To be Argued by:
SETH A. DYMOND
(Time Requested: 15 Minutes)

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Appellate Division–First Department Appellate Case No. 9765

Court of Appeals

of the

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.,

(For Continuation of Appearances See Inside Cover)

BRIEF FOR PLAINTIFFS-RESPONDENTS

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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,

– and –

WHITTAKER CLARK & DANIELS, INC.,

Defendant-Appellant,

– 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

This 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. In the interim, our Appellate Divisions have correctly applied the causation standard set forth in Parker and its progeny dozens of times, irrespective of whether they found the evidence legally sufficient or insufficient. Having the benefit of these voluminous precedents, Plaintiffs-Respondents Florence and Francis Nemeth utilized only sound methodology and presented a causation case that was devoid of gaps. Put differently, this vast jurisprudence provided Plaintiffs with a roadmap to present legally sufficient evidence; one that they followed.

What resulted was the use of a causation methodology carefully crafted to comply with a method this Court explicitly approved of in Parker, namely, mathematical modeling, which the Appellate Division majority clearly recognized. R.8465-66, n.7 ("the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with Parker," which was "…based on work history *and math models*") (emphasis added).

But even the use of a method already approbated by this Court is not enough for Defendant-Appellant Whittaker Clark & Daniels ("WCD"). Despite Appellant's averments to apply the Parker standard here, in reality, it asks this

Court to jettison that standard in favor of an "actually-inhaled quantification" standard. See App. Br. at 1, 9-10, 20-21, 24. Against Plaintiff's massive scientific foundation and the legion of caselaw behind it, Appellant's thinly-veiled attempt to radically alter the Parker standard is an exercise in obfuscation.

Indeed, requiring a plaintiff to quantify the levels of asbestos *actually inhaled* from the product to prove specific causation is the functional equivalent of a "precise quantification" standard that this Court has repeatedly rejected as not simply inconsistent with the science, but "insurmountable" in most toxic tort scenarios, which the majority below understood. Parker, supra at 447-48; R.8467 ("[c]ontrary to WCD's argument, Juni in no way affected Parker's holding that precise quantification is not required in toxic tort cases."). And the lone dissenter below appeared to erroneously champion this departure from Parker, as the crux of his dissent was that "plaintiff's experts…failed to quantify the level of Mrs. Nemeth's *actual* exposure to asbestos…". R.8480 (emphasis added), 8486. Such a position is in derogation of this Court's well-settled framework.

Appellant, in fact, appears to disregard or warp the fundamental precepts repeatedly outlined by this Court, including that: (1) precise quantification is not required (see Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y.3d 762, 784 (2014); Parker, supra); (2) satisfaction of the Parker standard is inherently intertwined with the general acceptance of the methodology in the scientific

community (see Parker, supra); (3) general causation addresses only whether the toxin of asbestos can cause mesothelioma (id.); (4) a "scientific expression" of a plaintiff's exposure level is simply "…evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause [the disease]" (Cornell, supra); and (5) since causation "hinges on the scientific literature in the [trial] record," a failure to make a causal showing in one case has no bearing on whether such a showing is made in another. Id. at 785-86.

Even in In re NYC Asbestos Litig. [Juni III] (32 N.Y.3d 1116 (2018)), this Court made clear that its holding was limited to "th[at] particular record," and Judge Wilson, in concurring, underscored that the holding was not a statement that the defendant was "correct as a scientific matter." Id. at 1118 (per curiam opinion), 1120 (Wilson, J. concurring). Further, the critical gap in proof in Juni, i.e., that the asbestos in the brakes transformed into a non-toxic substance after product use, is not even asserted here as to the friable, asbestos-containing cosmetic powder at issue, let alone established. R.17 (Supreme Court stating that "the Juni record involv[ed] a very different product, very different testimony").

To this end, the type of product at issue is vital to the analysis, and the product here is one that releases free-form asbestos upon every single use (R.3199-3224); and not just any asbestos, but the *more* carcinogenic amphibole asbestos. R.4086-87.

In short, application of the Parker standard to the facts of this case makes it clear that Nemeth's robust causation proofs—coupled with the use of math models to quantify the asbestos released into Mrs. Nemeth's breathing zone during her use of Desert Flower Dusting Powder (hereinafter "DFDP")—were more than sufficient to support the jury's verdict with a valid line of reasoning and permissible inferences.

Plaintiffs' proofs included extensive evidence—epidemiological and otherwise—showing that asbestos, including that contained in talcum powder, causes peritoneal mesothelioma, the measure of which was expressed in a variety of ways, including that non-trivial exposures are those that are at least double the background level of asbestos (R.4827), which are "significant" when occurring with "regularity" (R. 4870-71), as a quantified measurement against the level of asbestos permitted in schools under the Asbestos Hazard Emergency Response Act (hereinafter "AHERA") (R.3182-83), and even by reinforcing that "the very low levels" that cause mesothelioma are those below the current regulatory limit for workplace exposures. R.4082-84, 4400, 4856. The Appellate Division detailed these proofs. R.8446-47 (discussing, inter alia, the "unacceptable levels of asbestos").

Against these disease-causing parameters, Plaintiffs' proofs further included: (1) the undisputed testimony from Mrs. Nemeth that she used and breathed in dust

from DFDP in her small, unventilated bathroom, on a daily basis for 11 straight years (R.4147-49, 5337, 8031, 8040-59); (2) the undisputed evidence that DFDP was consistently contaminated with loose, friable *amphibole* asbestos—the more carcinogenic type—derived from WCD's talc (R.1979, 2920, 2956, 2980-3082, 3091-3142, 3175, 3202-11, 3821-22, 3430-33, 3439, 3441, 3903, 3948, 4043-44, 4073-74, 4086-87, 4090-91, 4134-40, 4594, 4769-70, 4780-81, 4913, 4985-90, 7572-75, 7579-80, 7589-90); (3) the simulation of microscopist Sean Fitzgerald that *quantified* the level of amphibole exposure from vintage DFDP as more than 2.7 million fibers during each use, and trillions of total fibers across Mrs. Nemeth's 11-year product use, which is orders of magnitude above the background levels of asbestos and the AHERA permissible limit (R.2118-19, 2919-24, 3182-3224, 3962-64, 4400, 4753-54, 4818); (4) the published, peer-reviewed studies reporting on quantified levels of asbestos released from a cosmetic talcum product of a comparable kind to DFDP, which revealed substantially similar levels of asbestos exposure to the math models here, including in a recreated bathroom simulation (R.3179-81, 3308, 3957, 4112, 4368-69, 4852); and (5) the specific causation opinion of expert Dr. Jacqueline Moline that Mrs. Nemeth's exposure to asbestos from DFDP was a substantial contributing factor to her terminal disease, which wedded the foregoing scientific predicate to the factual foundation of Mrs. Nemeth's "daily" exposure to asbestos-containing dust from DFDP for 11 years.

R.4147-49. Certainly, this constitutes "evidence from which the factfinder can conclude that [Mrs. Nemeth] was exposed to levels of [asbestos from DFDP] that are known to cause [mesothelioma]." Cornell, supra.

Indeed, once the free-form asbestos in DFDP is in the air, it operates no differently than the asbestos studied in a body of literature numbering in the tens of thousands. R.3318, 4309. This, too, was plainly recognized by the majority below (R.8448). Accordingly, this evidence was more than sufficient to establish a valid line of reasoning and permissible inferences to support the jury's unanimous causation finding, particularly where Appellant's experts not only failed to rebut any of these predicates, but failed to offer *any* case-specific opinions whatsoever.

Nor is there any merit to Appellant's challenge to Plaintiffs' isolated and cured summation remark regarding transvaginal exposure. Tellingly, Appellant fails to even mention this Court's limited standard of review, which is whether the denial of WCD's mistrial application was an abuse of discretion as a matter of law (see Brady v. Ottaway Newspapers, Inc., 63 N.Y.2d 1031, 1033 (1984)), which allows for reversal only if there was "*no* room for the exercise of...reasonable discretion." People v. Branch, 83 N.Y.2d 663, 667 (1994) (emphasis added).

Here, it simply cannot be said that Supreme Court abused its discretion as a matter of law in denying Appellant's mistrial application—as correctly held by the Appellate Division—where (1) the comment was predicated on testimony admitted

without objection (R.4070, R.4117-23, 4869-70), (2) it was an isolated remark amid a lengthy summation that came after a lengthy trial, (3) Plaintiffs' counsel was otherwise clear that the causation claim was respiratory-based (R.5337, 5373), (4) there is not even an inkling of jury confusion or prejudice reflected in the jury notes or the unanimous verdict (R.5526-27, 5531-36), (5) the jury was repeatedly instructed that summation comments were not evidence, and they should consider only the admitted exhibits and testimony (R.2566, 5483-84, 5502-03), (6) Plaintiffs' causation proofs were both unrebutted and overwhelming, and (7) any error was cured during the mini-closing that forced Plaintiffs' counsel to recant his own words (R.5479). See People v. Speaks, 28 N.Y.3d 990, 992 (2016) (comment was "within the bounds of permissible rhetorical argument"); People v. Galloway, 54 N.Y.2d 396, 399 (1981); People v. Broady, 5 N.Y.2d 500, 516 (1959) (no abuse where, inter alia, jury was instructed that summation was not evidence); Wilson v. City of New York, 65 A.D.3d 906, 908 (1st Dept., 2009) ("remarks were unlikely to have affected the outcome" after lengthy trial and lengthy summation); accord Riffel v. Brumburg, 91 A.D.2d 842, 842 (4th Dept., 1982).

Recognizing this, and despite only seeking a mistrial based on a "no cure" assertion (R.5426, 5472), WCD altered its contentions post-verdict and asserted for the first time that curative action other than the mini-closing would have sufficed. R.52. Even putting aside that such a challenge is unpreserved and nonreviewable

(see Grzesiak v. General Elec. Co., 68 N.Y.2d 937, 939 (1986)), it is still impermissible under the standard of review. See People v. Cook, 34 N.Y.3d 412, 423 (2019) (court is "not free to substitute [its] judgment for that of [Supreme Court]…"); Branch, supra at 668 (whether "other Judges would have handled the matter differently [is not part of the] review."). Nonetheless, Supreme Court's mini-closing was provident, particularly when viewed in its full context, including that it was a mere continuance of the summation from one day to the next that did not alter the sequence of trial (R.5432; C.P.L.R. § 4011), and counsel effectively ameliorated the concern after taking great pains to ensure that he conformed to Supreme Court's curative parameters. R.5464, 5471-76, 5479. This modality, in fact, was more effective than a mere curative instruction, as it compelled Plaintiffs' counsel to disclaim his own words. Cf. People v. Kurkowski, 83 A.D.3d 1595, 1596 (4th Dept., 2011) ("court offered defense counsel the opportunity to reopen summations…, thus alleviating any possible prejudice…"); People v. Whaley, 70 A.D.3d 570, 571 (1st Dept., 2010) ("court's curative actions were sufficient to prevent the remarks in question from causing any prejudice"); see also Sawyer v. United States, 202 U.S. 150, 168 (1906) (no "ground laid for [reversing] verdict where" summation comment was improper but counsel withdrew it).

