STATE OF NEW YORK

SUPREME COURT: COUNTY OF ERIE

In Re: ASBESTOS LITIGATION

EIGHTH JUDICIAL DISTRICT

JOSEPH A. SKRZYNSKI and

DEBORAH M. SKRZYNSKI,

Plaintiffs,

-vs-

AKEBONO BRAKE CORPORATION, et al.

Defendants.

DECISION & ORDER

Motion #006

Index No.: 808086/2021

Motion made by Ford Motor Company for Summary Judgment

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In writing this Decision and Order, the documents attached hereto as an appendix were reviewed and after hearing oral argument on September 19, 2022 made by Robert J. Mullins, II, Esq. on behalf of the moving defendant Ford Motor Company requesting preclusion and summary judgment, and Suzanne M. Ratcliffe, Esq. for plaintiffs in opposition to said motion, Ford's motion is granted in part and denied in part.

PROCEDURAL EVENTS

The Plaintiff, Joseph A. Skrzynski ("plaintiff") and his wife Deborah M. Skryzynski commenced this action on June 21, 2021, naming defendant Ford ("Ford"), as a source of Joseph A. Skrzynski's exposure to asbestos, which had led to his being diagnosed at age 65 with malignant mesothelioma of the peritoneum. All further references to "plaintiff" will be in reference to Joseph A. Skrzynski only. Ford served its verified Answer on July 28, 2021. Plaintiff served Answers to Defendants' Alternative Standard Interrogatories on September 10, 2021 and served Amended Answers to Defendants' Alternative Standard Interrogatories on November 5, 2021 in which Plaintiff names his spouse as a dependent. Mr. Skrzynski was deposed on November 10, 11 and 12, 2021. This matter is now set for trial on October 11, 2022.

LATE FILING OF PLAINTIFFS' EXPERT SUBMISSIONS

Ford asks this Court to not consider the submissions of Plaintiffs' expert, Marty A. Kanarek, Ph.D., because they were filed "long after" the April 12, 2022 submission date set by this Court. Defendant does not state any prejudice to it by the late filing. Plaintiffs argue that on November 15, 2021, they served Defendant with a § 3101(d) notice that Dr. Kanarek was expected to testify in this trial and what his expected testimony would encompass.

CPLR section 3212(b) states, "Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.

As such, the Court will consider all reports submitted by both parties.

ALLEGED FACTS AND CONTENTIONS

Plaintiff testified that as a parts supply guy/delivery man for the Towne Lincoln Ford Mercury dealership, also known as FG Downing Development Inc. (hereafter "Towne") in Orchard Park, New York, from around 1974/1975 to roughly 1979/1980, he was exposure to dust reportedly containing asbestos. Plaintiff testified to daily exposure to this dust in opening boxes and handling Ford specified friction materials such as brakes and clutches. His proximity to the mechanics performing brake and clutch jobs was sometimes (2-3 feet) while he observed their work, and through the sweeping, cleaning, and maintaining the shops and equipment. He also testified that everywhere was dusty, including the parts department. He stated that there was dust on all the boxes that he used to wipe or blow off, and that it was not a clean environment. (*Transcript of deposition testimony of Joseph A. Skrzynski*, NYSCEF No. 222, *Plaintiff's* Exhibit 4 *annexed to Plaintiff's Affirmation in opposition to Defendant's Summary Judgment Motion*, NYSCEF No. 272, *hereinafter all Plaintiff's Exhibits will be referenced by Exhibit numbers*).

Roger K. French, a co-worker of Mr. Skrzynski at Towne, was deposed on February 16, 2021, and allegedly corroborated Mr. Skrzynski's testimony as to his work in the parts department at Towne Lincoln as well as Mr. Skrzynski's exposure to dust allegedly containing asbestos from time spent in the garage while mechanical work including brake and clutch removal and installation was performed. (*Transcript of deposition testimony of Roger K. French*, NYSCEF Doc. No. 277, *Plaintiff's* Ex. 5)

Plaintiff alleges that Ford does not dispute that it manufactured automobiles – including Lincoln and Mercury vehicles—for decades that specified and/or utilized asbestos-containing brakes, clutches, and gaskets, and sold asbestos-containing replacement parts for use in its vehicles. "Ford's products at issue in this case are twofold: 1) Ford/Lincoln/Mercury vehicles, and 2) Ford aftermarket asbestos-containing automotive parts, including those manufactured by Ford Authorized Remanufacturers to Ford designs." (*Plaintiff's* Ex. 7) Plaintiff alleges that Ford admits that all its vehicles designed for general consumer use prior to the 1983 model year were designed with at least one set of asbestos-

containing brakes. (*Plaintiff's* Ex. 6) Plaintiff alleges that if a particular Ford (or Lincoln/Mercury) vehicle was designed to utilize asbestos-containing parts, it required asbestos-containing parts for future repairs, at least through 1987. (*Plaintiff's* Ex. 7 at 5-7)

Plaintiff alleges that all the brake assemblies he handled, removed, and replaced contained asbestos during the time he was employed by Towne from 1975 to 1979. He produced internal Ford documents which purport to disclose that brake repair work performed on *any* pre-1983 vehicle required the use of asbestos containing replacement parts, until at least 1987. (*Id.* at 69) By 1986, eighty-two percent of Ford replacement parts contained asbestos which Ford continued to make available until 2001. (*Plaintiff's* Ex. 6) Towne had to regularly keep a supply of asbestos-containing Ford friction components in-house long after Ford began phasing out asbestos from these parts. (*Plaintiff's* Ex. 8) Ford's asbestos-containing brakes contained considerable amounts of asbestos ranging from 25% to 85%. (*Plaintiff's* Ex. 8) Ford used woven asbestos clutches and molded asbestos brake linings on multiple Lincoln and Mercury models, including the Mercury Cougar, Marquis, Lincoln Mark III, Mark IV, Mark V, and Continentals, all of which were either directly handled by plaintiff or were used when he observed brake and clutch work being done. (*Plaintiff's* Exs. 4, 11, and 12)

Defendant does not appear to dispute that asbestos is a toxin generally capable of causing related injuries. Nor does it appear that Ford denies that plaintiff worked with asbestos-containing friction products that it supplied. Ford does dispute that the chrysotile fibers as a component of its friction products causes disease or increased the risk for (peritoneal) mesothelioma in its friction-product workers and by extension, plaintiff's injury here.

