NO. 123895 & NO. 124002
(consolidated)

In the Supreme Court of Illinois

PNEUMO ABEX LLC and
OWENS-ILLINOIS, INC.

Defendants-Petitioners,

v.

JOHN JONES and
DEBORAH JONES

Plaintiffs-Respondents,

On Grant of a Petition for Leave to Appeal from a Decision of the
Appellate Court, Fifth District, Case No. 5-16-0239
There Appealed from the Judicial Circuit Court,
Richland County, Illinois, Case No. 13-L-21
Honorable William C. Hudson, Judge Presiding

REPLY BRIEF OF DEFENDANT-PETITIONER PNEUMO ABEX LLC

HEYL, ROYSTER, VOELKER & ALLEN, P.C.
Craig L. Unrath, Esq.
ARDC No. 6207905
300 Hamilton Boulevard
P.O. Box 6199
Peoria, Illinois 61601
Telephone: (309) 676-0400
Facsimile: (309) 676-3374
cunrath@heylroyster.com

YETTER COLEMAN LLP
Reagan W. Simpson, Esq.
ARDC No. 6314525
811 Main Street, Suite 4100
Houston, Texas 77002
Telephone: (713) 632-8000
Fax: (713) 632-8002
rsimpson@yettercoleman.com

SWANSON, MARTIN & BELL, LLP
Gary C. Pinter, Esq.
ARDC No. 6293560
103 W. Vandalia Street, Suite 215
Edwardsville, Illinois 62025
Telephone: (618) 655-3131
Fax: (618) 655-3113
gpinter@smbtrials.com

WILKINSON, GOELLER, MODESITT,
WILKINSON & DRUMMY, LLP
Raymond H. Modesitt, Esq.
ARDC No. 6315123
333 Ohio Street, P.O. Box 800
Terre Haute, Indiana 47808-0800
Telephone: (812) 232-4311
Fax: (812) 235-5107
rhmodesitt@wilkinsonlaw.com

Attorneys for Defendant-Petitioner Pneumo Abex LLC

E-FILED
4/29/2019 2:28 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

REPLY

I. Plaintiffs' "Statement of Facts" Supplies Arguments, Not Facts.

Beginning on page 6, after discussing the opinions rendered over the years in this litigation, Plaintiffs' "Statement of Facts" switches to pure argument and invective. Plaintiffs do more than just insinuate that Abex was part of a plot to deal with compensation laws by the group referred to as "the asbestos companies," or "the unit," or the "conspirators." Yet Abex is nowhere to be found in the letter that supposedly set the conspiratorial plot in motion, Plaintiffs' Exhibit 312. This letter from Sumner Simpson, the President of Raybestos Manhattan, is not written to Abex, Abex is not copied on the letter, and Abex is not even included in the potential list of sponsors of the proposed research.

Contrary to what Plaintiffs misrepresent, Abex did not attend any "boardroom meetings" to hatch a plan. Plaintiffs' Brief at 7. Abex never attended *any* meeting of the sponsors of the asbestosis research at the Saranac Labs. Abex was noticeably absent at the initial meeting of the sponsors in New York 1937. AX600 [A.74] (the ten companies at the meeting "did not include American Brakeblok Corporation"). Nor did Abex attend the meeting in 1948 where the sponsors discussed Dr. Gardner's draft report. AX747 [A.151].

In between those years, the record shows almost nothing about Abex. Abex signed a Memorandum of Agreement that simply set out its obligation to share in the expense of "experiments with asbestos dust." AX602. No ulterior motive for those experiments is stated in that agreement. Plaintiffs imagine this Memorandum as "a signed agreement among several competitors in the asbestos industry to fund, control, and censor research related to asbestos with the stated purpose of manipulating the legal and medical landscape to their benefit." Plaintiffs' Brief at 25. This, they say, is what the Appellate Court supposedly missed in its analysis of the required evidence of conspiracy in *Gillenwater v. Honeywell Int'l, Inc.*, 2013 Ill. App. (4th) 120929. Plaintiffs' Brief at 25. Yet the agreement that Abex signed simply recites the amount Abex would contribute financially to the planned asbestosis research.

The record further shows that Abex enclosed its first payment of $250 in a letter dated February 1937. AX605 [A.83]. Again, the letter does nothing more than refer to what Abex is to contribute—$250 a year for three years. The other letters in the record to and from Abex are in the fall of 1948—concerning the other New York meeting that Abex did not attend, the meeting about Dr. Gardner's draft report whose potential publication did not cause Abex any alarm. *See* AX746-49 [A.149-54]. Thus,

there are no facts recited by Plaintiffs to support their claim that Abex entered into the type of agreement that this Court required in *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102 (1999).

