Matter of New York City Asbestos Litig.
2017 NY Slip Op 30005(U)
January 4, 2017
Supreme Court, New York County
Docket Number: 190034/15
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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GERALDINE ANDREWS, as Executrix for the Estate of WALTER ANDREWS, and GERALDINE ANDREWS, individually

Plaintiffs,

-against-

DECISION & ORDER

A. O. SMITH WATER PRODUCTS, et al

Defendants

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PETER H. MOULTON, J.S.C:

This case involves Plaintiff Walter Andrews' alleged exposure to asbestos-containing dust from, *inter alia*, his work 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) plaintiffs' "day in the life" video; (2) plaintiffs' experts Dr. Moline's and Dr. Fleider's causation opinions; (3) submission of regulatory materials and public health pronouncements; (4) plaintiffs' state-of-the-art witnesses' opinions regarding defendants' knowledge of asbestos dangers; and (5) submission of evidence concerning the knowledge of trade associations imputed to their members. Additionally, in order to demonstrate the culpability of other corporations, defendants request permission to use

Article 16 evidence (interrogatories from settled defendants in this action and depositions of asbestos defendants from other cases). This decision will not address plaintiffs' day in the life video because the parties are currently attempting to resolve that issue. Additionally, the decision will not address preclusion of Dr. Fleider's causation opinion because at oral argument the parties noted that Dr. Fleider will not testify.

Preclusion of Dr. Moline's Causation Opinion

Defendants assert that Dr. Moline will offer a scientifically unsupportable causation opinion that the effect of every occupational exposure – regardless of the fiber type, friability, and dose – is a substantial factor in contributing to the causation of plaintiff's mesothelioma.[1] Defendants maintain that Dr. Moline will testify that every breath that Mr. Andrews ever took in an environment that had a level of asbestos above background, increased plaintiff's risk of developing mesothelioma. Defendants contend that this approach is known as the "single fiber", "any exposure", "cumulative exposure" or "each and every exposure" theory.[2]

Defendants further argue that Dr. Moline uses the same "inverse approach" found invalid in *Parker v. Mobile Oil Corp.*, 7 N.Y.3d 434 [2006]) and *Sean R. ex rel. Debra R.*

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[1]Defendants reference two papers from Dr. David Eaton, Ph.D., a toxicologist and Professor of Environmental and Occupational Health Sciences at the University of Washington. The papers focus on the relationship between dose and effect as the hallmark of basic toxicology.

[2]It is important to note at the outset that defendants mischaracterize plaintiffs' theory. The cumulative exposure theory and the each and every exposure theory are different. Plaintiffs' expert will testify on causation considering the cumulative exposure of each and every exposure.

v. BMW of North America, LLC (26 N.Y.3d 801 [2016]). That approach, defendants assert, is not a surrogate for an established scientific methodology which takes into account the quantity and quality of exposure, nor is it a surrogate for an opinion based on epidemiological studies or the scientific literature relative to a defendant's product. Defendants maintain that under *Parker*, a medical causation opinion should establish, for each defendant, (1) whether Mr. Andrews was exposed to asbestos from that defendant's product; (2) whether the type of asbestos used in connection with that defendant's product was capable of causing his disease; and (3) whether Mr. Andrews was exposed to a sufficient level of asbestos in conjunction with that defendant's product to cause Mr. Andrews' disease.[3] Defendants stress that *Cornell v. 360 W. 51st St. Realty, LLC* (22 N.Y.3d 762 [2014]), which reaffirmed *Parker*, required that experts offer some evidence of offending dosage levels to establish causation. While acknowledging that *Parker* does not require a "precise quantification," defendants note that *Parker* did not "dispense with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect" (*id.* at 784). Defendants cite to cases around that country which have rejected the "every exposure" theory as either unscientific under a *Frye* or *Daubert* analysis, or insufficient for a causation finding.

Defendants also maintain that as a medical doctor, Dr. Moline is not qualified to opine on causation because she lacks the expertise to provide estimates, opinions, or scientific expression regarding the actual (or predicted) "exposure" from any particular product. Defendants contend that plaintiff has not retained any expert with expertise in

[3]It is the third prong however, which is at issue in all asbestos cases – i.e., proving specific causation.

industrial hygiene, toxicology, mineralogy, air sampling, or asbestos-containing products. They cite Dr. Moline's testimony in another case where she stated that the only way to quantify the amount of any particular agent in the air is to sample, collect, and evaluate the air using a type of microscope. Alternatively, defendants request that this Court hold a *Frye* hearing.

Plaintiffs counter that plaintiff's deposition testimony and the anticipated testimony of Dr. Jacqueline Moline raise issues of causation for the jury. Plaintiffs note that defendants seek 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]). Plaintiffs assert that these cases hold that an expert's testimony that exposure to visible asbestos-containing dust is sufficient to cause asbestos related-cancer, is sufficient to support a jury's finding of causation. The First Department has consistently so ruled, plaintiffs argue, because there is a firmly settled scientific foundation conclusively establishing that chrysotile asbestos dust causes cancer, and that exposure to such dust at a concentration that renders it visible is capable of causing disease, particularly mesothelioma. Plaintiffs note that no case in NYCAL has adopted defendants' argument except *Juni v. A.O. Smith Water Products Co.*, 48 Misc.3d 460 [Sup Ct, New York County 2015]).

Plaintiffs further explain that they are not relying on an "each and every exposure" theory. Plaintiffs assert that consistent with her reports and the overwhelming scientific consensus, Dr. Moline will testify that Mr. Andrews' cumulative exposures to visible

asbestos-containing dust, as a result of work performed on defendants' products, was a substantial contributing factor in the development of plaintiff's mesothelioma, as his levels of occupational exposure were far greater than required to contribute to the disease.[4] She will explain to the jury that her causation opinion is based on her education, training, experience, and review of the medical and scientific literature.

Plaintiffs also note that Dr. Moline may also rely on such medical/scientific literature as the consensus statements from major international asbestos conferences and medical organizations (e.g., Helsinki I and II), publically available and peer-reviewed medical and scientific literature, based on research conducted on asbestos and on the particular products at issue here (which plaintiffs assert will show that even far lower exposure levels than those that occurred are capable of causing mesothelioma). Plaintiffs state that Dr. Moline may rely on the position statements and scientific findings of various national and international regulatory agencies and scientific bodies, including, but not limited to: the American Cancer Society, World Health Organization, Environmental Protection Agency, World Trade Organization, National Institute For Occupational Safety and Health, US Dept. of Labor, Occupational Safety and Health Administration, US Surgeon General, National Academy of Sciences, US Consumer Products Safety Commission, International Labor Organization, International Agency for Research of Cancer, National Cancer Institute, American Industrial Hygiene Association, United States

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[4]Plaintiffs point to Dr. Moline's conclusion "to a reasonable degree of medical certainty, that Mr. Andrews's malignant mesothelioma was a result of his cumulative exposures to asbestos that began nearly 50 years before he was diagnosed with the tumor" and further, "that the cumulative exposure to each company's asbestos product or products and asbestos containing equipment, was a substantial contributing factor in the development of Mr. Andrews's malignant mesothelioma."

Congress, and the National Toxicology Program.

Plaintiffs further argues that no *Frye* or *Parker* hearing is warranted because defendants' entire argument actually boils down to the unremarkable assertion that plaintiff will have to convince a jury of causation at trial - and not that plaintiffs' causation theory is novel.

Defendants motion *in limine* to preclude Dr. Moline's testimony is denied. Notably very recently, the First Department cited to both *Penn* v *Amchem* (85 AD3d 475 [1st Dept 2011]*)* 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]).

At oral argument, defendants did not attempt to distinguish *Lustenring*, 13 AD3d 69, *supra*, and its progeny. Because those cases cannot be distinguished, defendants finally clarified their true position – that they believe First Department cases are incorrectly decided in light of *Parker*, *Sean R.*, and *Cornell.* However, contrary to defendants' argument, these Court of Appeals cases (which did not involve claims of injury from respirable asbestos) do not 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).

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] Defendants' emphasis on quantification, and their complaints that Dr. Moline (or other experts) do not quantify asbestos release by sampling, collecting, and evaluating the air ignores the reality that the asbestos-containing product at issue is almost always no longer on the market or otherwise available, and therefore, is not capable of being tested.[6] Thus, *Parker* was not presented

[5]*Cornell* 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 symptoms alleged by plaintiff, which were common in the general population. Nor did the expert even identify the specific disease causing agent.

[6]Additionally, in *Parker, Sean R.* and *Cornell* there were potential natural causes of plaintiff's ailments. Here, however, exposure to respirable asbestos has long been

with the situation that concerned the Court – where it is "inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court" (7 NY3d at 447).[7]

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."

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"]).

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considered the signature cause of mesothelioma.

[7]Defendants do not explain what "alternative potentially acceptable ways" exist to demonstrate specific causation, where the products at issue is no longer available and where the frequency of the exposure is based on plaintiff's recollection of encounters with products decades ago.

Preclusion of Regulatory Materials and Public Health Announcements

Defendants cite *Parker*, where the Court stated that "standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate causation" (7 N.Y.3d at 540).[8] Defendants assert that pronouncements and publications from various regulatory and public health agencies or organizations in the U.S. and abroad are irrelevant to causation where the regulatory and public health agencies act in a broad preventative role in promulgating regulations. The standard of scientific proof used by OSHA, EPA, and other regulatory entities to enact regulations, defendants argue, is below the legal standard required to establish causation in court actions. Defendants point to OSHA's statement in its 1986 asbestos regulation, where it stated that "the Agency's determination that a particular level of risk is 'significant' will be based largely on policy considerations .... OSHA is not required to support the finding that a significant risk exists with anything approaching scientific certainty." 51 Fed. Reg. 22,612 at 22,646 (*citing Industrial Union Dep't.*, 448 U.S. 607). Thus, admission of this evidence would mislead the jury and prejudice defendants because the jury is likely to give such "official" governmental and quasi-governmental pronouncements undue weight.

Further, defendants assert that many of the pronouncements are based on outdated science which does not account for significant additional research over the past 20 years that has established clear differences between the potential of chrysotile and amphiboles to

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[8]Defendants do not address whether the materials would be admissible to prove notice.

cause mesothelioma. For example, plaintiffs and their experts typically rely heavily on pronouncements made by OSHA and the EPA in 1986 that treat all types of asbestos as equally capable of causing mesothelioma. However, defendants assert that the epidemiological evidence that has developed over the ensuing 20 years has clearly established dramatic differences in the potencies of chrysotile and amphiboles. Morever, the 1986 pronouncements of OSHA and EPA reflect opinions, investigation, and work product of private third parties and are not based on studies conducted by the agencies themselves and, because of their precautionary purpose, cannot offer reliable and trustworthy scientific conclusions regarding the potential, if any, of chrysotile to cause mesothelioma.

Additionally, defendants argue that the materials are hearsay for which there is no exception. Defendants add that the public records exception of CPLR 4520 does not apply because none of the documents were prepared by government officials "pursuant to duty imposed by law as to which matters there was a duty to report" and they are not "trustworthy." Additionally many of the materials were prepared by non-governmental international organizations like IARC, the WHO, the WTO or the IPSC, defendants add.

Defendants further stress that plaintiffs should not be allowed to use the expert witnesses to introduce regulatory and public health pronouncements regarding asbestos through a back door. While experts are allowed to rely on inadmissible hearsay in reaching their opinions under CPLR 4515, defendants argue that the jury should not hear

inadmissible information used as the basis for an expert's opinion. Defendants cites *Hambsch v. New York City Tr. Auth.*, 63 N.Y.2d 723 [1984]). Further, New York law requires that the facts or data upon which an expert purports must be of a type reasonably relied upon by experts in the particular field.

In opposition, plaintiffs argue that defendants' request is overly sweeping and premature. Plaintiffs maintain that the materials and pronouncements which defendants attempt to have the Court exclude are regularly admitted in asbestos-related cases because they are relied upon by plaintiffs' expert witnesses and bear undeniable indicia of trustworthiness. Plaintiffs cite one example where the Consumer Product Safety Commission, a federal regulatory agency operating under a Congressional legislative duty to issue regulations and related documents, issued a ban on asbestos-containing consumer spackling products. Plaintiffs assert that regulating asbestos released from consumer products falls under the legitimate authority and area of competence of that Commission, whose mission is to protect the public against unreasonable risks of injury or death from consumer products through regulatory standards and the findings are trustworthy. Thus, plaintiffs' experts opinion that the asbestos in defendants' product(s) was dangerous to consumers is perfectly in line with the general consensus of the medical and scientific community – as reflected in the very regulatory and public health pronouncements. Plaintiffs cite federal court cases and one New Jersey case that ruled that the Commission's ban on consumer spackling products containing asbestos was admissible. Plaintiffs

complain that defendants' own experts rely on OSHA regulations as a basis for their opinions. Plaintiffs add that regulatory materials and public health pronouncements should be admitted as relevant state-of-the-art documents since the origins of asbestos litigation.

