Carpenter v. 3m Co.

Superior Court of California, County of Los Angeles

August 25, 2023, Decided

20STCV46727

Reporter
2023 Cal. Super. LEXIS 59191 *

RONALD LEROY CARPENTER, et al. v. 3M COMPANY, et al.

Core Terms

cause of action, summary adjudication, punitive damages, summary judgment motion, concealed, brake, clutches, ***asbestos***, alleges, products, summary judgment, argues, truck, shift a burden, material fact, conspiracy, suppressed, present evidence, interrogatory, exposure, hazards, malice, summary adjudication motion, deposition testimony, Aftermarket, convincing, exposed to ***asbestos***, oppression, negates, moves

Judges: **[*1]** Honorable Laura A. Seigle, Judge.

Opinion by: Laura A. Seigle

Opinion

NATURE OF PROCEEDINGS: 1) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant ZF Active Safety US Inc., Formerly Known as Kelsy-Hayes Company (Carpenter); (2) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant BWDAC, Inc. (Carpenter-20STCV467272); (3) Hearing on Motion for Summary Adjudication for Defendant Paccar Inc. (Carpenter-20STCV46727);

Matters are called for hearing.

The Court issues Tentative Rulings.

1) The Court calls the Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant ZF Active Safety US Inc., Formerly Known as Kelsy-Hayes Company:

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant ZF Active Safety US Inc., Formerly Known as Kelsy-Hayes Company (Carpenter scheduled for 08/25/2023 is 'Held' for case 20STCV46727.

Both sides submit and the Court adopts the Tentative Ruling as the Final Court Order as follows:

ORDER RE MOTION FOR SUMMARY JUDGMENT (ZF ACTIVE)

Defendant ZF Active Safety US Inc. filed a motion for summary judgment of Plaintiffs Ronald Carpenter **[*2]** and Patricia Carpenter's claims that Ronald Carpenter was exposed to ***asbestos*** from Defendant's products. Plaintiffs did not file an opposition.

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or … demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." (*Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334*.) To show that a plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854*.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id. at p. 855*.) A plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact.

(*McGonnell v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103-1104*.) The plaintiff's deposition **[*3]** testimony that he did not recall ever

working with a product manufactured by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. (*Weber v. John Crane, Inc. (2006) 143 Cal.App.4th 1433, 1439*.) "'If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses.'" (*Id. at p. 1440*.)

Defendant argues Plaintiffs have no evidence Ronald Carpenter was exposed to any ***asbestos***-containing parts from Defendant. (Motion at p. 2.) Defendant served interrogatories asking Plaintiffs to identify the people with knowledge that Ronald Carpenter was exposed to ***asbestos*** from Defendant. (Ex. 3 at p. 2.) Plaintiffs responded Ronald Carpenter was near trucks that contained ***asbestos***-containing parts from Defendant, but Plaintiffs did not identify evidence supporting that assertion. (Ex. 8 at p. 3.) Defendant also cites Ronald Carpenter's deposition testimony that he has not heard of Defendant's predecessor, does **[*4]** not associate any products with Defendant's predecessor, and has no information about the predecessor or its products. (Ex. 13 at pp. 332-333.) In sum, the discovery responses are factually-devoid of evidence that Ronald Carpenter was exposed to ***asbestos*** from Defendant's products, thus shifting the burden.

Because Plaintiffs did not file an opposition, they did not show the existence of disputed issues. The motion for summary judgment is GRANTED. Defendant is to file a proposed judgment within five day.

The moving party is to give notice.

2) The Court calls the Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant BWDAC, Inc.:

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant BWDAC, Inc. (Carpenter-20STCV467272) scheduled for 08/25/2023 is 'Held' for case 20STCV46727.

