Evans v 3M Co.
2017 NY Slip Op 30658(U)
April 5, 2017
Supreme Court, New York County
Docket Number: 190109/2015
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190109/2015
Motion Seq. 010

JEANNE EVANS, as Executor for the Estate of FREDERICK W. EVANS, and JEANNE EVANS, Individually

Plaintiff,

-against-

DECISION & ORDER

3M COMPANY, et al.

Defendants

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PETER H. MOULTON, J.S.C:

This case involves Plaintiff Frederic W. Evans' alleged exposure to asbestos-containing products and equipment during residential renovations, while working as a cable puller for Western Electric from 1946 to 1948, as a groundsman and lineman for Queens Gas & Electric from 1948 to 1952, as an HVAC apprentice/mechanic for various employers throughout New York from 1952 to 1963, and as an HVAC mechanic and supervisor from 1965 to 1986 at residential and commercial sites throughout Vermont for Vermont Heating. Additionally, plaintiff has testified as to possible bystander asbestos exposure at worksites he visited while self-employed from 1987 to 2001 1) as a roofer (1966), 2) as a maintenance repairman involving flooring, ceiling, door, and plaster work (1971-1977), and 3) as a carpenter personally handling and installing flooring and insulated doors while being present in boiler rooms where other trades were working in his immediate vicinity (1977-1990).

Defendants submit a joint omnibus motion *in limine* to preclude certain evidence at trial. They seek to preclude: (1) improper specific causation testimony of plaintiffs' medical experts,

the subject of which will be addressed in a separate motion to be heard by this court on Wednesday April 5, 2017; (2) argument or evidence of government statements or regulations regarding asbestos hazards; (3) argument or evidence regarding knowledge or conduct post-dating plaintiff's last exposures; (4) plaintiffs purported expert witness Dr. Arnold Brody's testimony; (5) the testimony of any MAS and MVA employee and to exclude evidence of any MAS and MVA work practice studies; and (6) plaintiffs from arguing that defendants are liable for products they did not manufacture or supply. Defendants also seek to compel plaintiff to file all possible claims to bankruptcy trusts and or seeking to forever enjoin plaintiff from filing any claims to bankruptcy trusts.

PRECLUSION OF REGULATORY MATERIALS AND PUBLIC HEALTH ANNOUNCEMENTS

Defendants cite *Parker v. Mobile Oil Corp.*, 7 NY3d 434, 450 [2006], where the Court stated that "standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate causation." Defendants assert that pronouncements and publications from various regulatory and public health agencies or organizations in the United States and abroad are irrelevant to causation where the regulatory and public health agencies act in a broad preventative role when promulgating those regulations. Defendants avow that "statements and regulations from agencies make relatively conservative assumptions regarding the level of exposure to a harmful substance that is potentially dangerous to the public health" (Defendant's Memo of Law at p. 8). Defendants further argue that the standard of scientific proof used by regulatory entities to enact regulations is below the legal standard required to establish causation in court actions since government agencies and other similar entities "often utilize cost benefit analysis to assess risk and 'err on the side of caution'" (*see McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1249-50 [11th Cir. 2005][*quoting Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1201 [11th Cir. 2002]).

Defendants point out that the United States Supreme Court has observed that the United States Food and Drug Adminstration ("FDA") will sometimes act on "evidence that suggests, but does not prove, causation" (*see Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309, 1320 [2011]). Defendants further highlight the Occupational Safety and Health Administration's ["OSHA"] desire "to use conservative assumptions in interpreting…data with respect to carcinogens, risking error on the side of overprotection rather than underprotection" (*Industrial Union* Dep't*., AFL-CIO v. Am. Petroleum Ins*t., 448 US 607, 656 [1980]). In light of these examples, defendants argue that the admission of evidence from regulatory materials and public health pronouncements would mislead the jury and prejudice defendants because the jury is likely to give such "official" governmental and quasi-governmental pronouncements undue weight in spite of their legal deficiencies.

In contrast, defendants aver that the causation inquiry undertaken by the courts does not prescribe guidelines, but rather "determines whether a harmful substance has *actually* caused a particular individual's harm" (*see Comeau v. W.R. Grace & Co.*, 216 AD2d 79, 80 [1st Dept. 1995] *Cawein v. Flintkote Co.*, 203 AD2d 105, 106 [1st Dept. 1994]). As such, "the question is not what level of exposure to asbestos is acceptable from a public health standpoint, but whether [a plaintiff] was sufficiently exposed to EACH asbestos-containing product for which each of the [d]efendants bear legal responsibility to be a substantial factor" in causing a plaintiff's illness (*see Parker*, 7 NY3d at 448). Defendants argue that statements and regulations of government agencies do not aid in making this determination because they are focused on aims separate and apart from legal causation.

At oral argument on March 29, 2017, defendants further emphasized that because several of the statements and regulations of government agencies that plaintiffs may introduce post-date

the last known dates of exposure (an argument that will be addressed further in the next section), their probative value is greatly outweighed by the prejudice that defendants would suffer.

In opposition, plaintiffs argue that defendants' request is overly sweeping and premature. Plaintiffs highlight that defendants have not given the court sufficient information to rule *in limine*. Indeed, plaintiffs emphasize that defendants have not identified any specific statements or regulations that they seek to exclude, but instead broadly ask the court to keep out "statements and regulations of government agencies and regulations regarding potential health hazards of substances," and statements like "[f]or example, various government entities and public health organizations . . . such as 'there is no known safe level of exposure to asbestos' or that there is 'no known threshold' below which asbestos exposure will not cause disease." In plaintiffs' assessment, the court cannot make an evidentiary ruling without knowing exactly what evidence it is being asked to rule on. To the extent that defendants have an objection to the introduction of a particular statement or regulation at trial, plaintiffs assert that they can make the appropriate objection during the course of the trial. Until such time, however, the motion should be denied.

Plaintiffs maintain that the materials and pronouncements which defendants attempt to exclude are regularly admitted in asbestos cases because they are relied upon by plaintiffs' expert witnesses and bear undeniable indicia of trustworthiness. Plaintiffs state that it is generally accepted in the scientific community that there is no known safe level of asbestos exposure and that there is no threshold level of exposure required for the development of mesothelioma. Plaintiffs aver that numerous public health and regulatory agencies share these opinions and base their regulations and statements on this scientific consensus, including OSHA.

Plaintiffs highlight that OSHA, which regulates workplace exposures, is one agency (among others) that has made the pronouncement that "[t]here is no 'safe' level of asbestos

exposure for any type of asbestos fiber" (*see* Plaintiff's Memo of Law in Opposition at Ex. 2, OSHA Website, Safety and Health Topics: Asbestos, https://www.osha.gov/SLTC/asbestos). Plaintiffs additionally highlight that OSHA relies on numerous scientists that have found that "[a]sbestos exposures as short in duration as a few days have caused mesothelioma in humans" (*id.*). Therefore, the agency cautions that, "[e]very occupational exposure to asbestos can cause injury or disease; every occupational exposure to asbestos contributes to the risk of getting an asbestos related disease." (*id.*). Plaintiffs assert that these statements, and other similar statements or regulations, comport with and are supported by the general scientific consensus regarding asbestos exposure. Plaintiffs assert that regulating asbestos released from consumer products falls under the legitimate authority and area of competence of OSHA and other agencies, whose mission is to protect the public against unreasonable risks of injury or death from consumer products through regulatory standards and findings. Thus, plaintiffs' experts' opinion that the asbestos in defendants' products was dangerous to consumers is perfectly in line with the general consensus of the medical and scientific community - as reflected in the various regulatory and public health pronouncements.

Plaintiffs also address *Parker*'s statement that "standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate causation" (7 NY3d at 450). Plaintiffs point to defendants' conflation of research and standards and maintain that *Parker* did not hold that such standards are wholly irrelevant. Plaintiffs distinguish between the standards promulgated by regulatory agencies and research performed by agencies that also hold regulatory authority. While *Parker* held that the former, by itself, was insufficient to prove causation, *Parker* had no effect on the use of the latter (*see Matter of Neurontin Prod. Liab. Litig.*, 24 Misc 3d 1215(A) [Sup Ct 2009]). In *Matter of Neurontin*, plaintiffs noted that Judge Friedman held that the

plaintiff could rely on an FDA study that led to regulatory action because the study itself did not constitute a standard promulgated by a regulatory agency. Rather, the scientific study in question provided the underlying support for the agency action. Thus, plaintiffs concluded that "[w]ith few exceptions, it is expected that Plaintiffs' experts will rely on . . . research organizations] (i.e. the World Health Organization, the International Agency for Research on Cancer, the National Cancer Institute, the Agency for Toxic Substances and Disease Registry, the World Trade Organization) and not regulatory agencies."

The motion *in limine* to preclude the submission of regulatory materials and public health announcements is decided in accordance with the following. To the extent that plaintiffs intend to introduce such documents into evidence, plaintiffs are directed to submit an exhibit list of these documents no later than Monday April 10, 2017, and identify the relevant hearsay exception. To the extent that the regulatory materials and public health announcements will not be separately introduced at trial, but will form the basis for expert testimony, the court cannot determine on this submission whether the materials would be subject to the professional reliability exception. Therefore, that aspect of the motion is denied. The standards promulgated by regulatory agencies as protective measures are inadmissible to demonstrate causation. However, studies that lead to regulatory action can be admissible (as opposed to standards promulgated by a regulatory agency as a matter of policy). Defendants have not demonstrated that the material upon which plaintiffs' experts relied is based on outdated science such that it should be excluded. Further, defendants may submit their own scientific evidence at trial (assuming that the evidence is admissible). The parties are also instructed to work together on a jury instruction clarifying that evidence derived from regulatory materials and public health announcements is not relevant as to causation but is relevant as to notice, if charged.

EVIDENCE REGARDING KNOWLEDGE OR CONDUCT POST-DATING PLAINTIFF'S LAST ALLEGED EXPOSURE

Defendants assert that evidence of defendants' knowledge and conduct long after the dates relevant to the allegations in this case should not be admitted at trial as such evidence is irrelevant, inadmissible, and highly prejudicial. Specifically, defendants submit that plaintiffs should not be able to submit evidence at trial consisting of exhibits arguing that regulations, regulatory statements, documents, and other materials dated after plaintiff's last alleged exposures show defendants' knowledge of plaintiff's alleged work with or around defendants' products. Defendants submit that such documents are inadmissible as they are dated years after plaintiff's alleged last exposure to defendants' products, have no bearing on any material issue in this case, and would be unduly prejudicial.

Additionally, defendants argue that to the extent that plaintiffs also seek to introduce evidence regarding post-remedial measures from the 1980s, such evidence is inadmissible to prove negligence (*see Alfieri v. Carmelite Nursing Home, Inc.*, 29 Misc. 3d 509, 510, 907 N.Y.S.2d 577, 578 [Civ. Ct. 2010] ["The Court of Appeals of the State of New York, has consistently held for over 120 years that any post-accident modification or repairs made in an appliance, structure, or machine which caused an accident is neither evidence nor an admission of negligence"]).

In opposition, plaintiffs submit that defendants' motion on this ground is procedurally flawed because it is premature and requests that this court rule on the admissibility of non-specific evidence in a factual vacuum. Plaintiffs state that they reserve the right to make relevant arguments and offer authority to specific evidence to which defendants object at the time such evidence is offered.

Plaintiffs further oppose defendants' application by arguing that evidence that post-dates plaintiff's exposure is directly relevant to the issues in this case, including causation and corporate

knowledge. Plaintiffs argue that defendants' knowledge of the danger posed by its asbestos products and failure to use due care, or that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances, are elements of plaintiffs' claims based on the theory of negligence. Plaintiffs aver that at trial they will introduce evidence that defendants designed, manufactured, distributed and sold asbestos-containing products that plaintiff worked with and around, and that defendants knew that their products contained asbestos, could release asbestos fibers, and that such exposures to asbestos were hazardous. Plaintiffs submit that evidence of defendants' corporate behavior, as borne out by their documents and products, during and after the time after plaintiff's exposure may also go to the issues of state of the art raised in this case.

Similarly, plaintiffs argue that defendants cannot exclude evidence of their post-exposure knowledge since New York recognizes a post-sale duty to warn (*Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 733 N.Y.S.2d 410 [1st Dept 2001][wherein it was held that the jury properly determined the plaintiff duty issue: even though defendant sold a bare metal product, it had a duty to warn about the conspicuous hazards of asbestos-containing materials third-parties foreseeably manufactured and/or used therewith subsequent to that sale]).

Plaintiffs further state that they have a right to prove defendants' reckless disregard with respect to the dangers of asbestos. As such, plaintiffs submit that evidence concerning defendants' products and documents, including information pre-dating and post-dating plaintiff's exposure, is relevant to show defendants' degree of culpability, awareness of the risk, duration of conduct, and existence of similar past conduct.

Plaintiffs aver that defendants have failed to meet their burden of showing that there is any "unfair" prejudice from the "post-exposure" evidence or that any such unfair prejudice

"substantially outweighs" the highly probative value of this evidence. Plaintiffs highlight that defendants have failed to bring anything more than general, boiler-plate language before the court, and have not even identified what evidence they seek to exclude. As such, plaintiffs argue that defendants have not articulated how this evidence unfairly prejudices them in a way wholly disproportionate to the value of the evidence offered to prove their reckless disregard.

