DOUGLAS L. HAYES VERSUS ASBESTOS CORP. LTD, ET AL

CIVIL ACTION NO. 2:13-2392

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

2015 U.S. Dist. LEXIS 69343

May 28, 2015, Decided
May 28, 2015, Filed

COUNSEL: [*1] For Douglas L Hayes, Chad L Hayes, statutory heir and son of decedent Douglas L Hayes, Chris L Hayes, statutory heir and son of decedent Douglas L Hayes, Plaintiffs: Philip Charles Hoffman, LEAD ATTORNEY, Frank Joseph Swarr, Landry Swarr & Cannella, New Orleans, LA; David Ryan Cannella, Cannella Law Firm, New Orleans, LA; Mickey P Landry, Landry & Swarr, New Orleans, LA.

For Ford Motor Co, Defendant: Janika D Polk, LEAD ATTORNEY, Amber Brianne Barlow, Deborah D Kuchler, Lee Blanton Ziffer, Monique M Weiner, Kuchler Polk et al, New Orleans, LA; Terrence M R Zic, PRO HAC VICE, Whiteford Taylor et al, Bethesda, MD.

For Toyota Motor Sales U S A Inc, Defendant: Lance B Williams, LEAD ATTORNEY, Meghan Brianne Shumaker, Quincy T Crochet, McCranie Sistrunk et al (COV), Covington, LA.

For Honeywell International Inc, Defendant: Alicia Natasha Ritchie, LEAD ATTORNEY, Miles & Stockbridge, Baltimore, MD; Eric Alan Shuman, Sarah Elizabeth McMillan, McGlinchey Stafford (NO), New Orleans, LA; Jack R Reiter, PRO HAC VICE, Gray Robinson (MIAMI), Miami, FL; Kevin P Greene, PRO HAC VICE, Willcox & Savage, Norfolk, VA; Michael Alan Brown, PRO HAC VICE, Miles & Stockbridge, Baltimore, MD.

For C N H America [*2] L L C, named in Complaint as Case New Holland Inc, Defendant: Patrick J O'Cain, LEAD ATTORNEY, Deirdre C McGlinchey, Jose L Barro, III, McGlinchey Stafford (NO), New Orleans, LA; Martin A Conn, Moran Reeves & Conn, PRO HAC VICE, Richmond, VA.

JUDGES: JAMES T. TRIMBLE, JR., UNITED STATES DISTRICT JUDGE. MAG. JUDGE KAY.

OPINION BY: JAMES T. TRIMBLE, JR.

OPINION

MEMORANDUM RULING

Before the court are two (2) motions: "Motion for Summary Judgment Regarding "Reasonably Anticipated Use" on behalf of Honeywell International, Inc."("Honeywell") (R. #88) and "Ford Motor Company's ("Ford") Motion for Summary Judgment on the Issue of 'Reasonably Anticipated Use' Under the Louisiana Products Liability Act" (R. #89).Defendants, Honeywell and Ford, maintain that the brake drum blow out procedure,[1] used by Bubba Oustalet Dealership ("dealership"), Douglas Hayes' employer, was not a "reasonably anticipated use" of defendants' products; specifically this procedure and/or any other procedure

that was contrary to Ford's express instructions and warnings was not a "reasonably anticipated use of defendants' products. Thus, Honeywell and Ford argue that they cannot be held liable under the Louisiana Products Liability Act ("LPLA") for [*3] harm allegedly resulting from those practices.

> 1 Plaintiffs allege that this procedure was used by a mechanic performing a brake job; the mechanic would use high pressure compressed air to remove worn brake dust from within brake drums -- referred to as "brake drum blow out".

STATEMENT OF FACTS

Plaintiffs, Chad Hayes and Christopher Hayes, have sued several defendants alleging exposure to asbestos caused their father, Mr. Hayes, to suffer and die from Mesothelioma. Mr. Hayes worked as a car salesman at the Bubba Oustalet dealership (the "dealership") from 1993 to 2013. The dealership sells Ford and Toyota cars and light struck and various used vehicles. Honeywell is the successor in interest to Bendix Corporation, which was one of several manufacturers to supply brake parts for Ford's vehicles as original and replacement parts. None of the other suppliers have been sued in this lawsuit. The dealership service department repairs all makes and models of vehicles.

Mr. Hayes did not make repairs to vehicles, nor did he assist the mechanics at the dealership or elsewhere. He spent most of his day in the new car showroom which was an air-conditioned room separate from the repair shop. Mr. Hayes [*4] spoke with mechanics in the shop once or twice daily for 10 to 15 minute intervals to check on a client's vehicle.

In 1972, the Occupational Safety and Health Administration ("OSHA") enacted a series of regulations designed to impose controls on workplace exposures to asbestos throughout the industry. From 1975, nearly two decades before Mr. Hayes began working at the dealership, Ford repeatedly provided numerous written instructions and warnings to its dealerships, including Oustalet which includes, but are not limited to the following:[2] to refrain from using compressed air to clean brake assemblies for the explicit purpose of minimizing dust generation and the potential for exposure to asbestos. Ford instructed its dealerships to use a vacuum cleaner that was suitable for use with asbestos fibers, and to dispose of the dust and dirt in a manner that prevented dust exposure. Ford further gave instructions to cordon off areas dedicated to brake service, to prominently place warning signs and to prevent non-essential personnel from entering the area. Ford warned that exposure to asbestos fibers present on automobile and truck brake and clutch assemblies were hazardous to one's health [*5] when made airborne with compressed air or dry brushing. Ford instructed the dealerships to post signs warning of the hazards of asbestos, to avoid breathing the dust, to wear assigned protective equipment, and to not remain in an area unless one's work required it. Ford expressly and specifically warned against the use of air compressor hoses to remove dust or dirt. Ford also warned its dealers that if the dust could not be minimized through the use of vacuum hoses, a high-efficiency cartridge or airline respirator should be used. Ford also warned that if a vacuum was not available, cleaning should be done wet, and if that procedure generated dust, the technicians should wear government-approved toxic dust purifying respirators. Ford asserts that it did not have either actual or constructive knowledge that Oustalet mechanics used compressed air to blow out dust from the brake drums or any procedure in direct contravention of these warnings and instructions.

> 2 Ford exhibit D, Technical Service Bulletin ("TSB") No. 99 dated 10/24/1975 Ford exhibit D attached to 30(b)(6) depo. of Matthew Fyie, pp. 46-47; TSB No. 99, p. 8; Ford exhibit F, TSB No. 83-22, p. 7; Ford exhibit G, Ford Motor Company [*6] Package Material Specification L5-1516 and accompanying photographs of boxes with the warning label affixed; Ford exhibit H, Ford Motor Company Package Material Specification 101516, 1987 revision; Ford exhibit I, excerpts from Ford Motor Company 1983 Truck Shop Manual, Ford exhibit J, excerpts from Ford Motor Company 1984 Truck Shop Manual; Ford exhibit K, excerpts of Ford Motor Company 1985 Car Shop Manual, Ford exhibit L, excerpts from Ford Motor Company 1986 Car Shop Manual, Ford exhibit M, excerpt Ford Motor Company 1987 Car Shop Manual; Ford exhibit N, Ford Motor Company 1988 Truck Shop Manual; Ford exhibit N, excerpt Ford Motor Company 1988 Truck Shop Manual, Ford exhibit O, Ford Motor Company, 1990 Truck Shop Manual; Ford exhibit P, excerpt Ford Motor Company 1991; Ford exhibit P, excerpt Ford Motor Company 1991 Truck Shop Manual; Ford exhibit Q, excerpt Ford

Motor Company 1989 Car Shop Manual; Ford exhibit R, excerpt Ford Motor Company 1992 Mustang Service Manual; Ford exhibit S, excerpt Ford Motor Company 1993 Mustang Service Manual.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together [*7] with the affidavits, if any, when viewed in the light most favorable to the non-moving party, indicate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[3] A fact is "material" if its existence or nonexistence "might affect the outcome of the suit under governing law."[4] A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party.[5] As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the on-moving party's claim."[6] Once the movant makes this showing, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial.[7] The burden requires more than mere allegations or denials of the adverse party's pleadings. The non-moving party must demonstrate by way of affidavit or other admissible evidence that there are genuine issues of material fact or law.[8] There is no genuine issue of material fact if, viewing the evidence in the light more favorable to the non-moving party, no reasonable [*8] trier of fact could find for the nonmoving party.[9] If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.[10]

3 Fed. Ft. Civ. P. 56(c).
4 *Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 249 (1986).*
5 *Stewart v. Murphy, 174 F.3d 530, 533 (5th Cir. 1999).*
6 *Vera v. Tue, 73 F.3d 604, 607 (5th Cir. 1996).*
7 *Anderson, 477 U.S. at 249.*
8 *Celotex Coro, v. Catrett, 477 U.S. 317, 324 (1986).*
9 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).*
10 *Anderson, 477 U.S. at 249-50.*

LAW AND ANALYSIS

Honeywell is the successor in interest to the Bendix Corporation, one of the suppliers that provided asbestos containing brake shoes to Ford. Ford sold certain vehicles to the dealership where Mr. Hayes worked from 1993 until his death in 2013. Plaintiffs allege that Mr. Hayes was exposed to asbestos when mechanics performed a "brake drum blow out" procedure on an asbestos containing brake drum. Honeywell and Ford maintain that plaintiffs cannot show that as of 1993, the brake drum blow out procedure was a "reasonably anticipated" use of their brake products. Thus, because this procedure was not a "reasonably anticipated " use of Honeywell or Ford products, neither defendant can be held liable for harm allegedly resulting from the practice.

Louisiana Revised Statute 9:2800.54 (A) provides as follows:

> The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a ***reasonably anticipated use*** [*9] [11] of the product by the claimant or another person or entity.

11 Emphasis added.

The LPLA defines "reasonably anticipated use" as "a use or handling of the product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances."[12] Honeywell relies on the repeated warnings sent out by Ford for years prior to 1993 to dealerships warning and instructing the mechanics to avoid "brake drum blow out," the dangers of asbestos, as well as the OSHA compliant instructions on how to safely remove asbestos containing brake parts. Thus, Honeywell argues that under an objective standard, it would not have a basis to anticipate that as of 1993, a car dealer would still be performing a work practice which had for so long been the subject of such advice.

12 *La. R.S.9:2800.53(7).*

Plaintiffs maintain that there are disputed issues of material facts as to: (1) whether the warnings allegedly provided regarding the process of using compressed air to

clean asbestos dust from brake assembly parts (brake drum blow out(s)) were adequate and received by the mechanics at the dealership, (2) whether it was common place in the industry to use brake drum blow outs in the early to mid-1990s, (3) [*10] whether defendants knew or should have known that those warnings were being disregarded by the mechanics at the dealership, and (4) whether the alternative brake job procedure defendants claim to have used while Mr. Hayes worked at the dealership could have caused a significant exposure to asbestos.

Mr. Hayes testified in his deposition that he thought that he had been exposed to asbestos from being in close proximity to brake operations.[13] Of significance, Mr. Hayes testified that he "assumed" they were using asbestos brake parts.[14] Mr. Hayes further testified that he was present during hundreds of brake jobs, and that most of his customers would bring their vehicles to the dealership for service.[15] He also testified that the use of compressed air hoses was "[j]ust to clean everything up."[16] He did not associate the use of compressed air hoses with brake removal jobs.

13 Plaintiffs' exhibit A, Hayes depo. p. 20.
14 Id., p. 21-22.
15 Id. pp. 23-24.
16 Id.

Richard Oustalet, the owner of the dealership testified in his deposition that some brake products that were original equipment contained asbestos.[17] Mr. Oustalet also testified that he became aware of the dangers of asbestos in the 1990s, even though he could not pinpoint the exact date.[18] [*11] Oustalet testified that some mechanics were using compressed air to perform brake jobs.[19] While Oustalet did not recall learning from the defendants about the dangers of asbestos, nor did he personally see any of the defendants' warnings, he did specifically remember being informed by OSHA of the potential asbestos problem with brakes in the mid-1990s.[20] He also testified that the dealership received instructions and warnings from Ford pursuant to repair manuals and TSBs, and that the service technicians were expected to perform repair services pursuant to and in compliance with repair manuals and TSBs sent by Ford.[21] Mr. Hayes also testified that he did not see defendants' warnings about potential asbestos problems with brakes.[22]

17 Plaintiffs' exhibit B, Oustalet depo. p. 29; Plaintiffs' exhibit C, Matthew Fyie depo., pp. 22-25; Plaintiffs' exhibit E (R. #88, para. 5).
18 Plaintiffs' exhibit D; Plaintiffs' exhibit B, pp. 33-36.
19 Plaintiffs' exhibit B, pp. 35-36.
20 Id., p. 38.
21 Defendant's exhibit C, Oustalet depo. p. 13:23-14:12.
22 Plaintiffs exhibit A, p. 25.

Plaintiffs further rely on the testimony of Matthew Fyie, Ford's corporate representative, who testified that Ford did not have a practice of inspecting Ford Dealerships to ensure that they were following proper protocol with respect to dealing with asbestos.[23] Mr. Fyie testified that such would be the responsibility of the dealership and OSHA.[24] Thus, plaintiffs argue that there is a genuine issue of material fact regarding whether Ford's warnings were adequate to alert the dealership to the dangers of brake drum blow outs relying on Kampen v. American Isuzu Motors. Inc.[25]

23 Plaintiffs exhibit C, pp. 42-43.
24 Id.
25 *157 F.3d 306 (5th Cir. 1998)*(a warning about product misuse is relevant to assessing what uses of a product a manufacturer should reasonably anticipate; if a manufacturer knows or should know that users are disregarding the [*12] warnings when using the product, that prohibited use is considered to be a reasonably anticipated use).

Plaintiffs also submit the testimony of their expert, William E. Longo, Ph.D., who identified brake drum blow outs as "a very common work practice used by brake mechanics."[26]

26 Plaintiffs' exhibit D, Supplemental Expert Report, p. 6.

Honeywell cites Kampen, wherein the court held that the analysis to determine a reasonably anticipated use under the LPLA is an "objective inquiry" which focuses on "what uses of its product the manufacturer should have reasonably expected at the time of manufacture."[27] Honeywell argues that plaintiffs' evidence that relies on the testimony of workers at the dealership regarding the use of brake drum blow outs during the 1990s is irrelevant because the proper objective inquiry is the expectation of a manufacturer at the time of manufacture.

[28] Thus, plaintiffs' use of the end users practices -- the dealership-- does not constitute objective evidence that a manufacturer should have reasonably anticipated the use.

27 Kampen, 157 F.3d at 309.
28 Kampen, 157 F.3d at 309.

Honeywell submits the affidavits of Richard Oustalet[29] and Arden Killmer to show that this procedure was not being utilized when Mr. Hayes was employed at [*13] the dealership. In its attempt to establish the universal knowledge about the dangers of asbestos and the need to avoid disturbing such materials in a manner which would release dust, Honeywell submits the deposition testimony of Mr. Hayes' son, Chad Hayes. Chad Hayes testified that he learned from his co-workers in the field of telecommunication cables installations, of the dangers of asbestos.[30] Honeywell also cites Sturlese v. Six-Chuter,[31] wherein the Third Circuit identified that a key part of "the real contest" was whether plaintiffs' damages arose "from a reasonably anticipated use of the product by the claimant or another person or entity."

