

To Be Argued By:
ANDREW J. PINCUS

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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)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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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 REFRACTORIES 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.

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ARGUMENT

I. THE TRIAL COURT EFFECTIVELY RELIEVED PLAINTIFFS OF THEIR OBLIGATION TO ESTABLISH EXPOSURE TO DISEASE-CAUSING ASBESTOS FROM DEFENDANTS' WELDING RODS.

Plaintiffs do not dispute that this is a product-liability case of first impression. They concede, as they must, that judgment has never been entered against Lincoln Electric Company or Hobart Brothers Company—or, to our knowledge, against any other welding rod manufacturer—on the theory that dust from welding rods contained disease-causing asbestos.¹ And plaintiffs do not deny what their own expert admitted (A325-327): There are *no* scientific studies or experiments proving that dust from welding rods contained disease-causing asbestos.

Nevertheless, plaintiffs repeatedly assume that because this is an “asbestos case” it was appropriate, or harmless error, for the trial court to eliminate plaintiffs’ burden of proving that defendants’ products were actually dangerous (and preclude defendants’ attempts to contest that issue). Whether such rulings would have been permissible in a typical “asbestos case” is not before this court. Rather, because it is undisputed that plaintiffs’ allegations—far from being “settled”—were legally unprecedented and scientifically unproven, plaintiffs here should have been required

¹ See Levy, Phillips & Konigsberg L.L.P., Verdicts, <http://www.mesothelioma-atty.com/html/verdicts.html> (these verdicts are “the first ever” against “a manufacturer of asbestos-containing welding rods”) (last visited September 12, 2005).

to carry the same burden of proof as any other product-liability plaintiff. Accordingly, the trial court's rulings effectively lifting that burden were clear error.²

A. The Court Refused To Conduct A *Frye* Hearing.

1. *The court's error*

Plaintiffs argue that a *Frye* hearing was not required because “it is generally accepted that dust released from asbestos-containing products is capable of producing disease.” Resp. 27. But the question in this case is not whether dust from notorious “asbestos-containing products” is capable of producing disease, but whether dust from defendants’ welding rods—which had never before been found to release disease-causing asbestos—can cause disease.³ See Br. 21. For that proposition, plaintiffs did not present evidence about the contents of welding-rod dust; they relied on the purported scientific principle that *all* dust from *any* asbestos-containing product—including, specifically, defendants’ welding rods—must contain disease-causing asbestos. The trial court’s failure to hold a *Frye* hearing on that novel proposition was error.

² This Court must consider “[t]he cumulative effect” of the errors below. *Arroyo v. City of New York*, 567 N.Y.S.2d 257, 258 (App. Div. 1st Dep’t 1991).

³ For purposes of appeal, defendants accept plaintiffs’ claim that they saw dust from defendants’ welding rods. But, given the dusty industrial workplace, defendants do not believe that plaintiffs’ decades-old recollections support the conclusion that the dust they saw originated from the rods.

In their opposition to a *Frye* hearing, plaintiffs said that “there is an adequate foundation for Drs. Markowitz and Moline to testify based on well-established medical and scientific knowledge that *these products* contributed to the plaintiffs’ asbestos-related diseases” simply because “plaintiffs have testified that they observed dust when using defendants’ asbestos-containing products.” A98 (emphasis added). After the trial court denied a *Frye* hearing, Dr. Moline testified that if defendants’ “asbestos-containing welding rods * * * became dusty” (RA170) then those rods were “a significant contributing factor in causing [plaintiffs’ diseases]” (A268), even though she admitted that there is no evidence that dust from defendants’ products actually contained disease-causing asbestos (A325-327). *See* Br. 15-16. During closing arguments, plaintiffs’ counsel told the jury that “you do not need a fiber-release test to show [that] asbestos fibers are released when you see dust in the air from [defendants’ products].” A674. Indeed, plaintiffs argue in this Court that “Dr. Moline may opine about the effect of dust release from asbestos-containing products,” including defendants’ welding rods, “even in the absence of fiber release testing.” Resp. 37.

In sum, plaintiffs and their experts did not rely on empirical evidence about the content of dust from defendants’ welding rods, but instead on the supposed scientific

principle that visible dust from defendants' welding rods must contain disease-causing asbestos.

There is *no* precedent for that “scientific principle” in either science or law. There is certainly no evidence that it is “generally accepted by the relevant scientific community.” *See* Br. 17-20. A *Frye* hearing may be unnecessary when experts use visible dust as a proxy for asbestos exposure from products that have already been *proved* to release disease-causing asbestos—*i.e.*, when it is already “generally accepted” that dust from the products contains disease-causing asbestos (*see* Br. 22-23)—but that is *not* the situation here. Indeed, plaintiffs still cannot identify anyone outside of their trial team who accepts the “scientific principle” on which they relied.

Plaintiffs' list of cases (Resp. 24-26, 37-38), only reinforces this point. Each case involves a product for which there is an existing body of empirical evidence and judicial opinions establishing that the product's dust contains disease-causing asbestos. Indeed, 17 of those 20 cases involve two products: pipe gaskets and packing.⁴ Not only is there a long history of imposing liability based on exposure to dust from these products, there is also a body of supporting empirical evidence. *See, e.g., Fraysure v. A Best Prods. Co.*, 2003 WL 22971024, at *2 (Ohio Ct. App. Dec.

