

Matter of New York City Asbestos Litig.

2016 NY Slip Op 30767(U)

April 18, 2016

Supreme Court, New York County

Docket Number: 102479/03

Judge: Peter H. Moulton

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4/21/16
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. Peter H. Moulton PART 50

Justice

ALICE BUTERA, as Executrix for the estate
of VERNON DEPRIEST

Plaintiffs

v.

A.O. SMITH WATER PRODUCTS CO., et al.

Defendant

INDEX NO. 102479/2003 ✓

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

HELENA D. MISKILL, as Executrix for the

FILED

INDEX NO. 109496/2003

estate of
THOMAS GEORGE MISKILL, and HELENA
MISKILL, Individually,

APR 21 2016

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs

MOTION DATE _____

v.

A.W. CHESTERTON Co., et al.

MOTION SEQ. NO. 04

Defendant

MOTION CAL. NO. _____

Upon the foregoing papers, it is ORDERED that Defendant Crane Co.'s motions,
in limine, in the above-captioned matters are decided in accordance with the attached
written decision of today's date.

Dated: 4/18/16

New York, New York

J.S.C.
PETER H. MOULTON

1. Check one: Case Disposed Non-Final Disposition
2. Check as Appropriate: Motion is: Granted Denied Granted in Part Other

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

-----X
IN RE NEW YORK CITY ASBESTOS LITIGATION

-----X
ALICE BUTERA, as Executrix for the estate of VERNON
DEPRIEST

Index 102479/03

Plaintiffs
-against-

A.O. SMITH WATER PRODUCTS CO., *et al.*

Defendants

-----X
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THOMAS GEORGE MISKILL, and HELENA D.
MISKILL, Individually,

Index 109496/03

Plaintiffs
-against-

A.W. CHESTERTON COMPANY, *et al.*

Defendants

-----X
PETER H. MOULTON, J.S.C.:

FILED

APR 21 2016

COUNTY CLERK'S OFFICE
NEW YORK

Defendant Crane Co. ("Crane") moves *in limine*, and pursuant to CPLR 3103[a], for an order precluding plaintiffs from offering specific causation testimony through plaintiffs' noticed medical experts at trial. Crane claims that plaintiffs experts will testify under the theory that "each and every exposure" to asbestos caused plaintiffs' injuries, rather than providing scientific assessments of the specific doses of asbestos plaintiffs were allegedly exposed to. In the alternative, Crane requests a *Frye* hearing to afford the court the opportunity to fully evaluate the foundation of any specific causation testimony offered by plaintiffs' experts. Crane objects to the specific causation testimony that it believes plaintiffs' experts will tender at trial, particularly that of Dr. James A. Strauchen, M.D ("Dr. Strauchen"). To fully understand the context that

underlies Crane's application, the court will briefly highlight the testimony that plaintiffs seek to offer at trial.

BACKGROUND

Plaintiff Vernon DePriest was diagnosed with mesothelioma on October 25, 2002, and passed away on July 2, 2004. He died prior to being deposed. DePriest's nephew and co-worker, Charles Stagnito ("Stagnito"), was deposed in connection with this case. Stagnito testified that DePriest was exposed to asbestos while working as a sheet-metal worker at various shipyards and furnace installer industrial sites in and around metropolitan Rochester, New York, during the 1960s and 1970s (*see generally* Stagnito Deposition). With regard to the asbestos-containing products for which plaintiffs allege Crane bears responsibility, Stagnito described DePriest's exposure to asbestos-containing insulation, packing, gaskets, and pipe covering used in connection with valves during a ten-year period beginning in 1973 when they worked together (*see generally* Stagnito Deposition).

Stagnito further testified that he and DePriest worked at approximately twenty commercial work sites during their decade of work together, and that Crane valves were present at those sites. He described those valves and their surrounding piping as being wrapped with asbestos insulation, and stated that the repair of Crane valves involved exposure to asbestos from the removal of exterior insulation and removal and replacement of asbestos-containing gaskets and rope packing within valves (Tr. 132-169; 177-192). Stagnito described witnessing DePriest work on Crane valves throughout their tenure together (Tr. 180-182). He further elaborated that he would witness DePriest's exposure to asbestos dust from removal of insulation on those valves (*id.*). Stagnito offered similar detail when describing DePriest's exposure to gaskets while working with Crane valves (Tr. 182-184). Stagnito was also able to describe dust emanating from DePriest's removal and installation of packing on Crane valves (Tr. 186-188).

