IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARY SMITH, Individually, as Executrix of the Estate of PHILLIP SMITH, Deceased and as surviving spouse of PHILLIP SMITH, deceased,	)	
	)	C.A. No. 09C-07-287 BEN
Plaintiffs,	)	
	)	
v.	)	
	)	
BENJAMIN MOORE & CO., AZKO NOBEL PAINTS, LLC, RUST-OLEUM BRANDS CO., and THE SHERWIN-WILLIAMS CO.	)	
	)	
Defendants.	)	

OPINION

Date Submitted: May 11, 2012
Date Decided: July 18, 2012

Upon Defendants' Motions for Summary Judgment: **GRANTED**

Thomas C. Crumplar, Esquire and Jordan J. Perry, Esquire, Jacobs & Crumplar, P.A., 2 East 7th Street, P.O. Box 1271, Wilmington, DE 19899, Christopher Madeksho, Esquire (*pro hac vice*) (argued), The Madeksho Law Firm, Midtown Plaza, 5225 Katy Freeway, Suite 500, Houston, TX 77007, Attorneys for the Plaintiffs.

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Esquire and Patrick Branigan, Esquire (argued), Swartz Campbell LLC, 300 Delaware Avenue, Suite 1130, P.O. Box 330, Wilmington, DE 19899, Gregg R. Brown, Esquire (*pro hac vice*), Germer Getz Beaman & Brown, LLP, 301 Congress Avenue, Suite 1700, Austin, Texas 78701, Attorneys for Rust-Oleum Brands Company; William R. Adams, Esquire and Kate G. Shumaker, Esquire, Dickie McCamey & Chilcote P.C., 300 Delaware Avenue, Suite 1630, Wilmington, DE 19801, Christopher D. Stofko, Esquire (*pro hac vice*), Katherine S. Gallagher, Esquire (*pro hac vice*), and James R. Miller, Esquire (*pro hac vice*), Dickie McCamey &Chilcote, P.C., Two PPG Place, Suite 400, Pittsburgh, PA, 15222, Attorneys for The Sherwin Williams Company.

Jurden, J.

I. INTRODUCTION

Before the Court is Defendants' Benjamin-Moore & Company ("Benjamin Moore"), the Sherwin-Williams Company ("Sherwin-Williams"), Akzo Nobel Paints, LCC, as successor in interest to the Glidden Co. ("Akzo"), and Rust-oleum Brands Company ("Rust-oleum") (where appropriate, collectively, "Defendants") Motions for Summary Judgment. Mary Smith filed suit on July 30, 2009, in her individual capacity, as the Executrix of the Estate of Phillip Smith, and as his surviving spouse, (collectively "Plaintiffs"). Plaintiffs claim that wrongful exposure to benzene-containing products during the course of Mr. Smith's employment caused him to develop Acute Myeloid Leukemia ("AML").[1] According to Plaintiffs, as a result of his exposure, Mr. Smith died on April 26, 2008.[2] For the reasons that follow, Defendants' Motions for Summary Judgment are **GRANTED**.

II. FACTS

Plaintiffs allege that Mr. Smith's employment exposed him to various benezene-containing "lubricants, cleaners, paints, paint thinners, paint strippers, solvents and chemicals" distributed, marketed, and/or manufactured by the Product Defendants while working as a pipefitter, insulator, and painter for Valero Energy

[1] Plaintiffs' Second Amended Complaint ("Pl. Am. Comp.") (Trans. ID. No. 36611685) at ¶¶ 6-7, 12.

[2] *Id*. at ¶ 7.

Corporation, Texaco, and as a self-employed painter.[3] Four product-identification witnesses, Mary Smith, Alan Smith, Gary Reisling, and Tim Edwards, were deposed in this case. Each witness could only provide general, non-specific testimony describing the manufacturer.[4] Not one of Plaintiffs' witnesses identified a specific product that allegedly contained benzene.[5]

Plaintiffs also allege that Mr. Smith suffered benzene exposure when he used Rust-Oleum spray paint to paint "valve covers and stuff like that, just to dress thing up" when working on cars.[6] Although Phillip Smith's son, Alan, identified Rust-Oleum as a product that his father used, he could not provide any further

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[3] *Id*. at ¶ 13.

[4] *E.g.*, Benjamin Moore's Motion for Summary Judgment ("Ben. Mtn. for Sum. J.") (Trans. ID. No. 40956666) at p. 3 (citing Mary Smith's Deposition, Exhibit E at pp. 34-39, 50-55, 67, 71-74, 77-83, 86) (describing generally that her husband used Benjamin Moore and Sherwin-Williams products between 1973 and 1976 while working as a painter in Colorado Springs, Colorado); Ben. Mtn. for Sum. J. at p. 3 (citing Alan Smith's Deposition, Exhibit F at pp. 15-18, , 31-35, 97, 107, 118, 127, 128) (testifying that he assisted his father as a painter from 1973 to 1976 in Colorado Springs, Colordado and periodically throughout the 1980's, and described generally using Benjamin Moore products fifty percent of the time. Mr. Smith did not recall using Benjamin Moore products after 1976); Sherwin-Williams' Motion for Summary Judgment ("Sher. Mtn. for Sum. J.") (Trans. ID. No. 40942124) at p. 9 (citing Alan Smith's Deposition, Exhibit B at pp. 100-102) (testifying that he and his father purchased and used Sherwin-Williams' paint and related products when painting in Texas between 1983 and 1989); Sher. Mtn. for Sum. J. at p. 9 (citing Mary Smith's Deposition, Exhibit C at 126-127) (testifying that she believed Mr. Smith used Sherwin-Williams' paint while painting in Colorado between 1973 and 1976, but could not offer anything more specific with respect to a description of the product other than she thought it was "oil-based paint."); Akzo's Motion for Summary Judgment ("Akzo Mtn. for Sum. J.") (Trans. ID. No. 40939270) at p. 3-5 (noting that: (1) Gary Reisling failed to testify that Mr. Smith ever worked with a Glidden product at any time during his employment with Mr. Smith at Valero; (2) Mrs. Smith failed to testify that Mr. Smith ever worked with a Glidden product at anytime during his work history; (3) Alan Smith testified that Mr. Smith worked with Glidden paint while working for Merchant Homes from 1981 to 1983, but did not specifically identify a Glidden product that contained benzene; and (4) Tim Edwards, Mr. Smith's co-worker at Texaco, failed to testify that Mr. Smith ever worked with a Glidden product while employed at Texaco.); Rust-Oleum's Mtn. for Sum. J. ("Rust Mtn. for Sum. J.") (Trans. ID. No. 41080434) at p. 3 (noting that Gary Reisling, Mary Smith, and Tim Edwards all failed to identify any products for which Rust-Oleum might be responsible).

[5] *See id*.

[6] Rust. Mtn. for Sum. J. at p. 3 (citing Alan Smith's Deposition, Exhibit A at p. 28).

details about any products used by Mr. Smith or allegedly manufactured by Rust-Oleum.[7]

III. PARTIES' CONTENTIONS

Plaintiffs and Defendants agree that the substantive law of Texas applies to this case.[8] Defendants argue that Plaintiffs' product-identification witnesses have failed to sufficiently identify specific products that could have caused or contributed to Mr. Smith's AML, and thus, Plaintiffs' claims fail under Texas law. Plaintiffs counter that Defendants' Motions are premature because they address causation, rather than product identification, and according to the Case Scheduling Order, causation summary judgment motions are to be filed at a later date after the completion of expert discovery.[9]

III. STANDARD OF REVIEW

On a motion for summary judgment, the Court views all facts in a light most favorable to the non-moving party, and determines whether a genuine issue of material fact exists.[10] If the moving party's motion is supported by evidence that

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[7] *Id*. at 4 (citing Alan Smith's Deposition, Exhibit A at p. 92).

[8] Pl. Am. Comp. at ¶ 10; Transcript of Oral Argument (Trans. ID No. 43436745) at p. 9.

[9] *See* Case Scheduling Order (Trans. ID No. 37045050) at ¶¶ 2-3, 7. ("All case dispositive motions based on lack of product identification shall be filed, along with an opening brief, on or before October 24, 2011."); ("Plaintiffs shall identify their trial experts on causation and produce their trial causation experts Rule 26 disclosures and/or reports on or before January 2, 2012."); ("All *Daubert* motions as to trial causation experts and case dispositive motions based on causation shall be served and filed along with an opening brief, on or before June 14, 2012.").

[10] *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

shows no material issues of fact, the burden shifts to the non-moving party to demonstrate that material issues of fact do exist, thus requiring a trial.[11] When the record reveals that material facts are in dispute or the factual record is not thoroughly developed so as to allow the Court to apply the law to the factual record, then the Court will not grant summary judgment.[12]

V. DISCUSSION

Plaintiffs argue that product identification is the sole issue to be considered at this stage in the case. However, the Texas Supreme Court does not address "product identification" as a lone concept. Instead, under Texas law, the Court considers product identification under the umbrella of causation, specifically, substantial-factor causation.[13] This is so because Texas law requires the Court to consider dose.[14] The Texas Supreme Court has noted that dose is "the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect."[15] Logic dictates that a dose analysis necessarily requires

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[11] *Id*; *see also In re Asbestos Litig.* ("*Helm*"), 2007 WL 1651968, at *15 (Del. Super.).
[12] *In re Asbestos Litig.* ("*Hudson*"), 2007 WL 2410879, at *2 (Del. Super.) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[13] *See Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007)

[14] *Flores*, 232 S.W.3d at 770 ("One of toxicology's central tenets is that 'the dose makes the poison.'")(other citation omitted). Indeed, "[a]ll substances are poisonous – there is none which is not; the dose differentiates a poison from a remedy." *Id*. (citing David L. Eaton, *Scientific Judgment and Toxic Torts – A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & POL'Y 5 (2003) (citing CURTIS D. KLAASSEN, CASARETT AND DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS Chs. 1, 4 (McGraw Hill 6th ed. 2001) (1975))).

