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 ROTHLEN and JENNIFER ROTHLEIN N/K/A JENNIFER D. ANSELL, as Personal Representive of the Estate of EDWARD ROTHLEIN, Deceased,

Plaintiffs,

- against -

AMERICAN INTERNATIONAL INDUSTRIES FOR CLUBMAN, *et al.*,

Defendants.

INDEX NO.	190374/2016
MOTION DATE	10/23/2019
MOTION SEQ. NO.	013
MOTION CAL. NO.	

The following papers, numbered 1 to 10 were read on this motion for summary judgment by Colgate Palmolive Company as successor in interest to The Mennen Company:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 10

Cross-Motion: ☐ Yes **X** No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Colgate Palmolive Company, as successor in interest to The Mennen Company's motion for summary judgment, pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims asserted against The Mennen Company is denied.

Plaintiff, Edward Rothlein (hereinafter decedent), was diagnosed with peritoneal mesothelioma on or about October of 2016 and he died on October 17, 2018 (Opp. Exhs. 4 and 41, pgs. 3 - 4 of 20). Plaintiffs allege the decedent's exposure to asbestos - as relevant to this motion - is from asbestos containing talc in Mennen talcum powder manufactured by The Mennen Company, currently owned by Colgate Palmolive Company as successor in interest (hereinafter "defendant"). Plaintiffs allege that the decedent's personal use of Mennen talcum powder exposed him to asbestos from 1973 through approximately 1982.

Decedent was deposed over the course of two days, January 24 and 25, 2017 and his de bene esse deposition was conducted on June 16, 2017 (Mot. Exh. 3, and Opp. Exhs. 1 and 2). At his deposition the decedent testified that he personally used Mennen talcum powder starting in 1973 when he switched from using Cashmere Bouquet talcum powder because he wanted to change from the flower smell to something more manly, and was using Mennen deodorant at the time. He recalled that Mennen talcum powder had a scent. He described Mennen talcum powder as off-white and coarse, not as white or silky smooth as Cashmere Bouquet. He stated that the Mennen talcum powder came in a white plastic container with a sprinkle top, and the container had a big green label that said "Mennen" in block letters. Decedent could not recall the specific additional words but thought it said "bath talc." Decedent testified that he would shake a little of the Mennen talcum powder on his hand, about the size of a dime and put it on his face, he then used a little bit more, about the size of a quarter, to put on his body. He stated he used to pat the Mennen talcum powder on his body in the bathroom after bathing in the evenings. He described the process of applying Mennen talcum powder to his face on a daily basis as shaking it out, rubbing it around and patting it onto his face after shaving, afterwards he would try to take it out of his mustache, it would take about thirty to forty seconds. Decedent testified that he applied Mennem talcum powder to his body by pouring it in his hand, rubbing it together and then spreading it over his body and that also created dust. Decedent claimed the entire process of applying Mennen talcum powder would take a minute or two and that created dust. Decedent

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

testified that when he used Mennen talcum powder it created "powder dust" that he would smell at that time. He believed that he breathed in the dust (Opp. Exh. 1, pgs. 193-198 and 214-217, and Opp. Exh. 2, pgs. 54-57)

Plaintiff, Sharon Rothlein, testified at her deposition that during the same period her husband used Mennen, she would occasionally use it too. She remembered that the Mennen talcum powder bottles had the word "Mennen" and the word "talc" written on them, but those were the only words she remembered seeing (Opp. Exh. 3, pgs. 50-54 and 106).

Plaintiffs commenced this action on December 8, 2016 to recover for damages resulting from the decedent's exposure to asbestos from the defendants' products. The complaint was subsequently amended twice to add additional defendants. Plaintiffs' Second Amended Complaint dated January 30, 2017, separately named "Colgate-Palmolive Company (for Cashmere Bouquet)" and "Colgate-Palmolive Company, as successor in interest to The Mennen Company," as defendants. Defendant served an Answer to plaintiffs' complaint on January 9, 2017 and an Answer to plaintiffs' Second Amended Complaint on February 22, 2017 (Mot. Exhs. 10 and 14).

Defendant now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Complaint and all cross-claims against it. Defendant argues that the plaintiffs are unable to establish general or specific causation, or their claim for punitive damages.

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 non-moving 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]).

Defendant argues that plaintiffs are not expected to present any admissible evidence of exposure to asbestos. Defendant argues that Mennen was not formulated to contain asbestsos and plaintiffs' experts fail to raise issues of fact 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 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 the decedent either was not exposed to asbestos from their products, or that the levels of asbestos he was exposed to were not sufficient to contribute to the development of his 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]).

Defendant's arguments that plaintiffs' experts - including Dr. Moline - fail to provide admissible evidence on the issue of causation and cannot raise any issues of fact, amount to "pointing to gaps in plaintiffs' proof" and fail to state a prima facie basis to obtain summary judgment . To the extent defendant argues plaintiffs' withdrawn experts, Dr. Barry Castleman and Dr. Ronald Gordon, Ph.D. (Mot. Exhs. 27 and 28), do not provide sufficient evidence to establish lack of causation, this fails to state a basis to obtain summary judgment, as plaintiffs are not relying on theirs opinions in opposing summary judgment.

The letter reports of plaintiffs' expert Dr. Murray Finkelstein, Ph.D., M.D. dated September 14, 2017 and Revised (supplemental report) March 6, 2018, are unaffirmed and unsworn. These

reports are not in admissible form, have no probative value and fail to raise an issue of fact to defeat summary judgment on causation (Grasso v. Angerami, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991]; Quinones v. Ksieniewicz, 80 AD 3d 506, 915 NYS 2d 70 [1st Dept. 2013]; Lazu v. Harlem Group, Inc., 89 AD 3d 435, 931 NYS 2d 608 [1st Dept. 2011]; Migliaccio v. Miruku, 56 AD 3d 393, 869 NYS 2d 24 [1st Dept. 2008]; and McLoryd v. Pennypacker, 178 AD 2d 227, 577 NYS 2d 272 [1st Dept. 1991] lv. denied 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]).

Plaintiffs provide a sworn affidavit incorporating the report of Dr. Jacqueline Moline, M.D. which is sufficiently admissible (Opp. Exh. 41) .

Defendant argues that the specific bottles of Mennen talcum powder used by the decedent, were not tested and plaintiffs have no direct evidence of exposure. Defendant cites to precedent from multiple jurisdictions other than New York - including California, Maryland, Georgia and Delaware - in support of this argument. Defendant does not establish that the evidentiary standard applied by these other jurisdictions is the same as the State of New York where plaintiffs are not required to show the precise cause of their damages, only facts and conditions from which the defendant's liability may be reasonably inferred. Plaintiffs' failure to provide the actual bottles of Mennen talcum powder that were used, is not dispositive (See 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] and Cornell v. West 51st Street Realty, LLC, 22 N.Y. 3d 76, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

It is defendant's contention 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 the Matter of New York City Asbestos Litigation (Juni), 32 NY 3d 1116, 116 NE 3d 75, 91 NYS 3d 784 [2018], because plaintiffs are unable to establish general and specific causation. Colgate relies on its experts Dr. Matthew S. Sanchez, a doctor of geology; and Jennifer Sahmel, M.P.H.,C.I.H., C.S.P., a certified industrial hygienist and certified safety professional, to establish lack of any 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).

Defendant argues that its experts' opinions are supported by peer reviewed epidemiology and independent risk assessments, and demonstrate there is no scientifically established causal relationship between exposure to cosmetic talcum powder and mesothelioma. It is further argued that even if there were trace asbestos contamination in Mennen talcum powder products, decedent's and his wife's use of the product would not have been capable of causing his mesothelioma.

Defendant relies on Dr. Sanchez's January 24, 2019 affidavit and December 1, 2017 report (Mot. Exh. 1, Parts 1 and 2). Dr. Sanchez states that talc in its purest form is not asbestos. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and analysis of the materials is needed to make a determination. Dr. Sanchez relies on the Food and Drug Administration (FDA) testing and standard for testing to determine if asbestos fibers are present, and the Environmental Protection Agency (EPA) R-93 protocol for determining the optical properties of asbestos, to determine if it is a mineral type and whether it is asbestiform or not. Dr. Sanchez cites to historical testing by the FDA which typically found little or no asbestos contamination in the talc used in Mennen talcum powder. Dr. Sanchez analyzes the talc mined from the regions in Southwest Montana, specifically the Willow Creek mine and the Bearhead mine in Montana, and from Val Chinsone/Val Germanasca, Italy, which he states were used in Mennen talcum powder during the period relevant to decedent's exposure. He cites to reports and studies of testing of the talc and concludes that the talc that was used in Mennen talcum powder products, that was mined in Italy, North Carolina and Montana, does not contain asbestos (Mot. Exh. 1).

Defendant's expert Jennifer Sahmel, cites to the Occupational Safety and Health Administration - Permissible Exposure Limits (OSHA-PEL) and the National Institute of Occupational Safety and Health (NIOSH) standards for determining respirable asbestos dust. She

discusses the Food and Drug Administration's (FDA) risk analysis of asbestos from cosmetic talc products results from testing done in the mid to late 1970's. She determines that the decedent's cumulative exposure to any asbestos in Mennen talcum powder from his use would be within or below the cumulative ambient or background levels of asbestos found in the air (Mot. Exh. 2, Parts 1 and 2).

Dr. Moline's November 20, 2017 report discusses plaintiff's medical and exposure history, past medical history, family history, cigarette smoking history, and her environmental and occupational history. Dr. Moline explains occupational medicine and its assessment of risk in relation to asbestos as the cause of mesothelioma. Dr. Moline explains the different types of diseases - including mesothelioma - that can be caused by exposure to asbestos. Dr. Moline considers mesothelioma to be a dose responsive disease. She cites to agencies - including the National Institute for Occupational Safety and Health (NIOSH), OSHA and the EPA- together with a 2014 conclusion by the World Health Organization (the WHO), as recognizing that there is no "safe" level of exposure to asbestos regardless of the fiber type or size (Opp. Exh. 41).

Dr. Moline cites to criteria for diagnosis and attribution established in 1997. She states that a great majority of mesothelioma is due to asbestos exposure and that mesothelioma can occur in cases with low asbestos exposures, however, very low background environmental exposures carry only an extremely low risk. Dr. Moline also cites to a study indicating that exposure to asbestos at levels below OSHA - PEL of 0.1 fibers per cubic centimeter can cause disease. Dr. Moline concludes, to a reasonable degree of medical certainty, that the decedent was exposed to levels of asbestos that was above ambient background levels. She relies on analysis of the talc from source mines and defendant's Mennen talcum powder, that found they were contaminated with asbestos. She determines that decedent's mesothelioma was caused by his exposure to asbestos and asbestos contaminated talcum powder (Opp. Exh. 41).

Defendant 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 plaintiff is 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' experts are relying on some of the same scientists and scientific organizations as defendant's 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]).

Defendant's experts Dr. Matthew S. Sanchez and Jennifer Sahmel rely on recognized studies and reports to establish that there is no causal relationship between Mennen talcum powder products and mesothelioma. Plaintiffs' expert, Dr. Jacqueline Moline, also relies on studies and reports in part from the same scientific organizations, including OSHA and the EPA, to establish that decedent's exposure to asbestos contaminated talc in the Mennen talcum powder products he used during the relevant time period can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Specific Causation:

Defendant argues that Mennen talcum powder products did not have any asbestos in them, and to the extent there was asbestos contamination the amounts were incapable of causing mesothelioma. Defendant also argues that to the extent there was asbestos containing talc in Mennen talcum powder products, it would not produce breathable dust to a level sufficient to cause the decedent's mesothelioma, and thus plaintiffs are unable to establish specific causation. In support of its arguments on specific causation, defendant relies on the reports of its experts Dr, Sanchez and Jennifer Sahmel.

The Court of Appeals has enumerated several ways an expert might demonstrate specific 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 the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Dr. Sanchez states that the only analytical protocol recognized by the FDA for certifying talc as " asbestos free" requires XRD (infared absorption) testing. Dr. Sanchez reviews reports and studies and interprets them as demonstrating that there is no asbestos in the source mines used for the production of Mennen talcum powder. He identifies the various forms of asbestos fibers and provides the geology of source mines. He analyzes the talc mined from the regions in Southwest Montana, specifically the Willow Creek mine and the Bearhead mine in Montana, and from Val Chinsone/ Val Germanasca, Italy, which he states were used in Mennen talcum powder during the period relevant to decedent's exposure. Dr. Sanchez states that historical testing shows there was no asbestos found in the talc used for Mennen talc powder. Dr. Sanchez relies on his own facility, RJ Lee's, testing which found no asbestos in the historical samples of Mennen talcum powder that it tested, and FDA testing in 1979 and 1986 that found no asbestos in Cashmere Bouquet. He states that in 1986 the FDA found no basis to conclude a health warning was needed stating the hazardous effects of asbestos in talc because there was no basis to do so. Dr. Sanchez refers to a study by the FDA in 2012 that found no asbestos in the samples. Dr. Sanchez evaluates the testing performed by plaintiffs' experts and concludes that the methodology used for his testing was flawed. Dr. Sanchez ultimately concludes that Mennen talcum powder used by the decedent and the talc from the source mines, are free of asbestos to a reasonable degree of scientific certainty (Mot. Exh. 1, Parts 1 and 2).

Ms. Sahmel relies on multiple articles, reports and studies that she summarizes and attaches to her report. Ms. Sahmel assesses OSHA PEL standards and compares them over time and to more recent standards, as reflected in a chart. She also addresses the EPA's standards. Ms. Sahmel discusses the source mines for talc used in Mennen talcum powder products and the relevant testing that found no asbestos. Ms. Sahmel summarizes testing on Mennen talcum powder (Mot. Exh. 2, parts 1 and 2).

Ms. Sahmel provides the various methods for determining exposure and risk assessment. She uses an upper bound assumption that trace asbestos could be found in the Cashmere Bouquet talcum powder used by the decedent and Mrs. Rothlein, she determines that it would be well within cumulative lifetime background or ambient levels found in the air in the United States and below OSHA PEL for working with asbestos. In reliance on the materials cited, Ms. Sahmel performed an "evaluation of hypothetical cumulative exposures to asbestos from the use of cosmetic talc powder products." Her evaluation results are reflected in Table 2, "Estimates of Potential Exposure Associated with the Consumer Use of Cosmetic Talcum Powder Products over a 70-Year Lifetime"(Mot. Exh. 2, Part 1, Table 2). Ms. Sahmel, in assessing decedent's cumulative asbestos exposure potential (Mot. Exh. 2, Part 1, Table 3) used hypothetical fiber concentrations of 0.12 f/cc with a worst case asbestos content estimate of 0.1%. Ms. Sahmel determines that decedent's total cumulative lifetime theoretical exposure could be as much as 0.0011 f/cc-year, which is below the range of ambient exposure. She further states that the rate of exposure would drop off "sharply" thirty seconds following the "dusting activity." (Mot. Exh. 2, Part 1, pgs. 45-46).

Ms. Sahmel prepared a table reflecting lifetime cumulative ambient exposure based on the lowest and highest measured asbestos specific airborne fiber concentrations. She calculates the lowest cumulative exposure over a period of 70 years as being 0.002 and the upper bound exposure as 0.4 (Mot. Exh. 2, Part 1,Table 4). Ms. Sahmel determines that the decedent's alleged exposure for the relevant period of exposure was well within cumulative ambient exposure levels found in the air in the United States and did not create a significant risk of mesothelioma. She concludes that there is no evidence that consumer use of Mennen talcum powder during the period relevant to decedent's exposure would have resulted in any measurable exposure to asbestos by

the decedent. She further concludes that decedent's cumulative range of exposures were well below any lifetime cumulative ambient exposures and well below OSHA PEL for asbestos (Mot. Exh. 2).

Dr. Moline refers to testing done using phase contrast microscopy and transmission electron microscopy that found significant levels of asbestos fibers (anthrophyllite, tremolite and chrysotile) in the breathing zone of the person applying the talcum powder and bystanders. Dr. Moline states that there is bystander exposure to asbestos in talc of 1.35 f/cc, with potential exposure for those using the talc by shaking as 4.8 f/cc with an actual asbestos fiber measurement of 1.8 f/cc. She cites to measurements using a puff for bystanders as 13.7 f/cc and 9.7 f/cc, and an actual asbestos fiber measurement of 4.9 f/cc and 3.5 f/cc. Dr. Moline cites to the Mine Safety and Health Administration's (MSHA) 1984 results of monitoring mill personnel for Italian talc, that concluded that bulk Italian talc was comprised of approximately 0.6% anthophyllite. She refers to testing conducted by MVA Scientific Consultants which found that there was significant amounts of exposure to tremolite, anthophyllite and chrysotile asbestos fiber in talcum powder, including Mennen talcum powder. She determines that decedent's mesothelioma was caused by his exposure to asbestos contaminated talc (Opp. Exh.41).

