

Gonzalez, P.J., Friedman, Moskowitz, Clark, JJ.

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15676-		190215/11
15677-		190262/11
15678	In re New York City Asbestos Litigation,	190293/11
	- - - - -	190294/11
	All NYCAL Cases,	190299/11
	Plaintiff-Respondents,	190311/11

-against-

A.O Smith Water Products Co., et al.,
Defendants,

Crane Co., et al.,
Defendants-Appellants.

K & L Gates LLP, Pittsburg, PA, (Michael J. Ross of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for Crane Co., appellant.

Pillsbury Winthrop Shaw Pittman, LLP, New York (E. Leo Milonas of counsel), and Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel) for Cleaver-Brooks, Inc., appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Erik C. DiMarco of counsel), for Andal Corp., AT&T Corp, Carrier Corporation, Carver Pump Company, Chevron USA Inc., Clyde Union Inc., Control Components, Inc., Conwed Corporation, Electric Boat Corporation, Ericsson, Inc., Federal-Mogul Abestos, Personal Injury Trust, General Dynamics Corporation, Gulf Oil Corporation, Hess Corporation, Hyde Marine, Inc., International Comfort Products LLC, Ira S. Bushey & Sons, Inc., New Yorker Boiler Company, Inc., Otis Elevator Company, Puget Sound Commerce Center, Inc., RSCC Wire & Cable LLC, S.W. Anderson Sales Corp., Scapa Group, Spencer Heater, TRIM-H LLC, Vanderbilt Minerals, LLC, Warner Communications, Inc., and Warner-Elektra-Atlantic Corporation, appellants.

Nixon Peabody LLP, Buffalo (Samuel Goldblatt of counsel), for Patterson-Kelly Company, appellant.

McGivney & Kluger, P.C., New York (Kerryann Cook of counsel), for Bradco Supply Corporation, Spencer Turbine Company, Stockham Valves & Fittings, Sid Harvey Industries, Madsen & Howell, Inc., Triangle PWC, Inc., Homasote Company, Red Devil, Inc., Safeguard Industrial, Gerosa Incorporated, Patterson Pump Co, Fairbanks Company, Nash Engineering, Fay Spofford, Zurn Industries, Pecora Corporation, CCX, Inc., Gorman-Rupp, DAP, Inc., American Gilsonite, Falk Corporation, Flowserve Corp, Atwood & Morrill Co., Barnes and Jones, Algoma Hardwoods, Courter & Company, George A. Fuller Co, Water Applications & Systems Corporation, Rain Bird Sprinkler, Croll-Reynolds, Treadwell Corp., RCH Newco, Electric Switchboard Co., Levy Tishman Liquidating Corp., Columbia Boiler (NY), Lincoln Electric Products, Elixir Industries, Eckel Industries, AII, Acquisition (Holland Furnace), Serge Elevators, Approval Oil of Brooklyn, Simplex Wire, Bergen Industrial, J. Heller, New York Protective, ADSCO, Sunbeam, Siemens Water Technologies Corp, Henry Company, W.W. Henry Company, Costal Plumbing Supply, Andal Corporation, Alcoa, Inc., Zenith Radio, Seco/Warwick Corporation, J.A. Sexauer, Inc., American Wire & Cable and Twin City, appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Philip J. O'Rourke of counsel), for Kaiser Gypsum Company, Inc., Peerless Industries, Inc., Graybar Electric Company, Inc., Henkel Corporation and NASCO Holdings, Inc., appellants.

Darger Errante Yavitz & Blau LLP, New York (Jonathan Kromberg of counsel), for Amchem Products, Inc., Beazer East, Inc., Certainteed Corporation, Dana Companies, LLC, Gould Electronics Inc., Hobart Brothers Company, Lennox Industries Inc., The Lincoln electric Company, Linde, LLC, Union Carbide Corporation, appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Joseph LaSala of counsel), for A.O. Smith Water Products Company, Tuthill Corp., Stewart Warner Corporation, Invensys Systems, Inc., Robertshaw Controls Company, Benjamin Moore & Company, Baker Perkins, Inc., Lipe Automation Corporation, Eaton Corporation, Rockwell Automation, Inc., Flowserve U.S. Inc., Edward Valves, Nordstrom Valves, Edward Vogt Valves, Burnham LLC,

and Exxon Mobil Corporation, appellants.

Timothy M. McCann, New York, for Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc., appellants.

Schnader Harrison Segal & Lewis LLP, New York (Matther S. Tamasco of counsel), for Fort Kent Holdings, Inc., appellant.

Steptoe & Johnson LLP, New York (Shehzad Hasan of counsel), for Metropolitan Life Insurance Company, appellant.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for Georgia-Pacific LLC, appellant.

Cullen and Dykman LLP, New York (John J. Fanning of counsel), for Ajax Electric Company, Allied Building Products Corp., AWC 1997 Corporation, Burnham LLC, David Fabricators Of N.Y., Inc., Elof Hansson, Inc., Fordham Supply Co., Inc., Friedrich Metal Products Co., Inc., Goulds Pumps, Inc., Grandview Block & Supply Co., Howden North American, Inc., Long Island Lighting Company, Mario & DiBono Plastering Co., Inc., National Grid Generation LLC, New York Power Authority, Niagara Mohawk Power Corporation, Sleepy Hollow Chimney Supply, Ltd., Spence Engineering Co., Inc., The Brooklyn Union Gas Company, Thermo Products LLC, and Webb & Sons, Inc., appellants.

Ahmuty, Demers & Mcmanus, Albertson (Frank A Cecere, Jr. of counsel), for EX-FM, Inc, Thomas & Betts Corporation, Tishman realty & Construction Co., Webster Plumbing Supply, Inc. and Yuba Heat Transfer, appellants.

Thompson Hine LLP, New York (Joseph Koczko of counsel), for Central Hudson Gas& Electric Corporation, Alcoa Steamship Company, Inc., Aluminum Company of America (ALCOA), American President Lines, Ltd., American Trading and Production Corporation, Central Gulf Lines, Inc., Chiquita Brands International, Inc., Farrell Lines Incorporated, Maersk B.V. and Waterman Steamship Corporation, appellants.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Nancy L. Pennie of counsel), for Ford Motor Company, appellant.

Troutman Sanders LLP, New York (Richard P. O'Leary of counsel), for Standard Motor Products, Inc., Parker-Hannifin Corporation, Cleveland Wheel and Brakes, Fisher Scientific Company, L.L.C., Fisher Scientific International, Inc., Hercules, Inc., Champlain Cable Corporation, Ametek, Inc., Ashland, Inc., Mestek, Inc., Advanced Thermal Hydraulics, Inc., Champlain Cable Corporation, Ametek Inc., Ashland Inc., Corporation, Mestek, Inc., Sulzer Pumps (US) Inc., and Sulzer Bingham Pumps, Inc., appellants.

Barry, McTiernan & Moore LLC, New York (Suzanne M. Halbardier of counsel), for 84 Lumber Company, Asbestos Corporation Ltd., Atlas Turner, Inc., Bell Asbestos Mines, Ltd., Blackman Plumbing Supply, Davis & Warshaw, Domco Products Texas, Inc., ECR International, Inc., Fulton Boiler Works, Inc., The Olympic Glove & Safety Company, Inc., R.W. Beckett Corporation, Security Supply Corporation, SPX Cooling Technologies, Inc. and Whip Mix Corporation, appellants.

Waters, McPherson, McNeil, P.C., New York (Giovanni Regina of counsel), for Riley Power Inc. and Turner Construction Company, Inc., appellants.

Freehill Hogan & Mahar LLP, New York (Thomas M. Canevari of counsel), for Universe Tankships, Inc., National Bulk Carriers, Inc., and Crowley Marine Services, Inc., appellants.

The Sultzzer Law Group, P.C., New York (Joseph Lipari and Jason Pisultzzer of counsel), for Leviton Manufacturing Company, Inc., AIW-2010 Wind Down Corp., Long Island Tinsmiths Supply Corp., H.G. Page & Sons, Inc., and Elementis Chemicals Inc., appellants.

Law Offices Of David L. Ferstendig, LLC, New York (David L. Ferstendig of counsel), for Amsted Rail Company, Inc., appellant.

McGuireWoods LLP, New York (Genevieve Macsteel of counsel), for ITT Corporation, appellant.

Pascarella DiVita, PLLC, New York (Lisa M. Pascarella of counsel), for Bird Incorporated, Rheem Manufacturing Company, Trane US, Inc., and Ingersoll Rand Company, appellants.

Landman Corsi Ballaine & Ford, P.C., New York (Christopher S. Kozak of counsel), for American Biltrite Inc., appellant.

Lavin, O'Neil, Cedrone & DiSipio, New York (Timothy J. McHugh of counsel), for 3M Company, appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Paul J. Zoeller of counsel), for ArvinMeritor, Inc. and Maremont Corporation, appellants.

O'Toole Fernandez Weiner Van Lieu, LLC, New York (Steven A. Weiner of counsel), for Acme Heat & Power, Inc., Avocet Enterprises, Inc., Clark-Reliance Corporation, IMI Cash Valve/A.W. Cash Valve Manufacturing Company and Pennco Inc., appellants.

Eckert Seamans, Cherin & Mellott, LLC, White Plains (David Katzenstein of counsel), for Cargill, Inc., Superior Lidgerwood Mundy Corporation, Taco, Inc. and Navistar, and (Thomas M. Smith of counsel), for Residual Enterprises Corporation, appellants.

Damon Morey LLP, New York (Heidi B. Ruchala of counsel), for Genuine Parts Company and National Automotive Parts Association. appellants.

Garrity, Graham, Murphy, Garofalo & Flinn, New York (Anthony J. Marino of counsel), for United Conveyor Corporation, appellant.

McDermott Will & Emery LLP, New York (Donald R. Pugliese of counsel), for Honeywell International Inc., appellant.

Hawkins Parnell Thackston & Young LLP, New York (Edward P. Abbot of counsel), for Pneumo Abex LLC, appellant.

Harris Beach PLLC, New York (Cynthia Weiss Antonucci of counsel), for Albany International Corp., Auto Zone, Inc., Armstrong International, Inc., Barker Aggregates, Barker Marine, Ltd., Barker Boys Towing Corp., Cooper Industries, LLC., H.C. Oswald Supply Company Inc., Honeywell International Inc., Allied Chemical Corporation, Hubbell Incorporated, Hubbell Incorporated (Delaware), Hubbell Lighting, Inc., Prescolite Division, LeFrak Organization, Inc., Plastics Engineering Company, Progress Lighting Inc., Saint-Gobain Abrasives, Inc. and Xerox Corporation, appellants.

Littleton Joyce Ughetta Park & Kelly LLP, Purchase (Diane H. Miller of counsel), for Kerr Corporation, Zy-Tech Global Industries, Inc., VWR International, LLC and Ballantyne Strong, Inc., appellants.

Goldberg Corwin LLP, New York (Zachary S. Goldberg of counsel), for Bridgestone Americas Tire Operations, LLC, and Bridgestone Americas, Inc., appellants.

Hoagland, Longo, Moran, Dunst & Doukas LLP, New York (Monica R. Kostrzewa of counsel), for York International Corporation, Johnson Controls, Inc. and Kohler Co., appellants.

Malaby & Bradley, LLC, New York (Robert C. Malaby of counsel), for Alcoa, Inc., Bakers Pride Oven Co., Inc., Crown Boiler Company, Donald Durham Company, J.A. Sexauer, Inc., Met-Pro Technologies LLC, Morse Diesel, Inc., NACCO Materials Handling Group, Inc., Qualitex Company, Reynolds Metals Company, Roper Pump Company, Sears, Roebuck and Co., Superior Boiler Works, Inc. and Terex Corporation, appellants.

Reed Smith LLP, New York (Christopher W. Healy of counsel), for BASF Catalysts LLC, appellant.

Hodges Walsh & Messemer, LLP, White Plains (George S. Hodges of counsel), for Electrolux Home Products Inc., Spirax Sarco, Inc. and Clark-Reliance Corporation, appellants.

Harwood Lloyd, LLC, New York (Russell A. Pepe of counsel), for Carlisle Industrial Brake & Friction, Inc. and Graham Corp., appellants.

McMahon, Martine & Gallagher, LLP, Brooklyn (Heidi C. Baker of counsel), for Eastern Refractories Co., Inc., and Tishman Realty & Construction Co., Inc., appellants.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondents.

Levy Komitor, New York (Robert Komitor of counsel), for respondents.

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered April 15, 2014 (the April Order), which modified Section XVII of the New York City Asbestos Litigation Case Management Order, as amended May 26, 2011, to allow punitive damages claims to proceed, and denied defendants' motion to vacate and declare inapplicable the Case Management Order, unanimously modified, on the law, to the extent of deleting the second sentence from the first decretal paragraph, remanding the matter to the Coordinating Justice for a determination of procedural protocols on the issue of punitive damages, staying implementation of the modified order until such a determination is made, and otherwise affirmed, without costs. Appeal from an interim order, same court and Justice, entered May 8, 2014, which partially stayed the application of the April order, unanimously dismissed, without costs, as academic. Appeal from an order, same court and Justice, entered December 18, 2014, which, to the extent appealable, denied defendants' motions to renew the April Order, unanimously dismissed, without costs, as abandoned.

In this New York City Asbestos Litigation (NYCAL), the Case Management Order (CMO) was amended in 1996 by the Coordinating

Justice to add section XVII which provides that "Counts for punitive damages are deferred *until such time as the Court deems otherwise*, upon notice and hearing" (emphasis added). In April 2013, all plaintiffs jointly moved to modify Section XVII to read: "Plaintiffs are permitted to seek punitive damages against defendants upon application to the assigned Trial Court." The NYCAL defendants jointly opposed the motion and moved to vacate and declare inapplicable the CMO, asserting, *inter alia*, that the CMO could not be amended without their consent. In July 2013, six NYCAL plaintiffs moved for permission to allege punitive damages claims and proffer related evidence against the defendants in their cases. The defendants in those six cases, and amici curiae, including the NYCAL defendants, opposed the motion.

The motion court had the authority to modify the CMO. New York's Uniform Rules for Trial Courts Section 202.69 (see 22 NYCRR 202.69) allows the Coordinating Justice to "issue case management orders after consultation with counsel." The court reached its determination after consulting with counsel, and hearing and considering defense counsel's objections.

The April Order did not constitute an improper "advisory opinion." The order modified the CMO, something which the court

was empowered to do. Unlike in *Cuomo v Long Is. Light. Co.* (71 NY2d 349 [1998]), the parties to the NYCAL are involved in an actual dispute in New York Courts, and the April Order did not give advice, it set parameters for that litigation.

However, we find that the court exceeded its authority to the extent that the April Order directs that applications for permission to charge the jury on the issue of punitive damages “shall be made at the conclusion of the evidentiary phase of the trial upon notice to the affected defendant(s), to which such defendant(s) shall have an opportunity to respond.” Due process requires that a defendant be provided with an “opportunity to conduct discovery and establish a defense with respect to this [] damage[s] claim” since such claims involve “different elements and standards of proof and potentially subject defendants to a far greater and different dimension of liability than would otherwise [be] the case” (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23 [1st Dept 2003]). The April Order deprives defendants of their rights to due process by leaving them guessing, until the close of evidence at trial, whether or not punitive damages will be sought. Even plaintiffs, in their proposed modification of Section XVII, recognized the need for pre-trial resolution of the punitive damages issue. We therefore

modify to delete the second sentence of the first decretal paragraph of the April Order and remand the matter to the Coordinating Justice for a determination of procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages. We note, however, that this decision does not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the April Order, including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance.

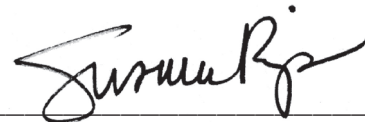
In a subsequent order, entered December 18, 2014, the motion court denied defendants' motion for a stay and found, *inter alia*, "there is nothing . . . that prohibits discovery requests tailored to punitive damages issues . . . Nor does the Order or the CMO contain any prohibition against a defendant's moving to dismiss counts for punitive damages." These explanations do not resolve the issue arising from the April Order. Defendants cannot seek discovery in connection with, and the court cannot dismiss, a claim which a plaintiff has not yet actively asserted.

Finally, no appeal lies from the denial of reargument (see *D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]), and defendants

have abandoned their appeal from the portion of the order denying renewal (see *Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

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

ENTERED: JULY 9, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK