To Be Argued By:
Tennille J. Checkovich
Time Requested: 30 Minutes

APL-2017-00114

New York County Clerk's Index No. 190315/12

Court of Appeals

STATE OF NEW YORK

MARY JUNI, as Administratrix for the Estate of ARTHUR H. JUNI, JR. and MARY JUNI, Individually,

Plaintiffs-Appellants,

against

A.O. SMITH WATER PRODUCTS CO., AERCO INTERNATIONAL, INC., AGCO CORPORATION f/k/a and as Successor in interest to MASSEY-FERGUSON, INC., AIR & LIQUID SYSTEMS CORPORATION, as successor-by-merger to BUFFALO PUMPS, INC., AMCHEM PRODUCTS, INC., n/k/a RHONE POULENC AG COMPANY, n/k/a BAYER CROP SCIENCE INC., ARVINMERITOR, INC., Individually and as successor-in-interest to ROCKWELL AUTOMOTIVE, BMCE, INC. f/k/a UNITED CENTRIFUGAL PUMP, BOISE CASCADE CORPORATION, BORG-WARNER CORPORATION, by its successor-in-interest, BORG-WARNER MORSE TEC, INC., BW/IP, INC. and its wholly owned subsidiaries, CARLISLE CORPORATION, CATERPILLAR, INC., CBS CORPORATION, f/k/a VIACOM INC., successor by merger to CBS CORPORATION, f/k/a

(Caption Continued on the Reverse and Following Page)

RESPONDENT'S BRIEF AND REPLY TO *AMICI* CONCERNED PHYSICIANS AND SCIENTISTS

Tennille J. Checkovich
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
804-775-1000

Nancy L. Pennie
AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
600 Third Avenue
New York, New York 10016
212-593-6700

Attorneys for Defendant-Respondent

Date Completed: February 23, 2018

WESTINGHOUSE ELECTRIC CORPORATION, COURTER & COMPANY INCORPORATED, CRANE CO., CUMMINS ENGINE COMPANY, INC., DANA COMPANIES, LLC, DEERE & CO., DENTSPLY INTERNATIONAL, INC., Individually and as Successor to DENTSPLY AUSTENAL and DENTSPLY CERAMCO, EATON CORPORATION, as successor-in-interest to CUTLER HAMMER, INC., EMPIRE-ACE INSULATION MFG. CORP., FEDERAL-MOGUL ASBESTOS PERSONAL INJURY TRUST, as successor to FELT PRODUCTS MFG., CO., FEDERAL-MOGUL ASBESTOS PERSONAL INJURY TRUST, as successor to the former VELLUMOID INC., division of FEDERAL-MOGUL CORPORATION, FLOWSERVE CORPORATION, Individually and Solely as Successor to Durco, Durion; BW/IP, Anchor Darling, Superior Group, Pacific Pumps, Sier-Bath Pumps, Edward Vogt, Vogt Valves, Nordstrom Valves and Edward Valve, Inc.; FLOWSERVE US, INC., Solely as Successor to Rockwell Manufacturing Company, Edward Valve Inc., Nordstrom Valves, Inc., Edward Vogt Valve Company and Vogt Valve Company, FMC CORPORATION, on behalf of its former CHICAGO PUMP & NORTHERN PUMP BUSINESSES,

Defendants,

FORD MOTOR COMPANY,

Defendant-Respondent,

and

FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INC., HARLEY-DAVIDSON, INC., HONEYWELL INTERNATIONAL, INC., f/k/a ALLIED SIGNAL, INC./BENDIX, IMO INDUSTRIES, INC., INGERSOLL-RAND COMPANY, INTERNATIONAL TRUCK AND ENGINE CORPORATION, ITT CORPORATION, ITT INDUSTRIES, INC., Individually and as successor to BELL & GOSSETT COMPANY and as successor to KENNEDY VALVE MANUFACTURING CO., INC. and as successor to GRINNELL VALVE CO., INC., KELSEY HAYES COMPANY d/b/a TRW, KENNEDY VALVE MANUFACTURING CO., INC., KENTILE FLOORS, INC., KERR CORPORATION d/b/a KERR DENTAL CORPORATION, Individually and as successor by merger to KERR MANUFACTURING COMPANY, KORODY-COLYER CORPORATION, LIPE-AUTOMATION CORP., MACK TRUCKS, INC., MAREMOUNT CORP., MCCORD CORPORATION, Individually and as successor in interest to A. E. CLEVITE, INC. and J.P. INDUSTRIES, INC., MOTION CONTROL INDUSTRIES, INC., as predecessor in interest to CARLISLE CORPORATION, O'CONNOR CONSTRUCTORS, INC., f/k/a THOMAS O'CONNOR & CONNOR & CO., INC., OWENS-ILLINOIS, INC., PACCAR, INC., Individually and through its division, PETERBILT MOTORS CO., PARKER-HANNIFIN CORPORATION, PEERLESS INDUSTRIES, INC., PERKINS ENGINES, INC., PFIZER, INC. (PFIZER), PNEUMO ABEX, LLC, successor in interest to ABEX CORPORATION (ABEX), RAPID-AMERICAN CORPORATION, RESEARCH-COTTRELL, INC., ROGERS CORPORATION, SEQUOIA VENTURES, INC., f/k/a BECHTEL

CORPORATION, SPIRAX SARCO, INC. Individually and as successor to SARCO COMPANY, STANDARD MOTOR PRODUCTS, INC., THE FAIRBANKS COMPANY, THE J.M. NEY COMPANY, TRANE U.S. INC., f/k/a AMERICAN STANDARD, INC., TREADWELL CORPORATION, TYCO INTERNATIONAL (US) INC., Individually and as Successor to Hancock Valves and Lonergan Valves and Yarway Corporation and Grinnell Corporation, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UNITED CONVEYOR CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN, a division of The Marley-Wylain Company, a wholly owned subsidiary of The Marley Company, LLC, WESTINGHOUSE AIR BRAKES COMPANY, f/k/a UNION SWITCH & SIGNAL CO., WHIP MIX CORPORATION, YARWAY CORPORATION, YUBA HEAT TRANSFER, LLC.,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The two most critical facets of expert causation testimony in toxic tort cases are: (1) general causation, which is proof that the toxin in question is capable of causing the plaintiff's illness, including proof of the amount of exposure to that toxin required to cause illness; and (2) specific causation, which is proof that the plaintiff's illness was, in fact, caused by the toxin. While the Plaintiffs' *Amici* have proposed a "multi-faceted" approach for assessing causation, they fail to adequately account for these two indispensable facets. The Plaintiffs' *Amici* attempt to gloss over this shortcoming by arguing that this Court should relax these fundamental requirements in asbestos cases. Whatever merit this approach may have in cases involving exposure to amphibole asbestos, it is inappropriate in cases where, as here, a plaintiff alleges exposure to chrysotile asbestos in automotive friction products, because there is simply no reliable scientific evidence establishing that exposure to chrysotile in such products increases a plaintiff's risk of disease.

The fact that the Plaintiffs' *Amici* have failed to provide a relevant and reliable approach for assessing causation is unsurprising in light of the fact that their brief is merely a repackaging of the oft-excluded "each and every exposure" and "cumulative exposure" theories that plaintiffs' experts (including many of the Plaintiffs' *Amici* themselves) attempt to offer in courts throughout the country

without success. This Court should refuse to follow their scientifically unreliable approach here.

ARGUMENT

I. The Approach For Assessing Causation Proposed By Plaintiffs' *Amici* Does Not Satisfy The Requirements Of New York Law.

A. New York law requires expert causation testimony in toxic tort cases to be based on a scientific expression of a plaintiff's exposure and to establish that such exposure is sufficient to cause disease.

New York law has long recognized that, in order to justify an imposition of tort liability on a particular defendant, that defendant's tortious conduct must have been a substantial factor in bringing about the plaintiff's injury. *See* NY PJI § 2:70 (defining substantial factor causation). This requirement is designed to ensure that a defendant whose conduct has only a "trivial" impact on a plaintiff is not liable for that plaintiff's injury. *Id.* (noting that, "to be substantial, [a cause] cannot be slight or trivial"). This is a central tenant of the law of causation in New York and throughout the country—both the Restatement Second and Restatement Third of Torts recognize that a defendant should not be held liable for tortious conduct that has only a *de minimis* impact on a plaintiff. *See* Restatement (Second) of Torts § 433, Comment d (explaining that, in cases involving multiple causes from multiple actors, "[s]ome other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect

of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor"); *see also* Restatement (Third) of Torts: Phys. & Emot. Harm § 36 ("When an actor's negligent conduct constitutes only a trivial contribution to a causal set . . . the harm is not within the scope of the actor's liability.").

In order to prove that exposure to an allegedly harmful substance was a substantial factor in causing a particular plaintiff's injury in a toxic tort case under New York law, a plaintiff must offer admissible expert testimony on both general and specific causation. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 (2006) ("It is well-established that an opinion on causation should set 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)."); *see also Sean R. ex rel. Debra R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 808 (2016) (same); *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 784 (2014) (same).

General causation. Expert testimony on general causation must establish that "the toxin in question can in fact cause the illness, and the amount of exposure required to cause the illness (the dose-response relationship)." *Parker*, 7 N.Y.3d at 445-46 & n.2. Proof that exposure to a particular substance poses a risk—even an increased risk—of disease is insufficient to establish general causation. *Cornell*, 22 N.Y.3d at 783 (explaining that proof of a "risk", "linkage", or "association"

between exposure to a particular substance and contraction of a disease are necessary but insufficient to establish general causation). Rather, in order to establish general causation, an expert must specify the threshold level of exposure above which humans can contract a disease or provide some other relevant and scientifically reliable method for ascertaining the quantum of exposure necessary to cause that disease.[1] *Parker*, 7 N.Y.3d at 445-46 & n.2; *Cornell*, 22 N.Y.3d at 784.

Specific causation. Expert testimony on specific causation must establish that a particular plaintiff was exposed to sufficient levels of a toxin from a particular defendant's product to cause his or her illness. *Parker*, 7 N.Y.3d at 448 (explaining that specific causation is "the likelihood that plaintiff's illness was caused by the toxin," which requires "eliminating other potential causes of the disease"). While specific causation testimony need not "pinpoint exposure with complete precision," it must be based on some "scientific expression" of the plaintiff's exposure. *Id.* at 449; *see also Sean R.*, 26 N.Y.3d at 808-09 ("[W]e have never 'dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect.'") (quoting *Cornell*, 22 N.Y.3d at 784). A scientific expression of exposure can be supplied through, for

[1] Plaintiffs' *Amici* acknowledge that, even under their approach, a particular plaintiff's occupational exposure must have been "significant" in order to be deemed to have caused his or her mesothelioma. (*See* Pls.' Amicus Br. 6, 12-13.)

example, "the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin", or "[c]omparison [of the plaintiff's exposure] to the exposure levels of subjects of other studies". *Parker*, 7 N.Y.3d at 449. Whatever method an expert chooses, that method must "be generally accepted as reliable in the scientific community" in order to be admissible. *Id.*

B. This Court should not relax these well-settled requirements in asbestos cases involving exposure to chrysotile in automotive friction products.

The Plaintiffs' *Amici* ignore these basic requirements, arguing instead that their "multi-faceted approach" would serve as a suitable substitute for assessing causation in asbestos cases involving plaintiffs who contracted mesothelioma. (Pls.' Amicus Br. 2.) According to the Plaintiffs' *Amici*, this is because mesothelioma is a "signature and sentinel asbestos-caused disease" and "[t]he mainstream scientific community is in consensus that all forms of asbestos can and do cause mesothelioma[.]" (Pls.' Amicus Br. 4-6.)

This argument ignores critical differences among the various types of asbestos fibers. As Ford explained in its Response Brief, it is beyond dispute that amphibole asbestos is significantly more potent than chrysotile in terms of increasing an exposed person's risk of contracting mesothelioma. (Ford Resp. Br. 10-13); *see also, e.g., Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 846

(D. Md. 2017) ("[C]hrysotile asbestos is classified in an entirely separate mineralogical family from amphibole asbestos and is widely considered less potent."). Even the Junis' experts agree on this point. (A238-41, 273, 1191-92, 1197.) Additionally, whatever the toxicity of raw chrysotile asbestos, processed chrysotile found in automotive friction products does not have the same toxicity. (Ford Resp. Br. 10-13.)

This is significant, because the potency of the asbestos fiber to which a person is exposed determines the level at which that person's exposure would pose a risk of disease. *See, e.g.*, *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 853 (E.D.N.C. 2015) ("The parties agree that amphibole asbestos is more potent than chrysotile asbestos, and that higher levels of exposure to chrysotile asbestos than amphibole asbestos are necessary to cause mesothelioma."). Thus, while Plaintiffs' *Amici* may be correct that "all forms of asbestos can and do cause mesothelioma" (Pls.' Amicus Br. 6 n.7), that statement glosses over the fact that differences in fiber potency mean that certain categories of workers simply do not face an increased risk of contracting an occupational asbestos-related disease. The relevant scientific studies bear this out. Twenty-one of the twenty-two epidemiological studies of vehicle mechanics performed worldwide found *no increased risk* of mesothelioma among vehicle mechanics. (A1309-11.)

The Plaintiffs' *Amici* attempt to downplay the significance of the existing epidemiology on the ground that the "mainstream scientific community" does not insist on "a specific, statistically significant, epidemiological study of a particular job title, or of a particular asbestos-containing product" in order to conclude that exposure to a particular product caused a patient's disease. (Pls.' Amicus Br. 2-3.) This is a red herring. While an expert may not need epidemiological support to offer a causation opinion in every case, it does not follow that an expert can reach a conclusion contrary to the great weight of the epidemiology without relevant and reliable scientific support of his or her own. *See, e.g.*, *Parker*, 7 N.Y.3d at 450 (finding expert general causation testimony insufficient based on the fact that "[p]laintiff's experts were unable to identify a single epidemiologic study finding an increased risk of AML as a result of exposure to gasoline"); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 882 (10th Cir. 2005) ("We are not holding that epidemiological studies are always necessary in a toxic tort case. We are simply holding that where there is a large body of contrary epidemiological evidence, it is necessary to at least address it with evidence that is based on medically reliable and scientifically valid methodology."). The approach proposed by Plaintiffs' *Amici* fails to account for the relevant epidemiology, opting instead to offer generic criticisms of those studies. (Pls.' Amicus Br. 23.) Given this, this Court should not embrace the relaxed causation standards proposed by Plaintiffs' *Amici* here.

C. The approach proposed by Plaintiffs' *Amici* does not satisfy the central requirements of New York law because it does not establish threshold levels of exposure or that Mr. Juni's exposure exceeded them.

The Plaintiffs' *Amici* argue that scientists in the field use a "multi-faceted diagnostic approach" to determine whether a particular plaintiff has contracted an asbestos-related disease and that courts should follow suit. (Pls.' Amicus Br. 6.) Under this multi-faceted approach, the Plaintiffs' *Amici* argue that experts assessing whether a causal relationship exists should consider the following factors: (1) the plaintiff's qualitative history of occupational exposure,[2] (2) the plaintiff's susceptibility to contracting an asbestos-related disease, (3) biological plausibility (i.e., whether exposure to a particular substance is capable of causing plaintiff's disease), (4) case reports (i.e., anecdotal accounts of individuals who contracted mesothelioma), and (5) statistical epidemiological studies. (Pls.' Amicus Br. 6-28.) The Plaintiffs' *Amici* purport to apply this approach to the facts of this case, arguing that "any objective scientist would deem Mr. Juni's exposures to such asbestos-containing dust [while working in garages] to have increased his risk of contracting mesothelioma." (Pls.' Amicus Br. 2.) As explained in more detail in the following paragraphs, however, the many "facets" of this cumulative

[2] By her own admission, the Junis' specific causation expert did not take Mr. Juni's occupational exposures into account in offering her opinion. (A1157.) Thus, even if this Court adopts the approach proposed by Plaintiffs' *Amici*, that would not be enough to salvage the expert testimony offered below or the Junis' claims.

exposure approach are little more than an attempt to paper over the fact that it is unable to distinguish in any meaningful way between exposures that are substantial contributing factors and those that are not. In other words, absent a reliable scientific method for determining which exposures are causative, the "cumulative exposure" approach devolves into "each and every exposure" testimony, which was recognized and excluded in the courts below and in courts throughout the country. This Court should not adopt the approach for assessing causation proposed by Plaintiffs' *Amici*.

1. The "multi-faceted approach" proposed by Plaintiffs' *Amici* fails to provide a relevant and reliable way to separate causative exposures from non-causative ones.

Like the Junis' experts here, the Plaintiffs' *Amici* acknowledge that mesothelioma is a dose-responsive disease and argue that their approach to ascertaining causation would not treat each and every exposure to chrysotile as causative. (Pls.' Amicus Br. 3 ("Nor do scientific assessments about the causative effect of 25 years of repeated occupational exposures equate to an opinion that each such exposure or 'every fiber' constitutes a 'substantial contributing factor' in causing mesothelioma.").) The attempt by Plaintiffs' *Amici* to distinguish their theory from the each and every exposure theory does not withstand scrutiny, however. While the Plaintiffs' *Amici* list a number of factors that they deem "essential" to assessing causation, none of those factors supplies a mechanism to

separate causative exposures from non-causative ones in the case of any individual plaintiff. (Pls.' Amicus Br. 6-28.)

Lacking such a mechanism, the Plaintiffs' *Amici* default to the generic "cumulative exposure" opinion offered by the Junis' experts in this case and excluded by courts throughout the country in similar cases. (*See, e.g.*, Pls.' Amicus Br. 4 ("In the case of a 'signature' and sentential asbestos-caused disease such as mesothelioma, the mainstream scientific community views causation as a function of cumulative exposure.").) This theory is not sufficient to supply a foundation for an expert's causation testimony under New York law for at least the following reasons.

First, even if it is true that mesothelioma is the product of an individual's cumulative exposures to asbestos, that does not and cannot establish that exposure to a *particular product* caused a particular plaintiff's mesothelioma. Instead, as the Plaintiffs' *Amici* appear to acknowledge, this theory can establish, at most, that exposure to a particular product increased a particular plaintiff's *risk* of contracting mesothelioma. (*See, e.g.*, Pls.' Amicus Br. 1 ("We deem it irrefutable that repeated exposures to asbestos-containing dust from automotive brakes, clutches, and gaskets, over a period of years, would contribute to a person's total dose and to *that person's risk or probability* of developing mesothelioma and other cancers.") (emphasis added).) As noted above, however, it is blackletter law in New York

that a defendant cannot be held liable based solely upon proof that exposure to its products increased a plaintiff's *risk* of contracting mesothelioma. *See, e.g.*, *Cornell*, 22 N.Y.3d at 783. Absent some way to translate this allegedly *increased risk* into a scientifically reliable conclusion regarding *causation*, the multi-faceted approach proposed by Plaintiffs' *Amici* fails to conform to the requirements of New York law.

Second, the cumulative exposure theory is incompatible with New York law because it fails to provide a relevant and reliable way to separate exposures that are capable of causing mesothelioma from those that are not. Even minimal exposures contribute to an individual's "cumulative dose," and the Plaintiffs' *Amici* have failed to provide a scientifically reliable way to determine which of a plaintiff's "cumulative" exposures should be ruled in and which should be ruled out. While this shortcoming may be of minimal significance in a clinical setting, where attributions of defendant-specific causation are largely immaterial to a particular plaintiff's course of treatment, the inability to make defendant-specific attributions of causation renders a theory meaningless in the toxic tort context, where proof of a causal connection between a particular defendant's conduct and a particular plaintiff's injuries is essential. *See, e.g.*, *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *4 (D. Utah Jan. 18, 2013) (excluding cumulative exposure testimony on the ground that it "does virtually nothing to help the trier of

fact decide the all-important question of specific causation" because the expert's "opinions are based solely on his belief that he should not rule out any exposure as a contributing cause").

Allowing the approach proposed by Plaintiffs' *Amici* to suffice on the issue of causation would result in an imposition of absolute liability as to every company whose asbestos-containing product happened to cross paths with a future toxic tort plaintiff. *See Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 342 (Tex. 2014) (noting that, if courts "were to adopt a less demanding standard for mesothelioma cases and accept that any exposure to asbestos is sufficient to establish liability, the result essentially would be not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime"). Because New York law does not sanction such a broad imposition of liability, this Court should not adopt the approach proposed by Plaintiffs' *Amici* here.

2. The specific causation arguments made by Plaintiffs' *Amici* fail because they are not premised on a scientific expression of Mr. Juni's exposures and because they are based on an inaccurate view of the facts.

The Plaintiffs' *Amici* attempt to apply their theory to the facts of this case by arguing that Mr. Juni's exposures to chrysotile in Ford friction products increased his "risk" of contracting mesothelioma. (Pls.' Amicus Br. 2.) Setting aside the fact that, as explained above, an opinion regarding an increased *risk* is not

sufficient to establish *causation* under New York law, this opinion is not helpful to the Court because it is not based on a scientific expression of Mr. Juni's alleged exposure.

