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

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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*)

CASE NO. 2019-1219

REPLY 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.

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INTRODUCTION

The judgment should be vacated because Plaintiff's brief does not point to legally sufficient record evidence establishing that Mrs. Nemeth was exposed to asbestos from the Desert Flower[1] talcum powder product in a manner that was capable of causing *peritoneal* mesothelioma. First, Plaintiff points to no scientific evidence that asbestos in Desert Flower talcum powder causes *peritoneal* mesothelioma at all. Second, there is no scientific expression of the amount of Desert Flower exposure that would be necessary to cause *peritoneal* mesothelioma in the record, or that Mrs. Nemeth's exposure exceeded such a threshold. Under *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), it cannot be inferred that asbestos in Desert Flower caused Mrs. Nemeth's *peritoneal* mesothelioma simply because asbestos may cause mesothelioma in another circumstance. Yet, that is the impermissible inference on which Plaintiff's case relies; the same inference and testimony on which plaintiff relied and was rejected in *In re New York City Asbestos Litig.*, 148 A.D.3d 233, 235-36 (1st Dep't 2017) ("*Juni II*"), *aff'd*, 32 N.Y.3d 1116 (2018) ("*Juni III*"). Accordingly, the judgment should be vacated as a matter of law because Plaintiff has not shown that Desert Flower is capable of causing and did cause Mrs. Nemeth's *peritoneal* mesothelioma.

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[1] Defined terms have the same meaning as in WCD's Opening Brief ("WCD Br.").

Furthermore, Plaintiff's contention WCD supplied asbestos-contaminated talc to Shulton, that then made its way into the Desert Flower Mrs. Nemeth used, relies on such a pile of shaky inferences that it fails as a matter of law. For example, Plaintiff argues that because some talc somewhere in Italy and Alabama may have been contaminated with asbestos, all talc acquired from those regions must have been contaminated as well. Plaintiff further argues that some rock "outcroppings" in North Carolina had asbestos in 2013, and because WCD supplied talc from North Carolina decades prior, it had to have been from the same outcroppings and it too must have been contaminated. These leaps of logic cannot support a rational verdict on causation as a matter of law.

The shakiness of Plaintiff's evidence on causation led its counsel to inflame the jury so they would overlook the holes in Plaintiff's case. Plaintiff's counsel did this by arguing that transvaginal exposure to Desert Flower caused Mrs. Nemeth's *peritoneal* mesothelioma. There was no evidence of transvaginal exposure to Desert Flower, or that such use could or did cause any injury. While the trial court eventually recognized the impropriety, it declined to issue a curative instruction.

The trial court compounded its error by issuing an erroneous instruction on the duty of care. The jury was instructed to hold WCD to an expert standard, instead of a reasonable manufacturer standard. Plaintiff identifies no basis in the

decisions of this Court or the Court of Appeals for such instruction or justification for its use in this case. Plaintiff brushes aside the undeniable prejudice WCD suffered, which denied WCD a fair trial.

Plaintiff's counsel's improper argument and the erroneous jury instructions led the jury to allocate responsibility irrationally: 50% to WCD and 50% to Shulton. Shulton, not WCD, manufactured, packaged, and sold Desert Flower, and had direct connections to Mrs. Nemeth. New York law is clear that directly responsible parties should be held more responsible than those indirectly connected, like WCD, to any alleged harm. WCD had no control over the final product or direct contact with Mrs. Nemeth and cannot rationally be allocated the same or more fault than an entity that did.

If the jury's award after the unfair trial is allowed to stand, just compensation—as compared to awards in comparable cases—calls for the award to be reduced. Plaintiff's request that this Court undo Plaintiff's stipulation to the present damages award must be rejected.

Finally, if the judgment stands (which it should not), the Court should find General Obligations Law § 15-108 ("G.O.L. § 15-108(a)") was correctly applied and reject Plaintiff's contention otherwise. Here, defendants who settled pre-trial were not attributed fault on the verdict sheet. Under *Williams v. Niske*, 81 N.Y.2d 437 (1993), money paid by those settling defendants should be deducted

from the trial court's award and then the percentage of fault determined by the jury applied to the remaining damages amount, so as to avoid non-equitable outcomes and prevent double recovery. The trial court correctly followed that procedure.

ARGUMENT

I. THE JUDGMENT MUST BE VACATED BECAUSE PLAINTIFF FAILED TO SHOW CAUSATION

A. Plaintiff Failed To Prove That Cosmetic Talc Can Cause Peritoneal Mesothelioma

Plaintiff is required to show general causation, or that the allegedly asbestos-contaminated talc WCD supplied was "capable of causing the particular illness." *Parker*, 7 N.Y.3d at 448. In *Parker*, the ingredient was benzene, the product was gasoline, and the illness was acute myelogenous leukemia ("AML"). The Court of Appeals explained that the proper inquiry was "the relationship, if any, between exposure to *gasoline containing benzene as a component and AML*." *Id.* at 449-50 (emphasis added). *Parker* rejected the notion that an association between "exposure to benzene and the risk of developing AML," was sufficient. *Id*. Rather, *Parker* requires proof of the connection between the ingredient *in the defendants' product* and the particular illness plaintiff allegedly suffered: Plaintiff here was thus required to show that asbestos *allegedly in the cosmetic talcum powder* is capable of causing *peritoneal* mesothelioma (not *just mesothelioma*). Plaintiff failed.

Plaintiff argues there is "ample scientific evidence (including epidemiology) here connecting mesothelioma with asbestos exposure." Pl. Br. 40.

However, as *Juni II* made clear, "the fact that asbestos . . . has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant." 148 A.D.3d at 236. This evidence of general causation was not established here. Neither Dr. Moline nor any other witness testified that asbestos *in cosmetic talc* caused Mrs. Nemeth's *peritoneal mesothelioma*. The only record evidence is that asbestos, generally, can cause peritoneal mesothelioma, without any tie to cosmetic talcum powder. *See* J.R. 4115, 4061 (Welch study showing association between asbestos and men who developed peritoneal mesothelioma, with no tie to cosmetic talcum powder). Further, each of the litany of articles Plaintiff cites fails to make a causal connection between asbestos *in cosmetic talcum powder* and *peritoneal mesothelioma*:

- Andrion: Plaintiff's characterization of this study as showing the 17-year-old's daily use of asbestos-contaminated talc "caused" his peritoneal mesothelioma is untrue. *See* Pl. Br. 41. Rather, the study *associates* his peritoneal mesothelioma with asbestos exposure, and cannot state with certainty his disease was asbestos related. *See* J.R. 941 (article entitled "Malignant Peritoneal Mesothelioma In A 17-Year Old Boy With Evidence Of Previous Exposure To Chrysotile And Tremolite Asbestos"); J.R. 945 ("[D]efinite proof of the asbestos-related nature of this . . . cannot be established with certainty"). As this Court made

clear in *Juni II*, "linkage and association are not sufficient in themselves to establish causation." 148 A.D.3d at 242.

- Millette and Gamble: Plaintiff argues these articles "demonstrate the presence of asbestos in talc supplied by WCD sufficient to cause disease." Pl. Br. 41. Plaintiff's lack of specificity as to the particular "disease" is telling: neither article addresses *peritoneal* mesothelioma, nor do they demonstrate a causal relationship between asbestos exposure and peritoneal mesothelioma.

- Rohl: As Plaintiff recognizes, Pl. Br. 41, Rohl is not a human health study and is not specific to WCD or Desert Flower, nor does it help Plaintiff at all on general causation.

- Roggli: Dr. Moline testified the studies show that use of cosmetic talc may be "associated" with "asbestos-related disease." J.R. 4422. The studies do not establish that asbestos-contaminated talc causes peritoneal mesothelioma.

Epidemiological studies are the "gold standard" for showing general causation, *see Berger v. Amchem Prods.*, 818 N.Y.S2d 754, 762 (2006), and Plaintiff has failed to show general causation through this or any alternate type of study, *see In re: Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1128 (2d Cir. 1995) ("*Maiorana*").

B. Plaintiff Failed To Offer A Sufficient "Scientific Expression" Of Exposure Levels from WCD-Related Products

Juni II, as affirmed by the Court of Appeals in *Juni III*, is the law. To prove specific causation, "the fact that asbestos . . . has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; 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 his disease." 148 A.D.3d at 236. This holding is not limited by some "unique factual posture" of *Juni* and is, instead, an application of long-standing principles of New York law, including *Parker*. Plaintiff needed to offer a "scientific expression" of Mrs. Nemeth's exposure level to asbestos from Desert Flower, and then demonstrate such exposure, standing alone, was sufficient to cause *peritoneal* mesothelioma. *Parker*, 7 N.Y.3d at 449; *Juni II*, 148 A.D.3d at 237 (Plaintiff's "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") (citing *Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 809 (2016)) (emphasis added). New York toxic tort law requires a "scientific expression" of Plaintiff's exposure levels from WCD-supplied talc because otherwise the jury has no basis to compare the facts of this case to any study that purports to find a causal link between exposures to asbestos in cosmetic talcum products and peritoneal mesothelioma (and Plaintiff has identified none). *See Parker*, 7 N.Y.3d; *Sean R.*, 26 N.Y.3d; *Cornell v. 360 West 51st St. Realty, LLC*, 22

N.Y.3d 762, 784 (2014). By adopting the "scientific expression" requirement, the Court of Appeals recognized, in the realm of toxic tort, juries are prone to being misled by "unreliable or speculative information (or 'junk science') . . . [supported] with the weight of an impressively credentialed expert." *Parker,* 7 N.Y.3d at 447.

Parker and its progeny, including *Juni*, consider whether plaintiffs in those cases proffered expert testimony that qualified as a "scientific expression" of the exposure levels to toxins in the defendants' products. For example, in *Parker*, the Court of Appeals found no scientific expression sufficient to meet the requirements of specific causation even though plaintiff's experts cited "several studies that linked benzene exposure to leukemia" that showed "a risk of mortality from leukemia of about '150 times above background' over a 40-year working lifetime from exposure to benzene," noted plaintiff often "had cuts or abrasions on his hand that would have increased the absorption of benzene directly into his bloodstream," and concluded plaintiff "had greater levels of exposure to benzene than the workers in the refinery studies." *See Parker*, 7 N.Y.3d at 444-45, 449 (the plaintiff's expert's conclusion that the plaintiff's exposures to benzene were "excessive" and thus sufficient to cause a benzene-related illness "cannot be characterized as a scientific expression of [the plaintiff's] exposure level"). Similarly, in *Cornell*, the court rejected the plaintiff's expert's opinion regarding specific causation because, among other reasons, the expert made "no effort to

quantify [tenant's] level of exposure" to a mixture of microbial contaminants allegedly in the defendant landlord's apartment and instead simply asserted that the tenant was "unquestionably exposed to unsanitary conditions." 22 N.Y.3d at 784.

Here, Plaintiff offers practically the same evidence the Court of Appeals rejected in *Parker* and *Cornell*. Mrs. Nemeth's deposition testimony describing her daily use of Desert Flower is similar to, and less compelling than, Mr. Parker's description of his "frequent" exposure to "extensive" amounts of gasoline. *See Parker*, 7 N.Y.3d at 449. Mr. Fitzgerald's testimony that his glove box test results were "several [orders] of magnitude higher" than ambient exposure, and Dr. Moline's testimony that "higher than ambient exposure" to asbestos results in "elevated rates of mesothelioma," *see* Pl. Br. 25, is similar to, and less compelling than, the *Parker* expert's conclusion that Mr. Parker had "greater levels of exposure" than the subjects of studies who developed AML, *see* 7 N.Y.3d at 444-45. Such evidence is not a scientific expression of the level of exposure necessary to cause peritoneal mesothelioma as required by the case law. The key "is the relationship, if any, between exposure to [cosmetic talcum powder] containing [asbestos] and [peritoneal mesothelioma]," which, as in *Parker*, was not established here. *Id.* at 449-50.

Unlike the record in *Miller*, on which Plaintiff relies, the record here shows that Plaintiff's expert, Mr. Fitzgerald, failed to offer a specific numerical

estimate of Mrs. Nemeth's exposure. *See Miller v. BMW of N. Am.*, No. 190087/2014, 2016 WL 3802961, at *5 (N.Y. Sup. Ct. May 4, 2016) ("*Miller I*"), *aff'd*, 154 A.D.3d 441 (1st Dep't 2017) ("*Miller II*"). Rather than supporting Plaintiff's case, *Miller* instead offers what Plaintiff's experts should have done but failed to do. There, plaintiff's expert performed a "dose calculation" and determined plaintiff was exposed to ".024 fibers/cc" of asbestos over his lifetime that was attributable to defendant's product. *See id.* Plaintiff's expert in *Miller* testified this specific, quantified exposure amount was sufficient to cause the particular disease from which plaintiff suffered. *See id.* Here, Plaintiff's expert did not offer a dose calculation and therefore cannot and did not opine on whether there was sufficient exposure to asbestos to cause Mrs. Nemeth's particular disease. Plaintiff offered Mr. Fitzgerald's "glove box" test results, in which he shook powder in a small box and estimated that 2,760,000 fibers were released into the "glove box." However, the "glove box" test did not simulate the conditions of Mrs. Nemeth's use of or exposure to asbestos allegedly contained in Desert Flower.[2] Additionally, distinct from measuring what level of asbestos Mrs. Nemeth was exposed to—or what level of fibers were respirable by Mrs. Nemeth during her use—the test merely measured

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[2] Namely, as noted in WCD's Brief, Mr. Fitzgerald was not qualified to perform the test, the products he tested were purchased from eBay (with no evidence that they were not independently contaminated), and the "glove box" did not recreate Mrs. Nemeth's five-by-seven foot bathroom. *See* WCD Brief 20.

what levels of fibers were "released." This is very different from the precise fibers/cc exposure level proffered in *Miller* to show that a scientific expression of a particular exposure level caused a particular illness to the Plaintiff.

Plaintiff's reliance on the "visible dust" standard is similarly misplaced. *See* Pl. Br. 24. The law is clear "visible dust" alone is insufficient evidence of causation of a particular illness. *See Juni II*, 148 A.D.3d at 239. As *Juni II* notes, the few occasions where the courts have relied on visible dust, expert testimony presented at trial "established that the extent and quantity of the dust to which the plaintiffs had been exposed contained enough asbestos to cause the mesothelioma." 148 A.D.3d at 239. Here, Plaintiff's experts did not establish the extent and quantity of dust from Desert Flower to which Mrs. Nemeth was allegedly exposed or that it was sufficient to cause peritoneal mesothelioma.

Having failed to offer sufficient evidence that asbestos in cosmetic talcum powder is capable of causing peritoneal mesothelioma—general causation—or that Mrs. Nemeth was exposed to a sufficient dose of asbestos from her use of Desert Flower to cause her peritoneal mesothelioma—specific causation—Plaintiff failed to meet the burden on causation and WCD should be awarded judgment as a matter of law.

C. The Evidence Does Not Support A Rational Verdict That WCD Supplied Asbestos-Contaminated Talc Used in Desert Flower

Plaintiff is required to show that asbestos-contaminated talc was supplied by WCD and incorporated into Desert Flower. *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498 (1978). Plaintiff argues that cosmetic talc mined from Alabama and Italy was allegedly used in some Desert Flower products at some point in time and, because there was asbestos in talc mines *somewhere* in Alabama and *somewhere* in Italy, all talc from those regions must be contaminated with asbestos. This line of reasoning is insufficient to establish causation as a matter of law. Mr. Fitzgerald—Plaintiff's witness—testified that the composition of talc can vary widely from area to area. *See* J.R. 3472. Given that the composition of talc ore can vary widely, positive tests of contamination in a mine at one point in time cannot lead to the inference on which Plaintiff and the jury relied—that all talc in an entire state or country is contaminated. Other than broad ties to Alabama and Italy, Plaintiff fails to link the talc WCD supplied to asbestos-contaminated talc in those regions. Tellingly, Plaintiff fails to discuss either region in the argument of Plaintiff's brief and only focuses on North Carolina.

In 2013, Mr. Fitzgerald sampled rock from an area he believed to be the Hitchcock mine in North Carolina and found certain "outcroppings" were contaminated with asbestos. J.R. 2151, 2995-97. Plaintiff relies on this testing and evidence that WCD sold two grades of talc from the Hitchcock mine in 1974 (two

years after Mrs. Nemeth stopped using Desert Flower), *see* J.R. 981-82, 4987, to argue Mrs. Nemeth's Desert Flower was contaminated. Mr. Fitzgerald offered no evidence that the particular "outcroppings" he tested were the areas *actually mined* prior to 1972 or that the talc derived from these outcroppings was sold to WCD or supplied to Shulton. Plaintiff also does not identify any evidence suggesting that talc from this "outcropping" was actually used as an ingredient in Desert Flower. *See* Pl. Br. 12-14, 31-32. Plaintiff, and more importantly the jury and this Court, are left with the insufficient, irrational, and inappropriate inferences that because there was allegedly asbestos-contaminated talc in "outcroppings" in North Carolina in 2013, WCD must have sourced asbestos-contaminated talc from the same "outcroppings" prior to 1972 and such talc ultimately made it into Desert Flower. A finding of causation cannot rest on these inferences as a matter of law.

Plaintiff also attempts to infer from WCD's two internal tests (out of hundreds) revealing detectable levels of tremolite minerals in the Italian talc, that Desert Flower must have been contaminated with asbestos. Pl. Br. 31-32. However, no evidence whatsoever was presented to show that the talc identified in these two tests was contaminated with asbestiform tremolite or that it was ever distributed by WCD to Shulton for use in Desert Flower.

Plaintiff's reliance on tests of other Shulton products to show Desert Flower was contaminated is insufficient to show causation because those products

have no connection to Mrs. Nemeth. *See* Pl. Br. 32; *Cohen*, 45 N.Y.2d at 498. Shulton's former employee, Mr. Kaenzig, who testified he "wasn't the guy with the cookbook" and had no knowledge of the recipes for Shulton's products, including Desert Flower, cannot link WCD to Mrs. Nemeth's Desert Flower. S.R. 318-19.

II. PLAINTIFF'S SUMMATION WARRANTS A NEW TRIAL BECAUSE IT WAS UNFAIR AND UNDULY PREJUDICIAL

A "party's right to a fair trial in a civil action may be defeated when the conduct of opposing counsel unfairly and prejudicially interjects extraneous and irrelevant issues." *Rohring v. City of Niagara Falls*, 192 A.D.2d 228, 230 (4th Dep't 1993). WCD did not have a fair trial because it was unduly prejudiced by Plaintiff's counsel's summation that "[w]ith a woman like Flo, there are two avenues of exposure . . . [which] 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. This was unduly prejudicial because there was zero evidence that use of Desert Flower "in her pelvic region" had anything to do with Mrs. Nemeth's peritoneal mesothelioma. The only evidence is that pelvic exposure to asbestos may be associated with *ovarian cancer*.

WCD immediately objected to Plaintiff's counsel's remarks, which the trial court overruled. J.R. 5338. The trial court recognized the next day that Plaintiff's counsel was making an argument based on facts not supported by evidence—namely that Mrs. Nemeth must have developed peritoneal mesothelioma

through her use of Desert Flower because, in addition to inhalation, there was somehow transvaginal migration of asbestos fibers to Mrs. Nemeth's peritoneum from her use of Desert Flower. This is in contrast to the single, inhalation avenue for her other numerous exposures, such as from asbestos-contaminated lawn products and her son's asbestos-contaminated clothing. Upon realizing this, the trial court stated, outside the presence of the jury, "I don't believe that [Dr. Moline] gave an affirmative opinion that Mrs. Nemeth's peritoneal mesothelioma was caused by both breathing [Desert Flower] 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." J.R. 5420. Instead of granting WCD's request for a curative instruction, the trial court allowed Plaintiff's counsel to again go before the jury and "clear up" the issue in "like a mini-closing." J.R. 5420-21. Plaintiff's counsel did not "clear up" the issue at all, but doubled down on his prejudicial statement, and the trial court did not permit WCD to respond. J.R. 5479.

Summations cannot be "based on facts not in the record." *Selzer v. New York City Tr. Auth.,* 100 A.D.3d 157, 163 (1st Dep't 2012); Siegel, N.Y. Prac. § 397 (6th ed. 2018) (an attorney oversteps when "making statements on matters not in evidence or indulging arguments having no basis whatever in the proof"). Plaintiff's summation violated that rule. There was no evidence Mrs. Nemeth's peritoneal mesothelioma was caused by pelvic exposure to asbestos, or even that pelvic

exposure to asbestos can cause peritoneal mesothelioma. Yet, Plaintiff asked the jury to make the inference and they probably did, to WCD's extreme prejudice. Plaintiff's prejudicial summation was compounded by the trial court's failure to issue a curative instruction, as it was required to do. *See Lyons v. City of New York*, 29 A.D.2d 923, 923 (1st Dep't 1968) (granting a new trial because defense counsel made prejudicial comments in summation, and the "trial court compounded the resulting prejudice to plaintiff by overruling his objections without proper rebuke to defense counsel and without proper instructions to the jury"); *People v. Swanson*, 278 A.D. 846, 846-47 (2d Dep't 1951) (granting a new trial because the "[t]rial [c]ourt did not admonish or restrain [plaintiff's counsel] and did not instruct the jury to disregard the improper statements made in this summation . . . Defendant is entitled to a fair trial neither colored nor influenced by irrelevant matters or prejudicial arguments of counsel likely to mislead or confuse the jury").

Plaintiff argues courts have sustained verdicts where courts issued corrections to mitigate potential prejudice; however, these cases are distinguishable because no such correction was given here. In *Chappotin v. City of New York*, defense counsel's remarks only pointed out the insufficiency and contradictory nature of plaintiff's proof *and* the court gave a curative instruction. 90 A.D.3d 425, 426 (1st Dep't 2011). Likewise, in *Mena v. New York City Tr. Auth*., the court's "prompt and thorough curative instructions were sufficient to assure that defendants

were not deprived of fair trial" and the trial was saved from irreversible error "solely by heroic efforts of court." 238 A.D.2d 159, 160 (1st Dep't 1997). The trial court's efforts here were far from "heroic": the trial court failed to give *any* curative instruction, much less one that promptly and thoroughly cleared up the confusion Plaintiff's counsel's statement caused. Instead of a curative instruction, the trial court overruled defendant's objection and allowed Plaintiff's counsel to make a "mini-closing," which compounded the prejudice. In the "mini-closing," Plaintiff's counsel reminded the jury about the two avenues of exposure by stating "certain *other avenues* of [asbestos] exposure specific to women" exist and should be considered. J.R. 5479 (emphasis added). This second mention of other avenues of exposure, when Plaintiff's counsel should have been disclaiming a second avenue, compounded the error and prejudiced WCD right before deliberations.

The cumulative effect of Dr. Moline's irrelevant testimony on ovarian cancer, which was not at issue in this case, Plaintiff's counsel's inappropriate summation, and the trial court's failure to properly cure the unfair and prejudicial remarks denied WCD a fair trial and requires reversal. *See Rodriguez v. New York City Hous. Auth.*, 209 A.D.2d 260, 261 (1st Dep't 1994) ("Even if we were to conclude, as plaintiff contends, that his counsel's remarks during summation were not so egregious as to require reversal, the cumulative effect of her summation

together with the error in the engineer's testimony warrants reversal and a new trial.").

III. THE TRIAL COURT'S DUTY OF CARE INSTRUCTION WAS ERRONEOUS

"If a charge is ambiguous, inconsistent, erroneous, confusing, one-sided, incomplete or overly technical a new trial will be ordered if prejudice has resulted to any party." *Smith v. Midwood Realty Assoc.*, 289 A.D.2d 391, 392 (2d Dep't 2001) (internal citations omitted); *see also Biener v. City of New York*, 47 A.D.2d 520, 521 (1975) ("[A] charge that confuses and creates doubt as to the principle of law to be applied requires a new trial . . . [a] charge must not contain contradictory and inadequate statements of rules of law."). A new trial should be granted because the trial court's inconsistent instructions were incorrect and caused extreme prejudice to WCD.

The trial court's instruction on strict products liability was not in line with New York Pattern Jury Instruction 2:120. Pattern Jury Instruction 2:120 says throughout that the standard of care is that of a reasonable person. *See, e.g.,* Pattern Jury Instruction 2:120, "Strict Products Liability" ("A product is defective if it is not reasonably safe—that is, if the product is likely to be harmful to (persons, property) that a *reasonable person who had actual knowledge* of its potential for producing injury would conclude that it should not have been marketed in that condition.") (emphasis added). Nowhere does PJI 2:120 instruct that a distributor, like WCD, is

to be held "to the knowledge of an expert in the field," as the trial court instructed here. *See id.* *Cover v. Cohen*, on which Plaintiff relies, similarly follows the reasonable person standard and nowhere endorses, or even mentions, the "expert in the field" standard. *See* 61 N.Y.2d 261, 266 (1984).

Plaintiff's other cited cases are inapposite. *George v. Celotex* is a federal case in which the Second Circuit considered whether an unpublished report should be entered into evidence, and explicitly mentions defendants did not challenge the jury instructions. *See* 914 F.2d 26, 28-29 (2d Cir. 1990). *Penn v. Amchem Prods.* cites *Celotex* for the principle that a defendant's failure to test or investigate the safety of its products permitted the jury to conclude that defendant failed to adequately warn plaintiff; it does not support the "expert in the field" standard Plaintiff sponsored. *See* 85 A.D. 3d 475, 476 (2011). *Hackshaw v. ABB, Inc.* concerns an instruction that does not contain the "expert in the field" language. *See* No. 190022/13, 2015 N.Y. Misc. LEXIS 100 *15 (N.Y. Sup. Ct. Jan. 7, 2015). *Frankson v. Brown & Williamson Tobacco Corp.* is a case related to the admission of evidence, not jury instructions. *See* 791 N.Y.S.2d 869 (N.Y. Sup. Ct. 2004). And *Scoles v. Econolodge* cites *Celotex* for the proposition that a manufacturer has a duty to test and inspect its products, not that it is to be held to the standard of an "expert in the field." No. 108409/11, 2014 N.Y. Misc. LEXIS 2067, *17 (N.Y. Sup. Ct. Apr. 29, 2014).

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

Not only was the trial court's instruction wrong, it was also contradictory and misleading. In *Smith v. Midwood*, the court found the trial court's initial instruction adequately stated the law regarding vicarious liability. 289 A.D.2d at 392. However, the trial court continued, incorrectly, to give an ambiguous statement of law that resulted in a confusing jury charge. *Id*. The Second Department held the jury instructions were prejudicial because they were ambiguous, confusing, and contradictory, and accordingly ordered a new trial. *Id*. This is exactly what happened here. The trial court initially gave the correct instruction stating the jury should consider whether "the defendant acted with reasonable care" after considering "the general custom or practices of others . . . in the same business or trade" at the time and that the "defendant's conduct is not to be considered unreasonable simply because someone else may have used a safer practice." J.R. 5498-99. Then the trial court said, "[a] manufacturer, distributor or seller is held to the knowledge of an expert in its respective industry" and this knowledge "depends on the state of scientific knowledge and technology at the

time." *Id*. This inconsistent charge prejudiced WCD by confusing the jury regarding which standard of liability applied, a central issue.

Plaintiff argues WCD waived this argument because WCD did not object to the jury instructions as inconsistent until after the court instructed the jury. Pl. Br. 51. However, there is no rule to that effect. Such a rule would be untenable because a party cannot know the instruction given until it is actually given. In fact, this Court has recognized objections can be made postcharge. *Carrasquillo v. American Type Founders Co., Inc.*, 183 A.D.2d 410 (1st Dep't 1992) (holding waiver where party failed to object "when requested to do so at the precharge *and postcharge* stages of the trial") (emphasis added). Unlike in *Carrasquillo*, WCD *did object* immediately after the jury was instructed. J.R. 5514.

Plaintiff cites to *Klotz v. Warick* to argue waiver, *see* Pl. Br. 51, but counsel there failed to object at all, *see* 53 A.D.3d 976, 979 (3d Dep't 2008) ("[T]he court asked counsel if there were any objections . . . [i]n response, plaintiffs' counsel did not register any pertinent objection."). Here, WCD did object. But, even assuming WCD *had* failed to preserve its objection (which it did not), errors in jury instructions can result in new trials in the interests of justice. *See Johnson v. Grant*, 3 A.D.3d 720, 721 (3d Dep't 2004) ("Although given an opportunity, plaintiffs did not timely object to such refusal thus waiving any right to challenge the charge on appeal . . . [h]owever, even absent a timely objection, this Court is empowered to

grant a new trial in the interest of justice where demonstrated errors in a jury instruction are fundamental.") (internal quotations omitted); *People v. Stahl*, 138 A.D.2d 920, 921 (4th Dep't 1988) ("Although there was no timely objection to this error [in a jury instruction], a new trial is required because the error is of such magnitude as to deny defendant his constitutional right to a fair trial.").

A new trial should be granted because the jury instructions were inconsistent and confusing and prejudiced WCD by holding it to an expert standard.

IV. THE JURY'S APPORTIONMENT OF FAULT WAS AGAINST THE WEIGHT OF THE EVIDENCE

WCD did not manufacture or sell Desert Flower and did not have an opportunity to warn Mrs. Nemeth through a label on Desert Flower; Shulton did. J.R. 1386. WCD distributed talc to Shulton, which Shulton then may have used to create a finished product. Shulton tested it for quality throughout the manufacturing process. J.R. 3438-42. On this basis, an apportionment of equal fault between WCD and Shulton should be vacated.

The litany of cases cited by WCD shows direct tortfeasors are rightfully held more responsible than indirect tortfeasors. Those cases are examples of where this Court set aside a jury allocation of fault that apportioned too much fault to an indirectly responsible party. *See* WCD Br. 39-40. The Court should set aside the allocation here where WCD was, at best, indirectly responsible for any harm Mrs. Nemeth suffered. Just because this is an "asbestos case" does not immunize the

apportionment from review, as Plaintiff contends. *See, e.g.*, *Bigelow v. Acands, Inc.*, 196 A.D.2d 436, 437-38 (1st Dep't 1993) (ordering retrial on apportionment in asbestos case).

As to the settling defendants, Plaintiff tries to but cannot have it both ways by arguing that the evidence was insufficient to apportion fault to the settling defendants. WCD presented evidence of the settling defendants' respective fault, namely, the same evidence Plaintiff argues is sufficient to hold WCD liable. The record shows Mrs. Nemeth was exposed to asbestos through extensive home renovation projects, lawn and garden products she used throughout her life, and cleaning her son's work clothing from when he was an elevator mechanic. J.R. 4307, 4371-72, 7101-03. Dr. Moline testified "*all* of [Mrs. Nemeth's] exposures contributed to her disease"—including those exposures from the settling defendants' products. *See* J.R. 4298, 4306-08 (emphasis added). If that testimony is sufficient to hold WCD liable, it is sufficient to hold settling defendants liable as well. This case is different than *Idell* where the defendant argued for settled defendants to be included on the verdict sheet "regardless of whether *any* evidence of their liability was presented." *See In re: New York City Asbestos Litig.*, 164 A.D.3d 1128, 1129 (1st Dep't 2018) ("*Idell*") (emphasis added). Per Plaintiff's own admission, *see* Pl. Br. 54, that is not the case here, where evidence was presented showing Mrs. Nemeth

was exposed to the settling defendants' products and, according to Dr. Moline, such products contributed to her development of peritoneal mesothelioma.

Accordingly, the jury's allocation of fault is against the weight of the evidence and should be set aside.

V. THE AS-REMITTED AWARD MATERIALLY DEVIATES FROM REASONABLE COMPENSATION

Plaintiff stipulated to the as-remitted award of $6,000,000 for Mrs. Nemeth's past pain and suffering and $600,000 for Mr. Nemeth's loss of consortium. J.R. 146. Now taking issue with its own stipulation (which it cannot be permitted to do), Plaintiff asks this Court to undo the stipulation and reinstate the jury award. "It has long been and remains the rule that parties who stipulate to a modification of damages as an alternative to a new trial are not aggrieved by the modification and may not appeal from it." *Adams v. Genie Industries, Inc.*, 14 N.Y.3d 535, 540-41 (2010); *see also Dudley v. Perkins*, 235 N.Y. 448, 457 (1923) (plaintiffs "are not aggrieved by the reduction of the judgment in their favor which they stipulated to accept in preference to taking a new trial. Therefore they have no right of appeal from such modification").

After arguing against its own stipulation, Plaintiff then asks this Court to institute a new regime whereby judicial precedent is ignored. *See* Pl. Br. 57. The standard for determining whether a jury award is excessive is set by judicial precedent. *Paek v. City of New York*, 28 A.D.3d 207, 209 (1st Dep't 2006); *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 alternative system Plaintiff advocates is unsupported by CPLR 5501 or any case law whatsoever. New York courts have long held remittitur does not infringe on a party's right to a trial by jury and remitting an outsized jury award is within the courts' inherent constitutional powers, not to mention the statutory authority granted by CPLR 5501(c). The figure set by the court to which a party may stipulate to or face a new trial represents "the maximum . . . *found by the court* to be permissible on the facts." Siegel, N.Y. Prac. § 407 (6th ed. 2018) (emphasis added). In *O'Connor v. Papertsian*, plaintiff argued the trial court's modification of the judgment deprived plaintiff of trial by jury. 309 N.Y. 465, 469 (1956). The court rejected this argument and held the power of the trial court and Appellate Division to raise or lower jury verdicts is a constitutional power and "that practice does not lead to any encroachment upon the functions of the jury." *Id*. at 472 (quoting *Herman v. U.S. Trust Co*., 221 N.Y. 143, 147 (1917)).

Furthermore, Plaintiff's cited cases *support* further remittitur here because not only does this Court *routinely* reduce outsized jury awards, but the award here also far exceeds awards approved by this Court in comparable cases. *See In re: New York City Asbestos Litig.*, 143 A.D.3d 485, 486 (1st Dep't 2016)

("*Hackshaw*") (*reducing* a jury verdict award that had *previously been reduced* by a trial court judge to $3,000,000, which is *half* of the outsized award here, and recognizing that the "decedent experienced severe and crippling symptoms, as well as tremendous physical and emotion pain"); *In re: New York City Asbestos Litig.*, 143 A.D.3d 483, 483-85 (1st Dep't 2016) ("*Sweberg*") (*reducing* an award that had *previously been reduced* by a trial court judge to $4,500,000, over $1 million *less* than the outsized award here, even where plaintiff suffered future damages, which are not present here); *Miller II*, 154 A.D.3d at 441 (affirming a *reduced* award of $5 million for past pain and suffering, $1 million *less* than the award here); *In re: New York City Asbestos Litig.*, No. 190374/2014, 2016 WL 6093510, at *6 (N.Y. Sup. Ct. Oct. 19, 2016) ("*Geritano*") (*reducing* an award to $3 million, *half* of the outsized award here); *Gondar v. A.O. Smith Water Prods.*, No. 190079/15, 2017 WL 658033, at *1 (N.Y. Sup. Ct. Feb. 14, 2017) (*reducing* an outsized jury award); *Robaey v. Air & Liquid Systems Corp.*, No. 190276/2013, 2018 WL 4944382, at *15 (N.Y. Sup. Ct. Oct. 11, 2018) (*reducing* an outsized jury award).

WCD respectfully submits that reasonable compensation—in line with comparable cases—would be $4,500,000 for pain and suffering and $450,000 for loss of consortium.

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

The trial court correctly applied G.O.L. § 15-108(a), as interpreted by *Williams v. Niske*, 81 N.Y.2d 437 (1993), to the judgment in this case. G.O.L. § 15-108(a) provides:

> When a release . . . is given to one of two or more persons . . . claimed to be liable in tort for the same injury . . . it does not discharge any of the other tortfeasors from liability . . . but it reduces the claim of the [plaintiff] against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

G.O.L. § 15-108(a) is intended to encourage settlements and is also "concerned . . . with assuring that a nonsettling defendant does not pay more than its equitable share." *Williams*, 81 N.Y.2d at 443. Plaintiff's construction would have WCD paying more than its equitable share.

As in *Williams*, Plaintiff here received $732,500 prior to trial from settling defendants. *See* 81 N.Y.2d at 445; J.R. 146. Plaintiff's remaining uncompensated damage, as stipulated to in the remitted award, was $5,867,500. J.R. 146. This was then properly apportioned according to the equitable fault assigned by the jury. *See* 81 N.Y.2d at 445. This left a net verdict of $2,933,750 against WCD. J.R. 146. This tracks the method in *Williams* and best accomplishes the purpose of G.O.L. § 15-108(a), to avoid an unequitable award against nonsettling defendants. The Court of Appeals explained in *Williams*:

> [Plaintiff's proposal of] aggregating all six settling defendants and their payments . . . is a false comparison because in fact no equitable share was determined as to the . . . defendants who settled before trial. As a practical matter, moreover, the result is that—contrary to the statutory object—[the defendant] is deprived of credit for the . . . pretrial settlement.

See 81 N.Y.2d at 444.

The Pattern Jury Instructions and commentary uniformly agree that *Williams*, not *Didner*, controls the set-off calculation for settling defendants whose fault is not apportioned at trial. *See, e.g.,* Pattern Jury Instruction 2:275A cmt (Dec. 2016); Siegel, N.Y. Prac. § 176 (6th ed. 2018); 14 N.Y. Prac., New York Law of Torts § 10:26 (2016).

This case is not like *In re: New York City Asbestos Litig.*, 82 N.Y.2d 342, 351 (1993) ("*Didner*"). As Plaintiff recognizes, *see* Pl. Br. 61, in *Didner*, the 16 defendants that settled before the verdict *appeared on the verdict sheet* and were apportioned zero percent of fault *by the jury*. 82 N.Y.2d at 347. In contrast, fault here *was not* apportioned for the settling defendants. Without citation, Plaintiff declares that "[a]s in *Didner*, the equitable share of fault for each settling defendant has been determined." Pl. Br. 62. The verdict sheet, however, plainly shows that equitable shares of fault were determined only as to Shulton and WCD, *see* J.R. 7556, and not as to *any* non-Shulton settling defendant. This case is like *Williams*. "[W]e do not know what [the settling defendants'] equitable share should be" and "no equitable share was determined as to [the defendants] who settled before trial."

81 N.Y.2d at 441, 444. Like in *Williams*, but unlike in *Didner*, the jury was not given the opportunity to assess fault as to any other defendant. The trial court correctly applied G.O.L. § 15-108(a).

CONCLUSION

For the reasons stated above and in WCD's Brief, the Court should set aside the verdict and enter judgment for WCD or order a new trial, or, in the alternative, remit the award to $4.5 million for pain and suffering and $450,000 for loss of consortium, and affirm the trial court's application of G.O.L. § 15-108(a).

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May 3, 2019

Respectfully submitted,

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