29 Honeywell exhibit D, Oustalet depo.; Honeywell exhibit E, Arden Killmer depo.
30 Honeywell exhibit F, Chad Hayes depo. p. 9-10.
31 *822 So.2d 173 (La.App. 3 Cir. 6/26/02)*, writ denied, *829 So.2d 1049*.

Honeywell contends that plaintiffs' use of Dr. Longo's expert opinion that brake drum blow out "was a very common work practice used by brake mechanics" is inadmissible and insufficient to create a dispute of material fact to preclude summary judgment because Dr. Longo is not qualified to render this opinion regarding the prevalence of automotive industry practices. Honeywell remarks that Dr. Longo has been [*14] qualified to offer expert testimony as a material scientist and microscopist and is not an expert in automotive engineering, car dealership operations, or an industrial hygienist. Thus, lacking such expertise, he cannot opine on the prevalence, if any, of that industry's practice or custom. Honeywell further submits that Dr. Longo's assertion lacks any factual basis or support.

Honeywell refers the court to Dr. Longo's expert opinion which states that there were studies performed back in the 50's, 60s and 70's when the Federal Government was pushing the industry to get people to quit using compressed air.[32] Thus, Honeywell suggests that Dr. Longo's expert reports actually support defendants' position that this practice was not a reasonably anticipated use by the 1990s and 2000s.

32 Honeywell's exhibit C.

More significantly, Honeywell and Ford argue that plaintiffs have failed to offer any factual or expert testimony that Bendix (now Honeywell) and Ford knew or should have known that brake drum blow out was a practice being used in contravention of Ford's numerous warnings, laws and regulations, and prevailing practices.

Notably, we find that plaintiffs' reliance on Savant v. Beretta USA. Corp. [*15] [33] is misplaced In Savant, there was evidence from four lay witnesses regarding the handling of a shotgun at issue in the case, two professional hunting guides regarding the standard practice and regular habits of hunters and use of the shotgun, a registered professional engineer regarding the adequacy of the warnings at issue, and the past president of a gun maker's guild opinion that the usage of a shotgun was considered reasonably anticipated by gun manufacturers. There is no such evidence in the record about the use of the blow out procedure while performing brake jobs.

33 2007 WL 1068481, at *9-10 (W.D. La. 2007).

In the alternative, plaintiffs maintain that if the court determines that defendants' warnings were adequate, and the dealership's use of the product was not a reasonably anticipated use, Dr. Longo testified that the use of a liquid brake cleaner from an aerosolized spray would be a significant exposure to asbestos 1000 times above background levels.[34] Dr. Longo opined that this procedure could also have caused a significant exposure to asbestos, and therefore precludes this court from granting summary judgment.

34 Plaintiffs' exhibit E, pp. 61-62.

Honeywell and Ford argue that there is a complete lack of evidence in the [*16] record to suggest that the mechanics used an aerosol spray while performing brake jobs. Therefore, whether or not such use could expose one to asbestos is irrelevant because there is no evidence that Mr. Hayes was ever exposed to asbestos in that manner. We agree with defendants that there is no evidence in the record that the mechanics at the

dealership used an aerosol spray while performing a brake job in Mr. Hayes' presence.

The court finds that there is no genuine issue of material fact. If in fact the mechanics used the drum blow out procedure, this was not a reasonably anticipated use. Furthermore, Honeywell and Ford are correct in that there is no evidence in the record that the mechanics were using an aerosolized spray as expressed by Dr. Longo, and if there was this procedure was also not a reasonably anticipated use of the defendants' products.

CONCLUSION

For the reasons set forth above, the motions for summary judgment will be granted, dismissing with prejudice, plaintiffs' claims against defendants, Honeywell International Inc. and Ford Motor Company, and judgment will be rendered in accordance with the court's rulings made herein.

THUS DONE AND SIGNED in Alexandria, Louisiana [*17] on this 28th day of May, 2015.

/s/ James T. Trimble, Jr.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

JUDGMENT

Pursuant to the Memorandum Rulings of this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motions for summary judgments (R. #86, 87, 88, 89, 91 and 94) are hereby **GRANTED** dismissing with prejudice plaintiffs' claims against defendants, Honeywell International, Inc., Toyota Motor Sales USA, Inc., C N H America, LLC, and Ford Motor Company at plaintiffs' costs.

THUS DONE AND SIGNED in Alexandria, Louisiana on this 28th day of May, 2015.

/s/ James T. Trimble, Jr.

Judge James T. Trimble, Jr.

United States District Judge

DOUGLAS L. HAYES VERSUS ASBESTOS CORP. LTD, ET AL

CIVIL ACTION NO. 2:13-2392

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

2015 U.S. Dist. LEXIS 69344

May 28, 2015, Decided
May 28, 2015, Filed

COUNSEL: [*1] For Douglas L Hayes, Chad L Hayes, statutory heir and son of decedent Douglas L Hayes, Chris L Hayes, statutory heir and son of decedent Douglas L Hayes, Plaintiffs: Philip Charles Hoffman, LEAD ATTORNEY, Frank Joseph Swarr, Landry Swarr & Cannella, New Orleans, LA; David Ryan Cannella, Cannella Law Firm, New Orleans, LA; Mickey P Landry, Landry & Swarr, New Orleans, LA.