Both sides submit and the Court adopts the Tentative Ruling as the Final Court Order as follows:

ORDER RE MOTION FOR SUMMARY JUDGMENT (BWDAC)

Defendant BWDAC, Inc. filed a motion for summary judgment, and in the alternative, summary adjudication, of Plaintiffs Ronald Carpenter and Patricia Carpenter's claims that Ronald Carpenter was **[*5]** exposed to ***asbestos*** from Defendant's products.

A. Summary Judgment

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or … demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." (*Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334*.) To show that a plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854*.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id. at p. 855*.) A plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact. (*McGonnell v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103-1104*.) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured **[*6]** by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. (*Weber v. John Crane, Inc. (2006) 143 Cal.App.4th 1433, 1439*.) "'If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses.'" (*Id. at p. 1440*.)

Defendant argues that Plaintiffs have no evidence that Ronald Carpenter was exposed to Defendant's ***asbestos***-containing products because BWDAC is not a successor-in-interest to Borg Warner.

BWDAC was incorporated in 1981 and acquired assets of Borg Warner's Automotive Aftermarket Operations division. (Undisputed Material Fact ("UMF") 13, 16.) It

sold clutches under the Borg Warner trademark beginning in July 1981 to the aftermarket such as warehouse distributors and some retailers. (Kotzum Decl., ¶ 4; Motion at p. 7.) Ronald Carpenter testified that Kraft used BorgWarner clutches on their trucks because he saw the boxes with the BorgWarner name on it, about once a month he would watch a **[*7]** mechanic at the Kraft garage pull out a BorgWarner clutch and put it on a truck, he does not know where Kraft obtained the clutches from, and he has never heard of BWDAC. (Defendant'sEx. G at pp. 437, 579, 580-582, 587.)

Defendant argues BWDAC would not have sold clutches to Kraft because it sold to warehouse distributors and retailers. (Motion at p. 7.) But that does not preclude Kraft ordering the clutches from warehouse distributors or retailers.

Defendant argues all of the BorgWarner clutches Ronald Carpenter saw were pre-1981. (Motion at p. 7.) In support of this argument, Defendant cites UMF 3 and UMF 13. (Motion at p. 7.) UMF 3 states Ronald Carpenter alleges he worked at service stations from 1960 to 1973, as a production line worker from 1976 to 1978, and as a truck driver for Kraft from 1978 to 1999. UMF 13 states BWDAC was incorporated in 1981. Those facts do not support the conclusion that Ronald Carpenter only saw pre-1981 BorgWarner clutches. Defendant admits that BWDAC made clutches after 1981 using the BorgWarner trademark. Therefore, the clutches Ronald Carpenter saw coming out of the boxes labeled BorgWarner when he was at Kraft could have been made by BWDAC.

Defendant **[*8]** has not presented evidence that conclusively negates an element of the Plaintiffs' cause of action and has not shown that Plaintiffs do not have or cannot obtain the necessary evidence. Therefore the burden does not shift, and the motion for summary judgment is DENIED.

B. Summary Adjudication

1. Third Cause of Action

Defendant moves for summary adjudication of the third cause of action for fraud. This cause of action alleges, with no specificity, that Defendant "failed to disclose certain facts, known only to them and that Ronald Leroy Carpenter could not have discovered regarding the existence of hazardous ***asbestos*** that became airborne. (Complaint at p. 12.) It alleges Defendant "represented to Ronald Leroy Carpenter that certain facts were true: the air was safe to breath because it did not contain ***asbestos***, and any ***asbestos*** was not hazardous." (Complaint at p. 14.) The complaint fails to specify who made these statements, when and where they were made, whether they were in writing or oral, or how Carpenter relied on them.

Defendant served a special interrogatory asking for all evidence supporting the cause of action for fraud. (Defendant's Ex. C at p. 4.) In response, Plaintiffs recite **[*9]** the vague allegations of their complaint but fail to describe specifically any false statement Defendant made to Plaintiffs or state how Ronald Carpenter relied on that statement. (Defendant's Ex. D at pp. 7, 36.) Defendant argues because Ronald Carpenter testified he never heard of BWDAC, he could not have had any communications with BWDAC. Given that the extent of Ronald Carpenter's involvement with BWDAC clutches was watching Kraft mechanics install them, it makes sense that Ronald Carpenter had no communications with BWDAC.