⁴ Including *Lustering v. AC&S, Inc.*, 786 N.Y.S.2d 20 (App. Div. 1st Dep't 2004), on which plaintiffs' heavily rely.

18, 2003) (work-simulation testing showed “asbestos dust in concentrations exceeding OSHA standards by 300%”); *Garlock, Inc. v. Gallagher*, 814 A.2d 1007, 1011-1012 (Md. Ct. Spec. App. 2003) (expert conducted work-simulation testing); *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 53 (2d Cir. 2000) (work-simulation testing showed “one to four fibers per cubic centimeter [of air]”); *AC&S, Inc. v. Abate*, 710 A.2d 944, 985 & n.49 (Md. Ct. Spec. App. 1998) (“[the defendant’s] own plant monitoring reports * * * revealed that unsafe levels of asbestos fibers were released into the air” during processes that “mirrored work performed by workers in the field”).

With respect to defendants’ welding rods, on the other hand, it is undisputed that there are *no* scientific studies that support plaintiffs’ contention. The contrast between plaintiffs’ long list of cases repeatedly imposing liability for other products and this single unprecedented case highlights why a *Frye* hearing was necessary here. Plaintiffs had the burden of proving that defendants’ welding rods were unsafe—something that has never before been proved. Defendants were therefore entitled to receive a *Frye* hearing before plaintiffs could argue, without any empirical support or any legal or scientific precedent, that those products must have been dangerous simply because they contained asbestos and emitted dust.

In a last-ditch effort to avoid reversal, plaintiffs now attempt to recast their argument by asserting that whether a “given product * * * release[ed] asbestos of a

type or in sufficient quantity to cause disease * * * present questions of fact for the jury, not novel scientific theories.” Resp. 26. But plaintiffs’ experts, and plaintiffs’ counsel, took exactly the opposite position at trial—relying not on empirical evidence, but on the “scientific principle” that welding-rod dust must contain disease-causing asbestos—without any evaluation by the trial court of that novel “scientific principle.”⁵

2. *The claim of error was preserved*

Plaintiffs’ assertion, here (Resp. 28-29) and elsewhere (Resp. 39, 44-45), that defendants waived arguments by not including them in a post-trial motion is frivolous. Appeal from a final judgment brings up for review “any ruling to which the appellant objected” (CPLR 5501), and defendants adequately preserved this, and the other issues, by making appropriate objections. *See generally* CPLR 4017; DAVID D. SIEGEL, *NEW YORK PRACTICE* § 396 (4th ed. 2005). CPLR 4406, which plaintiffs cite, merely limits each party to a single post-trial motion. And *Virkler v. Shockney*, 578

⁵ If the Court were to accept this revised version of plaintiffs’ position at trial, then the judgments below must be reversed for insufficient evidence. Plaintiffs’ own expert admitted that there is no empirical evidence that defendants’ products “release[ed] asbestos of a type or in sufficient quantity to cause disease” (Resp. 26). *See* A325-327. And, even though defendants asked this Court to direct entry of judgment on this basis (Br. 59-60), plaintiffs’ Response does not identify a single piece of evidence showing that there was disease-causing asbestos in welding-rod dust.

N.Y.S.2d 325 (App. Div. 4th Dep't 1991), involved an appellant who never appropriately raised collateral source issues and violated an order directing it to include them in its post-trial motion.

Plaintiffs also claim (Resp. 27-29) that defendants waived the *Frye* argument by failing to mention Drs. Moline and Todd in their pre-trial motion. Defendants' motion did not mention these individuals because plaintiffs originally intended to introduce this testimony through other experts (*see* A69-72), and withdrew those experts after defendants' motion was filed (A99 n.4). Moreover, defendants' motion was clearly directed at plaintiffs' theory, not the particular expert. Plaintiffs plainly recognized this: Their response to the motion expressly defends Dr. Moline's proposed testimony (A99-103). Finally, the trial court determined that defendants had adequately raised this issue (*see* A158-160); there is no basis for this Court to find otherwise.

B. The Court Prevented Defendants' Medical Expert From Providing Any Plaintiff-Specific Testimony.

The trial court barred defendants' medical expert, Dr. Feingold, from providing any plaintiff-specific testimony. *See* Br. 24-30. Plaintiffs do not even attempt to defend that action on the ground they advanced below and the trial court adopted—that exclusion was justified under 22 N.Y.C.R.R. § 202.17(h). *See* A494-

499. Now, they invoke the NYCAL Case Management Order (“CMO”) and CPLR 3101(d)(1)(i). Neither of plaintiffs’ new arguments has any merit.

First, plaintiffs falsely contend that Section XV.E.2.h of the CMO requires all medical experts, whether or not they examined the plaintiff, to produce a report. Resp. 40, 42. But Section XV.E of the CMO, “Discovery Schedules (Time Lines) and Sanctions” (A48-53), does not *create* discovery obligations, it merely establishes a schedule for fulfilling the obligations set out in earlier sections of the CMO. And those earlier sections, specifically Section IX, “Medical Examinations of Plaintiffs” (A47), make clear that only experts who personally examine the plaintiff are required to produce a report. *See* Br. 25.

Moreover, plaintiffs do not deny that only examining experts are required to produce a report under generally applicable rules of civil practice. *See* Br. 25-26. If the drafters of the CMO intended to overturn that established rule, they would have used clear and unequivocal language to do so. They did not.