Likewise, it is only argument, not a factual statement, that Abex was exerting "influence" on Dr. Gardner (Plaintiffs' Brief at 9) merely because Vandiver Brown told Sumner Simpson that all sponsors were entitled to the benefits of the research—something that would be expected by those helping to underwrite the research. Plaintiffs cite no correspondence between Abex and Dr. Gardner, or any letter by Dr. Gardner that refers to Abex, because there is none. Abex is absent from the description of the supposed nefarious events depicted on page 8 through the first paragraph of Page 12. If there was any exhibit showing Abex's complicity, the Plaintiffs would surely cite it.

The implication that Abex was involved in the "Scheme" is pure imagination. Plaintiffs' reliance on such baseless insinuations speaks volumes as to the veracity of the "evidence" plaintiffs present to juries in this litigation.

II. Criticisms of Abex's Later Conduct Have Nothing to Do with a Claim of Conspiracy.

After inventing Abex's participation in a conspiracy plot, Plaintiffs fast forward to the late 1960s and 1970s, addressing conduct they

characterize as "Abex's Continued Participation In The Conspiracy." Plaintiffs' Brief at 15. There is in fact no "continued" connection between the decision on the 11-mice experiment and what Abex was doing two decades later. As the Court in *Rodarmel* noted:

> Besides, in agreeing to suppress the eight or nine tumorous mice, the financing corporations did not agree, generally and perpetually, to withhold any and all information about the carcinogenic effects of asbestos.

Rodarmel v. Pneumo Abex L.L.C., 2011 IL App (4th) 100463 at ¶130.

As already shown in Abex's opening brief, Abex was primarily a foundry company, thought it had asbestos exposure well under control, and did not expect asbestos use in brake manufacturing or brake products to be a problem. *See* Abex Brief at 37-38. There is nothing "disingenuous" (Plaintiffs' Brief at 45) about Abex's assertion that, when the issue of the 11-mice experiment arose, Abex did not view asbestos as a problem in its limited business in producing brake components. Abex Medical Director Dr. Hamlin wrote exactly that in 1944, concluding that disease from asbestos was likely to be a problem in mining, textiles, and insulation. AX159 [A.11]. He did not see it as a problem in friction manufacturing, and from his perspective as the Medical Director for a company engaged mostly in foundry operations, he viewed silica as "public enemy No. 1." AX159 [A.12].

Under Dr. Hamlin's supervision, Abex had extensive dust control and monitoring measures. *See* AX162, 347 & 361 [A.16, 61, 64]; (AX251-270); *see generally* (AX303-80, which are found in Volumes X through XII of Exhibits to Affidavit of Reagan W. Simpson). Two insurance companies agreed after surveying Abex's operations with Dr. Hamlin that asbestos exposure was not a problem at Abex. *See* Abex's Brief at 22 (citing AX162 [A.21-22]; AX170 [A.26-29]; AX254 [A.41-43]; AX258 [A.49-51]). Internal company documents spanning three decades show Abex's belief that asbestos did not pose a health problem in brake manufacturing facilities or in the use of brake products. AX115, 170, 177 & 181 [A.2, 26-30, 34]. Plaintiffs claim that Abex hid dangers from workers but fails to mention that, in August 1965, Abex sent a letter inviting the Labor Union Committee members to attend a meeting with Abex management, the United States Public Health Service, and the Virginia State Department of Health about the USPHS's planned asbestos study at Abex's Winchester facility. And if Abex was as bad as Plaintiffs claim, why were there no claims of asbestosis for 35 years and then only two in the 1970s and two more in the 1980s? *See* Abex Brief at 21-23 (citing AX207 [A.38]; (AX291 at 14)).

It is important to keep in mind that facts about how Abex conducted its business operations in the 1960s, 1970s, and 1980s show only Abex's *unilateral* conduct. There is no evidence that Abex was furthering any illegal agreement with others in conducting its business operations up until it stopped using asbestos in 1987. *See* C07168. How Abex conducted its business, whether it took adequate steps to protect and warn workers and customers have significance only to exposure claims that are not at issue in this case. Nothing that the Court decides in this case will affect any exposure claims against Abex.

III. There Is No New Evidence Omitted by Abex from its Appendix or Briefing.

Not content to accuse Abex of hiding facts from workers and customers, Plaintiffs accuse Abex of hiding facts from this Court by not including six exhibits in its Appendix. Yet the exhibits are not included in the Appendix because they are not in the record of this case. Obviously, the parties viewed them, correctly, as not important enough to submit in the summary judgment evidence.

