To be Argued by:
RENNER K. WALKER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

FRANCIS NEMETH, individually and as the Personal Representative of the estate of FLORENCE NEMETH,

Plaintiff-Respondent-Cross-Appellant,

– against –

BRENNTAG NORTH AMERICA, as a successor-in-interest to Mineral Pigment Solutions, Inc., as a successor-in-interest to Whittaker, Clark & Daniels, Inc., BRENNTAG SPECIALTIES, INC., f/k/a Mineral Pigment Solutions, Inc., as a successor-in-interest to Whittaker, Clark & Daniels, Inc., CBS CORPORATION, f/k/a Viacom, Inc., successor by merger to CBS CORPORATION, f/k/a Westinghouse Electric Corporation, GENERAL ELECTRONIC COMPANY, SHULTON, INC., individually and as successor to The Shulton Group and Shulton, Inc., THE PROCTOR & GAMBLE COMPANY, as successor-in-interest to The Shulton Group and/or Shulton, Inc. and THE SCOTTS COMPANY LLC, UNION CARBIDE CORP.,

Defendants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFF-RESPONDENT-CROSS-APPELLANT

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New York County Clerk's Index No. 190138/14

WHITTAKER CLARK & DANIELS, INC.,

Defendant-Appellant-Cross-Respondent,

– and –

WYETH HOLDINGS CORPORATION, f/k/a American Cyanamid Company, individually and as successor-in-interest to Shulton, Inc., DAP, INC., GEORGIA-PACIFIC LLC, OTIS ELEVATOR COMPANY, SCHINDLER ELEVATOR CORPORATION, THYSSENKRUPP ELEVATOR COMPANY, as successor-in-interest to Dover Corporation, a division of Thyssenkrupp Elevator Company, ROCKWELL AUTOMATION, as successor to Allen-Bradley, GENERAL CABLE CORP. and SCHNEIDER ELECTRIC USA, INC., f/k/a Square D,

Defendants.

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QUESTIONS PRESENTED

1. Did plaintiffs prove defendant's product proximately caused decedent's mesothelioma?

Answer: Yes.

2. Does one summation remark require a new trial where it constituted fair comment upon the evidence, and Supreme Court issued a prompt correction?

Answer: No.

3. Was the jury's apportionment of fault and Supreme Court's refusal to place potential tortfeasors on the verdict sheet reversible, where defendant failed to meet its Article 16 burden?

Answer: No.

4. Did Supreme Court err by instructing the jury consistent with New York law?

Answer: No.

5. Did the verdict materially deviate from reasonable compensation for nearly four years of pain and suffering, including a severe chemotherapy regimen, several surgeries, and complete loss of enjoyment, dignity, and hope?

Answer: No.

6. Did Supreme Court incorrectly apply G.O.L § 15-108(a) by performing a dollar-for-dollar reduction of the settling defendants in addition to a percentage reduction of the verdict?

Answer: Yes.

PRELIMINARY STATEMENT

Florence Nemeth ("Flo") used Desert Flower Dusting Powder ("DFDP"), a cosmetic talcum powder product manufactured by Shulton Inc. ("Shulton"), every day after showering for 11 years. Shulton manufactured DFDP using raw talc supplied by Whittaker Clark & Daniels ("WCD"). Flo's application of this "dusting powder" unsurprisingly created dust, which she inhaled on a daily basis. In May 2012, Flo began to suffer from symptoms of malignant peritoneal mesothelioma, a cancer caused by asbestos. She was diagnosed in November 2012, and thereafter continued suffering the excruciating effects of this wicked disease until her death.

At trial, Plaintiffs proffered compelling direct and circumstantial evidence, showing: (i) WCD's talc was regularly and consistently contaminated with asbestos, which WCD knew or should have known; (ii) WCD's source talc and Shulton cosmetic talc products (including DFDP) released significant levels of asbestos fibers upon use; (iii) asbestos-contaminated cosmetic talc causes mesothelioma; and (iv) Flo's daily DFDP use for 11 years (including when it contained WCD's talc) was a substantial factor causing her mesothelioma.

After a lengthy trial, the jury rendered a well-supported Plaintiffs' verdict. WCD now seeks to overturn the jury's verdict and reverse the trial court's well-reasoned rulings, by obfuscating and ignoring the evidence, and improperly

seeking to draw every inference in its favor. This Court should affirm the judgment as modified in accordance with Plaintiffs' cross-appeal.

First, Plaintiffs showed: (i) during the time period in question WCD was the principal supplier of talc to Shulton and that all grades of such talc were regularly and consistently contaminated with asbestos; (ii) Shulton used WCD talc in all of its powder products, with the only differences having nothing to do with the talc; (iii) recent testing of these products revealed the release of dangerous levels of asbestos fibers.

Second, Plaintiffs' highly qualified causation expert testified based on her vast knowledge and experience, as well as the extensive evidence presented, not only that asbestos in cosmetic talc generally causes all forms of mesothelioma, but that Flo was exposed to sufficient levels of WCD's asbestos-contaminated talc to cause her peritoneal mesothelioma.

Third, one remark during Plaintiffs' summation does not require a new trial. The argument was a fair comment upon the evidence, and the trial court recognized there was no intent to inflame the jury. Nonetheless, Plaintiffs' counsel corrected the record at the court's direction.

Fourth, the trial court correctly instructed the jury on the state-of-the-art standard. New York law holds WCD, as a distributor of raw talc, to the knowledge

of an expert in the field. Further, the instruction was not inconsistent with the remainder of the court's instruction.

Fifth, WCD failed to carry its burden of demonstrating the fault of joint tortfeasors. Thus the jury's apportionment was proper and sustainable.

Sixth, the trial court erred by granting remittitur. The jury's verdict did not materially deviate from reasonable compensation and is consistent with numerous recent jury verdicts involving shorter durations and lesser degrees of pain and suffering. Certainly, further remitter is unwarranted.

Finally, the trial court erroneously molded the verdict under G.O.L. § 15-108(a). Contrary to *Matter of N.Y.C. Asbestos Litig. (Didner)*, 82 N.Y.2d 342 (1993), the trial court performed a dollar-for-dollar setoff with respect to settling defendants not on the verdict sheet (whose liability was determined to be zero)and then an additional setoff for Shulton based on Shulton's percentage of fault, instead of aggregating the setoffs. This Court should modify the trial court's setoff accordingly.

STATEMENT OF FACTS

A. FLORENCE NEMETH'S DAILY DFDP USE.

Flo used DFDP every day for eleven years beginning in the early 1960s. [S.R.471, 480-81, 487, 491, 498-99.] Each box of the powder included a powder puff, which she used to "pat [the powder] on [her] body all over." [S.R.482, 487-88.] The air was "[v]ery dusty," and she would "breathe the dust in." [S.R.488.] She and her mother went through a "big box" of DFDP every 2 weeks. [S.R.490.]

She applied DFDP this way every evening after showering in her "tiny" bathroom, which had no ventilation or window. [S.R.480, 487, 490-91.] The dust settled "[o]n top of the sink, on top of the toilet and on the floor." [S.R.488.] She tried to clean it up, but could never get it all. [S.R.489.]

Flo married Frank Nemeth in 1966, and they moved into their own apartment. [S.R.473-74, 491-92.] As before, she used DFDP daily in the same size bathroom, similarly without windows or ventilation. [S.R.493, 495-96.] Her application of DFDP all over her body was "very dusty," and she inhaled it. [S.R.494.] Dust settled on various surfaces. [S.R.494-95.] She went through a box of DFDP every 2 weeks, [S.R.495], and continued using DFDP until age 25. [S.R.491.]

B. FLORENCE NEMETH'S DIAGNOSIS OF MESOTHELIOMA AND YEARS OF PAIN AND SUFFERING.

Before she began suffering the effects of mesothelioma, Flo was "[v]ery healthy"; she walked five miles a day, loved shopping, gardened, and took care of her family and her home. [S.R.514, 517; J.R.3448-49, 3452-53.] She and Frank traveled and went to sporting events. [S.R.515.] They lived 10 minutes from their kids and grandkids and took them on vacations, to zoos, water parks, and church. [S.R.515; *see also* J.R.3449.] Flo attended church twice a week. [J.R.3449-50.] She was an "energetic," "independent and self-sufficient person" with a rich and fulfilling family life. [S.R.515-16; J.R.3448-49.]

That all changed after she was diagnosed with mesothelioma. [*See* S.R.516, 533, 535-38; J.R.3458.]

The pain and discomfort started even before she was actually diagnosed: In May 2012, she "became very bloated" and had "lots of discomfort." [S.R.517; J.R.5006.] Following months of tests, Flo was diagnosed with mesothelioma in November 2012. [J.R.4155, S.R.477.]. The news was devastating. [S.R.519.]

By June 2015, she had undergone continuous chemotherapy and three surgeries. [S.R.522.] The first surgery was shortly after her diagnosis in 2012; the surgeon "cut [her] from the middle of [her] chest all the way down" in an unsuccessful effort to remove all the tumor. [S.R.522-230; J.R.5009.] After the surgery, she was "very drained and weak," both physically and mentally, and was

hospitalized for five days. [S.R.523.] The surgery significantly limited her mobility. [S.R.524.] She rated the pain following surgery as an 8 or 9 on a scale of 10. [S.R.524.]

She had another surgery 3 months later. [S.R.524-25.] The doctors again cut into her abdominal cavity, removed another larger tumor, [S.R.525], and performed a "chemotherapy wash." [J.R.5010.] Flo was hospitalized for 5 days after the surgery; and suffered severe pain—8 or 9 out of 10. [S.R.525.]

The third surgery, 9 months later, again involved cutting into her abdominal cavity "top to bottom." [S.R.526.] The tumor could not be removed this time, because it had spread too extensively. [S.R.526.] She was hospitalized for 5 days, suffering pain she described as a 9 out of 10. [S.R.526-27.] At this point, she lost her mobility, and couldn't do anything. [S.R.527.]

The peritoneal mesothelioma caused fluid to build up in her abdomen, which was drained 4 times over the course of her disease. [S.R.527-28.] The amount of fluid was significant—"15 to 20 pounds of fluid" each time. [S.R.528.] As her daughter, explained: "[I]t would fill up, [and] get bigger…and hard as a rock." [J.R.3457.] The fluid limited Flo's ability to walk, made it harder to breathe, and created extreme abdominal pressure, resulting in pain she described as being a 9 to 10 out of 10. [S.R.528.]

During this entire time, Flo also endured an intensive chemotherapy regimen. For three years, she had chemotherapy treatments every few weeks. [S.R.529.] She felt "[t]errible" for "the next several days" after each treatment. [S.R.530.] The chemotherapy's side effects were traumatic: Flo lost her hair and her teeth broke. [S.R.531.] She was exhausted following each treatment and slept for days. [S.R.529-30.] The chemotherapy completely sapped her appetite. Her daughter testified: "It's like watching somebody starve to death." [J.R.3460.]