Accordingly, the order of the Appellate Division should be affirmed.

QUESTIONS PRESENTED

1. Did the Appellate Division correctly conclude that Plaintiffs presented legally sufficient evidence of causation against Appellant, in satisfaction of the Parker standard, where decedent Florence Nemeth's daily exposure, for 11 straight years, to loose, potent, amphibole asbestos from her use of cosmetic dusting powder that contained friable asbestos-contaminated talc supplied by Appellant, constituted a dose of asbestos—calculated via mathematical modeling—that is more than sufficient to cause peritoneal mesothelioma?
2. Did the Appellate Division abuse its discretion as a matter of law by concluding that Appellant's mistrial application was providently denied where the isolated summation remark at issue was predicated on evidence admitted without objection, came after a lengthy trial and lengthy closing, was effectively cured by the summation continuance, and where the causation proofs were otherwise overwhelming and there was no objective indication of jury confusion or prejudice to Appellant's substantial right?

COUNTER-STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Flo Nemeth developed peritoneal mesothelioma in May, 2012, which was 40 years after her use of DFDP, and she suffered for almost four years before succumbing to her terminal cancer. R.3454-61, 4155-64, 5006-10, 8076-98.

i. The Unrebutted Factual Foundation

a. Mrs. Nemeth's daily exposure to DFDP for 11 straight years in her confined, unventilated bathroom

Beginning in 1960, at 14 years old, Flo Nemeth used DFDP every day for 11 years. R.8031, 8040-41, 8047, 8051-59. She did so after showering, applying this "flaky powder" product in a "tiny," unventilated bathroom. R.8040-41, 8047, 8050-51, 8055-56. She used a powder puff to "pat" or "splash" the powder "all over" her body, including on her neck. R.8041-42, 8047-48, 8054. As a result, the air became "[v]ery dusty," and she "breathe[d] the dust in" (R.8048, 8054). Any dust not initially inhaled settled on the bathroom surfaces (R.8048, 8054-55), generating a second daily exposure when she wiped it up. R.8048-49. She thus received a double exposure to DFDP, every single day, for 11 straight years.

Since she went through a "big box" of DFDP every two weeks (R.8050, 8055), she was exposed to *all* of the powder contained within each and every box.[1]

[1] She initially split each box with her mother, but after marrying in 1966, she went through each box herself. R.8050-56.

This regular and frequent exposure to DFDP is not disputed. R.29-30. WCD failed to establish any other causative sources of exposure under Article 16.

b. The incorporation of WCD talc as the chief ingredient in DFDP during Mrs. Nemeth's exposure period

DFDP was a cosmetic dusting powder manufactured by Shulton and marketed to women. R.4992-93, 7393-95. DFDP was comprised of 90% talc and a few other minor constituents. R.2956, 3441, 7579-80. From 1966 onward, 99% of the talc incorporated into DFDP was obtained from WCD (R.3430-33, 3439, 7572-75, 7589-90), and even before that, WCD was still a main talc supplier to Shulton. R.4992-93. Although Shulton had a "contingent" talc supplier, it was never used. R.7589-90, 7779-80, 7873-74; see also R.3432-33.

c. The *more* carcinogenic type of asbestos found in WCD's talc within DFDP

Asbestos is a group of six fibrous minerals categorized into serpentine and amphibole. R.2924, 4084-85, 4592. Chrysotile is an "s"-shaped, serpentine fiber, and amphiboles are needle-shaped. R.2924. 95% of all commercially-used asbestos was chrysotile. R.4084-85. Talc predominantly contains amphibole asbestos rather than chrysotile. R.3912. Tremolite and anthophyllite are non-commercial types of amphibole asbestos prevalent in talc. R.2974-75, 3912, 4085, 4592-93.

Although all types of asbestos can cause mesothelioma, it is generally accepted that amphiboles are more "potent," i.e., more carcinogenic, in doing so. R.4086-87; see also R.478.

d. The free-form, friable nature of the amphibole asbestos in DFDP derived from WCD's talc

A mountain of historical and contemporaneous testing—including in peer-reviewed literature—on (1) WCD's pertinent talc ore sources from Italy, North Carolina, and Alabama, (2) DFDP itself, and (3) related Shulton products with this same WCD-derived talc, revealed consistent asbestos content of tremolite, anthophyllite, and occasionally chrysotile in percentages by weight that ranged as high as 5%. R.1979, 2980-3082, 3091-3142, 3175, 3203-11, 3821-22, 3903, 3948, 4137-40, 4769-70, 4780-81, 4922-23, 4985-90.

Critically, a product with "encapsulated" asbestos must be manipulated to release the asbestos, whereas one with "friable", i.e., crushable by hand, asbestos is inherently "releasable." R.2920, 4043-44. Asbestos in cosmetic talc products like DFDP is friable, meaning "there is no encapsulation, nothing weighing it down. It's just fibers that become airborne" and "aerosolized," which "can get deep into the lung and exert human health effects." R.3202-11, 4043-44; see also R.478.

Even Appellant's own expert geologist confirmed that asbestos in talc is friable (R.4594), and WCD's own representative testified that its talc "*is* a dust." R.4913 (emphasis added).

ii. The Unrebutted General Causation Evidence

As to basic principles of asbestos science, Plaintiffs established, inter alia, that virtually all cases of mesothelioma, including peritoneal, are caused by asbestos (R.4059-60),[2] the disease has a long latency period (R.4063), individuals could react differently to the same level of exposure (R.4045-46, 4078-79), it is caused by a "multi-hit" process of cell mutation (R.4088), asbestos fibers are microscopic and aerodynamically buoyant (R.4034-36), asbestos fibers on the ground can get "re-entrained," meaning, if disturbed, they float back up into the air and can be breathed (R.4036-37), science has not defined a level below which cancer will not occur, but one might exist (R.4079-81), mesothelioma is a dose-dependent disease, such that the more exposure one has, the greater the risk of disease (R.4068), and every measurable exposure to asbestos a person has contributes to her total dose. R.4088. These well-settled scientific principles do not alone form the *legal* predicate for proximate cause; they simply provide underlying context.

[2] As a general principle of science, both pleural and peritoneal mesothelioma were described as a "sentinel health event" and "signal tumor" attributable to asbestos exposure. R.4060. See In re Joint Eastern & Southern Dist. Asbestos Litig. v. U.S. Mineral Prods. Co., 52 F.3d 1124, 1049-50 (2d Cir., 1995) (distinguishing colon cancer from "a mesothelioma-like signature disease" of asbestos exposure).

a. The different "types" of mesothelioma

There are four areas in the body where mesothelial tissue is present, and thus where a mesothelioma can occur: pleura (lining the lungs), peritoneum (lining the abdomen), pericardium (lining the heart), and tunica vaginalis, in men only (lining the testicles). R.4046, 4321. Upon inhalation of asbestos, the lymphatic drainage system can take asbestos particles "throughout the body," including to all of the aforementioned areas. R.4031-33, 4035, 4039, 4046. But the "type" of mesothelioma is distinguished only at the cellular level, not by where in the body it presents, which provides context for the epidemiology. R.4869-70 ("if it's inhaled [] the physiology should be the same, male or female, from breathing it in.").[3]

b. The scientific predicate establishing that asbestos causes peritoneal mesothelioma

The massive body of asbestos science comprises tens of thousands of articles (R.2815-16, 2825-33, 3318, 3335), with the first epidemiological study linking asbestos exposure to cancer conducted in 1955 (R.2844), and a more "quantitative" epidemiological study—Dr. Selikoff's study—confirming the causal link between asbestos and mesothelioma conducted in the early 1960's. R.2846-48.

[3] There are exceedingly rare "subtypes" of mesothelioma that may not be caused by asbestos (R.4322), but Mrs. Nemeth suffered from the common, "epithelial" type (R.458, 696, 750), which is the "same type" of mesothelioma occurring in both the pleura or peritoneum. R.4032.

Plaintiffs causation expert, Dr. Moline, opined that it has "been established from an epidemiological perspective that asbestos causes peritoneal mesothelioma," and that the published literature indicates that "asbestos contaminated talc can lead to peritoneal mesothelioma" (R.4115-16), which was supported by a 60-year-old "body of literature," including "multiple studies" showing that asbestos in talc causes peritoneal mesothelioma. R.4309.

Numerous peer-reviewed articles and studies informed her opinion that brief or low levels of asbestos exposure can cause peritoneal mesothelioma (R.4061, 4067-68), including the Helsinki consensus report of international scientists (R.4074-76), the Welch study, which concluded that even "slight," non-occupational exposure to asbestos resulted in a "six fold" excess risk of developing peritoneal mesothelioma when compared to Dr. Selikoff's landmark study (R.4062-63, 4869), and the position of every governmental agency or international organization that has reviewed this science. R.4081.

The general causation testimony, however, did *not* rest solely upon a vague notion of "low levels." Dr. Moline stated that 3.4 persons per thousand regularly exposed to asbestos at "the very low levels" of 0.1 fibers per cubic centimeter ("f/cc") will develop mesothelioma. R.4082-84 (OSHA "estimate[s] that there will be 3.4 excess cases of mesothelioma per thousand individuals, even at that level…"), 4856. She elaborated on the significance of this dose:

> Q. From an occupational health perspective, what significance is there, if any, to the fact that even at that .1 standard you're going to see three to four cases of mesothelioma?
>
> A. Well, I mean, it shows that very low levels of asbestos exposure can cause disease. And that it's very difficult to have low levels.

R.4083-84, 4400 ("there's certainly studies that show mesothelial rates at increased levels" at 0.1 f/cc). This is contrasted with the ambient air levels of asbestos, which present no known risk. R.891, 4086-87. Indeed, when compared to the general population rate of one to four mesotheliomas per million individuals (R.4073), 3.4 excess mesotheliomas per thousand individuals equates to *3,400* mesotheliomas per million individuals at such a dose (i.e., 3.4 multiplied by 1,000).

This dramatic elevation in mesothelioma cases even "at levels less than 0.1 [f/cc]" was further supported by explicit reference to two LaCourt studies, the Rodelsperger/Itwasubo study, and the Agudo study (R.4401-02). Strikingly, there was no cross-examination whatsoever on these studies.

And still there was more. Dr. Moline also relied upon an epidemiological study of talc miners from Val Chisone, Italy—the same mines where WCD sourced talc—which found four peritoneal tumors among just 880 talc miners (R.4131), and a NIOSH study on U.S. talc miners—including from North Carolina where WCD sourced talc—showing that cosmetic talc causes non-malignant

asbestos disease, which is significant because these fibrosis diseases are caused by a higher dose of asbestos than mesothelioma. R.4045-46, 4137-40.[4]

c. The experts agreed that epidemiology on cosmetic talc users is unnecessary for causation purposes

Asbestos was used in 3,000 commercially-available products, but very few of these products have been the subject of an epidemiological study. R.4073-74. This is because what causes disease is "the exposure to asbestos, not the product per se. It's the asbestos contamination or the asbestos content of the product." R.4074. Defendant's own epidemiologist conceded that the "critical" studies were those performed on asbestos and mesothelioma rather than on cosmetic talc use. R.4262-63 ("But it had everything to do with asbestos and mesothelioma, which is the critical issue here, is it not?").

Consequently, case reports may highlight a "particular exposure scenario" that "leads to mesothelioma." R.4135. This is true with uncommon asbestos products (R.4091), and is particularly true with asbestos-*contaminated* products,

[4] Appellant attempted to rely on other talc miner epidemiological studies, but the limitations and confounders inherent in those studies were identified. No mesotheliomas were identified in one study because dust suppression methods had already been implemented in the mines (R.4123-24), and in the others the cohort sizes were too small, the only exposure history taken was from death certificates rather than the "best evidence," the subjects were not followed for a sufficient amount of time to account for the long latency of disease, the workers' particular jobs were misclassified, only men were studied, and, worst of all, deaths in the cohorts occurring post-study were ignored. R.4069-70, 4073, 4124-34, 4420. Even Appellant's epidemiologist acknowledged these limitations. R.4225, 4260. Nor do WCD's relied-upon talc miner studies account for the milling process, which grinds the asbestos into smaller particles and spreads it equally throughout the cosmetic talc, making it more easily releasable. R.2970-72, 3022.

like DFDP, since asbestos "happens to be in the talc, but the asbestos is what causes the mesothelioma." R.4095. Put differently, case reports have "greater weight" with sentinel asbestos diseases like mesothelioma, and Dr. Moline thus relied, in part, on case reports concluding that asbestos in cosmetic talc caused peritoneal mesothelioma. R.4134-36.

And since the amphibole asbestos is free-form within talc products, this literature is "part and parcel with the fact that this form of asbestos is associated with diseases." R.4090. Indeed, even Defendant's own expert acknowledged that a "sufficient dose of amphibole asbestos" causes peritoneal mesothelioma. R.4193.

Further, the higher rate of "idiopathic" mesothelioma that may occur in women is an unreliable statistic accounted for by the fact that many physicians do not even know asbestos is contained within cosmetic talc, meaning they will "never know they had an exposure and they are misclassified as idiopathic," thereby skewing study results. R.4109.

iii. The Unrebutted Specific Causation Evidence

a. The quantified scientific expression of Mrs. Nemeth's exposure level from DFDP provided via mathematical models

In order to fill in gaps highlighted in Juni, Plaintiffs presented the testimony of geologist and microscopist Sean Fitzgerald. R.2890-2909, 2948. In addition to confirming the aerosolized asbestos content of WCD-branded talc ore samples (R.3203-11), he simulated the use of DFDP. R.3182-84.

To do so, he applied the product in a glove box to determine the amount of asbestos released "in the breathing zone relative to the hands inserted in the glove box." R.3179. This usage of a glove box is approved by the EPA (R.3955-56), as admitted by WCD's expert. R.4650-51, 4727-34. It is also a "safer" and more economical method than recreating a bathroom environment. R.4851.

Simulating the use of vintage DFDP—dating to the relevant time period here (R.3190, 8042-46, 8057-58)—in the exact manner Mrs. Nemeth used it, resulted in a *quantified* level of amphibole asbestos fibers—*2,760,000*—released into the user's breathing zone during a "singular event usage," which is thousands of times above the AHERA permissible level in schools. R.3199-3224; see also R.2916-17, 2920, 3182-83, 3195-98. He utilized math models to reach this calculation, since his testing represented only one-tenth of the air sample recommended by AHERA (R.3962-64), which even Appellant's geologist acknowledged was a permissible extrapolation under this methodology. R.4753-54.[5]

Mr. Fitzgerald then calculated the total amphibole fibers released from DFDP, based on Mrs. Nemeth's 11-year usage, as "billions and trillions." R.3224. This is several orders of magnitude above the level of asbestos in the ambient air,

[5] This quantified level compares to the hazardous levels set forth in the peer-reviewed study finding up to 8.0 f/cc (R.4852, 4857, 4860 ("It does compare")), which involved a product containing talc derived from largely the same ore sources at issue here (R.3180-81, 3877), thereby providing yet another rational means to articulate Mrs. Nemeth's massive, unsafe exposure level.

which is an understated comparison from a potency perspective, as the background asbestos is chrysotile and DFDP released amphiboles. R.3942-45.

The methodology employed is "published" by the ASTM ("American Standards of Testing of Materials") and the AHERA protocols for counting asbestos in air samples. R.3195-99, 3203, 3210-12, 3731-32, 3743, 3844, 3910-11, 3913-14 (discussing ASTM's endorsement), 3961-64. The general acceptance of this method in the scientific community is so clear that *all* of Appellant's disclosed testing experts intended to rely on it. R.2118-19 (report relying on the "AHERA criteria"); see also R.2179, 2182-83, 2185, 2212. Mr. Segrave admitted that the AHERA method is appropriate for "airborne tests" (R.4647-48), and he used this method in his own simulations while conceding that it only provided a "conservative estimate of the total amount of asbestos in the sample." R.4740-43.

Nor was the DFDP simulation a mere test on "releasability," since the very purpose of such a test is "to determine if the user could inhale asbestos during a talcum powder application." R.949, 2919, 2922-24. The draw of air using pumps was to simulate breathing, and the closest filter ensnaring asbestos fibers was "under [his] nose" so he had "a sample right there where [the user] would breathe," i.e., to simulate inhalation in "a manner consistent with" Mrs. Nemeth's use of DFDP. R.3185-86, 3196. In fact, he used two different levels of air flow to simulate different "respiratory rates." R.3188, 3840. Mr. Fitzgerald summed this

up by declaring that his simulation was intended to "target[] the actual exposure" (R.3187, R.3219), and Dr. Moline confirmed that the asbestos in that breathing zone is going to be inhaled. R.4818.[6]

And in addition to using sound methodology, these quantified results were compared to, and found to be consistent with, the levels reported in the peer-reviewed scientific literature. R.3179-81, 3308, 3957, 4112; see also R.901, 961. In fact, Mr. Fitzgerald's peer-reviewed article was relied upon by the CDC to explain a cause of mesothelioma in women. R.3176-79.

b. The specific causation opinion marrying the meticulous scientific predicate to Mrs. Nemeth's daily exposure to friable amphiboles from DFDP

Dr. Moline wedded the foregoing vast scientific predicate to the facts of this case by opining, via a hypothetical question, that Plaintiff's regular and frequent exposure to asbestos from WCD-derived talc in DFDP was a substantial contributing factor to Plaintiff's mesothelioma. R.4147-49. This hypothetical was accurately predicated on (1) the undisputed and quantified frequency of Mrs. Nemeth's use of DFDP and her inhalation of airborne asbestos generated from applying DFDP all over her body and the re-entrainment of these fibers from clean-up activities; (2) WCD's undisputed supply of the talc ingredient in DFDP

[6] To the extent Mr. Fitzgerald stated that his test was just to determine if asbestos was released, he was referring to a prior study on a *different* talc product. R.3179-80.

during the relevant time period; (3) the undisputed amphibole asbestos content in DFDP from WCD's talc; (4) the math models conducted by Mr. Fitzgerald that quantified the level of free-form, friable amphibole fibers released into Mrs. Nemeth's breathing zone from her use of DFDP at a dose that is orders of magnitude above all applicable reference points; and (5) the published, peer-reviewed study finding levels of airborne asbestos fibers from a similar cosmetic talc product that were analogous to Mr. Fitzgerald's results. R.4037-38, 4147-49, 4847-48, 4852, 4860. She thereafter opined that Mrs. Nemeth's use of DFDP, alone, was sufficient to cause this mesothelioma. R.4310-11, 4861.

Dr. Moline predicated her ultimate opinion on, inter alia, the evidence that WCD's talc in DFDP contained asbestos, the studies showing the release of respirable asbestos "at levels well above those that have been associated in multiple studies with the development of disease," the "literature related to talcum powder" and talcum powder users, her evaluation of "hundreds" of people diagnosed with peritoneal mesothelioma, including people, like Mrs. Nemeth, with non-occupational exposures, and the appropriate latency period for the development of mesothelioma. R.4017, 4057, 4063-64, 4089-98, 4100-02, 4113-14, 4149-50, 4359. In so doing, she compared Mrs. Nemeth's use of the product to "analogous" studies in the literature that contained dust measurements. R.4368-69, 4852, 4855, 4860. She also noted that precisely quantifying the actual asbestos

inhaled by Mrs. Nemeth was scientifically impossible. R.4819 ("I wasn't there with a microscope and sitting next to her every breathing second of her life, so no, I do not" know the exact number of fibers inhaled); see also R.4346, 4365.[7]

Dr. Moline "follow[ed] methodology that's accepted" (R.4873), and she even expressed the specific causation inquiry in another way, stating that for attribution, the exposure must be at least two times the background level of asbestos. R.4827. And she disavowed that "trivial" exposures constitute substantial contributing factors, thus remaining consistent with the legal standard. R.4821.

As to her reliance on Mr. Fitzgerald's math modeling, she noted that this type of testing "collaboration" is precisely the type of scientific expression that occupational medicine physicians rely upon for causation. R.3998-99, 4006. She expressed Mr. Fitzgerald's quantified levels of respirable asbestos as orders of magnitude higher than the ambient air levels, and "levels at which multiple studies have shown elevated rates of mesothelioma." R.4108. She noted that Mr. Fitzgerald's results were comparable to the unacceptable levels found in the published cosmetic talc article. See p.19 n.5, supra.

[7] Indeed, WCD's expert who sought to proffer a precise quantification opinion was precluded on the basis that such opinion was unreliable, which is not challenged. R.8450, n.3.

In so doing, she explicitly refuted the notion that "visible dust" alone was sufficient for attribution, since "it's what's in the dust that matters," not simply that there is visible dust. R.4041-42.

c. The lack of case-specific opinions from Appellant's experts

In addition to acknowledging the general acceptance of the methodologies employed by Plaintiffs' experts (R.2118-19, 4193, 4262-63, 4753-54), WCD's experts made other concessions that run contrary to its current position. Dr. Moolgavkar, for example, opined that a purported "spontaneous" mesothelioma is reliable only if "you have taken a good history" to determine if there was any asbestos exposure (R.4206), which depends on "how skilled the interviewers are" (R.4258-59), and that asbestos exposure is the "strongest environmental risk factor for mesothelioma." R.4213. Mr. Segrave admitted that he never performed air sampling on DFDP, despite an opportunity to do so. R.4721-22.

More importantly, neither of WCD's experts offered a single case-specific opinion. The opinions of Plaintiffs' experts, therefore, stood unrebutted, as the Appellate Division recognized. R.8467 ("WCD did not produce any expert evidence on the issue of medical or specific causation.").

iv. The Admitted Evidence That Asbestos Can Reach The Peritoneum Intervaginally

On direct, Dr. Moline testified that "women have a different route of exposure, potential exposure than men for mesothelioma and that may be why

[rates of] peritoneal mesothelioma are actually higher" in women. R.4070. No objection was lodged to this testimony. She then discussed an article regarding cosmetic talc and ovarian cancer, noting that asbestos causes ovarian cancer but that ovarian cancer was not at issue here, and she instead relied on the article for the discussion of "transvaginal exposure" and how fibers can enter the "body through vaginal excursion" and travel "into the peritoneum." R.4121-23. No objection was lodged to this testimony either. Instead, Defendant lodged a foundational objection, asserting this article was "not reliable." R.4117-20. A proper foundation was then laid, resolving that objection. R.4120-22.

Thereafter, on redirect, Dr. Moline, in discussing the physiological distinction between men and women, testified that "[w]omen have another [route] of exposure that men don't have to the peritoneal cavity and that's asbestos can go intervaginally and reach the peritoneal cavity. So women have another opportunity for exposure to the peritoneum then men…Women just have an added opportunity for exposure." R.4869-70. No objection was lodged to this testimony.

B. PERTINENT PROCEDURAL BACKGROUND

i. Plaintiffs' Transvaginal Comment During Summation And The Denial Of Appellant's Mistrial Application

After three weeks of trial, amid a three-hour summation comprising 136 transcript pages, Plaintiffs' counsel remarked that since Mrs. Nemeth used DFDP all over her body, "…as Dr. Moline later explains, asbestos can enter the body in

various ways. With a woman like Flo, there are two avenues of exposure. And the way she's describing, I will submit, means she's getting asbestos in her body from two different ways, from breathing it in and then using it all over her body, in her pelvic region." R.5337-38. An objection was lodged, Plaintiffs responded that this testimony was in evidence, and the court instructed counsel to "go on." R.5338. Plaintiff's counsel proceeded with his summation, reiterating the transvaginal testimony once more since the objection had been overruled. R.5361-62.

At a break, WCD moved for a mistrial, asserting that there was no way to "get past" this remark. R.5376, 5379, 5381. Plaintiffs cited the unobjected-to evidence of transvaginal exposure. R.5382, 5412, 5423-24.

Supreme Court advised that it was denying the mistrial and it directed Plaintiffs to proceed with the summation, although it reserved on what, if any, curative action to take. R.5384 ("I want to see this through to the end...I have to reserve. I'm not granting a mistrial").

Plaintiffs' counsel then concluded his summation, and in so doing, was clear that the causation claim was respiratory-based. R.5337, 5373 ("She breathed this for years. It was without a doubt a substantial contributing factor.")

ii. The Mini-Closing Forcing Plaintiffs To Recant Their Own Words, And Supreme Court's Pertinent Charge

The next day, Supreme Court acknowledged Dr. Moline's transvaginal testimony, but since there was no causation opinion elicited on that topic, it noted

that it "would like that corrected" and directed that counsel "revisit that issue in sort of like a mini-closing." R.5420-21, 5424-25. Supreme Court noted that "because we are dealing with the evidence record – I believe that can be easily cured. And there's no basis for a mistrial on that." R.5432.

The mini-closing was, in fact, directed in a larger context, as Supreme Court noted that "99% of the presentation was on point and fair," but two other minor "areas" needed to be cleared up that were not conducive to a mere curative instruction. R.5421-22, 5426 ("an inference could be drawn in the manner in which you tried to explain it…We just need to clear that up a little bit"), 5453, 5464, 5476 ("I have requested based on certain rulings that [counsel] revisit a very small portion of his closing statement again.").

Plaintiffs' counsel was very careful to abide by Supreme Court's parameters in the mini-closing to ensure that any concern was ameliorated. R.5464 ("…I will run by the Court exactly what the three areas are so I don't miss anything else."), 5471-76. The following colloquy ensued:

> MR. KRAMER: With regard to exposure, in order to put it in context, I want to make sure -- I don't want to overstep by repeating what I said yesterday. Or should I not mention the second avenue and just purely say, we are talking here about breathing?
>
> THE COURT: No. You must make it clear that while you made reference to it --
>
> MR. KRAMER: So I should reference it?

> THE COURT: Yeah. Of course. It was never your intention to infer that any…exposure transvaginally, was the competent producing cause of her disease. That was never intended to suggest that. You were referring to Dr. Moline's response to certain literature and potential. That is not confirmed in this case.
>
> MR. KRAMER: Okay.
>
> THE COURT: That is very clear.

R.5471-72.

In the mini-closing, counsel was effective in neutralizing his prior remark:

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

R.5479. This was the last thing the jury heard from counsel.

Notably, at no point on either day did WCD request a curative instruction or object to the curative modality employed, even after its mistrial application was denied; instead, it hewed to the extreme position that this isolated remark—backed by record evidence—was incurable. R.5426 ("it's not curable"), 5429, 5472.[8]

To this end, Supreme Court charged the jury, three times, that attorney statements and summations are not evidence. R.2566, 5483-84, 5502-03.

[8] Defendant, notably, asked for a curative instruction on another alleged error, which was properly denied. R.5308.

iii. The Unanimous Jury Verdict Evincing No Confusion As To Any Issue

The jury returned a verdict finding WCD liable and apportioning it and Shulton 50% fault each. R.5532-37. Other than apportionment, all of the verdict sheet questions, including causation, were decided unanimously. R.5534-35. Nor were there any jury notes on the transvaginal exposure issue or even on causation generally; all of the jury notes pertained to the talc's asbestos content (R.5526-31).

iv. The Post Verdict Motion And Determination

WCD moved to set aside the verdict, or in the alternative for a new trial, on a host of grounds, including as to causation. R.7-75, 2289-2324. During argument, Supreme Court elucidated on his discretionary summation act, including that, having denied a mistrial, it would be "more effective" to compel counsel to recant his own words. R.46, 48 ("So based on that I thought it best since he said what he said that it would be more effective for him to do a mea culpa and sa[y], you know, I made a mistake. I was wrong. I said something earlier…I thought that was, without prejudice to your claiming mistrial, an acceptable resolution" to have Plaintiffs' counsel "fall on his sword and say I made a mistake").

Appellant's counsel then agreed that a mini-closing can be a reasonable curative act within the court's discretion. R.52 ("I can imagine a circumstance where a curative statement by plaintiff's counsel would be sufficient").

WCD's motion was denied, except as to the remittitur of damages. R.70-73.

v. The Appellate Division Order

In a 3-1 split, the Appellate Division, First Department affirmed the judgment awarding Plaintiffs money damages, finding, inter alia, that the evidence was legally sufficient to establish causation. R.8440-8504.

The majority recognized the basis for general causation (R.8447-48, 8462-64), but on this record, focused on specific causation since the general causation challenge was really one addressed to the weight of the evidence. R.8441, 8462-64. Yet they did recognize that a cosmetic talc product with friable, free-form asbestos is simply informed by the basic asbestos epidemiology rather than some ostensible need for product-specific studies. R.8448, 8464. They also recognized that the general acceptance of Dr. Moline's methodology went unrebutted. R.8450-51.

As to specific causation, the majority averred that Dr. Moline's opinion that DFDP was a substantial contributing factor to Mrs. Nemeth's mesothelioma was based on, inter alia, the quantified factual foundation of frequency of exposure married to Mr. Fitzgerald's quantified math models (R.8448-49, 8465-67), and they correctly declared that "the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with Parker," which was "based on work history and math models" (R.8465-66, n.7), thereby meeting Parker's "quantification requirement." R.8467.

Indeed, the majority's analysis focused on this Court's "seminal" decision in Parker. R.8452-62. Only after thoroughly discussing Parker and its progeny did the majority discuss Lustenring v. AC&S, Inc. (13 A.D.3d 69 (1st Dept., 2004)), doing so mainly in a historical context, but nonetheless finding it consistent with Parker. R.8458-61, n.5 ("[t]o put Juni in context, it is informative to discuss the progression of asbestos causation case law…in the Appellate Division and trial courts…A leading Appellate Division decision on causation in asbestos cases *was* Lustenring…") (emphasis added), 8466. It then noted that Juni was inapposite when evaluated under the same standard. R.8466-67.

The lone dissenter respectfully confused the distinction in the "type" of mesothelioma as one focused on location in the body rather than at the cellular level (R.8479, 8481, 8483, 8485-86 n.6, 8491), and erroneously based the crux of his dissent on a standard, contraindicated by Parker, that effectively demands precise quantification. R.8480 ("plaintiff's experts also failed to quantify the level of Mrs. Nemeth's *actual* exposure to asbestos - that is to say, they offered no estimate of the amount of asbestos she *actually* would have breathed in while using Desert Flower…") (emphasis added), 8486-88. And yet, in an associated footnote, the dissenter acknowledged Mr. Fitzgerald's mathematical modeling, but still inaccurately asserted that this colossal dose had no reference point for disease. R.8480, n.3. The dissenter then constricted the Parker standard so severely that he

disregarded Dr. Moline's proper reliance on Mr. Fitzgerald's math models, and sought to require her to personally, and solely, "estimate of the level of exposure that could have caused Mrs. Nemeth's disease." R.8482. He then discounted that Mr. Fitzgerald's opinion quantified the levels of *respirable* asbestos from DFDP, erroneously citing to Mr. Fitzgerald's discussion of *a different* test he performed that was the subject of his peer-reviewed article, before averring that nothing short of a recreated bathroom simulation would suffice. Compare R.8487, 8492-93 n.12, with R.3179-80 ("there were very similar results to the glove box [when] compared to…the full size of the bathroom"). Notwithstanding these clear departures from Parker, the dissenter erroneously couched the majority's position as being out of line with Parker. R.8478 ("…majority decides this appeal as if the Court of Appeals had already overruled its cases…"), 8495.

As to Plaintiffs' summation remark, the majority noted that the transvaginal testimony was elicited without objection (R.8468), and that the attendant summation remark was an isolated one amid a lengthy closing addressing a "plethora" of issues, which did not confuse the jury as to Plaintiffs' airborne asbestos causation predicate. R.8468, 8471.

More importantly, although noting that the mini-closing may not have been the most "ideal" curative act, the majority recognized that Supreme Court's charge, coupled with the mini-closing, successfully ameliorated any potential for prejudice,

particularly where the mini-closing was merely a "clarifying" continuation of Plaintiffs' summation. R.8472-73. The majority correctly characterized Appellant's challenge as one seeking only a mistrial. R.8472-73.

The dissenter, conversely, relied upon a perceived "intuitive" appeal to the summation remark (R.8501), despite the utter lack of objective indicia of jury inflammation. He then mistakenly addressed the providence of Supreme Court's curative act, despite that it was unpreserved. R.8502.

The First Department granted leave (R.8439), and this appeal ensued.

ARGUMENT

I. A VALID LINE OF REASONING AND PERMISSIBLE INFERENCES CLEARLY SUPPORT THE JURY'S CAUSATION FINDING

The causation finding was not utterly irrational. It is well-settled that a court may not set aside the verdict based on a legal insufficiency of the evidence unless no valid line of reasoning and permissible inferences would lead rational jurors to the conclusion they reached. See Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 498-99 (1978). To prevail, the challenging party must establish that it was "utterly irrational" for the jury to have reached the result it did. Killon v. Parrotta, 28 N.Y.3d 101, 104 (2016). This is tantamount to a directed verdict analysis at trial, which asks whether questions exist for the jury. Cohen, supra.

A. The Parker Standard, Its Application To Asbestos Actions, And Appellant's Moving Target Approach

i. The versatility of the Parker standard

In Parker (supra), this Court set forth a basic framework for establishing causation in toxic tort actions. In so doing, it took pains to outline a versatile standard dependent on the particular toxin, the development of the science, and the facts of each case. It defined general causation as proof that "the toxin is capable of causing the particular illness," and specific causation as proof that the plaintiff "was exposed to sufficient levels of the toxin to cause the illness." Id. at 448.

Highlighting the versatility of this standard, this Court explained that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community." Id. It thus tied the legal causation standard to *any* method that is generally accepted in the scientific community. In furtherance of this, this Court provided a non-exhaustive list of acceptable ways to establish causation, which included quantitative, semi-quantitative, and qualitative methods. Id. One such exemplar method identified in Parker—and utilized here—was "mathematical modeling." Id. Ultimately, this Court boiled the specific causation test down to something "characterized as a scientific expression of [plaintiff's] exposure level." Id. at 448-49.

Thereafter, this Court reiterated that "'precise quantification' or a 'dose-response relationship' or 'an exact numerical value' is not required to make a showing of specific causation," and it clarified that a "scientific expression" was nothing more than "…evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered." Cornell, 22 N.Y.3d 762, supra at 784. In a subsequent precedent, this Court yet again reemphasized the versatile nature of its specific causation standard, averring that a "scientific expression" could even take the form of a sensory threshold. See Sean R. v. BMW of N. Am., LLC, 26 N.Y.3d 801, 811 (2016) ("Odor thresholds can be particularly helpful in occupational exposure cases, where the odor threshold of a substance exceeds permissible workplace safety standards.").

And in its most recent pronouncement, this Court simply reaffirmed that the causation standard to be applied in asbestos actions is that "set forth in [Parker] and [Cornell]." Juni III, 32 N.Y.3d 1116, supra at 1118.

The flexibility of the Parker standard is buttressed by this Court's averment therein that it is "inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court." Parker, supra at 448 (quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 264 (4th Cir., 1999) (since "it is usually difficult, if not impossible, to quantify the amount of

exposure…exact details pertaining to the plaintiff's exposure… need not invariably provide the basis for an expert's opinion on causation").[9]

Against this well-defined, yet malleable framework, WCD's contentions are nothing more than a thinly-veiled attempt to abrogate the Parker standard in favor of an insurmountable "precise quantification" standard.

ii. The variety of generally accepted causation methods employed in asbestos litigation, which are both product-dependent and fact-specific

There are varying, generally-accepted causation methods employed in asbestos actions, which depend on the product type and exposure scenario.

Appellant, for instance, takes issue with a "visible dust" methodology, whereby evidence of the release of visible *asbestos* dust in the product-user's breathing zone correlates to the well-established science demonstrating that such visible *asbestos* dust necessarily contains levels that can cause cancer. In so doing, WCD cites largely to Lustenring and asserts that since it was a pre-Parker decision, it does not satisfy the Parker standard. But the visible dust method is generally accepted in the scientific community for use with products comprised entirely or predominantly of asbestos, such that any visible dust generated will in fact be asbestos dust, and in that context, this method has been approbated on appeal both before and after Parker. See, e.g., Dominick v. Charles Millar & Son Co., 149

[9] It should not be lost that Westberry was a case involving talc exposure.

A.D.3d 1554 (4th Dept., 2017) (visible dust method was valid where the product was bags of loose asbestos cement, since any visible dust was asbestos dust), rearg. denied, 151 A.D.3d 1970, lv. denied 30 N.Y.3d 907 (2017). The decision in Lustenring conforms precisely to this product-dependent precept, and is thus consistent with Parker. See Lustenring, supra (visible dust method valid where "clouds of dust raised specifically by the manipulation and crushing of defendant's" asbestos products). Both the majority below (R.8458-61) and the Juni II Court understood this. See In re NYC Asbestos Litig. [Juni II], 148 A.D.3d 233, 238-39 (1st Dept., 2017).

Yet a visible dust method may not, standing alone, satisfy the Parker standard when applied to other types of products, such as asbestos-containing brakes. Since that product may present an issue of the asbestos converting into a non-toxic substance after product use, visible dust is an insufficient methodology because the level of asbestos in the visible dust is not readily apparent. With such a product, a method utilizing some greater form of quantification may be more appropriate. Compare Juni III, supra (finding that a visible must method for asbestos brakes was insufficient), with In re NYC Asbestos Litig. [Miller], 154 A.D.3d 441 (1st Dept., 2017), lv. denied 30 N.Y.3d 909 (2018) (finding that a more quantified method for asbestos brakes was sufficient).

Other products, still, may dictate the use of different causation methods. Semi-quantitative methods, predicated on Parker's own declaration that comparing plaintiff's exposure level to "the exposure levels of subjects of other studies…" (Parker, supra at 449), have been approbated for products in which, like here, asbestos fiber release simulations have been conducted and/or reported in the literature. See, e.g., In re Eighth Jud. Dist. Asbestos Litig. [Stock], 187 A.D.3d 1623, 1624 (4th Dept., 2020) (method valid in a valve case where expert relied "in part on her review of studies of workers involved in tasks similar to those performed by decedent"), lv. denied 189 A.D.3d 2171 (4th Dept., 2020); see also Caruolo v. John Crane, Inc., 226 F.3d 46 (2d Cir., 2000) (cited with approval by Juni II, supra); In re NYC Asbestos Litig. [Dummitt], 36 Misc.3d 1234(A) at *9 (Sup. Ct., N.Y. Cty., Aug 20, 2012), aff'd 121 A.D.3d 230 (1st Dept., 2014), aff'd 27 N.Y.3d 765 (2016); cf. Jackson v. Nutmeg Technologies, Inc., 43 A.D.3d 599 (3d Dept., 2007).

Certainly, then, a mathematical modeling method—which is precisely what was used here—more than suffices. R.8465-66, n.7 ("the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with Parker," which was "based on work history and math models").

In short, the causation method used is mainly prescribed by product type, which was echoed by Dr. Moline when she drew a distinction between a product

containing asbestos that is not breathable, with one like DFDP, that is "meant to be in a powder form." R.4393-96 (it "depends on the nature of the actual product.").

It is not surprising, then, that, irrespective of the outcome, our Appellate Divisions have consistently applied the versatile Parker standard in asbestos actions in a product-dependent manner, predicated on the discrete factual and scientific record before them. See, e.g., Stock, supra; In re NYC Asbestos Litig. [Robaey], 186 A.D.3d 401 (1st Dept., 2020) (sufficient in engine gasket case); Ford v. A.O. Smith Water Prod., 173 A.D.3d 602 (1st Dept., 2019) (sufficient in boiler case); DiScala v. Charles B. Chrystal Co., Inc., 173 A.D.3d 573 (1st Dept., 2019) (insufficient in talcum powder case); In re NYC Asbestos Litig. [Murphy–Clagett], 173 A.D.3d 529 (1st Dept., 2019) (sufficient in boiler case); Corazza v. Caterpillar, et al., 170 A.D.3d 610 (1st Dept., 2019) (insufficient in brake and clutch case); Miller, supra (sufficient in brake case); Dominick, supra (sufficient in asbestos cement case); Juni II, supra (insufficient in brake case); In re NYC Asbestos Litig. [Hackshaw], 143 A.D.3d 485 (1st Dept., 2016) (sufficient in boiler case); In re NYC Asbestos Litig. [Sweberg], 143 A.D.3d 483 (1st Dept., 2016) (same), lv. dismissed 28 N.Y.3d 1165 (2017), rearg. denied 29 N.Y.3d 992 (2017); Penn v. Amchem Products, 85 A.D.3d 475 (1st Dept., 2011) (sufficient in dental liner case); In re NY Asbestos Litig. [Marshall], 28 A.D.3d 255, 256 (1st Dept., 2006) (sufficient in gasket case); Lustenring, supra) (same); Dummitt, supra

(sufficient in valve case); Konstantin v 630 Third Ave. Associates, 37 Misc.3d 1206(A) at *6-7 (Sup Ct., NY Cty., 2012) (sufficient in joint compound case where plaintiff had mesothelioma of the tunica vaginalis), aff'd 121 A.D.3d 230 (1st Dept., 2014), aff'd 27 N.Y.3d 1172 (2016).[10]

To this end, Appellant baselessly denigrates the First Department for purportedly "drifting away from Parker…" App. Br. at 23. But Appellant completely ignores that in three of the First Department's most recent decisions, it concluded that plaintiff's causation proofs were insufficient. See Discala, Corazza, and Juni II, supra. Clearly, instead of "drifting away from Parker," the First Department is doing precisely what this Court has prescribed, namely, applying the versatile Parker standard to the science and facts presented on each discrete record. See Cornell, supra at 785-86. This Court should do the same here, with its analysis grounded in the nature of a *friable*, *amphibole*-containing talcum powder product.

iii. The focus on each discrete record in satisfying the Parker standard

One overarching theme of the aforementioned precedents is that legal sufficiency "hinges on the scientific literature in the record before the trial court in the particular case." Cornell, supra at 785-86. In fact, the Cornell Court declared

[10] Notably, Dr. Moline was the causation expert in a number of the affirmed cases, including Stock, Ford, Dominick, & Penn.

that any one case "does not (and indeed cannot) stand for the proposition that a cause-and-effect relationship does not exist between [a toxin and a disease]." Id. The concurring opinions in Juni III buttress this, as Justice Fahey disavowed that the holding addressed general or specific causation except as to the lack of any asbestos remaining in that brake product, and Justice Wilson averred that "I do not suggest that [defendant] is correct as a scientific matter; that question remains for the trier of fact in each case. Here, in my view, there was simply a gap in proof as to the toxicity of the products at issue." Id.

That different records lead to different results is most aptly demonstrated by a comparison of the instant case to Discala (supra), as both involved a WCD-derived cosmetic talcum powder product from Shulton. The gap in proof in Discala was closed here by presenting, inter alia, the mathematical modeling testimony of Mr. Fitzgerald. Compare DiScala, supra (method invalid where expert only "opined that the decedent's exposure to unspecified…levels of asbestos in the talcum product she used caused her mesothelioma").

iv. Appellant's moving target approach to abrogate Parker in favor of an insurmountable precise quantification standard, which is cloaked in an illusory argument that Parker has not been satisfied

WCD has consistently pushed to abrogate Parker in favor of a precise quantification standard that would, not surprisingly, be insurmountable in most toxic tort circumstances. It veils this illusory argument as one merely seeking a

faithful application of Parker, while concurrently and speciously accusing Plaintiffs of seeking to relax the Parker standard. Plaintiffs ask this Court for nothing more than to apply the Parker standard to the particular facts here, which leads to the inescapable conclusion that the evidence was more than sufficient to establish causation.

Tellingly, Appellant's moving target approach appears to be undergirded by the following motif: any method used by plaintiffs, in any scenario, is insufficient. Appellant, for example, asserts herein that a visible dust method cannot satisfy Parker, despite its approval in decisions post-Parker upon a product-dependent analysis. See, e.g., Dominick, supra. And when a plaintiff employed a more stringent method, WCD shifted its argument to one requiring testing of the "specific bottles" used by plaintiff. See In re NYC Asbestos. Litig. [Molina], 2020 WL 2769130, at *3 (Sup. Ct., N.Y. Cty., May 27, 2020) (arguing "specific bottles of Clubman talcum powder used by the decedent were not tested."). And when a plaintiff actually tested the product, WCD shifted again to contend that plaintiff was required to quantify the level of "fibers released" from the product. Discala, Brief for Defendant-Appellant, 2016 WL 11532917 at p.43-44 (1st Dept., July 11, 2016) (Fitzgerald's opinion was deficient…because he failed to quantify the number of asbestos fibers *released* from the product…") (emphasis added).

And here, of course, where Mr. Fitzgerald *did* quantify fiber release, WCD shifts once more to assert that "releasability" is not enough and that quantification of "actual" asbestos "inhaled" must be elicited to satisfy Parker. App. Br. at 1, 9-10, 20-21, 24. Considering Appellant's unswerving attempt to move the goalposts, it is no surprise that WCD challenges even Mrs. Nemeth's use of one of the exemplar methods identified in Parker—mathematical modeling.

Against this backdrop, the parties' positions are clear: Plaintiff seeks the application of the Parker standard, and Defendant seeks to abrogate that standard in favor of one that would be impossible to satisfy, i.e., actual inhalation quantification.[11] R.507, 8317-18 (industrial hygienists noting that it would be "impossible to determine [the] accuracy" of a precise quantification assessment). Appellant, however, has not come remotely close to establishing that the jury's causation finding was utterly irrational.

B. The Evidence Is More Than Sufficient To Establish General Causation

As noted supra, general causation requires proof that "the toxin is capable of causing the particular illness." Parker, supra at 448. Contrary to WCD's assertion, such an inquiry is not product-specific; it is toxin-specific. See In re NYC Asbestos

[11] Indeed, at trial, Defendant asserted that nothing short of an industrial hygienist testifying to actual levels inhaled would satisfy specific causation. R.3238. Supreme Court responded that, inter alia, "to the extent you feel they need to establish their prime facie proof with an industrial hygienist rings hollow," since Plaintiffs' medical causation expert has the ability to "put[] it all together…to determine causation" R.3239.

Litig. [Feinberg], 53 Misc. 3d 579, 596 (Sup. Ct., N.Y. Cty., 2016) ("the connection between asbestos dust and mesothelioma is well known (providing the basis for general causation)"); see also Wiegman v. AC&S Inc, 24 A.D.3d 375 (1st Dept., 2006) ("[t]he link between asbestos and disease is well documented"). Nor does Parker signal otherwise, as the general causation inquiry therein was not in dispute. Parker, supra at 449 (the link between "benzene and the risk of developing AML…is not in dispute").

Moreover, contrary to Appellant's position, Parker does not require that a general causation showing include the precise "benchmark" at which disease will occur. While the Parker Court referenced a case in footnote 2 setting forth such a standard, it ultimately adopted a standard omitting that requirement. Compare id. at 446 n.2, with id. at 448. That plain reading should be given effect, particularly where a precise quantification requirement was also rejected. This is corroborated by Juni III, since Judge Wilson's concurring opinion confirmed the general causation principle that exposure to "chrysotile asbestos…carries increased risk for mesothelioma,…and the proof is more than sufficient to establish that [Mr. Juni's] exposure to asbestos caused his disease..." Juni III, supra at 1120.

Here, too, general causation was clearly established. Contrary to Appellant's contention, this showing did not rest on vague references to "low levels" of asbestos causing mesothelioma. The disease-causing parameters were elaborated in

multiple ways, with delineated references to dose (even assuming that is required) (R.3182-83, 4082-84, 4391, 4400, 4827, 4856). Dr. Moline even disavowed that exposure to background levels of chrysotile cause disease (R.4328-29, 4390, 4399; see also R.3945, 4084-85). This was appreciated by the Appellate Division. R.8447-48, 8462-64.

Dr. Moline's opinion was predicated on 60 years of scientific literature, which not only included the Helsinki consensus report, the Welch study, two talc miner studies, and the position statement of every relevant agency or organization (R.4061-68, 4074-76, 4081, 4131, 4137-40, 4309, 4869), but she also supported this opinion by explicit reference to additional studies. R.4401-02. Considering the findings of those studies, it is unsurprising that Appellant chose not to ask Dr. Moline a single question on cross regarding this particular "data…supporting [her] opinion." C.P.L.R. § 4515 ("the witness may state h[er] opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, [s]he may be required to specify the data and other criteria supporting the opinion"). Certainly, without even exploring these additional studies, Appellant cannot establish that Dr. Moline's general causation opinion was based only on a "link" or "association" between asbestos and peritoneal mesothelioma. App. Br. at

16.[12] See Tarlowe v. Metro. Ski Slopes, Inc., 28 N.Y.2d 410, 414 (1971) ("The extent to which [the expert] elaborates or fails to elaborate on the technical basis supporting the opinion affects only the weight of the expert testimony"); cf. Sean R., supra at 809 (experts did *not* identify "any text, scholarly article or scientific study" supporting the causation opinion).

And this vast and unrebutted scientific foundation was further informed by (1) the more potent amphibole asbestos content at issue (R.4086-87), which even Appellant's epidemiologist effectively conceded (R.4193) (admitting that a "sufficient dose of amphibole asbestos" causes peritoneal mesothelioma)), and (2) that Mrs. Nemeth suffered from the common cellular "type" of mesothelioma—epithelial—that occurs in both the pleura and peritoneum. R.4031-33, 4035, 4039, 4046, 4355, 4869-70; see also R.458, 696, 750. As such, Appellant's attempt to draw some distinction between peritoneal and pleural mesothelioma is misguided. App. Br. at 19. See Parker, supra at 448 (general causation focuses on the toxin's ability to cause "the particular illness").

[12] Appellant strains to twist Dr. Moline's words to characterize the Welch study as showing a mere "association" between low levels of exposure and mesothelioma. But the finding of a six-fold increased risk exemplifies causation. R.4062-63. See In re Joint Eastern & Southern Dist. Asbestos Litig., 52 F.3d 1124, supra at 1128 (more than two-fold increase is a causal factor).

In short, Appellant utterly ignores the foregoing critical testimony, relies upon isolated statements that are taken out of context, and improperly draws all inferences in its favor. See Dummitt, 36 Misc.3d 1234(A), supra at *7-8 (defendant "relie[d] on isolated responses by Dr. Moline…and fail[ed] to address the entirety of [her] testimony within the evidentiary and contextual framework of the trial").

Thus, the foregoing unrebutted evidence provided the jury with a valid line of reasoning to rationally conclude that asbestos causes peritoneal mesothelioma.

C. The Evidence Is More Than Sufficient To Establish Specific Causation

As noted supra, specific causation requires proof that the plaintiff "was exposed to sufficient levels of the toxin to cause the illness." Parker, supra at 448.

Here, the record evidence falls on the diametrically opposite end of the spectrum from Juni. Measured against the well-established causation parameters, Plaintiffs' proofs included:

(1) the undisputed evidence of Mrs. Nemeth's regular, frequent, and direct exposure to all of the dust within each box of DFDP for an 11-year period, which was explicitly quantified in the specific causation hypothetical (R.4147-49, 8031, 8040-59);

(2) the undisputed evidence that WCD's talc incorporated into vintage DFDP contained potent, *amphibole* asbestos (R.1979, 2955-56, 2974-75, 2980-

3082, 3091-3142, 3203-11, 3821-22, 3439, 3903, 3948, 4086-87, 4137-40, 4780-81, 4985-90, 7572-75, 7579-80, 7589-90);

(3) the friable nature of the amphiboles within DFDP, such that once it is released into the air, exposure can be evaluated using the basic asbestos epidemiology (R.2920, 3202-11, 4043-44, 4073-74, 4090-91, 4134-37, 4594, 4913);

(4) the asbestos fiber release simulation and mathematical modeling conducted by Mr. Fitzgerald on vintage DFDP, which revealed that Mrs. Nemeth was exposed to 2.7 million asbestos fibers daily from DFDP for 11 years, amounting to a total dose of trillions of amphibole fibers from WCD-derived talc, which was asbestos that is going to be inhaled (R.4818), and which both experts agreed was based on valid methodology (R.2118-19, 4753-54); this constitutes a level of exposure that is orders of magnitude above the ambient air level of less potent chrysotile (R.3942-45, 4108), and the AHERA clearance level (R.3182-83, 3199, 3212, 3224, 3962-64). See Parker, supra at 449 ("exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account…");

(5) the comparison of the foregoing quantification to a published, peer-reviewed study reporting quantified levels of asbestos released from an analogous consumer talc product in a bathroom simulation that far exceeded the

regulatory limit for workplace exposures (R.3179-81, 3308, 3957, 4112, 4368-69, 4852, 4860; see also p.19 n.5, supra). See Parker, supra at 449 ("comparison to the exposure levels of subjects of other studies could be helpful…"); see also Sean R., supra at 810-11 (helpful where "…threshold of a substance exceeds permissible workplace safety standards").

(6) Dr. Moline's personal experience of having "evaluated hundreds" of people diagnosed with peritoneal mesothelioma, including those, like Mrs. Nemeth, with non-occupational exposures (R.4017, 4057, 4113-14, 4149-50, 4359);

(7) the appropriate latency period for the development of mesothelioma, which here was 52 years from first use (R.4063, 4150);

(8) the "literature related to talcum powder" and its users, and the release of respirable asbestos "at levels well above those that have been associated in multiple studies with the development of disease" (R.4149-50; see also 4063-64, 4089-4102); and

(9) Dr. Moline's specific causation opinion, which married the foregoing scientific foundation to Mrs. Nemeth's daily exposure to amphibole asbestos from her use of DFDP for 11 years. R.4147-49.

Certainly, this evidence, when viewed in its totality, constitutes "a scientific expression of [Mrs. Nemeth's] exposure levels" (Parker, supra at 448-49), and permitted the jury to "conclude that the plaintiff was exposed to levels of

[asbestos] that are known to cause" mesothelioma. Cornell, supra at 784. The Appellate Division recognized as much:

> Dr. Moline's conclusion was based upon Nemeth's estimated exposure to such toxin, as derived from Nemeth's own testimony about the timing frequency and duration of her historical use of DFTP. Dr. Moline also took into consideration the results of Fitzgerald's testing of an historical sample of DFTP quantifying the number of asbestos fibers released from DFTP in a simulated setting. Thus, the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with Parker.

(R.8465).

Against this mountain of *unrebutted* scientific support, it is rather unsurprising that Appellant resorts to obfuscating and grasping contentions as to both the law and the facts. Appellant makes every effort to bring this case within the ambit of Juni (App. Br. at 23), but this Court in Juni III quite explicitly applied the Parker standard to the "particular record" before it (id. at 1118), and the instant case was tried specifically with the goal of avoiding the errors made therein. Both courts below understood that Juni presented a vastly different factual and scientific record, involving a markedly different product. R.17 (Supreme Court stating that "the Juni record involv[ed] a very different product, very different testimony"), 8466 ("Juni is a factually unique decision that does not impact on the specific causation issues raised in this case").

Indeed, here, Dr. Moline did not subscribe to a mere "cumulative dose" or "any exposure" theory. See App. Br. at 16. Her testimony that all exposures

contribute to one's overall dose (R.4151) is merely a general principle of science. Cf. Rost v. Ford Motor Co., 151 A.3d 1032, 1045 (Pa., 2016) (defendant "conflated the 'irrefutable scientific fact' that every exposure cumulatively contributes to the total dose…, with the legal question…as to whether particular exposures to asbestos are 'substantial factors…'"); see also R.4379-80 (noting that "cumulative exposure" testimony was merely provided "in the greater medical sense"). Dr. Moline then confirmed that there must be enough asbestos in DFDP for it to have constituted a substantial contributing factor (R.4826-27), and that Mrs. Nemeth's exposure to DFDP *alone* was sufficient to cause her mesothelioma. R.4310-11, 4861.

Unable to reconcile the clear distinction between the instant record and Juni, Appellant turns to improperly denigrating the Appellant Division for purportedly disregarding Parker in favor of Lustenring. App. Br. at 22. But the majority did no such thing. Instead, it began its analysis—as "[a]ny analysis" must—with the "seminal" three-part criteria in Parker. R.8452-53. Only thereafter did it discuss Lustenring in a historical context before correctly concluding that the holding was consistent with Parker. R.8458-61 n.5, 8466. It then noted that the First Department's decision in Juni II did not "overrule" Lustenring, but rather "distinguished" it under Parker. Id.; see also Cornell, supra at 785-86 (causation "hinges on the scientific literature in the [trial] record").

Still obfuscating, Appellant cites to evidence under the pretense that it undermines causation when, in actuality, it supports causation. It cites, for example, Dr. Moline's testimony about trivial exposures. See App. Br. at 20. Yet by disavowing that trivial exposures, standing alone, constitute substantial contributing factors (R.4821), Dr. Moline's opinion is consistent with New York's legal standard, which was charged to the jury without objection. R.5497 ("There may be more than one cause of an injury, but to be substantial, it cannot be slight or trivial."). And she even went further, by identifying a non-trivial, significant exposure as one that is at least double the ambient air concentrations and that occurs regularly. R.4827, 4870-71. This supports, rather than undermines, causation. See Caruolo v. John Crane, Inc., 226 F.3d 46, 53 (2d Cir., 2000) (defense expert testifying that for an asbestos exposure "to be a substantial contributing factor" to mesothelioma, the product "needs to create levels in the environment which are substantially greater than the background levels in the environment.").

And yet, perhaps most egregious is Appellant's veiled endorsement of an "actual inhalation" standard that, in addition to being a moving target as discussed supra, is in clear derogation of Parker (supra at 447-48) (precise quantification is not required, and the standard cannot be insurmountable). Mr. Fitzgerald's simulation, however, was not a mere releasability test; it measured fibers released

into the "breathing zone" (R.3179), based on "respiratory rates" (R.3188, 3840), to "target[] the actual exposure" (R.3187, 3219), which Dr. Moline expressly stated was asbestos that would be inhaled. R.4818. In arguing to the contrary, both WCD and the dissenter below conflated Mr. Fitzgerald's DFDP simulation with a *different* simulation that was the subject of his peer-reviewed article. R.3179-80 ("Q. Can you describe what you did as part of the air releasability testing *in this peer review published paper*?") (emphasis added).

Appellant divulged its radical position upon its cross-examination of Dr. Moline. R.4819 ("Q. Do you have any information about the amount of any asbestos that could have made its way into Mrs. Nemeth's lungs? A. I wasn't there with a microscope and sitting next to her every breathing second of her life. So, no, I do not."), 4839-40, 4842. And it argued that Dr. Moline, *personally*, "didn't provide the exact mathematical quantification." R.2524, 5083-84. Supreme Court repeatedly corrected this misguided position. R.4376-78 (noting that Mr. Fitzgerald provided the "quantification component of the plaintiff's burden here," which was then posed to Dr. Moline in a hypothetical), 4493.

Strikingly, when WCD objected to Mr. Fitzgerald providing "inhalation" testimony, Supreme Court echoed the reasoning of Judge Wilson's concurring opinion in Juni III: "The question is, was she only breathing talc or something else…That's for [the jury] to decide. You can't change the facts and the grounds."

R.3226-28. Cf. Juni III, supra at 1120 ("I do not suggest that [defendant] is correct as a scientific matter; that question remains for the trier of fact in each case.").

Nor did WCD's own experts even attempt to calculate the quantified level of asbestos that Mrs. Nemeth "actually inhaled" to show that such a level was not capable of causing mesothelioma. No case-specific expert opinions were offered to compete with Plaintiffs' experts' opinions, which nevertheless would be an issue of the weight of the evidence that is outside this Court's scope of review. See Vadala v. Carroll, 59 N.Y.2d 751, 752-53 (1983).

Accordingly, there is nothing remotely close to an "inhalation" gap here, let alone any other gap in Plaintiffs' causation proofs. Therefore, it clearly cannot be said that it was "utterly irrational" for the jury to have concluded that Mrs. Nemeth's exposure to asbestos from trillions of potent, amphibole asbestos fibers from WCD-derived talc in DFDP over 11 years was a substantial contributing factor to her peritoneal mesothelioma. See Cohen, supra.

II. SUPREME COURT DID NOT ABUSE ITS DISCRETION AS A MATTER OF LAW BY DENYING APPELLANT'S MISTRIAL APPLICATION BASED ON AN ISOLATED SUMMATION REMARK THAT WAS CURED BY THE SUMMATION CONTINUANCE

There was no error as a matter of law in Supreme Court's discretionary act denying WCD's mistrial motion. Tellingly, not once in its Opening Brief does Appellant mention the limited standard of review, i.e., whether Supreme Court's

denial of a mistrial constituted an abuse of discretion as a matter of law. See Brady v. Ottaway Newspapers, Inc., 63 N.Y.2d 1031, 1033 (1984) ("appellants do not even claim" that the decision was "an abuse as a matter of law"). Since this presents a pure legal question (see People v. Jones, 24 N.Y.3d 623, 629 (2014)), this Court is "not free to substitute [its] judgment for that of [Supreme Court]…" (People v. Cook, 34 N.Y.3d 412, 423 (2019)), and it cannot reverse unless it finds "*no* room for the exercise of...reasonable discretion." People v. Branch, 83 N.Y.2d 663, 667 (1994) (emphasis added).

By correlation, the trial "judge must be and is given great latitude in controlling the…scope of…summations." People v. Mairena, 34 N.Y.3d 473, 482 (2019). The essence of discretion entails a choice of "means" at the trial court's "disposal" for "dealing with [a] problem." Branch, supra; Black's Law Dictionary at 419 (5th ed.) (defining "discretionary acts" as "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion").

Relatedly, it is well-settled that a new trial should only be granted based on improper summation comments where they were so egregious as to deprive defendant of a fair trial (see Penn v Amchem Products, 85 A.D.3d 475, 477 (1st Dept., 2011)), or their "cumulative effect" deprived defendant of a fair trial (Gregware v. City of New York, 132 A.D.3d 51, 62 (1st Dept., 2015), or they

"permeated the trial and created a climate of hostility that effectively destroyed the defendant's ability to obtain a fair trial." DiMichel v. S. Buffalo Ry. Co., 80 N.Y.2d 184, 198 (1992). Conversely, an isolated comment, a cured one, or one that posed no danger of leading to an unsupported verdict, does not present circumstances sufficient to warrant a new trial. See, e.g., Wilson v. City of New York, 65 A.D.3d 906, 908 (1st Dept., 2009); Calzado v. New York City Transit Auth., 304 A.D.2d 385 (1st Dept., 2003).

Here, since it was a reasonable act of discretion for Supreme Court to deny WCD's mistrial application and direct Plaintiffs' counsel to neutralize his own words before the jury, Appellant has not come remotely close to establishing that the denial of a mistrial rose to the level of constituting an abuse of discretion as a matter of law. The transvaginal exposure summation remark was based on record evidence admitted without objection (R.4070, R.4117-23, 4869-70), and was an isolated remark made amid a three-hour closing that addressed a "plethora" of issues, which came after a three-week trial comprising thousands of pages of testimony and voluminous exhibits. R.8468, 8471. See Wilson, supra at 908 ("remarks are unlikely to have affected the outcome" after lengthy trial and summation); cf. People v. Speaks, 28 N.Y.3d 990, 992 (2016) (comment was "within the bounds of permissible rhetorical argument").

Plaintiffs' counsel was otherwise clear that the causation theory was predicated on breathing the asbestos (R.5337, 5373) ("She breathed this for years. It was without a doubt a substantial contributing factor.")), and in fact the unrebutted respiratory-based causation proofs were so overwhelming that the comment had no net effect on the outcome. See People v. Galloway, 54 N.Y.2d 396, 401 (1981) ("prosecutor's comment, in the context of the entire summation and, even more, the entire trial,…was harmless error"); Calzado, supra ("Plaintiff's case was very strong, and we are satisfied that the net effect of counsel's improper, but largely isolated, conspiracy allusion was minimal."); Pareja v. City of New York, 49 A.D.3d 470 (1st Dept., 2008) ("these remarks were brief and, after a [lengthy trial], were unlikely to have affected the outcome."); Riffel v. Brumburg, 91 A.D.2d 842, 842 (4th Dept., 1982) (even after "repeated" improper remarks, "given the very strong evidence of lack of fault on defendant's part in this case, reversal based on counsel's comments is not warranted.").

Indeed, the record is bereft of even a hint of jury confusion or prejudice to WCD due to this inconsequential remark. There were no jury notes addressed to causation; all notes asked about the asbestos content in WCD's talc. R.5526-27, 5531. All of the verdict sheet interrogatories, including for proximate cause, were answered unanimously, except as to fault apportionment, which is unrelated to the

remark at issue. R.5533-36.[13] This contradicts any notion of potential prejudice, let alone actual prejudice to a substantial right.

Buttressing this is that the jury was repeatedly instructed that summation comments were not evidence, and they should consider only the exhibits and testimony that was admitted. R.2566, 5483-84, 5502-03. See People v. Broady, 5 N.Y.2d 500, 516 (1959) (no abuse where, inter alia, jury was instructed that summation was not evidence); cf. People v Davis, 58 N.Y.2d 1102, 1103-04 (1983) (must presume that jury instructions were followed).

Moreover, since WCD took an all-or-nothing approach to this issue at trial and never sought, in the alternative to a mistrial, *any* curative relief (R.5426 ("it's not curable")), its challenge to the providence of the mini-closing, raised for the first time post-verdict, is unpreserved and nonreviewable. See App. Br. at Point II(B) (arguing "…trial court did not grant mistrial *or issue a curative instruction*") (emphasis added). See Grzesiak v. General Elec. Co., 68 N.Y.2d 937 (1986); People v. Young, 48 N.Y.2d 995, 996 (1980) ("defendant adhered to his unwarranted demand for a mistrial"); see also People v. Whalen, 59 N.Y.2d 273, 280 (1983) (unless judge is alerted to error and afforded "an opportunity to correct himself, defendant must be deemed to have waived any objection").

[13] Even so, that this trial was fair is further underscored by Appellant's success in getting 50% apportioned to Shulton although Plaintiffs' counsel asked the jury for 10%. R.5386.

But if considered, the mini-closing constituted a reasonable act of discretion. Initially, the reopening of a summation is not an unprecedented curative act. See, e.g., People v. Kurkowski, 83 A.D.3d 1595, 1596 (4th Dept., 2011) ("court offered defense counsel the opportunity to reopen summations…, thus alleviating any possible prejudice…"); cf. People v. Cromwell, 150 A.D.2d 715, 716 (2d Dept., 1989) (counsel never sought permission to reopen his summation); see also Seeco, Inc. v. Hales, 22 S.W.3d 157, 178 (Ark. 2000) (reopening summation was provident). In fact, Appellant directly acknowledged this during post-verdict argument. R.52 ("I can imagine a circumstance where a curative statement by plaintiff's counsel would be sufficient").

The so-called mini-closing was, in reality, a simple continuance of counsel's summation, as he concluded at the end of one day and the mini-closing occurred the very next morning, thereby maintaining the trial sequence. See C.P.L.R. § 4011 ("[t]he court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial…"); cf. Cook, supra at 424 (no prejudice where hearing and reopening occurred over two consecutive days).

And inasmuch as the transvaginal issue was based on record evidence, Supreme Court reasonably determined that it could be "easily cured" by having counsel neutralize it in a summation continuance. R.5432. See Branch, supra (to be reversible, there must have been "no room for the exercise of...reasonable

discretion"); cf. People v. Roseman, 78 A.D.2d 878, 880 (2d Dept., 1980) (should have allowed reopening where "prosecutor's remark was susceptible to the interpretation advanced by him," but still created an erroneous impression).

Nor is it unprecedented for an improper remark to be cured by counsel's own counteraction. See, e.g., In re Jamar W., 269 A.D.2d 103, 103 (1st Dept., 2000) (improper statement during summation was retracted and disposition was based on evidence presented); see also Sawyer v. United States, 202 U.S. 150, 168 (1906) (no "ground laid for [reversal] where" summation comment was improper but counsel withdrew it). This modality, in fact, presented a more effective cure than an instruction, as evinced by Supreme Court's thought process. R.48 ("I thought [it] was…an acceptable resolution" to have counsel "fall on his sword…").

And the mini-closing was eminently effective. Counsel took great pains to ensure that he conformed to Supreme Court's curative parameters (R.5464, 5471-76), and he then told the jury that "the case is really about what was released into the air," so they should "focus[] on the airborne particulate and the fact that Flo said she breathed that particulate in." R.5479. See People v. Whaley, 70 A.D.3d 570, 571 (1st Dept., 2010) ("court's curative actions were sufficient to prevent the remarks in question from causing any prejudice"). Nothing whatsoever about this negation can be deemed a "double-down" on the transvaginal remark. App. Br. at

26. See Selzer v. New York City Transit Auth., 100 A.D.3d 157, 163 (1st Dept., 2012) (counsel did not exceed broad boundaries of summation).

Similarly, the contention that the Appellate Division relied entirely on counsel's "good faith" in finding no abuse is a patent red herring. App. Br. at 28. In reality, Supreme Court's offhand, stated belief that the comment had not been "motivated by any lack of good faith" was merely one, minor factor amid the majority's careful and comprehensive analysis. R.8472-73. Appellant's caselaw, in this regard, is inapposite, involving either *multiple* improper, *uncured* remarks (see, e.g., Lyons v. City of New York, 29 A.D.2d 923 (1st Dept., 1968), aff'd, 25 N.Y.2d 996 (1969)), comments so inflammatory that they violated the Code of Professional Responsibility (see, e.g., Whalen, supra at 280-81), or comments tied to erroneously admitted evidence. See, e.g., Badr v. Hogan, 75 N.Y.2d 629, 636 (1990). Otherwise, Appellant's caselaw supports Plaintiffs' position. See, e.g., Rohring v. City of Niagara Falls, 192 A.D.2d 228, 230-31 (4th Dept., 1983), aff'd, 84 N.Y.2d 60 (1994).

Under these particular circumstances, the denial of a mistrial was not an abuse of discretion as a matter of law, and if considered further, the choice to employ a mini-closing as a cure did not prejudice Appellant as to a substantial right.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Appellate Division should be affirmed in its entirety, with costs awarded to Respondent.

Dated: New York, New York
May 6, 2021

Respectfully submitted,
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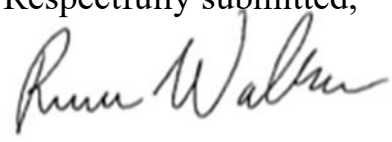
CERTIFICATION

I certify, pursuant to 22 N.Y.C.R.R. 500.13(c)(1) & (3), that the total word count for all printed text in the body of the brief, exclusive of the table of contents, table of authorities, questions presented, and any other non-countable content identified in Section 500.13(c)(3), is 13,797 words.

Dated: May 6, 2021

Respectfully submitted,



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