Further, the exhibits reveal nothing new. They were all admitted, with one exception, in *Rodarmel*, *Gillenwater*, and *Menssen v. Pneumo Abex Corp.*, 2012 Ill. App. (4th) 100904, as shown by the verified index to the appellate record in those cases that appears in this record at C07110-188.

"Missing" Plaintiffs' Exhibits 202 and 296 were in the records of the *Rodarmel* and *Menssen* cases. Plaintiffs' Exhibits 313 and 314 were in the record in *Rodarmel*. Plaintiffs' Exhibit 326 was in records of the *Gillenwater* and *Menssen* cases. *See* C07115, 7118-19 (*Rodarmel* record); C07131, 7133-34 (*Menssen* record); C07158 (*Gillenwater* record).

Plaintiffs' Exhibit 360D, which is also AX757 in this litigation, is the only exhibit that was not part of the record in *Rodarmel*, *Menssen*, or *Gillenwater*. Even a cursory review shows that it is a completely innocuous letter in which Abex Vice President Kelly merely acknowledges receipt of the revised report of Dr. Gardner's experiments and says he would read it with interest. Until the appellate briefing in this Court, no one has viewed this insignificant document as being worthy of inclusion.

As to the other "missing" exhibits, none had any cognizable effect on the outcome of those three cases. Indeed, the other five exhibits have minimal, if any, relevance to the claims against Abex—which is no doubt why Plaintiffs did not include any of them as evidence in opposing Abex's motion for summary judgment. Each one is addressed below.

Plaintiffs' Exhibit 202 is a company newsletter. The characterization that it falsely promises immediate action is not a fact from the newsletter but argument by counsel. Abex has presented to this Court considerable

evidence about corrective actions taken by Abex over many years to protect workers from asbestos exposure. *See* Abex's Brief at 21-23.

Plaintiffs' Exhibit 296 deals with one machine that was still being used to produce asbestos-containing brake components in 1987, the year Abex stopped using asbestos (C07168), and in any event long after the publication of Dr. Gardner's research and after the development of extensive OSHA regulations on asbestos, when a continuing conspiracy would have been impossible.

Plaintiffs' Exhibits 313 and 314 did not involve Abex at all, and they are actually part of the considerable evidence in this record that Abex was at the periphery of this research project, as already discussed. Finally, Plaintiffs' Exhibit 326 simply transmits the revised report of Dr. Gardner's research on asbestosis and adds nothing to the overall facts of the case.

Thus, the reason for not including those six exhibits in Abex's appendix is hardly nefarious. Further, because the exhibits, save one innocuous letter, are part of the evidentiary record in this litigation, Plaintiffs can raise no possibility of new evidence that might argue against a summary judgment. The record has all the evidence that will ever be available, Abex has not withheld any of it, and the evidence is legally insufficient to raise a fact issue about conspiratorial conduct by Abex.

IV. The Summary Judgment Standard in this Litigation Should Mirror the Directed Verdict Standard.

Contrary to Plaintiffs' Brief at 18, Abex is not arguing that any plaintiff must *prove* its case at the summary judgment level. But all plaintiffs, including the ones in this repetitive litigation, must raise a fact issue under the proper legal standard. As this Court has observed, "to survive a motion for summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment." *Bruns v. City of Centralia*, 2014 IL 116998, ¶12.

In this litigation, that "factual basis" must comply with the requirement of clear and convincing evidence standard. As discussed extensively in Abex's Brief, Illinois law is settled that the clear and convincing evidence standard applies to claims for civil conspiracy at the summary judgment stage. *See* Abex's Brief at 33-34 (citing, *inter alia*, *Lozman v. Putnam*, 379 Ill. App. 3d 807, 828 (1st Dist. 2008) (conspiracy case); *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50-51 (2nd Dist. 1992) (antitrust conspiracy case)). A corollary to the clear and convincing evidence standard is the innocent construction rule. "Under this clear and convincing standard, if the facts and circumstances relied upon are as consistent with innocence as with guilt it is the duty of the court to find that the conspiracy has not been proved." *McClure*, 188 Ill. 2d at 140-41

(quotation omitted). "Innocent" in this context means non-conspiratorial. *Gillenwater* at ¶123. Under those standards, Plaintiffs are incapable of supplying the required factual basis in their conspiracy claim against Abex.

True, the Appellate Court in this case did refer to the clear and convincing evidence standard. But Abex's complaint is that the Appellate Court did not *apply* that standard, as the Appellate Court did in *Rodarmel*, *Menssen*, and *Gillenwater*. It is not enough simply to reference the clear and convincing evidence standard and then conclude summarily that there is a fact issue. Any actual application of that standard will yield the same result as in *Rodarmel*, *Menssen*, and *Gillenwater*.

Plaintiffs continue to maintain the inapplicability of the clear and convincing evidence standard by asserting that the now-rejected *Burgess* opinion found direct evidence of conspiratorial conduct by Abex. In its brief at pages 32-33, Abex has already explained why that is not so. The Appellate Court in *Burgess* recognized the applicability of the innocent construction rule, which is part of the clear and convincing evidence standard. *See Burgess v. Abex Corp.*, 311 Ill. App. 3d 900, 903 (4th Dist. 2000).

Moreover, Plaintiffs are only half right at page 4 of their Brief when they argue that the facts did not change between *Burgess* and *Rodarmel*.

While the factual record is set, *Rodarmel* was the first opinion to examine in detail the facts surrounding the meaningless results of the 11-mice experiment. *Burgess* ignored those facts and erroneously assumed that the results were valid. As *Rodarmel*, *Menssen*, and *Gillenwater* correctly held, deciding not to publish meaningless information that the researcher himself did not want to publish on a subject that was already widely published cannot be direct evidence of a conspiracy. AX641 [A.122]; AX748 [A.152]. That is especially true as to Abex, which expressed no concern about publishing the results with the 11 mice. *See* AX746 [A.149].

Finally, courts are often hesitant to grant summary judgment where a plaintiff may be able to marshal more evidence at trial. That prospect does not exist in the case at bar. What is unique about this litigation is that the evidence is closed. No more evidence or witnesses can shed any light on what happened in the 1930s and 1940s when this conspiracy was supposedly hatched. Plaintiffs' attempt in this appeal to show otherwise fails, as already discussed. The same evidence is presented in trial after trial. When, as here, "all of the evidence [is] before the court and upon such evidence there [is] nothing left to go to a jury, and the court would be required to direct a verdict, then a summary judgment should be entered."

Cohen v. Chicago Park Dist., 2017 IL 121800, at ¶27 (quoting *Fooden v. Bd. of Governors of State Colleges & Univs.*, 48 Ill. 2d 580, 587 (1971)).

V. There Is Legally Insufficient Evidence of Any Conspiratorial Conduct by Abex.

Abex is not attempting to abolish conspiracy law in Illinois or even change that body of law. Instead, Abex relies on this Court's pronouncements in *McClure*. To prevent conspiracy claims based on speculation, *McClure* required evidence beyond mere parallel conduct and applied the clear and convincing evidence standard, along with its corollary, the innocent construction rule. *McClure*, 188 Ill. at 135, 140-41.

Appellate Courts have been applying *McClure* in this litigation. As a result, there has never been an affirmance of any judgment against Abex during the past 25 years. In the last eight years, no evidence of conspiracy against Abex has been found in three reported appellate opinions, participated in by five appellate justices, together with the justices in the two unreported cases that appeared in this Court on petitions for leave to appeal that were denied (*see* Abex Brief at 4). During that time, Circuit Courts have agreed across the state in more than 100 summary judgments.

A. Plaintiffs can muster only parallel conduct.

Nothing in the Plaintiffs' Brief dispels the simple truth that all the supposed evidence of conspiracy against Abex amounts to nothing more

than parallel conduct—evidence that Abex and other manufacturers allegedly failed to warn about asbestos exposure. Not even that evidence shows fully parallel conduct, because warnings were issued at different times by different manufacturers, as admitted by Dr. Barry Castleman, Plaintiffs' own expert on the history of the industrial use of asbestos. Dr. Castleman acknowledged that the alleged conspirators chose to issue warnings about asbestos at different times and thus "ma[de] their own decisions about whether they were going to warn their customers." A.271; *accord Rodarmel* at ¶¶110-11.

Plaintiffs argue at page 24 of their Brief that their conspiracy theory is not "solely" about Abex's participation in the so-called "Saranac Scheme." But without Saranac, there is nothing left that could possibly be classified as something other than parallel conduct, and the evidence conclusively shows that not publishing the 11-mice experiment has no significance to the conspiracy claim against Abex.

When the time came to consider whether to include the 11-mice experiment in the published report, Abex management looked to its Medical Director, Lloyd Hamlin. After reviewing the draft report and Vandiver Brown's comments, Dr. Hamlin put his thoughts in writing because he could not attend the called meeting of research sponsors.

Significantly, he wrote that he lacked any concern about the 11-mice experiment because similar reports were already frequent in the literature in the Unites States and abroad. AX746 [A.149]. He did express criticism of conflicting statements in the report about the incidence of pneumonia, but he saw no reason for his presence at the meeting to review the manuscript. AX746 [A.149].

At the meeting, Vandiver Brown read Dr. Hamlin's comments to the sponsors. AX748 [A.152]. The sponsors agreed with what Dr. Hamlin had written about correcting the conflicting statements on pneumonia, but their unanimous opinion, contrary to Dr. Hamlin's written comments, was to delete the reference to cancer and tumors. They had four valid reasons for their disagreement with Dr. Hamlin: (1) Dr. Gardner had not intended to study cancer; (2) he wanted to conduct a proper study; (3) he did not want the results with the 11 mice to be published; and (4) he had included tumor-susceptible mice in his research, meaning that the cause of tumors could not be attributed to asbestos exposure. *See* AX638 [A.86], AX639.1 [A.103]; AX641 [A.121]; AX748 [A.152]; *see also Rodarmel* at ¶¶30-31; *Gillenwater* at ¶135.

Those four facts are fully confirmed by the record in this litigation, as discussed in detail on page 40 of Abex's Brief. They were confirmed as well by the Appellate Court in *Rodarmel*:

> Gardner frankly admitted that for a number of reasons, the experiments he had conducted thus far were unenlightening with respect to cancer—as he put it, "the results with asbestos mean[t] nothing." None of the experiments had been designed to study the carcinogenic effects of asbestos, 11 mice were too small of a group to be meaningful, and "the strain of mice kept in the laboratory * * * [had] changed from time to time by importation of new stock," some of which was especially susceptible to cancer. All the same, he believed that "[a]decisive answer to this question would be of real practical value," and he was confident that the answer could be discovered at Saranac Laboratory.
>
> To verify his "accidential discovery of possible carcinogenic action of fibrous asbestos," Gardner wanted "to repeat the mouse inhalation experiments under properly controlled conditions."

Rodarmel at ¶¶36-37.

Viewed in an objective and rational light, Abex was not part of a "boardroom" effort to hide so-called valid research results. That is why Judge Drummond in the *Bowles* case found no evidence that Abex had even participated in the decision about omitting the 11-mice experiment:

> Regardless of what any expert on either side says in 2012 about the significance of the 1948 Saranac study, this court keeps coming back to the memo of [Abex medical director] Dr. Hamlin . . . . [citing AX746 [A.149].
>
> . . . .

> The bottom line is that Dr. Hamlin did not see anything in Saranac which caused him concern, stated much of what was in the Saranac study was already known, and, finally, said he was too busy with other meetings to even attend. None of this suggests an agreement by Abex to conceal and, in fact, points to the opposite conclusion.
>
> . . . . The actions of Abex with regard to the publishing of [the] Saranac study are, in this court's opinion, not only consistent as much with innocence as guilt, they are evidence of Abex's claim in this case that asbestos was not a primary concern for them.

A.327-29; *see* Abex Brief at 40-41. The Circuit Court Judge in the *Johnson* case reached a similar conclusion about Abex not being a part of any agreement, as shown at pages 8-9 in the Answer to the Petition for Leave to Appeal that Abex filed in No. 123820.

Abex was provided ample and accurate reasons for the sponsors' disagreement with Dr. Hamlin about the 11-mice experiment. AX748 [A.152]. Under the circumstances of an invalid accidental experiment that the researcher himself did not want to publish on a topic that was already frequently reported on in the United States and abroad, Abex's conduct is *at least* consistent with non-conspiratorial motives—if not conclusive proof of its innocent motives. Thus, the innocent construction rule is amply met. Contrary to Plaintiffs' charge at pages 39-40 of their Brief, the Appellate Court in *Rodarmel*, *Menssen*, and *Gillenwater* was not trying to turn the innocent construction rule into an "any construction rule."

Nor does the Appellate Court deserve the harangue in the Plaintiffs' Brief about self-interest analysis. *See* Plaintiffs' Brief at 42-45. Whether there is conduct against self-interest is simply an additional factor in deciding if there is sufficient evidence of conspiracy. When a party acts both in parallel with others and against its own interest, a potential conspiratorial agreement may be inferred. *See Gillenwater* at ¶¶140-41. But in this case, there is no evidence even suggesting that Abex's conduct with regard to the 11-mice experiment was against its self-interest. To the contrary, its conduct has, at the very least, an equally innocent explanation. For both reasons, no conspiratorial agreement can be inferred.

B. Plaintiffs cannot change the facts.

Plaintiffs cite other evidence in an attempt to manufacture an appearance of significance to the 11-mice experiment, apparently for the purpose of attributing an evil motive to Abex. That attempt is vain, first of all, because Abex never knew about any of this supposed evidence of significance of the 11-mice experiment. As Circuit Court Judge Prochaska of Winnebago County ruled in granting summary judgment for Abex:

> As McClure stated, a party must voluntarily and knowingly enter a conspiracy. McClure v. Owens Corning-Fiberglas Corp., 188 Ill. 2d 102, 133-34 (Ill. 1999). If Abex had no knowledge that the report was publishable, they did not voluntarily agree to enter the conspiracy when they did not push to have the report published. Instead, they would have

> believed that they had no obligation to publish the study and that agreeing to withhold publication was proper. This Court finds that there is no evidence to show that Abex had notice of the scientific validity of the study. Therefore, Abex could not have entered a conspiracy by failing to publish the results of the study.

Order in *Turville v. Honeywell International, et al.*, (in Attachment G to Affidavit of Reagan W. Simpson in Supplemental Record); *accord Rodarmel* at ¶124 ("Unless Abex had notice that the tumorous mice were scientific evidence that asbestos caused cancer, Abex did not enter into a conspiratorial agreement . . . ."). Regardless, the other evidence cited by Plaintiffs does not validate the 11-mice experiment.

First, Plaintiffs point to a letter authored by Dr. Lynch. That letter, written in very general terms, and with no reference to the 11-mice experiment, stated that Dr. Gardner's research was publishable. AX711 [A.135]. And yet, there is no evidence in the record to show that Dr. Lynch knew that Dr. Gardner and leading cancer doctors viewed the 11-mice experiment as meaningless or that Dr. Gardner himself wanted to omit the experiment from the published report. *See* AX638 [A.86], AX641 [A.121], AX652 [A.125]; *see also Rodarmel* at ¶¶30-31; *Gillenwater* at ¶135.

Further, in 1952 and 1957, Dr. Lynch wrote articles that discussed the serious flaws in Dr. Gardner's 11-mice experiment (*see* A.251, 263-64), as discussed in more detail in Abex's Brief at 19-21 and 48-50. In one article

Dr. Lynch noted that Dr. Gardner "stopped" his experiment "apparently intending to set up a proper experiment" later, and Dr. Lynch added that there was "no experimental proof that the inhalation of asbestos . . .will cause bronchiogenic carcinoma." A.263-64.

In addition to relying on Dr. Lynch's general statement about Dr. Gardner's research, Plaintiffs try in vain to rehabilitate Dr. Frank, their retained expert. In doing so, they omit Dr. Frank's concession that, if Gardner did not know the natural tumor rate of his 11 mice—and he did not—then he needed to have a control group—and he had none:

> Q. In an animal study, if you are trying to determine if a particular substance will stimulate a certain response, wouldn't it be a good idea to have the same type of animals at the same time being subjected to everything, except the stimulant?
>
> A. Not necessarily. There are many experiments where the strain is well enough characterized and has been stable over time that it is not necessary to run a blank control.
>
> Q. Now, when you say that, you are referring to a known rate of spontaneous tumor in the mouse that's used?
>
> A. Right. If you—
>
> Q. In other words, if you have a known—if you have a known rate of 50 percent in this animal that's been baseline studied, and you expose it to a stimulus, and it all of a sudden runs 85 percent, then and you have an excess?
>
> A. Yes.
>
> Q. But that's because you have a known established rate?
>
> A. That's what I just said.

> Q. Okay.
>
> A. Because you asked me, don't you—isn't it good to run an—essentially, you were asking me about a blank control in every case.
>
> And the reason I answered as I did is because, no, when you do have that information, there's no reason to run the blank control when you have a stable known rate of a particular kind of tumor.
>
> Q. But if you don't have that —
>
> A. Then you should run a control.

A.293.

The Court need not accept what Abex is saying about Dr. Frank. United States District Judge Mihm concluded that Dr. Frank's testimony and opinions were nothing more than "junk science" that failed to fill the gap in the Plaintiffs' case. *Ellis v. Pneumo Abex Corp.*, 62 F. Supp. 3d 833, 841-42 (C.D. Ill. 2014). Circuit Court Judge Lawrence was quoted on this same point at pages 44-45 of Abex's brief:

> Of course originally in that Saranac report, Dr. Gardner's report—in that report there [were] several problems with it as outlined in *Rodarmel* and otherwise. The strain of mice was not known. The source of mice and the age of the mice were not known. The tumor rate of the mice used was unknown. Dr. Gardner indicated to the sponsors of the report that it should not be published. The NCI committee concluded that the results of Gardner's experiment meant nothing because Gardner didn't know the strain of those mice used or the tumor rate. And so plaintiff has suggested that Dr. Frank could help fill that gap.
>
> Dr. Frank has made a conclusory statement that Dr. Gardner's results had scientific value. On the other hand he

> admits that Dr. Gardner did not run a control and that a control was scientifically necessary if the spontaneous tumor rate of the mice being used was not known and he did not know what strain of mice Dr. Gardner had used. And in the court's opinion, this deficiency as Abex has argued to the court and the court agrees with their argument that that deficiency of expert opinion is *incurable*.
>
> *There is nothing that Dr. Frank can do or say that will alter the flaws in Dr. Gardner's experiment*, and so therefore the court does find that Dr. Frank's opinions are inadequate to fill the gap that the *Rodarmel* case identified.
>
> So when the court looks at all of those, the court does find the plaintiffs' evidence insufficient to prove either the alleged conspiracy agreement or an act in furtherance of that agreement that caused the injury in this case by the required standard of clear and convincing evidence and therefore the court will go ahead and grant the motion for summary judgment.

A.331.

Judge Lawrence granted the second motion for summary judgment obtained by Abex in this litigation. All the subsequent other summary judgments—more than 100 and including the one in this case—were granted after consideration of Dr. Frank's depositions. Those Circuit Court Judges were, therefore, not simply parroting the holdings in *Rodarmel*, *Menssen*, and *Gillenwater*, as argued in Plaintiffs' Brief at pages 33-34. Plaintiffs did not retain Dr. Frank to opine about the 11-mice experiment until after the trials in those three cases, so his testimony on that subject was not addressed by the Appellate Court in *Rodarmel*, *Menssen*, or *Gillenwater*.

C. The 11-mice experiment lacked any significance, and so does the decision not to publish it.

Dr. Gardner said that the results of the 11-mice experiment meant nothing:

> None of these experiments was planned to study carcinogenic effects. Mice were only used as there was space in the dust rooms and many of these animals that died after short exposures were discarded without autopsy as they could not have developed a sufficient amount of dust reaction to be of interest. The strain of mice kept in the laboratory has changed from time to time by importation of new stock. At one time we did procure from Dr. Maud Slye some cancer susceptible stock but as these animals failed to react to inhaled quartz we lost interest in the subject.
>
> *Obviously under such conditions, the results with asbestos mean nothing* but in view of the considerations which I have cited, I believe they should be checked.
>
> . . . .
>
> In order to verify our accidental discovery of possible carcinogenic action of fibrous asbestos, I would like to repeat the mouse inhalation experiment under properly controlled conditions.

AX641 [A.122] (emphasis added).

Agreeing with Dr. Gardner were the leading cancer doctors at the time, who viewed the results as so unimportant that they declined to fund any further research by Dr. Gardner:

> DR. MURPHY: You notice he calls it an <u>uncontrolled</u> experiment, so I doubt if he knows the normal lung tumor rate for his animals. . . . . It is very hard to get a strain of mice that gives much lower than 3 or 4 per cent, and we have some strains and give as high as 50 to 80 per cent normally. I

> wouldn't consider that figure, uncontrolled, as of any significance whatever, unless I knew the strain of the animals, knew it was a low strain; and of course that is the whole danger and having a project of this kind carried on in an institution where they have absolutely no experience with animals in planning cancer experiments.
>
> . . . .
>
> DR. DYER: An incidence of 81.8 per cent in 11 white mice is not very impressive.
>
> DR. MURPHY: It doesn't mean anything.

AX652 [A.131-32] (underlining in original).

As noted above, Dr. Gardner explained why the results meant nothing. He was not intending to study cancer, he did not know the age or spontaneous tumor rate of the mice, he did not use a control group, and he had used a strain of mice in his research that were susceptible to developing tumors spontaneously. AX641 [A.121]; AX639 [A.98-99]; AX639.1 [A.103]; AX748 [A.152].

Dr. Pratt, who co-authored the final publication, confirmed that the 11-mice experiment was meaningless, adding that it was not even known if the tumors were cancerous. *See* AX739.1 [A.142]; AX739 [A.138]; (AX739); A.305-06, 313. Because of the "material contradiction" among the Saranac documents, "it actually is unclear that any of the tumors were malignant, *i.e.*, cancerous," and as a result, "Gardner's cancer findings remain shrouded in ambiguity." *Rodarmel* at ¶¶50-51.

