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

APL-2020-00122
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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*)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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May 21, 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.

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PRELIMINARY STATEMENT[1]

The Order failed to apply *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434 (2006) and its progeny, which require proof by Plaintiff of (1) the amount of exposure to the toxin that is known to cause the injury and (2) a "scientific expression" of Mrs. Nemeth's exposure. Here, Plaintiff presented the jury with evidence that, when shaken in a "glove box," asbestos was released from a substance alleged to be Desert Flower at levels "above" what is found in ambient air. That's it. Plaintiff has identified nothing more. By this appeal Defendant merely asks the Court to require the Supreme Court to apply the *Parker* standard to this case (no more, no less) by requiring evidence of the amount of exposure to inhaled asbestos that is known to cause peritoneal mesothelioma and a "scientific expression" of Mrs. Nemeth's inhaled exposure to asbestos so the jury can decide if a disease-causing exposure has occurred.

Rather than follow *Parker* and its own decision in *Juni v. A.O. Smith Water Prods. Co.*, 148 A.D.3d 233, 239 (1st Dep't 2017), *aff'd* 32 N.Y.3d 1116 (2018), the First Department instead relied on its pre-*Parker* decision in *Lustenring v. AC&S, Inc*., 13 A.D.3d 69 (1st Dep't 2004). *Lustenring* permitted a jury verdict to stand against the manufacturer of an asbestos-containing product without evidence of the amount of exposure to inhaled asbestos that was known to cause the plaintiff's

[1] Defined terms and abbreviations used herein shall have the same meaning as those in Whittaker's Opening Brief For Defendant-Appellant, unless otherwise noted.

disease and without a "scientific expression" of plaintiff's inhaled exposure to asbestos. Like the Supreme Court did in this case, *Lustenring* relied on the presence of "visible dust" near the plaintiff. Plaintiff does not and cannot show that the Order in this case or *Lustenring* can be reconciled with this Court's 2006 decision in *Parker*. In fact, the First Department "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 v. Brenntag N. Am*., 183 A.D.3d at 211, 236 (1st 2020) (Dissent).

The parties agree that "[t]his is now the fourth time in the 15 years since deciding *Parker v. Mobil Oil Corp*, 7 N.Y.3d 434 (2006) that this Court has been asked to address the issue of causation in toxic torts." That is because the Supreme Court simply does not consistently apply the very clear *Parker* standard. Contrary to Plaintiff's arguments, Whittaker is not seeking a change in the law, but a re-affirmance of *Parker* and an order setting aside of the verdict.

Plaintiff's counsel's argument in summation that Mrs. Nemeth's peritoneal mesothelioma was caused by vaginal exposure to Desert Flower presents an additional and separate basis for setting aside the verdict. The trial judge, Order, and Dissent all agree the summation was not supported by the record. Plaintiff's counsel's remarks were also not "isolated," as he made numerous references to two avenues of exposure and Mrs. Nemeth using Desert Flower all over her body. R5337–38; R5361–62. The undue prejudice to Whittaker is manifest as the

"exposure issue went to the heart of the case" and was "the very last thing the jury heard from one of the lawyers." *Nemeth*, 183 A.D.3d at 249–50 (Dissent). Most importantly, Plaintiff's counsel's unprecedented post-objection "mini-closing" did nothing to cure the prejudice and instead multiplied it by reminding the jury of Plaintiff's unsupported theory. The trial court had discretion to issue a curative instruction or order a mistrial to correct the prejudice in response to Whittaker's objections, but failed to do either, which warrants reversal and a new trial.

The trial court stated that Defendant's objections to Plaintiff's summation were preserved for appeal, and both the Order and Dissent recognized that Defendant immediately objected to the improper summation. *See* R5514–15; *Nemeth*, 183 A.D.3d at 231, 247. Plaintiff's waiver argument is baseless and the jury verdict should be set aside.

ARGUMENT

POINT I THE ORDER FAILED TO APPLY *PARKER* AND INCORRECTLY RELIED ON *LUSTENRING*

A. *Parker* Requires a "Scientific Expression" That is Generally Accepted as Reliable by the Scientific Community

Parker and its progeny require proof by Plaintiff of (1) the amount of exposure to the toxin that is known to cause the injury (here, the amount of exposure to inhaled asbestos that is known to cause peritoneal mesothelioma) and (2) a "scientific expression" of a particular person's exposure (here, 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 was exceeded).