The conflicting affidavits and testimony, and construing the evidence in a light most favorable to the plaintiff as the non-moving party, warrants denial of this motion for summary judgment. Decedent's deposition testimony, the reports of plaintiff's expert, Dr. Moline and the other admissible evidence plaintiffs presented sufficiently create "facts and conditions from which [Colgate-Palmolive Company's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and raise issues of fact. There remain issues of fact as to whether the Mennen talcum powder products were contaminated with asbestos, and whether decedent's use of those products , during the periods relevant to his alleged exposure to asbestos caused his mesothelioma.

Plaintiffs have also raised issues of fact requiring denial of the motion for summary judgment to dismiss the cause of action for punitive damages. 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]). Defendant argues it should not be found wanton and reckless because it purchased The Mennen Company in 1992 approximately ten (10) years after the decedent last used Mennen talcum powder.

Defendant argues it should not be found wanton and reckless because The Mennen Company relied on testing performed by Whittaker Clark and Daniels and performed additional testing under the proper standards during the decedent's alleged period of exposure, with no asbestos found in the talc or Mennen talcum powder products. Plaintiffs' argue that the testimony of defendant's corporate representative, together with the expert report of Dr. Moline and the other admissible evidence they submitted raises issues of fact on whether punitive damages are warranted. Plaintiffs provide the deposition testimony, in an unrelated actions, of defendant's corporate representative, Daniella Urbach-Ross, Ph.D., a toxicologist. Dr. Urbach-Ross testified at a deposition conducted in an unrelated action that The Mennen Company made annual profits in excess of $100 million and had two laboratories and at least one medical director or doctor on staff to research the safety of their products and there is no indication that it did so (Opp. Exh. 44 pgs. 78-82, 96, 112-115 and 131-132). In another unrelated action, Dr. Urbach-Ross testified that defendant spent more on "travel and entertainment" for its then President, Mr. Suffis, than on talc analysis (Opp. Exhs. 44, pgs. 306-310).

There remain issues of fact as to whether The Mennen Company intentionally avoided potential test results that found asbestos fibers in its talc and continued to advocate for the use of its talc as uncontaminated. To the extent that plaintiffs argue that The Mennen Company placed corporate profits and reputation above the health and safety of the decedent, the issue of punitive damages is to be determined by the trial judge after submission of all the evidence.

Defendant alternatively argues that equity requires there should not be liability for any wanton, reckless or malicious acts of the predecessor company, The Mennen Company. Defendant provides no evidentiary support for its alleged lack of liability for its predecessor to obtain summary judgment. There is no copy of the actual merger agreement, only the cover and signature page (Mot.

Exh. 61). Although the general rule is that a corporation that acquires the assets of another is not liable for the torts of its predecessor, an exception is made for a "de facto merger." Defendant's corporate representative, Daniella Urback-Ross, Ph.D., a toxicologist, testified at a deposition conducted in an unrelated action, that former Mennen employees continued to work for Colgate Palmolive Company after the merger, which is one of four factors establishing a potential "de facto merger" (Opp. Exh. 45, pgs. 22-23)(See In re: New York City Asbestos Litigation (Van Nocker), 15 AD 3d 254 at 256, 789 NYS 2d 484 [1st Dept. 2005]). Defendant fails to provide an evidentiary basis for the alleged lack of existence of either a "de facto merger" or actual contractual merger that would result in no liability for punitive damages for The Mennen Company, further warranting that the issue of punitive damages be determined by the trial judge after submission of all the evidence.

Accordingly, it is ORDERED that defendant Colgate Palmolive Company as successor in interest to The Mennen Company's motion for summary judgment, pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims asserted against The Mennen Company is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: November 13, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE