Talc Litigation



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Perrin Conferences New York Asbestos Litigation Conference





ENGLISH V. COLGATE

- A decision from April 13, 2023. Colgate moved to preclude Dr. Longo's 2021 supplemental reports as untimely, or alternatively to postpone the trial and compel the light fraction materials and TEM grids referred to in Longo's supplemental reports.
- Plaintiff opposed arguing that the reports were timely as a result of stays due to Covid-19 a bankruptcy and the plaintiff's death, and that Dr. Longo had been deposed on the supplemental reports over a number of days in other jurisdictions, and that the CMO permits discovery up to 10 days before trial.
- Citing CPLR 3101(d) and multiple sections of the CMO, the Court deemed plaintiff's expert disclosure had been timely served, and that preclusion of Dr. Longo's supplemental reports was not warranted.

ENGLISH V. COLGATE

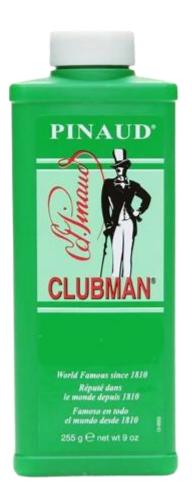
- The Court further ruled that Colgate had failed to establish that special circumstances existed such that Dr. Longo's testing material must be produced.
- The original materials tested by Dr. Longo had been provided during discovery, so there was no indication that Colgate was unable to obtain the materials elsewhere.
- Colgate had not established that the tests could not be replicated or that the samples were somehow different than the samples originally provided to plaintiff by Colgate.



ENGLISH V. COLGATE (REARGUE)

- Colgate moved to reargue.
- Court found that Colgate failed to establish that the Court, in its Prior Decision,
 misapprehended or overlooked the facts or law in determining the existence of
 special circumstances that would warrant the compilation of the light friction
 materials and TEM grids.

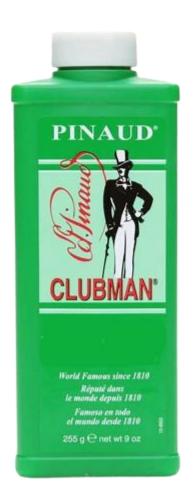
- In a recommendation dated September 21, 2023, NYCAL Special Master Phillip Goldstein determined A.I.I. had failed to establish the requisite "special circumstances" for a deposition of Dr. Moline.
- NY Law and NYCAL practice disfavors expert depositions.
- CPLR 3101(d)(1)(i) requires:
 - Identify the expert witness
 - Provide reasonable detail the subject matter of expected testimony
 - Qualifications
 - Summary of grounds for opinion
- Expert reports not necessary under the CPLR



- NY Courts routinely reject requests to compel depositions of experts barring "special circumstances." Hallahan v Ashland 237 AD2d 697 (3d Dept. 1997).
- Neither the purported novelty of the opinion..., nor the claimed flaws underlying the expert's opinion rise to the level of special circumstances" *Padro v. Pfizer* 269 AD2d 129 (1st Dept. 2000)
- Judge Gall's decision in Hough v. Colgate.
- "Cherry picking one or two studies as a predicate for a deposition could open the floodgates..."



- A.I.I. argued *Nemeth* decision constituted a special circumstance to allow a deposition of a witness criticized by the Court in reversing verdict.
- Nemeth constrained by procedural posture as post-judgment decision, has little or no bearing on the different standards for summary judgment.
- Subject of ongoing debate whether *Nemeth* changed the law or clarified the standards of admissibility of expert testimony under *Parker* and its progeny.
- "Routinely allowing expert depositions based on *Nemeth* could open the floodgates..."