Because the discovery responses were factually-devoid on this point, the burden shifted. In their opposition, Plaintiffs do not identify or describe any false statement BWDAC made to Ronald Carpenter. Therefore, Plaintiffs' fraud claim cannot be based on a fraudulent misrepresentation, no matter what the complaint says.

The complaint also alleges Defendant fraudulently concealed information from Plaintiffs. " '[T]he elements of a cause of action for fraud based on concealment are " '(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have **[*10]** intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " [Citation.]' " (*Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276, 310-311*.) When a fiduciary duty does not exist, a duty to disclose arises only "when the defendant had exclusive knowledge of material facts not known to the plaintiff," or "when the defendant actively conceals a material fact from the plaintiff," or "when the defendant makes partial representations but also suppresses some material facts." (*Id. at p. 311*.) This type of relationship " 'can only come into being as a result of some sort of transaction between the parties' " and "must necessarily arise from direct dealings between the

plaintiff and the defendant; it cannot arise between the defendant and the public at large." (Ibid.) Evidence that the defendant was involved in retail sales of the disputed product to consumers and profited from them can satisfy the Bigler-Engler requirement. (*Bader v. Johnson & Johnson (2022) 86 Cal.App.5th 1094, 1132*.)

As stated, Ronald Carpenter's involvement with Defendant's products **[*11]** was watching Kraft mechanics install clutches made by Defendant under the Borg Warner name. That means he was not purchasing the parts from Defendant and had no direct relationship or transactions with Defendant. In response to an interrogatory asking for all facts supporting the fraud cause of action, Plaintiffs recite the vague allegations of their complaint but fail to describe specifically any fact Defendant concealed from Plaintiffs or state how Ronald Carpenter relied on that concealment. (Defendant's Ex. D at pp. 7, 36.) This is enough to shift the burden. In opposition, Plaintiffs do not present any evidence of any relationship or transaction between Plaintiffs and Defendant. Therefore, Plaintiffs did not show a disputed issue.

Plaintiffs state they need additional discovery pursuant to *Code of Civil Procedure section 437c, subdivision (h)* because they have not yet deposed Defendant's corporate representative about Defendant's corporate history, knowledge of the hazards of ***asbestos***, and sale of clutches. (Opposition at pp. 11-12.) But Plaintiffs do not explain how a deposition on those topics will show that Ronald Carpenter actually did have communications or a relationship with Defendant.

The motion for summary adjudication of **[*12]** the third cause of action is granted.

2. Fourth Cause of Action

Defendant moves for summary adjudication of the fourth cause of action for conspiracy. (Motion at p. 14.) This cause of action alleged all of the defendants conspired together to commit fraudulent concealment and make false statements to Ronald Leroy Carpenter. (Complaint at p. 22.) The complaint contains no details about how the conspiracy occurred and are nothing more than deficient boilerplate. Plaintiffs' opposition papers are similarly entirely free of any specifics about how this conspiracy occurred.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510-511*.) "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Id. at p. 511*.) Because summary adjudication is granted on the third cause of action, Defendant cannot be liable for conspiring to commit fraud.

The motion is granted as to the fourth cause of action.

3. Punitive Damages

Defendant moves for summary adjudication of the request **[*13]** for punitive damages. (Motion at pp. 14-15.)

When the motion targets a request for punitive damages, a higher standard of proof is at play. "Although the clear and convincing evidentiary standard is a stringent one, 'it does not impose on a plaintiff the obligation to "prove" a case for punitive damages at summary judgment [or summary adjudication.' [Citations.] Even so, 'where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard.' [Citation.]" (*Butte Fire Cases (2018) 24 Cal.App.5th 1150, 1158-1159*.) "Summary judgment or summary adjudication ' " 'on the issue of punitive damages is proper' only 'when no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression.' " '. [Citation.]" (*Id. at p. 1159*.)

