In re Asbestos

United States District Court for the Northern District of California

May 10, 2021, Decided; May 10, 2021, Filed

Case No. 19-cv-00325-HSG

Reporter
2021 U.S. Dist. LEXIS 91016 *; 2021 WL 1884647

IN RE TOY ***ASBESTOS***

Core Terms

asbestos, brakes, exposure, products, partial summary judgment, punitive damages, managing agent, linings, dust, cause of action, hazard, warn

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Judges: HAYWOOD S. GILLIAM, JR., United States District Judge.

Opinion by: HAYWOOD S. GILLIAM, JR.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR PARTIAL SUMMARY JUDGMENT

Re: Dkt. No. 430

Pending before the Court is Defendant Honeywell International, Inc.'s motion for partial summary judgment. *See* Dkt. No. 430. For the reasons detailed below, the Court **GRANTS IN PART** and **DENIES IN PART** the motion.

I. BACKGROUND

Plaintiffs Agnes Toy and Thomas Toy, Jr. initially filed this action in Alameda Superior Court against over forty Defendants, alleging that Thomas H. Toy, Sr. developed malignant mesothelioma and later died from exposure to ***asbestos***-containing products or equipment that Defendants either manufactured or supplied. *See* Dkt. No. 1-1. Defendants removed this action to federal court, Dkt. No. 1, and Plaintiffs filed a second amended complaint on July 22, 2019, Dkt. No. 247 ("SAC").

As relevant to these motions, Plaintiffs allege that Mr. Toy was exposed to ***asbestos*** from Bendix brand brakes, supplied by Defendant Honeywell as successor-in-interest to The Bendix Corporation. *See id.* at ¶¶ 5-6. According to Defendant, Plaintiffs subsequently clarified that Mr. Toy was **[*5]** exposed to Bendix brakes "in the 1950s while working as a wheel vehicle mechanic and motor sergeant in the United States Army." *See* Dkt. No. 430-2, Ex. H at 3. "He also worked on brakes at Treasure Island in the 1970s." *See id.* Defendant Honeywell now moves for partial summary judgment as to Plaintiffs' (1) second cause of action for breach of implied warranty; (2) sixth cause of action for fraud and concealment; (3) seventh cause of action for conspiracy to defraud and failure to warn; and (4) request for punitive damages. *See* Dkt. No. 430.

II. LEGAL STANDARD

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)*. And a dispute is "genuine" if there is evidence in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986)*, and "may not weigh the evidence or make credibility **[*6]** determinations,"

Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997), *overruled on other grounds by Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008)*. If a court finds that there is no genuine dispute of material fact as to only a single claim or defense or as to part of a claim or defense, it may enter partial summary judgment. *Fed. R. Civ. P. 56(a)*.

III. EVIDENTIARY OBJECTIONS

Defendant separately filed objections to evidence submitted by Plaintiffs in opposition to the motion for partial summary judgment. *See* Dkt. No. 505-1. Under Civil Local Rule 7-3(c), "[a]ny evidentiary and procedural objections to the opposition must be contained within the reply brief or memorandum." *See Civil L.R. 7-3(c)*. The Court therefore **DENIES** these objections for failing to comply with Civil Local Rule 7-3.

IV. DISCUSSION

Defendant contends that several of Plaintiffs' causes of action and their request for punitive damages are not supported by admissible evidence. Plaintiffs do not oppose Defendant's motion for partial summary judgment as to the breach of warranty, fraud and concealment, or conspiracy to defraud and failure to warn claims. *See* Dkt. No. 496. The Court therefore **GRANTS** the motion as to these claims. Plaintiffs only contest the motion as to their request for punitive damages under *California Civil Code § 3294*. *See id.*

Under California law, a plaintiff may recover punitive damages "where **[*7]** it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." *Cal. Civ. Code § 3294(a)*. "Malice" under the statute is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Id.* at *§ 3294(c)(1)*. To establish the existence of "conscious disregard," "the defendant must have *actual knowledge* of the risk of harm it is creating and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm." *See Butte Fire Cases, 24 Cal. App. 5th 1150, 1159 (Cal. Ct. App. 2018)*, *as modified on denial of reh'g* (July 26, 2018) (quotations omitted) (emphasis in original). Moreover, "[u]nder the clear and convincing standard, the evidence must be so clear as to leave no substantial doubt" and must be "sufficiently strong to command the unhesitating assent of every reasonable mind." *Id. at 1158*.

Additionally, *§ 3294* imposes a heightened standard for plaintiffs seeking punitive damages against corporations, requiring that "the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice [] be on the part of an officer, **[*8]** director, or managing agent of the corporation." *See Cal. Civ. Code § 3294(b)*. However, a plaintiff "need not produce a smoking memorandum signed by the CEO and Board of Directors" to satisfy this "managing agent" requirement. *See Willis v. Buffalo Pumps Inc., 34 F. Supp. 3d 1117, 1133 (S.D. Cal. 2014)*. Rather, a plaintiff may provide:

> evidence showing the information in the possession of the corporation and the structure of management decision[-]making that permits an inference that the information in fact moved upward to a point where corporate policy was formulated. These inferences cannot be based merely on speculation, but they may be established by circumstantial evidence, in accordance with ordinary standards of proof.

Romo v. Ford Motor Co., 99 Cal. App. 4th 1115, 1141 (Cal. Ct. App. 2002), *vacated and remanded on other grounds*, *538 U.S. 1028 (2003)*.

Here, Defendant argues that there is no evidence that it had actual knowledge of the risk of harm from ***asbestos*** in its products or that it failed to take steps to mitigate such risk. *See* Dkt. No. 505 at 5-6. Defendant highlights Plaintiffs' response to the special interrogatory in which it asked Plaintiffs to "[s]tate all facts that support YOUR contention that HONEYWELL engaged in conduct or is responsible for omissions that would make HONEYWELL liable for punitive damages." *See* Dkt. No. 430-2, Ex. H at 241.[1] In response, **[*9]** Plaintiffs provided the unsupported assertion that:

> By the 1960s Bendix knew ***asbestos*** killed people. Yet Bendix continued to sell ***asbestos*** brakes for four decades. Bendix manufactured brakes with ***asbestos*** until 2001 and continued to sell ***asbestos*** brakes until 2002. Bendix has admitted that in 1986 it was still manufacturing 90% of its drum brakes with ***asbestos***.

Id. at 242. And when Defendant asked Plaintiffs to

[1] For clarity and ease of reference, the Court refers to the page numbers of the PDF rather than the specific exhibit, unless otherwise stated.

identify the managing agents that Plaintiffs believe had knowledge that use of Bendix brakes "increased the user's risk of any kind of cancer," Plaintiffs referred generically to "all depositions taken in this case and all exhibits thereto, as well as all former testimony of propounding party and all exhibits thereto, and all business records of propounding party."[2] *See id.* at 242-43.

In opposition to the motion for summary judgment, Plaintiffs respond that Defendant had knowledge of the hazards of ***asbestos*** beginning as early as the 1930s from "the vendors that sold ***asbestos*** to it, its membership in various industry groups, its own employees, and even mainstream popular publications like the *New York Times* and *Newsweek* magazine." Dkt. No. 496 at 11.

Publications. Plaintiffs point to **[*10]** evidence that there was increasing public awareness of the dangers of ***asbestos***, citing articles published in the *New York Times* in 1948 and 1965, and in *Newsweek* in 1950. *See* Dkt. No. 496-15, Ex. 14; Dkt. No. 496-16, Ex. 15; Dkt. No. 496-19, Ex. 18. In the 1950 article, Dr. W.C. Huerper from the National Cancer Institute identified "air pollution with ***asbestos***" as "the probable cause of increased lung and respiratory tract cancer." *See* Dkt. No. 496-16, Ex. 15. And in the 1965 article, Dr. Irving J. Selikoff announced the establishment of an environmental health laboratory at Mount Sinai Hospital to continue investigating the dangers of ***asbestos*** and other contaminants. *See* Dkt. No. 496-19, Ex. 18. He identified "***asbestos*** dust" as a "potential health hazard for one-quarter of the population or more," explaining that "the dangers of exposure to ***asbestos*** dust were not limited to those who work directly with [it]," but also "extend to workers in 'contiguous trades.'" *Id.* The article also specifically noted that ***asbestos*** is commonly used in "brake linings." *Id.*

Although Plaintiffs have not presented direct evidence that these specific publications were read by Defendant's managing agents, **[*11]** the Court finds that a reasonable jury could nevertheless infer knowledge from such circumstantial evidence. It would be reasonable to conclude that Defendant's managing agents would be aware of articles that described a substance contained in products that they manufactured and sold as a known carcinogen. As noted below, Plaintiffs also proffer evidence that Defendant's employees shared other similar articles about the possible dangers of ***asbestos***.

Letter from Bendix Employee. Plaintiffs identify a letter dated September 12, 1966, from Bendix employee E.A. Martin, the Director of Purchases for Bendix's New York plant, addressed to an employee of Johns Manville, a General Sales Manager for the ***asbestos*** supplier ("Martin Letter"). *See* Dkt. No. 496-20, Ex. 19; *see also* Dkt. No. 496-4, Ex. 3 ("Cohen I Depo.") at 313:11-317:23; Dkt. No. 496-21, Ex. 20. The letter attaches an article from *Chemical Week* entitled ***Asbestos****: Awaiting 'Trial.*' The article states that ***asbestos*** "has been accused—though not yet 'convicted'—as a significant health hazard." *See id.* It notes that the United States Public Health Service determined that "40% of all Americans have mild, chronic cases of asbestosis, even **[*12]** though they never worked directly with ***asbestos***." *Id.* Above the article is a list of "[s]ources of airborne ***asbestos***," including "[m]otor vehicle brake linings and clutch plates." *Id.* In the letter itself, E.A. Martin flags the article and concludes: "My answer to the problem is: if you have enjoyed a good life while working with ***asbestos*** products why not die from it. There's got to be some cause." *See id.*

Defendant asserts that there is no evidence in the record that E.A. Martin was an officer, director, or managing agent, and that at most this letter indicates "a cavalier attitude towards public safety," which is insufficient to establish malice. *See* Dkt. No. 505 at 13. However, as the California Court of Appeal aptly explained when analyzing the same letter, "the jury reasonably could infer that (1) questions about the safety of ***asbestos*** were known generally within the ***asbestos*** industry and (2) Bendix's management was not more ignorant than Martin about these questions,

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[2] The Court notes that these interrogatory responses appear deficient on their face. "A party may answer an interrogatory by specifying records from which the answers may be obtained and by making the records available for inspection." *See* Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983) (quotations omitted). However, the records must be specified "in sufficient detail to enable the interrogating party to locate and identify them as readily as the party responding party could." ***Fed. R. Civ. P. 33(d)***. Plaintiffs did not do so here. Nevertheless, Defendant did not move to compel more detailed responses, and discovery closed over a year ago. *See* Dkt. No. 348. The Court declines to credit Defendant's attempt to use these interrogatory responses now, well after the close of discovery, to suggest that Plaintiffs have no evidence to support their punitive damages theory. Defendant failed to seek more detailed responses at its own hazard.

which had serious business implications for a company selling ***asbestos*** products." *Phillips v. Honeywell Int'l. Inc., 9 Cal. App. 5th 1061, 1084 (Cal. Ct. App. 2017)* (holding that court did not abuse discretion by admitting Martin letter into evidence at trial). Although Defendant may argue to the **[*13]** jury that this letter merely reflects one individual's "cavalier attitude," that is not the only reasonable interpretation, and at this stage the Court must view the evidence in the light most favorable to Plaintiffs.

Materials from Vendors. Plaintiffs further cite to information that Defendant received from Johns Manville in 1968, 1969, and 1972. In 1968, N.W. Hendry from Johns Manville sent a letter explaining that moving forward, its bags of chrysotile ***asbestos*** would contain a warning label that "[p]ersons exposed to this material should use adequate protective devices as inhalation of this material over long periods may be harmful." *See* Dkt. No. 496-21, Ex. 20. Although the letter explained that the label was a reminder for "all *industrial users* of ***asbestos***," it also said "[a]s you know, in the past several years there has been increasing publicity and medical attention given to health effects of inhaling industrial dust and fumes of all kinds." *Id.* (emphasis added). In 1969, Johns Manville also sent a "position paper on ***Asbestos***" to Mr. Harry Stolar, the General Manager of Friction Materials Division at Bendix. *See* Dkt. No. 469-22, Ex. 21. Although the position paper stated that **[*14]** "[t]here is no scientific evidence that anyone has ever contracted any disease from exposure to the wearing or weathering of brake linings," the paper also cited studies that have suggested an increased risk of disease for those with exposure to ***asbestos*** dust. *Id.* And in 1972, Johns Manville held a seminar about ***asbestos*** at Bendix's Executive Offices. *See* Dkt. O. 469-23, Ex. 22. Questions during the presentation included the risk of grinding brake linings and how to dispose of dust in garages. *Id.* The cited answer said to "[u]se vacuum." *Id.* The list of attendees included the Vice Chairman and Chief Operating Officer of Bendix. *See id.*

Defendant responds that this information "shows that Bendix was proactively taking steps to determine the safety of its products." *See* Dkt. No. 505 at 11. But again, that is only one possible interpretation. A jury could also reasonably conclude that Defendant's managing agents—including its COO—were aware of the risks of ***asbestos*** though they continued to sell ***asbestos***-containing products.