Second, plaintiffs erroneously assert that exclusion was appropriate because defendants’ expert disclosures were inadequate under CPLR 3101(d)(1)(i). However, CPLR 3101(d)(1)(i) does *not* require the disclosure of expert reports, and plaintiffs have conceded that the trial court limited Dr. Feingold’s testimony “because Dr.

Feingold did not produce a medical report,” not because defendants failed to satisfy general disclosure requirements. *See* A495-496; *see also* A688.

In any case, CPLR 3101(d)(1)(i) requires a party to disclose only the identity, qualifications, and subject matter of the testimony of their expert witnesses. Defendants provided all of those details. *See* A37-38; RA1241-1242. Indeed, defendants provided the same level of disclosure with respect to *all* of their expert witnesses (*see, e.g.*, A37-41; RA1241) and none of the other experts were excluded or limited in any way.⁶

Even if defendants’ expert disclosures had been deficient under CPLR 3101(d)(1)(i)—and even if this had been the reason for the trial court’s ruling—it still would have been improper to exclude Dr. Feingold’s testimony. Plaintiffs sat on Dr. Hughson’s original disclosure for six months and only raised the issue immediately before trial. Plaintiffs’ failure to lodge a timely objection precludes exclusion of the testimony. *See, e.g., Clark v. Weber*, 695 N.Y.S.2d 34, 35-36 (App. Div. 1st Dep’t 1999); *Freeman v. Kirkland*, 584 N.Y.S.2d 828, 829-830 (App. Div. 1st Dep’t 1992).

⁶ Plaintiffs’ implication that Dr. Feingold’s testimony was properly excluded because defendants promised to produce a report in the letter informing the court of Dr. Hughson’s unavailability (Resp. 40) is baseless. The letter did not say that defendants would *disclose to plaintiffs* a report from Dr. Feingold. *See* A116. Moreover, any “promise” in this letter of May 6, 2003 (A115), could not justify the exclusion of Dr. Feingold’s testimony two days later, on May 8, 2003 (A494-496).

And, with respect to Dr. Feingold’s last-minute “substitute” disclosure, CPLR 3101(d)(1)(i) explicitly states that a party who, for “good cause,” retains an expert immediately before trial “shall not thereupon be precluded from introducing the expert’s testimony at the trial solely on grounds of noncompliance with this paragraph.” Dr. Feingold was retained late because of Dr. Hughson’s hospitalization (A115-118)—certainly “good cause.” There is no merit, in fact or law, to plaintiffs’ *post-hoc* argument that CPLR 3101(d)(1)(i) justifies the trial court’s draconian sanction of excluding all plaintiff-specific testimony.⁷

Finally, plaintiffs’ extensive effort to disguise the obvious prejudice from this ruling (Resp. 43-47) is futile. Plaintiffs cannot credibly assert that excluding *all plaintiff-specific medical testimony* was not prejudicial after they told the jury that Dr. Feingold’s silence was a concession of liability.⁸ A679-681; *see* Br. 28-30.

⁷ The cases cited by plaintiffs do not support their argument under CPLR 3101(d)(1)(i), and they all specifically confirm that a non-examining expert is not required to produce a report. *See, e.g., Campoli v. Lobmeyer*, 583 N.Y.S.2d 639 (App. Div. 3d Dep’t 1992) (expert allowed to testify because: (i) no report is required from a non-examining expert, and (ii) court properly *excused* failure to make any disclosure under CPLR 3101(d)(1)(i)).

⁸ Plaintiffs’ allegation that their improper closing argument was somehow excused by defense counsel’s comments about Dr. Longo (Resp. 45-46) distorts the record and is irrelevant. The comments about Dr. Longo were appropriate because Dr. Longo testified about factual matters such as whether he performed testing on the mock-ups. *See* SA1-3; Resp. 17. Moreover, plaintiffs did not object to these comments. Similarly, plaintiffs’ mention of a chart that allegedly duplicated their

Particularly unconvincing is plaintiffs’ assertion that testimony about a few asbestos-containing products from defendants’ *materials-science* expert and testimony from *plaintiffs’* medical expert was somehow an adequate substitute for the excluded testimony from Dr. Feingold, *defendants’* *medical* expert. Resp. 44 n.19. The erroneous exclusion of all plaintiff-specific testimony was devastating to defendants’ case.

C. The Court 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 testimony-by-ambush

Defendants have explained (Br. 36-39) that the trial court should have excluded Dr. Todd’s testimony-by-ambush—her last-minute assertion that her rod-rubbing experiment proved that “workers who worked with or around asbestos containing welding rods would have been exposed to asbestos fibers in the air” (A353-354).

Plaintiffs claim that defendants should not have been surprised. Resp. 36. But they do not deny that Dr. Todd’s report (A806-809) made no claims about welders’ actual exposure. Nor do they deny that Dr. Todd specifically stated in her deposition

improper comments (Resp. 46) is both factually unsupported and irrelevant. Neither the chart nor a description of its contents is before this Court. And, even assuming that the chart duplicated plaintiffs’ improper closing argument, it would have been incorporated into defendants’ contemporaneous objection.

(A114) and her initial trial testimony (A337, A345-346) that her experiment could *not* justify such claims. Nor do plaintiffs deny the fundamental scientific fact—acknowledged by every witness at trial (*see* Br. 32)—that a glove-box test *cannot* justify claims about workers’ actual exposure.