For Ford Motor Co, Defendant: Janika D Polk, LEAD ATTORNEY, Amber Brianne Barlow, Deborah D Kuchler, Lee Blanton Ziffer, Monique M Weiner, Kuchler Polk et al, New Orleans, LA; Terrence M R Zic, PRO HAC VICE, Whiteford Taylor et al, Bethesda, MD.

For Toyota Motor Sales U S A Inc, Defendant: Lance B Williams, LEAD ATTORNEY, Meghan Brianne Shumaker, Quincy T Crochet, McCranie Sistrunk et al (COV), Covington, LA.

For Honeywell International Inc, Defendant: Alicia Natasha Ritchie, LEAD ATTORNEY, Miles & Stockbridge, Baltimore, MD; Eric Alan Shuman, Sarah Elizabeth McMillan, McGlinchey Stafford (NO), New Orleans, LA; Jack R Reiter, PRO HAC VICE, Gray Robinson (MIAMI), Miami, FL; Kevin P Greene, PRO HAC VICE, Willcox & Savage, Norfolk, VA; Michael Alan Brown, PRO HAC VICE, Miles & Stockbridge, Baltimore, MD.

For C N H America [*2] L L C, named in Complaint as Case New Holland Inc, Defendant: Patrick J O'Cain, LEAD ATTORNEY, Deirdre C McGlinchey, Jose L Barro, III, McGlinchey Stafford (NO), New Orleans, LA; Martin A Conn, Moran Reeves & Conn, PRO HAC VICE, Richmond, VA.

JUDGES: JAMES T. TRIMBLE, JR., UNITED STATES DISTRICT JUDGE. MAG. JUDGE KAY.

OPINION BY: JAMES T. TRIMBLE, JR.

OPINION

MEMORANDUM RULING

Before the court is are two motions; (1) "Motion for Summary Judgment on behalf of Honeywell International, Inc." (R. #87) and (2) "Ford Motor Company's ("Ford") Motion for Summary Judgment on Product Identification, Exposure, and Causation," (R. #91)wherein the movers seek to be have the claims asserted against them dismissed with prejudice pursuant to *Rule 56* of the Rules of Civil Procedure.

FACTUAL STATEMENT

In his complaint, Mr. Douglas Hayes, now deceased,

alleges that he was exposed to asbestos from brake shoes being repaired in the shop at the Bubba Oustalet Ford/Toyota dealership where Mr. Hayes worked as a car salesman. The following facts are not in dispute.

Mr. Hayes worked as a car salesman at the Bubba Oustalet dealership from 1993 until 2013; the dealership sells Ford and Toyota cars and light trucks as well as various used vehicles. The [*3] service department works on any make or model of a vehicle. Mr. Hayes performed no work as a mechanic at the dealership, nor did he assist the mechanics. During his employment at the dealership, Mr. Hayes spent most of his time in the car showroom, but did visit the shop once or twice a day for a 10-15 minute visit to check on the status of customers' vehicles.

Mr. Hayes never saw a "Bendix" product in the shop.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, when viewed in the light most favorable to the non-moving party, indicate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[1] A fact is "material" if its existence or nonexistence "might affect the outcome of the suit under governing law."[2] A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party.[3] As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence [*4] supporting the on-moving party's claim."[4] Once the movant makes this showing, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial.[5] The burden requires more than mere allegations or denials of the adverse party's pleadings. The non-moving party must demonstrate by way of affidavit or other admissible evidence that there are genuine issues of material fact or law.[6] There is no genuine issue of material fact if, viewing the evidence in the light more favorable to the non-moving party, no reasonable trier of fact couid find for the non-moving party.[7] If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.[8]

1 *Fed. R. Civ. P. 56(c).*

2 *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).*

3 *Stewart v. Murphy, 174 F.3d 530, 533 (5th Cir. 1999).*

4 *Vera v. Tue, 73 F.3d 604, 607 (5th Cir. 1996).*

5 *Anderson, 477 U.S. at 249.*

6 *Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).*

7 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).*

8 *Anderson, 477 U.S. at 249-50.*

LAW AND ANALYSIS

Plaintiffs claim that three of this lawsuit's four defendants--Honeywell, Ford and Toyota--supplied asbestos containing drum brake components to one of Mr. Hayes' employers, the Bubba Oustalet Ford & Toyota dealership. Plaintiffs allege that Mr. Hayes breathed dust from these brake products whenever he was present while the dealership's mechanics used a compressed air hose to "blow out" worn brake dust from within the brake drums.[9] Plaintiffs then claim that [*5] Mr. Hayes breathed this dust which contained asbestos and later caused his mesothelioma.

9 Ford exhibit A, Expert report of Dr. William Longo, p. 6.

The Louisiana Products Liability Acts is the sole remedy against Ford in this matter. *Louisiana Revised Statute 9:2800.54(A)* provides as follows:

> The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders that product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

Under the LPLA, a plaintiff must establish four elements: "(1) that the defendant is a manufacturer of the product; (2) that the claimant's damage was proximately caused by a characteristic of the product; (3) that this characteristic made the product "unreasonably dangerous"; and (4) that the claimant's damage arose from a reasonably anticipated use of the product by the claimant or someone else."[10]

10 *Stahl v. Novartix Pharm. Corp., 283 F.3d 254, 260-61 (5th Cir. 2002)*(citing *La.R.S. 9:2800.54*).

