

Shulman v Brenntag N. Am., Inc.
2018 NY Slip Op 32943(U)
November 19, 2018
Supreme Court, New York County
Docket Number: 190025/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13IN RE: NEW YORK CITY ASBESTOS LITIGATION

JENNY SHULMAN and BRONISLAV KRUTKOVICH,

INDEX NO. 190025/2017

Plaintiffs,

MOTION DATE 11/07/2018

- against -

MOTION SEQ. NO. 003

BRENNTAG NORTH AMERICA, INC., et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Johnson & Johnson and Johnson & Johnson Consumer Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Corrected Third Amended Complaint, is granted to the extent of dismissing the express warranty claims asserted in the sixth cause of action. The remainder of the relief sought is denied.

Plaintiff, Jenny Shulman, was diagnosed with peritoneal mesothelioma after a hysterectomy and oophorectomy for endometrial cancer on or about February of 2016. She was forty (40) years old at the time of her diagnosis. (Opp. Exh. 1, pgs. 96-97). Ms. Shulman's exposure - as relevant to this motion - is allegedly from the use of Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson & Johnson Baby Powder ("JJBP"). Ms. Shulman alleges that she used JJBP daily from 1980 to 1990. Ms. Shulman alleges that she continued to use JJBP with less regularity, when she started using other manufacturers talc products, from 1991 through 2011.

At her deposition Ms. Shulman testified that her mother used JJBP on her after they came to America from Russia in 1979. She testified that her mother applied JJBP from when Ms. Shulman was around the age of three (1980) until she was about eight years old. Ms. Shulman's mother confirmed that she used JJBP on her daughter, but did not describe the manner in which it was applied to Ms. Shulman (Mot. Kurland Aff., Exh. 8, pg. 150).

Ms. Shulman testified that she applied JJBP on herself daily after showering, starting around eight years old until she was thirteen years old, when she switched to using a different manufacturer's talc product (Opp. Exh. 1, pg. 239, Exh. 2 pg. and Exh. 4, pgs. 21 and 28). She would shake the powder from the JJBP bottle onto her hand and apply it to her chest, under her breasts, abdomen, shoulders, thighs, between her legs and her feet. She would also put JJBP in her shoes to absorb odor (Opp. Exh. 1, pgs. 238-239, Exh. 2, pgs. 281-282 and Exh. 4, pgs. 21-25). Ms. Shulman testified that JJBP would become "dusty" when being shaken out of the bottle and that she could both smell and breath it in (Opp. Exh. 4, pgs. 23 and 26). She placed the wet towel used to dry herself from her shower on the floor to collect the dust, which Ms. Shulman described as "pretty messy" (Opp. Exh. 2, pgs 281-282). Ms. Shulman recalled reading the labels on the back of the JJBP containers she used but could not remember the details of what they said, other than as she got older she read the word "talc" (Opp. Exh. 3, pgs. 283-284 and Exh. 4, pgs. 24-25 and 64-65).

Ms. Shulman testified that after she turned thirteen, she switched to another talc product, but if she ran out of the other talc product, she would go back and use JJBP (Opp. Exh. 4, pg. 32).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

She testified that she continued using JJPB with less regularity from 1991 through 2011, when she stopped using it completely (Opp. Exh. 2, pg. 291).

Plaintiff, Bronislav (a.k.a. "Brian") Krutkovich, lived with Ms. Shulman in 2008; they got married on March 15, 2017 (Opp. Exh. 1, pg. 71 and Exh. 4, pg. 9). Mr. Krutkovich testified at his deposition that he did not remember being present when Ms. Shulman used JJPB and did not see her use it (Opp. Exh. 3, pgs. 59-60).

Plaintiffs commenced this action on January 23, 2017 to recover for damages resulting from Ms. Shulman's exposure to asbestos from defendants' products. Plaintiffs' Third Amended Complaint filed on February 22, 2017 asserts seven causes of action for: (1) and (5) strict products liability, (3) strict liability, (2) and (4) negligence, (6) Bronislav Krutkovich's claim for loss of consortium, and (7) breach of warranty. Plaintiffs seek both compensatory and punitive damages in the first through sixth causes of action (Mot. Kurland Aff., Exh. 1). On January 11, 2018 plaintiffs filed a "Corrected Third Amended Complaint" to assert claims against the defendants that were previously erroneously omitted from the Third Amended Complaint (Mot. Kurland Aff., Exh. 23). On January 31, 2018 defendants answered the Corrected Third Amended Complaint denying liability and asserting affirmative defenses (Mot. Kurland Aff., Exh. 4).

