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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LAOSD ASBESTOS CASES

B263726

SHARRON LINSOWE et al.,

(Los Angeles County
Super. Ct. No. JCCP4674)

Plaintiffs and Appellants,

v.

BORGWARNER MORSE TEC INC., et
al.,

Defendants and Respondents.

APPEAL from a judgment of the Superior Court of
Los Angeles County, Emilie Harris Elias, Judge. Reversed.

Heubeck Law, John C. Heubeck and Marc A. Lowe for
Plaintiffs and Appellants.

Horvitz & Levy, Curt Cutting, John A. Taylor, Jr.; Ongaro, David R. Ongaro, Nevin C. Brownfield for Defendants and Respondents.

INTRODUCTION

This case arose following the death of Henry Linsowe (Linsowe). Plaintiffs, Linsowe's wife and sons, alleged that while Linsowe was a career brake mechanic working on Ford, Lincoln, and Mercury vehicles, he was exposed to asbestos-containing brake parts supplied by defendant Honeywell International, Inc., successor-in-interest to The Bendix Corporation. Honeywell moved for summary judgment, arguing that plaintiffs could not present a triable issue of fact as to whether Linsowe was exposed to asbestos-containing Bendix products. The trial court granted the motion.

We reverse. The evidence demonstrated that during the time Linsowe worked on Ford, Lincoln, and Mercury vehicles, Bendix supplied asbestos-containing brake parts for many of those cars. Some evidence directly connected Linsowe's work with specific models of vehicles that contained Bendix parts. This evidence was sufficient to establish a triable issue as to whether Linsowe was exposed to Bendix brake parts, and the motion for summary judgment should have been denied.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2011, plaintiffs filed a complaint against Ford and other defendants alleging causes of action for negligence, strict liability, and loss of consortium. In their complaint, plaintiffs alleged that Linsowe worked as a brake mechanic at Downey Ford (also known as Downey Auto Center) from approximately 1969 to 1986. They alleged that Linsowe was exposed to asbestos "during various activities, including handling, beveling,

removing, cutting, scoring, grinding, shaping, drilling, and installing of asbestos-containing brake pads and shoes, and the use of compressed air to clean and remove asbestos dust from brake drums and assemblies.” Honeywell was added to plaintiffs’ complaint as a Doe defendant in March 2014.

A. Honeywell’s motion for summary judgment

Honeywell moved for summary judgment in October 2014. Honeywell submitted discovery responses with its motion in which plaintiffs stated that Bendix supplied asbestos-containing brake and clutch parts to Ford. They also stated that “Ford may have applied its own markings/packaging to the products prior to installing or reselling them.” When asked in discovery for documents supporting their allegations against Honeywell, plaintiffs responded that they did not have documents, but defendants likely had such documents in their possession. Honeywell included plaintiffs’ discovery responses stating that Linsowe worked at Downey Ford from 1969 through 1986, and deposition testimony of plaintiff Sharron Linsowe, who testified that her husband worked at Downey Ford from approximately 1969 to 1995. When asked for the identity of witnesses who had knowledge of Linsowe’s exposure to Honeywell products, plaintiffs identified Linsowe’s coworker Dennis Keene; former president of Downey Ford, James Graham; and the person most qualified from codefendant Ford Corporation.

Honeywell also submitted excerpts of the deposition transcripts from Ford’s person most knowledgeable, Matthew Fyie, who testified that Bendix and another supplier supplied brake linings and shoes for Ford passenger vehicles in the

1960's.¹ Fyie testified that "Ford didn't assemble linings to shoes or the pads. They came assembled as a complete unit." When asked which models used Bendix brakes, Fyie responded, "I couldn't really say. . . . [Y]ou know, we're talking over a period of quite a few years, and each vehicle would sometimes have different configurations, would have different suppliers on the fronts versus the rears, so it's impossible to memorialize that." Fyie said he had not done any research to determine which brakes were supplied by Bendix. Fyie recalled that one model, the Mustang, had Bendix brakes, but "I don't know if they supplied them for all Mustang brakes or not." Honeywell also submitted the testimony of Keene, Linsowe's coworker, who said he did not know the brand or manufacturer of the brakes Linsowe worked on.

