SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEORGE R. PECK
Supreme Court Justice

X TRIAL/IAS, PART 16
NASSAU COUNTY

VICTORIA PISTONE and PETER PISTONE, JR.,

Plaintiffs,

INDEX NO. 607637-15
MOTION SEQ. 008 & 010
MOTION SUBMIT
DATE 3-12-18

-against-

AMERICAN BILTRITE, INC. (Successor to DAVID CHASSLER, INC. a/k/a, CHASSLER TRADING CORPORATION; AMTICO INTERNATIONAL, INC.; APOLLO DISTRIBUTING COMPANY; BERGEN TILE DEPOT, INC. ind. and as sue. to BERGEN TILE CORP. OF LONG ISLAND; BERGEN TILE PAINT & LINOLEUM CORP.; CBS CORPORATION (a Delaware Corporation) f/k/a VIACOM, INC. (As successor-by-merger to CBS CORPORATION (a Pennsylvania Corporation) f/k/a WESTINGHOUSE ELECTRIC CORPORATION; CLASSIC TILE II, INC., a/k/a CLASSIC TILE, INC.; DAL-TILE CORPORATION ind. and as sue. to AMERICAN OLEAN TILE CO. FLOWSERVE CORP., ind. and as sue. to DURCO INTERNATIONAL, INC., DOMCO PRODUCTS TEXAS, L.P. ind. and as sue. to AZROCK INDUSTRIES, INC.; FOSTER WHEELER CORPORATION; GARDNER INDUSTRIES, INC.; GENERAL ELECTRIC COMPANY; GEORGIA-PACIFIC CORPORATION; HONEYWELL INTERNATIONAL INC. ind. and as sue. to (F/K/A ALLIED SIGNAL) AS SUCCESSOR IN INTEREST TO BENDIX CORPORATION; IMO INDUSTRIES, INC. ind.

and as sue. to DELAVAL TURBINE, TRANSAMERICA DELAVAL AND IMO DELAVAL;
J. J. HAINES & COMPANY, LLC (Successor to CMH SPACE FLOORING PRODUCTS, INC. Successor to BAYARD SALES CORPORATION);
MANNINGTON MILLS, INC.;
MARJAM SUPPLY CO., INC.;
SALESMASTER ASSOCIATES, INC.;
TARKETT, INC., ind. and as sue. to AZROCK INDUSTRIES;
UNION CARBIDE CORPORATION;
VIACOM, INC. AS SUCCESSOR BY MERGER TO CBS CORP. FKA WESTINGHOUSE ELECTRIC CORPORATION;
W.W. HENRY COMPANY;
CLASSIC TILE, INC.; GOODRICH CORPORATION ind. and as sue. to f/k/a the BF Goodrich Company Successor-in-Interest by merger with Colteck Industires, Inc. And Garlock, Inc.,

Defendants.

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SALES MASTER ASSOCIATES, INC.,

Third-Party Plaintiff,

-against-

MODEL CARPETS, INC.,

Third-Party Defendant.

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APOLLO DISTRIBUTING COMPANY,

Second Third-Party Plaintiff,

-against-

MODEL CARPETS, INC.,
REDCO GROUP, INC., and
BUILDEX, INC.,

Second Third-Party Defendants.
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PARK SLOPE HERITAGE DEVELOPMENT CORP.
F/K/A BERGEN TILE PAINT & LINOLEUM CORP.,

Third Third-Party Plaintiff,

-against-

MODEL CARPETS, INC.,
REDCO GROUP, INC. and
BUILDEX INC.,

Third Third-Party Defendants.
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These motions by the defendants Mannington Mills, Inc. (Motion Sequence No. 8), and American Biltrite, Inc. (Motion Sequence No. 10) for an order pursuant to CPLR§ 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them is determined as provided herein.

The plaintiffs in this action seek to recover, inter alia, damages for personal injuries that the plaintiff Victoria Pistone ("the plaintiff") allegedly sustained, more specifically, peritoneal mesothelioma, from her exposure to *chrysotile* asbestos fibers in products manufactured by, inter alia, Mannington Mills and American Biltrite. They allege, inter alia, that she was exposed to asbestos as the result of accompanying her father Rudolph Wesselhoft to work. They allege that she was exposed to asbestos when he cut vinyl sheet flooring manufactured by Mannington Mills

as well as tiles manufactured by American Biltrite at his jobs, as well as in her home when she allegedly inhaled airborne asbestos which he brought home on his clothing.

Defendants Mannington Mills and American Biltrite seek summary judgment dismissing the complaint against them. They maintain that in light of the Court's recent decision in *In re New York City Asbestos Litig.* ("*Juni*"), (148 AD3d 233 [1st Dept 2017]), they are entitled to dismissal of the complaint and concomitantly any cross-claims on the ground that the plaintiff cannot establish that her peritoneal mesothelioma was caused by their specific products. More specifically, they cannot establish general causation, i.e., that chrysotile asbestos fibers cause peritoneal mesothelioma nor can they establish specific causation, i.e., that she was exposed to sufficient levels of chrysotile asbestos fibers from their products to cause her disease.

The facts pertinent to the determinations of these motions are as follows:

The plaintiff was born on February 5, 1976. She testified at her examination-before-trial that her father Wesselhoft sold and installed tile, carpet and vinyl sheet flooring when she was a child. She specifically recalled him working at Crosslay's warehouse in Bayshore, NY where she regularly accompanied him on Saturdays. At that job, her father cut vinyl sheet flooring and carpets for installers and opened boxes of tiles and laid them out. The plaintiff did not know the brands her father used there and she did not recall helping him there. The plaintiff testified that she would be covered in dust when she got home, like her father.

Wesselhoft testified at his examination-before-trial that he worked at Redco/Crosslay Building Products which was owned by Buildex Inc. as warehouse manager from 1973 until 1980.

Wesselhoft testified that he brought his daughter, the plaintiff, to work with him there from February to August 1980, nearly every Saturday. He testified that on Saturdays, he cut carpet, sheet vinyl flooring and sometimes tile so that the orders would be ready for pick up by the installers on Monday mornings. His testimony regarding cutting tile was inconsistent. While at one point he testified that he cut tile for installation daily, he also testified that he only cut tile there sometimes, when the job was tight installation wise, so that the installers would only have to cut a smidgen when installing it. He testified that he cut the tiles either with a machine or manually with a tool with a file handle, scriber and needle to score it. If he didn't have the machine, he would measure the tile and then score it and snap it. It he had the machine, he would set the blade for six inches and chop the tile which was the only way to do it without shattering or cracking the tile. He recalled three brands of tile being at Crosslay; Kentile, Armstrong and Amtico, which was manufactured by American Biltrite.

He testified that the plaintiff helped him at the Crosslay warehouse by helping him cut vinyl sheet flooring, some off which was manufactured by Mannington Mills. He testified that the process of cutting flooring and tiles created a visible dust that was airborne and ultimately settled on the floor and had to be swept up and disposed of, which he testified would become airborne again. He testified that the plaintiff also routinely helped him out by sweeping the floor which had resultant asbestos debris on it with a broom. He testified that they would use the kind of broom that minimized the creation of airborne dust. He testified that all of the products used at Crossslay contained asbestos and that he believed that the plaintiff was exposed to asbestos from the bottom layer of the vinyl flooring.

Wesselhoft also testified that he also brought the plaintiff to approximately 10 side jobs from 1980 to 1982, during which time he was self-employed. At those jobs, he sometimes installed Mannington Mills' flooring. He specifically recalled removing Amtico asphalt tiles at least one site which he testified took about an hour and a half to two hours. He installed vinyl flooring in its place. He recalled using an ice chopper and a hammer to remove the Amtico tile and testified that the plaintiff swept up as the work progressed. In addition, while she did not help with the installation of the floors at those jobs, the plaintiff swept up when he was done. Wesselhoft testified that each job took approximately six hours during which time the plaintiff would be present with him. The plaintiff, however, did not recall visiting independent job sites with her father.

Wesselhoft testified that he began working at Model Carpet in September 1981 as a warehouse manager. He testified that he also cut flooring, carpet and tiles including Amtico's vinyl asbestos tiles there four to five times a day. He testified that he also brought the plaintiff there intermittently on Saturdays in 1981. Wesselhoft testified that the infant plaintiff assisted him by sweeping the floor at that job, too. He did not recall her being present when he cut tiles there however, the plaintiff recalled helping him cut flooring there sometimes. Wesselhoft could not remember what he cut when the plaintiff was present at Model Carpet.

The plaintiff testified that her father later worked at Model Carpet in Deer Park were he sold carpet, blinds, and vinyl sheet goods. The plaintiff testified that she also accompanied her father to that job on Saturdays and that she would help him out there by sweeping the warehouse floor. The plaintiff was unable to identify Amtico tiles as being present at either location.

The plaintiff also testified she customarily hugged and kissed her father when he returned from work and that he had "flaky things on him" which looked like "dandruff." She described it as "powdery, dusty...." She testified that she inhaled it when she was hugging him or was close to him. She analogized it to the dust at the warehouses. The plaintiff's father, Rudolph Wesselhoft, agreed that the plaintiff was exposed to asbestos as a child when she hugged him after work as well as when visiting him at work where he cut vinyl flooring and tiles which contained asbestos. The plaintiff also testified that at the age of nine or ten, she would help her mother with her father's laundry and that she was exposed to asbestos dust when she or her mother shook out her father's clothes. She estimated that that happened approximately 100 times a year for ten years.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). A party seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 923 [1993]). If the movant makes a prima facie showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hospital*, supra at 324). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' " (*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067–1068 [1979], quoting CPLR 3212, subd. [b]). "On a

motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

"In order to establish entitlement to judgment as a matter of law, defendants [bear] the initial burden of demonstrating that their respective products 'could not have contributed to the causation' of [the plaintiff's] asbestos-related injuries (*O'Connor v AERCO Intern., Inc.*, 152 AD3d 841, 842–43 [3d Dept 2017], quoting *Matter of New York City Asbestos Litig.*, 116 AD3d 545, 545 [1st Dept 2014]; citing *Matter of New York City Asbestos Litig.*, 216 AD2d 79, 80 [1st Dept 1995]). "'Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). "[A] defendant cannot satisfy this burden by merely pointing to gaps in a plaintiff's proof" (*O'Connor v AERCO Intern., Inc.*, 152 AD3d at 843; citing *Overocker v Madigan*, 113 AD3d 924, 925 [3d Dept 2014]; *DiBartolomeo v St. Peter's Hosp. of the City of Albany*, 73 AD3d 1326, 1327 [3d Dept 2010]; *Dow v Schenectady County Dept. of Social Servs.*, 46 AD3d 1084, 1084 [3d Dept 2007]; *Johnson City Cent. School Dist. v Fidelity & Deposit Co. of Md.*, 272 AD2d 818, 821 [3d Dept 2000]). "Stated another way, a defendant cannot prevail on a motion for summary judgment merely by correctly arguing that the record before a court on the motion would be one which, *if presented at trial*, 'would fail to [satisfy a plaintiff's] burden of proof and the court would be required to direct a verdict for defendant[ ] (emphasis added)' " (*O'Connor v AERCO Intern., Inc.*, 152 AD3d at 843, quoting *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 35 [2011] [Smith, J., concurring]). "Accordingly, plaintiffs' burden to establish a material issue of fact as to 'facts and conditions from

which [defendants'] liability may reasonably be inferred' is only triggered in the event that a moving defendant made the aforementioned prima facie showing" (*O'Connor v AERCO Intern., Inc.*, 152 AD3d at 843, quoting *Matter of New York City Asbestos Litig.*, 216 AD2d at 80; citing *Scheidel v A.C. & S., Inc.*, 258 AD2d 751, 754 [3d Dept 1999], lv denied 93 NY2d 809 [1999]). However, once a defendant meets his burden, the plaintiff must produce evidence which establishes the existence of material issues of fact concerning his or her exposure to asbestos from the moving defendant's product(s) as well as evidence that the exposure had the potential to cause mesothelioma, whether by direct evidence or studies ("*Juni*", 148 AD3d at 236; *Sean R. v BMW of N. Am., LLC,* 26 NY3d 801, 809 [2016]; *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784 [2014], rearg denied 22 NY3d 996 [2014]; *Parker v Mobil Oil Corp.*, 7 NY3d 434, 449 [2006], rearg denied 8 NY3d 828 [2007]).

"[T]he fact that asbestos, or chrysolite, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin *from the defendant's products* to have caused his disease (emphasis added)." (*In re New York City Asbestos Litig.*, 148 AD3d at 233, citing *Sean R. v BMW of N. Am., LLC,* 26 NY3d at 809; see also, *Bagley v Adel Wiggins Group*, 327 Conn 89, 171 A3d 432 [2017]; *In re R.O.C.*, 131 SW3d 129 [Tex App 2004]; *DiSantis v Abex Corp.*, 1989 WL 150548 [ED Pa 1989], affd sub nom. *Abex Corp. v Allied Corp.*, 908 F2d 961 [3d Cir 1990], affd 908 F2d 962 [3d Cir 1990]). "The circumstantial evidence of identity of the manufacturer of a defective product causing personal injury must establish that it is reasonably

probable, not merely possible or evenly balanced, that the defendant was the source of the offending product" (*Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601–02 [1996]). Furthermore, "the standards set by *Parker* and *Cornell* require that a plaintiff claiming that a defendant is liable for causing his or her mesothelioma must still establish some scientific basis for a finding of causation attributable to the particular defendant's product" (*Juni*, 148 AD3d at 239). Indeed, "a judgment in an asbestos case ... based solely on a bare conclusion that because the plaintiff worked with the defendant's asbestos-containing products, those products were a contributing cause of the plaintiff's mesothelioma" cannot stand because the "mere presence of visible dust [is not] considered sufficient alone to prove causation" (*Juni*, 148 AD3d at 238-239, citing *Lustenring v AC&S, Inc.*, 13 AD3d 69 [1st Dept 2004], lv denied 4 NY3d 708 [2005]; *Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011]; *Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [1st Dept 2006]). "Even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies" adequately similar to the plaintiff's scenario (*Juni*, 148 AD3d at 236, citing *Parker v Mobil Oil Corp.*, 7 NY3d at 449). Furthermore, when relying on an assertion that even a single exposure to asbestos can be treated as contributing to causing an asbestos-related disease, the plaintiff's experts must identify a basis for that conclusion. "Moreover, reliance on the theory of cumulative exposure...is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to

be found a contributing cause of the disease" (*Juni,* 148 AD3d at 239, citing *Parker v Mobil Oil Corp.*, 7 NY3d at 449).

"In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation) (*Sean R. v BMW of N. Am., LLC,* 26 NY3d at 808-809, citing *Parker v Mobil Oil Corp.*, 7 NY3d at 448). "Although it is 'not always necessary for a plaintiff to quantify exposure levels precisely', we have never 'dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect' " (*Sean R. v BMW of N. Am., LLC,* 26 NY3d at 808-809, quoting *Parker v Mobil Oil Corp.*, 7 NY3d at 448 and *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d at 784). " 'At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' " (*Sean R. v BMW of N. Am., LLC,* 26 NY3d at 808-809, quoting *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784 quoting *Wright v Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir 1996]).

"[W]hile precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining to the plaintiff's exposure are beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert's opinion on causation" (*Parker v Mobil Oil Corp.*, 7 NY3d at 448, citing *Westberry v Gislaved Gummi* AB, 178 F3d 257, 264 [4th

Cir 1999]; see also *Heller v Shaw Indus., Inc.*, 167 F3d 146, 157 [3d Cir 1999]; *Hardyman v Norfolk & W. Ry. Co.*, 243 F3d 255, 265-266 [6th Cir 2001]). "Some cases requiring an expert to establish the dosage at which a substance is toxic and the amount of exposure a plaintiff actually experienced also appear to recognize that an exact number may not be necessary" (*Parker v Mobil Oil Corp.*, 7 NY3d at 448-49, citing *Wright v Willamette Indus., Inc.*, 91 F3d at 1107 ["We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains"]; *McClain v. Metabolife Intl., Inc.*, 401 F3d 1233, 1241 [11th Cir.2005], rehearing and rehearing en banc denied, 159 Fed Appx 183 [11th Cir 2005]). While "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, ...whatever methods an expert uses to establish causation [must be] generally accepted in the scientific community" (*Parker v Mobil Oil Corp.*, 7 NY3d at 448). As the Court stated in *Parker v Mobil Oil Corp.*, 7 NY3d at 449:

> "There could be several other ways an expert might demonstrate causation. For instance, ... the intensity of exposure to [the toxin] may be more important than a cumulative dose for determining the risk of developing [the disease]. Moreover, exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin. It is also possible that more qualitative means could be used to express a plaintiff's exposure. Comparison to the exposure levels of subjects of other studies could be helpful *provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects.* These, along with others, could be potentially acceptable ways to demonstrate causation if they were found to be generally accepted as reliable in the scientific community (emphasis added).

Again, a judgment in an asbestos case based solely on a bare conclusion that because the

plaintiff worked with the defendant's asbestos-containing products, those products were a contributing cause of the plaintiff's mesothelioma may not stand. *In re New York City Asbestos Litig.*, 148 AD3d at 238). "Where the courts rel[y] on evidence linking visible dust to the use of the particular defendant's product, expert testimony [must] establish[] that the extent and quantity of the dust to which the plaintiffs had been exposed contained enough asbestos to cause the mesothelioma. [T]he mere presence of visible dust [is not] considered sufficient alone to prove causation" (In *re New York City Asbestos Litig.*, 148 AD3d at 239).

Mannington Mills and American Biltrite maintain, inter alia, that there is no evidence that the asbestos fibers contained in their products, more specifically, chrysotile asbestos fibers, cause peritoneal mesothelioma or that the plaintiff was exposed to sufficient levels of them from their products which is known to cause peritoneal mesothelioma.

In support of its motion, Mannington Mills has submitted the affidavits of a former Certified Industrial Hygienist and now Senior Consultant with Durham Technical Services Mark F. Durham and Board Certified Internist and Pulmonologist, Allan Feingold, M.D.

Having reviewed the pertinent legal documents, Durham affords the plaintiff the benefits of all relevant facts and opines that assuming that she performed work with Mannington Mills sheet flooring from infancy to the age of 6, her eight hour time Weighted Average exposure to asbestos from those products, if any, would be far less than 0.1 fibers per cubic centimeter ("f/cc") of air, which he opines is at or below the limit of detection of the optical microscopy method used to measure airborne concentrations of asbestos. He opines that such a low level of airborne asbestos

would have been a negligible contribution to a lifetime exposure to asbestos. Durham also opines that cutting vinyl sheet flooring that contained asbestos in the back would not have released respirable particulate that contained asbestos which could have been breathed by the plaintiff either at the warehouse or at home. He explains that Mannington Mills' flooring products were non-friable, smooth-surfaced flexible material that could be rolled, handled and cut without damaging the integrity of the layered components and causing the release of asbestos. Thus, the amount of asbestos fibers contained in the products is not an accurate reflection of the amount *that would be released* during a particular task. Different products release different levels of asbestos fibers depending on whether the product has been encapsulated with a bonding agent, which Mannington vinyl flooring was.

Dr. Feingold notes that the medical literature does not include a single instance where peritoneal mesothelioma was contracted by a worker exposed to only chrysotile asbestos. Similarly, he opines that peer review literature does not contain any evidence of a cause and effect relationship between low dose direct or second hand exposure to chrysotile asbestos and the development of mesothelioma. He explains that it is generally accepted that peritoneal mesothelioma is associated only with heavy exposure to amosite and crocidolite asbestos. Even long term follow up of autopsy reports of miners who were heavily exposed to chrysotile asbestos did not reveal a single episode of peritoneal mesothelioma. Feingold opines that since the use of encapsulated chrysotile-containing flooring is associated with the airborne release of chrysotile dust that is within the current PEL exposure (OSHA Permissible Exposure Limits) of 0.1 f/cc, that concentration would neither

significantly increase a person's overall asbestos burden nor increase the risk of malignant mesothelioma. Dr. Feingold opines that the plaintiff suffers from spontaneous malignant epithelioid peritoneal mesothelioma and that there is no evidence that the disease was caused by asbestos exposure. Via its experts' affidavits, Mannington Mills has established both that its product was not the general or specific cause of the plaintiff's peritoneal mesothelioma. The burden accordingly shifts to her to establish the existence of material issues of fact.

In support of its motion, American Biltrite has submitted the affidavits of Certified Industrial Hygienist John W. Spencer and Dr. James Crapo.

Spencer has explained that:

> Non-friable materials are encapsulated products, with asbestos fibers bound into a matrix material, a process that significantly reduced or eliminates the potential for release of fibers when damaged or disturbed.....The sale of non-friable asbestos-containing products in U.S. commerce remains permissible to this day.

He also explains that the American Conference of Governmental Industrial Hygienists have set Threshold Limit Values (TLV) and OSHA Permissible Exposure Limits (PEL) for the United States. The limit for TLV and PEL is 0.1 f/cc. Spencer notes that American Biltrite manufactured both non-asbestos flooring from 1961 to 1985, as well as resin-based vinyl floor tile which contains chrysotile asbestos as a minority ingredient (13 % to 18 %). That product was non-friable; the asbestos fibers were bound into a matrix material that eliminated or significantly reduced the potential for release. Thus, he notes that it is not even clear whether the plaintiff ever inhaled asbestos fibers from American Biltrite's products.

Based upon the plaintiff and Wesselhoft's testimony of the exposure at their examinations-

before-trial, assuming the maximum estimated time and frequency of use of Amtico tiles and accounting for every manner in which Wesselhoft used the product, and assuming all Amtico tiles used by him contained asbestos, Spencer estimates that the plaintiff's exposure to chrysotile asbestos at a cumulative dose of less than .0000297 f/cc-yr, an amount well below the OSHA PEL as well as urban ambient levels of airborne asbestos. Spencer opines that that is indistinguishable from most lifetime cumulative exposures to ambient asbestos, well below a working lifetime at the Occupational Safety and Health Administration and World Health Organization permissible exposure limits and well below lifetime cumulative exposure at the USEPA clearance limit.

With regards to the plaintiff's alleged take home exposure to asbestos from American Biltrite's products, Spencer cites a study which evaluated take home exposure and the risk associated with the handling of asbestos contaminated clothing. That study demonstrated that airborne concentrations for the clothes handler were 0.2-1.4 % of the daily Total Weighted Average or approximately 1.0 % of the worker's workplace concentrations. Spencer calculated Wesselhoft's exposure cutting Amtico's tiles to less than 0.00022 f/cc, resulting in the likely take home to be at a range of 00000022 f/cc. Therefore, any potential secondary exposures the plaintiff suffered from is also comparable to ambient concentrations.

Spencer concluded that assuming, arguendo, that the plaintiff was exposed to American Biltrite's tiles as alleged and that the product in fact contained asbestos, she would not have been exposed to asbestos above historical or today's occupational health standards and guidelines. Since the product is non-friable, exposure to airborne asbestos fibers from these products would have been

negligible and would not be considered by OSHA or the EPA to present a significant health risk.

Dr. Crapo opines that at most, the plaintiff was exposed to a negligible amount of chrysotile fibers, if any, from Amtico's tiles which played no part in her disease. He explains that "[i]n women most mesothelioma are idiopathic or unrelated to asbestos exposure" and the peritoneal mesothelioma in women has not been shown to have a significant relationship with occupational asbestos. It primarily occurs as a spontaneous malignancy, unrelated to asbestos exposure. He also explains that

> "[i]n contrast to amphibole forms of asbestos, chrysotile asbestos is not a cause for human peritoneal mesothelioma. Products that contain chrysotile in an encapsulated from and which have a low fiber release, such as floor tiles, would not create risk for developing peritoneal mesothelioma."

Dr. Crapo accordingly concludes that possible exposure to American Biltrite's tiles would not contribute to the risk of developing peritoneal mesothelioma.

Via its experts, American Biltrite has also has established both that its product was not the general or specific cause of the plaintiff's peritoneal mesothelioma. The burden accordingly shifts to her to establish the existence of material issues of fact. In opposition to both of the defendants' motions, the plaintiff has submitted the new report of Certified Industrial Hygienist, Steven Paskal, (which is not in admissible form), a Report by Dr. Josephine Moline (which is not in admissible form) and an affirmation by Board Certified Pathologist Dr. David Y. Zhang.

Initially, the court rejects the plaintiffs' theory that the standard set forth in, inter alia, *Lustenring v AC&S, Inc.* (13 AD3d 69 [1st Dept 2004], lv denied 4 NY3d 708 [2005]) applies and imposes a lesser burden than the court imposed in *Juni*. The court in *Juni* in fact held "[w]e agree

with the trial court that the standards enunciated by *Parker* and *Cornell* are applicable here, that they are not altered by *Lustenring v AC&S, Inc.* or other asbestos cases...." (*Juni*, 148 AD3d at 236). Again, the court stated:

> Although it is not always necessary for a plaintiff to quantify exposure levels precisely' (id.), we have never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect. At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" (*Juni*, 148 AD3d at 236, quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]; *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784 [2014]; *Wright v Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir 1996])" (26 NY3d at 808-809).

The court explained that "[w]here the courts relied on evidence linking visible dust to the use of the particular defendant's product, expert testimony established that the extent and quantity of the dust to which the plaintiffs had been exposed contained enough asbestos to cause the mesothelioma. In none of those case was the mere presence of visible dust considered sufficient alone to prove causation" (*Juni,* 148 AD3d at 239).

