

STATE OF NEW YORK FIFTH JUDICIAL DISTRICT
SUPREME COURT COUNTY OF ONEIDA

* * * * *

MARSHA MADAR and LAWRENCE MADAR, JR.,

Plaintiffs,

- against -

84 LUMBER COMPANY, ET AL.,

Defendants.

* * * * *

Index No.: 103806-2018

RJI No.: 21-18-013

Bench Decision re Colgate-Palmolive

Oneida County Courthouse
Rome, New York 13440
July 22, 2019

HELD BEFORE:

THE HONORABLE SCOTT J. DEL CONTE
SUPREME COURT JUSTICE

APPEARANCES:

JASON HODRINSKY, ESQ.
Attorney for Plaintiffs

ERIK C. DI MARCO, ESQ.
Attorney for Defendant Colgate-Palmolive

ANN MARIE DUFFY, ESQ.
Attorney for Defendant Avon Products, Inc.

Reported By:

Therese B. Plante, CSR, RPR
Senior Court Reporter

1 THE COURT: We are back on the record in the
2 Marsha Madar and Lawrence Madar, Jr. vs. 84 Lumber
3 Company, Colgate-Palmolive and Avon Products, Inc.

4 We just heard oral argument on behalf of
5 Colgate-Palmolive with respect to its motion for summary
6 judgement as well as oral argument in connection with
7 Avon's motion for summary judgement.

8 I want to say first, Counselors, thank you very
9 much for your appearances and argument here today and
10 your very thorough briefs. And I'm prepared to issue my
11 decisions with respect to both motions.

12 First, with respect to Colgate-Palmolive's
13 motion for summary judgement, the Plaintiff in this
14 lawsuit, Marsha Madar, was diagnosed with peritoneal
15 mesothelioma in 2017. She then brought this action
16 claiming exposure to fibrous asbestos from several
17 products over her lifetime, including a talcum powder
18 marketed as Cashmere Bouquet which was manufactured and
19 distributed by Defendant Colgate-Palmolive for a hundred
20 years.

21 During the times relevant for this lawsuit,
22 Cashmere-Bouquet was produced from talc mined in Italy,
23 Montana and North Carolina. By her own testimony,
24 Ms. Madar's use of Colgate-Palmolive's Cashmere Bouquet
25 powder was limited to, at the very most, two containers

1 that she shared with her mother and sister in the early
2 1970s. There is no dispute as to this critical fact.

3 Ms. Madar's action against Colgate-Palmolive
4 rests entirely on her alleged exposure to fibrous
5 asbestos in the early 1970s as a result of her shared use
6 of just two bottles of Cashmere Bouquet talcum powder.

7 Ms. Madar did, however, use hundreds upon
8 hundreds of other containers of talcum powder over the
9 course of her lifetime as well as other potentially
10 asbestos-containing products manufactured by other
11 defendants in this action.

12 Defendant Colgate-Palmolive has moved for
13 summary judgement on three grounds. Specifically:
14 (1) That the talc in its Cashmere Bouquet did not contain
15 asbestos; (2) that there is no general causation here as
16 a matter of law because, even assuming that the talc in
17 its Cashmere Bouquet did contain trace amounts of fibrous
18 asbestos, that asbestos was not capable of causing
19 mesothelioma; and (3) that there is no specific causation
20 here as a matter of law because, even if the talc in its
21 Cashmere Bouquet did contain fibrous asbestos and was
22 capable of causing mesothelioma, Ms. Madar was not
23 exposed to sufficient levels of asbestos from Cashmere
24 Bouquet to have caused her mesothelioma.

25 The Court does not need to reach the first or

1 second grounds of Defendant Colgate-Palmolive's motion
2 for summary judgement for the reasons I will discuss
3 shortly.

4 It should be noted, however, there are numerous
5 cases across New York and other jurisdictions in which
6 summary judgement was denied on those grounds because, in
7 other cases, Courts determined that the plaintiffs
8 submitted sufficient expert and historical evidence to
9 create a question of fact that Cashmere Bouquet contained
10 detectable amounts of asbestos and asbestiform fibers or
11 that factual questions were raised whether exposure to
12 certain talcum powders is capable of causing peritoneal
13 mesothelioma.

14 It is the third ground for summary judgement,
15 the absence of specific causation, that is the core
16 argument and dispositive issue raised by
17 Colgate-Palmolive in this action.

18 As the First Department explained in *Juni*, 148
19 AD3d 203, quote, "The fact that asbestos, or chrysotile,
20 has been linked to mesothelioma is not enough for a
21 determination of liability against a particular
22 defendant. A causation expert must still establish that
23 the plaintiff was exposed to sufficient levels of toxin
24 from the defendant's products to have caused that
25 disease," end quote.