Honeywell contended that plaintiffs' evidence was insufficient to establish that Linsowe had been exposed to Bendix products. Honeywell argued, "Here, there is no admissible or reliable evidence of decedent's exposure to an asbestos-containing product manufactured by Honeywell. . . . None of the persons identified by plaintiffs as a witness (as well as all persons deposed to date) could provide competent testimony that decedent used a Bendix brake." As a result, Honeywell argued,

¹ When the motion for summary judgment was filed on October 15, 2014, Fyie already had created a chart demonstrating which Ford, Mercury, and Lincoln vehicles used Bendix brakes for certain years in the 1970's and 1980 (discussed more fully below), and testified about it at the second session of his deposition. Honeywell nonetheless submitted only two pages from the first session of Fyie's deposition, in which he stated that he did not know which models of cars included Bendix brakes in the 1960's.

plaintiffs “cannot prove causation—a critical element for all their claims.”

B. Plaintiffs’ opposition

Plaintiffs opposed Honeywell’s motion. They argued that Honeywell failed to meet its burden under Code of Civil Procedure section 437c (section 437c) to demonstrate that plaintiffs’ causes of action had no merit. Plaintiffs argued that Honeywell’s insistence on direct evidence was misguided: “The fact that Mr. Linsowe’s heirs cannot personally identify a specific day, on which a specific Ford vehicle, with a specific VIN number, was worked on by Mr. Linsowe that contained Bendix asbestos brake products does not form the basis for a summary adjudication.”

Plaintiffs also argued that the evidence they submitted in opposition to the motion demonstrated a triable issue of fact. According to plaintiffs, brake mechanics such as Linsowe are exposed to asbestos when working on existing brakes installed in vehicles, and also in preparing and installing replacement brakes. Plaintiffs submitted the testimony of James Graham, former president of Downey Ford. Graham testified that he likely met Linsowe when Linsowe began working at Downey Ford in 1969, and that he knew Linsowe to be a brake and suspension mechanic. He testified that Downey Ford sold only Ford cars. He testified that in the 1970’s, Downey Ford sold Ford Pintos, Fiestas, Mavericks, Fairmonts, Granadas, Fairlanes, Torinos, LTDs, LTD IIs, Customs, Galaxies, station wagons, Ranch Wagons, Country Sedans, Country Squires, Thunderbirds, Mustangs, and light trucks; Graham also agreed that Downey

Ford serviced all of those models of vehicles.² Sometimes the mechanics at Downey Ford would work on trade-ins or service cars purchased at auction to include in the used car inventory; overall, the service work was predominantly on Ford vehicles. Graham believed that genuine Ford parts were used at Downey Ford.

Plaintiffs also submitted additional testimony by Linsowe's coworker, Keene. He testified that "99 percent of our work was on first-time brake jobs on cars that were two or three years old" because the cars were under warranty, and therefore most of the parts removed from those cars were original equipment installed when the cars were new. The boxes of replacement parts the mechanics used at Downey Ford had "FoMoCo" printed on the box, showing that they were Ford-supplied parts.

Keene testified that he saw Linsowe work on Thunderbirds for all the years they worked together, but there is no indication in the deposition excerpts of which years they worked together. Keene said he saw Linsowe work on Ford Fiestas and Capris, and Lincoln-Mercury Comets, Mantegos, and Continentals, but he could not identify the specific model years of these cars.

Plaintiffs also relied on additional testimony by Fyie, the person most qualified for Ford. Fyie testified that all Ford cars had asbestos brakes in the 1960's and 1970's, except for a specialized police car that was available for a short period in the 1970's. When counsel asked Fyie which company supplied Ford with the asbestos-containing brake parts, Fyie responded, "I couldn't tell you model by model. I can tell you what I remember

² Graham also testified that Downey Ford sold and serviced certain cars in the 1980's, but rather than listing the cars, he refers to an exhibit that is not included with the record.

from doing research on various vehicles, but you would really have to go model by model, and that's kind of a big research project." He said that for cars manufactured in the 1960's, Bendix and another manufacturer "are the ones I've seen most frequently."

Plaintiffs also submitted testimony from the second session of Fyie's deposition, in which Fyie testified about creating a chart listing relevant parts for a variety of models of Ford, Lincoln, and Mercury vehicles. Fyie testified that he used a database that went back to 1967 to find the part manufacturers; earlier information was not available. The earliest models listed were from 1975; there was no explanation as to why earlier models were not included. The chart showed Bendix supplied brake parts for the following Ford vehicles³: 1975, 1977, and 1978 Pinto; 1980 Fiesta; 1975 and 1977 Maverick; 1978 and 1980 Fairmont; 1980 Fiesta; 1975, 1977, and 1979 Granada; 1976 Torino; 1975, 1977, and 1979 LTD; 1978 LTD II; 1975, 1977, and 1979 Custom; 1975 and 1979 Country Squire; 1976, 1978, and 1980 Thunderbird; 1975, 1976, 1977, and 1978 Mustang II; 1979 Mustang; 1978 Ranch Wagon. The chart showed Ford supplied Bendix brake parts for the following Mercury vehicles: 1974

³ Fyie's chart does not include all years, and the record does not indicate why certain years are missing. At oral argument, counsel stated that the chart was created for a different case that involved a limited number of vehicles. For some model years for some cars on the chart, there is a dark line that is not clear in the court's copy, but appears to say "vehicle does not exist." For other vehicles, however, the chart simply skips years with no explanation. The Fiesta and the Fairmont list years 1978 and 1980, for example, with no explanation as to why 1979 is not included.

Bobcat; 1971, 1973, and 1975 Comet; 1970 Cyclone; 1971, 1973, and 1975 Montego; 1971 and 1973 Monterey; 1970, 1972, and 1974 Marquis; 1970, 1972, and 1974 Colony Park; 1971, 1973, and 1975 Cougar. The chart showed Ford supplied Bendix brake parts for the following Lincoln vehicles: 1970, 1972, and 1974 Continental; 1971 Mark III; 1972, 1973, and 1975 Mark IV.

Plaintiffs also submitted several Bendix catalogs and manuals dated from 1967 to 1986. A letter from Ford's counsel indicated that the 1972 Bendix brake systems manual was included with Ford's document production as part of discovery. The parts manuals showed that Bendix supplied replacement parts for certain Ford, Lincoln, and Mercury vehicles pre-dating Fyie's list, but because they were Bendix catalogs, they did not indicate whether other manufacturers also supplied such parts.

In its reply, Honeywell argued that it had shifted the burden with its motion, and plaintiffs' evidence "do[es] nothing to support any claim that decedent was exposed to asbestos from a Honeywell product." Honeywell also objected to some of the evidence plaintiffs submitted with their opposition. Among other things, Honeywell argued that all but two exhibits—including depositions, discovery responses, and the catalogs plaintiffs submitted—were not authenticated.

C. The hearing on the motion

At the hearing on the motion, plaintiffs' counsel argued that Linsowe "work[ed] exclusively at a Ford dealership for 35 years. He works on eight cars a day, that's 2,000 cars a year. In ten years that's 20,000 vehicles." Counsel pointed out that Honeywell could not point to any other suppliers of asbestos brakes to Ford, and said, "[W]e can by inference establish that my guy was exposed to Bendix brake linings." Even if there were

other suppliers, counsel argued, apportionment would be determined at trial and it was not a deciding factor on summary judgment.

Defense counsel argued, “We’re dealing with hypotheticals here. Asbestos tort is a unique situation. You must prove the exposure to a certain defendant’s products We’ve had no testimony by decedent of how often he worked, how many brake jobs he did.” The court asked plaintiff’s counsel for clarification about the extent of Linsowe’s work on brakes, and counsel said one of Linsowe’s coworkers testified that Linsowe did brake jobs every day. The court asked for a page and line citation, and counsel had trouble finding that information. The court went off the record, and when it came back onto the record, it appeared that plaintiffs’ counsel was under the impression that he had filed something the judge could not locate. When defense counsel objected to the submission of any new evidence, the court said, “I am not allowing any new evidence. What I’m letting him do is to go through the file downstairs and see if he finds the original.” The judge added, “Sometimes paperwork getting to the courtroom doesn’t always get here and I don’t punish lawyers for that.”

Defense counsel continued his argument, saying Linsowe’s coworkers did not have “any information the decedent was exposed to Bendix brakes. It’s irrelevant how long he worked around each of them or any of them. For the entire time that Keene was with him, he had no information regarding Bendix exposure. . . . [A]ll he ever saw were Ford brand of brakes so he never [saw] the word Bendix.” The court questioned whether that was relevant: “The boxes are branded Ford, but Ford concedes that they didn’t make the brakes that they [subbed] out to other people. So the fact that the box says Ford doesn’t mean

anything.” Counsel responded that because Ford used brake suppliers other than Bendix, there was no way to know whether the brakes were Bendix brakes or from another supplier.

The court took Honeywell’s motion under submission. The judge told plaintiffs’ counsel again to look for the evidence he believed he had filed, and let the court know within a week whether the documents had been filed with the court.

D. Plaintiffs’ supplemental filing

Several days later, plaintiffs’ counsel filed a document titled “Errata to Exhibit B” in support of its opposition to the motion for summary judgment. The errata stated, “In an effort to locate the relevant passages in the record, Plaintiffs have discovered that both the Plaintiffs and the Defendant have committed an error of omission in that they did not include a portion of the deposition of Dennis Keene that is material to the duration and scope of Henry Linsowe’s exposure to brakes while employed as a brake mechanic at Downey Ford.” A declaration by one of plaintiffs’ attorneys stated, “It has now come to my attention that pages 72, 85, 86, and 89 [of the Keene deposition,] which are cited in response to Honeywell’s Separate Statement, Item No. 8, are missing.”

Plaintiffs submitted portions of the Keene deposition that were not included with the motion or opposition. This testimony established that Keene worked at Downey Ford from June or July 1971 to May 1978, and that Linsowe worked there during that time. Keene characterized Linsowe’s job duties by saying that he was “a front end and brake man.” Keene said he personally observed Linsowe doing brake work, and that Linsowe “worked on probably eight brake jobs a day.” Keene said he knew this because he worked directly across the service bay from

Linsowe, he could see him working and switching out cars as he completed jobs, and he estimated that completing a brake job without complications took about an hour.⁴ Keene also testified that he saw Linsowe doing brake work on Downey Police Ford LTDs and Pinto station wagons, but he was not able to identify the model years of those cars except to say that the Pintos were likely 1974 or later. He saw Linsowe work on “Thunderbirds, pickup trucks, Galaxy 500s, Mavericks, Mustangs, Cortinas, Courier pickup trucks.” Keene said the pickup trucks included F-100s, F-250s, and F-350s. He testified that Linsowe worked on Mavericks “from the beginning until they were discontinued,” but he could not specify that Linsowe worked on a particular model year. Keene also said that Linsowe worked on Mustangs and F-100 series pickup trucks for every year they were manufactured from 1970 to 1978. Keene was not able to specify which model years Linsowe worked on with respect to the F-250, F-350, Courier, Fiesta, Comet, Capri, Montego, or Continental.

Plaintiffs also submitted a declaration by Keene, which was marked as an exhibit to his deposition. The declaration stated that Keene worked at Downey Ford from June or July 1971 to June 1977. Keene said he observed Linsowe at work five days a week, eight hours a day for six years. Linsowe did about eight brake jobs per day on either newer cars that were having their first brake work done, or for regular customers and fleet owners such as the Downey Police Department. Keene’s declaration stated that the parts they used were “in boxes labeled as either new Ford parts or Ford-authorized remanufactured parts.”

⁴ Later in his deposition, Keene clarified that they worked an evening shift, 5:00 p.m. to midnight, which is a seven-hour shift.

Honeywell objected to plaintiffs' submission of new evidence and moved to strike it. Honeywell noted that the Keene declaration had been submitted in opposition to Ford's motion for summary judgment, but not in opposition to Honeywell's. It also pointed out that the errata included evidence that had not been submitted to the court before the hearing, and that the court stated at the hearing that it would not accept additional evidence.

E. The court's ruling

The court issued a written ruling granting the motion. The court held that Honeywell shifted the burden under section 437c by demonstrating that plaintiffs' discovery responses failed to show evidence of exposure specifically to Bendix brakes. The court also found that Honeywell demonstrated that "the record does not include any testimony that any witness specifically saw Decedent use, or work around others using, Bendix brakes at Downey Ford." Plaintiffs failed to demonstrate a triable issue of fact because "Plaintiffs cite no witness testimony showing that Decedent ever worked with, or around others using, Bendix brakes at Downey Ford." The court noted that Fyie's testimony showed that Ford used multiple suppliers for brakes. The court also said that "Plaintiffs' supplemental filings run afoul of the Court's December 31st minute order since they include previously unfiled documents. [¶] Even considered, the previously unfiled documents do not raise a triable issue that Decedent was exposed to Bendix brakes at Downey Ford." The court also ruled on the parties' written objections to evidence submitted with the motion and opposition, but it did not mention Honeywell's objection and motion to strike plaintiffs' late-filed evidence.

The court entered judgment in favor of Honeywell shortly thereafter, and plaintiffs timely appealed.

STANDARD OF REVIEW

A trial court properly grants a motion for summary judgment where “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (§ 437c, subd. (c).) “We review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.’ [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

In its motion for summary judgment, Honeywell challenged only whether plaintiffs had sufficient evidence to present a triable issue as to whether Linsowe was exposed to asbestos from Bendix products.⁵ “In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant’s defective asbestos-containing products.” (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982.) “If there has been no exposure, the plaintiff cannot demonstrate that the defendant caused his or her injuries.” (*Collin v. CalPortland Company* (2014) 228 Cal.App.4th 582, 589 (*Collin*).)

In asbestos litigation, the sufficiency of the evidence of exposure depends on the factual circumstances of each case.

⁵ Honeywell also moved for summary adjudication of plaintiffs’ request for punitive damages, but that aspect of the motion is not at issue on appeal.

(*Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1237 (*Casey*)). “Mere speculation or conjecture about exposure to asbestos . . . is insufficient to demonstrate the existence of a triable issue of fact to preclude summary judgment. [Citations.] Nor does the simple ‘possibility’ of exposure create a triable factual issue. [¶] The quality of evidence of exposure must be sufficient ‘to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.’ [Citation.] At the very least, the plaintiff must provide ‘circumstantial evidence . . . sufficient to support a reasonable inference’ [citation] that the ‘defendant’s asbestos products or activities were present at plaintiff’s work site’ [citation].” (*Ibid.*)

DISCUSSION

A. Honeywell’s motion shifted the burden under section 437c

Plaintiffs argue that Honeywell failed to shift the burden on summary judgment, and therefore its motion should have been denied. “[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 (*Aguilar*)). “A defendant bears the burden of persuasion that ‘one or more elements of’ the ‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto. ([Code of Civil Procedure], § 437c, subd. (o)(2)).” (*Aguilar*, 25 Cal.4th at p. 850.) A defendant seeking summary judgment therefore “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a

burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*)

Plaintiffs contend Honeywell failed to carry its burden because it focused only on the lack of direct evidence of exposure, ignoring inferences that can be drawn from circumstantial evidence. Plaintiffs argue, “Honeywell asked the trial court to entertain only direct evidence, namely a witness or authenticated photograph that shows Mr. Linsowe working on a specific day on a specific vehicle replacing a specific brake shoe. Honeywell ignores the equivalent value of circumstantial evidence and Plaintiffs’ right to all reasonable inferences that can be drawn from the available evidence.”

With its motion, Honeywell submitted plaintiffs’ discovery responses stating that they did not have documents supporting their claims against Honeywell. Plaintiffs identified Linsowe’s coworker Keene as a fact witness, and Honeywell submitted Keene’s testimony stating that he did not know the manufacturer of the brakes Linsowe worked with. Honeywell also submitted the testimony of Ford’s person most qualified, Fyie, who testified that Ford used multiple suppliers for its asbestos brakes in the 1960’s, and he did not know which models of cars had Bendix brakes.

This evidence was sufficient to shift the burden under section 437c. A defendant moving for summary judgment “may show through factually devoid discovery responses that the plaintiff does not possess and cannot reasonably obtain needed evidence.” (*Collin, supra*, 228 Cal.App.4th at p. 587.) Here, plaintiffs’ case against Ford had been pending since April 2011, but when plaintiffs answered discovery requests in July 2014, they were unable to provide any information or produce any

documents supporting their claims against Bendix. Although plaintiffs had named Keene and Fyie as witnesses in support of their claims, neither witness's testimony connected Linsowe with Bendix brakes. Defendants therefore met their initial burden to show that plaintiffs were unable to establish that Linsowe had been exposed to Bendix brakes.

B. Plaintiffs met their burden to show a triable issue of material fact as to exposure

Once a defendant seeking summary judgment has met its initial burden, “the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . shall not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.” (§ 437c, subd. (p)(2).) Plaintiffs therefore had the burden to show a triable issue of material fact regarding Linsowe's exposure to Bendix brakes.

In determining whether plaintiffs presented a triable issue, “we ‘view the evidence in the light most favorable to plaintiffs as the losing parties’ and ‘liberally construe plaintiffs’ evidentiary submissions and strictly scrutinize defendant[s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs’ favor.’ [Citation.]” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.)

We first consider whether plaintiffs met their burden based only on the evidence submitted with their opposition, without the supplemental evidence filed after the hearing. The evidence submitted with Honeywell's motion established that Linsowe was

a brake mechanic at Downey Ford from 1969 to either 1986 (according to plaintiffs' discovery responses) or 1995 (according to Sharron Linsowe's deposition).⁶ Plaintiffs' evidence included Graham's testimony that Linsowe was a brake and suspension mechanic at Downey Ford starting in 1968. The evidence therefore showed that Linsowe worked on brakes in the late 1960's, through the 1970's, and into the 1980's. Graham testified that in the 1970's, Downey Ford sold and serviced Ford Pintos, Fiestas, Mavericks, Fairmonts, Granadas, Fairlanes, Torinos, LTDs, LTD IIs, Customs, Galaxies, station wagons, Ranch Wagons, Country Sedans, Country Squires, Thunderbirds, Mustangs, and light trucks. Keene testified that 99 percent of the brake work at Downey Ford was done on cars that were only a few years old and still under warranty, suggesting that Linsowe was doing brake jobs at Downey Ford on cars with model years from the mid-1960's to at least the early 1980's.

Plaintiffs also submitted Fyie's chart showing that for several years in the 1970's—the same years Linsowe was doing brake work at Downey Ford—Ford supplied Bendix brakes for use in Pintos, Mavericks, Fairmonts, Granadas, Torinos, LTDs, LTDIIs, Customs, Country Squires, Thunderbirds, Mustangs, Ranch Wagons, Bobcats, Comets, Cyclones, Montegos, Montereyes, Marquis, Colony Parks, Cougars, Continentals, Mark IIIs, and Mark IVs. Keene specifically saw Linsowe work on Thunderbirds, Comets, Montegos, and Continentals—cars that

⁶ Honeywell argues in its respondent's brief that "plaintiffs presented evidence that Linsowe was a brake mechanic at Downey Ford, but no evidence regarding the dates he was employed there." In fact, evidence of the dates of Linsowe's employment is peppered throughout the evidence, including in the evidence submitted by Honeywell.

contained Bendix components in certain years—even though Keene could not identify the specific model years of the cars Linsowe worked on. The list of cars Graham said were serviced at Downey Ford and Keene said he saw Linsowe work on overlaps substantially with the list of cars for which Bendix supplied brakes in the relevant time period. With this information, a trier of fact reasonably could infer that at least some of the brake work Linsowe did at Downey Ford in the 1970's involved brakes manufactured by Bendix, thereby exposing Linsowe to asbestos from Bendix products.

Honeywell argues that plaintiffs' circumstantial evidence of exposure is insufficient to support a reasonable inference in favor of plaintiffs. Honeywell compares this case to *Collin, supra*, 228 Cal.App.4th 582, in which the defendant made two very similar products—"Colton gun plastic cement," which contained asbestos, and plastic cement that did not contain asbestos. (*Id.* at p. 589.) The plaintiff—the sole product identification witness—recalled using plastic cement, but never saw a bag that had the word "gun" on it. (*Id.* at p. 590.) In his opposition to the defendant's motion for summary judgment, the plaintiff produced evidence that the plastic cement and gun plastic cement were very similar in appearance and were used in similar applications, and argued that these similarities were sufficient to raise a triable issue of fact as to whether the plaintiff was exposed to asbestos in the gun plastic cement. (*Id.* at p. 591.) The Court of Appeal rejected this argument: "[O]n the evidence presented, guesswork is required for the trier of fact to conclude that the product Loren encountered was Colton gun plastic cement." (*Id.* at p. 592.) The court continued, "[A] mere possibility that Loren was exposed to Colton gun plastic cement is not enough to create a triable issue

of fact. [Citations.] The evidence here could not reasonably permit a trier of fact to conclude that the product to which Loren was exposed was more likely than not Colton gun plastic cement. [Citation.] This case does not involve equally conflicting evidence or inferences.” (*Ibid.*)

Honeywell argues that as in *Collin*, “[i]t would be entirely speculative to infer Linsowe was exposed to Bendix brakes merely because he performed work on Ford vehicles during some unspecified period.” This argument does not accurately reflect the evidence in this case. The evidence demonstrated that the time period in which Linsowe worked on Ford, Lincoln, and Mercury vehicles was the same time period in which Bendix supplied brakes for numerous Ford, Lincoln, and Mercury vehicles. There was significant overlap between the vehicles Graham and Keene said Downey Ford serviced and the vehicles that used Bendix brake parts. Unlike the evidence in *Collin*, where the sole product identification witness could not recall seeing the only asbestos-containing product at issue, here there is an extensive list of vehicle models with Bendix brakes, along with testimony that those were the very vehicle models serviced at Downey Ford in the same years Linsowe worked there. The evidence here is far more substantial than the evidence in *Collin*.

Honeywell argues that Fyie’s chart of Bendix brake products “did not support any inference that Linsowe probably performed work on vehicles with Bendix brakes.” Coupled with additional evidence, however, such an inference could be supported. Keene testified that Linsowe “worked on a lot of Lincoln Mercuries,” including the Comet, Montego, and Continental. In each year identified in Fyie’s chart, Comets, Montegos, and Continentals all had Bendix parts. Keene testified

that Linsowe worked on each model year of Thunderbirds for all the years that they worked at Downey Ford together. While the specific time period Keene worked at Downey Ford was not specified in the opposition evidence (although that information was included in the supplemental evidence), Fyie's chart shows that 1976, 1978, and 1980 Thunderbirds all included Bendix parts. It was undisputed that Linsowe worked at Downey Ford through the entire decade of the 1970's and into the 1980's, and regularly worked on cars that were two to three years old. A trier of fact reasonably could infer that it was more likely than not that Linsowe worked on Thunderbird models that included Bendix brakes.

Honeywell argues that because Keene could not identify specific model years of the Comets, Montegos, and Thunderbirds he saw Linsowe working on, and Fyie's chart only showed that Bendix brakes were on cars in a limited number of model years, it is speculative to say that Linsowe was exposed to Bendix brakes from those cars. But Honeywell's argument focuses too much on direct evidence, and dismisses the inferences that can be drawn from the remaining evidence. "[C]ircumstantial evidence [may be] sufficient to support a reasonable inference of exposure." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1420 (*Lineaweaver*).)

Linsowe was a full-time brake mechanic through the entire decade of the 1970's and into the 1980's. Fyie's chart, Graham's testimony, and Keene's testimony together demonstrate that a significant number of cars serviced at Downey Ford used Bendix-supplied brake parts during that time period. Indeed, although Fyie's chart includes information from only certain model years with some unexplained gaps in time, the chart shows the vast

majority of Ford, Mercury, and Lincoln vehicles listed in the chart included Bendix parts. Based on the significant overlap in models and time periods, a trier of fact reasonably could conclude that Linsowe handled Bendix parts at Downey Ford.

This case is similar to *Lineaweaver, supra*, 31 Cal.App.4th 1409, where the plaintiff alleged that he was exposed to asbestos insulation. The plaintiff presented evidence that he worked around insulation at the refinery where he was employed, and the defendant was a significant supplier of asbestos insulation to the refinery. (*Id.* at p. 1420.) In *Lineaweaver* the plaintiff testified that he saw boxes with the defendant's name on them⁷; here, Fyie's chart, Graham's testimony, and Keene's testimony demonstrate that Bendix supplied parts for the types of cars worked on at Downey Ford during the time Linsowe worked there. In both *Lineaweaver* and here, the evidence presented was sufficient to support a reasonable inference that "defendant's product was definitely at [the] work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it." (*Ibid.*) Therefore, considering only the evidence submitted before the hearing on the motion for summary judgment, the motion should have been denied.

⁷ Honeywell also argues that Keene's testimony cannot support an inference of exposure because "the only boxes he saw at Downey Ford containing brake parts were all labeled FoMoCo." However, the Fyie testimony submitted with Honeywell's own motion demonstrated that Ford received pre-assembled brakes from outside suppliers, and that it did not manufacture its own brakes. The fact that the brakes were in FoMoCo boxes, therefore, does nothing to prove or disprove the identity of the supplier of those brakes.

Plaintiffs filed part of Keene's deposition and his declaration after the hearing on the motion for summary judgment. Honeywell objected to the late-filed evidence and moved to strike it. The court apparently did not sustain the objection; in the section of the written ruling with the other objections, Honeywell's objection to the late-filed evidence is not mentioned. It appears that the court considered plaintiffs' late-filed evidence, because it cited the evidence along with the other evidence plaintiffs submitted, under the heading "supplemental filings." In addition, although the court stated that the late filings "run afoul of the Court's December 31st minute order," the court then stated, "Even considered, the previously unfiled documents do not raise a triable issue that Decedent as exposed to Bendix brakes at Downey Ford." As it does not appear that the court sustained the objection to the late-filed evidence, we will consider it.⁸ (See §437c, subd. (c) [in reviewing a summary judgment, we consider "all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court."].)

The late-filed evidence directly supports some of the inferences available from the earlier-filed evidence. Keene's declaration and deposition make clear that he worked with Linsowe at Downey Ford from 1971 to 1978. Keene personally observed Linsowe doing brake work full time, and estimated that Linsowe did about eight brake jobs per day. Keene said 99

⁸ Honeywell contends, "Plaintiffs' opening brief does not argue that the trial court erred in refusing to consider new evidence. Accordingly, plaintiffs have waived any contention that the trial court should have considered it." As discussed above, however, the record shows that the court did consider the late-filed evidence.