Plaintiffs also address *Parker's* statement that "standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate causation" (7 NY3d at 540). Plaintiffs point to defendants' conflation of research and standards and maintain that 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 organization[s] (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 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 by January 17, 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. Despite plaintiffs' meandering arguments, it appears that plaintiffs acknowledge that the standards promulgated by regulatory agencies as protective measures are inadmissible to demonstrate causation. The Court agrees, however, that 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 also not demonstrated that the material 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).

Preclusion of Plaintiffs' State-Of The-Art Witness Testimony and Documents Regarding Knowledge Of Asbestos Hazards

Defendants seek to preclude plaintiffs various "state-of-the-art" witnesses who will testify regarding the defendants' alleged knowledge of the alleged hazards of asbestos and levels at which asbestos may produce diseases. Defendants maintain that these witnesses can best be characterized as librarians of assorted, carefully selected articles and

documents from various sources, including plaintiffs' counsel. The witnesses opinions and supporting exhibits, defendants assert, must be precluded as irrelevant to what the particular defendants in this action, or other manufacturers knew, and would mislead the jury. Alternatively, defendants seek to limit the testimony and exhibits to the knowledge of the hazards of asbestos held before or at the time of Mr. Andrew's alleged use of each specific Defendant's product and no later, because the knowledge of the hazards at a later date is irrelevant to a duty to warn owed at an earlier date.

Defendants argue that evidence regarding the "hazards of asbestos" and the epidemiological relationship between asbestos and disease development is irrelevant because the epidemiology, the mode of action, and particularly the harmful dose of asbestos fibers are markedly different for mesothelioma versus asbestosis. Thus, defendants argue that information about risks of asbestosis from high levels of exposure in asbestos miners or millers provides the jury with no relevant information whatsoever about what might have been known or knowable about risks to end-users like Mr. Andrews, whose claims relate to products or equipment alleged to have contained asbestos as an ingredient or part of a component. Therefore, defendants assert that plaintiffs' counsel should not be permitted to present a general account of the state-of-the-art and should limit their statements to the alleged knowledge with respect to mesothelioma and asbestos exposure.

Defendants further claim that plaintiffs' state-of-the-art witnesses are not qualified

to provide expert testimony regarding particular products or equipment, and/or any defendant's knowledge of the dangers of asbestos or levels at which asbestos exposure will cause disease. According to defendants, plaintiff state-of-the-art witnesses do not hold the requisite degrees and they have not had the "long observation and actual experience" required under *Price v. NYC Housing Auth.*, (92 NY2d 553, 559 [1988]). Defendants note that none of the state-of-the-art witnesses are medical doctors, toxicologists, mineralogists, epidemiologists, or industrial hygienists. Defendants stress that none has published any books or articles specifically about or has any formal education or training in asbestos and/or asbestos related diseases. Therefore, defendants assert that those witnesses lack the requisite skills, education, knowledge and experience to offer a conclusion regarding what the defendants knew or should have known. Moreover, defendants assert that recitation of literature constitutes inadmissible hearsay without an exception to the hearsay rule. Additionally, defendants argue that the testimony intrudes on the jury's duty to draw its own conclusions. The testimony must help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror, and the state-of-the-art witnesses are not more qualified than a layperson to understand documents that speak for themselves. Additionally, plaintiffs have not shown that defendants received or reviewed the relevant documents.

Plaintiffs counter that their state-of-art witnesses Drs. Castleman, Rosner, and Markowitz, by virtue of their education, training, and decades of study on the subject of the

history of science as it relates to public health, are highly qualified to address asbestos "state-of-the-art." Plaintiffs assert that Dr. Castleman has received extensive formal training in environmental engineering and public health, requiring him to familiarize himself with various methods of scientific research. Therefore, plaintiffs argue that he is highly qualified to identify and discuss the medical, scientific, and other published literature on asbestos and asbestos-related disease. Drs. Rosner and Markowitz, plaintiffs assert, are historians who have been professional collaborators for almost the entirety of their professional and academic careers and have not only written extensively on subjects such as the history of knowledge regarding the hazards of silica exposure, but have won professional accolades for their work.

Plaintiffs maintain that Drs. Castleman, Rosner, and Markowitz's review and analysis of the historic literature regarding the hazards of asbestos and their respective opinions as to when it was known, and therefore also knowable, that exposure to asbestos was hazardous, will assist the trier-of-fact in determining a key issue in these cases. Plaintiffs assert that Drs. Castleman, Rosner, and Markowitz have respectively reviewed thousands of published articles and studies evidencing the extent of knowledge of the hazards from before the turn of the 20th century through the 1970s. Plaintiffs assert the witnesses will present this complex medical and scientific historical information, which spans almost century, in a concise and understandable manner. In addition, plaintiffs note, defendants will have their opportunity to challenge the basis for Drs. Castleman, Rosner,

and Markowitz's opinions.

Pursuant to the New York Pattern Jury Instruction 1:190, it is the jury's responsibility to weigh the defendants' arguments as to the strength or weakness of the expert's opinion. Plaintiffs state they expect to show at trial that beginning in the late 1890s, numerous articles began to appear in medical, scientific, technical and trade publications, journals and texts which discussed the hazards of exposure to asbestos dust. Plaintiffs contend that the defendants, charged with the duty of keeping abreast of scientific and technical knowledge relating to the safety of their products, were (or should have been) alerted by these articles to the hazards posed by their products. Drs. Barry Castleman, David Rosner, and/or Gerald Markowitz will testify as to the existence and availability of the literature, and to discuss it as it relates to the state of knowledge of the hazards of asbestos, i.e. notice: what was known and, therefore, knowable.

Plaintiffs reject defendants' contention that only physicians or other health professionals are qualified to discuss what information was publicly available regarding the hazards of asbestos, and note that trial judges in NYCAL have repeatedly allowed their testimony. Because Drs. Castleman, Rosner, and Markowitz are trained as social scientists in the field of public health who have devoted decades to the scientific, historical study of the development of health hazards and public health, plaintiffs assert that they possess specialized knowledge that will assist the trier of fact. To suggest that Drs. Castleman, Rosner, and Markowitz have no more than a lay person's knowledge of the history of

knowledge of the hazards of industry is to deny that the historical study of public health is a scientific discipline.

Furthermore, plaintiffs assert that it would be improper to limit the testimony and exhibits to the knowledge of the hazards of asbestos held before or at the time of plaintiff's exposures because defendants' knowledge of the hazards at a later date is relevant to (1) recklessness and (2) breach of a continuing duty to warn.

Defendants' motion *in limine* to preclude plaintiffs various "state-of-the-art" witnesses is denied. The witnesses have specialized knowledge which may assist the trier of fact. The witnesses have already digested decades of work in the field, and the jury is free to accept or disregard their testimony. The witnesses have testified in numerous NYCAL cases. While defendants suggest that general testimony regarding the knowledge of the dangers of asbestos will mislead the jury, the jury will be properly instructed that they must determine that to breach the duty to warn, the particular defendant at issue must have known or should have known of the dangers. While it is true that there are differences in the toxicity of the various types of asbestos, defendants are free to submit such evidence for the jury's consideration. Further, contrary to defendants' argument, plaintiffs need not show that defendants received or reviewed the documents at issue because defendants can be held liable for a failure to warn not only if they actually knew of the dangers but if they should have known of them. Additionally it would be improper to limit the testimony and exhibits to the knowledge of the hazards of asbestos held before or

at the time of plaintiff's exposures because defendants' knowledge of the hazards at a later date is relevant to recklessness and a breach of a continuing duty to warn.

Actions or Knowledge of a Trade Association Imputed to its Members

Defendants maintain that in order for information published by a trade association to be admitted to support a finding that a defendant knew or should have known about asbestos health hazards, the trade association has to be a trade association to which the defendant belonged, and there must be some proof the defendant received the subject information. Defendants maintain that plaintiffs must show that the documents are authentic; that the individuals listed within those documents are associated with defendants or provided the documents or information to defendants; that defendants had actual or constructive knowledge of the documents; and citing *Loschiavo v. Port Auth. of N.Y.*, 58 NY2d 1040 [1983]), that the information was received by an individual in his or her capacity as an agent or officer of his or her employer. A member of a group, defendants argue, should not be held guilty by association. Furthermore, citing various federal court cases (one involving an asbestos product liability conspiracy claim), defendants assert that the general rule is that a member of an association is not liable for the association's wrongful acts unless the member participated in, approved, or had knowledge of the bad conduct.

Defendants conclude that plaintiffs should be precluded from imputing trade

association actions and knowledge to defendants because that evidence is irrelevant, inadmissible, prejudicial, and because a trade association's knowledge does not give rise to the inference that a defendant knew, or should have known, that same knowledge.

In opposition, plaintiffs assert that the motion is premature. In any event, plaintiffs assert that such evidence is relevant and admissible to prove what defendant should have known, either by conducting its own tests or by being in contact with others in the industry. The evidence is not hearsay, plaintiffs assert, because the evidence is used to prove notice - -i.e., not what defendants actually knew, but what defendants should have known.

The motion *in limine* to preclude plaintiffs from submitting evidence regarding actions and knowledge of trade associations in order to impute knowledge to defendants is denied. In support of its arguments, defendants creatively attempt to use the hearsay exception regarding speaking authority (i.e., the admissibility of an agent's hearsay statement against his employer as an exception to hearsay when made within the scope of the agent's authority). However, the issue is not about speaking authority or an exception to the hearsay rule but rather, non-hearsay – i.e., what defendants should have known. Defendants incorrectly assert that there must be some proof the defendant actually received the subject information. Rather, a finding of liability may be based not only on what defendants knew but what they should have known. Potential evidence concerning the knowledge of trade associations is not irrelevant or prejudicial. It may be considered, along with other evidence, as a basis for a jury's finding on whether defendants breached a

duty to warn. Such admissibility and relevance is exemplified by the Court of Appeals' recent discussion regarding the reasons for upholding a jury verdict in *Matter of New York City Asbestos Litig* (27 NY3d 765 [2016]). There, the Court of Appeals pointed to trial evidence concerning trade associations' knowledge and noted that "starting in the 1930s, certain trade associations, including associations to which Crane executives and employees belonged, issued publications describing the hazards of exposure to dust from asbestos-based products. In the late 1960s, one such trade group published an article summarizing the growing evidence of a connection between asbestos exposure and a type of cancer called mesothelioma" (*id.* at 780). Accordingly, defendants arguments are misplaced.

Materials That Defendants Seek to Offer for Article 16 Purposes

In order to demonstrate the culpability of other corporations and entities for purposes of Article 16 of the CPLR, defendants request permission to use answers to interrogatories, and corporate representative depositions, from settled defendants and bankrupt defendants. Defendants seek to admit such interrogatories and depositions to convince the jury to allocate fault to these non-party entities, thereby reducing any allocation of fault to defendants still in the case at the time of verdict.

Defendants rely on CPLR 3117 which governs the use of depositions, and states in relevant part in subsection (a)(2):

(a) ... At the trial ...any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

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(2) the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence.

Defendants further argue that the interrogatory answers of entities that are not in the case at the time of verdict would come in via CPLR 3131 which provides that "answers [to interrogatories] may be used to the same extent as the depositions of a party."

Defendants also rely on the Case Management Order ("CMO") which provides in section XII(A) that "parties may utilize depositions taken in other state and federal jurisdictions and cases where a party or predecessor or successor in interest had notice and opportunity to attend and participate as provided in CPLR 3117." Defendants admit that the term "predecessor in interest" is not defined the CMO.

Defendants assert that plaintiffs routinely use such material where parties are still in the case, which demonstrates the reliability of the material. The material is admissible, defendants argue, because it constitutes the admissions of adverse settled parties.

Plaintiffs point out that cross-claims against settled defendants are extinguished when the settlement is finalized and that defendants are barred from the Bankruptcy Code from asserting cross-claims against bankrupt defendants. Therefore defendants are not "adversely interested" in relation to such settled or bankrupt defendants. Plaintiffs further

argue that defendants' standard form interrogatories, submitted pursuant to the NYCAL CMO, are often self serving and have not been tested by cross-examination. The corporate representative depositions of bankrupt and settled entities are similarly infirm, plaintiffs argue, because such depositions were not taken by the plaintiffs in this case, and therefore these named plaintiffs' interests were not represented at the deposition.

Defendants motion is denied. While defendants would have a stronger argument under the Federal Rules of Evidence for the admission of this material, CPLR 3117(a)(2) does not extend to the interrogatory answers or corporate representative depositions of defendants who have settled or who have gone bankrupt. First, the depositions and interrogatory answers were not taken of these entities when they were parties to this action. (*see, e.g., Matter of New York City Asbestos Litigation (Assenzio)*, 2015 WL 667907 at 32.) Moreover, the moving defendants, who are the proponents of this material, are not adversely interested with respect to the proposed Article 16 entities because all claims by co-defendants against the bankrupt or settled defendants have been extinguished. Finally, the CMO section cited by plaintiffs incorporates by reference CPLR 3117, so it affords no broader admissibility to the material in question than is provided in the CPLR.

It is hereby

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

Dated: January 4, 2017

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