The suggestion that defendants should have expected Dr. Todd, at the last minute, to testify contrary to her deposition and initial trial testimony, outside the scope of her report, and against the conceded scientific limits of her experiment, is simply ridiculous.⁹

Plaintiffs argue that Dr. Todd’s testimony-by-ambush was not prejudicial because it duplicated Dr. Moline’s testimony that, as a scientific principle, dust from defendants’ welding rods must have contained disease-causing asbestos. Resp. 37-38. As we have discussed, however (*see* Section I.A, *supra*), there is a world of difference between an expert who claims to have *empirical evidence* that welding-rod dust contains disease-causing asbestos and an expert who simply asserts that *all* dust from *any* asbestos-containing product must contain disease-causing asbestos. Dr. Moline’s

⁹ Plaintiffs’ claim that defendants were required to state the ground for their objection (Resp. 39) is specious. General objections are adequate to preserve issues for appeal. *See* CPLR 4017; *see generally* DAVID D. SIEGEL, NEW YORK PRACTICE § 396 (4th ed. 2005). Moreover, the basis for defendants’ objection was perfectly clear in the context, and if plaintiffs had any doubt they could have asked for a specification.

concededly unsupported allegations about the content of dust from defendants' welding rods (which should have been tested in a *Frye* hearing) were in no way equivalent to Dr. Todd's assertion that her experiment empirically proved those allegations. Because Dr. Todd was the only witness who claimed to have actual scientific evidence that welders were exposed to disease-causing asbestos in the dust from defendants' welding rods, defendants suffered obvious prejudice from the erroneous admission of her unsupported and improper testimony.

2. *Dr. Todd's experiment*

Although it does not affect the need for a new trial based on Dr. Todd's testimony-by-ambush, plaintiffs argue that Dr. Todd's rod-rubbing experiment shows that defendants' products *could* release disease-causing asbestos. Resp. 7-8, 34-35. That argument is riddled with factual errors and confusion. As an initial matter, plaintiffs do not deny that Dr. Todd experimented on 14-year-old welding rods of uncertain origin and custodial history, without cleaning those rods, and using a procedure that was intentionally designed to release asbestos fibers rather than imitate welders' actual use of welding rods.¹⁰ *See* Br. 32-35. Neither do they deny that after 15 minutes of rubbing together two uncleaned 14-year-old welding rods of uncertain

¹⁰ Plaintiffs criticize defendants' "jabs about the source of the rods Dr. Todd used," but they do not deny that Dr. Todd had no idea where these rods had been for the last 14 years. Resp. 35.

origin and history, Dr. Todd did not identify even a single disease-causing asbestos fiber. *Id.* Rather, plaintiffs try to muddy the waters by raising two alleged “distortions” in defendants’ brief.¹¹

First, plaintiffs say that defendants “greatly distort” Dr. Todd’s test by claiming that “only a few fibers were released,” whereas, in fact, “*thousands* of asbestos fibers” were released. Resp. 7-8. But defendants clearly, and accurately, stated that Dr. Todd detected “0.090 asbestos fibers per cubic centimeter of air” (thus, 11,111 cubic centimeters of air would contain a thousand fibers), and that she actually identified and examined only nine fibers. Br. 35. The point is that: (i) the concentration is very low (*see* Br. 36 n.9), and (ii) the nine fibers that were actually identified and examined provide the only evidence about whether there was any disease-causing asbestos in any of the dust from defendants’ welding rods. Because those nine fibers were all harmless, Dr. Todd’s experiment cannot help plaintiffs carry their burden of showing that defendants’ welding rods caused their diseases. *See* Br. 36.

¹¹ Plaintiffs assert that defendants’ expert Dr. Balzer “admitted that asbestos-containing welding rods can release respirable asbestos fibers.” Resp. 35. But Dr. Balzer was simply answering questions about the reported results of “the Todd Dement test” (RA396-397), and he elsewhere made very clear that those results must be rejected because Dr. Todd’s experiment was fatally flawed even as a fiber-release test (A401-404, A438-439).

Second, plaintiffs claim that defendants were wrong in stating that all of the fibers were “completely ‘encapsulated’” and none of them were respirable, because Dr. Longo testified that *none* of them were “completely ‘encapsulated’” and *all* of them “were respirable.” Resp. 7-8. But, with respect to encapsulation, defendants said that “seven [of the nine fibers] were *at least partially encapsulated* in a binding agent.” Br. 35 (emphasis added). That is consistent with Dr. Longo’s results and testimony. *See* A820-821; RA540; *see also* Resp. 7-8. And, with respect to respirability, defendants accurately said that it was undisputed at trial that “‘when fibers are embedded in a matrix, they can’t be inhaled because they’re too heavy’ to penetrate the alveoli of the lung.” Br. 35-36 (quoting A502-505).

Plaintiffs imply that Dr. Longo gave contrary testimony, but they are playing a shell game. Neither Dr. Longo, nor any other expert, said that partially encapsulated fibers—those that Dr. Longo identified as “matrix” and listed as “M-F” or “M-B” on his results sheets (*see* A820-821)—were respirable or could cause disease.¹² *See* A808, A820-821. When Dr. Longo discussed the structures identified in the alleged Hobart rods (Sample 4), he said nothing about whether those structures were

¹² It should be noted that most of the testimony that plaintiffs cite (Resp. 8) relates to experiments that Dr. Todd performed on samples *other than* the alleged Hobart rods (Sample 4). For example, the photographs that Dr. Longo discussed (RA1007-1024) were of structures identified in Sample 9. *See* RA529-539. Dr. Longo did not introduce any photographs of the structures identified in Sample 4.

respirable. *See* RA540-541. And when he did mention respirability, while discussing Sample 9, he identified as respirable only those structures marked on his results sheet with an “F” (for fiber) or “B” (for bundle). *Compare* RA527-528 with A831-833 (the results for Sample 9); *see also* RA548-554 (discussing structures from residue created by Sample 9). In other words, when discussing respirability, Dr. Longo intentionally skipped over partially encapsulated structures (*i.e.*, those marked as “M-F” or “M-B”). *Id.* At no point did Dr. Longo even imply—let alone explicitly claim—that partially encapsulated fibers are respirable: It was undisputed that they are not respirable because they do not possess the special aerodynamic properties required to pass through the airway and into the alveoli of the lung.

Furthermore, although free fibers and bundles may be respirable—*i.e.*, they may have the requisite aerodynamic properties (*see* Br. 35-36)—the two free fibers identified in Dr. Todd’s experiment were 0.6 and 0.8 microns long (A820-821). And plaintiffs do not dispute that fibers that small are harmless. *See* Br. 35 (citing A287-289, A504-509).

In sum, although they try to muddy the waters, plaintiffs never actually disagree with defendants’ conclusion (Br. 36): Even setting aside all of the flaws with Dr. Todd’s experiment, *none* of the fibers she identified could cause disease—those fibers were either too small, partially encapsulated in a matrix, or both.

D. The Court Prevented Defendants From Cross-Examining A Witness Who Gave Critical Adverse Testimony.

At the outset of trial, the court below was asked to decide whether a party could cross-examine an expert who was not called in that party's case but who gave medical testimony that was relevant to that party's case. A170-172. The question was initially raised with respect to Drs. Markowitz and Moline, because they were scheduled to testify on the first and second days of trial respectively. *Id.*; *see also* A176, A261.

But the trial court resolved the issue categorically:

All the 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.

A171.1-172. Pursuant to this rule, the trial court granted every request to cross-examine a medical expert *except for* defendants' request to cross-examine Dr. Roggli.¹³ Thus, contrary to plaintiffs' revisionist history (Resp. 62), there *was* an explicit ruling that any party could cross-examine any expert who gave medical testimony relevant to that party's case.

Even absent such a pre-trial ruling, defendants should have been allowed to cross-examine Dr. Roggli. The few published opinions that discuss the right to cross-

¹³ Plaintiffs' assertion that "[t]he *Perkins* defendant was not permitted to cross-examine defendants-appellants' witnesses even though its counsel disagreed with certain testimony those witnesses offered" (Resp. 62 (citing A601)) is false: The *Perkins* defendant never asked to cross-examine any of defendants' witnesses. A602.

examine witnesses in a consolidated case hold that cross-examination should be liberally allowed notwithstanding the formal boundaries between cases tried before the same jury. *See Lamborn v. Czarnikow-Rionda Co.*, 237 N.Y.S. 69, 70 (App. Div. 1st Dep't 1929); *McCarthy v. Mobile Cranes, Inc.*, 199 Cal. App. 2d 500, 509 (1962); *see generally* Br. 43-44.

Plaintiffs criticize these cases because they involve different “procedural posture[s]” than this case (Resp. 63-64), but do not explain why those differences render the fundamental fairness principles announced in *Lamborn* and *McCarthy* inapplicable. For example, the advent of third-party practice (Resp. 63-64) may explain why this issue arises so rarely in modern cases, but it does not explain why the principle of liberalized cross-examination announced in *Lamborn* should be disregarded. Indeed, plaintiffs acknowledge that *Lamborn* allowed cross-examination of witnesses in a consolidated case “[b]ecause the facts and issues [in the cases] were identical.” Resp. 63. Accordingly, defendants should have been allowed to cross-examine Dr. Roggli with respect to medical “facts and issues [that] were identical” in the consolidated cases.

Moreover, even with the differences in “procedural posture” identified by plaintiffs, *Lamborn* and *McCarthy* are the only authority before the Court on this

issue: Plaintiffs do not identify a single case (or even a secondary source) supporting their position.

Equally spurious is plaintiffs' suggestion (Resp. 64-65) that defendants suffered no prejudice because *some* of Dr. Roggli's testimony was favorable and Dr. Feingold could have responded to Dr. Roggli's unfavorable testimony. Setting aside the fact that Dr. Roggli was the last witness at trial (precluding a response from Dr. Feingold), plaintiffs ignore the fundamental role of cross-examination as "the principal means by which the believability of a witness and the truth of testimony is tested." *Graves v. Am. Express*, 669 N.Y.S.2d 463 (App. Term 2d Dep't 1997). Plaintiffs do not dispute that Dr. Roggli's testimony was adverse to defendants on many critical issues (*see* Br. 40-42). The fact that he, and defendants' own witnesses, gave other testimony favorable to defendants does not undo the prejudice that defendants suffered when they were denied an opportunity to clarify, qualify, or impeach Dr. Roggli's adverse testimony.¹⁴