The cases relied upon by the plaintiff are all distinguishable. In In *re New York City Abestos Litig.* (154 AD3d 441 [1st Dept 2017], lv to appeal denied sub nom. *Miller v BMW of N. AM., LLC*, 30 NY3d 909 [2018], and lv to appeal denied sub nom. *Matter of New York City Asbestos Litig.*, 30 NY3d 909 [2018]), the plaintiff's expert performed a dose reconstruction using the defendant's product to illustrate the amount of f/cc's produced. In *Nemeth v Whittaker Clark & Daniels* (Short Form Order dated May 30, 2017, Sup Ct New York County index No. 190/138/14), while the court permitted Dr. Moline to testify re talc testing by Sean Fitzgerald whereby he measured the specific

amount of asbestos released from the cosmetic talc at issue, he specifically noted that that was an "outlier" as it was not an asbestos-containing product case.

The plaintiff has failed to establish general causation, i.e., that chrysotile asbestos causes peritoneal mesothelioma, let alone specific causation, *i.e.*, that vinyl floor sheets and/or tiles, more specifically, that vinyl floor sheets or tiles manufactured by either Mannington Mills or American Biltrite contained sufficient amounts of chrysotile asbestos to cause peritoneal mesothelioma. Neither Paskal nor Dr. Moline have opined that chrysotile abestos can cause peritoneal mesothelioma. They rely on Dr. Zhang. While Dr. Zhang has opined that chrysotile causes the disease and that the defendants' products contained and produced enough to cause the plaintiff's disease, he has failed to support that conclusion with any scientifically acceptable evidence (see infra).

Paskal opines that the plaintiff contracted peritoneal mesothelioma based upon her exposure to asbestos. He acknowledges that "[t]he exposure levels experienced by family contacts of asbestos-exposed persons *have never* been directly measured." However, he cites a study of the daughters of shipyard workers who were exposed to asbestos which showed that two percent of their daughters with 20 or more years of secondary exposure experienced *indicia* of asbestosis. Suffice it to say, that is not a similar group worthy of comparison here and indicia of asbestosis is not peritoneal mesothelioma. Citing a separate epidemiological study that investigated compensable asbestosis as a function of long-term cumulative exposure, it was determined that asbestos rates of 1-10 % corresponded to cumulative exposure of 10-20 fiber/cc years. He then combines the data

from these two unrelated studies, and estimates that the average day long exposure of a daughter of an asbestos-exposed shipyard worker was on the order of 0.1-1 f/cc Total Weighted Average and goes on to conclude that "[m]onitoring of the fiber levels associated with just the task of laundering asbestos-contaminated clothes, corroborates this association." These corollaries however have not been explained and standing alone, are not rational. In any event, at the time that the plaintiff began helping with her father's laundry, Mannington Mills' and American Biltrite's products did not contain asbestos. More importantly, defendants have established that dust observed on clothing from work sites is not indicative of a significant exposure to asbestos and Paksal has not cited acceptable data to the contrary.

Paskel also opines that the plaintiff "forays" when she accompanied her father to freelance jobs "including a couple that involved scraping off of old sheet flooring that virtually certainly contained asbestos...would have spanned the orders 0.01-1+ fibers /cc of asbestos." Per the testimony of Wesselhoft, the only product that has been identified as having been removed while the plaintiff was present and therefore exposed to was made by American Biltrite at ONE free lance job. However, there is no evidence that that sufficed to exposed her to an amount of chrysotile asbestos which is known to cause mesothelioma, even in combination with other unknown amounts from American Biltrite's products.

Paskal's reliance on Resilient Floor Coverings Institute's ("RFCI") air monitoring tests is also misplaced. Those reports reflect the asbestos fibers in the air from sheet flooring installation of Flintkote Floor Tile. Test Cite # 1 revealed between .0001 and .0155 asbestos fibers/cc in eight

hours (Time Weighted Average) following a floor installation. And, again, it was not the defendants' products. The second study at which a vinyl floor was installed revealed 0.1 fibers/cc in eight hours (Time Weighted Average) following a floor installation. Neither of those studies support Paskal's conclusion that there was .01 to 1.0 asbestos fibers/cc in eight hours (Time Weighted Average) following a floor installation of the defendants' products. And again since with very limited exception, the infant's possible exposure to asbestos fibers has not been shown to have occurred during floor removals, the other studies relied upon by the RFCI are not applicable. In any event, that study concluded that "[t]he results of th[o]se tests show that when the recommended procedures for removal and installation of asbestos backed sheet vinyl floor covering are followed, the exposure to airborne asbestos fibers is substantially below the allowed OSHA limit."

Paskal then concludes that as a result of the activities described, the plaintiff "would have repeatedly incurred asbestos exposures that ranged from hundreds to millions of times greater than (and in addition to) ambient pollution levels in even the most polluted areas. Each of these exposures substantially increased her risk of contracting mesothelial cancer." Paskal however also acknowledges that he needs more information like the amount of time that the plaintiff was exposed to the defendants' products in order to make his calculation (fn 3) and suggests the he may do so at trial when "provided exposure times in hypothetical questions [which he] will then translate ...into cumulative exposure estimates." Paskal's answers to "hypothetical" questions at trial will not produce the evidence needed here to establish that the plaintiff was exposed to sufficient amount of chrysotile asbestos which is known to cause peritoneal mesothelioma. Moreover, he allegedly

reviewed the transcripts of the plaintiff's and Wesselhoft's examinations-before-trial from which he could have extracted approximate time figures to enable the calculations. Paskal also opines that warning should have been provided on the products.

Paskel also cites a letter from New Jersey Manufacturers' Insurance Company to Mannington Mills in which it is noted that "an appreciable quantity of [asbestos-containing] dust from the trimming on the floor around the knife and on the floor runner after the cutting wheel." He also notes an internal 1980 letter which noted cutting related exposures in the "sample room" at the Mannington Mills factory on the order of .01-.1 fibers/cc. There is no basis for concluding that the plainitff's exposure would match the exposure found in Mannington's factories, therefore, Paskal's reliance on a Mannington Mills letter report is rejected. More importantly, dust does not equate with mesothelioma causing fibers. As for samples taken from Mannington's manufacturing cites, Paskal does not equate them to the exposure the infant plaintiff suffered from either so those studies are irrelevant here. And, Paskal has admitted that he has never observed any measurements of asbestos fiber /cc for sweeping of residue resuting from cutting or scoring vinyl flooring. Rather, he has relied on sweeping asbestos-containing debris in general, without regard to the source of the debris, which hardly aids the plaintiff in satisfying her burden here.

As for the physical contact between the plaintiff and her father, while they allege she did his laundry for ten years beginning at the age of approximately nine, when the plaintiff turned nine years old, defendants' products no longer contained asbestos.

Suffice to say, the plaintiffs have clearly not met their burden via the opinion of Paskal. He

has provided no evidence that either of the defendants' products contained sufficient amounts of asbestos to cause peritoneal mesothelioma. Nor has he demonstrated that the plaintiff was subjected to adequate amounts of asbestos from either of the defendant's products to cause her disease.

In the most general terms, Dr. Moline opines that asbestos is a common cause of cancer. She refers to "numerous studies" that show that household exposure to asbestos from family members who worked with asbestos can lead to an increased risk of mesothelioma of their family members. No reports are cited, let alone generally scientifically accepted ones. Dr. Moline opines that the plaintiff's exposure to asbestos at her father's work sites and to his clothing at home can cumulatively lead to an increased risk of mesothelioma, without regard to the product, fiber type or the capability of a specific fiber to cause the disease. Since Dr. Moline relies on Mr. Zhang's calculations of asbestos fiber count which this court has rejected (see infra), her conclusions are also inadmissible.

Suffice to say, the plaintiffs have clearly not met their burden via the opinion of Dr. Moline, either. She has provided no evidence that either of the defendants' products contained asbestos which causes peritoneal mesothelioma nor has she demonstrated that the plaintiff was subjected to adequate amounts of mesothelioma causing asbestos from either of the defendant's products to cause her disease.

The plaintiff has also submitted an affidavit by Dr. Zhang. While he opines that chrysotile asbestos causes peritoneal mesothelioma, he has not provided any proper support for that conclusion. The five articles he cites bear no relationship to the facts here, which is required. His studies involve

exposure to amphibole fibers including exposure in large cement factories and several shipyards and mines, circumstances which all include exposure to amphibole asbestos and sometimes other mesothelioma causing agents, with no differentiation regarding possible exposure to chrysotile asbestos.

Zhang also relies on a 2016 Epidemiology study by Kanarek which this court finds does not meet the standards required for the court to consider it here. It is not a direct study which illustrates the relationship between chrysotile asbestos and peritoneal mesothelioma. Furthermore, while Kanarek opines that "current evidence supports the view that chrysotile itself can cause malignant mesothelioma," that statement actually refers to pleural *as opposed to* peritoneal mesothelioma. The publication he cites, *Pathology Asbestos-Associated Diseases* (2014), by Dr. Victor Roggli, actually states that "[p]eritoneal mesothelioma follows exposure to commercial amphibole fibers (amosite or crocidolite), but have not convincingly been related to exposure to chrysotile asbestos...."

Dr. Zhang also relies on a report of "Airborne fiber concentrations measured during the installation of vinyl-asbestos floor tile and sheet vinyl flooring backed with asbestos floor felt" which approached 1.0 f/cc as determined by PMC. However, that report reflects the total amount of all fibers and more importantly, specifically states that "actual asbestos fiber concentrations were not determined." That Report accordingly cannot be relied on to establish the amount of asbestos fibers that are emitted from the installation of vinyl flooring.

Dr. Zhang concedes that there is no scientific evidence which establishes that a known level of asbestos exposure is known to cause peritoneal mesothelioma. Even if there was, that establishes

only general association, not proximate cause. Again, the issue is whether and what quantity of chrysotile asbestos contained within defendants' products --that the plaintiff has been exposed to-- has been known to cause mesothelioma. *Juri,* supra. Dr. Zhang opines that plaintiff's exposure to the asbestos increased her risk of mesothelioma and then goes on to conclude that it caused it. While Dr. Zhang notes that it has not been determined that any dose no matter how low is safe, he cannot from that conclude that any amount can therefore be considered *causative*: There is no evidence to support that quantum leap and he has not offered any scientific basis for such a conclusion. Curiously, he would not similarly opine that all background asbestos can cause mesothelioma.

Dr. Zhang's reliance on a German study conducted in 2001 of 125 male cases of mesothelioma in which it is concluded that "dose-response relationships exists even at levels of cumulative exposure below 1 fiber year," including levels below .15 fibers/cc is also rejected. That Report indicates that the numbers were subject to be "influenced by information bias, exposure assessment bias and random error." In addition, it is not a study of chrysotile fiber but rather represents a potential risk for mesothelioma at lower dose exposures to amphibole asbestos fibers. It accordingly does not support the conclusion reached for here.

In Reply, American Biltrite's expert Dr. Crapo explains that the "Hill criteria" applies to establish that a particular product causes a disease. To establish causation, there must be a strong association, consistency of showing effect in multiple studies, showing a biologic gradient where higher doses causes increased disease frequency, a plausible biological mechanism and experimental evidence in animals showing the postulated effect. He opines that "[t]aking into consideration all

available cohort and case control studies of workers with chrysotile only exposure, the strength of association of peritoneal mesothelioma with chrysotile is zero." He offers detailed discussions of these studies which clearly support his conclusion. More specifically, he cites the biologic gradient study which shows a zero association between chrysotile asbestos and peritoneal mesothelioma as compared to a clear dose/response relationship between exposure to amphibole asbestos fibers and peritoneal mesothelioma. With respect to consistency, he notes that there is no association between chrysotile asbestos and peritoneal mesothelioma *under a variety of circumstances,* compared to a strong consistency between amphibole asbestos fibers and peritoneal mesothelioma *under a variety of circumstances*. And, he cites the biologic plausibility which shows that the fibers of chrysotile asbestos are not durable and therefore cannot remain in the peritoneum for long periods of time in contrast to amphibole asbestos fibers which have long half lives for clearance from the human body as they are not readily broken down which results in their accumulation in the peritoneum. Accordingly, it is in fact plausible that amphibole asbestos fibers are a cause of human peritoneal asbestos. He notes that the fact that chrysotile asbestos fibers can induce peritoneal mesothelioma in animals *when injected into the peritoneum* does not equate with them causing that disease when inhaled since the manner in which the fiber is deposited varies. In fact, animal inhalation studies of chrysotile asbestos fibers have consistently failed to demonstrate peritoneal mesothelioma. Multiple animal inhalation studies have demonstrated that the inhalation of chrysotile asbestos fibers have failed to show a relationship to peritoneal or pleural mesothelioma. In conclusion, citing 173 epidemiological studies, reports, publications, opinions, etc. Dr. Crapo opines that:

> "the weight of evidence from animal evidence demonstrates: 1) that peritoneal mesothelioma is not caused by inhalation exposure to chrysotile; and 2) that increased risk for peritoneal mesothelioma requires the deposition of large numbers of long amphibole fibers in the peritoneum."

Succinctly stated, he opines that there is no link between exposure to chrysotile asbestos and peritoneal mesothelioma.

The plaintiff has not identified any generally accepted scientific opinion or scientific data that demonstrates that chrysotile asbestos can cause peritoneal mesothelioma. Were this not enough, there is no evidence to support a conclusion that chrysotile asbestos that emanates from floor tiles or vinyl sheet flooring can cause the disease, either. There are no epidemiological studies to support such a conclusion. Nor are there measurements of chrysotile asbestos fibers contained in flooring products which can be compared to comparable bonafide studies, either.

A step further, the plaintiff has offered no evidence to support a conclusion that these defendants' products themselves played an operative role in the development of her disease. There is not a shred of evidence to support a conclusion that the moving defendants' products contained adequate amounts of chrysotile asbestos to cause peritoneal mesothelioma. No mathematical modeling has been offered to give an estimate or precise quantity of chrysotile asbestos exposure the plaintiff might have been exposed to from Mannington Mills' or American Biltrite's vinyl flooring or tiles. There has not been any comparison between the approximate exposure the plaintiff suffered to other parties' exposure to the chrysotile fibers. The strategy usually employed by industrial hygienists consists of assembling workers believed to have similar exposures into groups which have the same general exposure characteristics because of the similarity and frequency of the

tasks they perform and the material and processes they work with. That process has not been employed here.

In fact, none of the studies relied upon by the plaintiff's experts constitute generally accepted studies consisting of scientific data which establishes that it is commonly or generally accepted that chrysotile asbestos causes peritoneal mesothelioma, let alone chrysotile asbestos emanating from the defendants' products. See, *Parker v Mobil Oil Corp.*, 7 NY3d at 449-450 (the relationship between benzene and the risk of AML is not disputed, but the issue here is the relationship between gasoline that contains benzene and AML). The relationship between vinyl flooring and tiles and peritoneal mesothelioma has at best been shown to represent a possible association between the two, no more.

Similarly, the plaintiff has not established that she was exposed to amounts of chrysotile asbestos from the moving defendants' products to cause peritoneal mesothelioma. The studies her expert relies on are not comparable to her circumstances. There is insufficient scientific evidence that that as a result of her exposure to the defendants' products, the plaintiff was exposed to an asbestos that has been found to cause peritoneal mesothelioma nor is there scientific evidence which establishes that she was subjected to a sufficient amount of such an asbestos to be caused to suffer from that disease.

In conclusion, there is no evidence that chrysotile asbestos causes peritoneal mesothelioma nor is there evidence that the plaintiff was exposed to amounts of chrysotile asbestos from Mannington Mills or American Biltrite's products sufficient to have caused her disease. .

The defendants Mannington Mills and American Biltrite's motions for summary judgment

dismissing the complaint and any and all cross-claims against them are granted.

This shall constitute the decision and order of this court. All matters not specifically addressed are herein denied.

Dated: April 18, 2018
Mineola, New York

Enter:

HONORABLE GEORGE R. PECK, J. S.C.

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