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| Temperino v Amchem Prods. |
| 2019 NY Slip Op 34795(U) |
| November 20, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 17-605482 |
| Judge: Jerry Garguilo |
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SHORT FORM ORDER

E-FILE

INDEX No. 17-605482
CAL. No. 18-01126AB

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

CORRECTED ORDER

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 4-24-19 (002, 003, 004 & 005)
MOTION DATE 5-22-19 (006, 007, & 008)
MOTION DATE 6-5-19 (009)
Mot. Seq. # 002 - MD # 006 - WDN
003 - MD # 007 - MD
004 - MD # 008 - MD
005 - MD # 009 - MD

PETER TEMPERINO
Plaintiff,
- against -
AMCHEM PRODUCTS, et al.,
Defendants.

WEITZ & LUXENBERG, P.C.
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700 Broadway
New York, New York 10003

DARGER ERRANTE YAVITZ & BLAU
Attorney for Defendant Amchem
116 East 27th Street, 12th Floor
New York, New York 10016

Upon the following papers read on this e-filed motions for, inter alia, preclusion: Notice of Motion/ Order to Show Cause and supporting papers by defendant American Honda Motor Co, Inc., dated April 1, 2019; by defendant Nissan North America, Inc., dated April 4, 2019; by defendant DCo, LLC, dated April 8, 2019; by defendant Eaton Corporation, dated April 18, 2019; by defendant Ford Motor Company, dated April 30, 2019; by defendant Pneumo Abex LLC, dated May 3, 2019; by defendant PACCAR Inc., dated May 6, 2019; by defendant Perkins Engines, Inc., dated May 21, 2019; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers by plaintiff, dated April 29, 2019, May 2, 2019, May 9, 2019, May 10, 2019, and June 4, 2019; Replying Affidavits and supporting papers by defendant American Honda Motor Co, Inc., dated April 23, 2019; by defendant Nissan North America, Inc., dated April 23, 2019; by defendant DCo, LLC, dated April 23, 2019; by defendant Eaton Corporation, dated May 3, 2019; by defendant Ford Motor Company, dated May 15, 2019; by defendant Pneumo Abex LLC, dated May 21, 2019; by defendant PACCAR Inc., dated May 21, 2019; by defendant Perkins Engines, Inc., dated May 21, 2019; Other; it is,

ORDERED that the court, sua sponte, hereby recalls and vacates its order dated November 18, 2019, and issues the following order in its place and stead:

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ORDERED that the motion (#002) by defendant American Honda Motor Co., Inc., the motion (#003) by defendant Nissan North America, Inc., the motion (#004) by defendant DCo, LLC, the motion (#005) by defendant Eaton Corporation, the motion (#006) by defendant Ford Motor Company, the motion (#007) by defendant Pneumo Abex LLC, the motion (#008) by defendant PACCAR, Inc., and the motion by defendant Perkins Engines, Inc., are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#002) by defendant American Honda Motor Co., Inc. for summary judgment is denied; and it is

ORDERED that the motions by defendant Nissan North America, Inc., defendant DCo, LLC, defendant Eaton Corporation, defendant Pneumo Abex LLC, defendant PACCAR, Inc., and defendant Perkins Engines, Inc., to preclude the causation opinions of plaintiff's expert witnesses and for summary judgment are determined as follows; and it is further

ORDERED that the motion by defendant Ford Motor Company to preclude the causation opinions of plaintiff's expert witnesses and for summary judgment shall be marked as withdrawn in accordance with correspondence from defense counsel dated October 29, 2019.

This is an action to recover damages for the injuries allegedly sustained by Peter Temperino as a result of exposure to asbestos contained in products manufactured or sold by defendants.

Defendant American Honda Motor Co, Inc., moves for summary judgment dismissing the complaint and cross claims on the grounds that plaintiff cannot establish general or specific causation against it. Specifically, it argues that plaintiff's experts failed to specify any threshold level of exposure to asbestos required to produce the injuries alleged.

Defendant Nissan North America, Inc., moves for an order precluding plaintiff's medical causation experts from testifying that plaintiff's alleged asbestos exposures from its products substantially contributed to his development of lung cancer and for summary judgment in its favor. Alternatively, it seeks an evidentiary hearing on the issue of whether the causation opinions of plaintiff's experts are admissible.

Defendant DCo, LLC, moves for an order precluding the causation opinions of plaintiff's experts and, upon preclusion granting summary judgment in its favor. Alternatively, it requests an order granting a pretrial hearing as to plaintiff's experts' methodology in forming their causation opinions. Defendant DCo adopts and incorporates by reference the factual and legal representations contained in codefendants' motions.

