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November 13, 2020

Re: *Nemeth v. Brenntag North America*, APL-2020-00122

John P. Asiello
Chief Clerk and Legal Counsel to the Court
Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

Dear Mr. Asiello:

With leave of Court, Defendant-Appellant WCD[1] respectfully submits this reply in support of its opening submission filed with the Court on October 19, 2020 ("WCD Letter" or "WCD Ltr.") and to briefly address arguments raised in Plaintiff's submission filed with the Court on November 9, 2020 ("Pls. Ltr.").

The jury was presented with evidence that when shaken in a "glove box," a substance alleged to be Desert Flower released asbestos above levels found in ambient air. That's it. The First Department relied on its own 2004 decision in *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69 (1st Dep't 2004) to impose liability for Mrs. Nemeth's mesothelioma of the peritoneum[2]

[1] Defined terms and abbreviations used herein shall have the same meaning as those in WCD's Letter, unless otherwise noted.

[2] It is undisputed that the "peritoneum" is not part of the respiratory system and biologically closer to the vagina (see Point II, below) than the mouth and nose.

on WCD, because *Lustenring* permitted a jury verdict to stand against the manufacturer of an asbestos-containing product based on the presence of "visible dust" near the plaintiff. *Lustenring* required no scientific proof of causation at all. Plaintiff does not and cannot show that the Order in this case or *Lustenring* can be reconciled with this Court's 2006 decision in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006). In fact, the First Department "decide[d] this appeal as if the Court of Appeals had already overruled [*Parker* and its progeny] requiring the plaintiff in a toxic tort case to present expert evidence." *Nemeth v. Brenntag N. Am.*, 183 A.D.3d 211, 236 (Dissent). For these reasons, as explained further below, the judgment should be vacated and the requirements of *Parker* re-affirmed.

I. The Order Failed To Apply *Parker* And Relied Incorrectly On *Lustenring*

Parker and its progeny require proof by Plaintiff of (1) the amount of exposure to the toxin that is known to cause the injury (the amount of exposure to inhaled asbestos from cosmetic talc use that is known to cause peritoneal mesothelioma) and (2) a "scientific expression" of a particular person's exposure (a "scientific expression" of Mrs. Nemeth's exposure to inhaled asbestos from her use of Desert Flower from which the jury could have concluded the level of exposure capable of causing peritoneal mesothelioma had been exceeded). WCD is not asking the Court to "ratchet up" the *Parker* standard as Plaintiff contends, but to require the Supreme Court to apply it as written.

A. The Order Did Not Require Proof of Causation Consistent With The Requirements of *Parker*

Parker requires the presentation of a scientific expression of Mrs. Nemeth's exposure to inhaled asbestos in Desert Flower that could be compared to a level of such exposure science has shown to have been sufficient to have caused her peritoneal mesothelioma.

As an initial matter, Plaintiff did not offer evidence at trial establishing the level of exposure to inhaled asbestos released from Desert Flower sufficient to cause peritoneal mesothelioma. "This threshold showing . . . is entirely absent from the record of this case [and t]he omission is evident from the [First Department] majority's detailed opinion, which identifies nothing in the record offering even an approximation of the level of asbestos exposure (whether cumulative or otherwise) that would have been capable of causing peritoneal mesothelioma." *See Nemeth*, 183 A.D.3d at 237–38 (Dissent).

Instead, Plaintiff offered Dr. Moline's vague testimony that "brief or low level exposure of asbestos" could cause peritoneal mesothelioma, and that "significant" exposure would occur where there was "some element of regularity or very high exposure over a shorter period of time." *Id*. at 218–19; 238 (Dissent). When asked, Dr. Moline admitted she could not define "significant exposure." R4880–84 ("Q You said in answer to counsel's question that it's not defined what significant exposure is. A. Yes."); ("Q. Did you define what higher than significant would be in your report? A. No").[3] This kind of testimony was expressly rejected and deemed insufficient in *Parker*. *See Parker*, 7 N.Y.3d at 449 (expert testimony that injured party experienced "frequent[]" and "excessive" exposure insufficient). Tellingly, Plaintiff relegates its response to this threshold requirement to a footnote, and baselessly claims that WCD's position would require testing of asbestos exposure on humans. *See* Pls. Ltr. at 15. As noted by the Dissent, this is ridiculous and "[i]f [Plaintiff] means to suggest that . . . causation cannot be proved in an asbestos case in the absence of such unethical

[3] Dr. Moline's inability to define "significant exposure" is fatal, as it leaves open the amount of Mrs. Nemeth's exposure (*i.e.*, the definition of "significant") and the form of such exposure (*i.e.*, whether it was "near" Mrs. Nemeth, "breathed in" by Mrs. Nemeth, "breathed in and in the lungs" of Mrs. Nemeth, "breathed in and somehow in the peritoneum" of Mrs. Nemeth, or something else entirely).

studies—which presumably do not exist—that is a suggestion to which [Defendant] need not even respond." *See Nemeth*, 183 A.D.3d at 240 n. 7.