Defendants' motion is denied without prejudice to individual defendants asserting their objections at trial. I decline to decide admissibility issues in a vacuum, especially where defendants' have not made any specific arguments identifying the evidence that they seek to exclude. Defendants' blanket request for preclusion of any evidence that post-dates plaintiff's exposure is denied. Contrary to defendants' argument, documents which post-date exposure are relevant to the issue of recklessness (*see Peraica v A.O. Smith Water Prods., Co.*, 143 AD3d 448 [1st Dept 2016] [recklessness charge proper "in light of the evidence showing defendant's long-standing knowledge of the dangers of asbestos"]; *Matter of New York City Asbestos Litigation.*, 143 AD3d 483 [1st Dept 2016] [same]). The parties are instructed to work together on a jury instruction that will aid the jurors and make them understand that evidence post-dating plaintiff's last alleged exposure is not relevant as to state of the art (what defendants knew or should have known at the time of exposure), but is relevant to recklessness, if charged.

PRECLUDE THE TESTIMONY OF DR. ARNOLD BRODY

Defendants move to preclude the testimony of Dr. Arnold Brody ("Dr. Brody"), arguing that his testimony is irrelevant, time consuming, cumulative and prejudicial. Dr. Brody is a professor in the Department of Pathology and the Department of Environmental Health Sciences at Tulane University Medical Center, part of the graduate faculty in Molecular and Cellular Biology, and director of the Lung Biology Program at the Center of Bioenvironmental Research

at the medical school. Plaintiffs state that he has authored over 100 articles in the area of pathogenesis and lung disease.

Defendants' primary argument is that Dr. Brody's testimony should be precluded because, according to Dr. Brody's prior testimony, his opinions are based on animal studies. Therefore, Defendants maintain his opinions do not translate to human disease. Plaintiffs counter that animal studies are not irrelevant, novel or confined to Dr. Brody's work. Plaintiffs maintain that animal studies have been used for over half a century in connection with asbestos disease research. In the 1940s, plaintiffs assert that many of the major asbestos companies paid for extensive animal research on rats at the Saranac laboratory. In the 1940s, plaintiffs note that German researchers first proved asbestos causes cancer by inducing asbestos tumors in mice. Plaintiffs assert that the number of published asbestos animal studies is legion and that scientists routinely utilize animals studies because research in human beings would be illegal, immoral, and nearly impossible due to latency factors. Plaintiffs point out that defendants can cross-examine Dr. Brody regarding what his studies show. Plaintiffs point out that various federal and state courts, including in New York state have found Dr. Brody's testimony scientifically reliable and supported by citations to peer review articles (*citing e.g., Pittsburgh Corning Corp. v Walters*, 1 SW3d 759, 775 [Ct App Tex 13th Distr. 1999]; *Matter of Asbestos Products Liab. Litigation* 714 Fed Supp2d 535 [ED Pa 2010]).

Defendants also maintain that Dr. Brody's testimony will consume too much time, pointing to one California case where Dr. Brody's testimony was excluded because it was "going to be unduly consumptive of the jury and court time." Defendants additionally complain that Dr. Brody's testimony is duplicative of Plaintiffs' pathologist, Dr. John Maddox. Plaintiffs disagree that Dr. Brody's testimony will consume too much time and, in any event, assert that they are not

relegated to presenting an abbreviated version of the scientific and medical evidence in this case. Plaintiffs point out that Dr. Maddox is a medical doctor, pathologist, and is certified by the American Board of Pathology in Anatomic and Clinical Pathology and in Hematology. Dr. Brody, however, has a Ph.D. in Cell Biology Ultrastructural Cytology with expertise in pulmonary disease, pathology, pulmonary pathobiology and environmental lung diseases. Plaintiffs also assert that Dr. Brody's testimony is necessary to educate the jury on mesothelioma at a cellular level, and explain the development of cancer from DNA damage to tumorigenesis to angiogenesis and metastasis. Unlike Dr. Maddox, plaintiffs assert that Dr. Brody will describe how the lungs operate in general, how asbestos fibers infiltrate the lungs, and how that asbestos causes disease at a cellular level. Dr. Brody will not discuss plaintiff or any case specifics, but Dr. Maddox will. Thus, plaintiffs assert that Dr. Brody's testimony is not cumulative of Dr. Maddox's testimony, but rather is complimentary of Dr. Maddox's testimony.

Defendants also argue that the Court should preclude Dr. Brody's testimony because it is prejudicial. Defendants argue that Dr. Brody will likely show slides of magnified rat lung cells and the "sheer size of the projected images creates the prejudicial and misleading impression that asbestos cause massive damage to lung tissue immediately upon inhalation." Plaintiffs counter that they will be prejudiced if Dr. Brody is not allowed to testify. They explain that Dr. Brody's testimony might discuss the mechanism by which chrysotile causes injury, to rebut defendants' anticipated "Chrysotile Defense" which argues that chrysotile is either incapable of causing mesothelioma or has a very low mesotheliogenic capability. Plaintiffs explain that Dr. Brody's testimony will explain in layman's terms how the body responds to the induction of asbestos, and in particular chrysotile, through improper cell replication and help the jury understand, on a cellular level, how inhaled asbestos causes malignancy. Plaintiffs state that Dr. Brody's studies

look at matters such as how the fibers reach the air sacs where air exchange takes place, and how the fibers are covered by the epithelium near where the blood flows, which in turn demonstrates that asbestos fibers get picked up by blood cells and are transported throughout the body. Thus, Plaintiffs argue that they will be severely prejudiced if defendants will be able to espouse a theory that plaintiff's exposures do not cause disease, while plaintiffs will be hampered in their ability to prove the contrary.

Defendants' motion to exclude Dr. Brody's testimony is denied. Defendants have not presented any medical evidence to support a finding that animal studies cannot reflect on human diseases. Defendants concerns can also be aired on cross-examination and can be considered by the jury in assessing the weight which they assign to Dr. Brody's opinion. Plaintiffs are not limited to providing an abbreviated scientific evidence and defendants estimated time of less than two days of testimony/cross-examination is not unduly long. Dr. Brody's testimony is not cumulative of Dr. Maddox's anticipated testimony as it is meant to assist the jury in understanding the relationship between exposure to asbestos fibers and the disease process generally and to provide context for Dr. Maddox's causation testimony regarding the specifics of this action.

PRECLUDING THE TESTIMONY OF ANY MAS AND MVA EMPLOYEE AND TO EXCLUDE EVIDENCE OF ANY MVA WORK PRACTICE STUDIES

Defendants anticipate that at trial plaintiffs will attempt to satisfy the burden of proving exposure to respirable asbestos fibers by using videotapes and studies prepared by Material Analytical Services, Inc. ("MAS") or MVA Scientific Consultants ("MVA") which purport to depict the amount of alleged asbestos-containing fibers in the air from the manipulation of asbestos-containing materials.

Defendants submit that any attempt to prove exposure via the aforementioned videotapes and studies violates New York's rules of evidence, because:

(1) the methodology used by MAS and MVA is not generally accepted in the relevant scientific community for quantifying airborne asbestos levels or evaluating the risk posed by asbestos;
(2) such evidence is irrelevant; and
(3) the probative value of such evidence is outweighed by the risk that its admission would confuse the main issues, mislead the jury, and unduly prejudice defendants.

MAS and MVA are engineering consulting firms that specialize in material characterization work, asbestos analysis, and the testing of asbestos-containing products. MAS and MVA have, in the past, designed and conducted work practice studies concerning the removal and replacement of insulation, gaskets and packing. These studies are videotaped using "Tyndall light phenomena," which employs high intensity lights against black walls specially designed to enhance the observation of material released during the experiment. The studies are conducted inside an exposure characterization laboratory, which measures approximately fifteen (15) feet in length, twenty (20) feet in width, eight (8) feet in height. The details of the industrial products are laid out in detail in each particular study and the asbestos-containing materials are also described, as well as the conditions in which the materials had remained prior to the study.

Defendants argue that MAS and MVA videotapes are misleading and inaccurate. They further posit that the artificial lighting methodologies used and depicted in these videos have not gained general scientific acceptance. Defendants point out that New York courts apply *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and only allow the admission of expert testimony or evidence based on scientific principles or procedures only after those principles or procedures have "gained general acceptance" in its specified field (*People v. Wesley*, 83 NY2d 417 [1994]). Defendants argue that the experiments, tests, and methodologies depicted in the MAS and MVA videotapes have not gained general acceptance in their specified field, and cannot be accepted as reliable for the following reasons:

- Videotapes using artificial lighting techniques provide no information concerning the size, type or concentration of airborne asbestos particles.

- The use of artificial lighting techniques creates buoyancy, due to the heat generated by the lights, permitting particulate matter to remain airborne for longer periods of time, and thereby artificially inflating airborne fiber counts.
- The use of artificial lighting techniques cannot selectively illustrate actual respirable particles of asbestos, but rather illuminates and depicts fibers of all sorts indiscriminately.
- Videotapes using artificial lighting techniques are not an acceptable industrial hygiene practice for the evaluation of occupational exposures to asbestos.

Defendants further submit that artificial "Tyndall" lighting techniques often exaggerate the appearance of dust in MAS and MVA videotapes and therefore are misleading. Defendants emphasize that in these videos, the dust produced from the MAS and MVA activities is illuminated using high intensity theater lights against the black backdrop of the walls of the MAS chamber. Further, most of the illuminated dust depicted in these videos is out-of-focus, because the cameras used to record the studies are focused on the activity being performed, rather than the dust surrounding activity. Thus, defendants argue that the videos do not accurately represent the dust as it would be seen by the human eye, which has the ability to rapidly and instinctively adjust its focus. Defendants further highlight that the founder of MAS, Dr. William Longo, has repeatedly been forced to concede the limitations and questionable probative value of his videotapes, primarily resulting from the use of the aforementioned artificial lighting techniques.

Finally, defendants argue that the introduction of such evidence will consume undue time. Defendants submit that they will be required to conduct extensive cross-examination to show that the tests are not representative of the conditions encountered by plaintiff, that they are not conducted pursuant to generally accepted scientific principles, and that the data and videotape materials are biased by MAS's and MVA's incentive to produce data and imagery that is favorable to plaintiffs. In doing so, defendants will have to cross-examine Dr. Longo, put on testimony by their own expert witnesses, and submit their own tests and videos. Essentially, defendants argue

that the court will wind up holding a "trial-within-a-trial" over the MAS and MVA studies and videotapes.

In opposition, plaintiffs argue that defendants' motion should be denied because: (1) it is overbroad; (2) the MAS and MVA studies and demonstration videos are relevant and will assist the jury in understanding how plaintiff was exposed to asbestos from working with and around defendants' products; (3) the MAS and MVA demonstration videos are reliable and admissible demonstrative evidence; (4) the scientific methodology employed by MAS and MVA is widely accepted in the scientific community; and (5) numerous courts throughout the country have admitted both the studies and demonstrative videotapes as relevant.

Plaintiffs have stipulated to not calling any MAS or MVA employee at trial. While defendants orally accepted that stipulation during a conference call with the court on Friday March 24, 2017, in the written stipulation subsequently circulated by defendants on March 27, 2017, a provision excluding any experts' reliance on these materials was added. Plaintiffs state that this additional provision was not part of the accepted agreement as it is unreasonable and without basis.

At trial plaintiffs anticipate that one of their experts, Dr. Carl Brodkin, may or may not testify regarding his reliance on MAS or MVA studies. To the extent that he does, plaintiffs argue that Dr. Brodkin's reliance upon those materials is irrelevant as he is entitled to rely upon any number of materials in forming his opinion, and if defendants have a problem with the materials upon which he relies, that is an appropriate issue for cross-examination.

Plaintiffs go on to emphasize that defendants have continuously argued at trial that working with and around their asbestos-containing products does not liberate asbestos fibers. Plaintiffs submit that the MAS and MVA videotaped workplace simulations and demonstrations are not only relevant to address this precise question because they graphically document copious amounts of

dust (including asbestos dust) being liberated by working with defendants' asbestos-containing products, but they are singularly material to the defendants' defense that working with and around defendants' products does not generate dust or airborne asbestos fibers.

Plaintiffs further argue that the MAS and MVA studies are reliable since they are conducted under strict protocols and generally accepted procedures and methodologies. Plaintiffs also state that the simulations are consistent with the testimony plaintiff provided when he described working with and around defendants' products. Plaintiffs additionally argue that defendants attempt to discredit the use of Tyndall lighting is inaccurate as defendants fail to mention that MAS and MVA demonstrations show the work chamber under normal room lighting as well as under Tyndall lighting. Plaintiffs further submit that the demonstrations show that substantial quantities of dust are actually liberated during the normal use (and even handling) of asbestos products - contrary to one of defendants' main defenses.

Plaintiffs additionally state that the importance of the MAS and MVA workplace videos is to help the jurors understand that dust - some visible, some invisible - was liberated when plaintiff worked around and handled defendants' asbestos-containing products and to demonstratively prove that working with these materials does in fact create dust. The lighting shows the flow of air in the room and the effect is not constant. That is, the jury can see what the room looks like both with and without the lighting effect. The normal room lighting shows what is visible to the naked eye under normal conditions and the Tyndall lighting shows what is normally invisible to the naked eye absent the special lighting. The MAS and MVA studies do not artificially create the dust or add dust to the simulations, they simply show the dust that results from working with and handling asbestos-containing products and expose the dust to Tyndall lighting to show what is invisible to the naked eye. Stated differently - simply because you cannot see it, does not mean it is not there.

So, if a defendant stands up in court and tells the jury that its products did not generate dust and did not liberate asbestos fibers, plaintiff can respond and demonstrably show otherwise.