Defendant Eaton Corporation moves for an order precluding testimony from plaintiff's medical causation experts and for summary judgment dismissing the complaint and all cross claims. In the alternative, defendant Eaton Corporation seeks a Frye hearing as to the admissibility of the causation opinions of plaintiff's experts.

Defendant Pneumo Abex LLC moves for an order precluding the causation opinions of plaintiff's expert witnesses, and, upon preclusion granting summary judgment dismissing the complaint and all cross

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claims against it. In the alternative, defendant Pneumo Abex seeks a pretrial hearing as to the methodology of plaintiff's experts in forming their causation opinions.

Defendant PACCAR Inc. moves for summary judgment in its favor, arguing that plaintiff could not have been exposed to the quantity and type of respirable asbestos fibers from PACCAR products necessary to cause his illness. Defendant PACCAR also adopts the arguments of co-defendant Ford Motor Company in its request for alternative relief in the form of a Frye hearing.

Defendant Perkins Engines, Inc. moves for an order precluding the causation opinions of plaintiff's expert witnesses, and upon preclusion, summary judgment dismissing the complaint and all cross claims against it. In the alternative, defendant Perkins Engines seeks a Frye hearing as to methodology of plaintiff's experts in forming their causation opinions.

Plaintiff opposes the motions filed by the above-mentioned defendants, arguing that they are untimely. Plaintiff further argues that he provided clear and uncontroverted deposition testimony recalling his substantial exposure to asbestos dust from defendants' products and that the expert opinions he submitted rests on a sound foundation of overwhelming scientific consensus. The court notes that it granted defendants permission to file late motions for summary judgment and, thus, it is properly exercising its discretion in entertaining such motions.

Plaintiff testified that he began working around 15 years old, as a mechanic performing maintenance and repair to garbage trucks. He testified that his duties include replacing brakes and clutches, gaskets as well as other repairs. He stated that he would sand drum brakes and at times use an air compressor to blow out brake dust during repairs. He testified that he observed visible dust created from his work performing, among other things, brake, clutch and gasket repair and that he breathed in the dust. He testified that he also worked as a construction worker at various residential and commercial sites and that his duties included, among other thing, demolition, tearing out and installing boilers, pumps, and valves. Plaintiff stated that he was exposed to asbestos when he removed boilers and from his work with the firebox, valves, pumps, and circulators, which had asbestos-containing external insulation. In addition, he testified that he smoked up to two packs of cigarettes per day for about 37 years.

As to the motion for summary judgment by defendant American Honda Motor Co, Inc., the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

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Defendant American Honda Motor Co. submits reports of its experts, Coreen Robbins, Bryan Hardin, and Dr. Allan Feingold, and reports of plaintiff's experts, including Dr. Brent Staggs and Dr. Neil Schachter. Defendant contends that the reports of its experts established that its product could not have caused plaintiff's injury as plaintiff was not exposed to sufficient levels of asbestos to cause his lung cancer due to his work on Honda brand vehicles. It further argues that plaintiff's experts fail to provide any scientific expression or quantification of plaintiff's potential exposure to asbestos from its products and, therefore, cannot establish general or specific causation.

Coreen Robbins, an industrial hygienist, states in her report that chrysotile asbestos fiber exposure, if any, is non-existent or negligibly low for vehicle mechanics. She states that epidemiologic studies reveal that mechanics are not at an increased risk of developing lung cancer and that mechanic work does not produce exposures adequate to cause lung cancer. Specifically, Robbins explained that "exposures experienced by mechanics during typical tasks such as brake, clutch, gasket, and exhaust work are very low, or non-existent, involving commercial, short-fiber chrysotile-type asbestos, if any, with overall eight-hour, time weighted average exposures averaging 0.04 f/cc for brake work, 0.0016 f/cc for clutch work, and 0.018 f/cc for gasket and exhaust work." She concludes that it is "not scientifically supported that [plaintiff's] exposure to chrysotile fibers due to his mechanic work could be a substantial factor in the development of his lung cancer. She explains that plaintiff's history of smoking cigarettes significantly elevated his risk of lung cancer. She further states that plaintiff's work with boilers exposed him to asbestos and that boiler workers are at a significantly increased risk of mesothelioma.