Parker suggested three methods by which an expert could establish causation where a 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 other subjects." *Parker*, 7 N.Y.3d at 449. "These, along with others, could be potentially acceptable ways to demonstrate causation *if* they were found to be generally accepted as reliable in the scientific community." *Id*. (emphasis added).

While Plaintiff stresses the "versatility" of *Parker* to justify lower causation standards, ultimately *Parker* requires a "scientific expression" that is "generally accepted as reliable in the scientific community." *Id*. at 449. In Plaintiff's own example, *Sean R. v. BMW of N. Am. LLC*, 26 N.Y.3d 801, 811 (2016), the court noted that "[o]dor thresholds can be particularly helpful in occupational exposure cases, where the odor threshold of a substance exceeds permissible workplace safety standards," but it also stated that "[i]n some cases, however, the odor threshold of a substance is far below toxicity." Ultimately, the court in *Sean R*. held plaintiff *failed* to meet his burden of proving that the "methodology his experts employed was generally accepted in the scientific community." *Id*. at 811–12. This holding

emphasizes that while different methodologies may be used to establish causation, Plaintiff must still establish that the methodologies are generally accepted in the scientific community, and thereafter use those methodologies to provide a scientific expression of exposure. Here, Plaintiff did neither. Whittaker is merely asking this Court to require the Supreme Court to apply the *Parker* standard as established.

B. *Lustenring* And A "Visible Dust" Theory Cannot Be Squared With *Parker*

Plaintiff's assertion that causation methods employed in different cases will be fact dependent is unremarkable, as that is always the case. However, causation testimony based on "visible dust", which was found sufficient in *Lustenring*, is clearly insufficient under *Parker* and progeny. *See Lustenring*, 13 A.D.3d at 70 (allowing jury verdict to stand based on conclusory expert testimony that plaintiffs worked "all day for long periods in clouds of dust" which "necessarily" contained "enough asbestos to cause mesothelioma"). *Parker* requires toxic tort plaintiffs to provide the factfinder with a "scientific expression of [the] exposure level" and held one expert's opinion testimony insufficient because the expert's "general, subjective and conclusory assertion—based on Parker's deposition testimony—that Parker had 'far more exposure to benzene than did refinery workers in [various] epidemiological studies' [was] plainly insufficient to establish causation." *Parker*, 7 N.Y.3d at 449.

Similarly, in *Sean R.*, 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.'" *Sean R.*, 26 N.Y.3d at 809.

Consistent with these cases, the First Department in *Juni* held that plaintiffs "must still establish some scientific basis for a finding of causation attributable to the particular defendant's product." *Juni*, 148 A.D.3d at 239. There, plaintiff sponsored "general, subjective and conclusory" causation opinion testimony from his expert 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. 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. This Court affirmed. *Lustenring's* "visible dust" methodology clearly does not meet the *Parker* standard of causation because it requires no scientific proof of causation whatsoever. Plaintiff does not

and cannot show that the Order or *Lustenring* can be reconciled with this requirement.

Plaintiff argues that cases involving different asbestos containing products "may dictate the use of different causation methods." Pls. Br. at 38. That is exactly what *Parker* recognized when it suggested "several other ways an expert might demonstrate causation." *Parker*, 7 N.Y.3d at 449. The issue here is that the Supreme Court has not consistently applied *Parker*,[2] and even, as in this case, "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).

C. The Order Did Not Require Proof of Causation Consistent With The Requirements of *Parker*

Whittaker is not "push[ing] to abrogate *Parker* in favor of a precise quantification standard that would . . . be insurmountable in most toxic tort circumstances," but is merely asking this Court to apply *Parker*. Pls. Br. at 41. Precise quantification may not be required. What is required, however, is the presentation of a scientific expression of Mrs. Nemeth's exposure to inhaled asbestos that could be compared to a level of such exposure science has shown to have been

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[2] *Compare, e.g.*, *Juni v. A.O. Smith Water Prods. Co.*, 148 A.D.3d 233, 237 (1st Dep't 2017) (testimony that "the visibility of the dust itself indicates the magnitude of the exposure 'at levels that are . . . capable of causing disease'" is insufficient to establish specific causation) *with Dominick v. Charles Millar & Son Co.*, 149 A.D.3d 1554, 1554 (4th Dep't 2017) (testimony that "if a worker sees asbestos dust, that is a 'massive exposure . . . capable of causing disease'" is sufficient to establish specific causation).

sufficient to have caused her peritoneal mesothelioma. *Parker*, 7 N.Y.3d at 434 (2006). Plaintiff did not meet this requirement.