Ford's expert, Dr. Anil Vachani, opines that the asbestos from Ford products to which Plaintiff was allegedly exposed is qualitatively different than raw, amphibole asbestos. Dr. Vachani explains that epidemiology studies he reviewed, including occupational mechanics consistently demonstrate that chrysotile fibers (asbestos) as a component of friction products does not cause disease and demonstrate no increased risk for mesothelioma among the group of occupational mechanics citing M. Goodman, et. al., Mesothelioma and Lung

Cancer Among Motor Vehicle Mechanics: A Meta-Analysis, 48 Ann. Occup. Hyg. 309, 322 (2004). Dr. Vachani further opines that those peer reviewed epidemiology studies support his opinion that Chrysolite as a component of automotive friction parts does not cause asbestos related disease. And, that asbestos contained in brakes is embedded in resin. *See, id.* His opinion is that very little asbestos survives the braking process which chemically converts chrysotile into the non-carcinogen forsterite. *See, id.* He further opines that brake dust is more than 99% forsterite and less than 1% asbestos in a non-fibrous form according to Jeremiah R. Lynch, *Brake Lining Decomposition Products, J. Air Pollution Control Ass'n*, Dec. 1968, at 824, 826; Ronald L. Williams & Jean L. Muhlbaier, *Asbestos Brake Emissions, Envtl. Res.*, Oct. 1982, at 70 – 82. *See, Affirmation of Dr. Anil Vachani*, NYSCEF Doc. No. 231, *Defendant's* Exhibit N *annexed to Defendant's Memorandum in Support of Defendant's Summary Judgment motion*, NYSCEF No. 217 (hereinafter, all Defendant's Exhibits will be referenced by capital letters).

BURDEN OF PROOF

Defendant argues that Dr. Vachani's recitation of facts and opinions contained in his affidavit meets Ford's prima facie burden on general causation thereby shifting the burden to Plaintiffs.

Defendant recognizes that it bears the heavy initial burden of showing "in the first instance" that working with, or close by work with its friction products containing chrysotile fibers, could not contribute to causation of the Plaintiff's injuries. *See, Takas v. Asbestospray Corp.*, 255 A.D.2d 1002 (4th Dept. 1998); Reid v. Georgia – Pacific Corp., 212 A.D.2d 462 (1st Dept. 1995).

Plaintiff's expert Dr. Marty Kanarek Ph.D., M.P.H. published an article (*Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 507 [1989]) where he found documented cases of mesothelioma from exposure to chrysotile asbestos. (Kanarek, M.S. Mesothelioma from Chrysotile Asbestos: Update; Annals of Epidemiology 21:688 – 697 [2011]; Erratum: Annals of Epidemiology 22:377 [2012]). Plaintiff also cites several studies that found considerable amounts of chrysotile asbestos in the dust created from blowing compressed air on used

brake parts. (*Mesothelioma studies are listed in Plaintiff's Affirmation*, NYSCEF No. 272 at pp. 12 and 13).

Defendant's expert opinion is based on epidemiology studies that allege chrysotile fibers contained in friction products do not cause mesothelioma or after the braking process converts those chrysotile fibers from used brakes to the non-carcinogen forsterite. Plaintiff's expert opinion is based on epidemiology studies that found exposure to chrysotile asbestos does cause mesothelioma.

It appears that Plaintiffs' have not provided at this point epidemiological studies showing "unreleased", "embedded", or "coated" chrysotile fibers as a component of Defendant's friction parts or products cause or increase the risk of contracting mesothelioma. However, once chrysotile fibers are released in dust or otherwise, the opposing experts disagree on causation or increased risk of disease, thus raising material fact issues of causation after chrysotile is released in respirable forms. Moreover, Plaintiff claims that Defendant's Exhibit M reflects that Ford brakes and clutches also contain small amounts of amphibole asbestos which apparently opposing experts would agree cause or increase risk of mesothelioma if inhaled in amounts known to cause or increase risk of disease.

Defendant rightly points out that Plaintiffs must provide expert testimony based on methodologies generally accepted in the scientific community that establish sufficient quantity of exposure to the toxin dose, in terms of scientific expression, that prove the quantified dose does, in fact, cause disease. *See, Juni v. A.O. Water Products Co.*, 32 N.Y.3d 1116 (2018); *Nemeth v. Brenntag North America* 38 N.Y.3d 336 (April 26, 2022). Defendant argues Plaintiff only provides studies in scientific expression of "peak exposure"[1] and no studies in scientific expressions of exposure to Mr. Skrzynski in terms of a time-weighted average reflecting fiber level exposure per cubic centimeter years (F/cc years) which Defendant argues is the proper methodology generally accepted in the scientific community. Yet, Defendant does not provide in its motion papers any "generally

[1] **At oral argument, Defendant's counsel explained that "peak exposures" represent a sort of maximum amount of respirable fibers in the air within a few minutes of the activity that releases those fibers.**

accepted" studies providing scientific expressions of quantity toxin dosage of workers like Mr. Skrzynski in those same terms of "fiber per cc years."

Defendant's expert Dr. Vachani's opinion is that plaintiff's working with and in the vicinity of others working on Ford friction products was not, and could not have been, a substantial contributing factor to his development of peritoneal mesothelioma. Dr. Vachani does not provide any scientific studies that express in fiber per cc years exposure to Ford workers in similar work circumstances as plaintiff. Perhaps if Defendant provided such an unrefuted fiber per cc years study it would have met its prima facie burden on general causation shifting the burden to plaintiffs. It did not leaving this Court then with a battle of the opposing experts for a jury's consideration and determination.

DEFENDANT'S ARGUMENTS ON GENERAL AND SPECIFIC CAUSATION

The Defendant argues that the Plaintiffs' evidence (provided by their experts) of exposure to sufficient levels of asbestos that may have caused Plaintiff's asbestos-related injuries amounts to mere conclusions, expression of hope, unsubstantiated allegations, or rank speculation; all of which cannot overcome the Defendant's prima facie summary judgment presentation.

Defendant further argues that Plaintiff's expert, Marty S. Kanarek, Ph.D. fails to cite a single epidemiological study showing chrysotile asbestos found in friction products are known to cause peritoneal mesothelioma. Instead, Ford argues that Dr. Kanarek's failure is his reliance on: (1) his own literature involving mining, manufacturing, and community asbestos exposures; (2) publications from the International Agency on Research on Cancer ("IARC") and the World Health Organization ("WHO"); (3) Dr. Millette's flawed experiments and glove box tests; and (4) the Bradford-Hill factors. Ford argues that the literature, publications, experiments, and factors relied on by Dr. Kanarek as the foundations for his opinions were rejected by the First Department in *Juni* as insufficient to establish general causation because those foundational materials of mesothelioma in garage mechanics or those who work with friction products in a vehicle repair setting show only an association between the work and mesothelioma and not causation. Citing, *Juni*, 148 A.D.2d at 236-37.

Dr. Kanarek's article "Mesothelioma from Chrysotile Asbestos: Update" relies on cohorts which have been demonstrated time and again to have had substantial exposure to other types of asbestos such as amosite and crocidolite. This is significant argues Ford because, unlike chrysotile, those fibers can cause mesothelioma at extraordinary low exposure levels. Plaintiff's expert misapplied the "Hill criteria" by using evidence of the link between exposure to raw and mixed asbestos fibers and mesothelioma to opine that friction products must have the same effect. And that governmental public policy risk assessment models and promulgated protective measures like IARC and WHO are inadequate to demonstrate legal causation. Citing, *Parker* 7 N.Y.3d at 450 and *Cornell*, 22 N.Y.3d at 782.

Defendant argues that Plaintiffs' expert, Dr. Millette's testing fails to show the levels of asbestos released in a parts department and brake-work-area similar to where Mr. Skrzynski worked and ultimately inhaled by him at levels known to be sufficient to cause mesothelioma. If the Plaintiff's experts cannot prove Mr. Skrzynski's actual exposure was comparable to an amount known to cause mesothelioma, argues Defendant, the Defendant's motion for summary judgment must be granted.

Defendant further argues that Plaintiff's expert Dr. Jacqueline Moline's opinions on causation have been repeatedly found insufficient as a matter of law to establish causation., citing *In the Matter of New York City Asbestos Litigation, Mary Juni, Individually and as Administatrix of the Estate of Arthur H. Juni, Jr.*, 32N.Y.3d 1116 (2018) (Juni); *Juni v. A.O. Water Products Co.*, 32 N.Y.3d 1116 (2018); *Nemeth v. Brenntag North America* 38 N.Y.3d 336 (April 26, 2022).

Dr. Moline's "chart" used by Plaintiff to claim his specific exposure far exceeds the minimum threshold levels of asbestos is not accurate because the chart does not reflect the level of exposure to asbestos from friction products that have the capability of causing mesothelioma. The studies, say Defendant, referenced in the "chart" involved "mixed fiber types, do not differentiate between chrysotile and amphibole asbestos exposure, do not involve friction

products, and acknowledge that the chrysotile examined in these studies was contaminated with amphibole asbestos.

PLAINTIFFS' ARGUMENTS ON GENERAL AND SPECIFIC CAUSATION

Plaintiffs argue that Ford does not dispute that the friction products that plaintiff handled and worked in proximity to contained asbestos. He avers that Ford specified molded asbestos brake linings and woven asbestos clutches for a number of vehicles that were being worked on near him and for which he delivered the asbestos containing parts.

Plaintiff's expert, Dr. Marty Kanarek, Ph.D., M.P.H., opines that all forms of asbestos cause mesothelioma. There is a consensus among scientists and health agencies including the World Health Organization and the International Agency on Research on Cancer that exposures to any type of asbestos can increase the likelihood of mesothelioma. (*See, affirmation & integrated report of Dr. Marty Kanarek Ph.D.*, M.P.H. dated August 29,2022) Further, Dr. Kanarek published an article (*Hymowitz v. Eli Lilly & Co.*, 73 NY2d 487, 507 [1989]) specifically addressing mesothelioma caused by exposure to chrysotile asbestos where he found many documented cases of mesothelioma from exposure to chrysotile asbestos. (*Id. Kanarek, M.S. Mesothelioma from chrysotile asbestos: update. Annals of Epidemiology* 21:688-697 (2011); *Erratum: Annals of Epidemiology* 22:377 [2012]). Contrary to Ford's assertions in its moving papers, the Plaintiff cites several studies that found considerable amounts of chrysotile asbestos in the dust created from blowing compressed air on used brake parts:

- Rohl AN, Langer AM, Wolf MS, Weisman I. Asbestos exposure during brake lining maintenance and repair. Environ Research 12:110-128 (1976): measured fibers in dust samples from car brake drums and found chrysotile in all samples; found measurable concentrations of asbestos found up to 75 feet from where compressed air was being used to blow out and average concentrations of 16 fibers/ml of air.
- Lorimer WV, Rohl AN, Miller A, Nicholson WJ, Selikoff IJ. Asbestos Exposure of Brake Repair Workers in the United States. Mt Sinai J

Med 43:207-18 (1976): Measured mean fiber concentrations of 3.8 fibers/ml in NYC brake workshops.

- Kauppinen T and Korhonen K. Exposure to Asbestos During Brake Maintenance of Automotive Vehicles by Different Methods. Am Ind Hyg Assoc J 48:499-504 (1987): Air hoses used to blow out brakes created a cloud of dust, 8.2 fibers/cm^3 and grinding of new brake linings prior to installation led to asbestos fiber counts as high as 125 fibers/cm^3.
- Lemen RA. Asbestos in brakes: exposure and risk of disease. Am J Ind Med 45:229-237 (2004b): For every gram of brake dust, this translates to the equivalent of 90 trillion short asbestos fibers and 300 billion long asbestos fibers.
- Madl AK, Scott LL Murbach DM, Fehling KA, Finley BL, Paustenbauch DJ, Exposure to chrysotile asbestos associated with unpacking and repacking boxes of automobile brake pads and shoes. 52(6):463-79 (2008): Air sampling found 1.8 F/cc in opening of friction product boxes with chrysotile concentrations 20-45% content by weight; average airborne chrysotile concentrations (30 min.) from 0.086 to 0.368 and 0.021 to 0.126 F/cc^{-1} for a worker unpacking and repacking 4-20 boxes of brake pads and 4-20 boxes of brake shoes.
- Cely-Garcia MF, Sanchez M, Breysse PN and Ramos-Bonilla JP. Personal Exposures to Asbestos Fibers During Brake Maintenance of Passenger Vehicles. Ann Occup Hyg 56(9):985-999 (2012): Conducted personal monitoring for asbestos in 3 brake repair shops in Bogata Columbia using standard NIOSH methods for 8-hour time weighted average and short term exposures of 30 minutes resulting in extremely personal asbestos concentrations ranging from 0.006 to 3.493 f/cm^3 for 8 hour time weighted averages and from 0.015 to 8.835 f/cm^3 for 30 minute samples.
- Millette JR, Compton S, DePasquale C. Microscopy in the Investigation of Asbestos-Containing Friction Products. The Microscope 68:3/4:111-131 (2020): Air sampling results for brake activities in a number of studies showed considerable amounts of asbestos fiber release with no detectable quantities of forsterite.

(*Plaintiffs' Affirmation* NYSCEF Doc. No. 272 at pp. 12 & 13)

Plaintiff cites Ford's own documents that allegedly show that as of 1973, it was aware that asbestos dust has a "**relatively high toxicity**" and that "**at least 15%** of the total dust volume is composed of asbestos fibers" in a "typical brake service job." (*Plaintiff's* Exhibit 26 which contains the emphasis).

Plaintiffs submit that their expert witness, James R. Millette, Ph.D., is an environmental scientist and Board Certified in forensic engineering sciences specializing in environmental, industrial hygiene exposure and particle and material science. In 2020, Dr. Millette coauthored a report entitled "Microscopy in the Investigation of Asbestos-Containing Friction Products". *See, The Microscope Vol.* 68:3/4, pp 111 – 131, 2020 ("*The Microscope*") NYSCEF No. 286.

In the *Microscope* article, Dr. Millette states that bulk analyses was performed of ≈ 100 asbestos-containing friction products including those associated with brand names Bendix, Ford and about 33 other brands. Dr. Millette's report concludes:

> The results of the fiber release studies (A – K) using PCM and TEM analyses showed that asbestos fibers can be released from friction products during sanding, filing, drilling, rivet removal, grinding, beveling, clean-up activities with brooms or compressed air, and the shaking of contaminated clothing. The levels ranged from below 0.25 F/cc (hand filing) to 241 F/cc (beveling with angle grinder). Consistent with other studies in the scientific literature, activities involving hand tools generally generated lower levels of airborne asbestos fibers than those involving power tools.
>
> PLM and TEM analyses of wheel brake drum dust showed a level less than 1% asbestos by weight percentages in brake dust can contain high numbers of fibers. Analyses by XRD, PLM, and TEM found no evidence of forsterite in the brake wear dust.

According to Dr. Millette's report:
PCM stands for phase contrast microscopy
TEM stands for transmission electron microscopy
PLM stands for polarized light microscopy

XRD stands for X-ray diffraction
Microscope article, NYSCEF No. 286 at 123, 124.

Dr. Millette's own studies have shown that uncoated asbestos fibers were present on the surfaces and edges of friction products, including Ford (Bendix Brakes) and Ford (Borg Warner) clutches that would be released into the air upon rubbing or abrading. Further, Dr. Millette reviewed and listed the results of numerous friction product fiber release studies evidencing high levels of release and exposures to asbestos fibers during brake servicing, including blow-outs with compressed air, sanding, filing, and grinding brakes ranging from 0.1 to 241 F/cc using Phase Contrast Microscopy.

Dr. Millette's direct testing of Ford (Bendix) brake disc pads found that hand sanding the pads resulted in 2.2 f/cc (54 str/cc by TEM AHERA) asbestos fiber level for the person sanding and 13 str/cc by TEM AHEARA for bystanders. Clean up of same also exposes the worker to asbestos fibers ranging from 0.5 to 2.2 F/cc using Phase Contrast Microscopy depending on proximity to the dust.

He recites actual and various numerical levels of asbestos fibers released from hand sanded Ford (Bendix) brake disc pads into the "breathing zone" of workers performing "various friction activities" and of their bystanders. Dr. Millette also found asbestos fiber levels in studies he conducted of those sweeping dust, opening and air-blowing out of boxes of brakes and clutches. He also reviewed Ford's internal documents reflecting asbestos fiber exposure levels of Ford employees unpacking clutch discs and pressure plate boxes.

Dr. Millette reviewed case materials, including plaintiff's testimony, as well as reports of studies performed by MVA Scientific Consultants and relevant published scientific literature concerning asbestos friction products. (*See,* Plaintiff's Exhibit 14, Affirmation of James Millette, Ph.D., D-IBFES Report In the matter of Joseph Skrzynski dated August 26, 2022). He also reviewed Ford internal documents and studies from 1978 and 1979 showing time-weighted average (TW) numerical asbestos exposure levels in excess of then current corporate guidelines requiring medical monitoring for Ford employees who unpacked pressure plates and opened clutch plate boxes. *See, Dr. Millette's affirmation* NYSCEF No. 286. The same work performed by plaintiff. He then

compared his test results with plaintiff's deposition testimony and concluded that plaintiff "would have had exposure to asbestos fibers consistent" with the exposure levels found in his tests and findings.

Dr. Millette renders an opinion "to a reasonable degree of scientific certainty" that plaintiff was exposed to asbestos at the following levels:

- Standing within 5 feet of mechanics blowing out brakes with compressed air: up to 14 F/cc;
- Standing at the parts counter, about 30-50 feet away from blowout: up to 0.3 F/cc;
- Turning of the brakes in the back of the facility: up to 1.3 F/cc;
- Dr. Millette found 21 million asbestos fibers in the dust from surfaces within a box of brake components and 1.8 asbestos F/cc in the air in the box, and the internal corporate communications showing evidence of asbestos dust in shipping boxes.

Defendant argues that Dr. Millette's opinion should be ignored because it does not reflect the levels of asbestos released in a parts department and brake-work-area similar to where plaintiff worked. However, Dr. Millette's testing does include experiments simulating, to a certain extent, plaintiff's testimony that he himself opened boxes of brakes and blew the dust out of these boxes; that he also sometimes stood two feet away from mechanics or right next to them doing brake work including the "sanding" of parts; that dust occurred routinely when he cleaned the parts department; and, that he handled and carried brake and clutch parts, and saw mechanics blow out the clutch parts with compressed air.

Defendant's position that Dr. Millette's estimates of plaintiff's specific exposure are unreliable and incorrect because the "varying ranges" of exposure are based on "peak exposure" studies and not on time-weighted averages expressed as a fiber per cc year calculation must be left to the jury's consideration and decision.

This Court, however, finds that there are material issues of fact as to whether or not chrysotile as a component of Ford's automotive friction parts would have contributed to Plaintiff to contracting mesothelioma. This Court finds material issues of fact presented by the disagreement the Plaintiffs' experts, Dr. Kanarek and Dr. Millette have with Defendant's expert, Dr. Vachani (after they

both have reviewed various studies) as to the extent to which the act of braking converts chrysotile into the apparent non-carcinogen, forsterite.

CLUTCHES

There were occasions plaintiff would open the box of clutch parts and handle the clutches themselves to give them to the mechanics, recalling seeing dust inside some of the clutch part boxes. Ford itself allegedly knew that those regularly handling the boxes of asbestos-containing automotive parts would be exposed to respirable asbestos dust.

Dr. Millette reviewed a number of Ford internal documents including:

- A November 1978 study of an employee unpacking a clutch disc at a Ford Facility showed an exposure to the employee of a time –weighted average (TW) of 0.014 F/cc in excess of then current corporate guidelines requiring medical monitoring. (*Plaintiffs' Affirmation*, NYSCEF Doc. No. 272 p. 15)
- A 1979 memo written by a Ford industrial hygienist identifying asbestos exposure when clutch assemblies are removed from their boxes.52 Ford's industrial hygienist found the "employe [sic] exposures to asbestos dust primarily occurs when the discs are actually handled." (*Plaintiffs'* Ex. 16)
- A May 14, 1979 Ford Interoffice Memo found that an employee who unpacked pressure plates and opened clutch plate boxes had exposure levels of 0.05-0.3 F/cc. (*Dr. Millette's, "The Microscope" article* 68: 3 - 4: 111 – 131 [2020])
- Another memorandum from a different Ford industrial hygienist also warned (internally) of the hazard posed by those handling asbestos-containing parts and their boxes in 1979. That memorandum identified asbestos exposure to those unpacking and opening clutch plate boxes, and even warned against throwing boxes into the dumpster, "as it will disperse asbestos fibers into the atmosphere." (*Plaintiffs'* Exs. 17 & 18)

Defendant's motion papers address its friction products but do not specifically address the internal documents concerning possible exposure from unpacking clutches referenced by Dr. Millette.

SPECIFIC CAUSATION

In her affirmation (NYSCEF Doc. 291), the plaintiff's expert Jacqueline Moline, MD, MSc, FACP, FACOEM, cited the deposition testimony of the plaintiff, who stated that the mechanics working close to him would blow out the brakes with compressed air, sand the brake pads before installing them, and sweep the shop of the accumulated dust. The plaintiff would also handle asbestos-containing parts when taking them out of the boxes for the mechanics to install. According to the Complaint, the mechanics utilized Ford Lincoln Mercury pads.

Dr. Moline then recites peer reviewed literature noting an increased incidence of mesothelioma over varying levels of exposures to asbestos in fiber years as noted by *Lacourt, Rodelsperger, Rolland, and Jiang* as noted below:

STUDY	FIBER TYPE	EXPOSURE RANGE IN TOTAL FIBER YEARS (F/YR)	INCREASED RISK
Lacourt	Mixed	>0 – 0.1 f/yr 0.1 – 1 f/yr	4 fold 8.3 fold
Rodelsperger	Mixed	>0 – 0.15 f/yr 0.15 – 1.5 f/yr	7.9 fold 21.9 fold
Rolland	Mixed	>0 – 0.07 f/yr	2.8 fold
Jiang	Chrysotile (Textile)	>0 – 0.5 f/yr	28 fold

Id.

Based on Dr. Millette's findings of plaintiff's exposure to asbestos and these articles published in the peer-reviewed literature, Dr. Moline opined that the exposures to the dust from asbestos-containing Ford friction products that plaintiff handled and was exposed to, were above levels at which mesotheliomas have been shown to occur, and that his exposure to asbestos

from these products resulted in a lifetime exposure that increased his risk of and caused his mesothelioma.[2]

In the instant matter, Dr. Millette provided respirable asbestos fiber release studies for similar activities and proximities to what plaintiff states were the source of his exposure to asbestos. Dr. Moline relied on and compared Dr. Millette's estimates of plaintiff's exposure levels to those exposure levels found in the studies reflected in her affirmation. The studies relied upon by Dr. Moline which quantified the levels of exposure range in total fiber years (F/YR) were seen to "elevate (the) risk of mesothelioma" from 4-fold to 28-fold. Opining that the exposure range levels in those studies are "in the range of exposure that Mr. Skrzynski experienced." (*Dr. Moline's affirm.* NYSCEF Doc. No. 291).

> ... it is my opinion to a reasonable degree of medical certainty that the exposures of the dust from asbestos-containing Ford friction products that Mr. Skrzynski used and was exposed to, were above levels at which mesothelioma have been shown to occur, and that his exposure to asbestos from these products resulted in a lifetime exposure that increased his risk of and caused his mesothelioma. *Id.*

The Defendant argues that Plaintiffs' proof as outlined above fails to provide "scientific expressions" of his exposure to active chrysotile asbestos fibers from Ford products at levels that are known to cause mesothelioma citing *Parker*, 7 N.Y.3d at 449.

Ford argues that Plaintiffs' experts "fail to connect" their "lists" of alleged exposure levels, measured as F/cc or fibers per cubic centimeter, with Dr. Moline's chart values measured as "exposure range in total fiber years." Ford

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[2] Plaintiff admits that the *Nemeth* Court held that Dr. Moline's testimony was insufficient to establish specific causation because she relied upon an exposure study (known as a "glove box test") that did "not offer an estimate of the amount [of asbestos] that would be inhaled" by the decedent. Importantly, however, the Court of Appeals in *Nemeth* held that plaintiffs "could have" satisfied their burden by conducting a test which simulated or mimicked the types of activities resulting in the exposures being alleged, i.e., "conduct[ing] a test in an actual bathroom of the level of exposure to respirable asbestos resulting from the use of cosmetic powder[.]"

also argues that Plaintiffs' experts do not explain how the concentrations of fibers per cubic centimeter are converted to the fiber years which was used as the unit of measurement in the studies cited by Dr. Moline in her chart. "Indeed, no expert attempted to estimate the cumulative fiber-year level for Plaintiff's work." *See, Defendant's reply memorandum* NYSCEF 421.

The Court of Appeals in *Parker* stressed that it is not necessary to precisely quantify a plaintiff's exposure level and that it rejected the requirement that a plaintiff establish a dose response relationship. (*See,* 60 Id. 61 *Nemeth* at *2-3. 62 *Nemeth* at *3; *see also, Dyer* at *3 ("What *Nemeth* requires, however, is that in asbestos cases, exposure simulation studies must account for respirable asbestos fibers released from the toxic product.").

While affirming the specific ruling in the case before it, the Court of Appeals in *Parker* stressed that:

> Where we depart from the Appellate Division is that we find 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.

Defendant argues that Plaintiffs' experts' opinions must be disregarded because their opinions are not based on time-weighted (fiber per cc year) studies. Rather, argues Defendant, Dr. Millette's "peak estimate" studies and the other studies relied on by Dr. Moline cannot provide to a reasonable degree of medical certainty a scientific expression of plaintiff's cumulative life exposure to levels that cause or increase the risk of mesothelioma.

To this Court, at this stage of proceedings in this case, it appears plaintiff has made a prima facie showing of with Drs. Millette's and Moline's use of scientific expression and a level of scientific rigor to overcome Ford's motion to exclude their expert opinions. The Court further finds that there are material differences of opinion by the experts used by plaintiff and Ford regarding the sufficiency and correctness of the "methodologies" and the "scientific expression" used by the Plaintiff's experts to prove his exposure to active chrysotile asbestos fibers from Ford products at levels known to cause mesothelioma.

Ford argues that it is unfair and legally invalid for it to be forced to trial because this Court is not properly exercising its "gatekeeper role" by not excluding Plaintiffs' experts' opinions, citing *Parker v. Mobil Oil Corp.*, 7N.Y.3d 434 (2006), *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014), *Juni*, and *Nemeth*. However, those cases do not hold that unless the plaintiffs submit opinions based on time-weighted averages as the only "generally accepted methodology" to prove causation (fiber per cc year calculation), their case must be summarily dismissed before trial.

Defendant's argument that Plaintiff's experts rely on invalid causation evidence must first be presented to a jury and if they find otherwise, the defendant must argue the points to the appellate courts for their rulings on the specific scientific methodologies it argues must become the law of this state.

Thus, here, as distinct from in *Nemeth*, Dr. Moline speaks to the quantifiable levels of asbestos exposure sufficient to cause mesothelioma as established in and supported by peer reviewed literature—the kind of evidence the Court of Appeals held may be sufficient to satisfy plaintiffs' causation burden in that case.

Unlike in the *Juni* trial, Dr. Moline, in her affirmation in the present case, was able to rely on peer reviewed studies and Dr. Millette's reports to come to the conclusion to a reasonable degree of medical certainty that:

> ... the exposures to the dust from asbestos-containing Ford friction products that Mr. Skrzynski used and was exposed to, were above levels at which mesothelioma have been shown to occur, and that his exposure to asbestos from these products resulted in a lifetime exposure that increased his risk of and caused his mesothelioma. NYSCEF No. 291 at 7.

In the *Juni* trial, Dr. Moline concluded that she could provide no scientific expression of *Juni's* exposure absent data, which was not provided and does not exist in the record of that trial. Moline also conceded that she did not know whether the dust to which *Juni* was exposed contained any asbestos, much less enough to cause mesothelioma. The *Nemeth* Court stated that Plaintiffs "could

also have introduced evidence regarding the inhalation levels known to cause peritoneal mesothelioma but did not do so". *See, Nemeth* at *3.

In the present case, Dr. Moline's opinion relies on Dr. Millette's numerical dose exposure studies and numerical estimates of Mr. Skrzynski's actual exposure to asbestos from Ford's friction products and asbestos-containing dust he came in contact with.

This Court finds that there are material questions of fact regarding causation issues created by the opposing experts. Moreover, although the Plaintiffs have the burden to prove causation at trial in this case, the Defendant in its summary judgment motion has the burden to show "in the first instance" that its product(s) could not have contributed to the causation of the Plaintiff's injuries. *See, Takas v. Asbestospray Corp.*, 255 A.D. 2d 1002 (4th Dept. 1998); Reid v. Georgia – Pacific Corp., 212 A.D> 2d 462 (1st Dept. 1995).

This Court is of the opinion that Ford has failed to make a prima facie showing that its asbestos-containing products could not have contributed to the causation of Mr. Skrzynski's injuries. *See, Comeau v. W. R. Grace*, 216 A.D. 2d 79 (1st Dept. 1995).

PLAINTIFF'S EXPOSURE TO THERAPEUTIC RADIATION AS IT RELATES TO HIS MESOTHELIOMA

Ford argues that, under the holding in *Cornell*, 22 N.Y.3d at 785, 786, (2009) Plaintiff's experts must rule out plaintiff's therapeutic radiation as a cause of his mesothelioma and they failed to do so. In support, Ford points to Dr. Moline's statement that "risk of mesothelioma [occurs] in a small number of individuals who receive therapeutic radiation." Ex K at p. 5.

Plaintiff counters that Dr. Moline's opinion is that an individual who received therapeutic radiation "does not negate the contribution of asbestos to the development of his cancer." *See, Defense* Ex K.

Plaintiffs also relies on Dr. Kanarek who addresses the effect of radiation therapy in the causation of mesothelioma in his report and concludes that

radiation is not a risk factor, citing a 2022 published study that found "the increased risk of death from asbestos, combined with little evidence of a rising trend in mesothelioma mortality with increasing radiation exposure, suggests that mesothelioma (and asbestosis) excess in this (sic) workers was due to asbestos exposure ... not occupational low-dose radiation." (*Dr. Kanarek citing Mumma MT, Sirko JL, Boice JD, Blot Wj. Mesothelioma mortality within two radiation monitored occupational cohorts. Int J Radiation Biology* 98:786-794 [2022]).

Here as well there are material issues of fact regarding the effects of therapeutic radiation to plaintiff's mesothelioma in this case and requiring denial of a motion for summary judgment and direction to proceed to trial on these issues raised by the Defendant with respect to the Plaintiff's therapeutic radiation treatment and his mesothelioma diagnoses.

PUNITIVE DAMAGES

Ford also makes three distinct arguments regarding plaintiff's cause of action for punitive damages: (i) Plaintiff has not established his statutory right to sue for punitive damages under New York law; (ii) New York's punitive damages laws are vague and unconstitutional; and (iii) if punitive damages are to be considered New York's choice-of-laws requires this Court apply Michigan law which would not allow Plaintiff to recover such damages, even where he pursues his personal injury claims under New York law.

Regarding Ford's first argument, Ford argues that the information available to Ford at the time of plaintiff's alleged injury-causing exposure consistently showed for decades that even full-time automobile mechanics, where exposed, were exposed to chrysotile asbestos at levels well below the levels established by the federal government and other authoritative organizations. And here, plaintiff's exposure as a parts driver who would occasionally observe auto-mechanics work on brakes and clutched, was substantially less than that full-time auto mechanics.

Further, that it has consistently acted in good faith, following state and federal standards with regards to its asbestos-containing parts and products.

Plaintiff argues that Ford had known for decades prior to plaintiff's alleged exposure, that inhaled asbestos fibers could cause significant lung injuries, including lung cancer and mesothelioma. Arguably, Ford believed that it was acting within the bounds of Michigan and Federal laws and would therefore make its decisions to fix the problem or warn the public, solely based upon a cost benefit analysis. An example offered by plaintiff was Ford's apparent ability to utilize alternatives to asbestos-containing brake and clutch products acknowledging the toxic effects of inhaling airborne asbestos fibers. That in the 1970's, during plaintiff's alleged exposure, Ford had access to non-asbestos brake parts, but chose not to utilize these parts as the cost per auto to install non-asbestos front brakes was $1.25 and therefore cost prohibitive. Ford alleges had no other known solution but acknowledge that the parts manufacturers were looking to Ford for a solution.

One such toxic effect of inhaling brake dust from the Ford product was mesothelioma. Plaintiff here, alleges that his exposure to dust from Ford products caused his mesothelioma. Experts for Ford and plaintiff disagree on that claim. However, where the experts with the same fact pattern disagree, that becomes a question of fact for the trier of fact. See, Campo v. Neary, 52 A.D.3d 1194, 1198, 860 N.Y.S.2d 703 [4th Dept. 2008], "conflicting medical expert testimony 'rais[ing] issues of credibility for the jury to determine' "

Plaintiff also alleges a failure to warn citing, inter alia that in a May 18, 1973 memo several Ford supervisors and engineers were reporting on their departments' use of compressed air blow out during brake work in a "Brake Lining Dust Removal Survey." Their "General Conclusions" stated: All realized there is some degree of health ramifications involved. All agreed they could perform necessary brake maintenance without air blow-off method. They also confirmed that vacuuming brake dust "is the superior and proven method that is the safest." Ford never informed its mechanics, consumers, or the plaintiff that they should utilize a vacuum instead of compressed air when cleaning out (asbestos-containing) brake dust.

The threshold for establishing punitive damages in New York is "demanding," requiring the plaintiff to demonstrate that the defendant's conduct was "so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others and that the conduct demonstrates a high degree of moral culpability." *West v. Goodyear Tire & Rubber Co.*, 973 F.Supp. 385, 387 (S.D.N.Y.1997) (*quoting Rinaldo v. Mashayekhi*, 185 A.D.2d 435, 585 N.Y.S.2d 615 (App.Div.3d Dept.1992)); *see, also, Danis v. CSX Transportation, Inc.*, 2005 WL 2133604, at *2 (W.D.N.Y. Aug. 31.2005).

The purpose of a punitive damages award being to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future rather than to compensate the injured party. *See, Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 489, 836 N.Y.S.2d 509, 868 N.E.2d 189 (2007) (*citing Walker v. Sheldon*, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961)).

New York courts have used a variety of phrases to describe the "moral culpability" that will support punitive damages for nonintentional torts including: "utter recklessness;" "reckless and of a criminal nature, and clearly established;" "wanton or malicious, or gross and outrageous" or "a design to oppress and injure;" "conscious indifference to the effect of his acts;" action "committed recklessly or wantonly, i.e., without regard to the rights of the plaintiff, or of people in general." In summary, ... the recklessness that will give rise to punitive damages must be close to criminality and like criminal behavior, it must be clearly established.... [E]ven where there is gross negligence, punitive damages are awarded in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public. 973 F.Supp. at 387 (internal quotation marks, alterations and citations omitted). "[A] plaintiff seeking punitive damages in New York must prove the existence of these factors by a preponderance of the evidence." *Marcoux v. Farm Service and Supplies, Inc.*, 283 F.Supp.2d 901, 908 (S.D.N.Y.2003) (*citing Greenbaum v. Svenska Handelsbanken*, NY, 979 F.Supp. 973, 982–83 (S.D.N.Y.1997).

"[T]he determination whether to award punitive damages and in what amount those damages should be awarded generally rests within the sound discretion of the trier of fact...." *In re Eighth Judicial Dist. Asbestos Litigation*, 92 A.D.3d 1259, 938 N.Y.S.2d 715, 716 (App. Div. 4th Dep't 2012). In this case, plaintiffs have proffered evidence of conduct attributable to Ford giving rise to genuine issues of fact sufficient to require submission of the question of punitive damages to a jury.

In 1975, Ford possessed information concluding that there was "minimal, if any, effort to control dust in most garages" and there "was little awareness of the potential hazard of brake dust." Ford also knew that dealership mechanics did not rely on the service manuals Ford put out "in real life." Technical Service Bulletins are merely supplements to these manuals. Nonetheless, Ford never put any caution or warning of any kind on boxes of its replacement asbestos brakes or clutches until 1980. The word "cancer" never appeared on the boxes until 1987. Even after Ford provided diluted "warnings" on its products, the warnings were wholly insufficient and failed to apprise dealership workers like Mr. Skrzynski and his coworker Mr. French of the danger Ford's products involved. Ford's 1980 specification for its clutch warning, for example, provided for a 2.5" by 2.5" label in 8-point font that informed the user that "asbestos dust may cause serious bodily harm." No evidence has been provided that shows that Ford ever warned dealerships of the risk from merely handling new brakes and clutch boxes, or that merely opening boxes of asbestos parts can cause elevated exposure to asbestos.

In a motion for summary judgment to dismiss a cause of action, the moving party initially bears the burden of proving a prima facie entitlement to summary judgment on the cause of action or defense, by tendering evidence in admissible form eliminating any material issues of fact (*Zuckerman v City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; Friends of Animals v Associated Fur Mfrs., 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 [1979]).

If the moving party fails to meet the initial prima facie burden of proof, the court must deny the motion, without any need to even consider the opposition papers submitted by the adversary party (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320,

508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]).

If prima facie entitlement to summary judgment is shown by the moving party, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See, Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Summary judgment may only be granted in any proceeding when it has been clearly ascertained that there is no triable issue of fact outstanding, as "issue-finding, rather than issue-determination" is its function (*Ferrante v American Lung Ass'n.*, 90 N.Y.2d 623, 665 N.Y.S.3d 25, 687 N.E.2d 1308 [1997], *quoting Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a material fact. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978). Therefore, even if an issue of fact is debatable or arguable, a motion for summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

Considering just this evidence in the light most favorable to plaintiff, the court must reject defendant's contention that there is no valid line of reasoning or permissible inferences to be drawn from the available proof upon which a rational jury might conclude that Ford acted with "wanton and reckless" disregard for public safety by failing to replace its asbestos-containing products, relevant to this case, with non-asbestos products. Or further, after deciding to continue to utilize these products, plaintiff alleges that Ford failed to warn the consumer of its findings and continued to sell and use these asbestos-containing products. *Sweeney v. McCormick*, 159 A.D.2d 832, 552 N.Y.S.2d 707, 709 (App. Div.3d Dep't 1990) (act is considered "wanton and reckless" when done under circumstances showing "heedlessness and an utter disregard for the rights and safety of others."). Accordingly, defendants are not entitled to summary judgment dismissing plaintiffs' punitive damages claim from the case.

CONSTITUTIONALITY OF PUNITIVE DAMAGES

For years, New York jurors have considered and sometimes awarded punitive damages in asbestos litigation. Appellate court have reviewed these determinations and have yet to declare New Yok's punitive damages laws to be unconstitutional, regardless of whether it rejects or affirms a trial court's award of punitive damages. See, Matter of Eighth Judicial District Asbestos Litigation (Drabczyk), 92 AD3d 1259 (4th Dept), lv app den, 19 NY3d 803 (2012); Matter of New York City Asbestos Litig., 89 N.Y.2d 955, 956, 655 N.Y.S.2d 855, 678 N.E.2d 467, affg. 225 A.D.2d 414, 640 N.Y.S.2d 488; New York City Asbestos Litig., 225 A.D.2d at 415, 640 N.Y.S.2d 488.

In this present case, until relevant facts are established in the trial record, the court cannot adequately review whether a particular award of punitive damages violates New York's common-law principle that such awards be kept "within reasonable bounds considering the purpose to be achieved as well as the mala fides of the defendant in the particular case" (Faulk v. Aware, Inc., 19 A.D.2d 464, 472, 244 N.Y.S.2d 259, affd. 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778, cert. denied 380 U.S. 916, 85 S.Ct. 900, 13 L.Ed.2d 801; see also, Nellis v. Miller, 101 A.D.2d 1002, 1003, 477 N.Y.S.2d 72) or whether the aggregate amount of awards of punitive damages has exceeded the limits of due process (see, Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 280–282, cert. dismissed 497 U.S. 1057, 111 S.Ct. 27, 111 L.Ed.2d 840; Johnson v. Celotex Corp., 899 F.2d 1281, 1287–1288, cert. denied 498 U.S. 920, 111 S.Ct. 297, 112 L.Ed.2d 250).

CHOICE OF LAWS

Plaintiff commenced this tort action in New York seeking damages for injuries he alleges where sustained following his exposure to asbestos dust. Now and at the time of the alleged exposure, plaintiff was domiciled in New York.

Defendant Ford Motor Company's ("Ford") principal place of business is in Michigan and seeks dismissal of plaintiffs' claim for punitive damages.

As alleged by plaintiff, the tort theory on which Ford's liability is predicated is that it manufactured unsafe product(s), failed to warn of the risks and hazards

Ford knew to be inherent, then sold and distributed the asbestos-containing products, leading to plaintiff's injury-causing exposure.

Defendant Ford Motor Company's ("Ford") principal place of business is in Michigan and seeks dismissal of plaintiffs' claim for punitive damages, contending that Michigan's punitive damages statutes regulate this conduct, and thus does not apply in a tort dispute arising from plaintiff's exposure to its products that occurred in New York.

No other defendant has raised choice of law.

Because New York is the forum state, New York's choice of law principles governs the outcome of this matter. *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 620 N.Y.S.3d 310 (1994). In resolving a choice of law issue, New York employs the interest analysis doctrine which sought to affect the law of the jurisdiction having the greatest interest in resolving the particular issue. *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 929 N.Y.S.2d 41 (2011); *see, also, Butler v. Stagecoach Group*, PLC., 72 A.D.3d 1581, 900 N.Y.S.2d 541 (4th Dep't 2010). New York also distinguishes between "conduct regulating" laws and "loss allocating" laws. *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 595 N.Y.S.2d 919 (1993) Where conduct regulating laws are at issue such as here, the law of the jurisdiction where the "tort occurred" will generally apply because that jurisdiction has the greatest interest in regulating behavior within its orders. *See, Lankenau v. Boles*, 119 A.D.3d 1404, 990 N.Y.S.2d 394 (4th Dep't 2014).

In cases involving economic harm, New York law provides that ordinarily the tort occurs "where the plaintiff resides and sustains the economic impact of the loss." *Cantor Fitzgerald Inc. v. Lutnick*, 313 F.3d 704, 710 (2d Cir. 2002) (citation omitted); *see* *20 *Soward v. Deutsch Bank AG*, 814 F. Supp. 2d 272, 278 (S.D.N.Y. 2011), *affd*, 507 Fed. Appx. 71 (2d Cir. 2013); see also, e.g., *Matter of Smith Barney, Harris Upham & Co. v. Luckie*. 85 N.Y.2d 193, 207, 623 N.Y.S.2d 800, cert. denied, 516 U.S. 811 (1995); *Int'l Bhd. of Teamsters Loc. 456 Health & Welfare Tr. Fund v. Quest Diagnostics Inc.*, 2012 U.S. Dist. LEXIS 205511, at *12 (E.D.N.Y. Apr. 19, 2012).

New York's interest in governing Plaintiff's punitive damages claim remains clear, as the place of the allegedly wrongful conduct "generally has superior interests in protecting the reasonable expectations of the parties who relied on the laws of that place to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future." *Mary Doe*, 457 F.Supp.3d at 286, (*quoting AHW Inv. P'ship, MFS v. Citigroup, Inc.*, 661 F. App'x 2, 5 (2d Cir. 2016).

Additionally, "[C]onduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring" (*Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 522, 620 N.Y.S.2d 310, 644 N.E.2d 1001; *see, generally, Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 198, 491 N.Y.S.2d 90, 480 N.E.2d 679). "'If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders'" (*Padula*, 84 N.Y.2d at 522, 620 N.Y.S.2d 310, 644 N.E.2d 1001, *quoting Cooney v. Osgood Mach.*, 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 612 N.E.2d 277). Conversely, where the conflicting laws serve only to allocate losses between the parties, such as vicarious liability or comparative negligence rules, the jurisdiction where the tort **396 occurred has only a minimal interest in applying its own law (*see, Schultz*, 65 N.Y.2d at 198, 491 N.Y.S.2d 90, 480 N.E.2d 679; *Burnett v. Columbus McKinnon Corp.*, 69 A.D.3d 58, 60–62, 887 N.Y.S.2d 405).

New York law must apply because the alleged tort occurred in New York where the Plaintiff resided and sustained the physical and economic impact of the loss. Specifically, the Plaintiff was employed in and domiciled in New York State, the alleged exposure occurred in New York, to where Ford had its automobiles and parts delivered for New York consumers and mechanics. There are no allegations of Ford playing a role in or otherwise being involved in plaintiff's exposure other than the decision to provide to consumers in New York and other states, asbestos-containing parts in their automobiles and trucks. See, Hargrave v. Oki Nursery, Inc. 636 F.2d 897 (2d Cir. 1980) (New York law applied where economic injury was immediately felt in New York where plaintiffs were domiciled and doing business, where they were located and where the tort occurred).

The case of *Sondik v. Kimmel*, 131 A.D.3d 1041, 16 N.Y.S.3d 296 (2d Dep't 2015), similarly supports plaintiff's position. There, the plaintiff commenced an action in New York seeking to recover damages for the non-consensual use of a video clip of himself in California. On appeal, the plaintiff claimed that the court erred in determining that New York law governed. The Appellate Division disagreed. The Appellate Court found that although the alleged tortious conduct, the editing of the video clip, occurred in California, the plaintiff's alleged injury occurred in New York where he is domiciled and resided. The Court concluded that New York State is the state with the greater interest in protecting the plaintiff, its citizen and resident.

The same result is mandated at bar. Clearly, these injuries to Plaintiff took place in New York where the tort occurred and where Plaintiff lives and was employed, and this action must be governed by New York law.

PLAINTIFFS' CAUSES OF ACTION FOR BREACH OF IMPLIED AND EXPRESS WARRANTIES, VIOLATIONS OF NEW YORK LABOR LAW AND INDUSTRIAL CODE, AND LOSS OF CONSORTIUM

Plaintiffs do not oppose partial summary judgment being granted to defendant Ford Motor Company dismissing Plaintiffs' Second Cause of Action for breach of the implied/express warranties against Defendant, Ford Motor Company, and further do not oppose partial summary judgment granted to Defendant Ford Motor Company dismissing those portions of Plaintiffs' Fifth Cause of Action relating to alleged violations of the New York State Labor Law and Industrial Code and Plaintiffs do not oppose partial summary judgment be granted to defendant Ford Motor Company dismissing Plaintiff Deborah M. Skrzynski's loss of consortium claims against defendant, Ford Motor Company.

In accordance with this Decision, it is hereby:

ORDERED, that Ford Motor Company's motion for an order dismissing Plaintiffs' Second Cause of Action for breach of implied and express warranties is GRANTED, and it is further

ORDERED, that Ford Motor Company's motion for an order dismissing those portions of Plaintiffs' Fifth Cause of Action relating to alleged violations of the New York State Labor Law and Industrial Code is GRANTED, and it is further

ORDERED, that Ford Motor Company's motion for and order dismissing Plaintiffs' Sixth Cause of Action, Deborah M. Skrzynski's Cause of Action for Loss of Consortium is GRANTED, and it is further

ORDERED, the Defendant's Motion for an Order, pursuant to Civil Practice Law and Rules § 3212 for Summary Judgment dismissing the remaining Causes of Action of Joseph A. Skrzynski and all crossclaims against Ford Motor Company is DENIED.

Dated: 6 October 2022

Edward A Pace

Hon. Edward A. Pace, J.S.C.

APPENDIX TO DECISION AND ORDER

808086/2021

MOTION #006

NYSCEF DOC #	DOCUMENT TYPE
1	Summons & Complaint (Corrected)
29	Answer: Ford Motor Company
215	Notice of Motion #006: Ford
216	Affirmation in Support of Motion #006
217	Memorandum of Law in Support of Motion #006
218,219,220,221 222, 226, 229, 230 231, 232, 233, 234, 236	Exhibits A, B, C, D, E I, L, M, N, O, P, Q N, to Ford's Motion #006
277	Affirmation in Opposition: Plaintiff
284, 285, 286	Exhibits 12, 13, 14 to Plaintiffs' Affirmation in Opposition to Motion
424	Reply Affirmation
425	Memorandum of Law in Support of Reply