

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CivilLITIGATION

# Asbestos litigation: Rejecting single exposure theory

### A fresh analysis of establishing causation

A recent decision in New York County may significantly alter how asbestos cases are prosecuted and defended in New York. In a 40 page opinion in *Juni v. A.O. Smith Water Products, et al.* (Index No. 190315/12), Supreme Court Judge Barbara Jaffe held that an asbestos or other toxic tort plaintiff must quantify their exposure in some objective scientific manner to establish causation.

Judge Jaffe also rejected the single exposure theory (i.e., that a single exposure is enough to establish causation without considering whether additional exposures occurred) as irreconcilable with the well-recognized scientific requirement that the amount, duration and frequency of the exposure be considered in assessing the sufficiency of an exposure in increasing the risk of developing a disease.

The plaintiff in *Juni* was a mechanic for the entirety of his working life, performing all activities associated with that field, including changing brakes, replacing clutches, removing parts of the engine and cleaning up after the various work was completed. The plaintiff and his wife brought suit alleging that Juni developed mesothelioma after being exposed to asbestos from brakes, clutches or gaskets sold or distributed by defendant, Ford Motor Company.

After trial, the jury rendered a verdict finding that: (1) Juni was exposed to asbestos from brakes, clutches or gaskets sold or distributed by Ford, (2) Ford failed to exercise reasonable care by not providing an adequate warning about the hazards of exposure to asbestos, and (3) Ford's failure to warn Juni was a substantial contributing factor in causing his injury. The jury found that Ford had acted recklessly, and awarded \$8 million for pain and suffering, and \$3 million for loss of consortium.

In setting aside the verdict, Judge Jaffe initially determined that plaintiff had failed to demonstrate causation between the alleged exposure and Juni's mesothelioma. She noted that in order to establish that Ford's failure to warn plaintiff adequately

of the dangers of exposure to asbestos was a substantial factor in causing his mesothelioma, plaintiffs were required to prove not only that his mesothelioma was caused by his exposure to asbestos, but that he was exposed to sufficient levels to cause his illness as a result of his work on brakes, clutches, or gaskets sold or distributed by Ford (citing on *Parker v. Mobile Oil Corp.*, 7 N.Y.3d 434 [2006], and *Cornell v. 360 West 51st Street Realty LLC*, 22 N.Y.3d 762 [2014]).

Judge Jaffe found that plaintiffs were seeking to be relieved of the burden of establishing some quantifiable level of exposure, and instead asking the court and jury to assume that plaintiff's mesothelioma "must" have been caused by exposure to asbestos contained in brakes, clutches or gaskets. Judge Jaffe noted that, as in *Parker*, the plaintiff offered evidence through his experts that there is no safe level of exposure to asbestos.

However, the simple fact that mesothelioma is only caused by exposure to asbestos does not dispose of the issue of whether a defendant's product caused the mesothelioma. She explained that it is not the association between mesothelioma and asbestos that is at issue when determining causation, but rather whether a defendant may be held liable for causing a plaintiff's mesothelioma. This necessarily depends on the sufficiency of the exposure, if any, to asbestos in the defendant's product, and whether that exposure is capable of causing mesothelioma.

Judge Jaffe held that absent evidence of the amount, duration or frequency of plaintiff's exposure to asbestos-containing dust from brakes, clutches or gaskets sold or distributed by Ford, plaintiff had not established a dose-response relationship, or otherwise even minimally quantified plaintiff's exposures. She also noted that plaintiff failed to use any other method identified by the Court of Appeals in *Parker* and *Cornell* to express plaintiff's exposure scientifically (for example, estimating his exposure through mathematical modeling by taking into account his

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work studies). As such, plaintiffs failed to establish causation.

Plaintiffs alternatively relied upon the single exposure theory, arguing that evidence that plaintiff was regularly exposed over many years to asbestos contained in brakes, clutches or gaskets sold or distributed by defendant rendered a quantification of his individual exposures unnecessary.

Judge Jaffe noted that the assertion that every single exposure to asbestos constitutes a “significant” contributing factor is irreconcilable with the well-recognized scientific requirement that the amount, duration and frequency of the exposure be considered in assessing the sufficiency of an exposure in increasing the risk of developing a disease. In other words, the risk of developing a disease increases or decreases depending on the nature of the exposure, which depends on the amount, duration, and fre-

quency of the exposure.

Judge Jaffe also noted that plaintiffs failed to offer sufficient evidence that any specific exposure increases the risk of a disease, and thus is a significant contributing factor to causing the disease. She also cited a number of decisions from other jurisdictions rejecting the single exposure theory.

Although the decision in *Juni* has not been affirmed or addressed by an appellate court, the well-reasoned opinion provides an insight as to how courts may treat evidentiary issues in toxic tort cases going forward. Assuming *Juni* is affirmed, a toxic exposure plaintiff will need to quantify his or her exposure in some scientific way, and will no longer be permitted to rely on the single exposure theory.

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