percent of the work Linsowe did was on Ford vehicles, and the majority of those vehicles were two or three years old. Keene also said he saw Linsowe work on Mustangs for every year they were manufactured from 1970 to 1978. According to Fyie's chart, Bendix brake parts were used in 1975, 1976, 1977, 1978, and 1979 Mustangs; there is no information about parts for earlier models. If Keene, between 1971 and 1978, saw Linsowe working on cars that were two to three years old, and he saw Linsowe working on Mustangs for every year they were manufactured, he would have seen Linsowe working on 1975 and 1976 Mustangs, for which Bendix supplied brakes.⁹

Keene also saw Linsowe work on Mavericks "from the beginning until they were discontinued." Fyie's chart shows that 1975 and 1977 Mavericks had Bendix brakes. Again, if Keene, between 1971 and 1978, saw Linsowe working on cars that were two to three years old, and he saw Linsowe working on Mavericks until they were discontinued, he would have seen Linsowe working on 1975 Mavericks, for which Bendix supplied brakes.

Keene also testified that he saw Linsowe work on Pintos, Thunderbirds, pickup trucks, Galaxie 500s, Cortinas, police

⁹ Honeywell argues that "the chart lists only the 1979 Mustang, which was not manufactured while Keene worked with Linsowe." Indeed, the chart does call the 1975, 1976, 1977, and 1978 models "Mustang II," and the 1979 model "Mustang." Because Keene testified that he saw Linsowe work on "Mustangs" every year they worked together, without distinguishing a model number, we can infer that Keene's reference to Mustangs included references to Mustang IIs. As always on appeal following summary judgment, we view the evidence, and the inferences that can be drawn from it, in the light most favorable to the opposing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

LTDs, and pickup trucks, although he did not know the model years of those cars. In the time frame Keene would have seen Linsowe working on these cars, Bendix supplied brakes for Pintos (1975), Thunderbirds (1976), and LTDs (1975).¹⁰ Pickup trucks, Galaxies, and Cortinas are not on Fyie's list.

Honeywell argues that Keene's declaration states that he stopped working at Downey Ford in 1977, and therefore "even the oldest Thunderbird model listed on the chart—the 1976 model—would not have had brake service until 1978 or later, after Keene left Downey Ford." At his deposition, however, Keene said he left Downey Ford in May 1978. "If the evidence is in conflict, the factual issues must be resolved by trial." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

Honeywell argues that because plaintiffs did not prove that Linsowe worked on *all* Ford models, any conclusion that Linsowe was exposed to Bendix products would necessarily be speculation. However, plaintiffs have demonstrated that Linsowe worked almost exclusively on Ford, Lincoln, and Mercury vehicles for at least the bulk of the 1970's, if not his entire career at Downey Ford. They also have demonstrated that a large number of Ford, Lincoln, and Mercury vehicles in the mid-to-late 1970's had Bendix-supplied brakes. They even have produced evidence that in a relevant time frame, Linsowe worked on some of the specific models identified as having Bendix brakes. This evidence is

¹⁰ Honeywell argues, "As Plaintiffs concede, the LTD Police Interceptor did not use asbestos-containing brakes." Plaintiffs make no such concession in the cited documents, and Fyie's chart shows that each of the LTD models listed as "P/C Pursuit" did have Bendix brakes.

sufficient to demonstrate a triable issue as to whether Linsowe was exposed to Bendix products while working at Downey Ford.

This case is unlike *Casey v. Perini Corp.*, *supra*, 206 Cal.App.4th 1222, where the plaintiff's discovery responses assumed, "without any evidentiary support, that the dust and debris allegedly disturbed by Perini workers contained asbestos" (*id.* at p. 1230) and plaintiffs' expert testimony relying on these unsupported allegations was insufficient because "[n]otably absent is any factual support for the proposition that the challenged jobsites contained asbestos during the relevant time period." (*Id.* at p. 1233.) This case is also unlike *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, where the plaintiffs presented no evidence linking the employee to any work in which respirable asbestos fibers would have been released, and the expert opinion lacked sufficient factual foundation and was therefore insufficient to bridge that evidentiary gap.

Here, the evidence is sufficient to show a triable issue of fact. "[E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact.*" (*Aguilar, supra*, 25 Cal.4th at p. 856.) The evidence presented supports an inference that Linsowe was exposed to Bendix brakes while working at Downey Ford. Honeywell's motion for summary judgment should have been denied.

C. Evidentiary rulings

Plaintiffs argue that the trial court erred in ruling that the Bendix parts catalogs plaintiffs submitted with their opposition were inadmissible. Because we find that the motion for summary judgment should have been denied even without consideration of

this additional evidence, we will not address the court's evidentiary rulings relating to the additional evidence.

DISPOSITION

The judgment in favor of Honeywell is reversed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.