Defendants, Johnson & Johnson (hereinafter referred to individually as "JJ") and Johnson & Johnson Consumer Inc. (hereinafter referred to individually as "JJCI"), now move for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Corrected Third Amended Complaint.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendants' argument that plaintiffs are not expected to present any admissible evidence of exposure to asbestos, citing to expert testimony plaintiffs' "may" rely on, is unavailing.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (*Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that Ms. Shulman either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendants argument that plaintiffs have no evidence and cannot raise an issue of fact that Ms. Shulman was exposed to asbestos from the use of JJPB during the relevant periods of 1980 to 1990 and 1991 through 2011, fails to establish a prima facie basis to obtain summary judgment.

Defendants cite to the standards of *Sean R. v. BMW of N. Am., LLC*, 26 N.Y. 3d 801, 48 N.E. 3d 937, 28 N.Y.S. 3d 656 [2016] and *In re New York City Asbestos Litigation (Mary Juni)*, 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept., 2017], arguing that summary judgment is warranted as to the plaintiffs' strict liability, product liability and negligence claims because of lack of causation. Defendants claim that there is no asbestos contamination from their products because: (1) the talc was sourced from asbestos free mines, (2) the mined talc was purified, (3) there were internal tests

to ensure the lack of contamination and (4) both government and independent tests confirmed the product was asbestos free. It is defendants' contention that their defense experts establish Ms. Shulman was not exposed to asbestos through use of their products or that they caused her mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. 11, 13, 14, 15, 17 and 19), FDA findings in 1976 (Mot. Kurland Aff. Exh. 16), and the expert affidavits of Dana M. Hollins, MPH, CIH, Gregory B. Diette, M.D., M.H.S. and Mathew S. Sanchez, Ph.D., to establish that Ms. Shulman was not exposed to asbestos through use of their products or that they caused her mesothelioma. Defendants claim that during the periods relevant to Ms. Shulman's exposure, JJPB talc was obtained only from the Windsor Mine in Vermont (1980 - 2003) and Guangxi, China (starting in 2003).

Some of the articles, reports and studies annexed to the motion papers are dated during periods outside of Ms. Shulman's exposure in 1980 to 1990 and 1991 through 2011 (See Mot. Kurland Aff. Exhs. 11, 13, 14, 15, 17 and 19). The 1976 FDA findings are also outside of Ms. Shulman's alleged period of exposure.

Dana M. Hollins has a Masters Degree in Occupational and Environmental Epidemiology and is a board certified industrial hygienist. She is employed as a Principal Health Scientist by Cardno ChemRisk, a private scientific consulting firm. She did not perform any testing and instead relies exclusively on reports and studies, only some of which were annexed to the motion papers or cover the time period relevant to Ms. Shulman's alleged period of exposure. Ms. Hollins concludes that cosmetic-grade talc has not been shown to be a risk factor for mesothelioma. Ms. Hollins addresses Italian sourced cosmetic grade talc even though the defendants claim that it is not relevant to Ms. Shulman's alleged period of exposure to asbestos in JJPB (Hollins Aff., pgs. 10 - 11, para. 37, pgs. 12, paras. 42-43, pg. 13, para. 44-465).

Ms. Hollins relies on animal toxicology studies and concludes that the evidence from animal studies does not support a finding of carcinogenicity of talc, inhaled or otherwise. Ms. Hollins also relies on occupational (commercial/employment based) studies, including those involving Italian cosmetic talc miners and millers, and determines that toxicology and epidemiology literature evaluating the carcinogenic potential of cosmetic talc does not provide "convincing evidence that cosmetic talc results in cases of mesothelioma" (Hollins Aff., pg. 20, paras. 67-68, pg. 21 paras. 68 and 71, pg. 22 paras. 71 - 72). She prepared two tables estimating potential exposure associated with consumer use of cosmetic talcum powder products for (1) powdering infants over a period of two years and (2) over a 70 year lifetime (Hollins Aff., pgs. 24-25, para. 76, Table 1 and Table 2).

A third table was prepared applying specifically to Ms. Shulman's potential exposure to defendants' talcum powder products, relying on the same data as the other two tables (Hollins Aff., pg. 30, para. 85, Table 3). She calculates that Ms. Shulman's upper bound cumulative exposure to asbestos from use of JJPB is "0.0012 f/cc-yr." (Hollins Aff., pg. 31, para. 86). In preparing the tables, Mrs. Hollins makes assumptions relying in part on excerpts from Ms. Shulman's deposition testimony, "assumed" time periods and amount of exposure where it was lacking in Ms. Shulman's deposition testimony (Hollins Aff., pg. 30, para. 85, footnotes e, f, l, j and k). Ms. Hollins made no evaluation for an alleged "latency period" of "10 years" prior to Ms. Shulman's diagnosis (Hollins Aff., pg. 30, para. 85, footnotes f and l).

Ms. Hollins addresses ambient exposure to asbestos outdoors and indoors, and created a fourth table relying on multiple reports and studies not annexed to either her report or the motion papers and calculates "cumulative ambient exposure over a seventy year life-time" as a "minimum of 0.002" and "maximum of 0.4" (Hollins Aff., pg. 37, para. 97). She refers to a Price and Ware 2004, report that found environmental exposures did not trigger a risk response in women and "must have been below a threshold for mesothelioma" (Hollins Aff., pg. 37, para. 98). Ms. Hollins relies on a series of studies that are not annexed to her affidavit or the motion papers to establish that peritoneal mesothelioma has an unknown etiology with only a small number attributed to asbestos exposure (Hollins Aff., pgs. 246-27, paras. 81-83).

Ms. Hollins' affidavit fails to "unequivocally" establish lack of causation or meet defendants' prima facie burden. She contradicts defendants' argument that Italian talc was only

used during a period outside of Ms. Shulman's alleged exposure by relying on evaluations in reports or studies of Italian talc. There is no scientific basis provided for the second table estimating "Potential Exposure Associated with the Consumer Use of Cosmetic Talcum Powder Products Over a 70-Year Lifetime." Ms. Hollins reliance on studies and unpublished reports that are not annexed to her affidavit, and assumptions made as to Ms. Shulman's time periods of exposure indicated in the footnotes as part of the calculations, including the missing ten year "latency" period, fail to establish lack of causation. Ms. Shulman stopped using JJPB about five years before her diagnosis. The "10 year" "latency period" results in Ms. Hollins rendering calculations that do not include the five year period Ms. Shulman was still using defendants' product, and results in a speculative determination. Ms. Hollins' reliance on speculation and conjecture, is not "unequivocal" proof of lack of causation, or establish defendants' prima facie basis to obtain summary judgment (see *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2006], *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, supra, and *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, supra).

Gregory B. Diette, M.D., M.H.S., is a medical doctor specializing in pulmonary and internal medicine, with a masters degree in toxicology. He is an attending physician at Johns Hopkins Hospital and Johns Hopkins Bayview Medical Center and a professor in the Division of Pulmonary and Critical Care, as well as Epidemiology and Environmental Health Sciences. Dr. Diette's research is focused on environmental causes of human disease. Dr. Diette states Ms. Shulman's background and employment history, but fails to cite the source for this information, he does not indicate he reviewed any records (Diette Aff., pgs. 2-6). To the extent Dr. Diette reviewed the entirety of Ms. Shulman's deposition transcripts (three of them), defendants only annexed excerpts and it is unclear how Dr. Diette otherwise obtained a full history.

Dr. Diette did not perform any testing and instead relies exclusively on reports or studies that are not annexed to either his affidavit or the motion papers. Dr. Diette refers to factors and review of scientific and medical literature but only refers to "criteria articulated by Austin Bradford Hill" with no citations to the materials, which are not included as part of defendants' motion papers (Diette Aff., pgs. 6-7, paras. 22-25). He also refers to "a recent study by Bauman and Carbone" concerning environmental asbestos exposure and mesothelioma, providing no dates other than "recent," or other citations to these materials which are not annexed to the defendants' motion papers. Dr. Diette in relying on Bauman and Carbone determines that a higher proportion of younger female cases with mesothelioma are due to environmental causes (Diette Aff., pgs. 11-12, paras. 38-40). Dr. Diette refers to the distinctions between asbestos and talc, but does not provide a scientific foundation. There is no citation to any literature (Diette Aff., pgs. 7-8, paras. 26-27). Dr. Diette refers to pleural thickening, pleural plaques and asbestosis, however he does not explain how this relates to Ms. Shulman's peritoneal mesothelioma, and she does not assert that she had any of the three conditions (Diette Aff., pgs. 8-9, paras. 28-32).

Dr. Diette concedes that peritoneal mesothelioma has been less studied than pleural mesothelioma, and refers to studies with no citations (Diette Aff., pgs. 12-13, paras. 41-43). He determines that risk factors for peritoneal mesothelioma include prior abdominal surgery and that asbestosis is commonly reported in cases of peritoneal mesothelioma, but there is no evidence that low dose asbestos exposure would cause peritoneal mesothelioma (Diette Aff., pgs. 12-13, paras. 41-43). Dr. Diette does not provide any correlation to asbestosis and Ms. Shulman, who has not alleged she was diagnosed with asbestosis. Dr. Diette refers to "Finley and colleagues recently performed an analysis," and "Three other studies examining the long term health effects of pleurodesis" there is no relationship between these studies and Ms. Shulman's diagnosis of peritoneal mesothelioma, there are no citations to or excerpts from these studies annexed to the motion papers (Diette Aff., pgs. 13-14, paras. 46-49).

Dr. Diette refers to studies of talc and mesothelioma applying to miners and millers in Vermont, Italy, France, Norway and Austria, but not China, to conclude that there is no showing of a relationship between talc and mesothelioma. He only identifies the NIOSH study of Vermont miners and millers, he provides no citations or details, only an alleged conclusion that there was no mesothelioma found in the study (Diette Aff., pgs. 14, paras. 50-52). Dr. Diette does not state the relevance of the studies that do not involve talc from the same region alleged by defendants as applying to their products during the period Ms. Shulman alleges she used JJPB and was exposed to asbestos.

Dr. Diette explains that Ms. Shulman has Lynch Syndrome, a gene mutation that increases the risk of multiple cancers including peritoneal mesothelioma. He concludes that Lynch Syndrome, and not the defendants' talc products, is the most likely cause of Ms. Shulman's peritoneal mesothelioma (Diette Aff., pgs. 15-16, paras. 53-65). Dr. Diette's conclusions do not address any distinction between Ms. Shulman's becoming more susceptible to peritoneal mesothelioma because of Lynch Syndrome through asbestos exposure as opposed to actually contracting the disease because of Lynch Syndrome.

Dr. Diette's affidavit fails to meet defendants' prima facie burden as to causation, under *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, supra and *In re New York City Asbestos Litigation* (Mary Juni), 148 A.D. 3d 233, supra. The conclusions in Dr. Diette's affidavit are speculative and conclusory. He relies on studies, reports or tests conducted by others with no citations, and they are not annexed to the motion papers, and has not provided a scientific foundation for his conclusions. He frequently refers to pleural mesothelioma and related conditions of pleural thickening, pleural plaques and asbestosis, which are unrelated to Ms. Shulman's diagnosis of peritoneal mesothelioma, rendering his determinations speculative (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra). Dr. Diette renders a conclusory analysis and fails to establish lack of causation (*Romano v Stanley*, 90 N.Y. 2d 444, 684 N.E. 2d 19, 661 N.Y.S. 2d 589 [1997] and *Guzman ex. rel. Jones v. 4030 Bronx Blvd. Associates L.L.C.*, 54 A.D. 3d 42, 861 N.Y.S. 2d 298 [1st Dept. 2008]). Dr. Diette fails to make a prima facie showing of lack of causation.

Matthew S. Sanchez, Ph.D. has a doctorate in geology and specializes in asbestos and the development of asbestos analytical methods. Dr. Sanchez has been employed by a private entity, the RJ Lee Group, Inc., as a principal investigator for over ten (10) years. He states that talc in its purest form is not asbestos. He describes asbestos as a regulated group of six naturally occurring, highly fibrous, silicate minerals that when crystallized can become one of two families of asbestos containing minerals: serpentine and amphibole. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and analysis of the materials is needed to make a determination. He does not state the frequency of testing needed to make a determination and whether the asbestos containing samples would be identified consistently throughout a given location.

Dr. Sanchez's affidavit attempts to address alleged defects in plaintiffs' expert analysis. He concludes that their finding of asbestos in talc and defendants' talc products is flawed and relies on non-accepted methodology for detection of asbestos. The part of the affidavit that attempts to discredit plaintiffs' experts does not make a prima facie showing of lack of causation (see *Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516; *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575). He ultimately concludes that defendants' talcum powder, and the talc used, is free of asbestos. Dr. Sanchez bases his conclusion on review, analysis and interpretation of decades of studies conducted by scientists and his own testing of allegedly relevant talcs. Dr. Sanchez did not find asbestos contamination in defendants' talc mined in Vermont or China.

Dr. Sanchez's Affidavit fails to make a prima facie showing of lack of causation as to Ms. Shulman. His attempts to address deficiencies in reports and studies by plaintiffs' experts and references to studies and testing with samples that are not from the period relevant to Ms. Shulman's alleged exposure renders his affidavit conclusory and speculative (Sanchez Aff., para. 44, pg. 12). There are reports and studies he cites that are also not annexed to his affidavit or the motion papers, that further render his conclusions speculative. He does not establish a prima facie basis for the defendants to obtain summary judgment (See *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra and *Lopez v. Fordham Univ.*, 69 A.D. 3d 532, 894 N.Y.S.2d 389 [1st Dept., 2010]).

Defendants' experts have not "unequivocally" established that their products could not have contributed to the causation of plaintiff's injury to warrant summary judgment on plaintiffs' negligence and strict liability claims (*Comeau v W. R. Grace & Co.- Conn. (In re New York City Asbestos Litig.)*, 216 A.D. 2d 79, supra at pg. 80, *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra). Defendants did not meet their prima facie burden with the expert affidavits and the additional reports and studies that are included with the motion papers.

Plaintiffs argue that issues of fact remain as to whether Ms. Shulman's exposure to asbestos from JJPB caused her peritoneal mesothelioma. Plaintiffs and their experts include exposure to Italian talc, because of its use in 1980, during a strike at defendants' Vermont mines (Opp. Memo. of Law, pg. 2, ll. "J&J Has Been Manufacturing and Selling Talcum Powder Products Since 1984 With Talc from Three Sources: Italy, Vermont and China," footnote 27).

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered, and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (*In re New York City Asbestos Litigation* (Mary Juni), 148 A.D. 3d 233, supra pg. 236, citing to *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2016]). Specific causation can be established by an expert's comparison of the exposure levels found in the subjects of other studies. The expert is required to provide specific details of the comparison and show how the plaintiff's exposure level related to those of the other subjects (*Id.*). The *Juni* case applied the *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434 and *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014], standards for the plaintiff to establish causation to asbestos litigation.

Plaintiffs' experts are Dr. Jacqueline Moline, Dr. Steven P. Compton and Dr. William E. Longo. Plaintiff also cites to articles, reports, tests and studies that are alleged to demonstrate asbestos contamination in talc (Opp. Exhs. 10, 14, 29, 30, 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 49, 50, 57, 58, 78, 80, 84, 87, 91, 93, 97, 104, 105, 106, 107, 108, 109, 110, 111, 120, 122, 123, 124, 125, 126, 127, 139, 148, 173, 178, 179, 342),

Jacqueline Moline, M.D., Msc, FACP, FACOEM, specializes in occupational and environmental disease specifically asbestos related occupational medicine. Defendants arguments that Dr. Moline was discredited in the *Juni* case are unavailing. In the *Juni* case, Dr. Moline testified as to plaintiff's exposure to dust in brakes as part of his employment. In the *Juni* case, the court determined that the plaintiff was unable to establish causation because of Dr. Moline's lack of knowledge whether the asbestos fibers were active after the braking process (*In re New York City Asbestos Litigation* (Mary Juni), 148 AD3d 233, supra, pg. 237). This case is distinguishable, since it does not involve exposure in a commercial setting or through Ms. Shulman's work, but as part of the use of cosmetic talc on a daily basis for at least ten years, up to as much as thirty years.

