

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF VENTURA  
VENTURA**

**MINUTE ORDER**

DATE: 12/17/2015

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM: Denise Potts

CASE NO: **56-2014-00458073-CU-AS-VTA**

CASE TITLE: **Robert Denyer vs AB Electrolux**

CASE CATEGORY: Civil - Unlimited      CASE TYPE: Asbestos

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**EVENT TYPE:** Motion for Summary Judgment and/or Adjudication

**MOVING PARTY:** Goodloe E Moore Inc

**CAUSAL DOCUMENT/DATE FILED:** Motion for Summary Judgment and/or Adjudication, 09/23/2015

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**APPEARANCES**

Stephen M. Fishback, counsel, present for Plaintiff(s).

John Sullivan, specially appearing for counsel Gary D Sharp, present for Defendant(s).

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At 8:52 a.m., court convenes in this matter with all parties present as previously indicated.

Counsel have received and read the court's written tentative ruling.

Matter submitted to the Court with argument.

The Court finds/orders:

Matter is taken under submission.

Upon further consideration of submitted matter, the Court rules as follows:

**The court's ruling is as follows:**

The court grants Plaintiffs Gertrude Denyer's, Edward Lawrence Denyer's and Elizabeth Denyer Hoggan's request for judicial notice.

Overrule Plaintiffs' evidentiary objections to the "reply" declaration of George S. Sullivan.

Sustain Defendant Goodloe E. Moore, Inc.'s evidentiary objections to the Declaration of Plaintiffs' expert Charles Ay.

The court finds for the purposes of the present motion only, that: (i) Defendant Goodloe's Material Facts Nos. 1, 3-5, and 7-13 are undisputed and established; (ii) Defendant Goodloe's Material Material Facts Nos. 14, 18, 23, 26, 35, and 38 are disputed and established; (iii) Defendant Goodloe's Material Facts Nos. 2, 6, 15-17, 19-21, 24, 27, 36, and 39 are disputed and not established; (iv) Defendant Goodloe's

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Material Facts Nos. 22, 25, 34, and 37 are mere incorporations of other Material Facts; (v) Defendant Goodloe's Material Facts Nos. 28-33 are mooted by Plaintiffs' request to dismiss the third and fourth causes of action; (vi) Plaintiffs' Additional Material Facts Nos. 1-7 and 9-11 are supported by the cited-to evidence and established; and (vii) Plaintiffs' Additional Material Facts Nos. 8 and 12 are not supported by the cited-to evidence and not established.

Goodloe E. Moore, Inc. ("Goodloe") moves for summary judgment on Plaintiffs Gertrude Denyer, Edward Lawrence Denyer, and Elizabeth Denyer Hoggan's 1st Amended Complaint or, alternatively, summary adjudication of Plaintiffs' first through fourth, sixth and seventh causes of action and their claim for punitive damages. Plaintiffs oppose Defendant Goodloe's motion.

**Threshold Procedural Issue: Defendant Goodloe's "Reply" Evidence:**

For this first time with its reply papers, Goodloe submits the supplemental declaration of its counsel George S. Sullivan and attached Exhibit 1 thereto, portions of the transcript of the telephonic deposition of Plaintiffs' expert Charles Ay taken on November 20, 2015. The general rule is that the Court will normally not consider "reply" evidence submitted in support of a motion for summary judgment/adjudication in the absence of exceptional circumstances which might justify consideration of this "reply" evidence. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn.8; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316; *Nazir v. United Airlines, Inc.*, supra, 178 Cal.App.4th at p. 252.)

Here, Sullivan's "reply" declaration is solely for the purpose of authenticating Ay's partial deposition transcript. This deposition was taken on November 20, 2015, after Goodloe filed its original moving papers. Moreover, this deposition transcript does not contain "new matter" so much as attempt to put the declaration statements of Plaintiff's expert Ay in context, and therefore is merely supplemental in nature. As such, the Court will consider Goodloe's "reply" evidence. The court overrules Plaintiffs written objections to Sullivan's "reply" declaration based on them not being filed with Goodloe's moving papers.

**Defendant Goodloe's Request for Summary Judgment:**

Defendant Goodloe contends that it is entitled to summary judgment because Plaintiffs lack evidence of Decedent Robert Denyer's exposure to asbestos attributable to Goodloe. Goodloe correctly notes the rule that the plaintiff in an asbestos case bears the burden of proving exposure to the defendant's asbestos-containing product. (See, e.g., *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103.) However, on a motion for summary judgment/adjudication, the initial burden is on Goodloe as moving party to demonstrate that Plaintiffs cannot establish an element of their case. (See *McGonnell v. Kaiser Gypsum Co.*, supra, 98 Cal. App. 4th at pp. 1102-1103.)

Goodloe contends that it satisfies its initial burden of demonstrating that Plaintiffs cannot establish Decedent's exposure to asbestos in a Goodloe product based on (i) the deposition testimony of Decedent that he did not know whether the Tuff-Bond (i.e., Goodloe's product) that he used contained asbestos and did not remember any writings on the packages other than "Tuff-Bond" (see Opposition Separate Statement, Material Facts Nos. 8, 9 [both undisputed and established]); (ii) deposition testimony by Decedent's coworker Jeff Plass and his wife Gertrude Denyer that they did not have

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information about Decedent working with Tuff-Bond (*id.* at Material Facts Nos. 11, 13 [both undisputed and established]); and (iii) allegedly factually-deficient discovery responses by Plaintiffs to written discovery propounded by Goodloe on the issue of Decedent's exposure to asbestos from a Goodloe product (*id.* Material Facts Nos. 15-17, 19-21 [all disputed and not established].)

The evidence in (i) is insufficient to establish that Decedent was not exposed to an asbestos-containing product of Goodloe; at most it indicates that Decedent could not, through his own testimony, show that the "Tuff-Bond" product he used contained asbestos. The evidence in (ii) above is also insufficient to affirmatively show the absence of any exposure; all it shows is that Plass and Plaintiff Gertrude Denyer had no personal knowledge of such exposure (a fact which is not surprising).

Finally, the evidence in (iii) above is insufficient to establish that Plaintiffs' discovery responses are factually deficient/devoid on the issue of exposure. In particular, Plaintiffs' discovery responses identify the name (Tuff Bond adhesive) of Goodloe's alleged asbestos-containing products, when Decedent was exposed to such products, and the basis mechanism of the exposure. Simply stated, Plaintiffs' discovery responses in this action are not as vague and conclusory as to the responses in *Casey v. Perini Corp.*, as cited by Goodloe. (See *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th 1222, 1229-1231.)

Unlike the plaintiff's discovery responses in *Casey*, here Plaintiffs' responses identify the generic names of the products at issue, identify witnesses other than Decedent/Plaintiffs who have knowledge of facts relevant to Decedent's exposure (including Goodloe officers/employees Robert Rew and Gregory Rew; see, e.g., Def.'s Exh. M, p. 10, subd. (c)), and numerous documents (*id.* at p. 11, subd. (d)).

Goodloe fails to make any showing that these identified witnesses and specified documents do not support a finding that Decedent was exposed to an asbestos-containing Goodloe product. Simply stated, Goodloe's attempt to rely on Plaintiffs' factually deficient discovery responses to satisfy its initial burden on the issue of exposure fails because the identified discovery responses are not factually devoid on their face, and Goodloe fails to demonstrate that they are, in fact, factually deficient.

Additionally, all of Plaintiffs' written discovery responses relied upon by Goodloe contained multiple objections, creating the possibility that Plaintiffs were withholding information based on those objections and arguably precluding, under *Gaggero v. Yura* (2003) 108 Cal.App.4th 884 at pages 891-893, any conclusion that Plaintiffs' responses indicate they cannot prove an essential element of their claim.

Based on the above, Goodloe fails to satisfy its initial burden of demonstrating that Plaintiffs cannot establish Decedent's exposure to an asbestos-containing Goodloe product, and therefore the burden never shifts to Plaintiffs to demonstrate a triable issue of fact as to such exposure. Accordingly, there is a triable issue of fact as to exposure and Goodloe's request for summary judgment is denied.

#### **Defendant Goodloe's Requests for Summary Adjudication:**

In the alternative, Goodloe requests summary adjudication of six specified Issues: (1) the first cause of action for negligence; (2) the second cause of action for strict liability; (3) the third cause of action for false representation; (4) the fourth cause of action for intentional tort; (5) Plaintiff Gertrude Denyer's seventh cause of action for loss of consortium; and (6) Plaintiffs' claim for punitive damages.

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Issues Nos. 1 and 2 are based on the sale alleged lack of evidenced of exposure as Defendant Goodloe's request for summary judgment, and fail for the same reason: namely, that the allegedly factually-deficient discovery responses relied upon by Goodloe are not factually deficient on their face, and contain objections which render their significance unclear. (See Material Facts Nos. 24 and 27 [both disputed and unestablished].)

Issues Nos. 3 and 4 are moot, due to Plaintiffs' request that the false representation and intentional tort claims be dismissed. Goodloe's request for summary adjudication of Issue No. 5 is based on the legal argument that Plaintiff Gertrude Denyer's loss of consortium claim fails if the underlying tort claims (negligence and strict liability) claims fail. Because Goodloe fails to establish that it is entitled to summary adjudication of the negligence and strict liability claims, it also fails to establish that it is entitled to summary adjudication of the loss of consortium claim. Moreover, the allegedly factually-deficient discovery responses relied upon by Goodloe are not factually deficient on their face, and contain objections which render their significance unclear. (See Material Facts No. 36 [disputed and not established].)

Finally, Goodloe's request for summary adjudication of Issue No. 6 (punitive damages) is based on allegedly factually-deficient discovery responses, and also fails because the responses are not factually-deficient on their face, and contain objections which render their significance unclear. (See Material Facts No. 39 [disputed and not established].)

Based on the above, Goodloe's request for summary adjudication is placed off calendar as moot as to Issues Nos. 3 and 4, and denied as to Issues Nos. 1, 2, 5, and 6.

Notice to be given by clerk.