The Plaintiffs' *Amici* describe their understanding of Mr. Juni's exposure as follows:

> We assume for purposes of these comments that Mr. Juni was diagnosed with mesothelioma about 2012, that he was occupationally exposed to asbestos from new and used brakes, clutches, and gaskets over a period of approximately 25 years as a mechanic maintaining a fleet of approximately 500 Ford vehicles, and that those exposures began in approximately 1964, about 48 years prior to his diagnosis. Assuming this to be the case, these exposures would have been many orders of magnitude above the miniscule amount of exposures Mr. Juni may have received from "ambient" or "background" asbestos.

(Pls.' Amicus Br. 2.) This does not provide a sufficient foundation for specific causation under New York law. In *Parker*, for example, the plaintiff's expert testified that Parker had been exposed to "frequent" and "excessive" levels of benzene without attempting to quantify Parker's exposure in any way. *Parker*, 7 N.Y.3d at 447-49. This Court held that such testimony lacked foundation, finding that the gratuitous use of adjectives without any attempt to quantify Parker's exposure "cannot be characterized as a scientific expression of Parker's exposure level". *Id.* at 449.

Here, as in *Parker*, the Plaintiffs' *Amici* have offered an opinion that is not based on a scientific expression of Mr. Juni's exposure. While they refer to the

number of Ford vehicles in the fleet that Mr. Juni serviced, that does not qualify as a scientific expression of Mr. Juni's exposure for at least three reasons. First, it fails to account for the nature of Mr. Juni's work on this fleet of vehicles. This is significant because, as explained below, much of Mr. Juni's work did not involve contact with asbestos-containing parts. Second, it does not establish whether any asbestos-containing products to which Mr. Juni was allegedly exposed were manufactured by Ford. Thus, even if the Plaintiffs' *Amici* could establish that Mr. Juni was exposed to asbestos-containing automotive frictions products, they would not have a basis to attribute those exposures to Ford. Third, it does not discuss how often Mr. Juni performed brake work, making it impossible to determine the frequency of his exposure, if any, to Ford asbestos-containing products. Plaintiffs' *Amici* also fail to compare Mr. Juni's work practices and resulting exposures to those in any study discussing asbestos exposure in brake work generally. Given this, the multi-faceted approach proposed by Plaintiffs' *Amici* leads to an "opinion" here that does not satisfy New York's requirements governing the admissibility of expert causation testimony, and this Court should disregard it.

Additionally, this specific causation argument is based on an inaccurate view of the facts. As Ford explained in its Response Brief, Mr. Juni spent the vast majority of his career "assisting" other mechanics and performing tasks that did not involve asbestos exposure, like "welding" and "supervising." (Ford Resp. Br.

4-10.) The Plaintiffs' *Amici* fail to take into account this aspect of Mr. Juni's work history. This has two significant implications: (1) it means that any conclusion that the Plaintiffs' *Amici* reach regarding Mr. Juni's risk of contracting mesothelioma is unreliable, and (2) it reveals that the recitation of facts purportedly establishing the significance of Mr. Juni's alleged exposures is merely a smokescreen for the fact that the arguments of Plaintiffs' *Amici* are based on the assumption that each and every exposure to asbestos is causative of mesothelioma. Therefore, this Court should disregard the views of Plaintiffs' *Amici* regarding the purported cause of Mr. Juni's mesothelioma.[3]

II. The Plaintiffs' *Amici* Routinely Offer The Theory They Offer In Their Brief As Putative Expert Testimony, And This Court And Courts Throughout The Country Routinely Exclude It.

The fact that the Plaintiffs' *Amici* failed to provide a relevant and reliable method for assessing causation is unsurprising. While the Plaintiffs' *Amici* repeatedly reference the "non-litigation scientific community" (*see* Pls.' Amicus Br. 3, 4, 10, 14), they are not members of that group. In fact, many of Plaintiffs' *Amici* are highly compensated plaintiffs' experts in asbestos and other litigation.[4]

[3] Indeed, elsewhere in their brief, Plaintiffs' *Amici* acknowledge that a number of people who work in garages do not face an increased risk of contracting mesothelioma *precisely* because, like Mr. Juni, they do not consistently perform brake work. (Pls' Amicus Br. 25.) The fact that Plaintiffs' *Amici* conveniently overlook this self-evident fact in their specific causation arguments further demonstrates that their theory is little more than result-driven pseudoscience aimed at expanding the scope of potentially liable defendants in asbestos cases.

[4] At least the following Plaintiffs' *Amici* are known to counsel for Ford to testify regularly on behalf of plaintiffs in asbestos litigation: Arthur L. Frank, Barry Castleman, David Egilman,

Several of these experts have attempted to offer some version of their "multi-faceted approach" as expert testimony. Courts throughout the country, including this one, exclude such testimony routinely. For example, the lead author of the brief—Dr. Phillip J. Landrigan—was the putative expert whose analogous causation testimony was excluded in *Parker*. *Parker*, 7 N.Y. 3d at 449-50 (offering causation opinion based on the "hypothesis" that "there is no threshold [of exposure to benzene] below which leukemia would not occur").

Other courts have excluded similar testimony from many of the Plaintiffs' *Amici* in similar asbestos cases, as the following examples illustrate:

- Arthur L. Frank:
    - *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 677–78 (7th Cir. 2017) (affirming exclusion of Dr. Frank's testimony and noting that "the principle behind the 'each and every exposure' theory and the cumulative exposure theory is the same—that it is impossible to determine which particular exposure to carcinogens, if any, caused an illness");
    - *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 849 (D. Md. 2017) (excluding Dr. Frank and noting that, although he did not "explicitly use the phrase 'each and every exposure,' the theories are one and the same"); and
    - *Suoja v. Owens–Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (holding that, whether called "cumulative exposure" or "each and every exposure," Dr. Frank's "ultimate opinion was not tied to any specific quantum of exposure that was attributable to defendant,

David Ozonoff, David Rosner, John M. Dement, John C. Maddox, Leslie T. Stayner, L. Christine Oliver, Laura Welch, Colin Soskolne, and Richard Kradin. (*See* Pls.' Amicus Br. 30-35.)

but instead was based on his holistic view that every exposure to asbestos, no matter how minimal, is a substantial contributing factor to any resulting mesothelioma").

- John C. Maddox:

  - *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56 (Pa. 2012) ("In this regard, Dr. Maddox's any-exposure opinion is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive."); and

  - *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 544 (Ga. App. 2011) ("Giving proper deference to the trial court's ruling, we cannot conclude that the court abused its discretion in excluding Dr. Maddox's specific causation testimony."); *see also id.* at 543 (affirming trial court's finding that "Dr. Maddox was a "'quintessential expert for hire'").

- Barry Castleman:

  - *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773–74 (Tex. 2007) (excluding Castleman's causation testimony regarding dust in automotive friction case because "in keeping with the *de minimis* rule espoused in *Lohrmann* and required by our precedent, we conclude the evidence of causation in this case was legally insufficient").

- Richard Kradin:

  - *Bell v. Foster Wheeler Energy Corp.*, No. CV 15-6394, 2016 WL 5847124, at *4 (E.D. La. Oct. 6, 2016) ("Dr. Kraus's, Dr. Kradin's, and Mr. Parker's opinions on specific causation are unreliable and must be excluded under Rule 702.").

While these putative experts have crafted a number of different labels for their theory, the unscientific kernel of their philosophy—that is, that an expert witness can offer relevant and reliable causation opinions without regard for

dose—remains the same. Consistent with long-standing New York law and this Court's rulings in *Parker*, *Cornell*, and *Sean R.*, this Court should reject the "multi-faceted approach" proposed by the Plaintiffs' *Amici* as insufficient under New York law. *Parker*, 7 N.Y.3d at 445-46; *Cornell*, 22 N.Y.3d at 784; *Sean R.*, 26 N.Y.3d at 808-09.

CONCLUSION

For the foregoing reasons, Ford respectfully requests that this Court affirm the decision of the Appellate Division affirming the trial court's entry of judgment in favor of Ford.

Dated: February 23, 2018

BY:

Tennille J. Checkovich
McGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(804) 775-1000
tcheckovich@mcguirewoods.com

Nancy L. Pennie
AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
600 Third Avenue
New York, New York 10016
(212) 593-6700
nlpennie@arfdlaw.com

Attorneys for Defendant-Respondent