First, Plaintiff did not offer evidence at trial establishing the level of exposure to inhaled asbestos sufficient to cause peritoneal mesothelioma. Plaintiff claims that "[c]ontrary to WCD's assertion, such an inquiry is not product-specific; it is toxin-specific." Pls. Br. at 43. Whittaker has consistently argued that Plaintiff failed to offer evidence establishing the level of exposure to *asbestos* sufficient to cause *peritoneal* mesothelioma. *See* Defendant's Opening Br. at 19–24 ("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") (citing *Parker*, 7 N.Y.3d at 448). Further Whittaker has never argued that *Parker* requires a showing of a "precise 'benchmark' at which disease will occur." Pls. Br. at 44. Rather, Plaintiff is required to offer evidence of some amount of asbestos exposure known to cause peritoneal mesothelioma, or at least some threshold level by which the jury has some basis to compare Mrs. Nemeth's claimed exposure level to the exposure amount capable of causing the disease as shown through scientific methods. "This threshold showing . . . is entirely absent from the record of this case [and t]he omission is evident from the [First Department] majority's detailed opinion, which identifies nothing in the record offering even an approximation of the level of asbestos exposure (whether

cumulative or otherwise) that would have been capable of causing peritoneal mesothelioma." *See Nemeth*, 183 A.D.3d at 237–38 (Dissent).

Dr. Moline's vague testimony that "brief or low level exposure of asbestos" could cause peritoneal mesothelioma, and that "significant" exposure would occur where there was "some element of regularity or very high exposure over a shorter period of time," is not enough as a matter of law. *Id*. at 218–19; 238 (Dissent). When asked, Dr. Moline admitted she could not define "significant exposure." R4880–84 ("Q. You said in answer to counsel's question that it's not defined what significant exposure is here . . . A. Yes."); ("Q. Did you define what higher than significant would be in your report? A. No").[3] "Critically, not one of the articles Dr. Moline discussed on the witness stand (she mentioned none in her written report) sets forth an estimate of the minimum level of exposure to respirable asbestos (cumulative or otherwise) that would suffice to cause peritoneal mesothelioma." *Nemeth*, 183 A.D.3d at 238–40 (Dissent) (finding no epidemiological support in articles or in the record generally). The kind of testimony that Plaintiff offered in this case was expressly rejected and deemed insufficient in *Parker*. *See Parker*, 7 N.Y.3d at 449 (expert testimony that injured party experienced "frequent[]" and "excessive" exposure insufficient).

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[3] Dr. Moline's inability to define "significant exposure" is fatal, as it leaves open the amount of Mrs. Nemeth's exposure (i.e., the definition of "significant") and the form of such exposure (i.e., whether it was "near" Mrs. Nemeth, "breathed in" by Mrs. Nemeth, "breathed in and in the lungs" of Mrs. Nemeth, "breathed in and somehow in the peritoneum" of Mrs. Nemeth, or something else entirely).