Ultimately, Flo's cancer metastasized from her abdomen to her right lung. [S.R.532-33.] News of the cancer's spread was "depressing." [S.R.532.] She put the loss of hope in stark terms: "It's a terrible feeling to think maybe…it's going to go away. But when they told me it progressed to my lung, it just took everything out of me." [S.R.532.]

Breathing became a daily struggle. [S.R.533; J.R.3457-58.] The pain continued to progress as well. Flo felt pain all over her body including an "excruciating," "stabbing" pain in her lower back. [S.R.534.] The daily pain was an 8 out of 10. [S.R.534.]

She lost the ability to do the things she loved with Frank and her family. [S.R.535.] She couldn't take her grandkids to playgrounds, on vacation, or to water parks: "I can't go there, it's all hilly. My kids want to put me in a wheelchair, I

don't want to go around like that." [S.R.535.] This made her feel "terrible" because "this was not my life, I was a very active person." [S.R.536.]

The disease progression was accompanied by stress, fear, anxiety, and depression. [S.R.539.] She constantly worried about what would happen to Frank and her family if she got sicker. [S.R.540.] Flo faced much of the stress and depression alone: "There are times I cry but they don't know it. I don't like to let them see that I get upset…." [S.R.539; J.R.3454.] Attending church twice a week was always a source of solace, comfort, and community; but as the disease progressed, it prevented Flo from attending church service as well. [J.R.3458-59.]

Likewise, the disease erased Flo's and Frank's plans for the future—"[r]etiring, enjoying life, be[ing] able to go on vacations." [S.R.541.] "We're both retired now and we do nothing." [S.R.540-41.]

While Flo continued to decline, she and her family briefly pinned their hopes on an experimental treatment, but it failed. [S.R.531-32; J.R.3460.] Her cancer progressed unabated. [S.R.531-32; J.R.3460.] As her daughter put it: "[W]e all latched on to hope and it didn't help, so she just went downhill." [J.R.3460.]

Her daughter was present and cared for her mother during the final months of her life. [J.R.3461.] The pain from the tumor affected Flo's whole body. [J.R.3461.] The pain medication she took did not "kill the pain"; it only "numb[ed] her." [J.R.3461.]

Flo could not wash herself, and needed her daughter to help her with bathroom duties. [J.R.3462.] It was a demeaning end of life: the embarrassment of having her daughter help her with toilet functions was "very hard." [J.R.3462.]

Over the last few weeks of her life, Flo's breathing "got worse." [J.R.3463.] Fluid accumulated in her lung, making it almost impossible to breathe. [J.R.3463.] She was relegated to eating baby food. [J.R.3464.] She went through "breakthrough pain," which refers to "when someone has chronic pain" and they have been taking "long acting pain medication….[and] the pain breaks through that." [J.R.4165.]

In all, Flo suffered with the devastating and ever-worsening effects of this disease for 46 months from the date of her first symptoms in May 2012 until she died on March 5th, 2016. [J.R.4164.]

Frank Nemeth lost the companionship, consortium, services and care of his loving wife of 50 years. [J.R.5028-32; S.R.537-39.]

C. WCD SOLD ASBESTOS-CONTAMINATED TALC TO SHULTON DURING THE PERIOD FLO USED DFDP.

1. WCD was the main supplier of talc to Shulton.

WCD sold talc to Shulton the entire time Flo used DFDP, [J.R.4992-93], and was the nearly exclusive supplier of talc used in Shulton products during a significant portion of her usage. [J.R.3430-32, 3439.] Wiz Kaenzig, a former Shulton employee who "controlled the inventory" at Shulton's Mays Landing

plant, testified that WCD accounted for almost 99% of the talc Shulton used at least from 1966 through the 1970s. [J.R.3432; S.R.12-15, 29-30.]

Each twice-monthly truckload from WCD to Shulton contained 40,000 pounds of talc. [S.R.33.] Shulton had a "blanket purchase order" under which it purchased nearly all of its talc from WCD on an "annual basis." [J.R.3432.] While there were "backup suppliers," available in an emergency, Kaenzig could not recall a time when one was called upon. [S.R.29-30, 219-20, 313-14; *see also* J.R.3432-33.]

Shulton manufactured several cosmetic talc products, including DFDP, Old Spice, and Friendship Garden. [S.R.19.] Yet, all these products used the same WCD-supplied talc along with small amounts of perfume and flow agent. [S.R.19-20.][1] Raw talc was mixed in large portable tanks and then "labeled as to what the product was, whether it was Desert Flower, Old Spice" or something else. [J.R.3438; S.R.47-48; *see also* S.R.317-19.]

2. WCD's talc was mined from asbestos-containing deposits.

WCD sold only four grades of talc to Shulton from three sources: 141 from Alabama; 643 or 2450 from North Carolina; and 1615 from Italy. [J.R.3174-75, 4985-86.] WCD sold these talcs to Shulton during the 1950s, 1960s, and 1970s.

[1] The main ingredient in any of these products—more than 90% of the contents—is talc. [J.R.2956, 3441.] WCD's claim that it could have "establish[ed] [DFDP's] formula," WCD Br. 16, is conjectural and meritless, since DFDP's "formula card" no longer exists. [J.R.3786-95.]

[J.R.4992-93.] Plaintiffs' testing expert and geologist Sean Fitzgerald painstakingly demonstrated that each grade of WCD's talc sold to Shulton was contaminated with asbestos, by reviewing literature regarding "the actual geology of those different regions, the geology of the specific mines…historic testing of the ore, contemporary testing of the ore, historic and contemporary documents of testing and the actual testing." [J.R.2987-88.]

i. 141 Alabama talc.

141 talc came from an Alabama deposit. [S.R.450] A peer-reviewed 2004 article that examined talc formations in various parts of the United States found anthophyllite and tremolite asbestos in the Alabama talc region. [J.R.2981-82.] Alabama talc was first associated with anthophyllite asbestos in 1873. [J.R.3023.]

A 1968 University of Alabama geological survey showed veins of anthophyllite and tremolite, "intimately intergrown" with the talc in the area. [J.R.3019-22.] Likewise, a U.S.G.S. map documented "locations…of historic asbestos mines, prospects and natural occurrences in the eastern U.S.," which was significant because "it follows the same belt as the major talc occurrences on the East Coast." [J.R.3024-25.] This was true of both WCD's Alabama and North Carolina talc sources. [J.R.3026.]

ii. 643 and 2450 North Carolina talc.

643 and 2450 talc were drawn from the Hitchcock mine about a quarter mile south of Murphy, North Carolina.[2] [J.R.2988; S.R.605.] Fitzgerald reviewed a 1948 article published by Van Horn, which examined the Hitchcock mine's regional stratigraphy (its rock layers), and found marble and talc layers, each of which contained "inner growths…high in tremolite minerals." [J.R.2989-91.] The article concluded that talc in the region is "intimately associated" with amphibole minerals, including tremolite asbestos. [J.R.2991-92.]

Fitzgerald personally visited the Hitchcock mine. [J.R.2996.] While there, he noticed materials in the mine's buildings containing WCD's logo, including industrial soapstone talc crayons and bags of talc bearing WCD's logo. [J.R.2997-98, 3000-01, 6729.] Fitzgerald also happened upon an outcropping, which is "rock that is representative of the bedrock." [J.R.2995.] He took a sample and tested it in his lab, finding it contained tremolite asbestos. [J.R.2995, 3014-17, 6727 (Ex.22b), 6728 (Ex.22c).]

[2] WCD's corporate representative, Theodore Hubbard, admitted that "all the different codes that are for Hitchcock North Carolina are all from the same mine." [S.R.605.]

iii. 1615 Italian talc.

1615 talc was mined in the Val Germanesca-Val Chisone region of Italy. [J.R.3026-27.] A joint venture of WCD and another company had "exclusive rights" to this Italian talc. [J.R.4925; S.R.431.]

Numerous studies found tremolite throughout the region's talc deposits, including a study by Peretti [J.R.3030-31.] and one by Pooley who tested samples from the Italian mine and found tremolite. [J.R.3031-34.] Another study, by Ilgren and Pooley, found tremolite "throughout the region." [J.R.3079-81.] An article by Sandrone and Zucchetti described amphiboles "regularly throughout the talcs." [J.R.3035-36.] A document from the Soceite Talcoe Grafile Val Chisone likewise reported fibrous asbestos in the region. [J.R.3037-38.]

In confirming asbestos contamination in Italian talc, Fitzgerald relied on a variety of sources, including the above articles and a review of the actual geology and mineralogy, "including maps of the region showing where the mines were in Italy." [J.R.3902.] He explained that not knowing where the precise mine was located would not matter for analyzing WCD's 1615 talc: the various mines in the region "were all clustered and farmed the same basic talc body." [J.R.3903.]

3. Historical testing of WCD talc sources and Shulton's products consistently revealed asbestos contamination.

Testing by different laboratories during the 1960s and 1970s found asbestos in WCD's source talc or in products that were made with WCD talc, including:

- Gamble NIOSH Study, 1982: talc from North Carolina Murphy Marble belt finding .1-5% asbestos, [J.R.4139-40];
- Johns-Manville Research and Engineering Center, 1968: finding trace amounts of tremolite in 2 Shulton talc products, [J.R.3123-26, 6810 (Ex. 36)];
- Johns-Manville Research and Engineering Center, 1973: finding asbestos in Shulton products and Val Chisone ore samples, [J.R.3127-29, 6823-51 (Ex. 37)];
- ES Laboratories, 1972: finding 1% chrysotile in 1615 Italian talc, [J.R.3138-40, 6900-01 (Ex. 40)];
- Lewin/NYU, August 1972: finding 2% tremolite in Desert Flower spray powder product, [J.R.3135-37, 6888-99 (Ex. 39)];
- Lewin/NYU, September 1972: finding 2% tremolite and .5% chrysotile in 1615, [J.R.3140-43, 6902 (Ex. 41)]; and
- Lewin/NYU, 1973: testing Shulton Old Spice talcum powder, finding 1% tremolite, [J.R.3129-34, 6852-87 (Ex. 38).]

4. Plaintiffs' testing expert's contemporary testing of WCD source talcs and vintage DFDP samples corroborated historical findings and showed that significant amounts of asbestos was releasable.

Corroborating the historical testing, Fitzgerald tested a sealed vintage product sample of DFDP and samples of WCD source talc and found asbestos in both. Moreover, he conducted a releasability study with a glove box[3] and found significant release of asbestos fibers. [J.R.2917-19.]

[3] A glove box is a sealed Plexiglas device that ensures containment of examined substances [J.R.3184, 3188.] The glove box method has been used by the EPA as a contained method for simulating use. [J.R.3955-56.]

His testing confirmed that the asbestos "constituent with that talc would be released in the air where it could be breathed." [J.R.2919.] Fitzgerald's testing of "talc ore" samples yielded the same results: "[T]hose talc ores not only contained asbestos, but those asbestos fibers were releasable." [J.R.2920.]

Ultimately, Fitzgerald opined that the talc WCD sold for use in DFDP "during the time period relevant to this case was regularly and consistently contaminated with releasable asbestos." [J.R.2923-24.] Moreover, Fitzgerald noted that "[t]hose talc sources would have been contaminated during the time of [Flo's] use," [J.R.2916.] regardless of when the study was conducted, since geological formations do not change on timescales relevant to this litigation. [J.R.3937-38.][4]

5. WCD's historical tests, ostensibly showing its talcs to be asbestos-free, were incomplete and misleading.

For decades, WCD proclaimed that its talc was asbestos-free. For example, in a 1975 letter to the Cosmetic Toiletries and Fragrance Association, WCD claimed its test program using x-ray diffraction ("XRD") as its methodology, was meant to "ensure customers using our cosmetic grade talcs that they are free of asbestos fibers." [J.R.6925 (Ex.47).] WCD touted its program as providing "the

4 WCD's expert concurred. [J.R.4758.]

best assurances that our cosmetic customers will receive cosmetic talcs which are free of *detectable* chrysotile[5] asbestos." [J.R.6925 (emphasis added).][6]

However, it was established at trial that "XRD is not sufficient to determine whether or not talc contains asbestos." [J.R.3173.] It was undisputed that transmission electron microscopy ("TEM")—available since the early 1950s—is the best method to detect low levels of asbestos contamination. [J.R.2960, 3082-83, 3089, 3898.] "XRD is not as sensitive as…TEM."[7] [J.R.3955.] In fact, XRD is the "least sensitive" method. [J.R.3174.]

Fitzgerald explained that WCD finding "non-detects" with XRD in samples where he found significant quantities of asbestos using TEM was unsurprising.[8] [J.R.3955.] Since asbestiform fibers "are too small to be seen with the naked eye," [J.R.3190,] even talc "described as high quality" or "mostly pure," often can "still

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5 Significantly, WCD did not even mention tremolite asbestos, the type of asbestiform fiber that more commonly contaminates talc deposits. [J.R.3175.]

6 Nor did WCD test any significant amount of its talc at that time: over all the years Flo Nemeth used DFDP, WCD tested approximately 28 grams of talc—about one ounce. [J.R.4772-73.]

7 Yet, in 1971, WCD advocated using the weaker XRD for testing talc in an FDA meeting on the subject. [J.R.6918, 6921 (Ex.46)].

8 Fitzgerald also estimated that a light microscope (itself more sensitive than XRD) would show only one in twenty of the asbestos structures actually present. [J.R.3897-98.] To see the larger population, TEM is necessary. [J.R.3898.]

contain microscopic contaminants."[9] [J.R.3906.] WCD's expert conceded XRD's many disadvantages, particularly that it "may give false negative results" so "there is a possibility that there are positives that XRD isn't picking up on." [J.R.4774-77.]

In short, the jury heard evidence that WCD's claim that its talc was asbestos-free, which it pressed at trial by offering many self-serving "non-detect" test results, was unworthy of credence because—as even WCD's expert conceded—the XRD testing methodology was insufficient.

D. WCD KNEW OR SHOULD HAVE KNOWN THAT ITS TALC WAS CONTAMINATED WITH ASBESTOS.

WCD was knowledgeable about asbestos, since it sold raw asbestos fiber between the 1930's and 1960's. [J.R.4892-94, 5555.]

Several publicly available articles dating to at least 1935, identified tremolite asbestos as a possible contaminant of talc. [J.R.3277-90.] Specifically a 1948 study found tremolite asbestos in the Hitchcock mine, which Fitzgerald relied upon. [*See* J.R.2989-92.][10]

Fitzgerald summarized: "we had all the tools and knowledge regarding talc and asbestos and why they might be contaminated at our disposal as early as the 1950s." [J.R.2913.] As a major marketer of both talc and asbestos, WCD did too.

[9] Given the limits of detection of XRD, "millions and billions of fibers could be missed." [J.R.3097-98.]

[10] [J.R.3292-98; S.R.817 (Ex.9)]

However, WCD did not test for the presence of asbestiform minerals like tremolite and anthophyllite in its talc until 1969, [J.R.4913], in response to public scrutiny that its talc was contaminated. [J.R.4918-20; S.R.633.]

E. WCD'S ASBESTOS-CONTAMINATED TALC CAUSED FLO'S PERITONEAL MESOTHELIOMA.

Regarding general causation, Plaintiffs' medical and causation expert, Dr. Jacqueline Moline testified that even brief or low-level exposures to asbestos, including asbestos in cosmetic talcum powder, causes all types of mesothelioma, including peritoneal mesothelioma. [J.R.4044-46, 4061, 4095.]

"Virtually all cases of mesothelioma are related to asbestos exposure." [J.R.4059.] Mesothelioma is a "sentinel health event," a disease "so associated with a particular exposure that…it warns you that that person had a particular exposure." [J.R.4060.] Peritoneal mesothelioma is a "signal tumor," a tumor "associated with one substance typically, so that if someone develops that cancer...then it signals that they've had exposure to that particular substance." [J.R.4060.]

Dr. Moline relied in part on a peer-reviewed article (the "Welch" article) that analyzed college educated men who "had low level[s] of exposure to asbestos that later developed peritoneal mesothelioma." [J.R.4061-63.] Significantly, the Welch article found that "even slight exposure to asbestos was associated with an increased risk over six fold of developing mesothelioma." [J.R.4062-63.]

Dr. Moline also relied on the Helsinki criteria, [J.R.4074-75], which specifies that a significant "history of exposure" to asbestos, including low levels of asbestos, in the domestic or household context, is sufficient to cause pleural and peritoneal mesothelioma. [*See* J.R.4076, 4409-10, 4885-86.] Dr. Moline specified that "significant exposure" is "something that's done regularly," and viewed Flo's exposure to asbestos-contaminated DFDP as "significant exposure." [J.R.4870-71]

Dr. Moline also relied on a series of articles discussing talc contaminated with tremolite asbestos. For instance, she referenced a peer-reviewed article, which noted that "tremolite…can contaminate talc," and that tremolite asbestos can cause disease. [J.R.4089-90.] Dr. Moline also relied on a peer-reviewed article, that examined mesothelioma tumor tissue and found "tremolite contaminated talc." [J.R.4092-93.]

On the subject of asbestos-contaminated talc causing asbestos-related disease, Dr. Moline found a 1982 NIOSH study to be helpful in demonstrating that talc miners and millers were developing asbestos-related conditions. [J.R.4137-38.] She also relied on a recent peer-reviewed article titled "Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women" by Gordon, Fitzgerald, and Millette (the "Millette study"). [J.R.4100-01.] It was particularly relevant because the authors found asbestos in a cosmetic talc product, showed that such asbestos became airborne upon typical use and then found asbestos in the

body of an individual with mesothelioma, whose only known exposure was cosmetic talc. [J.R.4102.]

Dr. Moline also relied on a particularly relevant case report involving a 17-year-old Italian boy who used asbestos-contaminated talc daily and was diagnosed with peritoneal mesothelioma. [J.R.4135-36.] This important case study "add[s] weight to the fact that the [Italian] talc was contaminated with asbestos and then we subsequently learned that individuals who were using these products develop mesothelioma, so there is a connection made." [J.R.4136-37.]

In this respect, Dr. Moline emphasized the significance of case reports, particularly when dealing with a "sentinel disease like mesothelioma," where such reports will carry "greater weight than with a common disease." [J.R.4134-35.] Indeed, case reports are frequently relied upon in environmental medicine and "may highlight a particular exposure scenario" such that environmental disease specialists "know this exposure scenario leads to mesothelioma." [J.R.4134-35.]

In describing why large, on-point epidemiological studies involving mesothelioma are not always available or required, Dr. Moline explained: there are "3,000 different types of [asbestos-containing] products. There aren't 3,000 different exposure scenarios that have been described that have specific papers…." and the sample size for mesothelioma generally is too small. [J.R.4073-74.] The upshot is clear: the medical and scientific community "understand[s] that what

causes a disease is the exposure to asbestos not the product *per se*. It's the asbestos contamination or the asbestos content of the product." [J.R.4074.] After all, it has been generally "established from an epidemiological perspective that asbestos causes peritoneal mesothelioma." [J.R.4115.]

In forming her opinion that Flo's exposure to WCD's asbestos-contaminated talc caused her peritoneal mesothelioma, [J.R.4149-50], Dr. Moline relied in part on (a) the evidence presented regarding Flo's daily DFDP use for 11 years, (b) that asbestos was present in the talc, (*see supra* at 11-17; [J.R.4096-97]), (c) that studies showed respirable asbestos levels coming from comparable use of the talc "well above those that have been associated in multiple studies with the development of disease," and (d) the "appropriate latency from when she was using this product to when she developed the disease." [J.R.4147-50.]

Dr. Moline emphasized the importance of "re-entrainment" of asbestos fibers, particularly when evaluating dangerous asbestos exposures in the home: "[A]fter the fibers become airborne, they eventually will settle on the ground or on a surface, but then when they're disturbed they become airborne again, so it provides from a health standpoint an opportunity for additional exposure." [J.R.4037.] Fibers can become re-entrained when stepped on, swept up, vacuumed, or cleared off a counter. [J.R.4037.]

From an environmental health standpoint, "the amount of time a person spends in an area where asbestos fibers would likely be re-entrained" is critical: "The more time somebody spends in an area, the more exposure they're going to have if the fibers are present." [J.R.4037.][11] Dr. Moline confirmed that Flo's cleaning of the bathroom after application of DFDP was "another exposure that goes to her total exposure." [J.R.4038.]

Visible dust is also significant: "If the product is contaminated with asbestos and it gives off dust," then whatever asbestos is in that dust will "have the potential for causing human health consequences." [J.R.4041-42.]

Dr. Moline also noted the importance that the asbestos in talc is not encapsulated. [J.R.4044.] "There is no encapsulation, so there is nothing weighing it down. It's just fibers that become airborne. People can breathe it in. And it can…exert human health effects." [J.R.4044.]

Besides Flo's testimony regarding her exposure, Dr. Moline also relied on Fitzgerald's testing of the product. [*See* J.R.4148.] Specifically, Fitzgerald performed a releasability analysis on various Shulton products[12]—including Old Spice products and DFDP—using a glove box to simulate the kind of exposure Flo would have and found levels of asbestos released "thousands of times" the levels

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[11] Flo was a career homemaker. [J.R.5020.]

[12] All Shulton products used the same WCD talc over the relevant time period. [S.R.19-20.]

"we use for air testing to make sure that our schools are safe."[13] [J.R.3182-83, 3185-86.]

Fitzgerald found a significant concentration of asbestos: "hundreds of thousands of fibers per square foot on the dust fall."[14] [J.R.3199.] Fitzgerald was able to quantify the number of asbestos structures released: he estimated that 2,760,000 fibers were in the chamber during his testing. [J.R.3200.] When calculated over the time Flo used DFDP, Mr. Fitzgerald concluded that she would have been exposed to "billions and trillions" of asbestos fibers. [J.R.3224.]

Fitzgerald testified that "a person in an urban area breathes in…60,000 fibers of asbestos per day." [J.R.3941-42.] The glove box test release results, were "several [orders] of magnitude higher." [J.R.3945.] Dr. Moline testified that such levels "orders of magnitude higher than ambient exposure," result in elevated rates of mesothelioma. [J.R.4108.]

Fitzgerald also tested ore samples from source talc and was able to quantify the results through extrapolation based on air flow, finding "releasable fibers in the hundreds of thousands…[in] tenths of a gram of both 141 and 1615 talc ores." [J.R.3211, 3961-62.]

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[13] Referring to levels promulgated pursuant to the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), Pub.L. 99-519, 100 Stat. 2970 (1986).

[14] The dust fall samples are taken with a dust wipe and were collected from the bottom of the glove box used to test DFDP. [J.R.3197-98.]

Dr. Moline also relied on the Millette study, *see supra* at 21-22, which contained similar findings to Fitzgerald's DFDP and source talc testing. [J.R.3177-84, 4100-01.] The three authors independently tested cosmetic talcum powder, and each "found the same type of asbestos." [J.R.3178.] Crucially, the cosmetic talc tested in the Millette study came from the two of the three source mines from which WCD obtained its talc which were ultimately sold to Shulton (Italian Val Chisone and North Carolina Murphy Marble Belt). [J.R.3180-81, 3877.]

The Millette study examined the releasability of asbestos fibers in a glove box, like Fitzgerald's testing of DFDP, with similar results as he found here. The authors also simulated use in a bathroom setting and found results similar to those found in the glove box. [J.R.3179-80, 3957.]

In sum, relying on all the above, Dr. Moline concluded that Flo's peritoneal mesothelioma was caused by her use of asbestos-contaminated talc: "she had the exposure, she has the appropriate amount of time from when she had the exposure and she has the significant disease related to this exposure." [J.R.4149-50.]

F. WCD FAILED TO PUT ON SUFFICIENT EVIDENCE OF THE FAULT OF JOINT TORTFEASORS.

At trial, WCD made little effort to demonstrate the fault of potential joint tortfeasors. WCD did not introduce any evidence of Flo's exposure to other asbestos-containing products, beyond relying on limited statements in Plaintiffs' interrogatory responses. [*See* J.R.4305-08.] Nor did WCD submit any evidence

confirming the asbestos content of these products or whether there was any "release and exposure" to connect Plaintiffs' interrogatory responses with Plaintiffs' experts' opinions. [J.R.5167.] There was also no evidence regarding whether any of these companies failed to warn of any hazards relating to their products.

With respect to Shulton, WCD did little to show the culpability of its customer. To the contrary, despite its knowledge that its talc contained asbestos and that asbestos is hazardous to human health, WCD "never provided a warning regarding the health hazards of asbestos." [S.R.669-70; J.R.4984.] Furthermore, Hubbard admitted that WCD owed an obligation to its customers: "You [WCD] are supplying these cosmetic companies. It's your obligation to make sure that you don't have a defective product." [J.R.4995.]

WCD argues Shulton tested for "purity" and "contaminants," WCD Br. 41, but this purity "analysis," according to George Dippold, WCD's corporate representative, only focused on "contaminating materials like iron" that would affect the "color" or "appearance" of the talc. [J.R.4916-17.][15]

At the close of trial, Plaintiffs moved for directed verdict regarding the settling defendants, arguing WCD had not carried its burden of proof to place them on the verdict sheet. [J.R.5164.]

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[15] WCD also provided lab services for their customers [J.R.5867 (Ex.13).]

The court granted Plaintiffs' motion as to all settling defendants except Shulton, reasoning that "there was no discrete causation opinion as to whether a particular product in fact was a substantial factor in causing the disease." [J.R.5169-70.] Shulton remained, since it had a direct relationship with WCD in purchasing raw talc. [J.R.5170-71, 5184-85.]

G. PLAINTIFFS' SUMMATION.

During Plaintiffs' summation in discussing Dr. Moline's testimony, Plaintiffs' counsel noted:

> [Flo Nemeth] said she used [DFDP] all over her body. As…Dr. Moline later explains, asbestos can enter the body in various ways. With a woman like Flo, there are two avenues of exposure. And the way she's describing, I will submit, means she's getting asbestos in her body from two different ways, from breathing it in and then using it all over her body, in her pelvic region.

[J.R.5337-38.]

The trial court initially agreed that this statement was correctly based on Dr. Moline's testimony, [J.R.5381], but changed course the next day and directed Plaintiffs' counsel to "revisit that issue" in a "mini-closing," reasoning Dr. Moline had not opined that transvaginal exposure to asbestos-contaminated talc "can cause peritoneal mesothelioma, pathophysiologically." [J.R.5412, 5419-21.] However, the court made clear "that I don't believe this was designed to prejudice the defendant or to say something inflammatory or to trigger any of those concerns that would justify a mistrial." [J.R.5419.]

Despite the fact that the evidence supported Plaintiffs' counsel's argument, [J.R.4869-70, 4070, 4121-23; *see also* J.R.119-20], and that there was no objection to any of the unrebutted testimony that went into the record, [J.R.119], Plaintiff's counsel, although taking issue with having to correct the record [J.R.119-20], delivered a second mini-closing in accordance with the court's direction. [J.R.5479.]

H. THE JURY'S VERDICT, WCD'S POST-TRIAL MOTION, AND THE COURT'S MISAPPLICATION OF G.O.L. § 15-108.

The jury rendered a verdict in favor of Plaintiffs awarding the Estate $15,000,000 for Flo's past pain and suffering and Frank $1,500,000 for loss of consortium, apportioning 50% of the fault to WCD and 50% to Shulton.

Subsequently, WCD moved for judgment as a matter of law or a new trial, and sought remittitur of the verdict. [J.R.2289-90.] The trial court denied WCD's post-trial motion but remitted the verdict to $6,600,000. ($6 million for Flo's pain and suffering and $600,000 for Frank's loss of consortium).

Plaintiffs submitted a proposed judgment, reducing the $6,600,000 verdict to $3,300,000 under G.O.L. § 15-108(a) in accordance with the aggregate apportioned fault of settling defendants (50%), which was greater than the total settlement monies obtained ($1,432,500). [J.R.2325-26.]

The court rejected plaintiffs' proposal, instead first reducing the remitted verdict by the value of settlements with defendants not on the verdict sheet, a

figure totaling $732,500. [J.R.146.] This initial reduction left a net verdict of $5,867,500, which the trial court then reduced by 50%, "representing the equitable share of the net verdict of settling tortfeasors appearing on the verdict sheet." [*Id.*] This second reduction left a net verdict of $2,933,750 against WCD. [*Id.*]

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED WCD'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL.

A. Scope of Review.

CPLR 4404(a) permits a court to set aside a verdict and grant judgment as a matter of law or order a new trial. Judgment as a matter of law is inappropriate unless the verdict is "utterly irrational" with "simply no valid line of reasoning and permissible inferences" to support it. *Killon v Parrotta*, 28 N.Y.3d 101, 108 (2016) (quotation omitted). Moreover, the court must consider the facts in the "light most favorable to the nonmovant" and afford them every reasonable inference. *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997).

Similarly, the determination with respect to whether to grant a new trial "must be exercised with considerable caution." *Yalkut v. New York*, 162 A.D.2d 185, 188 (1st Dep't 1990). "A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence." *Angel R. v. N.Y.C. Transit Auth.*, 139 A.D.3d 590, 590 (1st Dep't 2016).

B. Plaintiffs Demonstrably Proved Contamination.

WCD argues that Fitzgerald could not show that "WCD sourced talc from any particular mines that tested positive for asbestos, or that talc sourced from these regions was even used in Desert Flower." WCD Br. 36-37.[16] However, as Fitzgerald explained on cross-examination, "There were several holes into the same talc formation…but they all mined the same talc." [J.R.3598; *see also* J.R.3599-3602.]

Moreover, WCD neglects the abundant evidence demonstrating WCD's talc and its regional sources were asbestos-contaminated and that such talc was used by Shulton in its products. *See supra* at 11-12. WCD's blinkered view of the evidence omits, for example, Hubbard's testimony acknowledging that the Hitchcock mine was the source of all WCD's North Carolina talc, [J.R.4985-86], as well as Fitzgerald's discovery of asbestos-containing outcroppings there. [J.R.2995-97.] Further, numerous historic tests showed WCD's talc or products made with it to be asbestos-contaminated. *See supra* 15-16.

WCD admits that *at least two of its own tests* "revealed detectable levels of tremolite or chrysotile fibers." WCD Br. 16. WCD's positive test results are significant, given the scanty portion of its talc it tested and its use of XRD, a

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[16] Elsewhere, WCD overreachingly declares that "[t]alc can vary significantly depending on its grade and the region from which it is mined." WCD Br. 13. However, Fitzgerald's testimony *at most* supports an inference that there "might" be "some slight variations of the talc." [J.R.3472.]

woefully insensitive testing methodology that produces false negatives. *See supra* at 17-19.[17]

WCD also challenges Dr. Lewin's testing of other Shulton products, but not DFDP. WCD Br. 15. However, former Shulton employee Kaenzig made clear that WCD supplied 99% of the talc Shulton used at that the time of Lewin's testing, and that Shulton used the same talc across products. [*See* J.R.3432; S.R.313-15, 317-19.].

Finally, WCD points to Fitzgerald's admission that he did not know whether WCD procured talc from North Carolina or Alabama before 1972. WCD Br. 15. But WCD overlooks Hubbard's admission that WCD sold talcs 2450 (North Carolina) and 141 (Alabama) to Shulton "during the 50's, 60's, and 70's." [J.R.4992.] Further, WCD's own 1956 and 1957 sales books identifies North Carolina 641 and 2450 talcs as among its products. [J.R.5823-24 (Ex.12), 5999-6000, 6033-34 Ex.13).] And there is no evidence to suggest that WCD changed its talc sources over all of these time periods.

WCD incorrectly relies on decisions involving expert testimony "based on assumed facts not supported by the evidence." *Cooke v. Bernstein*, 45 A.D.2d 497,

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[17] WCD quibbles that one test was conducted in 1972, after Flo stopped using DFDP. However, the mineralogical features of talc are based on a geologic timescale, changing over "millions of years, not…overnight." [J.R.3937-38.]

500 (1st Dep't 1974); WCD Br. 35-36.[18] However, an expert may answer a hypothetical "[i]f the facts in the hypothetical question are fairly inferable from the evidence." *Tarlowe v. Metro. Ski Slopes, Inc.*, 28 N.Y.2d 410, 414 (1971). Here, the facts relied upon are fully supported by the record.

More fundamentally, WCD distorts the standard of review. At most, Fitzgerald acknowledged, in response to vague and highly equivocal questioning, that there "might" be "some slight variations" in the "purity"[19] of talc. [*See* J.R.3472.] This must weigh, as the standard goes, not only against Fitzgerald's repeated assertion that the precise location of the hole in the ground was not significant but against the literal weight—40,000 pounds—of talc WCD delivered to Shulton twice-monthly. [J.R.3598, 3903; S.R.33.]

C. Plaintiffs amply proved causation.

WCD seeks to set aside the verdict, averring Plaintiffs' proof does not comport with *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006) and *Matter of N.Y.C. Asbestos Litig. (Juni)*, 148 A.D.3d 233 (1st Dep't 2017), *aff'd* 32 N.Y.3d 1116 (2018). To the contrary, Plaintiffs presented abundant evidence that Flo's

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[18] *Shore Haven Apartments No. 6, Inc. v. Commissioner of Finance*, 93 A.D.2d 233, 236 (2d Dep't 1983) is inapposite since it involves a standard that only applied in cases involving real estate appraisals.

[19] WCD's corporate representative, testified that "purity" usually relates to the "color" and "slip" of the talc, not the "slight contaminations" all talcs have. [J.R.4917; *see also* J.R.3906.]

exposure to WCD's asbestos-contaminated talc caused her mesothelioma demonstrating both general and specific causation, and the jury unanimously agreed.

1. Legal framework.

An expert's opinion on causation "should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." *Parker*, 7 N.Y.3d at 448. Often, however, "a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value." *Id.* at 447.

Therefore, "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community." *Id.* at 448. Nonetheless, a plaintiff must provide "some 'scientific expression'…of the level of exposure to toxins in defendant's products that was sufficient to have caused the disease." *Juni*, 148 A.D.3d at 235 (quoting *Parker*, 7 N.Y.3d at 449).

There simply "'must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered.'" *Cornell v. 360 W. 51st St.*

Realty, LLC, 22 N.Y.3d 762, 784 (2014) (quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996)); *accord Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 808-09 (2016); *Dominick v. Charles Millar & Son Co.*, 149 A.D.3d 1554, 1555 (4th Dep't 2017). Causation always depends on the particular facts in each case. *See Cornell*, 26 N.Y.3d at 785; *Juni*, 148 A.D. 3d at 238-39.

Part and parcel of this standard is testimony regarding exposure to visible asbestos-containing dust. *See Penn v. Amchem Prods.*, 85 A.D.3d 475, 476 (1st Dep't 2011); *Matter of N.Y.C. Asbestos Litig. (Marshall)*, 28 A.D.3d 255, 256 (1st Dep't 2006); *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69, 70 (1st Dep't 2004). Thus, this Court has permitted expert testimony that "dust, raised from asbestos products and not just from industrial air in general, necessarily contains enough asbestos to cause mesothelioma." *Lustenring*, 13 A.D.3d at 70. *See also, Penn*, 85 A.D.3d at 476.

In *Juni*, this Court "did not criticize or question" those holdings. *See Juni*, 148 A.D.3d at 238-39; *Evans v. 3M Co.*, 2017 N.Y. Slip Op. 30756(U), 2017 N.Y. Misc. LEXIS 1436, at *11 (N.Y. Cty. Apr. 14, 2017). In fact, this Court cited them with unqualified approval just months before it decided *Juni*. *See Matter of N.Y.C. Asbestos Litig. (Sweberg)*, 143 A.D.3d 483, 484 (1st Dep't 2016); *Matter of N.Y.C. Asbestos Litig. (Hackshaw)*, 143 A.D.3d 485, 486 (1st Dep't 2016), and affirmed a

similar decision *after* deciding *Juni*. *Matter of N.Y.C. Asbestos Litig. (Miller II)*, 154 A.D.3d 441 (1st Dep't 2017).

2. *Juni* bears no resemblance to this case.

As the trial court recognized, *Juni* contains a highly particular record. *Juni*'s unique factual posture is neatly summarized by Judge Wilson's concurrence in the Court of Appeals decision:

> Ford adduced evidence that the process of manufacturing friction products under extreme temperatures alters the chemical composition of the asbestos, and the subsequent use of those products also subjects them to very high temperatures *causing the conversion of the asbestos into a biologically inert substance called Forsterite.* Plaintiffs did not produce an expert to rebut the argument that the physical properties of the asbestos in Ford's friction products had been so radically altered as to render conventional asbestos toxicology irrelevant.

32 N.Y.3d at 1119 (emphasis added). Of course, WCD presented no evidence of any such alchemy in this case.

Juni's experts not only conceded this point but further admitted that any small amount of remaining asbestos was small and flexible enough to be dissolvable and able to translocate through the lungs. *See* 148 A.D. 3d at 237-38. In other words, the asbestos was either chemically converted or else safe for other reasons. Consequently, the decision of the Court of Appeals emphasized that Ford was entitled to judgment as a matter of law "on this particular record." 32 N.Y.3d at 1118.

As several subsequent decisions have found, *Juni* is—like any proximate causation determination—"'based on [its] discrete facts.'" *Evans*, 2017 N.Y. Slip Op. 30756(U), 2017 N.Y. Misc. LEXIS 1436, at *10 (quoting *Juni*, 148 A.D. 3d at 238-39); *see also Dominick*, 149 A.D.3d at 1555. At a basic level, a case about friable talc exposure is vastly different from a case about encapsulated friction products. Notably, the *types* of asbestos in this case are the notoriously deadly tremolite and anthophyllite, not the comparatively less harmful chrysotile (which was then transmuted into the totally inert, nonhazardous forsterite by extraordinarily high heat). And for sure, not only is WCD's cosmetic talc naturally dusty; it isn't, like brake linings, encapsulated by another substance.

It is unsurprising then, that NYCAL's current Administrative Justice has repeatedly distinguished *Juni* and refused to apply its discrete facts to cosmetic talc cases. *See e.g.*, *Germain v. Am. Int'l Indus.*, 2018 N.Y. Slip Op. 33306(U), 2018 N.Y. Misc. LEXIS 6417, *14 (N.Y. Cty. Dec. 18, 2018); *Prokocimer v. Avon Prods., Inc.*, 2018 N.Y. Slip Op. 33170(U), 2018 N.Y. Misc. 6061, *17 (N.Y. Cty. Dec. 28, 2018); *Zoas v. BASF Catalysts, LLC*, 2018 N.Y. Slip Op. 33009(U), 2018 N.Y. Misc. LEXIS 5637, *17-18 (N.Y. Cty. Nov. 26, 2018).[20]

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[20] Ignoring these cases, WCD cites *Mantovi v. American Builtrite*, No. 2019 N.Y. Slip Op. 30247(U), 2019 LEXIS 419, (N.Y. Cty. Jan. 29, 2019) to imply that *Juni* has been broadly applied by the NYCAL court and is somehow applicable here. However, *Mantovi* involved an alleged exposure to asbestos-containing encapsulated floor tiles. The court made clear that summary judgement

3. Plaintiffs proved general causation.

Epidemiological studies have established that asbestos causes peritoneal and pleural mesothelioma. [J.R.4115.] Dr. Moline also concluded that asbestos-contaminated cosmetic talc causes mesothelioma, since "asbestos causes the mesothelioma" and "[i]t happens to be in the talc." [J.R.4095.]

WCD contends that "Dr. Moline admitted there are no epidemiological studies linking cosmetic talcum powder and peritoneal mesothelioma." WCD Br. 29 (citing [J.R.4439]). While this isn't precisely her testimony,[21] it isn't particularly relevant or unexpected in any event. As Dr. Moline made clear, epidemiological studies for every known asbestos-containing product and its connection to mesothelioma (peritoneal or pleural) is simply not feasible or enlightening. *See supra* at 22-23.

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hinged on plaintiff's failure to sufficiently identify the details of his exposure. *Id.* at *12.

More analogous to this case: that same court denied summary judgment one month later where a plaintiff more sufficiently identified his exposure to similar, encapsulated asbestos-containing floor tiles. *Marzigliano v. Amchem Prods., Inc,* 2019 Slip OP. 30535(U), 2019 N.Y. Misc. LEXIS 859, *19 (N.Y. Cty. Mar. 1, 2019).

[21] Actually, the question inquired whether there were "epidemiological or inhalation studies of *consumer use* of talc that [she] was aware of." [J.R.4439.] The truth is that there are epidemiological studies about asbestos-contaminated (emphasis added) talc—they just involve talc miners and millers, not product consumers. [J.R.4439.]

What WCD suggests here is that the absence of an on-point epidemiological study is *per se* insufficient under *Parker* and its progeny.[22] Of course, *Parker* does not require epidemiological studies at the level of granularity WCD demands. *See* 7 N.Y.3d at 449-50. "[N]o court has ever imposed [a] requirement [that there be epidemiological studies connecting asbestos exposure from a particular use of a particular product and mesothelioma] nor could there be epidemiological studies for every single product ever manufactured that contains asbestos or every product that is used with asbestos-containing products." *Matter of N.Y.C. Asbestos Litig. (Miller I)*, 2016 N.Y. Slip Op. 30765(U), 2016 N.Y. Misc. LEXIS 1557, *12 (N.Y. Cty. Apr. 25, 2016), *aff'd* 154 A.D.3d 441 (1st Dep't 2017).[23]

This legal landscape mirrors sound science: small sample sizes would limit the value of any such epidemiological study, and so the generally accepted standard is to give greater weight to case reports with respect to a sentinel health event like mesothelioma than a more common disease. *See supra* at 22.

WCD indirectly challenges this fact by arguing that "'[E]pidemiological evidence is indispensable in toxic and carcinogenic tort actions where direct proof of causation is lacking,'" WCD Br. 28 (citing *Nonnon v. City of New York*, 32

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[22] WCD's later intimation that there should be an epidemiological study for the precise "talc source," *see* WCD Br. 30, is even more absurd and likewise not supported either by precedent or generally accepted practice in the field.

[23] *Miller* was affirmed *after* this Court's decision in *Juni*.

A.D.3d 91, 105 (1st Dep't 2006) (quoting *In re Joint E. & S. Dist. Asbestos Litig. (Maiorana)*, 52 F.3d 1124, 1128 (2d Cir. 1995)).[24] However, *Maiorana* makes clear that the general causation inquiry asks "whether the epidemiological *or other scientific evidence* establishes a causal link between" the exposure and the disease. 52 F.3d at 1131 (emphasis added). Of course, unlike colon cancer in *Maiorana*, [25] there is ample scientific evidence (including epidemiology) here connecting mesothelioma with asbestos exposure. Indeed, even the trial court in *Maiorana* distinguished colon cancer from "a mesothelioma-like signature disease." *Id.* at 1049-50. The question of whether epidemiology is needed to connect a *specific asbestos-containing product* to mesothelioma is thus far different than trying to connect asbestos to a particular disease.

As a part of this challenge, WCD attempts to discredit the studies Dr. Moline relied upon. However, WCD's attack goes to weight, not admissibility. For

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[24] WCD also claims that *Matter of Seventh Judicial Dist. Asbestos Litig. (DeMeyer)*, 9 Misc.3d 306, 312 (Wayne Cty. 2005) holds that "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." WCD Br. 29. However, if anything, the *DeMeyer* court cast doubt on this proposition, stating "[t]his court does not interpret *Parker* as holding" epidemiological evidence was always necessary, as urged by the *DeMeyer* defendant. *Id.* at 312.

[25] Ultimately, the Second Circuit reversed the trial court's decision to grant defendant's post trial motion to dismiss, thus resurrecting the jury's verdict finding asbestos caused the plaintiff' colon cancer, despite the weak epidemiological evidence.

example, while WCD questions Dr. Moline's reliance on a case study of a 17-year-old whose daily use of asbestos-contaminated cosmetic talc caused his peritoneal mesothelioma, it was absolutely part of the arsenal of evidence demonstrating that individuals using asbestos-contaminated cosmetic talc products developed peritoneal mesothelioma. [J.R.4136-37.] *See also supra* at 22 (discussing the significance of case reports when dealing with a "sentinel disease like mesothelioma").

Similarly, WCD's proffered distinction as to the Millette study—it found asbestos fibers in lungs, not peritonea—is equally baseless. Respirable asbestos causes a variety of diseases, including both pleural and peritoneal mesothelioma. [*See* J.R.4044-46.] The same is true of WCD's attempt to question the significance of the 1982 Gamble article, which found asbestos-related pleural thickening in North Carolina talc miners (one of WCD's sources). These findings demonstrate the presence of asbestos in WCD's source talc sufficient to cause disease. [J.R.4138-40.]

WCD also decries the Rohl study, for not being "a human health effect study," WCD Br. 30. But that study helps establish a "dose" of asbestos in off-the-shelf cosmetic talc products. [J.R.4096-97, 4413-14]. Similarly, there is no basis as a matter of general causation to attack the Roggli studies, which show that exposure to tremolite (including in cosmetic talcum powder) causes mesothelioma

and that tremolite was found in the lungs of women who used cosmetic talc. [J.R.4090, 4422-24]. Certainly, those are pertinent findings that Dr. Moline could surely rely upon. WCD's effort to litigate whether "dose assessments" were made by those authors, *see* WCD Br. 30, is at best a subject for cross-examination.

Indeed, the "'appropriate' means of challenging" these studies were "the 'traditional' devices of 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Maiorana*, 52 F.3d at 1132 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993)).

4. Plaintiffs proved specific causation.

Dr. Moline had ample support to conclude that Flo's years of daily exposure to DFDP, which contained WCD's asbestos-contaminated talc, were a substantial factor causing her peritoneal mesothelioma.[26] [J.R.4147-51.] She relied on Flo's detailed deposition testimony, on the findings of the Millette study (demonstrating airborne asbestos was released upon a typical application of cosmetic talc at levels sufficient to cause mesothelioma), and Fitzgerald's testing of DFDP and source

[26] WCD claims that its expert, Dr. Moolgavkar, would have testified that Flo's exposure to DFDP played no role in her mesothelioma. However, Dr. Moolgavkar, who was not a licensed physician and never diagnosed anyone, [J.R.2487], was deemed unqualified by the court to testify regarding causation. WCD does not claim on appeal that this wholly justified ruling was erroneous. Significantly, WCD listed but never called another expert, who *was* qualified to discuss causation. [J.R.2487-88.]

talc ores. Dr. Moline also added her own expert view about the significance of visible dust and re-entrainment. *See supra* at 23-24.

WCD contends that a precise quantification is necessary to establish specific causation. WCD Br. 33. Both *Parker*, and this Court rejected this very notion. *Parker,* 7 N.Y.3d at 448; *Nonnon v. City of New York (Nonnon II)*, 88 A.D.3d 384, 396 (1st Dep't 2011); s*ee also Miller II*, 154 A.D.3d at 441 (affirming *Miller I,* 2016 N.Y. Misc. LEXIS 1557, at *16, which held expert's testimony that "it is generally accepted in the scientific community that there is no safe level of exposure to asbestos, that even a low dose exposure to asbestos can cause mesothelioma and that plaintiff was exposed to asbestos…based on the release of visible dust," sufficient foundation for specific causation).

After all, *Parker* itself actually relies on a talc case involving visible airborne dust exposure for its proposition that

> "while precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining to the plaintiffs exposure are beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an experts opinion on causation."

Parker, 7 N.Y.3d at 448 (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 264 (4th Cir. 1999)). In *Westberry*, the expert "did not point to Westberry's exposure to a specific level of airborne talc," but the court held "there was evidence of a substantial exposure" in view of testimony regarding daily exposure

to airborne talcum powder. 178 F.3d at 264. The trial court here recognized the significance of *Westbury* as well. [J.R.102]

The enlightening commentary in *Evans* and a prior opinion, *Kersten v. A.O. Smith Water Prods. Co.*, Index No. 190129/10 (Sup. Ct. N.Y. Cty. 2011), issued by the judges overseeing and/or trying New York asbestos cases, is also relevant here:

> To read *Parker* in the way defendants suggest would forestall recovery in nearly all asbestos cases. Justice Judith Gische explained it well in [*Kersten*]: "[I]n connection with asbestos exposure cases...the courts have acknowledged that in this type of litigation, precisely numerically quantifying exposure, is extremely difficult if not virtually impossible." She further noted that if defendant's reading of *Parker* was correct "it would be the death knell to asbestos exposure litigation because the standards that the defendants are seeking to impose would create an insurmountable standard that would deprive these toxic tort litigants of their day in court…[which] was one of the dangers that the *Parker* court was very aware of when it issued its decision.

Evans, 2017 N.Y. Misc. LEXIS 1436, at *14 (quoting *Kersten*, Index No. 190129/10).

Moreover, Dr. Moline *did* testify in quantitative terms, and undoubtedly gave a "scientific expression" in her opinion. Specifically, Dr. Moline relied in part on Fitzgerald's quantification of releasable fibers, *see supra* at 17, 25, and findings from the Millette study, s*upra* at 21-22, 26.

WCD contends that a precise recreation by an industrial hygienist to measure the respirable amount of asbestos is required to show specific causation. WCD Br. 19 (citing [J.R.4842-44] and *Juni*, 148 A.D.3d at 237). However, *Juni*

imposes no such requirement; instead, the cited portion lists only the many concessions made by the *Juni* experts that make it *sui generis*. Regardless, the Millette study *did* recreate an exposure scenario using a similarly sized bathroom; those results mirror Fitzgerald's glove box testing. *See supra* at 26. And, as Dr. Moline testified, where the results are scientifically consistent, there is no reason not to employ the safer, more contained, method. [J.R.4851.]

Likewise, WCD argues Fitzgerald "never quantified the number of asbestos fibers Mrs. Nemeth would have breathed in." WCD Br. 33. But no New York court has ever imposed such a requirement. Furthermore, WCD does not say how a "releasable" fiber (released in the breathing zone) is any different from a "respirable" fiber.

Finally, WCD incorrectly asserts that Plaintiffs offered the "same evidence" regarding "cumulative exposures" *Juni* rejected. WCD Br. 33. There, the experts effectively testified that "even a single exposure" could be a substantial factor. *Juni*, 148 A.D.3d at 239. As the Court explained:

> [R]eliance on the theory of cumulative exposure, <u>at least in the manner proposed by plaintiff</u>, is irreconcilable with the rule requiring at least *some* quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease.

Id. at 239 (emphasis added). *see also Berman v. Mobil Shipping & Transp. Co.*, 14-Civ-10025-GBD, 2019 U.S. Dist. LEXIS 55671, *32 (S.D.N.Y. Mar. 27, 2019).

While WCD plucks isolated references to "cumulative exposure" from their context, a fair reading of Dr. Moline's testimony shows there was ample consideration of "amount, duration, and frequency": her causation determination was based on Flo's testimony about her daily use of DFDP, over several years, going through a container every 2 weeks, as well as Fitzgerald's testimony that this application released "billions to trillions" of asbestos fibers over the course of her use. [J.R.4148-51.]

In sum, Plaintiffs thoroughly proved both general and specific causation at trial. The result was a jury question; and the jury unanimously concluded Plaintiffs had shown that WCD's talc, in Shulton's final product, caused the mesothelioma that took Florence Nemeth's life.

II. PLAINTIFFS' SUMMATION DOESN'T WARRANT A NEW TRIAL.

Next, WCD contends that one comment during closing argument, after a five-week trial, referring to Dr. Moline's testimony that talc can enter a woman's body in two ways requires re-trial. *See supra* at 28-29.

The trial court has vast discretion in deciding a challenge to opposing counsel's summation arguments. *See Pagano v. Murray*, 309 A.D.2d 910, 911 (2d Dep't 2003). Moreover, "[i]t is well established that a counsel is afforded wide latitude in summation to characterize and comment on the evidence." *Selzer v. N.Y.C. Trans. Auth.*, 100 A.D.3d 157, 163 (1st Dep't 2012).

Reversal is only appropriate when the allegedly inflammatory remarks "'permeated the trial and created a climate of hostility that effectively destroyed the defendant's ability to obtain a fair trial.'" *Rohring v. City of Niagara Falls*, 192 A.D.2d 228, 230 (4th Dep't 1993) (quoting *DiMichel v. S. Buffalo Ry. Co.*, 80 N.Y.2d 184, 198 (1992)). This Court recently set aside a verdict where the "record show[ed] a pervasive pattern of misconduct that permeated the month-long trial." *Smith v. Rudolph*, 151 A.D.3d 58, 63 (1st Dep't 2017). Here, in contrast, WCD only challenges a single remark at the end of a lengthy trial with numerous exhibits and voluminous testimony. *See Pareja v. City of New York*, 49 A.D.3d 470, 470 (1st Dep't 2008).

Importantly, the character of the comment WCD challenges is fundamentally different from the kind this Court has previously found sufficiently hostile. *See, e.g.*, *Minichiello v. Supper Club*, 296 A.D.2d 350, 352 (1st Dep't 2002) (forced Nazi comparisons based on defendant's German heritage); *People v. Ashwal*, 39 N.Y.2d 105, 107-10 (1976) (implied accusation of murder without evidence in a drug prosecution); *see also Chappotin v. City of New York*, 90 A.D.3d 425, 426 (1st Dep't 2011) ("counsel came close to overstepping" by arguing plaintiff "has played the [disability] system").

WCD calls Plaintiffs' counsel's argument "inflammatory," WCD Br. 21, but, it was actually benign and well "within the broad bounds of rhetorical

comment." *McDonald v. City of New York*, 172 A.D.2d 296, 297 (1st Dep't 1991). It did not "create a climate of hostility that so obscured the issues as to have made the trial unfair." *Balsz v. A&T Bus Co.*, 252 A.D.2d 458, 459 (1st Dep't 1998). Indeed, the trial court recognized there was no intent to prejudice WCD. [J.R.5419.]

Counsel's argument was well-supported and consistent with Dr. Moline's testimony. It was "'fair comment upon the evidence.'" *Selzer*, 100 A.D.3d at 163 (quoting *Cerasuoli v. Brevetti*, 166 A.D.2d 403, 404 (2d Dep't 1990)). While the article Dr. Moline relied upon dealt with ovarian cancer (also asbestos-related), not mesothelioma, [J.R.4122,] she explained the significance of the article to Plaintiffs' case:

> What I find most significant about this paper is they describe manners by which women in particular, since…only women can get ovarian cancer, can have exposure to talc. And they go through the literature about transvaginal exposure of talc and how talc can get…into the body through vaginal excursion up through into the abdominal cavity through the uterus, fallopian tubes and into the peritoneum.

[J.R.4122-23.] WCD did not object to this testimony.

Additionally, Dr. Moline opined, without objection, that "women have a different route of exposure, potential exposure than men for *mesothelioma* and that may be why *peritoneal mesothelioma* [rates for women] are actually higher." [J.R.4070 (emphasis added); *see also* [J.R.4869-70.]

Finally, as WCD acknowledges, the trial court required counsel to "clear up" the issue in a "mini-closing,"[27] [J.R.5420-21], a direction well within the broad bounds of the trial court's discretion. *Cf. Pagano*, 309 A.D.2d at 911. This Court has affirmed similar trial court decisions sustaining verdicts where the court has issued a correction to mitigate potential prejudice from summation remarks. *See Mena v. N.Y.C. Trans. Auth.*, 238 A.D.2d 159, 160 (1st Dep't 1997); *Chappotin*, 90 A.D.3d at 426.

III. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY AS TO WCD'S DUTY OF CARE.

WCD argues that the trial court incorrectly instructed the jury with a standard PJI and NYCAL charge on state-of-the-art that said, among other things: '[a] manufacturer, distributor or seller is held to the knowledge of an expert in its respective industry." [J.R.5499.]

At trial, WCD objected that the instruction was "not based on any pattern jury instruction or case law" and that it was "cumulative"[28] of other another jury instruction. [J.R.5198.] Yet, under New York law, manufacturers and distributors of asbestos-containing products *are* "held to the knowledge of an expert in its field." *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990).

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[27] Counsel issued the correction in line with the parameters set down by the court and understood to be agreed upon by the parties. [J.R.117-20].

[28] WCD has abandoned this "cumulative" objection on appeal, given its emphasis that the two instructions are "inconsistent." WCD Br. 37-39.

New York courts have consistently followed *George* over the years. *See Penn*, 73 A.D.3d at 494; *Hackshaw v. ABB, Inc.*, 2015 N.Y. Slip Op. 30043(U), 2015 N.Y. Misc. LEXIS 100, *15(N.Y. Cty. Jan. 7, 2015); *see also Frankson v. Brown & Williamson Tobacco Corp.*, 4 Misc. 3d 1002(A), 2009 N.Y. Misc. LEXIS 849, *3-4 (Kings Cty. June 22, 2004); *Scoles v. Econolodge*, 2014 N.Y. Slip Op. 31140(U), 2014 N.Y. Misc. LEXIS 2067, at *17 (N.Y. Cty. Apr. 29, 2014).

Further, the gist of *George's* point has been made by the New York Court of Appeals:

> [A] manufacturer or retailer may, however, incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale, through advancements in the state of the art, with which he is expected to stay abreast, or through being made aware of later accidents involving dangers in the product of which warning should be given to users.

Cover v. Cohen, 61 N.Y.2d 261, 274-75 (1984); *accord Baker v. St. Agnes Hosp.*, 70 A.D.2d 400, 406 (2d Dep't 1979).

Furthermore, the instruction was entirely in line with New York PJI 2:120. Indeed, the commentary to New York PJI 2:120 cites many of the cases discussed above for the substantive standard under New York law, including *Cover* and *Baker*. *See* New York PJI 2:120, at 757.

WCD also complains on appeal that the challenged instruction was "inconsistent" with another instruction (PJI 2:16) regarding the "general custom of practice" used by reasonable manufacturers, distributors and sellers at the time.

WCD Br. 38. However, WCD failed to preserve this claimed error. Before the jury's charge, WCD repeatedly and exclusively made the *diametrically opposite* objection—that the jury instructions were "cumulative" and "duplicative," not "inconsistent." [*See* J.R.5198, 5516.]

It wasn't until *after* the court instructed the jury—and they retired to begin deliberations—that WCD first mustered the inconsistency challenge.[29] *See* [J.R.5518]; CPLR 4110-b; *Klotz v. Warick*, 53 A.D.3d 976, 979 (3d Dep't 2008). Thus, the trial court recognized "this particular challenge is born of an afterthought." [J.R.5520.]

In any event, the instructions *were* consistent. As the trial court recognized, PJI 2:120 holds a manufacturer or distributor in WCD's shoes to the knowledge of an expert in their field and expects it to stay abreast of hazards in its products, whereas PJI 2:16 looks to whether WCD acted reasonably overall in light of the "general custom or practice" at the time. [J.R.5518-19.] Finally, in light of New York law holding WCD to the knowledge of an expert in the field, any inconsistency was harmless.

Accordingly, there is no reversible error in the court's state-of-the-art instruction.

[29] WCD claims to have objected before the jury began deliberations, WCD Br. 38 (citing [J.R.5514-25]), but the record shows otherwise. [*See* J.R.5513, 5525-26.]

IV. THE JURY'S APPORTIONMENT OF FAULT CONFORMS TO THE EVIDENCE.

The apportionment of fault is a question of fact for the jury and a jury's apportionment may *only* be vacated if it is not based "upon a fair interpretation of the evidence." *Loja v. Lavelle*, 132 A.D.3d 637, 640 (2d Dep't 2015).

This Court has consistently rejected challenges to jury apportionments of fault in asbestos cases. *See, e.g.*, *Marshall*, 28 A.D.3d at 256; *Lustenring*, 13 A.D.3d at 70; *Ronsini v. Garlock, Inc.*, 256 A.D.2d 250, 252 (1st Dep't 1998).

The cases to which WCD likens this case bear no resemblance. It goes almost without saying that this case does not involve an attempted suicide, *see Kim v. N.Y.C. Transit Auth.*, 27 A.D.3d 332, 338-39 (1st Dep't 2006), or a murder, *see Roseboro v. N.Y.C. Transit Auth.*, 10 A.D.3d 524, 526 (1st Dep't 2004).[30]

Wasson v. Barba, 287 A.D.2d 711, 712 (2d Dep't 2011), has even less bearing on this case. There, a government defendant was apportioned 100% of fault where a passenger was injured when a negligently driven car skidded out of control on icy and unsalted pavement, and the "jury's failure to apportion *any* fault to [the driver] is not supported by a fair interpretation of the evidence." *Id.* (emphasis added).

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[30] *See also Nash v. Port Auth. of N.Y. & N.J.*, 51 A.D.3d 337, 354 (1st Dep't 2008) (noting that *Roseboro* was "explicitly based 'on [its] facts'").

Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) is similarly inapplicable. *Malcolm* involved a decision about consolidation of 600 cases, 48 of which went to trial against 25 defendants and numerous third and fourth party defendants at over 250 work sites. *Id.* at 348. Following a yearlong trial, the Second Circuit vacated the verdict due to concerns about the impact of consolidation on "the unique circumstances" of a single case because there was an "unacceptably strong chance" that consolidation led to the jury's apportionment of an equal 9% fault to each remaining defendant, owing to the "jury throwing up its hands in the face of a torrent of evidence." *Id.* at 352. Certainly, no such circumstances exist here, and the jury's allocation is not "hard to explain" at all.

While WCD argues there is "no basis" for allocating WCD and Shulton equal fault, WCD Br. 40, the truth is that, if anything, WCD was due a *larger* share of blame. WCD ignores that it was WCD's ingredient—not any of the ingredients Shulton added later—that made DFDP dangerous. In light of the evidence presented of WCD's actual knowledge and actions, *see supra* at 19-20, it was completely reasonable that they apportion *at least* as much fault to the Defendant who tested the contaminated talc and sold it without warning.

Finally, WCD objects to the trial court's granting of Plaintiffs' directed verdict motion as to the non-Shulton settling defendants. But WCD did not meet its burden "to establish the equitable share of culpability attributable to each of the

settling defendants." *Zalinka v. Owens-Corning Fiberglass Corp.*, 221 A.D.2d 830, 831 (3d Dep't 1995); *Bigalow v. Acands, Inc.*, 196 A.D.2d 436, 438 (1st Dep't 1993).

WCD relied exclusively on Plaintiffs' interrogatory responses and a conclusory reference to Dr. Moline's cross-examination to assert that the non-Shulton settling defendants should have been placed on the verdict sheet. *See* WCD Br. 41 (citing [J.R.4298]). However, beyond that threadbare offering, WCD did not offer any competent evidence or testimony to show that the non-Shulton settling defendants' products caused Mrs. Nemeth's peritoneal mesothelioma. *See Matter of N.Y.C. Asbestos Litig. (Idell)*, 164 A.D.3d 1128, 1129 (1st Dep't 2018) (holding a defendant who fails to prove a *prima facie* case of a settling defendant's liability may not put the settling defendant on the verdict sheet). WCD's meager "proofs" does not establish that the trial court's grant of directed verdict—effectively allocating 0% fault as to each of those defendants—was "against the weight of the evidence."

Accordingly, the jury's apportionment of fault should not be disturbed.

V. THIS COURT SHOULD REINSTATE PLAINTIFFS' JURY VERDICT, WHICH DID NOT MATERIALLY DEVIATE FROM REASONABLE COMPENSATION.

As shown *supra* at 7-11, the evidence in this case fully supported the jury's monetary award for Flo's pain and suffering and Frank's loss of consortium.

Nonetheless, the trial court, partly in deference to the fact that Flo, although suffering with this disease for 46 months, died before the start of her trial, [J.R.132-33], reduced the verdict for Flo's pain and suffering from $15,000,000 to $6,000,000 and Frank's loss of consortium award from $1,500,000 to $600,000. [J.R.141.]

Astoundingly, not satisfied with this unjustified reduction, WCD seeks to reduce Plaintiffs' verdict even further. Not only should this Court reject WCD's outlandish invitation, it should instead, reinstate the jury's well-supported verdict, since it did not "materially deviate" from what constitutes "reasonable compensation."

"An appeal from a final judgment brings up for review…a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive," in which case "the appellate court may increase such judgment to a sum not exceeding the verdict…." CPLR 5501(a)(5).

This Court has exercised this power before. *See Woolfalk v. NYCHA*, 10 A.D.3d 524, 524 (1st Dep't 2004); *Ramos v. La Montana Moving & Storage*, 247 A.D.2d 333, 333-34 (1st Dep't 1998); *Perez v. Farrell Lines*, 223 A.D.2d 388, 389-90 (1st Dep't 1996); *Desa v. City of New York*, 188 A.D.2d 313, 314 (1st Dep't 1992). The reviewability does not require a cross appeal. *See Hecht v. New*

York, 60 N.Y.2d 57, 63 n.* (1983); *Rumph v. Gotham Ford*, 44 A.D.2d 792, 792-93 (1st Dep't 1974).

The amount of damages awarded to redress personal injuries is a quintessential jury question, and the jury's verdict "is entitled to great deference based upon its evaluation of the evidence." *Ortiz v. 975 LLC*, 74 A.D.3d 485, 486 (1st Dep't 2010).

Initially, a comparison of recent *jury verdicts* (rather than remitted figures) shows that the verdict here did not materially deviate from reasonable compensation. Over the last three years, juries deciding damages in mesothelioma cases in this jurisdiction have consistently awarded verdicts in the range of the present case. *See, e.g.*, *Hackshaw*, 143 A.D.3d at 485-86 ($10M for 12 months of pain and suffering); *Sweberg*, 143 A.D.3d at 483-85 ($15M; 42 months); *Miller*, 2016 N.Y. Misc. LEXIS 1557, *23-24 ($25M; 24 months); *Geritano v. A.O. Smith Water Prods.*, *Inc.,* Index No. 190374/2014 (N.Y. Cty. June 10, 2016) ($6.25M; 10 months); *Gondar v. A.O. Smith*, Index No. 190079/15 (N.Y. Cty. Feb. 10, 2017) ($22M; 17 months); *Anisansel v. AB Volvo,* Index No. 190250/2013 (N.Y. Cty. June 27, 2017) ($15M; 24 months); *Twidwell v. Goodyear Tire & Rubber*, Index No. 190136/2017 (N.Y. Cty. Aug. 18, 2018) ($40M; 41 months); *Robaey v. Air & Liquid Sys. Corp.*, Index No. 190276 (N.Y. Cty. Oct 11, 2018) ($50M; 52 months);

Murphy-Clagett v. A.O. Smith, Index No. 190311/15 (N.Y. Cty. Sept. 21, 2018) ($25M; 15 months).

By continually focusing on reducing verdicts based on prior judicial rulings rather than relying on a consensus of numerous juries granting awards for the same disease (mesothelioma) at generally consistent values (depending on duration and extent of pain and suffering), the plaintiff's right to a trial by jury is being diluted. The determination of damages, which under our system of justice is reserved for the trier of fact, is being taken out of the hands of the jury.

While this Court has previously noted that "[t]he standard for…determination is set by judicial precedent, not juries," *Paek v. City of New York*, 28 A.D.3d 207, 209 (1st Dep't 2006), time and reason have shown that the standard for reasonable compensation can no longer be set only by judicial precedent, particularly when jurors have regularly and consistently determined compensation for mesothelioma victims. As Justice Saxe wisely put it then: "The voice of a jury is the voice of the community, and it should not be so cavalierly ignored when deciding whether an award deviates materially from what would be reasonable compensation." *Id.* at 211 (Saxe, P.J., dissenting). An approach that puts no value whatsoever on the judgment of a jury of the litigants' peers unnecessarily silences that voice. The consistent reduction of verdicts and

disregard of the voice of juries divorces the notion of "reasonable compensation" from its appropriate moorings in the common law right to trial by jury.

To be sure, the trial court's remitted verdict was inappropriately low. WCD accepts that this Court has routinely held that pain and suffering damages awards of about $250,000 per month are appropriate. *See* WCD Br. 45-46 (citing *Paraica v. A.O. Smith Water Prods. Co.*, 143 A.D.3d 448, 451 (1st Dep't 2016) and *Hackshaw*, 143 A.D.3d at 486). Under that rubric, a reasonable verdict would have been $11,500,000 in past pain and suffering,[31] which is not a material deviation from the jury's verdict of $15,000,000.

Trying to minimize the horrendous ordeal Flo suffered, WCD audaciously claims, completely ignoring the compelling record in this case, that "Mrs. Nemeth did not experience serious symptoms from her peritoneal mesothelioma until March 2014, and only experienced "breakthrough pain' in her final three days of hospice care." WCD Br. 44 (citing [J.R.5013, 4165]).[32] WCD later claims, with

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[31] Likewise, the First Department has previously approved a $20,000 per month multiplier for damages for loss of consortium. *See Matter of N.Y.C. Asbestos Litig. (Brown)*, 146 A.D.3d 461, 462-63 (1st Dep't 2017). As with the pain and suffering framework, Plaintiffs in no way concede that such a multiplier is appropriate or permitted by law, but even under that approach, the award for Frank's loss-of-consortium claim should be increased to $960,000.

[32] Page 4165 contains Dr. Moline's description of what "breakthrough pain" is, but it is not limited to the last 2 days of her life. The breakthrough pain was simply reported to hospice when it took over her care on March 3, 2016. The other page WCD cites contains Flo's testimony that she underwent multiple surgeries *early in her illness* (while undergoing an intensive course of

little concern for what the record actually reflects, that "she lived relatively symptom free for the first 16 months following her diagnosis." WCD Br. 48.

Undoubtedly, Flo had constant and excruciating pain toward the end of her life that no level of medication could control. But even as the trial court recognized, the horrendous suffering that she experienced over the course of her disease "is not just limited to breakthrough pain." [J.R.130.]

The truth is that "severe and crippling symptoms, as well as tremendous physical and emotional pain," saturated the 46 months Flo endured a mesothelioma that began in her abdomen and migrated to her lungs, which steadily made it impossible for her to enjoy life in any way including the simple ability to breathe without gasping for air. *See supra* at 9-11.

Accordingly, further reduction of the jury's well-supported verdict is inappropriate, and this Court should instead reinstate the jury's verdict. At a bare minimum, the verdict should be increased above the remitted amount imposed by the trial court to at least coincide with past remitters.

VI. THE TRIAL COURT INCORRECTLY APPLIED G.O.L. § 15-108.

In cases involving multiple defendants, some of whom settle before trial, G.O.L. § 15-108(a) provides a nonsettling defendant who proceeds to trial a setoff

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chemotherapy) and had to have "25 pounds of fluid" drained from her abdomen, a process she describes as "very painful." [J.R.5013.] According to WCD, these are not serious symptoms.

from the eventual verdict equal to the amount paid in settlement, or in the amount of the released tortfeasor's equitable share of the damages, whichever is greater.

The Court of Appeals has clarified that when fault has been apportioned for settling defendants a court applying the statute should reduce the verdict "either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater." *Matter of N.Y.C Asbestos Litig. (Didner)*, 82 N.Y.2d 342, 351 (1993).[33] This is known as the "aggregate" approach, and it stands in contrast to the defendant-by-defendant approach in which the greater value of either the settlement monies or the equitable share of damages is determined for each individual defendant. *Id.*

The *Didner* court explained the aggregate approach encourages settlement and shares losses equitably among wrongdoers, adding "[a]t the same time, it avoids the potential injustice [where] a nonsettling defendant…take[s] advantage

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[33] Five months before its decision in *Didner*, the Court of Appeals decided how a court should calculate the appropriate setoff "where equitable liability has been determined for some settling defendants but not for others." *Williams*, 81 N.Y.2d at 444; *see also Didner*, 82 N.Y.2d at 345 & n.1 (recognizing *Williams* hadn't decided whether aggregation is appropriate). In such a case, the total verdict is reduced first by the value of settlement monies received from defendants whose equitable share of fault has not been assessed, and then the verdict is subsequently reduced by the greater of either the apportioned pro rata shares of fault of settling defendants or the settlement monies those defendants paid. *Williams*, 81 N.Y.2d at 445. That approach was inappropriately adopted by the trial court despite the fact that all equitable shares had been assessed.

of the settlements of the apportioned shares of the settling defendants so as to reduce the amount that it pays below its equitable share by cutting the compensation the jury has awarded to plaintiff." *Id.* Thus, where 18 defendants went to trial, and 16 settled before the verdict but appeared on the verdict sheet (including some exonerated at trial, being apportioned 0% of the fault), it was appropriate to aggregate their equitable shares of fault and separately aggregate the settlement monies paid, and then deduct the greater of the two aggregate numbers from the remaining nonsettling defendants' liability. *Id.* at 347 & n.3, 353.

"[A] construction [of G.O.L. § 15-108(a)] which places a nonsettling defendant in an advantageous position vis-à-vis settling tortfeasors is to be avoided." *Matter of N.Y.C. Asbestos Litig. (Dudick)*, 188 A.D.2d 214, 218 (1st Dep't 1993), *aff'd* 82 N.Y.2d 821 (1993) *Dudick* continues:

> [T]he credit to be given a nonsettling defendant should not be derived by a method which tends to undercompensate the plaintiff. That is, the plaintiff should receive the amount of his verdict reduced only insofar as the plaintiff has agreed to accept less in settlement than the share of damages attributable to the settling tortfeasors.

Id. After all, to encourage settlement, "the plaintiff must be free from the misapprehension that settlement will be disadvantageous, and the defendant must be free from any illusion that, by proceeding to trial, exposure to liability may be greatly reduced." *Id.*

As in *Didner*, the equitable share of fault for each settling defendant here has been determined, and so *Didner*'s aggregation rule applies. However, the trial court neglected its own determination of the equitable shares of fault for the non-Shulton settling defendants and inappropriately molded the verdict under the rubric of *Williams*. *See* n.33 *supra.*

However, the circumstances in *Williams* are not present in this case. There, the Court of Appeals emphasized that "no equitable share was determined as to the four defendants who settled before trial." 81 N.Y.2d at 444. The Court also noted that of the four settling defendants "we do not know what their equitable share should be" *Id.* at 441. *See also Whalen v. Kawasaki Motors Corp.*, 92 N.Y.2d 288, 294 (1998) ("The chief difficulty [in *Williams*] lay in that no equitable shares were determined for the four defendants who settled before trial, so that General Obligations Law § 15-108 could not be applied literally.").

That is not the case here. There can be no mistake that the equitable share of each non-Shulton settling as determined by the trial court is zero. Accordingly, a comparison between the equitable share of the verdict and the settlement monies paid in this case is straightforward. The settling defendants totaled 50% of the equitable apportionment of fault of a $6,600,000 verdict ($3,300,000), and the total value of their settlements was $1,432,500. G.O.L. § 15-108(a) calls for reducing

the verdict by the larger of those numbers. Accordingly, the verdict should have been reduced by $3,300,000, leaving a net verdict of $3,300,000.

The trial court, however, erroneously ignored *its own finding* in its directed verdict and treated the non-Shulton settling defendants as if no apportionment of fault existed as to them, reducing the verdict by the amount of non-Shulton settlement monies ($732,500) before deducting Shulton's pro rata share of the fault from the net verdict (50% of $5,876,500). In effect, the court performed an individual defendant-by-defendant reduction contrary to *Didner*. That left Plaintiffs with less recovery than intended by the jury or expected under New York law (i.e., $2,933,750 instead of $3,300,000).

Put simply, the nonsettling defendant should not be given a free ride to reduce the verdict even if it hasn't met its burden of proving the liability of settling defendants. Accordingly, the judgment should be re-calculated under the rubric of *Didner*.

CONCLUSION

This Court should affirm the trial court's judgment, as modified to reinstate the jury's verdict and to correctly apply the setoff framework of G.O.L. § 15-108.

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