

## Winter v A.O. Smith Water Prods. Co.

Supreme Court of New York, New York County

July 3, 2023, Decided

INDEX NO. 190233/2019

### Reporter

2023 N.Y. Misc. LEXIS 3515 \*; 2023 NY Slip Op 32330(U) \*\*

**[\*\*1]** LISA WINTER, AS ADMINISTRATRIX FOR THE ESTATE OF PASQUALE CINFO AND BETH CINFO, INDIVIDUALLY, Plaintiff, - v - A.O. SMITH WATER PRODUCTS CO, ABB, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO BROWN BOVERI, AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, CRANE CO., ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPE-S-VULCAN, ELLIOTT COMPANY, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, GRINNELL LLC, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., JENKINS BROS, PFIZER, INC. (PFIZER), SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL, UNION CARBIDE CORPORATION, UNITED CONVEYOR CORPORATION, WARREN PUMPS, LLC,

ZY-TECH GLOBAL INDUSTRIES, INC., ALFA LAVAL INC., INDIVIDUALLY AND AS SUCCESSOR TO SHARPLES, INC., ALFA LAVAL SEPARATION, INC.; AND DE LAVAL SEPARATOR COMPANY; A NEW JERSEY CORPORATION, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC., KAISER GYPSUM COMPANY, INC., MILTON ROY COMPANY, TACO, INC., Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

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cases, factors, consolidation, joint trial, disease, joinder, mesothelioma, joined

**Judges:** **[\*1]** PRESENT: HON. ADAM SILVERA, Justice.

**Opinion by:** ADAM SILVERA

### Opinion

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#### DECISION + ORDER ON MOTION

**[\*\*2]** The following e-filed documents, listed by NYSCEF document number (Motion 004) 187, 188, 189, 190, 191, 192, 194, 195, 196, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213 were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, it is ordered that plaintiff's order to show cause for joint trials is granted for the reasons set forth below.

Here, plaintiff moves for a joint trial of three actions. Plaintiff seeks to consolidate the instant action with

*Morie v Air & Liquid Systems*, 190140/2019, and *Toscani v AO Smith Water Products Co.*, 190086/2018. Defendants oppose.

The Case Management Order dated June 20, 2017 (hereinafter referred to as the "CMO") states that "[t]wo cases may be joined for trial where plaintiff demonstrates that joinder is warranted under [Malcolm v National Gypsum Co. \(995 F2d 346\)](#), and New York State cases interpreting *Malcolm*. *Malcolm* and its progeny list factors to measure whether cases should be joined; it is not necessary under [Malcolm](#) that all such factors be present to warrant joinder." CMO, §XXV. B. The factors to be considered under [Malcolm](#) are "(1) common worksites; (2) similar occupation; [\*2] (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged". [Malcolm, 955 F2d at 350-351](#). The United States Court of Appeals, 2nd Circuit, further noted that "[c]onsolidation of tort actions sharing common questions of law and fact is commonplace. This is true of **asbestos**-related personal injury cases as well." [Malcolm, id. at 350](#) (internal quotations and citations omitted). As to consolidation of three cases, the CMO states that "[u]pon good cause shown, a Trial Judge in [\*3] NYCAL may join a maximum of three cases for trial where it determines that 1) joinder is warranted under three or more of the factors described in [Malcolm](#) and New York State cases interpreting [Malcolm](#), and 2) where the three plaintiffs share the same disease. For purposes of this section 'same disease' shall mean that all the plaintiffs in the three cases proposed to be joined for trial share one of the following four categories of disease: 1) pleural mesothelioma, or 2) non-pleural mesothelioma, or 3) lung cancer, or 4) other cancers." CMO, §XXV. B.

Plaintiff argues that consolidation of the cases for [\*3] joint trial as specified above is appropriate. Plaintiff contends that all three (3) plaintiffs, Pasquale Cinfo, Robert Morie, and Frank E. Toscani, Jr., were exposed to **asbestos** during the course of their employment, working on similar equipment and machinery; i.e. valves, pumps, boilers, and pipes. Plaintiff further contends that all 3 plaintiffs developed pleural mesothelioma and have now succumbed to the illness. Moreover, the discovery in all 3 of these cases have been completed, and all 3 plaintiffs are represented by the same counsel.

Defendants Jenkins Bros. and Burnham LLC jointly

oppose, and defendants Milton Roy, LLC and ECR International, Inc. also oppose separately. Defendants Jenkins Bros. and Burnham LLC argue that plaintiff failed to meet the burden to establish sufficient commonalities amongst the 3 actions, consolidation of the 3 actions for trial would violate due process, and it would be contrary to judicial economy. Defendant Milton Roy, LLC makes the same arguments and further argues that the CMO prohibits the consolidation. Defendant ECR International, Inc. makes the same arguments as defendants Jenkins Bros. and Burnham LLC and further contends that the 3 plaintiffs' [\*4] occupations, worksites, and timeframes for exposure differ.

Here, reviewing all the [Malcolm](#) factors, the Court finds, and it is undisputed, that plaintiffs, Mr. Cinfo, Mr. Morie, and Mr. Toscani, were all exposed to **asbestos** through their [\*4] employment and their handling of similar materials and equipment. Moreover, Mr. Cinfo and Mr. Morie were both mechanics. Additionally, all 3 plaintiffs developed pleural mesothelioma from which all 3 plaintiffs subsequently passed away, the discovery in all of these actions are complete, and the 3 plaintiffs have the same counsel. Counsel for the opposing defendants Jenkins Bros. and Burnham LLC represents defendant Jenkins Bros. in all 3 actions. Such counsel also represents defendant Burnham LLC in *Morie v Air & Liquid Systems*, 190140/2019. Defendant Milton Roy LLC is sued in *Morie v Air & Liquid Systems*, 190140/2019, and defendant ECR International, Inc. is also sued in *Morie v Air & Liquid Systems*, 190140/2019. Thus, six of the eight [Malcolm](#) factors have been satisfied.

There are common issues of law and fact in both actions. The CMO explicitly states that the Court may order joinder of cases based upon the [Malcolm](#) factors and that not all such factors must be present. [\*5] Here, the [Malcolm](#) factors support joinder of the 3 actions. As Hon. Manuel Mendez previously held, "[j]udicial economy would be served by consolidating the actions of deceased plaintiffs with mesothelioma and whose exposure was related to their work on similar products... . In these case consolidations: (1) the central issue is the same; (2) it is the same Plaintiffs' counsel in the actions; (3) the Plaintiffs suffered from the same disease; (4) the Plaintiffs in the group are all deceased; and (5) the Plaintiffs were exposed...in a similar manner." *Haley v ABB, Inc.*, 190150/19, mot. 008, dated December 11, 2019. Moreover, the CMO specifically permits the joint trial of three actions where, as here, three or more of the [Malcolm](#) factors have been met and

the three plaintiffs share the same disease. As stated above, although the plaintiffs did not share common worksites, this does not preclude joinder of the cases for trial. Adequate safeguards can be put in place during the trial to avoid juror confusion. **[\*\*5]** Thus, plaintiff's motion seeking a joint trial is granted as to the instant action with *Morie v Air & Liquid Systems*, 190140/2019, and *Toscani v AO Smith Water Products Co.*, 190086/2018.

Accordingly, it is

ORDERED that plaintiff's motion seeking a joint trial **[\*6]** is granted; and it is further

ORDERED that a joint trial is granted as to the instant action with *Morie v Air & Liquid Systems*, 190140/2019, and *Toscani v AO Smith Water Products Co.*, 190086/2018; and it is further

ORDERED that, within thirty days of entry, plaintiffs shall serve a copy of this order upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court.

**7/3/2023**

**DATE**

/s/ Adam Silvera

**ADAM SILVERA, J.S.C.**

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