

**SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT**

In Re Eighth Judicial District Asbestos Litigation

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

**RONALD C. BREIDENSTEIN and
RUTH E. BREIDENSTEIN, his spouse,**

Plaintiffs

vs.

Index No. I 2004-11581

**ALLIEDSIGNAL,INC., Individually and as successor
in interest to ALLIED CORPORATION , as
sucursal in interest to the Bendix Corporation,
GARLOCK, INC. ,
PNEUMO ABEX CORPORATION, Individually and as successor
in interest to ABEX CORPORATION**

Defendants

APPEARANCES

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AMENDED DECISION AND ORDER

In this action which seeks damages resulting from plaintiff Ronald Breidenstein's exposure to asbestos, defendants Pneumo Abex Corporation and Allied Signal, Inc., move to preclude plaintiffs from offering testimony at the trial of this action that friction products cause asbestos related disease and to exclude such testimony from expert witnesses identified by plaintiffs Dr. Lemen, Dr. Markowitz and Dr. Egilman. In the alternative, they ask for *Frye* hearing on the issue.

Defendants argue that, because epidemiological studies do not support plaintiffs' allegations that asbestos-containing brakes and brake products can cause asbestos-related disease, plaintiffs' experts may not so testify. In addition, they urge that case reports relied on by these experts are insufficient, as a matter of law, to support their opinion, that case reports can not contravene epidemiological studies, and that the use of case reports as a basis of a scientific opinion violates the *Frye* standard. Defendants maintain that the proposition that friction products increase the risk of mesothelioma in mechanics is not generally supported in the scientific community.

This Court has reviewed the experts' affidavits as well as the articles and studies referenced therein or supplied by the parties as well as all the other materials submitted and has evaluated the parties' arguments.

It is axiomatic, as set forth in *Frye v. U.S.*, 293 F. 1013 (1923), that expert testimony be based on a scientific principle or procedure which has been "sufficiently established to have gained general acceptance in the particular field in which it belongs". This so-called *Frye* standard continues to be "endorsed and applied" in New York. *People v. Wernick*, 89 NY2d 111, 115 (1996) and has been the basis of this Court's decisions on the admissibility of expert testimony. See, e.g., *Stiner v. A.P. Green Industries, Inc.* Index No. I 1998-1666 November 20, 1998 [Rejecting the SV-40 virus defense to a claim of mesothelioma]; *St. John v. Georgia-Pacific Corporation*, Index No. I 2001-9946 June 8, 2004 [Rejecting the radiation defense and the chrysotile defense to a claim of mesothelioma]. Assuming

for the purposes of this decision that there are approximately seventeen epidemiological studies which do not support an elevated risk for mesothelioma for automobile mechanics, there is no New York court which would disqualify plaintiffs' experts for that reason. Similarly, no New York court agrees with defendants' arguments concerning case reports. In fact, the recent Second Department decision, *Parker v. Mobil Oil Corporation*, 16 AD 3d 648, 651 (2005) relied on by defendants for their argument that plaintiffs' experts' conclusions are flawed, held: "Generally, accepted reliability of the proffered testimony can be demonstrated through scientific or legal writings, judicial opinions, or expert opinion other than that of the proffered expert." This does not support defendants' narrow interpretation of expert testimony requirements.

Asbestos litigation, including the issue of causes of mesothelioma, has a long history in this state. In 1996, the Appellate Division, First Department stated: that mesothelioma was "an exceedingly rare disease...whose only known cause is exposure to asbestos" *Dollas v. Grace & Co.*, 225 AD 2d 319. In this state, chrysotile asbestos (the form of asbestos in component of brake products) is accepted as a cause of mesothelioma (see, e.g. *St. John, supra*; *Olin v. A.P. Green Industries*, Onondaga Cty. Index No. 2001-5992 bench decision by McCarthy, J. April 2, 2004). New York courts have been faced with the same motions as made herein. In 2001 and 2002, in separate proceedings in *Brown v. A.C. and S., Inc.*, New York County Index No. I 20595/00 Judge Louis B. York rejected the requests for a *Frye* hearing at least twice. Judge F. Dana Winslow admitted case reports in

Lechner v. A.C. and S., Inc. (Nassau County Index No. 2411/2002).

This Court is also persuaded by the reasoning of Judge Robert J. Colombo of Wayne County, Michigan, in *Chapin v. A & L Parts, Inc.*, Case No. 03-324775-NP in a bench decision rendered on May 28, 2004.

Judge Colombo conducted an evidentiary hearing and concluded that Dr. Lemen's testimony based on his work with NIOSH and as an Assistant Surgeon general, as well as a peer-reviewed author, was reliable and would be admissible.

