Gayoso v American Honda Motor Co., Inc.
2019 NY Slip Op 31184(U)
April 26, 2019
Supreme Court, New York County
Docket Number: 190209/2014
Judge: Manuel J. Mendez
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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

SHARON R. GAYOSO, as Personal Representative for the Estate of JAY A. GAYOSO, and SHARON R. GAYOSO, Individually,

Plaintiffs,

- against -

AMERICAN HONDA MOTOR CO., INC. (AHM), et al.,

Defendants.

INDEX NO. 190209/2014
MOTION DATE 04/22/2019
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion by Defendant Nissan North America, Inc. pursuant to CPLR to §3211(a)(8) to dismiss this action, alternatively for summary judgment on causation :

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

Cross-motion ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Nissan North America, Inc.'s (hereinafter "Nissan") motion pursuant to CPLR §3211(a)(8) to dismiss this action on the grounds of lack of jurisdiction, alternatively to preclude plaintiff's medical causation expert and for summary judgment pursuant to CPLR §3212 on the issue of causation, is denied.

Plaintiff Jay A. Gayoso (hereinafter referred to as decedent), was diagnosed with malignant mesothelioma in April of 2016. Decedent passed away on February 15, 2017, when he was about 55 years old. Decedent was a resident of New York until 1971 or 1972 when he was about eleven (11) years old, and the family moved to Connecticut (Mot. Exh. D, pgs. 12 and 16-17). Decedent's family moved to Florida between 1972 and 1973. Decedent remained a resident of Florida from about 1972 until his death, except for a brief period from about 1990 through 1992 when he moved back to New York to finish law school and work at a law firm for about two years (Mot. Exh. D, pgs. 20-25 and 80-81).

Plaintiffs allege that the decedent's exposure to asbestos caused his mesothelioma. Decedent's alleged exposure to asbestos - as relevant to this motion - was from observing mechanics work on brakes and clutches from defendant Nissan and its predecessor company, Datsun cars, at a Phillips 66 full service gas station in Fort Lauderdale, Florida, from about the end of 1977 through June of 1978 - his senior year in high school (Mot. Exh. D, pg. 37 and 50).

Decedent stated that his hours at the Phillips 66 gas station were Monday through Friday, mostly after school starting at 1:30 p.m. or 2:00 p.m. through 6:00 p.m. or 7:00 p.m. for a short shift, or until closing at 9:00 p.m.. He testified that he also worked on either a Saturday or a Sunday from 9:00a.m. to 6:00p.m., when called, and that he worked full time during spring break and in the summer. Decedent testified that his duties at the Phillips 66 gas station were to pump gas, clean the car windows, check the oil, put oil in cars, take out the trash, fix tires, cool down radiators by putting radiator fluid in, and sometimes helping the mechanics. He claimed that helping mechanics meant anything from getting a tool to getting parts, and on rare occasions holding a screwdriver to assist in completing a job (Mot. Exh. D, pgs. 40-42, 45-46 and 48-49).

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

Decedent stated he helped do clutch work on Nissan and Datsun vehicles. He stated that Nissan was known as Datsun during 1977 through 1988. He testified that clutch work would take many hours sometimes into the next day and that sometimes he would assist the mechanics doing the work by giving them parts. Decedent stated that clutch work involved dropping the gears out to get to the clutch - which he described as a disc with abrasive material on it - and removing the pressure plate that was on top of the clutch. He stated that dust would come out when the pressure plate was removed. Decedent testified that his exposure to asbestos from clutches was from the dust during the work, specifically from the abrasive part (Mot. Exh. D, pgs. 50-52, 60-61, 65 and 206). Decedent claimed that he was present for clutch work on Datsun vehicles - which occurred less frequently than brake work - and that he observed clutches removed from Datsun vehicles's many times. He recalled that he was able to tell that the brakes were from Datsun vehicles either from looking at them, or talking to the mechanics (Mot. Exh. D, pgs. 206-207).

Decedent stated that he was exposed to asbestos dust created by the mechanics when they were working on Datsun brakes while he was either standing right next to them, or "sometimes ten feet away" (Mot. Exh. D, pgs. 50-52). He specifically remembered that Datsun models 200SX, 210 and 240 were worked on "many times" - which was more than ten but less than one hundred times - during his employment at the Phillips 66 gas station (Mot. Exh. D, pgs. 188-189 and 198-199). Decedent testified that he observed both the removal and replacement of brakes on Datsun cars. He recalled the Datsun 200SX model car replacement brake was manufactured by Datsun. Decedent testified he knew the replacement brake was manufactured by Datsun after he talked to the mechanics on an almost daily basis, after he overheard customers talking to the mechanics, and because of some designation on the part (Mot. Exh. D, pgs. 199-204).

At all times relevant to exposure from Nissan decedent resided in Florida and was exposed to asbestos outside the State of New York. Nissan provides the affidavit of corporate representative, Lori McPherson, a senior paralegal for corporate governance. Ms. McPherson states that Nissan is a California Corporation with its principal place of business in Franklin, Tennessee. She states that Nissan has never operated a headquarters or maintained a principal place of business in the State of New York (Mot. Exh. E).

Plaintiffs commenced this action on June 17, 2014 by filing a Short-form Complaint naming various defendants, including Nissan, to recover for the injuries the decedent sustained. The Short-form Complaint states that Nissan "was and still is a duly organized domestic corporation doing business in the State of New York" (Mot. Exh. A). The Short-form Complaint incorporated the causes of action stated in the "NYCAL Weitz & Luxenberg Standard Asbestos Complaint for Personal Injury No. 7" (hereinafter "Standard Complaint No. 7") (Mot. Exh. B). Plaintiffs subsequently amended the Complaint twice but there were no amended provisions affecting jurisdiction (Mot. Exh. M). On August 15,2014, Nissan filed a Verified Answer to plaintiffs' Short-form Complaint and Standard Complaint No. 7 (Mot. Exh. C).

Nissan's motion seeks to dismiss plaintiffs' claims asserted against if for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). Nissan argues that this court lacks personal jurisdiction, and that there is no general or specific jurisdiction over it, therefore the plaintiffs' claims against it should be dismissed (See CPLR § 302(a)(1), (2) and (3)).

Plaintiffs in opposition argue that Nissan failed to explicitly deny personal jurisdiction by raising an Affirmative Defense in the Answer, and by appearing in the action and "electing to answer the complaint without objection to jurisdiction" (Opp. paras. 6 and 7), resulting in waiver of the jurisdictional defense.

CPLR §3211(a)(8) allows a party to move to dismiss one or more causes of action asserted against it on the grounds that the court has no jurisdiction of the person of the

defendant (See McKinney's Consolidated Laws of New York Annotated, CPLR § 3211(a)(8)). "A defense based upon lack of personal jurisdiction is deemed waived if the defendant fails to assert it, with specificity, in its answer" (See CPLR §3211(e) and Interlink Metals and Chemicals, Inc. v. Kazdan, 222 A.D. 2d 55, 644 N.Y.S. 2d 704 [1st Dept.,1996]).

Nissan argues that it did not need an affirmative defense of lack of personal jurisdiction in its Verified Answer because in responding to jurisdictional allegations made by plaintiffs in both the Short-form Complaint and the Standard Complaint No. 7, it "unequivocally denied plaintiffs' prominent and specific allegations concerning this Court's ability to exercise personal jurisdiction." It is Nissan's contention that it provided a sufficient denial of jurisdiction warranting the relief sought in this motion (See Mot. Exhs. A, B and C). The Standard Complaint No. 7, makes no specific allegations as to Nissan, and none of the causes of action adopted by the Short-form Complaint state specific personal jurisdiction claims.

"Under the CPLR, the objection (to personal jurisdiction) may be raised either by a pre-answer motion or by pleading it as an affirmative defense, whichever comes first"(Gager v. White, 53 N.Y. 2d 475, 425 N.E. 2d 851, 442 N.Y.S. 2d 463 [1981] citing to Siegel's New York Practice §111, "Making and Preserving Jurisdictional Objection"). A defense based upon lack of jurisdiction is waived if the defendant fails to assert it with specificity, such that it fails to fairly apprise the plaintiff of the defendant's objections (Interlink Metals and Chemicals, Inc. v. Kazdan, 222 A.D. 2d 55, supra, at pg. 58, Weisner v. Avis Rent-A-Car, 182 A.D. 2d 372, supra at pgs. 372-373, and Hatch v. Tran, 170 A.D. 2d 649, 567 N.Y.S. 2d 72 [2nd Dept., 1991]).

Nissan's Verified Answer asserts twenty-eight affirmative defenses, but none of them address personal jurisdiction. Nissan's Verified Answer asserts a counter-claim for costs and attorney's fees for plaintiffs' asserting "frivolous" claims against it, and two cross-claims for indemnification and contribution, all of which do not address personal jurisdiction (Mot. Exh. C). Nissan's failure to assert an affirmative defense of lack of personal jurisdiction or to specifically object on the grounds of personal jurisdiction, is a grounds to deem the defense waived.

Alternatively, Nissan's Verified Answer has two general denial paragraphs, denying "all material allegations" and "each and every other allegation" in plaintiffs' complaint. Both general denials deny "knowledge or information sufficient to form a belief as to the truth of every allegation asserted." The Verified Answer includes a single sentence that states "Nissan North America, Inc. is a foreign corporation."(Mot. Exh. C).

A denial as to "any knowledge or information sufficient to form a belief as to allegations" is reserved for a defendant that honestly lacks knowledge of the material allegations and is otherwise deemed frivolous (See Royal Bank of Canada v. Williams, 220 A.D. 603, 222 N.Y.S. 435 [1st Dept., 1927], citing to Rockind v. Perlman, 123 A.D. 808, 108 N.Y.S. 224 [2nd Dept., 1908], Dahlstrom v. Gemunder, 198 N.Y. 449, 92 N.E. 106 [1910] and Siegel, *New York Practice*, 4th ed. §221). Nissan's Answer must provide a more specific and detailed denial. General denials are not favored and do not raise the question of jurisdiction (Rouse v. Champion Home Builders Co., 47 A.D. 2d 584, 363 N.Y.S. 2d 167 [4th Dept., 1975] and Nass v. Nass, 64 A.D. 2d 852, 407 N.Y.S. 2d 344 [4th Dept. 1978]). Furthermore, "a party cannot employ a catch-all provision in an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party"(Scholastic Inc. v. Pace Plumbing Corp., 129 A.D. 3d 75, 8 N.Y.S. 3d 143 [1st Dept., 2015]).

Nissan's general denials are not sufficiently specific and do not establish the alleged lack of knowledge as to personal jurisdiction. The single sentence in the Verified Answer stating that Nissan is a "foreign corporation" does not make any specific objection or statement as to personal jurisdiction, and is insufficient to fairly apprise the plaintiffs in this action of Nissan's objections to personal jurisdiction (Mot. Exh. C).

By appearing in this action and electing to answer the complaint without a specific objection to personal jurisdiction, Nissan conferred jurisdiction upon the court and waived the defense (See McGowan v. Hoffmeister, 15 A.D.3d 297, 792 N.Y.S.2d 381 [1st. Dept. 2005]). This court finds that Nissan has waived its personal jurisdiction defense. The motion to dismiss plaintiffs' claims asserted against Nissan for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8), is denied.

Alternatively, Nissan seeks to preclude plaintiff's medical causation expert and obtain summary judgment on the issue of causation.

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 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent 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 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

Nissan argues that plaintiffs failed to proffer any expert opinion, or other evidence in the form of scientifically valid studies establishing causation and establishing that its specific products caused decedent's mesothelioma and death. Nissan relies on the report of plaintiffs' expert, Dr. David A. Schwartz, M.D., an internist and occupational medicine specialist, in support of its argument that plaintiffs will not present any admissible evidence and should be precluded, warranting summary judgment as to causation.

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 Products, 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 did not contribute to the causation of plaintiff's illness (Comeau v. W.R. Grace & Co. - Conn.(*Matter of New York City Asbestos Litigation*), 216 A.D. 2d 79, 628 N.Y.S. 2d 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], Di Salvo 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. 2d 766 [3rd Dept., 2017). Nissan must unequivocally establish that the decedent's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of his mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litigation*), 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Nissan's attempt to "point to gaps," in plaintiffs' evidence, fails to establish a prima facie basis for summary judgment.

Nissan contends that summary judgment is warranted under Parker v Mobil Oil Corp., 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], Cornell v 360 West 51st Street Realty, LLC, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept. 2017] affirmed 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiffs are unable to establish general and specific causation. Nissan argues that its experts Corrine A. Robbins, M.H.S., Ph.D., C.I.H. (a certified industrial hygienist) (Mot. Exh. F), Bryan D. Hardin, Ph.D, A.T.S., a toxicologist (Mot. Exh. G), and Dr. David H. Garabrant, M.D., M.P.H., an occupational medicine specialist (Mot. Exh. H), establish lack of causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff

suffered to establish general causation (Parker v. Mobil Oil Corp.,7 NY3d 434, 448, supra).

Nissan argues that unlike amphibole asbestos, no causal relationship exists between chrysotile asbestos and the development of mesothelioma. Nissan further argues that studies show low exposure to asbestos for mechanics and that even less exposure would occur for bystanders like the decedent, eliminating any general causation.

Nissan submits the November 25, 2015 Report of Dr. Corrine A. Robbins, M.H.S., Ph.D., C.I.H. (a certified industrial hygienist (Mot. Exh. F); the November 30, 2015 report of Dr. Bryan D. Hardin, Ph.D, A.T.S., a toxicologist (Mot. Exh. G); and the December 1, 2015 report of Dr. David H. Garabrant, M.D., M.P.H., a toxicologist with a Doctorate in Environmental Health Sciences (Mot. Exh. H), to establish lack of causation.

Dr. Corrine A. Robbins, M.H.S., Ph.D., C.I.H. is a certified industrial hygienist with a Master's Degree in Occupational Safety and Health, she is employed by Veritox. Her November 25, 2015 Report concludes that there is a lack of causal relationship between chrysotile asbestos in Nissan's products and decedent's mesothelioma. The November 25, 2015 report draws on multiple assumptions as to decedent's exposure from his deposition testimony, responses to interrogatories, and on multiple reports and studies pertaining to vehicle mechanics. It references materials from the Occupational Safety and Health Administration (OSHA) that "consistently found that then-existing asbestos exposures in vehicle repair were already below each new permissible exposure limit that was being proposed."(Mot. Exh. F, pg. 11). The November 25, 2015 report also cites to studies conducted by the World Health Organization ("WHO") as showing asbestos exposure from brake repair operations are consistently below contemporaneous exposure standards (Mot. Exh. F, pg. 11). She concludes that the decedent's lack of proximity, frequency and duration of exposure to Nissan products - which is less than vehicle mechanics for whom exposure is negligible - was insignificant and would not have been a substantial factor in the development of his mesothelioma (Mot. Exh. F, pg. 13).

Dr. Bryan D. Hardin, Ph.D, A.T.S., is a toxicologist with a Doctorate in Environmental Health Sciences. He is employed as a Principal Toxicologist at Veritox (Mot. Exh. G). His November 30, 2015 report relies, in part, on the same studies as Dr. Corrine A. Robbins and includes reference to a 2015 update of a 2004 meta-analysis concluding there is no increased risk of mesothelioma in motor vehicle mechanics (Mot. Exh. G, pg. 26). He states that brakes contained up to 50% chrysotile fibers which were embedded in resin and unable to create exposure, and that heat generated by the braking process coverted over 99% of the original chrysotile to forsterite, a non-asbestos mineral. The November 30, 2015 report relies on an ATSDR 2003 study that found that any remaining asbestos fibers would have zero potency to produce mesothelioma in humans. The November 30, 2015 report also cites to conclusions by staff scientists at the Environmental Protection Agency ("EPA") that concluded 0.04f/cc represented a reasonable estimate of exposures in brake repair shops, which is below contemporaneous exposure standards (Mot. Exh. G, pgs. 32-33). The November 30, 2015 report concludes that there is no scientific basis to conclude that decedent's claimed bystander exposure to mechanics working on Nissan products placed him at increased risk for developing mesothelioma (Mot. Exh. G, pgs. 59-60).

Dr. David H. Garabrant, M.D., M.P.H., an occupational medicine specialist, is board certified in both occupational medicine and internal medicine (Mot. Exh. H). His December 1, 2015 report summarizes the decedent's medical history, occupational exposure history, non-occupational exposure history and medical issues. Dr. Garabrant provides string citations to studies establishing that there is no increased risk of mesothelioma for mechanics and brake repair workers. The December 1, 2015 report cites to studies and reports that establish the relative risk of developing mesothelioma to vehicle mechanics and brake repair workers is not meaningfully different than in other occupations where there is no exposure to asbestos, such as teachers. Dr. Garabrant concludes that the decedent's bystander exposure to work performed by mechanics on Nissan products did not cause or contribute to his mesothelioma (Mot. Exh. H, pgs. 7-9).

Plaintiffs in opposition rely on the reports of Dr. David A. Schwartz, M.D., M.P.H., a specialist in preventative and occupational medicine, and Dr. Mark Ellis Ginsburg, M.D., a specialist in thoracic surgery (See Opp. Exhs. 9 and 10).

Nissan argues that plaintiffs failed to raise an issue of fact because the opposition papers rely on an unsworn April 4, 2019 expert report of Dr. Mark Ellis Ginsburg, M.D. (Opp. Exh. 10), which is hearsay. Plaintiffs' expert reports may be utilized in opposition to a motion for summary judgment, even as hearsay, if they are not the only evidence submitted (Navaraez v. NYRAC, 290 A.D. 2d 400, 737 N.Y.S. 2d 76 [1st Dept. 2002]). Plaintiffs have submitted other admissible evidence including the decedent's deposition testimony (Opp. Exh. 3). To the extent Nissan argues that Dr. Ginsburg's expert report is untimely there has been no showing that the delay was intentional, willful, or that there was prejudice to Nissan by the delay. Under the circumstances preclusion is not warranted (See Martin v. Triborough Bridge abd Tunnel Authority, 73 A.D. 3d 481, 901 N.Y.S. 2d 193 [1st Dept. 2010] and McDermott v. Alvey, Inc., 198 A.D. 2d 95, 603 N.Y.S. 2d 162 [1st Dept. 1993]).

Dr. Schwartz's December 28, 2014 report assesses the decedent's clinical history, past medical history, family history, social history, occupational exposure history, pulmonary function tests, radiographic images and pathology. The December 28, 2014 report states that asbestos is recognized as a carcinogen by the International Agency for Research on Cancer, the National Toxicology Program, OSHA, EPA and the WHO. He concludes that decedent's mesothelioma was caused by previous exposure to asbestos (Opp. Exh. 9).

Dr. Ginsburg's April 4, 2019 report assesses decedent's medical history, past medical history, medications, cigarette smoking history, family history, occupational and environmental exposure, pathology reports and radiology reports. The April 4, 2019 report relies on studies and reports from multiple entities - including the WHO, OSHA and the EPA - as demonstrating that all asbestos fiber, including chrysotile fibers can increase the likelihood of developing mesothelioma (Opp. Exh. 10, pg. 5 and footnotes 12-17and 22-23). The April 4, 2019 report further cites to studies showing exposure to asbestos in brakes are higher than ambient levels and epidemiological studies of garage mechanics that conclude significant risk of asbestos related disease (Opp. Exh. 10, pg. 7 and footnotes 71, 81-84, 86-87, 91-94). Dr. Ginsburg concludes that decedent's cumulative exposure to asbestos from each company's product, which plaintiffs contend includes Nissan's products, caused decedent's mesothelioma (Opp. Exh. 10, pg. 8).

Nissan argues that summary judgment is warranted under Cornell v. 360 West 51st Street Realty, LLC, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiffs are unable to establish general causation. In *Cornell,* 22 NY3d 762, supra, the defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' expert, Dr. Ginsburg, is relying on some of the same scientists and scientific organizations as the defendants' experts in support of general causation.

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 76 [2011]).

Nissan relies on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Plaintiffs' expert, Dr. Ginsburg, also relies on studies and reports in part from the same scientific organizations, OSHA, EPA and the WHO, to establish that plaintiff's exposure to chrysotile asbestos fibers can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

Nissan states that its products did not produce breathable dust to a level sufficient to cause the decedent's mesothelioma, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, "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;" "[c]omparison 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" (Parker v. Mobil Oil Corp., 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see Parker v. Mobil Oil Corp., 7 NY3d 434, supra at 448]). In turn, the Appellate Division in *In re New York City Abestos Litigation (Juni)*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] aff'd 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

In making a comparative exposure analysis, the November 25, 2015 report of Dr. Corrine A. Robbins evaluates decedent's exposure as a potential bystander and in handling parts, observing brake work and clutch work, and concludes decedent did not have sufficient proximity, frequency or duration to Nissan products to cause his mesothelioma. The November 25, 2015 report concludes that it is scientifically unsupported that chrysotile asbestos could pose a mesothelioma risk for the decedent (Mot. Exh. F, pg. 13). Dr. Robbins provides a table of epidemiological studies evaluating mesothelioma in vehicle mechanics and cites to the studies of occupations and mesothelioma, that determined that work as a vehicle mechanic was not associated with mesothelioma (Mot. Exh. F, pg. 14). Dr. Robbins further concludes that decedent's mesothelioma is most likely a result of unrecognized exposure to amphibole asbestos through some other type of work (Mot. Exh. F, pgs. 15-16).

Dr. Bryan D. Hardin's November 30, 2015 report assesses the decedent's medical history, exposure history, occupational history, bystander experience, claimed exposure to asbestos, reported use of Nissan/Datsun products, non-occupational history, and take home exposure history. Dr. Hardin opines that the decedent's records do not indicate a higher risk of developing asbestos through the alleged exposures, and that decedent's mesothelioma may be unrelated to any asbestos exposure (Mot. Exh. G, pgs. 20-21). Dr. Hardin further opines that vehicle mechanics are not at risk for mesothelioma. He relies on epidemological studies showing no increased risk of mesothelioma in vehicle mechanics (Mot. Exh. G, pgs. 22-27). Dr. Hardin cites to 1985 EPA scientist's conclusion that 0.04 f/cc represented a reasonable estimate of exposures in brake repair shops, and more recently published studies showing that performing automotive brake work would result in a cumulative exposure of less than 3 f/cc (Mot. Exh. G, pgs. 32-33). The November 30, 2015 report concludes that decedent's claimed bystander exposure to brake work from 1977 to 1978 would result in a cumulative lifetime exposure that is much less than that of career motor vehicle mechanics and that there was no increased risk of mesothelioma from Nissan's products (Mot. Exh. G, pgs. 59-60).

Dr. David H. Garabrant's December 1, 2015 report assesses the decedent's medical history, occupational exposure history, non-occupational exposure history and medical issues. Dr. Garabrant opines that the decedent's alleged bystander exposure to brake repairs and motor vehicle repairs did not result in exposure to asbestos fibers or place the decedent at an increased risk of mesothelioma. Dr. Garabrant cites to epidemiological studies as showing that other professions like insulators, ship yard workers, plumbers and pipe fitters, and boiler operators have increased risk of mesothelioma, but claims that none of the studies show increased risk for brake repair workers or motor vehicle mechanics. He concludes that decedent's asbestos exposure

as a bystander to brake repair work and motor vehicle repair work did not cause, contribute, or in any way lead to decedent's mesothelioma (Mot. Exh. H).

Plaintiff's expert, Dr. David A. Schwartz, M.D., M.P.H., states that the decedent's pleural mesothelioma was from his exposure to asbestos while working around mechanics that were performing brake and clutch work at a gas station from 1977-1978 (Mot. Exh. 9). Dr. Schwartz concludes that decedent's cumulative exposures to asbestos - including at the gas station from 1977-1978 - was a substantial contributing factor in causing decedent's mesothelioma (Opp. Exh. 9).

Plaintiff's expert Dr. Mark Ellis Ginsburg, M.D. relies on epidemiological studies and case reports of garage mechanics who worked on asbestos containing brakes that showed a statistically significant, or greater than double of the relative risk of asbestos related disease. Dr. Ginsburg cites to a report of an 8 hour TWA during brake car repair that was as high as 0.68 f/cc during the blow out of brakes (Opp. Exh. 10, pg. 7, footnote 84). He further cites to a NIOSH study of brake shops with peak measurements of 14.54 f/cc which occurred in areas where there was dry brushing and cleaning with compressed air (Opp. Exh. 10, pg. 7, footnote 89). The April 4, 2019 report states that aside from industrial hygiene, the presence of visible dust from an asbestos containing product represents a hazard, with a threshold limit value that significantly exceeds OSHA PEL of 0.1 f/cc TWA (Opp. Exh. 10, pg. 8 footnotes 69, 71-72). Dr. Ginsburg concludes that decedent's cumulative exposure to asbestos fibers from each company's product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tile, was a substantial contributing factor to the development of decedent's mesothelioma and death (Opp. Exh. 10). Dr. Ginsburg's report raises credibility issues and issues of fact on specific causation.

Plaintiffs are not required to show the precise causes of damages as a result of the decedent's exposure to Nissan's products, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific causation for Nissan's products (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

Plaintiffs cite to decedent's deposition testimony, as showing that he identified Nissan products and asbestos brakes and clutches from Datsun vehicles, as a source of his exposure to asbestos. Decedent described the manner of his exposure, specifically being in the presence of, and inhaling, the dust that was emitted when the mechanics were removing and replacing the clutches and brakes (Mot. Exh. D, pgs. 50-52, 60-61, 65 and 206-207). Decedent's deposition testimony, when combined with the reports of Dr. Schwartz and Dr. Ginsburg, has created credibility issues and raised issues of fact creating "facts and conditions from which [Nissan's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra). Construing the evidence in a light favorable to the plaintiffs, this is sufficient to warrant denial of summary judgment.

ACCORDINGLY, it is ORDERED that Defendant Nissan North America, Inc.'s motion pursuant to CPLR §3211(a)(8) to dismiss this action on the grounds of lack of jurisdiction, alternatively to preclude plaintiff's medical causation expert and for summary judgment pursuant to CPLR §3212 on the issue of causation, is denied.

ENTER:

Dated: April 26, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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