Plaintiffs' "obligation to identify the manufacturer of an allegedly defective product is inherent in the LPLA's requirement that plaintiff prove proximate causation."[11] An absence of facts to support a plaintiff's claim that asbestos exposure was a [*6] substantial factor is fatal to the plaintiff's claim.[12]

11 *Jefferson v. Lead Indus. Ass'n. Inc., 930 F.Supp. 241, 246 (E.D. La. 1996)* aff'd, *106 F.3d 1245 (5th Cir. 1997)*.

12 Robertson v. Doug Ashy Building Materials. Inc., 2014 WL 7277688 So.3d (La.App. 1st Cir.12/23/2014)

Under the Louisiana Products Liability Act, ("LPLA"), a plaintiff must prove that his damages were proximately caused by the targeted product's manufacturer.[13] Under Louisiana law, a plaintiff must prove more than the mere presence of a defendant's product at the injured party's place of work; that fact does not establish that the product was a substantial factor in causing injury.[14]

13 *La. R.S. 9:2800.54 (A)*.

14 *Hoerner v. Anco Insulations, Inc., 812 So.2d 45* (La.App. 4 Cir. l/23/02)(co-worker's testimony that he had used a particular supplier's insulation material, but was unsure whether plaintiff came into contact with it at a particular time and jobsite, insufficient to support claim against supplier.)

As noted by Ford, in order to prevail, plaintiffs must show that (1) Mr. Hayes was present when Oustalet mechanics used compressed air to blow dust out of brake drums; (2) this dust emanated from brakes supplied by Ford (or Bendix); (3) the Ford brakes contained asbestos; and (4) Mr. Hayes breathed this dust which caused the disease.

Honeywell International Inc. ("Honeywell")[15] and Ford maintain that there is no evidence in this case to prove that Mr. Hayes was in the vicinity of work being performed on [*7] a Bendix brake or a Ford-supplied product. In addition to the undisputed facts as set forth above, Honeywell and Ford assert that there is no witness who has testified that Mr. Hayes approached a Ford vehicle which was at that time having "Bendix" brake parts either installed or removed. Honeywell further asserts there is no documentation to establish which vehicles he may have visited in the shop, nor is there proof of the brand of brake part being installed or removed from any vehicle which Mr. Hayes happened to have approached. Hence, these defendants maintain that summary judgment should be granted in their favor because plaintiffs cannot identify their products which allegedly caused Mr. Hayes' illness, and/or the exposure to their activities or the exposure to their products was not "frequent enough" to be considered a "substantial contributing" factor in causing Mr. Hayes' contraction of mesothelioma.

15 Successor in interest to the Bendix Corp.

Plaintiff contends that the evidence clearly establishes that while Mr. Hayes was working at the dealership, asbestos containing products manufactured or supplied by Ford, Toyota and Bendix were used, which exposed Mr. Hayes to above background [*8] concentrations of asbestos and caused Mr. Hayes to develop mesothelioma. Plaintiffs rely on the following facts which they assert are undisputed:

1. Mr. Hayes worked at the dealership from 1993 to 2013.
2. During the time he worked at the dealership, some Ford and Toyota vehicles had asbestos containing component parts installed as original equipment.
3. Bendix manufactured brake parts on the Ford vehicles, some of which contained asbestos.
4. Ford, Toyota and Bendix original equipment asbestos containing brake products were used at the dealership when brake jobs were performed.
5. Mr. Hayes testified that he was in the service department while compressed air was used during brake jobs.
6. Mr. Hayes was in the service department at least twice a day, every day, for 10 to 15 minutes.
7. Mr. Hayes was in close proximity to hundreds of brake jobs.

Plaintiff submits the following summary judgment evidence to create a genuine issue of material fact for

trial:

a. Deposition testimony of Richard Oustalet, owner of the dealership;[16]

b. Perpetuated deposition testimony of plaintiff, Mr. Hayes;[17]

c. Affidavit of Richard Oustalet;[18]

d. 1990-2000 Vehicles sold to Bubba Oustalet Ford Lincoln;[19]

e. Deposition testimony [*9] of Matthew Fyie;[20]

f. Ford Motor Company Brake Assembly and Lining Suppliers;[21]

g. Honeywell's responses to plaintiffs' interrogatories;[22]

h. Deposition testimony of William E. Longo, PhD;[23]

i. Letter dated January 5, 2015 of Dr. Arthur L. Frank's opinion;[24]

j. Expert report by Dr. Murray M. Finkelstein.[25]

16 Plaintiffs' exhibit 2.
17 Plaintiffs' exhibit 1.
18 Plaintiffs' exhibit 3.
19 Plaintiffs' exhibit 4, (produced by Ford Motor Company).
20 Plaintiffs' exhibit 5.
21 Plaintiffs' exhibit 6.
22 Plaintiffs' exhibit 7.
23 Plaintiffs' exhibit 8.
24 Plaintiffs' exhibit 9.
25 Plaintiffs' exhibit 10.

Plaintiffs posit that every exposure to asbestos (above background) causes the disease to the exclusion of another exposure, and then argues that because all exposures contribute in mesothelioma cases, the question of whether they are significant is for the jury.[26] Plaintiffs contend that it is not necessary to have to specifically identify a particular product or particular defendant in order to defeat a motion for summary judgment. Plaintiffs rely on Martin v. Am. Petrofina, Inc.,[27] wherein the Fifth Circuit ruled that there was "sufficient evidence for a finder of fact to conclude that, more probably than not, the plaintiff was exposed to [defendant's [*10] asbestos-containing] mastics. In that case, even though plaintiff could not recall if he worked with a particular asbestos-containing product, a witness who did contract work for various companies testified that he used defendant's asbestos-containing mastics more than any other product.[28]

26 Citing *Landry v. Avondale Indus. Inc., 111 So.3d 508 (La.App. 4 Cir. 3/6/13)*(a determination regarding the amount of exposure emitted from a product and whether an exposure is a substantial factor in causing disease, is a question for the trier of fact).
27 *779 F.2d 250 (5th Cir. 1985)*.
28 Id.

In Grant v. Am. Sugar Refining, Inc.,[29] plaintiff sued the defendant as a seller, installer and remover of asbestos-containing insulation products at the Domino Sugar Refinery. The Fourth Circuit reversed the trial court's granting of defendant's motion for summary judgment concluding that the fact that plaintiff's father worked on a premises that had asbestos containing products, raised genuine issues of material fact.[30]

29 *952 So.2d 746, 747 (La.App. 4 Cir. 1/31/07)*.
30 *Id. at 750*.

In Held v. Avondale Industries, Inc.,[31] the plaintiffs' husband and father, Mr. Field, died from an asbestos-related disease; plaintiffs alleged that the exposure to asbestos caused the disease while working on ships as a marine surveyor. Mr. Field spent very little time at the shipyards and could [*11] not identify any asbestos-containing products which he was exposed. On summary judgment, the trial court found that plaintiffs failed to show that there was a genuine issue of material fact concerning whether asbestos-containing material at the shipyards was a substantial factor in causing Mr. Field's related disease.[32] The Fourth Circuit reversed the trial court's ruling relying on the affidavit of Dr. Victor Roggli, who routinely testifies on behalf of asbestos defendants. Dr. Roggli testified that "any of Mr. Held's exposures, even slight exposures, to asbestos" were a significant contributing cause of his asbestos related disease."[33]

31 *672 So.2d 1106 (La.App. 4 Cir. 4/3/96)*.
32 *Id. at 1109*.
33 Id.

Plaintiffs assert there is no dispute that asbestos containing products supplied by Ford and manufactured

by Bendix were used at the dealership in Mr. Hayes' presence. Honeywell and Ford, on the other hand, contend that plaintiffs have failed to identify their brake products as being removed by compressed air and exposing Mr. Hayes to asbestos when he might have been approaching the vehicle. Defendants note that Mr. Hayes was not a mechanic, nor did he assist mechanics with automotive repair at the dealership.[34] Mr. Hayes was a salesman who spent [*12] the majority of his time at work in the showroom, only visiting the service department once or twice a day for 10 - 15 minute intervals.[35]

34 Ford exhibit B, depo. of Douglas Hayes, p. 51:21-24.
35 Id.

Honeywell relies on Gill v. Ehicon,[36] wherein the trial court granted summary judgment to a manufacturer where plaintiffs could not prove product identification. In Gill, various manufacturers had supplied contaminated medical product to which plaintiff alleged that he might have been exposed. Some product batches did not contain the contaminating agent. The court held that because plaintiffs could not prove that the product was subject to a recall, they could not prove that they were contaminated.[37] Defendants, likewise, argue that because the dealership did not keep data of the brakes that were removed from the cars or trucks and/or recorded when Mr. Hayes approached the vehicles, plaintiffs cannot meet their burden of proof to identify any Bendix or Ford supplied products which contained asbestosis, nor can plaintiffs establish that Mr. Hayes was in close proximity when the brakes were being blown out by an air compressor or an aerosol can, such that he was exposed to asbestos during that time.

36 *2002 U.S. Dist. LEXIS 10763 (E.D.La. 2002)* [*13] .
37 Id. at 7.

Honeywell remarks that plaintiffs state that "some" Ford and Toyota vehicles had asbestos containing component parts as original equipment,[38] which necessarily infers that "some" vehicles did not have asbestos containing equipment. Indeed, Honeywell notes that only a small sub-part of Ford and Toyota vehicles were built with asbestos components at the relevant times.[39] Honeywell further points out that the dealership repaired all makes of vehicles, not just Ford and/or Toyotas;[40] there is also testimony that brake repair jobs were typically very competitive and many customers had their brake jobs done somewhere other than the dealership.[41]

38 Plaintiff's opposition, p. 2, R. #106.
39 Honeywell exhibit A, Ford's Supplemental Answer to Plaintiffs' Interrogatory No. 26; Exhibit B, Toyota Motor Sales' Supplemental Discovery Response, both of which state that Ford and Toyota started phasing out asbestos containing brakes in the 1970's and 1980's.
40 Honeywell exhibit D, Richard Oustalet depo. p. 15.
41 Honeywell exhibit E, Killmer depo. p. 49; Honeywell exhibit D, Oustalet dep. P. 48; Honeywell exhibit F, Hayes dep. P. 23-24.

Ford argues that plaintiffs cannot place Mr. Hayes' presence in the service department [*14] during a time when work was being performed on a Ford-supplied asbestos containing brake part, and there is an absence in the record that a mechanic blew out asbestos dust from a drum that contained a Ford brake, nor is there evidence that Mr. Hayes was present when this occurred. Thus, the chain of causation is broken and plaintiffs' case fails.

Defendants maintain that plaintiffs have failed to offer facts to show that any Bendix or Ford brake products, asbestos containing or not, were removed at the dealership. Furthermore, plaintiffs have not even suggested how they could prove that such parts were removed in Hayes' presence, and/ or whether Mr. Hayes was exposed to asbestos when the parts were being removed. Thus, defendants argue that the sufficiency of "substantial factor causation" evidence is irrelevant until plaintiffs can prove product identification.

Product identification is a threshold element of plaintiff's proof.[42] The court finds that there is no evidence in the record to meet this element of proof. Establishing that Oustalet is a Ford dealership and that the dealership ***sold*** some vehicles that contained asbestos parts is insufficient to meet the product identification [*15] element. The court cannot presume that because the dealership sold vehicles that had brake parts containing asbestos, and Mr. Hayes visited the service department on occasion for brief intervals, does not equate to Mr. Hayes being exposed to asbestos from Bendix or Ford-supplied brake parts. In order to make this giant leap, the court would have to infer that just because the dealership sold a vehicle that had a brake part

containing asbestos, that such a vehicle was brought back to the dealership to have the brake part removed and that brake part contained a Bendix or Ford supplied product.[43] We would then have to infer that the brake product that was being removed contained asbestos, and the mechanic used an outdated procedure, in violation of OSHA regulations and express warnings made by Ford. We would have to further infer that at that exact same time,[44] Mr. Hayes approached the vehicle and remained within three (3) to ten (10) feet of the vehicle during the time the brake part was being blown out. We would have to make all of these inferences because there is no evidence in the record that any of this actually happened. Ultimately, there is no factual support in the record that Mr. [*16] Hayes was exposed to asbestos by a Ford or Honeywell product during his employment with the Bubba Oustalet dealership.

42 *Thibodeaux v. Asbestos Corp. Ltd., 976 So.2d 859, 863 (La.App. 4 Cir. 2/20/08)*("We note at the outset that in asbestos cases there is a need to show that the plaintiff was exposed to the defendant's asbestos product. . . the only evidence . . . is that. . . Eagie was one of several suppliers of asbestos-containing products. . . nor was there any evidence submitted . . . that she was actually exposed to asbestos-containing products from [defendant] while she was at the hospital."; *Vodanovich v. A.P. Green Industries, Inc., 869 So.2d 930, 933 (La.App. 4 Cir. 3/3/04)*("Because plaintiff has provided no identification of actual work being performed in proximity, there can be no inference that the defendants' activities were a substantial factor in causing plaintiff's injuries. . . . mere possibility, and even unsupported probability, are not sufficient to support a judgment in plaintiff's favor. Accordingly, summary judgment was appropriate...";; see also *Maldanado v. State Through Dept, of Transp., 618 So.2d 537 (La.App. 4 Cir. 1993)* writ denied(La.9/9/93): *Fricke v. Owens-Corning Fiberglas Corp., 618 So.2d 473 (La.App. 4 Cir. 1993)*; *Baldwin v. Kikas, 635 So.2d 1324 (La.App. 4 Cir. 4/14/94)*, writ denied (La. 2/2/94); *Harrison v. Gulf South Beverages. Inc., 438 So.2d 261 (La.App. 4 Cir. 1983)* writ denied (La.12/9/83); *Jefferson v. Lead Ins. Ass'n. Inc., 930 F.Supp. 241, (E.D. La. 1996)*, aff'd *106 F.3d 1245,1246 (5th Cir. 1997)* (Louisiana does not recognize "market share" or other alternative liability theories.).

43 The court notes that the record indicates that Bendix was not the only supplier of brake parts for Ford. [*17]

44 Mr. Oustalet testified that the dealership performed approximately one (1) brake job per week during Mr. Hayes' employment. Ford exhibit C, Oustalet depo. pp. 31-32.

CONCLUSION

The court finds that plaintiffs have failed to create a genuine issue of fact for trial as to product identification and causation, a necessary element to plaintiffs' claim. Accordingly, the court will grant both Honeywell and Ford's motions for summary judgment as to product identification and the claims made against them will be dismissed with prejudice and judgment will be rendered in accordance with the court's ruling made herein.

THUS DONE AND SIGNED in Alexandria, Louisiana on this 28th day of May, 2015

/s/ James T. Trimble, Jr.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

JUDGMENT

Pursuant to the Memorandum Rulings of this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motions for summary judgments (R. #86, 87, 88, 89, 91 and 94) are hereby **GRANTED** dismissing with prejudice plaintiffs' claims against defendants, Honeywell International, Inc., Toyota Motor Sales USA, Inc., C N H America, LLC, and Ford Motor Company at plaintiffs' costs.

THUS DONE AND SIGNED in Alexandria, Louisiana on this 28th day of May, [*18] 2015.

/s/ James T. Trimble, Jr.

Judge James T. Trimble, Jr.

United States District Judge