NEW YORK COURT OF APPEALS ROUNDUP

A REVIEW OF '*NEW YORK CITY ASBESTOS LITIGATION, JUNI V. FORD*'

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The Court of Appeals issued a significant ruling on expert proof in the asbestos arena, holding that the plaintiff in a mesothelioma case had not provided sufficient evidence of causation and affirming the vacatur of an $11 million jury award. In *In the Matter of New York City Asbestos Litigation*, plaintiff's deceased husband was an auto mechanic who claimed exposure to asbestos dust while working on brakes, clutches and gaskets sold or distributed by Ford Motor Company. The court concluded that "the evidence was insufficient as a matter of law to establish that [Ford's] conduct was a proximate cause of the decedent's injuries" and that Ford was therefore entitled to judgment as a matter of law under CPLR 4404(a).

The decedent, Arthur Juni, was diagnosed with mesothelioma in 2012. He had worked as an auto mechanic from 1966 to 2009 in two garages owned by Orange & Rockland Utilities servicing mostly Ford vehicles. He brought suit against a number of defendants, including Ford Motor Company, but died in 2014 before trial. His wife continued the lawsuit, asserting claims for negligence, products liability, failure to warn and loss of consortium. Before he died, Juni testified in a deposition, which was read to the jury during a 20-day trial. Juni testified that he was exposed to asbestos-containing dust in a variety of ways, including when he removed brake drums from Ford trucks, replaced brakes in a variety of Ford vehicles, scuffed new brakes with sandpaper, replaced clutches, cleaned gaskets, and swept up asbestos-laden dust generated by other mechanics. Over the four week trial, the jury also heard from experts in epidemiology, toxicology, medicine, occupational hazards, and environmental science.

Defendants' experts testified that the chrysotile asbestos fibers in Ford's products were transformed into a biologically inert substance, Forsterite, during the high-heat manufacturing process and the products' subsequent high-heat use. Plaintiff's experts allegedly conceded that chrysotile activity can "become virtually nil" under high heat, that epidemiological studies on garage workers did not show a causal relationship with mesothelioma, and that "no one knows" whether the friction product dust to which Juni was exposed was toxic. The jury found Ford 49 percent liable for Juni's injuries and Orange & Rockland Utilities responsible for the remaining 51 percent.

The trial court granted Ford's motion to set aside the verdict on the ground that there was legally insufficient evidence to establish that Juni developed mesothelioma as a result of his exposure to asbestos-containing friction products sold or distributed by Ford. The Appellate Division, First Department affirmed, holding that plaintiff had failed to satisfy the standards set forth in *Parker v. Mobil Oil*, 7 N.Y.3d 434 (2006), and *Cornell v. 360 W. 51st St. Realty*, 22 N.Y.3d 762 (2014), which require that plaintiff provide, at a minimum, some

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"scientific expression" of the level of exposure to toxins in defendant's products that was sufficient to have caused the disease. Then-Justice Feinman wrote a lengthy dissent, arguing that the jury's verdict was not "utterly irrational" and, accordingly, that the majority inappropriately substituted their assessment of the witnesses' credibility for the jury's.

The Court of Appeals issued a Memorandum decision joined by Chief Judge DiFiore and Judge Stein in which Judges Fahey and Wilson joined in separate concurring opinions. The Memorandum decision stated without discussion that the evidence was insufficient as a matter of law to establish proximate cause pursuant to the standards set forth in *Parker*and *Cornell*. In *Parker*, the court established that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation), and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." 7 N.Y.3d at 448. In *Cornell*, the court held that "there must be evidence from which a factfinder can conclude that the plaintiff was exposed to the levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered." 22 N.Y.3d at 784. Judge Fahey's concurring opinion in the instant case states that, in his view, the evidence was legally insufficient to establish "a connection between [Ford] and decedent's exposure to asbestos" and that he was not addressing issues of "general or specific causation."

Judge Wilson concurred to highlight his opinion that the failure of proof related to general causation and not specific causation. Judge Wilson explained that, for him, a "necessary link in the proof of proximate cause was missing" because there was a "gap in proof as to the toxicity of the products at issue." Essentially, Judge Wilson pointed to the fact that while Juni claimed exposure to asbestos-laden dust, Ford's experts proffered reliable unrebutted evidence that "the physical properties of the asbestos in Ford's friction products had been so radically altered as to render conventional toxicology irrelevant." The First Department had similarly found that plaintiff's experts' concessions about chrysotile in friction products so undermined their assertions of causation "as to render those assertions groundless or unsupported." Interestingly, the trial judge noted that the plaintiff's expert had offered in a different case the opinion that visible dust emanating from an asbestos-containing product contained enough dust to be hazardous, but that such proof was lacking in Juni's case.

Judge Rivera dissented in a spirited opinion, while Judges Garcia and Feinman did not participate in the appeal. (Judge Feinman had dissented in the First Department decision below.) Judge Rivera noted that she agreed with Judge Feinman's earlier dissent. She focused on the standard for setting aside a jury verdict: that the outcome must be "utterly irrational," meaning that "there is simply no valid line of reasoning and permissible inferences which could possibly lead [a] rational [person] to the conclusion reached by the jury." Judge Rivera believed that there was compelling evidence of Juni's exposure to asbestos while working on Ford vehicles and products and inferred that the jury was unpersuaded by Ford's experts. She did not further address the alleged transformation of "active" chrysotile into "inactive" Forsterite in Ford's products.

The *Juni* decision presents an important development in the court's treatment of expert evidence in the asbestos personal injury field. The court essentially rejects the proffer of conclusory statements that visible dust contains active asbestos in the face of countervailing expert evidence that the active asbestos fibers in friction products have already been converted to biologically inert substances. The decision could be understood as setting up a burden-shifting scheme whereby the plaintiff must rebut the defendant's expert testimony in order to survive a challenge under *Parker* and *Cornell*. With this guidance from the court, plaintiffs and the lower courts are on notice as to the evidentiary burden that must be met in order to establish causation.