Schrank v Amchem Prods., Inc.
2020 NY Slip Op 34876(U)
February 6, 2020
Supreme Court, Westchester County
Docket Number: Index No. 58399/2018
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GLEN C. SCHRANK and LINDA O'BRIEN- SCHRANK,

Plaintiffs,

-against-

AMCHEM PRODUCTS, INC., et al.

Defendants.

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DECISION & ORDER
Index No. 58399/2018
Sequence No. 3

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 107-121,149-170, 176, were read in connection with moving defendant Ford Motor Company's motion that seeks an order precluding the causation opinions of plaintiffs' expert witnesses and upon preclusion, granting summary judgment as to Ford pursuant to CPLR 3212(a); or in the alternative, an order granting a pretrial hearing as to plaintiffs' experts' methodology in forming their causation opinions pursuant to Frye v United States, 54 App DC 46, 293F 1013(DC Cir. 1923) and Parker v Mobil Oil Corp. 7 NY3d 434 [2006]).

NOW based upon the foregoing, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New

York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). However, "evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination" (In re New York City Asbestos Litig., 7 AD3d 285 [1st Dept 2004]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324 [1986]).

Glen C. Schrank ("plaintiff") was diagnosed with lung cancer in April 2018, at the age of 63. He smoked Parliament filtered cigarettes between 1 and 1 ½ packs per day from 1966 to present. Despite heavily smoking most of his life, plaintiff contends that it was his exposure to Ford's alleged asbestos containing products, directly and proximately causing him to develop an asbestos related

disease. Plaintiff claims that he was exposed to asbestos-containing brakes and clutches, including those of Ford, during his work as an auto mechanic at different stations from approximately 1972 through 1991.

Plaintiff's wife, testified that she and plaintiff were smokers when they first met in 2006 and throughout their marriage. Plaintiff still smoked in October 2018, when he testified at his deposition but quit on and off since.

In order to succeed on their claim against Ford for alleged asbestos causing products, plaintiffs had to establish that plaintiff was exposed to the defendant's product and that it was more likely than not that this exposure was a substantial factor in his injury (Diel v Flintkote Co., 204 AD2d 53, 54 [1st Dept 1994]).

For the court to grant summary judgment in an asbestos case, a defendant must unequivocally establish that its product could not have contributed to the causation of plaintiffs injury, in that plaintiff either was not exposed to asbestos from its products, or that the levels of asbestos he was exposed to was not sufficient to contribute to the causation of his illness (Berensmann v 3M Company (Matter of New York City Asbestos Litig.), 122 AD3d 520 [1st Dept., 2014]).

If the moving defendant makes a prima facie showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that he or she was actually exposed to asbestos fibers released from the defendant's product (Cawein v Flintkote Co., 203 AD2d 105, 106 (1st Dept 1994).

In support of its motion, Ford offers the Affidavit of Anil Vachani, MD, MS, who reviewed materials and scientific literature related to the association between workplace exposure to asbestos and asbestos related diseases. The Ford expert comments that epidemiological studies have investigated the association between exposure to various risk factors and the development of lung

cancer. These studies have shown that tobacco use is the most important causative agent for lung cancer; approximately 80-90% of all lung cancers in the United States are attributable to smoking. The risk of lung cancer depends largely on the duration of smoking and the number of cigarettes smoked. A significant proportion of lung cancer is diagnosed in previous smokers, and that the absolute risk of lung cancer in previous smokers remains elevated after smoking cessation, but never returns to the risk observed in life long non smokers. Other important risk factors brought out by Ford's expert for lung cancer is family history of lung cancer; a diagnosis of emphysema, COPD or asthma; exposure to environmental tobacco smoke, radon, arsenic, work in certain occupations involving exposure to asbestos; and second hand smoke. Other factors to consider include the role of fiber type and size and the interaction of asbestos and smoking.