Bryan Hardin, principal toxicologist at Veritox, Inc., who holds a Ph.D. in environmental health sciences, states in his report that plaintiff's smoking history "alone is sufficient to explain a diagnosis of lung cancer," as tobacco smoke is a strong carcinogen, responsible for over 90% of lung cancer deaths in the United States. He states that only a small percentage of lung cancers are related to asbestos exposure, and that a much greater cumulative lifetime exposure than the exposure for a career vehicle mechanics is necessary to attribute lung cancer to asbestos. He further states that if the lung cancer is related to asbestos exposure, plaintiff's work for over 20 years in boiler demolition presented an opportunity for exposure to amphibole asbestos-containing materials which could have contributed to an increased risk of lung cancer.

Dr. Allan Feingold states in his report that plaintiff suffers from a rare form of pulmonary adenocarcinoma and that minimal exposure to encapsulated chrysotile asbestos he experienced from occasional work as a mechanic did not cause or contribute in any way to his disease. He states that plaintiff's malignancy was caused by his history of prolonged, nearly life-long, heavy cigarette smoking. He states that in the past, brakes and clutches manufactured in the United States contained "encapsulated chrysotile asbestos and that because asbestos is converted by the high temperature of normal brake to non-fibrous forsterite, residual brake dust contains non-asbestos forsterite with small quantities of chrysotile. He states that such dust does not represent a risk for the development of asbestosis and that there is no scientific basis for a conclusion that exposure to motor vehicle repair work played any role in causing plaintiff's lung cancer.

Dr. Brent Staggs states that the exposure history of plaintiff reveals a significant history of asbestos exposure and that he developed pulmonary adenocarcinoma after an appropriate latency period following

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his first known exposures to asbestos. He explains that exposure to chrysotile and amphibole asbestos is known to cause pulmonary adenocarcinoma. He concludes that plaintiff's cumulative exposure to asbestos of all fiber types was a significant contributing cause to his development of pulmonary adenocarcinoma. In an affidavit of Dr. Staggs, he states that asbestos is a known and complete carcinogen which initiates and promotes cancer and that decades of scientific study has shown that inhalation of asbestos fibers of all fiber types cause mesothelioma, lung cancer, as well as cancer of other sites. He states that asbestos shows a linear dose-response relationship with regard to the risk of developing mesothelioma, lung cancer and non-malignant asbestos diseases. He explains that multiple studies have demonstrated that the more asbestos a person is exposed to over time, the higher the risk of developing an asbestos related disease.

Dr. Neil Schachter states in his report that plaintiff suffers from a malignant neoplasm of the lung and that based on a reasonable degree of medical certainty, all of the exposures to asbestos containing products and equipment which plaintiff worked with resulted in respirable asbestos being released into his breathing zone above background level, contributed to his cumulative dose of asbestos. He states that this cumulative exposure to asbestos, along with his smoking history, was substantial causes of the development of his lung cancer.

Here, the motion by defendant American Honda Motor Co. for summary judgment is denied. The conflicting reports of the experts raise credibility issues that cannot be resolved on a motion for summary judgment (*see Messina v New York City Tr. Auth.*, 84 AD3d 439, 922 NYS2d 70 [1st Dept 2011]). Moreover, plaintiff is not required to show the precise cause of his injury as a result of his exposure to defendant American Honda Motor Co.'s products, only facts and conditions from which the defendant's liability may be reasonably inferred (*see Oken v A.C.S.*, 7 AD3d 285, 776 NYS2d 253 [1st Dept 2004]; *see also Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584 [2006]). Plaintiff's testimony identifying defendant American Honda Motor Co's products as a source of his exposure to asbestos, combined with the expert reports of Dr. Staggs and Dr. Schachter demonstrate an issue of fact as to whether such products caused his injuries (*see Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]).

With regard to the remaining defendants' motions, as "[t]he introduction of novel scientific evidence calls for a determination of its reliability . . . the *Frye* test asks 'whether the accepted techniques, when properly performed, generate results that are reliable within the scientific community generally'" (*Parker v Mobil Oil Co.*, 7 NY3d 434, 446, 824 NYS2d 584 [2006], quoting *People v Wesley*, 83 NY2d 417, 422, 611 NYS2d 97 [1994]). The *Frye* rule holds that expert testimony based on scientific theories, principles, or procedures is admissible only if such theories, principles, or procedures have gained general acceptance in the relevant field of scientific study (*see Frye v United States*, 293 F 1013, 1014 [1923]; *People v Wesley*, 83 NY 2d 417, 611 NYS2d 97; *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 [2d Dept 2011]; *Cumberbatch v Blanchette*, 35 AD3d 341, 825 NYS2d 744 [2d Dept 2006]). Significantly, the test for reliability is not whether a particular scientific theory, test or procedure is unanimously endorsed by the scientific community, but whether it is generally accepted as reliable (*see People v Middleton*, 54 NY2d 42, 444 NYS2d 581 [1981]; *Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 929 NYS2d 264 [2d Dept 2011]; *Zito v Zabarsky*, 28 AD3d 42, 812 NYS2d 535 [2d Dept 2006]). In fact, a court may find scientific tests reliable based on the general acceptance of the procedures as shown through legal writings and judicial opinions (*Lahey v Kelly*, 71 NY2d 135, 144, 524 NYS2d 30 [1987]). Where proposed expert

