

**SUPREME COURT - STATE OF NEW YORK**

**PRESENT:**

**Honorable James P. McCormack**  
**Justice**

\_\_\_\_\_  
**MASSIMO ALBERTELLI,**

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

**Plaintiff(s),**

**Index No. 600657/18**

**-against-**

**Motion Seq. No.: 016**  
**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.....X<sup>1</sup>

Defendant, Mercedes-Benz USA, LLC (Mercedes), moves this court for an order precluding the causation opinions of Plaintiff’s experts, and then granting it summary

\_\_\_\_\_  
<sup>1</sup>Mercedes 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.

judgment, pursuant to CPLR §3212. In the alternative, Mercedes seeks a hearing pursuant to *Parker v. Mobil Oil Corp.*, 7 NY3d 434 (2006) wherein Plaintiff would demonstrate an “adequate basis” for his expert’s opinions. Plaintiff, Massimo Albertelli (Albertelli), opposes the motion.

This asbestos litigation matter was commenced by summons and complaint dated January 12, 2018. Mercedes interposed an answer dated April 5, 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 Mercedes original equipment manufacturer (OEM) brakes, clutches, and gaskets, however Mercedes was only one parts manufacturer of many with whose parts he worked. In August, 2017, Albertelli was diagnosed with lung cancer, and commenced this action against Mercedes, among others, alleging that the Mercedes parts he worked with contained asbestos and caused his lung cancer. Mercedes now moves for summary judgment, arguing that Plaintiffs’ causation experts’ opinions should not be considered by the court and, as a result Plaintiffs cannot establish specific causation. In the alternative, Mercedes seeks a hearing to determine whether there is an “adequate basis” for Plaintiffs’ expert’s opinions..

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]).

In support of its motion, Mercedes offers the expert affirmations and affidavits of Ilan Allan Feingold, M.D., a pulmonologist, Dennis Paustenbach, a certified Industrial Hygienist and Toxicologist, and R. Thomas Brunner, a Senior Principal Technical Compliance employee.

Mr. Brunner states that from 1964 until 1967, all but two Mercedes car models were sold with disc brakes on all four wheels. Two models were sold with two disc brakes and two drum brakes. Starting in 1968, all models were sold with disc brakes. In August, 1984, Mercedes began phasing in vehicles with non-asbestos brake pads, and by 1988 all Mercedes vehicles had non-asbestos brake pads. Further, in 1985 Mercedes began phasing in non-asbestos clutch discs, and by January, 1988, all manual transmission Mercedes vehicles featured non-asbestos clutch discs.

Based upon Mr. Brunner's affidavit, Dr. Paustenbach opines that Albertelli was exposed to only "*de minimus* concentrations of asbestos from replacing brakes, clutch discs or gaskets" from Mercedes' vehicles. He explains that asbestos exposure from disc brakes is considerably lower than to drum brakes. Dr. Pausternach explains that dust caused by disk brakes tends to get created when the vehicle is being used, and dissipates into the air. Drum brakes tend to collect dust, and it is upon changing disc brakes that a greater exposure to dust can occur. Dr. Pausternach opines that it was Albertelli's cigarette smoking that caused his cancer.

Dr. Feingold also blames cigarette smoking for Albertelli's cancer, but also opines

that because Albertelli does not have asbestosis, or a “lung fiber burden of asbestos to persons similar with asbestosis” his cancer cannot be caused by asbestos. Dr. Feingold cites to numerous studies as support for this opinion.

Regarding Albertelli’s experts, Mark Ellis Greenberg, M.D., and David Y. Zhang, Mercedes argues that their opinions are based upon a theory that is regularly rejected by New York courts, and at the very least there should be a hearing for them to establish the efficacy of their theories.

The court rejects the arguments regarding Albertelli’s experts. 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 Mercedes’ challenges to Dr. Zhang’s and Dr. Ginsburg’s opinions do not require a hearing, but are better addressed at trial regarding foundation, and during cross examination. (*Parker v. Mobil Oil Corp., supra*). Mercedes tries to argue that Dr. Zhang and Dr. Ginsburg do not establish that Albertelli was exposed to enough asbestos from Mercedes 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 Mercedes 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 Mercedes does not cite to a case where his opinions were found inadmissible after a *Frye* or *Parker* hearing. This court is certain that had a New York

court so found, that is something Mercedes 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 hearing is required.

Based the affidavits from Mr. Brunner and Dr. Pausternach, and the affirmation of Dr. Feingold, the court finds Mercedes has established entitlement to summary judgment as matter of law on the issue of Mercedes not being the cause of Albertelli's cancer. The burden shifts to Albertelli to raise a material issue of fact requiring a trial of the action.

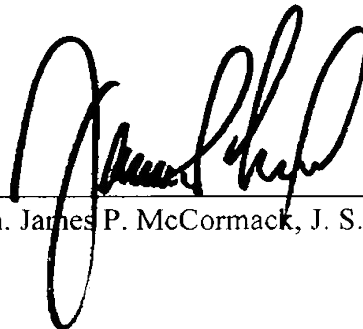
In opposition, Albertelli offers, *inter alia*, the affirmations of Dr. Ginsberg and Dr. Zhang, as well as Albertelli's deposition testimony. Further, Albertelli's counsel reference numerous studies, many of them refuting Dr. Feingold's asbestosis theory. These studies alone raise an issue fact particularly as to the relevancy of Dr. Feingold's opinion. Further, the court finds Labertelli has raised an issue of fact regarding the opinions of Dr. Pausternach, particularly his "dose reconstruction analysis". Finally, the opinions of Dr. Zhang and Dr. Ginsberg, together with Albertelli's deposition testimony, raise an issue of fact as to whether Albertelli was exposed to enough Mercedes products that contained asbestos to have caused his cancer. While Mercedes makes a compelling argument that there was less of a chance their asbestos products caused Albertelli's cancer, Albertelli has still established that he was exposed to Mercedes products that contained asbestos, at least from 1965 to 1988, and perhaps longer by working on older Mercedes models.

Accordingly, it is hereby

**ORDERED**, that Mercedes' motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Dated: May 10, 2021  
Mineola, N.Y.

A handwritten signature in black ink, appearing to read "James P. McCormack", is written over a horizontal line.

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