Plaintiff has no response but to try to muddy the waters with unsupported claims that "Dr. Moline's opinion was predicated on 60 years of scientific literature," none of which is in the record. Pls. Br. at 45. Dr. Moline did not identify epidemiological studies demonstrating that consumer use of cosmetic talc causes or even increases the risk of developing peritoneal mesothelioma, and was unable to point to studies that break down the risk of developing mesothelioma between pleural and peritoneal mesothelioma. R4439–40. In fact, Whittaker's counsel asked multiple questions regarding the studies identified in Plaintiff's brief and demonstrated Dr. Moline's confusion about the content of the studies and their reference to pleural rather than peritoneal mesothelioma. R4401–02; *see also Lanzo v. Cyprus Amax Minerals Co,* 2021 WL 1652746, at *1 (NJ App. Div. April 28, 2021) (reversing and remanding for new trials in a cosmetic talc asbestos case in which Dr. Moline relied on medical literature which did not support the opinions being given about the carcinogenicity of the type of contaminant alleged to be in the talc at issue). Moreover, even if the studies showed an "elevated risk" of peritoneal mesothelioma from exposure to asbestos contained in talc (as Plaintiff contends) this is still the kind of vague standard that fails under *Parker* as it cannot establish a baseline number for asbestos exposure sufficient to cause peritoneal mesothelioma. R4401–02; *Parker*, 7 N.Y.3d at 449 (expert testimony that injured party experienced "frequent[]" and "excessive" exposure insufficient); *see Nemeth*, 183 A.D.3d at 238–39 (Dissent). The record, read as a whole, shows that Plaintiff offered no

evidence at trial establishing the level of asbestos exposure capable of causing *peritoneal* mesothelioma. Dr. Moline offered the same kind of vague, non-specific expert testimony that was rejected in *Parker*.

Second, Plaintiff offered at trial no "scientific expression" of Mrs. Nemeth's inhaled exposure to asbestos for the jury to compare against the baseline figure of asbestos exposure sufficient to cause peritoneal mesothelioma (which Plaintiff also failed to provide). Critically, this is not a requirement that Plaintiff "precisely quantify" the level of inhaled asbestos, nor does Whittaker argue that should be the standard. Instead, *Parker* requires *some* "scientific expression" of Mrs. Nemeth's exposure to asbestos in Desert Flower using a generally accepted scientific methodology. *Parker*, 7 N.Y.3d at 449. Plaintiff identifies nothing in the record that scientifically expresses Mrs. Nemeth's exposure to asbestos in cosmetic talc at all.

Instead, Plaintiff lists various pieces of testimony or other evidence showing that Mrs. Nemeth was exposed to asbestos, including "Mrs. Nemeth's regular, frequent, and direct exposure to all of the dust within each box of [Desert Flower] for an 11-year period," "the friable nature of the amphiboles within [Desert Flower]," and "the asbestos fiber release simulation and mathematical modeling conducted by Mr. Fitzgerald on vintage [Desert Flower]." Pls. Br. at 47–49. But none of these are scientific expressions of Mrs. Nemeth's inhaled exposure to asbestos.

Fitzgerald's calculation that Mrs. Nemeth was "exposed" to 2.7 million asbestos fibers daily is not a "scientific expression" of her exposure either and it certainly did not involve "mathematical modeling."[4] Fitzgerald himself admitted 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." R3180 (emphasis added); Pls. Br. at 52–53. To sweep this important limitation on Fitzgerald's work under the rug, Plaintiff complains about moving "goalposts." But *Parker's* requirements are clear and were not met: "[i]t is well-established that an opinion on causation should set forth . . . that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." 7 N.Y. at 448. Fitzgerald did not testify to Mrs. Nemeth's "exposure," but only to releasability, and he has admitted as much. *See* R3200 (Fitzgerald testifying "[f]or Desert Flower . . . I estimated based on the number of fibers on the casettes [sic] that number of fibers actually released in the 245 cubic centimeter area of the hood itself, that there were 2,760,000 individual fibers in the chamber at the

[4] An example of mathematical modeling can be found in *Parker*, in which "a NIOSH study of rubber plant workers in Ohio found a relationship between increasing cumulative benzene exposure and leukemia mortality" and "the study showed a risk of mortality from leukemia of about '150 times above background' over a 40-year working lifetime from exposure to benzene at 10ppm. At 5 ppm, the risk was 12 times over background and at 1 ppm (or 40 ppm-years) the risk was doubled." The expert "explain[ed] that '[e]xtensive mathematical modeling was conducted to determine the shape of this positive dose-response relationship [and] [t]hese analyses found a linear model best explained the association. No evidence was found for a threshold level below which no leukemia occurs.'" 7 N.Y.3d at 444.