Plaintiff Thomas Miskill was diagnosed with mesothelioma on April 11, 2003, and passed on June 28, 2003. Miskill was a career Navy man. Due to his deteriorating health, Robert Cunningham (“Cunningham”), a Navy shipmate of his, provided the lionshare of testimony with respect to Miskill’s alleged exposure. Cunningham described Miskill's exposure to asbestos-containing insulation and gaskets used in connection with Crane valves while they served on board the USS Noa between 1940 and 1943. While aboard that vessel, Cunningham testified that he would visit the engine room daily for short periods while working on valves and related equipment (*see* Cunningham Tr. 33-35). Cunningham further testified that Miskill was often in his presence, and was exposed to asbestos dust at least between May, 1940 and January, 1943, when they were stationed together, from his repair related work on Crane valves (Tr. 35-38).

Dr. Strauchen was retained as a medical expert on behalf of both Plaintiffs Vernon Depriest and Thomas Miskill. According to plaintiffs, Dr. Strauchen reviewed the medical records, pathology slides, and case materials for both cases, and generated reports concluding that plaintiffs’ cumulative exposures to asbestos from Crane valves were a substantial contributing factor in causing their mesothelioma, as their respective levels of occupational exposure were far greater than required to cause the disease. Given what plaintiffs claim is a general scientific consensus that chrysotile asbestos, the kind contained in the dust that plaintiffs breathed in, is capable of causing mesothelioma even in low doses, plaintiffs submit that Dr. Strauchen’s conclusions rest on a well-supported foundation and follow the generally accepted methodology in the field, thus satisfying New York’s standard for the admissibility of expert causation testimony.

At trial plaintiffs state that Dr. Strauchen will testify, consistent with his reports and an overwhelming scientific consensus, that plaintiffs' cumulative exposures to asbestos as a result of their work with, and around, Crane asbestos-containing products was a substantial contributing factor in causing their mesothelioma. Plaintiffs further submit that Dr. Strauchen will address all relevant medical issues pertaining to asbestos and asbestos disease. They further expect Dr. Strauchen to explain to the jury that his causation opinions (both general and specific) are based on his education, training, experience, and review of the medical and scientific literature. Plaintiffs state that Dr. Strauchen may also rely on consensus statements from major international asbestos conferences and medical organizations, publically available and peer-reviewed medical and scientific literature, and research that he and others have conducted to support his findings.

Plaintiffs also intend to call Dr. Steven Markowitz, M.D., as an expert in occupational and environmental medicine on the subjects of general medicine and general causation. They submit that Dr. Markowitz will testify that exposure to chrysotile asbestos is capable of causing mesothelioma. The foundational basis of Dr. Markowitz's opinion, plaintiffs aver, is multifold, including, but not limited to, animal studies on rats inhaling chrysotile dust; human studies involving large, epidemiological studies of groups of workers exposed to chrysotile dust; pathological studies finding chrysotile fibers in the lungs of exposed individuals; scientific peer-reviewed literature; and scientific agencies who conduct reviews of the subject of chrysotile asbestos causing malignant mesothelioma.

When discussing the foundational basis of his opinion that chrysotile asbestos found in multiple products can cause malignant mesothelioma, plaintiffs submit that Dr. Markowitz will rely on his knowledge, training and experience, industrial hygiene studies, individual case reports, evidence of elevated asbestos-related disease among the affected population,

peer-reviewed literature on the subject including epidemiological studies, and the stated conclusions of various national and international agencies and organizations interested in and charged with protecting public health.

DISCUSSION

New York law requires that “an opinion on causation should set forth a plaintiff’s exposure to a toxin, that the toxin is capable of causing the particular illness (general causation), and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (citations omitted)” (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). In *Parker*, the Court recognized that in certain cases, “a plaintiff’s exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value,” and went on to say that “it is not always necessary for a plaintiff to satisfy a dose response relationship, provided that whatever methods an expert uses to establish causation, are generally accepted in the scientific community” (*id.*, at 447-448). Following the holding in *Parker*, it has been held that “[s]o long as plaintiffs’ experts have provided a scientific expression of plaintiffs’ exposure levels, they will have laid an adequate foundation for their opinions on specific causation” (*see Nonnon v City of New York*, 88 AD3d 384, 396 [1st Dept 2011] [*quoting Jackson v Nutmeg Technologies, Inc.*, 43 AD3d 599, 602 [3rd Dept 2007]). The link between asbestos and disease that provides a basis for general causation has been well documented (*see In re New York Asbestos Litigation (Marshall)*, 28 AD3d 255 [1st Dept 2006]). The First Department has held that evidence of plaintiff’s exposure to clouds of dust from the manipulation of asbestos containing products, and expert testimony that such clouds of dust contain enough asbestos to cause mesothelioma, is sufficient to establish exposure and causation (*see Lustenring v AC&S, Inc.*, 13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]). In *Lustenring*, the First Department also stated it is not novel science for a party to introduce expert testimony showing that a plaintiff who was exposed to

visible dust containing asbestos fibers contracted mesothelioma as a result of that exposure, thus obviating the need for a *Frye* hearing (*id.*; *see also*). The following year, the First Department held in *Wiegman v. A C & S*, 24 AD3d 375 (1st Dept 2005) that a defendant's "claim that a *Frye* hearing should have been held is without merit. The link between asbestos and disease is well documented, and the parties merely differed as to whether the asbestos in this particular product could be released in respirable form so as to cause disease. Since the parties argued over causation, no novel scientific technique or application of science was at issue and a *Frye* hearing was not warranted" (*see also Penn v. Amchem*, 85 AD3d 475, 476 [1st Dept. 2011]).

Here, Crane's argument that plaintiffs' experts will be unable to establish general or specific causation under *Parker*, is unpersuasive. Contrary to defendant's argument, *Parker* would not have changed the holdings in cases like *Lustenring v AC & S, Inc.* (13 AD3d 69), *supra* and *Matter of New York Asbestos Litig.* (28 AD3d 255, *supra*). *Parker* is in fact consistent with such cases. *Parker* acknowledges that "often, a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value" (7 NY3d at 447). Therefore, *Parker* holds that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*id.* at 448). *Parker* also notes that things such as the intensity of the exposure may be more important than the cumulative dose, and a plaintiff's work history can be considered in order to estimate the exposure (*id.* at 449). Crane has furnished no basis for why the same cannot be done here. Contrary to defendant's argument, Doctors Strauchen and Markowitz are entitled to state their opinions based on the evidence that plaintiffs intend to proffer indicating that exposure to chrysotile asbestos, such as that applied to Crane valves, can cause mesothelioma from

cumulative exposure over a duration of time.¹ The doctors are further able to testify that intense exposure to such asbestos, as may be evidenced by plaintiffs alleged occupational history handling Crane valves for several years with continuous exposure to visible dust, suggests a scientific expression of plaintiffs' exposure levels adequate enough to provide a foundation for their opinions on specific causation.

The holding in *Juni v. A.O. Smith Water Products Co.*, Index No. 190315/2012 does not require a different result. To be sure, *Juni* is not controlling precedent. Even if it were, the court in *Juni* specifically expressed concern with respect to asbestos friction brake products that the testimony at trial revealed had only trace amounts of asbestos. That was noted in the court's decision wherein it was observed that "during the brake manufacturing process, when asbestos fibers are mixed with certain resins, they become non-respirable, and the 'vast majority' of studies assessing the composition of debris formed from work on brakes reflects that 99 percent of the asbestos is converted to a non-toxic substance during the process. Thus, when a worker claims exposure to a cloud of dust formed while working on a brake, that dust is composed of one percent asbestos."

In contrast, plaintiffs submit that at trial they will show that the conclusions drawn by the *Juni* court cannot be said of the chrysolite asbestos dust that they were allegedly exposed to. Such asbestos is of the same nature as the asbestos that plaintiffs aver was implicated in *Lustenring*, wherein the First Department held that a *Frye* hearing was not warranted because testimony by a plaintiff regarding visible dust from an asbestos-containing product provides a sufficient basis for a medical expert to testify that the product was a substantial factor in causing

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Contrary to Crane's premise in its moving papers, plaintiffs' medical experts are not making an argument with respect to "each and every exposure" to asbestos, but rather whether plaintiffs' "cumulative exposure" caused their mesothelioma.

the plaintiff's mesothelioma. Here, the evidence that plaintiffs' medical experts intend to submit has the potential to sufficiently establish a general connection between asbestos and mesothelioma, as well as a scientific expression of plaintiffs' exposure levels based on Stagnito and Cunningham's testimony, as well as other factors. Whether plaintiffs succeed in that undertaking has yet to be determined. What is clear, however, is that this court cannot preclude plaintiffs from attempting to make that case through the causation testimony of its medical experts.

Accordingly, it is hereby ORDERED that Crane's motion, *in limine*, to preclude plaintiffs from offering specific causation testimony through plaintiffs' noticed medical experts at trial, and Crane's application for a *Frye* hearing are hereby DENIED.

This constitutes the Decision and Order of the Court.

Dated: April 18, 2016



HON. PETER H. MOULTON

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