

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ONONDAGA

CAROL A. OLIN, Individually and as
Executrix of the Estate of ROGER D. OLIN :

Plaintiff,

INDEX#

2001-5992

- vs -

A.P. Green Industries, Inc., et al, :

Defendants.

BENCH DECISION

Oswego County Courthouse
Oswego, New York 13126
April 2, 2004

B e f o r e :

HONORABLE JAMES W. McCARTHY,

Acting Supreme Court Justice

A p p e a r a n c e s :

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Amy Maring, Official Court Reporter

1 (The Court rendered the following Bench Decision
2 after oral argument by counsel.)

3 * * *

4 BENCH DECISION

5 **THE COURT:** The motion before the Court by
6 Defendant, Kaiser Gypsum, is to preclude the testimony
7 of potential experts by the Plaintiff, Dr. Abraham and
8 whoever else Mr. Comerford has given notice of to
9 Defendants, to testify that the peritoneal
10 mesothelioma contracted by Mr. Olin which ultimately
11 led to his demise could be contracted via the joint
12 compound manufactured by Kaiser Gypsum which was
13 utilized allegedly by Mr. Olin prior to his death from
14 various procedures and working at his house.

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15 There's another question as to how much exposure
16 actually took place. Arguments and the documentation
17 before the Court would demonstrate that the manner in
18 which the particular joint compound was packaged by
19 Kaiser Gypsum would have apparently, at most, ten
20 percent chrysotile contained therein.

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21 The Defendant maintains that Dr. Abraham,
22 Dr. Suzuki and the other doctors proffered by the
23 Plaintiff to testify as experts as to connection
24 between the causation of the peritoneal mesothelioma
25 by possibly this joint compound, the chrysotile

1 asbestos therein, that the documentation via the
2 medical literature, studies, science, is not there
3 from which they can base their opinion on and that, at
4 most, they are individual case studies they rely on
5 which counsel for Defendant maintains is not
6 sufficient for an expert to testify in regard to
7 ultimate causation.

8 The Plaintiff maintains that the basis of both
9 Dr. Abraham and inferentially the matters put before
10 the Court, Dr. Suzuki, and their opinions aren't based
11 upon studies. Dr. Abraham was asked in his affidavit
12 which specifically states, put aside the issue of the
13 basis therefore, that in his opinion to a reasonable
14 degree of medical certainty the peritoneal
15 mesothelioma contracted by Mr. Olin could have been or
16 would have been caused by the chrysotile asbestos, can
17 be caused by chrysotile asbestos. Now, Dr. Suzuki did
18 a study and, although Mr. Shaw maintains the study is
19 not sufficient, he found as a basis that chrysotile
20 could cause peritoneal mesothelioma.

21 Referenced in Mr. Comerford's answering affidavit
22 is Dr. Suzuki's testimony in a 2002 case, *Brown v*
23 *AC&S*, an unreported case, and the testimony is
24 attached thereto. In that regard, Dr. Suzuki in that
25 trial did specifically testify that it caused

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1 malignant mesothelioma, that is, chrysotile. Mr. Shaw
2 maintains that even that would be insufficient because
3 there's no proof chrysotile causes mesothelioma of any
4 kind, although he candidly admits Courts have let that
5 testimony in regarding pleural mesothelioma but
6 there's never been a particular study, science
7 demonstrated in connection between chrysotile asbestos
8 exposure and peritoneal mesothelioma.

9 Now, interestingly enough, we found a case,
10 United States Court of Appeals, Sixth Circuit, *Boyd v*
11 *Celotex*, December 30, 1991, wherein the expert was
12 Dr. Suzuki and he testified before the Court in the
13 Third Circuit Court of Appeals, United States District
14 Court for Tennessee, went up to the Court of
15 Appeals -- Sixth Circuit, excuse me -- that, in his
16 opinion, chrysotile asbestos can cause peritoneal
17 mesothelioma. That was over objection of
18 Owens-Illinois regarding Kaylo, this product which
19 they make. The trial Judge therein affirmed that,
20 even over objection, there was sufficient science to
21 allow the testimony.

22 Again, Dr. Suzuki testified in this *Brown* case in
23 New York. However, I don't know if that was over
24 objection or not, and it appears to the Court, at
25 least there's no doubt in this Court's mind from the

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1 documentation proffered by both counsel and the
2 substantial studies and testimony that chrysotile, at
3 least for the purposes of receipt of evidence in
4 Court, can cause mesothelioma. It's been allowed in
5 many Courts. The testimony has been received pro and
6 con and if it's been allowed, it goes to the weight
7 and sufficiency of the evidence, not so much its
8 admissibility.

9 The particular point raised in this case is
10 relative to the connection between chrysotile asbestos
11 or, better said, the lack of any connection and
12 peritoneal mesothelioma from which Mr. Olin passed
13 away. Once you establish, at least in this Court's
14 opinion, that for purposes of getting before a jury
15 chrysotile may be a cause of mesothelioma and pleural
16 mesothelioma and you start bifurcating or trifurcating
17 and then saying well, it may cause lung cancer in this
18 cavity but there's no proof it got into this other
19 organ or can get into this other organ, but the
12:34PM 20 science is not there to allow it. Well, if it's
21 accepted that it's a cause of mesothelioma by juries
22 on ultimate verdicts, then when you're talking about
23 the particular function or system, how it gets into
24 another cavity of the body, and since we know it's a
25 mesothelioma causing agent, at least by verdicts and

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1 allowance in Courts of testimony, when you start
2 bifurcating and trifurcating it to say there's no
3 proof it was in that organ or that organ, that's not
4 science. That's opinion. That goes to weight. That
5 goes to proof. I don't believe it's a question of
6 science. I believe it's a question more of the weight
7 and proximate causation and all the other normal
8 things a jury listens to.

9 In all respects, the motion to preclude is
10 denied. Attach a copy of my Decision to the Order.

11 MR. COMERFORD: Thank you, your Honor.

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Olin vs. A.P. Green, et al - (Bench Decision)

C E R T I F I C A T I O N

I, Amy Maring, an Official Court Reporter for the Fifth Judicial District, do hereby certify that I did report in stenotype machine shorthand the proceedings held in the above matter at the aforementioned time and place.

Further, that the foregoing transcript consisting of 5 pages is a true, complete and accurate transcript of my original shorthand notes.

Amy Maring

Amy Maring

Dated:

April 8, 2004