

**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**

**BARBARA ST. JOHN, Administratrix of the Estate of
LORRIE L. KAZMAR, Deceased,**

Plaintiff

vs.

Index No. 1 2001-9946

**GEORGIA- PACIFIC CORPORATION,
THE FLINTKOTE COMPANY,
UNION CARBIDE CHEMICAL AND PLASTICS COMPANY, INC and
CERTAINTEED CORPORATION,**

Defendants

**GEORGIA- PACIFIC CORPORATION,
THE FLINTKOTE COMPANY,
UNION CARBIDE CHEMICAL AND PLASTICS COMPANY, INC and
CERTAINTEED CORPORATION,**

Third-Party Plaintiffs

vs.

**KAZMAR CONSTRUCTION, a Partnership,
84 LUMBER COMPANY, L. P.,
JELD-WEN, INC., as successor to
EVANS PRODUCTS COMPANY, as successor to
CAPP-HOMES, INC., and
THE FARASH CORPORATION**

Third- Party Defendants

APPEARANCES

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA, LLP
(Carl Green, Esq., of Counsel)
(Joseph T. Kremer, Esq., of Counsel)
Attorneys for Plaintiff
Suite 300
42 Delaware Avenue
Buffalo, New York 14202-3857

KAVINOKY & COOK
(Joseph J. Welter, Esq., of Counsel)
(Joan Fildes, Esq. Of Counsel)
Attorneys for Defendant Georgia- Pacific Corporation
120 Delaware Avenue
Buffalo, New York 14202

WRIGHT & ASSOCIATES, P.A.
(Steve Wright, Esq., of Counsel)
Attorneys for Defendant Georgia- Pacific Corporation
The Congress Building
615 Congress Street, Suite 201
P.O. Box 4077
Portland, Maine

McGIVNEY, KLUGER & GANNON
(James Hoore, Esq., of Counsel)
Attorneys for Third-Party Defendant Austin Company
Suite 1010
10 West Fayette Street
Syracuse, New York 13202

DAMON & MOREY
(Carol G. Snider, Esq., of Counsel)
Attorneys for Third-Party Defendant The Cowper Company
1000 Cathedral Place
298 Main Street
Buffalo, New York 14202-4096

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
(Robert J. Kelly, Esq., of Counsel)
Attorneys for Defendant Mobil Corporation
33 Washington Street
Newark, New Jersey 07102-3107

HOAGLAND, LONGO, MORAN, DUNST & DOUKAS, LLP
(Ryan E. Gilbert, Esq., of Counsel)
Attorneys for Third-Party Defendant 84 Lumber Company
40 Paterson Street
P.O. Box 480
New Brunswick, New Jersey 08903

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, LLP
(Paul F. Jones, Esq., of Counsel)
Attorneys for Defendant Chevron- Texaco
3400 HSBC Center
Buffalo, New York 14203-2887

DECISION AND ORDER

This action seeks damages resulting from plaintiff's decedent's exposure to asbestos.

As a preliminary matter, this Court admitted Steven Wright, Esq. of Portland, Maine, counsel for defendant Georgia- Pacific Corporation ("Georgia-Pacific"), pro hac vice.

Both sides have made motions concerning anticipated scientific and medical testimony at the trial. Plaintiff has moved to preclude the defendants from offering any expert testimony causally linking radiation to mesothelioma and to preclude the testimony of Yenner Erozan, M.D. on the alleged relationship between radiation therapy and mesothelioma. Georgia- Pacific, joined by other defendants, moves to preclude plaintiff from offering any testimony that

chrysotile asbestos causes mesothelioma. Plaintiff cross-moves to preclude the defendants from offering any expert testimony on the issue of a "chrysotile defense".

At the heart of these motions is the requirement, enunciated 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". The *Frye* standard continues to be "endorsed and applied" in New York. *People v. Wernick*, 89 NY2d 111, 115 (1996)

Due to the inability of one of defendant's expert witnesses to appear for a *Frye* hearing, the parties have agreed to have the issues determined upon affidavits of experts whom they also plan to call at trial. In addition, the parties have submitted, *inter alia*, journal and scientific articles, regulatory materials and deposition testimony.

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

The radiation controversy arose in this case because of a post-autopsy conference note. That note, which referenced four medical articles, suggested that Lorrie Kazmar's malignant mesothelioma (which was the cause of her death) was not related to asbestos exposure and was induced by radiation therapy for

Hodgkin's Disease.

Joan Gil, M.D., a pathologist and professor of pathology at Mount Sinai School of Medicine, in an affidavit dated May 10, 2004, identified that hospital "as a major research and treatment center for asbestos related disease ". He further stated that throughout his career he has "been actively involved in research and diagnosis of pleural mesothelioma ". He personally reviewed Ms. Kazmar's pathology materials and medical records as well as the autopsy report and the conference note. Dr. Gil analyzed the four articles referenced in the note and pointed out that none established a link between radiation and mesothelioma. Further, he stated that "no definitive link between radiation treatment and the onset of mesothelioma has ever been established and consequently such theory is not generally accepted in the medical community."

For defendant, Allan Feingold, M.D. , a specialist in internal and pulmonary medicine, with extensive experience in asbestos medicine, submitted an affidavit dated May 25, 2004. This affidavit does not state that the theory that radiation can cause mesothelioma has gained acceptance. In fact, Dr, Feingold admits that the required causal relationship has "not been proved by epidemiological investigation" . In paragraph 20, the following quote appears: "In 1997 Neugat et al were not able to identify an increased risk of mesothelioma on the basis of a retrospective study of...other patients treated with RT for Hodgkin's". Finally, Dr. Feingold quoted the most recent of the articles and

studies, published in 2004: "Although a single retrospective cohort analysis did not identify an association between radiation exposure and the development of mesothelioma, various case reports suggest that a relationship may exist."

In this Court's review of the literature, it was noted that most cases are isolated single cases, that no definitive conclusions are reached and that at most, this link is merely an unproven hypothesis. It is my conclusion that since, the required general acceptance has not been met, defendant's witnesses may not testify at trial that a link between radiation therapy and mesothelioma has been established.

The same conclusion is reached with respect to the defense contention that chrysotile asbestos does not cause mesothelioma. Dr. Gil, in an affidavit dated May 21, 2004 reviewed recent literature which had discussed the chrysotile defense: "we found no evidence in support of the amphibole [non-chrysotile] contaminant hypothesis"; "clinical and epidemiologic studies have established beyond all reasonable doubt that chrysotile asbestos causes... malignant mesothelioma of the pleura"; "Exposure to chrysotile products remains the leading cause of mesothelioma in the world"; and "all forms of asbestos are carcinogenic. All have been shown in clinical, epidemiologic and laboratory studies to be fully capable of causing mesothelioma ...chrysotile asbestos is still indisputably a human carcinogen ... Assertions that chrysotile asbestos can be used without risk are contrary to fact and extremely dangerous."

Dr. Gil stated:

That it is generally accepted by the medical community that malignant pleural mesothelioma is caused by exposure to all known types of asbestos fibers, including chrysotile asbestos, which accounts for upward of 95% of all asbestos previously used in the United States. Conversely, the so-called "chrysotile asbestos" defense is not generally accepted and not supported by the medical and scientific research.

While Dr. Finegold opines, in his affidavit, that "there is strong, consistent, nearly incontrovertible evidence that chrysotile asbestos is very unlikely to cause mesothelioma in human beings" and in Exhibit A attached to his affidavit that "there is strong scientific support" for the conclusion that "Without an amphibole contaminant, chrysotile does not cause malignant mesothelioma", nowhere does he state that this conclusion enjoys general acceptance in the scientific community. While Dr. Finegold takes issue with studies which do not support the chrysotile defense and criticizes governmental bodies such as OSHA and the EPA for failing to keep up to date on literature which would correct their belief that chrysotile does cause mesothelioma and predicts change in that position, such has not yet happened. Further it is apparent that the weight of evidence goes the other way.

For the foregoing reasons, defendant's motion to preclude plaintiff from offering testimony that chrysotile asbestos causes mesothelioma is denied and plaintiff's cross-motion precluding defendants from offering the chrysotile defense is granted.

Georgia- Pacific, joined by defendants 84 Lumber and Mobil Oil Corporation moved to preclude plaintiff's economist, Dr. Ronald Rieber from testifying because of inadequate disclosure. As this disclosure has been supplemented, this is no longer at issue. These defendants also moved for return of the pathology materials which were returned at the hearing of these motions.

Georgia- Pacific has moved to renew a prior motion seeking disqualification of Lipsitz, Green to renew its opposition to the severance of supplemental third-party defendants John W. Cowper Company, the Austin Company and Hi-Qual Building Materials.

It appears that this should properly be termed a reargument motion, rather than a renewal, motion, since no new facts have been submitted or change in law demonstrated. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2221:7.

Georgia- Pacific makes same arguments here as it did on the last motion, that because Mrs. St. John was a partner of Kazmar Construction, her counsel has a conflict in representing her as the representative of her daughter's estate and representing her as a potentially liable defendant. With respect to that portion of the motion related to severance, Georgia- Pacific apparently argues that defendants have had plenty of time to prepare and discovery is finished. Plaintiff and the severed defendants oppose the motion.

This court granted reargument and upon granting it, adheres to its prior decision, granting severance and denying Georgia Pacific's motion to disqualify plaintiff's attorney, Lipsitz, Green .

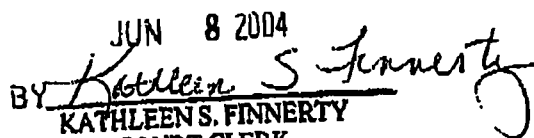
SO ORDERED



JAMES B. KANE, JHO

DATED: Buffalo, New York
June 8, 2004

GRANTED

JUN 8 2004
BY 

KATHLEEN S. FINNERTY
COURT CLERK