Staggs' April 15, 2016 Affidavit states that inhaled asbestos fibers can be translocated to other sites in the body and create disease or cause cancer. Dr. Staggs' opines that "lower doses of asbestos exposure increase the risk of lung cancer." Dr. Staggs concludes that mesothelioma and lung cancer are "dose-response" diseases caused by a person's cumulative exposures to asbestos over a life-time. Dr. Staggs explains that the more asbestos exposures someone has, the more likely it is that they will have cancer as a "response." (Opp. Comerford Aff., Exh. 20).

Dr. Staggs' February 9, 2019 report incorporates the opinion expressed in the April 15, 2016 Affidavit in support of his conclusion that, "Exposure to chrysotile and amphibole asbestos is known to cause primary esophageal adenocarcinoma." Dr. Staggs February 9, 2019 report assesses Mr. Conklin's clinical history, radiology reports, pathology reports, pathology materials and asbestos exposure history. The February 9, 2019 report cites to Mr. Conklin's deposition testimony and describes multiple exposures to asbestos in various products he worked with, including asbestos floor tiles. Dr. Staggs states that Mr. Conklin was exposed to asbestos by installing "flooring material" that created "visible dust" he breathed in. Dr. Staggs concludes that Mr. Conklin's significant history of smoking, and exposure to all types of asbestos fibers, including the chrysotile asbestos fibers, were contributing factors to his development of esophageal cancer. He further concludes that Mr. Conklin's esophageal cancer, asbestosis and pleural plaques are from cumulative exposure to each company's asbestos containing products, which plaintiffs argue includes ABI's vinyl asbestos floor tile (Opp. Comerford Aff., Exh. 19).

Dr. Staggs' report and affidavit do not distinguish exposure to ABI's vinyl asbestos floor tiles from any of the other exposures identified by Mr. Conklin, including the seven other brands of vinyl asbestos floor tiles he recalled working with. Dr. Staggs' fails to quantify Mr. Conklin's exposure to ABI's Amtico floor tiles, does not rely on comparison to the exposure levels in other studies, or provide comparison of the encapsulated chrysotile fibers in ABI's Amtico vinyl asbestos floor tiles to other forms of asbestos fibers. Dr. Staggs' report and affidavit fail to raise an issue of fact on specific causation (See [Parker v. Mobil Oil Corp.](#), 7 NY3d 434, *supra*).

ABI's experts have made a prima facie showing of specific causation. Plaintiffs' reliance on Dr. Staggs' report, plaintiff's deposition testimony and precedent from multiple jurisdictions, is insufficient to raise an issue of fact on specific causation. Plaintiffs' conclusory argument that Dr. Staggs' trial testimony will rest on an "overwhelming scientific consensus," does not raise an issue of fact. Plaintiffs' attorney references epidemiological reports, studies or papers to be used by their experts at the time of trial, that are not cited in Dr. Staggs' report or affidavit, they are hearsay and not admissible evidence to raise an issue of fact on summary judgment (Opp. Comerford Aff., para. 51, Exhs. 22 and 23). Plaintiffs' have not shown facts and conditions from which ABI's specific liability may be reasonably inferred, and summary judgment is warranted.

ACCORDINGLY, it is ORDERED that Defendant American Biltrite, Inc.'s motion for summary judgment pursuant to [CPLR § 3212](#) to dismiss Plaintiffs' complaint and all cross-claims asserted against it is granted, and it is further,

ORDERED that plaintiff's claims asserted against American Biltrite, Inc. are severed and dismissed, and it is further,

*8 ORDERED that all cross-claims asserted against American Biltrite, Inc. are severed from this action and dismissed, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

Dated: April 4, 2019

ENTER:

<<signature>>

MANUEL J. MENDEZ

J.S.C.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.