Plaintiffs conclude their arguments by stating that the MAS methodology (and the use of Tyndall lighting) has been repeatedly reported in the scientific literature for many years. Indeed, the methodology is accepted by the EPA as illustrated in its Standard Operating Procedure for Tyndall lighting, which provide standards guiding the methodology. Moreover, plaintiffs aver that Tyndall lighting is not used to make a quantitative assessment of actual exposure but rather to demonstrate that large amounts of dust can be in a worker's breathing zone without being visible to the naked eye. This fact is directly relevant to the issue of whether or not the product at issue is unreasonably dangerous. Plaintiffs further emphasize that Tyndall lighting demonstrates "pathways of exposure" from the source of dust to an individual. It thereby permits the observer to understand why a worker may not know that harmful dust is released from a product.

Defendants motion to preclude plaintiffs from introducing videotapes and MAS and MVA studies is denied. Despite questioning the reliability of MAS and MVA studies, defendants have proffered no scientific evidence that such studies or videos relying upon them warrant a *Frye* hearing (*see Lustenring v. AC&S, Inc.*, 13 AD3d 69 [1st Dept. 2004] ["[defendant's factual disagreement with plaintiffs' causation theory did not require a *Frye* hearing"]). While defendants cite a case in which a Texas federal judge found MAS tests were "junk science" that was not sufficiently tied to the facts of an individual case, defendants present no such evidence to me. Additionally, plaintiffs' cited evidence indicating that the EPA endorses Tyndall lighting tends to discredit defendants' characterization that MAS and MVA studies are categorically unreliable. Defendants complaints that there is no evidence that the videos plaintiffs may proffer were made in a lab that is of the same size and condition as the locations where plaintiff worked and that the

jury may believe that the dust illuminated by Tyndall lighting is asbestos can be remedied by a jury instruction. The parties should work to reach an agreement on such an instruction.

PRECLUDE PLAINTIFF FROM ARGUING THAT DEFENDANTS ARE LIABLE FOR PRODUCTS THEY DID NOT MANUFACTURE OR SUPPLY

Defendants argue that since plaintiffs allege exposure to products or materials that are not part of defendants' equipment and were not necessary for defendants' equipment to function, including insulation on the adjoining pipes and gaskets and packing manufactured by other companies and used with defendants' equipment, plaintiffs should be precluded from introducing evidence alleging that defendants had a duty to warn against the dangers arising from the known and reasonably foreseeable use of their products with the products of third-parties.

Under the holding in *In re New York City Asbestos Litig. v. A. W Chesterton (Dummitt),* 27 NY3d 765 [2016], defendants note that a "manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." Defendants further emphasize that the *Dummitt* court limited the scope of the duty to warn by stating that "we must draw a commonsense line at which duty ends based on the closeness of the connection between the manufacturer's product, the other product and their uses…The balance of those factors supports the following rule: the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended" (*Dummitt*, *supra*, 27 NY3d at 793). Defendants cite this principle for the proposition that an equipment manufacturer will not be held liable for

failing to warn of a product it did not manufacture, supply, or place into the stream of commerce or which is not necessary for the functionality of its product. Since defendants submit that plaintiffs' allegations fit within this framework, they argue that the court should preclude any evidence or argument that defendants are liable for any asbestos-containing product they "did not manufacture, supply, or place into the stream of commerce or which is not necessary for the functionality of its product."

In opposition, plaintiffs argue that defendants' present application is a summary judgment motion masquerading as a motion *in limine*. Indeed, plaintiffs aver that a motion *in limine* may not be used as a substitute for an untimely summary judgment motion. As such, plaintiffs submit that defendants' application is an improper dispositive motion at this stage and should be denied.

Further, plaintiffs submit that under the very New York law defendants cite to, they owed plaintiff a duty since a manufacturer has a duty to warn users of its products where the synergistic use of those products and third-party asbestos-containing products could expose them to carcinogenic asbestos dust. Accordingly, plaintiffs argue that defendants' motion is both procedurally and substantively inappropriate and should be denied.

Plaintiffs highlight that New York courts have consistently held equipment manufacturers liable for asbestos-containing replacement parts used in conjunction with a defendant's original equipment (*see, e.g., In re New York City Asbestos Litig. v. A.W. Chesterton (Dummit)*, 27 NY3d 765 [2016] [the manufacturer had a duty to warn the reasonably foreseeable users of its valves that the synergistic use of the valves and third-party asbestos-containing products could expose them to carcinogenic asbestos dust]; *Berkowitz v. AC&S, Inc.*, 733 NY2d 410 [1st Dept. 2001]). Furthermore, plaintiffs note that it has been recognized that when equipment is designed to be used

with asbestos components, defendants are liable for the foreseeable use of asbestos-containing parts in conjunction with their products.

