SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 190134/2010
KONSTANTIN, DAVID
VS.
630 THIRD AVENUE
SEQUENCE NUMBER : 006
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 20, 2012

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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DAVID KONSTANTIN,

Plaintiffs,

INDEX NO. 190134/10

-against-

630 THIRD AVENUE ASSOCIATES, et al,

Defendants

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JOAN A. MADDEN, J.:

Defendant Tishman Liquidating Corporation ("TLC") moves pursuant to CPLR 4404 for an order setting aside the verdict entered against it on August 16, 2011, and directing that judgment be entered in its favor or, in the alternative, reducing the verdict. Plaintiff opposes the motion.

Plaintiff David Konstantin alleges that he was exposed to asbestos when he worked as a carpenter from 1975 to 1977, during new construction at 622 Third Avenue and the Olympic Towers, and that, as a result of this exposure, he developed mesothelioma of the tunica vaginalis. An entity known as Tishman Realty and Construction Co., Inc. ("Tishman Realty"), which is now defunct, was the general contractor at both sites. During the trial, this court found that TLC was the successor to Tishman Realty and therefore TLC was potentially liable for claims asserted against it based on Tishman Realty's actions.[1]

The jury found that a joint compound used at the sites contained asbestos; that the asbestos was an unsafe product; that in the exercise of reasonable care TLC knew or should

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[1]TLC's argument in connection with this motion that successor liability was not sufficiently established is unavailing as the record establishes that TLC was formerly known as Tishman Realty. In any event, the court also found that "TLC is judicially estopped from denying that it was formerly known as Tishman Realty based on its own admissions in the Public Service Mutual Insurance complaint, and its responses to Weitz & Luxemberg [CAL] litigation," in which TLC admits it was previously known as Tishman Realty (T. at 1861-1864).

have known that the joint compound containing asbestos was being used at the sites; that Mr. Kostantin was exposed to asbestos at the sites; and that the exposure to asbestos was the cause of his injury. The jury further found that TLC exercised supervisory control over the drywall subcontractors using the asbestos containing joint compound; that TLC knew or should have known that its drywall subcontractors were using unsafe sanding methods with respect to the asbestos containing joint compound; that TLC failed to use reasonable care to prevent or correct the use of the asbestos containing joint compound, or to prevent and correct the unsafe sanding methods; and that these failures were a substantial factor in causing Mr. Konstantin's injury.

Moreover, as to the actions of TLC's employees, the jury also found that TLC created an unsafe condition by permitting its employees to sweep asbestos containing joint compound; that the failure to use reasonable care in sweeping was a substantial factor in causing Mr. Konstantin's injury; and that TLC acted with reckless disregard for the safety of Mr. Konstantin.

The jury awarded plaintiff $7 million for past pain and suffering; $12 million for future pain and suffering; $64,832 for past lost earnings; and $485,325 for future lost earnings, and apportioned 76% of the fault to TLC. Other entities on the verdict sheet, Georgia Pacific, Kaiser Gypsum and United States Gypsum, were found responsible based on evidence that they manufactured the joint compound containing asbestos during the relevant periods; the jury found that they were each 8% at fault.

TLC now moves to set aside the verdict on various grounds. CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon 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 evidence . . . [or] in the interest of justice." The standard for setting aside a verdict and entering judgment for the moving party as

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a matter of law is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict." Cohen v. Hallmark Cards, Inc, 45 NY2d 493, 499 (1978). However, "in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus, a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." Id.

The standard used in determining a motion to set aside a verdict as against the weight of evidence is "whether the evidence so preponderated in favor of [the moving party] that the verdict could not have been reached on any fair interpretation of the evidence " Lolik v. Big V Supermarkets, 86 NY2d 744, 746 (1995) (quoting Moffatt v. Moffatt, 86 AD2d 864 [2nd Dept 1982], aff'd, 62 NY2d 875 [1984]). This does not involve an interpretation of law, but rather "a discretionary balancing of many factors." Cohen v. Hallmark Cards, supra at 499.

I. TLC'S ENTITLEMENT TO A DIRECTED VERDICT AS TO LIABILITY

TLC argues that the court should have granted its motion for a directed verdict following the completion of plaintiffs' case as: (i) it was impossible for the jury to determine, as a matter of fact, that Mr. Konstantin was exposed to asbestos-containing joint compound from the work of subcontractors, citing Matter of New York County Asbestos Litigation (Perdicaro), 52 AD3d 300 (1st Dept 2008); (ii) there was no evidence that TLC had any knowledge that the joint compound at the work site contained asbestos, and plaintiff's expert testimony did not establish such knowledge; (iii) plaintiff presented no evidence establishing that TLC's predecessor supervised and controlled the workplace; and (iv) plaintiff failed to proffer expert testimony establishing site safety requirements.

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With respect to the first issue, it cannot said that there was no valid line of reasoning or permissible inferences supporting the jury's finding that the joint compound at the work site contained asbestos. At trial, Mr. Konstantin identified Georgia Pacific, Kaiser Gypsum and United States Gypsum as the makers of the joint compound at the two sites (T. at 836). He stated that these products came in five-gallon pails and were pre-mixed (T. at 684-86, 842). The 1990 Federal Register, which required manufacturers to report asbestos-containing products to the Environmental Protection Agency ("EPA") (See Exhibit Q to TLC's motion), identified all three of these entities' pre-mixed joint compounds, referred to as "plasters," as containing asbestos during Mr. Konstantin's period of exposure. (T. at 2641-42). Moreover, plaintiffs' expert industrial hygienist, Richard Hatfield, testified that he tested the brands of joint compound that Mr. Konstatin identified and that they contained asbestos, and that asbestos in joint compounds was not phased out until the mid-1970's (T. at 1576-78; 1770-71). There was also evidence that a study of joint compounds done in 1974 and published in 1975 revealed that nine out of ten commercially available joint compounds contained asbestos in 1974 (T. at 1044-45). Furthermore, there was no evidence establishing that the joint compounds used at the sites were part of the 10% not containing asbestos.

Contrary to TLC's position, Matter of New York County Asbestos Litigation (Perdicaro), id, is not dispositive here. In Perdicaro, the Appellate Division, First Department reversed the trial court's denial of summary judgment, finding that there was no evidence that plaintiff was exposed to asbestos when installing insulation on new equipment. In this connection, the court noted that the insulation material at issue "often contained fire/heat resistant components other than asbestos," and that evidence that a subcontractor on the project ordered certain asbestos containing materials did not raise a factual question as there was no testimony from plaintiff that he ever observed those materials used on the site. Id at 301. In contrast, in this case, Mr.

Konstatin testified that he observed the joint compounds manufactured by the Georgia Pacific, Kaiser Gypsum and United States Gypsum at the work sites. When this testimony is considered together with the evidence that during the relevant time period, the three entities manufactured asbestos containing joint compound, there was sufficient evidence permitting the jury to draw an inference that Mr. Konstatin was exposed to asbestos.

As for whether the jury rationally found that TLC knew that the joint compounds at the work sites contained asbestos, plaintiffs can establish TLC's liability by demonstrating either that TLC knew, or that it should have known, of the unsafe condition. See NY PJI 2:216, Vol. 1B at 1089 (3d ed); (T. at 4081-86). Here, circumstantial evidence was presented from which the jury could have inferred that TLC knew, or that it should have known, that asbestos was used at the sites during the relevant periods and that it was unsafe. In this connection, Charles A. DeBenedettis, the project site superintendent for Tishman Realty during the relevant period, testified that plasters containing asbestos were generally used at work sites by subcontractors employed by TLC's predecessor (T. at 2011-2012). He also testified to a general awareness throughout the construction industry in the 1970's, and at TLC, of the dangers of asbestos and that such an awareness was primarily based on information published in technical trade journals (T. at 2011-2013). In addition, there was evidence that in 1974, OSHA published an alert to the construction industry warning of the dangers of asbestos (T. at 1210-1221). Furthermore, plaintiff was not required to present expert testimony to prove that TLC knew asbestos was used at the sites and that it was dangerous.

TLC also argues that there was no evidence from which the jury could have rationally inferred that it supervised and controlled either the drywall subcontractors sanding the joint compound containing asbestos, or its own employees who swept the joint compound containing asbestos. Labor Law § 200 is a codification of the common-law duty imposed on property

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owners, general contractors and employers to provide workers with a safe work site. See Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993); NY PJI 2:216. "[A]n implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition.'" Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 352 (1998) (quoting Russin v. Picciano & Son, 54 NY2d 311, 317 [1981]). Thus, to be charged with liability under Labor Law § 200, a general contractor must perform more than its "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v. Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003). However, when a general contractor creates the condition, supervision and control need not be demonstrated. Murphy v. Columbia Univ., 4 AD3d 200 (1st Dept 2004).

Here, while there may be an issue as to whether the evidence was such that the jury could rationally infer that TLC exercised sufficient supervision and control over the work of the drywall subcontractors so as to give rise to liability under Labor Law § 200, this issue is not dispositive as TLC was responsible for the creation of an unsafe condition by its own employees who swept the asbestos containing joint compound. See Murphy v. Columbia Univ., supra at 200. Moreover, the testimony of plaintiffs' medical experts, Dr. Stephen Markowitz and Dr. Jacqueline Moline, supports a finding of causation based on the sweeping of the asbestos containing joint compound. In particular, Dr. Markowitz testified that "[s]weeping of the debris containing asbestos in [Mr. Konstatin's] immediate vicinity over a couple of year period on a daily or near daily basis...clearly entered his breathing zone and contributed to his asbestos burden, and certainly contributed, acted as a casual factor in developing his mesothelioma..." (T. at 1041). Dr. Moline testified that "[t]here is no threshold that has been determined to be safe with respect to asbestos exposure and mesothelioma" even low doses of

asbestos can cause mesothelioma; plaintiff's cumulative exposures to asbestos were substantial contributing factors which caused his mesothelioma; each of the occupational exposures described contributed to causing the disease; and "there's no way of separating them [the individual exposures] out" (T. at 410). And, the testimony of plaintiff's industrial hygienist, Mr. Hatfield regarding the release of asbestos during such work is further evidence of causation.

TLC's position that it is entitled to a directed verdict based on plaintiff's failure to proffer expert testimony as to site safety is unavailing. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." De Long v. County of Erie, 60 NY2d 296, 307 (1983). Here, no site safety expert testimony was required to establish that unsafe conditions existed when asbestos was released into the air through the sanding and sweeping of the asbestos-containing joint compounds. Moreover, Mr. Konstatin testified that TLC did not take steps to protect workers from asbestos; that it did not provide warnings, respirators or masks, or segregate the drywall workers using the joint compound (T. at 679-81).

Additionally, the cases relied on by TLC are not to the contrary, as they simply provide examples of parties using expert evidence to support, or to defend against, Labor Law claims under circumstances that are factually distinct from the instant case. See e.g. Miglionico v. Bovis Lend Lease, Inc., 47 AD3d 561 (1st Dept 2008) (where expert testimony addressed whether the failure to provide safety equipment was a departure from good and sufficient safety practices and was a substantial factor causing plaintiff's fall); DeLeon v. State of New York, 22 AD3d 786 (2nd Dept 2005) (defendant entitled to summary judgment based on expert affidavit demonstrating that the construction zone, which plaintiff alleged was not properly safeguarded,

conformed with relevant industry standards and practices and defendant was not otherwise negligent). Accordingly, plaintiffs' failure to call a site safety expert is not a basis for a directed verdict.

II. TLC'S MOTION FOR A DIRECTED VERDICT BASED ON RELEASES

TLC argues that the court improperly proceeded with the trial without considering TLC's motion for a directed verdict based on plaintiffs' settlement with the building owners which released not only the owners but also their agents. TLC asserts that since its predecessor was an agent of the owners, the releases likewise apply to TLC and relieve TLC of any liability.

This argument is without merit. First, TLC cannot show any prejudice resulting from the court's reserving decision on its motion. Furthermore, as plaintiff notes, the issue of the releases was not raised prior to trial and thus the redacted releases were not produced to the court until the trial was well under way. In any event, the releases would not have provided a basis for directed a verdict in TLC's favor, as they do not express a clear intent to release TLC or its predecessor.

General Obligations Law § 15–108(a) states in relevant part that "[w]hen a release. . . is given to one of two or more persons liable or claimed to be liable in tort for the same injury. . . it does not discharge any of the other tortfeasors from liability for the injury. . . unless its terms expressly so provide." The purpose of the statute is "to eliminate the inequities existent under the common-law rule where a general release given to one wrongdoer discharged all others." Spector v. K-Mart Corp., 99 AD2d 605, 605 (3rd Dept 1984) (internal citations omitted). Although the statute has been "construed to require an express designation by name or other specific identification of which parties are intended to be released," id, courts have also held that a release need not specifically identify the discharged parties if the expressed intent is otherwise clear. See Wells v. Shearson Lehman/American Express, 72 NY2d 11, 23 (1988)

(holding that words "anyone else" in release read in context of the release made "clear that the parties' intention was to put an end to all of plaintiffs' claims relating [to the events underlying lawsuit]").

In this case, the releases did not name TLC's predecessor as a discharged party and it cannot be said that the term "agent" expressed a clear intent to release the general contractor at the sites, particularly since under these circumstances, an agent could refer to any number of entities. Furthermore, if the releases were intended to apply to the general contractor, they could have referred to the general contractor by name or otherwise indicated such an intent. Compare Feinberg v. Marsh USA, Inc., 54 AD3d 615 (1st Dept 2008) (trial court correctly found that the broker is a released party under unambiguous definition of "Agent" contained in the release). Accordingly, TLC was not entitled to a directed verdict based on the releases.

III. ISSUES REGARDING BASES FOR OPINIONS OF PLAINTIFF'S MEDICAL EXPERTS

TLC first argues that the court erred in denying its motion for a *Frye* hearing which TLC made prior to jury selection and renewed prior to the testimony of plaintiff's two medical experts, Dr. Markowitz and Dr. James Strauchen.[2] Dr. Markowitz and Dr. Strauchen both testified that asbestos exposure caused Mr. Konstantin to develop mesothelioma of the tunica vaginalis, a rare disease with approximately 224 reported cases.

New York courts apply the standard established by Frye v. United States, 293 F 1013 (D.C. Cir. 1923), for screening novel scientific evidence. Under the rule in Frye, scientific evidence, including expert testimony, must be based on "a principle or procedure [which] has

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[2]The court found that defendants' request for a Frye hearing was untimely and that it should have been made prior to the commencement of trial, stating that "when defendants were aware that this was an issue during the discovery stage of the proceedings . . . I believe defendants were aware as early as ten months prior to jury selection on this issue" (T. at 944). The court also denied the request for a Frye hearing on the substantive grounds described herein.

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'gained general acceptance' in its specified field." People v. Wesley, 83 N.Y.2d 417, 422 (1994) (quoting Frye, supra at 1014). "[T]he particular procedure need not be 'unanimously [i]ndorsed' by the scientific community but must be 'generally accepted as reliable.'" Id at 423 (quoting People v. Middleton, 54 NY2d 42, 49 [1981]). "'[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather, it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions." Zito v. Zabarsky, 28 AD3d 42, 44 (2nd Dept 2006) (quoting Beck v. Warner-Lambert Co., 2002 WL 31107923 (Sup Ct, NY Co, August 16, 2002).

When, as here, the issue concerns a causal connection, plaintiff's expert must set forth scientific evidence based on generally accepted principles showing such a causal link. See Selig v. Pfizer, Inc, 290 AD2d 319, 320 (1st Dept), lv den, 98 NY2d 603 (2002). Such a showing can be made through "'court opinions, texts, laboratory standards or scholarly articles.'" Marsh v. Smythe, 12 AD3d 307, 311 (1st Dept 2004) (quoting People v. Wesley, supra at 437, concurring opinion, Kaye, J.). However, it is not necessary that "the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert." Marsh v. Smythe, supra at 312-313.

As stated in the court's decision on the record, "a Frye hearing asks whether theoretically the said techniques, when performed as they should be generate results generally accepted as reliable in the scientific community" (August 23, 2011 decision, p. 4) and, in this case, "the question is not related to the scientific methodology used, rather the inquiry is whether there is an appropriate foundation for the expert's opinion" (id at 5, citing Parker v.

[* 12]

Mobil Oil Corp, 7 NY3d 434 [2006]). The decision noted that "[t]he foundational inquiry is separate and distinct from the Frye inquiry and is a question applied to all evidence; whether there was a proper foundation to determine whether the accepted methods were appropriately employed" (id at 4, citing Parker v. Mobil Oil Corp, supra at 447).

Here, TLC based its motion for a Frye hearing on the report of its expert, Dr. Michael Sirosky, which states that "'[a]t our current state of knowledge, there is no strong empirical evidence for asbestos as a risk factor for tunica mesothelioma'" (T. at 943). As previously determined, this statement does not warrant a Frye hearing as it was insufficient to challenge the methods or bases for Dr. Markowitz's testimony (T. at 943). Moreover, after trial, when TLC renewed its motion to preclude the testimony plaintiff's medical experts on Frye grounds and for lack of a foundation, the court found that there was no Frye issue as the opinions of plaintiff's medical experts were based on methodologies and techniques that are generally accepted in the scientific community. Thus, the court noted that Dr. Markowitz, who is qualified in the field of environmental medicine, based his opinion linking asbestos exposure to mesothelioma of the tunica vaginalis on scholarly articles, including an epidemiological study, case reports and other articles linking asbestos exposure (T. at 1030-1119; August 23, 2011 decision, pp 2-3), and that Dr. Strauchen, who is a pathologist, based his opinion that mesotheliomas are one non-distinguishable disease on pathology slides (id at 3).

The court reserved decision, however, on whether there was a proper foundation for the opinions of plaintiff's medical experts that Mr. Konstantin's mesothelioma of the tunica vaginalis was caused by asbestos exposure. Following the trial, the parties were directed to submit post-trial briefs regarding this issue.

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)." Parker v. Mobil Oil Corp, supra at 448. Moreover, "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. Rather, "so long as plaintiff's experts have provided a 'scientific expression' of plaintiff's exposure's levels, they will have laid an adequate foundation for their opinions on specific causation." Nonnon v. City of New York, 88 AD3d 384, 396 (1st Dept 2011).

Under this standard, plaintiff established legally sufficient evidence of causation. As a preliminary matter, it must noted that the "link between asbestos and disease is well documented," Wiegman v. AC&S, Inc., 24 AD3d 375 (1st Dept 2005), and the courts have found that expert testimony has established that dust in the air from asbestos products causes mesothelioma. See Lustenring v. AC&S, Inc., 13 AD3d 69, 70 (1st Dept 2004). Moreover, in this case, the record contained evidence of Mr. Konstatin's exposure to asbestos, including Mr. Konstatin's occupational history in which Mr. Konstantin reported a history of exposure to asbestos (T. at 1028). In addition, Dr. Markowitz testified that the latency period of 30 years between the exposure and the development of mesothelioma "fits the typical pattern" (T. at 1028). He also noted that Mr. Konstantin had a pleural plaque, which is a marker for asbestos exposure (T. at 1008).

However, TLC argues that plaintiffs failed to prove general causation, that is, that asbestos exposure can cause mesothelioma of the tunica vaginalis. Asserting that it has not been shown that asbestos fibers migrate from the lung to the tunica vaginalis, TLC relies on the opinion of their own expert Dr. Michael Sirosky, a urologist, who testified that there is no pathway for asbestos to get into the tunica vaginalis unless it occurs *in utero* or there is a hernia (T. at 65-66).

[* 14]

TLC's position is unavailing in light of the foundational evidence in the record supporting causation. First, in support of his opinion that Mr. Konstantin's exposure to asbestos caused him to develop mesothelioma of the tunica vaginalis, Dr. Markowitz cited a case study published in 1998 showing that 30 to 40 percent of the cases of malignant mesothelioma of the tunica vaginalis reported a history of asbestos exposure. Significantly, Dr. Markowitz also testified to a 2010 epidemiological study by Marinaccio in Italy where occupational histories were taken, and in 65% of the cases of malignant mesothelioma of tunica vaginalis reported prior exposure to asbestos (T. at 1026-1028). Dr. Markowitz stated that "it's a combination of knowing that it is a malignant mesothelioma of the tunica vaginalis, is the signal for cancer, wherever it occurs, for asbestos exposure and then specifically the studies of people with this particular rare type of cancer have shown the same thing" (T. at 1028).

Dr. Markowitz also reviewed Mr. Konstantin's medical records and the pathology reports of Dr. Strauchen. He noted that in the tunica vaginalis there is "mesothelial tissue just like around the heart, just like around the lungs and around the abdomen"[3] (T at 1020). He testified that when viewed on the microscope, "malignant mesothelioma of the tunica vaginalis . . . the cells . . . are the same as the malignant mesothelioma cells the originate in the pleura or in the chest or in the abdomen. . . . When they do special stains of the slides and look for characteristics staining patterns which is specific for mesothelioma, they find that same results in tunica vaginalis as they do in the pleura" (T at 1029).

Furthermore, there was sufficient evidence to provide a foundation for the theory that asbestos fibers migrate throughout the body from the lungs. Dr. Maskowitz testified that asbestos fibers travel through the blood stream (T at 1025), as did Dr. Moline (T at 424, 425).

Dr. Strauchen also opined that mesothelioma of the tunica vaginalis was caused by

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[3]Mesothelial tissue surrounds the heart, the abdomen, the lungs and the testicles and its function is to lubricate and protect these areas of the body (T. at 1021).

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asbestos exposure.[4] He testified that "mesothelium, something capable of causing mesothelioma of the pleura can also cause it in the peritoneum and tunica vaginalis, because its all the same tissue. It's well documented that asbestos fibers, although taken in mostly into the lung , disseminate throughout the body...It's even found in the placenta in the case of pregnancy and so they are capable of reaching even in the tunica vaginalis" (T at 1811). Moreover, while he testified he did not visualize asbestos fibers in any of the tissues that came from Mr. Konstantin's tunica vaginalis, he also testified that "typically in mesothelioma cases, even in the pleura, one doesn't find asbestos fibers in the tumor" (T. at 1813).

Based upon the foregoing, there was an adequate foundation for the conclusion of plaintiff's experts that his mesothelioma of the tunica vaginalis was caused by asbestos exposure.

IV. VIDEO DEMONSTRATION OF WORK PRACTICES

TLC argues that the video demonstration of work practices, which was shown twice during trial, should have been excluded as it was highly prejudicial and did not accurately depict the conditions under which Mr. Konstantin was working, and that showing the video a second time while plaintiff's liability expert Mr. Hatfield testified resulted in further prejudice to TLC. These arguments are without merit.

First, as noted by plaintiff, TLC observed the video tape during Mr. Konstantin's deposition, which was held a year before trial, and at his deposition, Mr. Konstantin testified that the methods of workers using the joint compound shown in the video were substantially similar or identical to the methods used by the drywall subcontractors at the sites in issue.

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[4]While Dr. Strauchen's opinions as to causation were originally limited solely to the relationship between asbestos exposure and the pleural plaque he identified in his supplemental report, on cross examination TLC opened the door as to his opinion regarding whether Mr. Konstantin's mesothelioma of the tunica vaginalis was caused by asbestos exposure (T. at 1809-1811).

Furthermore, I provided a limiting instruction to the jury indicating that the video simulation did not represent the exact conditions of the work sites but only similar activities (T. at 690 - 691). Moreover, "'testimony concerning the demonstration[ ] was subject to cross-examination and subsequent expert rebuttal testimony, both of which criticized the demonstration[ ] and minimized [its] significance' as well as the methodology of the expert who prepared the videotape." Matter of Eighth Judicial District Asbestos Litigation (Reynolds), 32 AD3d 1268, 1270 (4th Dept 2006), rev'd on other grounds, 8 NY3d 717 (2007) (quoting Blanchard v. Whitlark, 286 AD2d 925, 926-927 [4th Dept 2001]). Thus, the video was properly admitted and satisfied the standard for demonstrative evidence.

Finally, the fact that the video was played first during Mr. Konstantin's testimony for foundational purposes and a second time in connection with Mr. Hatfield's testimony so Mr. Hatfield could explain his methodology and results, was not prejudicial, and to the extent there was any prejudice, it was not sufficient to have deprived TLC of a fair trial.

V. ADDITIONAL ISSUES REGARDING PLAINTIFF'S EXPERTS

TLC argues that it was prejudiced by plaintiff's failure to promptly exchange Mr. Hatfield's reliance materials, i.e. reports and studies that Mr. Hatfield was relying on at the time of trial. This argument is without merit as Mr. Hatfield did not generate any reports or studies in this case and there is no requirement that he create a report. See CPLR 3101(d). Moreover, as indicated above, TLC was not prejudiced by plaintiff's failure to produce the video simulation, since TLC viewed the video during Mr. Konstantin's deposition a year before trial.

TLC also argues that the court should not have admitted Dr. Strauchen's testimony regarding Mr. Konstantin's pleural plaques and that it was prejudiced by Dr. Strauchen's supplemental expert report, which was served after the trial commenced. TLC asserts that the supplemental report was prejudicial as it changed the theory of plaintiff's medical case by

adding the allegation that Mr. Konstantin had a pleural thickening which was a marker for asbestos exposure. This argument is unavailing. The court properly ruled that the belated production was admissible and not prejudicial to TLC's defense and mitigated any prejudice by offering TLC an opportunity to offer a rebuttal witness. Notably, TLC's own expert, Dr. Sirosky indicated in his expert report that Mr. Konstantin's CT scan showed a pleural plaque. In addition, Mr. Konstantin was alive at the time of trial and his disease was progressing, and Dr. Strauchen's supplemental report detailed the progression of the disease, including how Mr. Konstantin's mesothelioma had metastasized. In any event, the supplemental report did not change the theory of plaintiff's case but, rather provided further substantiation for his position that his mesothelioma was caused by asbestos exposure.

VI. RECKLESSNESS

TLC argues that no rational jury could find that it acted in a reckless manner and therefore the court erred in charging "recklessness" as requested by plaintiff. TLC also argues that the recklessness charge prejudiced the jury in rendering the award and was tantamount to a punitive damages award.[5]

As to the standard to be applied where reckless conduct is alleged, the Court of Appeals has "adopted a gross negligence standard, requiring that 'the actor has intentionally done an act of unreasonable character in disregard of a known or 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." Maltese v. Westinghouse Electric Corp, 89 NY2d 955 (1997) (internal citations

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[5]TLC also argues in a footnote that plaintiffs failed to properly allege recklessness, and thus the court should not have permitted the charge. However, TLC failed to raise this objection during trial or at oral argument with respect to the charge on recklessness, and first raised this issue in a written motion for a directed verdict submitted after oral argument and the decision on the motion. Thus, the objection was not preserved. In any event, recklessness was sufficiently pleaded in paragraph 78 of plaintiffs' complaint, which alleges that defendants acted with "wanton and reckless disregard" for Mr. Konstantin's safety.

omitted).

Here, the evidence showed the following: Mr. Konstantin worked at two construction sites from 1975 to 1977 where TLC's predecessor was the general contractor; joint compounds containing asbestos were used at the sites; and the joint compounds were sanded and then swept up causing dust from the compounds to become air bourne in the areas where Mr. Konstantin was working. There was also evidence of TLC's access to information regarding the dangers of asbestos before Mr. Konstatin's exposure from 1975 to 1977, including a 1969 letter from James Endler, Tishman Realty's head of construction, indicating that it was aware of the dangerous of asbestos fibers (TLC's motion, Exh. L) and testimony that TLC had access to the AMSE journals dating back to the 1930's (T. at 2659-64). Moreover, as noted earlier, Mr. DeBenedettis, the project site superintendent for Tishman Realty during the relevant period, testified that plasters containing asbestos were generally used at work sites by subcontractors employed by TLC's predecessor (T 2011-2012), and that there was a general awareness throughout the construction industry in the 1970's and at TLC, of the dangers of asbestos and that such an awareness was primarily through information published in technical trade journals (T 2011-2013). In addition, there was evidence that in 1974, OSHA published an alert to the construction industry warning of the dangers of asbestos.

Giving plaintiffs the benefit of all favorable inferences, this evidence supports an inference that TLC knew as early as the 1930's, and certainly in the late 1960's and early 1970's, before Mr. Konstatin's exposure in 1975-1977, of the dangers of asbestos generally, and that asbestos was used in joint compounds. This knowledge and TLC's failure to take steps to protect workers, like Mr. Konstatin, from asbestos dust from these joint compounds, establish sufficient evidence from which a jury could infer that in failing to protect Mr. Konstatin, TLC acted intentionally concerning a known risk with conscious indifference as to harm that

was highly probable. See Matter of Eighth Judicial District Asbestos Litigation (Drabczyk), 92 AD3d 1259 (4th Dept), lv app den, 19 NY3d 803 (2012); Matter of New York City Asbestos Litigation (D'Ulisse), 16 Misc.3d 945 (Sup Ct, NY Co 2007); Hamiliton v Garlock, Inc, 96 FSupp2d 352 (SDNY 2000); In re Asbestos Litigation (Greff, McPadden, Ciletti), 986 FSupp 761 (SDNY 1997).

Finally, nothing in the record suggests that the recklessness charge had an impact on the amount of pain and suffering awarded by the jury.

VII. TLC'S OBJECTIONS TO CERTAIN DOCUMENTS IN EVIDENCE

TLC asserts that the court erred in permitting plaintiff to introduce the following documents into evidence over TLC's objections: 1) the 1969 James Ender letter; 2) a 1972 Tishman Annual Report; 3) a 1974 Tishman Annual Report; 4) 1973 Press Release regarding Olympic Towers; 5) the 1990 Federal Register regarding asbestos products; and 6) progress photos of Olympic Towers. TLC also objects to the admission of certain materials generated by the American Society of Mechanical Engineers ("ASME"), such as membership lists and articles published in its Journal of Engineering.[6]

Contrary to TLC's position, these documents were properly admitted. With respect to the 1969 Ender letter, while, as TLC asserts, the letter concerned the World Trade Center and asbestos containing fireproofing material and asbestos in joint compounds, it was properly admitted as evidence of TLC's actual knowledge that asbestos dust posed a danger at construction sites prior to Mr. Konstantin's exposure. In addition, the jury was provided with a limiting instruction that such evidence was only being offered as to the issue of knowledge of the dangers and that there were no allegations regarding fireproofing exposure in Mr.

[6]TLC does not argue that the documents should have been excluded as hearsay but notes that the court admitted the documents under various exceptions to the hearsay doctrine.

Konstantin's case (T. 2631-32).

As for the Tishman Annual Reports, which TLC argues are irrelevant as they make no reference to exposure to joint compounds at the relevant sites, these documents were admitted to show that TLC was the general contractor at the sites and the jury was given a limiting instruction clarifying the purpose of admitting these documents (T. 2635). Next, while the 1973 Press Release from Olympic Towers references fireproofing and not joint compounds or the trades at issue in this case, as plaintiff points out, the Press Release is probative of whether TLC's predecessor exercised supervision and control over the work site for the purposes of Labor Law § 200.

With respect to the 1990 Federal Register regarding asbestos products, TLC asserts that it is without probative value as it does not establish that asbestos containing joint compounds were at the sites during the relevant period. TLC also notes that the register does not mention that asbestos-free products were available. Contrary to TLC's position, the document was properly admitted as evidence that the brands of joint compounds identified by Mr. Konstantin as being at the sites, were asbestos containing during the period of his exposure. Next, the progress photos were properly admitted as evidence that TLC was the general contractor at the sites.

The ASME documents were also properly admitted, even though they pre-dated TLC's membership in ASME, since, as previously found, the jury could infer from the record that TLC learned about the information regarding the dangers of asbestos from the materials generated by ASME, including trade journals. In this regard, the jury was given a limiting instruction noting that the articles pre-dated TLC's membership (T. at 2651-52).

VIII. ISSUES REGARDING NON-PARTY TORTFEASORS

TLC argues that various errors made by the court regarding non-party tortfeasors

warrant a new trial. First, TLC argues that the court erred in not including Bendix on the verdict sheet based on Mr. Konstatin's testimony that he worked with Bendix brakes as a teenager and that he observed dust from the linings while sanding them, and the testimony from plaintiffs' expert Dr. Markowitz that the brake work performed by Mr. Konstatin was one of the risks that contributed to his injury (T. 1054). However, at trial, there was no evidence that the Bendix brake pads that Mr. Konstatin worked with contained asbestos, and thus Dr. Markovitz's opinion lacked a factual foundation. Compare Penn v. Amchem Products, 85 AD3d 475 (1st Dept 2011)(evidence, including expert testimony that exposure to dust from dental liners manufactured by defendant contained enough asbestos to cause plaintiff's mesothelioma was sufficient to support verdict against defendant where there was evidence that the dust from the dental liners contained asbestos). Accordingly, TLC has "not sustained its burden of showing that the negligence of nonparty defendants was a significant cause of plaintiff's injuries." Matter of New York Asbestos Litigation (Marshall), 28 AD3d 255, 256 (1st Dept 2006).

TLC also argues that the court improperly instructed the jury regarding the burden of proof as to the Article 16 non-party tortfeasors. TLC asserts that under CPLR 1603, defendant only has the burden of proving, by the preponderence of the evidence, its equitable share of total liability. However, as noted by plaintiff, this issue is moot since the jury apportioned liability to the three non-party companies listed on the verdict sheet. In any event, the court's charge was proper since a defendant seeking to apportion liability to non-party companies must establish that the negligence of those companies "was a significant cause of plaintiff's injuries," and the "proper amount of the equitable shares attributable to the other companies." Matter of New York Asbestos Litigation (Marshall), supra at 256 (1st Dept 2006) (citing Matter of New York City Asbestos Litigation (Ronsini), 256 AD2d 250, 252 [1st Dept 1998], lv den, 93 NY2d 818 [1999], cert den sub nom Worthington Corp v. Ronsini, 529 US 1019 [2000]); Zalinka v.

Owens-Corning Fiberglass Corp, 221 AD2d 830 [3rd Dept 1995]; Bigelow v. Acands, Inc, 196 AD2d 436 [1st Dept 1993]).

IX. CONSOLIDATION

TLC moves for a new trial on the grounds that consolidation of this case with the Dummit case[7] was improper as the two cases lack sufficient commonality since they involved completely different trades, work sites, employers and types of employment. TLC also argues that the legal theories underlying the claims against the defendants in Dummit, such as failure to warn, were inapplicable to the negligence and Labor Law claims asserted by Mr. Konstatin, and that the jury was confused by the consolidation of the cases and, in particular, by the sequencing of witnesses. TLC's arguments are unavailing.

As explained in the decision on the record, historically, in New York County, asbestos cases have been consolidated for trial. The consolidation decision details the court's consideration of the factors delineated in Malcolm v. National Gypsum Co, 995 F2d 346, 350-351 (2nd Cir 1993). In any event, as to Mr.Dummit and Mr. Konstantin, there was sufficient similarity of occupations as both alleged exposure due to work, which in the case of Mr. Konstantin involved the sanding of joint compound during construction work, and in the case of Mr. Dummitt involved the repair and maintenance of equipment. Moreover, the nature of exposure was similar, as both involved exposure while in the vicinity of the work which plaintiffs alleged released asbestos fibers into the air. In addition, while Mr. Konstantin developed mesothelioma of the tunica vaginalis and Mr. Dummit developed pleura mesothelioma, TLC suffered no prejudice since only the cause of Mr. Konstantin's mesothelioma was disputed; it was undisputed that Mr. Dummit's mesothelioma resulted from exposure to asbestos.

The fact that the two cases involved different legal theories is not a basis for a finding

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[7]Dummit v. A.W. Chesterton, Index No. 190196/10, Sup Ct, NY Co.

that any substantial right of TLC's has been prejudiced. See Chinatown Apartments, Inc v. New York City Transit Authority, 100 AD2d 824 (1st Dept 1984). TLC's further assertion of jury confusion is unsupported by the record. Throughout the trial, the jury was given instructions with respect to evidence admitted for a limited purpose or against only one defendant, and the jury was provided with separate and detailed verdict sheets for each plaintiff. With respect the sequencing of witnesses, the court repeatedly stated that the order of witnesses was primarily due to budgetary restraints restricting court hours. Accordingly, TLC's motion to set aside the verdict based on the consolidation of the cases for trial is denied.

X. PLAINTIFF'S OPENING AND SUMMATION AS GROUNDS FOR A NEW TRIAL

TLC argues that plaintiff's improper opening remarks which TLC alleges included statements that TLC "failed to warn" even though such a failure was not an issue at trial, that TLC allegedly was liable for knowledge of "an unrelated Tishman entity" and that TLC "had knowledge" of asbestos via its alleged predecessor, are grounds for a new trial.

TLC's position is unavailing. First, while plaintiff's opening addressed TLC's failure to test for workplace exposure to asbestos and its failure to erect safety signs (T. at 174-178), plaintiff did not assert that TLC had a duty to warn Mr. Konstantin, or that TLC was liable for a failure to warn. Moreover, as to TLC's arguments regarding TLC's knowledge based on that of its predecessor, Tishman Realty, the general contractor on the site, the court ruled that TLC was subject to successor liability as it was formerly known as Tishman Realty, and that, in any event, TLC was "judicially estopped from denying that it was formerly known as Tishman Realty based on its own admissions in the Public Service Mutual Insurance complaint, and its responses to Weitz & Luxemberg [CAL] litigation," in which TLC admits it was previously known as Tishman Realty. (T 1861-1864). Accordingly, plaintiff's opening remarks regarding TLC's knowledge based on that of Tishman Realty were not inappropriate.

TLC next argues that it is entitled to a mistrial based on the statements in plaintiff's summation which according to TLC allegedly insinuated that TLC had intentionally hidden or destroyed documents, and instructed the jury to award plaintiff $20 million. This argument is without merit. First, any comments by plaintiff's counsel as to a lack of a construction file at the work site constitute fair comment and, in any event, were not so egregious as to deprive TLC of a fair trial. See Wilson v. City of New York, 65 AD3d 906, 908 (1st Dept 2009) (while remarks made in closing "were improper and would have been better off left unsaid, they did not create a climate of hostility that so obscured the issues as to have made the trial unfair" [internal quotations and citations omitted]). Likewise, even assuming the comment by plaintiff's counsel regarding the amount the jury should was improper, it did not deprive TLC of a fair trial.[8] Id; see also Britell v. Sloan's Supermarket, Inc, 261 AD2d 130 (1st Dept 1999) (finding that even if it was an improper "summation comment urging jury to urging a $400,000 award for past pain and suffering . . . [it] was an isolated one that did not reflect the overall tenor of the summation" and thus did not provide a basis for overturning the verdict).

Thus, the remarks by plaintiff's counsel during opening and summation do not provide a basis for a new trial.

XI. AGAINST THE WEIGHT OF EVIDENCE

TLC argues that the jury verdict was against the weight of evidence as plaintiff's proofs failed to: 1) identify the asbestos containing product that allegedly caused Mr. Konstantin's injury; 2) show that TLC owed Mr. Konstanin any duty that was breached such that liability could be found under the Labor Law; and 3) prove that Mr. Konstantin's alleged exposure to asbestos was a proximate cause of his mesothelioma. TLC also argues that the jury's finding of 76% liability against TLC was irrational and against the weight of the evidence since TLC did not

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[8]As plaintiff points out, TLC never objected to plaintiff's remarks during summation.

manufacture, sell or distribute the asbestos containing joint compounds.

These arguments are unavailing. As indicated above, the standard used in determining a motion to set aside a verdict as against the weight of evidence is "whether the evidence so preponderated in favor of [the moving party] that the verdict could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, supra 746. Here, the jury's determination that the joint compounds at the sites contained asbestos was based on a fair interpretation of the evidence, which included, *inter alia*, the 1990 Federal Register identifying all three relevant manufacturers' pre-mixed joint compounds identified by Mr. Konstantin as present at the work site, as containing asbestos during the relevant period. In addition, the record showing that TLC's predecessor was a general contractor at the work site, supported the jury's finding that TLC owed a duty to Konstantin, a carpenter employed at the sites.

Moreover, with respect to the breach of that duty, evidence in the record establishing that the employees of TLC's predecessor directed workers to take various safety measures, provided a rational basis for the jury's finding that TLC supervised and controlled the work of various subcontractors so as to give rise to liability under Labor Law § 200. In any event, even if it could be argued that a fair interpretation of the evidence did not provide a basis for finding that TLC supervised and controlled the work of the drywall subcontractors, evidence in the record established that TLC's own employees created the dangerous condition through sweeping asbestos containing dust from the joint compounds and thus provides a rational basis supporting the jury's finding of liability under Labor Law § 200.

Next, the testimony of Dr. Markowitz and Dr. Strauchen provided a sufficient evidentiary basis for the jury's finding that asbestos caused Mr. Konstantin's injury. The conflicting testimony of TLC's expert, Dr. Sirosky, is not a ground for concluding that the jury's verdict was against the weight of evidence.

With respect to the apportionment of liability, the jury's finding that TLC was 76% at fault was based on a fair interpretation of the evidence which included proof that TLC was present at the work site, knew that the joint compounds contained asbestos, knew that asbestos dust posed a danger at construction sites, and failed to provide safety measures to protect Mr. Konstantin from being exposed asbestos. Thus, the apportionment of liability was not against the weight of evidence.

XII. CUMULATIVE ERRORS

TLC argues that the cumulative effect of the court's errors require a new trial, and in particular, its rulings with respect to Dr. Sirosky's testimony and Mr. Konstantin's testimony regarding TLC's role as general contractor at the sites. Contrary to TLC's position, the court properly ruled on the objections to Dr. Sirosky's testimony on cross examination and on redirect as well as with respect to Mr. Konstantin's testimony, which was based on his personal observations of the actions of TLC's predecessor at the work site and thus did not call for expert testimony.

XIII. REMITTITUR

The jury awarded Mr. Konstantin $7 million for past pain and suffering; $12 million for future pain and suffering for an estimated one and half years; $64,832 for past lost earnings; and $485,325 for future lost earnings.

The amount of damages to be awarded for personal injuries is primarily a question for the jury, however, an award may be set aside "as excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501(c); see Ortiz v. 975 LLC, 74 AD3d 485 (1st Dept 2010). Although CPLR 5501(c) dictates to the Appellate Division to overturn a verdict when it materially deviates from what is considered reasonable compensation, this standard has been held to apply to a trial court. See Shurgan v. Tedesco, 179 AD2d 805,

806 (2nd Dept 1992). In determining whether an award deviates from what is reasonable compensation, courts look to comparable cases "bearing in mind that personal injury awards , especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification." Reed v. City of New York, 304 AD2d 1 (1st Dept), lv app den 100 NY 503 (2003). However, the amount of damages awarded or sustained in prior cases involving similar injuries is not binding on courts. See Senko v. Fonda, 53 AD2d 638, 639 (2nd Dept 1976). "Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible." So v. Wing Tat Realty Co., 259 AD2d 373, 374 (1st Dept 1999). Moreover, courts have recognized that the amount of damages to be awarded is a question of fact for the jury and a jury's verdict should be given considerable deference. See Ortiz v. 975 LLC, supra.

Recent decisions which address the issue of the amount of damages where plaintiffs suffered from mesothelioma have sustained awards of $3.5 million, Penn v. Amchem Products, 85 AD3d 475 (1st Dept 2011); $3 million and $4.5 million respectively for plaintiffs Noah Pride and Bernard Mayer, In re New York Asbestos Litigation (Marshall), 28 AD3d 255 (1st Dept 2006) and $20 million, In re New York City Asbestos Litigation (D'Ulisse), 16 Misc3d 945 (Sup Ct NY Co. 2007). In two decisions issued in December 2011, where plaintiff developed lung cancer from, *inter alia*, exposure to asbestos, the trial court sustained awards of $8 million In re New York City Asbestos Litigation (McCarthy) Index No. 100490/99 (Sup Ct NY Co. 2011) and $6 million, In re New York City Asbestos Litigation (Koczur), Index No. 122340/99 (Sup Ct NY Co. 2011).

In Dummitt, I found the award of $32 million, $16 million for past and future pain and suffering deviated materially from reasonable compensation and ordered a new trial as to

damages unless plaintiff stipulated to awards of $5.5 million and $2.5 million, respectively, for past and future pain and suffering.

TLC cites In re New York Asbestos Litigation (Marshall), supra, which involved two mesothelioma cases where the First Department ordered new trials unless in Pride, plaintiff stipulated to reduce an award of $8 million to $3 million for 11 months of past pain and suffering, and unless in Meyers, plaintiff stipulated to reduce an award of $7 million to $3 million for 16 months of past pain and suffering and an award of $7 million to $1.5 million for seven months of future pain and suffering.

While awards in comparable cases are a factor to be considered, as noted above, such awards are not binding, since a precise comparison of injuries is not possible. Here, Mr. Konstatin suffered from a hydrocele on his testicle, which enlarged to the size of an apple. While awaiting surgery to remove the hydrocele, he experienced pain and soreness from movement and twice had fluid drained from the hydrocele. After surgery which removed the hydrocele Mr. Konstantin continued to experience pain in his groin. Subsequent surgery was performed to remove to nodules on his testicles after which he was diagnosed with mesothelioma at age 53. Mr. Konstantin underwent another surgery which removed his left testicle and half of his left scrotum. Mr. Konstantin testified that he experienced pain, needed medications for pain and depression and was unable to work.

In addition to the three surgeries, Mr. Konstatin had six weeks of radiation and two courses of chemotherapy. Mr. Konstantin further testified that the radiation treatments burned his back and affected his throat and intestines and the chemotherapy treatment caused nausea, confusion, groin pain and shortness of breath. Mr. Konstantin also testified he was no longer able to engage in sexual activity, received injections of anesthesia in his groin and took narcotic drugs for breakthrough pain which resulted in constipation and confusion. Mr. Konstantin's

further medical treatment included procedures to drain fluid from his lungs and to obtain a biopsy, procedures in connection with a disease-related hernia and to remedy scarring from his previous surgeries, and a second course of chemotherapy.

As a result of the disease and treatment, Mr. Konstantin testified that he slept most of the day, was unable to work, needed a cane to walk, and was unable to participate in activities he previously enjoyed including community events, various sports, and playing drums in a band in which he was a member.

Evidence indicates that as the disease progresses, the cancer will spread to his groin, lymph nodes, and chest. He will lose weight and muscle mass and will be unable to fight infection and will be debilitated and eventually pass away from the disease in one to two years. At the time of trial, Mr. Konstatin had experienced 33 months of pain and suffering, and the jury estimated that he would experience 18 months of future pain and suffering.

The evidence here thus differs from the cases relied on by TLC as to the information regarding treatment, duration and extent of pain and suffering available from the record. Thus, for example, Mr. Pride, unlike Mr. Konstantin, had no treatment for a year prior to trial, only one thoracentises and tolerated chemotherapy well. In contrast, Mr. Konstantin had extensive treatment for three years before trial including three surgeries and various procedures, resulting in the removal of a testicle and part of his scrotum, radiation and two courses of chemotherapy. As to Mr. Pride and Mr. Mayer, the jury's awards were based on past and future pain and suffering for a total of 11 months and 25 months respectively, a significant difference from the award fro Mr. Konstantin which is based on a total of 51 months. In addition, the awards in the two lung cancer cases were based on pain and suffering for periods fo time less than Mr. Konstantin's 51 months; two years duration in McCarthy and from four to six months in Koczur. The highest verdict, awarded in D'Ulisse, was based on medical treatment which, while similar to

Mr. Konstantin's treatment, was more extensive. Mr. D'Ulisse had surgery to remove his left lung, a rib and part of his diaphragm, followed by chemotherapy which resulted in loss of feelings in his legs, numbness of his thighs and toes, vomiting and insomnia. He had trouble breathing and was given oxygen and had intense pain in his stomach. From the radiation he could not swallow and he chocked when he tried to eat. Mr. D'Ulisse also suffered from severe constipation, rectal bleeding and depression.

Taking in consideration the amount of the following awards, recognizing that awards for pain and suffering are not subject to precise mathematical quantification, and giving the jury's verdict great deference, I conclude that based on the nature, extent and duration of Mr. Konstantin's injuries, the awards of $7 million for past pain and suffering and $12 million for future pain and suffering deviate materially from what would be reasonable compensation. Pursuant to CPLR 5501(c), the awards of past and future pain and suffering are 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 awards to $4.5 million for past pain and suffering and $3.5 million for future pain and suffering.

Next, the court finds that the jury's award of economic damages in the amount of $64,832 for past lost earnings and $485,325 for future lost earnings was not excessive. While business was down prior to Mr. Konstantin's diagnosis, the evidence showed that his business was primarily suffering due to his inability to contribute to the business and that his years of experience as a general contractor and his leadership were central to the success of his business. Notably, the jury awarded less in economic damages than calculated by plaintiff's expert economist.

Accordingly, it is

ORDERED that the motion by defendant Tishman Liquidating Corporation for a judgment

notwithstanding the verdict is denied; and it is further

ORDERED that the motion by defendant Tishman Liquidating Corporation to set aside the verdict is granted to the extent of vacating the awards of $7 million for past pain and suffering and $12 million for future pain and suffering, and ordering a new trial 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 awards to $4.5 million for past pain and suffering and $3.5 million for future pain and suffering; and it is further

ORDERED that the balance of the motion by defendant Tishman Liquidating Corporation is denied.

DATED: September 20, 2012

J.S.C.