TIPPIN

- Oct. 2022 Deposition of Dr. Longo
 - SOPs exist, not shared, no one uses
- Nov. 2022 WCD Application for Longo's SOPs
 - SOPs used, not reported in Reports
 - "Trade secrets" / would hurt Longo's bottom line
- 11/30/22 Video hearing with Special Master
- 4/26/23 WCD filed for Bankruptcy (no ruling)





SUMMARY JUDGMENT STANDARD

- The Court of Appeals established a three-part test for establishing causation in toxic tort cases in *Parker v. Mobil Oil Corp.*, 7 NY3d 434 (2006): (1) that the plaintiff was exposed to a toxin; (2) that the toxin is capable of causing the particular illness (general causation); and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation).
- The *Parker* test was reaffirmed by the Court of Appeals in *Nemeth v. Brenntag North America*, 38 NY3d 336 (2022). The Court stated that an expert opinion "must meet our requirements for establishing exposure to a toxin in an amount sufficient to cause decedent's peritoneal mesothelioma." The Court further noted that conclusory assertions are insufficient to meet the *Parker* test and while a precise numerical value is not required there must be some "scientific expression linking decedent's actual exposure to asbestos to a level known to cause mesothelioma."

CAMPISE V. WHITTAKER CLARK & DANIELS

- Whittaker Clark & Daniels ("WCD") moved for summary judgment against plaintiff, arguing that while it sold talc to companies who produced consumer talc products, it is only speculation as to whether its talc was in the specific products used by plaintiff, that cosmetic talc does not cause mesothelioma, and that the levels of talc inhaled by plaintiff were not enough to cause mesothelioma.
- The Court noted that while defendant's Affidavit provided a *prima facie* showing that its talc did not contain asbestos, the plaintiff provided extensive evidentiary proof that established a triable issue of fact as it pertains to the question of asbestos in defendant's talc. Having determined that a triable issue of fact existed, the Court had to turn to the question of causation.



CAMPISE V. WHITTAKER CLARK & DANIELS

- WCD argued that there was no scientific evidence, that rose to the Parker standards, that found
 an increased risk of mesothelioma due to exposure to talc and therefore, the plaintiff failed to
 meet the general causation prong of the Parker test.
- Plaintiff offered extensive discovery materials, including affidavits of Dr. Moline and an article titled "Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women."
- The Court denied WCD's motion on April 28, 2023, noting that plaintiff's evidence was enough to create factual issues regarding general causation and that Dr. Moline's calculations met the standard set forth in *Parker* and *Nameth* and that her opinion constituted sufficient evidence of causation to overcome summary judgment.

ENGLISH V. COLGATE

- Colgate-Palmolive Co. ("Colgate"), argued that Texas law should have been applied and that plaintiff had no demonstrated causation in accordance with Texas' standard, as well as contended that they established a *prima facie* case against causation under New York law such that it is entitled to summary judgment. Plaintiff opposed, noting that both the law of the forum applies to the instant motion, and that plaintiff has offered sufficient evidence of causation under New York law.
- Noting that plaintiff did in fact offered detailed evidence that the primary source of talc used at the time was largely contaminated with asbestos, and that plaintiff offered conflicting evidence regarding Colgate's choice to use talc contaminated with asbestos as opposed to non-contaminated alternatives, the Court denied Colgate's motion for summary judgment on September 11, 2023.
- Colgate also made this identical argument in the *Rasso v. Avon Products, Inc.* case. This argument was denied on September 13, 2023.





ENGLISH V. SHULTON

- Shulton, Inc. ("Shulton") also moved for summary judgment against in the English matter.
- Similar to Colgate, Shulton argued that Texas law should be applied to plaintiff's claims and that plaintiff's claims must be dismissed because plaintiffs cannot, as a matter of law, establish causation under Texas law.
- This motion was denied on September 11, 2023, in accordance with the Colgate ruling.





ENGLISH V. WHITTAKER CLARK & DANIELS

- Whittaker Clark & Daniels, Inc. ("WCD") moved for summary judgment on the grounds that the face powder formulations would require source speculation, the "contents evidence" proved that WCD-distributed talc did not contain detectable asbestos, scientific evidence demonstrated that consumer use of talc does not increase a person's risk of developing mesothelioma, and that there was evidence that plaintiff's alleged use of the face powder did not result in a sufficient level of asbestos exposure to cause her mesothelioma.
- This motion was denied without prejudice on September 6, 2023. The Court noted that WCD may renew this motion upon completion of its bankruptcy proceedings.



