SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

ANN ZOAS and CHRISTOS ZOAS,

Plaintiffs,

- against -

BASF CATALYSTS, LLC, *et al.*,

Defendants.

INDEX NO. 190162/2017

MOTION DATE 11/14/2018

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Johnson & Johnson and Johnson & Johnson Consumer Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5, 6 - 7
Replying Affidavits	8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Amended Complaint, is denied.

Plaintiff, Anna Zoas, was diagnosed with pleural mesothelioma on or about March 17, 2017. At the time of her diagnosis she was 76 years old. She alleges that she has no known asbestos exposure except from the use of talcum powder products. Her exposure - as relevant to this motion - is allegedly from the use of Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson & Johnson Baby Powder ("JJBP"). Mrs. Zoas alleges that she used the defendants' product daily from 1945 to 1948. From 1948 to 1956 she used it regularly about 80% of the time. She used JJBP regularly from 1949 until about January of 2017. Mrs. Zoas also claims she used JJBP on each of her four children until they were about six years old and regularly on her grandson.

At her deposition Mrs. Zoas testified that she recalled her mother used JJBP on her starting when she was five years old, after her daily bath or sponge bath, and an additional one or two times a day in the summer, until 1948, when she was eight years old. She testified that when she was five or six years old she applied JJBP to a rubber baby doll when she played house, approximately three times a week. She would pour JJBP onto the doll using about three good shales (Opp. Exh. 4, pgs. 106-108 and 337-338, Exh. 3, pgs. 42-43). Mrs. Zoas testified that she remembered her mother would apply JJBP by shaking the container four or five times directly onto her whole body. When Mrs. Zoas was about eight years old she began applying JJBP onto herself by shaking the powder onto her body four or five times after a shower, bath or sponge bath (Opp. Exh. 4, pgs.334-335). Mrs. Zoas testified that when her mother applied JJBP and when she used it playing house with her friends, the powder would become "smokey" and she would breathe it in (Opp. Exh. 3, pgs.35-36 and 44).

Mrs. Zoas testified that from 1948 to 1956 she used JJBP about 80% of the time and another manufacturer's product 20% of the time (Opp. Exh. 4, pgs. , 310 and 312). Mrs. Zoas claims that between the age of 20 to 31 she started using a powder puff purchased separately that was replaced every two weeks and an empty box that she would fill halfway up with JJBP (Opp. Exh. 4, pgs. 347-349). Starting when she was about 31, she would sprinkle powder directly into her underwear and bra, but not directly on her body (Opp. Exh. 4, pgs. 352 and 408). Mrs. Zoas also testified from the time she was twelve years old until 2017, she used JJBP in her shoes to keep her feet dry (Opp. Exh. 4, pgs. 365-367). Plaintiff testified that when she applied the JJBP it would create a cloud of dust in the air that she breathed in (*Opp.*, Exh. 4 pgs. 170, 355-356, 367).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Mrs. Zoas did not read any labels on the JJBP bottles when she was younger (Opp. Exh. 4, pg. 332). As she got older (pre-20 years old to the earlier range of 20 to 31 years old) Mrs. Zoas remembered reading the back of the container, but she was not looking for anything, and did not remember seeing a warning. Mrs. Zoas testified that if she had seen a warning she would not have used the product (Opp. Exh. 4, pgs. 346 347).

Mrs. Zoas testified that she began using JJBP on a regular basis on each of her four children after baths and when changing diapers. She testified that at one point she was using JJBP on up to seven diaper changes a day. She would apply about three shakes of JJBP for diaper changes and four or five shakes of JJBP when she gave the children a bath about 3 times a week (Opp. Exh. 3, pgs. 52-54). Mrs. Zoas used JJBP on her first daughter, Anastasia, born in 1959, for approximately ten years, shaking it directly onto the baby, especially in the diaper area (Opp. Exh. 4, pgs. 337-338). Her second child, Christopher, was born in 1961 and he was powdered using JJBP until he was about six years old (Opp. Exh. 4, pg. 344). She initially powdered Christopher on the bed, but when he turned two she applied the powder to his body while he was standing up as she dried him off after a bath or shower (Opp. Exh. 4, pgs. 340- 341). Her third child, Alice, was born in 1963, and she was powdered with JJBP until she was about six years old. As Alice got older, Mrs. Zoas would take Alice from the tub and stand her over a towel on the toilet seat to dry her down and apply the powder (Opp. Exh. 4, pgs. 344-345). Mrs. Zoas' fourth and youngest child, Mary was born in 1964, and powder was applied to her in the same manner as the other children (Opp. Exh. 4, pg. 345).

