

Evans v 3M Co.

2017 NY Slip Op 30756(U)

April 14, 2017

Supreme Court, New York County

Docket Number: 190109/15

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

Plaintiffs,

-against-

Motion Sequence 10

3 M COMPANY a/k/a MINNESOTA MINING &
MANUFACTURING COMPANY, et al

Defendants

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PETER H. MOULTON, J.S.C:

This case involves Plaintiff Frederick Evans' alleged exposure to asbestos-containing dust from his work as an HVAC Heating-Install Mechanic from 1955-1959 servicing, removing and installing boilers. Mr. Evans alleges exposure to boiler insulation, asbestos rope, asbestos cement and asbestos gaskets.

Defendants submit a joint omnibus motion *in limine* to preclude, among other things, the causation opinions of Plaintiffs' experts' Dr. Carl Brodtkin, Dr. Arnold Brody and Dr. John Maddox. Alternatively, Defendants seek a *Frye* hearing. The sole defendant remaining in this action is Burnham LLC f/k/a Burnham Corporation (hereafter "Burnham")

or “Defendant”).¹ The separate motion by ECR International, Inc. (hereafter “ECR”), for the same relief (motion sequence 19), is now moot in light of a recent settlement. Because, as Plaintiffs explain, Dr. Brody’s testimony is related only to general causation (and not specific causation), this decision is addressed to the anticipated testimony of Dr. Brodtkin and Dr. Maddox.

Defendant’s Arguments

Defendant asserts that Plaintiffs’ causation experts will offer a scientifically unsupportable causation opinion based on a version of the theory that “each and every exposure” to asbestos was a substantial contributing factor to Mr. Evans’ disease. Without citing any scientific or medical evidence, Defendant contends that the “cumulative exposure theory” is not generally accepted in the field of asbestos-related diseases; is not based on any accepted scientific methodology; and is not supported by any controlled studies, testing or medical literature. Therefore, Plaintiffs’ theory can not comply with the *Frye* standard.

Defendant cites the standard in *Parker v. Mobil Corp.* that “[i]t is well-established 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 the plaintiff was exposed to sufficient levels of the toxin to cause illness (specific causation)” (7 NY3d 434, 448 [2006]). Defendant argues that even if Plaintiffs can establish general causation (that asbestos is capable of causing mesothelioma), Plaintiffs’ medical experts cannot establish

¹For purposes of convenience, I will refer to the arguments made in Defendants’ omnibus motion as Burnham’s arguments, even though Burnham’s counsel did not prepare the omnibus papers.

specific causation--that Mr. Evans was exposed to sufficient levels of asbestos from his work with or around each of the Defendants' products to have substantially contributed to causing his disease. This is, Defendant argues, because Plaintiffs' experts make no effort to evaluate the specific dose, length, or intensity of any of Mr. Evans' alleged exposures from any of the Defendants' products. Citing *Hamilton vs. Beretta U.S.A. Corp.* (96 NY2d 222 [2001]), Defendant notes that New York has rejected the theories of concert of action and market share liability in asbestos litigation because a plaintiff must prove his or her case against each defendant separately. Defendant asserts that Plaintiffs cannot use the "inverse approach" found invalid in *Parker v. Mobile Oil Corp.* (7 NY3d 434, *supra*) and *Sean R. v BMW of N. Am., LLC* (26 NY3d 801 [2016]). Defendant highlights that the Court in *Sean R.* stated that "[a]lthough it is sometimes difficult, if not impossible, to quantify a plaintiff's past exposure to a substance, we have not dispensed with the requirement that a causation expert in a toxic tort case show, through generally accepted methodologies, that a plaintiff was exposed to a sufficient amount of a toxin to have caused his injuries." (26 NY3d at 812, *supra*). Defendant also cites Justice Jaffe's decision in *Juni v. A.O. Smith Water Products Co.*, No. 190315/12 (Sup Ct, New York County April 13, 2015), which was affirmed by the First Department after submission of Defendants' omnibus brief (*Matter of New York City Asbestos Litig.*, 2017 Slip Op 01523 [1st Dept 2017]).

Plaintiffs' Arguments

Plaintiffs explain that they are not relying on an "each and every exposure" theory. Moreover, citing Dr. Brodtkin's 5/28/16 report at pages 1-24 and 47-48, Plaintiffs argue

that, contrary to Burnham's argument, Dr. Brodtkin performed a dose analysis considering the amount, duration and frequency of Mr. Evans' exposure (hereafter the "ADF"). Plaintiffs assert that Dr. Brodtkin estimated the number of asbestos-containing materials and equipment to which Mr. Evans was exposed and the concentrations of airborne asbestos from each of Mr. Evans' exposures. Dr. Brodtkin further notes in his report at page 51 that he relies upon "Epidemiological studies of HVAC/heating trades, boiler & related systems, machinery/mechanic repairmen & chrysotile-exposed workers indicate high risk for asbestos exposure and developments of mesothelioma (see attached reference-reliance list)." Thus, Plaintiffs observe that Dr. Brodtkin's opinions are based on Mr. Evans' medical records and asbestos exposure history, evidence of the exposure levels generated by Mr. Evans' work with asbestos-containing cables, HVAC and boiler associated products, his potential bystander exposure while in the U.S. Navy, and numerous scientific articles on his reliance list, as well as his knowledge, training, and experience.

Dr. Maddox, Plaintiffs explain, considers whether there was a real exposure (one that actually was sufficient to have been measurable, although it was not measured at the time, but can be determined by reference to the literature concerning the particular types of products). Plaintiffs explain that Dr. Maddox considers whether the exposures were repetitive, in order to build up dose, because exposures of higher concentration and of longer duration are probably more contributory than those of lesser concentration or duration. Plaintiffs point to federal district litigation where various courts accepted Dr. Maddox's testimony as satisfying the *Daubert* standard of admissibility.

Plaintiffs further maintain that Defendant misreads *Parker*. Plaintiffs highlight that the Court of Appeals in *Parker* stressed “[w]here we depart from the Appellate Division is that we find 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” (7 NY3d at 448, *supra*). Plaintiffs cite to cases in other jurisdictions which hold that precise quantification is not necessary. Plaintiffs note that the Court of Appeals in *Parker* held that “qualitative means could be used to express a plaintiff’s exposure” (*id.* at 449). Plaintiffs observe that the Court also relied upon, and to that extent incorporated, the Fourth Circuit’s understanding that evidence of exposure levels “is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert’s opinion on causation” (*id.* at 448). Plaintiffs assert that *Parker* implicitly envisioned asbestos litigation when it relied upon the Fourth Circuit decision which emphasized that humans are rarely exposed to chemicals in a manner that permits a quantitative determination and that exposure frequently occur in occupational settings where workers are exposed to industrial chemicals like lead or asbestos where it is usually difficult, if not impossible, to quantify the amount of exposure.

Plaintiffs further argue that Burnham seeks to have this Court reverse long-settled New York asbestos causation principles as articulated in the Appellate Division decisions *Penn v. Amchem*, 85 AD3d 475, 476 [1st Dept 2011]; *Wiegman v. A.C. & S, Inc.*, 24 AD3d 375 [1st Dept 2005]; and *Lustenring v. A.C. & S, Inc.*, 13 AD3d 69 [1st Dept 2004]). Those cases held, Plaintiffs observe, that causation can be established by expert testimony

that exposure to visible asbestos-containing dust for long periods of time is sufficient to cause asbestos related-cancer. Moreover, they add that a *Frye* or *Parker* hearing is unwarranted.

Oral Argument

Oral argument was held on April 5, 2017 with Plaintiffs and ECR, but that defendant has now settled with Plaintiffs. Defendant Burnham did not appear because Burnham rested on Defendants' omnibus motion. At oral argument, Plaintiffs clarified that they are not relying on a cumulative exposure theory in order to prove special causation. Rather, Plaintiffs explained that they will rely on cumulative exposure on the issue of general causation (i.e., that all of the cumulative exposures lead to a increased cancer risk). However, for specific causation, they reiterated that will rely on Dr. Brodkin's opinion assessing the ADF, and that Dr. Brodkin will rely on reported studies, including, as indicated in his report "Epidemiologic studies of HVAC/heating trades, boiler & related systems, machinery/mechanic repairmen."

Discussion

Defendant's motion *in limine* to preclude plaintiffs' causation experts is denied. Dr. Brodkin's 66-page report establishes a sufficient basis, at this juncture, for his anticipated opinion at trial that Burnham products were a substantial factor in causing Mr. Evans' disease. Defendant failed to demonstrate that Dr. Brodkin's opinion is insufficient in light of Dr. Brodkin's quantification of the ADF of exposure for boilers and boiler products. To establish frequency and duration, Dr. Brodkin specifies the percentages of time that Mr. Evans spent at Vulcan installing, servicing and repairing jacketed and un-jacketed boilers between 1955-1959 (*see* Occupational & Environmental History section of report at pages

5, 13-15). Dr. Brodtkin also notes that Mr. Evans cut asbestos rope to fit between boiler sections, front doors, burner parts, flue hoods and pressing asbestos rope generated visible dust (*id.* at 15). He further notes that “Mr. Evans mixed ‘asbestos powder’. . . generating dusty conditions/breathed (then applied by putty knife) ~3-4 hrs” (*id.* at 16). To establish the dose, Dr. Brodtkin’s report discusses the anticipated fibers per cubic centimeter of certain types of activities which would result in significant asbestos exposure (e.g., high volume boiler work, asbestos rope cutting, insulation cement and insulation removal (*see* Diagnosis & Assessment section of report at page 3). Thus, he opines that Mr. Evans sustained “~3.5 years cumulative asbestos exposure during installation/removal of hot boiler systems” and lists the ranges of exposure for each type of exposure that Mr. Evans testified enduring (*id.*), which he considered to be “strong epidemiologic evidence for asbestos-related meso” (*id.* at 4). The report also indicates that Dr. Brodtkin’s opinions are based on epidemiologic studies of HVAC/heating trades and boiler related systems.

While Plaintiffs anticipate that Dr. Maddox’s opinion will consider whether Mr. Evans’ exposures were repetitive and will refer to the literature concerning the particular types of products, his report does not reflect this position. However, Dr. Brodtkin’s report considers the ADF of Mr. Evans’ exposures, and is sufficient at this juncture. Moreover, Dr. Brodtkin and Dr. Maddox will presumably expand on their reports. Notably, even in *Juni v. A.O. Smith Water Products Co.*, *supra*, Judge Barbara Jaffe reserved decision on Ford’s motion to preclude the plaintiffs’ expert testimony until after verdict. Here, the trial has not even commenced.

Neither the Appellate Division, First Department decision (hereafter the “*Juni* Court”), nor the cited Court of Appeals’ precedent, compel a different result. The *Juni*

Court held that “[t]he evidence presented by plaintiff here was insufficient because it failed to establish that the decedent's mesothelioma was a result of his exposure to a sufficient quantity of asbestos in friction products sold or distributed by defendant Ford Motor Company” (*Matter of New York City Asbestos Litig*, 2017 Slip Op 01523 at 5, *supra*).² Those products were brakes, clutches and manifold gaskets in Ford vehicles. As the *Juni* Court noted, rulings concerning specific causation “are based on their discrete facts” (*id.* at 9). Not only was the product at issue significant there, but so too were “the concessions made by both of plaintiff's experts” regarding the product, which “undermined their assertions of causation as to render those assertions groundless or unsupported” (*id.* at 5). Thus, the *Juni* Court noted that “Dr. Moline's testimony that the visibility of the dust itself indicates the magnitude of the exposure ‘at levels that are . . . capable of causing disease’ was undermined when she conceded that studies have shown that more than 99% of the debris from brake wear is not comprised of asbestos fibers” (*id.* at 6). In addition, Dr. Moline acknowledged that “most chrysotile fibers in brake pads undergo a transformation during the braking process, and she did not know whether the fibers from the brake debris to which Juni was exposed were still active” (*id.*). The *Juni* Court also noted that plaintiff's other witness, Dr. Steven Markowitz, “acknowledged that 21 of 22 epidemiological studies that addressed asbestos exposure to mechanics working on friction products found no increased risk of mesothelioma”; his concession that “when asbestos fibers in braking equipment are mixed with certain resins during manufacturing, ‘they would not be respirable’”; and his concession that “the high heat generated within the brake drums when the brakes are applied converts most of the asbestos in the brake lining to another mineral

²The majority was composed of three judges, with Justice Paul Feinman dissenting.

known as forsterite” (*id.* at 7).

As this action does not involve friction products which degrade when used, *Matter of New York City Asbestos Litig.* (2017 Slip Op 01523, *supra*) is not applicable. Notably, the *Juni* Court did not criticize or question the holdings in *Lustenring v AC & S, Inc.* (13 AD3d 69, *supra*), *Penn v Amchem* (85 AD3d 475, *supra*) and *Matter of New York City Asbestos Litig.* (28 AD3d 255, *supra*).³ The *Juni* Court stated that while the mere presence of visible dust alone is insufficient to prove causation, the evidence in those cases that “plaintiffs worked all day for long periods in clouds of dust” and expert testimony stating the dust “necessarily contained enough asbestos to cause mesothelioma” was sufficient to support the jury verdicts. On the other hand the *Juni* Court found that the evidence of “plaintiff’s expert as to the contents of the dust to which the decedent was exposed was equivocal at best” (2017 Slip Op 01523 at 9, *supra*).

Moreover, the *Juni* Court was critical of the cumulative exposure theory “at least in the manner proposed by plaintiffs” because it was irreconcilable with the requirement of some quantification or means of assessing the ADF (*id.* at 10). Here, Dr. Brodkin’s report considers an ADF analysis.

³Recently, the First Department cited to both *Penn v Amchem* (85 AD3d 475, *supra*) and *Lustenring v AC & S, Inc.*, 13 AD3d 69, *supra*, and upheld jury verdicts based on a plaintiff’s testimony of regular exposure to asbestos dust and, expert testimony that such exposure was the proximate cause of a plaintiff’s mesothelioma (*see Matter of New York City Asbestos Litig.*, 143 AD3d 483 [1st Dept 2016] [plaintiff electrician worked on installing, renovating and demolishing boilers, asbestos-containing insulation and mixing asbestos concrete powder]; *Matter of New York City Asbestos Litig.*, 143 AD3d 485 [1st Dept 2016] [plaintiff mechanic and electrician worked on removing asbestos-containing insulation from valves and mixing asbestos insulation cement]).

None of the cited Court of Appeals cases (which did not involve claims of injury from respirable asbestos) provide a basis for jettisoning *Lustenring* and its progeny from asbestos litigation. *Parker* itself noted that a plaintiff need not quantify exposure levels precisely (or use a dose-response relationship). Indeed, it is worth noting that *Parker* relied upon *Westberry v Gislaved Gummi AB* (178 F3d 257 [4th Cir 1999]), a case which allowed expert testimony demonstrating that a plaintiff contracted sinus disease from airborne talc based on a qualitative, not quantitative, analysis. As *Parker* acknowledges “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). Factors such as the intensity of the exposure may be more important than the cumulative dose, and plaintiff’s work history can be considered in order to estimate the exposure (*id.* at 449).⁴

Further, while the experts in *Parker* and *Sean R.* were precluded from testifying, it is important to note that in those cases, the product at issue - - gasoline - - was a product that was still on the market and therefore, capable of being tested.⁵ Thus, *Parker* was not presented with the situation that concerned it - - where it is “inappropriate to set an

⁴There was evidence in *Parker* that the benzene concentration in gasoline was 2%, but studies indicated that concentrations of 2% to 3% did not show an additional risk for plaintiff’s disease (*id.* at 443, 450).

⁵*Cornell v 360 West 51st Street Realty LLC* (22 NY3d 762 [1st Dept 2014]) provides less support for defendants because in that case the plaintiff also failed to prove general causation and defendant submitted evidence that the scientific community did not accept that mold causes the alleged symptoms, which were common in the general population. Nor did the expert even identify the specific disease causing agent.

insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court” (7 NY3d at 447). Defendant’s emphasis on quantification, and their complaints that Plaintiffs’ experts do not quantify asbestos release by sampling, collecting, and evaluating the air ignores the reality that the asbestos-containing product at issue (unlike in *Parker*) is almost always no longer on the market or otherwise available, and therefore, is not capable of being tested.⁶

To read *Parker* in the way defendants suggest would forestall recovery in nearly all asbestos cases. Justice Judith Gische explained it well in *Kersten v. A.O. Smith Water Prods. Co.*, Index No. 190129/10 [Sup. Ct., NY County 2011]). Justice Gische noted that “in connection with asbestos exposure cases that the courts have acknowledged that in this type of litigation, precisely numerically quantifying exposure, is extremely difficult if not virtually impossible.” She further noted that if defendant’s reading of *Parker* was correct “it would be the death knell to asbestos exposure litigation because the standards that the defendants are seeking to impose would create an insurmountable standard that would deprive these toxic tort litigants of their day in court . . . [which] was one of the dangers that the *Parker* court was very aware of when it issued its decision.”⁷

⁶Additionally, in *Parker*, *Sean R.* and *Cornell* there were potential natural causes of plaintiff’s ailments. Here, however, exposure to respirable asbestos has long been considered the signature cause of mesothelioma.

⁷Whether the standard articulated in *Lustering* and its progeny is the correct test for proving causation in asbestos cases might be resolved by the Court of Appeals. The difficulties in proving causation in toxic tort cases have lead many jurisdictions to create different tests (*see, e.g.*, Comment: A Dose of Reality: The Struggle with Causation in Toxic Tort Litigation, 51 Hous. L. Rev. 1147 [2014]). In asbestos cases, the difficulties are compounded, as noted by Justice Paul Feinman in his dissent, because “mesothelioma takes decades to manifest, and the victim is generally long retired from the workplace

A *Frye* hearing is not warranted (*see Lustenring*, 13 AD3d at 69, *supra* [“[d]efendant's factual disagreement with plaintiffs’ causation theory did not require a *Frye* hearing”]).

It is hereby

ORDERED that Defendant’s omnibus motion *in limine* is denied.

Dated: April 14, 2017


HON. PETER H. MOULTON
SUPREME COURT JUSTICE

J.S.C

where exposure occurred. Witnesses have died. Work sites very often no longer exist, and when operational, most did not monitor and make records of air quality. The subject materials or products containing asbestos are no longer in existence and cannot be tested” (*Matter of New York City Asbestos Litig*, 2017 Slip Op 01523 at 39-40, *supra*). If the Court of Appeals hears this issue, it might also consider whether mesothelioma is a disease where causation is not capable of practicable division. If that is the case, the Court of Appeals may fashion a different test because negligent tort-feasors, who neither act in concert nor concurrently, may be jointly and severally liable if the injury by its nature is incapable of practicable division among those multiple tort-feasors (*see e.g., Ravo v Rogatnick* (70 NY2d 305 [1987])).