KAYE V. REVLON

- Revlon moved for summary judgment on the grounds that plaintiff was not exposed to asbestos from any Revlon product during her use of the "Charlie" talcum powder from approximately 1968-1976 because they did not create the "Charlie" brand until 1974, that there was no evidence their talcum powder contained asbestos, and that talc itself does not cause mesothelioma.
- Plaintiff opposed, arguing that Revlon was unequivocally identified as the manufacturer of the Charlie baby powder, and that testing exists which has concluded that talc in the baby powder contained asbestos.
- The Court denied Revlon's motion on September 6, 2023, noting that Revlon's primary evidence (deposition testimony of Revlon's corporate representative) did not display the requisite personal knowledge to dispel with certainty any questions of fact of the manufacturing of the "Charlie" brand. The Court further noted that Revlon failed to offer any evidence that their product did not contain asbestos.

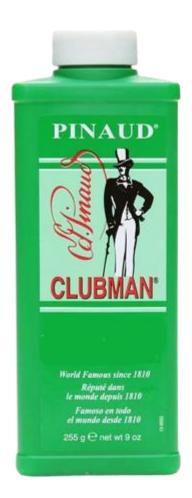


KAYE V. CHANEL

- Chanel moved for partial summary judgment to dismiss Plaintiff's punitive damages claim on the basis that Chanel did not exhibit the "level of malice and near criminal reckless disregard" necessary to justify such damages.
- Plaintiff opposed, arguing that Chanel was aware of the presence of asbestos in its talc and the negative impacts of asbestos as early as the 1970s and continued to use asbestos containing talc in its products for over 20 years after.
- The Court denied Chanel's motion on October 5, 2023, holding that Chanel did not offer any evidence that dispelled with certainty questions of fact regarding their level of recklessness or wanton disregard regarding asbestos in talc. The Court reasoned, "As a reasonable juror could find that Chanel was on notice of its contaminated talc and that its subsequent conduct and usage of such talc rises to the level required for punitive damages, issues of fact exist to preclude summary judgment on punitive damages."



- Relatively recent decision issued on <u>October 18, 2023</u>, denying All's (American International Industries) motion for summary judgment.
- In its decision, the Court said *Nemeth* was "erroneously" relied upon by Defendant in its moving papers, and that the burden, at the SJ stage, was for Defendant "to prove as a matter of law that there was no causation," as articulated in the First Department's decision in *Dyer* (2022).
- The Court also found that plaintiff raised issues of fact related to plaintiff's use of the alleged All products and the mineral composition and sourcing of those talc products, sufficient to preclude SJ.



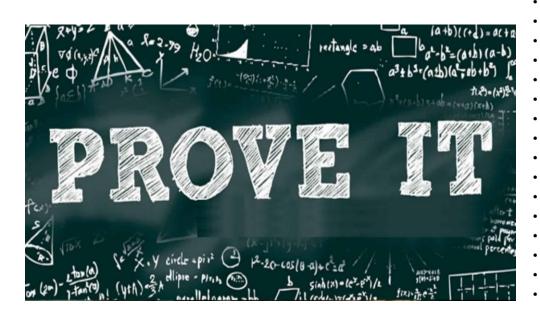
SASON V. DYKES LUMBER CO.

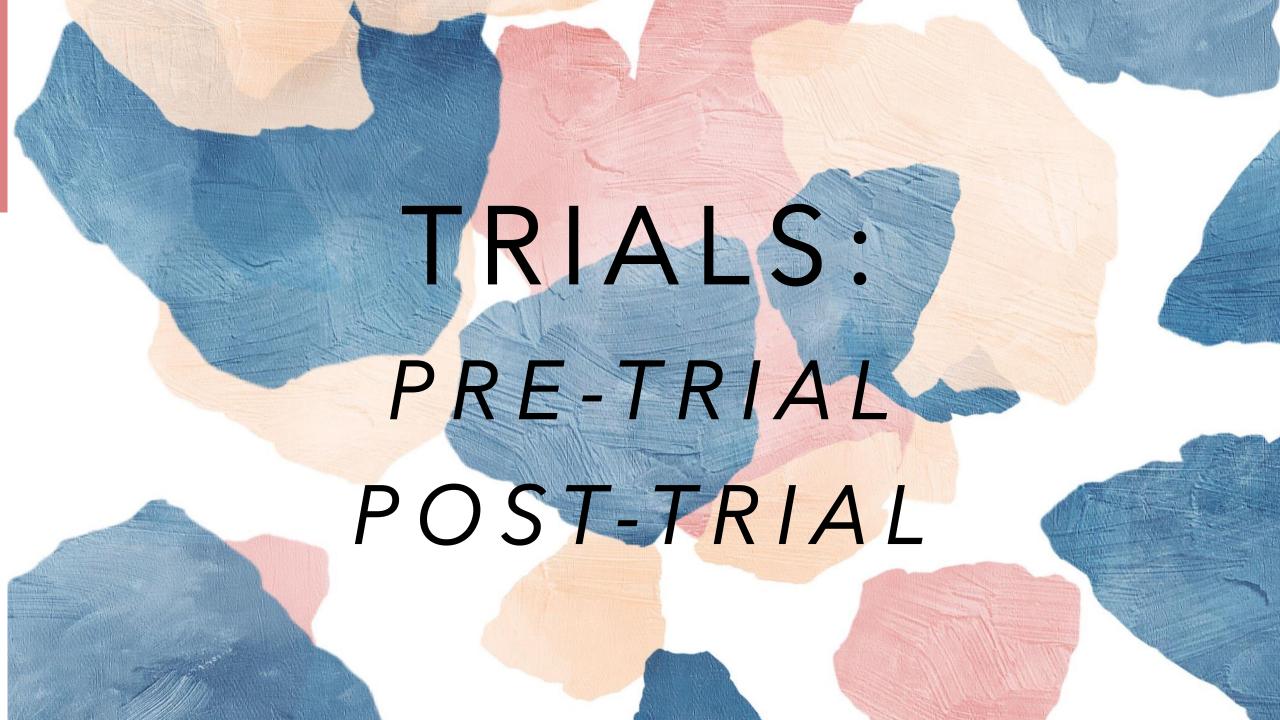
- Not a talc decision, but one relevant to summary judgment standards and expert opinions on causation.
- Recent decision issued by the First Department on November 16, 2023, affirming that Defendant's summary judgment motion was properly denied by the lower court (Judge Silvera on July 24, 2023).
- The linchpin of this decision hinges on the issue of fact created by competing causation evidence and expert opinions - "the classic 'battle of the experts."
- In the Court's opinion, plaintiff's expert's reference to simulation studies of fiber release was considered sufficient scientific expression requirement under Nemeth.



GOMEZ V. KOLMAR LABORATORIES

- Kolmar moved for summary judgment to dismiss on the grounds that plaintiff-decedent Dolores Gomez had not established that she was exposed to any asbestos-containing product manufactured by Kolmar and that any such product was manufactured per the specifications of Johnson & Johnson.
- Plaintiff opposed on the grounds that Kolmar confirmed its manufacturing role in a product at issue in the case and had an active role in manufacturing the product.
- The Court denied Kolmar's motion finding conflicting evidence with regard to Kolmar's involvement with the product at issue and confirmed that it was a manufacturer of the product during the time of Ms. Gomez's exposure, and thus Kolmar "failed to 'establish that its products could not have contributed to the causation of plaintiff's injury." citing Reid v. Georgia Pacific Corp.





- Trial court erred in admitting expert testimony by Webber, Moline and Longo, abused its discretion in denying 104 Hearings as to the reliability of their testimony.
- NJRE 104: The court shall decide any preliminary questions about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding the court is not bound by evidence rules, except those on privilege and Rule 403. The court may hear and determine such matters out of the presence of the jury.
- In re Accutane 234 NJ 340 (2018)
 - trial courts to assess both methodology and the underlying data
 - Testimony should be excluded when it does not satisfy Court's standard for sound methodology and reasonable reliance on data and information used by other experts in the field.
- Lanzo v. Cyprus 467 N.J. Super. 476 (App. Div. 2021)
 - Allowing experts to testify concerning untested opinions is error

- Webber's testimony re cleavage fragments unsupported
 - Lanzo Court failed to assess methodology and did not consider underlying data.
 - Webber failed to identify the data he used to form his opinion, only generally stated without explanation or discussion that the sources he relied upon were similarly relied on by other unspecified experts.
 - Court criticizes studies relied on by Webber
- Court failed to hold NJRE 104 hearing
- Application of Daubert factors did not support admission of Webber testimony