In products liability cases, a manufacturer of a defective product is liable for injuries caused by the defect where the product is not accompanied by adequate warnings (*see Liriano v. Hobart Corp.*, 92 NY2d 232, 237 [1998]). The Court of Appeals' recent component-part decision in *Dummitt* reaffirmed this principle within the context of asbestos litigation, while elaborating on the circumstances that give rise to the duty to warn. The Court held that "the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product, which as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended" (*id.* at 776).[1] To discern whether or not such a duty exists in the first instance, the Court observed that one "cannot recognize a duty based entirely on foreseeability of the harm at issue, though foreseeability defines the scope of a duty once it has been recognized" (*id.* at 788). Instead, "the court must settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question," and "the public policy served by the presence or absence of a duty and the logical basis of a duty" (*id.*). While the Court of Appeals recognized the longstanding principle that a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product which it knew or should have known (and must warn of dangers arising from the product's

[1]In ruling as such, the Court of Appeals cited its prior decision in *Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298 [1992], where a tire manufacturer who had manufactured a sound product and had "no control of the production . . . no role in placing that [product] in the stream of commerce, and derived no benefit from its sale" was found to have no liability for a defective rim which exploded because the defendant did not manufacturer the rim which was later attached by a third party to its tire after the tire was sold.

intended use or a reasonably foreseeable unintended use), it emphasized that "[t]he manufacturer's duty also includes a legal obligation to issue warnings regarding hazards arising from foreseeable uses of the product about which the manufacturer learns after the sale of the product" (*id.*). Indeed, "the duty 'extends to the original or ultimate purchasers of the product, to employees of those purchasers, and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn" (*id.* at 788-89; *citing McLaughlin v. Mine Safety Appliance Co.*, 11 NY2d 62, 69 [1962]).

Additionally, the Court of Appeals explained that "where a manufacturer creates a product that cannot be used without another product as a result of the design of the product, the mechanics of the product or the absence of economically feasible alternative means of enabling the product to function as intended, the manufacturer has a substantial, albeit indirect, role in placing the third-party product in the stream of commerce" (*id.* at 794). As such, "where all the other relevant circumstances outlined above are present, if the evidence supports an inference that the third-party product is the only product that both enables the intended function of the manufacturer's product and is available at a cost that is reasonably sustainable for the average individual or entity that purchases the manufacturer's product for the use at issue, the manufacturer has a duty to warn of the perils of the economically necessary and foreseeable combined use of its product with the third-party product" (*id.* at 797).

Defendants' motion is denied, as the court cannot determine on this submission whether or not it would be proper to prevent plaintiffs from submitting evidence establishing a connection between defendants' products and the use of asbestos with third-party component parts. Neither plaintiffs nor defendants annex exhibits to their motion papers with respect to plaintiffs' potential claims at trial that that the use of asbestos by third-parties in conjunction with defendants' products

was reasonably foreseeable "as a matter of design, mechanics or economic necessity…to enable [defendants'] product[s] to function as intended" (*Dummitt*, *supra*, 27 NY3d at 793). In the absence of such evidence, the court cannot decide this issue. Concrete evidence that defendants may seek to exclude at trial cannot be substituted for mere conjecture. In the absence of concrete evidence that defendants seek to exclude at trial, the motion is denied.

COMPEL FILING OF PLAINTIFFS' PROOF OF CLAIMS OR TO FOREVER ENJOIN FILING CLAIMS WITH BANKRUPTCY TRUSTS

Defendants seek to compel plaintiff to file all possible proof of claim forms at the present time or produce all proofs of claim documents supporting or associated with those claims that are intended to be or already filed on the grounds that outstanding claims and potential recovery against other entities impact any potential verdict and recovery as to the defendants.

At oral argument on Wednesday March 29, 2017, plaintiffs represented that all possible proofs of claim had been filed in this action, and defendants had been apprised of any and all relevant information. Plaintiffs also represented that no additional proofs of claim would be filed. As such, defendants' application on this ground is moot.

MISCELLANEOUS APPLICATIONS

Defendants' remaining miscellaneous *in limine* applications were stipulated to on the record at oral argument on this motion on Wednesday March 29, 2017. To the extent that any of those applications remain outstanding, defendants may make the appropriate objections during the trial.

It is hereby

ORDERED that the motion *in limine* is decided as stated herein.

Dated April 5, 2017

HON. PETER H. MOULTON
J.S.C.