STATE OF NEW YORK
COURT OF APPEALS

FRANCIS NEMETH, individually and as the personal representative of the Estate of FLORENCE NEMETH, Plaintiff-Respondent against BRENNTAG NORTH AMERICA, et al. Defendants, and Whittaker, Clark & Daniels, Inc., Defendant-Appellant.	Index No. 190138/14 APL-2020-00122

WHITTAKER, CLARK & DANIELS, INC.'S BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Defendant-Appellant Whittaker, Clark & Daniels, Inc. ("Whittaker") is a non-governmental corporate party. Whittaker does not have subsidiaries. Whittaker is a wholly owned subsidiary of Soco West, Inc., a Delaware corporation, which is in turn wholly owned by Brilliant National Services, Inc., also a Delaware corporation. Whittaker is not publicly traded and no publicly held corporation owns 10% or more of Whittaker.

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Rules

Whittaker, Clark & Daniels, Inc. ("Whittaker") respectfully submits this response to the amicus curiae brief submitted by Richard L. Kradin and "other concerned physicians and scientists" (the "Amici"), filed with the Court on May 21, 2021 (Mo. No. 2021-512 (Pin No. 82638)) (the "Amicus Brief"), and accepted as filed by the Court on September 3, 2021. *See* 22 NYCRR § 500.12(f).

PRELIMINARY STATEMENT

The Amicus Brief ignores this Court's causation standards set forth in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006) and attempts to create a new causation standard, whereby any level of exposure to asbestos above "normal" background levels would be sufficient to prove causation. This type of "vague, conclusory and subjective" evidence has already been rejected by this Court as insufficient under the standards of *Parker* and progeny. That Amici are asking this Court to throw out the *Parker* standard in favor of no standard at all confirms again that the Plaintiff failed to the meet the *Parker* standard in the trial court and that the judgment should be vacated.

Amici's attempt to prop up its extreme and baseless position by asserting that Whittaker makes the "erroneous[] claim that a medical expert must quantify an individual's asbestos exposure to a particular product to properly assess its role in disease causation" should be rejected. Whittaker is asking the Court to require the application of the *Parker* standard and has not made the argument attributed to it by Amici. *See, e.g.,* Reply Brief for Defendant-Appellant at 7 ("Whittaker is not

'push[ing] to abrogate *Parker* in favor of a precise quantification standard that would . . . be insurmountable in most toxic tort circumstances,' but is merely asking this Court to apply *Parker*. . . . Precise quantification may not be required."). It is disingenuous for Plaintiff, and now the Amici, to insist otherwise. Both Amici and Plaintiff failed to show Mrs. Nemeth's dose exposure and the level (scientifically expressed) sufficient to cause her peritoneal mesothelioma so the jury could determine causation.

The Amicus Brief is nothing more than an attempt to supplement a fatally deficient trial record. Yet, the supposed facts offered in the Amicus Brief do nothing to save Plaintiff's case on causation. First, the entire brief is devoted to arguing that a patchwork of articles and case studies allegedly support the argument that asbestos-contaminated talcum powder causes pleural mesothelioma (as opposed to peritoneal mesothelioma in the abdomen). The articles, research, and other sources cited and discussed by the Amici are absent from this case's trial record and cannot now be inserted by a non-party. Moreover, the substance of the Amicus Brief does nothing more than alert the Court to the views and opinions of several scientists and physicians, the majority of whom have been retained by plaintiffs in asbestos litigation on numerous occasions in the past. Amici's bias and misunderstanding of the law is evident by their extreme position that there is no need for the trial courts to evaluate scientific evidence, because any expert's opinion that an individual's mesothelioma was caused by that individual's use of asbestos contaminated

cosmetic talcum powder is automatically reliable. Amicus Brief at 3 ("While there may be scientists who, despite what is accepted by the scientific mainstream, hold different opinions, there is no generally-accepted basis to find that an opinion assigning causation for an individual's mesothelioma to asbestos-contaminated cosmetic talcum powder is not reliable.").

Given Amici's bias and that the "studies" they cite are not in the trial record and presented to the jury, the Amicus Brief should be discounted accordingly. The Amicus Brief does not remedy Plaintiff's deficient trial record on causation in this case and the judgment should be vacated.

ARGUMENT

POINT I THE AMICUS BRIEF IGNORES *PARKER* AND ATTEMPTS TO CREATE A NEW CAUSATION STANDARD

To establish causation, this Court's precedent clearly requires Plaintiff to prove through generally accepted methodologies (1) the level of exposure to inhaled asbestos from cosmetic talc use known to cause ***peritoneal mesothelioma*** and (2) a "scientific expression" of Mrs. Nemeth's exposure to inhaled asbestos from her use of Desert Flower, which the jury could have compared to the level of exposure known to cause peritoneal mesothelioma. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006); *Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801 (2016).

The Amicus Brief attempts to entirely evade establishing causation by claiming it "makes no scientific difference as to the product from which the asbestos

originates." Amicus Brief at 11–12. It is fundamental to tort law that a plaintiff must establish causation by showing that he or she was exposed to defendant's product. Amici then ignore *Parker* and attempt to create a new causation standard (which is no standard at all) by claiming "[t]here is no recognized threshold of exposure to asbestos above 'normal' ambient background [] that does not increase the risk of disease for those exposed to asbestos generated by product use." Amicus Brief at 12. Amici argue that any exposure to asbestos above background levels is causative of mesothelioma, and that the "efforts 'to deduce a "threshold" by identifying the lowest estimated dose received by any observed case is a logical nonsense.'" *Id.* at 12–13. Such "vague, conclusory and subjective" evidence has been rejected by this Court as insufficient under *Parker* and its progeny. *Nemeth v. Brenntag North America*, 183 A.D.3d 211, 242 (1st Dep't 2020) (Dissent); *see, e.g. Parker*, 7 N.Y.3d at 449, *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 784 (2014) (rejecting opinion that "made no effort to quantify [plaintiff's] level of exposure"); *Sean R.*, 26 N.Y.3d at 809 (exposure levels should be reconstructed for expert to opine whether they were at levels "known to cause" disability).

While this may be Amici's view on causation standards, that does not excuse Amici or Plaintiff from establishing causation in accordance with *Parker* or other of this Court's precedent, which Amici has made no attempt to do. *Parker* requires Plaintiff to establish the level of exposure to inhaled asbestos from cosmetic talc use known to cause peritoneal mesothelioma. *Parker*, 7 N.Y.3d at 448. Plaintiff offered

no evidence on the amount of asbestos that could be inhaled from normal consumer use of cosmetic talc nor did he offer evidence on the amount of asbestos exposure known to cause peritoneal mesothelioma, and thus the jury was left with no basis by which to compare Mrs. Nemeth's claimed exposure level to the exposure amount known to cause her particular disease as shown by scientific methods. *Nemeth*, 183 A.D.3d at 240–41 (Dissent). By arguing that there was no threshold for mesothelioma and by failing to qualify the difference between pleural and peritoneal mesothelioma per the Helsinki criteria that she relied upon, Plaintiff's expert, Dr. Jacqueline Moline, asked the jury to speculate about whether there was enough alleged exposure from Desert Flower to have caused Mrs. Nemeth's peritoneal mesothelioma. *See* R4882–84. The Amicus Brief is of no help to Plaintiff, as it makes no effort to establish a baseline or threshold level in accordance with *Parker*.

It is important for this Court to reiterate that a foundation sufficient to impose liability on a defendant requires a scientifically expressed connection between a particular exposure and the disease at issue, using generally accepted scientific methods. The implication of Amici's arguments would leave the door open to thousands of potential claims against individuals and businesses that have no scientific basis and are remotely, if at all, connected to an alleged exposure. This issue is particularly timely and especially important given the current coronavirus pandemic.

POINT II THE AMICUS BRIEF DOES NOT SAVE PLAINTIFF'S CASE ON CAUSATION

The Amicus Brief does not remedy Plaintiff's failure to meet the causation standards established by this Court in *Parker*. To the extent the scientists and physicians are "concerned" by the supposedly "erroneous[] claim" that "a medical expert must quantify an individual's asbestos exposure to a particular product to properly assess its role in disease causation," they need not be, as that claim is a rhetorical concoction by Plaintiff designed to make Whittaker's position seem extreme and out-of-step with the law. *Parker* suggested three methods by which an expert could establish causation where precise measurement of cumulative dose may not be possible: (1) focusing on intensity of exposure rather than cumulative dose; (2) estimating exposure through mathematical modeling; or (3) "[c]ompari[ng] . . . the exposure levels of subjects of others studies . . . provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those to other subjects." *Parker*, 7 N.Y.3d at 449; Brief for Defendant-Appellant at 16; Reply Brief for Defendant-Appellant at 4.

What Whittaker does argue—and what the Amici fail to offer any proper response to that would be useful to the Court—is that *Parker* requires evidence of the amount of exposure to inhaled asbestos that is known to cause peritoneal mesothelioma and a "scientific expression" of Mrs. Nemeth's inhaled exposure to asbestos. Plaintiff and Amici both fail to meet the *Parker* standard of causation.

Despite arguing that "mesothelioma is a cumulative exposure disease to which all sources of asbestos exposure contribute," fatally, no measurement of a cumulative dose was provided in this case. Amicus Brief at 11. Amici rely heavily on the Helsinki article, which speculatively suggests that cumulative exposures may contribute to a patient's mesothelioma. This is similar to Dr. Moline's testimony at trial, in which she stated that Mrs. Nemeth's "cumulative exposures" caused her mesothelioma. R4298 ("I said all of her exposures contributed to her disease."). However, this Court has found this type of causation testimony to be legally *insufficient* under New York law. *See Juni v. A.O. Smith Water Prods. Co.*, 148 A.D.3d 233, 236–37 (1st Dep't 2017), *aff'd* 32 N.Y.3d 1116 (2018). In *Juni*, plaintiff sponsored "general, subjective and conclusory" causation opinion testimony from Dr. Moline, who was also Plaintiff's expert here, that "Juni's 'cumulative exposures to asbestos caused his mesothelioma,' referring to 'the sum total of [his] exposure to asbestos . . . over [his] lifetime.'" And that the "visibility of the dust itself indicates the magnitude of the exposure 'at levels that are . . . capable of causing disease.'" *Id.* at 237, 242. Applying *Parker* and *Sean R.*, the First Department rejected the expert's "broad conclusion on causation" because "a plaintiff claiming that a defendant is liable for causing his or her mesothelioma must still establish some scientific basis for a finding of causation attributable to the particular defendant's product." *Id.* at 239. Offering the same evidence rejected in *Juni*, Dr. Moline testified that "[i]t's all of [the cumulative exposures] combined"

that caused Mrs. Nemeth's disease and that "all of [Mrs. Nemeth's] exposures contributed to her disease." R4298–99. Like in *Juni*, Plaintiff failed to offer tangible expressions of those exposures.

The Amicus Brief argues that the Helsinki article serves as a framework for determining whether "total cumulative exposure was capable of causing mesothelioma, and whether some subset of the total exposure was a significant or appreciable exposure." Amicus Brief at 15. However, the Helsinki article does not define what "significant" or "appreciable" is, which leaves it highly subjective and non-scientific, and obviously does not constitute a "scientific expression." Dr. Moline also offered 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," but that testimony is not enough as a matter of law. *Nemeth*, 183 A.D.3d 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 here . . . A. Yes."); ("Q. Did you define what higher than significant would be in your report. A. No"). Both Dr. Moline and the Helsinki article's inability to define "significant exposure" does not meet the *Parker* standard, and leaves the fact-finder without information about the amount of Mrs. Nemeth's exposure to Desert Flower and where it fits along the spectrum of Mrs. Nemeth's cumulative exposures to all asbestos-containing

products. Additionally, as the Dissent pointed out, "not one of the articles Dr. Moline discussed on the witness stand (she mentioned none in her written report) sets forth an estimate of the minimum level of exposure to respirable asbestos (cumulative or otherwise) that would suffice to cause peritoneal mesothelioma." *Nemeth*, 183 A.D.3d at 238–40 (Dissent) (finding no epidemiological support in articles, including the Helsinki article, or in the record generally).

Amici also claim "neither the Helsinki Criteria, nor any other credible medical or scientific authority, include the necessity of making a quantitative estimate of a patient's asbestos 'dose.'" Amicus Brief at 15. *Parker* may not require a "dose." However, Amici's claim that "such an estimate [is] impossible" is false. Amicus Brief at 15. First, Dr. Moline expressly admitted on cross-examination that it would have been possible for an industrial hygienist to have estimated Mrs. Nemeth's exposure levels, but that such measurements were not done in this case. *See* R4841–42 ("And the question that was posed to me, when you said actual, so actual to me means that an actual individual using [Desert Flower]. If you are asking me can it be recreated by an industrial hygienist, yes, it can."). The trial court recognized this as well. R4383 ("It's self evident, [Dr. Moline] did nothing more. She didn't do an industrial hygiene test. She didn't do – it's self evident."). As the Dissent clearly realized, "plaintiff's experts in this case did not offer an 'estimate' of Mrs. Nemeth's level of exposure based on an 'extrapolation' from the glove box text conducted by

Mr. Fitzgerald or 'by reference to estimation based upon work history and math models.'" *Nemeth*, 183 A.D.3d at 244–45 (Dissent).

Second, Plaintiffs in other cases have been able to meet or been required to meet the standards set by *Parker* for scientifically calculating a dose exposure based on the injured party's use of the asbestos-containing produced. *See, e.g. Miller v. BMW of North America*, 2016 WL 3802961, at *5 (N.Y. Sup. Ct. May 4, 2016), *aff'd*, 154 A.D.3d 441 (1st Dep't 2017) (plaintiff provided "dose calculation" of plaintiff's exposure to asbestos), *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007) (holding plaintiff must present "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing asbestos-related disease."); *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012) (requiring experts to prove a causative dose). Thus, the Amici have also failed to offer anything helpful under the second prong of *Parker*.

POINT III THE AMICUS BRIEF ATTEMPTS TO SUPPLEMENT A FATALLY DEFICIENT TRIAL RECORD

The Amicus Brief also represents an attempt to supplement a fatally deficient trial record with irrelevant facts, articles, and studies, which are wholly absent from the trial record. The Amicus Brief spends several pages arguing that "all types of asbestos fibers cause disease" and citing studies, which purportedly conclude that "talc containing asbestos is a human carcinogen capable of causing mesothelioma."

Amicus Brief at 4–7; 16–21. None of this is at issue in the case. Despite the fact that exposure to certain asbestos fibers in certain concentrations and doses may be able to cause disease, arguing that talc containing asbestos is capable of causing mesothelioma does not satisfy the first prong of this Court's causation requirements.

Amici argue that while certain cases of mesothelioma are considered "'idiopathic,' *i.e.* of unknown origin, this may reflect incomplete exposure histories or immediately unavailable information about a patient's product use or a product's asbestos content, and not necessarily because a mesothelioma is unrelated to asbestos exposure." Amicus Brief at 9. Amici's argument that most idiopathic cases of mesothelioma can somehow be traceable to cosmetic talc exposure, is completely unsupported by the record or common sense. And, this is in direct contrast to Plaintiff's expert's testimony at trial that, on some occasions, mesothelioma may develop without any exposure to asbestos. R4070.

Amici also argue that a single author, Sir Bradford Hill, has criticized placing an "inordinate emphasis on 'epidemiological studies'" in proving causation. Amicus Brief at 21–22. The opinion of one author cannot displace the fact that it is well settled that the most reliable evidence for proving causation is an epidemiological study of human populations. *See Nonnon v. City of New York*, 32 A.D.3d 91, 105 (1st Dep't 2006) ("[E]pidemiological evidence is indispensable in toxic and carcinogenic tort actions where direct proof of causation is lacking'") (quoting *Matter of Joint E. & S. Dist. Asbestos Litig.*, 52 F.2d 1124, 1128 (2d Cir. 1995); *Id.*

at 104 (epidemiology is the "primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or a disease") (internal quotations omitted); *see also Matter of Seventh Jud. Dist. Asbestos Litig.*, 9 Misc. 3d 306, 312 (N.Y. Sup. Ct. 2005) (failure to rely on epidemiology in an asbestos case was *prima facie* evidence that plaintiff's expert did not rely on generally accepted methodology when putting forward general causation evidence).

Dr. Moline did not identify epidemiological studies demonstrating that consumer use of cosmetic talc causes or even increases the risk of developing peritoneal mesothelioma, and was unable to point to studies that break down the risk of developing pleural versus peritoneal mesothelioma. R4439–40; *see also Parker*, 7 N.Y.3d at 450 (plaintiffs' experts failed to identify a single epidemiological study showing an increased risk of AML from the product at issue). Instead of relying on epidemiological studies, Dr. Moline relied on seven articles she claimed showed that asbestos in talc can cause peritoneal mesothelioma. The articles were an insufficient basis for her opinion as a matter of law, because they did not involve peritoneal mesothelioma, did not involve a consumer's use of cosmetic talc, did not express dose quantifications (by either estimate or comparison), and were otherwise limited to individual case studies and not groups or populations of similarly-exposed individuals. *See* R4412–48; *Nemeth*, 183 A.D.3d at 238–40 (Dissent) (finding no epidemiological support in the "Welch article," "Helsinki article," "Andrion article,"

or in the record generally, for whether there exists a level of asbestos exposure for cosmetic talc use sufficient to cause peritoneal mesothelioma.).

Like Plaintiff, Amici fail to offer any epidemiological studies in support of causation. Instead, Amici try to discredit a number of epidemiological studies that "effectively disprove a causal link between cosmetic talc and mesothelioma," which studies were not at issue at trial. Amicus Brief at 23. Citing studies showing a connection between asbestos exposure and pleural thickening, not peritoneal mesothelioma, Amici go on to conclude that "it is widely accepted that talc containing asbestos is a human carcinogen capable of causing mesothelioma." Amicus Brief at 26. Again, this statement alone can never be enough to satisfy Plaintiff's burden of establishing through generally accepted methodologies the level of exposure to inhaled asbestos from cosmetic talc use sufficient to cause Mrs. Nemeth's peritoneal mesothelioma, as required by *Parker*.

CONCLUSION

For the forgoing reasons, and those in Whittaker's previous briefs before this Court, this Court should discount the Amicus Brief, set aside the verdict and enter judgment for Whittaker, or order a new trial.

Dated: September 16, 2021
New York, New York

Respectfully submitted,
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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contexts, the table of cases and authorities and the statement of questions presented required by subsection (a) of this sections; and any addendum containing material required by subsection 500.1(h) of this Part is 3,226 words.

Dated: September 16, 2021
New York, New York