For a corporate defendant, the oppression, fraud or malice "must be on the part of an officer, director, or managing agent of the corporation." (*Civ. Code, § 3294, subd. (b)*.) That requirement can be satisfied " 'if the evidence **[*14]** permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others." ' [Citation.]" (*Morgan v. J-M Manufacturing Company, Inc. (2021) 60 Cal.App.5th 1078, 1090*.) A plaintiff also "can satisfy the 'managing agent' requirement 'through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated.'

[Citation.]" (*Id. at p. 1091*.)

" '[I]ntentionally marketing a defective product knowing that it might cause injury and death is 'highly reprehensible.' [Citation.]" (*Bankhead v. ArvinMeritor, Inc. (2012) 205 Cal.App.4th 68, 85*.) Punitive damages may be available when a defendant knows the dangers of ***asbestos***, took action to protect its own employees, knew that its products were likely to pose a danger to users, and did not warn them. (Pfeifer v. John Crane, Inc. (2013) 220 Cal.Ap.4th 1270, 1300.) Such evidence "was sufficient to show malice, that is, despicable conduct coupled with conscious disregard for the safety of others." (Id. at pp. 1300-1301.)

Defendant argues Plaintiffs cannot show any malice, fraud, or oppression by Defendant. (Motion at p. 15.) Defendant served a special interrogatory asking for all evidence supporting the **[*15]** request for punitive damages. (Defendant's Ex. C at p. 4.) In response, Plaintiffs provided a lot of information about Borg Warner's knowledge of the hazards of ***asbestos*** and actions taken concerning its employees, but not about BWDAC. Instead, Plaintiffs contended BWDAC is the successor-in-interest to Borg Warner. (Defendant's Ex. D at pp. 39-49.) However, Plaintiffs' interrogatory responses did not identify any information supporting the assertion that BWDAC is Borg Warner's successor-in-interest. Because the discovery responses were devoid in this respect, the burden shifted.

In opposition, Plaintiffs attach the February 28, 1981 Agreement for Sales of Assets by which BWDAC obtained the assets of Borg Warner's Automotive Aftermarket Operations division. (Plaintiffs' Ex. C.) The agreement states that Borg Warner was transferring all of the assets and business of its Ottawa Division, Automotive Parts Division, Automotive Parts Division International, Ballwin/Washington Division and the Automotive Parts Division of Borg-Warner (Canada) Limited, defined as "Automotive Aftermarket Operations." (Plaintiffs' Ex. C at p. 1.) It stated that BWDAC's predecessor assumed the liability for "[t]he **[*16]** obligations of the Automotive After-market Operations for (i) claims for injuries or damages occurring after the Effective Date involving products manufactured by the Ottawa Division and the Ballwin/Washington Division of the Automotive Aftermarket Operations … ." (Plaintiffs' Ex. C at pp. 9-10.) This could be interpreted to mean that BWDAC's predecessor (and then BWDAC) assumed the liability for post-1981 damages caused by ***asbestos***-containing aftermarket products made by Borg Warner before 1981. (Plaintiffs' Ex. F.)

Therefore, Plaintiffs showed the existence of disputed issues about whether BWDAC assumed liability for damages caused by Borg Warner's pre-1981 clutches when it obtained the assets of Borg Warner's Automotive Aftermarket Operations division. The motion for summary adjudication of punitive damages is denied.

The motion for summary judgment is DENIED. The motion for summary adjudication is GRANTED as to the third and fourth causes of action, and DENIED as to punitive damages.

The moving party is to give notice.

3) The Court calls the Hearing on Motion for Summary Adjudication for Defendant Paccar Inc.:

The Hearing on Motion for Summary Adjudication for Defendant Paccar Inc. **[*17]** (Carpenter-20STCV46727) scheduled for 08/25/2023 is 'Held' for case 20STCV46727.

Counsel argue and submit. The Court places the motion under submission and LATER rules as follows:

ORDER RE MOTION FOR SUMMARY JUDGMENT (PACCAR)

Defendant Paccar Inc. filed a motion for summary judgment, and in the alternative, summary adjudication, of Plaintiffs Ronald Carpenter and Patricia Carpenter's claims that Ronald Carpenter was exposed to ***asbestos*** from Defendant's products.

A. Objections

1. Defendant's Objections

Defendant objects to facts set out in Plaintiffs' separate statement and argues that they are not supported by the evidence. That is improper. Objections should be to the evidence. Arguments about whether the facts set out in a separate statement are disputed belong in a party's memorandum of points and authorities or in a response to the separate statement. The objections to the facts in Plaintiffs' Separate Statement are overruled.

B. Summary Judgment

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or … demonstrate[] that under no hypothesis is there a material issue of fact that requires

the process of trial." (*Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334*.) To show that a **[*18]** plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854*.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id. at p. 855*.) A plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact.

(*McGonnell v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103-1104*.) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. (*Weber v. John Crane, Inc. (2006) 143 Cal.App.4th 1433, 1439*.) "'If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or **[*19]** documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses.'" (*Id. at p. 1440*.)

Defendant argues that Plaintiffs have no evidence that Ronald Carpenter was exposed to Defendant's brakes, clutches or gaskets because "[s]uch component parts must necessarily be either parts originally installed on a Peterbilt or Kenworth vehicle at the assembly plant, or replacement parts sold/supplied by PACCAR." (Motion at p. 12.) Defendant argues Plaintiffs do not know whether the brakes, clutches, or gaskets were original. (Motion at pp. 13-14.) In support of this argument, Defendant cites Ronald Carpenter's deposition testimony. He testified that he did not do the maintenance work on the trucks, he does not know where the parts came from, and he had a new Kenworth truck that he took in for a brake job when it had 100,000 miles on it. (Ex. K at pp. 184, 199-200.)

This testimony does not show Plaintiffs have no evidence the parts were original. Carpenter testified that when he started driving the Kenworth truck it was new and therefore had original brakes when he took it in for a brake **[*20]** job. (Ex. K at pp. 199-200.) If Defendants are arguing that it is not credible that a truck with 100,000 miles would still have new brakes, that is an issue for the jury to decide.

Defendant also argues that, assuming Ronald Carpenter was exposed during the brake jobs, the amount of exposure was not sufficient to cause his illness. (Motion at pp. 14-15.) Ronald Carpenter testified that when brake jobs were done, he was about 15 feet away. He stayed in the driver's room for a couple hours with the door open when the brake jobs were done. (Ex. K at pp. 156-157, 203-204.) Defendant cites its expert who opined that in that situation, exposure would be well below permissible limits. (Motion at p. 15.)

Assuming this evidence shifts the burden, Plaintiffs showed the existence of disputed issues. Plaintiffs cited their own expert's opinion that Ronald Carpenter likely was exposed to ***asbestos*** from the mechanics working on the brakes on the truck he drove, including from contaminated clothing, and this exposure was significant. (Ex. N, ¶¶ 67-68, 159, 170, 175-176, 220, 224, 226, 228.) The conflict between the experts' opinions is for the jury to resolve.

The motion for summary judgment is denied. **[*21]**

C. Summary Adjudication

1. Third Cause of Action

Defendant moves for summary adjudication of the third cause of action for fraud. This cause of action alleges, with no specificity, that Defendant "failed to disclose certain facts, known only to them and that Ronald Leroy Carpenter could not have discovered regarding the existence of hazardous ***asbestos*** that became airborne. (Complaint at p. 12.) It alleges Defendant "represented to Ronald Leroy Carpenter that certain facts were true: the air was safe to breath because it did not contain ***asbestos***, and any ***asbestos*** was not hazardous." (Complaint at p. 14.) The complaint fails to specify who made these statements, when and where they were made, whether they were in writing or oral statements, or how Carpenter relied on them.

Ronald Carpenter testified he had no association or communication with anyone from Defendant and never received any literature or manuals from Defendant. (Ex. K at pp. 290-291.) He has no knowledge of any false representation from Defendant. (Ex. K at p. 292.)

Plaintiffs' opposition does not identify any false representation or communication that Defendant made to Ronald Carpenter. Therefore, this cause of action cannot **[*22]** be based on a false representation. It must be based on concealment.

" '[T]he elements of a cause of action for fraud based on concealment are " '(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " [Citation.]' " (*Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276, 310-311*.) When a fiduciary duty does not exist, a duty to disclose arises only "when the defendant had exclusive knowledge of material facts not known to the plaintiff," or "when the defendant actively conceals a material fact from the plaintiff," or "when the defendant makes partial representations but also suppresses some material facts." (*Id. at p. 311*.) This type of relationship " 'can only come into being as a result of some sort of transaction between the parties' " and "must necessarily arise from direct dealings between the **[*23]** plaintiff and the defendant; it cannot arise between the defendant and the public at large." (Ibid.) Evidence that the defendant was involved in retail sales of the disputed product to consumers and profited from them can satisfy the Bigler-Engler requirement. (*Bader v. Johnson & Johnson (2022) 86 Cal.App.5th 1094, 1132*.)

Ronald Carpenter testified he has no information Defendant concealed any information from him. (Ex. K at pp. 291-292.) Given that Ronald Carpenter had no communications with Defendant, and was simply a bystander when brake jobs were done on his truck, Defendant has shown that Plaintiffs cannot prove Carpenter had any direct dealings or transactions with Defendant. This is enough to shift the burden. In opposition, Plaintiffs do not present any evidence of any relationship or transaction between Plaintiffs and Defendant. Therefore, Plaintiffs did not show a disputed issue.

Plaintiffs state they need additional discovery pursuant to *Code of Civil Procedure section 437c, subdivision (h)* because they have not yet deposed Defendant's corporate representative about Defendant's "historical knowledge of the hazards of ***asbestos***" and "information related to its sale of ***asbestos***-component parts." (Opposition at p. 20.) But Plaintiffs do not explain how a deposition on those topics will **[*24]** provide evidence that Rondald Carpenter actually did have communications or a relationship with Defendant.

The motion for summary adjudication of the third cause of action is granted.

2. Fourth Cause of Action

Defendant moves for summary adjudication of the fourth cause of action for conspiracy. This cause of action alleges all of the defendants conspired together to commit fraudulent concealment and make false statements to Ronald Leroy Carpenter. (Motion at p. 22.) The complaint contains no details about how the conspiracy occurred, and the allegations are nothing more than deficient boilerplate. Plaintiffs' opposition papers are similarly entirely free of any specifics about how this conspiracy among all of the defendants occurred.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510-511*.) "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Id. at p. 511*.) Because summary adjudication is granted on the third cause of action, Defendant cannot **[*25]** be liable for conspiring with all of the other defendants to commit fraud.

The motion is granted as to the fourth cause of action.

3. Fifth Cause of Action

Defendant moves for summary adjudication of the fifth cause of action for premises liability. This cause of action alleges that Defendant owned, leased, occupied or controlled the property and were negligent in the use or maintenance of the property. (Complaint at p. 23.) Defendant agues there is no evidence of exposure at a location that Defendant controlled; the only exposures were when Plaintiff's father was doing brake jobs and when he took his work truck in for brake jobs at Kraft. (Motion at p. 17.)

This cause of action makes no sense. Plaintiffs contend Ronald Carpenter was exposed to ***asbestos*** in

Defendant's parts when mechanics for his employer (Kraft) did maintenance and his father did brake jobs. (Opposition at pp. 2-4.) The complaint alleges he was exposed at a service station owned by his father, at Kraft, at a service station he owned, and at his children's homes. (Complaint at pp. 5-6.) Plaintiffs do not allege Carpenter went to Defendant's facilities and was exposed there. Nor do Plaintiffs allege Defendant controlled **[*26]** or owned the Kraft facility, the service stations, or the children's homes. Thus, on its face, this cause of action against Defendant is deficient. Plaintiffs do not mention this cause of action in their opposition or explain any factual basis for it. The motion is granted as to the fifth cause of action.

4. Punitive Damages

Defendant moves for summary adjudication of the request for punitive damages.

When the motion targets a request for punitive damages, a higher standard of proof is at play.

"Although the clear and convincing evidentiary standard is a stringent one, 'it does not impose on a plaintiff the obligation to "prove" a case for punitive damages at summary judgment [or summary adjudication.' [Citations.] Even so, 'where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard.' [Citation.]" (*Butte Fire Cases (2018) 24 Cal.App.5th 1150, 1158-1159*.) "Summary judgment or summary adjudication ' " 'on the issue of punitive damages is **[*27]** proper' only 'when no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression.' " '. [Citation.]" (*Id. at p. 1159*.)

For a corporate defendant, the oppression, fraud or malice "must be on the part of an officer, director, or managing agent of the corporation." (*Civ. Code, § 3294, subd. (b)*.) That requirement can be satisfied " 'if the evidence permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others." ' [Citation.]" (*Morgan v. J-M Manufacturing Company, Inc. (2021) 60 Cal.App.5th 1078, 1090*.) A plaintiff also "can satisfy the 'managing agent' requirement 'through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated.' [Citation.]" (*Id. at p. 1091*.)

" '[I]ntentionally marketing a defective product knowing that it might cause injury and death is 'highly reprehensible.' [Citation.]" (*Bankhead v. ArvinMeritor, Inc. (2012) 205 Cal.App.4th 68, 85*.) Punitive damages may be available when a defendant knows the dangers of ***asbestos***, took action to protect its own employees, knew that its products were likely to pose a danger **[*28]** to users, and did not warn them. (Pfeifer v. John Crane, Inc. (2013) 220 Cal.Ap.4th 1270, 1300.) Such evidence "was sufficient to show malice, that is, despicable conduct coupled with conscious disregard for the safety of others." (Id. at pp. 1300-1301.)

Defendant argues Plaintiffs cannot show any malice, fraud, or oppression by Defendant because Ronald Carpenter testified he has no information supporting the request for punitive damages. (Motion at p. 18.) What Ronald Carpenter knows does not determine whether Defendant engaged in malice, fraud or oppression.

Defendant also cites a response to an interrogatory asking for all facts supporting the request for punitive damages. Plaintiffs' response contained a lot of references to generic articles about the dangers of ***asbestos*** and the presence of ***asbestos*** in brakes. (Ex. G at pp. 9-25.) However, the response does not show evidence that Defendant knew at the time of Ronald Carpenter's exposure about the danger its brakes presented or that there was a corporate decision to ignore that danger. Thus, the burden is shifted.

In response, Plaintiffs cites evidence that by the 1980s, Defendant knew its brakes contained ***asbestos*** and created dust, received a warning about the hazards of ***asbestos*** from working on brakes in 1978, **[*29]** and placed a warning in a maintenance manual that was kept at dealerships but not sent to end-users. (Additional Disputed Material Facts ("ADMF") 42, 46, 52, 53.) This is sufficient to show a disputed issue about whether knew about the hazards and warned some users at the dealership but failed to warn end users.

The motion is denied as to punitive damages.

The motion for summary judgment is DENIED. The motion for summary adjudication is GRANTED as to the third, fourth, and fifth causes of action, and DENIED as to punitive damages.

The moving party is electronically advised to give notice.

A copy of this minute order will append to the following coordinated case under JCCP4674: 20STCV46727.

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