To Be Argued By:
BRYCE L. FRIEDMAN
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APL-2020-00122
New York County Clerk's Index No. 190138/14

Court of Appeals

STATE OF NEW YORK

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

Plaintiff-Respondent,

—against—

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

Defendants,

WHITTAKER CLARK & DANIELS, INC.,

Defendant-Appellant,

(*Caption continued on inside cover*)

BRIEF FOR DEFENDANT-APPELLANT

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March 23, 2021

—and—

Wyeth Holdings Corporation, f/k/a American Cyanamid Company, individually and as successor-in-interest to Shulton, Inc., DAP, Inc., Georgia-Pacific LLC, Otis Elevator Company, Schindler Elevator Corporation, Thyssenkrupp Elevator Company, as successor-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.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO 22 NYCRR RULE 500.1(f)

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

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PRELIMINARY STATEMENT

This is a toxic tort personal injury case. Mrs. Nemeth passed away from peritoneal (abdominal) mesothelioma in March 2016. A central question at trial was whether Mrs. Nemeth's particular disease was caused by using Desert Flower cosmetic talcum powder ("Desert Flower"). Specifically, the jury was asked to determine whether the talc supplied by defendant Whittaker Clark & Daniels, Inc. ("Whittaker") in the 1960s, which may have been used in the formulation of Desert Flower and was allegedly contaminated with asbestos, caused Mrs. Nemeth's disease. Whittaker appeals from the April 9, 2020 Decision and Order of the Appellate Division, First Department (Friedman, J.P., Gische, Kapnick, and Singh, J.J.) (the "Order"), *see Nemeth v. Brenntag North America*, 183 A.D.3d 211 (1st Dep't 2020), by which a majority of the First Department relied on its own, 16 year-old precedent that required no showing of scientific standard against which the jury could compare the causation evidence before it, rather than more recent standards set out by this Court which require precisely such a showing.

The law on causation is settled and should have been applied by the Supreme Court. To establish causation, this Court's precedent clearly requires Plaintiff to prove through generally accepted methodologies (1) the level of exposure to inhaled asbestos from cosmetic talc use known to cause peritoneal mesothelioma and (2) a "scientific expression" of Mrs. Nemeth's exposure to inhaled asbestos from her use of Desert Flower, which the jury could have compared to the level of exposure

known to cause peritoneal mesothelioma. *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434 (2006); *Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801 (2016). Plaintiff failed to satisfy the prerequisites for causation under *Parker* and its progeny.

Recognizing as much, the First Department majority sidestepped the causation standard by describing it as "vexing" and instead relied on the pre-*Parker* First Department decision *Lustenring v. AC&S, Inc*., 13 A.D.3d 69 (1st Dep't 2004). *Lustenring* was an asbestos product liability case, in which the plaintiffs worked "all day for long periods in clouds of dust" created from manipulating and crushing products "made with asbestos." The First Department allowed a jury verdict to stand against the manufacturer of the asbestos-containing product based on conclusory expert testimony that the "clouds of dust" plaintiffs were exposed to "necessarily" contained "enough asbestos to cause mesothelioma." *Lustenring*, 13 A.D.3d at 70. By relying on *Lustenring* and the description of "visible dust" rather than the applicable "scientific expression" approach developed since *Parker*, "the majority [of the First Department panel] decide[d] this appeal as if the Court of Appeals had already overruled [*Parker* and its progeny] requiring the plaintiff in a toxic tort case to present expert evidence." *Nemeth*, 183 A.D.3d. at 236 (Dissent). Based on *Parker* and its progeny, the kind of expert testimony provided in *Lustenring* is insufficient to meet the "scientific expression" standard of causation currently applicable. Plaintiff relied solely on the same expert testimony in this case. Thus, the First Department erred and should be reversed.

Indeed, this Court's precedent since *Parker* requires evidence of the amount of exposure to a product needed to cause the particular disease, followed by a scientific expression of the amount of exposure this plaintiff allegedly had, so the jury can determine if the product at issue could have caused the injury.[1] Letting the Order stand based on "vague, conclusory and subjective" causation opinions leaves jury speculation to fill the gap between what is known about the toxin and the particular injury/condition, as compared to the particular product use in this case, and thus is contrary to law. *See Nemeth*, 183 A.D.3d at 242 (Dissent). It is important for the Court to reiterate that a foundation sufficient to impose liability on a defendant requires a scientifically expressed connection between the particular exposure and the disease at issue, using generally accepted scientific methods. Otherwise, the door will be open to thousands of potential claims that have no scientific basis against individuals and businesses only remotely, if at all, connected to an alleged exposure. This issue is particularly timely and especially important given the scientific uncertainty in New York and elsewhere surrounding COVID 19.

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[1] These concepts are sometimes described as "general" and "specific" causation. *See, e.g. Juni v. A.O. Smith Water Prods. Co*., 32 N.Y.3d 1116, 1118 (2018) (joining majority decision in holding plaintiff failed to establish defendant's conduct was a proximate cause of decedent's injuries under *Parker* and noting that the concurrence did "not address any other issues of general or specific causation reached by the Appellate Division."). Whether the level of exposure to the product known to cause the specific disease is a component of general or specific causation may not be clear from the Court's precedent, *Nemeth*, 183 A.D.3d at 237 n.5, the appropriate labeling of the components of the necessary showing is not germane to deciding this appeal.

The law and the interests of justice and its fair administration require reversal here and a strong message to follow *Parker* and its progeny.

As an additional and separate basis for reversal, the Order should be reversed because contrary to the evidence presented by Plaintiff, Plaintiff's counsel argued in summation that Mrs. Nemeth's peritoneal mesothelioma was caused by vaginal exposure to Desert Flower, a suggestion intuitively appealing to laypersons, given the proximity of the pelvic region to the abdomen, where her disease occurred.[2] The trial judge, the Order and the dissent from Justice Friedman (the "Dissent") all agree the summation argument was not supported by the record, and there was not a shred of evidence that Mrs. Nemeth's peritoneal mesothelioma could have been or was caused by transvaginal exposure (i.e., use in the vaginal area, and somehow absorbed into the lining of the abdomen). The trial court recognized Plaintiff's counsel's statement as unduly prejudicial and inappropriate, but erroneously refused to order a mistrial or issue a curative instruction and instead, in an unprecedented decision, allowed Plaintiff's counsel to reopen his closing to correct his own misstatement, where, instead, counsel doubled down on it. Further, the trial court did not allow Whittaker's counsel a similar opportunity to reopen closing and respond. To excuse the lack of a sufficient curative instruction by the trial court, the Order cites that Plaintiff's counsel's was not "motivated by any 'lack of good faith,'" which is

[2] Notably, peritoneal mesothelioma is a cancer of the lining of the peritoneum in the abdomen, and is not a cancer of the respiratory system.

irrelevant.[3] The question is whether Whittaker was deprived of "a fair trial when plaintiff's counsel baselessly introduced the pelvic exposure theory into the case" after Whittaker had closed. *Nemeth*, 183 A.D.3d at 249 (Dissent). Whittaker was denied a fair trial because no curative instruction was issued. Further, by focusing on counsel's subjective intent, the Order will set counsel at war and trial proceedings into disarray as both sides will try to prove mistakes were made in bad faith.

This Court should reverse the decisions below and award Whittaker judgement as a matter of law. In the alternative, this Court should grant Whittaker a new trial.

QUESTIONS PRESENTED

Question 1 Did the First Department err by denying Whittaker's motion for judgment notwithstanding the verdict and sustaining the jury's verdict that use of Desert Flower, a cosmetic talcum powder, caused Mrs. Nemeth's peritoneal (abdominal) mesothelioma in the absence of expert evidence establishing through generally accepted methodologies that Mrs. Nemeth was exposed to a scientifically expressed amount of talc known to cause her peritoneal mesothelioma, as required by this Court's precedent in *Juni v. A.O. Smith Water Prods. Co.*, 32 N.Y.3d 1116 (2018), *Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801 (2016), *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014), and *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006)?

Question 2 Did the First Department err in not ordering a new trial based on Plaintiff's counsel's "intuitively appealing" and

[3] Even if Plaintiff's counsel's subjective intent were relevant, the fact that counsel doubled-down on this argument and did not admit that the argument was not supported by the evidence, actually shows a lack of good faith.

indisputably unduly prejudicial argument that Mrs. Nemeth's peritoneal mesothelioma occurred through regular vaginal use of Desert Flower, despite no record evidence of vaginal use or transvaginal entry of the product, or that such use could cause peritoneal mesothelioma. The trial judge acknowledged that allowing the summation was an error and prejudicial to Whittaker, but refused to order a mistrial or issue a curative instruction. The First Department also declined to order a new trial on the unprecedented basis of Plaintiff's counsel's apparent "good faith" in making the argument in summation even though Plaintiff's counsel's intent is legally irrelevant on the issue of prejudice?

STATEMENT OF JURISDICTION

The Court has jurisdiction over the appeal pursuant to CPLR 5602(a)(1)(i) because the underlying action originated in the Supreme Court of the State of New York, County of New York, and the decision of the Appellate Division is a final determination that disposes of the matter as to Respondents. *See We're Assoc. Co. v. Cohen, Stracher & Bloom*, 65 N.Y.2d 148, 149 n.1 (1985) ("The order from which our permission to appeal was sought is final as to the individual defendants, and therefore the appeal is properly before us, because the action was finally determined as to them . . ."); *see also Barile v. Kavanaugh*, 67 N.Y.2d 392, 395 n.2 (1986) (same).

STATEMENT OF CASE

A. Factual Background

During the 1960s and into the 1980s, Whittaker distributed minerals and pigments. *Nemeth*, 183 A.D.3d at 215; R4892–4895. Shulton, Inc. was a

manufacturer of finished talcum powder products and sourced talc from various suppliers, such as Whittaker, to create its products, including Desert Flower. R1386, 3430–31, 3435, 3442.[4]

Mrs. Nemeth used Desert Flower daily for eleven years, starting in 1960. R625–35. She applied the powder to her body for approximately two minutes after she showered, and then spent approximately five minutes cleaning powder that fell. R637, 1377–78, 4147–48.

From 1966 through 1975, Mrs. Nemeth was exposed to asbestos through products related to home renovation and lawn and garden maintenance. R4370–72, 7101, 7103. She was also exposed to asbestos in the 1980s, when her son brought asbestos dust home on clothing he wore as an elevator mechanic. *Id*.

Mrs. Nemeth was diagnosed with peritoneal mesothelioma in November 2012. R4154–55, 7093. Peritoneal mesothelioma is a tumor of the mesothelial cells, which line the body's gut or abdomen. R4046. In women, peritoneal mesothelioma cases are often idiopathic, meaning it can arise spontaneously or from an obscure or unknown cause. R4070.

B. Procedural History

Plaintiff filed suit in New York County on April 16, 2014, naming Whittaker, Shulton and eleven other defendants. R144–45. After Plaintiff settled with certain

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[4] Citations to "R_" refer to the record on appeal before this Court, and submitted with this brief.

defendants, the case was tried only against Whittaker for 21 days from March 9, 2017 through April 7, 2017. R2560–61, 5529.

1. Trial Evidence: Lack Of Causation

Principal issues at trial were causation and exposure through inhalation. Plaintiff was required to show a consumer's use of cosmetic talcum powder can cause peritoneal mesothelioma *and* that Mrs. Nemeth's particular use of Desert Flower caused her peritoneal mesothelioma. *See Juni v. A.O. Smith Water Prods. Co*., 148 A.D.3d 233 (1st Dep't 2017), *Sean R.,* 26 N.Y.3d 801, *Cornell,* 22 N.Y.3d 762, and *Parker*, 7 N.Y.3d 434.[5] Plaintiff's causation evidence was based principally on Dr. Jacqueline Moline's testimony. However, Dr. Moline did not show evidence of a proven link between consumer use of cosmetic talcum powder and peritoneal mesothelioma, nor did she offer any study, analysis, or opinion identifying a scientific expression of the specific levels of exposure to Desert Flower, which data points a jury could have used to reach a conclusion as to the cause of her peritoneal mesothelioma. R4883; *Nemeth*, 183 A.D.3d at 238–40 (Dissent). Indeed, Dr. Moline could not and did not identify any peritoneal mesothelioma exposure benchmarks, much less compare such benchmarks to any purported exposure from Mrs. Nemeth's use of Desert Flower. R4108, 4439–40. Her opinion was thus insufficient.

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[5] Whittaker does not concede that the talc it supplied to Shulton was contaminated with asbestos, but that issue is not up for appeal.

On February 23, 2017 and March 2, 2017, R2431–32, 2233–37, the trial court reserved decision on Whittaker's motions *in limine* based on causation, which sought in part to preclude Dr. Moline from testifying that cosmetic talc was a substantial contributing factor to the development of Mrs. Nemeth's peritoneal mesothelioma. R2431–32. At trial, Dr. Moline did not offer evidence showing that any amount of inhaled Desert Flower or asbestos therein (assuming there is any) can cause peritoneal mesothelioma. Indeed, even taking separately the alleged toxin (asbestos), Dr. Moline conceded that "not every inhalation of asbestos fibers results in peritoneal mesothelioma" and that some exposures to asbestos are "trivial and don't increase a person's risk of developing mesothelioma." R4819–21. And, "[c]ritically," as the Dissent noted, "not one of the articles Dr. Moline discussed on the witness stand (she mentioned none in her written report) sets forth an estimate of the minimum level of exposure to respirable asbestos (cumulative or otherwise) that would suffice to cause peritoneal mesothelioma." *Nemeth,* 183 A.D.3d at 238–40 (finding no epidemiological support in the "Welch article," "Helsinki article," "Andrion article," or in the record generally, for whether there exists a level of asbestos exposure for cosmetic talc use sufficient to cause peritoneal mesothelioma).

Next, instead of providing a level of Mrs. Nemeth's purported exposure of that could have been compared with that threshold level discussed in the paragraph above, Dr. Moline pointed to a "releasability" experiment performed for purposes of this case by another of Plaintiff's paid trial experts, geologist Sean Fitzgerald.

Nemeth, 183 A.D.3d at 240–41 (Dissent). In his experiment, Mr. Fitzgerald shook samples of Desert Flower in a "glove box" to see if "asbestos and talc is . . . *released* into the air." R3223–34, 3178–84 (emphasis added). Mr. Fitzgerald admitted he estimated only the amount of asbestos released, not the amount of asbestos Mrs. Nemeth actually would have breathed, in a space having the same size and conditions as her bathroom. R3180 (Fitzgerald testifying that "my test was just to see if countable structures of asbestos were *releasable* from the product, period. I wasn't actually trying to simulate the entire environment. I just wanted to see if simulation of using the material would cause asbestos in the talc, if present, to be *released* into the air.") (emphasis added). Mr. Fitzgerald's purported measurement of fibers released in the glove box was not asserted to be the amount of fibers that were inhaled or could have been respired by Mrs. Nemeth, and, in fact, there was no scientific evidence of respiration of any talc during routine use in a bathroom. *Nemeth*, 183 A.D.3d at 240–41 (Dissent).

Although Dr. Moline's trial testimony "stretch[ed] through almost 1,000 pages," she failed to offer a scientific expression of an "estimate of the level of exposure that could have caused Mrs. Nemeth's disease," and further admitted that, although mesothelioma caused by asbestos exposure is related to cumulative dose, "she was unaware of either the daily or lifetime dose of asbestos" to which Mrs. Nemeth was exposed by using Desert Flower. *Id*. at 238–41 (Dissent); R3994–4887.

Thus, there were multiple gaps in the evidence needed for the jury to conclude that Mrs. Nemeth inhaled enough asbestos from Desert Flower to cause her peritoneal mesothelioma. The trial court thereafter denied Whittaker's motion for a directed verdict and allowed the case to be decided by the jury. R5090.

2. Plaintiff's Counsel's Improper Summation

Recognizing the flimsiness of Plaintiff's causation evidence, in summation Plaintiff's counsel argued that Mrs. Nemeth developed peritoneal mesothelioma through pelvic/vaginal exposure to asbestos. R5337–38. However, there was no evidence of pelvic/vaginal exposure, nor any opinion that such exposure could have caused Mrs. Nemeth's peritoneal mesothelioma. Whittaker immediately objected, but Plaintiff's counsel was permitted to continue, and Whittaker was not given an opportunity to rebut. R5338. The trial court recognized its error the next day, but instead of ordering a mistrial or giving a curative instruction, allowed Plaintiff's counsel to address the issue in a "mini-closing" to "clear it up" before the jury, R5420–22, a "cure" that is not supported by any precedent, *see Nemeth*, 183 A.D.3d at 250 (Dissent). As the Dissent recognized, Plaintiff's counsel "did nothing to cure the prejudice caused by his earlier improper statements, and arguably even worsened that prejudice" by doubling down on rather than clearing up the issue. *Id*. Moreover, Whittaker's counsel was not afforded a similar opportunity to address the issue in a "mini-closing." As a result, Whittaker was prejudiced and deprived of a fair trial on the basis that, "after 21 days of trial, the very last thing the jury heard from one of

the lawyers," which was "likely to remain vivid in their minds when they retired to deliberate–was a reminder of the pelvic exposure theory, without an actual instruction to disregard it." *Id*.

3. Jury Verdict and Post-Trial Proceedings

The jury rendered a verdict in favor of Plaintiff on April 7, 2017, apportioning 50% of the fault to Whittaker and 50% to Shulton, the only defendants on the verdict sheet. R5535. 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. R5535–36.

Whittaker 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. R2289–90. On May 30, 2017, the trial court denied the 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 to $6 million and reduce the award to Francis Nemeth to $600,000. R7–74, 2327–28. On August 22, 2017, the trial court (Shulman, J.) entered judgment (the "Judgment"). R147.

C. First Department's Decision and Appeal

On September 21, 2017, Whittaker timely noticed its appeal from the Judgment and all adverse rulings subsumed therein. R3. On October 2, 2017, Plaintiff noticed a cross appeal from the Judgment and all adverse rulings subsumed therein. R5.

On April 9, 2020, the First Department (Friedman, J.P., Gische, Kapnick, and Singh, J.J.) issued the Order, modifying in part and otherwise affirming the Judgment. The three-Justice majority (with an opinion written by Justice Gische) modified the as-remitted jury verdict awarding Plaintiff the principal amount of $3,300,000, and otherwise affirmed the lower court. *Nemeth,* 183 A.D.3d at 235–36. Relying primarily on *Lustenring* and the "visible dust" theory of causation, the Order held that Mrs. Nemeth's testimony of her "personal history of prolonged exposure to visible dust [ ] beyond what is contained in ambient air [ ] would be sufficient to create a jury question," despite no evidence presented as to (1) the level of asbestos exposure sufficient to cause peritoneal mesothelioma or (2) a "scientific expression" of Mrs. Nemeth's exposure to asbestos through her use of Desert Flower. *Nemeth*, 183 A.D.3d at 229–30.[6]

Justice Friedman issued a twenty-five page dissent, finding Plaintiff's failure to establish causation entitled Whittaker to judgment notwithstanding the verdict, and, alternatively, that Plaintiff's counsel's improper summation warranted reversing judgment and granting Whittaker a new trial. As to causation, the Dissent correctly observed that "the majority decides this appeal as if the Court of Appeals had already overruled its cases requiring the plaintiff in a toxic tort case to present

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[6] The Order also failed to accurately describe the record evidence on causation and the complete absence of scientific support showing that consumer use of cosmetic talc is capable of causing peritoneal mesothelioma. *Compare Nemeth*, 183 A.D.3d at 227–228 with *id*. 238–240 (Dissent).

expert evidence" as required by *Sean R.* and *Parker*. 183 A.D.3d. at 236. There was no evidence that (1) the amount of exposure to inhaled asbestos from cosmetic talc use that is known to cause peritoneal mesothelioma and (2) a "scientific expression" of Mrs. Nemeth's exposure to inhaled asbestos from her use of Desert Flower, from which the jury could have concluded the level of exposure capable of causing peritoneal mesothelioma had been exceeded. At best, Dr. Moline testified that mesothelioma is a disease that signifies that there likely was an asbestos exposure, an approach to proof of causation rejected by this Court in *Sean R. See id.* at 244 (Dissent). As to Plaintiff's improper summation, Justice Friedman correctly noted "[t]he pelvic exposure theory's intuitive appeal, the lack of evidence to connect such exposure to Mrs. Nemeth's disease, and the fact that the exposure issue went to the heart of the case . . . combined to deprive Whittaker of a fair trial when [P]laintiff's counsel baselessly introduced the pelvic exposure theory into the case." *Id*. at 249.

Whittaker was served with the Order and notice of entry on May 4, 2020, and on June 3, 2020, Whittaker timely noticed its motion for leave to appeal the two questions presented here. On August 13, 2020, the same panel of Justices at the First Department granted Whittaker's motion for leave to appeal. After Whittaker submitted its Preliminary Appeal Statement, this Court, by letter dated September 23, 2020, directed briefing under the method set forth in Rule 500.11. On January 21, 2021, this Court terminated its review of the appeal by the alternative procedure

set forth in Rule 500.11 and directed briefing and argument pursuant to its standard procedures of briefing and argument.

ARGUMENT

This Court reviews questions of law—like those presented here—*de novo*. *See* CPLR 5501(b); *Cohen v. Hallmark Cards, Inc*., 45 N.Y.2d 493, 499 (1978).

POINT I PLAINTIFF'S EVIDENCE ON CAUSATION WAS INSUFFICIENT

The Order applied a standard for specific causation in toxic tort personal injury cases that is at odds with this Court's precedent. To establish causation, this Court's precedent since *Parker* requires proof of (1) the amount of exposure to the toxin (here, trace asbestos contamination in cosmetic talcum) that is known to cause the particular injury (here, peritoneal mesothelioma) and (2) a "scientific expression" of a particular person's exposure to that "toxin" (here, Mrs. Nemeth's purported inhalation of asbestos from her use of Desert Flower), which together would satisfy the legal requirements for causation and provide the jury with a foundation to make its causation determination. Because the Order applied a different standard, it is contrary to New York law and should be reversed.

A. This Court Requires A "Scientific Expression" Of Exposure Known To Cause A Particular Illness

In *Parker*, the Court recognized 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. That was

the result here, when the trial court denied Whittaker's motion for a directed verdict. Fundamentally, if a litigant "wishes to prove that '[a] person was exposed to sufficient levels of [a particular] toxin to cause [a particular] illness', the litigant must first establish the level of exposure to the particular toxin that is sufficient to cause the particular illness." *Nemeth*, 183 A.D.3d at 237 (Dissent) (citing *Parker*, 7 N.Y.2d at 448). Causation "hinges on the scientific literature in the record before the trial court" and, showing a mere "risk," "linkage," or "association" is insufficient. *Cornell*, 22 N.Y.3d at 783, 785.

Separately, the plaintiff also must lay a foundation demonstrating the exposure to the toxin by the individual, even where it might be difficult to define that exposure. *Parker* suggested three methods by which an expert could establish causation where precise measurement of cumulative dose may not be possible: (1) focusing on intensity of exposure rather than cumulative dose; (2) estimating exposure through mathematical modeling; or (3) "[c]ompari[ng] . . . the exposure levels of subjects of other studies . . . provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects." *Id.* Pinpoint precision may not be required, but the expert evidence must still provide the factfinder with a "scientific expression of [the] exposure level," so the factfinder can assess whether the level has been met. *Parker*,

7 N.Y.3d at 449.[7] In *Parker*, the Court rejected expert testimony that "Parker was 'frequently' exposed to 'excessive' amounts of gasoline" as an adequate "scientific expression of Parker's exposure level." *Id.* at 449. The Court also rejected as insufficient expert testimony that Parker had "far more exposure to benzene than did refinery workers in [various] epidemiological studies." *Id.*

In *Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801 (2016), this Court again considered the adequacy of expert opinion testimony in a toxic tort case where the plaintiff claimed *in utero* exposure to gasoline fumes from a car manufactured by the defendant caused plaintiff's disabilities. This Court held "[a]t a minimum . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" and "[n]ot only is it necessary for a causation expert to establish that the plaintiff was exposed to sufficient levels of a toxin to have caused his injuries, but the expert also must do so through methods 'found to be generally accepted as reliable in the scientific community.'" *Id*. at 809. The record in *Sean R*. contained scientific studies supporting a causal connection

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[7] Similar to *Parker*, courts around the country have rejected the "any exposure" theory in asbestos cases (i.e. that any exposure to the defendant's product could have caused plaintiff's disease). *See, e.g. Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007) (holding plaintiff must present "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing asbestos-related disease."); *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012) (requiring experts to prove a causative dose); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 733 (Va. 2013) (holding experts "must opine as to what level of exposure is sufficient to cause mesothelioma, and whether the levels of exposure at issue . . . were sufficient.").

between the plaintiff's disabilities and exposures to gasoline at certain levels, but plaintiff's experts still fell short because they failed to sponsor a "reliable" and "generally accepted" means of reconstructing the plaintiff's actual exposure to opine whether it was at levels "known to cause" the disability. *Id*. at 807, 809–10.

In accordance with these cases, the First Department held in *Juni* that plaintiffs "must . . . establish some scientific basis for a finding of causation attributable to the particular defendant's product." 148 A.D.3d at 239. There, plaintiff sponsored "general, subjective and conclusory" causation opinion testimony from Dr. Moline, who was also Plaintiff's expert here, that "Juni's 'cumulative exposures to asbestos caused his mesothelioma,' referring to 'the sum total of [his] exposure to asbestos . . . over his lifetime,'" and that the "visibility of the dust itself indicates the magnitude of the exposure 'at levels that are . . . capable of causing disease.'" *Id*. at 237, 242. Applying *Parker* and *Sean R*., the First Department rejected the expert's "broad conclusions on causation" because "a plaintiff claiming that a defendant is liable for causing his or her mesothelioma must still establish some scientific basis for a finding of causation attributable to the particular defendant's product." *Id*. at 239. Three years ago, this Court affirmed the First Department's *Juni* opinion in a memorandum decision joined by four judges. *See* 32 N.Y.3d 1116 (2018). However, as evidenced by the fact that the First Department granted Whittaker's motion for leave to appeal in this case, further

direction is needed to make sure the Supreme Court adheres to *Parker* and its progeny.[8]

