

<b>Matter of Luca v American Intl. Indus.</b>
2020 NY Slip Op 31493(U)
May 19, 2020
Supreme Court, New York County
Docket Number: 190317/2016
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ**  
**JUSTICE**

**PART 13**

**IN RE: NEW YORK CITY ASBESTOS LITIGATION**

**MARIANN LUCA, Individually and GAETANO LUCA,  
As Executor of the Estate of VINCENT LUCA,  
Deceased,**

**Plaintiffs,**

**-against-**

**AMERICAN INTERNATIONAL INDUSTRIES, et al.,**

**Defendants.**

**INDEX NO. 190317/2016**  
**MOTION DATE 03/20/2020**  
**MOTION SEQ. NO. 010**  
**MOTION CAL. NO. \_\_\_\_\_**

The following papers, numbered 1 to 10 were read on this motion by American International Industries pursuant to CPLR §3212 for summary judgment:

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8 - 10</u>

**Cross-Motion:  Yes  No**

Upon a reading of the foregoing cited papers, it is Ordered that defendant, American International Industries' motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages, is denied.

Plaintiff, Vincent Luca (hereinafter decedent), was diagnosed with malignant epithelioid mesothelioma on or about July of 2016 and died on February 9, 2018 (Opp. Exh. 3). Plaintiffs allege the decedent's exposure to asbestos - as relevant to this motion - is from asbestos containing talc in "Clubman Talc" products that were manufactured by American International Industries (hereinafter "American"). Plaintiffs allege that the decedent was exposed to the asbestos in Clubman talcum powder from about 1960 through 2016. The parties have stipulated that the moving defendant is only liable for Clubman talcum powder products manufactured after August 13, 1987 (Mot. Exh. E).

At his deposition the decedent testified that he was born in 1935 and lived in the Maletto part of Sicily, in Italy, until about 1960 (Mot. Exh. D, pg. 284, Opp. Exh. 1, pgs. 7-8, 11 and 25-28). Decedent stated that in 1975 he opened his own barbershop in Brooklyn where he remained working through 2016. Decedent testified that he retired around 2007 but continued to work in his barbershop part-time for a few hours a day through 2016 (Opp. Exh. 1, pgs. 26-27 and 46). Decedent stated that during the

relevant period he kept the shop open from 8:00 a.m. through 6:00p.m., initially six days a week and then he closed on Mondays and worked five days a week until his retirement in 2007 (Opp. Exh. 1, pgs. 42-43 and 46).

Decedent remembered that the Clubman talcum powder he used initially came in a green and white tin container, but later in a plastic one (Opp. Exh. 1, pgs. 28-32). Decedent described how he used Clubman talcum powder at his barbershop to shave and cut hair. He testified that after doing a shave he would use a second hot towel to apply lotion to the customer's face, then he would apply Clubman talcum powder to the towel and spread the powder all over the customer's face. Decedent stated that after he cut hair, he would shave the customer's neck and apply Clubman talcum powder to a towel and a brush, then he put it on the customer's neck. Decedent recalled that Clubman talcum powder had a scent he liked and when it was applied to the customer it created a cloud that would fill his nose and mouth. He stated that he also would sweep up the barbershop and while he swept and dumped the debris into the garbage pail he observed a cloud of dust that smelled of Clubman talcum powder. Decedent testified that at the end of the day he would shake out the jacket he wore at the barbershop making the powder come up and it smelled like Clubman talcum powder (Opp. Exh. 1, pgs. 27-28, 34-35 and 44-46).

Plaintiffs commenced this action on October 20, 2016 to recover for damages resulting from the decedent's exposure to asbestos from the defendants' products. The complaint was subsequently amended five times to add additional defendants and the Fifth Amended Complaint was amended on June 10, 2019 to add a cause of action for wrongful death and survival damages (Mot. Exhs. A1-A6). American filed an "Answer to Standard complaint No. 1, with Affirmative Defenses and Cross-claims" on January 11, 2017 (Mot. Exh. F-1). On March 20, 2017 American served an Amended Acknowledgment of Service and Answer to Plaintiff's Complaint (Mot. Exh. F-2).

American now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively, American seeks partial summary judgment dismissing the plaintiffs' claims for punitive damages.

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, 89 NY 2d 833, 675 NE 2d 458, 652 NYS 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving 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 NY 2d 525, 571 NE 2d 645, 569 NYS 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 nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD 2d 583, 677 NYS 2d 136 [1<sup>st</sup> Dept. 1998]).

**American argues that it has made a prima facie case and plaintiffs cannot prove general or specific causation. American further argues that plaintiffs' experts cannot provide proof or raise any issues of fact that the decedent was exposed to asbestos contaminated Clubman talcum powder during the relevant period after August 13, 1987 through 2016.**

**American argues that plaintiffs' expert, Dr. Jacqueline Moline, MD, Msc, FACP, FACOEM, did not begin researching the possibility of asbestos as a contaminant in talcum powder or related hazards until 2007 or 2008 and this establishes there was no previously known risk of mesothelioma to end users of its product.**

**A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 AD 3d 516, 38 NYS 3d 797 [1<sup>st</sup> Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 AD 3d 575, 27 NYS 3d 157 [1<sup>st</sup> 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 AD 2d 462, 622 NYS 2d 946 [1<sup>st</sup> Dept., 1995], *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 AD 3d 498, 1 NYS 3d 20 [1<sup>st</sup> Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 AD 3d 841, 57 NYS 3d 766 [3<sup>rd</sup> Dept., 2017]). American must unequivocally establish that the decedent was either not exposed to asbestos from their products, or that the levels of asbestos he was exposed to were insufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 AD 3d 520, 997 NYS 2d 381 [1<sup>st</sup> Dept., 2014]).**

**American's arguments pertaining to plaintiffs' expert Dr. Jacqueline Moline, amount to pointing to gaps in proof and are not a prima facie basis to obtain summary judgment dismissing the entire claim, or partial summary judgment dismissing the punitive damages claim. Furthermore, American's arguments that plaintiffs' experts lack evidence to raise an issue of fact on causation, also amounts to "pointing to gaps in plaintiff's proof" and fails to make a prima facie case to obtain summary judgment.**

**American's argument that the specific bottles of their products used by the decedent were not tested and that there is no direct evidence of exposure to asbestos, is unpersuasive. Plaintiffs are not required to show the precise causes of their damages, but only show facts and conditions from which defendant's liability may be reasonably inferred (*Oken v A.C. & S. (Matter of New York City Asbestos Litig.)*, 7 AD 3d 285, 776 NYS 2d 253 [1st Dept. 2004], *Parker v. Mobil Oil Corp.*, 7 NY 3d 434 at pg. 448, 857 NE 2d 1114, 824 NYS 2d 584 [2006], and *Cornell v. 360 West 51<sup>st</sup> Street Realty, LLC*, 22 NY 3d 762, 9 NE 3d 884, 986 NYS 2d 389 [2014]).**

**American provides the affidavit of its Executive Vice-President Charles Loveless. He states that American was supplied with cosmetic or pharmaceutical grade talc from Whittaker Clark and Daniels ("WCD"), later known as Brenntag Specialties, Inc. or Brenntag North America, Inc. (hereinafter referred to as "Brenntag") and the Clubman talc was sourced from Barretts Minerals, Inc. in Southwest Montana. Mr. Loveless annexes to his affidavit copies of authentication**

certificates from Barretts Minerals, Inc., from 2001 through 2008 and from 2011 through 2017 (Mot. Exh. G, Exhs. 1-4). He states that American stopped producing Clubman talcum powder with talc and switched to cornstarch as of July 1, 2017 as a result of difficulties obtaining insurance because of baseless litigation (Mot. Exh. G). American argues that the literature, testing, scientific and medical authorities it relies on confirms that the talc used in Clubman talcum powder does not contain regulated asbestos fibers.

Plaintiffs provide deposition transcripts of Mr. Loveless and Theodore Hubbard, WCD's corporate representative (Opp. Exh. 9, 10, 11 and 12). Mr. Hubbard, on behalf of WCD, testified that the sales records show that the 1745 talc, which plaintiffs allege was sold to American and used in Clubman talcum powder, came from a mine in Montana (Opp. Exh. 9, pgs. 77-79). Mr. Loveless stated that Clubman talcum powder used talc supplied from WCD from 1987 through 2003. He stated that American used WCD until it was contacted by WCD in the early 2000s and told to use Brenntag. Mr. Loveless testified that American relied exclusively on testing performed by suppliers of the talc that was purchased and did not test the finished Clubman talcum powder products from 1987 through December of 2015 (Opp. Exh. 12, pgs. 35-41). Plaintiffs argue that they tested the same Montana talc sold by WCD to American for use in Clubman talcum powder and it was found to contain asbestos, which, together with their expert reports, raises an issue of fact on liability.

American argues that the unsworn September 20, 2017 report of plaintiffs' expert, Steven P. Compton, Ph.D. (Opp. Exhs. 13 and 15), does not affirm the statements in the report to be "true under the penalties of perjury" and is not subscribed before a notary public or other authorized official, rendering it inadmissible hearsay on this motion for summary judgment. Dr. Compton's reports as annexed to the opposition papers are hearsay and inadmissible as evidence on this motion for summary judgment (*Grasso v. Angerami*, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991], *Frees v. Frank & Walter Eberhart L.P. No. 1*, 71 AD 3d 491, 896 NYS 2d 71 [1<sup>st</sup> Dept. 2010], *Offman v. Singh*, 27 AD 3d 284, 813 NYS 2d 56 [1<sup>st</sup> Dept. 2006], CPLR §2106, *Shinn v. Catanzaro*, 1 AD 3d 195, 767 NYS 2d 88 [1<sup>st</sup> Dept. 2003], and *Arce v. 1704 Seddon Realty Corp.*, 89 AD 3d 602, 935 NYS 2d 1 [1<sup>st</sup> Dept. 2011]). Plaintiffs' argument that Dr. Compton's deposition testimony excerpts annexed to the opposition papers cures the defect, is unavailing (see Opp. Exhs. 14 and 16). Dr. Compton identifies reports in the deposition excerpts, but his testimony does not establish that those reports are the same as those used to oppose this motion.

American claims that the expert reports of Mr. Alan M. Seagrave, P.G., Kenneth A. Mundt, Ph.D., FACE, Brooke T. Mossman, Ph.D., Michael Graham, M.D., Robert C. Adams MS, CIH, CSP, FAIHA, and John E. Bailey, Jr., Ph.D., establish that no causal relationship exists between the talc used in Clubman talcum powder and the decedent's development of mesothelioma. American argues that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 NY 3d 1116, 116 NE 3d 75, 91 NYS 3d 784 [2018], because plaintiffs are unable to establish general and specific causation.

The July 29, 2019 report of Brooke T. Mossman, Ph.D., a pathologist, states that he was not retained as a diagnostic pathologist and therefore his report does not include any opinions of the decedent's diagnosis. The report does not include any assessment of the decedent's use of talc, exposure to asbestos or pleural mesothelioma and does not establish lack of causation as to the decedent (Mot. Exh. S).

John E. Bailey, Jr., Ph.D. is a chemist whose report states that from 1971 through 2002 he was primarily employed by the Food and Drug Administration's (FDA) Division of Colors and Cosmetics. In 2002 Dr. Bailey left the FDA and was employed by the Cosmetics, Toiletries & Fragrance Association ("CTFA"). Mr. Bailey's report does not include any opinions of the decedent's pleural mesothelioma diagnosis. Dr. Bailey's report relies solely on his expertise of the FDA's mandate, policies and procedures on cosmetic talc and FDA review of data, research, and testing, including the agency's own testing. He does not include any assessment of the decedent's use of talc, exposure to asbestos or his pleural mesothelioma and does not establish lack of causation (Mot. Exh. JJ).

The August 26, 2019 report of Michael Graham, MD, a pathologist, discusses decedent's medical history and work history. He states that the records establish that the decedent's pleural mesothelioma was caused by residing in Maletto, Italy. Dr. Graham states that "the weight of the current scientific information does not establish, to a reasonable degree of medical certainty, a causal relationship between cosmetic talc exposure and the development of human pleural malignant mesothelioma." Dr. Graham states that he is unaware of any epidemiologic study demonstrating that barbers have an increased incidence of mesothelioma as a result of the exposure to cosmetic talc. He does not refer to any studies, reports or testing but concludes that the decedent's mesothelioma was most likely not caused by cosmetic talc (Mot. Exh. W). Dr. Graham's report does not establish lack of causation.

#### **General Causation:**

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (Parker v. Mobil Oil Corp., 7 NY3d 434, 448, supra).

American argues that the decedent was not exposed to asbestos from talc used in Clubman talc, eliminating any general causation. American further argues that the decedent's source of exposure to asbestos was from fluoro-edenite that was in the soil and used as building material in Maletto, Italy.

The February 3, 2020 expert report of Mr. Alan M. Seagrave, Professional Geologist (P.G.), states that all the talc used in Clubman talcum powder post-1987 was from the Barrett Mine in Southwest Montana, identified by WCD as 1745 talc. Mr. Seagrave states that none of the Montana talc supplied to American from WCD to make Clubman talcum powder during the relevant period of 1987 through 2016 was contaminated with asbestos (Mot. Exh. H). His report includes "TABLE 2 Clubman Talc Codes, X-Ray Diffraction (XRD) Results, and Mr. Luca;" which shows that during the period from 1971 through 1991 the Montana talc was mixed with other Talc from North Carolina, California, Korea and Australia and assigned the talc code 1625. Table 2 shows that XRD testing of 1625 talc found less than 0.5% tremolite fibers (Mot. Exh. H, pg. 48).

**Mr. Seagrave states that the United States Environmental Protection Agency (EPA) 1992 Health Assessment did not find any serpentine or amphibole accessory minerals. He also states that a 2010 report by the International Agency for Research on Cancer (IARC) published by the World Health Organization (The WHO) states that there were no reports of serpentine tremolite, or anthophyllite asbestos in Montana talc, as further establishing that the WCD talc from mines in Montana was not contaminated. Mr. Seagrave states that testing done in 2010 by the Food and Drug Administration (FDA) of cosmetic talc used for various products, including Clubman talcum powder, found no asbestos (Mot. Exh. H, pgs. 22-24 and 44-45).**

**Mr. Seagrave discusses his 2009 visit to Biancavilla, Sicily and observations made at asbestos containing fluoro-edenite basalt quarries that were used to provide road fill and building material in the surrounding area, including Maletto, Sicily where the decedent lived from 1935 until 1960. Mr. Seagrave states that the area is known to have a higher causation of mesothelioma and Maletto is close in proximity to the deposits found in Biancavilla which is the likely cause of the decedent's pleural mesothelioma, not the use of Clubman talcum powder (Mot. Exh. H, pgs. 39-43 and 67-68).**

**The February 25, 2020 report of Kenneth A. Mundt, Ph.D., FACE, an epidemiologist, discusses the principles of epidemiological methods and perspective (Mot. Exh. I). He refers to the IARC 2006 approach for classifying carcinogens. He also cites to IARC 2010 as stating that talc is not an amphibole mineral or a form of asbestos, but that it may co-exist with accessory minerals such as serpentine and amphibole (Mot. Exh. I, pgs. 5 and 7). Dr. Mundt provides an overview of the epidemiology of malignant mesothelioma and the characteristics and toxicity of asbestos fibers. He cites to the IARC 2012 in support of his statement that "silicate minerals can also occur in non-fibrous or non-asbestiform habit, including cleavage fragments which are not asbestos" (Mot. Exh. I, pgs. 8-11). Dr. Mundt relies on Mr. Seagrave's report for his conclusion that the decedent's exposure to fluoro-edenite from 1935 through 1960 in Italy is the most likely cause of his pleural mesothelioma, and not the use of Clubman talcum powder (Mot. Exh. I, pgs. 15 and 21-22).**

**The February 19, 2020 report of Robert C. Adams MS, CIH, CSP FAIHA, an industrial hygienist, summarizes the decedent's life, work and exposure history to Clubman talcum powder. He discusses potential exposure to asbestos in talc, and various studies measuring talc particulates and fiber concentrations in cosmetic talcum powder use. Mr. Adams cites the National Institute for Occupational Safety and Health (NIOSH) from 2011, which states that "due to analytical difficulties in differentiating between asbestiform and non-asbestiform habits and the inability to assign a risk factor to non-asbestiform analogs of asbestos, there is continued emphasis to apply conservative exposure estimates for asbestos air sampling." Mr. Adams also cites to NIOSH's 1972 finding that twenty seconds after the application of talc containing baby powder, exposures to fibers diminished rapidly.**

**Mr. Adams discusses the decedent's potential exposure during the time he resided in Maletto, Italy. He states that fluoro-edenite fibrous amphiboles are considered a confirmed carcinogen by IARC, and cases of mesothelioma in the nearby Biancavilla, Italy area have been linked to environmental exposures to**

**fluoro-edenite (IARC, 2014). Mr. Adams concludes that the decedent's cumulative use of talc, assuming trace amounts of regulated asbestiform minerals associated with Clubman talcum powder, would be within the range of cumulative background concentrations of asbestos associated with the environment. Mr. Adams relies on the report of Alan Seagrave and further concludes that the decedent's exposure to fluoro-edenite in Maletto, Italy, increased the risk and was the cause of decedent's pleural mesothelioma (Mot. Exh. II).**

**Plaintiffs rely on the July 5, 2017 expert report of Dr. Jacqueline Moline, MD, Msc, FACP, FACOEM, a specialist certified in Occupational and Internal Medicine. She assesses decedent's medical and exposure history, past medical history, cigarette history, and occupational and environmental history. Dr. Moline states that asbestos is a well-known cause of mesothelioma and talc has been reported as containing asbestos fibers for decades. Dr. Moline relies on studies, testing and reports assessing talcum powder exposure. She also relies on agencies, including the FDA, NIOSH, EPA and IARC as establishing that talc contaminated with asbestos is carcinogenic. Dr. Moline concludes that the decedent's cumulative exposure to asbestos contaminated Clubman talcum powder, which he used for decades on a regular and frequent basis when taking care of his barbershop customers, caused his mesothelioma (Opp. Exh. 23).**

**The March 8, 2018 report of Dr. Murray M. Finkelstein, Ph.D., M.D.CM., C.C.F.P., a medical doctor and epidemiologist, reviews the decedent's medical records and pathology information, and reports of testing done by the FDA that found tremolite in Clubman talc. Dr. Finkelstein states that the asbestos containing fluoro-edenite found in Biancavilla, Italy was 29.1 kilometers away from Maletto, Italy where the decedent lived. He cites to studies done by Bruni in Italy in 2006 and 2014 which state that the amphibole fiber diffusion in the Biancavilla environment had been maximum during the sixties and the seventies-after the decedent left Italy- with the uncontrolled development of the local building industry. He provides a map showing the area of potential exposure from Biancavilla to further demonstrate that Maletto was outside of the area of potential exposure. Dr. Finkelstein discusses the human health effects of exposure to Clubman talcum powder, which contained trace amounts of fibrous amphibole, and concludes that it is the cause of decedent's mesothelioma. (Opp. Exh. 29).**

**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 NY 2d 57, 268 NYS 2d 18, 215 NE 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 AD 3d 538, 12 NYS 3d 35 [1<sup>st</sup> Dept., 2015]). "It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (Vega v. Restani Const. Corp., 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). The conflicting expert reports raise credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 AD 3d 439, 922 NYS 2d 70 [1<sup>st</sup> Dept. 2011], Almonte v. 638 West 160 LLC, 139 AD 3d 439, 29 NYS 3d 178 [1<sup>st</sup> Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 AD 3d 554, 71 NYS 3d 884 [1<sup>st</sup> Dept., 2018]).**

American's experts rely on studies and reports and agency findings to establish that there is no asbestos in Clubman talcum powder during the relevant time period and that it is not the cause of decedent's mesothelioma. Plaintiffs' experts, Drs. Finkelstein and Moline also rely on studies and reports and in part on the same agencies, FDA, IARC, EPA and NIOSH, to establish that the decedent's exposure to asbestos in the talc used in Clubman talcum powder exposed the decedent to asbestos and caused his mesothelioma. Dr. Moline and Dr. Finkelstein rely on scientific studies and reports to reach their conclusions and American has not discredited all of the researchers or entities that are relied upon in their reports. Dr. Finkelstein and Dr. Moline's extrapolation from case studies, not necessarily specific to barbers but related to talc miners or millers, sufficiently raises issues of fact on general causation as American's experts also relied on case studies related to talc miners and millers (*Nemeth v. Brenntag North America*, 2020 NY Slip Op. 1705445 [1<sup>st</sup> Dept. 2020]). There is also conflicting expert testimony as to whether the decedent was exposed to fluoro-edenite when he lived in Italy. These conflicting expert reports raise credibility issues, and issues of fact on general causation.

#### Specific Causation:

The Court of Appeals has enumerated several ways an expert might demonstrate specific causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin." The "comparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, supra at 448]). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Mr. Seagrave states that there are six events that are needed to have asbestos in a finished talc product: (1) asbestos must exist in the area where the talc is mined; (2) non-talc rocks containing asbestos must be adjacent to the talc; (3) amphibole/asbestos-containing rock must survive the beneficiation process, including hand-sorting, mechanical screening, milling, flotation, and density separation; (4) among the talc sold, the portion of talc with asbestos contamination must reach the manufacturer of the product (American International Industries) and be used in the specific product (Clubman talcum powder); (5) a portion of the contaminated talc must be placed into the actual container purchased and used by the plaintiff; and (6) the process would have to be repeated over and over for extended periods of time for the plaintiff to have cumulative exposure to talcum powder contaminated with asbestos.

He concludes that from a mineralogical and geological perspective, the high purity of the talc deposits in southwest Montana renders it almost impossible for the decedent to be exposed to levels of contaminated talc sufficient to cause his mesothelioma. Mr. Seagrave further concludes that the most likely cause of decedent's mesothelioma is exposure to fluoro-edenite asbestos fibers from dry unpaved roads and loose soils upslope from Maletto, Italy in the 1950's and 1960's (Mot. Exh. H, pgs. 65-68).

Dr. Mundt makes a comparison analysis citing to 2009 and 2016 reports of studies of barbers and hairdressers in Denmark, Finland, Iceland, Norway and Sweden that were gathered as part of the NOCCA study, and states that although there was a finding of mesothelioma, the percentages are not greater than the general exposed population (Motion Exh. I, pg. 15). Dr. Mundt cites to various studies of talc miners and millers in various locations including New York and Italy and states that there was no significant risk of malignant mesothelioma. He does not cite to any study applying solely to Montana talc, but states that a small study not intended to evaluate mesothelioma incidence or mortality of millers and miners from Montana, Texas and North Carolina, focused on respiratory symptoms, determined that only the talc dust samples from Texas had tremolite and antigorite asbestos fibers (Mot. Exh. I, pgs. 16-19). Dr. Mundt concludes that a synthesis of the body of epidemiological evidence on talc and talcum powder exposure clearly demonstrates no risk of mesothelioma. He further concludes that the decedent's use of American's Clubman talcum powder was not the most likely cause of the malignant pleural mesothelioma. He states that the decedent's mesothelioma was most likely caused by exposure to fluoro-edenite while living in Maletto, Italy (Mot. Exh. I, pgs. 21-22).

Mr. Adams relies on Mr. Seagrave's report in estimating the decedent's exposure from task based respirable dust associated with the direct use of American's Clubman talcum powder products. Mr. Adams estimated that the decedent typically performed between ten and twenty haircuts per day, and each haircut took between twenty to thirty minutes, additionally, it was estimated the decedent commonly swept the floor four to five times per day. Mr. Adams assumed decedent had a daily exposure time of 90 minutes/day for applying talcum powder during a typical day, including time to perform sweeping tasks, his estimated 8-hour Time Weighted Average (TWA) exposure would be 0.004 f/cc. He states that the current Occupational Safety and Health Administration (OSHA) Permissible Exposure Limit (PEL) is 0.1 f/cc. Mr. Adams concludes that the decedent's cumulative exposure to asbestos in Clubman talcum powder is less than 10% of the current permissible OSHA PEL if regulated asbestiform mineral was present in the same amount in every application of talcum powder the decedent made. He further concludes that the decedent's exposure to asbestos from the use of Clubman talcum powder is within the range of cumulative background concentrations of asbestos associated with the environment and generally not known to be associated with the risk of mesothelioma in the general population. Mr. Adams opines that the decedent's mesothelioma was most likely caused by exposure to fluoro-edenite while living in Maletto, Italy (Mot. Exh. II, pgs.14-16).

Plaintiffs' expert, Dr. Finkelstein refers to Dr. Compton's testing using a Transmission Electron Microscope (TEM) equipped with a Thermo Scientific Noran System 7 energy dispersive x-ray spectrometry (EDS) analysis system and capable of selected area electron diffraction (SAED). Dr. Finkelstein states that testing was performed on four historic samples of Clubman talcum powder in 2017 and the tests identified anthophyllite fibers in all four samples. The anthophyllite fiber concentration for all four samples ranged from approximately eleven to fifty-one million fibers per gram.

Dr. Finkelstein cites to Dr. Ann Wylie, Professor of Geology (2016) on the size of asbestos fibers and the distinction between cleavage fragments and actual asbestos fibers. He states that the asbestos fibers and not cleavage fragments were detected by Dr. Compton. Dr. Finkelstein determines that Clubman retail products contained trace amounts of fibrous amphibole. He cites to his analysis, performed with Dr. Andre Dufresne, of the fiber burden in the lungs of miners and millers in the

Province of Quebec, Canada (Finkelstein and Dufresne 1999) and states that the chrysotile ores of Quebec are contaminated with trace amounts of tremolite and other fibrous amphiboles (McDonald et al. 1997). Dr. Finkelstein cites to findings that anthophyllite fibers have caused mesothelioma in Finnish miners. He also cites to other findings that tremolite is an established cause of mesothelioma in humans (Luce et al., 1994; Luce et al., 2000). Dr. Finkelstein concludes that exposure to asbestos fibers in the Clubman talc used by the decedent was a substantial contributing cause of his malignant mesothelioma (Opp. Exh. 29)

Dr. Moline relies on published studies and reports of testing done on talcum powder that found asbestos fibers. She cites to a 2007 report that found small amounts of talcum powder (0.1 gram) released thousands of asbestos fibers. She also cites to a paper by Gordon, et.al., that evaluated the mineralogical constituents of commercial talcum powder and its ability to release asbestos fibers into the breathing zone of the direct user and bystanders, which measured 18 million anthophyllite asbestos fibers per gram in the talcum powder. She states that air measurements were done by both Phase Contrast Microscopy (PCM) and TEM, and these revealed significant levels of anthophyllite and tremolite with some chrysotile asbestos fibers were noted in the breathing zone of the individual applying the powder as well as a bystander. Dr. Moline specifically refers to the results from an experiment showing that personal measurements from the shaker container test showed a measurement by PCM of 4.8 f/cc, with an actual asbestos fiber measurement of 1.8 f/cc. She states that bystander measurements showed an exposure of 1.35 f/cc by PCM and 0.5 f/cc of actual asbestos fibers. Dr. Moline states that the decedent used Clubman talcum powder in an analogous fashion to that described by Gordon, et.al., in his daily work as a barber. She concludes that the decedent suffered from malignant mesothelioma as a result of his exposures to asbestos-contaminated talcum powder (Opp. Exh. 23).

Plaintiffs' experts, Drs. Finkelstein and Moline, did not precisely quantify the decedent's exposure to asbestos contaminated talc. Their conclusions based upon the decedent's testimony concerning his exposure- including the timing, frequency and duration of his use of American's Clubman talcum powder – and the testing of historical samples quantifying the amount of asbestos fibers released in a simulated setting (resulting in an extrapolation of exposure levels) is sufficient to create an issue of fact on specific causation (Nemeth v. Brenntag North America, 2020 NY Slip Op. 1705445 [1<sup>st</sup> Dept. 2020]).

Plaintiffs are not required to show the precise causes of damages as a result of the decedent's exposure to asbestos in American's Clubman talcum powder product, they are only required to 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" (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]). Plaintiffs as the non-moving party, are entitled to the benefit of all favorable inferences. The opposition papers have provided proof that creates an inference as to specific causation from the decedent's exposure to asbestos in the talc used in American's Clubman talcum powder.

**Plaintiffs have sufficiently raised credibility issues and issues of fact as to general and specific causation, warranting denial of summary judgment.**

**American alternatively seeks partial summary judgment on the plaintiffs' claims for punitive damages.**

**Plaintiffs raised issues of fact as to the cause of action for punitive damages. 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]).**

**Plaintiffs have shown that during the relevant period of August 13, 1987 through at least 2015 American failed to test or otherwise confirm the purity of the talc used in its Clubman talcum powder products, and instead relied solely on alleged testing done by WCD. American's corporate representative, Mr. Loveless states that the company was uninterested in using alternatives to talc and insisted on its purity, even when there was evidence to the contrary, and only changed its policies after litigation (Mot. Exh. G). The issue of punitive damages is best left to be determined by the trial judge after submission of all the evidence.**

**ACCORDINGLY, it is ORDERED that defendant American International Industries' motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages, is denied.**

**ENTER:**

**Dated: May 19, 2020**



**MANUEL J. MENDEZ  
J.S.C.**

**MANUEL J. MENDEZ  
J.S.C.**

**Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION**

**Check if appropriate:  DO NOT POST  REFERENCE**