

At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 2<sup>nd</sup> day of August 2017

P R E S E N T:

HON. JULIANNE T. CAPETOLA  
Justice of the Supreme Court

⓪

-----X  
GIULIO R. NOVELLO and ROSARIA NOVELLO,  
Plaintiff,

**DECISION AND ORDER ON MOTION**

Index No: 607229/2015

Motion Sequence: 005, 006, 007,  
008

- against -

AMERICAN HONDA MOTOR CO., INC. (AHM), et.al.,  
Defendants.

-----X

The following papers were read on these Motions:

- Defendant Nissan North America, Inc.'s Notice of Motion and Supporting Documents (Motion Sequence 005)
- Defendant Toyota Motor Sales, U.S.A., Inc.'s Notice of Motion and Supporting Documents (Motion Sequence 006)
- Defendant American Honda Motor Co., Inc.'s Notice of Motion and Supporting Documents (Motion Sequence 007)
- Defendant Ford Motor Company's Notice of Motion and Supporting Documents (Motion Sequence 008)
- Plaintiffs' Dual Affirmation in Opposition to Defendant Toyota Motor Sales, U.S.A., Inc. and Defendant Nissan North America Inc.'s Motions (Motion Sequence 005, 006)
- Plaintiffs' Dual Affirmation in Opposition to Defendant Ford Motor Company and Defendant Honda Motor Co., Inc.'s Motions (Motion Sequence 007, 008)
- Defendant Nissan North America, Inc.'s Reply Affirmation
- Defendant Toyota Motor Sales, Inc.'s Reply Affirmation
- Defendant American Honda Motor Co., Inc.'s Reply Affirmation

Defendants Nissan North America, Inc. (hereinafter "Nissan"), Toyota Motor Sales, U.S.A., Inc. (hereinafter "Toyota"), American Honda Motor Co. Inc. (hereinafter "Honda"), and Ford Motor Company (hereinafter "Ford") have all moved individually to renew and reargue this Court's Decision and Order on Motion dated February 28, 2017 pursuant to CPLR §2221. Plaintiffs opposed the motions. Defendants Nissan, Toyota and Honda submitted reply affirmations. Oral argument was held on June 1, 2017 and the motions were deemed submitted upon the Court's receipt of the transcript of the oral argument on July 21, 2017.

The underlying action seeks damages for personal injuries allegedly sustained by Plaintiff Giulio Novello and, derivatively, his wife Plaintiff Rosaria Novello, as a result of his exposure to asbestos resulting his diagnosis of lung cancer. Mr. Novello was born in Italy in 1932, where he lived until approximately 1950 when his family moved to Argentina. He married in 1961 and moved with his family to the United States in 1965. From 1952 to 1965 he worked at several auto body shops in Argentina, and then, upon coming to the United States, he worked at Burnside Avenue Garage from 1965 until his retirement in 2009. Throughout his career as an automotive technician he worked on brakes. In September 2015 he was diagnosed with lung cancer.

All four Defendants sought summary dismissal of the complaint as against them pursuant to CPLR §3212 in their original motions. Defendants Ford, Nissan, and Toyota sought the preclusion of the causation opinions offered by Plaintiffs' expert witnesses and, upon the preclusion of those opinions, each seeks summary judgment on that basis. The four Defendants argue herein that they are entitled to renewal and reargument pursuant to CPLR §2221(e) in light of the Appellate Division First Department decision on *Matter of New York City Asbestos Litig.*, decided on the same date this Court issued its Decision and Order on Motion, February 28, 2017, inasmuch as there has been a change to the applicable law as a result of that decision. 148 A.D.3d 233 (1<sup>st</sup>. Dept. 2017).

CPLR §2221(e) states, in relevant part, that a motion for leave to renew:

- “1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination”.

In the instant matter, the four Defendants rely on the *Matter of New York City Asbestos Litig.* (hereinafter referred to by the name of the Plaintiff-decedent therein, “*Juni*”) in support of their proposition that Plaintiffs herein have failed to sufficiently demonstrate causation and, accordingly, Defendants are entitled to summary dismissal of the complaint.

The Court in *Juni* upheld the lower court's granting of a motion to set aside a jury verdict which had been in favor of the plaintiff therein and states, in relevant part,

“The trial court also correctly declined to adopt plaintiffs' theory of cumulative exposure to support the verdict. Neither of plaintiff's experts stated a basis for their assertion that even a single exposure to asbestos can

be treated as contributing to causing an asbestos-related disease.

Moreover, reliance on the theory of cumulative exposure, at least in the manner proposed by plaintiffs, is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease (see *Parker*, 7 N.Y.3d at 449, 824 N.Y.S.2d 584, 857 N.E.2d 1114).

The dissent references a ‘consensus from the medical and scientific communities that even low doses of asbestos exposure, above that in the ambient environment, are sufficient to cause mesothelioma.’ We do not agree that the existence of any such consensus entitles a particular plaintiff to be awarded judgment against a particular defendant by merely establishing some exposure to a product containing any amount of asbestos. Rather, the standards set by *Parker* and *Cornell*, require that a plaintiff claiming that a defendant is liable for causing his or her mesothelioma must still establish some scientific basis for a finding of causation attributable to the particular defendant's product. Here, the experts' broad conclusions on causation lacked a sufficient foundation, and were therefore legally insufficient to establish that Juni's exposure to asbestos from brakes, clutches, or gaskets sold or distributed by defendant constituted a significant contributing factor in causing Juni's mesothelioma. There is therefore no valid line of reasoning or permissible inference which could have led the jury to reach its result”. *Id.*

The Court in *Juni* also notes that,

“Our dissenting colleague suggests that the proof in asbestos cases need not be analyzed using the same criteria as those we use to analyze exposure in other toxic tort cases, namely, the quantification or other ‘scientific expression of exposure’ required by *Parker*. The dissent also suggests that applying the same criteria would set an insurmountable standard for asbestos claims. However, there is no valid distinction to be made between the difficulty of establishing exposure to, say, benzene in gasoline and exposure to asbestos. In each type of matter, a foundation must be made to support an expert's conclusion regarding causation”. *Id.*

In the instant matter, Defendants each argued that, based upon the deposition testimony of Plaintiff Giulio Novello and the expert opinions of Dr. James Strauchen and Dr. Mark Ellis Ginsburg, the only expert witnesses put forth by Plaintiffs, that Plaintiffs are unable to set forth a prima facie case and, therefore, the action must be dismissed. This Court held in its Decision and Order on Motion dated February 28, 2017, that “ the paramount consideration is the fact that Plaintiffs’ expert opinions have the *potential* to establish causation and the matter of whether Plaintiffs are successful in that regard is a factual determination to be made solely by the triers of fact”. Prior to *Juni*, the potential to establish causation could exist despite inability to quantify exposure. Based upon the holdings of the Court in *Juni*, Plaintiffs in the instant matter have not put forth expert

opinions that have the potential to establish causation as required inasmuch as *Juni* now stands for the proposition that “reliance on the theory of cumulative exposure . . . is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease”. Absent some quantification or means of assessing the exposure to each individual Defendant’s product, the foundation for Plaintiffs’ experts’ opinions regarding causation is lacking and therefore legally insufficient. Accordingly, Plaintiffs are unable to demonstrate the potential to establish causation as required.

In light of the holdings of the Appellate Division First Department in *Juni*, though the Court is sympathetic to the plight of the Plaintiffs, the Court is constrained to permit renewal of the underlying motions and, upon renewal, to reverse its decision and dismiss the complaint inasmuch as, pursuant to the *Juni* decision, Plaintiffs are unable to sufficiently establish causation.

In accordance with the forgoing, it is hereby:

ORDERED, that the motion by Defendant Nissan North America, Inc. (Motion Sequence 005) is hereby granted in its entirety and the complaint filed under Index #607229/2015 is dismissed as against them; and it is further

ORDERED, that the motion by Defendant Toyota Motor Sales, U.S.A., Inc. (Motion Sequence 006) is hereby granted in its entirety and the complaint filed under Index #607229/2015 is dismissed as against them; and it is further

ORDERED, that the motion by Defendant American Honda Motor Co., Inc. (Motion Sequence 007) is hereby granted in its entirety and the complaint filed under Index #607229/2015 is dismissed as against them; and it is further

ORDERED, that the motion by Defendant Ford Motor Company (Motion Sequence 008) is hereby granted in its entirety and the complaint filed under Index #607229/2015 is dismissed as against them; and it is further

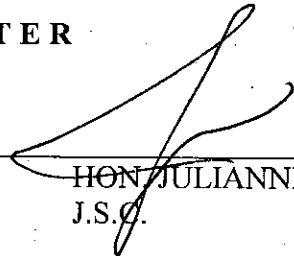
ORDERED, that any relief not specifically granted herein is otherwise denied.

Defendant Nissan North America, Inc. shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

*Dated: 8/2/17*



HON. JULIANNE T. CAPETOLA  
J.S.C.

**ENTERED**

AUG 10 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE