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## [Matter of New York City Asbestos Litig.](#)

Supreme Court of New York, New York County

April 13, 2015, Decided

190315/12

### Reporter

48 Misc. 3d 460 \*; 11 N.Y.S.3d 416 \*\*; 2015 N.Y. Misc. LEXIS 1272 \*\*\*; 2015 NY Slip Op 25125 \*\*\*\*

[\*\*\*\*1] In the Matter of New York City Asbestos Litigation. Arthur H. Juni et al., Plaintiffs, v A.O. Smith Water Products et al., Defendants.

**Subsequent History:** As Corrected June 8, 2015.

Affirmed by, Appeal dismissed by [Matter of New York City Asbestos Litig., 148 AD3d 233, 48 NYS3d 365, 2017 N.Y. App. Div. LEXIS 1505 \(N.Y. App. Div. 1st Dep't, Feb. 28, 2017\)](#)

**Prior History:** [Matter of New York City Asbestos Litig., 2015 N.Y. Misc. LEXIS 1168 \(N.Y. Sup. Ct., Apr. 13, 2015\)](#)

[Juni v A.O. Smith Water Prods., 2015 N.Y. Misc. LEXIS 1218 \(N.Y. Sup. Ct., Apr. 13, 2015\)](#)

### Core Terms

exposure, causation, mesothelioma, asbestos, brakes, studies, products, dust, exposed to asbestos, clutches, benzene, disease, gaskets, exposed, friction, scientific, cumulative, gasoline, mechanics, quantify, levels, distributed, increased risk, visible, epidemiological, expert opinion, causes, toxic tort, vehicles, garage

### Case Summary

#### Overview

**HOLDINGS:** [1]-Based on a review of judicial precedents, Parker and Cornell were deemed controlling in deciding whether the opinions of plaintiffs' experts are sufficient to prove causation as a matter of law in all toxic tort matters, including asbestos cases; [2]-A verdict for a mechanic in his asbestos exposure action against a vehicle manufacturer that used asbestos-containing replacement parts was set aside

causation, under a Parker analysis, did not sufficiently establish that his exposure was capable of causing his mesothelioma; [3]-Specific causation was also not shown, as the expert was unable to provide scientific expression of the mechanic's exposure absent data, which was not provided and did not exist in the record.

#### Outcome

Motion to set aside verdict granted; verdict set aside in entirety. Judgment rendered for vehicle manufacturer.

### LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

#### [HN1](#) **Trials, Judgment as Matter of Law**

Pursuant to [CPLR 4404\(a\)](#), the court may set aside a verdict or judgment entered after trial and direct that judgment be entered in favor of a party entitled to judgment as a matter of law on the ground that the verdict was not supported by legally sufficient evidence. In order to find that a verdict should be set aside as a matter of law, the court must determine that there is no valid line of reasoning and permissible inferences which could possibly lead rational jurors to the conclusion reached by the jury on the basis of the evidence presented at trial. Thus, it must appear upon a fair interpretation of the evidence that no valid line of reasoning or set of permissible inferences exist that would permit the jurors to arrive at the verdict reached.

48 Misc. 3d 460, \*460; 11 N.Y.S.3d 416, \*\*416; 2015 N.Y. Misc. LEXIS 1272, \*\*\*1272; 2015 NY Slip Op 25125, \*\*\*\*1

Frye Standard

Torts > ... > Elements > Causation > General  
Overview

Torts > ... > Elements > Causation > General  
Overview

#### [HN4](#) Evidence, Expert Testimony

#### [HN2](#) Expert Witnesses, Kelly Frye Standard

In addressing the admissibility of expert opinions for a toxic tort case, the pertinent inquiry is whether there is a proper foundation - to determine whether the accepted methods were appropriately employed in a particular case. The Court contrasted a Frye hearing, by which the trial court determines if the scientific procedure and results are generally accepted as reliable in the scientific community. The relevant inquiry in a toxic tort case is whether the methods employed by the plaintiff's experts led to a reliable result, specifically, whether they provided a reliable causation opinion without using a dose-response relationship and without quantifying the plaintiff's exposure.

The first question an epidemiologist addresses is whether an association exists between exposure to the agent and disease. Although a causal relationship is one possible explanation for an observed association between an exposure and a disease, an association does not necessarily mean that there is a cause-effect relationship.

Torts > ... > Proof > Evidence > Burdens of Proof

#### [HN5](#) Evidence, Burdens of Proof

Torts > ... > Proof > Evidence > Expert Testimony

Torts > ... > Elements > Causation > General  
Overview

While it was acknowledged in Parker that a precise quantification or dose-response relationship or an exact number is not required to show specific causation, such as for a toxic tort, Parker by no means dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect, and it is not enough for a plaintiff to show that a certain agent sometimes causes the kind of harm that he or she is complaining of. Rather, and at a minimum, there must be 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.

#### [HN3](#) Evidence, Expert Testimony

Although one problem with establishing causation in toxic tort cases is that, often, a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value, the well-established requirement is that an expert opinion on causation sets forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation). 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. Those methods could include estimating the plaintiff's exposure through mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposures with those reported in studies, provided that the expert specifically compares the plaintiff's exposure level with those of the other study's subjects.

Torts > ... > Proof > Evidence > Expert Testimony

Torts > ... > Elements > Causation > General  
Overview

#### [HN6](#) Evidence, Expert Testimony

Courts ruling on the sufficiency of expert evidence in a variety of toxic tort cases have relied on Parker.

Governments > Courts > Authority to Adjudicate

#### [HN7](#) Courts, Authority to Adjudicate

The Court of Appeals is "the State's policy-making tribunal."

Torts > ... > Proof > Evidence > Expert Testimony

48 Misc. 3d 460, \*460; 11 N.Y.S.3d 416, \*\*416; 2015 N.Y. Misc. LEXIS 1272, \*\*\*1272; 2015 NY Slip Op 25125, \*\*\*\*1

Torts > ... > Proof > Evidence > Burdens of Proof

[HN10](#) [↓] Evidence, Burdens of Proof

Torts > ... > Proof > Evidence > Expert Testimony

Proof of a risk, even an increased risk, does not constitute proof of causation. Association is not causation. Moreover, case reports or case studies are not generally accepted methods of establishing causation.

Torts > ... > Elements > Causation > General Overview

[HN8](#) [↓] Evidence, Burdens of Proof

Parker and Cornell are the controlling precedents in deciding whether the opinions of plaintiffs' experts are sufficient to prove causation as a matter of law in all toxic tort matters including asbestos cases. It is for the Court of Appeals alone to determine whether the link between mesothelioma and asbestos warrants relieving plaintiffs of the burden of establishing a foundation for the admission of an expert's opinion concerning general causation.

Torts > ... > Proof > Evidence > Burdens of Proof

Torts > ... > Proof > Evidence > Expert Testimony

Torts > ... > Elements > Causation > General Overview

[HN11](#) [↓] Evidence, Burdens of Proof

Peer-reviewed literature that only summarizes the studies is also insufficient to establish causation for a toxic tort. And the reports and findings of governmental agencies are irrelevant as they constitute insufficient proof of causation.

Torts > ... > Proof > Evidence > Expert Testimony

Torts > ... > Elements > Causation > General Overview

Torts > Products Liability > General Overview

Torts > ... > Proof > Evidence > Burdens of Proof

Torts > ... > Elements > Causation > General Overview

Torts > ... > Proof > Evidence > Expert Testimony

[HN9](#) [↓] Evidence, Expert Testimony

That mesothelioma is caused only by exposure to asbestos does not dispose of the issue of whether a defendant's product caused the mesothelioma, as it is not the association between mesothelioma and asbestos that is in issue when determining causation, but whether a defendant may be held liable for having caused a plaintiff's mesothelioma, which depends on the sufficiency of the exposure, if any, to asbestos in the defendant's product and whether that exposure is capable of causing mesothelioma. And, where an expert concedes that asbestos contained within friction products becomes degraded in the manufacturing process, and the plaintiff is alleged to have been exposed to numerous asbestos-containing products over many years, this issue may not be overlooked or ignored.

[HN12](#) [↓] Evidence, Burdens of Proof

Epidemiological studies specific to a profession, or even epidemiological studies in general, are not necessary to prove causation, and an expert need not submit or cite to epidemiological studies related to the specific profession at issue in order to prove causation. However, that epidemiological studies are not required does not mean that they are not probative. The absence of an epidemiological study is not fatal to proving causation.

Torts > ... > Proof > Evidence > Expert Testimony

Torts > ... > Proof > Evidence > Burdens of Proof

Torts > ... > Elements > Causation > General Overview

Torts > ... > Elements > Causation > General Overview

[HN13](#) [↓] Evidence, Expert Testimony

48 Misc. 3d 460, \*460; 11 N.Y.S.3d 416, \*\*416; 2015 N.Y. Misc. LEXIS 1272, \*\*\*1272; 2015 NY Slip Op 25125, \*\*\*\*1

The opinion that every single exposure constitutes a significant contributing factor because the exposures cumulatively cause the disease is irreconcilable with the well-recognized scientific requirement that the amount, duration, and frequency of exposure be considered in assessing the sufficiency of an exposure in increasing the risk of developing a disease. In other words, the risk of developing a disease increases or decreases depending on the nature of the exposure to the toxic tort, which depends on the amount, duration, and frequency of the exposure.

Torts > ... > Elements > Causation > General Overview

Torts > Products Liability > General Overview

#### [HN14](#) Evidence, Burdens of Proof

It is not the association between mesothelioma and asbestos that is in issue when determining legal causation for an asbestos exposure matter, but rather whether a particular defendant may be held liable for having caused a person's mesothelioma, which depends on the person's exposure to the defendant's product. Accepted science is that it is the nature and degree of the exposure that affects the risk of developing a disease.

Torts > ... > Proof > Evidence > Burdens of Proof

Torts > Products Liability > General Overview

Torts > ... > Elements > Causation > General Overview

#### [HN15](#) Evidence, Burdens of Proof

The Court of Appeals's direction in Parker and Cornell regarding the proof necessary to establish causation as a matter of law in a toxic tort case conforms with the case law in other jurisdictions addressing the issue of the sufficiency of evidence of cumulative exposure in asbestos cases. Many of those courts require specific proof of exposure and have rejected the so-called cumulative exposure theory and its variant, the "each and every" exposure theory.

Torts > ... > Elements > Causation > General Overview

Torts > ... > Proof > Evidence > Expert Testimony

#### [HN16](#) Evidence, Burdens of Proof

Although there may be cases where it will be difficult or impossible to quantify a plaintiff's exposure to a toxin, the Parker Court held that some quantification is nonetheless necessary for a plaintiff to prove causation. Therefore, that the plaintiff's burden of establishing that a particular exposure to asbestos was the cause of his mesothelioma is satisfied by an expert's opinion that a cumulative exposure to asbestos, no matter how small and without any quantification, was a substantial contributing factor to the development of a plaintiff's mesothelioma, is contrary to New York law as set forth in Parker and Cornell.

## Headnotes/Syllabus

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### Headnotes

#### **Evidence—Scientific Evidence—Exposure to Toxic Substances—Foundation for Expert Opinion—Causation**

In an action alleging that exposure to asbestos from vehicle parts sold or distributed by defendant caused plaintiff to develop mesothelioma over the course of his employment as a garage mechanic and that defendant's failure to warn plaintiff of the dangers of asbestos exposure was a substantial contributing factor in causing his illness, plaintiff failed to establish a sufficient foundation for admission of his expert witnesses' opinions on the issue of causation. Plaintiff was obliged to prove not only that his mesothelioma was caused by exposure to asbestos, but that he was exposed to sufficient levels of the toxin to cause his illness as a result of his work on the parts sold or distributed by defendant. That mesothelioma is caused only by exposure to asbestos does not dispose of the issue of whether a defendant's product caused the mesothelioma, as it is not the association between the disease and asbestos that is in issue when determining causation, but whether a defendant may be held liable for having caused a plaintiff's mesothelioma, which depends on the sufficiency of the exposure, if any, to asbestos in defendant's product and whether that exposure is capable of causing mesothelioma. The

48 Misc. 3d 460, \*460; 11 N.Y.S.3d 416, \*\*416; 2015 N.Y. Misc. LEXIS 1272, \*\*\*1272; 2015 NY Slip Op 25125, \*\*\*\*1

were insufficient evidence of general causation, as they showed only an association between mesothelioma and work with friction products in a vehicle repair setting. Moreover, absent knowledge of the amount, duration, or frequency of plaintiff's exposures to asbestos-containing dust from defendant's products, the expert could not establish a dose-response relationship or quantify plaintiff's exposures, and thus failed to provide a scientific expression of plaintiff's exposure to asbestos from defendant's products.

**Counsel:** *Aaronson Rappaport Feinstein & Deutsch, LLP* [\*\*\*1], New York City (*Oded Burger* of counsel), for Ford Motor Co., defendant.

*Weitz & Luxenberg, P.C.*, New York City (*Pierre Ratzki* of counsel), for plaintiffs.

**Judges:** BARBARA JAFFE, JSC.

**Opinion by:** BARBARA JAFFE

## Opinion

[\*461] [\*\*417] Barbara Jaffe, J.

Defendant Ford Motor Company moves posttrial for orders: (1) striking the causation opinions of plaintiffs' expert witnesses; [\*418] and (2) dismissing the action and entering judgment as a matter of law in favor of it based on plaintiffs' failure to establish a prima facie case at trial; or, alternatively (3) setting aside the verdict rendered against it at trial and granting a new trial; (4) granting it leave to renew its opposition to plaintiffs' motion to consolidate and upon renewal, denying the motion to consolidate and granting a new trial; (5) setting aside and remitting the [\*\*\*\*2] verdict as excessive and contrary to the weight of the evidence; and (6) reducing the verdict by offsets from settlements before entering judgment. Plaintiffs oppose.

### I. Background and Trial

Plaintiffs sued defendant, and others who have since settled, claiming that exposure to asbestos from products manufactured or used by them or used at their premises caused plaintiff Arthur Juni (Juni) to develop and die from [\*\*\*\*2] mesothelioma. The trial of this action was consolidated with two other actions, *Fersch v Amchem Prods., Inc.* (index No. 190468/12), and

190367/12). Prior to trial, I granted defendant Volkswagen of America's motion for an order precluding expert testimony in the *Fersch* matter to the extent of ordering a hearing pursuant to [Parker v Mobil Oil Corp.](#), [7 NY3d 434](#), [857 NE2d 1114](#), [824 NYS2d 584 \[2006\]](#). Before the hearing commenced, the *Fersch* plaintiffs settled their claims against Volkswagen.

A jury trial commenced, soon after which the *Middleton* plaintiffs discontinued their case in its entirety. Thus, the trial proceeded to verdict only in *Juni* and only as against defendant. After plaintiffs rested, defendant moved for an order striking the causation testimony of plaintiffs' experts and for a directed verdict based on the insufficiency of the evidence. I reserved decision.

At the charge conference, the parties agreed that the jury would be asked whether Juni was exposed to asbestos from [\*462] brakes, clutches, or gaskets sold or distributed by defendant, and would be presented with three alternative theories of liability against defendant: (1) common-law [\*\*\*3] negligence, (2) strict products liability (failure to warn), and (3) products liability (negligence). While plaintiffs conceded that "[defendant] didn't manufacture brakes, clutches or gaskets . . . [defendant] manufactured cars," they argued that defendant could additionally be held liable for Juni's exposure to asbestos-containing replacement parts used in its vehicles. (Tr at 2396.) Absent any evidence that defendant intended or required, within the meaning of *Berkowitz v A.C. & S., Inc.* (288 AD2d 148, 733 NYS2d 410 [1st Dept 2001]), that asbestos-containing replacement components be used in its vehicles, I declined to instruct the jury on whether defendant failed to warn Juni of the danger of components used in its vehicles. (Tr at 2401; see also [Matter of New York City Asbestos Litig.](#), [121 AD3d 230](#), [251-252](#), [990 NYS2d 174 \[1st Dept 2014\]](#), *lv granted* [2014 N.Y. App. Div. LEXIS 9175](#), [2014 NY Slip Op 92113\[U\]](#) [no duty to warn absent evidence that defendant had active role, interest, or influence in types of products to be used with own product after placing it into stream of commerce].)

The jury rendered its verdict finding that: (1) Juni was exposed to asbestos from brakes, clutches, or gaskets sold or distributed by defendant; (2) defendant failed to exercise reasonable care by not providing an adequate warning about the hazards of exposure to asbestos with respect [\*\*\*4] to the use of the brakes, clutches, or [\*\*419] gaskets; and (3) defendant's failure to warn Juni adequately was a substantial contributing factor in causing his injury. It then considered whether liability

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