SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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CHARLENE HILLYER, as Executrix for the Estate of CHARLES F. HILLYER,

Plaintiffs,

Index No.190132/13

-against-

DECISION/ORDER

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	

Defendant Burnham LLC ("Burnham") has filed the present post-trial motion pursuant to CPLR § 4401 and § 4404 for a directed verdict or an order setting aside the verdict and directing that judgment be entered in favor of Burnham, or in the alternative, for a new trial. In the alternative, it seeks *remittitur* of the verdict.

Decedent Charles Hillyer instituted this asbestos product-liability action. At the time trial commenced, there were three remaining defendants, Burnham, Cleaver Brooks, Inc. and William Powell Company. Plaintiff and Cleaver Brooks Inc. resolved the case during the trial and plaintiff voluntarily discontinued as against William Powell Company before jury deliberations

began. The jury rendered a verdict in favor of plaintiff and against defendant Burnham in the amount of $20 million for past pain and suffering. The jury also allocated thirty percent of liability to Burnham, thirty percent to Cleaver Brooks Inc. and forty percent to William Powell Company. The jury also found that Burnham was reckless in failing to warn of the toxic hazards of asbestos.

Plaintiff testified at his deposition regarding his exposure to Burnham boilers. He testified that he worked around many Burnham boilers as a steamfitter in the 1970's and that he was exposed to asbestos from Burnham boilers when he worked around Burnham boilers. Tr. at 651-652, 700. He testified that he believed he was exposed to asbestos from Burnham boilers and other boilers when other workers would tear off the insulation from the boilers. Tr. at 700. He testified as follows:

> Again, they would tear off the insulation, we would be taking off valves and that–and I be in the general area that they were working and they were just throwing it on the ground and again, walking in it, creating dust.

Tr. at 700.

Burnham makes a number of arguments as to why the verdict should be set aside. It argues that (1) it is entitled to a directed verdict or a new trial because plaintiff failed to prove that Burnham's failure to warn was a proximate cause of plaintiff's injury: (2) the jury's recklessness findings were not supported by the evidence; (3) the court's instruction on recklessness was improper; (5) it is entitled to a directed verdict or judgment notwithstanding the verdict because plaintiff's expert opinion was insufficient as a matter of law to establish specific causation; and (6) it is entitled to a new trial because the jury's allocation of fault is against the

weight of the evidence. In the alternative, it argues that the jury's award exceeds what is a reasonable award under the circumstances.

Section 4404(a) of the CPLR provides that "upon a motion of any party or on its own initiative, a court may set aside a verdict . . . and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence, [or] in the interest of justice." The standard for setting aside a verdict is very high. The Court of Appeals has held that a verdict may be set aside only when "there is simply no valid line of reasoning and permissible inferences" which could have led to the conclusion reached by the jury. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978). The First Department held that a verdict "will not be set aside unless the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence." *Pavlou v. City of New York*, 21 A.D.3d 74, 76 (1st Dept 2005). Moreover, the evidence must be construed in the light most favorable to the party that prevailed at trial. *See Motichka v. Cody*, 279 A.D.2d 310 (1st Dept 2001). Where the case presents conflicting expert testimony, "[t]he weight to be accorded the conflicting testimony of experts is 'a matter peculiarly within the province of the jury.'" *Torricelli v. Pisacano*, 9 A.D.3d 291 (1st Dept 2004) (citation omitted); *see also Cholewinski v. Wisnicki*, 21 A.D.3d 791 (1st Dept 2005).

Initially, Burnham argues that it is entitled to a directed verdict or judgment notwithstanding the verdict on the ground that plaintiff failed to prove that he would have heeded a warning if a warning had been provided by Burnham. However, this court has already rendered a decision at the conclusion of the trial denying Burnham's motion for a directed verdict on this issue and sees no reason to revisit this issue. This court specifically held as follows:

> After hearing arguments from both counsel and reading the relevant deposition testimony of the plaintiff in this action, and in light of the fact that plaintiff is deceased and not here and able to testify at trial, the court finds that there is enough testimony in the deposition transcript so that the issue of whether or not plaintiff would have heeded a [warning] should be an issue to be decided by the jury rather than by the court as a matter of law; and that the jury could make a reasonable inference from the testimony of the plaintiff that he would have heeded a [warning] if it had been provided to him.

Contrary to the argument made by Burnham, the court did not apply the heeding presumption in making its ruling denying the motion for a directed verdict. Rather, the court found that there was sufficient factual evidence in the record to submit the issue of whether plaintiff would have heeded a warning if it had been provided to the jury, who was entitled to make a credibility determination as to whether plaintiff would have heeded a warning if it had been given.

Moreover, it is well settled that "[o]rdinarily, issues of proximate cause are fact questions to be decided by a jury." *White v. Diaz*, 49 A.D.3d 134, 139 (1st Dept 2008) (internal citation omitted). Indeed, "[w]hile it is appropriate to decide the question of legal cause as a matter of law 'where only one conclusion may be drawn from the established facts', where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." *Id.* (quoting *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980)). Based on these well established principles, it is appropriate under the circumstances of this cause for the jury to have determined the issue of whether the failure to warn was the proximate cause of plaintiff's injuries rather than the court deciding the issue as a matter of law, as it is not clear that only one conclusion may be drawn from the deposition testimony as to whether plaintiff would have heeded a warning.

To the extent that Burnham argues that the court committed an error by not specifically

charging the jury that it was plaintiff's burden to prove that plaintiff would have heeded a warning if one had been given, the court finds this argument to be without merit. The court's charges on duty to warn, proximate cause and burdens of proof were entirely consistent with the charges contained in the pattern jury instructions, there is no pattern jury instruction which contains the language Burnham wished the court to charge regarding burden of proof and Burnham has not cited to any authority for the proposition that the court is required to charge the foregoing language regarding burden of proof.

Burnham next argues that the court should set aside the jury's verdict that Burnham acted with reckless disregard for plaintiff's safety as the evidence at trial did not warrant submission of the reckless disregard issue to the jury and the jury's finding of recklessness was against the weight of the evidence. Its primary argument is that the evidence presented at trial did not establish recklessness based on the Court of Appeals decision in *Maltese v. Westinghouse Electric Corp.*, 89 N.Y.2d 955 (1997). In *Maltese,* the court stated that it was adopting a "gross negligence standard" for reckless conduct, requiring a finding that "the actor has intentionally done an act of an unreasonable character in disregard of a known and obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome." The court stated that there was insufficient evidence to sustain a verdict of recklessness. According to the court, the evidence revealed that the defendant was aware that exposure to high concentrations of asbestos over time could cause injury "but not that workers such as [plaintiffs] were at risk at any time it could have warned them." *Id.*

The court finds that the jury's finding that Burnham acted with reckless disregard is supported by the record and should not be set aside. There was a valid line of reasoning and

permissible inferences which could have led a rational jury to conclude based on the evidence presented at trial that Burnham acted with reckless disregard, unlike the defendant in *Maltese*. Initially, there was evidence presented at trial from which a jury could have rationally concluded that Burnham had actual knowledge that exposure to high concentrations of asbestos over time could cause injury. There was also evidence presented at trial from which a jury could have rationally concluded that during the period of plaintiff's claimed exposure to Burnham's boilers in the 1970's that Burnham was aware of the following: that there were unjacketed Burnham boilers still in use; that Burnham had previously specified that these unjacketed boilers should be covered with asbestos cement; that these boilers were in fact covered with asbestos cement; that the asbestos cement would eventually have to be removed from the boilers when they were replaced or discarded; that when the asbestos cement was removed from the boilers, dust containing asbestos would be dispersed in the air and could be breathed in by workers in the vicinity, including workers who were not specifically working on the boilers; that Burnham never tested or investigated the safety of asbestos despite the fact that it knew asbestos was being used with its boilers; and that Burnham did not provide any warnings to any of these workers in violation of its continuing duty to warn post sale. Based on these inferences, which the jury could reasonably conclude based on the evidence presented at trial, there was a rational basis for the jury to conclude that Burnham "has intentionally done an act of an unreasonable character in disregard of a known and obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome." *Id.* Moreover, there was evidence presented from which a jury could rationally conclude that Burnham could have warned workers such as plaintiff in the 1970's that they were at risk when they were in the

vicinity of the unjacketed boilers at the time that the asbestos cement was removed from the boilers.

This exact issue was recently addressed by Justice Madden in *Assenzio v. A.O. Smith Water Products, Co.*, Index No. 190008/2012 (Sup Ct. NY Co 2012). In that decision, she rejected the same argument being made in the present case that there was insufficient evidence before the jury to uphold a finding of recklessness as against Burnham under the standard set forth by the Court of Appeals in *Maltese*. According to Justice Madden:

> Plaintiffs presented sufficient evidence with respect to the dangers of asbestos exposure from publically available information as well as information available in various trade journals and in other literature and in government regulations and statutes, including worker's compensation laws, so that the jury could find that ...Burnham knew or should have known of the dangers of exposure to asbestos. Moreover, sufficient evidence at trial was presented to establish that Burnham...specified the use of, or knew that asbestos containing products would be used in their equipment.
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> This evidence establishes sufficient proof to sustain the jury's determination that Burnham acted with gross indifference to the rights or safety of others, as Burnham knew of the dangers of asbestos; it had a history of selling boilers for over one hundred years; it specified the use of asbestos insulation on the exterior and interior of its boilers and sold such insulation; it failed to perform any testing with respect to exposure to asbestos, and it failed to warn about the dangers of asbestos.
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> Moreover, as the First Department found in the *Dummitt* case against Crane, there was;
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> sufficient evidence showing [defendant's] reckless disregard for the hazards posed by asbestos. The evidence demonstrated that [defendant] had received warnings about the dangers of asbestos as early as the 1930's from various trade associations, and [defendant] admitted it knew of the dangers of asbestos by the early 1970's.

Similarly, in this case against Burnham, there was evidence admitted from which a jury could reasonably infer that defendant had received warnings about the danger of asbestos as early as the 1930's from various trade associations and that it knew about the dangers of asbestos in the

1970's when plaintiff was allegedly exposed to asbestos from Burnham boilers.

Burnham next argues that the court's instruction on recklessness was improper as it failed to adequately convey to the jury the level of culpability required to support a recklessness finding. It argues that the jury charge contained in pattern jury instruction 2:275.2, which is the charge that this court used, fails to incorporate the standard required by the Court of Appeals decision in *Maltese.* This argument is without basis as the court finds that the language it used to instruct the jury on the recklessness standard was proper. As Justice Madden recently held in *Assenzio v. A.O Water Smith Prod.*, "in *Maltese*, the court did not hold that any specific language was required, and the PJI charge, as given, adequately expressed the standard." Moreover, the First Department in *In re New York City Asbestos Litig. (Konstantin and Dummitt)*, 121 A.D.3d 230 (1st Dept 2014) ("Dummitt") recently upheld a finding of recklessness as to other defendants in an asbestos product liability litigation where the same exact language was used in charging the jury on recklessness. Moreover, Burnham has not cited any cases where a court has found that the language used in the pattern jury instruction to define recklessness has ever been overturned by any court as not articulating the proper standard despite the fact that this charge has been used in countless litigations, including numerous asbestos and non-asbestos cases, and despite the fact that the Maltese decision is from 1997, approximately eighteen years ago.

Burnham next argues that it is entitled to a directed verdict or judgment notwithstanding the verdict because plaintiff's expert opinion was insufficient as a matter of law to establish specific causation as required under the holding in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006). In *Parker,* the court held that it "is well established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness

(general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation.)." *Id.* at 448. However, "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.* In that case, the court rejected the plaintiff's experts' testimony that exposure to gasoline caused plaintiff's AML as "[p]laintiff's experts were unable to identify a single epidemiologic study finding an increased risk of AML a s a result of exposure to gasoline." *Id.* at 450. In *Cornell v. 360 W. 51st Realty LLC,* 22 N.Y. 762 (2014), the Court of Appeals again addressed the issue of what showing must be made to establish specific causation in a toxic tort case. It stated as follows:

> Parker explains that 'precise quantification' or a 'dose-response relationship' or 'an exact numerical value' is not required to make a showing of specific causation. *Parker* by no means, though, dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect....As the Circuit Court of Appeals for the Eight Circuit commented...., there must be some evidence from which a factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered.

Id. at 784.

In *Lustenring v. AC&S, Inc.,* 13 A.D.3d 69 (1st Dept 2004), *lv. denied,* 4 N.Y.3d 708 (2005), an asbestos case, the First Department addressed what showing must be made to establish specific causation in an asbestos case. According to the court, the evidence showed that plaintiffs worked all day for long periods in clouds of dust which was raised by the manipulation and crushing of defendant's packing and gaskets, which were made with asbestos. The court found that "[v]alid expert testimony indicated that such dust, raised from asbestos products and

not just from industrial air in general, necessarily contains enough asbestos to cause mesothelioma." *Id.* at 70.

In the present case, the court finds that the expert testimony presented in this case was sufficient to satisfy the standards enunciated by the Court of Appeals in *Parker* and *Cornell.* Initially, the trial and appellate courts in New York which have addressed the issue, both before and after *Parker* have been decided, have consistently held that the presence of visible dust from an asbestos containing product establishes a sufficient foundation for an expert to conclude that the use of such product was a substantial factor in causing mesothelioma and Burnham has not cited to any New York cases where a court has not upheld a finding of specific causation where visible dust was present. *See, e.g., Lustenring.; Penn v. Amchem,* 85 A.D.3d 475, 476 (1st Dept 2010)*(*"On the issue of causation, sufficient evidence was provided by [plaintiff's] testimony that visible dust emanated while working with the dental liners and by his expert's testimony that such dust must have contained enough asbestos to cause his mesothelioma"); *Matter of New York Asbestos Litig,* 28 A.D.3d 255 (1st Dept 2006)*(*evidence fairly interpreted, permitted liability verdicts reached by the jury where the "evidence demonstrated that both plaintiffs were regularly exposed to dust from working with defendant's gaskets and packing, which were made of asbestos. The experts indicated that such dust from asbestos containing products contained enough asbestos to cause mesothelioma"); *Berger v. Achem Products,* 13 Misc. 3d 335, 346 (Sup Ct NY Co 2006)("It has long been established that mesothelioma caused by asbestos exposure is frequently not dose related and relatively small numbers of fiber that are inhaled may remain in the lungs for long periods and cause mesothelioma"). *Cf. Arthur Juni v. A.O. Smith Water Product,* Index No. 190315/2012 (Sup Ct NY Co 2015)(evidence offered insufficient to prove

that dust to which plaintiff was exposed contained any asbestos).

Moreover, the court finds that the expert testimony of David Schwartz, M.D. was sufficient to present the issue of specific causation to the jury to be resolved. Initially, he testified that there is no safe level of exposure to asbestos in regard to causing mesothelioma and that there are people who develop mesothelioma after being exposed to extraordinarily low concentrations of asbestos. Tr. at 1019. He further testified that:

> you can never pick out the one fiber that caused the disease, even though its possible that one fiber could cause disease. The risk is related to the amount of exposure that someone experienced throughout their lifetime, and you can't pick apart those individual exposures. What you can say is the exposures that took place within the latency period, the first exposure to onset of disease are all related to, and contribute to the risk of developing the particular outcome, in this case, the mesothelioma.
>
> All we know is the cumulative exposure increased his cumulative risk of developing mesothelioma and that all of the exposure contributed to the development of his mesothelioma.

Tr. at 1021, 1029. He further testified that plaintiff's mesothelioma was caused by occupational exposure to asbestos. Tr. at 1027. He testified that plaintiff "was exposed to asbestos between 1960 and 1983. During that time he was exposed on a very regular basis to asbestos while working as a steamfitter. He was exposed by virtue of his own activities as a steamfitter and by virtue of working around others who were working in his environment on products that were, or machinery that was insulated with asbestos." Tr. at 1028. Finally, he also testified that based on plaintiff's deposition testimony that while he was working as a steamfitter, he worked around many Burnham boilers, that other workers were tearing off insulation from the Burnham boilers in his presence and that there would be visible dust from this activity, that "the exposure to the dust from the boilers was a substantial contributing factor in terms of Mr. Hillyer developing

mesothelioma." Tr. at 1036. The basis for this opinion was his "personal and professional training in occupational environmental medicine as well as [his] experience in this area, the peer reviewed literature, the opinions of professional societies, and the opinion of scientific organizations as well as regulatory bodies." Tr. at 1036.

The court finds that the methods used by plaintiff's expert at trial to establish that plaintiff was exposed to sufficient levels of asbestos from Burnham's products for those products to have been a substantial contributing factor in causing plaintiff's mesothelioma are generally accepted in the scientific community. Based on the testimony presented at trial, the expert sufficiently established that it is generally accepted in the scientific community that there is no safe level of exposure to asbestos, that even a low dose exposure to asbestos can cause mesothelioma and that plaintiff was exposed to asbestos from Burnham boilers based on the release of visible dust when the insulation was removed. As the Court of Appeals made clear in *Parker*, "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.*

Burnham's argument that it is entitled to a new trial because the jury's allocation of fault is not supported by the evidence is without basis. The court finds that there was a sufficient evidentiary basis for the jury's determination as to the allocation of fault based on the evidence presented at trial, which allocated 30 percent of the fault to Burnham.

The next issue the court must address is whether the jury's award to Hillyer of $20,000,000 for past pain and suffering from the onset of mesothelioma to the date of his death was excessive and if so, whether a new trial on the issue of damages should be ordered. The

standard to be applied is whether the award "deviates materially from what would be reasonable compensation." CPLR §5501 (c). In order to determine whether the award was excessive, the court must compare the instant case with analogous cases with awards that have been previously upheld. *See Donlon v. City of New York*, 284 A.D.2d 13, 18 (1st Dept 2001). The most recent decision from the First Department addressing the issue of the amount of damages to be awarded in a mesothelioma case is *Dummitt.* In that case, the First Department upheld an award of past pain and suffering of $4.5 million and $3.5 million for future pain and suffering. It also upheld an award of past pain and suffering of $5.5 million and an award for future pain and suffering for $2.5 million. In other decisions, the First Department upheld an award of $1.5 million for past pain and suffering and $2 million for future pain and suffering *(Penn v. Achem Products*, 85 A.D.3d 475) (1st Dept 2011) and $3 million and $4.5 million respectively (*Matter of New York Asbestos Litig, Marshall*, 28 A.D.3d 255) (1st Dept 2006).

In the instant case, the jury awarded plaintiff $20,000,000 for past pain and suffering from the date of diagnosis until the time of death. He started experiencing symptoms in March of 2012, he was diagnosed with mesothelioma in March 2013 and passed away in September 2014. During that period, he experienced severe pain; shortness of breath; great difficulty breathing; multiple thoracenteses; debilitating chemotherapy treatments; a radical pleurectomy; radiation; and pneumonia. Based on all the circumstances of Mr. Hillyer's injuries, the award of $20,000,000 for past pain and suffering deviates materially from what would be reasonable compensation. Pursuant to CPLR 5501 (c), the award for past pain and suffering is vacated and a new trial ordered on the issue of damages unless plaintiff within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the award to $6 million.

Accordingly, it is hereby

ORDERED that the branches of Burnham's motion for a judgment notwithstanding the verdict is denied; and it is further

ORDERED that the portion of Burnham's motion to set aside the verdict is granted only to the extent of vacating the award of past pain and suffering to Hillyer and ordering a new trial on this issue unless plaintiff within thirty days of service of a copy of this decision and order with notice of entry stipulates to reduce the amount of past pain and suffering to $6 million; and it is further

ORDERED that the balance of Burnham's motion to set aside the verdict is denied.

Dated: 5/15/15

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.