time that the air samples were taken."). On cross-examination, Fitzgerald also admitted he was not an industrial hygienist. R3507 ("Q. You're not certified as an industrial hygienist? A. Right. Q. You don't hold yourself out as an industrial hygienist? You don't represent that you are an industrial hygienist? A. I'm not a certified industrial hygienist, correct."). Dr. Moline's testimony is of no help to Plaintiff either, as she testified it was possible to measure the amount of exposure, but that such measurements were not done in this case. *See* R4841–42 ("And the question that was posed to me, when you said actual, so actual to me means that an actual individual using [Desert Flower]. If you are asking me can it be recreated by an industrial hygienist, yes, it can."). The trial court recognized this as well. R4383 ("It's self evident, [Dr. Moline] did nothing more. She didn't do an industrial hygiene test. She didn't do – it's self evident."). As the Dissent clearly realized, "plaintiff's experts in this case did not offer an 'estimate' of Mrs. Nemeth's level of exposure based on an 'extrapolation' from the glove box test conducted by Mr. Fitzgerald or 'by reference to estimation based upon work history and math models.'" *Nemeth*, 183 A.D.3d at 244–45 (Dissent).

Indeed, Plaintiff's experts offered the same, inadequate testimony as in *Parker*. Fitzgerald testified that the amount of asbestos released in his "glove box" was "thousands of times" the levels of asbestos permitted in schools and "several orders of magnitude higher" than ambient levels. R3182–83; *Nemeth*, 183 A.D.3d at 217–18, 221, 229, 240–42 (Dissent). Dr. Moline used similar language, stating

Mrs. Nemeth was in the presence of "millions" and "trillions" of asbestos fibers during her daily use of Desert Flower, and that Desert Flower "released asbestos fibers several orders of magnitude higher than what a person would be exposed to by breathing ambient air." R4148; *Nemeth*, 183 A.D.3d at 219. However, this is exactly the type of generic, non-scientific "evidence" rejected as insufficient in *Parker*, where the expert testimony was that plaintiff was "'frequently' exposed to 'excessive' amounts of gasoline." 7 N.Y.3d at 449. This Court held that to be inadequate. *Id*.; *see also Juni*, 148 A.D.3d at 237–39 (evidence that Juni's "cumulative exposures to asbestos caused his mesothelioma" and the "sum total of [his] exposures to asbestos" was irreconcilable with the rule requiring plaintiffs to "establish some scientific basis for a finding of causation attributable to the particular defendant's product.")

Here, "[i]n essence, plaintiff's experts told the jury that the use of Desert Flower increased the asbestos level in Mrs. Nemeth's bathroom above that of the ambient air by some unspecific amount, and then speculated that this unquantified level of increased exposure was enough (at five minutes per day over about 11 years) to have caused peritoneal mesothelioma, even though no evidence had been presented to show the minimum level of exposure capable of causing that disease." *Nemeth*, 183 A.D.3d at 244–45 (Dissent). This type of vague causation evidence is insufficient under *Parker* and its progeny, and falls short of any of the three methods suggested by *Parker* by which an expert could establish causation.

D. *Juni* Not *Lustenring* Should Have Guided The Decision In This Case

In *Juni*, plaintiff's expert, also Dr. Moline, gave testimony 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. The First Department rejected Dr. Moline'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. The First Department's holding was affirmed by this Court. *See Matter of New York City Asbestos Litig.,* 32 N.Y.3d 1116 (2018). The results in this case should be the same because Plaintiff is relying on the same opinion by the same expert.

Mrs. Nemeth's use of cosmetic talc that allegedly was contaminated with trace amounts of asbestos is akin to the facts of *Juni*, where plaintiff failed to offer "measurements of what Mr. Juni was exposed to." *Juni*, 148 A.D.3d at 237. Here, too, Dr. Moline offered testimony that "[i]t's all of [the cumulative exposures] combined" that caused Mrs. Nemeth's disease and that "all of [Mrs. Nemeth's] exposures contributed to her disease." R4298–99. Like in *Juni*, Plaintiff here also failed to offer tangible expressions of Mrs. Nemeth's exposure. *See* R4811–12 (Dr. Moline testifying that "I certainly don't quantify the person's usage. I certainly didn't in this report. And I typically do not do that kind of calculation. Q. And in

your report you didn't compare the duration of any particular product use, correct? A. Correct. Q. And you didn't compare the frequency of any particular product use. A. Correct.").

Because *Juni* should have disposed of this case, the First Department paid lip service to *Parker*, but relied on *Lustenring*. *Parker* requires proof of the amount of exposure to the toxin known to cause injury and a "scientific expression" of a particular person's exposure. *Parker*, 7 N.Y.3d at 434; *Nemeth* 183 A.D.3d at 244 (Dissent) ("Nor is the bare fact that there was 'visible dust' in the air of Mrs. Nemeth's bathroom sufficient to prove causation in the absence of expert evidence 'establish[ing] that the extent and quantity of the dust . . . contained enough asbestos to cause the mesothelioma.'"). Unlike *Parker* and its progeny, the *Lustenring* opinion said nothing about giving the jury a benchmark known to cause the disease or a scientific expression of exposure to the particular toxin that could be compared to that benchmark to establish causation. Instead, in *Lustenring*, the First Department stated that the presence of "visible dust" and evidence that plaintiffs "manipulat[ed] and "crush[ed]" products "made with asbestos" and "worked all day for long periods in clouds of dust" was sufficient to establish causation. *Lustenring*, 13 A.D.3d at 70. By relying on *Lustenring* and the presence of "visible dust" rather than the applicable "scientific expression" approach developed since *Parker*, "the [First Department] majority 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). The Court should make clear that *Parker* requires a level of scientific proof of causation that was simply absent in this case.

For these reasons and those discussed in Defendant's Opening Brief, Whittaker respectfully requests this Court set aside the verdict and enter judgement for Whittaker as a matter of law, which will reaffirm its precedent under New York law.

POINT II DEFENDANT WAS DENIED A FAIR TRIAL BY THE IMPROPER AND PREJUDICIAL SUMMATION

Defendant was denied a fair trial because Plaintiff's counsel's summation improperly stated Mrs. Nemeth's peritoneal mesothelioma was caused by multiple avenues of exposure to asbestos, including previously unestablished vaginal exposure to Desert Flower. The trial court's failure to correct the improper summation was an abuse of discretion that was not harmless error, which warrants reversal and a new trial.[5] *See, e.g. People v. Sullivan*, 160 A.D.2d 161, 163 (1st Dep't 1990) (holding that it was abuse of discretion to read back prosecutor's summation over defense counsel's objection, which permitted additional opportunity for prosecutor to present arguments, "creating the potential for

[5] Plaintiff misstates Defendant's position. A mistrial was probably not the trial court's only option to cure Plaintiff's improper summation. As Plaintiff notes, "[t]he essence of discretion entails a choice of 'means' at the trial court's 'disposal' for 'dealing with [a] problem.'" Pls. Br. at 55. When faced with Plaintiff's counsel's improper statement, the trial court also could have issued a curative instruction, but failed to do so.

distracting the jurors from their own recollection of the facts and from the arguments of defense counsel," "[t]he cautionary instruction provided by the court to the effect that statements of counsel were not evidence, did not eliminate the prejudice to defendant created by the rereading of the prosecutor's summation," and that error was not harmless).

A. The Trial Court Should Have Ordered A Mistrial After Failing To Issue A Curative Instruction

The trial court, the Order, and Dissent agreed there was no record evidence to support Plaintiff's counsel's summation and that it was improper. *See Nemeth*, 183 A.D.3d at 231 ("Supreme Court agreed that Dr. Moline had not given an 'affirmative opinion that [Nemeth's] peritoneal mesothelioma was caused by both breathing the [DFDP] and having it enter her body transvaginally.'"); *id*. at 249 (Dissent) ("as the trial court 'properly concluded,' Dr. Moline 'did not conclude that Nemeth's mesothelioma was caused by transvaginal exposure to asbestos in [Desert Flower].'"). The prejudice from Plaintiff's counsel's summation also was not "an isolated comment," as Plaintiff claims, but "cumulative" because he argued that "[w]ith a woman like Flo, there are two avenues of exposure," "she's getting asbestos in her body from two different ways," and she's "using it all over her body, in her pelvic region." R5337–38. Later in the summation, Plaintiff's counsel stated Dr. Moline "testified there was a second avenue of exposure that could occur . . . basically, by the manner in which she applied it all to her body it entered

her vagina . . . [s]o there is another avenue of exposure which led to the peritoneum." R5361–62. Further, the comments were "egregious" in that the summation focused on causation which "went to the heart of the case." *Nemeth*, 183 A.D.3d at 249 (Dissent). Clearly, these comments were not "isolated" or "one[s] that posed no danger of leading to an unsupported verdict" as Plaintiff asserts. Pls. Br. at 56. The improper summation was "the very last thing the jury heard from one of the lawyers—a message likely to remain vivid in their minds when they retired to deliberate—[ ] a reminder of the pelvic exposure theory, without an actual instruction to disregard it." *Id*.; *Nemeth*, 183 A.D.3d at 250.

While the trial court had discretion to issue a curative instruction or order a mistrial, it did not do either and worsened the prejudice by allowing Plaintiff an additional "mini-closing," which only served to remind the jury of Plaintiff's unsupported exposure theory. As the Dissent noted, "[n]either the [First Department] 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. Plaintiff's counsel's "mini-closing" was not harmless error because counsel did not "clear up" the issue, but instead contended there was a second avenue of exposure by stating without any underlying basis, that "certain *other avenues* of [asbestos] exposure specific to women" exist and should be considered by the jury. R5479 (emphasis added).

Plaintiff claims that because there is no indication of "jury confusion or prejudice" in the record, Whittaker cannot have been prejudiced by the summation. Pls. Br. at 57–58. This is absurd. The intended effect of Plaintiff's counsel's comments in summation was not to confuse the jury about whether Mrs. Nemeth developed peritoneal mesothelioma from inhaled exposure or vaginal exposure, but to suggest that because there were multiple avenues of exposure from Defendant's product, then Defendant's product must have been a substantial contributing cause of Mrs. Nemeth's peritoneal mesothelioma. It is beyond reasonable dispute that Whittaker was prejudiced by Plaintiff's counsel's improper summation, which touched on the key issues of the case.

B. Whittaker's Objections Are Preserved

Defendant's objections to Plaintiff's summation and the trial court's inadequate cure are preserved. The trial court stated Whittaker's objections were preserved for appeal, and both the Order and Dissent recognized that Whittaker immediately objected to the improper summation.[6] The First Department addressed the issue of summation in over six pages in the Order and seven pages in the Dissent, and both the Order and Dissent specifically addressed the issue of the "mini-

[6] *See* R5514–15 ("Again, your exception is noted. Your objection, your claim for mistrial is fully preserved."); *Nemeth*, 183 A.D.3d at 231 ("Although defense counsel immediately objected, the court allowed plaintiff's counsel to complete his statement."); *id*. at 247 (Dissent) ("WCD's counsel's immediate objection to these comments was overruled. After the close of summation, but before the jury was charged, WCD renewed this objection and moved for a mistrial.").

closing," and never once suggested the possibility of waiver. See *Nemeth*, 183 A.D.3d at 233 ("Moreover, the trial court's decision allowing plaintiff's counsel to re-address the jury in a mini-closing, while perhaps not an ideal choice, was a sufficient cure to WCD's objection."); *id*. at 250 (Dissent) ("Finally, plaintiff's counsel's 'mini-closing' did nothing to cure the prejudice caused by his earlier improper statements, and arguably even worsened that prejudice.").

Plaintiff's assertion that Defendant never objected to the "mini-closing" is false and an effort to distract from the severe prejudice Whittaker suffered.[7] Pls. Br. at 59.

- Whittaker's counsel provided the trial court with an opportunity to issue a curative instruction, while preserving Whittaker's objection, stating "I would like to do this before the instructions to the jury because I don't want to be criticized later for not having given Your Honor an opportunity to cure these defects. The problem is these defects are not curable. So even with that it's not curable." *See* R5426.
- Whittaker's counsel objected *before* the "mini-closing," stating "I don't think what counsel is going to say about the second exposure avenue

[7] As for Plaintiff's claim that Whittaker's counsel "directly acknowledged [ ] during post-verdict argument" that the mini-closing constituted a reasonable act of discretion, what Whittaker's counsel actually said was "I can imagine a circumstance where a curative statement by plaintiff's counsel would be sufficient. We are just saying this one was not. That's our position." R52.

cures the record. I still take exception to it and I don't think it can be cured." *See* R5472.