Mrs. Zoas testified that she babysat her grandson, Patrick, from when he was a couple of months old until he was six or seven. He would stay with her on the weekend every two or three weeks (Opp. Exh. 4, pgs. 369 -370). She claims that JJBP was applied to Patrick when chaning diapers in the same manner as her children (Opp. Exh. 4, pgs. 369-371).

Plaintiffs commenced this action on May 12, 2017 to recover for damages resulting from Mrs. Zoas's exposure to asbestos from defendants' products. Plaintiffs' Standard Complaint asserts ten causes of action against the defendants for: (1) negligence, (2) negligence per se (3) strict liability, (4) strict liability-manufacturing defect, (5) strict liability - design defect, (6) market share liability, (7) alternative/collective liability, (8) fraudulent misrepresentation and conspiracy/concert action (9) Christos Zoas' claim for spousal loss of consortium and (10) punitive damages (Mot. Kurland Aff., Exh. 1). On July 4, 2017 plaintiffs Amended the Complaint (Opp. Exh. 2). On July 24, 2017 defendants answered the plaintiffs' Amended Complaint denying liability and asserting affirmative defenses (Mot. Kurland Aff., Exh. 2).

Defendants, Johnson & Johnson (hereinafter referred to individually as "JJ") and Johnson & Johnson Consumer Inc.'s (hereinafter referred to individually as "JJCI"), now move for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint as against them.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendants' argument that plaintiffs are not expected to present any legally sufficient and admissible evidence of exposure to asbestos, citing to expert testimony plaintiffs will rely on in their opposition papers, does not make a prima facie case. Nor does their attempt to use a footnote to preserve arguments made about plaintiffs' experts make out a prima facie case (See Memorandum of Law in Support, "C. Any Contrary Evidence that Plaintiffs Adduce Will be Legally Insufficient," pg. 16, footnote 4).

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and

Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to Reid v. Georgia - Pacific Corp., 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that Mrs. Zoas was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*),122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendants argue that plaintiffs have no evidence and cannot raise an issue of fact that Mrs. Zoas was exposed to asbestos from the use of JJBP, or that the use of JJBP during the relevant periods of 1945 to about January of 2017 did not result in her pleural mesothelioma.

Defendants argue that the standards asserted in Sean R. v. BMW of N. Am., LLC, 26 N.Y. 3d 801, 48 N.E. 3d 937, 28 N.Y.S. 3d 656 [2016] and In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233,48 N.Y.S. 3d 365 [1st Dept., 2017], entitle them to summary judgment on plaintiffs' strict liability and negligence claims because of lack of causation. Defendants claim that there is no asbestos contamination from their products because: (1) the talc was sourced from asbestos free mines, (2) the mined talc was purified, (3) there were internal tests to ensure the lack of contamination and (4) both government and independent tests confirmed the product was asbestos free. It is defendants' contention that their defense experts establish that Mrs. Zoas was not exposed to asbestos through the use of their products or that their products did not cause her mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. 8, 9, 10, 11, 12, 15, 21 and 22), FDA findings in 1976 (Mot. Kurland Aff. Exhs. 19), and the expert affidavits of Dana M. Hollins, MPH, CIH, Suresh H. Moolgavkar, M.B. B.S., Ph.D., Michael K. Peterson, MEM, DABT and Mathew S. Sanchez, Ph.D., to establish that Mrs. Zoas was not exposed to asbestos through use of their products or that their product did not cause her mesothelioma. They claim that during the periods relevant to Mrs. Zoas' alleged exposure, JJBP talc was obtained from Italy (1946-1964, 1967 or 1968), Vermont (1964, 1967,1968 - 2003) and Guangxi, China (starting in 2003).

Dana M. Hollins has a Masters Degree in Occupational and Environmental Epidemiology and is a board certified industrial hygienist. She is employed as a Principal Health Scientist by Cardno ChemRisk, a private scientific consulting firm. She did not perform any testing and instead relies exclusively on reports and studies, only some of which were annexed to the motion papers. She concludes cosmetic-grade talc has not been shown to be a risk factor for mesothelioma. She also relies on the reports of defendants' expert Dr. Sanchez and his conclusions that the cosmetic talc obtained from Italy, Vermont and China does not contain asbestos (Hollins Aff., pgs. 11, 13-14, paras. 42, 48 and 49).

Ms. Hollins concludes that the evidence from animal studies does not support a finding of carcinogenicity of talc, inhaled or otherwise. Ms. Hollins alleges that starting from the 1970's there are "numerous" published and unpublished studies that allegedly evaluate "airborne exposures (*to asbestos*) from dust or fiber in cosmetic talc powder products." She relies on six (6) publications and two unpublished studies for the preparation of two tables estimating potential exposure associated with consumer use of cosmetic talcum powder products (1) over a period of two years and (2) over a 70 year lifetime (Hollins Aff., paras. 65, 66, Table 1 and Table 2, pgs. 18 and 19-20).

A third table was prepared by Ms. Hollins applying specifically to Mrs. Zoas' potential exposure to asbestos from defendants talcum powder products during the periods of alleged exposure (Hollins Aff., pgs. 23-25, para. 79, Table 3). In preparing the tables, Ms. Hollins makes assumptions relying in part on excerpts from Mrs. Zoas' deposition testimony that are not annexed to the motion papers, and "assumed" the time period and amount of exposure where it was lacking in Mrs. Zoas' deposition testimony (Hollins Aff., pgs. 24-25, para. 79, footnotes A, H, I, M, O, T, Y, BB, CC and EE). Ms. Hollins did not estimate a duration for the application of JJBP for all of Mrs. Zoas' uses (for example, the duration of application of JJBP to the rubber doll when Mrs. Zoas was a child) (Hollins Aff., pg. 25, para. 79 Table 3, footnote L). Ms. Hollins made no evaluation for an

alleged "latency"period of "10 years" prior to Mrs. Zoas' diagnosis, ending her calculations at 2007 (Hollins Aff.,pg. 25, para.79, footnotes p, s). Ms. Hollins calculates that Mrs. Zoas' upper bound cumulative exposure to asbestos from use of defendants' talcum powder (JJBP) is "0.0177 f/cc-yr."(Hollins Aff., pg. 26, para. 80). Ms. Hollin's affidavit fails to "unequivocably" establish lack of causation or meet defendants' prima facie burden.

Suresh H. Moolgavkar, M.B., B.S., Ph.D. , has a doctorate in Mathematics. He has a medical degree from a foreign jurisdiction and admits that he is not licensed to practice medicine in the United States. Dr. Moolgavkar describes himself as a cancer epidemiologist and research scientist (Moolgavkar, pg. 2, paras. 5 and 6). Dr. Moolgavkar is currently employed as a Senior Fellow and Principal Scientist at Exponent, Inc., an international private consulting company.

Dr. Moolgavkar's opinion is based in part on his medical knowledge. Dr. Moolgavkar provides seven factors that are used as a framework in a discussion of causality, to be applied to the facts (Moolgavkar Aff., pgs. 4-5, para. 13). He contradicts defendants' other experts, by stating that "Risk assessment procedures used by regulatory agencies do not establish causal associations at low levels of exposure"(Moolgavkar Aff., pgs.5- 6, para.14). Dr. Moolgavkar states, "full opinions and bases for these opinions are provided in my report which is included as Appendix A" (There is no "Appendix A" attached or provided with Dr. Moolgavkar's report).

The remainder of Dr. Moolgavkar's report is spent rebutting plaintiff's expert, Dr. David Madigan (See Moolgavkar Aff., pgs. 8-22). Dr. Moolgavkar's attempt to point out potential perceived errors or gaps in the plaintiffs' expert report submitted as part of the opposition papers fails to make a prima facie case. Defendants' primary burden is to establish lack of causation, not rebuttal of plaintiffs' evidence (DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, supra at pg. 499, Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*),122 A.D. 3d 520, supra at pg. 521, and Koulermos v. A.O. Smith Water Prods., 137 A.D. 3d 575, supra at pg. 576).

Michael K. Peterson, M.E.M., DABT, has a Master's degree in Environmental Management with emphasis on risk assessment and environmental toxicology, and is board certified in toxicology. He is a principal scientist at Gradient, a private environmental consulting firm. Mr. Peterson concludes that the evidence from animal studies does not support a finding of carinogenicity of talc, inhaled or otherwise. Mr. Peterson determines that human epidemiologic data is lacking to specifically evaluate the relationship between exposure to cosmetic talc and the risk of mesothelioma in consumers(Peterson Aff., pg. 10, para. 43).

Mr. Peterson, citing to no specific study, states that the recorded cases of pleural mesothelioma is unique to industrial talc. He considers the level of talc dust exposure and concentrations to be greater in talc miners and millers over consumer exposure (Peterson Aff., pg. 11, para. 45). Mr. Peterson states that there has been no definitive evidence that asbestos exists in cosmetic talc, including the defendants' products; and determinations to the contrary rely on misconceptions. Mr. Peterson states that ionizing radiation Mrs. Zoas received for her laryngeal cancer from January to March of 2009 created a risk factor for all other cancers, including the mesothelioma she was diagnosed with eight years later in 2017. Mr. Peterson concedes that no dosage of radiation amounts were available for him to make a determination of actual causation as to Mrs. Zoas (Peterson Aff., pgs. 17-18, paras. 66-67). He concludes that although there is no description used in the genetic analysis of the biospsy conducted on Mrs. Zoas' tissue, a "loss of function mutation in BAP1" "may suggest" that Mrs. Zoas was genetically pre-diposed to mesothelioma (Peterson Aff., pg. 18-19, paras. 68-70). Mr. Peterson also refers to chronic inflammation citing to case reports of "peritoneal mesothelioma" suggesting a potential association. He refers to a "proposed" similar association between chronic inflammation and pleural mesothelioma and case studies working with tuberculosis (Peterson Aff., pgs. 20-21, paras. 71-74).

Mr. Peterson's affidavit fails to meet the defendants' prima facie burden as to causation, under Sean R. ex rel. Debra R. v BMW of North America, LLC, 26 NY3d 801,supra and In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, supra. Mr. Peterson's report fails to state the scientific basis for his conclusion that it is "possible" Mrs. Zoas' mesothelioma is of "spontaneous origin" and non-asbestos related, or explain how the risk factors actually cause Mrs. Zoas' mesothelioma (Romano v Stanley, 90 N.Y. 2d 444, 684 N.E. 2d 19, 661 N.Y.S. 2d 589 [1997]

and Guzman ex. rel. Jones v. 4030 Bronx Blvd. Associates L.L.C., 54 A.D. 3d 42, 861 N.Y.S. 2d 298 [1st Dept. 2008]).

Matthew S. Sanchez, Ph.D. has a doctorate in geology and specializes in asbestos and the development of asbestos analytical methods. Dr. Sanchez has been employed by a private entity, the RJ Lee Group, Inc., as a principal investigator for over ten (10) years. He states that talc in its purest form is not asbestos. He describes asbestos as a regulated group of six naturally occurring, highly fibrous, silicate minerals that when crystallized can become one of two families of asbestos containing minerals: serpentine and amphibole. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and that analysis of the materials is needed to make a determination. He does not state the frequency of testing needed to make a determination and whether the asbestos containing samples would be identified consistently throughout a given location.

Dr. Sanchez's report attempts to address alleged defects in plaintiffs' expert analysis. He concludes that their finding of asbestos in talc and defendants' talc products is flawed and relies on non-accepted methodology for detection of asbestos. The part of the report that attempts to discredit plaintiffs' experts does not make a prima facie showing of lack of causation (see Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516; Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575). He ultimately concludes that defendants' talcum powder, and the talc used, is free of asbestos to a reasonable degree of scientific certainty. To reach his conclusion, he relies on review, analysis and interpretation of decades of studies conducted by scientists, his own site visits to Italy and China, and testing of allegedly relevant talcs.

Dr. Sanchez concludes that the defendants' talc, mined in Italy, Vermont and China, does not contain asbestos. He refers to studies and testing with samples that are not from the entire period relevant to Mrs. Zoas' alleged exposure (i.e. 1945 -1956) or he fails to show that all of the research was conducted on samples taken from the relevant period. There are reports and studies he cites that are also not annexed to his affidavit or the motion papers (See Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*) , 122 A.D. 3d 520, supra and Lopez v. Fordham Univ., 69 A.D. 3d 532, 894 N.Y.S.2d 389 [1st Dept., 2010]).

Plaintiffs argue that defendants' experts have not "unequivocally" established that their products could not have contributed to the causation of plaintiff's injury to warrant summary judgment on plaintiffs' negligence and strict liability claims (Comeau v W. R. Grace & Co.- Conn. (*In re New York City Asbestos Litig.*), 216 A.D. 2d 79, supra at pg. 80, DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, supra, and Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*) , 122 A.D. 3d 520, supra). Alternatively, plaintiffs argue that issues of fact remain as to whether Mrs. Zoas' exposure to asbestos from JJBP caused her mesothelioma.

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered, and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, supra pg. 236, citing to Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2016]). Specific causation can be established by an expert's comparison of the exposure levels found in the subjects of other studies. The expert is required to provide specific details of the comparison and show how the plaintiff's exposure level related to those of the other subjects (Id). The *Juni* case applied the Parker v. Mobil Oil Corp., 7 N.Y. 3d 434 and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014], standards to asbestos litigation for the plaintiff to establish causation.

Plaintiffs' experts are Dr. Jacqueline Moline, Dr. David Madigan, Dr. Steven Compton, and Dr. William E. Longo.

Dr. Jacqueline Moline is a medical doctor specializing in occupational and environmental disease, and in asbestos related occupational medicine. She is currently employed as Director of Occupational and Environmental Medicine of Long Island, as part of the North Shore-LIJ Health System. Defendants arguments that Dr. Moline was discredited in the *Juni* case are unavailing. In the *Juni* case Dr. Moline testified as to plaintiff's exposure to dust in brakes as part of his employment. In the *Juni* case the court determined that the plaintiff was unable to establish

causation because of Dr. Moline's lack of knowledge whether the asbestos fibers were active after the braking process (In re New York City Asbestos Litigation (Mary Juni), 148 AD3d 233, supra, pg. 237). This case is distinguishable since it does not involve exposure in a commercial setting or exposure through Mrs. Zoas' work, but as part of the use of cosmetic talc, on a daily basis for a period of as much as seventy-two years . Dr. Moline relies on multiple studies which are provided by plaintiffs in subsections (See Opp. Exh. 81, Moline Aff. Part B - Part I). Dr. Moline concludes that even small amounts of exposure are sufficient to cause mesothelioma (Opp. Exh. 81, Moline Aff., Part A, pgs. 13-14).

Dr. Moline determines that Mrs. Zoas' cigarette smoking and exposure to radiation, did not cause Mrs. Zoas' mesotthelioma. Dr. Moline concludes that Mrs. Zoas' mesothelioma is directly related to her exposure to asbestos in JJBP over the course of many years. Dr. Moline's opinions are sufficient to raise an issue of fact on the issue of causation. Defendants have not shown that Dr. Moline's reliance on "litigation" driven analysis of their product is necessarily different from that of their own experts. Defendants contradict themselves by arguing that Dr. Moline's evaluations and determinations contradict Dr. Longo's determinations, and then argue she relied on Dr. Longo's flawed data, and in any case these contradictory arguments are unpersuasive.

Dr. Steven Compton is a doctor of physics, with laboratory experience in spectroscopy and microscopy. He is also the executive director of MVA Scientific Consultants a private research facility (Opp. Exh. 79). Dr. Compton prepared a report on Vermont Talc samples, in which he confirmed the presence of asbestos after scanning electron and transmission electron microscopy in fifteen samples of Vermont talc that had been collected by Mickey Gunter, Ph.D. (Opp. Exh. 79, paras. 7 - 9). He concludes that aerosolization of the consumer talc products containing the samples would have elevated concentrations of asbestos fibers. This study is sufficient to raise an issue of fact as to whether asbestos in the Vermont talc used by defendants could have caused or contributed to Ms. Zoas' pleural mesothelioma.

David Madigan, Ph. D. has his doctorate in statistics. He is a professor of Statistics at Columbia University (Opp. Exh. 84). Dr. Madigan performed mathematical calculations of the probability of Mrs. Zoas being exposed to asbestos in the JJBP that she used. He looked at seventeen JJBP containers in which asbestos was detected, to determine if they were the only ones that were contaminated. Dr. Madigan determines that there is a high probability (95%) of asbestos exposure in somewhere between 4 and 17 of the containers out of 20 used by Mrs. Zoas. He finds the Rubino et al. studies, relied on by the defendants' experts, lack statistical power. Dr. Madigan defines statistical power as "the probability of finding a statistically significant difference between exposed and control subjects when one truly exists." (Opp. Exh. 84, paras. 24 - 25). Dr. Madigan's affidavit is sufficient to raise issues of fact for a jury to determine whether there is a causal relationship between Mrs. Zoas' exposure to asbestos - solely through the use of talc in defendants' products for many years - and her pleural mesothelioma.

Dr. Edward Longo has a Doctorate of Philosophy in Materials Science and Engineering. He also studied microbiology and chemistry (Opp. Exh.17 Part A). Dr. Longo performed studies on samples of the defendants' products and reviewed other reports and studies - most are annexed to his affidavit (See Opp. Exh. 17 Part B - 17 Part J) - and concluded that there are high concentrations of asbestos in the talc found in defendants products (Exh. 17). Dr. Longo's "Below the Waist App. of JJBP" report further quantified the amount of asbestos exposure from the use of talc in a manner similar to Mrs. Zoas's use, determining that over a period of use she was exposed to high concentrations of asbestos through the use of defendants' talc products, including JJBP. Dr. Longo alleges that the tests performed by the defendants on JJBP for the period of Mrs. Zoas' alleged exposure - TM7024 - was designed in such a way as to allow asbestos in talc to pass "below detection limit" (Opp. Exh. 17 Parts A -J). The combined evidence from Dr. Longo raises an issue of fact as to causation. There remain issues of fact as to whether Mrs. Zoas' use of defendant's products exposed her to asbestos and resulted in her mesotheloma.

Defendants' argument that Dr. Longo relies on flawed methology to determine Mrs. Zoas' alleged exposure and fails to raise an issue of fact, is unpersuasive, given that defendants experts also relied on at least some similar studies and methodologies.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57,

268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority,84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011]).

Defendants arguments that the specific bottles of their products used by Mrs. Zoas were not tested and there is no direct evidence of exposure to asbestos, is unpersuasive. Plaintiff is not required to show the precise causes of her damages, but only show facts and conditions from which defendant's liability may be reasonably inferred. "Summary judgment must be denied when the plaintiff has presented sufficient evidence, not all of which is hearsay, to warrant a trial" (Oken v A.C. & S. (*Matter of New York City Asbestos Litig.*), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at pg. 448, and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

The conflicting expert affidavits, the "reasonable inference" standard and construing the evidence in a light most favorable to the plaintiffs, as the non-moving party, further warrants denial of summary judgment on the strict liability and negligence claims.

Plaintiffs have also raised issues of fact as to the punitive damages cause of action. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent plaintiffs argue that the defendants placed corporate profits and reputation above the health and safety of the consumer, specifically Mrs. Zoas, by failing to place any warnings about asbestos on their product, and their continued insistence that there is no asbestos in talc, there is an issue of fact that should be determined by the jury as to whether this conduct was reckless or wanton such that punitive damages maybe warranted.

Defendants argue that plaintiffs' damages experts, will not be able to opine as to loss of parental nurturing and guidance . There is no clam for loss of parental guidance made in the Amended Complaint .

Defendants fail to specifically identify or make any arguments or provide evidence in support of summary judgment on the causes of action for (6) market share liability, (7) alternative/collective liability, (8) fraudulent misrepresentation and conspiracy/concert action. Defendants failed to state a prima facie basis to obtain summary judgment on these three causes of action warranting denial of that relief, regardless of the sufficiency of plaintiff's papers in opposition (See Winegrad v. New York University Medical Center, 64 N.Y. 2d 851, 476 N.E. 2d 642, 487 N.Y.S. 2d 316 [1985]).

ACCORDINGLY, it is ORDERED that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Amended Complaint, is denied.

ENTER:

Dated: November 26, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
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