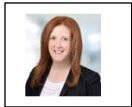


**IN THIS ISSUE**

*Elizabeth M. Sorenson Brothen and Michael E. Tuttle report on development within New York talcum powder litigation, making specific causation a question of law to be disposed of in summary judgment.*

## The Dust Settles on Causation: *Tippin* Decision is a Big Win for Talc Defendants

**ABOUT THE AUTHORS**

**Elizabeth Sorenson Brothen** is a partner in Foley Mansfield's Minneapolis office, a member of the firm's Executive Committee, and the chair of the firm's Product Liability Practice Group. She devotes her practice to defending product manufacturers, suppliers, and installers in high-risk product liability and toxic tort cases. She can be reached at [ebrotten@foleymansfield.com](mailto:ebrotten@foleymansfield.com).



**Michael E. Tuttle's** practice specializes in the defense of toxic tort claims involving asbestos, industrial chemical exposures, environmental contamination, as well as the defense of personal injury, product manufacturer and supplier liability, corporate structure liability, and premises liability matters and has successfully represented manufacturers, suppliers, and distributors. He can be reached at [mtuttle@foleymansfield.com](mailto:mtuttle@foleymansfield.com).

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**Joel Eagle**

Committee Chair

Thompson Hine LLP

[Joel.Eagle@ThompsonHine.com](mailto:Joel.Eagle@ThompsonHine.com)

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**Marie Chafe**

Vice Chair of Newsletters

Conn Kavanaugh Rosenthal Peisch & Ford, LLP

[MChafe@connkavanaugh.com](mailto:MChafe@connkavanaugh.com)

In a ruling that could shift the talc litigation landscape, New York's First Department, Appellate Division in *Tippin v. Johnson & Johnson* has set a clear causation standard within motion-practice for talc-related mesothelioma claims. See *Tippin v. Johnson & Johnson*, 2024 NY Slip. Op. 06679 (1<sup>st</sup> Dep't, Dec. 31, 2024). The court held, *inter alia*, that a plaintiff must now proffer specific-causation evidence when a talc-defendant establishes a *prima facie* defense based on the absence of epidemiological support that exposure to cosmetic talc may cause asbestos-related diseases. The First Department makes clear that whether a plaintiff's expert causation proofs are sufficient is a question of law that is appropriate for resolution at the summary judgment phase, and when that proof is insufficient, summary judgment for defendants is required.

Upon a talc defendant's demonstration that scientific literature fails to establish a causal nexus between cosmetic talc exposure and plaintiff's illness, a plaintiff seeking to defeat summary judgment must offer evidence specifically quantifying their exposure to asbestos as contained within cosmetic talcum-powder products at issue. Furthermore, such evidence must sufficiently demonstrate that such exposure levels were capable of causing the plaintiff's illness. Plaintiff's failure to do so, "falls short of satisfying the requirement of causation" and entitles a talc-defendant to a summary judgment as a matter of law. The *Tippin* ruling, which could significantly impact hundreds of pending cases, effectively raises the bar for plaintiffs while providing manufacturers with a more robust summary judgment framework.

In the *Tippin* trial court, the talc-defendant proffered decades of epidemiological evidence demonstrating no support for a causal relationship between cosmetic talc exposure and mesothelioma. See *Tippin v. 3M Company, et al.*, Sup. Ct. New York City., NY (Index No. 190062/2021) (NYSCEF Doc. No. 1127). Put succinctly, a review of approximately 4,450 talc miners and millers who were examined from the 1940's to 2020, which amounts to over 135,000 person-years, **does not show any increased rate of mesothelioma at all**, even though these workers were exposed to exponentially more cosmetic talc over their careers than typical consumers would be exposed to in a lifetime. Furthermore, analyses of extensive data related to barbers, hairdressers, and cosmetologists (who, like talc miller and miners were exposed to significantly more cosmetic talc than typical consumers) also showed **no statistically significant increased risk for mesothelioma from cosmetic talc**.

In response to the talc-defendant's *prima facie* showing of entitlement to summary judgment, the plaintiff failed to raise an issue of fact, insofar as plaintiff did not adduce evidence that demonstrating "exposure to levels of toxin as contained within the cosmetic talcum-powder products at issue sufficient to cause his illness." In doing so, the First Department extended the Court of Appeals holding in *Nemeth v. Brenntag N. Am.*, 38 N.Y.3d 336, 344-347 (2022) **to apply to plaintiff's burden at the summary judgment stage**. See also, *Matter of New York City Asbestos Litig.*, 207 A.D.3d 415-416 (1<sup>st</sup> Dept 2022) *lv denied sub nom*; *Olson v. Brenntag N. Am., Inc.*, 39 N.Y.3d 913 (2023).

As a result of the First Department's ruling in *Tippin*, the plaintiff's burden on specific

causation **at the summary judgment stage** requires showing both

- i) a “scientific expression of the level of exposure to toxins in defendant’s products that was sufficient to have caused the disease,” *Olson*, 207 A.D.3d 415 at 416 (1<sup>st</sup> Dep’t 2002); and
- ii) that plaintiff’s actual exposure was “in an amount sufficient to cause [ ] mesothelioma,” *Nemeth*, 38 N.Y.3d at 344.

When a plaintiff fails to do so, summary judgment is warranted to the talc-defendant. At the Trial Court, the plaintiff’s specific-causation expert, provided neither a threshold above which asbestos exposure can cause mesothelioma nor a calculation of plaintiff’s cumulative lifetime dose that can be compared to that threshold.

*Tippin*, in accord with prior decisions, requires that an asbestos plaintiff do more than rely on conclusory expert opinion arguing that any possible exposure to asbestos caused their disease without offering specific scientific support to refute a talc-defendant’s prima facie showing of entitlement to summary judgment. The First Department’s decision in *Tippin* demands scientific rigor over speculative expert testimony. By requiring plaintiffs to present specific causation evidence that quantifies both exposure thresholds and cumulative lifetime exposure, the court has effectively raised the bar for talc-related claims. For talc-defendants, the decision affirms a path to summary judgment, while plaintiffs’ attorneys will need to reassess their causation evidence in these complex cases.

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