- Whittaker's counsel objected again *during* the "mini-closing" but before jury instructions, stating "[j]ust preserving my objection, Your Honor." *See* R5479.
- At the first opportunity *after* the "mini-closing" and after the court's charge, the court stated that it was fully preserving Whittaker's objections to counsel's comments. *See* R5514.

Further, as Plaintiff emphasizes, the trial court had discretion and could have issued a curative instruction *sua sponte*, as it did elsewhere during the trial, *see* R4971–72 (trial court stating "I will be giving curative instructions on the issue of striking and disregard [sic] that paragraph"). Whittaker's objection to the mini-closing and to Plaintiff's prejudicial comments are clearly preserved.

C. Allowing Plaintiff's Counsel to Make a Mini-Closing To Correct His Own Misstatement Is Unprecedented

As the Dissent noted, "[n]either the [First Department] 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. Plaintiff attempts to reframe this "cure" as a "reasonable act of discretion" that is similar to the "reopening of a summation," but its cited cases are inapposite. Pls. Br. at 59; *see People v. Kurkowski*, 83 A.D.3d 1595, 1596 (4th Dep't 2011) (court

did not notify parties it intended to consider lesser included offense until after summations, but offered defense counsel opportunity to reopen summations for purpose of addressing lesser included offense, thus alleviating any possible prejudice to defendant); *People v. Cromwell*, 150 A.D.2d 715 (2d Dep't 1989) (following summations court informed counsel that it intended to charge third degree robbery as lesser included offense of first degree robbery, but defense counsel never sought permission to reopen summation to address elements of lesser included offense). In *Seeco, Inc. v. Hales*, 22 S.W.3d 157, 175 (Ark. 2000), the trial judge allowed a second closing argument to rebut prejudicial arguments made by counsel for appellants. The Supreme Court of Arkansas noted it "view[ed] these developments at close of trial as unprecedented" and "[w]ith the benefit of hindsight, several things might have been done differently" such as a sidebar conference or limiting the remarks "without additional commentary and argument." *Id*. at 178. Ultimately, the court held the trial judge did not abuse his discretion but it did "not approve in any form or fashion or endorse the procedure followed in this case to correct the error and prejudice initiated by counsel for the appellants." *Id*. In none of these cases was a counsel permitted to make a "mini-closing" or reopen his summation to correct his *own* prejudicial remarks.

Plaintiff next claims that it is not "unprecedented for an improper remark to be cured by counsel's own counteraction," but again these cases are inapposite. *See In re Jamar W*., 269 A.D.2d 103, 103 (1st Dep't 2000) (assistant corporation

counsel's statements during summation at dispositional hearing in Family Court were improper, which prompted apology to court and adversary, and counsel expressly retracted remarks and court opined that it was not biased by statements and intended to disregard them). In *Sawyer v. United States*, 202 U.S. 150, 168 (1906), plaintiff testified that he drank coffee when certain murders were being perpetrated and the district attorney stated "[a] man, under such circumstances, who would drink coffee, ought to be hung on general principle." The court held "[c]ounsel, in summing up to a jury, are under some excitement, and may naturally make a remark or statement which is improper. But there is not, on that account, any ground laid for setting aside a verdict where, as in this case, the court held it was improper, and the counsel withdrew and apologized for it." *Id*.

Unlike in these cases, Plaintiff's counsel never expressly withdrew or retracted the improper remarks. In fact, Plaintiff's counsel doubled down on the comments in the mini-closing. Further, unlike in *In re Jamar* where the remarks were only made to the court, which expressly stated it was not biased by the statements and intended to disregard them, here the comments were made to the jury, to which "[t]he notion of a transvaginal avenue of exposure would have been intuitively appealing." *Nemeth*, 183 A.D.3d at 249 (Dissent). Lastly, unlike in *Sawyer v. United States*, here the improper summation "went to the heart of the case." *Nemeth*, 183 A.D.3d at 249 (Dissent). For all these reasons, Plaintiff's "mini-closing" did not cure the improper summation.

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

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New York, New York

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CERTIFICATION

I certify pursuant to 22 N.Y.C.R.R. 500.13(c)(1) and 500.13(c)(3) that the total word count for all printed text in the body of the brief, exclusive of the table of contents and table of authorities, is 6,290 words.

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Respectfully submitted,