- Dr. Moline testimony unsupported
 - Lanzo Moline testimony similar defects as Webber's opinions at trial
 - Trial Court failed to assess Moline's methodology and the underlying data
- Moline failed to identify studies relied upon
- Moline failed to discuss details of Rohl and Mattenklott
- Moline failed to explain methodology, data or link between her theories and articles relied upon.
- Court failed to hold NJRE 104 hearing

• In permitting Longo extrapolation opinion testimony without first conducting a NJRE 104 hearing and subjecting Longo's claims to standards set forth in *Accutane* and *Daubert*, the trial court erred in its judicial gatekeeping function and abused its discretion

 Insufficient evidence to conclude Longo testimony based on sound, adequately founded scientific methodology involving data reasonably relied on by experts in the scientific field; and unclear if it had been tested, subjected to peer review, subjected to standards for controlling technique, or accepted in scientific community.

FRYE CHALLENGES IN NY

- SOIFER OCT. 2023
- CARDILLO LAST WEEK



SOIFER V. ALL ACQUISITION CORP, LLC

- 9/8/23 DAP filed Frye Motion as to Dr. Moline
- 10/11/23 Assigned to select jury, and assigned to Justice Adams for Trial before Justice Adams starting Jan. 2024
- 10/11/23 Instant argument
 - GENERAL CAUSATION caulking causes meso?
 - DAP argued "the toxin is the product."
 - SPECIFIC CAUSATION Mr. S's cancer from multiple products?
 - Nemeth only related to 1 product no dose
 - This case, cumulative dose theory no dose
 - PROXIMATE CAUSATION caulk dose substantial? (not trivial)
 - No cumulative dose
 - No DAP dose to compare it too



SOIFER V. ALL ACQUISITION CORP, LLC

Justice Adams denied DAP's Motion:

THE COURT: Here's what we are going to do. I am going to give you a decision on this so we can all move forward but what we'll do is -- let me tell you what my decision is and then we will go into the housekeeping, okay.

Defendants' motion to preclude Dr. Jackie Moline is denied. Dr. Jackie Moline will be subject to cross-examination at the time of trial in front of a jury.

You will note your exceptions for the record, everyone.

SOIFER V. ALL ACQUISITION CORP, LLC

• Time for more change? (page 34)

13	MR. KOZAK: Yes, exception.
14	THE COURT: I say that because sometimes when we
15	get so into it we forget. So when we do try the case, let's
16	all try to help each other because if we all try to help
17	each other with a good record, then we will have a good
18	record. I'll say this, Counselor, you make quite a
19	compelling argument, and I think based upon this argument
20	going forward I think we are going to see a change in the
21	3101(d's) because I think that you make a very good
22	argument, a very well thought out argument. I happen to
23	respectfully disagree with it, but I think change may be
24	coming.
25	MR. KOZAK: Thank you, Your Honor.







CARDILLO V. AMERICAN INTERNATIONA LINDUSTRIES

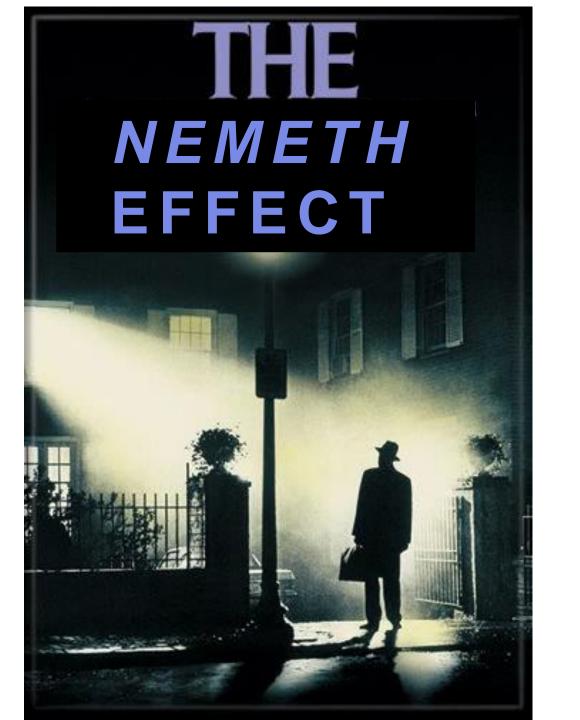
WORK EXPOSURE

FRYE MOTIONS FILED

- Plaintiffs:
 - Alan Segrave counting protocols
- Defendant:
 - Dr. Moline
 - Dr. Body
 - Dr. Longo









