

NOT DESIGNATED FOR PUBLICATION

HUBERT ADAM HYMEL * **NO. 2005-CA-0029**

VERSUS * **COURT OF APPEAL**

MCDERMOTT, * **FOURTH CIRCUIT**
INCORPORATED, CUSTOM *
AGGREGATE & GRINGING, * **STATE OF LOUISIANA**
INC., MISSISSIPPI VALLEY *
SILICA COMPANY, *
SOUTHERN SILICA OF *
LOUISIANA, INC., THE *
TRAVELERS INSURANCE * * * * *
COMPANY, UNION CARBIDE
CORPORATION, JAMES
POWELL, BILL WARNER, ET
AL.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-18328, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge

* * * * *

Judge Edwin A. Lombard

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(Court composed of Judge James F. McKay III, Judge David S. Gorbaty,
Judge Edwin A. Lombard)

MCKAY, J., CONCURS IN THE RESULT

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AFFIRMED

The issue in this appeal is whether the trial court correctly granted summary judgment dismissing Praxair, Inc. (“Praxair”) and Union Carbide Corporation (“Union Carbide”) from plaintiff’s lawsuit. After *de novo* review of the record in light of the applicable law and arguments of the parties, we affirm the judgment of the trial court.

Relevant Facts

Hubert Hymel, worked for McDermott, Inc. (“McDermott”), during his thirty-three year career as a welder and fitter (1961 through 1975) and, subsequently, as a welder and welding foreman (1975 through 1994). In 1995, Mr. Hymel was diagnosed with pulmonary fibrosis, aluminum pneumoconiosis, and mixed dust pneumoconiosis and filed the instant suit to recover damages from numerous defendants, including Praxair and Union Carbide, alleging that his injuries were due in part to his occupational exposure to aluminum-containing products manufactured by Praxair and

Union Carbide. After his death in April 1997, the petition was amended and supplemented to substitute his son, Johnny A. Hymel, as plaintiff for all survival damages and to assert a wrongful death claim.

Praxair and Union Carbide filed a joint motion for summary judgment on December 13, 2002, predicated on the fact that there is no evidence that Praxair or Union Carbide manufactured and/or sold aluminum-containing products to McDermott during decedent's employment with McDermott. Specifically, the defendants/appellees assert that the evidence produced after six years of discovery in this litigation indicate that Praxair never manufactured aluminum welding wire and that there is no record of sales by Union Carbide to McDermott or any other former employer of the decedent during the relevant time period. In support of its motion, Union Carbide attaches an affidavit by Edward Debor, as well as McDermott's responses to the request for admissions propounded by Praxair and Union Carbide which indicate that McDermott has no record of aluminum-containing products manufactured, distributed and/or sold by either Praxair or Union Carbide during the period from 1961 to 1994.

Plaintiff opposed defendants' motion for summary judgment, arguing

that the defendants failed to meet their burden of proof and that products manufactured by Linde, a division of Union Carbide, were used by McDermott and that aluminum wire manufactured by Linde was sold to McDermott by Braun Welding Supply, Inc.

After a hearing on January 9, 2004, the trial court granted defendants' motion for summary judgment "[f]or the reasons assigned in open court." The plaintiff appeals this judgment, but the record before this Court, as designated by appellant, does not contain a transcript of the motion hearing.

Applicable Law

Appellate courts review grants of summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate, i.e., whether there is a genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. *Ocean Energy, Inc. v. Plaquemines Parish Gov't*, 04-0066 (La. 7/6/04), 880 So.2d 1. The movant bears the burden of proof. La. Code Civ. Proc. 966(C)(2). If the movant meets this initial burden, the burden then shifts to plaintiff to present factual support adequate to establish that he will be able to satisfy the evidentiary burden at trial. *Richard v. Hall*, 03-1488 (La.

4/23/04), 874 So.2d 131, 137. If the plaintiff fails to meet this burden, there is no genuine issue of material fact and the defendant is entitled to summary judgment as a matter of law. *Id.* Accordingly, once the burden has shifted the opponent must produce factual support to avert the summary judgment and if the opponent fails to do so, summary judgment should be granted. La. Code Civ. Proc. art. 966(C)(2); *Racine v. Moon's Towing*, 01-2837 (La. 5/14/02), 817 So.2d 21.

Thus, to defeat a properly supported motion for summary judgment, the non-mover may not rest upon vague and conclusory allegations in pleadings, but must identify specific facts that establish a genuine issue exists for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In the absence of sufficient factual support opposing a motion, summary judgment is properly granted. *Id.*; *Babin v. Winn Dixie Louisiana, Inc.*, 00-0078 (La. 6/30/2000), 764 So.2d 37. **Discussion**

In this case, the defendants assert they are entitled to summary judgment as a matter of law because the plaintiff is unable to establish that the defendants manufactured and/or sold any aluminum-containing products used by the plaintiff's employer during the period of plaintiff's employment. The defendants support their contention with sufficient supporting documentation and, accordingly, to avert summary judgment the plaintiff must identify specific facts that establish a genuine issue exists for trial.

The plaintiff argues, however, that the defendants failed to meet their

burden of proof on summary judgment and, alternatively, that summary judgment is premature in this case because plaintiff's attempts at discovery have been stonewalled.

The plaintiff's complaints about discovery issues are not properly before us and, as a court of appeal, we cannot review evidence that is not in the record on appeal and cannot receive new evidence. *See Board of Directors of Industrial Development Board of the City of New Orleans v. All Taxpayers, Property Owners, Citizens of the City of New Orleans*, 03-0826 (La. App. 4 Cir. 5/29/03) 848 So.2d 740. Moreover, the plaintiff apparently misapprehends his burden on summary judgment. Once the defendants met their initial burden in establishing that they are entitled to summary judgment because the plaintiff is unable to establish an essential element of his case – that the defendants manufactured and/or sold aluminum-containing products to decedent's employer – the burden shifted to the plaintiff to come forward with some specific factual evidence that creates a genuine issue for trial. Upon *de novo* review of the evidence submitted by the plaintiff in opposition to defendants' motion, however, we do not find any evidence which suggests that the defendants manufactured or sold *aluminum-containing* products to plaintiffs' employer. Accordingly, summary judgment is appropriate in this case and we affirm the judgment of

the trial court.

AFFIRMED.