To Be Argued By:
ANDREW J. PINCUS

New York County Clerk's Index Nos. 120146/01 & 15031/02

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

INDEX NO. 120146/01

CHRISTINE WIEGMAN Individually and as the Administratrix of the Estate of DANIEL TUCKER,

Plaintiff-Respondent,

—against—

A C & S, INC.; A.P. GREEN INDUSTRIES, INC.; ATLAS TURNER, INC.; A.W. CHESTERTON CO., INC.; CERTAINTEED CORPORATION; C.E. THURSTON & SONS, INC.; COMBUSTION ENGINEERING, INC.; COURTER & COMPANY, INCORPORATED; DANA CORPORATION; DRESSER INDUSTRIES, INC.; DURABLA MANUFACTURING COMPANY; EASTERN REFRACTORIES CORPORATION; EMPIRE-ACE INSULATION MANUFACTURING CORP.; FAY, SPOFFORD & THORNDIKE OF NEW YORK, INC., f/k/a Wolff & Munier, Inc.; GARLOCK, INC.; GENERAL ELECTRIC COMPANY; GENERAL REFRACTORIES; HARBISON WALKER REFRACTORIES COMPANY; IMO INDUSTRIES, INC., as successor to and f/k/a

(*caption continued on inside cover*)

BRIEF FOR DEFENDANTS-APPELLANTS

KENNETH S. GELLER
ANDREW J. PINCUS
CARL J. SUMMERS
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Defendants-Appellants

REPRODUCED ON RECYCLED PAPER

Delaval Turbine, Transamerica Delaval, and IMO Delaval; INGERSOLL-RAND COMPANY; J.H. FRANCE REFRACTORIES COMPANY; JOHN CRANE, INC.; KAISER ALUMINUM AND CHEMICAL CORP.; NORTH AMERICAN REFRACTORIES COMPANY; PFIZER, INC.; PORTER-HAYDEN CO.; QUIGLEY COMPANY, INC.; RAPID-AMERICAN CORPORATION, as successor-in-interest to Phillip Carey Manufacturing Corp.; ROBERT A. KEASBEY CO.; SEQUOIA VENTURES, INC. f/k/a Bechtel Corporation; TAF INTERNATIONAL; THE ANCHOR PACKING CO.; TREADWELL CORPORATION; UNIROYAL, INC.; VIACOM INC., successor by merger to CBS Corporation, f/k/a Westinghouse Electric; WEIL MCLAIN, a division of The Marley Company, successor-in-interest to the Wylain Co.; WORTHINGTON CORPORATION; YORK INDUSTRIES CORPORATION,

Defendants,

THE LINCOLN ELECTRIC COMPANY and HOBART BROTHERS COMPANY,

Defendants-Appellants,

CONGOLEUM CORP.,

Defendant.

INDEX NO. 105031/02

ANGEL GOMEZ,

Plaintiff-Respondent,

—against—

A C & S, INC.; AMERICAN REFRACTORIES CO.; AMERICAN REFRACTROIES INC.; AMERICAN STANDARD, INC.; A.W. CHESTERTON CO., INC.; BORG-WARNER CORPORATION; CERTAINTEED CORPORATION; COMBUSTION ENGINEERING, INC.; CRANE CO.; CRANE PUMPS & SYSTEMS INC.; EMPIRE-ACE INSULATION MANUFACTURING CORP.; FORD MOTOR COMPANY; GARLOCK, INC.; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; GENERAL REFRACTORIES CO.; GOULDS PUMPS INCORPORATED; HERCULES CHEMICAL COMPANY, INC.; HOBART BROTHERS COMPANY; HONEYWELL INTERNATIONAL INC., f/k/a Allied Signal, Inc., as successor-in-interest to Bendix, Inc.; IMO INDUSTRIES, INC., as successor to and f/k/a Delaval Turbine, Transamerica Delaval, and IMO Delaval; INGERSOLL-RAND COMPANY; J.H. FRANCE REFRACTORIES COMPANY; PFIZER, INC.; PLIBRICO COMPANY; PORTER-HAYDEN CO.; PNEUMO ABEX CORPORATION, f/k/a Abex Corporation; QUAKER CHEMICAL CORPORATION; QUIGLEY COMPANY, INC.; RAPID AMERICAN CORPORATION, as successor-in-interest to Phillip Carey Manufacturing Corp.; ROBERT A. KEASBEY CO.; SELBY A. KEASBEY, CO.; STANDARD MOTOR PRODUCTS, INC., a/k/a EIS Brake Parts; and THE ANCHOR PACKING CO.,

Defendants,

THE LINCOLN ELECTRIC COMPANY,

Defendant-Appellant,

TURNER CONSTRUCTION COMPANY; UNION CARBIDE CORP.; UNIROYAL, INC.; VIACOM INC., successor by merger to CBS CORPORATION, f/k/a Westinghouse Electric Corporation; WEINMAN PUMPS, a division of Crane Pumps & Systems, Inc.; WORTHINGTON CORPORATION,

Defendants.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

QUESTIONS INVOLVED 1

NATURE OF THE CASE 2

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. A SERIES OF FUNDAMENTAL EVIDENTIARY ERRORS EFFECTIVELY RELIEVED PLAINTIFFS OF THEIR OBLIGATION TO ESTABLISH THAT PLAINTIFFS WERE EXPOSED TO DISEASE-CAUSING ASBESTOS FROM DEFENDANTS' WELDING RODS 12

A. The Court Erroneously Refused To Conduct A *Frye* Hearing On Plaintiffs' Novel "Scientific Principle" That Visible "Dust" From Welding Rods Conclusively Establishes Exposure To Dangerous Levels Of Disease-Causing Asbestos 14

B. The Court Erroneously Prevented Defendants' Expert From Discussing Plaintiffs' Medical Records Or Providing Any Plaintiff-Specific Testimony 24

C. The Court Erroneously Allowed Plaintiffs' Expert To Claim That Her "Rod-Rubbing" Experiment Proved That Welders Were Exposed To Disease-Causing Asbestos From Defendants' Products 30

1. Dr. Todd's "rod-rubbing" experiment 30

2. What Dr. Todd's experiment did not prove 32

TABLE OF CONTENTS
(continued)

Page

3. Dr. Todd's impermissible "testimony by ambush" 36

D. The Court Erroneously Prevented Defendants From Cross-Examining A Witness Proffered by The Defendant In A Consolidated Case Who Gave Critical Adverse Testimony 40

II. THE COURT ERRONEOUSLY ORDERED A WITNESS TO GIVE TESTIMONY THAT WAS SUBJECT TO THE ABSOLUTE ATTORNEY-CLIENT AND ATTORNEY-WORK-PRODUCT PRIVILEGES FOR NON-TESTIFYING EXPERTS 45

1. The attorney-work-product privilege 47

2. The attorney-client privilege 49

3. The prejudice from Dr. Longo's testimony 51

III. THE COURT ERRONEOUSLY GAVE THE JURY A SPOLIATION INSTRUCTION REGARDING TWO DIFFERENT SETS OF MOCK-UP WELDING RODS 51

A. Dr. Longo's Mock-Ups Were Withheld Under A Valid, And Uncontested, Claim Of Privilege 52

B. Brown's Mock-Ups Were Inadvertently Destroyed Or Thrown Out Years Before This Case Was Filed 56

IV. THIS COURT SHOULD DIRECT ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THERE WAS NO ADMISSIBLE EVIDENCE THAT DEFENDANTS' PRODUCTS COULD HAVE HARMED THE PLAINTIFFS 59

CONCLUSION 60

TABLE OF CONTENTS
(continued)

Page

CERTIFICATE OF COMPLIANCE 62

TABLE OF AUTHORITIES

Page(s)

Cases

Abadie v. Metro. Life Ins. Co., 784 So.2d 46 (La. Ct. App. 2001) 3

Bolm v. Triumph Corp., 422 N.Y.S.2d 969 (App. Div. 4th Dep't 1979) 54

Bruton v. United States, 391 U.S. 123 (1968) 44

Byczek v. New York Dep't of Parks, 438 N.Y.S.2d 596
(App. Div. 2d Dep't 1981) 26

Campoli v. Lobmeyer, 583 N.Y.S.2d 639 (App. Div. 3d Dep't 1992) 26

Clark v. Weber, 695 N.Y.S.2d 34 (App. Div. 1st Dep't 1999) 30

Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493 (1978) 60

Erena v. Colavita Pasta & Olive Oil Corp., 605 N.Y.S.2d 475
(App. Div. 3d Dep't 1993) 26

Friedel v. Bd. of Regents of Univ. of New York, 296 N.Y. 347 (1947) 43

Frye v. United States, 293 F. 1013 (1923) . . . . *passim*

Gregory v. Mulligan, 698 N.Y.S.2d 309 (App. Div. 2d Dept. 1999) 38

Klempner v. Leone, 715 N.Y.S.2d 743 (App. Div. 2d Dept. 2000) 38

Lamborn v. Czarnikow-Rionda Co., 237 N.Y.S. 69
(App. Div. 1st Dep't 1929) 43, 44

Lichtenberg v. Zinn, 663 N.Y.S.2d 452 (App. Div. 3d Dep't 1997) 47, 52

Lustering v. A C & S, Inc., 786 N.Y.S.2d 20 (App. Div. 1st Dep't 2004) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

McCarthy v. Mobile Cranes, Inc., 18 Cal. Rptr. 750 (Cal. Ct. App. 1962) 44

People v. Osorio, 75 N.Y.2d 80 (1989) 50

People v. Wernick, 89 N.Y.2d 111 (1996) 16, 17

Raymond v. New York, 740 N.Y.S.2d 743 (App. Div. 4th Dep't 2002) 57

Rogla v. Syracuse Hous. Auth., 707 N.Y.S.2d 572 (App. Div. 4th Dep't 2000) 57

In re Rosalie S., 657 N.Y.S.2d 131 (Fam. Ct. 1997) 48, 52

Rosario v. General Motors Corp., 543 N.Y.S.2d 974 (App. Div. 1st Dep't 1989) 49

Santariga v. McCann, 555 N.Y.S.2d 309 (App. Div. 1st Dep't 1990) 47, 52

Saulpaugh v. Krafte, 774 N.Y.S.2d 194 (App. Div. 3d Dep't), *leave to appeal denied by In re Saulpaugh*, 2004 WL 2376423 (N.Y. Oct. 19, 2004) 17

Selig v. Pfizer, Inc., 713 N.Y.S.2d 898 (Sup. Ct., N.Y. Co. 2000), *aff'd*, 755 N.Y.S.2d 549 (App. Div. 1st Dep't 2002) 17

Sommers v. Fed'n of Jewish Philanthropies of New York, 289 N.Y.S.2d 96 (Sup. Ct. Special Term 1968) 26

Squitieri v. New York, 669 N.Y.S.2d 589 (App. Div. 1st Dep't 1998) 58

Weisgram v. Marley Co., 120 S.Ct. 1011 (2000) 60

TABLE OF AUTHORITIES
(continued)

Page(s)

Xerox Corp. v. Town of Webster, 616 N.Y.S.2d 119
(App. Div. 4th Dep't 1994) 48, 52

Statutes

CPLR § 3101(b) 50

CPLR § 3101(c) 47, 49

CPLR § 3101(d) 49

CPLR § 4503(a) 49

CPLR § 5522 60

22 N.Y.C.R.R. § 202.17(h) 26

Miscellaneous

Weinstein, Korn, & Miller, N.Y. CIV. PRAC. 3101.52a 47

QUESTIONS INVOLVED

1. Whether the trial court was required to hold a *Frye* hearing before admitting testimony based on a novel scientific principle. The trial court admitted expert opinions based on an unprecedented and unproven "scientific principle" without first conducting a *Frye* hearing.

2. Whether a medical expert whose opinions are based on a review of the plaintiffs' existing medical records—not on an examination of the plaintiffs—may be barred from offering any testimony about the plaintiffs on the ground that the expert did not provide a medical report to the plaintiffs. The trial court prevented the expert from giving any testimony about the plaintiffs.

3. Whether plaintiffs' expert witness was properly allowed to testify that her experiment answered the ultimate issue at trial even though she acknowledged before and during trial that the experiment was incompetent for that purpose. The trial court allowed her highly prejudicial "argument by ambush."

4. Whether, when separate actions are consolidated for trial, one defendant has a right to cross-examine an expert witness proffered by another defendant in a consolidated case with respect to testimony adverse to the first defendant. The trial court allowed the witness's adverse testimony to go unchallenged.

5. Whether a witness who was previously retained by defendant's counsel

as a non-testifying consultant may testify for the plaintiff, without defendant's consent, about the facts of his prior retention and information obtained during that retention. The trial court ordered the witness to testify about the details of his prior retention by defendant despite defendant's assertion of attorney work product and attorney client privilege.

6. Whether the trial court may give a spoliation instruction with respect to materials not produced under a claim of privilege without first ruling on the privilege claim and ordering defendant to produce the materials. The trial court gave a spoliation charge even though the plaintiff never filed a motion to compel.

7. Whether the trial court may give a spoliation instruction with respect to materials that were unintentionally discarded years before these cases were filed. The trial court gave a spoliation charge.

8. Whether the Court should enter judgment as a matter of law for the defendants in a product liability case where there was no admissible evidence that the products in question could have injured the plaintiffs.

NATURE OF THE CASE

For some products containing asbestos—pipe insulation and asbestos blocks, for example—the link between exposure to dust from the product and disease is well established by scientists and long recognized by the courts. That is because routine

use of these products has been shown to produce dust containing substantial numbers of asbestos fibers that can enter the lung (that are "respirable")[1] and cause disease there. (For convenience, we refer to fibers that satisfy these requirements as "disease-causing" asbestos fibers.) *See, e.g.*, *Abadie v. Metro. Life Ins. Co.*, 784 So.2d 46, 89-91 (La. Ct. App. 2001). These cases do *not* involve one of those products.

Rather, plaintiffs' claim—that the dust produced when welders used defendants' *welding rods* contained harmful levels of disease-causing asbestos—is both legally and scientifically unprecedented: Before this case no judicial opinion or jury verdict had *ever* awarded damages on this theory and no scientific study or experiment had ever found that workplace use of defendants' welding rods emitted *any* respirable asbestos fibers, let alone fibers that could cause asbestos-related disease. On the contrary, all evidence indicated that the small percentage of asbestos in defendants' products was encapsulated at the molecular level and *could not be* released in respirable form. Thus, this was not just another case on the asbestos-litigation assembly line, but was a first-order product liability case involving a product that had never been the subject of a jury award.

---

[1] An asbestos fiber is not "respirable" simply because it can be breathed into the mouth. Instead, an asbestos fiber is "respirable" only if it has the physical characteristics—length, width, and shape—that allow the fiber to enter and become embedded in the alveoli of the lung where it can interact with the lung and cause disease. *See, e.g.*, A287-89, A503-05.

Defendants' Welding Rods

The Lincoln Electric Company ("Lincoln") and Hobart Brothers Company ("Hobart") both manufacture welding electrodes, commonly known as welding rods. As the name implies, welding rods are used in the process of welding together two pieces of metal. In arc welding, a current passes through the welding rod and arcs onto the metal surface to be welded. The arc cuts a groove in the surface, liquefies the metal on the end of the welding rod, and deposits that liquid metal from the welding rod into the groove. The resulting bond is called a weldment.

From the 1930s until 1981, Lincoln and Hobart manufactured some welding rods that contained a small amount of asbestos in their baked-on coating, or flux. Most of defendants' welding rods never contained any asbestos; but their American Welding Society classification "6010" rods, used for general purpose arc welding (A245-48), did contain a small amount of chrysotile asbestos (A243-44).

Defendants' welding rods were made by evenly coating a thin rod of steel with a layer of flux, which was burned off during the welding process. The flux on defendants' welding rods was manufactured by blending the dry ingredients, including a small percentage of chrysotile asbestos, with a liquid binder called sodium-silicate, or waterglass, sufficient to more than completely surround and coat the dry ingredients. A581-88. This mixture created a clay-like flux compound that then was

compressed into dense slugs, placed into an industrial extruder, and rapidly extruded, under several thousand psi of pressure, onto metal rods. *Id.* The evenly coated rods were baked until the flux became hard. *Id.* The same manufacturing process is used today, with other materials substituted for asbestos.[2]

The flux on defendants' welding rods facilitated transfer of the liquid metal through the welding arc and helped to shield impurities from entering the resulting weldment. A458-60.1. A small quantity of chrysotile asbestos was used in the flux primarily because asbestos provides "high temperature water," which means that it releases water when the asbestos molecule breaks down at 900-1500°F in the welding arc. A459-60.1, A537. When asbestos breaks down, it also produces silicate and magnesium molecules that strengthen the weldment by binding with impurities in the liquid metal. *Id.* When defendants attempted to replace asbestos as an ingredient in the flux on their welding rods they found it difficult to identify another material or combination of materials with these critical properties. A460-63.

Lincoln manufactured 6010 welding rods containing asbestos from the 1930s until June 1980 (A260) under the trade-names Fleetweld 5 and Fleetweld 5P (A206-

---

[2] Historically, other methods of applying asbestos to welding rods have been used by other manufacturers. For example, some manufacturers dipped the metal rod in a mixture containing asbestos and then in a superficial silicate coating; still others simply wrapped the metal with loose asbestos yarn. A304-06.

07). The flux on these rods contained 3½ to 14% "cationic fiber" (A207-10), 20% of which was chrysotile asbestos (A249-52), meaning that 0.7 to 2.8% of the flux was asbestos. Lincoln stopped using asbestos in its 6010 rods in 1980 because of increasingly strict OSHA regulations for workers who handled raw asbestos in its manufacturing plant. A253-54, A260.

Hobart manufactured 6010 welding rods containing asbestos until 1981 (A464) under the trade names Hobart 10 and Hobart 10IP (A457). According to the company's Material Safety Data Sheets for these welding rods, the flux on the rods contained less than 10% chrysotile asbestos depending on the diameter of the rod. A457; A802-05. Hobart stopped using asbestos because it was concerned about both the safety of workers in its manufacturing plant who handled the raw asbestos and the future availability of asbestos in the marketplace. A465.

OSHA Regulations

The Occupational Safety and Health Administration ("OSHA") first regulated asbestos in the workplace in 1971. At that time, the agency set the permissible exposure limit for asbestos at 12 fibers per cubic centimeter of air (averaged over an eight-hour work shift). A395-96. At the time that defendants stopped producing asbestos-containing welding rods, OSHA's permissible exposure limit was 2 fibers per cubic centimeter. A397-98; *see also* A405. Today, OSHA sets the limit at 0.10

fiber per cubic centimeter of air. *Id*. These limits count only fibers that are greater than 5 microns in length. A506-08.

Exposure Testing

In 1976, John Schuster, an employee in charge of OSHA compliance at Lincoln's manufacturing plant, conducted a "work simulation" test in order to measure the "maximum exposure" of a worker using Fleetweld 5P welding rods. A568-60. Schuster tested 600 pounds of rods, roughly the number of rods that would be used over 50 days of work. A570-71. He unboxed the rods (which were shipped in sealed metal containers) in a variety of ways, including with a grinding wheel and a pneumatic hammer (A571-74), then threw the rods against the wall, rolled them around on a metal table and otherwise manipulated them (A575-79). Schuster wore a lapel air monitor—a monitor designed to reproduce the actual breathing exposure of a welder—during this entire two-hour process and did not detect a single asbestos fiber.[3] A580. That result confirmed defendants' belief that their welding rods did not emit disease-causing asbestos because the asbestos was baked into the flux and encapsulated by waterglass at a molecular level. *See* A548-51. Schuster's test was the *only* empirical evidence in these cases that addressed the question whether welders

---

[3] The detection limit on Schuster's test was 5 microns, the same limit imposed by OSHA regulations (both in 1976 and now). A580.

were exposed to asbestos from defendants' products. *See id.*

The Plaintiffs

Daniel Tucker's welding career began in late 1979 when he attended welding school. A488-89. As noted above, both Lincoln and Hobart had stopped producing asbestos-containing welding rods by 1981. For nine years before he became a welder, Tucker worked as a mechanic on underground steam pipes. A481-88. This job required him to tear out amosite-asbestos insulation on steam pipes and install new amosite-asbestos insulation after the pipes had been repaired. A481-82. Tucker assisted welders two or three times a week while he was a mechanic and may have had some exposure to "dust" from welding rods while assisting the welders. A456. Even after Tucker became a welder, from 1980 until he left the job in 1986, he was still exposed to amosite-asbestos pipe covering that was being removed in order to expose the pipes that he then would weld. A490-91. Tucker was diagnosed with mesothelioma in September 2001 (A263-64), his pleura and left lung were removed in November 2001 (A265), and he died on September 17, 2002 (A266).

Angel Gomez was a welder at Hillside Metal from 1965 to 1967. A271-72. His maximum period of exposure to asbestos from defendants' welding rods was approximately two years. Before working at Hillside Metal, from 1962 to 1965, Gomez worked in an automotive garage where he was exposed to asbestos in brake

pads. A273-75. After working at Hillside Metal, Gomez was employed at various shipyards from 1967 to 1969 (A275-76) where his responsibilities included tearing out the asbestos-insulation blocks surrounding boilers and mixing asbestos cement (A275-76, A328-33). Gomez smoked approximately one pack of Marlboro or Newport cigarettes per day from 1960 until 1980. A277. Gomez was diagnosed with lung cancer in October 2001. A278. He also was diagnosed with bullous emphysema (A281), a condition associated with a long history of smoking but with no direct connection to asbestos exposure (A526-27). Gomez was *not* diagnosed with asbestosis, an inflamation of the lungs' lining caused by asbestos fibers. A282. Gomez was undergoing chemotherapy at the time of trial. A279-80.

Procedural History

Tucker filed a complaint against multiple defendants in the New York City Asbestos Litigation ("NYCAL") on October 25, 2001. On January 18, 2002, Tucker amended his complaint to add Lincoln and Hobart as defendants. All defendants other than Lincoln and Hobart settled or were dismissed before trial. Gomez filed a complaint against multiple defendants in the NYCAL on March 11, 2002. All defendants in Gomez's case, other than Lincoln, settled or were dismissed before trial.

Asbestos-exposure litigation against Lincoln and Hobart has traditionally involved the claim that welders were exposed to asbestos in the fumes from burning

welding rods. That "fume-exposure" theory of liability has been affirmatively disproved, and defendants have consistently won those cases. Tucker and Gomez originally raised the fume-exposure theory in this case. But, immediately after the Special Master ordered a *Frye* hearing, saying that she was "skeptical of plaintiffs' claims" (*see* A42-43), plaintiffs withdrew their fume-exposure theory and instead asserted the claim that they were exposed to asbestos in the dust produced when welders used defendants' welding rods (*see* A44).

This "dust-exposure" theory, the only theory of liability in this case, was relatively novel: *None* of the few cases in which it had previously been raised resulted in a verdict in the plaintiffs' favor. *See, e.g.*, A64-65, A88-89. Defendants sought a *Frye* hearing on plaintiffs' novel dust-exposure theory (*see* A54-96), but the trial court refused (*see* A158-60).

A jury trial was conducted before the Honorable Louis B. York. The jury returned a verdict against both defendants in Tucker's case and against Lincoln (the only defendant) in Gomez's case (Gomez was found to be 25% at fault because of his extensive history of smoking). Consolidated post-trial motions were filed on August 25, 2003, and denied on December 3, 2003. On May 27, 2004, the court entered final judgment in favor of Gomez in the total amount of $2,001,185.67. On August 26, 2004, the court entered final judgment in favor of Tucker in the total amount of

$1,913,600.51. Defendants were served with notice of entry of final judgment on August 13, 2004, in Gomez's case and on August 27, 2004, in Tucker's case. On September 13, 2004, defendants timely filed notices of appeal and pre-argument statements in both cases.

SUMMARY OF ARGUMENT

A series of evidentiary errors in these cases effectively relieved plaintiffs of their burden of proof and deprived defendants of their right to put on a defense. *See* Section I, *infra*. Each of these errors is sufficient to justify reversing the judgments against defendants. And the cumulative effect was a trial that violated basic precepts of fairness and due process, in which plaintiffs were not required to support their arguments and defendants were not allowed to support theirs. The trial court also erred by ordering a witness to give testimony on matters protected by an absolute privilege (*see* Section II, *infra*) and by giving an unwarranted spoliation instruction that allowed the jury to completely circumvent the central factual issues in this case (*see* Section III, *infra*). These errors require that the judgments against defendants be reversed. Finally, because plaintiffs did not introduce any properly admitted evidence that defendants' welding rods could have harmed Tucker or Gomez, despite a full and fair opportunity to do so, this Court should direct entry of judgment in defendants' favor. *See* Section IV, *infra*.

ARGUMENT

I. A SERIES OF FUNDAMENTAL EVIDENTIARY ERRORS EFFECTIVELY RELIEVED PLAINTIFFS OF THEIR OBLIGATION TO ESTABLISH THAT PLAINTIFFS WERE EXPOSED TO DISEASE-CAUSING ASBESTOS FROM DEFENDANTS' WELDING RODS.

In order to prevail on their unprecedented theory that "dust" from defendants' welding rods contained dangerous levels of disease-causing asbestos, plaintiffs should have been required, as a threshold matter, to prove that defendants' welding rods actually emitted dangerous levels of disease-causing asbestos when they were used in the workplace by welders such as Tucker and Gomez. But plaintiffs did not submit any such proof. Indeed, the only empirical data in the record were a welder exposure test showing that welders were *not* exposed to any disease-causing asbestos fibers (*see* pages 7-8, *supra*) and a fiber release experiment showing that even under fatally-flawed conditions bearing no resemblance whatever to the workplace no disease-causing asbestos fibers were released from 14-year-old welding rods (*see* pages 30-36, *infra*).

Instead of proving that their theory was true, plaintiffs prevailed because the court lifted that burden from their shoulders. In an astounding series of evidentiary rulings, the court: (i) allowed plaintiffs to avoid completely the central questions of fiber release and exposure by claiming that the presence of visible dust from a welding

rod, in and of itself, conclusively establishes exposure to dangerous levels of disease-causing asbestos; (ii) eviscerated defendants' case by ordering their medical expert not to give any testimony about either plaintiff, including testimony about the health effects of plaintiffs' exposure to other asbestos-containing products; (iii) permitted plaintiffs' expert, for the first time during her trial testimony, to transform her fatally flawed "rod-rubbing" experiment into a test of welders' asbestos exposure in the workplace; and (iv) barred defendants from any cross-examination of another defendant's expert witness who provided critical adverse testimony regarding the health effects of various types of asbestos exposure. The individual and cumulative effect of these rulings was to excuse plaintiffs' failure of proof and hamstring any defense that defendants might have raised.

It is not a coincidence that these errors all reflect a tacit disregard for the possibility that defendants' welding rods could be completely safe even though they contained a small amount of chrysotile asbestos. From the beginning, the trial court simply failed to realize that this case was different from the typical asbestos litigation in which any question about whether the product causes asbestos-related disease has long been settled through previous litigation or widely accepted scientific studies. Here, there was no previous jury award or judicial opinion endorsing plaintiffs' theory and there are no scientific studies "settling" this issue. Instead, the question whether

defendants' welding rods emit disease-causing asbestos (at all, let alone at levels sufficient to cause disease) was very much open to debate. Plaintiffs were obliged to carry their burden of proof on this issue, and defendants had a right to put on their defense. The trial court, apparently, disagreed.

A. The Court Erroneously Refused To Conduct A *Frye* Hearing On Plaintiffs' Novel "Scientific Principle" That Visible "Dust" From Welding Rods Conclusively Establishes Exposure To Dangerous Levels Of Disease-Causing Asbestos.

Lincoln and Hobart did not dispute that the flux on certain of their welding rods contained a small amount of chrysotile asbestos. Tucker and Gomez said that they remembered seeing "dust" from those welding rods when they used them two or three decades ago in generally dusty industrial settings. The central disputed issue at trial was whether this dust from defendants' welding rods contained disease-causing asbestos; that is, whether the asbestos in the flux of defendants' welding rods could be released in a form that could be inhaled, enter the alveoli of the lung, and interact with the lung to cause disease when the rods were used by welders.

Defendants argued that the asbestos could *not* be released in disease-causing form because it was encapsulated by waterglass at a molecular level: When the asbestos fibers were chemically "wetted" with liquid waterglass, each asbestos fiber was surrounded by a layer of sodium silicate that was thereafter permanently bound

to the fiber by electrostatic forces. A531-34. Dr. Thomas Eagar, a MIT professor who specializes in the science of welding, testified that one could no more separate an asbestos fiber from the flux of defendants' welding rods than remove a grain of flour from cake batter. *See* A550-51. In other words, even if dust was released from defendants' welding rods, that dust would not contain *any* asbestos fibers that could interact with the lung, let alone quantities sufficient to cause disease, because an asbestos fiber that is molecularly coated by sodium silicate can neither enter the alveoli nor interact with the lung (*see* A74-87, A502-05; *see also* A531-34, A550-51).

Plaintiffs, on the other hand, sought to avoid this central issue. They argued that, as a scientific principle, any visible dust emanating from an asbestos-containing welding rod necessarily contained dangerous quantities of disease-causing asbestos. And therefore, plaintiffs argued, Tucker's and Gomez's testimony that they saw "dust" was sufficient to prove that defendants' welding rods caused their diseases. Each of plaintiffs' experts asserted that "if a worker reports significant visible dust" from defendants' welding rods, then the disease-causing asbestos levels in the air are necessarily "significant" and "much above the P[ermissible] E[xposure] L[evel] that is in place today." A261-62 (plaintiffs' expert Dr. Moline); *see also* A182-84 (plaintiffs' expert Dr. Markowitz), A185-86 (same), A366-66.1 (plaintiffs' expert Dr. Todd). During closing arguments, plaintiffs' counsel summed up this theory for the

jury: "The fact is, if—you do not need a fiber-release test to show [that] asbestos fibers are released when you see dust in the air from [defendants' welding rods]." A674.

Plaintiffs' "principle" is illogical, unsupported, and unscientific. It is obviously impossible to know whether dust created by the handling and use in the workplace of defendants' welding rods contained disease-causing asbestos without analyzing that dust. Plaintiffs did not offer *any* proof that the dust from defendants' welding rods contained disease-causing asbestos—they did not even argue that the laws of physics and chemistry prove that disease-causing fibers must be released when welders bend, break, or handle welding rods. It is thus unsurprising that plaintiffs also did not offer *any* evidence that anyone outside their litigation team had ever endorsed their "scientific principle" that visible dust from welding rods necessarily contained dangerous levels of disease-causing asbestos.

Anticipating plaintiffs' position, defendants asked the trial court to conduct a pre-trial *Frye* hearing to determine whether this "principle" was "sufficiently established to have gained general acceptance in the particular field in which it belongs." *People v. Wernick*, 89 N.Y.2d 111, 115 (1996) (internal quotation marks omitted). Defendants submitted affidavits from three scientists—a professor of materials engineering at MIT, a certified industrial hygienist, and a physician—who

did *not* accept plaintiffs' theory and, in fact, asserted that it was false. *See* A73-87.

"The threshold standard for admissibility of novel scientific evidence in New York State is derived from *Frye v. United States*, 293 F. 1013 (1923)." *Selig v. Pfizer, Inc.*, 713 N.Y.S.2d 898, 901 (Sup. Ct., N.Y. Co. 2000), *aff'd*, 755 N.Y.S.2d 549 (App. Div. 1st Dep't 2002). A *Frye* hearing ensures that all expert testimony is "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." *Wernick*, 89 N.Y.2d at 115 (internal quotation marks omitted). Trial courts must conduct a pre-trial *Frye* hearing whenever proposed expert testimony is based on a novel scientific principle or there is a question whether the expert's theory "is supported by accepted scientific methods, particularly [when the] conclusions are allegedly novel." *Selig*, 713 N.Y.S.2d at 902.

The party seeking to introduce the challenged expert testimony has the burden of submitting objective evidence that the expert's principles have been generally accepted by the relevant scientific community: "Broad statements of general scientific acceptance without accompanying support, are insufficient" and the testimony should be excluded unless the party produces "controlled studies, clinical data, medical literature, peer review or supportive proof indicating that [the] theory [is] generally accepted by the relevant medical [or scientific] community." *Saulpaugh v. Krafte*,

774 N.Y.S.2d 194, 196 (App. Div. 3d Dep't), *leave to appeal denied by In re Saulpaugh*, 2004 WL 2376423 (N.Y. Oct. 19, 2004) (table).

Tucker and Gomez failed utterly to meet that burden. Plaintiffs opposed defendants' request for a *Frye* hearing, but they did not identify any scientific studies or articles adopting their principle, they did not identify any prior litigation in which their principle had been accepted, and they did not even provide affidavits from scientists claiming that the principle is accepted, much less generally accepted, in the scientific community. *See* A97-111. Instead, plaintiffs referred the court to several cases in which the plaintiff was allowed to argue that visible dust from *a different product* always contains dangerous levels of disease-causing asbestos. *Id.* From these cases plaintiffs inferred that "it is well established that a worker's reporting of visible dust from an asbestos-containing product during actual working conditions provides a sufficient (and indeed the most reliable basis) for an expert to conclude that the worker was exposed to hazardous levels of asbestos from a particular asbestos containing product." A102.

Plaintiffs' argument—because dust from other asbestos-containing products has been shown to contain dangerous levels of disease-causing asbestos, dust from defendants' welding rods therefore must also have contained dangerous levels of respirable asbestos—is a blatant non-sequitur. Different products have different

physical characteristics—specifically, the asbestos in different products is of different types, is used in different proportions, and is incorporated into the product in very different ways (*see, e.g.*, A542-44)—and there is no reason to think that analyzing the dust from one necessarily proves anything about the dust from another. Indeed, defendants' experts testified that it was the unique properties of the flux on defendants' welding rods that prevented the release of *any* disease-causing asbestos. *See* A74-87, A531-34, A550-51. Plaintiffs provided absolutely no evidence that any scientist, other than their own expert witnesses, had accepted the critical "scientific principle" that they put before the jury.

Indeed, when questioned, plaintiffs' own expert admitted that this principle is simply unsupported and illogical:

> Q: So when you offer the opinion that merely because someone sees dust coming from bending of a welding rod, you don't know what any of that dust is of your own knowledge, do you?
>
> * * *
>
> A: I don't know specifically at that time or day or what that dust is.
>
> Q: And you don't know if any of that dust, if it does contain asbestos, whether that asbestos is a respirable form, do you, Dr. Moline?
>
> A: No.
>
> Q: And in order to be a respirable form, it has to be a certain size and shape and it's got to be airborne, right?

A: Yes.

Q: You don't know any of that about these products, do you, the patients tell you about?

A: Well, I know when patients are talking about specific products there's a body of literature that discusses.

Q: For some products?

A: For some products. So I do know, or I can use the general medical knowledge.

Q: But for pipe covering, for example, there is a body of literature of pipe covering and the dust it gives off, right?

A: Yes.

Q: And that gives off a high level of dust, doesn't it, doctor?

A: It can.

Q: And cement, asbestos cement gives off a high level of dust when they are used in the field, don't they, doctor?

A: When they are being mixed and used.

Q: And asbestos containing pipe covering—I mean block, gives off large amounts of asbestos dust when it's being used in the field, right?

A: Yes.

Q: Did you see any articles or have any studies that you are aware of about the amount of respirable dust that may be given off by bending, abrading, stepping on, smashing welding rods?

A: I'm unaware of any literature.

A325-27. Of course, the question in *this* case is not whether the scientific community has generally accepted that dust from notoriously dangerous products such as pipe insulation, asbestos cement, and asbestos block contains dangerous levels of disease-causing asbestos. The relevant question in *this* case is whether the scientific community has generally accepted that dust created by welders' use of defendants' welding rods contains disease-causing asbestos. And, according to plaintiffs' own witness, there is no evidence that *that* principle has been generally accepted outside of plaintiffs' litigation team.[4]

In sum, defendants submitted three affidavits indicating that plaintiffs' "scientific principle" is *not* generally accepted in the scientific community and plaintiffs submitted nothing indicating that it is (not even affidavits from their own experts). This is precisely the situation in which a trial court must conduct a *Frye* hearing before allowing expert testimony into the case. Nevertheless, the trial court denied defendants request for a *Frye* hearing and permitted plaintiffs to put their unsupported principle before the jury without the judicial screening that *Frye* requires.

---

[4] That distinguishes this case from *Lustering v. A C & S, Inc.*, 786 N.Y.S.2d 20, 21 (App. Div. 1st Dep't 2004), where there was "[v]alid expert testimony" indicating that "dust raised specifically by the manipulation and crushing of defendant's packing and gaskets * * * necessarily contains enough asbestos to cause mesothelioma." Here, plaintiffs' expert admitted that there was *no* valid evidence proving that the dust raised specifically by the manipulation of defendants' welding rods contained any disease-causing asbestos, let alone enough to actually cause asbestos-related disease.

That was a fundamental and egregiously harmful error. A158-60.

The trial court's reasoning in denying defendants' request betrayed its deep misunderstanding of the primary issue in this case: "I can't conceive of anybody believing that the effects of asbestos dust as to whether or not it's a cause of cancer is a new and novel issue"; "[t]here is no question in my mind that asbestos dust does, sufficient exposure to it does cause cancer, and I'm not going to engage in determining whether or not that applies to welding rods * * * I will leave it to the experts to tell the jury that." A158-60. To be sure, defendants agreed that "sufficient exposure" to "asbestos dust" (*i.e.*, disease-causing asbestos) causes cancer and mesothelioma regardless of what product produced the disease-causing asbestos. However, the disputed issue—the central issue in this case—was whether defendants' welding rods in fact produced disease-causing asbestos when they were used in the workplace by welders such as Tucker and Gomez. Plaintiffs' novel "scientific principle" allowed them to ignore that question and simply assert, without any proof, that the dust that Tucker and Gomez saw necessarily contained dangerous levels of disease-causing asbestos.

To be clear, plaintiffs' approach might be appropriate in a routine, "mature," asbestos case involving a product that has been shown to emit disease-causing asbestos fibers (such as pipe covering, asbestos cement, or asbestos block, *see* A325-

27). In such cases there would be no basis for a *Frye* hearing because of the long-settled view of the medical community regarding disease-causing asbestos fiber release and causation with respect to those products.

But this was a first-of-its-kind product liability case: no jury verdict or judicial opinion had ever awarded damages on this theory and plaintiffs did not produce any prior studies, experiments, or reports finding that defendants' welding rods emit disease-causing asbestos fibers. Defendants were entitled to establish that this was not a coincidence—*i.e.*, that their product was safe even though it contained a small amount of chrysotile asbestos. And it was plaintiffs' burden to prove that defendants' welding rods were not safe because they released dangerous levels of disease-causing asbestos when used by working welders. The trial court's uncritical acceptance of plaintiffs' "scientific principle" effectively lifted the burden of proof from plaintiffs' shoulders on the central questions of fiber release and asbestos exposure.

This Court should vacate the judgment against defendants and order a new trial in which plaintiffs are precluded from arguing that the mere presence of dust from welding rods proves exposure to dangerous levels of disease-causing asbestos, or, at minimum, should vacate the judgment and order a new trial in which defendants are given an opportunity to challenge plaintiffs' novel "scientific principle" at a pre-trial *Frye* hearing.

B. The Court Erroneously Prevented Defendants' Expert From Discussing Plaintiffs' Medical Records Or Providing Any Plaintiff-Specific Testimony.

Defendants timely disclosed prior to trial that they had retained Dr. William Hughson to provide general and plaintiff-specific medical testimony. *See* A37-38 (Dr. Hughson "may offer testimony regarding the health, disease process and causation concerning the plaintiffs"). Over six months later, and less than one month before trial, Dr. Hughson became seriously ill and defendants were forced to substitute Dr. Allan Feingold. *See* A116-18. At a pre-trial hearing discussing this substitution, on May 8, 2003, plaintiffs argued for the first time that defendants' expert should not be allowed to give any testimony about Tucker or Gomez because defendants had not produced an expert report for either of them.[5] *See* A494-99. The trial court agreed. The court ordered Dr. Feingold to limit his testimony to general medical and scientific principles and barred defendants from introducing any specific testimony or opinions about either plaintiff. *See id*.

That ruling was clearly wrong: Defendants had no obligation to produce a medical report because the opinions of both of their experts (Dr. Hughson and Dr. Feingold) were based on a review of existing medical records and *not* an examination

[5] There is no transcript of this pre-trial hearing, but the trial court's ruling was memorialized on the record, along with defendants' objection, immediately prior to Dr. Feingold's testimony. *See* A494-993.

of the plaintiffs.

This case was governed by the Amended Case Management Order for the NYCAL, which provides that:

> Defendants shall have an opportunity, if they desire, to obtain a single medical examination of the plaintiff in accordance with CPLR 3121 and in accordance with the time line set forth herein. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line.

A47. In other words, the only report that the CMO requires is a report "*of the medical examination*" that defendants are allowed to conduct. If the defendants do not take advantage of their opportunity to conduct such an examination—and instead are content to have their expert base his opinions on a review of the plaintiff's existing records—there can be no report "of the medical examination" that defendants are obliged to produce. It follows that when the CMO allows courts to exclude the testimony of an expert "whose report and any supporting [materials] have not been provided by the deadline in the discovery order" (A51), it contemplates use of this extreme sanction only for those experts who did conduct a physical examination and thus were required to produce a report.

That is the principle that applies in general civil litigation.[6] The Uniform Rules

---

[6] The CMO specifies that "The Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County together with the express provisions of this Order shall govern all proceedings herein." A46.

for New York Trial Courts state that:

> [U]nless the judge presiding at the trial in the interests of justice and upon a showing of good cause shall hold otherwise * * * no party shall be permitted to offer any evidence of injuries or conditions not set forth or put in issue in the respective medical reports * * * nor will the court hear the testimony of any treating or examining medical providers whose medical reports have not been served as provided by this rule.

22 N.Y.C.R.R. § 202.17(h). Because the rule requires medical reports from only "treating or examining medical providers" (*id.*), courts have consistently held that a "physician's testimony, even absent a showing of good cause [for failure to produce a report], may be allowed where it is based solely upon the medical records already admitted into evidence and not upon the physician's examination of the injured party." *Erena v. Colavita Pasta & Olive Oil Corp.*, 605 N.Y.S.2d 475, 477 (App. Div. 3d Dep't 1993); *see also Campoli v. Lobmeyer*, 583 N.Y.S.2d 639 (App. Div. 3d Dep't 1992) (trial court correctly allowed expert testimony based on existing medical records even though party failed to produce a report); *Byczek v. New York Dep't of Parks*, 438 N.Y.S.2d 596 (App. Div. 2d Dep't 1981) (under previous version of this rule: "since [the expert] never examined or treated the plaintiff, but was to testify as an expert on the basis of the records in evidence, this requirement [for a medical report] does not apply"); *see generally Sommers v. Fed'n of Jewish Philanthropies of New Yor*k, 289 N.Y.S.2d 96, 99 (Sup. Ct. Special Term 1968) ("There seems to be

little question but that a medical expert's report containing his opinion on the question of liability, is not subject to ordinary exchange rules where said report is based upon other than the expert's own treatment or examination of the plaintiff.") (citations omitted).

Neither Dr. Hughson nor Dr. Feingold conducted an examination of Tucker or Gomez. Their opinions were based exclusively on a review of the existing medical records. Accordingly, defendants were under no obligation to produce a medical report. The trial court was plainly wrong to impose any sanction, let alone the draconian sanction of excluding all testimony about the plaintiffs, based on the erroneous requirement that defendants produce a report.

That error was devastating to defendants' case. It was impossible to put on an adequate defense without ever mentioning plaintiffs' occupational and medical history. And not only was Dr. Feingold ordered to refrain from discussing the facts or offering opinions regarding Tucker and Gomez, he was not even allowed to answer hypothetical questions that too closely resembled the facts in these cases. *See* A494-99.

As a result, each plaintiff was given free reign to take liberties in characterizing the facts of his case in the light most favorable to his claims without any fear of rebuttal. Defendants, on the other hand, were not allowed to explain and place proper

emphasis on Tucker's and Gomez's many years of exposure to notoriously dangerous asbestos products such as asbestos insulation and cement (*cf.* A326-27, A477-78). And defendants could not effectively contrast that severe exposure with the extremely low levels of exposure that plaintiffs contend they received through welding rods (even assuming that plaintiffs' unprecedented, unscientific, and unproven theory of exposure were true).

Simply stated, plaintiffs' medical experts were permitted to tell the jury that welding rods caused Tucker's mesothelioma and Gomez's lung cancer (based on the "scientific principle" that visible dust from welding rods necessarily contains dangerous levels of disease-causing asbestos). *See* A267-68, A283-84. Dr. Feingold, on the other hand, was *not* permitted to tell the jury that Tucker's mesothelioma in fact was caused by a decade of exposure to notoriously dangerous amosite-asbestos steam-pipe insulation, *not welding rods,* and Gomez's lung cancer was caused by decades of smoking and/or exposure to notoriously dangerous amosite-asbestos navy boiler insulation and asbestos cement, *not welding rods.* On this most basic issue of liability, defendants were rendered mute.

Moreover, plaintiffs unabashedly exploited defendants' enforced silence during closing arguments, when they said to the jury:

Was [Mr. Gomez's] exposure to asbestos a substantial factor in causing

> his lung cancer or was it, like [defendants' counsel] said, was it caused only by smoking? Dr. Moline [plaintiffs' expert] answered yes. Dr. Feingold * * * never said Mr. Gomez, never said the word Mr. Gomez, no opinion given about Mr. Gomez. Why is that?
>
> Was Mr. Gomez's exposure * * * to asbestos from welding rods a substantial factor in causing his lung cancer? * * * Dr. Moline yes. Dr. Feingold didn't mention the name Gomez, no benefit, undisputed.
>
> * * *
>
> Again, with Mr. Tucker * * * were the welding rods a substantial factor in causing Mr. Tucker's mesothelioma? Answer: Yes. * * * Dr. Feingold again, no testimony about any specifics about Mr. Tucker or Mr. Gomez's case, no test. These men, their occupational history, just extreme positions.

A679-81.

It was extremely misleading and highly prejudicial for plaintiffs to suggest that Dr. Feingold's silence was an acknowledgment of liability when they knew that it was instead a court-imposed sanction. After these comments, defendants asked the trial court for a curative instruction. A681.1-682. At first the court agreed: "I think I have to say something to the Jury that because of certain evidentiary issues, Dr. Feingold was not permitted to testify to—about the [plaintiffs]." A682. However, after plaintiffs' relentless opposition (A683-88), the court capitulated: "I will leave it the way it is. You have your objection. I do not want to clutter the record now with curative instructions in the middle of closing arguments." A688. Defendants then

moved for a mistrial and the court denied the motion. A688-89.

Plaintiffs' exploitation of the trial court's erroneous exclusion of all plaintiff-specific testimony and opinions highlights the extreme prejudice caused by this sanction. According to the plaintiffs, Dr. Feingold's testimony amounted to a concession of liability that welding rods were the cause of plaintiffs' diseases because Dr. Feingold's silence meant that it was "undisputed" that "asbestos from welding rods" was "a substantial factor" in causing Tucker's mesothelioma and Gomez's lung cancer. A679.

This Court should order a new trial in which defendants are allowed to put on appropriate expert testimony about the plaintiffs' medical and occupational history. *See, e.g.*, *Clark v. Weber*, 695 N.Y.S.2d 34 (App. Div. 1st Dep't 1999) (erroneous exclusion of relevant expert testimony because of failure to comply with disclosure requirement is reversible error).

C. The Court Erroneously Allowed Plaintiffs' Expert To Claim That Her "Rod-Rubbing" Experiment Proved That Welders Were Exposed To Disease-Causing Asbestos From Defendants' Products.

1. Dr. Todd's "rod-rubbing" experiment

In 1995, Dr. Lori Todd received two welding rods that a law firm had labeled as Hobart asbestos-containing welding rods. A164-67, A355-58. Dr. Todd could not personally verify that these were in fact Hobart rods. *Id.* She also did not know where

or under what conditions the rods had been stored for the 14 years since Hobart stopped making asbestos-containing welding rods. A356-57, A464. Nonetheless, Dr. Todd experimented with the rods by rubbing them together for 15 minutes inside a sealed glove-box while pulling a measured quantity of air out of the box through a filter that collected all particulate matter. A338-52.

Despite the age and unknown history of the welding rods, Dr. Todd's protocol did not include any controls for surface contamination (such as vacuuming the rods); she tested the welding rods exactly as she received them from the law firm, rubbing the surface of the rods together without first removing any asbestos fibers that may have accumulated on the surface over the years. A356-57, A363-64. Dr. Todd sent the filter from her experiment to Dr. William Longo, who counted the fibers on a portion of the filter and calculated the fibers per cubic centimeter of air. A351-52.

Dr. Longo reported that Dr. Todd's rod-rubbing experiment produced only 0.090 asbestos fibers per cubic centimeter of air. A808, 820-21. The nine asbestos fibers that Dr. Longo actually observed and counted had lengths of 0.6, 0.8, 0.6, 3.4, 0.6, 0.6, 7.0, 1.4, and 0.6 microns. *Id.* Dr. Longo listed seven of the nine fibers, including all fibers over 1 micron in length, as "matrix," which meant that the asbestos fiber was at least partially encapsulated in a binding agent (*id.*), most likely sodium-silicate, otherwise known as "waterglass."

2. What Dr. Todd's experiment did not prove

There were a host of problems with Dr. Todd's experiment, most obviously that she could not verify that the rods she tested were manufactured by Hobart. A164-67, A355-58. Setting that issue aside, however, the more important question is what Dr. Todd's "rod-rubbing" experiment was supposed to prove.

First, Dr. Todd's experiment did not address the question whether welders such as Tucker and Gomez were exposed to asbestos when they used defendants' welding rods. Every expert, *including Dr. Todd* (A336-37), agreed that to determine whether workers are exposed to asbestos when using a product, it is necessary to conduct a work-simulation test in the work environment using a lapel monitor (or similar device) that replicates the actual breathing exposure of a worker (*see* A285-86, A293-94, A399-400, A403-04, A415-16, A475-76, A548-51). Dr. Todd's test, on the other hand, was conducted inside a three-foot-wide glove box (A338) and measured every particle in the air, not just those that would be in a worker's breathing zone (A341). Her results, therefore, could not represent a welders' real-life exposure and could not answer the question whether a welder such as Tucker or Gomez would have been exposed to asbestos fibers when using defendants' products.

Second, Dr. Todd's experiment did not address the question whether asbestos fibers were released (let alone breathed in) when welders used defendants' products.

Dr. Todd admitted that she had no reason to think that welders rubbed welding rods together (A346); neither Tucker nor Gomez claimed that he rubbed rods together; and a knowledgeable expert testified that welders would never have any reason to rub two rods together, or even to rub one rod against something else (*see* A403; *see also* A359-60). Dr. Todd said that she chose to rub the rods together rather than bending them, breaking them, or handling them in some way similar to a welder because "[y]ou need to do something that would create a potential for getting [asbestos] in the air." A346. Whatever results she obtained from rubbing two rods together reveals nothing about whether asbestos would have been released when defendants' products were actually used by welders.

Third, Dr. Todd's experiment did not even address the *irrelevant* question whether asbestos fibers would have been released if a welder had decided to rub two welding rods together for 15 minutes. Hobart stopped producing asbestos-containing welding rods in 1981. A464. Therefore, the rods used in Dr. Todd's experiment were at least 14 years old. It was undisputed that prolonged exposure to moisture, heat, sunlight, or other elements, as well as the natural aging process, could cause the flux on a welding rod—including the encapsulating waterglass—to deteriorate, which makes a 14-year-old welding rod an unreliable indicator of the physical properties of

a relatively new production-line rod.[7] *See, e.g.*, A534-36, A538-39, A540-42. Dr. Todd's results from 14-year-old welding rods accordingly do not indicate whether the recently manufactured rods used by plaintiffs would have released asbestos, even if Tucker or Gomez had decided for some reason to rub two of them together for 15 minutes.

And, finally, Dr. Todd's experiment did not even address the question whether the two 14-year-old welding rods that she tested emit asbestos fibers when rubbed together for 15 minutes inside of a glove box, because she failed to control for surface contamination on the rods. A361-62, A363-64. That was a critical flaw in her experiment because Dr. Todd did not know where or under what conditions the rods that she tested had been stored for the previous 14 years. A356-57, 464. Defendants' expert, Dr. Balzer, testified that the risk of surface contamination was the "number one issue for me on this whole [experiment]" and that Dr. Todd's failure to control for it "invalidates the conclusion that I would draw from that data" because "those fibers they may have counted from another source." A401-02, A408-09; *see also* A438-39,

---

[7] Inexplicably, the trial court did not allow defendants to cross-examine Dr. Todd on this point because the court believed that it was outside the scope of her direct testimony. A368. That ruling was plainly wrong because Dr. Todd claimed that her experiment showed that "[t]he stuff that had asbestos in the coating got out with mild abrasion." A367. The age of the rods that she tested was obviously relevant to whether Dr. Todd's experiment really did show that the reasonably new rods used by plaintiffs would emit asbestos fibers "with mild abrasion."

A538-39, A540-42. In other words, there is simply no way to know whether the asbestos fibers that Dr. Todd detected came from the flux on the welding rods or from the ambient air of the warehouse, factory, legal evidence locker, or other location in which the rods had been stored, or from other asbestos-containing products stored with the rods, or from some other unknown source.

In any event, even with all of these problems affecting her results, Dr. Todd detected only 0.090 asbestos fibers per cubic centimeter of air. A808, 820-21. And of the nine fibers that were actually counted, six were less than 1 micron in length, eight were less than 5 microns in length, and seven were at least partially encapsulated in a binding agent. *Id*. Even plaintiffs' expert, Dr. Moline, admitted that particles below a certain size are harmless—although she claimed to be unfamiliar with the exact cutoff. A287-89. Defendants' expert *was* familiar with that information and testified that, according to current research, "fibers less than five microns do not cause damage" because they are small enough to be engulfed and dissolved by the body's natural defense mechanisms. A504-09; *see also* A510. Plaintiffs' experts did not disagree: They certainly did not claim that 0.6 or 0.8 micron fibers pose a health risk.[8] And it was undisputed that "when fibers are embedded in a matrix, they can't be

---

[8] Dr. Markowitz, one of plaintiffs' experts, said that "we don't know" whether shorter fibers cause disease (A179-81); that is a far cry from offering evidence that they do.

inhaled because they're too heavy" to penetrate the alveoli of the lung (A502-05), which is where they must lodge in order to cause disease (*id.*; A176-78).

In sum—and setting aside the fatal flaws in Dr. Todd's experiment—*none* of the fibers that Dr. Todd detected would pose a health risk to anyone. One was large enough, but it was bound up in a matrix and, thus, was harmless. Two were not bound up in a matrix but they had lengths of 0.6 and 0.8 microns and, thus, were harmless. And six were both too small to cause disease *and* bound up in a matrix. Therefore, even Dr. Todd's extremely low-level result of 0.090 fibers per cubic centimeter of air was an exaggerated figure.[9] Dr. Todd's test, for whatever it was worth, did not identify a single respirable asbestos fiber that could cause disease. In other words, the actual concentration of dangerous asbestos fibers (*i.e.*, disease-causing fibers that could cause disease) detected in Dr. Todd's "rod-rubbing" experiment was zero.

3. Dr. Todd's impermissible "testimony by ambush"

In her deposition, Dr. Todd acknowledged that her experiment did *not* measure welders' exposure to asbestos because "if you want me to design that kind of a test to

---

[9] Although Dr. Todd's experiment is not equivalent to standardized asbestos-concentration testing, it is useful to note that even today OSHA allows exposures of 0.10 fibers per cubic centimeter of air (*see, e.g.*, A137-38, A397-98) and that the background level of asbestos present in the ambient air of New York that Tucker and Gomez would have been breathing every day was approximately 0.010 to 0.030 fibers per cubic centimeter (A407).

get exposure exactly, that would be a different test," whereas her experiment "was not for that purpose" but only "to see if, you know, if [asbestos] would come off." A114. That was consistent with Dr. Todd's report, which did not contain any conclusions regarding welders' exposure to disease-causing asbestos. *See* A806-09.

At trial, Dr. Todd initially admitted that her experiment "was designed to show if asbestos fibers could be released from these materials. It was a fiber release study. It was not designed to say what actually a worker is exposed to, because then you would do a different kind of test." A337; *see also* A345-46. Nevertheless, at the conclusion of her direct testimony, Dr. Todd changed course, claiming for the first time that "workers who worked with or around asbestos containing welding rods would have been exposed to asbestos fibers in the air * * * [b]ased on this test." A353-54. The trial court denied defendants' objection to this unexpected and improper expansion of the scope and purpose of Dr. Todd's "rod-rubbing" experiment. *Id.*

Dr. Todd's last-minute surprise testimony on the most critical issue in the case should not have been admitted because it was beyond the scope of her report and contrary to her deposition testimony (as well as her initial trial testimony). In *Gregory v. Mulligan*, 698 N.Y.S.2d 309 (App. Div. 2d Dept. 1999), the Appellate Division reversed a defense judgment because the trial court allowed the defendant's expert to

testify that the plaintiff did not suffer a bone fracture even though the expert's report had concluded that there was a fracture. The court noted that the expert's "contradictory testimony at trial surprised and prejudiced the plaintiff, as the existence of a fracture had not previously been disputed." *Id.* Similarly, Dr. Todd's testimony "surprised and prejudiced" defendants because the fact that her experiment was inapplicable to welders' real-life exposure "had not previously been disputed." *Id.*; *see also Klempner v. Leone*, 715 N.Y.S.2d 743, 744 (App. Div. 2d Dept. 2000) ("Absent a showing of good cause, a medical expert's testimony should be precluded if it contradicts the facts and opinions in his or her medical report or discusses a condition or ailment not mentioned in the report.").

Moreover, by ambushing defendants with this claim at the last minute, plaintiffs prevented defendants from requesting a *Frye* hearing on Dr. Todd's experiment. Rubbing rods together inside of a glove box may be, theoretically, a scientifically valid way to determine whether any asbestos fibers are ever released from the rods under the peculiar conditions used in the experiment (although Dr. Todd's experiment was fatally flawed even as a fiber-release study (*see* pages 32-36, *supra*)). But as a test of *welders' actual exposure* to asbestos from welding rods, Dr. Todd's experiment would have been excluded outright because it was contrary to generally accepted scientific principles requiring a true work-simulation test. *See* A114, A285-86, A293-

94, A337, A399-400, A403-04, A415-16, A475-76, A548-51.

The trial court's erroneous admission of Dr. Todd's "testimony by ambush" was a critical error. Dr. Todd's last-minute statement was the only time in the entire case that a witness claimed to have empirical evidence proving that welders such as Tucker and Gomez were exposed to disease-causing asbestos fibers in dust from defendants' welding rods. Plaintiffs' other arguments were based on speculation or the equivalent of speculation—*i.e.*, plaintiffs' novel principle that visible dust from welding rods proves exposure to dangerous levels of disease-causing asbestos. Dr. Todd's testimony made it appear as if there was at least some minimal empirical evidence showing that defendants' products put welders at risk, whereas the truth was that Dr. Todd's experiment simply could not justify such conclusions under generally accepted scientific principles.

This Court should order a new trial in which Dr. Todd's testimony about her experiment is constrained to its proper scope (or, at minimum, in which defendants are given notice and an opportunity to challenge, through a *Frye* hearing, Dr. Todd's intention to draw conclusions about welders' actual exposure from her "rod-rubbing" experiment).

D. The Court Erroneously Prevented Defendants From Cross-Examining A Witness Proffered by The Defendant In A Consolidated Case Who Gave Critical Adverse Testimony.

Pursuant to the CMO for the NYCAL, the Tucker and Gomez cases were consolidated for trial together with a case filed by Eldon Perkins, who claimed that he was injured by exposure to asbestos from pipe gaskets manufactured by John Crane, Inc. Although the Perkins case involved a different product, the general scientific and medical issues—*e.g.*, asbestos exposure and disease causation—were the same as in the Tucker and Gomez cases. Therefore, at the beginning of trial, Judge York ruled that "[a]ll the [general medical/scientific] testimony will apply in all the cases. * * * I'm not going to tell [the jury] this only applies to this [case], this only applies to that [case]. And anybody can cross examine on the evidence." A171-72. Accordingly, all three defendants cross-examined plaintiffs' experts Drs. Markowitz (A189-90), Moline (A323-24), and Castleman (A381-82). But when Lincoln and Hobart asked to cross-examine John Crane's medical and scientific expert, Dr. Victor Roggli, the trial court reversed itself mid-trial and denied each of their repeated requests. A601-09, A625-30, A633-42 (denying renewed request after Roggli's testimony).

On several significant issues Dr. Roggli's opinions were favorable to John Crane but directly adverse to Lincoln and Hobart and directly contrary to the testimony of Lincoln's and Hobart's medical expert. For example, Dr. Roggli claimed

that all forms of asbestos can cause mesothelioma, although he admitted that chrysotile is the least dangerous. A612-20. Dr. Feingold, Lincoln's and Hobart's expert, testified that recent studies proved that chrysotile asbestos—the type found in welding rods—probably does not cause mesothelioma at all.[10] A515-17, A520-21, A524-25.

Second, Dr. Roggli testified, without any qualifications, that asbestos can cause lung cancer. A662-63. Dr. Feingold, on the other hand, clarified that asbestos exposure only causes lung cancer if it also causes asbestosis or a commensurate "fiber burden"—a distinction that was irrelevant in the Perkins case but important to Gomez's claims because Gomez did not have asbestosis. A511-14. Because defendants were not allowed to elicit this important qualification from Dr. Roggli, his testimony appeared to contradict Dr. Feingold.

Third, Dr. Roggli said that it is "reasonable" to assume that there is asbestos in visible dust from an asbestos-containing product. A660-61. This contradicted Dr. Feingold, who testified to the obvious fact that the naked eye cannot determine the content of dust. A525.1. It also gave unwarranted plausibility to Tucker's and

---

[10] These studies, Dr. Feingold explained, confirm that mesothelioma is caused by amosite and crocodolite asbestos—collectively known as "amphibole" asbestos—types of asbestos that are found in products such as asbestos insulation and cement. A517-22.

Gomez's "principle" that visible dust from defendants' products proves exposure to dangerous quantities of disease-causing asbestos. Defendants were not allowed to ask Dr. Roggli if his opinion, rendered in the context of pipe gaskets, would also apply to welding rods for which there is no evidence indicating that they release disease-causing asbestos fibers.

Finally, Dr. Roggli propounded a four-part test for attributing mesothelioma to an asbestos-containing product. A621-24. Dr. Roggli was the only expert in the case to set out such explicit criteria for determining disease causation. But no one asked whether his test was *too* permissive in attributing disease to individual products (neither John Crane nor Perkins had any reason to do so as the result of the test was favorable to John Crane and Perkins would have preferred a *more* permissive test) or explained how the test would apply—or asked if it was applicable—to Tucker's and Gomez's alleged exposure from welding rods.

Once again, the trial court failed to appreciate that this was a product liability case involving a product that had never before been shown to release disease-causing asbestos or cause asbestos-related disease. As such, questions of general science and medical causation were of central importance to plaintiffs' claims and it was critical for Lincoln and Hobart to cross-examine Dr. Roggli to the extent that he gave testimony on issues that were common to all of the consolidated cases. Indeed,

defendants' right to clarify, qualify, or impeach adverse testimony was so critical here precisely because the testimony came from someone labeled as a "defense witness": John Crane's trial strategy relied on the fact that Dr. Roggli was a plaintiff's expert by occupation (*see* A611, A637-38), but was testifying in this case on behalf of John Crane, a defendant.

Instead of allowing Lincoln and Hobart to question Dr. Roggli on these common issues, however, the trial court simply cautioned: "I think the jury should note this testimony is only relating to the Perkins case." A610. But that weak limiting instruction was obviously inadequate. "Cross-examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact." *Friedel v. Bd. of Regents of Univ. of New York*, 296 N.Y. 347, 352 (1947).

In *Lamborn v. Czarnikow-Rionda Co.*, 237 N.Y.S. 69, 70 (App. Div. 1st Dep't 1929), this Court upheld "the right of the defendant in [a] consolidated action, who is a stranger to the appellants' action, to participate in the cross-examination of all witnesses at the trial." In that case, Lamborn "brought an action against the defendant Czarnikow-Rionda Company to recover damages for breach of warranty respecting the quality of certain refined sugar * * * [and] Czarnikow Company, in the second action, [sought] to recover damages from the Federal Sugar Refining Company for breach of warranty as to the quality of the same sugar." *Id*. Lamborn objected to

Federal Sugar's cross-interrogatories directed to Lamborn's witnesses. Citing a string of common-law precedents (*id*. at 71-72), this Court held that "the interest of justice will best be served and its administration facilitated by permitting to all parties to the action the right of cross-examination of any witness called," thus affirming "the right of cross-examination of a plaintiff's witnesses on the part of a defendant in a consolidated action, who was not a party to the action brought by said plaintiff." *Id*. at 70.

Although, in *Lamborn*, the jury entered a single set of findings in the consolidated cases (*id*. at 71), the same rule of permissive cross-examination applies where the consolidated cases are "not susceptible of merger with [a] single set of findings (or verdict) and single judgment" (*McCarthy v. Mobile Cranes, Inc.*, 18 Cal. Rptr. 750, 752-53 (Cal. Ct. App. 1962)). *See also id*. at 755-56 ("in a consolidation of cases for trial appellant had an inalienable right to examine *all witnesses*" and "the suggestion[] that * * * you only have the right of cross-examination of opposing witnesses to you in your case * * * rest[s] upon procedural concepts which must yield to fundamental constitutional rights").

Moreover, "in the context of a joint trial [courts] cannot accept limiting instructions as an adequate substitute for [a party's] constitutional right of cross-examination." *Bruton v. United States*, 391 U.S. 123, 137 (1968). The trial court's

limiting instruction was particularly inadequate here because the experts in all three cases were testifying about the same scientific and medical issues. *See, e.g.*, A666 (plaintiffs' counsel admitting that "many of the issues are quite similar"). There is no way that the jury could form two competing sets of beliefs about the laws of science and principles of medicine underlying these cases (*e.g.*, concluding that in Perkins' case chrysotile asbestos *does* cause mesothelioma but in Tucker's case it *does not*). And, aside from the unavoidable impact of Dr. Roggli's testimony on the jury's substantive beliefs, without cross-examination Lincoln and Hobart could not undo or mitigate the damage of having a "defense expert" give testimony that appeared to contradict Lincoln and Hobart on significant issues.

This Court should order a new trial in which defendants are allowed to cross-examine all adverse witnesses.

II. THE COURT ERRONEOUSLY ORDERED A WITNESS TO GIVE TESTIMONY THAT WAS SUBJECT TO THE ABSOLUTE ATTORNEY-CLIENT AND ATTORNEY-WORK-PRODUCT PRIVILEGES FOR NON-TESTIFYING EXPERTS.

In 1989, Lincoln retained Dr. William Longo to test mock-up welding rods created in Lincoln's laboratory. At the time, Lincoln was facing litigation alleging that fumes from the welding arc contained disease-causing asbestos (a theory that has since been discredited and was abandoned by these plaintiffs in favor of the dust-

exposure theory (*see* page 9-10, *supra*)). Because Lincoln had not manufactured asbestos-containing welding rods in almost a decade, no production-line rods were available. Therefore, Lincoln scientists made a small batch of mock-ups in their lab for the specific purpose of burning them and analyzing the content of the fumes. Dr. Longo was retained to conduct the actual testing and assist Lincoln's counsel in analyzing this issue, but not to testify at trial. A721-22 (filed under seal), A440-48, A468-69, A473-74. The testing program was canceled before it began (A447-48), however, and Dr. Longo eventually returned the mock-ups to Lincoln's counsel (A449-50).

In these cases, Tucker and Gomez hired Dr. Longo as an expert as well, but also wanted him to testify about the mock-ups prepared by Lincoln and his prior retention by Lincoln as a consulting expert. Over Lincoln's objection, the trial court ordered Dr. Longo to testify about the facts, but not his opinion, with respect to the mock ups and his prior retention.[11] A736-77 (filed under seal), A440.

The trial court's ruling was clearly wrong because Dr. Longo's testimony about the mock-ups and his prior retention by Lincoln was subject to both the attorney-

---

[11] Defendants took an interlocutory appeal of the trial court's initial ruling. After Dr. Longo testified, pursuant to a the trial court's interpretation of an interim stay (A392-94), this Court denied defendants' then-moot request for an injunction without prejudice to raising this issue on appeal. *See* A119-20.

work-product and attorney-client privileges. Both of those privileges are absolute, and the trial court had no authority to order Dr. Longo to disclose Lincoln's privileged information.

1. The attorney-work-product privilege

"An expert who is retained as a consultant to assist in analyzing or preparing the case is beyond the scope of [discovery]; in fact, such experts are generally seen as an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure under subdivision (3101(c)-Attorney's work product)." *Santariga v. McCann*, 555 N.Y.S.2d 309, 310 (App. Div. 1st Dep't 1990) (omission in original; internal quotation marks omitted) (quoting Weinstein, Korn, & Miller, N.Y. CIV. PRAC., CPLR 3101.52a). In *Santariga*, the plaintiff requested a report prepared by a radiologist who "was merely retained as a consultant to evaluate the validity of plaintiff's allegations and to assist in the preparation of a defense, and will not testify at trial." *Id*. The court refused, noting that this report was prepared by a non-testifying expert and was therefore protected as attorney work-product, giving it an absolute privilege that the plaintiff cannot overcome, even with a showing of need or other special circumstances. *Id*.

Other cases reiterate the holding of *Santariga*. For example, in *Lichtenberg v. Zinn*, 663 N.Y.S.2d 452 (App. Div. 3d Dep't 1997), the defendants had appointed a

Special Litigation Committee ("SLC") to conduct an internal investigation of allegations raised in a shareholder derivative suit. As part of that investigation, the SLC's counsel hired outside consultants. In subsequent litigation, the plaintiffs sought discovery of communications between the SLC's counsel and these consultants. The Appellate Division upheld the trial court's refusal to allow such discovery, noting that "the absolute immunity of the attorney work product doctrine * * * protects those documents * * * representing communications made between the SLC and its counsel in regard to the various consultants hired by the SLC and those exchanges between the consultants themselves and the SLC counsel." *Id*. at 454.

Similarly, in *Xerox Corp. v. Town of Webster*, 616 N.Y.S.2d 119, 120 (App. Div. 4th Dep't 1994), the Appellate Division held that the trial court "properly granted the motion to quash the subpoena duces tecum served by plaintiff upon defendant's appraiser" because "the material sought from the appraiser was prepared to assist [defendant's attorney] in analyzing plaintiff's case" and was thus "protected from disclosure as part of the attorney's work product." Finally, in *In re Rosalie S.*, 657 N.Y.S.2d 131, 131-32 (Fam. Ct. 1997), the court recognized that the report and testimony of a non-testifying expert was "protected from disclosure as a part of the attorney's work product" because "the report was prepared to assist respondent's attorney" and "the ability to consult with [non-testifying] experts to prepare a

complete defense is a key element of due process. To undermine the ability of litigants freely to engage experts in a confidential manner would have a chilling effect on their use and, therefore, impair the fundamental fairness of the litigation process."

These cases are dispositive here. Lincoln retained Dr. Longo as a consulting expert in preparation for litigation (*see* A721-22 (filed under seal), A440-48, A468-74.8) and was entitled to an absolute attorney-work-product privilege with respect to that retention.[12] Dr. Longo's compelled testimony about the mock-ups and his communications and interactions with Lincoln and its counsel breached Lincoln's privilege.

2. The attorney-client privilege

The attorney-client privilege protects all "confidential communications[s] made between the attorney *or his employee* in the course of professional employment. CPLR § 4503(a) (emphasis added). And "[u]nless the client waives the privilege," the attorney and his employee "shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication."

---

[12] The trial court erroneously relied on *Rosario v. General Motors Corp.*, 543 N.Y.S.2d 974 (App. Div. 1st Dep't 1989), in ordering Dr. Longo to testify. *See* A753-57 (filed under seal). *Rosario* dealt with an exception to the qualified privilege for *testifying* experts under CPLR § 3101(d). *Id.* at 974. Dr. Longo was a consulting, *non-testifying*, expert, which entitles defendants to an absolute privilege under CPLR § 3101(c). *Rosario* is entirely inapposite here.

Id. The attorney-client privilege is absolute and cannot be abrogated by the court except in cases where "strong public policy" requires disclosure. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989); *see also* CPLR § 3101(b).

Communications between an attorney or client and an individual employed by the attorney are privileged as long as "the client had a reasonable expectation of confidentiality under the circumstances." *Osorio*, 75 N.Y.2d at 84. Dr. Longo was retained by Lincoln's counsel to assist them in analyzing the fume-exposure theory of liability and developing litigation strategy. A721-22 (filed under seal), A440-48, A468-74.8. There was no dispute that Lincoln expected the fact that it had retained Dr. Longo and the details of that retention to remain confidential.

Nevertheless, the trial court ordered Dr. Longo to testify about the circumstances of his retention by Lincoln (A440-41), his communications and interactions with Lincoln's counsel regarding the planned testing and the creation of the mock-ups (A441-48), and the legal strategies of Lincoln's counsel, including their ultimate decision not to conduct the fume-exposure testing (A447-48). Each of these areas of testimony was privileged and Dr. Longo should not have been allowed—let alone ordered—to violate Lincoln's absolute right to maintain the confidentiality of communications between it, its counsel, and consulting experts retained by its counsel.

3. The prejudice from Dr. Longo's testimony

The trial court's error in ordering Dr. Longo to disclose Lincoln's privileged information was extremely prejudicial and changed the course of this case. After Dr. Longo's testimony, plaintiffs repeatedly argued that Lincoln was attempting to hide evidence and generally suppress the truth because it had cancelled the testing protocol (even though the fume-exposure theory has been completely discredited) and had not produced the mock-ups in this case (even though they were both privileged and irrelevant to plaintiffs' case (*see* pages 52-56, *infra*)). *See, e.g.*, A552-57, A558-60, A673, A675-78. Dr. Longo's account of his retention by Lincoln and the "missing" mock-ups became a central theme of plaintiffs' case. And, even more significantly, Dr. Longo's testimony was the basis for a spoliation charge (discussed below) that allowed the jury to draw a negative inference against Lincoln based on these allegedly spoliated mock-ups. A690-91.

This Court should order a new trial in which Dr. Longo is prohibited from testifying about privileged matters.

III. THE COURT ERRONEOUSLY GAVE THE JURY A SPOLIATION INSTRUCTION REGARDING TWO DIFFERENT SETS OF MOCK-UP WELDING RODS.

Plaintiffs elicited testimony about two sets of mock-up, non-production line, welding rods: those made for consulting expert Dr. William Longo in 1989 and a

similar set made by Lincoln employee Ken Brown in 1987. Neither set was produced in this case. Brown's mock-ups were destroyed or thrown out years before this case was filed and Lincoln withheld Dr. Longo's mock-ups under a claim of privilege. Over defendants' objection (A643-56, A657), the trial court instructed the jury that it could find that Lincoln's disposal of or failure to produce these mock-ups was "decisive with respect to the issue of whether Lincoln Electric's asbestos-containing welding rods released respirable asbestos fibers" (A690-91). That erroneous instruction allowed the jury to circumvent the central issue in this case.

A. Dr. Longo's Mock-Ups Were Withheld Under A Valid, And Uncontested, Claim Of Privilege.

Dr. Longo's mock-ups were created in Lincoln's laboratory at the request of Lincoln's outside counsel, in conjunction with their consulting expert, to assist Lincoln's counsel in analyzing and developing legal strategy to oppose a fume-exposure theory of liability. *See* pages 45-49, *supra*. Thus, those mock-ups are attorney work product and are subject to the same privilege as is Dr. Longo's testimony about them. *See, e.g.*, *Santariga*, 555 N.Y.S.2d at 310; *Lichtenberg*, 663 N.Y.S.2d 452; *Xerox Corp.*, 616 N.Y.S.2d at 120; *In re Rosalie S.*, 657 N.Y.S.2d at 131-32. Lincoln asserted that privilege and refused to produce the mock-ups that Dr. Longo had returned to Lincoln's counsel. *See* A127-28, A133.

Lincoln's assertion of privilege was never overruled by the trial court. *See id*. Indeed, plaintiffs never even asked the court to compel disclosure of the mock-ups. Plaintiffs instead sought, and received, an instruction telling the jury that the absence of these mock-ups could justify an inference that Lincoln's production-line welding rods emitted disease-causing asbestos fibers. A643-56, A657. In other words, Lincoln was subjected to a negative inference on *the central issue in this case* because it maintained an uncontested claim of privilege with respect to these mock-ups. It is obviously inappropriate to give the jury a spoliation instruction when the allegedly spoliated objects are subject to a legitimate and unchallenged claim of privilege. Surely Lincoln was entitled, at a minimum, to a ruling rejecting its privilege claim before the jury could have been permitted to draw an adverse inference from the failure to produce the mock-ups.

A spoliation instruction was inappropriate here for the additional reason that the *laboratory mock-ups* made for Dr. Longo in *1989* were irrelevant to plaintiffs' claims about *production-line welding rods* manufactured up until *1981*. Dr. Longo's mock-ups were created in a single small batch using laboratory equipment almost a decade after Lincoln stopped mass-producing asbestos-containing welding rods on its

industrial production-line equipment.[13] Although in some product liability cases courts have admitted testing of a product that is different from the product at issue because "there was credible evidence that the two [products] were the same in all significant respects" (*Bolm v. Triumph Corp.*, 422 N.Y.S.2d 969, 975-76 (App. Div. 4th Dep't 1979)), here all of the credible evidence indicated that with respect to fiber release during use by welders, "rods made in the laboratory would not duplicate rods made on the production line" because "you will have materials that are mixed differently, they are combined differently, you can't use the same pressures you can't use the same temperatures it just—it isn't repeatable, as if it's on the production line" (A410-11; *see also* A581-98). Specifically, the differences in production techniques and equipment resulted in "differences in extrusion pressures, temperatures, [and] frictional heating on the surface [of the mock-ups]" as compared with a production-line welding rod. A545-47.

Although Dr. Longo testified that the mock-ups were made using the same ingredients, in the same proportions, as production-line welding rods (A444-45), that

---

[13] Although Dr. Longo claimed that his mock-ups were made on production-line equipment (A446-47, A469-73), testimony from a Lincoln employee made clear that it would have been "impossible" to create only 75 rods, using only 2-3 pounds of flux, on production-line equipment (A589-98). Moreover, Dr. Longo said that his mock-ups were baked on racks (A469-73), a technique that was used only in the laboratory (A587-88).

does not establish that the flux on the mock-ups would have the same physical characteristics as the flux on a production-line welding rod or, specifically, that the flux would behave the same when handled in the manner in which welders used the rods in the workplace. Indeed, one of defendants' welding experts examined a photograph of Dr. Longo's mock-ups and, with just his naked eye, identified a list of differences between the mock-ups and regular production-line rods: beveled and ragged ends, an uneven flux coating, irregularities in the flux, and porosity in the flux. A561-65.

John Schuster, a longtime Lincoln employee who had experience with both production-line welding rods and laboratory-created mock-ups, testified that: "The size, the pressures and so on, the baking methodology, it's all very different * * * [t]here's nothing about it that's the same." A591-97. In other words, worker exposure testing performed using Dr. Longo's mock-ups would not have proven, one way or the other, whether disease-causing asbestos fibers were released when Tucker and Gomez used production-line welding rods produced over a decade earlier. Notably, none of plaintiffs' experts said that they would have considered testing of these mock-ups relevant to plaintiffs' claims. Testing these mock-ups to prove plaintiffs' product liability claim would be like performing automobile crashworthiness testing on a car-show prototype; it would be far more prejudicial than probative and thus

inadmissible—whether it supported plaintiffs or defendants.[14] The trial court should not have allowed the jury to draw a negative inference about Lincoln's production-line welding rods based on alleged spoliation of objects that had no bearing on this case.

B. Brown's Mock-Ups Were Inadvertently Destroyed Or Thrown Out Years Before This Case Was Filed.

Ken Brown's mock-ups, like Dr. Longo's, were created in a small batch using laboratory equipment. A211-12. At some point in 1987, after completing fume-exposure tests using these mock-ups, Brown placed the leftover mock-ups into storage in his laboratory. A213-17. In 1999, after relocating the laboratory, Brown discovered that the excess mock-ups had been inadvertently destroyed or thrown out; he said that they "could have been destroyed anywhere from 1988, after we were through with the testing, all the way up to 1999 when we moved, anywhere in that time frame." A216-18, A223; *see also* A255-56.

Lincoln was named as a defendant in Tucker's case on January 18, 2002. Gomez's case was not filed until March 11, 2002. Thus, Brown's leftover mock-ups

---

[14] The purpose of the mock-ups, testing a fume-exposure theory, only reinforces this conclusion. In fume-exposure testing, the welding rod is burnt and the resulting fumes are analyzed; the surface properties of the flux are irrelevant. *See, e.g.*, A564. On the other hand, in dust-exposure testing, the welding rod is bent, broken, or otherwise handled; any change in the surface properties of the flux would obviously invalidate the results. *See, e.g.*, *id*. Because this was a dust-exposure case and plaintiffs had withdrawn their fume-exposure theory prior to trial (*see* pages 9-10, *supra*), these mock-ups were irrelevant here.

were destroyed or thrown out at least three years before these cases were filed, and likely years before that. Moreover, it is undisputed that the rods were simply forgotten in storage and inadvertently discarded because no one thought that they were important (they were right, the mock-ups were not important, *see* page 53-56, *supra*). A216-17, A255-56.

A spoliation instruction is wholly inappropriate where the objects in question were destroyed or thrown out in the regular course of business, with what was *at most* negligence. "In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices." *Rogla v. Syracuse Hous. Auth.*, 707 N.Y.S.2d 572, 573 (App. Div. 4th Dep't 2000) (internal quotation marks and citation omitted); *see also Raymond v. New York*, 740 N.Y.S.2d 743, 744 (App. Div. 4th Dep't 2002) (a request for a spoliation instruction should be denied where the evidence was destroyed "in good faith before litigation was pending, pursuant to [the party's] normal business practices").[15]

---

[15] Although this Court held in *Squitieri v. New York*, 669 N.Y.S.2d 589, 590 (App. Div. 1st Dep't 1998) (emphasis added), that "[s]poliation sanctions * * * are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's *ability to present a defense*," that case involved a plaintiff who negligently destroyed a critical piece of evidence and then attempted to impose liability on the defendant based on the plaintiff's prior analysis of the destroyed evidence. The rationale for the spoliation

Moreover, Brown's mock-ups, like Dr. Longo's, would have been irrelevant to Tucker's and Gomez's dust-exposure theory even if they had not been destroyed or thrown out years before this case was filed. *See* pages 53-56, *supra*. Dust-exposure testing of Brown's leftover mock-ups would not have helped to answer the questions raised in this case and would not have been admissible regardless of which side it supported. The trial court should not have allowed the jury to draw a negative inference about Lincoln's production-line welding rods based on its inadvertent disposal of these irrelevant mock-ups.

* * * * *

In sum, the trial court was wrong to give the jury a critical spoliation instruction with respect to both Dr. Longo's and Brown's mock-ups. Neither set of mock-ups was actually spoliated—one set was withheld under an unchallenged claim of privilege and the other was inadvertently discarded years before this case was filed. And, in any case, these laboratory-made mock-ups were very different from the products used by Tucker and Gomez and had no relevance to plaintiffs theory that defendants' production-line welding rods emitted disease-causing asbestos when used

---

sanction in *Squitieri* does not apply in cases where, in the regular course of business, the defendant discarded material that a plaintiff later claims may have been relevant to a subsequently-filed lawsuit and where the defendant does not attempt to rely on a prior analysis of the discarded evidence as part of its defense.

by welders. Because the improper spoliation instruction was potentially decisive on the central question of fiber release, this Court should order a new trial.

IV. THIS COURT SHOULD DIRECT ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THERE WAS NO ADMISSIBLE EVIDENCE THAT DEFENDANTS' PRODUCTS COULD HAVE HARMED THE PLAINTIFFS.

The appropriate remedy in this case is entry of judgment for defendants. Because plaintiffs' "scientific principle" that visible dust from defendants' welding rods necessarily contains dangerous levels of disease-causing asbestos should have been excluded under *Frye* (*see* Section I.A., *supra*) and Dr. Todd's last-minute claim that her rod-rubbing experiment was relevant to welders' actual exposure should have been excluded both because it was undisclosed expert testimony and because her experiment was incompetent for that purpose (*see* Section I.C., *supra*), there was *no* evidence properly admitted in this case that defendants' products could have exposed Tucker or Gomez to dangerous levels of disease-causing asbestos.[16] And, because the

---

[16] Not only did plaintiffs fail to submit any admissible evidence that defendants' welding rods emit disease-causing asbestos when used by welders, they did not even submit medical or epidemiological studies connecting the use of Lincoln's and Hobart's products to an increased risk of disease. That is because there are no such studies. *See* A325-27 (Dr. Todd), A417 (Dr. Balzer), A523 (Dr. Feingold). Plaintiffs' state-of-the-art expert, Dr. Castleman, discussed three articles from the 1930s and 1940s, two in German, that mention asbestos-related disease in populations of welders. *See* A297-99, A300-02; *cf.* A779-801. But these articles were admitted only on the issue of notice—not for the truth of their contents (A297-98)—which was appropriate because they did not establish any medical or epidemiological relationship

trial court should not have given a spoliation instruction that allowed the jury to circumvent that central issue (*see* Section III, *supra*), "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the [admissible] evidence presented at trial." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978).

Plaintiffs had a full and fair opportunity to present admissible evidence that defendants' welding rods could emit disease-causing asbestos. They failed to do so. This Court should now "render a final determination" in favor of defendants. CPLR § 5522; *cf. Weisgram v. Marley Co.*, 120 S.Ct. 1011, 1015 (2000) ("Appellate authority to [render a final] determination is no less when the evidence is rendered insufficient by the removal of erroneously admitted testimony than it is when the evidence, without any deletion, is insufficient.").

CONCLUSION

This Court should direct entry of judgment in favor of defendants in both cases. Alternatively, this Court should vacate the judgment in both cases and remand to the trial court for further proceedings.

---

and were irrelevant as to defendants' products (*see, e.g.*, A304-06, A436-37).

Respectfully submitted,

____

KENNETH S. GELLER
ANDREW J. PINCUS
CARL J. SUMMERS
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000
Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

This computer-generated brief was prepared using Corel WordPerfect version 11. It is double spaced and printed in 14 point Times New Roman font, a proportionally spaced typeface. The total number of words in the brief, as calculated by Corel WordPerfect version 11, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum is 13,882