Ford's expert reviewed the Analytical Epidemiological Studies of Vehicle and Brake Mechanics and Lung Cancer, and found that vehicle mechanics and in particular, brake repair mechanics, are potentially exposed to chrysotile asbestos from brake dust. This occupational group has, therefore, been included in several epidemiologic studies evaluating the association between occupation and various cancers, including lung cancer. However, studies failed to show an increased risk for lung cancer among vehicle mechanics. This is with the caveat that since smoking rates amongst vehicle mechanics are much higher compared to the general population, studies that do no account for the effect of cigarette smoking could introduce bias which would potentially overestimate the effect of brake repair work on lung cancer risk.

Another study Ford's expert points to is that the Epidemiological Studies of Vehicle and Brake Mechanics and Non-Malignant Asbestos Related Lung Disease Pleural plaques are indicators of exposure to asbestos. They are the most common manifestation of the inhalation, retention, and

biologic effect of asbestos.

Additionally, the epidemiological literature does not demonstrate that chrysotile asbestos exposure from brake work is associated with an increased risk for non-malignant lung disease. The risk of parenchyma disease is not increased among garage mechanics. The development of asbestosis requires exposure to large amounts of asbestos over long periods of time, but exposures during brake repair work are low and intermittent. There is also evidence that chrysotile fibers are less fibrogenic than amphiboles.

Brake workers are exposed predominantly to short chrysotile fibers, which is much less potent than amphibole fibers and there is increasing evidence that short fibers, irrespective of fiber type may not be carcinogenic at all.

Ford's expert continues that the absence of an association between vehicle repair and lung cancer is further supported by studies evaluating the risk of mesothelioma in automobile brake mechanics. These studies have consistently demonstrated no elevated risk of mesothelioma among brake workers. Given that asbestos is the predominant risk factor for mesothelioma, the lack of an increased risk for this disease among vehicle mechanic reflects the absence of risk associated with motor vehicle repair.

In fact, according to Ford's expert, researchers at Harvard University have summarized the results of the relevant studies for both mesothelioma and lung cancer and concluded that the evidence did not support an increase in risk of either lung cancer or mesothelioma among male automobile mechanics occupationally exposed to asbestos to brake repair.

Based upon Ford's expert's research and study, the expert opines that the primary cause of plaintiff's lung cancer was his prior history of tobacco use; he smoked approximately 1.5 packs of

cigarettes daily for approximately 50 years, and he was an active smoker at the time of diagnosis. His risk of lung cancer was further increased by his diagnosis of COPD, which is an independent risk factor for lung cancer.

Further, Ford's expert states that histologic evaluation of plaintiff's uninvolved lung tissue obtained during his lung cancer resection surgery did not identify any interstitial lung disease or asbestos associated pleural disease. The epidemiological literature does not support an association between exposure to friction products and the development of lung cancer or non-malignant lung disease. Therefore, it is defendant's expert's opinion that plaintiff's performance of motor vehicle repair, including work on brakes and clutches, did not increase his risk of developing lung cancer.

Ford also offers the Affidavit of Dennis Paustenbach, PHD, DABT, CIH, a board certified toxicologist and certified industrial hygienist with nearly 35 years of experience in occupational health, risk assessment, toxicology and environmental engineering. His experience includes investigating the health effects of exposure to asbestos. He has published over 300 peer reviewed articles and written more than 50 book chapters in fields including asbestos, as well as given many lectures at universities on these issues, and has conducted or supervised the conduct of more than 700 risk assessments related to individuals, contaminates sites, and consumer products. He has published over 30 peer reviewed manuscripts related to exposure to asbestos over the past ten years.

The toxicologist notes that epidemiologic studies have shown that vehicle mechanics are not at any greater risk of developing asbestos-related diseases than the general public. As such, plaintiff would not have been at an increased risk of developing mesothelioma, inconclusively diagnosed, as a result of his exposure from vehicle repair work. Smoking is a significant risk factor. Existing evidence does not support the claim of a synergetic relationship between cigarette smoke and

chrysotile asbestos on lung cancer risk at the low levels of asbestos exposure experienced by those who work with friction products. Plaintiff's lifetime cumulative exposure to chrysotile asbestos, even when coupled with smoking, as a result of his employment as an auto mechanic did not increase his risk of developing lung cancer. The toxicologist explains, in detail, that during the high temperature and pressure of the braking and clutching processes, asbestos fibers present in the friction materials degrade, causing only a very small percentage of the chrysotile fibers to remain intact. As a result, exposure to brake wear debris may be associated with little or no risk of asbestos disease.

In fact, the toxicologist believes that exposure to chrysotile asbestos associated with vehicle repair work, as well as handling and packing friction products are very low. In addition, the automotive and/or heavy truck repair work performed in the vicinity of plaintiff would not have resulted, on an annual time weighted average basis, in asbestos exposures that exceed the contemporaneous permissible exposure limits set by the federal government or the American Conference of Governmental Industrial Hygienist; (ACGIH) Threshold Limit Value (TLV).

Upon review of the record, Ford presented study after study demonstrating that there is no greater risk of any automobile mechanic of contracting asbestos related illness, and that if plaintiff was exposed by Ford's products, which have not even been properly identified, that exposure to asbestos would be very low and in conformance with government standards. Additionally, the experts opined that plaitniff's smoking for many years, and his COPD diagnosis were the reasons that plaitniff developed lung cancer. In light of the foregoing, and upon review of Ford's experts reports, Ford satisfy its threshold burden of showing that its products could not have contributed to the causation of plaintiff's injuries.

The burden now shifts to plaintiffs' experts to raise a triable issue of fact with respect to

causation. "A plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred" (In re New York City Asbestos Litig., 7 AD3d 285 [1st Dept 2004]).

Plaintiff's counsel served an expert report by Dr. Brent Staggs, a board-certified pathologist Anatomic Pathology, Clinical Pathology and Hematopatholgy, who is currently licensed to practice medicine in Arkansas, Alabama, Mississippi, Oklahoma, and Texas. He has reviewed hundreds of cases of asbestosis, asbestos related pleural disease, lung carcinomas and mesothelioma, both in clinical practice and in the setting of medical legal consultation. He has also performed more than a thousand autopsies, which included individuals who suffered from asbestos-related diseases.

Regarding causation, Dr. Staggs offers an opinion that plaintiff's cumulative exposure to asbestos of all fiber types was a significant contributing factor to his development of pulmonary squarmous cell carcinoma. Dr. Staggs claims that plaintiff breathed visible dust created by his work as a gas station attendant, and later as a mechanic, cleaning the garage and performing brake, clutch and gasket repairs. Plaitniff also had reported a significant history of smoking for over fifty years. Still, Dr. Staggs opines that based on the information provided and reviewed, plaitniff's cumulative exposure to asbestos of all fiber types was a significant contributing factor to his development of pulmonary squamous cell. Dr. Staggs states that inhalation of asbestos fibers of all fiber types causing lung cancer, while also claiming that the potency of different fiber types to cause lung cancer is an unsettled issue and numerous studies have reported potency differences between chrysotile and amphiboles (Ex G par. 9). Dr. Staggs further claims that further complicating the issue is mixed-fiber exposure, which regularly occurs in individual with asbestos caused cancer.

The next plaintiff expert report is from Dr. E. Neil Schachter, a board certified pulmonologist. Regarding causation, Dr. Schachter offers an opinion that plaintiff's "asbestos exposure is certainly the cause of his malignant disease in conjunction with his cigarette smoking. Each of [plaintiff's] asbestos exposures resulting in respirable dust levels above background contributed to a substantial and significant risk for his malignancy."

In toxic tort cases, "an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (**general causation**) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (**specific causation**) (Sean R. v BMW of N. Am., LLC, 26 NY3d at 808-809, citing Parker v Mobil Oil Corp., 7 NY3d at 448).

"[T]he fact that asbestos, or chrysolite, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused his disease" (In re New York City Asbestos Litig., 148 AD3d at 233, citing Sean R. v BMW of N. Am., LLC, 26 NY3d at 809).

"There could be several other ways an expert might demonstrate causation. For instance, … the intensity of exposure to [the toxin] may be more important than a cumulative dose for determining the risk of developing [the disease]. Moreover exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin. It is also possible that more qualitative means could be used to express a plaintiff's exposure Comparison to the exposure levels of subjects of other studies could be helpful provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects These along with others, could be potentially acceptable ways to demonstrate causation if they were found to be generally accepted as reliable in the scientific community"(*Parker v Mobil Oil Corp.,* 7 NY3d at 449).

Here, from these expert opinions, the circumstantial evidence of identity of the manufacturer

of a defective product causing personal injury failed to establish that it is reasonably probable, not merely possible or evenly balanced, that Ford was the source of the offending product (Healey v Firestone Tire & Rubber Co., 87 NY2d 596, 601–02 [1996]).

Plaintiffs experts fail to provide any basis for their opinions that plaintiff's work as an automobile mechanic and alleged exposure to each of Ford's products caused plaitniff's lung cancer. They fail to point to references to any studies, to any epidemiological studies finding that automobile mechanics have an increased risk of asbestos-related disease. Plaintiffs have provided no evidence that Ford's products contained asbestos which causes mesothelioma nor have they demonstrated that plaintiffs was subject to sufficient amounts of asbestos to have caused his illness.

Plaintiffs' expert failed to establish specific causation because the experts failed to establish sufficient exposure to a substance to cause the claimed adverse health effect. Even if plaintiff's experts could establish that plaintiff was exposed to asbestos-containing automotive friction products, they have not demonstrated a basis to attribute those exposures to Ford.

Specifically, Dr. Schacter provides no basis for his opinion that plaintiff's work as an automobile mechanic and alleged exposure to each defendant's product caused his lung cancer. Dr. Schacter also does not offer any opinion as to the capability of asbestos, including chrysotile asbestos to cause lung cancer, and makes no reference or response to multiple epidemiological studies. Neither does Dr. Staggs provide any basis for any estimate of the extent of plaintiff's alleged exposure to asbestos from automotive products generally or Ford products specifically.

Plaintiffs' experts fail to demonstrate how often plaintiff performed brake work with Ford Asbestos containing products, making it impossible to determine the frequency of his exposure, if any, attributable to Ford. The Court of Appeals recently reiterated the standard in Sean R. v BMW

of N. Am., LLC (26 NY3d 801 [2016]): "At a minimum, there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" (Juni v A.O. Smith Water Products Co. et al., (In re New York City Asbestos Litig., 148 AD3d 233 [1st Dept 2017], aff'd sub nom., 32 NY3d 1116 [2018]).

While plaintiffs are only required to show facts and conditions from which defendant's liability may be reasonably inferred, plaintiffs' proof was insufficient to establish any reasonable probability that a Ford product caused plaintiff's illness. Hence, the opposition papers have failed to provide sufficient proof to create an issue of fact that there is specific causation of plaintiff developing lung cancer from Ford's alleged asbestos containing products.

Accordingly, in light of the arguments presented, it is hereby

ORDERED, that defendant Ford's motion for summary judgment is granted and the complaint, and all cross claims (if any) are dismissed as to defendant Ford; and it is further

ORDERED, that the remaining parties are directed to appear on March 31, 2020 at 9:15A.M. in courtroom 1600, the Settlement Conference Part, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York 10601.

This constitutes the decision and order of the court.

All matters not specifically addressed are herewith denied.

Dated: **February 6, 2020**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All parties' attorneys by NYSCEF