There is simply no conspiratorial motive that can attach to a decision not to publish meaningless and ambiguous data, especially when published reports on the same subject were already frequent. For those reasons, already set out in Abex's Brief, and for all the reasons discussed in *Rodarmel*, *Menssen*, and *Gillenwater*, and in the summary judgment orders issued by many Circuit Courts, the decision to follow Dr. Gardner's recommendation to omit the 11-mice experiment was not evidence of any conspiratorial conduct. That leaves the Plaintiffs in this litigation with nothing more than parallel conduct, which this Court held to be legally insufficient in *McClure*. It is time for the Court to end the conspiracy litigation against Abex.

PRAYER

The Court should reverse the decision of the Appellate Court and affirm the summary judgment rendered by the Circuit Court. Abex prays for all other relief to which it is entitled.

Respectfully submitted by,

/s/Reagan W. Simpson

Craig L. Unrath, Esq.
ARDC# 6207905
HEYL, ROYSTER, VOELKER & ALLEN, P.C.
300 Hamilton Boulevard
P.O. Box 6199
Peoria, Illinois 61601
Telephone: (309) 676-0400
Fax: (309) 676-3374
cunrath@heylroyster.com

Gary C. Pinter, Esq.
ARDC No. 6293560
SWANSON, MARTIN & BELL, LLP
103 W. Vandalia Street, Suite 215
Edwardsville, Illinois 62025
Telephone: (618) 655-3131
Fax: (618) 655-3113
gpinter@smbtrials.com

Reagan W. Simpson, Esq.
ARDC No. 6314525
YETTER COLEMAN LLP
811 Main Street, Suite 4100
Houston, Texas 77002
Telephone: (713) 632-8000
Fax: (713) 632-8002
rsimpson@yettercoleman.com

Raymond H. Modesitt, Esq.
WILKINSON, GOELLER, MODESITT, WILKINSON & DRUMMY, LLP
ARDC No. 6315123
333 Ohio Street, P.O. Box 800
Terre Haute, Indiana 47808-0800
Telephone: (812) 232-4311
Fax: (812) 235-5107
rhmodesitt@wilkinsonlaw.com

Attorneys for the Defendant-Respondent Pneumo Abex LLC

CERTIFICATE OF COMPLIANCE WITH RULES 315 AND 341

Reagan W. Simpson one of the attorneys for the Defendant-Respondent Pneumo Abex LLC, certifies that this brief conforms to the requirements of Rule 341, including subdivisions (a), (b), and (d). This Brief contains 5,555 words, excluding only the items listed in Rule 341(b)(1).

/s/Reagan W. Simpson
Reagan W. Simpson, Esq.
ARDC No. 6314525
YETTER COLEMAN LLP
811 Main Street, Suite 4100
Houston, Texas 77002
rsimpson@yettercoleman.com
Attorney for the Defendant-Petitioner Pneumo Abex LLC

PROOF OF SERVICE

Reagan W. Simpson, one of the attorneys for Pneumo Abex LLC, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that on April 29, 2019, this reply brief was filed and served electronically with the Clerk of this Court and was served by email and Federal Express to counsel listed below:

Charles Lynn Corwin, Esq.
ccorwin@wcklaw.com
James Wylder, Esq.
jwylder@wcklaw.com
WYLDER CORWIN KELLY LLP
207 East Washington, Suite 102
Bloomington, IL 61701
Attorneys for Plaintiffs-Petitioners

Matthew Fischer, Esq.
mfischer@rshc-law.com
RILEY SAFER HOLMES & CANCILA LLP
Three First National Plaza
70 W. Madison Street, Suite 2900
Chicago, IL 60602-4246
Attorneys for Defendant-Respondent Owens-Illinois, Inc.

And was served by email on the following counsel:

Additional Attorneys for Pneumo Abex LLC

Craig L. Unrath, Esq.
HEYL, ROYSTER, VOELKER & ALLEN, P.C.
124 S.W. Adams, Suite 600
Peoria, Illinois 61602
cunrath@heylroyster.com

Gary C. Pinter, Esq.
SWANSON, MARTIN & BELL, LLP
103 W. Vandalia Street, Suite 215
Edwardsville, Illinois 62025
gpinter@smbtrials.com

Raymond H. Modesitt, Esq.
WILKINSON, GOELLER, MODESITT, WILKINSON & DRUMMY, LLP
333 Ohio Street, P.O. Box 800
Terre Haute, IN 47808-0800
rhmodesitt@wilkinsonlaw.com

/s/Reagan W. Simpson
Reagan W. Simpson, Esq.
ARDC No. 6314525
YETTER COLEMAN LLP
811 Main Street, Suite 4100
Houston, Texas 77002
rsimpson@yettercoleman.com
Attorney for the Defendant-Petitioner Pneumo Abex LLC

457,231