B. Plaintiff's Evidence Failed To Meet This Court's Precedent On Causation

First, and at the most basic level, Plaintiff did not offer evidence establishing the level of exposure to asbestos sufficient to cause peritoneal mesothelioma. *See Nemeth*, 183 A.D.3d at 237–38 (Dissent). Such evidence is crucial to plaintiff's burden on causation: New York law requires plaintiffs to prove they were exposed to sufficient levels of a toxin known to cause their illness, which requires establishing the baseline level of exposure needed to cause that illness. *See Parker*, 7 N.Y.3d at 448. Here, because Plaintiff offered no evidence on the amount of asbestos exposure known to cause peritoneal mesothelioma (or, at least, some threshold level), the jury had no basis by which to compare Mrs. Nemeth's claimed exposure level (which level, as noted below, also was not proffered) to the exposure amount required to cause the disease shown by scientific methods.

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[8] Far from setting an impossible standard, plaintiffs in other cases have managed to meet the standards set by *Parker* by, for example, scientifically calculating a dose exposure based on the injured party's use of the asbestos-containing product, *see, e.g., Miller v. BMW of North America*, No. 190087/2014, 2016 WL 3802961, at *5 (N.Y. Sup. Ct. May 04, 2016), *aff'd*, 154 A.D.3d 441 (1st Dep't 2017) (plaintiff provided "dose calculation" of plaintiff's exposure to asbestos), or by comparing the plaintiff's exposure level to studies of similarly situated individuals, *see, e.g., Stock v. Air & Liquid Sys. Corp.*, 187 A.D.3d 1623, 1623 (4th Dep't 2020) (plaintiff's expert reviewed studies of workers involved in tasks similar to those performed by decedent and compared decedent's exposure to those in studies).

Plaintiff offered only Dr. Moline's ungrounded, vague testimony that "brief or low level exposures of asbestos" could cause peritoneal mesothelioma, and that exposure could be termed "significant" where there is "some element of regularity or very high exposure over a shorter period of time." *Nemeth*, 183 A.D.3d at 218–19; 238 (Dissent). This is the very same kind of non-specific expert testimony that *Parker* rejected. *See Parker*, 7 N.Y.3d at 449 (expert testimony that injured party experienced "frequent" and "excessive" exposure insufficient). Dr. Moline did not define these exposure levels with "any numerical values," and admitted that "not every inhalation of asbestos fibers results in peritoneal mesothelioma." *Nemeth*, 183 A.D.3d at 238 (Dissent). She even acknowledged that "some exposure to asbestos . . . are trivial and don't increase a person's risk of developing mesothelioma." *Id*. Dr. Moline conceded that peritoneal mesothelioma may develop without exposure to asbestos. R4070. Even the scientific literature Dr. Moline relied on failed to provide the jury with a baseline figure of asbestos exposure sufficient to cause peritoneal mesothelioma. *See Nemeth*, 183 A.D.3d at 238–39 (Dissent).

Second, instead of offering the required "scientific expression" of Mrs. Nemeth's amount of exposure to inhaled asbestos through generally accepted methodology, Plaintiff proffered geologist Sean Fitzgerald, who measured only the "release" of asbestos by attempting to simulate the use of Desert Flower in a glove box. In his experiment, Fitzgerald estimated that 2,760,000 asbestos fibers were "released" each time the product was used, which he concluded was "thousands of

times" the level of asbestos permitted in schools and "several orders of magnitude higher" than ambient levels. *Id*. at 217–18, 221, 229, 240–242 (Dissent). By Fitzgerald's own admission, however, his estimates were not of Mrs. Nemeth's exposure—that is, the amount of asbestos she would have *inhaled* using Desert Flower in her bathroom—but were of the amount of asbestos *released* (but not necessarily inhaled) through manipulation of Desert Flower in a glove box. *See id*. at 242 (Dissent) (Fitzgerald admitting he "wasn't actually trying to simulate the entire environment" of Mrs. Nemeth's use). Fitzgerald's experiment failed to offer any estimate whatsoever—much less a "scientific expression" through a reliable and generally accepted methodology—of the amount of asbestos Mrs. Nemeth inhaled. In short, there was no connection between Fitzgerald's "releasability" experiment and Mrs. Nemeth's inhalation from normal use of the product in a bathroom. *See Juni*, 32 N.Y.3d at 1118 (there must be "legally sufficient evidence" showing "connection between [defendant's] products and decedent's exposure to asbestos") (concurrence).

Without actual measurements or estimations, the totality of Plaintiff's evidence on causation amounted to testimony that (1) "brief and low level[s]" of asbestos exposure may be associated with peritoneal mesothelioma and (2) Mrs. Nemeth may have been exposed to "released" asbestos in some unknown amount that was "several [orders] of magnitude higher" than ambient levels. Such "vague, conclusory and subjective" evidence, *Nemeth*, 183 A.D.3d at 242 (Dissent), has been

rejected by this Court as insufficient under the standards of *Parker* and progeny, *see, e.g. Parker*, 7 N.Y.3d at 449; *Cornell*, 22 N.Y.3d at 784 (rejecting opinion that "made no effort to quantify [plaintiff's] level of exposure"); *Sean R.*, 26 N.Y.3d at 809 (exposure levels should be reconstructed for expert to opine whether they were at levels "known to cause" disability).

The Order's reliance on the First Department's 2004 *Lustenring* decision to sustain the verdict here was clear error. The paucity of evidence relied on in the *Lustenring* opinion to support causation would not survive the standards outlined in *Parker* and its progeny. *Lustenring* did not require proof through reliable and generally accepted methodologies that plaintiff was exposed to sufficient levels of a toxin known to cause plaintiff's disease and a scientific expression offered as to plaintiff's actual or estimated level of exposure. To the contrary, *Lustenring* relies on the idea that the presence of "visible dust"—without a scientific expression of exposure—was sufficient to support causation. *See Lustenring*, 13 A.D.3d at 70. Unlike *Parker* and its progeny, *Lustenring* does not require the jury to be given the scientific expression of a benchmark which is known to cause the disease or a scientific expression from the particular product use that could be compared to that benchmark. Furthermore, even if the unique facts of *Lustenring* justify the approach taken there, the facts here differ materially. In *Lustenring*, plaintiffs "manipulat[ed]" and "crush[ed]" products "made with asbestos," with known amounts of asbestos in their formulations, and worked "all day for long periods in clouds of dust." *Id.* at

70. Desert Flower is not a product made with asbestos, but rather a product Plaintiff contends may have been contaminated with trace amounts of asbestos (but, which amount of asbestos contamination as a percentage or amount of the talcum product was never quantified). Here, Mrs. Nemeth's use of cosmetic talc that allegedly was contaminated with trace amounts of asbestos is more akin to *Juni*, where exposure to asbestos was more limited and incidental, and where plaintiff failed to offer "measurements of what Mr. Juni was exposed to." *Juni*, 148 A.D.3d at 237.

The Order also reflects a recent trend in the First Department of drifting away from *Parker* and an unwillingness to apply this Court's causation precedent in a fair and predictable manner. *Compare Nemeth*, 183 A.D.3d. at 211 (not applying *Parker*) and *In re New York City Asbestos Litigation ("Robaey"),* 186 A.D.3d 401 (1st Dep't 2020) (same) *with Miller v. BMW of N. Am*., 2016 WL 3802961, at *5, *aff'd*, 154 A.D.3d 441 (1st Dep't 2017) (affirming jury verdict under *Parker*); *Juni v. A.O. Smith Water Prods. Co*., 148 A.D.3d 233 (1st Dep't 2017) (overturning jury verdict under *Parker*), *aff'd* 32 N.Y.3d 1116 (2018); *Muhammad v. Fitzpatrick*, 937 N.Y.S.2d 519, 521 (4th Dep't 2012) (holding *Parker* not met); *Ratner v. McNeil-PPC, Inc.*, 933 N.Y.S.2d 323, 331 (2d Dep't 2011) (applying *Parker* at summary judgment); *Kendall v. Amica Mut. Ins. Co.*, 23 N.Y.S.3d 702, 706 (3d Dep't 2016) (applying *Parker* at summary judgment).

Plaintiff failed to provide evidence of (1) the amount of exposure to inhaled asbestos from cosmetic talc use that is known to cause peritoneal mesothelioma and

(2) a "scientific expression" of Mrs. Nemeth's exposure to inhaled asbestos from the use of Desert Flower, which the jury could have then compared to the level of exposure capable of causing peritoneal mesothelioma to assess whether Desert Flower use caused her peritoneal mesothelioma. As the Order incorrectly applies the law, Whittaker respectfully requests this Court set aside the verdict and enter judgment for Whittaker as a matter of law, which will reaffirm its precedent and re-set these important standards for toxic tort law in New York.

POINT II WHITTAKER DID NOT HAVE FAIR TRIAL. PLAINTIFF'S COUNSEL'S ERRONEOUS AND PREJUDICIAL SUMMATION WAS NOT SUPPORTED BY FACTS IN THE RECORD AND NO CURATIVE INSTRUCTION WAS GIVEN BY THE TRIAL COURT. THE ORDER'S RELIANCE ON PLAINTIFF'S "GOOD FAITH" IS NOT RELEVANT IN DETERMINING WHETHER A NEW TRIAL IS REQUIRED.

Plaintiff's counsel's summation was improper and prejudicial because it suggested Mrs. Nemeth's peritoneal mesothelioma was caused by vaginal exposure to Desert Flower, which was not supported by the record. The trial court refused to grant a mistrial or issue a curative instruction, and instead allowed Plaintiff's counsel to readdress the jury in a "mini-closing," which worsened the prejudice by reminding the jury of Plaintiff's unsupported theory. The Order's focus on counsel's "good faith" is irrelevant to whether Whittaker was prejudiced and denied a fair trial.

A. Plaintiff's Counsel's Summation Was Not Based On Record Evidence.

It is black letter law that a summation cannot be based on facts outside the record. *Marincic v. Long Is. R.R. Co.*, 20 N.Y.2d 676, 676 (N.Y. 1967) ("repeated

references during plaintiff's summation to matters not in evidence" caused prejudice cured by instruction to jury); *see* Siegel, N.Y. Prac. § 397 (6th ed. 2020) (an attorney oversteps when "making statements on matters not in evidence"). "From the outset, plaintiff's case against Whittaker was predicated on the claim that Mrs. Nemeth's exposure to asbestos from Desert Flower had come by way of respiration." *See Nemeth*, 183 A.D.3d at 246 (Dissent). Yet, Plaintiff's counsel's summation argued 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." R5337–38. Whittaker's counsel immediately objected, but the trial court overruled. R5338.

The trial court recognized the next day that Plaintiff's counsel's argument was not based on facts in the record. 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 the 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." R5420.

The closing was unduly prejudicial to Whittaker because (1) there was zero evidence that use of Desert Flower "in her pelvic region" had anything to do with Mrs. Nemeth's peritoneal mesothelioma,[9] (2) the new pelvic exposure theory was

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[9] The only record evidence was that pelvic exposure to asbestos may be associated with "ovarian cancer," which Mrs. Nemeth did not have and is of a different organ.

intuitively appealing to laypersons, given the close proximity of the pelvic region to Mrs. Nemeth's abdomen, and (3) the issue of Mrs. Nemeth's exposure "went to the heart of the case." *Nemeth*, 183 A.D.3 at 249 (Dissent). While the court could have granted a mistrial or corrected this prejudice through a curative instruction, it failed to do so, and in fact compounded the prejudice, as described below.

B. Whittaker Was Denied A Fair Trial Because The Trial Court Did Not Grant Mistrial Or Issue A Curative Instruction.

Instead of granting Whittaker's request for a mistrial or curative instruction, the trial court allowed Plaintiff's counsel to "clear up" the issue in "a mini-closing." R5420–21. In doing so, counsel did not "clear up" the issue, but doubled-down, and the trial court did not permit Whittaker's counsel to respond. R5479. In his "mini-closing," Plaintiff's counsel again contended there was a second avenue of exposure by stating "certain *other avenues* of [asbestos] exposure specific to women" exist and should be considered. R5479 (emphasis added). As Justice Friedman notes in the Dissent, "[n]either the majority nor plaintiff has found any precedent supporting the permissibility of allowing an attorney to reopen his closing to correct his own improper statements." *Nemeth*, 183 A.D.3d at 250.

A trial court's failure to issue a curative instruction to rectify a prejudicial summation requires a new trial. *See Badr v. Hogan*, 555 N.Y.S.2d 249, 253 (N.Y. 1990) (granting new trial where defense counsel's summation was sufficiently prejudicial because it bore on "critical issue"); *Lyons v. City of New York*, 29 A.D.2d

923, 923 (1st Dep't 1968) (granting new trial because defendant's counsel made prejudicial comments in summation and "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 new trial because trial court "did not admonish or restrain [plaintiff's counsel] and did not instruct the jury to disregard the improper statements made in [the] summation"); *Long Playing Sessions, Inc. v. Deluxe Laboratories, Inc.*, 514 N.Y.S.2d 737, 738 (1st Dep't 1987) (holding "the trial court should have restrained counsel or issued a curative instruction with regard to [plaintiff's counsel's] improper and prejudicial comments"); *Rohring v. City of Niagara Falls*, 192 A.D.2d 228, 230 (4th Dep't 1993) ("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."); *People v. Adams*, 21 N.Y.2d 397, 403 (N.Y. 1968) (granting new trial in interest of justice because prejudicial remarks in summation denied defendant right to fair trial); *People v. Whalen*, 59 N.Y.2d 273, 280–81 (N.Y. 1983) (granting new trial because prosecutor's conduct during summation was improper and prejudicial to defendant).

Here, where both the Order and Dissent agree Plaintiff's counsel's summation was improper, the trial court's failure to issue a curative instruction warrants reversal and a new trial.

C. **Counsel's Subjective "Good Faith" Is Irrelevant.**

The Order and Dissent agreed there was no record evidence to support Plaintiff's counsel's new vaginal exposure argument. *See Nemeth*, 183 A.D.3d at 231, n. 8; 246–47 (Dissent). Nonetheless, the Order allowed the verdict to stand because it did not believe the summation was "motivated by any 'lack of good faith.'" But, as the Dissent correctly notes, the "dispositive question is whether the erroneous comment deprived the adverse party of a fair trial, not . . . whether the lawyer who made the improper comment did so in 'good faith.'" *Nemeth*, 183 A.D.3d at 233; 249–50. It is beyond reasonable dispute that Whittaker was unduly prejudiced by Plaintiff's counsel's improper summation, which touched on the key issues of the case. The trial court's failure to offer a curative instruction compounded the other errors related to exposure and causation, discussed above, and denied Whittaker a fair trial.

This Court should find that the improper summation, which touched on the key issues of the case, compounded by the trial court's error in not offering a curative instruction, was unfairly prejudicial to Whittaker and denied Whittaker a fair trial.

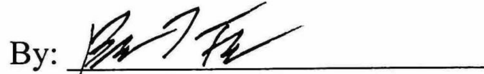
CONCLUSION

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

Dated: March 22, 2021
New York, New York

Respectfully submitted,

SIMPSON THACHER & BARTLETT LLP

By: 

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 7,540 words.

Dated: March 22, 2021
New York, New York