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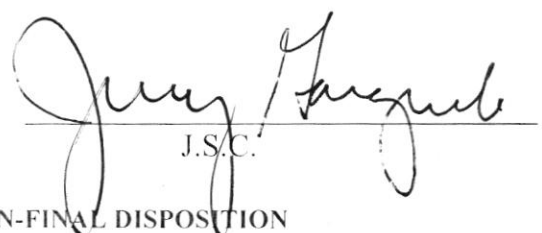
testimony does not involve a “novel or experimental” theory, principle or procedure, a preliminary *Frye* hearing is not warranted (see *Parker v Mobil Oil Co.*, 7 NY3d 434, 824 NYS2d 584; *People v Byrd*, 51 AD3d 267, 855 NYS2d 505 [1st Dept 2008]; *Hutchinson v Crown Equip. Corp.*, 48 AD3d 421, 852 NYS2d 187 [2d Dept 2008]; *Nonnon v City of New York*, 32 AD3d 91, 819 NYS2d 705 [1st Dept 2006], *aff’d* 9 NY3d 825, 842 NYS2d 756 [2007]; *Marsh v Smyth*, 12 AD3d 307, 785 NYS2d 440 [1st Dept 2004]).

Thus, to be entitled to preclusion or a *Frye* hearing, a movant must show, prima facie, that the theories and opinions of the opposing party’s expert generally are not accepted in the scientific community (see *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323; *Hutchinson v Crown Equip. Corp.*, 48 AD3d 421, 852 NYS2d 187; see generally *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463 [1998]). If such a showing is made, the burden shifts to the opposing party to demonstrate general acceptance by the scientific community of the principles or tests upon which the proposed evidence is based (see *Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 929 NYS2d 264; *Cumberbatch v Blanchette*, 35 AD3d 341, 825 NYS2d 744; *Zito v Zabarsky*, 28 AD3d 42, 812 NYS2d 535).

Furthermore, the general function of a motion in limine is to permit a party, before or during a trial, to obtain a preliminary order excluding the introduction of anticipated inadmissible, immaterial or prejudicial evidence or limiting the use of such evidence (*State of New York v Metz*, 241 AD2d 192, 198, 671 NYS2d 79 [1st Dept 1998]). However, a trial judge has broad discretion as to the admissibility of evidence offered at trial (see *Radosh v Shipstad*, 20 NY2d 504, 285 NYS2d 60 [1967]), and a ruling on a motion in limine, even when made in advance of trial and on paper, constitutes only an advisory opinion, which is not appealable as of right or by permission (*Winograd v Price*, 21 AD3d 956, 956, 800 NYS2d 649 [2d Dept 2005]).

Under the particular circumstances of this action, the court finds a ruling as to the admissibility of the opinions of plaintiff’s experts should be made at the time of trial, when a determination as to the relevance of such evidence may be made in context (see *Grant v Richard*, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; *Speed v Avis Rent-A-Car*, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]). “The main purpose of a *Frye* inquiry is to determine whether scientific deduction in a particular case has been sufficiently established to have gained general acceptance in a particular field, not, as defendants would have it used here, to verify the soundness of a scientific conclusion” (*Alston v Sunharbor Manor, LLC*, 48 AD3d 600, 601, 854 NYS2d 402 [2d Dept 2008]). Thus, the applications by defendants for a *Frye* hearing are denied at this time, without prejudice to renewal at the time of trial. Finally, the applications by defendants Nissan North America, Inc., DCo, LLC, Eaton Corporation, Pneumo Abex LLC, PACCAR, Inc., and Perkins Engines, Inc for summary judgment are denied, as they are dependent upon the determination to preclude or reject the “cumulative exposure” theory set forth by plaintiff’s experts.

Dated: 11/20/19


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION