SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 9, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10827 The People of the State of New York, Ind. 967/12
Respondent,

-against-

Luis Vasquez,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Luis Vasquez, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Patricia DiMango and Patricia Anne Williams, JJ. at CPL article 730 proceedings; Thomas E. Moran, J. at jury trial and sentencing), rendered October 18, 2013, convicting defendant of robbery in the first degree (two counts) and assault in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years, unanimously affirmed.

The jury convicted defendant based on his participation in a

shooting and robbery. The other participants were defendant's friend Francisco Calderon, Sonia Hernandez and Yahaira Diaz. The two women testified that they had been persuaded to ride along by defendant's promise that they would share the money stolen from the victim. Calderon testified that the presence of the two women would reduce suspicion as they waited for the victim to appear.

On the day of the shooting and robbery, defendant drove his girlfriend's dark green Ford Explorer SUV to 1365 LaFayette Avenue in the Bronx. Both Diaz and Hernandez testified to what happened after all four got into the SUV. While driving to the scene, defendant told the others that a "Chinese man" walking with a bag would be their target. The four waited in the parked SUV for approximately two hours. When the victim emerged from the building, defendant identified him as "the Chinese man,"[1] and Calderon got out of the car. Diaz followed. After a struggle, Calderon shot the victim three times, took the bag, and returned to the car with Diaz. Diaz testified that as the SUV sped away from the scene, both defendant and Hernandez repeatedly said, "We won." Calderon threatened to kill the women if they discussed

[1]The victim is of Korean heritage.

the crime with anyone.

Unbeknownst to defendant and the others, a retired sanitation worker driving his own car in the vicinity saw Calderon holding a gun while standing next to Diaz. The witness testified that he heard gunshots and saw another man fall to his knees. After Calderon and Diaz got back in the vehicle with defendant and Hernandez, the witness followed the SUV and called 911. The witness estimated that defendant was driving approximately 60 miles per hour. Eventually, the witness saw a police van, which was responding to the radio run about the shooting and robbery, and pointed out the SUV to the officers. He told the officers that at least one of the occupants had a gun.

The officers activated their lights and siren and pulled the SUV over. The officers directed the occupants of the SUV to throw the car keys out the window and place their hands outside the SUV. According to Diaz and Hernandez, defendant instead threw Diaz's house keys out of the driver side window and then sped away as the officers exited their van.

The chase continued. Hernandez testified that Calderon threw the gun out of the SUV. At one point, defendant pulled over to let Calderon and Diaz out of the car. Eventually

defendant drove the SUV into a bus depot parking lot and was cornered. Defendant jumped out of the SUV, climbed a fence, and fled. Police recovered his wallet from the SUV. Defendant was arrested approximately 18 months later.

Hernandez and Diaz testified against defendant at trial pursuant to cooperation agreements, after pleading guilty to third degree grand larceny and third degree robbery, respectively. Calderon pleaded guilty to first degree robbery to cover five robberies committed in September 2010, including the instant offense.

Calderon testified for the defense. He attempted to exculpate defendant by claiming that the robbery was his idea, and that he did not tell defendant or the others that he was going to rob the victim. Instead, he told them he needed a ride to apply for a job. Calderon testified that he compelled defendant under gunpoint to drive away from the scene. The jury convicted defendant as described above.

Defendant raises several issues on appeal. We find that none warrant reversal.

In the circumstances presented, defendant was not entitled to a third CPL article 730 examination, and there was no violation of the procedural requirements of that article.

Examining psychiatrists had twice reported that defendant was competent, that he was malingering, and that his records did not show a history of psychiatric treatment or symptoms. Justice DiMango agreed with the examiners that defendant was malingering, but nevertheless acquiesced to defense counsel's request for a third exam. However, the examiners submitted addenda to their earlier reports, adhering to their conclusion that defendant had been malingering, and finding that a further exam would be a waste of resources. When the parties next appeared before Justice Williams, she providently exercised her discretion in determining that a third exam was no longer needed. The record supports her determination, made upon review of the prior reports, observations of defendant in court, and consideration of defense counsel's representations of defendant's conduct, that defendant was malingering and that there was no reasonable ground to believe that he was an incapacitated person (*see e.g. People v Mendez*, 306 AD2d 143, 143 [1st Dept 2003], *lv denied* 100 NY2d 622 [2003]; *see also People v Wyche*, 21 AD3d 281 [1st Dept 2005], *lv denied* 6 NY3d 761 [2005]). Nothing in the record casts any doubt on defendant's competency. *People v Armlin* (37 NY2d 167 [1975]), cited by defendant, does not deprive a court of all discretion to dispense with a previously granted examination (*see People v*

Washington, 171 AD3d 458, 459 [1st Dept 2019], *lv denied* 34 NY3d 939 [2019]).

The trial court's denial of defense counsel's request for time to speak to Calderon, who was incarcerated, before he was called to the stand was a provident exercise of discretion under all the circumstances. In any event, any error in this regard was harmless for several reasons. Counsel already knew the content of Calderon's anticipated testimony, and Calderon testified in accordance with the information he had already supplied to counsel. There is no indication that Calderon was insufficiently prepared to testify. As discussed at greater length below, the evidence overwhelmingly established that defendant knowingly, rather than unwittingly, acted as an active participant in the robbery. We also find that the court's ruling had no adverse effect on defendant's right to a fair trial, to present a defense, or to effective assistance of counsel.

The court properly discharged a deliberating juror and replaced her with an alternate upon defendant's written consent, executed in open court (*see* CPL 270.35[1]). The court conducted an adequate inquiry, by phone, into the reason for the juror's absence, and ascertained the juror's health issues, including high blood pressure, and that she had a doctor's note confirming

her medical unfitness to continue deliberating. Defendant then personally consented to her discharge and stated his desire not to force her to continue deliberating. Defendant's written consent to her discharge was made knowingly, voluntarily and intelligently after the court offered numerous times to call the juror again and instruct her to return to the courthouse, after defendant received ample time to confer with counsel, and after defense counsel confirmed that he had reviewed the waiver with defendant and had explained that they could talk further with the juror or agree to substitute an alternate juror. Although defendant at one point claimed to have been pressured, he expressly stated that he still wanted to replace the juror.

We agree with the dissent that the prosecutor improperly cross-examined Calderon concerning three other crimes in which he had left the scene in a dark SUV. Some of the questions included a partial or complete recitation of the license plate number of the SUV used in the instant crime. This was a clear attempt to associate defendant with uncharged crimes, and the court should have sustained defense counsel's objections to this line of questioning. Similarly, the prosecutor should not have made two references in her summation to the use of this "getaway vehicle" in other crimes when discussing Calderon's testimony.

However, these errors were harmless in light of the overwhelming evidence of defendant's guilt. Diaz and Hernandez both testified that defendant invited them to the robbery with the promise that they would share in the proceeds. They both testified that defendant identified the "Chinese man" who was the mark. Defendant exclaimed, "We won," when Calderon returned to the car with the victim's money. After leaving the scene he drove recklessly at high speed. Both women testified that when the SUV was initially stopped by the police, defendant threw Diaz's house keys out of the car window and sped away to evade capture. If he had been coerced into acting as getaway driver, as Calderon claimed, defendant had the opportunity to explain that to police on two occasions: after he let Calderon and Diaz out of the car, and when he was cornered in the bus depot parking lot.

The dissent characterizes the testimony of the two women as that of culpable accomplices who received favorable plea bargains, but the jury credited their testimony over Calderon's attempt to exculpate defendant. It was for the jury to weigh these competing narratives.

The evidence at trial demonstrates that there is no "significant probability, rather than only a rational

possibility," that the jury would have acquitted defendant had it not been for the references to the SUV's connection with Calderon's other crimes (*People v Crimmins*, 36 NY2d 230, 242 [1975]; *see also People v Baines*, 178 AD3d 476, 477 [1st Dept 2019] [erroneous admission of uncharged crimes evidence was harmless]; *People v Chapman*, 101 AD3d 406, 406 [1st Dept 2012] [assuming that admission of uncharged crime evidence was improper, it was "harmless in the face of the overwhelming proof of defendant's guilt"], *lv denied*, 20 NY3d 1097 [2013]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se arguments.

All concur except Manzanet-Daniels, J.P. and Gesmer, J. who dissent in a memorandum by Manzanet-Daniels, J.P. as follows:

MANZANET-DANIELS, J. (dissenting)

The trial court's failure to circumscribe the prosecutor's cross-examination of defense witness Calderon left the jury with the impression that defendant had participated with Calderon in uncharged robberies. This, in conjunction with the prosecutor's argument in summation that defendant and Calderon were involved in a "spree" of other uncharged robberies, deprived defendant of a fair trial on the charges in this case (*see People v Ventimiglia*, 52 NY2d 350, 359 [1981]). Because the evidence was not so overwhelming as to render these errors harmless, I would reverse the judgment and remand the matter for a new trial.

When a defendant is tried for one offense, "he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded" (*People v Wilkinson*, 71 AD3d 249, 253 [2d Dept 2010] [internal quotation marks omitted]; *see Ventimiglia*, 52 NY2d at 359). Proof of uncharged crimes may be admitted for certain narrow purposes, but it "may not be admitted solely to demonstrate a defendant's bad character or criminal propensity" (*People v Blair*, 90 NY2d 1003, 1004-05 [1997] [testimony concerning an alleged drug transaction occurring eight

months earlier did nothing to refute the defendant's claim that he had been framed, but served only to show his propensity to sell drugs, and thus was inadmissible]); *Wilkinson*, 71 AD2d at 255 [evidence of uncharged sales on other occasions "is rarely if ever admissible merely to complete the narrative"] [internal quotation marks omitted]).

Under the guise of impeaching Calderon's credibility, the prosecutor repeatedly implied to the jury that defendant was the "getaway" driver for Calderon in a string of violent robberies. The prosecutor began by asking Calderon, during cross, if he was aware that the license plate on defendant's SUV was "[EVD] 4556." Although Calderon replied that he was not aware, the prosecutor proceeded to ask detailed questions about multiple other robberies Calderon had committed in September 2010 – robberies that were not at issue in defendant's trial. The prosecutor asked Calderon if, on September 11, 2010, he entered the Rosa Beauty Salon on the Grand Concourse and robbed people at gunpoint, before "flee[ing] from that scene in a dark SUV with the partial plate number [EVD] 6." The prosecutor asked Calderon if, on September 16, 2010, he entered the Mi Amiga Beauty Salon and "pointed a gun at the head of an eight-year[]-old boy and threatened to shoot him," before robbing several people at

gunpoint. The prosecutor asked if he had "fled" the scene of the robbery "in a dark SUV which contained partial plate number 4556." The prosecutor asked Calderon if, on September 18, 2010, he and another male Hispanic entered Mi Estrellita Beauty Parlor, armed with a silver gun and a knife, and "robbed several people at gunpoint," before "fle[eing] in a dark Ford Explorer going northbound on Morris Avenue from East Treemont Avenue."

This testimony left the jury with the impression that defendant – whose girlfriend owned a 2003 Ford Explorer with license plate EVD 4556 – participated in these uncharged robberies.

The color, model, and license plate of Calderon's alleged getaway car in the other cases were not pertinent to this case. Rather, by going seriatim through Calderon's crimes and questioning him regarding license plate numbers, the prosecutor was trying to implicate defendant by suggesting that he drove Calderon to and from those other robberies (*see e.g. People v Ortiz*, 69 AD3d 490, 491 [1st Dept 2010] [prosecutor's reference to the defendant's girlfriend's criminal record served no other purpose but "to suggest that defendant was associated with a disreputable person"]). The prosecutor in this case was "invit[ing] [the] jury to misfocus" on defendant's purported

guilt in Calderon's other robberies instead of on the evidence relating to the case before it (*People v Rojas*, 97 NY2d 32, 36-37 [2001]). This is exactly the kind of propensity evidence that may not be admitted at trial (*see People v Blair*, 90 NY2d 1003).

Worsening matters, the prosecutor argued during summation that Calderon's "getaway vehicle" for the commission of his other robberies was defendant's "dark green SUV." Indeed, without any basis in the record, he asserted that Calderon's "getaway vehicle of choice" was "that dark green SUV."

The evidence of defendant's guilt was not so overwhelming that these errors may be deemed harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant did not participate in the robbery itself, and was at most alleged to be a "getaway driver." He was not found with fruits of the crime; indeed, he was implicated on the word of more culpable accomplices who received

beneficial plea bargains. Because the evidence of prior uncharged crimes served no legitimate purpose and the error in its admission cannot be deemed harmless, the judgment should be reversed and the matter remanded for a new trial.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10851N Cleofoster Baptiste, Index 102506/10
Plaintiff-Respondent,

-against-

RLP-East, LLC, et al.,
Defendants-Appellants.

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Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

H. Fitzmore Harris, P.C., Bronx (Fitzmore Harris of counsel), for respondent.

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Order, Supreme Court, Supreme Court, New York County (James E. D'Auguste, J.), entered May 6, 2019, which, following a jury verdict in favor of plaintiff on the issue of liability and awarding plaintiff a total sum of $3,044,038, denied defendants' motion to set aside the verdict, unanimously modified, on the law, to reduce the jury award for future medical expenses to $370,684, and otherwise affirmed, without costs.

It was error for the trial court to submit to the jury a special verdict sheet which combined all liability claims together, making it impossible to determine on which claim or claims the jury found in favor of plaintiff (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223 [1st Dept 1996]). The single combined question makes it theoretically

possible that the jury found in favor of plaintiff solely on a violation of the Industrial Code, when such a violation in and of itself is insufficient to impart liability. While a violation of Labor Law § 240(1) in and of itself is a finding of negligence and liability, violation of a provision of the Industrial Code is only evidence of negligence, and Labor Law § 241(6) requires the additional finding that the violation showed a lack of reasonable care (*see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]).

The question is fundamentally flawed in that it makes it impossible to determine on which claim or claims the jury found in favor of plaintiff. It is for this reason that "and/or" questions are disfavored on jury verdict sheets *(see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d at 223). And while the exact phrase "and/or" is not present here, the use of the word "any" effectively provided the same result.
Nevertheless, the error does not require a new trial, as the evidence supported the judgment as a matter of law on plaintiff's claims pursuant to both Labor Law § 240(1) and Labor Law § 241(6). Plaintiff was injured when he was struck by a plank of wood that fell from work above, triggering Labor Law § 240(1) liability (*see Greenwood v Whitney Museum of Am. Art*, 161 AD3d

425, 425-426 [1st Dept 2018]). Further, the uncontroverted evidence was that plaintiff was in an area where he was exposed to falling objects, and that the pass through opening to the floor above should have been covered at the time of his accident, but was not (*see* 12 NYCRR 23-1.7 [a][1]). Defendants failed to offer any evidence that the Industrial Code violation was not unreasonable under the circumstances, and thus did not rebut plaintiff's entitlement to judgment as a matter of law on his Labor Law § 241(6) claim.

The special verdict sheet was not in error, however, as it was not necessary to include a provision whereby the jury would specify what injuries it found were caused by the construction accident and what injuries, if any, were caused by a subsequent bus accident. The jury was properly charged on the issue of proximate cause, and it found in plaintiff's favor (*see Kircher v Motel 6 G.P., Inc.*, 305 AD2d 261 [1st Dept 2003]).

The trial court also erred in permitting plaintiff to call an accident reconstructionist to testify that his injuries were caused by the construction accident, and not the bus accident, since the witness was not a biomechanical engineer nor was there any evidence that he had relevant medical training (*see Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995];

compare Plate v Palisade Film Delivery Corp., 39 AD3d 835, 837 [2d Dept 2007]). Nevertheless, this error does not require reversal, as plaintiff proffered medical experts who testified that plaintiff's injuries were caused by the construction accident. Although defendants' experts opined that the injuries were not traumatic, but were degenerative in nature, one of defendants' medical experts conceded that plaintiff's injuries could have been caused by the type of trauma described by a witness to the construction accident.

The jury's award of future lost earnings had sufficient certainty and was adequately supported by the evidence, which included the testimony of an expert economist (*see Reichman v Warehouse One*, 173 AD2d 250, 252 [1st Dept 1991], *lv dismissed in part, denied in part* 78 NY2d 1058 [1991]).

The jury's award of future medical expenses, to the extent predicated on the continuing need for neurological treatment and pain management, was adequately supported by the evidence. Although the court struck certain portions of Dr. Krishna's report, there is sufficient evidence in the trial record that plaintiff will require neurological followup and continue to suffer future pain.

The claim was without adequate evidentiary support to the

extent predicated on the need for future spinal surgery. Plaintiff's medical expert's assertion "off the top of his head" that the need for future surgery was "50/50" was insufficient to support such a claim (*see Brewster v Prince Apts.*, 264 AD2d 611, 617 [1st Dept 1999], *lv dismissed* 94 NY2d 875 [2000], *lv denied* 94 NY2d 762 [2000]). The award should accordingly be reduced to $370,684, after subtracting the estimated cost of $54,261 for future surgery. Defendants offer no countervailing expert testimony and thus did not directly refute plaintiff's economist's testimony.

We have considered the remainder of defendants' contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Gische, J.P., Mazzarelli, Webber, Moulton, JJ.

11015-		Index 310169/16
11015A-		V-2344/19
11015B-		V-3414/19
11015C-		V-3414-19/19A
11016-		O-3412/19
11016A-		O-3412-19/19A
11016B	In re Olga P., Petitioner-Appellant, -against- Ioannis Y., Defendant-Respondent. - - - - - Olga P., Petitioner-Appellant, -against- Ioannis Y., Defendant-Respondent.	O-3412-19/19B

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Olga P., appellant pro se.

Myra L. Freed and Lawrence B. Goodman, New York, for respondent.

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Order, Supreme Court, New York County (Michael L. Katz, J.), entered November 27, 2018, appointing the wife a guardian ad litem, unanimously affirmed, without costs. Appeal from order, Supreme Court, New York County (Steven Liebman, Special Referee), entered January 30, 2019, which terminated an order for supervised discovery, unanimously affirmed, without costs. Orders, Family Court, New York County (Karen I. Lupuloff, J.),

entered on or about April 4, 2019, which dismissed the wife's custody and family offense petitions for lack of jurisdiction, unanimously affirmed, without costs. Order, Supreme Court, New York County (Michael L. Katz, J.), entered April 18, 2019, which, inter alia, directed the husband to pay certain monthly expenses incurred by the wife, interim maintenance and the wife's interim counsel fees, unanimously affirmed, without costs. Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about May 6, 2019, which denied the wife's objection to an order of the same court (Kevin Mahoney, Support Magistrate), entered on or about March 27, 2019, which dismissed her petition for support on the ground that she had a motion pending before the Supreme Court seeking identical relief, unanimously affirmed, without costs. Order, Family Court, New York County (Gail Adams, Referee), entered on or about June 3, 2019, which dismissed the wife's family offense petition with leave to seek the same relief in the Supreme Court, unanimously affirmed, without costs.

We find that the Supreme Court providently exercised its discretion in appointing a guardian ad litem for the wife because, as a result of her deteriorating mental health, she was incapable of prosecuting or defending the case and assisting counsel (*see* CPLR 1201; *Anonymous v Anonymous*, 256 AD2d 90 [1st

Dept 1998], *lv denied* 99 NY2d 509 [2003]).

The wife's appeal from the January 30, 2019 order of the Special Referee has no merit. In that order, the Special Referee stated that "the referenced discovery supervision as directed was concluded and completed." It was not an improvident exercise of discretion for the Special Referee to oversee or conclude supervised discovery. Supreme Court appropriately appointed the Special Referee pursuant to CPLR 3104(a) in light of the wife's frustration of discovery. The need for supervised discovery was alleviated after the wife was appointed a guardian ad litem who retained a matrimonial counsel for the wife.

The Family Court properly dismissed the wife's custody and support petitions for lack of jurisdiction. Since the Family Court is a court of limited jurisdiction, absent a referral from the Supreme Court, it does not have original jurisdiction over proceedings for custody and visitation while an action for divorce is pending (NY Const, art VI, § 13[b][2]; *Matter of O'Neil v O'Neil*, 193 AD2d 16, 19 [2d Dept 1993]; *Poliandro v Poliandro*, 119 AD2d 577 [2d Dept 1986], *appeal dismissed* 68 NY2d 908 [1986]). The same rule applies to proceedings for child support or spousal support (NY Const, art VI § 13[b][4]; *LaPiana v LaPiana*, 67 AD2d 966 [2d Dept 1979]).

We decline to disturb the pendente lite award. Ordinarily, an aggrieved party's remedy for any perceived inequities in a pendente lite award is a speedy trial, and no exception is warranted here (*see Turret v Turret*, 147 AD3d 467, 468 [1st Dept 2017]; *Nimkoff v Nimkoff*, 69 AD3d 501 [1st Dept 2010]; *Gad v Gad*, 283 AD2d 200 [1st Dept 2001]).

Although the Supreme Court and Family Court have concurrent jurisdiction to entertain and issue orders of protection, the Family Court properly dismissed the wife's family offense and violation petitions (*see* Domestic Relations Law § 252). At the time of the filing of the family offense petitions, the divorce case had been pending for almost three years before Justice Katz and the issue of an order of protection was intrinsically intertwined with the matrimonial action. The legislature's grant of concurrent jurisdiction was not intended to give an advantage

to one side by allowing the same issues to be litigated in two forums.

We have considered the wife's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11110 CWCapital Investments LLC, et al., Index 652092/18
Plaintiffs-Respondents,

-against-

CWCapital Cobalt VR Ltd., et al.,
Defendants-Appellants,

Merrill Lynch, Pierce, Fenner &
Smith Incorporated,
Defendants.

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Quinn Emanuel Urquhart & Sullivan, LLP, New York (Jonathan E. Pickhardt of counsel), for CWCapital Cobalt Vr Ltd. and Carbolic LLC, appellants.

Ganfer Shore Leeds & Zauderer LLP, New York (Mark C. Zauderer of counsel), for CWCapital Cobalt Vr Ltd., appellant.

Latham & Watkins LLP, New York (Sandeep Savla of counsel), for Och-Ziff Capital Management Group LLC, Och-Ziff Holding Corporation, OZ Management LP, OZ Master Fund, Ltd., OZ Enhanced Master Fund, Ltd., Oz Credit Opportunities Master Fund, Ltd, OZ GC Opportunities Master Fund, Ltd., and OZSC, L.P., appellants.

Venable LLP, New York (Gregory A. Cross of counsel), for respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered September 25, 2019, which, insofar as appealed from as limited by the briefs, denied defendants' motions to dismiss the amended complaint, unanimously modified, on the law, to grant the motion of defendants CWCapital Cobalt VR Ltd. and Carbolic, LLC with respect to the fifth cause of action as against Carbolic,

LLC and the second cause of action to the extent it alleges that CWCapital Cobalt VR Ltd. breached section 7.09 of the indenture, and to grant the remaining defendants' motion to dismiss the amended complaint in its entirety as against them, and otherwise affirmed, without costs.

This action involves a 2007 collateralized debt obligation (CDO) in which various classes of notes were issued by defendant CWCapital Cobalt VR Ltd. (Cobalt). The transaction is governed by an indenture and a collateral management agreement (CMA). Under the CMA, plaintiff CWCapital Investments LLC (CWCI) was named as collateral manager and appointed as Cobalt's "exclusive agent" to provide Cobalt with certain services, including exercising the right to appoint or act as the controlling class representative or directing holder (together the CCR). CWCI exercised that right by appointing itself as the CCR, and has served in that role since the 2007 inception of the CDO.

During the course of the CDO, the notes were transferred several times. As relevant here, in August 2016, pursuant to five separate sale agreements, former defendant Merrill Lynch, Pierce, Fenner and Smith Incorporated sold certain notes to defendants OZ Master Fund, Ltd., OZ Enhanced Master Fund, Ltd., OZ Credit Opportunities Master Fund, Ltd., OZ GC Opportunities

Master Fund, Ltd. and OZSC, L.P. (collectively the OZ Funds). In section 5(a) of the sale agreements, the OZ Funds promised not to aid in the removal of the collateral manager, and in section 4, they represented that they were in compliance with all applicable laws, including the Foreign Corrupt Practices Act (FCPA). Plaintiff Galaxy Acquisition LLC (Galaxy), CWCI's parent, which purportedly had the power to veto any transfer of the notes, approved the sales.

Shortly thereafter, the OZ Funds transferred the notes to defendant Carbolic, LLC. In connection with that transaction, Carbolic wrote five letters to Galaxy (the letter agreements) in which it made the same promises that the OZ Funds had made in sections 5(a)(1)(A) and 5(a)(1)(B) of the sale agreements.

In April 2018, Cobalt sent notice letters designating Carbolic as the new CCR. CWCI and Galaxy then commenced this action alleging that in replacing CWCI with Cobalt as the CCR, the various defendants breached the indenture, the CMA, the sale agreements and the letter agreements, and engaged in tortious conduct. They also alleged breach of contract and fraud in connection with the sale of the notes to the OZ Funds. By separate motions, Cobalt and Carbolic, and the OZ Funds and the

OZ Management defendants[1], moved to dismiss the amended complaint. In January 2019, after the motions were briefed but before the motion court's decision, Cobalt withdrew its appointment of Carbolic as the CCR. It is undisputed that Carbolic never took over as the CCR, and that CWCI has always retained that role. As relevant to the issues on appeal, after supplemental briefing, the motion court denied the motions.[2] Defendants now appeal.

The second cause of action alleges that Cobalt breached both the CMA and the indenture by appointing Carbolic as the new CCR. With respect to the CMA, plaintiffs maintain that because section 1 of that agreement names CWCI as Cobalt's "exclusive agent" for purposes of appointing the CCR, Cobalt gave up any right it may have had to do so itself. Citing *Morpheus Capital Advisors LLC v UBS AG* (23 NY3d 528 [2014]), Cobalt argues that despite the exclusive agency provided for in the CMA, it nevertheless retained the right to appoint the CCR. Whether or not *Morpheus*

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[1] Och-Ziff Capital Management Group LLC, OZ Management L.P. and Och-Ziff Holding Corporation (collectively OZ Management).

[2] The motion court dismissed a declaratory judgment claim against Cobalt and Carbolic, and one of Galaxy's contract claims against Cobalt. Plaintiffs do not cross-appeal from these dismissals.

is applicable, Cobalt's argument fails because it lost any right it may have had to appoint the CCR. In the indenture, Cobalt "assign[ed], transfer[red], convey[ed] and set over to the Trustee . . . all of [its] estate, right, title and interest in, to and under the [CMA]." Although the Trustee gave Cobalt "a license to exercise all of [its] rights pursuant to the [CMA]," that license was "automatically revoked upon the occurrence of an Event of Default." On June 30, 2017, the Trustee gave notice of an Event of Default. Thus, Cobalt's license was revoked before it sent the April 2018 notices appointing Carbolic as the new CCR.[3]

Plaintiffs have also stated a claim that Cobalt breached sections 7.11(b) and 7.16 of the indenture. Section 7.11(b) states Cobalt agrees not to "engage in any business with respect to . . . the Collateral except as expressly permitted or required by this Indenture and the [CMA]." Section 7.16 provides that

[3] In its reply brief, Cobalt contends that the expiration of its license is irrelevant because its right to appoint the CCR is not derived from the CMA but rather from certain rights it purportedly obtained through its alleged ownership of the transaction bonds. However, in its opening brief, Cobalt made the contradictory argument that it was in fact relying upon its status as the principal under the CMA. We decline to consider Cobalt's argument, first raised in reply, which is inconsistent with the argument in its main brief (*see Herman v Herman*, 162 AD3d 459, 461 [1st Dept 2018], *lv denied* 32 NY3d 915 [2019]).

"[Cobalt] agrees to . . . refrain from performing any actions prohibited under[] the [CMA]." Since plaintiffs sufficiently allege that Cobalt's actions are prohibited by the CMA's "exclusive agent" provision, they have also alleged a breach of sections 7.11(b) and 7.16. However, we agree with Cobalt that plaintiffs have failed to allege a breach of section 7.09(b) of the indenture, which prohibits Cobalt from "contract[ing] with other Persons . . . for the performance of actions or obligations to be performed by [Cobalt]" under the indenture. Because Cobalt has no obligation under the indenture to perform the role of CCR, its appointment of Carbolic to that role does not violate section 7.09(b).

In the third cause of action, plaintiffs allege that the OZ Funds breached the sale agreements by appointing Carbolic as the CCR thereby removing CWCI from that role. The fifth cause of action alleges that Carbolic and the OZ Funds breached the letter agreements by that same conduct. In Section 5(a)(i)(A) of the sale agreements, the OZ Funds promised not to "direct, or join or acquiesce in . . . any direction, to terminate or remove [CWIC] (the ". . . Collateral Manager") under the related [CMA]." In Section 5(a)(i)(B), they agreed not to "consent to or approve of any amendment to the [indenture] that would . . . reduce the

rights of the . . . Collateral Manager." In the letter agreements, Carbolic made the same promises.

The motion court should have dismissed these claims since the documentary evidence establishes that no breach occurred. Section 5(a)(i)(A), and the mirror provision in the letter agreements, only prohibit acts related to removal of CWCI *as collateral manager*. It is undisputed that CWCI was never removed as collateral manager. Indeed, the notice letters appointing Carbolic as the new CCR say nothing about CWCI's role as collateral manager, much less purport to remove CWCI from that role.

We find unavailing plaintiffs' argument that appointing Carbolic as the CCR is the same as directly removing CWCI as collateral manager because the only substantive duty of the collateral manager is to serve as or appoint the CCR. The offering memorandum attached to the amended complaint shows that the role of the CCR is separate and distinct from the function of the collateral manager. Further, the CMA itself lists a host of services that the collateral manager must provide, separate and apart from those related to the CCR.

Likewise, there was no breach of Section 5(a)(i)(B) and the parallel language in the letter agreements. Those sections

prohibit the consent to, or approval of, an amendment to the indenture that would reduce CWCI's rights as collateral manager. The notice letters do not mention any amendment to the indenture, let alone one that would reduce CWCI's rights. Nor have plaintiffs alleged that any amendment to the indenture actually was made or attempted.

Because the documentary evidence, namely the unambiguous contracts and the notice letters, shows that the OZ Funds and Carbolic did not engage in conduct prohibited by the contracts, the third and fifth causes of action should be dismissed (*see Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016] [affirming dismissal on documentary evidence because the language of the contract "simply does not say what [the] plaintiff claims it says"]; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 [1st Dept 2011] ["The breach of contract cause of action fails to state a (claim) for breach of the promise to provide subordination protection since there is no such promise in the relevant agreements"]).[4]

[4] In addition, the fifth cause of action is not proper as to the OZ Funds because they are not parties to the letter agreements (*see e.g. Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012] ["There can be no breach of contract claim against a non-signatory to the contract"]).

The fourth cause of action alleges that the OZ Funds and OZ Management breached section 4 of the sale agreements by falsely representing that the OZ Funds were in compliance with the FCPA. Plaintiffs lack standing to assert this claim because they are neither parties to the sale agreements nor third-party beneficiaries with respect to section 4. A nonparty can asset a breach of contract claim "only if it is an intended, and not a mere incidental, beneficiary, and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract" (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001] [internal citation omitted]). Thus, "[a]bsent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent" (*id.* at 108-109).

Here, the contractual language does not establish that the parties intended to benefit plaintiffs with respect to section 4. The representation that the OZ Funds were in compliance with the FCPA was made only to the seller of the notes, Merrill Lynch, not to plaintiffs. That section further provides that only Merrill Lynch, not plaintiffs, was relying on the truthfulness of the representation. Notably, in section 5 of the agreements, the

parties agreed that plaintiffs are "express third party beneficiar[ies] . . . *under this Section 5*" (emphasis added). Thus, the omission of a similar clause in section 4 reflects the parties' intent to exclude plaintiffs as third-party beneficiaries under that section (*see Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007] ["the expression of one thing implies the exclusion of the other"]; *see also Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 707-708, 710 [2018]). Thus, the fourth cause of action should be dismissed.

In the sixth cause of action, plaintiffs allege that OZ Management tortiously interfered with and caused Cobalt to breach the CMA and the indenture. The seventh and eighth causes of action allege that OZ Management fraudulently induced Galaxy to consent to the sale of notes from Merrill Lynch to the OZ Funds. These claims fail for lack of damages, a required element of both torts (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 144 [2017] ["actual harm is an element of fraudulent inducement"]; *AREP Fifty-Seventh, LLC v. PMGP Assoc., L.P.*, 115 AD3d 402 [1st Dept 2014] [tortious interference requires a showing of damages]). Although a plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages,

it must plead "allegations from which damages attributable to [defendant's conduct] might be reasonably inferred" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003][internal quotation marks omitted]).

Here, plaintiffs have failed to do so. They do not explain how they sustained damages as a result of Cobalt's designation of Carbolic as the new CCR. It is undisputed that the notice letters appointing Carbolic as the CCR were never given effect, the appointment of Carbolic was withdrawn, and CWCI continued operating as the CCR. Nor have plaintiffs shown how they were injured by the allegedly false representations about compliance with the FCPA. Because cognizable damages cannot be reasonably inferred, the sixth, seventh and eighth causes of action should be dismissed (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 110 [1st Dept 2004]).

The only specific harm that plaintiffs point to is that they were allegedly forced to engage in "costly litigation." However, it is well settled that "attorneys' fees . . . are not recoverable unless authorized by statute, court rule, or written agreement of the parties" (*Reif v Nagy*, 175 AD3d 107, 131 [1st Dept 2019]). Plaintiffs identify no such statute, court rule or agreement. The "narrow exception" involving litigation with a

third party (*Hunt v Sharp*, 85 NY2d 883, 885 [1995]) does not apply here. Cobalt is plaintiffs' present adversary, and it was also CWCI's adversary in the other litigations (*see id.* [attorneys' fees unavailable "where . . . the purported 'third-party' wrongdoer is, either legally or as a practical matter, the same as the claimant's opponent in the main action"]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11360 The People of the State of New York, Ind. 2401/15
Respondent,

-against-

Ivan Perez,
Defendant-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered February 8, 2017, as amended April 12, 2017, convicting defendant, after a jury trial, of manslaughter in the first degree and gang assault in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 20 years, unanimously affirmed.

Defendant did not preserve the particular legal sufficiency arguments he raises on appeal, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. Contrary to defendant's

argument, the People were not required to prove that defendant personally inflicted the injuries that caused the victim's death. Regardless of what the focus of the prosecutor's summation may have been, the theory of accessorial liability, that is, that defendant at least aided other participants while acting with the same intent (*see* Penal Law § 20.00), was presented to the jury in the indictment and the court's charge, and it was supported by the evidence. Moreover, "there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]).

The court providently exercised its discretion in admitting four autopsy photos, two of which showed the victim's internal organs (*see People v Pobliner*, 32 NY2d 356, 369-370 [1973], *cert denied* 416 US 905 [1974]). While these photos were gruesome, they were relevant to material issues including defendant's intent to cause serious physical injury (*see People v Wood*, 79 NY2d 958, 960 [1992]). The photos also corroborated the Medical Examiner's testimony about the victim's injuries, and "[t]he People were not bound to rely entirely on [that] testimony" (*People v Stevens*, 76 NY2d 833, 836 [1990]).

Defendant failed to preserve his due process challenge to the admission of the photos (*see e.g. People v Lane*, 7 NY3d 888,

889 [2006]; *People v Kello*, 96 NY2d 740, 743 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, since "defendant is essentially raising state-law issues that are not of constitutional dimension" (*People v Jackson*, 133 AD3d 474, 476 [1st Dept 2015], *lv denied* 26 NY3d 1146 [2016] [internal quotation marks and citation omitted]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11361 Alda Lizzett Bonilla Arzu, Index 300168/18
Plaintiff-Appellant,

-against-

Kevin Dana Gratt Associates,
Defendant-Respondent.

_____

Alda Lizzett Bonilla Arzu, appellant pro se.

Wood Smith Henning & Berman LLP, White Plains (Alexandra B. Cumella of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Shawndya L. Simpson, J.), entered on or about June 18, 2019, which dismissed the action, unanimously dismissed, without costs, as taken from a nonappealable order.

The action was dismissed upon plaintiff's failure to appear for the June 18, 2019 status conference (*see* 22 NYCRR 202.27[b]). An order entered on default of the aggrieved party is not

appealable (CPLR 5511; *Figiel v Met Food*, 48 AD3d 330 [1st Dept 2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11362 In re Byron M., Dkt. V-02937-10/17B
Petitioner-Respondent,

-against-

Sasha A.,
Respondent-Respondent.

_____

Cedeno Law Group, P.L.L.C., New York (Sandra Spennato of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Jacob K. Maeroff, Referee), entered on or about April 5, 2019, which, inter alia, after a hearing, granted petitioner father three therapeutic supervised visits with the subject child, unanimously affirmed, without costs.

There is a rebuttable presumption that visitation by a noncustodial parent is in the child's best interest and should be denied only in exceptional circumstances (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]; *Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 546 [1st Dept 2016], *lv dismissed* 29 NY3d 965 [2017]). Here, the presumption that petitioner and the child should visit with each other was not rebutted as there was no evidence in the record that visitation with petitioner would

place the child in any physical danger or that it would harm her by producing serious emotional strain or disturbance. Nor are there exceptional circumstances to support a finding that petitioner forfeited his right to visitation.

Contrary to the argument by the attorney for the child, the Family Court considered the child's position after conducting an in camera interview. While the child's wishes are some indication of what is in her best interests and "are entitled to great weight" (*Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014] [internal quotation marks omitted]), those expressed wishes are only one factor to be considered and do not dictate a certain result in determining the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11363 Alfredo Guante, Index 25684/17E
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants-Respondents,

Emilio Del Villar, et al.,
Defendants-Appellants.

_____

McCabe, Collins, McGeough, Fowler, Levine & Nogan, LLP, Carle Place (James M. Hayes of counsel), for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Joseph P. Stoduto of counsel), for Alfredo Guante, respondent.

James E. Johnson, Corporation Counsel, New York (Mackenzie Fillow of counsel), for The City of New York and The New York City Department of Parks and Recreation, respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about June 24, 2019, which denied the motion of defendants Emilio and Maria Del Villar for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants Emilio and Maria Del Villar failed to establish prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he tripped and fell on the sidewalk abutting their property.

Although the City is responsible for maintaining the area that is designated a bus stop location (*see Bednark v City of New York*, 162 AD3d 565 [1st Dept 2018]), the motion court properly denied defendants' motion as premature, since discovery had not been completed. On the record presented, there is no way to determine whether plaintiff fell within a designated bus stop (*see McCormick v City of New York*, 165 AD3d 565 [1st Dept 2018]; *Munasca v Morrison Mgt. LLC*, 111 AD3d 564, 565 [1st Dept 2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11364-
11364A In re Board of Hampton House Condominium,
Petitioner-Respondent,

-against-

Rora LLC,
Respondent-Appellant.

Index 650287/18

Morrison Tenenbaum, PLLC, New York (Lawrence F. Morrison of counsel), for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Cory L. Weiss of counsel), for respondent.

Appeal from orders, Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 3 and July 18, 2018, which, respectively, granted the petition and confirmed the January 11, 2018 arbitration award, and amended the July 3 order, deemed appeal from judgment, same court and Justice, entered July 24, 2018, awarding petitioner the total sum of $77,408.68, unanimously affirmed, without costs.

Generally speaking, "courts will not second-guess the factual findings or the legal conclusions of the arbitrator" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 632 [1979]) where there is no violation of CPLR 7511(b)(1) or public policy. Here, the arbitration award did not violate public policy, was not

based on corruption, fraud, misconduct, or bias, nor was it irrational on its face (*see Matter of Phillips v Manhattan & Bronx Surface Tr. Operating Auth.*, 132 AD3d 149, 153 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). Contrary to respondent's contention, the fact that the award applied the common charge allocation formula agreed to by its predecessor was not tantamount to binding respondent to a contract to which it was not a party, nor did the award violate the public policy underlying Real Property Law § 339-m.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11365- Ind. 492/17
11365A The People of the State of New York, 1525/18
Respondent,

-against-

Trevor McCoy,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered October 1, 2018,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Kapnick, Webber, González, JJ.

11366-
11366A Seeking Valhalla Trust formerly known as Carl Deane 2013 Revocable Trust, et al.,
Plaintiffs-Appellants,

-against-

Carol Deane, et al.,
Defendants-Respondents.

Index 653174/18

_____

Cadwalader, Wickersham & Taft LLP, New York (Nathan M. Bull of counsel), for appellants.

Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for respondents.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 26, 2019, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 4, 2019, to the extent it granted defendants' motion to dismiss the causes of action for a declaratory judgment and for breach of fiduciary duty, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants, who expressly stated that they were assuming that plaintiffs had standing for purposes of the instant motion, may not raise the standing issue for the first time on appeal

(s*ee Van Damme v Gelber*, 79 AD3d 534, 535 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]), including a challenge in the guise of an argument that plaintiffs are not "aggrieved" under CPLR 5511.

The motion court correctly found that defendant Deane did not have a veto over whether to act on plaintiffs' demand that Saint Gervais LLC commence this action. However, notwithstanding that the other two managers had a vote, plaintiffs sufficiently pleaded demand futility by raising a reasonable doubt as to the independence of those managers (*see In re China Agritech, Inc. Shareholder Derivative Litig.*, 2013 WL 2181514, *15, 2013 Del Ch LEXIS 132, *40-42 [Del Ch, May 21, 2013, C.A. No. 7163-VCL]). Plaintiffs alleged that one manager was Deane's sister and the other was the deceased husband's nephew, who was also an employee to whom Deane had paid a $2 million bonus (*see Mizel v Connelly*, 1999 WL 550369, *4, 1999 Del Ch LEXIS 157, *10-13 (Del Ch July 22, 1999, No. Civ. A. 16638]).

Nonetheless, the complaint was correctly dismissed for failure to state a cause of action. As the court found, Deane did not breach the operating agreement or the covenant of good faith and fair dealing by exercising her express sole discretion to reallocate sharing ratios, even down to zero, at any time (*see Sullivan v Harnisch*, 96 AD3d 667 [2012]). The language of the

provision is unambiguous (*Rudman v Deane*, 138 AD3d 537 [1st Dept 2016]). Considered otherwise, Deane merely exercised the very power given to her by the operating argreement (*cf. Shatz v Chertok* 180 AD3d 609 [1st Dept 2020]).

Nor is Deane's discretion limited by section 7.5 or the final sentence of section 3.3 of the operating agreement. Section 7.5 merely restates the general duty of good faith. The final sentence of section 3.3 is merely a statement of intention, i.e., that the reallocation power be used to facilitate a management incentive program, and is not binding (*Rudman*, 138 AD3d at 539).

Given that defendants complied with all terms of the operating agreement, plaintiffs' claim of breach of fiduciary duty was also correctly dismissed (*see Panattoni Dev. Co., Inc. v Scout Fund 1-A, LP*, 154 AD3d 555, 558 [1st Dept 2017]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11367 Paulicopter - Cia., et al., Index 150161/17
Plaintiffs-Appellants,

-against-

Bank of America, N.A.,
Defendant-Respondent,

Bank of America Merrill Lynch
Banco Múltiplo S.A., et al.,
Defendants.

_____

Schlam Stone & Dolan LLP, New York (Seth D. Allen of counsel), for appellants.

Moore & Van Allen PLLC, New York (James P. McLoughlin, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered March 28, 2019, which granted defendant Bank of America, N.A.'s motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Plaintiffs allege that defendant Bank of America breached a structured lease transaction by seizing the aircraft that they acquired pursuant to the transaction. The motion court correctly found that defendant's repossession of the aircraft was justified by at least two separate events of default on plaintiffs' part and thus that defendant was not in breach of the leases or any corresponding duty of good faith.

First, it is undisputed that plaintiffs did not pay the rent due March 30, 2016 until May 4, 2016, and that it never paid the interest and administrative fees that had accrued. Plaintiffs' delay in paying the rent far exceeded the sublease's 10-day grace period, and the documentary evidence submitted by defendant "flatly contradicted" plaintiffs' contention that defendant waived its right to declare an event of default (*see Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003] [internal quotation marks omitted], *lv denied* 100 NY2d 512 [2003]). Moreover, the "hell or high water" clause establishes that it was plaintiffs that waived their rights to declare a default, not defendant, since hell or high water clauses "require[] the lessee to make payments irrespective of any defects in performance" (*Wells Fargo Fin. Leasing, Inc. v Kokoon, Inc.*, No, 155239/2013, 2013 NY Slip Op 30204[U], *17 [Sup Ct, NY County, Jan. 25, 2013]).

Second, plaintiffs breached the parties' liquidity covenant. The records submitted to the court by defendant establish that plaintiff Antonio Joao Abdalla Filho, the principal owner of plaintiff Paulicopter, had not been paid on the precatório (an obligation of a Brazilian government entity to pay judgments against it) for more than six years because it was the subject of

litigation brought by the State of São Paulo and that the precatório was subject to a claim or other encumbrance because it was awaiting the outcome of a suit bought by the State Treasury against the amount deposited. Thus, the precatório was neither unencumbered nor liquid.

The breach of the implied covenant of good faith and fair dealing claim was correctly dismissed as duplicative of the breach of contract claim. In any event, the complaint makes no nonconclusory allegations of bad faith on defendant's part.

The tortious interference with contract, conversion, and conspiracy claims were correctly dismissed under New York law. Plaintiffs contend that Brazilian law governs these claims, but they failed to plead or otherwise prove the substance of Brazilian law (CPLR 3016[e]; *see Bank of N.Y. v Norilsk Nickel*, 14 AD3d 140, 148 [1st Dept 2004], *lv dismissed* 4 NY3d 846

[2005]). In any event, plaintiffs failed to establish that Brazilian or North Carolina law would save their tort claims.

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11368 The People of the State of New York, Ind. 2774/15
Respondent,

-against-

Herbert Varela,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 26, 2017, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11369-
11369A In re Wayne Miller,
Petitioner-Appellant,

-against-

The New York City Office of
Administrative Trials and Hearings,
et al.,
Respondents-Respondents.

Index 101352/17

Olenko Law PLLC, New York (Mariana Olenko of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Carmen Victoria St. George, J.), entered May 21, 2018, which denied the petition to annul the determination of respondents, dated January 11, 2017, after a hearing, imposing a $1,600 civil penalty for operating a tower crane without proper certification, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court and Justice, entered October 19, 2018, which, insofar as appealable, denied petitioner's motion for leave to renew, unanimously affirmed, without costs.

Petitioner was found to have operated a tower crane without

proper certification, and fined $1,600. At the time of his violation in 2016, as a Class A hoisting machine operator (HMO) licensee, petitioner was required, when asked, to submit proof of "one or more valid certification(s) issued by an organization accredited to offer crane operator certification," showing the type of crane or cranes which he was authorized to operate (1 RCNY 104-09[b][2]). As a Class A HMO licensee, he was permitted to operate only the types of cranes that the Department of Buildings' records indicates he was qualified or certified to operate (*see* 1 RCNY 104-09[d]).

Contrary to petitioner's argument, this statutory language required him to hold a certification which specifically authorized him to operate a tower crane (*see Matter of Fields v New York City Campaign Fin. Bd.*, 81 AD3d 441, 446 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]). Even if, as petitioner claims, the language is not entirely clear, respondents' interpretation and implementation of the Rule was reasonable and had a rational basis (*see Matter of Hughes v Doherty*, 5 NY3d 100, 105 [2005]). To the extent petitioner claims that the language of 1 RCNY 104-09 is inconsistent with the provisions of Administrative Code of City of NY § 28-405.1, the Rule's provisions are intended to be in addition to the Administrative

Code (1 RCNY 104-09[e]).

Leave to renew was properly denied, as petitioner failed to show that a 2018 amendment to the Rule effected "a change in the law that would change the prior determination" (CPLR 2221[e][2]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11370-
11370A In re Grace D., Dkt. V-05978-17/17A
Petitioner-Respondent,

-against-

Francois Stanislas Alexandre B.,
Respondent-Appellant.

_____

Cohen Rabin Stine Schumann LLP, New York (Harriet Newman Cohen of counsel), for appellant.

_____

Orders, Family Court, New York County (Gail A. Adams, Referee), entered on or about December 18, 2017, and on or about January 8, 2018, which, to the extent appealed from as limited by the brief, denied respondent father's motion to modify a custody order issued by a Texas court, unanimously vacated, on the law, without costs, as void for lack of subject matter jurisdiction.

Under the Uniform Child Custody Jurisdiction and Enforcement Act, codified as Domestic Relations Law (DRL) § 76 *et seq.*, Family Court did not have subject matter jurisdiction to make a determination as to respondent's motion to modify the parties' existing custody agreement issued by a Texas court. There is no dispute that respondent continues to reside in Texas, and there is no evidence that the Texas court has determined that it no longer has exclusive, continuing jurisdiction over the matter

(*see* DRL 76-a, 76-b; *Stocker v Sheehan*, 13 AD3d 1, 4 [1st Dept 2004]). Accordingly, the court's denial of respondent's motion is vacated as void (*see generally Lacks v Lacks*, 41 NY2d 71, 74-76 [1976]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11371 The People of the State of New York, Ind. 2764/14
Respondent,

-against-

Mekhi Muhammad,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (V. Marika Meis of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert L. Myers of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (April Newbauer, J.), rendered April 18, 2019,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Friedman, J.P., Kapnick, Webber, González, JJ.

11372 Lexington Insurance Company as subrogee of Prime Alliance Group Ltd., et al., Plaintiffs, Index 112533/11 590928/13

-against-

Kiska Development Group LLC, et al., Defendants-Respondents-Appellants,

Bayport Construction Corp., Defendant-Respondent.

- - - - -

Kiska Development Group LLC, et al., Third-Party Plaintiffs-Respondents-Appellants,

-against-

Mt. Hawley Insurance Company, Third-Party Defendant-Appellant-Respondent.

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Delahunt Law PLLC, Buffalo (Timothy E. Delahunt of counsel), for appellant-respondent.

Kennedys, New York (Ann M. Odelson of counsel), for respondents-appellants.

Baker Greenspan & Bernstein, Bellmore (Robert L. Bernstein, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered October 31, 2018, which, insofar as appealed from as limited by the briefs, denied defendants/third-party plaintiffs Kiska Development Group LLC and 14 West 14 LLC's motion for

summary judgment on their claim against defendant Bayport Construction Corp. for contractual indemnification, denied the motion for summary judgment on their claim that Kiska is an additional insured under the policy issued to Bayport by third-party defendant (Mt. Hawley), granted Mt. Hawley's cross motion for summary judgment declaring that Kiska is not an additional insured, and denied the motion for summary judgment dismissing 14 West's claim that it is an additional insured, unanimously modified, on the law, to declare that Mt. Hawley is obligated at this stage merely to defend 14 West, as opposed to indemnifying it, and otherwise affirmed, without costs.

Kiska is not an additional insured under the policy that Mt. Hawley issued to Bayport, because the contract between Kiska and Bayport lacks the requisite "express and specific language requiring that [Kiska] be named as an additional insured" (*Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 405 [1st Dept 2017]). The contract required Bayport to procure insurance naming 14 West as an additional insured, but it only required Kiska to be a Certificate Holder, and the Certificate states that it "does not amend, extend or alter the coverage afforded by the [policy]" (*see Three Boroughs, LLC v Endurance Am. Specialty Ins. Co.*, 143 AD3d 480, 481 [1st Dept 2016]; *see also West 64th St., LLC v Axis*

U.S. Ins., 63 AD3d 471, 472 [1st Dept 2009]; *Illinois Natl. Ins. Co. v American Alternative Ins. Corp.*, 58 AD3d 537, 538 [1st Dept 2009]; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]).

The provision of the Kiska-Bayport contract that says Kiska may retain monies due to Bayport "until all ... suits or claims, actions or proceedings for damages ... shall have been settled or determined, unless [Bayport] presents ... evidence satisfactory to [Kiska] of adequate insurance ... covering [Kiska] ... as additional insured" does not require Bayport to procure additional insured coverage for Kiska (*see Clavin*, 156 AD3d at 405).

Kiska cites various provisions of its contract with Bayport that require Bayport to indemnify it. However, as Kiska itself says, entitlement to additional insured status and contractual indemnification are distinct.

Kiska contends that its contract with Bayport incorporated by reference the main contract between Kiska and 14 West and that the main contract requires Bayport to name Kiska as an additional insured. However, it provides no record support for these claims. In any event, a general provision incorporating the Kiska-14 West contract by reference would not require Bayport to

procure additional insured coverage for Kiska (*see e.g. Betancur v Lincoln Ctr. for the Performing Arts, Inc.*, 101 AD3d 429, 430 [1st Dept 2012]; *Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]).

Mt. Hawley concedes that 14 West is an additional insured under the policy that it issued to Bayport, but it contends that 14 West's claim is academic because 14 West is already receiving defense and indemnity from third-party plaintiff New York Marine and General Insurance Company (Kiska's insurer). This argument is unavailing. The New York Marine policy (under which 14 West is an additional insured) is excess to Mt. Hawley's policy (under which 14 West is also an additional insured). Therefore, Mt. Hawley – not New York Marine – should be defending 14 West in the main action.

Mt. Hawley is correct, however, that it was premature to declare that it was obligated to indemnify (as opposed to defend) 14 West (*see Mt. Hawley Ins. Co. v American States Ins. Co.*, 168 AD3d 558, 559 [1st Dept 2019]; *Greenwich Ins. Co. v City of New York*, 139 AD3d 615 [1st Dept 2016]). Mt. Hawley's policy affords coverage to additional insureds "only with respect to liability for ... 'property damage' ... caused, in whole or in part, by ... [Bayport's] acts or omissions." This means coverage for property

damage proximately caused by Bayport (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313 [2017]). It has not yet been determined whether Bayport was the proximate cause of the collapse of the wall.

We affirm, on other grounds, the denial of 14 West's motion for summary judgment on its claim against Bayport for contractual indemnification. With respect to 14 West (as opposed to Kiska), there are no issues of fact; 14 West simply is not entitled to contractual indemnification from Bayport, because the contract between Kiska and Bayport does not say that Bayport must indemnify 14 West (*see Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016]).

As for Kiska's summary judgment motion against Bayport, the contract between them requires Bayport to indemnify Kiska for claims arising out of Bayport's negligent acts or omissions or breaches of contract, and it has not yet been determined whether Bayport was negligent or breached the contract (*see Trawally*, 137 AD3d at 493). In addition, the contract provides for indemnification for Kiska only to the extent the claim is not

caused by Kiska's negligence, and Kiska has not established that it was free from negligence (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Matthews v Trump 767 Fifth Ave., LLC*, 50 AD3d 486, 487 [1st Dept 2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11373-
11373A Phyllis Carcia, Deceased, by
Jo-Anne Tavano, as Administratrix
of her Estate,
Plaintiff-Appellant,

-against-

Richard Greif, M.D., et al.,
Defendants-Respondents,

Richard Radna, M.D., et al.,
Defendants.

Index 805346/14

Salenger, Sacks, Kimmel & Bavaro LLP, Woodbury (Beth S. Gereg of counsel), for appellant.

Lewis Johs Avallone Aviles, LLP, Islandia (Amy E. Bedell of counsel), for Richard Greif, M.D., respondent.

Garson & Jakub, LLP, New York (Maria S. Hristova of counsel), for Leticia Gonzalez, M.D., respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 14, 2018, which granted the motion of defendant Leticia Gonzalez, M.D. for summary judgment dismissing the complaint as against her, unanimously affirmed, without costs. Order, same court and Justice, entered September 14, 2018, which granted the motion of defendant Richard Greif, M.D. for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

This medical malpractice action arose when the 49-year-old decedent died from a pulmonary embolism (PE) caused by bilateral deep vein thromboses (DVT) in her legs after undergoing a two-day surgery on her back. Dr. Gonzalez, a family medicine doctor physician, and Dr. Grief, a cardiologist (collectively, defendants), consulted in decedent's care and reviewed decedent's electrocardiograms (EKG), which showed T wave inversions. Plaintiff claims that defendants deviated from good and accepted standards of medical practice when they failed to order additional testing to rule out PE and DVT as the cause of the T wave inversions, despite the fact that decedent was otherwise asymptomatic.

Defendants demonstrated prima facie entitlement to judgment as a matter of law by submitting evidence showing that there was no departure from good and accepted medical practice in the treatment of decedent (*see generally Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]). Defendants presented evidence that they continuously monitored plaintiff's EKG, which was improving, and the T wave inversions they identified were not indicative of PE and DVT. The evidence also established that plaintiff exhibited no physical symptoms of DVT (such as shortness of breath or chest pain) during defendants repeat exams (*see Lopez v Gramuglia*, 133

AD3d 424, 425 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact with respect to either defendant. Plaintiff's expert's affirmation was limited to general and conclusory assertions that "abnormal EKG findings should raise a suspicion for PE," which should have led defendants to "conduct further testing." Plaintiff's expert failed to discuss or otherwise rebut the opinion proffered by defendants' experts that the T wave inversions identified on plaintiff's EKG (i.e. non-specific t-wave inversions in leads V3-V6), without additional abnormalities, were not indicative of DVT or PE and thus did not require further testing as claimed by plaintiff. In fact, plaintiff's expert noted that plaintiff did not exhibit any "classic" symptoms of DVT and PE and he agreed with Dr. Grief "that t-wave inversions are not, in and of themselves, indicative of DVT or PE." For this reason, plaintiff's conclusory opinion that further testing should have been ordered is insufficient to defeat defendants' motions for summary judgment (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]).

Plaintiff does not dispute the grant of summary judgment to Dr. Gonzalez on the claim for lack of informed consent and negligent hiring, and thus, that claim also remains dismissed.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11374-
11374A Knox, LLC doing business as
Knox, LLC of New York, et al.,
Plaintiffs-Respondents,

-against-

John R. Lakian, et al.,
Defendants-Appellants.

Index 651880/12

Zalkind Duncan & Bernstein LLP, Boston, MA (Ana Isabel Munoz of the bar of the State of the Commonwealth of Massachusetts and State of New Jersey admitted pro hac vice of counsel), for appellants.

Delbello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Scott M. Salant of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered March 21, 2019, in favor of plaintiffs, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 7, 2018, to the extent it granted plaintiffs' motion for summary judgment on the fraudulent inducement claim, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs seek to recover the investments they made in nonparty Capital L Group, LLC, which were diverted to personal bank accounts held by Capital L's chief executive officer, defendant Lakian. Plaintiffs claim that they were fraudulently

induced into investing (*see generally Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-579 [2018]). Defendants contend that an issue of fact exists as to whether plaintiffs' reliance on the statements made to them by Lakian was justified.

Defendants argue that nonparty Donald J. Whelley, the sole manager and member of plaintiff DJW Advisors, LLC's expressed concerns about Capital L's accounting systems and back-office operations, but ignored these "red flags," and that therefore plaintiffs bear the responsibility for that risk (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). However, Whelley's concerns were unrelated to the eventual fraudulent diversion of the funds. Defendants failed to demonstrate that Whelley "ha[d] hints of [Lakian's misrepresentations'] falsity" and therefore had a duty to probe further (*id.*).

Defendants contend that Whelley should have inspected a full set of financial documents, but they failed to show that if he had done so he would have been alerted to the potential fraudulent diversion of funds (*see UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]). Their references to the "tangled accounts" and "problematic

transactions" that Whelley would have seen had he reviewed unspecified documents are too vague to raise an issue of fact.

The record does not support defendants' contention that Whelley's expressed concerns were in fact concerns about where Capital L's money was going. Moreover, Whelley was certain that Capital L's record keeping and back-office problems had been solved by its acquisition of Capital Guardian Holding LLC; if Whelley had been concerned about a potential fraudulent diversion of funds, his concern would not have been alleviated by the acquisition of a new company.

Defendants contend that Whelley should have insisted on language in the subscription agreement to ensure that the investment would be used solely to acquire registered investment advisors. However, the fraudulent inducement claim is based not on defendants' use of plaintiffs' funds for general business operations instead of the acquisition of registered investment advisors but on the diversion of their funds for personal purposes. Defendants' argument that Whelley should have mistrusted them because they told him to wire investment funds to defendant JRL Investment Group, Inc. contradicts the argument they advanced before the motion court, i.e., that JRL was an innocuous, temporary repository for plaintiffs' funds before

transfer to Capital L's accounts.

Defendants point out that plaintiffs' own expert readily detected the fraud. However, the expert was reviewing records incorporating and post-dating the investments at issue.

Contrary to defendants' contention, the court awarded plaintiffs damages only in the amount of their actual losses (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Even if certain of plaintiffs' funds were used for operating expenses, defendants failed to show that plaintiffs derived value as a result. Nor did defendants show that plaintiffs derived value from their ownership interest in Capital L.

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11375 Lazeny Dembele, Index 26964/15E
Plaintiff-Appellant, 43065/16E

-against-

373-381 Pas Associates, LLC,
Defendant-Respondent.

- - - - -

373-381 Pas Associates, LLC,
Third-Party Plaintiff-Respondent,

-against-

373 Park, LLC,
Third-Party Defendant-Respondent.

_____

Diamond & Diamond, LLC, Brooklyn (Stuart Diamond of counsel), for appellant.

Varvaro, Cotter & Bender, White Plains (Lisa L. Gollihue of counsel), for 373-381 Pas Associates, LLC, respondent.

Yankwitt LLP, White Plains (Alicia Tallbe of counsel), for 373 Park, LLC, respondent.

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Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered on or about January 10, 2019, which, insofar as appealed from as limited by the briefs, granted the motions of defendant and third-party defendant for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motions denied, and the complaint and third-party complaint reinstated.

Plaintiff, an employee of the restaurant owned by third-party defendant, slipped and fell on snow and ice on a metal ramp leading from the side door of the restaurant to the sidewalk. Third-party defendant leases the ground floor and basement space from defendant landowner. The evidence shows that the ramp was erected over the public sidewalk alongside defendant's building, and is not included in the diagram of the leased space. Further, the director of leasing for defendant's property manager testified that the ramp was built for use by people with disabilities.

Notwithstanding any lease provisions obligating the restaurant to remove snow and ice from the sidewalk, defendant, as owner of the property abutting the sidewalk, had a nondelegable duty to keep the sidewalk, and any special uses made of the sidewalk, in a safe condition, including the removal of

snow and ice (*see Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167 [2019][decided after the motion court's decision]; *see also LaRosa v Corner Locations, II, L.P.*, 169 AD3d 512 [1st Dept 2019]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11376 In re Loeb Boathouse Services, LLC, et al., Petitioners-Plaintiffs, Index 158983/16 158978/16

JPO Concepts, Inc., Petitioner-Plaintiff-Appellant,

-against-

The City of New York, etc., et al., Respondents-Defendants-Respondents.

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Law Office of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Mackenzie Fillow of counsel), for City of New York, The Department of Parks and Recreation, respondents.

LePatner & Associates, LLP, New York (Peter C. Dee of counsel), for Dean Poll and Central Park Boathouse LLC, respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 15, 2018, which, in this hybrid CPLR article 78 proceeding-plenary action, granted respondents' motions to dismiss the first amended petition and second amended verified complaint, unanimously affirmed, without costs.

Petitioner-plaintiff JPO Concepts, Inc. had standing to pursue this article 78 proceeding and plenary action (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]; *Maraia v Orange Regional Med. Ctr.*, 63 AD3d

1113, 1115 [2d Dept 2009]). Nevertheless, the court properly dismissed the petition and complaint due to JPO's failure to exhaust its administrative remedies (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). JPO did not allege that it submitted a protest which complied with the terms of 12 RCNY 1-08(a) and contrary to its contention, an email sent by its representative to a project manager criticizing the bidder who was subsequently awarded the licensing agreement did not constitute a protest as defined by 12 RCNY 1-08(a). JPO's email was not sent to the agency head or its designee, and was sent before the agency rendered its determination. Various individuals' appearances at a Franchise and Concession Review Committee public hearing on behalf of JPO also did not satisfy the terms of 12 RCNY 1-08(a), and the protest was not submitted in writing to the agency head (*see Matter of S & M Dev. v State Div. of Hous. & Community Renewal*, 182 AD2d 995, 996 [3d Dept 1992]).

We find that JPO did not make a proper showing of futility to justify making an exception to the exhaustion of remedies

requirement (*see generally Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 88 AD3d 72, 81 [1st Dept 2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11377 Nationwide Affinity Insurance Company of America,
Plaintiff-Respondent,

-against-

James Thomas, et al.,
Defendants-Appellants.

Index 157816/16

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The Rybak Firm, PLLC, Brooklyn (Karina Barska of counsel), for appellants.

Hollander Legal Group, P.C., Melville (Allan S. Hollander of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered February 19, 2019, granting Nationwide's motion for summary judgment to the extent of declaring that plaintiff was not obligated to provide coverage under the subject insurance policy by virtue of the claimants' failures to appear for examinations under oath, unanimously affirmed, without costs.

The court properly granted summary judgment for a declaration of no coverage on the obligation by plaintiff to reimburse the healthcare provider defendants-appellants for their

treatment of the claims of the claimant defendants as they failed to appear for timely and properly noticed EUOs, which constitutes a breach of a condition precedent, vitiating coverage.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11378N JP Morgan Chase Bank, N.A., Index 380586/11
Plaintiff-Respondent,

-against-

Alexandra White, also known as
Alexandra Dowling, et al.,
Defendants.
- - - - -
Adam Plotch,
Non-party-Appellant.

_____

The Law Offices of Thomas J. Finn, Forest Hills (Thomas J. Finn of counsel), for appellant.

McCalla Raymer Leibert Pierce, LLC, New York (Charles Jeanfreau of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 4, 2018, which denied the motion of nonparty Adam Plotch to vacate a judgment of foreclosure and sale entered in plaintiff's favor on a condominium unit at 705 Purdy Street, in the Bronx, on September 15, 2015, and to vacate the summary judgment and default judgment order, entered on or about January 24, 2014, underlying said judgment of foreclosure and sale, unanimously affirmed, with costs.

Plotch acquired title to the subject property pursuant to a Referee's deed issued in a prior foreclosure action brought by the Condominium Board to enforce a lien for common charges. The

Referee's deed was expressly subject to, inter alia, the mortgage lien owed to plaintiff's predecessor. Plotch's title, and status as the owner of the equity of redemption, made him an interested party, and gives him standing to oppose plaintiff's foreclosure action (*see Deutsche Bank Natl. Trust Co. v Tanibajeva*, 132 AD3d 430, 431 [1st Dept 2015]). Nonetheless, plaintiff's filing of the notice of pendency in May 2011 put all persons acquiring an interest in the property thereafter, including Plotch in February 2012, on constructive notice of the action. Plotch was thereby "bound by all proceedings taken in the action after such filing to the same extent as a party" (CPLR 6501). Hence, while Plotch's ownership of the property made him an interested party, he "was not a necessary party, he being in no better position than a purchaser or incumbrancer whose interest is acquired by a conveyance subsequent to the filing of such notice and whose interest is deemed foreclosed as though he were an actual party to the action" (*Westchester Fed. Sav. & Loan Assn. v H.E.W. Constr. Corp.*, 29 AD2d 670, 671 [2d Dept 1968], *lv denied* 21 NY2d 646 [1968]; *see Novastar Mtge., Inc. v Mendoza*, 26 AD3d 479, 479-480 [2d Dept 2006]). Hence, standing alone, Plotch's ownership of the equity of redemption did not entitle him to service of any of the papers herein and such lack of service does not vitiate

the summary judgment order or judgment of foreclosure (*see Citimortgage, Inc. v Dulgeroff*, 138 AD3d 419, 419 [1st Dept 2016], *lv dismissed* 28 NY3d 1081 [2016]; *Westchester Fed. Sav. & Loan Assn.*, 29 AD2d at 671).

Plaintiff's failure to serve Plotch with a copy of the summary judgment/default judgment order, notwithstanding that order's directive that plaintiff do so, likewise does not constitute a jurisdictional defect or other basis for vacatur of that order. Nor has Plotch pointed to any injustice resulting from plaintiff's failure to serve him with a copy of the summary judgment order, since, as we find herein, summary judgment was properly granted (*see Amalgamated Bank v Helmsley-Spear, Inc.*, 25 NY3d 1098, 1100 [2015]; *Dulgeroff*, 138 AD3d at 419).

The "mislabeling" of the affidavit of service of the summary judgment/default judgment motion is a mere irregularity, which does not warrant denial of the underlying motion absent prejudice, which Plotch does not (and cannot) assert (CPLR 2001; *County of Nassau v Cedric Constr. Corp.*, 100 AD2d 890, 891 [2d Dept 1984]).

Plotch's arguments directed at the merits of plaintiff's motion for summary judgment/default judgment do not lie on this appeal from denial of his motion to vacate the summary judgment

order and judgment of foreclosure (*see Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 178 AD3d 489, 489 [1st Dept 2019]; *Nichols v Curtis*, 104 AD3d 526, 529 [1st Dept 2013]).

We have considered Plotch's other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

Friedman, J.P., Kapnick, Webber, González, JJ.

11379N Denise Ruiz, Index 158475/15
Plaintiff-Respondent,

-against-

Park Gramercy Owners Corp., et al.,
Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A.H. McGovern of counsel), for appellants.

Mitchell Dranow, Sea Cliff, for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered April 23, 2019, which, inter alia, denied defendants' motion to vacate the note of issue, unanimously reversed, on the law and the facts, without costs, and the motion granted.

"[A] note of issue should be vacated when [it] is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has been completed" (*Savino v Lewittes*, 160 AD2d 176, 177 [1st Dept 1990]; *see Pua v Lam*, 155 AD3d 487 [1st Dept 2017]; 22 NYCRR 202.21[e]). Here, the motion to vacate the note of issue should have been granted since plaintiff had not provided authorizations allowing her out-of-state medical providers to release her medical records to defendants, as well as certain receipts for expenses incurred as a result of her

injuries, before filing the note of issue and certificate of readiness.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Barbara R. Kapnick
Anil C. Singh, JJ.

9765
Index 190138/14

_____x

Francis Nemeth, etc.,
Plaintiff-Respondent-Appellant,

-against-

Brenntag North America, etc., et al.,
Defendants,

Whittaker, Clark & Daniels, Inc.,
Defendant-Appellant-Respondent.

_____x

Defendant appeals from the judgment of Supreme Court, New York County (Martin Shulman, J.), entered August 22, 2017, upon a jury verdict.

Simpson Thacher & Bartlett LLP, New York (Bryce L. Friedman and Eamonn W. Campbell of counsel), for appellant-respondent.

Levy Konigsberg LLP, New York (Renner K. Walker and Robert I. Komitor of counsel), for respondent-appellant.

GISCHE J.,

The most vexing issue framed by this appeal pertains to specific causation: was there sufficient evidence in the record for the jury to conclude that decedent, Florence Nemeth, was exposed to a quantity of asbestos causing her to contract peritoneal mesothelioma. As more fully explained below, the trial record contains sufficient evidence, consistent with the Court of Appeals' reasoning in *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]), to support the jury's verdict and conclusion that Nemeth was exposed to a sufficient quantity of asbestos to cause the disease.

Nemeth was diagnosed in November 2012 with peritoneal mesothelioma, a tumor of mesothelia cells in the gut or abdomen. She died shortly before this trial commenced. Desert Flower Talcum Powder (DFTP) was manufactured by codefendant Shulton, Inc. (Shulton) using raw talc. Whittaker, Clark & Daniels, Inc. (WCD), a distributor of minerals and pigments, supplied Shulton with raw talc. Plaintiff's claim, accepted by the jury, was that Nemeth was exposed to asbestos contaminated talc which WCD supplied to Shulton for its use in its production of DFTP, that WCD knew, or should have known, of such contamination, and that Nemeth's use of DFTP was a proximate cause of her peritoneal mesothelioma.

The jury found in favor of plaintiff, awarding the estate $15,000,000 and plaintiff's widower, $1,500,000 for loss of consortium. It apportioned fault, 50% to Shulton and 50% to WCD. WCD's motion for a judgment notwithstanding the verdict was granted by the trial court only to the extent of ordering a new trial on damages, unless plaintiff stipulated to reduced judgments in the respective amounts of $6,000,000 and $600,000. Plaintiff so stipulated. The motion was otherwise denied. After the court made adjustments pursuant to General Obligations Law §15-108, the judgments entered against WCD were for $2,667,045.45 in favor of the estate and $266,704.55 in favor of decedent's spouse. WCD now appeals. Plaintiff cross-appeals, but only on issues related to damages.

WCD seeks Appellate Division review of the jury's determination of facts in accordance with two standards of review. It asks this Court to (1) examine the facts to determine whether the weight of the evidence comports with the verdict, and alternatively (2) to consider whether the evidence was insufficient as a matter of law, rendering the verdict utterly irrational (CPLR 4404[a]; *Killon v Parotta*, 28 NY3d 101, 108 [2016]). This Court may not disregard a jury verdict as against the weight of the evidence unless "the evidence preponderate[d] in favor of the [moving party] that [it] could not have been

reached on any fair interpretation of the evidence" (*id.* at 107 [internal citation omitted]). The remedy for a verdict that is against the weight of the evidence is to remit for a new trial. Where, however, the jury verdict is found insufficient as a matter of law, we must determine that the verdict is utterly irrational, meaning there is no valid line of reasoning or permissible inferences from the evidence presented by which a rational person could reach the jury's conclusion (*id.* at 108). The remedy for an utterly irrational verdict is a judgment in favor of the moving party (*id.*).

WCD's additional argument, that plaintiff's counsel's closing remarks unfairly influenced the jury, requires the Court to consider whether those remarks were fair comment or, if not, so prejudicial that they deprived WCD of a fair trial, warranting a new trial in the interest of justice (*see e.g. People v Galloway*, 54 NY2d 396, 399 [1981]; *see also Peters v Wallis*, 135 AD3d 922, 923 [2d Dept 2016]). Other arguments by the parties are evaluated according to whether they constitute errors of law affecting the verdict (*see Evans v Newark-Wayne Community Hosp*, 35 AD2d 1071, 1072 [4th Dept 1970]).

Against these highly deferential standards of review, the relevant trial evidence in this case may be summarized as follows:

Nemeth testified in a preserved videotaped deposition that over an 11-year period, from at least 1960 until 1971, she powdered her body with DFTP every day after showering, using a powder puff for two minutes to apply it all over her body. The air she breathed in was "[v]ery dusty" and after powdering, she would spend an additional five minutes every day wiping down powder from the sink, toilet, and floor using a damp paper towel. The bathrooms of the apartments where she lived when she used DFTP were "tiny," only about "5x6," with no windows, and no ventilation. Nemeth finished a box of DFTP every two weeks.

Nemeth was diagnosed with peritoneal mesothelioma in November 2012, approximately 40 months before she died in March 2016. She underwent three surgeries in an attempt to remove the tumors, but the disease eventually spread to every organ in her abdomen. Nemeth underwent years of chemotherapy and on four separate occasions, her abdomen was drained of accumulated fluids. Eventually, Nemeth's cancer metastasized to her lung and she died after spending some time in hospice care.

Shulton's former employee, Wiz Kaenzig, testified[1] that during the relevant time (1969 through 1971), WCD supplied

[1]Kaenzig did not testify personally at trial. His recorded sworn testimony, taken in prior proceedings, was put before the jury.

Shulton with talc that it used in its products, including DFTP. He also testified that 99% of the talc that Shulton used during a substantial period of that 11-year period was obtained from WCD.

Sean Fitzgerald, a geologist, testified for plaintiff. Fitzgerald opined that the talc sold by WCD to Shulton during the relevant time was regularly and consistently contaminated with releasable asbestos. In addition to reviewing historical testing information, maps, surveys and other testing data, Fitzgerald based his opinion on his own testing of talc ore obtained from WCD source mines.

Fitzgerald also obtained a vintage sample of DFTP and conducted releasibility studies on it. The test involved placing the sample into a "glove box," which is a sealed, plexiglass chamber fitted with gloves and a filter. He testified that this testing method simulated Nemeth's use of talc in a close environment. After the talc was agitated within the chamber, Fitzgerald analyzed the fibers that he collected from the filter and dust wipes. He estimated that as many as 2,760,000 individual asbestos fibers were released during that test.

Calculating Nemeth's use of DFTP over the time, duration and frequency of exposure that Nemeth testified to, Fitzgerald concluded that she would have been exposed to billions and trillions of asbestos fibers on account of her use of DFTP over

the 11-year period. He contrasted that with 60,000 fibers per day that a person living in an urban area breathes in as a result of ambient asbestos. He concluded that the number of released asbestos fibers from DFTP were several orders of magnitude higher than that found in ambient air.

To establish that WCD was knowledgeable about asbestos during the relevant time, plaintiff relied upon historic information about the known dangers of asbestos in talc. David Rosner, PhD, a history professor, testified that as far back as 1935, there were published studies reporting tremolite (a form of asbestos), as a potential contaminant of talc, and the presence of asbestos-related diseases in talc workers. Rosner also testified that WCD distributed raw asbestos as part of its business model from the 1930's to the early 1960's, possibly into the early 1970's. He testified that despite WCD's presumptive awareness of these dangers, it did not warn its customers of them, nor did WCD advise its customers to, in turn, advise their end users of those hazards.

Jacqueline Moline, M.D., an internal medicine doctor specializing in occupational and environmental medicine, was plaintiff's principal expert witness on the issues of both general and specific causation. On the issue of general causation, Dr. Moline opined that even brief or low-level

exposure to asbestos, including asbestos contaminated talcum powder, causes all types of mesothelioma (including both pleural and peritoneal mesothelioma); virtually all cases of mesothelioma are related to asbestos exposure; and that mesothelioma is a sentinel health event of exposure to asbestos, meaning its presence is evidence of asbestos exposure. She testified that there are no known safe levels of exposure to asbestos, even while acknowledging that exposure to asbestos in ambient air is not a causative agent for mesothelioma.

In reaching this conclusion, Dr. Moline relied on her clinical experience in treating hundreds of patients with mesothelioma and peer reviewed literature which included both epidemiological and case studies. She also relied on government standards and regulations pertaining to unacceptable levels of asbestos. Among the authorities she relied upon was the Welch article, a study of college-educated men with low levels of asbestos exposure who developed peritoneal mesothelioma, the Helsinki criteria, articles showing that tremolite-contaminated talc can cause asbestos related disease, a 1982 NIOSH study concerning talc miners and millers and their development of asbestos related disease, case studies including the Gordon, Fitzgerald and Millette study concerning a woman's use of asbestos-contaminated cosmetic talcum powder and mesothelioma, as

well as a study of a 17-year-old boy who used asbestos contaminated talc and developed peritoneal mesothelioma.

Dr. Moline explained that although there were no specific epidemiological studies regarding asbestos contaminated cosmetic talc and peritoneal mesothelioma, she was able to draw her conclusion by analogy from other relevant epidemiological studies, because it is the asbestos and not the talc per se that causes the disease. In addition, Dr. Moline pointed out that although there are thousands of asbestos containing products, epidemiological studies are not necessarily performed for each and every product. She also relied on case studies of mesothelioma in patients after using asbestos contaminated talc products.

On the issue of specific causation, Dr. Moline concluded that Nemeth's peritoneal mesothelioma was caused by her exposure to asbestos in DFTP. Her opinion rested not only on her expertise and knowledge of the literature in the field, it was also founded on the facts, as presented to her in counsel's hypothetical question. Certain facts she relied on were derived from both Nemeth's and Fitzgerald's testimony. While there was no precise quantification of the amount of asbestos to which Nemeth was actually exposed, Dr. Moline's opinion was in large part based upon the timing, duration and frequency of Nemeth's

use of DFTP, derived from Nemeth's testimony, the latency period from the time Nemeth used the product until the development of the disease, the dusty nature of talcum powder, proof presented at trial that the DFTP used by Nemeth was contaminated with asbestos, and Fitzgerald's releasibility analysis of DFTP and conclusion that it released asbestos fibers several orders of magnitude higher than what a person would be exposed to by breathing ambient air.

On its direct case WCD called Alan Seagrave, a geologist. Like Fitzgerald, he obtained some rock ore samples for testing to determine their asbestos contamination and tested them using X-ray diffraction. He reported that only two of the samples tested positive for such contamination.

WCD also called Suresh Moolgavkar, PhD, an epidemiologist to testify as an expert. The court, however, granted plaintiff's motion in limine, prohibiting Dr. Moolgavkar from giving any opinion about medical causation, which ruling is not challenged on appeal.[2] [3] Dr. Moolgavkar gave testimony on general causation.

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[2]WCD claims that had the court permitted Dr. Moolgavkar to testify on specific causation, he would have opined that even if DFTP was contaminated with asbestos, it played no causative role in the development of Nemeth's peritoneal mesothelioma. The trial judge found that Dr. Moolgavkar did not possess the professional qualifications to render this opinion. Although WCD expresses its dissatisfaction with the trial court's ruling, no actual legal argument is raised challenging it and WCD has,

He concluded that there was no general causative connection between asbestos and peritoneal mesothelioma in women. Dr. Moolgavkar opined that mesothelioma may occur spontaneously, due to some cellular mutation, and it can also be idiopathic, meaning that there is no explanation for why it happens. He also testified that age is a strong risk factor for most cancers and the risk of cancer increases very rapidly with age. Dr. Moolgavkar's testimony was based on epidemiological studies. Although Dr. Moolgavkar disagreed with Dr. Moline's conclusions, he did not testify that her methodology in reaching them is not generally accepted by the relevant scientific community. In fact, he affirmatively recognized in his November 2, 2015 letter/report that reliance on epidemiological studies is

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therefore, abandoned whatever argument it may have had regarding that ruling (*Stefkatos v Frezza*, 95 AD3d 787 [1st Dept 2012]). In any event, the court's ruling that Dr. Moolgavkar did not possess the requisite qualifications to testify on causation was not a serious mistake (if a mistake at all), nor an error of law, nor an abuse of the trial court's discretion (*Matter of Sylvestri*, 44 NY2d 260, 268 [1978]; *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398 [1941]; *Board. of Mgrs. of 195 Hudson St. Condominum v 195 Hudson St. Assoc., LLC*, 63 AD3d 523, 524 [1st Dept 2009]).

[3]WCD likewise complains that the court improperly excluded Robert C. Adams, its dose reconstruction expert, without raising any express legal argument. The trial court ruling excluding Adams, however, was made without prejudice, permitting WCD the opportunity to establish that Adams's methodology was reliable. It did not seek to reintroduce its expert.

accepted methodology for evaluating causation questions.

Each of the parties' experts were cross-examined, pointing out limitations in the data relied upon and the testing methods utilized in reaching their opinions.

Before the case was submitted to the jury, the trial court determined that WCD's CPLR article 16 claims against all settling defendants, other than Shulton, would not be presented to the jury because WCD had failed to make a prima facie case against them. Although Shulton had also settled with plaintiff, the trial court found that a prima facie case against Shulton was presented at trial. Consequently, Shulton was the only settling defendant appearing on the jury verdict sheet for CPLR article 16 apportionment purposes.

Causation

A gateway causation issue raised by WCD concerns the sufficiency and/or weight of plaintiff's evidence proving that it supplied the asbestos contaminated talc contained in the product (DFTP) that Nemeth used. Plaintiff's geologic expert Sean Fitzgerald established through his analysis of an historical sample of DFTP that it was contaminated with asbestos. There was further testimony by Shulton's former employee that WCD sold talc to Shulton for use in its products, including DFTP, during the entire time Nemeth used DFTP. He further stated that WCD was

virtually Shulton's exclusive (99%) supplier of talc during a significant portion of that time. There was also evidence by Fitzgerald that the mines supplying WCD with the talc it sold to Shulton were contaminated with asbestos. Fitzgerald's conclusions were based upon literature about the geology of the mines in question, historic and contemporary documents regarding testing of the ore from such mines, and his own actual testing of an exemplary ore sample.

In view of this evidence, a jury finding that Nemeth was exposed to asbestos contaminated talc supplied by WCD is not utterly irrational. Moreover, although defendant presented its own experts on the issue of asbestos contamination in WCD's talc, there is no basis to conclude that the evidence adduced by WCD so preponderated in its favor that a conclusion of asbestos contamination could not have been reached on any fair interpretation of the evidence. Hence, the jury finding that WCD supplied the offending asbestos contaminated talc was neither insufficient nor against the weight of the evidence.

Case Law on Causation

WCD predominantly argues that the evidence before the jury on general and specific causation was insufficient and against the weight of the evidence. Any analysis of causation in connection with toxic torts begins with the Court of Appeals'

seminal case of *Parker v Mobil Oil Corp*. (7 NY3d 434 [2016], *supra*). *Parker* stands for the legal principle that any opinion on causation should set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing a particular illness (general causation) and (3) that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (7 NY3d at 448). The underlying claim in *Parker* was that a gas station attendant had contracted acute myelogenous leukemia due to his exposure to benzene contained in gasoline. The Appellate Division dismissed the complaint based on the expert's inability to quantify the plaintiff's exposure to benzene or demonstrate that such exposure exceeded a threshold that would cause disease. Although the Court of Appeals affirmed dismissal in *Parker*, it expressly departed from the Appellate Division's analysis, holding that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*id.* at 448).

The Court of Appeals recognized that precise information and exact details are not always available in toxic tort cases and they may not be necessary so long as there is "evidence from which a reasonable person could conclude" that the defendant's

offending substance "has probably caused" the kind of harm of which the plaintiff complains (*id.* at 448-449). The Court went on to provide a nonexclusive list of several other ways an expert might demonstrate causation:

> "For instance, amici note that the intensity of exposure to benzene may be more important than a cumulative dose for determining the risk of developing leukemia. Moreover, exposure can be estimated through the use of mathematical modeling by taking plaintiff's work history into account to estimate the exposure to a toxin. It is also possible that more qualitative means could be used to express a plaintiff's exposure. Comparison 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. These, along with others, could be potentially acceptable ways to demonstrate causation if they were found to be generally accepted as reliable in the scientific community" (*id.* at 449).

Parker is significant because it recognizes that mathematically precise quantification of exposure to a toxic substance, years after a plaintiff's exposure to such substance, may be impossible and, consequently, alternative means of proof should be available for an injured plaintiff to pursue what may otherwise be a valid claim. This recognition is particularly apt in asbestos exposure cases where the latency period between exposure and the onset of disease can be 20, 40 or 50 years (*see*

Fusaro v Porter-Hayden, Co., 145 Misc 2d 911, 916 [Sup Ct, NY County 1989], *affd* 170 AD2d 239 [1st Dept 1991] [30-35 years]).[4]

Following *Parker*, up until its decision in *Matter of New York City Asbestos Litig. [Juni]* (32 NY3d 1116 [2018]), the Court of Appeals continued to address causation in toxic tort cases, other than asbestos cases. In *Cornell v 360 W. 51st St. Realty, LLC* (22 NY3d 762 [2014]), a divided Court of Appeals (4-2) affirmed dismissal of the complaint alleging injury from exposure to mold because the plaintiff could not prove either general or specific causation. The majority, following the *Parker* analytic framework, held that the plaintiff's experts' opinion, that mold had an association or linkage to the respiratory ailments the plaintiff claimed to have suffered, was insufficient to establish general causation under *Frye v United States* (293 F 1013 [DC Cir 1923]). The Court elucidated that the *Frye* test for assessing the evidentiary reliability of scientific evidence focuses on principles and methodology. It further held that even though an expert, using reliable principles and methods, extrapolates his or her opinion from such reliable data, a court may still reject it based on *Frye* if there is simply too great an analytical gap

[4]Dr. Moline testified that the latency period for mesothelioma may be as long as 50 years. Dr. Moolgavkar also testified to long latency periods (40 years).

between the data and the opinion proffered. While acknowledging its precedent that "precise quantification" of exposure is not necessary to prove specific causation, it held that a medical doctor's differential diagnosis was not enough to establish specific causation in the particular case before it (*Cornell* at 784, quoting *Parker* at 448).

In *Sean R v BMW of N. Am., LLC* (26 NY3d 801 [2016]), the Court of Appeals was confronted with a causation issue in connection with a plaintiff's claim that a fetus' in utero exposure to gasoline had caused the child's birth defects. The BMW driven by the mother while pregnant had a defective fuel hose, permitting gasoline fumes to escape into and permeate the interior of the car. The plaintiff testified that she could smell the gasoline and that she had experienced nausea, headaches and throat irritation. The plaintiff's expert opined that for symptoms such as these to occur immediately, there must have been a gasoline vapor concentration in the car of at least 1000 ppm, which is a toxic level. Applying the *Parker* analysis, the Court of Appeals upheld the preclusion of the expert testimony because the "methods" she used to reach her conclusion were not generally accepted as reliable within the scientific community (*Sean R.* at 806). Although the expert reached her conclusion relying on controlled studies that measured symptoms in response to a given

exposure of gasoline, and the Court of Appeals acknowledged the reliability of the studies, it nevertheless held that the scientific community did not accept an inverse analysis derived from them. In other words, the studies failed to support the expert's conclusion that evidence of the symptoms permitted a conclusion that they were a result of exposure to a toxic concentration of gasoline vapor.

In discussing causation, the Court of Appeals in Sean R. held:

> "Although it is not always necessary for a plaintiff to quantify exposure levels precisely, we have never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect. At a minimum there must be evidence from which the factfinder can conclude that plaintiff was exposed to levels of the agent that are known to cause the kind of harm that the plaintiff claims to have suffered. Not only is it necessary for a causation expert to establish that the plaintiff was exposed to sufficient levels of a toxin to have caused the injuries, but the expert must do so through methods found to be generally accepted as reliable in the scientific community. This general acceptance requirement, also known as the *Frye* test, governs the admissibility of expert testimony in New York" (*id*. at 808-809 [internal quotation marks, alterations and citation omitted]).

In accordance with *Parker* and its progeny, issues of causation in asbestos exposure cases were developing in the New

York trial and appellate courts. In 2018 the Court of Appeals decided *Juni*, considering for the first time the issues of causation in connection with asbestos exposure and mesothelioma. To put *Juni* in context, it is informative to discuss the progression of asbestos causation case law as it had developed up until then in the Appellate Division and trial courts.[5]

A leading Appellate Division decision on causation in asbestos cases was *Lustenring v AC&S, Inc*. (13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]). *Lustenring* held that evidence of the plaintiff working all day and for prolonged periods of time "in clouds of dust" resulting from the manipulation and crushing of packing and gaskets containing asbestos, along with expert testimony that the dust was from asbestos and not just industrial air in general, supported a conclusion that the dust contained enough asbestos to cause mesothelioma (13 AD3d at 70). Although *Lustenring* was decided before Parker, the causation analysis in *Lustenring* continued to

[5]Contrary to the dissent's argument, we are not suggesting that the Appellate Division and the trial courts have developed a body of law in contravention of *Parker* and its progeny. Nor are we, as the dissent suggests, forecasting that the Court of Appeals will change course in this area of the law To the contrary, it is our position that this Court and the trial courts' decisions are wholly consistent with Court of Appeals' precedent. Such precedent repeatedly acknowledges that precise information, and exact details are not the only way to prove causation.

be applied by the Appellate Division and the trial courts even after *Parker* and its Court of Appeals progeny were decided (*see Matter of New York City Asbestos Litig. [Sweberg]*, 2015 NY Slip Op 30043[U], at *5 [Sup Ct, NY County 2015], *affd as modified* 143 AD3d 483 [1st Dept 2016], *lv dismissed* 28 NY3d 11165 [2017]; *Matter of New York City Asbestos Litig. [Hackshaw]* 143 AD3d 485 [1st Dept 2016]; *affd* 29 NY3d 1068 [2017]); *Penn v Amchem Prods.*, 85 AD3d 475 [1st Dept 2011]). Analytical support for the *Lustenring* analysis seemed to flow from and is consistent with *Parker's* express acknowledgment that exposure to a toxic substance can be "estimated" based upon a plaintiff's "work history" (*Parker* at 590-591).

In 2017, this Court decided *Juni* (148 AD3d 233 [1st Dept 2017]). Arthur Juni claimed that his mesothelioma was proximately caused by his exposure, as an auto mechanic, to asbestos dust released from brakes, clutches and manifold gaskets on Ford vehicles he had worked on. The four Justices deciding the case at the Appellate Division split on the issue of causation; two Justices finding insufficient evidence of specific causation, one Justice finding, in a separate concurrence, neither specific nor general causation, and the one Justice dissenting, finding that the trial evidence on causation was sufficient under *Parker* to support the jury verdict. The

Appellate Division dissent was in large part founded on the analytical framework in *Lustenring*.

Significantly, the *Juni* majority analysis of specific causation did not hold that *Lustenring* was no longer valid law in light of *Parker* and its progeny, nor did it overrule *Lustenring*. Instead, the majority distinguished the circumstances in *Lustenring* from *Juni* and explained it within the rubric of a *Parker* based analysis as follows:

> "Moreover, our decisions in *Lustenring v AC&S, Inc.*, (13 AD3d 69 [2004], *supra*) and other asbestos cases (*see e.g. Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011]; *Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [1st Dept 2006]) do not justify allowing a judgment in an asbestos case to stand solely on a bare conclusion that because the plaintiff worked with the defendant's asbestos-containing products, those products were a contributing cause of plaintiff's mesothelioma. The rulings in each of those cases are based on their discrete facts. *Where the courts relied on evidence linking visible dust to the use of the particular defendant's product, expert testimony established that the extent and quantity of the dust to which the plaintiffs had been exposed contained enough asbestos to cause the mesothelioma. In none of those cases was the mere presence of visible dust considered sufficient alone to prove causation*. For example in *Lustenring*, the evidence established that 'both plaintiffs worked all day for long periods in clouds of dust,' which the expert testimony stated necessarily contain[ed] enough asbestos to cause mesothelioma" (*Juni* at 238-239

[emphasis added], quoting *Lustenring* at 90).

At the Appellate Division, the *Juni* majority adopted a narrow reading of *Lustenring*, while the dissent read *Lustenring* more broadly.

In 2018, a plurality of a five judge panel at the Court of Appeals affirmed *Juni*, but not in accordance with the reasoning of the Appellate Division's majority. Of the four judges voting to affirm, two joined in a memorandum decision holding that proximate causation had not been legally established in accordance with *Parker* and *Cornell*; one judge separately concurred, stating that there was insufficient legal evidence establishing a connection between the defendant's products and the plaintiff's exposure to asbestos, expressly pointing out that he did not reach the issues of general or specific causation that had been reached by the Appellate Division. The fourth judge forming the plurality also wrote separately, explaining he concurred because there was a failure in proof on the issue of general causation. The concurrence rested on the defendant's unrebutted evidence that the friction products to which the plaintiff had been exposed were manufactured under extreme temperatures, changing the chemical composition of the asbestos in them to a biologically inert substance called forsterite. None of the separate decisions comprising the plurality endorsed

or rejected the reasoning of *Lustenring*. They did not address the issue of specific causation. The sole dissenting judge primarily relied upon the reasoning of the Appellate Division dissent in *Juni* (32 NY3d at 1118-1122).

After the Appellate Division decision in *Juni* and its affirmance by the Court of Appeals, this Court continued to apply the Appellate Division decision in *Juni*, with varying results (*Ford v A.O. Smith Water Prods.*, 173 AD3d 602 [1st Dept 2019][causation]; *Matter of New York City Asbestos Litig. [DiScala]*, 173 AD3d 573 [1st Dept 2019]; *Corazza v Amchem Prods., Inc.*, 170 AD3d 610 [1st Dept 2019] [no causation]; *Matter of New York City Asbestos Litig. [Miller]*, 154 AD3d 441 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018][causation]).

It is in consideration of this case law that the parties' arguments on general and specific causation in this case are evaluated.

General Causation

As previously stated, Dr. Moline testified that asbestos in talc is capable of causing peritoneal mesothelioma. Her opinion was based upon peer reviewed articles that reported epidemiological studies, case studies, review of governmental and international agency positions on asbestos safety, and her personal clinical experience treating numerous patients stricken

with mesothelioma.

WCD claims to challenge Dr. Moline's methodology in arriving at her conclusion. WCD, however, presented no evidence whatsoever that Dr. Moline's reliance on scientific and other germane literature in the field was not generally accepted in the relevant scientific community (*see Cornell*, 22 NY3d at 782). In fact, WCD's expert, Dr. Moolgavkar, acknowledged in his November 2, 2015 letter/report that reliance on epidemiological studies to reach conclusions on causation in asbestos exposure cases is generally accepted in the relevant scientific community.[6] Also, contrary to WCD's arguments, Dr. Moline's testimony did not simply "associate" or "link" asbestos to mesothelioma, she described it as a sentinel health event of asbestos exposure, and that virtually all cases of mesothelioma are related to asbestos exposure. WCD fails to identify any analytical gap between the data Dr. Moline relied on and her opinion (*id.* at 781). Accordingly, there is no evidence supporting WCD's *Frye* reliability arguments.

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[6] The dissent's argument that plaintiff's epidemiological studies are, as a matter of law, insufficient is without bases. Clearly no controlled dose response studies concerning unsafe levels of asbestos exposure can be ethically conducted in humans. This is also expressly recognized by Dr. Moolgavkar in his letter/report dated November 2, 2015. Consequently, both Dr. Moline and Dr. Moolgavkar primarily relied on epidemiological studies to reach their conclusions.

At their core, WCD's arguments are not lodged at the legal sufficiency of the evidence, but its weight. WCD complains that the studies Dr. Moline relies on do not specifically concern the use of cosmetic talc and/or in unrelated to peritoneal as opposed to pleural mesothelioma. Dr. Moline testified however, that studies do not exist for every type of asbestos-containing product and it is the asbestos contamination of the talc that causes the disease. She further explained that her opinion was partly extrapolated from a case study concerning asbestos contaminated talc ore and its effect on miners and millers who were exposed to such talc. WCD's expert on general causation, Dr. Moolgavkar, also relied on epidemiological studies in reaching his conclusion that there is no association between asbestos contaminated talc and peritoneal mesothelioma in women. He admitted, however, that the studies he relied on only concerned men, and did not concern peritoneal mesothelioma or cosmetic talc. After each sides' attorney highlighted the weaknesses in the other sides' expert's scientific evidence and authorities, it then became the province of the jury to weigh the evidence and decide which opinion was more credible (*see Monroy v Glavas*, 57 AD3d 631, 632 [2d Dept 2008]). There is no legal basis to disturb the jury's findings and verdict in favor of plaintiff (*see Naseer v Dynasty Home Improvement*, 117 AD3d 623

[1st Dept 2014]).

Specific Causation

Dr. Moline, as plaintiff's expert on specific causation, testified in court that Nemeth's exposure to asbestos contaminated talc in DFTP caused Nemeth's peritoneal mesothelioma. Her testimony was in response to a hypothetical question posed by plaintiff's counsel, which included evidence in the trial record. WCD's primary argument is that Dr. Moline's opinion on specific causation is legally insufficient in that it fails to satisfy the quantification element.

Although Dr. Moline did not precisely quantify the amount of asbestos contaminated talc Nemeth was exposed to when using DFTP, Dr. Moline's conclusion was based upon Nemeth's estimated exposure to such toxin, as derived from Nemeth's own testimony about the timing, frequency and duration of her historical use of DFTP. Dr. Moline also took into consideration the results of Fitzgerald's testing of an historical sample of DFTP quantifying the number of asbestos fibers released from DFTP in a simulated setting. Thus, the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with *Parker*.[7]

[7]The dissent's argument that the absence of a mathematical calculation of the amount of asbestos Nemeth was exposed to, as a matter of law, defeats her claim is inconsistent with case law. This approach, if adopted, would effectively sound the death

In *Juni*, the Court of Appeals did not decide the issue of specific causation. *Juni* is a factually unique decision that does not impact on the specific causation issues raised in this case. To the extent the Appellate Division decision in *Juni* provides some general parameters for evaluating the legal sufficiency of specific causation in asbestos cases, this case passes muster, whether the broad interpretation of *Parker* and *Lustenring* followed by the *Juni* dissent is accepted, or the more narrow interpretation of *Parker and Lustenring* adopted by the Appellate Division majority is applied. Nemeth's testimony established, first hand, her personal history of prolonged exposure to visible dust (*Lustenring* at 70), beyond what is contained in ambient air. This would be sufficient to create a jury question under the reasoning of the Appellate Division dissent in *Juni* (148 AD3d at 243 [Feinman, J., dissenting]).

However, even under the Appellate Division's majority

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knell for most, if not all, asbestos exposure cases going forward. *Parker* expressly leaves open a plaintiff's ability to prove specific causation without precise mathematical calculation, but by reference to estimation based on work history and math models, as was done here. Clearly, the mathematical proof that the dissent believes is required to prove specific causation in asbestos exposure cases is unavailable where the latency period is prolonged. For instance, at bar, it would have required Nemeth to start measuring the air quality in her bathroom for toxins approximately 40 years before she was diagnosed with the disease.

opinion in *Juni*, stating that expert testimony on quantification is necessary to show that such dust "contained enough asbestos to cause the mesothelioma" (*id.* at 239), that quantification requirement is sufficiently met here to create a jury question. Fitzgerald's testimony about the amount of asbestos released in a glove box analysis of DFTP, along with the timing, duration and frequency of Nemeth's use of that product, with his conclusion that the amount of asbestos greatly exceeded by "several [orders] of magnitude" the amount of asbestos fibers in ambient air, presents a sound basis for the jury's conclusion. Contrary to WCD's argument, *Juni* in no way affected *Parker's* holding that precise quantification is not required in toxic tort cases.

WCD's alternative argument, that Dr. Moline's opinion is against the weight of the evidence, should be rejected. WCD did not produce any expert evidence on the issue of medical or specific causation. There is no basis, in this record, for a finding that the weight of the evidence presented at trial preponderated in favor of finding no specific causation.

Plaintiff's Summation

WCD's argument that plaintiff's counsel's remarks on summation deprived it of a fair trial and improperly influenced the jury is rejected. The following testimony, relevant to this argument, was elicited at trial:

On direct examination, Dr. Moline testified, without objection, that women have another route of potential exposure to asbestos because the talc can get into the body through vaginal excursion into the abdominal cavity through the uterus, fallopian tubes and into the peritoneum. She also testified, without objection, that this physiological difference may explain "why peritoneal mesothelioma [rates] are actually higher . . . " in women, adding that "there is no reason to say that women are more likely to develop spontaneous tumors than men."

Based on this testimony, during a lengthy summation (spanning 136 pages of trial transcript) and covering a plethora of issues, plaintiff's counsel made the following remarks:

> "asbestos can enter the body in various ways. With a woman like Flo [Nemeth], there are two avenues of exposure. And the way she [Dr. Moline] is describing, I will submit, means she's [Nemeth] getting asbestos in her body from two different ways, from breathing it in, and then using it all over her body, in her pelvic regions . . ."

Although defense counsel immediately objected, the court allowed plaintiff's counsel to complete his statement. Plaintiff's counsel continued as follows:

> "[Dr. Moline] told us exactly how in a case of a woman like Flo with peritoneal mesothelioma, the asbestos can get to the peritoneum . . . ."
>
> "And in this case, in Flo's case, they

> accumulated in the peritoneum. And that's where the disease took place. Not spontaneously, as if by magic. . . And [Dr. Moline] also testified that there was a second avenue of exposure that could occur. . . by the manner in which [Nemeth] applied it all to her body it entered her vagina, is what [Dr. Moline] said. So there is another avenue of exposure which led to the peritoneum."

WCD's subsequent motion for a mistrial was denied. Supreme Court agreed that Dr. Moline had not given an "affirmative opinion that [Nemeth's] peritoneal mesothelioma was caused by both breathing the Desert Flower Dusting Powder and having it enter her body transvaginally." The court observed, however, that Dr. Moline had, in fact, testified that transvaginal exposure to asbestos contaminated talc "can cause peritoneal mesothelioma," and Dr. Moline had testified it would "explain the phenomenon of why there are more cases of peritoneal mesothelioma in women than men."[8]

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[8]Contrary to WCD's claim, Dr. Moline's testimony on transvaginal exposure in women was not limited to general causation of ovarian cancer. Although one study she relied on concerned ovarian cancer, her testimony was more generally about the ability of dust to enter a women's body through her vagina. Ultimately, the trial court properly concluded that the deficit in plaintiff's counsel's characterization of Dr. Moline's testimony during summation was not about her general conclusion, that asbestos contaminated talcum powder can enter a women's body transvaginally, but that she did not conclude that Nemeth's mesothelioma was caused by transvaginal exposure to asbestos in DFTP.

Nonetheless, to allay WCD's concerns and avoid any possible prejudice, the court instructed plaintiff's counsel to do a subsequent "mini-closing," allowing him to clarify his remarks. Plaintiff's counsel then made the following statement:

> "We heard extensive evidence about air born [sic] particulate fibers. The fact that Flo Nemeth, she testified that she breathed this in over years. I then told you about and you were here when Dr. Moline testified based on articles she read about certain other avenues of exposure specific to women. And I reiterated that yesterday. But, what I would like you to do and what I – and what the evidence shows in this case is that we are focused on the air born [sic] particulate and the fact that Flo said she breathed that particulate in. Even though the literature may suggest something that Dr. Moline touched upon, the case is really about what was released into the air, tie that up with Mr. Fitzgerald's simulation. And I just wanted to reiterate that."

WCD claims that plaintiff's counsel's remarks improperly confused the jury because although plaintiff's "focus" was on Nemeth's "inhalation" of asbestos, transvaginal exposure was not eliminated as a possible means of exposure. WCD claims further that Dr Moline's testimony only generally causally linked transvaginal exposure to cancer, but plaintiff's counsel misrepresented the record by stating to the jury that Nemeth's transvaginal exposure to asbestos contaminated talc specifically caused her peritoneal mesothelioma.

Supreme Court carefully instructed the jury before opening statements and again before closing arguments that the remarks the attorneys make when addressing them are not evidence. The jurors were also correctly instructed that they had to decide the case based only upon the testimony of witnesses, photographs, documents and other exhibits introduced into evidence at trial. Jurors are presumed to follow the law as it is charged by the court (*People v Davis*, 58 NY2d 1102 [1983]).

In addition, it is well-settled law that attorneys are afforded "wide latitude" in presenting their arguments to a jury in summation (*Gregware v City of New York*, 132 AD3d 51, 61 [1st Dept 2015]; *see People v Galloway*, 54 NY2d at 399). Even where a remark is not fair comment, so long as it does not substantially prejudice a trial by improperly influencing the jury's verdict, there is no basis for granting a mistrial (*Galloway*, 54 NY2d at 401).

Plaintiff's counsel's summation comments were isolated remarks during a very lengthy summation. They were not pervasive, egregious or an obdurate pattern of remarks that inflamed the jury into believing that the focus of plaintiff's exposure to asbestos contaminated talc was other than airborne particulants that she had breathed in for many years (*see People v Whaley*, 70 AD3d 570, 571 [1st Dept 2010], *lv denied* 14 NY3d 894

[2010]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The remarks did not divert the jury's attention from the core issues they had to decide (*Selzer v New York City Tr. Auth.*, 100 AD3d 157, 163 [1st Dept 2012]). Nor did they deprive WCD of substantial justice (*compare Smith v Rudolph*, 151 AD3d 58, 63 [1st Dept 2017][pattern of defense counsel's misconduct so pervasive as to deprive the plaintiff of a fair trial]). The remarks, as the trial court observed, directly pertained to testimony to which WCD failed to object. Defense counsel, could have, but made no effort to blunt Dr. Moline's testimony during his own summation (*see e.g. Gregware v City of New York*, 132 AD3d at 61).

The trial court's general jury instruction, that counsel's remarks should not be considered as evidence, ameliorated plaintiff's counsel's mischaracterization of evidence. Moreover, the trial court's decision allowing plaintiff's counsel to re-address the jury in a mini-closing, while perhaps not an ideal choice, was a sufficient cure to WCD's objection (*see Avila v Robani Energy Inc.* 12 AD3d 223, 223 [1st Dept 2004]). The trial judge, who was in the "best position" to evaluate any errors and decide whether, under the circumstances the verdict was affected by them, stated that he believed the comments had not been motivated by any "lack of good faith" (*see Micallef v Miehle Co.*,

Div. of Miehle-Goss Dexter, 39 NY2d 376, 381 [1976]). Since plaintiff had the right to close last, counsel's additional closing remarks were clarifying and little more than "fair comment upon the evidence" (*Selzer*, 100 AD3d at 163 [internal quotation marks omitted]). They do not warrant a mistrial.

Jury Instruction

Before deliberations, the court instructed the jury that it was to consider whether "defendant acted with reasonable care" taking into account the general custom or practice of others in the industry. It also instructed - over defense counsel's objection – that WCD, as a manufacturer, distributor or seller is held to the knowledge of an expert in its respective industry, based on the state of the art in the industry at the time of the sale and Nemeth's exposure to the product. WCD contends these instructions were inconsistent and confusing to the jury.

WCD's claim, that the Supreme Court erred when it gave the jury a "state of art charge" instructing them that WCD was held to the knowledge of an expert in its field, is unavailing. Equally unavailing is WCD's further argument that this instruction is inconsistent with the instruction that WCD was required to act with reasonable care. The state of the art instruction correctly specified the level of knowledge a defendant is required to have. As a distributor of minerals and

pigments, including talc, WCD is expected to keep abreast of developments in the state of the art of its product through research, reports, scientific literature, and other available methods *(Cover v Cohen*, 61 NY2d 261, 274-275 [1984]; PJI 2:120, Comment; *see Matter of New York City Asbestos Litig. [Sweberg]*, 2015 NY Slip Op 30043[U], at *5 [rejecting the defendant's posttrial argument that the court erred in so charging jury]). WCD did not preserve its inconsistency argument and, in any event, whether WCD acted with "reasonable care" depends on the knowledge WCD had, or should have had, per the state of the art instruction.

Damages

WCD's argument that the jury's allocation of equal blame to it and Shulton was insufficient and against the weight of the evidence, because Shulton manufactured and sold the DFTP that injured Nemeth, is unavailing. The jury heard evidence from which it could conclude that WCD supplied the asbestos contaminated talc used by Shulton in its products, and that WCD knew or should have known that the talc was contaminated. The jury fairly determined that WCD's conduct was a cause of Nemeth's injuries at least as great as Shulton, who manufactured and sold DFTP to Nemeth (*see e.g. Stewart v Manhattan & Bronx Surface Tr. Operating Auth.*, 60 AD3d 445, 445-446 [1st Dept 2009]).

WCD also argues that the trial court improperly excluded other, settling, defendants from the jury verdict sheet, which would have allowed the jury to apportion liability to those defendants. The trial court, however, properly excluded all settling defendants except Shulton from the verdict sheet because WCD, which had the burden of proof, failed to present a prima facie case of liability against them *(Matter of New York City Asbestos Litig. [Idell]*, 164 AD3d 1128, 1129 [1st Dept 2018], *appeal dismissed* 32 NY3d 1186 [2019]).

WCD's argument that the verdict, as reduced by the trial court, should be further reduced by this Court is without merit. Likewise, plaintiff's challenge to the reduction of the jury award by the trial court is also without merit. The trial court correctly adjusted the jury verdict so that it did not materially deviate from reasonable compensation (*Donlon v City of New York*, 284 AD2d 13 [1st Dept 2001]). In addition, plaintiff, who stipulated to the reduced award in order to avoid retrial, is precluded from challenging the reduced award on appeal.

Issues raised by plaintiff on its cross appeal regarding the court's calculation of offsets for payments made by the settling defendants, however, do have merit. General Obligations Law § 15-108 requires that a judgment be adjusted by subtracting the greater of other tortfeasors' equitable share of the damages or

the amount actually paid by them. Here, the trial court first subtracted $732,500 from the damage award, representing the amounts paid by all the settling defendants that were not on the verdict sheet. It then further reduced the jury award by 50%, representing the apportionment to Shulton made by the jury. While this may be the proper method where the equitable share of liability has been determined for some, but not all, of the settling defendants (see *Williams v Niske*, 81 NY2d 437, 444-445 [1993]), a different calculation applies when all the settling tortfeasors have been included in the apportionment of liability. In such cases, the aggregate method should be applied (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 82 NY2d 342 [1993]). Although the jury did not apportion liability for the settling defendant's except Shulton, by expressly finding that WCD had not proven a prima facie case against them, the trial court effectively apportioned their liability at 0%. Under the aggregate method of calculation, the damages should only be reduced by the greater of 50% or the aggregate of all settling defendants (including Shulton). In this case, there appears to be no dispute that 50% was greater than the aggregate of all monies paid by all settling defendants. I would therefore increase the judgment to $3,300,000.

Accordingly the judgment of the Supreme Court, New York

County (Martin Shulman, J.), entered August 22, 2017, upon a jury verdict awarding plaintiff the principal amount of $2,933,750 should be modified, on the law, to the extent of increasing the principal amount to $3,300,000, and otherwise affirmed, without costs.

All concur except Friedman, J.P. who dissents in an Opinion.

FRIEDMAN, J.P. (dissenting)

As an intermediate appellate tribunal of the state of New York, this Court is bound to apply the law as it has been determined in previously decided cases of the state's highest tribunal, the Court of Appeals. It is not our role to anticipate a departure by the Court of Appeals from its own precedents. Moreover, to the extent the decisions of this Court might be inconsistent with those of the Court of Appeals, we are bound to follow the law as stated by the Court of Appeals, even if our own conflicting decisions are more recent.

I preface my dissent with the foregoing because it seems to me that the majority decides this appeal as if the Court of Appeals had already overruled its cases requiring the plaintiff in a toxic tort case to present expert evidence "show[ing], through generally accepted methodologies, that [she] was exposed to a sufficient amount of a toxin to have caused [her] injuries" (*Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 812 [2016]), and that such expert evidence, even though "not required to pinpoint exposure with complete precision," provide the factfinder with "a scientific expression of [the] exposure level" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 449 [2006]; *see also Sean R.*, 26 NY3d at 809 ["At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels

of th(e) agent that are known to cause the kind of harm that the plaintiff claims to have suffered"] [internal quotation marks omitted]).

Plaintiff won a jury verdict against defendant Whitaker, Clark & Daniels (WCD) on the theory that his late wife, Florence Nemeth, died from peritoneal mesothelioma that resulted from her respiration of asbestos contained in Desert Flower Dusting Powder (Desert Flower), a cosmetic talcum powder that she used from 1960 through 1971. During that period, WCD supplied talc — allegedly naturally contaminated with asbestos — that was used to manufacture Desert Flower.[1] At trial, however, plaintiff failed to present expert evidence specifying the level of exposure to respirable asbestos that would have been sufficient to cause peritoneal mesothelioma, the specific cancer that afflicted Mrs. Nemeth.[2] Indeed, plaintiff's medical expert on causation admitted that her report did not offer any numerical definition of a "significant exposure" to asbestos. While this omission, by

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[1]All defendants in this action other than WCD settled with plaintiff or were otherwise dismissed from the case before trial. Shulton, Inc., the manufacturer of Desert Flower, was one of the settling defendants. The jury apportioned fault for Mrs. Nemeth's injuries 50/50 between Shulton and WCD. As discussed more fully below, the settling defendants other than Shulton did not appear on the verdict sheet.

[2]Peritoneal mesothelioma is cancer of the lining of the peritoneum, the abdominal wall.

itself, renders plaintiff's evidence on causation legally insufficient, plaintiff's experts also failed to quantify the level of Mrs. Nemeth's actual exposure to asbestos — that is to say, they offered no estimate of the amount of asbestos she actually would have breathed in while using Desert Flower in a space with the dimensions and air conditions of her bathroom.[3] As more fully discussed below, under the governing precedents of the Court of Appeals, plaintiff's evidence falls short of establishing that Mrs. Nemeth "was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*Parker*, 7 NY3d at 448). For that reason, the judgment in favor of plaintiff should be reversed and WCD's motion for judgment notwithstanding the verdict pursuant to CPLR 4404(a) should be granted. Accordingly, I respectfully dissent.[4]

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[3]Even if (as the majority seems to assume) the level of Mrs. Nemeth's exposure to asbestos could be deemed to be shown by plaintiff's geological expert's estimate that 2,760,000 asbestos fibers would have been released each time she used Desert Flower, this would not cure plaintiff's aforementioned failure to present evidence establishing the level of asbestos exposure necessary to cause peritoneal cancer.

[4]Because plaintiff's failure to establish the element of specific causation, standing alone, entitles WCD to judgment in its favor, I need not discuss WCD's two other arguments for dismissing the complaint as against it, namely, that plaintiff failed to establish general causation — i.e., that asbestos in cosmetic powder is capable of causing peritoneal cancer (*see Parker*, 7 NY3d at 448) — and that plaintiff failed to present sufficient evidence that WCD supplied asbestos-contaminated talc

To state the obvious, if a litigant wishes to prove that "[a person] was exposed to sufficient levels of [a particular] toxin to cause [a particular] illness" (*id.*), the litigant must first establish the level of exposure to the particular toxin that is sufficient to cause the particular illness.[5] This threshold showing — evidence of the level of exposure to respirable asbestos that would have been sufficient to have caused Mrs. Nemeth's peritoneal cancer — is entirely absent from the record of this case. The omission is evident from the majority's detailed opinion, which identifies nothing in the record offering even an approximation of the level of asbestos exposure (whether cumulative or otherwise) that would have been capable of causing peritoneal mesothelioma. To be sure, this is not due to any oversight on the part of the majority, since the same gap is

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for the manufacture of Desert Flower. Even if WCD were not entitled to dismissal of the complaint, it would be entitled to a new trial by the trial court's error in failing to issue a curative instruction to the jury to correct an improper and materially prejudicial statement made by plaintiff's counsel in the course of his summation. I will discuss the latter issue at the conclusion of this dissent.

[5]It is not clear from the decisions cited above whether the Court of Appeals considers a showing of the level of exposure sufficient to cause an illness to be a component of general causation or a component of specific causation. Here, for the sake of streamlining the discussion, I have elected to treat proof of the sufficient level of exposure as a component of specific causation. However, the analysis would be no different if such proof were treated as a component of general causation.

evident in plaintiff's appellate briefs and in the written report by his medical expert on causation, Jacqueline Moline, M.D.

Strikingly, although the transcript of Dr. Moline's trial testimony stretches through almost a thousand pages of the record, none of the portions of that testimony to which plaintiff refers us on appeal offers a "scientific expression" (*id.* at 449) of an estimate of the level of exposure that could have caused Mrs. Nemeth's disease. On this point, the best Dr. Moline could manage was to opine that "brief or low level exposures of asbestos" could "cause" peritoneal mesothelioma, and that, for this purpose, an exposure is "significant" if it has "some element of regularity or very high exposure over a shorter period of time." As previously noted, Dr. Moline admitted that, in her report, she did not define by "any numeral [sic] value" what she believed would constitute a "significant" asbestos exposure. Nor of course did she define by any numerical values what "brief or low level exposures of asbestos" could cause peritoneal mesothelioma. She also admitted that "not every inhalation of asbestos fibers results in peritoneal mesothelioma," and that "some exposures to asbestos . . . are trivial and don't increase a person's risk of developing mesothelioma."

Further, Dr. Moline's vague assessment of the level of exposure sufficient to cause peritoneal mesothelioma is not

clarified by the scientific literature on which she relied in her testimony. Critically, not one of the articles Dr. Moline discussed on the witness stand (she mentioned none in her written report) sets forth an estimate of the minimum level of exposure to respirable asbestos (cumulative or otherwise) that would suffice to cause peritoneal mesothelioma. For example, the article discussed by Dr. Moline that most directly addresses the connection between asbestos and peritoneal mesothelioma is a study (the Welch article) of college-educated men with a history of "low level" asbestos exposure who developed peritoneal mesothelioma. As described by Dr. Moline, however, the Welch article concludes only that low-level asbestos exposure is "*associated* with an increased risk over six fold" (emphasis added) of developing the disease. Thus, by her own account, the Welch article merely describes an association between low levels of asbestos exposure and peritoneal mesothelioma, and does not purport to prove that such exposure was the *cause* of the disease (*see Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 783 [2014] ["an association does not necessarily mean that there is a cause-effect relationship"] [internal quotation marks and emphasis omitted]). Moreover, Dr. Moline did not reveal how the Welch article defines or quantifies what its authors deemed to constitute low-level asbestos exposure — and, therefore, she

necessarily could not discuss how the levels of exposure discussed in the article relate to Mrs. Nemeth's alleged exposure.

Dr. Moline also discussed an article entitled "Consensus report: Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution" (the Helsinki article). The Helsinki article, after stating that "a history of *significant* occupational, domestic, or environmental exposure to asbestos will suffice for attribution" of *pleural* mesothelioma to such exposure (emphasis added), continues: "There is evidence that *peritoneal* mesotheliomas are associated with higher levels of asbestos exposure than *pleural* mesotheliomas are" (emphasis added). The Helsinki article does not define what its authors deemed to constitute a "significant" exposure. A third article Dr. Moline discussed (the Andrion article) is a single-case study of the fatal peritoneal mesothelioma of a 17-year-old boy who was reported by his mother to have had the "curious habit" of "us[ing] large quantities of cosmetic talc daily," from "the age of 9 until about the age of 12." The Andrion article does not attempt to quantify the level of the deceased boy's environmental asbestos exposure, and cautions that "definite proof of the asbestos-related nature of this [malignant mesothelioma] cannot

be established with certainty[.]"[6]

There is no merit to the majority's implicit attribution to me (in footnote 6 of its opinion) of the position that causation in a toxic tort case cannot be proved through epidemiological studies.[7] The deficiency in plaintiff's scientific evidence on the causation issue in this case is that, as described by

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[6]The remaining articles discussed by Dr. Moline similarly fail to address the question of the level of asbestos exposure required to produce peritoneal mesothelioma. An article entitled "Asbestos in commercial cosmetic talcum powder as a cause of mesothelioma in women," while setting forth autopsy findings from the lungs of a woman who contracted an unspecified variety of mesothelioma after using an unidentified brand of cosmetic powder, estimates neither that woman's level of environmental asbestos exposure nor the level of such exposure sufficient to cause any variety of mesothelioma. Another article (Gamble) is an X-ray study of the chest conditions of talc miners and millers who had not been diagnosed with any disease. Two articles (Roggli 1994 and Roggli 2002), while finding an association between asbestos exposure and certain diseases, offer no estimate of the level of exposure required to produce a disease. An article entitled "Cosmetic Talc and Ovarian Cancer" addresses a disease that, as Dr. Moline acknowledged, "is not the type of cancer we're talking about in this particular case." Finally, the last two articles (Rohl and Paoletti) were not even studies of human health effects.

[7]I do not understand the majority's point in stating that "controlled dose response studies concerning unsafe levels of asbestos exposure can[not] be ethically conducted in humans." If the majority means to suggest that I take the position that causation cannot be proved in an asbestos case in the absence of such unethical studies — which presumably do not exist — that is a suggestion to which I need not even respond. This leaves the question of why the majority chooses to make this point.

plaintiff's medical expert, none of the articles on which she relied — even the ones that were epidemiological in nature (and a number of them plainly were not) — purport to estimate, based on epidemiological data, the level of asbestos exposure sufficient to cause peritoneal mesothelioma.[8] Dr. Moline did not discuss in her testimony any epidemiological study setting forth such an estimate.

Even if plaintiff had established the level of asbestos exposure sufficient to cause peritoneal mesothelioma — which, for the reasons just discussed, he did not — his evidence of specific causation still would have been legally insufficient by reason of his failure to offer a "scientific expression" (*Parker*, 7 NY3d at 449) of Mrs. Nemeth's actual level of exposure to respirable asbestos. Plaintiff's geological expert, Sean Fitzgerald, measured the release of asbestos when he simulated Mrs. Nemeth's use of Desert Flower (as described in her deposition testimony) in a glove box.[9] Mr. Fitzgerald estimated, based on this test,

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[8]To the extent the articles discussed in Dr. Moline's testimony have themselves been placed in the record, they do not remedy the gap in plaintiff's proof.

[9]The sample of Desert Flower used for the test was, according to Mr. Fitzgerald, a package of the product advertised as dating from the 1960s, which he had purchased online. I note that I find it unnecessary to reach the issue WCD raises as to Mr. Fitzgerald's qualification to opine on Mrs. Nemeth's exposure to asbestos from her use of Desert Flower.

that 2,760,000 asbestos fibers were released each time Mrs. Nemeth used Desert Flower, and he asserted that this was "thousands of times" the level of asbestos permitted in schools and "several [orders] of magnitude higher" than the ambient level of airborne asbestos. Dr. Moline relied on these estimates in rendering her opinion on medical causation.

The deficiency of Mr. Fitzgerald's analysis based on the glove box test — again, putting aside for the moment that plaintiff never made the threshold showing of the level of asbestos exposure sufficient to cause peritoneal mesothelioma — is that Mr. Fitzgerald, by his own admission, estimated only the amount of asbestos released upon each application of Desert Flower, not the amount of asbestos to which Mrs. Nemeth actually would have been exposed, in a space having the same size and air conditions as her bathroom, by breathing it in. As Mr. Fitzgerald testified,

> "[M]y test was just to see if countable structures of asbestos were releasable from the product, period. I wasn't actually trying to simulate the entire environment. I just wanted to see if simulation of using the material would cause asbestos in the talc, if present, to be released into the air."

Consistent with this concession by Mr. Fitzgerald, Dr. Moline (who relied on Mr. Fitzgerald's "releasability" analysis) admitted that she was unaware of either the daily or lifetime

dose of asbestos to which a person would be exposed by using Desert Flower. In short, the "releasability" that Mr. Fitzgerald estimated in a glove box is not a measure of Mrs. Nemeth's actual exposure to asbestos in a bathroom, since she could have been harmed only by the asbestos fibers that she actually breathed in.[10]

At this juncture, it should be noted that, at the close of the evidence, plaintiff successfully opposed WCD's request that the jury be asked to apportion fault among WCD and all of the

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[10]Notably absent from the record is any attempt by Mr. Fitzgerald to estimate the amount of asbestos that Mrs. Nemeth actually respirated while using Desert Flower in her bathroom by comparing his estimate (based on the glove box test) of the asbestos concentration in the air of her bathroom to the ratio of (1) a person's estimated respiration of asbestos from the ambient air (60,000 fibers per day, according to Mr. Fitzgerald's testimony) to (2) the estimated asbestos concentration in the ambient air. It is also remarkable that Mr. Fitzgerald never expressed his estimate of Mrs. Nemeth's cumulative asbestos exposure from Desert Flower by the scientific measure prescribed for this purpose by the Occupational Safety and Health Administration (OSHA). As Dr. Moline discussed in her testimony, under OSHA rules, workplace asbestos exposure is expressed in terms of fibers per cubic centimeter (f/cc) on a time-weighted average basis (*see* 29 CFR § 1910.1001[c][1]). This measure was employed by the plaintiff's expert in one of the cases on which the majority and plaintiff rely (*see Matter of New York City Asbestos Litig. [Miller]*, 154 AD3d 441 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018], *affg* 2016 NY Slip Op 30765[U], *10 [Sup Ct, NY County 2016]). With regard to the time-weighting factor, it should be borne in mind that Mrs. Nemeth's daily exposure to the Desert Flower dust lasted only five minutes, not for a more sustained period, as is typical in cases of occupational asbestos exposure.

settling defendants, not just between WCD and Shulton, the manufacturer of Desert Flower. Thus, plaintiff cannot (and does not) rely on the theory that the asbestos from Desert Flower and the asbestos from the other alleged sources of Mrs. Nemeth's asbestos exposure were all substantially contributing causes of her injuries.[11] Because Desert Flower was the only potential source of asbestos exposure that the jury was asked to consider, plaintiff was required to prove that the asbestos from Desert Flower was sufficient to cause peritoneal mesothelioma.

Moreover, the vague, conclusory and subjective terms in which plaintiff's experts characterized both the level of asbestos exposure sufficient to cause peritoneal mesothelioma ("brief and low level") and the level of asbestos exposure to which Mrs. Nemeth allegedly was subjected ("several [orders] of magnitude higher" than the ambient; "thousands of times" the

[11]As noted in Dr. Moline's report, before the relevant defendants settled, plaintiff alleged that, in addition to Desert Flower, Mrs. Nemeth had been exposed to asbestos from: (1) construction materials she worked with while renovating her home; (2) lawn care products she used while gardening; and (3) dusty work clothes that she laundered for her son. At trial, the court ruled that WCD failed to make a prima facie case for apportioning fault to any of the settling defendants other than Shulton. Since plaintiff successfully sought this ruling, he would be judicially estopped to argue that Mrs. Nemeth's illness was caused by her cumulative asbestos exposure from Desert Flower and all other alleged sources. While WCD, on appeal, challenges the exclusion of the settling defendants other than Shulton from the verdict sheet, I find it unnecessary to reach this issue.

level permitted in schools) do not fulfill the Court of Appeals' requirement of a "scientific expression" (*Parker*, 7 NY3d at 449). Indeed, these are precisely the kinds of expressions the Court of Appeals has found wanting. For example, *Parker* rejected as "insufficient" a medical expert's report that the plaintiff "was 'frequently' exposed to 'excessive' amounts of gasoline and had 'extensive exposures . . . in both liquid and vapor form'"(*id.*) The Court held that these statements, "even given that an expert is not required to pinpoint exposure with complete precision[,] cannot be characterized as a scientific expression of [the plaintiff's] exposure level" (*id.*; *see also Cornell*, 22 NY3d at 784 [rejecting an expert opinion that, among other deficiencies, "made no effort to quantify (the plaintiff's) level of exposure" to a mixture of microbial contaminants that allegedly infested her apartment, and instead "simply asserted . . . that she was 'unquestionably exposed to unsanitary conditions'"]).

Similarly, *Parker*, even while clarifying that "the amount of exposure need [not] be quantified *exactly*" (7 NY3d at 449 [emphasis added]), found "plainly insufficient to establish causation" a medical expert's "general, subjective and conclusory assertion . . . that [the plaintiff] had 'far more exposure to benzene [from gasoline while working at gas stations] than did the refinery workers in the epidemiological studies'" that found

an increased risk of leukemia among such workers (*id.*). The Court noted that the expert's comparison of the plaintiff's exposure level to that of the refinery workers in the studies "neither states the level of the refinery workers' exposure, nor specifies how [the plaintiff's] exposure exceeded it, thus lacking in epidemiological evidence to support the claim" (*id.*).

The Court of Appeals' criticisms of the plaintiff's use of the refinery studies in *Parker* apply with even greater force to Dr. Moline's statement in this case that the release of asbestos fibers Mr. Fitzgerald had estimated through the glove box test was "at levels at which multiple studies have shown elevated rates of mesothelioma." Dr. Moline never clarified which "studies" she was referring to, the exposure "levels" discussed in those studies, or whether the mesothelioma discussed in the studies was peritoneal, the variety relevant here, or pleural, the more common variety discussed in most of the literature. Further, as previously discussed, none of the studies discussed by Dr. Moline even set forth an estimate of the level of asbestos exposure sufficient to cause peritoneal mesothelioma.

As should be clear from language in the decision quoted by the majority itself, *Parker*'s clarification that "an expert is not required to pinpoint exposure with complete precision" (*id.*) did not open the door to the sort of hazy language used by

plaintiff's experts here. *Parker* suggested three methods by which an expert might attempt to establish causation where it is not possible to measure cumulative dose precisely — focusing on intensity of exposure rather than cumulative dose, mathematical modeling based on work history to estimate total exposure, and "[c]omparison to the exposure levels of subjects of other studies . . . *provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects*" (*id.* [emphasis added]). In this case, plaintiff's expert utilized none of these methods.

To the extent Dr. Moline attempted to demonstrate causation based on the accepted fact that mesothelioma is usually caused by asbestos exposure, her testimony runs afoul of *Sean R.*, in which the Court of Appeals rejected such an "inverse approach" to proof of causation — "working backwards from reported symptoms to divine an otherwise unknown concentration of [a toxin]" (26 NY3d at 810). Nor is the bare fact that there was "visible dust" in the air of Mrs. Nemeth's bathroom sufficient to prove causation in the absence of expert evidence "establish[ing] that the extent and quantity of the dust . . . contained enough asbestos to cause the mesothelioma" (*Matter of New York City Asbestos Litig. [Juni]*, 148 AD3d 233, 239 [1st Dept 2017], *affd* 32 NY3d 1116 [2018]).

The Court of Appeals' common-sense recognition in *Parker* that absolute precision in measuring exposure levels will usually be unattainable in toxic tort cases is transformed by the majority into a license to prove causation without any attempt by plaintiff's experts to express even an estimate of the level of exposure in mathematical or scientific terms. Contrary to the majority's assertion, plaintiff's experts in this case did not offer an "estimate" of Mrs. Nemeth's level of exposure based on an "extrapolation" from the glove box test conducted by Mr. Fitzgerald or "by reference to estimation based upon work history and math models."[12] In essence, plaintiff's experts told the jury that the use of Desert Flower increased the asbestos level in Mrs. Nemeth's bathroom above that of the ambient air by some unspecified amount, and then speculated that this unquantified level of increased exposure was enough (at five minutes per day

[12]As previously noted in footnote 11 of this writing, while it seems to me that such an extrapolation from the glove box test might have been feasible, Mr. Fitzgerald did not testify to having conducted any such analysis. Such an analysis was needed, inasmuch as, to state the obvious, a glove box is not a bathroom. Moreover, as discussed in the article in the record co-authored by Mr. Fitzgerald (the aforementioned "Asbestos in commercial cosmetic talcum powders as a cause of mesothelioma in women"), it is possible to conduct a test in an actual bathroom of the level of exposure to respirable asbestos resulting from the use of a cosmetic powder. Mr. Fitzgerald, however, did not conduct any such test with Desert Flower in a bathroom the size of Mrs. Nemeth's.

over about 11 years) to have caused peritoneal mesothelioma, even though no evidence had been presented to show the minimum level of exposure capable of causing that disease. This does not pass muster under *Sean R.*, *Cornell* and *Parker.*

Needless to say, neither Mrs. Nemeth nor anyone else could be expected to have measured the level of toxins in the air of her bathroom in anticipation of receiving a diagnosis of mesothelioma 40 years in the future. Thus, there is neither basis nor merit to the majority's unfounded suggestion that I would require such direct measurement of a plaintiff's actual exposure while using a product. But to require a toxic-tort plaintiff to present scientific rough estimates of the relevant exposure levels (namely, the approximate level sufficient to cause the disease and the approximate level of the plaintiff's actual exposure) — which is what existing Court of Appeals precedent does reasonably require — does not, contrary to the majority's hyperbolic claim, "sound the death knell for most . . . asbestos exposure cases going forward."

We are bound by the law as stated by the Court of Appeals in *Sean R.*, *Cornell* and *Parker*, none of which were disturbed by the Court of Appeals' more recent memorandum decision (joined by four Judges) affirming this Court in *Juni* (and reaffirming the law as

stated in *Parker* and *Cornell*).[13] The majority — in spite of its unpersuasive claim to be deciding this case consistently with existing Court of Appeals precedent — appears to discern in the two concurrences and the dissent on the Court of Appeals in *Juni* the possibility that the Court of Appeals may be about to change course in this area of the law. Even if the majority's implicit prognostication is correct, such a prospect should not affect our application of existing binding case law before the Court of Appeals has actually taken such a step. Further, as stated at the outset of this dissent, to the extent this Court's decisions have deviated from the standards of *Sean R.*, *Cornell* and *Parker*, we are bound to follow the law as stated by the Court of Appeals, even if our own conflicting decisions are more recent.[14]

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[13]Insofar as relevant to this case, the Court of Appeals' memorandum decision in *Juni* states: "Viewing the evidence in the light most favorable to plaintiff, the evidence was insufficient as a matter of law to establish that defendant Ford Motor Company's conduct was a proximate cause of the decedent's injuries pursuant to the standards set forth in [*Parker*] and [*Cornell*]. Accordingly, on this particular record, defendant was entitled to judgment as a matter of law under CPLR 4404(a)" (32 NY3d at 1118 [footnote omitted]). Contrary to the majority's assertion that only "two [Judges of the Court of Appeals] joined" this memorandum decision, both of the Judges who wrote concurring opinions expressly joined the memorandum decision, as well (*see id.* ["I join the majority's memorandum decision"] [Fahey, J.]; *id.* at 1119 ["I concur in the Court's opinion"] [Wilson, J.]).

[14]For this reason, I regard as superfluous the dicta of this Court's *Juni* majority opinion seeking to harmonize *Lustenring v AC&S, Inc.* (13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708

Accordingly, the majority's reinterpretation of the decisions of the Court of Appeals in light of our own more recent case law seems to me to be an unsound approach. We should simply follow the Court of Appeals cases, whose application to the instant matter seems to me straightforward.

In my view, the foregoing establishes that plaintiff failed to present evidence sufficient to prove that Mrs. Nemeth's peritoneal mesothelioma was caused by respirable asbestos to which she was exposed by her use of Desert Flower. I therefore believe that we should reverse the judgment in favor plaintiff and grant WCD's motion for judgment notwithstanding the verdict. However, for the reasons discussed below, even if I concluded that the record contained sufficient evidence to support the verdict, I would vote to reverse and grant WCD a new trial.

From the outset, plaintiff's case against WCD was predicated on the claim that Mrs. Nemeth's exposure to asbestos from Desert Flower had come by way of respiration. In the course of Dr. Moline's lengthy testimony, however, plaintiff's counsel briefly questioned her about the aforementioned article entitled "Cosmetic Talc and Ovarian Cancer," which posits that *ovarian*

[2005]) with the Court of Appeals' subsequent (2006) *Parker* decision. Whether or not the two decisions can be reconciled, *Parker* is the precedent by which this Court is bound.

cancer may result from pelvic exposure to asbestos in cosmetic powders. While Dr. Moline acknowledged that ovarian cancer "is not the type of cancer we're talking about in this particular case," she testified that the article was "significant" because it "describe[s] manners by which women in particular . . . can have exposure to talc," namely, through "transvaginal exposure," i.e., "through vaginal excursion up through into the abdominal cavity through the uterus, fallopian tubes and into the peritoneum." As the trial court later concluded, however, Dr. Moline never identified any study concluding that *peritoneal mesothelioma* in women may be caused by pelvic exposure to asbestos, nor did Dr. Moline herself opine to that effect.

Subsequently, in the course of his summation, plaintiff's counsel made the following statement to the jury:

> "[Mrs. Nemeth] said she used [Desert Flower] all over her body. . . . [A]s Dr. Moline later explains, asbestos can enter the body in various ways. With a woman like [Mrs. Nemeth], there are two avenues of exposure. And the way she's describing, I will submit means she's getting asbestos in her body from two different ways, from breathing it in and then using it all over her body, in her pelvic region."

WCD's counsel's immediate objection to these comments was overruled. After the close of the summation, but before the jury was charged, WCD renewed this objection and moved for a mistrial. The court denied the request for a mistrial, but reserved

decision on the underlying objection.

The next day, the court, having further deliberated on the matter, ruled that WCD's objection to the comments about pelvic exposure did indeed have merit. The court stated:

> "You have to remind me, . . . but I don't believe that [Dr. Moline] gave an affirmative opinion that Mrs. Nemeth's peritoneal mesothelioma was caused by both breathing the Desert Flower Dusting Powder and having it enter her body transvaginally.
>
> "*I don't believe we got that specific opinion with precise facts to support that type of exposure and an understanding of how that type of exposure can cause peritoneal mesothelioma, pathophsyiologically, respectfully*" (emphasis added).[15]

After plaintiff's counsel offered a defense of his comments, the court responded:

> "We have no evidence of record despite the fact that you pointed out that he didn't object to that portion of [Dr. Moline's] testimony describing the [L]ancet article ["Cosmetic Talc and Ovarian Cancer"] . . . . And there was no specific causation opinion that this was a separate discrete entry point for purposes of causing [Mrs. Nemeth's] cancer. That's not here. So, in that context, the way it was presented [on summation], suggested to this jury that that was a

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[15]The majority's paraphrase of the italicized statement by the trial court picks the words "can cause peritoneal mesothelioma" out of their context to change the import of the statement into the reverse of what the court meant. In essence, the majority turns the court's statement on its head. Specifically, as can be seen from the fuller quote I have provided, and contrary to the majority's assertion, the trial court did *not* "observe[] that Dr. Moline had, in fact, testified that transvaginal exposure to asbestos contaminated talc 'can cause peritoneal mesothelioma'" — quite the opposite, in fact.

> separate basis for it. And that's not this record, and, therefore, we need to clear that up."

Subsequently, the court reiterated: "There was no expert testimony that specifically establishes that exposure through the vagina was a substantial factor in causing her mesothelioma. . . . That's why I had concerns this morning."

Although the court ultimately determined that WCD had raised a meritorious objection to plaintiff's summation comments about pelvic exposure, the court did not take the usual course of issuing a curative instruction to negate the impact of the improper comment. Instead, the court suggested to plaintiff's counsel that he "revisit that issue in sort of like a mini-closing."

Plaintiff's counsel subsequently re-opened his summation and made the following comments on this issue:

> "Exposure to the talc in this case. We heard extensive evidence about air born[e] particulate fibers. The fact that Flo Nemeth, she testified that she breathed this in over the years.
>
> "I then told you about and you were here when Dr. Moline testified based on articles she read about certain other avenues of exposure specific to women. And I reiterated that yesterday. But, what I would like you to do and what I — and what the evidence shows in this case is that we are focused on the air born[e] particulate and the fact that Flo said she breathed that particulate in.
>
> "Even though the literature may suggest something that Dr. Moline touched upon, the case is really about

> what was released into the air, tie that up with Mr. Fitzgerald's [glove box] simulation. And I just wanted to reiterate that."

After plaintiff's counsel's renewed summation, WCD renewed its motion for a mistrial, which the court denied. The court also denied WCD's request that the verdict sheet instruct the jury that, in order to return a verdict in favor of plaintiff, it was required to find that Mrs. Nemeth had been exposed to asbestos from Desert Flower by way of inhalation.

"It is fundamental that the jury must decide the issues on the evidence, and therefore fundamental that counsel, in summing up, must stay within the four corners of the evidence and avoid irrelevant comments which have no bearing on any legitimate issue in the case" (*People v Ashwal*, 39 NY2d 105, 109 [1976] [internal quotation marks and citation omitted]). Stated otherwise, a summation may not be "based on facts not in the record" (*Selzer v New York City Tr. Auth.*, 100 AD3d 157, 163 [1st Dept 2012]). Here, even though the trial court initially overruled WCD's objection to plaintiff's counsel's comments concerning pelvic exposure, the court ultimately corrected itself when it recognized that those comments were not based on facts in the record because — as the court spelled out on the record in its statements quoted above — Dr. Moline never testified that asbestos absorbed transvaginally can lead to peritoneal

mesothelioma (as opposed to ovarian cancer). Even the majority concedes that "plaintiff's counsel[] mischaracteriz[ed] [the] evidence" because, as the trial court "properly concluded," Dr. Moline "did not conclude that Nemeth's mesothelioma was caused by transvaginal exposure to asbestos in [Desert Flower]."[16]

Although the majority does not offer a defense on the merits of the summation remarks at issue, it takes the position that those remarks were not so prejudicial as to have deprived WCD of a fair trial. I disagree. The notion of a transvaginal avenue of exposure would have been intuitively appealing to laypersons, given that the pelvic region is obviously much closer to the peritoneum than are the nose and mouth — notwithstanding that, as the majority concedes, the scientific evidence in the record identified only exposure through the respiratory system as a possible cause of peritoneal mesothelioma. The pelvic exposure theory's intuitive appeal, the lack of evidence to connect such exposure to Mrs. Nemeth's disease, and the fact that the exposure issue went to the heart of the case — these factors combined to deprive WCD of a fair trial when plaintiff's counsel baselessly

[16]It is therefore irrelevant that WCD did not object to Dr. Moline's testimony about the article positing a link between ovarian cancer and pelvic exposure to asbestos. As the trial court recognized, that testimony did not support the inference plaintiff's counsel asked the jury to draw in the summation comments at issue, to which WCD did object.

introduced the pelvic exposure theory into the case. Moreover, the dispositive question is whether the erroneous comment deprived the adverse party of a fair trial, not (as the majority seems to believe) whether the lawyer who made the improper comment did so in "good faith."[17]

While perhaps a curative instruction by the court would have been sufficient to negate the prejudicial effect of plaintiff's counsel's pelvic exposure comments, the court gave no such instruction. Instead, the court allowed plaintiff's counsel to reopen his summation to "revisit that issue" and "clear [it] up." Neither the majority nor plaintiff has found any precedent supporting the permissibility of allowing an attorney to reopen his closing to correct his own improper statements. In particular, the only case the majority cites on this point is one in which this Court found that an improper summation statement had been sufficiently remedied by a curative instruction given by the court (*see Avila v Robani Energy Inc.*, 12 AD3d 223 [1st Dept 2004]).

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[17]Plaintiff's counsel compounded the prejudice of his remarks about transvaginal exposure by immediately following them up with this conclusion of his argument on the exposure issue: "Now it's just a matter of linking the dots of how she actually used it. You have to ask yourself this, did I tip those scales, is it more likely than not that she was exposed to this product given everything we already talked about. The answer is again unquestionably yes."

Finally, plaintiff's counsel's "mini-closing" did nothing to cure the prejudice caused by his earlier improper statements, and arguably even worsened that prejudice. Counsel never explicitly disavowed the pelvic exposure theory — he simply recalled to the jury that he had discussed "certain other [than respiratory] avenues of exposure specific to women," and then said that "we are focused on the air born[e] particulate and the fact that Flo said she breathed that particulate in." Thus, after 21 days of trial, the very last thing the jury heard from one of the lawyers — a message likely to remain vivid in their minds when they retired to deliberate — was a reminder of the pelvic exposure theory, without an actual instruction to disregard it.

For the foregoing reasons, I believe that we should reverse the judgment and grant WCD's motion for judgment notwithstanding the verdict or, failing that, that we should reverse the judgment and grant WCD's motion for a new trial. Accordingly, I respectfully dissent.

Judgment of Supreme Court, New York County (Martin Shulman, J.), entered August 22, 2017, upon a jury verdict awarding plaintiff the principal amount of $2,933,750 should be modified, on the law, to the extent of increasing the principal amount to $3,300,000, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur except Friedman, J.P., who dissents in an Opinion.

Friedman, J.P., Gische, Kapnick, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2020

CLERK