1 Put differently, under the *Juni* standard, the
2 plaintiff in an asbestos action must establish, quote,
3 "some scientific basis for a finding of causation
4 attributable to the particular defendant's product," at
5 trial in order to meet their burden of proof.

6 We are not at trial, and this is a motion for
7 summary judgement. And, accordingly, the burden of proof
8 is not on the Plaintiff at this juncture but on the
9 moving Defendant, Colgate-Palmolive.

10 To meet this initial burden of proof, then, the
11 Defendant, Colgate-Palmolive, must submit proof in
12 admissible form, establishing unequivocally as a matter
13 of law that the Plaintiff's exposure to fibrous asbestos
14 from its product was in amounts insufficient to
15 contribute to the causation of the Plaintiff's
16 mesothelioma.

17 In reviewing this proof, all evidence and
18 reasonable inferences must be viewed in the light most
19 favorable to Ms. Madar, the nonmoving party, and any
20 questions of credibility or fact must be reserved for the
21 jury.

22 Based on the record in this case, the
23 Defendant, Colgate-Palmolive has met its initial burden.
24 Colgate's expert Jennifer Sahmel, an Industrial
25 Hygienist, performed both a mathematical modeling of

1 Ms. Madar's asbestos exposure and a comparison of
2 her exposures to subjects in published studies,
3 concluding that, quote, "There is no evidence that
4 she was exposed to levels of asbestos associated with
5 a statistically-significant increased risk of
6 asbestos-related disease, including peritoneal
7 mesothelioma," end quote.

8 Ms. Sahmel further opined that, assuming all
9 reasonable inferences in favor of the Plaintiff here,
10 Ms. Madar's exposure to asbestos from her extremely
11 limited use of Cashmere Bouquet would have been below
12 ambient background exposure.

13 This is significant, as the Plaintiffs' expert
14 testified during a deposition that exposure to ambient
15 background levels of asbestos does not present an
16 increased risk for development of mesothelioma.

17 To put it simply, Ms. Sahmel opined very
18 directly and emphatically that even assuming the, quote,
19 "worst case," scenario, as Defendant's counsel described
20 it, Ms. Madar's exposure to just two bottles of Cashmere
21 Bouquet would not be sufficient to have contributed to
22 the causation of mesothelioma.

23 With this evidence, the Defendant has
24 established a prima facie entitlement to the judgment as
25 a matter of law.

1 The burden then shifts to the Plaintiff to
2 raise a triable question of fact. The Plaintiff here has
3 failed to do so. The Court is cognizant of the
4 statements from The Centers for Disease Control and
5 Prevention and the Environmental Protection Agency that
6 there is no threshold below which there is no risk to
7 from exposure to asbestos, given that asbestos fibers
8 remain in the body.

9 However, as a legal matter, the Plaintiff is
10 still required to prove specific causation as it relates
11 to her admitted exposure to only two bottles of
12 Colgate-Palmolive's talcum powder in the early 1970s.

13 While the Plaintiff has submitted some expert
14 evidence that there may have been friable asbestos powder
15 in the raw talc used to manufacture Cashmere Bouquet, the
16 Plaintiff has submitted no proof, expert or otherwise, to
17 contradict the sworn statements of Defendant's expert
18 that Ms. Madar's exposure to any fibrous asbestos as a
19 result of her use of Cashmere-Bouquet, even assuming the
20 worst-case scenario, was not sufficient to have
21 contributed to the causation for mesothelioma.

22 Accordingly, the Plaintiff has failed to raise
23 a triable question of fact. Defendant
24 Colgate-Palmolive's motion for summary judgement is,
25 therefore, granted. Specifically, the motion is granted

1 on the ground that the defendant has established as a
2 matter of law that there was no specific causation as it
3 relates to Plaintiff's use of the Defendant's product
4 here, Cashmere Bouquet talcum powder.

5 The remaining issues raised by the Defendant in
6 its motion, including the argument relative to punitive
7 damages and the failure to state a cause of action, were
8 not reached by the Court.

9 Defendant's counsel is directed to submit a
10 proposed Order in Word format, copies to the Plaintiffs'
11 counsel and attaching a transcript of this bench decision
12 by August 8th, 2019. And that should be emailed to my
13 chambers' email: DelConte-Chambers@nycourts.gov.

14 (Whereupon, the proceedings were concluded.)
15
16

17 **C E R T I F I C A T I O N**
18

19 The foregoing is a true and accurate transcript of my
20 stenographic notes in the above-entitled matter.

21 Dated: July 23, 2019.
22

23 Therese Plante, Sr. Court Reporter
24 Signature/Title
25