

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

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WILLIAM G. STODOLOSKI and CLAIRE PISANTI,

**TRIAL/IAS, PART 12
NASSAU COUNTY**

Plaintiff(s),

Index No. 604712/19

-against-

**Motion Seq. No.: 003
Motion Submitted: 3/3/21**

A.O. SMITH WATER PRODUCTS, et. al,

Defendant(s).

_____ x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits/Memorandum of Law.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X¹

Defendant, Ford Motor Company (Ford), moves this court for an order precluding

¹Ford requested oral argument, but after reviewing the papers the court found the issues thoroughly, if not expertly briefed by both sides rendering further input from counsel superfluous.

the causation opinions of Plaintiffs' expert, and then granting it summary judgment, pursuant to CPLR §3212, as a result. In the alternative, Ford seeks an order directing a *Frye* hearing to determine if Plaintiffs' expert's opinions are generally accepted within the scientific community. Plaintiffs, William G. Stodolosky (Stodolosky) and Claire Pisanti oppose the motion.

This asbestos litigation matter was commenced by summons and complaint dated April 5, 2019. Ford interposed an answer dated May 15, 2019. The case certified ready for trial on January 23, 2020 and a note of issue was filed on February 19, 2020

Stodoloski was an auto mechanic throughout his career, and from 1965 or 1966 to 1969, and from 1971 to 1977 or 1978, he worked for Bob & Jim's Service Station in Mineola, County of Nassau. During these periods of time, he performed all aspects of car repair including removing and replacing Ford original equipment manufacturer (OEM) brakes and clutches, and also working on "asbestos-containing" Ford gaskets, however Ford was only one parts manufacturer of many whose parts he worked with. In February, 2019, Stodoloski was diagnosed with lung cancer, and commenced this action against Ford, among others, alleging that the Ford parts he worked with contained asbestos and caused his lung cancer. Ford now moves for summary judgment, arguing that Plaintiffs' causation expert's opinions should not be considered by the court and, as a result Plaintiffs cannot establish causation. In the alternative, Ford seeks a *Frye* hearing to determine whether Plaintiffs' expert's opinion is generally accepted in the scientific

community.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (see *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

In a toxic tort matter, to establish causation, a plaintiff must establish that the toxin is capable of causing the illness from which the plaintiff suffers (general causation), and that the plaintiff was exposed to enough of the toxin to cause the illness (specific causation). (*Parker v. Mobil Oil Corp.*, 7 NY3d 434 [2006]). Part of the defendant's burden in moving for summary judgment is trying to establish that its chemicals could not

have caused the illness. (*Cinquemani v. Old Slip Associates*, 43 AD3d 1096 [2d Dept. 2007]).

Ford's arguments focus on the type of asbestos Stodoloski was exposed to, how much he was exposed to, that mechanics as a group were not at great risk based upon studies, and the fact that he was a long-term smoker.

According to Ford's expert, Jennifer S. Pierce, M.S., Ph.D., a Principal Health Scientist, Stodoloski was exposed to chrysotile asbestos, which is in the serpentines category, as opposed to amphiboles category. This is relevant for a number of reasons, the first being that Ms. Pierce opines that exposure to chrysotile asbestos is less dangerous than to amphiboles. Second, Ford brakes contained chrysotile asbestos, and the friction and heat that brakes cause and are exposed to would break down the asbestos to the point where exposure to it would not be dangerous. Similarly, Stodoloski's exposure to asbestos in clutches would have also been minimal. Ms. Pierce further opines that studies indicate that automobile mechanics in general were not at great risk for lung cancer, and that Stodoloski's exposure would have been below the cumulative chrysotile exposure levels that would have been dangerous to him.

Ford also offers the expert opinion of Anil Vachani, M.D., M.S., a medical doctor with a degree in Masters of Science. Dr. Vachani points to Stodoloski's family history of lung cancer, his smoking history and his history of COPD and emphysema as the causes of his lung cancer.

Despite the expert affidavits, the court finds that Ford has failed to establish entitlement to summary judgment as a matter of law. Annexed to the moving papers Ford submits Stodoloski's deposition testimony. During his testimony, Stodoloski offers numerous examples of being exposed to "clouds" of airborne particles caused by working with vehicles with Ford brakes, clutches and gaskets. He testified that simply working on the products caused these clouds of dust, but that also cleaning up the garage further caused clouds of dust. While Ford's experts opine that Stodoloski was not exposed to enough asbestos material to cause his cancer, his testimony raises an issue of fact as to whether those claims are accurate. Even if the court were to accept the premise that chrysotile asbestos is not as dangerous as amphiboles, and that Stodoloski was only exposed to chrysotile, his description of the amounts he was exposed to neutralizes, at best, those opinions.

As for seeking a *Frye* hearing for Stodoloski's expert, Dr. David. Y. Zhang, M.D., the court tends to agree with Stodoloski that this is really a premature motion *in limine*. However, since it has been fully briefed, the court sees no reason not to address it. The court finds Ford's challenges to Dr. Zhang's opinions does not require a *Frye* hearing, but is better addressed at trial regarding foundation, and during cross examination. (*Parker v. Mobil Oil Corp., supra*). Ford tries to argue that Dr. Zhang does not establish that Stodoloski was exposed to enough asbestos from Ford products specifically, but instead relies upon a "cumulative exposure" approach which is not allowed under New York law.

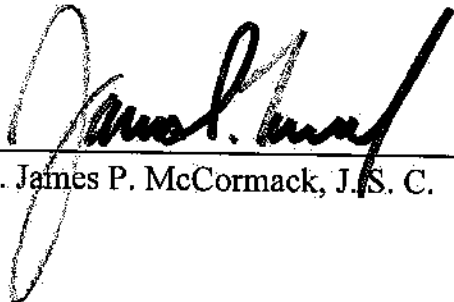
However, this court finds that Dr. Zhang's opinions are more nuanced than Ford claims. This court further notes that there appear to be numerous instances where Dr. Zhang has been used as an expert in asbestos litigation, yet Ford does not cite to a case where his opinions were found inadmissible after a *Frye* hearing. This court is certain that had a New York court so found, that is something Ford would have brought to this court's attention. Regardless, this court rejects the notion that Dr. Zhang's opinions deviate to such an extent from the current state of the law that a *Frye* hearing is required to determine if they are generally accepted within the scientific community.

Accordingly, it is hereby

ORDERED, that Ford's motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Dated: April 12, 2021
Mineola, N.Y.



Hon. James P. McCormack, J.S. C.