Dr. Moline prepares a table of levels of exposure to asbestos from shaker application, and calculates exposure time from baby diapering and body powdering, and determines that Ms. Shulman's total dose of asbestos from exposure to JJPB is 0.247 f/cc-yr, which reflects a combination of 0.0174 f/cc-yr. from Ms. Shulman's mother's use of JJPB when she was a child and personal use resulting in 0.23 f/cc-yr (Opp. Exh. 24, pgs. 29-30, para. 57 - 59). Dr. Moline relies on the Rodelsperger study concluding that even small amounts of exposure are sufficient to cause mesothelioma (Opp. Exh. 24, pg 18, para. 40). Dr. Moline also relies on studies and reports of asbestos in talc from the same regions and mines in Vermont and China used in defendants' products during the periods relevant to Mrs. Shulman's alleged exposure to asbestos. Dr. Moline refers to studies related to Italian Talc which plaintiffs allege are applicable because it was used in defendants' products during a strike at the Vermont mines from December of 1979 through 1980 (See Opp. Exh. 5 and Opp. Exh. 24, pages 21- 26, para. 46 -54).

Dr. Moline cities to the Neman et al., Malignant Mesothelioma Register 1987-1999 in determining that the gene mutation (BAP-1) related to Lynch Syndrome confers increased susceptibility to mesothelioma in individuals with both asbestos exposure and Lynch Syndrome (Opp. Exh. 24, pg. 20, para. 45). She concludes that exposure to asbestos in JJPB over the course of many years and the Lynch Syndrome are the cause of Ms. Shulman's peritoneal mesothelioma. Dr. Moline's opinions are sufficient to raise an issue of fact on the issue of causation. Defendants have not shown that her reliance on "litigation" driven analysis of their product is necessarily different from that of their own experts. Defendants contradict themselves by arguing that Dr. Moline's evaluations and determinations contradict Dr. Longo's determinations, and then argue she relied on Dr. Longo's flawed data, and in any case these contradictory arguments are unpersuasive.

Dr. Steven Compton is a doctor of physics, with laboratory experience in spectroscopy and microscopy. He is also the executive director of MVA Scientific Consultants a private research facility (Opp. Exh. 27). Dr. Compton prepared a report on Italian Talc and on Vermont Talc samples,

in which he confirmed the presence of asbestos after scanning electron and transmission electron microscopy in thirteen samples of the Italian talc, and fifteen samples of Vermont talc, that had been collected by Mickey Gunter, PhD (Opp. Exh. 27, paras. 4 -11). He concludes that aerosolization of the consumer talc products containing the samples would have elevated concentrations of asbestos fibers. This study is sufficient to raise an issue of fact as to whether asbestos in the Italian and Vermont talc used by defendants could have caused or contributed to Ms. Shulman's peritoneal mesothelioma.

Dr. Edward Longo has a Doctorate of Philosophy in Materials Science and Engineering. He also studied microbiology and chemistry. Dr. Longo is currently employed as President of Materials Analytical Services LLC a private research facility (Opp. Exh. 45, NYSCEF doc. 344). He performed studies on samples of the defendants' products and reviewed other reports and studies - most were annexed to the opposition papers - and concluded that there is asbestos in the talc found in defendants' products (Opp. Exh. 45). Dr. Longo's reports are annexed to his affidavit/declaration (Opp. Exh. 45, Exhs. B,C,D, E). He conducted testing of samples by use of analytical transmission electron microscopy (ATEM), found detectable amounts of asbestos in defendants products and finds that the testing methods used by defendants do not detect all of the asbestos fibers in their products. Dr. Longo determined that over a period of approximately twenty years of exposure to JJBP Ms. Shulman was exposed to levels of asbestos well above background or ambient levels. Dr. Longo also determined that a majority of the talc Ms. Shulman was exposed to came from Vermont. His testing resulted in the determination that there were significant quantities of asbestos in vintages contemporaneous with Ms. Shulman's use of JJBP (Opp. Exh. 45, pg.17, para. 35). The evidence from Dr. Longo raises an issue of fact as to causation. There remains issues of fact as to whether Ms. Shulman's use of defendant's products exposed her to asbestos and resulted in or contributed to her peritoneal mesothelioma.

Defendants' argument that Dr. Longo and Dr. Moline rely on samples taken before or after Ms. Shulman's alleged exposure, fails to raise an issue of fact, and is unpersuasive, given that defendants' experts, Dana M. Hollins and Dr. Diette, also relied on at least some studies and samples taken both before and after the relevant period, and talc studies from countries defendants allege are not relevant to this litigation (ie. Italy, France, Norway, etc.).

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011]).

Defendants arguments that the specific bottles of their products used by Ms. Shulman were not tested and there is no direct evidence of exposure to asbestos, is unpersuasive. Plaintiffs are not required to show the precise causes of damages or quantification, but only show facts and conditions from which defendant's liability may be reasonably inferred. "Summary judgment must be denied when the plaintiff has presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (Matter of New York City Asbestos Litig.)*, 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, supra at pg. 448, and *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

The conflicting expert affidavits, the "reasonable inference" standard and construing the evidence in a light most favorable to the plaintiffs as the non-moving party further warrants denial of summary judgment sought by the defendants on the strict liability and negligence claims.

Plaintiffs have also raised issues of fact as to the punitive damages sought in the first six causes of action. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (*Ross v. Louise Wise Servs., Inc.*, 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent plaintiffs argue that the defendants put corporate profits and reputation above the health and safety of the consumer (specifically Ms. Shulman) by negligence, and by failing to place any warnings about asbestos on their product, and their continued insistence that there is no asbestos in talc, there is an issue of fact that should be determined by the jury as to whether this conduct was reckless or wanton such that punitive damages are warranted.

Defendants seek summary judgment on the sixth cause of action for breach of warranty, alleging that this cause of action is not warranted and plaintiffs have failed to establish that Ms. Shulman relied on any representations or promises they made about their products. Defendants argue that there is no implied warranty because plaintiffs cannot provide evidence establishing that JJBP was contaminated with asbestos or otherwise defective. Alternatively, defendants argue that plaintiffs failed to oppose their arguments and they are entitled to summary judgment dismissing the sixth cause of action for breach of warranty. Defendants provide excerpts from Ms. Shulman's deposition testimony to prove that she did not rely on advertising, fraudulent statements or have any discussions with their representatives (Mot. Kurland Aff., Exh. 5, pg. 328).

Defendants have established a prima facie basis for summary judgment dismissing the part of plaintiff's sixth cause of action that asserts claims for breach of express warranty. Plaintiffs did not claim that Ms. Shulman relied on warranties or statements of fact made by the defendants. Ms. Shulman did not identify any written warranties or language on the bottles of JJBP that she used, or state any specific promises made to her by the defendants. Defendants correctly argue that plaintiff has not shown justifiable reliance on any representations (See *Cecere v. Zep Mfg. Co.*, 116 A.D. 3d 901, 983 N.Y.S. 2d 846 [2nd Dept., 2014]). To the extent the sixth cause of action assert claims for breach of express warranty, they are dismissed.

Defendants have not established a prima facie basis for summary judgment dismissing plaintiffs' claims for implied warranty. Implied warranty applies to fitness for the purpose of the allegedly defective products used by Ms. Shulman and that relate to her negligence claims. Plaintiffs have established that issues of fact exist as to whether JJBP used by Ms. Shulman was contaminated with asbestos and defective, or unsuited for its purpose (See *Denny v. Ford Motor Co.*, 87 N.Y. 2d 248, 662 N.E. 2d 730, 639 N.Y.S. 2d 250 [1995], *Navarez v. Wardsworth*, 2018 N.Y. Slip. Op. 06475 [1st Dept., 2018]).

ACCORDINGLY, it is ORDERED that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Corrected Third Amended Complaint, is granted only to the extent of dismissing the express warranty claims asserted in the sixth cause of action, and it is further,

ORDERED that the express warranty claims asserted against defendants Johnson & Johnson and Johnson & Johnson Consumer Inc., in the sixth cause of action of the Corrected Third Amended Complaint, are severed and dismissed, and it is further,

ORDERED that the remainder of the sixth cause of action for breach of implied warranty remains in effect, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: November 19, 2018


MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
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