I agree with Judge Colombo's observation that: "It is not really important to have an epidemiological study to determine whether the risk of cancer is increased by asbestos exposure in every occupation" "

Defendants' reliance on *Parker*, supra, is misplaced. In that case, which sought to link plaintiff's benzene exposure to acute myelogenous leukemia, the Court found that plaintiff's inability to establish either his level of exposure or the concentration level of the benzene to which he was exposed rendered the testimony of his experts inadmissible. In this Court's opinion, this case does not aid the defense. Here, there is ample evidence, both testimonial and scientific, of Mr. Breidenstein's exposure to the asbestos contained in defendant's brake products and of the asbestos content of those products. Also, defendants overstate the three-step process requirement. Most importantly, *Parker* is not an asbestos case .

I find that the opinions given by the experts in their reports and affidavits are based on principles which have gained general scientific acceptance. In addition, they are not novel. For the above reasons, defendants' motion is, in all respects, denied.

Plaintiffs' witnesses will not be restricted concerning their causation testimony .

Motions in limine, Generally

The parties are cautioned that these anticipatory rulings, made at the pre-trial stage may be subject to change upon appropriate objection at trial. *Pelligrino v. New York City Transit Authority*, 171 AD2d 709 (2nd Dept. 1982); *Belmar v. City of Syracuse*, 100 AD2d 745 (4th Dept. 1984); *Cotgreave v. Public Administrator of Imperial County (Cal.)*, 91 AD2d 600 (2nd Dept. 1982)

Preclude use of **Plaintiff's picture**. At this time, the motion is granted, Plaintiff is expected to testify , there is no basis to believe that his family will be unavailable, the jury will have first-hand evidence of the effect of his illness on plaintiff and his family.

Preclude **Saranac Lake Laboratory** documents . Assuming that plaintiffs wish to introduce the "Saranac Lake" documents as authenticated by Willis Hazard into evidence against defendants, this motion is denied subject to defendants' ability to read other deposition transcripts into evidence.

Preclude **Industrial Health Foundation** documents. To the extent that the IHF Documents can be linked to the defendants' knowledge of the hazards of asbestos and asbestos-containing products and connected to plaintiff's injuries, they would appear relevant and admissible, assuming proper authentication and introduction.

Preclude evidence concerning **Friction Materials Standards Institute** documents. Again, to the extent that the IHF Documents can be linked to the

defendants' knowledge of the hazards of asbestos and asbestos-containing products and connected to plaintiff's injuries, they would appear relevant and admissible, assuming proper authentication and introduction.

Preclude Intro of **EPA Report re: Asbestos Disease and Auto mechanics**

This objection is over-ruled.

Exclude evidence of **workers' comp claims** against Defendant Garlock

This objection is over-ruled to the extent that such testimony is related to notice of asbestos hazards and does not post-date plaintiff's exposure.

Preclude testimony about any of Garlock's asbestos-containing products **except rope packing**- the motion is denied at this time, dependent upon plaintiff's ability to identify other asbestos-containing products to which he was exposed or if they can be linked to defendants' knowledge of asbestos' hazards.

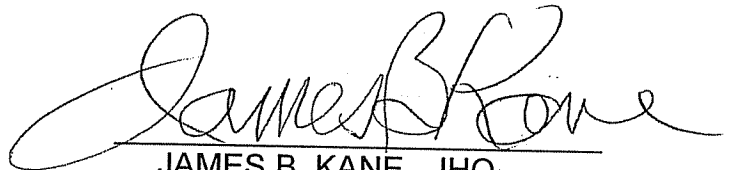
Preclude **use of 1986 Material Safety Data Sheet**. Denied at this time as was ruled in *Reynolds v. Garlock* .

Preclude use of deposition testimony of **George Houghton** (Garlock)- Reserved till time of trial.

Exclude **blow-out test** performed by Longo / Hatfield. It was conceded that this test would be the subject of a *Frye* hearing which we will schedule sometime during the trial of this action. The other motions concerning Dr. Longo, Mr. Hatfield or Material Analytical Services, not argued pre-trial will be reserved until the time of trial.

Produce the **filter used by Dr. Roggli**. Having heard the arguments and papers submitted on this issue, I conclude that the value of the review of the filter outweighs its risk of loss and it is ordered to be sent to Dr. Abraham.

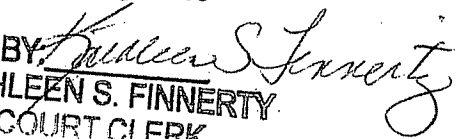
SO ORDERED


JAMES B. KANE, JHO

DATED: Buffalo, New York
September 28, 2005

GRANTED

SEP 28 2005

BY: 
KATHLEEN S. FINNERTY
COURT CLERK