[15] *Id*. (citing Eaton, *Scientific Judgment and Toxic Torts*, 12 J.L. & POL'Y at 11). Plaintiffs' expert, Melvyn Kopstein, Ph.D, shares this opinion. *See* Dr. Kopstein's Expert Report and CV (Trans. ID No. 41641356) at p. 9 ("A given product's benzene concentration is arguably its most important property relating to benzene exposures.").

an analysis of a specific product's ingredients. Thus, to prevail at trial, Plaintiffs are faced with two hurdles they must overcome: produce defendant-specific evidence relating to the approximate dose of the alleged exposure and show that the dose was a substantial factor in causing Mr. Smith's disease.[16] "It is not adequate to simply establish that some exposure occurred. Because most chemically induced adverse health effects clearly demonstrate thresholds, there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of causation can be inferred."[17] In other words, under Texas law, the plaintiff in a toxic tort case must show both general and specific causation.[18] "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury."[19]

To prove that Defendants' products caused Mr. Smith to develop AML, Plaintiffs must demonstrate that a substance to which Mr. Smith was allegedly exposed contained benzene and that his exposure was so great that it was a "substantial-factor" in his development of AML. Thus, under Texas law, Plaintiffs

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[16] *Flores*, 232 S.W.3d at 773.

[17] *Id*. (quoting Eaton, 12 J.L. & POL'Y at 39) (internal quotation marks omitted).

[18] *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588, 595 (Tex. App. 2010) (citing *Merrell Dow. Pharm.,Inc. v. Havner*, 953 S.W.2d 706, 714-15, 720 (Tex. 1997)).

[19] *Id*. (quoting *Havner*, 953 S.W.2d at 714).

are required to identify a specific product that contains benzene. As the evidence currently stands, Plaintiffs have not demonstrated that any of the general products they have identified contain benzene. Without identifying specific products, Plaintiffs cannot prove the quantity of exposure, *i.e.*, the dose, or show that Defendants' products were a substantial factor in causing Mr. Smith's injury. The Texas Supreme Court in *Borg-Warner v. Flores*[20] rejected the notion that simply establishing the presence of a defendant's product will suffice to show an injury.[21] Instead, as noted above, "a plaintiff must prove that the defendant's product was a substantial factor in causing the alleged harm."[22] While mathematical precision is not required to prevail in a toxic tort case under Texas law, merely showing "some exposure" to the allegedly toxic product is insufficient.[23] In short, by not identifying a specific product, Plaintiffs cannot show that Defendants' products are toxic.[24]

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[20] 232 S.W.3d 765 (Tex. 2007).

[21] *See id*. at 773.

[22] *Id*. (other citation omitted).

[23] *See id*. at 773.

[24] Plaintiffs argue that their causation expert, Melvyn Kopstein, Ph.D, despite not relying on documentation that establishes the contents of Defendants' various products, can opine on Mr. Smith's exposure because he is "knowledgeable about the composition (including benzene content) of ingredient used in formulating these products …" during the time period of Mr. Smith's alleged exposure. Dr. Kopstein's Expert Report and CV at p. 10. The basis for Dr. Kopstein's opinion that Mr. Smith developed AML as a result of exposure to Defendants' products is his knowledge that Defendants' products "typically contained" a certain level of benzene during that time period. *See* Dr. Kopstein's Expert Report and CV at pp. 11-13. Although Plaintiffs seek to rely upon Dr. Kopstein's opinion to avoid summary judgment, because they have not identified a specific product, Plaintiffs cannot demonstrate under Texas law the quantity of exposure (dose) that Mr. Smith allegedly suffered or show that the products were a substantial factor in causing Mr. Smith's disease.

Plaintiffs rely upon *In re Dana Corporation*[25] to argue that they have sufficiently identified the products at issue in this case. Plaintiffs' reliance on this case is misplaced. The Texas Supreme Court decided *In re Dana Corporation* in the context of a challenge to a discovery order. There, the Texas Supreme Court held that the plaintiffs sufficiently identified products in affidavits to warrant production of the defendant's insurance policies.[26]

Here, without identifying a specific product, Plaintiffs cannot prove as a matter of law that the products used by Mr. Smith contained benzene, and thus, Plaintiffs cannot prove under Texas law that Defendants' products were a substantial factor in causing Mr. Smith's AML. Consequently, viewing the facts in a light most favorable to Plaintiffs, because Plaintiffs have not identified a Defendants' specific product, there is no genuine issue of material fact as to whether Defendants' products caused Mr. Smith to develop AML.

VI. CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment are **GRANTED**.

IT IS SO ORDERED.

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[25] 138 S.W.3d 298 (Tex. 2004).

[26] *Id*. at 301.

Jan R. Jurden, Judge

cc: Prothonotary