¹⁴ Plaintiffs complain that defendants did not make a sufficiently detailed offer of proof. Resp. 65. But the trial court did not order an offer of proof (A608-609), and plaintiffs have not identified any authority indicating that one was required. Regardless, defendants adequately identified the general areas on which they would have cross-examined Dr. Roggli, including: (i) his testimony on the "science of disease causation * * * which directly contradict[ed] some of the testimony that Dr. Feingold had given" (RA849), (ii) "his opinions about fiber type and which fiber types are more likely to cause or not to cause * * * mesothelioma" (RA850), and (iii) his testimony on "all the general medicine" (A630). It was obviously impossible for

II. THE TRIAL COURT ORDERED TESTIMONY THAT VIOLATED THE ATTORNEY-CLIENT AND ATTORNEY-WORK-PRODUCT PRIVILEGES FOR NON-TESTIFYING EXPERTS.

Plaintiffs do not deny that the interjection into this case of Dr. Longo's testimony regarding his prior retention by Lincoln was sufficiently prejudicial to warrant granting a new trial. Instead, they desperately argue that Dr. Longo's testimony did not infringe any privileges. Their arguments are not convincing.

A. Dr. Longo's Testimony Violated Lincoln's Absolute Work-Product And Attorney-Client Privileges.

Plaintiffs suggest that the attorney-client privilege does not apply to Dr. Longo's testimony about his prior retention. Resp. 53-54. But the cases that they cite hold only that a previously retained expert can offer his or her "opinion concerning nontestimonial evidence, which was properly acquired by the [other party]; and not any confidential communications between the defendant or his counsel and the retained expert." *People v. Greene*, 153 A.D.2d 439, 448 (2d Dep't 1990) (discussing *People v. Edney*, 39 N.Y.2d 620 (1976)). In *Greene*, the court allowed an expert to testify about a palmprint to which the prosecution already had access. *Id.* In *Edney*, the court allowed an expert to testify about his prior psychiatric examination of the

defendants to do anything other than "indicate[] some general issues [they] would have liked to cover" (Resp. 65) because they were never allowed to ask Dr. Roggli any questions.

defendant because the defendant had raised a defense of insanity, thus entitling the prosecutor to an examination. 39 N.Y.2d at 625-626. In both cases, the prosecutor was free to have *some* expert testify about the subject matter and the fact that their chosen expert had previously been retained by the defendant was not disqualifying. Those cases are inapplicable here.

Dr. Longo's testimony dealt exclusively with the details of his prior retention by Lincoln. He was not asked to testify about objective evidence that was already properly in plaintiffs' possession or to give his expert opinion on a medical or scientific issue that was already appropriately part of the case. On the contrary, *everything* Dr. Longo said was "inextricably intertwined with communications which passed between him and [Lincoln's counsel]" (*Greene*, 153 A.D.2d at 449) and *none* of it had to do with "evidence which, in any event * * * would be available to [plaintiffs]" (*Edney*, 39 N.Y.2d at 626). Indeed, the entire purpose of having Dr. Longo testify was so that he could interject his retention into the case and reveal the details of how he was retained by Lincoln and what happened in the course of that retention. Such testimony is clearly subject to the attorney-client privilege. *See* Br. 49-50.

For the same reason, plaintiffs are wrong in asserting that Dr. Longo's testimony was not protected by the absolute work-product privilege afforded to

consulting experts. Resp. 54. Dr. Longo’s testimony necessarily revealed “the information and observations of [Lincoln’s attorneys] that [were] conveyed to [him].” *Id.* (quoting *Edney*, 39 N.Y.2d at 625). Again, Dr. Longo was not asked to testify about some otherwise unprivileged fact that he happened to learn in the course of his retention (*e.g.*, a traffic accident observed in Lincoln’s parking lot); he was ordered to reveal how and why he was retained and what happened in the course of that retention. This falls squarely within the absolute work-product immunity afforded to consulting experts, who operate as “an adjunct to the lawyer’s strategic thought processes” and thus cannot testify about their retention by, or work on behalf of, those attorneys. *Santariga v. McCann*, 555 N.Y.S.2d 309, 310 (App. Div. 1st Dep’t 1990); *see generally* Br. 47-49.

B. Limited Discussion Of Dr. Longo’s Retention In A Prior Case Did Not Authorize His Testimony Here.

Plaintiffs argue that Lincoln waived these privileges because it discussed Dr. Longo’s retention and the existence of the mock-ups in a previous case. Resp. 55. But, as the affidavit that plaintiffs cite makes clear, it was Dr. Longo who disclosed these facts in his deposition in that litigation. RA1436 ¶ 3. Lincoln was simply trying to protect its privilege after Dr. Longo’s unauthorized disclosure.

Moreover, Dr. Longo's testimony in *this* case went far beyond what was previously disclosed (*see* RA1435-1436, RA1442): the "bare bones" facts that Dr. Longo had been retained by Lincoln and had been given mock-up welding rods as part of that retention. In this case, Dr. Longo testified extensively about the details of his retention, his communication with Lincoln's counsel, his travel and work at the direction of Lincoln's counsel, Lincoln's litigation strategy with respect to the fume theory of exposure, and Lincoln's attempt to secure its privileged information and materials. *See* A440-448. Lincoln's attempt to protect its privilege following Dr. Longo's inappropriate disclosure did not authorize the extensive and detailed testimony that Dr. Longo was ordered to give in this case.

C. The Unavailability Of The Mock-Ups Has No Effect On Lincoln's Privileges.

Plaintiffs argue that the trial court appropriately compelled Dr. Longo to testify because the unavailability of the mock-ups created a "special circumstance" as defined by *Rosario v. General Motors Corp.*, 543 N.Y.S.2d 974 (App. Div. 1st Dep't 1989). *Resp.* 57-60. But *Rosario* held that "when material physical evidence is inspected by an expert for one side, and then lost or destroyed before the other side has had an opportunity to conduct its own expert inspection, a special circumstance exists *within the meaning of CPLR 3101(d)(1)(iii).*" 543 N.Y.S.2d at 974 (emphasis added).

However, as defendants previously noted (Br. 49 n.12), when an expert is “retained as a consultant * * * and will not testify at trial” then “[p]laintiff cannot * * * claim entitlement [to disclosure] based on CPLR 3101(d)(1)(i) or (iii).” *Santariga*, 555 N.Y.S. at 310. Because it is undisputed that Dr. Longo was retained solely as a nontestifying expert, *Rosario*’s “special circumstances” exception for testifying experts is simply irrelevant. There are no “special circumstance” (or other) exceptions to the work-product privilege afforded to consulting experts—that privilege is absolute.¹⁵

D. The Consent Order Did Not Authorize The Trial Court’s Order Compelling Disclosure.

The idea that, by entering into a consent order with Dr. Longo, Lincoln somehow waived its right to enforce the common-law or statutory privileges afforded by state law (Resp. 55-57), is ridiculous. The consent order restricts Dr. Longo even when state law does not, and the fact that it contains pro-forma language that allows him to testify if “ordered by a court” does not mean that courts may disregard the

¹⁵ Plaintiffs wrongly claim that, according to *Santariga*, “a nontestifying expert’s report would be discoverable” if the other party showed special need. Resp. 59-60. *Santariga* simply noted that, in addition to being absolutely privileged under CPLR 3101(c), a non-testifying expert’s report is also subject to the qualified privilege for material prepared in anticipation of litigation under CPLR 3101(d)(2). 555 N.Y.S.2d at 310. Even if there were a special need that created an exception to this qualified privilege, the absolute privilege under 3101(c) would still preclude disclosure; *Santariga* does not say otherwise.

governing law of privilege when issuing such an order. *See, e.g., Baker v. Gen. Motors, Corp.*, 522 U.S. 222, 240 (1998).

E. The “At-Issue Doctrine” Is Irrelevant.

Plaintiffs claim that Lincoln waived its privileges because it put “the existence of sample rods and the appearance of the rods used by plaintiffs-respondents at issue.” Resp. 60-61. The “At-Issue Doctrine,” however, applies only when a party “waives the attorney-client privilege” by “placing the subject matter of counsel’s advice in issue” and “making selective disclosure of such advice.” *IMO Indus., Inc. v. Anderson Kill & Olick*, 746 N.Y.S.2d 572, 575 (Sup. Ct. 2002). This doctrine arises most commonly “[w]here a party asserts as an affirmative defense the reliance upon the advice of counsel”—which necessarily puts communications with counsel “at issue.” *Village Bd. of Pleasantville v. Rattner*, 515 N.Y.S.2d 585 (App. Div. 2d Dep’t 1987).

Lincoln did not in any way rely on Dr. Longo’s prior retention as part of its affirmative defense in this case. Indeed, Dr. Longo’s prior retention could have no bearing on the merits of plaintiffs’ claims, as his retention pertained solely to the fume-exposure theory of liability. The “At-Issue Doctrine” is irrelevant here.

III. THE TRIAL COURT ERRONEOUSLY GAVE A SPOILIATION INSTRUCTION REGARDING MOCK-UP WELDING RODS.

A spoliation instruction is appropriate only if the evidence in question would have been relevant. *See* Br. 51-59. It was undisputed that testing of the mock-ups at issue in this case would have been irrelevant. Indeed, the affidavit plaintiffs cite (Resp. 51) states that the mock-ups “were not designed to test whether asbestos fibers could be released into the atmosphere when the welding rod ‘flux’ coating is bent or broken during normal usage” and “[t]he ‘flux’ coating of [the mock-ups] was not designed to permit replication of the bending or breaking qualities of an actual factory-made welding rod, as produced by defendants prior to [1981].” A123 ¶ 6; *see also* A124-125 ¶ 12 (same); A211-212 (mock-ups were “lab made rather than production [line]” and replicated production-line welding rods only in that they used the “same formulation”); A443-447 (Longo’s mock-ups were designed to replicate the fumes from burning production-line welding rods).

And, more importantly, plaintiffs do not deny that several experts specifically testified that any experiment performed on these mock-ups would have been irrelevant for purposes of the “dust-exposure” theory in this case and *no* witness said that such testing would have been relevant.¹⁶ *See* Br. 54-56. Therefore, although plaintiffs now

¹⁶ Testing on the mock-ups would have been relevant only if there were evidence that they were “the same in all significant respects.” *Bolm v. Triumph Corp.*, 422

claim that this was a “question of fact” (Resp. 52), it was actually undisputed that these mock-ups were irrelevant here. That renders the spoliation instruction inappropriate.

For the same reason, plaintiffs’ overblown allegations that Lincoln has been making false discovery responses (Resp. 14, 18, 47-51) are mistaken. In fact, the mock-ups were not responsive to any of these discovery requests (thus, Lincoln’s responses did not “deny” that they existed). For example, the NYCAL request asks for “[s]amples of any products listed in Answers 9 and 10 of the type manufactured by defendant.” RA1431. Lincoln stopped manufacturing the welding rods listed in Answers 9 and 10 (those used by plaintiffs) in 1981—there are no remaining samples of those welding rods.¹⁷ The mock-ups, created in Lincoln’s laboratory in 1987 and 1990, were *not* samples of the type of product manufactured by Lincoln and used by plaintiffs—they were objects created in a small batch on laboratory equipment that were intended to mimic the products Lincoln had manufactured only in certain limited

N.Y.S.2d 969, 975-976 (App. Div. 4th Dep’t 1979).

¹⁷ A “sample” is, in relevant part, “a single item from a larger whole or group * * * presented for inspection or shown as evidence of quality.” Merriam-Webster OnLine Dictionary, <http://www.m-w.com> (last visited September 12, 2005). The mock-ups are *not* “from [the] larger whole or group” comprised of the welding rods that Lincoln manufactured until 1981.

respects.¹⁸ *See generally* A125-127. Plaintiffs do not contend that the discovery request asked for mock-ups, prototypes, or other objects that bear some relationship (other than identity) to Lincoln’s production-line welding rods. Plaintiffs could have made such a request, although Lincoln would have objected, but they never did. Thus, the spoliation instruction was not justified as a sanction for Lincoln’s prior discovery responses.

Moreover, the spoliation instruction also was improper because neither set of mock-ups were wrongfully withheld or intentionally destroyed.

A. Dr. Longo’s Mock-Ups

Plaintiffs contend that Lincoln did not withhold Dr. Longo’s mock-ups under a claim of privilege because it did not specifically list them in its NYCAL discovery responses. Resp. 50-51. As noted above, however, the mock-ups were *not responsive* to those discovery requests. Plaintiffs first raised the issue of the mock-ups at trial, at which point Lincoln appropriately asserted its privilege. A747-757 (filed under seal); *see also* A128. As defendants’ previously noted (Br. 53)—and plaintiffs do not

¹⁸ Contrary to plaintiffs’ insinuation (Resp. 14, 51-52), Mr. Brown said only that his mock-ups were “lab sample[s]” that duplicated “the same formulation” as Lincoln’s 6010 production-line welding rods (A211-212). Regardless, it was undisputed that he made them in 1987 on laboratory equipment. A211-214. Those facts, not clever examination of a lay-witness, control the legal question whether the mock-ups were “samples” under plaintiffs’ discovery request.

dispute—plaintiffs never actually asked the trial court to compel disclosure of Dr. Longo’s mock-ups. Lincoln should not have been sanctioned for withholding objects it never was compelled to produce.

B. Mr. Brown’s Mock-Ups

When asked whether his mock-ups were in his laboratory in 1999, Mr. Brown said: “I don’t know when they were thrown out, because I personally did not discard them * * * [t]hey could have been destroyed anywhere from 1988, after we were through with the testing, all the way up to 1999 when we moved [the laboratory].” A217. Plaintiffs tried to confuse the issue by quoting from a prior deposition, but that testimony merely indicated that *if* the mock-ups were still in the lab in 1999, then they were thrown out at that time because “everything got cleared out.” A226.

Regardless, it is clear that Mr. Brown simply did not consider these mock-ups to be important because they were not actual samples of Lincoln’s welding rods, but were objects he had personally created in his laboratory for the purpose of conducting fume testing. *See, e.g.*, A228, A230. Thus, they were simply discarded at some point in the normal course of business. *Id.* Accordingly, a spoliation instruction was inappropriate.

Plaintiffs’ cases (Resp. 50) do not compel a different result. There, the spoliated evidence had either been specifically requested by the other side and then

destroyed (*Weiss v. Connecticut Mutual Insurance Co.*, 731 N.Y.S.2d 713 (App. Div. 1st Dep't 2001)), was the unique item at issue in the case (*Amaris v. Sharp Electronics Corp.*, 758 N.Y.S.2d 637 (App. Div. 1st Dep't 2003)), or both (*Sage Realty Corp. v. Proskauer Rose LLP.*, 713 N.Y.S.2d 155 (App. Div. 1st Dep't 2000)).¹⁹ Mr. Brown's mock-ups were obviously not the unique items at issue in this case, nor was there a discovery request specifically asking for these mock-ups. Thus, these cases, which impose a higher duty affirmatively to preserve evidence that is of unique importance to litigation, do not support a spoliation instruction for (at most) negligent destruction in this case.

IV. THIS COURT SHOULD DIRECT ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS.

Even with the opportunity to scour the record and marshal all the evidence in their favor, plaintiffs did not identify a single piece of admissible evidence indicating that defendants' welding rods could have harmed them. Plaintiffs do not deny that they had a full and fair opportunity to present every argument at their disposal. Because plaintiffs failed to carry their burden of proof, judgment should now be entered in defendants' favor.

¹⁹ Furthermore, none of these cases impose liability on a *defendant* for negligent loss or destruction of evidence. Instead, they hold only that a *plaintiff* can be sanctioned for trying to impose liability based on evidence that it negligently lost or destroyed.

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 for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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