

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____ x
MASSIMO ALBERTELLI,

TRIAL/IAS, PART 12
NASSAU COUNTY

Plaintiff(s),

Index No. 600657/18

-against-

Motion Seq. No.: 015
Motion Submitted: 3/19/21

AMCHEM PRODUCTS INC 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 the causation opinions of Plaintiff’s expert, and then granting it summary judgment,

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.

pursuant to CPLR §3212, as a result. In the alternative, Ford seeks an order directing a *Frye* hearing to determine if Plaintiff's expert's opinions are generally accepted within the scientific community. Plaintiff, Massimo Albertelli (Albertelli), opposes the motion.

This asbestos litigation matter was commenced by summons and complaint dated January 12, 2018. Ford interposed an answer dated April 10, 2018. The case certified ready for trial on December 4, 2019 and a note of issue was filed on March 4, 2020.

Albertelli was an auto mechanic throughout his career, and from 1965-2011 either worked at or owned various auto garages. During these periods of time, he performed all aspects of car repair including removing and replacing Ford original equipment manufacturer (OEM) brakes, clutches, and gaskets, however Ford was only one parts manufacturer of many whose parts he worked with. In August, 2017, Albertelli 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 Albertelli 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, Brent D. Kerger, Ph.D., DABT, a board certified toxicologist and environmental chemist, Albertelli 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 Dr. Berger opines that exposure to chrysotile asbestos is less dangerous than to amphiboles. Second, Albertelli's exposure to asbestos in clutches would have also been minimal. Dr. Kerger further opines that studies indicate that automobile mechanics in general were not at great risk for lung cancer, and that Albertelli'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 Dominik Alexnader, Ph.D., an epidemiologist. Dr. Alexander points to Albertelli's family history of cancer, his smoking history, his exposure to second-hand smoke and his history of COPD and emphysema as the causes of his lung cancer. Similarly, another expert, Michael Graham, M.D., a board certified pathologist with extensive experience in asbestos-related diseases, also opines that it was Albertelli's cigarette smoking, and exposure to cigarette smoke that caused 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 Albertelli's deposition testimony. During his testimony, Albertelli offers

numerous examples of being exposed to dust caused by working with vehicles with Ford brakes, clutches and gaskets. He testified that simply working on the products caused this dust. He testified that, in general, he would work in 15-20 Ford clutches a year. He would need to scrape off a Ford gasket one or two a week, but could also be 10 in a week. He also regularly worked with Ford brakes. While Ford's experts opine that Albertelli 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 no as dangerous as amphiboles, and that Albertelli 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 Albertelli's experts, Dr. David. Y. Zhang, M.D. and Mark Ellis Ginsburg, M.D., the court tends to agree with Albertelli 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 and Dr. Ginsburg's opinions do not require a *Frye* hearing, but are better addressed at trial regarding foundation, and during cross examination. (*Parker v. Mobil Oil Corp., supra*). Ford tries to argue that Dr. Zhang and Dr. Ginsburg do not establish that Albertelli was exposed to enough asbestos from Ford products specifically, but instead rely 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

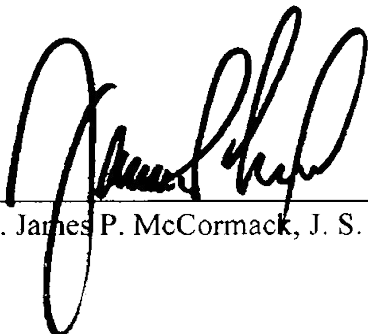
further notes that there appear to be numerous instances where Dr. Zhang has been used as an expert in asbestos litigation, yet Ford does not cite to a case where his opinions were found inadmissible after a *Frye* hearing. This court is certain that had a New York court so found, that is something Ford would have brought to this court's attention. Regardless, this court rejects the notion that Dr. Zhang's and Dr. Ginsburg'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: May 10, 2021
Mineola, N.Y.



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