To Be Argued By:
BRYCE L. FRIEDMAN
Time Requested: 15 Minutes

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

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.; THE SCOTTS COMPANY LLC; UNION CARBIDE CORP.,

Defendants,

WHITTAKER CLARK & DANIELS, INC.,

Defendant-Appellant-Cross-Respondent,

(*Caption continued on inside cover*)

BRIEF FOR DEFENDANT-APPELLANT-CROSS-RESPONDENT

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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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

1. Did the trial court err by denying Defendant-Appellant Whittaker Clark & Daniels, Inc.'s ("WCD") CPLR 4404(a) motion for judgment as a matter of law where Plaintiff failed to meet its burden at trial to show WCD's talc used in Shulton, Inc.'s ("Shulton") Desert Flower Dusting Powder ("Desert Flower") was capable of causing peritoneal mesothelioma (general causation) and that Mrs. Florence Nemeth ("Mrs. Nemeth") was exposed to a sufficient quantity of WCD's talc through her use of Desert Flower to cause peritoneal mesothelioma (specific causation), as required by *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), *Cornell v. 360 W. 51 St. Realty, LLC*, 22 N.Y.3d 762 (2014), *Sean R. v. BMW of North America, LLC*, 26 N.Y.3d 801 (2016), and *In re: New York City Asbestos Litigation*, 148 A.D.3d 233 (1st Dep't 2017) ("*Juni II*"), *aff'd*, 32 N.Y.3d 1116 (2018)?

Answer: Yes.

2. Did the trial court err by denying WCD's CPLR 4404(a) motion to vacate the verdict and order a new trial based on (1) an improper jury charge that held WCD to the standard of an "expert in the field" rather than the standard of a reasonable manufacturer, distributor, or seller and (2) the evidence being insufficient to show that Plaintiff failed to prove that Desert Flower actually contained WCD's talc, that the talc used in Desert Flower was contaminated with asbestos, and that

Mrs. Nemeth inhaled respirable amounts of asbestos fibers from her use Desert Flower?

Answer: Yes.

3. Did the trial court err by denying WCD's CPLR 4404(a) motion to vacate the verdict and order a new trial because the verdict was infected by prejudicial and improper statements made by Plaintiff's counsel in summations that Mrs. Nemeth's peritoneal mesothelioma could have been caused by pelvic exposure to Desert Flower, statements unsubstantiated by a single piece of record evidence?

Answer: Yes.

4. Did the trial court err by denying WCD's CPLR 4404(a) motion to vacate the jury's allocation of 50% of the fault to defendant, while allocating an equivalent 50% of the fault to the manufacturer of the product to which Mrs. Nemeth allegedly had direct exposure and that had a supervening duty to warn?

Answer: Yes.

PRELIMINARY STATEMENT

This is an appeal from a post-trial judgment in an asbestos-related personal injury case involving *peritoneal* mesothelioma allegedly caused by the pre-1972 use of a cosmetic dusting powder known as Desert Flower. Defendant-Appellant WCD purportedly supplied the talc used as an ingredient in the powder and the talc is alleged to have been contaminated with asbestos such that it caused Mrs. Nemeth's *peritoneal* mesothelioma and ultimate death. However, the evidence does not come close to meeting the legal standard to impose liability on WCD. In addition, the trial court instructed the jury incorrectly and made a series of rulings that unfairly prejudiced WCD.

First, the record evidence does not meet the legal requirements of causation as established by the Court of Appeals in *Parker v. Mobil Oil Corporation*, 7 N.Y.3d 434 (2006), more recently developed and applied by the Court of Appeals in *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014), *Sean R. v. BMW of North America, LLC*, 25 N.Y.2d 801 (2016), and *In re: New York City Asbestos Litigation*, 32 N.Y.3d 1116 (2018) ("*Juni II*"). Here, Plaintiff was required to enter into evidence scientific proof of general causation—evidence that a consumer's use of talc could cause *peritoneal* mesothelioma—and specific causation—evidence that Mrs. Nemeth developed peritoneal mesothelioma as a result of using Desert Flower. Plaintiff relied on evidence of general causation that was not tied at all to WCD's

talc or to Mrs. Nemeth's particular cancer – *peritoneal* mesothelioma. With respect to general causation, Plaintiff's expert, Dr. Jacqueline Moline ("Dr. Moline"), testified she was not aware of any epidemiological or inhalation studies linking consumer use of talc to peritoneal mesothelioma. With respect to specific causation, Dr. Moline provided the same expert opinion testimony as she did in prior New York "asbestos" cases—namely, Mrs. Nemeth's "cumulative exposures" caused her mesothelioma. This Court and the Court of Appeals found this type of causation testimony to be legally insufficient under New York law, justifying an award of judgment as a matter of law to defendant under CPLR 4404(a). *See Juni II*, 148 A.D. 3d at 263, *aff'd*, 32 N.Y.3d 1116 (2018). Compounding the error, the trial court refused to allow WCD's experts Dr. Suresh Moolgavkar ("Dr. Moolgavkar") and Dr. Robert Adams ("Dr. Adams") to testify that, even if contaminated, Desert Flower played no role in the development of Mrs. Nemeth's peritoneal mesothelioma. If allowed to testify, they would have explained to the jury exactly how and why Dr. Moline's testimony was insufficient.

Second, the jury's verdict against WCD should be vacated because Plaintiff failed to prove the talc WCD supplied to Shulton was (1) contaminated with asbestos and (2) used in Desert Flower. Without connecting WCD to Desert Flower, Plaintiff failed to show WCD caused Mrs. Nemeth's incredibly rare cancer. Again, the trial court refused to allow WCD's experts to testify and explain the talc WCD

supplied to Shulton, assuming Mrs. Nemeth used a product which contained talc supplied by WCD, could not have caused Mrs. Nemeth's peritoneal mesothelioma.

Third, compounding the errors regarding the admission and exclusion of expert testimony, the trial court erroneously instructed the jury to evaluate WCD's behavior under an expert's standard of care, rather than the standard applied to a reasonable distributer of talc at the time.

Fourth, the jury's allocation of equal blame to WCD and to Shulton was against the weight of the evidence. Shulton manufactured and sold the product that allegedly harmed Mrs. Nemeth, and was in the best position to include warnings on the product. Additionally, the trial court compounded the unfair result against WCD by excluding from the verdict sheet Georgia Pacific LLC, Otis Elevator Company, Westinghouse Elevator Company, Dover Corporation, and Schindler Elevator Corporation, all of which allegedly exposed Mrs. Nemeth to asbestos.

Fifth, recognizing the weakness of his case, Plaintiff's counsel's summation improperly and prejudicially referred to facts not established in the record evidence, tainting the record against WCD and influencing the jury's view of the evidence and, eventually, its verdict. For instance, Plaintiff's counsel submitted to the jury that Mrs. Nemeth's peritoneal mesothelioma may have been caused by pelvic exposure to talc, a submission unsubstantiated by a single piece of record

evidence. Although the trial court eventually recognized the error, it failed to sufficiently make a curative instruction to the jury.

Finally, the as-remitted damages figures of $6 million for Mrs. Nemeth's pain and suffering and $600,000 for Mr. Nemeth's loss of consortium remains excessive in light of the circumstances of the case and damages awarded in comparable cases, and should be remitted to no more than $4.5 million for pain and suffering and $450,000 for loss of consortium, if the other errors are allowed to stand.

As explained more fully below, the May 30, 2017 decision and order denying WCD's CPLR 4404(a) motion seeking (1) judgment as a matter of law, notwithstanding the verdict, (2) dismissal of Plaintiff's complaint against WCD as a matter of law or alternatively, (3) a new trial on the liability and damages issues, (the "Decision and Order"), and the August 22, 2017 final judgment (the "Judgment") entered by the Supreme Court, New York County (Shulman, J.), should be vacated and judgment entered for WCD.

FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant WCD's Business

WCD was a minerals and pigments distributor. J.R. 4894-95.[1] WCD distributed minerals, including cosmetic-grade talc, manufactured by other entities. J.R. 4894-97. WCD acquired the talc from a non-party miner, J.R. 4909-10, and then distributed the talc in large, 50-pound bags to its purchasers, J.R. 4895-96.

Depending on its purity, color, and "slip"—the ability for slipperiness—different types, or grades, of talc were used for different purposes. J.R. 4916-18. The closer you can get to "true" or "pure" talc, free of trace materials like iron, the higher the grade of talc. J.R. 4916-18. Not all talc is contaminated with asbestos and the composition of talc varies from mine to mine. J.R. 3472. Around 1971, cosmetic product manufacturers and suppliers, including WCD, started testing their products for asbestos content in talc. J.R. 4993. That is also the same year Mrs. Nemeth stopped her daily use of Desert Flower, which Plaintiff alleged included asbestos-contaminated talc supplied by WCD. *See* J.R. 635.

Shulton was a manufacturer of perfumes, body fragrances, and talcum powder for personal consumer products, including Desert Flower. J.R. 1386. To manufacture its talcum powder, Shulton had a "blanket order" for talc from WCD,

[1] WCD no longer conducts traditional business activities, including sales or distribution.

J.R. 967, suggesting WCD supplied talc to Shulton from mines located in North Carolina, Alabama, and the Val Chisone region of Italy. J.R. 981-82, 5295. Shulton got additional talc from other suppliers. *Id.* Upon receiving the talc, Shulton tested it in a small on-site lab to assess the quality of the talc and to determine whether any contaminants were present. J.R. 3435, 3442. Shulton then mixed the talc with a flowing agent and a perfume to create the talcum powder product it then sold to retailers. J.R. 3430-31. After mixing, Shulton tested its products again to determine whether any contaminants were present. J.R. 3439.

B. Mrs. Nemeth's Alleged Exposures to Asbestos

Mrs. Nemeth used Shulton's Desert Flower "every day" from 1960 through 1971. *See* J.R. 625-35. Mrs. Nemeth used Desert Flower after she showered in the bathroom and applied the powder over her body. J.R. 637. Applying the powder took approximately two minutes every time she used it. *Id*. After use, Mrs. Nemeth then spent approximately five minutes cleaning any powder that fell to the floor during her use. J.R. 4147-48. Mrs. Nemeth testified at her deposition there were no windows or ventilation in the bathroom. J.R. 1377-78.

From 1966 through 1975, Mrs. Nemeth performed extensive home renovations, both on her own home and when helping her friends renovate their homes. J.R. 7101-02. During these renovations, Mrs. Nemeth worked with joint compound and caulking compound. J.R. 7102. She also performed work on ceilings

and floor tiles. *Id.* She performed caulking on windows and doors and removed a wall from her home during a renovation. *Id.* Plaintiff's expert testified Mrs. Nemeth was exposed to asbestos through these home renovation projects. J.R. 4307, 4371-72.

Mrs. Nemeth said she was also exposed to asbestos through products she used as a result of her maintenance, treatment, and care of her lawn and garden throughout her life. J.R. 7101. In maintaining her lawn, Mrs. Nemeth used "vermiculite-based lawn care products" that were allegedly contaminated with asbestos. *Id.*

Mrs. Nemeth said she was exposed to asbestos through laundering her son's work clothing when he worked as an elevator mechanic and repairman during the 1980s. J.R. 7103. Mrs. Nemeth's son spent time working with products containing asbestos during his employment and carried asbestos dust home on his clothing when he returned from work. *Id*. Mrs. Nemeth was allegedly exposed to asbestos when she washed and cleaned his clothing. *Id*.

C. Mrs. Nemeth's Diagnosis – Peritoneal Mesothelioma

Mrs. Nemeth was diagnosed with *peritoneal* mesothelioma on November 12, 2012. J.R. 4155, 7093. Mesothelioma is a tumor of the mesothelial cells, which line the body's internal organs. J.R. 4046. Mesothelioma differs based on the location where the tumor develops. *Id.* The most common location of

mesothelioma is in the mesothelial cells surrounding the lungs, known as the pleura. J.R. 4046-47. Mrs. Nemeth was diagnosed with *peritoneal* mesothelioma. J.R. 4155, 7093. *Peritoneal* mesothelioma occurs in the gut or abdomen. J.R. 3269. It is even more rare than pleural mesothelioma and, as the trial court acknowledged, "very different" from pleural mesothelioma. J.R. 2390. In women, *peritoneal* mesothelioma cases are often idiopathic, meaning it can arise spontaneously or from an obscure or unknown cause. J.R. 4070.

While Mrs. Nemeth was diagnosed with mesothelioma in November 2012, she was asymptomatic, other than bloating, for approximately 16 months. *See* J.R. 5011-12. In March 2013, Mrs. Nemeth received treatment to relieve the bloating and was subsequently "fine for a year." J.R. 5013. Plaintiff's medical expert testified Mrs. Nemeth "probably felt a lot better" after the treatment "because she had less fluid and less distention." J.R. 4158. Mrs. Nemeth was able to live a regular life for much of the time following her diagnosis. For example, Mrs. Nemeth's daughter testified that Mrs. Nemeth, a "daredevil in life," was healthy enough to go on a roller coaster ride while she was being treated. *See* J.R. 3454. She also went on vacation with her family and was able to travel "all over the state, wherever she wanted to go." J.R. 5027. Only in her final three days did Mrs. Nemeth experience "breakthrough pain." J.R. 4165. Mrs. Nemeth passed away on March 5, 2016. J.R. 4164.

D. Pre-Trial Proceedings

Plaintiff filed suit on April 16, 2014, naming WCD and twelve other defendants. *See* J.R. 144-45. Plaintiff settled with five of the defendants before trial. *See id*. The case proceeded to trial against WCD alone. *See id.*

On February 23, 2017, the trial court denied WCD's motion in limine to preclude Plaintiff's causation expert, Dr. Moline, from testifying that cosmetic talc was a substantial contributing factor to the development of Mrs. Nemeth's peritoneal mesothelioma. J.R. 2431-32. WCD argued Dr. Moline's testimony failed to meet the requirements of general and specific causation as articulated in *Parker*, 7 N.Y.3d, and related cases. J.R. 2389-91. Specifically, WCD argued that Dr. Moline's testimony failed to show both (1) general medical causation linking peritoneal mesothelioma to cosmetic talc and (2) specific medical causation linking Desert Flower to Mrs. Nemeth's development of peritoneal mesothelioma, or to the specific talc distributed by WCD. J.R. 2389-94.

WCD also moved to foreclose Plaintiff's expert Sean Fitzgerald ("Mr. Fitzgerald") from (1) proffering testimony regarding ore samples and vintage product samples and (2) producing evidence of Shulton's other products for purposes of establishing Desert Flower was contaminated with asbestos. J.R. 2451. WCD moved to foreclose Mr. Fitzgerald's testimony on the basis that, among other things, the "vintage" products he tested were purchased on eBay and there was no

proof they were not independently contaminated. J.R. 2453. The trial court denied WCD's motion. J.R. 2457.

On that same day, the trial court precluded WCD's experts, Dr. Moolgavkar, from testifying on issues of medical causation, and Mr. Adams, from performing a dose reconstruction. J.R. 2488, 2500. If allowed to testify at trial, Dr. Moolgavkar would have opined that (1) even if Mrs. Nemeth's Desert Flower contained asbestos, as alleged, it "played no role in the development of her peritoneal mesothelioma" and (2) unless Mrs. Nemeth had exposure to either substantial levels of asbestos from an unknown source or "to ionizing radiation," then her "peritoneal mesothelioma arose spontaneously." J.R. 393. Dr. Moolgavkar would have opined that "epidemiologic studies of talc exposure, whether or not contaminated with asbestos, provide no evidence of an increased risk of mesothelioma." J.R. 383. Mr. Adams would have opined that Mrs. Nemeth's alleged exposure through her use of Desert Flower, assuming it was contaminated, "would reasonably be expected to have resulted in a cumulative lifetime exposure to asbestos . . . within the range associated with lifetime exposure to ambient background asbestos levels . . . and, therefore, is not a known risk factor for the development of mesothelioma." J.R. 472.

This Court's decision in *Juni II* was entered after motion in limine decisions but before trial. J.R. 2234. Therefore, WCD renewed its motion in limine based on *Juni II*, which the trial court denied on March 3, 2017. J.R. 2233-37.

E. Trial Proceedings

Trial began on March 9, 2017. J.R. 2563. At trial, Plaintiff failed to lay the necessary foundation showing WCD was liable for Mrs. Nemeth's development of peritoneal mesothelioma. Plaintiff was required to show (1) Shulton used talc supplied by WCD as an ingredient in Desert Flower; (2) WCD's talc supplied to Shulton was contaminated with asbestos; and (3) WCD knew or should have known its talc was contaminated with asbestos and therefore had a duty to warn Mrs. Nemeth of the risk.

1. There is No Evidence Linking Asbestos-Contaminated Talc to WCD

Talc can vary significantly depending on its grade and the region from which it is mined. J.R. 3174, 3566-67. Plaintiff offered no evidence that WCD's source mines included talc contaminated with undetectable levels of asbestos. Plaintiff's "geological expert," Mr. Fitzgerald, testified it is not the case that all talc is contaminated with asbestos and the makeup of talc may vary from mine to mine. J.R. 3472. Mr. Fitzgerald did not identify the specific mines from which talc distributed by WCD was obtained and distributed to Shulton. J.R. 3598-3601. Mr.

Fitzgerald did not offer evidence that Mrs. Nemeth's alleged use of Desert Flower included talc that was contaminated with asbestos. J.R. 3503-04.

WCD sourced talc from the Val Chisone region in Italy. J.R. 981-82. Mr. Fitzgerald, relying on studies he reviewed, testified that some cosmetic talc from the Val Chisone region was contaminated with asbestos. J.R. 2913-15, 3128-29. Mr. Fitzgerald was not able to testify that WCD sourced talc from any particular mine in the region that was identified as having asbestos-contaminated talc. J.R. 3616-17, 3697, 3703-04, 3711.

Mr. Fitzgerald was unable to link a mine that WCD sourced from in Italy to asbestos contamination:

> Q: With respect to talc that [WCD] could have sourced from Italy, can you tell us if there is a study, a document that says that a mine that [WCD] actually purchased talc from prior to '72 was contaminated?
> . . .
> A: Not a specific named mine, just the region itself.
> Q: So, is the answer no? Is the answer to my question no?
> A: I believe that it is.
> Q: That the answer is no?
> A: I believe the answer is no. J.R. 3616-17

Specifically, Mr. Fitzgerald testified that:

> The Court: What you're saying is you believe the talc came from a certain region, but you can't pinpoint a specific mine in that region. Is that what you're saying, sir, to answer his question?
> The witness: Yes, sir, that's correct.
> . . .
> The Court: I was able to assist, I hope, in trying to get an answer to the question as to whether Mr. Fitzgerald was able to identify a specific

> mine in the Val Chisone region. He said he couldn't identify a specific mine, but he was able to based on information he learned . . . determine that the talc came from a certain region. J.R. 3599-601.

Mr. Fitzgerald testified that some Alabama talc was contaminated with asbestos. J.R. 3021-33, 3693-96. However, he did not testify that WCD purchased talc from any sources contaminated with asbestos prior to 1972, by which time Mrs. Nemeth stopped using Desert Flower. J.R. 3693-94, 3697. Mr. Fitzgerald was unable to provide any article or study identifying a WCD-source mine in Alabama as having asbestos-contaminated talc. J.R. 3697.

Mr. Fitzgerald testified that some North Carolina talc was contaminated with asbestos. J.R. 2988-3019. However, he was not able to testify that WCD purchased talc from a source that provided asbestos-contaminated talc prior to 1972. J.R. 3711. *Mr. Fitzgerald failed to link WCD's source mines to talc contaminated with asbestos. Id.*

Mr. Fitzgerald cited tests conducted by Dr. Seymour Lewin ("Dr. Lewin"), of New York University, who was hired by the FDA in 1971 to test cosmetic talcum powders in certain commercial customer products. J.R. 3130-32. Mr. Lewin's study found asbestos in 17 samples of the 100 different cosmetic talcum products it tested. J.R. 3132. Importantly, Dr. Lewin's study did not test Desert Flower, the product at issue in this case, nor did Dr. Lewin, Mr. Fitzgerald, or

Plaintiff ever demonstrate that the ingredients, much less the talc supplier or mine source, were the same across any other tested products. *See* J.R. 3132-36.

Mr. Fitzgerald also cited to and relied on historical studies of talc WCD had outside labs perform starting in 1971. *See* J.R. 3138-42. Of the many tests WCD ran, only two revealed detectable levels of tremolite or chrysotile fibers, one of which was conducted in 1972, a year after Mrs. Nemeth stopped using Desert Flower. *See* J.R. 3131-42. There was no evidence offered, however, linking this talc to Shulton or to Desert Flower, or evidence suggesting such talc was ever sold for consumer use.

Mr. Fitzgerald testified about a number of other grades of talc and source regions of talc that had no established link to WCD or to Shulton. *See, e.g.*, J.R. 2163-70. In an attempt to connect this evidence, Plaintiff argued that WCD may have "blended" talc products to meet cost concerns, without evidence linking such talc to any product used by Mrs. Nemeth. J.R. 2437.

2. WCD Was Unfairly Precluded From Establishing the Formula for Desert Flower

Plaintiff only provided general testimony that Desert Flower contained talc, perfume, and a flowing agent, without showing the jury the exact formula, and WCD was precluded from asking Mr. Fitzgerald about the "formula card" for Desert Flower to show he did not know if it contained WCD-supplied talc. J.R. 3788, 3798.

The preclusion was prejudicial because Mr. Fitzgerald was unable to specify whether WCD talc was even used in Desert Flower.

3. There is Insufficient Medical Causation Evidence Linking Mrs. Nemeth's Peritoneal Mesothelioma to WCD's Talc Product

Plaintiff offered Dr. Moline in an effort to meet its burden on general and specific causation – *i.e.* to show that consumer use of cosmetic talcum powder can cause peritoneal mesothelioma and that Mrs. Nemeth inhaled a sufficient dose of respirable asbestos fibers from her alleged use of Desert Flower to cause her peritoneal mesothelioma. Dr. Moline offered virtually the same testimony this Court and the Court of Appeals found insufficient in *Juni II*.

a. Dr. Moline Failed to Link Consumer Use of Cosmetic Talcum Powder to Peritoneal Mesothelioma

On general causation, Dr. Moline concluded there is an *association* between the use of cosmetic talc and peritoneal mesothelioma, but did not offer any study, analysis, or opinion identifying what the "significant" level of exposure is that *causes* peritoneal mesothelioma. J.R. 4883 ("Q: [D]id you define anywhere in your report . . . what you believe significant exposure is? A: Not in any numeral value."). Even more egregious, Dr. Moline failed to identify epidemiological studies demonstrating consumer use of cosmetic talcum powder causes or even increases the risk of developing peritoneal mesothelioma, and was unable to point to studies

that break down the risk of developing mesothelioma between pleural and peritoneal mesothelioma. J.R. 4439-40. On cross-examination, Dr. Moline unequivocally confirmed there were no "epidemiological or inhalation studies of consumer use of talc." J.R. 4439.

Instead of relying on epidemiological studies, Dr. Moline relied on seven articles she claimed showed that asbestos in talc can cause peritoneal mesothelioma. The articles were an insufficient basis for her opinion as a matter of law, because they were not human health studies, did not express dose quantifications (by either estimate or comparison), involved *pleural* thickening, not *peritoneal* mesothelioma, and were limited to individual case studies. *See* J.R. 4412-48; *see also infra* Section I.A.1.

b. Dr. Moline Failed to Provide an Admissible Scientific Foundation of a Level of Exposure to Asbestos from Mrs. Nemeth's Use of Desert Flower to Link it to Her Peritoneal Mesothelioma

On specific causation, Dr. Moline did not establish or quantify the specific amount of asbestos she believed Mrs. Nemeth inhaled through her use of Desert Flower, or that this amount was sufficient to have caused her peritoneal mesothelioma.

Dr. Moline offered the same testimony that this Court found was insufficient in *Juni II*. J.R. 4298; *see Juni II*, 148 A.D.3d at 236-37. She said Mrs.

Nemeth developed peritoneal mesothelioma through her "cumulative exposures" to asbestos, including to Desert Flower, which, along with the other exposures, was a "substantial cause" of her extremely rare cancer. J.R. 4298 ("I said all of her exposures contributed to her disease."). Dr. Moline agreed that "not every inhalation of asbestos fibers results in peritoneal mesothelioma" and that some exposures to asbestos are trivial and do not increase a person's risk of developing mesothelioma. J.R. 4819-21. Dr. Moline testified that, on some occasions, mesothelioma may develop without exposure to asbestos. J.R. 4824-25.

In response to a question from WCD's counsel whether it was important to know how much Desert Flower Mrs. Nemeth used each day, Dr. Moline testified that all that was important to her to determine Desert Flower caused Mrs. Nemeth's peritoneal mesothelioma was that Mrs. Nemeth "used [Desert Flower] regularly in a manner which would elaborate dust that she had potential to breathe in." J.R. 4839-40. Dr. Moline offered this testimony despite admitting not all asbestos exposures cause peritoneal mesothelioma, J.R. 4819-21, and an industrial hygienist could recreate Mrs. Nemeth's use of Desert Flower and measure the respirable amount of asbestos, J.R. 4842-44, which is required to show specific causation under the law. *See Juni II*, 148 A.D.3d 233 at 237.

c. Mr. Fitzgerald's "Releasability" Test Does Not Save Dr. Moline's Causation Opinions

Plaintiff did offer a purported "releasability" simulation test performed by Mr. Fitzgerald, who is not an industrial hygienist. J.R. 3178-80. However, Mr. Fitzgerald is a geologist and not qualified to perform a simulation to quantify the alleged exposure. J.R. 3184. WCD's objected to the test on the grounds that it went far beyond Mr. Fitzgerald's expertise, which the trial court overruled. J.R. 3184-87.

Mr. Fitzgerald measured the amount of asbestos fibers released into the air by using Desert Flower. J.R. 3178-80. He used "vintage" samples of various products obtained from eBay and manipulated them in a "glove box" to purport to simulate Mrs. Nemeth's use of the product in her five-by-seven foot bathroom, "to see what happens when it goes in the air" and if "asbestos and talc is also released in the air." J.R. 3223-34, 3178-84. Mr. Fitzgerald opined that if Desert Flower were contaminated with asbestos, it would have been "significantly releasable," meaning that the asbestos levels he tested were greater than the "levels of concern we would see that [we] would be concerned about in the air our children breathe." J.R. 3182-85, 3200. Based on Mr. Fitzgerald's testimony, Dr. Moline then testified that the asbestos levels Mr. Fitzgerald tested were similar to those in articles showing increased "risks of mesothelioma" (even though Mr. Fitzgerald did not offer any testimony about quantifiable levels that could be inhaled). J.R. 4108-09. Further,

the articles Dr. Moline referenced related to *pleural* mesothelioma rather than *peritoneal* mesothelioma. J.R. 4108. Mr. Fitzgerald's releasability test was an insufficient foundation for Dr. Moline's testimony.

4. Plaintiff's Motion to Exclude Article 16 Defendants Was Improperly Granted

Prior to the jury's verdict, Plaintiff moved to exclude defendants "Georgia Pacific, DAP, Otis, Schindler, and any other equipment manufacturer or product listed in Mrs. Nemeth's interrogatories," (the "Article 16 Defendants") from the verdict sheet, arguing there was insufficient evidence linking the companies to asbestos and to Mrs. Nemeth's rare cancer. J.R. 5163-64. The trial court granted the motion, refusing to allow WCD to argue in the alternative that, to the extent the jury found that Mrs. Nemeth's peritoneal mesothelioma *was* caused by asbestos exposure, it should be able to consider all of the asbestos exposures included in Mrs. Nemeth's interrogatories and considered by her medical causation expert. J.R. 5170. As a result of the trial court's rulings, WCD was allowed to establish an Article 16 defense against only Shulton. *See* J.R. 7553-58.

5. Plaintiff's Summation

In closing, Plaintiff's counsel improperly introduced the inflammatory theory that Mrs. Nemeth may have developed peritoneal mesothelioma through pelvic exposure. J.R. 5337-38 ("[A]s 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. WCD immediately objected, but the trial court permitted Plaintiff's counsel to continue after Plaintiff's counsel asserted "it's evidence in this case." J.R. 5338. The evidence Dr. Moline offered, however, is that pelvic exposure to asbestos can cause ovarian cancer. J.R. 4122.

The trial court later recognized the error. J.R 5420-21 ("I don't believe that [Dr. Moline] gave an affirmative opinion that Mrs. Nemeth's peritoneal mesothelioma was caused by both breathing the Desert Flower Dusting Power and having it enter her body transvaginally. I don't believe we got that specific opinion with precise facts to support that type of exposure and an understanding of how that type of exposure can cause peritoneal mesothelioma, pathophysiologically, respectfully."). However, the trial court refused to give a curative instruction and its alternative cure was insufficient—allowing Plaintiff's counsel to address the issue "in sort of like a mini-closing." J.R. 5420-21. The court instructed Plaintiff's counsel to go to the jury and "clear it up." J.R. 5421-22.

Plaintiff's counsel did not clear it up. Plaintiff's counsel said to the jury, uncorrected by the trial court and with no opportunity given to WCD to respond, that:

> What I would like you to do and what I - - and what the evidence shows in this case is that we are focused on the air born particulate and the fact that Flo said she breathed that particulate in. Even though the literature may suggest something that Dr. Moline touched upon, the case is really about what was released into the air, tie that up with Mr. Fitzgerald's simulation. And I just wanted to reiterate that. J.R. 5479.

WCD again objected. *Id*.

6. The Jury's Verdict

On April 7, 2017, the jury rendered a verdict in favor of Plaintiff, apportioning 50% of the fault to WCD and 50% to Shulton. J.R. 5535. The jury awarded $15 million to Mrs. Nemeth for her past pain and suffering and $1.5 million to Francis Nemeth for his loss of consortium. J.R. 5535-36. WCD thereafter moved for entry of judgment notwithstanding the verdict, dismissal of the complaint as a matter of law or, a new trial, or, in the alternative, remittitur of damages. J.R. 2289-90. On May 30, 2017, the trial court denied the entire motion, except to vacate the $15 million award and order a new trial on damages unless Plaintiff stipulated to reduce the award to Mrs. Nemeth for her past pain and suffering to $6 million and to reduce the jury's award to Francis Nemeth for his loss of consortium to $600,000 (the "Order"). J.R. 7-74, 2327-28.

On May 31, 2017, in his proposed judgment, Plaintiff recited he had "settled and discontinued the actions against CBS Corporation, General Electric Company, The Procter & Gamble Company, as successor-in-interest to The Shulton

Group and/or Shulton Inc., Otis Elevator Company, and Georgia-Pacific LLC with the aggregate sum of all settlement amounts paid, or recited to be paid, to Plaintiff being One Million, Four Hundred and Thirty-Two Thousand, Five Hundred and 0/100 Dollars ('$1,432,500.00')." J.R. 2339. Of these settling defendants, only Shulton appeared on the verdict sheet and was apportioned fault. *See id*. WCD's proposed judgment, submitted on June 14, 2017, subtracted these non-Shulton settlements, pursuant to application of G.O.L. § 15-108, and according to the Court of Appeals' decision in *Williams v. Niske*, 81 N.Y.2d 437, 441 (1993) (deducting pre-trial settlement payments and then applying equitable fault as determined by the jury), from Plaintiff's remitted award. *Id.*

The trial court entered Judgment on August 21, 2017, adopting WCD's proposed judgment (the "Judgment"). J.R. 146. On September 21, 2017, WCD noticed its appeal from the Judgment, and all adverse rulings subsumed within the Judgment, including, but not limited to, the Order. J.R. 3. On October 2, 2017, Plaintiff noticed a cross appeal from the Judgment, and all adverse rulings subsumed within the Judgment, "relating to the Court's adjustment of the verdict pursuant to G.O.L. § 15-108." J.R. 5.

STANDARD OF REVIEW

The trial court erred in denying WCD's CPLR 4404(a) motion and WCD is entitled to judgment as a matter of law. Under CPLR 4404(a), a verdict

may be set aside and judgment entered as a matter of law if, viewing the evidence in the light most favorable to the non-moving party, "there is no valid line of reasoning and permissible inferences that could have [led] rational jurors to the conclusion they reached." *Stephenson v. Hotel Empls. & Rest. Employees Union Local 100 of AFL-CIO*, 6 N.Y.3d 265, 271 (2006); *see also Juni II*, 32 N.Y.3d at 1118 (viewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish proximate cause, and thus defendant was entitled to judgment as a matter of law under CPLR 4404(a)).

The trial court also erred in denying WCD's CPLR 4404(a) motion which argued the jury's verdict was against the weight of the evidence. Under CPLR 4404(a), the trial court may set aside the verdict if it determines no rational jury could have reached the verdict it did on a fair interpretation of the evidence presented at trial. A new trial may be ordered when the verdict is "contrary to the weight of the evidence" or otherwise is "in the interest of justice." CPLR 4404(a).

ARGUMENT

I. PLAINTIFF'S CAUSATION EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND AGAINST THE WEIGHT OF THE EVIDENCE

Viewing the evidence in the light most favorable to Plaintiff, there was no rational basis for the jury to conclude WCD's product was a substantial factor in causing harm to Mrs. Nemeth. Plaintiff—relying on Dr. Moline's testimony—failed

to show WCD's talc was capable of causing Mrs. Nemeth's peritoneal mesothelioma (general causation) or that Mrs. Nemeth was exposed to a sufficient quantity of asbestos fibers from her use of Desert Flower to cause her to develop peritoneal mesothelioma (specific causation).

Accordingly, WCD is entitled to judgment as a matter of law based on Plaintiff's failure to meet the legal requirements of causation, or, alternatively, a new trial on the basis that the jury's findings on causation were against the weight of the evidence and in the interest of justice.

A. Plaintiff's Causation Evidence Was Legally Insufficient

Plaintiff's evidence of causation was insufficient under New York law. Proving causation requires showing both (1) "that the toxin is capable of causing the particular injuries plaintiff suffered" (*i.e.* general causation) and (2) that "the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" (*i.e.* specific causation). *Sean R.*, 26 N.Y.3d at 808; *see also Parker*, 7 N.Y.3d at 448 ("An expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)."). Both steps must be shown by means "generally accepted as reliable in the scientific community." *Id.* at 449. As this Court made clear in *Juni II*, where, as here, a plaintiff alleges exposure to a toxin

found in many defendants' products, over an extended time, at differing doses, in connection with different activities, "a causation expert must . . . establish that the plaintiff was exposed to sufficient levels of the toxin *from the defendant's products* to have caused his disease." *See Juni II*, 148 A.D.3d at 263 (citing *Sean R.*, 26 N.Y.3d at 808-12). The expert's methodology is critical: New York courts are cognizant of "the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it." *Parker*, 7 N.Y.3d at 447. Merely associating product use and Mrs. Nemeth's peritoneal mesothelioma is insufficient. *Id.* at 449-50. Plaintiff's causation experts did not adequately show either general or specific causation, and, therefore, WCD is entitled to judgment as a matter of law, or, at a minimum, a new trial.

1. Plaintiff Did Not Establish General Causation As A Matter of Law

General causation is established when a plaintiff shows a toxin exists within a particular product and that such toxin is "capable of causing the particular illness." *Parker*, 7 N.Y.3d at 448. To make this showing, a plaintiff must provide evidence via methods that are "generally accepted as reliable in the scientific community." *Id.* at 449. Generic opinions regarding "increased risk" and

"associations" in connection with the estimated dose of the toxin and a given disease are insufficient. *Id.* at 450.

Here, Plaintiff failed to show general causation, *i.e.*, that a consumer's use of cosmetic talcum powder is capable of causing peritoneal mesothelioma. Dr. Moline, Plaintiff's causation expert, was required to show that undetectable levels of asbestos allegedly in *cosmetic talcum powder*, when used by a consumer, is capable of causing *peritoneal* mesothelioma. *Parker*, 7 N.Y.2d at 449-50 ("Key to this litigation is the relationship, if any, between exposure to *gasoline containing benzene as a component* and AML.") (emphasis added); *see also In re: New York City Asbestos Litig.*, 48 Misc. 3d 460, 482 (N.Y. Sup. Ct. 2015) ("*Juni I*") ("The issue . . . is whether chrysotile asbestos, *as contained within friction products*, causes mesothelioma, an issue closely analogous to that addressed in *Parker*, namely, whether benzene, as contained in gasoline, causes AML.") (emphasis added).

It is settled that the most reliable evidence for proving general causation is an epidemiological study of human populations. *See Nonnon v. City of New York*, 32 A.D.3d 91, 105 (1st Dep't 2006) ("'[E]pidemoiological evidence is indispensable in toxic and carcinogenic tort actions where direct proof of causation is lacking'") (quoting *Matter of Joint E. & S. Dist. Asbestos Litig.*, 52 F.2d 1124, 1128 (2d Cir. 1995) ("*Maiorana*")); *Id.* at 104 (epidemiology is "the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and

a set of symptoms or a disease") (internal quotations omitted); *see also Matter of Seventh Jud. Dist. Asbestos Litig.*, 9 Misc. 3d 306, 312 (N.Y. Sup. Ct. 2005) ("*DeMeyer*") (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) (emphasis added). None of the studies Dr. Moline relied on provided any information beyond the unremarkable fact that asbestos exposure, in some instances, causes mesothelioma. J.R. 4115. What Dr. Moline was required to show, but failed to, was whether the exposure to asbestos from a cosmetic talcum product could be sufficient to cause *peritoneal* mesothelioma. Dr. Moline admitted there are no epidemiological studies linking cosmetic talcum powder and peritoneal mesothelioma. J.R. 4439. On cross, WCD asked Dr. Moline to confirm there were no "epidemiological or inhalation studies of consumer use of talc that [Dr. Moline was] aware of," and Dr. Moline responded, "[t]hat's correct." J.R. 4439.

The articles Dr. Moline relied on all suffer from fatal flaws rendering them inapplicable, unreliable, or speculative, and therefore legally insufficient to establish general causation. They either (1) fail to include an exposure analysis to which Dr. Moline could estimate or compare Mrs. Nemeth's product use; (2) were not linked to *peritoneal* mesothelioma; (3) were individual and atypical case reports; or (4) were otherwise factually distinguishable from Mrs. Nemeth's circumstances.

The first article, Rohl 1976, was *not a human health effect study* and cannot be compared to Mrs. Nemeth's alleged use of cosmetic talcum powder. J.R. 4412-16. The second article, Gamble 1982, found *pleural* thickening, but failed to find *peritoneal* mesothelioma, because "[t]hey weren't looking for that." J.R. 4417. The third, Paoletti 1984, was also *not a human health effect study* and it did not include an exposure or dose assessment; the study did not even test any subjects at all. J.R. 4417-18. The fourth, Andrion 1994, Dr. Moline admitted was not a study, but was *a single case report of a single 17-year old boy*, which used large quantities of talcum powder from a different talc source. J.R. 4418-21. The fifth, Roggli 1994, failed to include any details about the use of cosmetic talc by the subjects and failed to include dose assessments for the individuals who used cosmetic talc. J.R. 4424. The sixth, Roggli 2002, failed to include dose assessments, exposure assessments, or product use descriptions. J.R. 4425-26. The final article, Gordon 2014, found asbestos fibers in the *lungs* of the woman studied (notably, *not* in the *peritoneum*). J.R. 4431. Asbestos fibers were not found in Mrs. Nemeth's lungs. J.R. 4347-48. The articles Dr. Moline relied on fail to show that cosmetic talc allegedly contaminated with asbestos is capable of causing peritoneal mesothelioma.

Notably, none of the articles provide a quantitative or qualitative analysis of the minimal level of asbestos exposure from consumer use of cosmetic talcum powder sufficient to cause peritoneal mesothelioma. J.R. 4102, 4112-31.

Further, certain studies Dr. Moline relied on found no link between cosmetic-grade talc and mesothelioma. J.R. 4448-49. This makes Dr. Moline's testimony insufficient as a matter of law. WCD's experts, on the other hand, relying on epidemiological studies, would have offered the opinion that Mrs. Nemeth's exposure to Desert Flower "played no role in the development of her peritoneal mesothelioma." J.R. 393. But, the trial court improperly excluded them from the trial.

2. Plaintiff Did Not Establish Specific Causation As A Matter of Law

Plaintiff failed to show specific causation, *i.e.*, that Mrs. Nemeth was "exposed . . . to sufficient levels of the toxin" by WCD's talc as used in Shulton's Desert Flower "to cause the illness," namely, Mrs. Nemeth's peritoneal mesothelioma. *Parker*, 7 N.Y.3d at 448; *see also Juni II*, 148 A.D.3d at 235-36 ("[P]laintiff was obliged to prove not only that Juni's mesothelioma was caused by exposure to asbestos, but that he was exposed to sufficient levels of the toxin from his work on brakes, clutches, or gaskets, sold or distributed by defendant, to have caused his illness."). "Even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some *scientific method*, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects

of reported studies." *Id.* at 236 (emphasis added); *see also Parker*, 7 N.Y.3d at 449 (excluding expert opinion that was "lacking in epidemiologic evidence to support the claim"). Generic opinions regarding "increased risk" and "associations" in connection with the estimated dose of the toxin and a given disease are insufficient. *See Parker*, 7 N.Y.3d at 450; *Cornell*, 22 N.Y.3d at 783-84.

This Court, in *Juni II*, held that plaintiff's experts in that case—including the same Dr. Moline serving as causation expert here—failed to establish causation on the basis that "[p]laintiff was obliged to prove not only that Juni's mesothelioma was caused by exposure to asbestos, but that he was exposed to *sufficient levels of the toxin*" from his work on defendant's products "to have caused his illness." *Juni II*, 148 A.D.3d at 235-36. Rejecting the notion that *Parker* and *Cornell* do not apply to asbestos cases, this Court wrote that "there is no valid distinction between the difficulty of establishing exposure to, say, benzene in gasoline and exposure to asbestos. In each type of matter, a foundation must be made to support an expert's conclusion regarding causation." *Id.* at 238.

Merely linking asbestos to mesothelioma "is not enough for a determination of liability against a particular defendant"; instead, "a causation expert" must still establish that the plaintiff "was exposed to sufficient levels of the toxin from the defendant's products to have caused the disease." *Id.* at 236. Analysis through some "scientific method, such as mathematical modeling based on a

plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies" is required. *Id.* This evidence was not offered at trial. Instead, as in *Juni II*, Plaintiff's causation expert "testified only in terms of an increased risk and association between asbestos and mesothelioma" and "failed to either quantify the decedent's exposure level or otherwise provide any scientific expression of [her] exposure level" with respect to WCD's cosmetic grade talc. *Id.* at 237.

Offering the same evidence rejected by this Court in *Juni II*, Dr. Moline testified that all of Mrs. Nemeth's "cumulative exposures" caused her peritoneal mesothelioma. J.R. 4151, 4298, 4304. Dr. Moline relied on the "cumulative exposure" theory because she was unable to separately quantify any individual exposures and she testified that many of Mrs. Nemeth's exposures were "substantial contributing factors" that caused her cancer. J.R. 4087-88. When asked what caused Mrs. Nemeth's mesothelioma, Dr. Moline offered the overbroad opinion that "[h]er exposures to asbestos" caused her disease. J.R. 4147.

Dr. Moline did not report Mrs. Nemeth's fiber level exposures from her use of Desert Flower. Instead, she relied on Mr. Fitzgerald's "*releasability*" analysis. J.R. 4842. This evidence does not meet the requirements of *Parker* and *Juni II*. Mr. Fitzgerald never quantified the number of asbestos fibers Mrs. Nemeth would have breathed in during his test, which Dr. Moline recognized a proper industrial hygienist could have done. J.R. 4842. Instead, he testified the level of

asbestos released during his test was "significant." J.R. 3182-83. This opinion is deficient under *Parker* and *Juni II* because Mr. Fitzgerald failed to accurately recreate the conditions of Mrs. Nemeth's alleged use of Desert Flower (as an industrial hygienist could have done), and failed to quantify the number of *respirable* (as distinctly opposed to "*releasable*") asbestos fibers present from Mrs. Nemeth's described use of Desert Flower. *See Parker*, 7 N.Y.3d at 448 (plaintiff was required to show that while using defendants' product, plaintiff was "exposed to sufficient levels of the toxin to cause the illness"); *Juni II*, 148 A.D.3d at 235-36 ("[P]laintiff was obliged to prove not only that Juni's mesothelioma was caused by exposure to asbestos, but that he was exposed to sufficient levels of the toxin *from his work on brakes, clutches, or gaskets, sold or distributed by defendant*, to have caused his illness.") (emphasis added); *Mantovi v. American Builtrite, Inc.*, No. 190055/2017, NYSCEF Doc. No. 255, (N.Y. Sup. Ct. Jan. 31, 2019) (applying the Court of Appeals' *Juni II* affirmation to hold that plaintiffs' expert's testimony, which failed to establish that plaintiff was exposed to sufficient levels of asbestos to cause the disease, was insufficient as a matter of law).

Dr. Moline believed Mr. Fitzgerald's analysis showed "the reports of releasable asbestos fibers from cosmetic dust" were "orders of magnitude" above the ambient levels of asbestos. J.R. 4108. No numbers were quantified to compare to established scientific evidence. *See id.* Nonetheless, Dr. Moline testified that "if

it is true" that the amount of fibers from cosmetic talc were orders of magnitude higher than ambient exposure, then "they're at levels at which multiple studies have shown elevated risks of mesothelioma." *Id*. Dr. Moline did not specify whether she was referring to *pleural* mesothelioma, or *peritoneal* mesothelioma. *See id.* She could not have been referring to Mrs. Nemeth's peritoneal mesothelioma because, as she admitted, there are no studies linking peritoneal mesothelioma to cosmetic talc. J.R. 4439-40.

Plaintiff's failure to link the respirability of a sufficient dose of asbestos through Mrs. Nemeth's use of Desert Flower to her *peritoneal* mesothelioma is fatal under New York law and WCD should be awarded judgment as a matter of law.

B. Plaintiff's Evidence of Contamination Was Insufficient

An expert's opinion based on assumptions and speculations contrary to record evidence carries no probative value. *Cooke v. Bernstein*, 45 A.D.2d 497, 500 (1st Dep't 1974) ("Plaintiff's entire case . . . is predicated on the speculations of his expert, which were in turn based on assumed facts not supported by the evidence. It is settled law that an expert's opinion not based on facts in the record or personally known to the witness is worthless."); *Shore Haven Apts. v. Commissioner of. Fin. Of City of New York*, 93 A.D.2d 233, 236 (2d Dep't 1983) ("When an expert opinion lacks factual support and is bolstered only by the expert's qualifications, it carries little probative value and should be rejected for it cannot be weighed intelligently.");

Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) ("With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence.").

Plaintiff failed to offer sufficient evidence tying asbestos in talc to WCD, Shulton, Desert Flower, and the Desert Flower powder Mrs. Nemeth said she used. When reviewing for weight of the evidence, this Court considers "whether a particular factual question was correctly resolved by the trier of facts." *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498 (1978). "[T]he question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors," and if "the Appellate Division concludes that the jury has made erroneous factual findings, the court is required to order a new trial." *Id*. at 499; *see also Arrigo v. Turner Const. Co., Inc*., 182 A.D.2d 482, 483-84 (1st Dep't 1992) (ordering a new trial where the jury verdict was against the weight of the evidence). By failing to tie WCD to any asbestos-contaminated talc supplied to Shulton and used as an ingredient in the Desert Flower Mrs. Nemeth used prior to 1972, Plaintiff failed to show a WCD-supplied talc was contaminated with asbestos and thus capable of causing Mrs. Nemeth's peritoneal mesothelioma.

While Mr. Fitzgerald testified that the talc from the *regions* where WCD sourced talc eventually made its way to Shulton, Mr. Fitzgerald acknowledged

talc can vary in quality and composition, even within the same mine, and he was not able to say 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. *See supra* Section E.1; J.R. 3598-99, 3616-17.

II. THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY REGARDING WCD'S DUTY OF CARE AND PLAINTIFF FAILED TO SHOW WCD BREACHED THAT DUTY

The jury was to consider "whether taking all of the facts and circumstances into account, the defendant acted with reasonable care" after considering "the general custom or practice" used by reasonable manufacturers, distributors, and sellers at the time. Pattern Jury Instruction 2:16, "Common Law Standard of Care – Customary Business Practices."

The trial court initially gave the correct instruction. J.R. 5498-99 ("What you must consider is whether taking all of the facts and circumstances into account, the defendant acted with reasonable care."). The trial court erred, however, by continuing to instruct the jury that:

> A manufacturer, distributor or seller is held to the knowledge of an expert in its respective industry. This does not mean that the defendant is presumed to know what was not possible to know at the time its products were sold, or, for example, modern tests which used methodologies that had not yet been developed at the time the defendant distributed its product cannot be relied upon to show that the defendant could have learned the results of those tests at the time the product was distributed. Therefore, a manufacturer, distributor, or seller's knowledge to know of a particular danger or effect of its product

> depends on the state of scientific knowledge and technology at the time the product was sold and plaintiff was exposed to such product. J.R. 5499.

The trial court made the instruction over the exception of WCD's counsel. J.R. 5197-98 ("I know there was an exception yesterday. There was a full discussion on it. I basically made a ruling yesterday. Again, I am allowing you to again note your exception to the state of the art charge."). WCD's exception was that the charge was "not based on any pattern jury instruction or case law." J.R. 5198. WCD objected to the instructions as read to the jury before deliberations. J.R. 5514-25.

These inconsistent instructions—one suggesting that the level of knowledge should be compared to "the general custom or practice" and the other requiring a level of knowledge of an expert in the field—caused confusion in the jury. Instructing the jury to hold WCD to the standard of an expert—rather than a reasonable manufacturer, distributor, or seller—essentially transformed the case from a negligence case to a strict liability case. Changing the standard to which WCD was held in the eyes of the jury was not harmless error. *Lifson v. City of Syracuse*, 17 N.Y.3d 492, 498 (2011) (where an instruction "could have affected the outcome of the trial, it was not harmless error"). WCD could have prevailed at trial under the correct standard, as shown in the record evidence that WCD was acting in accordance with general custom and practice. For example, WCD began testing the

talc it supplied upon learning of the potential contamination. *See* J.R. 3536-38, 4993. During the time of the alleged product use, the FDA never put any restrictions on manufacturers for the selling of cosmetic talc and never required warnings to be put on cosmetic talc. J.R. 3592. WCD acted in accordance with the general practices of the industry at the time.

Because of the trial court's erroneous instruction, WCD was denied a fair trial and should be awarded a new trial. *See J.R. Loftus, Inc. v. White,* 85 N.Y.2d 874, 876 (1995) ("[A] set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial.").

III. THE ALLOCATION OF RESPONSIBILITY SHOULD BE SET ASIDE

The jury's allocation of 50% of the fault to WCD and 50% of the fault to Shulton should be set aside. Similarly, it was against the weight of the evidence for the trial court to grant Plaintiff's motion to keep the Article 16 Defendants off the verdict sheet.

When a jury's allocation of responsibility "ignores the evidence," the court should set aside the jury's allocation and order a new trial. *Roseboro v. New York City Transit Auth.*, 10 A.D.3d 524, 526 (1st Dep't 2004); *Wasson v. Barba*, 287 A.D.2d 711, 712 (2nd Dep't 2001). This Court routinely overturns jury allocations that assign greater fault to indirectly involved defendants than to directly involved

defendants. *See, e.g., Seong Sal Kim v. New York City Transit Authority*, 27 A.D.3d 332, 339 (1st Dep't 2006) (setting aside jury's apportionment of fault between plaintiff who deliberately attempted to commit suicide and the train operator); *Loja v. Lavelle*, 132 A.D.3d 637, 640 (2nd Dep't 2015) (setting aside jury's apportionment of fault among an injured employee, the employer, and the driver who struck employee while closing a ramp to a truck owned by the employer).

An analysis of the jury's allocation of fault in this case demonstrates that the jury's allocation ignored the evidence and was irrational. As in *Malcolm v. National Gypsum Company*, it is "hard to explain" how the jury could have apportioned equal fault between the two defendants—there is "an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993).

There is no basis for assigning WCD an allocation of fault equal to that assigned to Shulton, the manufacturer, packager, and seller of Desert Flower. The evidence showed Shulton—not WCD—placed the final product into the stream of commerce. J.R. 1386. Shulton—not WCD—had the ability to put a warning on the final product that reached Mrs. Nemeth and other customers. *Id.* Shulton had the most knowledge of its own product. WCD, on the other hand, was a distributor that passed along bagged talc to Shulton. J.R. 4895-96. Shulton received raw materials

from suppliers and put those materials through extensive quality control procedures, which it used to test for general purity and to screen out various contaminants. J.R. 3440-42. Through this process, Shulton would have identified any asbestos in the raw materials if it were in fact present. Additionally, Shulton fundamentally altered the talc it received from its suppliers by mixing it with other products to create Desert Flower, which combined talc with perfume and a flowing agent, thus creating an entirely new product that it marketed and sold to customers. *Id.* Shulton then put this material through an additional round of quality control procedures. J.R. 3438-39, 3441.

Mrs. Nemeth's interrogatory responses indicate she was also exposed to asbestos through products manufactured by Georgia Pacific, Westinghouse Elevator Company, Otis Elevator Company, Dover Corporation, and Schindler Elevator Corporation. J.R. 4306-08. Preventing the jury from allocating fault to these defendants—when Plaintiff's expert Dr. Moline testified that all of Mrs. Nemeth's exposures caused her disease—goes against the weight of the evidence. J.R. 4298.

Accordingly, the jury's allocation of 50% of the fault to WCD and 50% to Shulton ignored the evidence and should be set aside.

IV. PLAINTIFF'S CLOSING ARGUMENTS WERE IMPROPER AND UNDULY PREJUDICIAL

Attorneys may not make prejudicial or inflammatory remarks during closing statements, *see Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 54 (1st Dep't 1990) ("The impact of the summation by plaintiffs' counsel . . . could only have been devastatingly prejudicial to defendants and amounted to a violation of their right to a fair trial."), nor may they make irrelevant comments which have no bearing on any legitimate issue in the case or make arguments not supported by evidence during closing statements, *see, e.g., People v. Ashwal*, 39 N.Y.2d 105 (1976).

WCD was unduly prejudiced by Plaintiff's counsel's unsupported statement in closing that Mrs. Nemeth developed peritoneal mesothelioma through transvaginal exposure, prejudice that was compounded through the trial court's failure to properly cure the error.

To bolster their flimsy case on causation, Plaintiff's counsel improperly attempted to introduce in the minds of the jury a transvaginal avenue of exposure to asbestos as causing her peritoneal mesothelioma (*i.e.*, a route that would be anatomically much closer to the peritoneum than a respirable avenue of exposure through the nose or mouth). Plaintiff's counsel "submitted" to the jury that Mrs. Nemeth was exposed to asbestos "from breathing it in and then using it all over her body, in her pelvic region." J.R. 5337-38. This was against the evidence, which

showed that ovarian cancer, not peritoneal mesothelioma, can develop through pelvic exposure. J.R. 4122. WCD immediately objected, which the trial court overruled. J.R. 5338.

The trial court later recognized its error and stated, outside the presence of the jury, that the jury was not presented with evidence to support Plaintiff's counsel's transvaginal exposure claim. J.R. 5420-21. To cure this issue, however, the trial court offered no instruction to the jury and allowed Plaintiff's counsel to address the jury again. *Id.* Taking advantage of the opportunity, Plaintiff's counsel told the jury that the case was "*focused*" on what was released into the air, leaving open, and in no way dismissing, the possibility of transvaginal exposure. J.R. 5479. In an attempt to mitigate the prejudice and close the door on the possibility of transvaginal exposure, WCD asked the trial court to specify for the jury that it must find that Mrs. Nemeth was exposed to asbestos via inhalation through an instruction on the jury sheet, which the trial court denied. J.R. 4122, 5468.

Thus, confusion remained for the jury in deliberations that while Plaintiff's "focus" was on inhalation, the transvaginal exposure avenue was still possible. J.R. 5479. WCD was thereby denied a fair trial and a new trial should be ordered.

V. THE REMITTED AWARD OF $6 MILLION IN PAIN AND SUFFERING AND $600,000 IN LOSS OF CONSORTIUM REMAINS EXCESSIVE

The trial court's remitted award of $6 million in pain and suffering damages and $600,000 for Mr. Nemeth's loss of consortium remains excessive. This Court reviews damages to determine whether the award "deviates materially from what would be reasonable compensation." CPLR 5501(c). In determining what is reasonable, New York courts look to approved awards in similar cases and compares the cases factually. *Paek v. City of New York*, 28 A.D.3d 207, 209 (1st Dep't 2006) ("The standard for that determination is set by judicial precedent, not juries."); *accord Donlon v. City of New York*, 284 A.D.2d 13, 18 (1st Dep't 2001) (courts should "determine what awards have been previously approved on appellate review and decide whether the instant award falls within those boundaries."). The award in this case—$6 million in pain and suffering, plus $600,000 for loss of consortium—exceeds the awards in comparable cases. The award should be reduced to no more than $4,500,000 for pain and suffering and $450,000 for loss of consortium.

Mrs. Nemeth was diagnosed with peritoneal mesothelioma about 40 months before passing away, a period lasting from November 2012 until March 2016. However, 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. J.R. 5013, 4165.

Konstantin v. 630 Third Avenue Associates is an appropriate barometer for the Court. 121 A.D.3d 230 (1st Dep't 2014). There, this Court, reviewing two companion cases, upheld the trial court's reduction of a $7 million award to plaintiff Konstantin to $4.5 million (for 33 months of past pain and suffering, an average of $136,000 per month). *Id*. at 239. In upholding that reduction, the Court stressed plaintiff endured five surgeries over those 33 months, two rounds of chemotherapy and another round of broad-ranged radiation, and his mesothelioma migrated from his testicles (where it caused extreme pain and swelling) to his pleura, resulting in additional surgery and "unbearable" pain. *Id*. at 236.

This Court also upheld the trial court's reduction of a $16 million past pain and suffering award to the *Dummitt* plaintiff to $5.5 million for past pain and suffering (over 27 months, an average of $203,703 per month). There the Court stressed the seriousness of the plaintiff's condition and course of treatment, which included procedures to drain the fluid in her lungs, a complete lung collapse, thoracic surgery, and three rounds of chemotherapy, in addition to expected future pain and suffering. *Dummitt v. A.W. Chesterton*, 121 A.D.3d 230, 255 (1st Dep't 2014); *see also Dummitt v. A.W. Chesterton*, 36 Misc.3d 1234(a), 2012 WL 4748316, at *1 (N.Y. Sup. Ct. Sept. 20, 2012) (trial court's decision in *Dummitt*).

In *Peraica* and *Hackshaw*, two recent awards reviewed by this Court, the Court remitted past pain and suffering awards, providing a reduced award to the

Hackshaw plaintiff of $3 million for 12 months (an average of $250,000 per month) and a reduced award to the *Peraica* plaintiff of $4.25 million for 17 months (again, an average of $250,000 per month). The Court stressed in each case that decedent had experienced severe and crippling symptoms and tremendous physical and emotional pain. When the Court has approved awards close to the as-remitted award in this case, the plaintiffs in those cases suffered extended periods of debilitating pain and suffering, including future pain and suffering, on a level not matched in the facts of this case until the last three days of Mrs. Nemeth's life. *See Peraica v. A.O. Smith Water Prods. Co.*, 143 A.D.3d 448, 451 (1st Dep't 2016) ("[D]ecedent experienced severe and crippling symptoms, as well as tremendous physical and emotional pain[.]"); *In re: New York City Asbestos Litig.*, 143 A.D.3d 485, 486 (1st Dep't 2016) ("*Hackshaw*") (Hackshaw "went through debilitating chemotherapy treatments; he underwent surgery, a pleurectomy where the pleura had to be removed to get to the tumor; he was in intense pain . . . [and] had great difficulty breathing and was placed on a bipap breathing machine and was unable to communicate at the end of his life.").

In *Hackshaw,* this Court did not affirm the trial court's past pain and suffering award of $6 million covering about 12 months. Instead, the Court remitted the award to $3 million (an average of $250,000 per month). *Hackshaw*, 143 A.D.3d at 485. In *Peraica,* this Court similarly did not affirm the trial court's award of $9.9

million for past pain and suffering covering about 17 months. Instead, the Court remitted the award to $4.25 million (an average of $250,000 per month) and, in doing so, observed that the "further-reduced damages award [of $4.25 million] is significant and exceeds amounts set in some of our precedents." *Peraica,* 143 A.D.3d at 451.[2]

While analyzing pain and suffering awards in comparable cases by computing their per-month average is a helpful exercise, the Court should take into account that when the disease progresses less aggressively, and the plaintiff lives a longer and more enjoyable life, there are more months during which plaintiff's suffering is far less pronounced. Mrs. Nemeth is an example of this: she lived for a longer period of time following her diagnosis than other plaintiffs (40 months, *see* J.R. 4164) and for approximately 16 months of that time she was able to live her life relatively unburdened. *See* J.R. 5011-12. Thus, the damages award for Mrs. Nemeth, who lived 40 months, should not be double the award of a mesothelioma victim who, because he or she suffered from a more aggressive disease, with more

[2] For some of those precedents, *see, e.g., In re: New York City Asbestos Litig.*, 28 A.D.3d 255 (1st Dep't 2006) ("*Marshall*") (upholding reduction of $8 million award to Marshall for 11 months of suffering to $3 million (an average of $272,727 per month) and reduction of $7 million award to Mayer for 16 months of suffering to $3 million (an average of $187,500 per month)); and *Konstantin*, 121 A.D.3d at 230 (upholding reduction of 7 million award for 33 months of suffering to $4.5 million (an average of $136,363 per month)).

pronounced pain and suffering, lived for just 20 months. Instead, the Court should remit the damages award to reflect Mrs. Nemeth's pain and suffering, where she lived relatively symptom free for the first 16 months following her diagnosis, and did not experience symptoms as debilitating as the worst cases this Court has seen until her last few days. WCD respectfully submits that $4.5 million is reasonable compensation.

Once the past pain and suffering award is remitted, Mr. Nemeth's loss of consortium award—which the jury pegged at one-tenth of its award to the decedent—should be substantially reduced as well. On this issue, an illustrative case is *Penn v. Amchem Products*, 85 A.D.3d 475 (1st Dept. 2011). There, the jury's loss of consortium award was reduced from $1.67 million to $260,000 for a period covering approximately 25 months, which would translate to an average of around $10,400 per month. *Penn*, 85 A.D.3d at 476-77. Similarly, in *Brown v. Bell & Gossett Company*, this Court upheld the remittitur of a wife's $1 million loss of consortium award to $360,000, where there was 18 months of pain and suffering by the husband (an average of $20,000 per month). 146 A.D.3d 461 (1st Dep't 2017). Here, taking into account the roughly 16 months in which Mrs. Nemeth was relatively symptom-free, a remitted award for loss of consortium should be no more than $450,000.

CONCLUSION

For the foregoing reasons, the Court should set aside the verdict and enter judgment for Whittaker, Clark & Daniels, Inc. or order a new trial, or, in the alternative, remit the award to $4.5 million in pain and suffering and $450,000 in loss of consortium.

Dated: New York, New York
February 19, 2019

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
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.; The Scotts Company LLC; Union Carbide Corp.,
Defendants,

Whittaker Clark & Daniels, Inc.,
Defendant-Appellant-Cross-Respondent,

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.

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

1. The index number of the case is 190138/14.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on April 16, 2014 by service of summons and complaint; the answers of Defendant were served thereafter.

5. The nature and object of the action is asbestos litigation.

6. This appeal is from a Decision and Order of the Honorable Martin Schulman, entered in favor of plaintiff, against defendant on June 12, 2017, which denied defendant's application to vacate the verdict for a new trial. This appeal is also from a Judgment of the Honorable Martin Schulman, entered in favor plaintiff, against defendant on August 22, 2017, which the plaintiff recovered damages.

7. The appeal is on a full reproduced record.