Second, Plaintiff offered at trial no "scientific expression" of Mrs. Nemeth's inhaled exposure to asbestos for the jury to compare to the evidence of the amount that might have caused her peritoneal mesothelioma. This is not a requirement that Plaintiff "precisely quantify" the level of inhaled asbestos. But, *Parker* requires some "scientific expression" of Mrs. Nemeth's exposure to asbestos in Desert Flower using a generally accepted scientific methodology. *Parker*, 7 N.Y.3d at 449.[4] Plaintiff identifies nothing in the record that scientifically expresses Mrs. Nemeth's exposure to asbestos, at all.

Plaintiff's citation to Fitzgerald's "glove box testing" is a diversion, not evidence of exposure. Fitzgerald did not scientifically express Mrs. Nemeth's exposure to inhaled asbestos through use of Desert Flower in a way that would have allowed the jury to compare it to an amount known to cause her disease. Indeed, Fitzgerald admitted that "my test was just to see if countable structures of asbestos were releasable from the product, period. I wasn't actually trying to simulate the entire environment. I just wanted to see if simulation of using the material would cause asbestos in the talc, if present, to be released into the air." R3180. To sweep this important limitation on Fitzgerald's work under the rug, Plaintiff misleadingly states that Fitzgerald's test "showed that Nemeth was *exposed*, on a daily basis

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[4] *Parker* does not require precise measurement of cumulative dose. *See* WCD Ltr. at 13–14. Where such precise measurement may not be possible, plaintiffs' experts may instead: (1) focus on intensity of exposure rather than cumulative dose; (2) estimate exposure through mathematical modeling; or (3) compare "the exposure levels of subjects of other studies . . . provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects." *Parker*, 7 N.Y.3d at 449.

for eleven years straight, to approximately 2,760,000 asbestos fibers during a typical use." Pls. Ltr. at 17 (emphasis added). Yet there is no such testimony in the record. *See* R3200 (Fitzgerald testifying "[f]or Desert Flower . . . I estimated based on the number of fibers on the casettes [sic] that number of fibers actually *released* in the 245 cubic centimeter area of the hood itself, that there were 2,760,000 individual fibers in the chamber at the time that the air samples were taken.") (emphasis added). Fitzgerald did not offer any scientific expression of Mrs. Nemeth's exposure to inhaled asbestos from her use of Desert Flower. He has admitted as much.

Furthermore, Fitzgerald testified that the amount of asbestos released in his "glove box" was "thousands of times" the levels of asbestos permitted in schools and "several orders of magnitude higher" than ambient levels. R3182–83; *Nemeth*, 183 A.D.3d at 217–18, 221, 229, 240–42 (Dissent). Dr. Moline used similar language, stating Mrs. Nemeth was in the presence of "millions" and "trillions" of asbestos fibers during her daily use of Desert Flower, and that Desert Flower "released asbestos fibers several orders of magnitude higher than what a person would be exposed to by breathing ambient air." R4148; *Nemeth*, 183 A.D.3d at 219. However, this is exactly the type of generic, non-scientific "evidence" rejected as insufficient in *Parker*, where the expert testimony was that plaintiff was "'frequently' exposed to 'excessive' amounts of gasoline." 7 N.Y.3d at 449. This Court held that to be an inadequate "scientific expression of Parker's exposure level." *Id.*

Here, "[i]n essence, plaintiff's experts told the jury that the use of Desert Flower increased the asbestos level in Mrs. Nemeth's bathroom above that of the ambient air by some unspecific amount, and then speculated that this unquantified level of increased exposure was enough (at five minutes per day over about 11 years) to have caused peritoneal mesothelioma,

even though no evidence had been presented to show the minimum level of exposure capable of causing that disease." *Nemeth*, 183 A.D.3d at 244–45 (Dissent). This type of vague causation evidence is insufficient under *Parker* and its progeny, and falls short of any of the three methods suggested by *Parker* by which an expert could establish causation.

B. The Order Relied on *Lustenring*, Which Cannot Be Squared With *Parker*

The *Parker* decision requires proof of the amount of exposure to the toxin known to cause injury and a "scientific expression" of a particular person's exposure. *Parker*, 7. N.Y.3d at 434; *Nemeth*, 183 A.D.3d at 244 (Dissent) ("Nor is the bare fact that there was 'visible dust' in the air of Mrs. Nemeth's bathroom sufficient to prove causation in the absence of expert evidence 'establish[ing] that the extent and quantity of the dust . . . contained enough asbestos to cause the mesothelioma'"). Unlike *Parker* and its progeny, the *Lustenring* opinion said nothing about giving the jury a benchmark known to cause the disease or a scientific expression of exposure to the particular toxin that could be compared to that benchmark to establish causation. Instead, in *Lustenring*, the First Department stated that the presence of "visible dust" and evidence that plaintiffs "manipulat[ed]" and "crush[ed]" products "made with asbestos" and "worked all day for long periods in clouds of dust" was sufficient to establish causation. *Lustenring*, 13 A.D.3d at 70. By relying on *Lustenring* and the presence of "visible dust" rather than the applicable "scientific expression" approach developed since *Parker*, "the [First Department] majority decide[d] this appeal as if the Court of Appeals had already overruled [*Parker* and its progeny] requiring the plaintiff in a toxic tort case to present expert evidence." *Nemeth*, 183 A.D.3d at 236 (Dissent). The Court should make clear that *Parker* requires a level of scientific proof of causation that was simply absent in this case.

II. Defendant Was Denied A Fair Trial By The Improper and Prejudicial Summation

Defendant was denied a fair trial because Plaintiff's counsel's summation improperly stated Mrs. Nemeth's peritoneal mesothelioma was caused by vaginal exposure to Desert Flower. Plaintiff's response takes no issue with the fact that WCD was prejudiced by the summation, *see* Pls. Ltr. at 22–28, yet argues the trial court's "cure" was sufficient to rectify the prejudice WCD suffered. While the trial court had discretion to issue a curative instruction or order a mistrial, it did not do either and worsened the prejudice by allowing Plaintiff an additional "mini-closing," which only served to remind the jury of Plaintiff's unsupported exposure theory. As the Dissent noted, "[n]either the [First Department] majority nor plaintiff has found any precedent supporting the permissibility of allowing an attorney to reopen his closing to correct his own improper statements." *Nemeth*, 183 A.D.3d at 250.

In an attempt to wave this issue away, Plaintiff also claims WCD did not preserve its objections on this issue. Not so. WCD lodged objections to the improper summation and the trial court's inadequate cure, and WCD's objections were directly acknowledged by the trial court to have been preserved for appeal, and were addressed by the First Department below. R5479, 5514; *see Nemeth*, 183 A.D.3d at 230 (discussing "WCD's argument that plaintiff's counsel's remarks on summation deprived it of a fair trial"); *id.* at 48 (Dissent) ("Although the court ultimately determined that WCD had raised a meritorious objection to plaintiff's summation comments about pelvic exposure, the court did not take the usual course of issuing a curative instruction").

A. The Trial Court Should Have Ordered A Mistrial After Failing To Issue A Curative Instruction

The trial court, the Order and Dissent agreed there was no record evidence to support Plaintiff's counsel's summation and that it was improper. *See Nemeth*, 183 A.D.3d at 231 ("Supreme Court agreed that Dr. Moline had not given an 'affirmative opinion that [Nemeth's] peritoneal mesothelioma was caused by both breathing the Desert Flower Dusting Powder and having it enter her body transvaginally.'"); *id*. at 249 (Dissent) ("as the trial court 'properly concluded,' Dr. Moline 'did not conclude that Nemeth's mesothelioma was caused by transvaginal exposure to asbestos in [Desert Flower].'"). The prejudice from Plaintiff's counsel's summation *was* pervasive because he argued that "[w]ith a woman like Flo, there are two avenues of exposure," "she's getting asbestos in her body from two different ways," and she's "using it all over her body, in her pelvic region." R5337–38. Later in summation, Plaintiff's counsel stated Dr. Moline "testified there was a second avenue of exposure that could occur . . . basically, by the manner in which she applied it all to her body it entered her vagina . . . [s]o there is another avenue of exposure which led to the peritoneum." R5361–62. Further, the summation also focused on *the core issue* at trial (causation), which "went to the heart of the case." *Nemeth*, 183 A.D.3d at 249 (Dissent). While Plaintiff emphasizes that his improper summation came at the end of a 21-day trial with "voluminous exhibits and thousands of pages of total trial transcript" and that the trial court gave a "general[] instruction to base its verdict on the evidence," the improper summation was also "the very last thing the jury heard from one of the lawyers—a message likely to remain vivid in their minds when they retired to deliberate—[ ] a reminder of the pelvic exposure theory, without an actual instruction to disregard it." *Nemeth*, 183 A.D.3d at 250; Pls. Ltr. at 24–25. The trial court

had discretion to issue a curative instruction or order a mistrial to correct the prejudice, which touched on key issues of the case, but failed to do either, which warrants reversal and a new trial.[5]

B. WCD's Objections Are Preserved

Defendant's objections to Plaintiff's summation and the trial court's inadequate cure are preserved. The trial court stated WCD's objections were preserved for appeal, and both the Order and Dissent recognized that WCD immediately objected to the improper summation.[6] The First Department addressed the issue of summation in over six pages in the Order and seven pages in the Dissent, both specifically addressing the issue of the "mini-closing," and never once suggested the possibility of waiver. *See Nemeth*, 183 A.D. 3d at 233 ("Moreover, the trial court's decision allowing plaintiff's counsel to re-address the jury in a mini-closing, while perhaps not an ideal choice, was a sufficient cure to WCD's objection."); *id*. at 250 (Dissent) ("Finally, plaintiff's counsel's 'mini-closing' did nothing to cure the prejudice caused by his earlier improper statements, and arguably even worsened that prejudice.").

Plaintiff's assertion that Defendant never objected to the "mini-closing" and in fact "'acquiesced in the scope and content' of the mini-closing" is false. Pls. Ltr. at 26–27.

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5 Plaintiff misstates Defendant's position. A mistrial was probably not the trial court's only option to cure Plaintiff's improper summation. But, having failed to give a curative instruction, a mistrial is the only option now.

6 *See* R5514–15 ("Again, your exception is noted. Your objection, your claim for mistrial is fully preserved."); *Nemeth*, 183 A.D.3d at 231 ("Although defense counsel immediately objected, the court allowed plaintiff's counsel to complete his statement."); *id.* at 247 (Dissent) ("WCD's counsel's immediate objection to these comments was overruled. After the close of summation, but before the jury was charged, WCD renewed this objection and moved for a mistrial.").

- WCD's counsel provided the trial court with an opportunity to issue a curative instruction, while preserving WCD's objection, stating "I would like to do this before the instructions to the jury because I don't want to be criticized later for not having given Your Honor an opportunity to cure these defects. The problem is these defects are not curable. So even with that it's not curable." *See* R5426.
- WCD's counsel objected ***before*** the "mini-closing," stating "I don't think what counsel is going to say about the second exposure avenue cures the record. I still take exception to it and I don't think it can be cured." *See* R5472.
- WCD's counsel objected again ***during*** the "mini-closing," but before jury instructions, stating "[j]ust preserving my objection, Your Honor." *See* R5479.
- At the first opportunity ***after*** the "mini-closing" and after the court's charge, the court stated that it was fully preserving WCD's objections to counsel's comments. R5514.

Further, as Plaintiff emphasizes, the trial court has "considerable discretion," *see* Pls. Ltr. at 3, and could have issued a curative instruction *sua sponte*, as it did elsewhere during the trial, *see* R4971–72 (trial court stating "I will be giving curative instructions on the issue of striking and disregard [sic] that paragraph"). It was not necessary for WCD's counsel to "demand a specific curative instruction by the trial court judge." Pls. Ltr. at 27–28.

CONCLUSION

For the forgoing reasons, this Court should set aside the verdict and enter judgment for WCD, or order a new trial.

Respectfully submitted,

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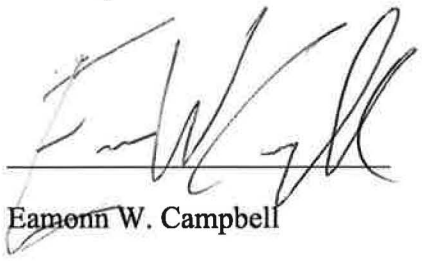
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 NYCRR § 500.11(m)), Eamonn W. Campbell, an attorney at Simpson Thacher & Bartlett LLP, hereby affirms that according to the word count feature of the word processing program used to prepare this letter brief, the brief contains 2,943 words, which complies with the limitations stated in section 500.11(m).



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