Internal Memoranda. Plaintiffs also identify several Bendix internal memoranda from 1975 to 1980 further suggesting that Defendant was apprised of the growing literature **[*15]** on the risks of ***asbestos***. One memorandum from June 1975, for example, described a presentation from Dr. Selikoff at Ford, Chrysler, and General Motors, in which he "presented data which showed that 24% of the brake lining mechanics which he had studied showed some type of chest abnormalities," and that "significant quantities of brake lining dust are present when vehicles are relined." *See* Dkt. No. 496-32, Ex. 31. Another from 1976 discussed the "***asbestos*** problem," and included a document entitled "a review of the medical literature." *See* Dkt. No. 496-35, Ex. 34. The summary noted that "there is no conclusive proof of a safe threshold level of exposure" to ***asbestos*** dust, and that the risk of "asbestosis, bronchogenic cancer and mesothelioma" exist for "[a]ll commercial forms of ***asbestos***." *See id.* In July 1976, a memorandum cited a later study published in August 1976 about the risk of ***asbestos*** exposure from brake work, and notes that "it is conceivable to have ***asbestos*** levels in excess of OSHA standards . . . ." *See* Dkt. No. 496-37, Ex. 36. Later that same year, a Bendix employee recommended "that Bendix actively pursue the development of automotive friction materials containing no **[*16]** ***asbestos***." *See* Dkt. No. 496-36, Ex. 35; *see also* Dkt. No. 496-39, Ex. 38.

Defendant argues that it placed OSHA-compliant warnings on its products beginning in 1973 such that these later memoranda are irrelevant in evaluating punitive damages. *See* Dkt. No. 505 at 12-13. Defendant's belief that its warning labels were sufficient, however, is not dispositive. Viewing Plaintiffs' evidence in its entirety, a jury could reasonably conclude that Defendant actively collected and pursued information about the risk of ***asbestos*** over time, including as it relates to exposure to ***asbestos*** during brake lining maintenance and repair, but that it did not provide adequate warnings. *See, e.g.*, Dkt. No. 430-4, Ex. 3 ("Cohen Depo. II") at 111-13, 138-41, 153-59, 183-85, 200-01 (discussing Bendix labels).

Defendant also urges that the scientific literature was—and remains—mixed as to the risk of harm of ***asbestos*** from brakes. Dkt. No. 505 at 3, 6-8. Defendant points out that in its products "***asbestos*** fibers were bound together with a resin binder system such that exposure to or the proper use of Honeywell's friction product did not pose a health hazard to the end user." *See* Dkt. No. 505 at 1-2. Defendant similarly **[*17]** cites to other articles "showing no dangers [of ***asbestos*** exposure] from brakes." *See, e.g.*, Dkt. No. 505-2, Exs. N, P, R—

U. But the state of scientific knowledge regarding the hazards of ***asbestos*** generally, and for Defendant's brake products more specifically, is an issue of disputed fact. The Court understands that Defendant disagrees with Plaintiffs' argument and has alternative explanations for the proffered evidence. Defendant may address these issues at trial, and the jury—not the Court—will weigh the evidence.

Having considered the parties' arguments, and drawing all reasonable inferences in favor of Plaintiffs as the Court must at this stage, the Court finds that Plaintiffs' proffered evidence raises at least one dispute of material fact as to whether Defendant's managing agents had actual knowledge that their ***asbestos***-containing brakes were dangerous, and as to whether Defendant consciously disregarded these risks during the time of Mr. Toy's exposure. Accordingly, Defendant's motion for partial summary judgment is **DENIED** on this basis. Defendant remains free to raise objections to Plaintiffs' evidence at trial, and the Court will consider such objections in context.

V. CONCLUSION [*18]

Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion for partial summary judgment. The Court **GRANTS** the motion as to Plaintiffs' causes of action for breach of warranty, fraud and concealment, and conspiracy to defraud and failure to warn, but otherwise **DENIES** summary judgment as to Plaintiffs' claim for punitive damages.

IT IS SO ORDERED.

Dated: May 10, 2021

/s/ Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.

United States District Judge

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