WHERE ARE WE, HOW DID WE GET HERE?

Nemeth v. Brenntag North America

- Ruling by NY Court of Appeal
- Upholds standard set in Parker v. Mobil Oil
- Glove box not appropriate foundation for Dr. Moline's causation opinion

IDELL V. AERCO INTERNATIONAL, INC.

The court properly precluded defendant from introducing evidence of plaintiff's alleged exposure to asbestos in Scotland before he emigrated to the United States because such evidence was speculative.

CAREFUL WHAT YOUWISH FOR

IDELL V. AERCO INTERNATIONAL, INC.

Matter of New York City Asbestos Litig., 164 A.D.3d 1128 (2018)

83 N.Y.S.3d 481, 2018 N.Y. Slip Op. 06058



164 A.D.3d 1128, 83 N.Y.S.3d 481, 2018 N.Y. Slip Op. 06058

**1 In the Matter of New York City Asbestos Litigation. Ann Marie Idell, Respondent,

V

Aerco International, Inc., et al., Defendants, Crane Co. et al., Respondents, and Jenkins Bros., Appellant.

> Supreme Court, Appellate Division, First Department, New York 190219/16, 6936, 6937, 6938 September 13, 2018

CITE TITLE AS: Matter of New York City Asbestos Litig.

HEADNOTES

Bros.' (defendant) motion pursuant to CPLR 4404 to set aside the verdict, and granted plaintiff's motion pursuant to CPLR 4404 to set aside the verdict to the extent of directing a new trial unless defendant stipulated to an increase in the jury awards of \$1.8 million and \$1.5 million for past and future pain and suffering, respectively, to \$4 million and \$2.5 million, respectively, *1129 unanimously modified, on the law, the facts and as a matter of discretion, to vacate the additurs for past and future pain and suffering and to direct a new trial on past pain and suffering only, unless, within 30 days of service of a copy of this order with notice of entry, defendant stipulates to increase the award for past pain and suffering to \$4 million, and to reinstate the jury's future pain and suffering award, and otherwise affirmed, without costs.

The Supreme Court properly precluded defendant from eliciting testimony from plaintiff's expert regarding exposure to asbestos in the alleged nonparty tortfeasors' products because the court properly found that defendant failed to establish specific causation against such alleged nonparty

tortfeasors (see Matter of New York City Asbestos Litig., 148 AD3d 233, 238-239 [1st Dept 2017]).

DISCOVERY AT TRIAL?

- Cardillo v. A-I-I: Requests for Admissions
 - 10/18/23 assigned out to select a jury
 - 11/8/23 64 RFAs propounded by Plaintiff
 - 11/13/23 A-I-I objected as improper and untimely under CMO
 - 11/14/23 Hearing with Justice Rosado
 - Jurisdiction?
 - Timely?
 - "Narrowly Tailored"
 - 11/15/23 Order by Justice Rosado re: jurisdiction
 - 11/20/23 A-I-I's Motion for a Protective Order





CARDILLO MOTIONS

Plaintiff's MILs

- Preclude Other Exposures
- Preclude OSHA PEL as "safe"
- Preclude Argument that Regulated Asbestos Cannot Cause Cancer
- Preclude Defendant's Dose Assessment as Speculative

Defense MILs

- Preclude Evidence After Last Alleged Use (unless relates to defendant's conduct)
- Preclude Anecdotal Phrases per Nemeth (speculative)
- Preclude Individually Susceptible (speculative)
- Preclude Talc Sources Not Related to A-I-I's Products
- Preclude Exposures From Barber Shop
- Preclude Exposures from Home Use

