IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION | |
| OLGA PAVLICK, Individually, and as Personal Representative of the Estate of JOHN PAVLICK, JR., | Civil Action No. 10-174-GMS |
| Plaintiff, | |
| v. | |
| ADVANCE STORES CO., INC. et al., | |
| Defendants. | |

**ORDER**

At Wilmington this 16th day of June 2015, presently before the court are several pretrial matters for the court's resolution;

IT IS HEREBY ORDERED THAT:

1. The plaintiff's motion for sanctions for the defendant's failure to produce documents relating to the testimony of Gayla McCluskey (D.I. 62) is DENIED;[1]
2. The defendant's motion to strike the plaintiff's amendment to the pretrial order (D.I. 66) is DENIED;

[1] There is little dispute that the defendant has not complied with its duty under Federal Rule of Civil Procedure 26 to produce fourteen pages of Ms. McCluskey's handwritten notes, which apparently she reviewed in preparing her expert report. Nonetheless, and without improperly burdening the plaintiff to prove the content of the missing notes, the court is not persuaded that a sanction is warranted for the defendant's infraction. "There is no rule of law mandating a particular sanction upon a finding of improper destruction or loss of evidence; rather, such a decision is left to the discretion of the Court." *See Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 111 (E.D. Pa. 2005) (citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir.1994)). The primary factors for the court's consideration are the defendant's degree of fault and the prejudice to the plaintiff. *See Schmid*, 13 F.3d at 79. In light of plaintiff's counsel's prior familiarity with Ms. McCluskey and the length of time since her deposition occurred, the court is satisfied that if there were a legitimate possibility of conflicting or adverse information being in the missing notes, counsel would have raised this as an issue before now. Thus, considering both fault and prejudice, the court does not believe that sanctioning the defendant is appropriate. The court will instruct defendant's counsel to redouble their efforts to locate Ms. McCluskey's notes, but the plaintiff's motion is denied.

3. The "heeding presumption" will apply to the plaintiff's failure-to-warn strict liability claim;[2]

4. The defendant will not be permitted to introduce evidence concerning the "state of the art" during the relevant time period;[3]

5. The defendant's objections to plaintiff's exhibits are OVERRULED without prejudice.[4]

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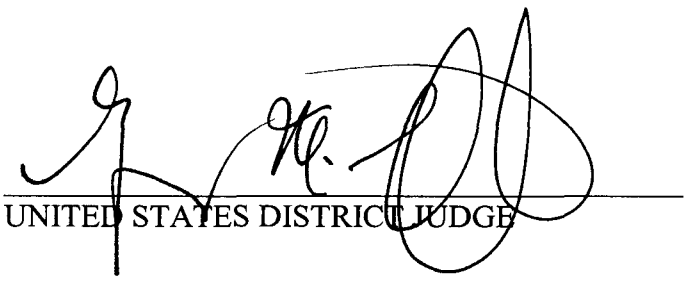
[2] New Jersey law makes clear that public policy considerations favor the application of a heeding presumption, especially in asbestos failure-to-warn cases. *See, e.g.*, *Coffman v. Keene Corp.*, 628 A.2d 710, 716–18 (N.J. 1993). Thus, notwithstanding the defendant's numerous citations for the proposition that presumptions—as a unified concept—are generally disfavored, the heeding presumption is appropriate in this case. The defendant will be given the opportunity to rebut this presumption, consistent with the Federal Rules of Evidence. *See Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1085 (N.J. App. Div. 1998) ("We are satisfied that . . . the only burden shifting stemming from the heeding presumption is with respect to the burden of production. That is to say, once the heeding presumption comes into play, the burden of coming forward with evidence, *i.e.* the burden of production, shifts to the defendant to overcome or rebut the presumption."), *aff'd*, 730 A.2d 285 (1999). At this time, the court cannot say as a matter of law that the defendant lacks evidence to satisfy the shifted burden. The parties should craft an instruction that captures New Jersey law on the heeding presumption.

[3] The Supreme Court of New Jersey has held:

> [S]tate-of-the-art is a negligence defense. It seeks to explain why defendants are not culpable for failing to provide a warning. . . . But in strict liability cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer.

*Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539, 546 (N.J. 1982). The defendant properly points out that the holding of *Beshada* has since been limited only to asbestos cases. *See Feldman v. Lederle Labs*, 479 A.2d 374, 388 (N.J. 1984) ("The rationale of *Beshada* is not applicable to this case. We do not overrule *Beshada*, but restrict *Beshada* to the circumstances giving rise to its holding."). Moreover, the ongoing vitality of the case perhaps is questionable. *Beshada*, however, still remains good law in New Jersey. And it makes clear that the state-of-the-art defense has no place in an asbestos strict liability case. *See Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 473 (N.J 1986) ("Under the holding of *Beshada* a defendant is precluded and a plaintiff is relieved, on the liability aspect of an asbestos, strict-liability, failure-to-warn case, from introducing evidence relating to a defendant's actual knowledge or the state of knowledge in the asbestos field at the time of distribution."); *see also Becker v. Baron Bros., Coliseum Auto Parts, Inc.*, 649 A.2d 613, 622 (N.J. 1994) ("The Appellate Division in this case determined that . . . the *Beshada* decision continues to be sound precedent in asbestos litigation. That determination is correct in respect of its state-of-the-art-defense holding." (internal quotation marks omitted)). The court declines the defendant's invitation to effect a major change in New Jersey substantive tort law.

[4] The court agrees with the plaintiff that the exhibits identified during the conference on June 16, 2015, are relevant as to the danger posed by the defendant's products. The exhibits are also not evidence of subsequent remedial measures, such that they would be inadmissible under Federal Rule of Evidence 407. The court is, however, receptive to the defendant's concerns. The parties shall craft an instruction specifying that the evidence is only to be used for the purpose of establishing dangerousness of the specific asbestos fibers, rather than as evidence of any wrongdoing on the part of the defendant—"corporate conduct" was the defendant's term. Moreover, the court will entertain objections during the course of trial should the plaintiff's proffered evidence becomes needlessly cumulative or a waste of time. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . wasting time, or needlessly presenting cumulative evidence.").



UNITED STATES DISTRICT JUDGE