SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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IVANA PERAICA, as Administratrix for the Estate of IVO J. PERAICA, and MILICA PERAICA, Individually,

Plaintiffs,

- against -

A.O. SMITH WATER PRODUCTS CO., ET AL.,

Defendants.

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Index No.: 190339/2011

Decision and Order

HON. MARTIN SHULMAN:

Defendant Crane Co. ("Crane" or "Defendant") has filed a post-trial motion pursuant to CPLR 4404(a) for judgment as a matter of law notwithstanding a jury verdict rendered in favor of Decedent-Plaintiff Ivo J. Peraica ("Peraica" or "Plaintiff") in this product liability (asbestos exposure) action. The underlying joint trial initially involving eight plaintiffs and numerous defendants began on November 11, 2012 and ended on March 1, 2013, when the jury returned a verdict awarding Peraica, the sole remaining plaintiff, $35 million for personal injuries and wrongful death. The jury found Crane, the sole remaining defendant, 15% liable for Plaintiff contracting, and dying from mesothelioma, an asbestos-related disease and, for purposes of CPLR 1602, also found Crane was "reckless" in failing to warn of the toxic hazards of asbestos.

In seeking judgment setting aside the verdict and dismissing Peraica's action as against Defendant as a matter of law, Crane principally relies on *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289 (1992)("*Rastelli*"), *In re: Eighth Jud. Dist. Asbestos Litig. (Drabczyk)*, 92 AD3d 1259 (4th Dept), *lv denied* 19 NY3d 803 (2012) ("*Drabczyk*")

as well as *Surre v Foster Wheeler, LLC*, 831 F Supp 2d 797 (SDNY 2011). Reduced to its essence, Crane particularly contends, as it did throughout this protracted trial, that based on the record evidence, Defendant's "bare metal" defense (i.e., the boilers in issue Crane manufactured and placed into the stream of commerce contained no asbestos-containing materials, components or parts ["bare metal product"]) shields it from any liability for Peraica's asbestos-related illness and wrongful death. Crane also contends that a post-verdict judgment of dismissal is warranted because admittedly there was no evidence Defendant manufactured/supplied the asbestos-containing insulation materials ("ACMs") to which Plaintiff was fatally exposed. Consequently, Crane had no legal duty to warn of the dangers inherent in the ACMs others manufactured/supplied, even if the use of these ACMs with its boilers was foreseeable (*viz.*, foreseeability, alone, does not define duty--it merely determines the scope of the duty once it is determined to exist [quotation marks and citations omitted]).

In addition to the foregoing, Crane alternatively highlights alleged errors which either warrant a judgment of dismissal or, at a minimum, a new trial: 1) instructions to the jury were not consistent with *Rastelli* and/or *Drabczyk* (i.e., liability attaches only when a manufacturer or distributer actually placed the harm-causing product into the stream of commerce); 2) an instruction to the jury was not consistent with the "law of the case" in a prior decision of the NYCAL Coordinating Justice in the Peraica action granting Taco Pump's motion for summary judgment of dismissal (*Peraica v A.O. Smith Water Prods., nor*, Index No. 190339/11, August 27, 2012 [Sup Ct NY Co, Klein-Heitler,

J])[1] (Exhibit A to Cottle Aff in Support of Post-Trial Motion); 3) a claimed absence of evidence that Plaintiff would have read and heeded an asbestos-related health warning precluded a "heeding presumption" instruction to the jury that was arguably given erroneously as a conclusive presumption rather than a rebuttable one; 4) a "continuing duty to warn" instruction to the jury was unwarranted in the absence of post-sale evidence of later-discovered dangers triggering a duty for Crane to continuously warn about the hazards of asbestos thermal insulation supplied by others; 5) consolidated jury trials with multiple plaintiffs and other co-defendants allegedly charged with manufacturing and supplying products and equipment with ACMs severely prejudices any defendant proffering a "bare metal" defense; 6) the trial record neither supported a "recklessness" instruction to the jury nor its finding of recklessness against Crane; 7) where Peraica's varied employers as well as owners of certain work sites that underwent asbestos removal were knowledgeable about the hazards of ACMs and failed to warn Peraica and others similarly situated about same, then a jury instruction should have been given advancing the superceding/intervening cause doctrine;[2] and/or

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[1] In searching the record, Justice Klein-Heitler found no evidence that Taco's pumps, manufactured and supplied without any ACMs, needed same to properly function or that ACMs were ever recommended or specified for this machinery in its sales catalogues, etc. This ruling obviously involved a different co-defendant, was grounded on a different factual record and is simply not applicable to Crane. Moreover, by failing to assert this "law of the case" challenge during the trial or even at the charge conference, Defendant effectively waived this challenge (*see* Golanski Opp Aff at ¶¶ 57-60).

[2] Crane claims there was evidence suggesting that Peraica's employers and certain entities such as Mt. Sinai Medical Center and New York Port Authority, among other owners of certain sites where Plaintiff worked, had an independent legal duty to not only warn of the dangers of asbestos, but also to implement safety measures to control/protect against worker exposure. Thus, Crane argues that this instruction would have enabled the jury to consider whether Peraica's employers and these owners jointly and severally breached their respective legal duty to Plaintiff constituting a superceding/intervening cause which, in turn, breaks the

8) remittitur because the $35 million pain and suffering award for Peraica's asbestos related illness and wrongful death is excessive and unreasonable under the circumstances (e.g., reported sustainable verdicts awarded decedent plaintiffs in similar circumstances were in the low/high-mid seven figure range).

Finally, Crane seeks post-verdict discovery to obtain the total amount of funds Peraica has recovered or stands to recover from the bankruptcy trusts, settling defendants, etc., for asbestos related injuries to properly mold a judgment, if any, in Plaintiff's favor.

Peraica's counsel, in urging the court to deny entirely Crane's post-verdict motion, extensively particularizes the following factual/legal points raised before, during and after the verdict:[3]

- Not only did Crane's earliest product catalogs published during the first decade of the 20th Century (*see illustratively*, Exhibits 3 and 4 to Golanski Opp Aff), aggressively promote the sale of asbestos insulation to be applied to its boilers "making the benefits of asbestos insulation an integral part of its marketing scheme. . .",[4] but record evidence also established that Defendant "designed and supplied its products with asbestos containing gaskets, packing, insulation and cement. . .";[5]

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causal chain thereby absolving Crane of any liability for Peraica's mesothelioma and wrongful death.

[3] Alani Golanski, Esq. submitted a 100 page affirmation ("Golanski Opp Aff") with extensive references/citations to 49 exhibits comprising portions of trial transcripts, trial evidence including, *inter alia*, Crane's product catalogues, state of the art documents (e.g., US government reports, industrial and scientific journals, trade journals, etc.) as well as court decisions, copies of which were contained in 4 bound volumes.

[4] See *Vespe-Benchimol v A.O. Smith Water Prods., nor*, Index No. 190320/10, November 15, 2011 (Sup Ct NY Co, Klein-Heitler, J)(Exhibit 22 to Golanski Opp Aff at pp 3-4).

[5] *See Contento v A.C. & S., Inc.*, 2012 NY Misc LEXIS 1156, 2012 Slip Op 39617U, [*6] (Sup Ct NY Co, Klein-Heitler, J)(Exhibit 24 to Golanski Opp Aff).

- Crane's corporate representative candidly acknowledged that at least from the turn of the 20th Century through the 1970s, this multi-national company was a dominant player manufacturing and/or distributing equipment (e.g., boilers, pumps, etc.), industrial components (i.e., valves) and associated insulation products (e.g., asbestos-containing pipe covering, block, cement, cement pipe, millboard, gaskets, packing and rope, etc.)[6] and did the latter through its Branch Houses a/k/a Crane Supply Houses (smaller versions of a "Home Depot"), located regionally throughout the United States (Exhibits 1-6 to Golanski Opp Aff);

- Throughout decades of Crane's national sales of these widely-used ACMs, Defendant knew/foresaw the ACMs it manufactured and/or distributed were/would be used to insulate heat-generating equipment and components for safety and cost-efficiency, did/would require regular removal and replacement and did/would generate high levels of visible dust upon manipulation (installation or removal [i.e., rip-outs]) due to their friability;

- From lectures and panel discussions at regional/national business conferences, from medical and scientific literature disseminated in varied continents and the United States (from the 1890s through the 1960s) (*see illustratively*, Exhibits 7 and 36 to Golanski Opp Aff) as well as from trade association journals, Crane's high-level executives (and particularly its medical director [s]) acquired state-of-the-art knowledge that exposure from ACMs can cause asbestos-related diseases such as mesothelioma;

- In accordance with *Berkowitz v A. C. & S., Inc.*, 288 AD2d 148 (1st Dept 2001) ("*Berkowitz*"), the jury properly determined the *Berkowitz* duty issue, *viz.*, even though Crane sold a bare metal product, it had a duty to warn about the conspicuous hazards of ACMs third-parties foreseeably manufactured and/or used therewith subsequent to that sale, and Crane's failure to warn was a basis for liability to Peraica, who was injured and ultimately killed from toxic exposure to ACMs applied to/installed on its bare metal product;

- Ample record evidence proved that despite having a century's worth of actual, in-depth knowledge that workers such as Peraica were at high risk of injury due to high-dose asbestos exposure from removing ACMs from Defendant's boilers (far more than a general awareness of the linkage between asbestos exposure and disease), Crane displayed a reckless disregard for Plaintiff's safety concerns warranting a "recklessness" jury charge;

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[6] For more than three quarters of a century, Crane also sold ACMs manufactured by third parties and closely identified with these products and their manufacturing companies which Defendant perceived to be as good as its own (Golanski Opp Aff at ¶ 12).

- The record evidence amply supported the jury verdict finding Crane was reckless (*viz.*, Defendant's intentional failure to warn workers such as Peraica demonstrated its conscious indifference to the high probability that Peraica would contract a fatal asbestos-related disease);

- Plaintiff's unrebutted testimony read into the record of his newfound, albeit cursory, knowledge about the hazards of ACMs during the latter part of his working life as an asbestos remover as well as his then rudimentary efforts to protect himself (Exhibit 1 to Golanski Opp Aff at pp 5149-5168) allowed the jury to apply the correctly given "heeding presumption" instruction and conclude that Peraica would have heeded a warning about the dangers of breathing asbestos, if Crane had provided one, and taken appropriate precautions;

- Crane not only had a duty to warn about the hazards of asbestos exposure when it sold its boilers, but Defendant also had a continuing post-sale duty to warn because of the foreseeable use of ACMs for the operation and maintenance of its boilers, and because of the medical and scientific research (from the turn of the 20th Century up to and including the period of Peraica's working life) incontrovertibly showing the causative link between ultra hazardous asbestos exposure (even to low doses for short durations) and disease, justifying this correctly given jury instruction as to the latter;

- While Crane hyperbolically claims the Peraica verdict is the product of a jury exposed to irrelevant, cumulative and inflammatory evidence admitted in this joint trial of eight mesothelioma plaintiffs, including Peraica, nonetheless, there is no legal and/or factual basis to set aside the verdict and seek a new trial based on Crane's post-trial challenge to the underlying trial consolidation order (*Adler v Air & Liquid Sys. Corp., nor*, Index No. 190181/11, August 7, 2012 [Sup Ct NY Co, Feinman, J])("Consolidation Order") (Exhibit 40 to Golanski Opp Aff);

- Crane cannot point to any record evidence that warranted the jury allocating more even percentages of fault among the tortfeasor-entities listed on the verdict sheet, whereas, the reported assigned percentages reflected the jury's fair interpretation of the evidentiary factors supporting Crane's and each listed tortfeasor's relative degree of fault (CPLR 1402) for Peraica's mesothelioma;

- Because the record is devoid of any evidence that the claimed negligent acts of Peraica's employers and/or worksite property owners (in failing to protect Plaintiff from asbestos exposure) were so extraordinary and, perforce, unforeseeable as to shield Crane from liability for its failure to warn, the court correctly did not give a superceding/intervening cause instruction to the jury;

- Taking a "totality of circumstances" approach to Peraica's daughter's unchallenged testimonial account of the breadth, depth and two-year duration of Peraica's extraordinary pain and suffering (both physically and emotionally from

the onset of his mesothelioma up to and including his wrongful death) as well as to the unchallenged portion of the expert medical testimony about Plaintiff's terminal illness progression (*see* Golanski Opp Aff at ¶¶ 181-206) the jury awarded a fair and just sum of $35 million, still, if remittitur is being considered, the reduction should be a modest one; and

- Finally, Crane's post-verdict discovery requests are improper and unnecessary to properly mold the judgment.

DISCUSSION

The following is the basic legal framework for deciding a post-verdict motion for a judgment of dismissal notwithstanding the verdict or, alternatively, to set it aside and grant a new trial:

> A court may set aside a jury verdict and grant judgment as a matter of law to the losing party only where "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499).

Brewster v Prince Apts., Inc., 264 AD2d 611, 612 (1st Dept 1999), *lv denied* 94 NY2d 762 (2000); *see also*, *Smolinsky v 46 Rampasture Owners, Inc.*, 230 AD2d 620, 646 NYS2d 110 (1st Dept 1996); and *Niewieroski v National Cleaning Contrs.*, 126 AD2d 424, 425 (1st Dept 1987). Upon the court's review of the trial record, it must construe the evidence in the light most favorable to the non-moving party (*see Mirand v City of New York*, 84 NY2d 44, 50 [1994]). Restating the latter standard more broadly:

> To be entitled to a judgment as a matter of law, the defendant-movant must demonstrate that the plaintiff failed to make out a *prima facie* case; the plaintiff's evidence must be accepted as true, and the plaintiff must be given the benefit of every favorable inference which can reasonably be drawn from the evidence (*Windisch v Weiman*, 161 AD2d 433, 437). The motion should be granted only if there is no rational process by which the jury could find for plaintiff as against the moving defendant . . .

Campbell v Rogers & Wells, 218 AD2d 576, 580 (1st Dept 1995).

> Under a different standard, "[w]hile the trial court has the power to set aside the jury's verdict if contrary to the weight of the evidence (CPLR 4404 [a]), the court must first conclude 'that the jury could not have reached its verdict on any fair interpretation of the evidence' (*Delgado v Board of Educ.*, 65 AD2d 547, *affd* 48 NY2d 643) . . ." *Wiseberg v Douglas Elliman-Gibbons & Ives, Inc.*, 224 AD2d 361, 638 NYS2d 82 (1st Dept 1996). In this context, the court's analysis will not involve a question of law, but rather will require a discretionary balancing of many factors. *See Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2nd Dept 1985). Thus, the trial court may not set aside the jury verdict "merely because it disagrees with the result. Its power in this area must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict. Fact-finding is within the province of the jury, not the trial court . . ." *Brown v Taylor*, 221 AD2d 208, 209, 633 NYS2d 170, 171 (1st Dept 1995).

Sorrenti v City of New York, 17 Misc3d 1102(A), 2007 NY Slip Op 51796(U), at *6-7 (Sup Ct NY Co, August 16, 2007), *affd* 67 AD3d 407 (1st Dept 2009), *affd* 16 NY3d 472 (2011).

During the trial, the jury heard undisputed evidence that: Peraica, after emigrating to the United States from Croatia in 1978, obtained employment as an asbestos remover, and at various commercial sites throughout New York City, Plaintiff removed exterior asbestos insulation from pumps, valves, chillers, turbines and boilers; where relevant here, the jury learned that due to the nature of his work over a period of 20 years, Peraica was always in close proximity to asbestos-insulated Crane boilers and was regularly and frequently exposed to harmful asbestos dust created after he removed the old insulation from this equipment;[7] Crane never provided any warning

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[7] Parenthetically, there was no genuine issue of material fact as to the quantitative nature of Peraica's asbestos exposure and the jury never had to engage in any fact-based analysis of Plaintiff's work-related, high-dose exposure to asbestos thermal insulation on Crane's boilers to determine whether he met the "frequency-regularity-proximity" test (*see, Lohrmann v Pittsburgh Corning Corp.*, 782 F2d 1157 [4th Cir 1986]), adopted as a legal standard of exposure in many jurisdictions.

about the hazards of asbestos, and Peraica contracted, and eventually died from, asbestos-caused mesothelioma; and his exposure to asbestos-insulated Crane boilers was among the contributing significant causes of Plaintiff's fatal cancer (*see* relevant portions of the trial transcript at Exhibit 1 to Golanski Opp Aff).

Against this undisputed factual backdrop, the crux of Crane's post-verdict motion is its oft-stated claim made throughout this litigation that as a manufacturer and distributor of an otherwise sound bare metal product, it had no duty to warn against the hazards of ACMs subsequently supplied/applied by others to insulate its boilers and, therefore, cannot be liable for Peraica's asbestos-related illness and wrongful death. Simply restated, Crane contends the *Berkowitz* duty issue was a legal one for the court to resolve in its favor and should never have been deemed a disputed issue of material fact for the jury to resolve. In this context, Crane relies on a perceived national jurisprudential trend to shield a manufacturer advancing a bare metal defense from liability,[8] a trend Crane persistently urges New York courts to adopt.

Nonetheless, this court declines to do so. In addressing the *Berkowitz* duty issue, there is no need to reinvent the wheel as this decision adopts and fully incorporates the thorough, well-reasoned analysis the Hon. Joan Madden, JSC, provided in *Dummitt v A.W. Chesterton* (*In re: New York City Asbestos Litig.*), 36 Misc3d 1234(A), 2012 NY Slip Op 51597(U) (Sup Ct, NY Co, August 20, 2012, Madden, J) ("*Dummitt*"). Hence, this court readily concurs with the *ratio decidendi* contained in the comprehensive **Duty to Warn** section of *Dummitt* at [***4-25], and

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[8] *E.g.*, *O'Neil v Crane Co*, 266 P3d 987 (Sup Ct Cal, 2012), *Simonetta v Viad Corp.*, 197 P3d 127 (Sup Ct Wash 2008) and *Conner v Alfa Laval, Inc.*, 842 F Supp 2d 791 (EDPA 2012).

tailors it to this case in a one-sentence summary, namely, *Berkowitz* and successive New York case law (*see* Exhibits 9-28 to Golanski Opp Aff), applying a well developed products liability doctrine wholly consistent with *Rastelli* (e.g., *Liriano v Hobart Corp.*, 92 NY2d 232 [1998]), make clear that the *Berkowitz* duty issue is a factual one for a trier of fact to determine even though others supplied/applied ACMs to Crane's bare metal product after its sale.[9]

This being said, there was more than sufficient record evidence to persuade the jury to resolve the Berkowitz duty issue and conclude that "Crane meant for its . . . [boilers] to be used, or knew or should have known that its . . . [boilers] would be used with asbestos-containing . . . insulation to warrant a [jury] determination that Crane was . . . liable under a failure to warn theory in strict products liability and negligence. . ." (bracketed matter added) (*Dummitt* at ***14). On this record, the jury properly resolved the *Berkowitz* duty issue against Crane, finding Defendant liable for its failure to warn not on the mere possibility that ACMs would be used to insulate Crane boilers, but rather on a known probability, if not a cast-iron certainty, that Crane "meant for its [bare metal] product to be used with a defective product [i.e., ACMs] [even] of another manufacturer, or knew or should have known of its use . . ." (bracketed matter added)(*Id.* at ***15).

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[9] This court is mindful that in *Drabczyk*, the Appellate Division, Fourth Department, concluded that a defendant-manufacturer and distributer of both asbestos-containing valves and bare metal valves could not be liable for the decedent-plaintiff's work-site exposure to ACMs others supplied/applied to the latter, post-sale. Even so, *Drabczyk* is not binding authority for this court on the *Berkowitz* duty issue. *See generally*, *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664-665 (2d Dept 1984).

Accordingly, the branch of Crane's post-verdict motion for a judgment of dismissal notwithstanding the verdict because it claimed no legal duty to warn of the hazards of ACMs others manufactured and subsequently supplied/applied to its boilers is denied. *LePatner v VJM Home Renovations, Inc.*, 295 AD2d 322 (2d Dept 2002). In considering this same central argument in Crane's post-verdict motion to set aside the verdict as being against the weight of the evidence, it also cannot be said that the "verdict [on liability] for the [P]laintiff . . . so preponderate[d] in favor of . . . [Crane] that [the verdict] could not have been reached on any fair interpretation of the evidence . . ." (bracketed matter added). *Moffatt v Moffatt*, 86 AD2d 864 (2d Dept 1982), quoted with approval in *Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744 (1995). In conducting a factual inquiry of the trial record, this court further finds no basis to set aside the verdict as against the weight of the evidence and direct a new trial.

Regarding the "heeding presumption" instruction, this court cannot fathom the basis for Crane's claim that its wording, either express or implied, renders the presumption a conclusive one. This claim is simply unsupportable. In any event, the Appellate Division, First Department, citing with approval the relevant federal case law interpreting New York law in "failure to warn" cases, endorsed the proposition that "New York Law presumes users will heed warnings provided with a product . . ." (*Union Carbide Corp. v Affiliated FM Ins. Co.*, 101 AD3d 434 [1st Dept 2012]). Thus, this properly worded instruction has solid jurisprudential support. Moreover, Crane had a full and fair opportunity to submit evidence to rebut this presumption and persuade this jury that even with a proper warning, Peraica would more than likely not have heeded it. Contrarily, except for Crane directing the jury's attention to information about Plaintiff's

regular wine intake, albeit without evidence of any long-term ill effects, Defendant cannot turn to anything in the trial record that would have demonstrated that had Peraica been properly warned about the hazards of breathing toxic asbestos dust, he would not have taken appropriate precautions to avoid the harmful effects of his extensive exposure.

Given Crane's admitted "state-of-the-art" knowledge about the ever growing dangers of asbestos-containing insulation used with its boilers (expanded with each passing decade during a 75 year period), it was proper for the jury to consider not only whether Crane had a duty to warn of the ultra-hazardous risks of exposure to ACMs Crane knew or should have known would be supplied/applied to its bare metal product at the time of sale, but also whether Crane had a continuing duty to warn throughout its useful life (*see Cover v Cohen*, 61 NY2d 261, 265 [1984])(a duty to warn may be imposed on a manufacturer of a product otherwise safe at the time of sale when notified of emerging post-sale risks of harm from user-operation). Accordingly, this court properly gave a "continuing duty" instruction in consonance with the law.

On the strength of the adopted *Dummitt* analysis of the *Berkowitz* duty issue, this court also concludes that a reasonable view of the evidence justified giving the jury a recklessness instruction, and its inquiry here establishes "there . . . [was a] valid line of reasoning and permissible inferences that . . . [led this] rational jury to conclude that [D]efendant acted with reckless disregard for decedent's safety for failing to warn him of the dangers associated with . . . [insulating ACMs others manufactured and supplied that was meant to be/was applied to its boilers] . . ." (bracketed matter added and citations omitted)(*Drabczyk*, 92 AD3d at 1260).

The branch of Crane's post-verdict motion to set aside the verdict and grant a new trial based on this court's unwillingness to give the jury a "superceding cause" instruction is groundless as well.

> Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence . . . If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus.

Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315 (1980) (citations omitted).

As the trial record makes clear, Crane did not prove any alleged negligence of Peraica's employers and/or work-site property owners in failing to protect Peraica from work-site asbestos exposure (e.g., a failure to warn, etc.) was so extraordinary as to be unforeseeable to Defendant thereby shielding Crane from any culpability for its own negligence in failing to warn. This challenge also seems to be borne of an afterthought especially when Crane made no request to even list any employer or work-site property owner on the verdict sheet, which could have otherwise allowed the jury to consider allocating a percentage of fault to that entity for contributing to Plaintiff's asbestos-related illness (see Golanski Opp Aff at ¶ 176, n. 7).

Crane's post-verdict motion also takes issue with the jury finding Defendant 15% liable for causing Peraica's terminal illness complaining that this percentage of fault was greater than the percentages of fault allocated to other tortfeasors not at trial. In other words, Crane believes the jury indefensibly assigned it a greater share of the blame because it chose to defend to the bitter end and therefore deserves a new trial. To

mitigate against its share of liability, Crane had the burden of proving the respective culpability of one or more of its co-defendants, any settling tortfeasor and one or more absentee bankrupt tortfeasors[10] and persuading the jury that the degrees of fault among all the listed tortfeasors were of the same magnitude. Evidently, Defendant managed to do so with at least one absentee bankrupt tortfeasor as the jury found Johns-Manville 15% liable as well (*see* Exhibit 47 to Golanski Opp Aff). In any event, the relative degrees of fault the jury apportioned among the listed tortfeasors on the verdict sheet were based on a fair interpretation of the evidence and will not be disturbed. *Beecham v New York City Trans. Auth.*, 54 AD3d 594 (1st Dept 2008).

In Crane's post-verdict motion, Defendant briefly reargues its prior challenge to the Consolidation Order. A traditional standard in the defense playbook, defendants routinely oppose consolidation of varied clusters of NYCAL cases for joint trials always claiming prejudice and due process violations (*viz.*, justice can only be achieved one case at time).

During the pre-trial stages of this litigation, 22 personal injury/wrongful death actions comprising an April 2012 *in extremis* cluster were referred to Hon. Paul Feinman, JSC, for trial pursuant to the NYCAL Amended Case Management Order. Crane, having had a full and fair opportunity to oppose an omnibus order to show cause which sought to consolidate these cases for joint trials, expansively made the same

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[10] It is now well settled in NYCAL, a bankrupt "tortfeasor is not exempt from consideration of damages under CPLR article 16. To the extent that such entity's culpability is 50% or less, exposure for non-economic damages can still be calculated in apportioning liability. . ." *Tancredi v A.C.& S., Inc. (In re: New York City Asbestos Litig.)*, 6 AD3d 352 (1st Dept 2004).

points it now summarily makes in its post-verdict motion. In exercising discretion on a consolidation application pursuant to CPLR § 602(a), Justice Feinman considered certain suggested factors for determining the appropriateness of joint trials in asbestos exposure cases (*see Malcolm v National Gypsum Co.*, 995 F2d 346, 351-352 (2d Cir 1993]), weighed the pros and cons, namely, the commonalities and individualities and divided the 22 cases into three distinct trial groups in the Consolidation Order, one of which was the Peraica group assigned to this court for trial. This being said, this post-verdict challenge falls flat for two reasons. First, any self-perceived prejudice or claimed jury confusion ostensibly dissipated when Crane chose to remain as the sole defendant in this months-long trial. Without having to compete with its former co-defendants, Crane ultimately had a captive audience to not only persuasively marshal the record evidence so the jury could potentially resolve the *Berkowitz* duty issue in its favor, but also to point them in the direction of all the "empty chairs" (e.g., settling co-defendants, bankrupt tortfeasors, etc.) Crane argued were the entities truly responsible for Peraica's terminal illness. Secondly, this challenge fails because the Consolidation Order is the law of the case,[11] and the jury verdict is not some new factor entitling Crane to a trial do-over.

In considering the correctness of the jury damages award verdict, CPLR §5501[c] states, in relevant part:

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[11] "The doctrine of the 'law of the case' . . . applies to various stages of the same litigation and not to different litigations... The purpose of the law of the case doctrine is to avoid the retrial of issues already determined in the same case...[This doctrine] *is in essence a doctrine of intra-action res judicata . . .*" (bracketed matter and emphasis added). *Brooklyn Caledonian Hosp. v Cintron*, 147 Misc2d 498, 501 (Civ Ct Kings Co, 1990, Ritholtz, J).

> In reviewing a money judgment in an action in which an itemized verdict is required in which it is contended that the award is . . . inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is . . . inadequate if it deviates materially from what would be reasonable compensation.

"Trial courts may also apply this material deviation standard in overturning jury awards but should exercise their discretion sparingly in doing so. *Shurgan v Tedesco*, 179 AD2d 805 (2d Dept 1992); *Prunty v YMCA of Lockport, Inc.*, 206 AD2d 911 (4th Dept 1994); see also, *Donlon v City of New York*, 284 AD2d 13 (1st Dept 2001) (implicitly approving the application of this standard at the trial level). For guidance, a trial court will typically turn to prior verdicts approved in similar cases, but must undertake this review and analysis with caution not to rigidly adhere to precedents (because fact patterns and injuries in cases are never identical) and/or substitute the court's judgment for that of the jurors whose primary function is to assess damages. *So v Wing Tat Realty, Inc.*, 259 AD2d 373, 374 (1st Dept 1999)." *Lamasa v Bachman*, 8 Misc3d 1001(a), 2005 Misc. LEXIS 1164 [***27-28](Sup Ct NY Co), *affd* 56 AD3d 304 (1st Dept 2008).

Several years ago, this court decided a post-verdict motion for remittitur (Exhibit 43 to Golanski Opp Aff) in two actions consolidated for a joint trial involving decedent-plaintiffs who claimed they contracted terminal lung cancer from asbestos exposure (*see Koczur v A.C.&S., Inc.* [*In re: New York City Asbestos Litig.*], Index No.122304/09 [$13,650,000 award reduced to $6,500,000] and *McCarthy v A.C.&S., Inc.* [*In re: New York City Asbestos Litig.*], Index No. 100490/99 [$8,500,000 award sustained] [Sup Ct NY Co, December 6, 2011])(collectively "*Koczur*").

In its *Koczur* ruling, this court did take note of certain verdicts either sustained or downwardly adjusted (in the low to mid seven figure range) in similar cases.[12] Implicit in this court's *Koczur* ruling is the notion that although a range of verdicts in comparable cases is lower than a damage award being challenged, it does not mandate remittitur to that range, particularly in the absence of qualitative or quantitative bases for those First Department verdict reductions.

Norfolk & Western Ry. Co. v Ayers, 538 US 135 (2003)("*Ayers*"), cited in *Koczur*, is insightful for this court's analysis as to the fairness of the $35 million damage award being challenged here. In *Ayers*, a jury in a Federal Employers' Liability Act case awarded six former railroad workers (suffering from work-related, non-terminal asbestosis) pain and suffering damage awards ranging from $770,000 to $1,200,000 for "fear of developing cancer. . ." (*Id.* at 140). In the majority decision, the US Supreme Court duly acknowledged it did not grant review to judge the reasonableness of these damage awards (an implied inference that such awards in those circumstances neither shocked their collective conscience nor materially deviated from what would be reasonable compensation[13]) (*Id.* at 159). And relevant to this discussion, the *Ayers* court ultimately held that these FELA claimants can recover mental anguish damages for fear of developing cancer without requiring these claimants to produce any medical

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[12] *Penn v Amchem Products*, 85 AD3d 475 (1st Dept 2011); *Pride v John Crane, Inc.*, 28 AD3d 255 (1st Dept 2006); and *Lustenring v A.C.&S., Inc.*, 13 AD3d 69 (1st Dept 2004).

[13] For an interesting analysis of the applicability of CPLR § 5501[c] in federal litigation, *see Gasperini v Center for Humanities, Inc.*, 518 US 415 (1996).

proof demonstrating their likelihood of contracting cancer or physical evidence of their claimed fears.

From this perspective, in looking at the totality of Peraica's circumstances, unchallenged on this record, including his prior health and lifestyle, his extraordinary mental and physical pain and suffering,[14] the two-year duration of his fatal mesothelioma and his constant apprehension of imminent death, Peraica's suffering was exponentially many times greater than that of the *Koczur* plaintiffs. *A fortiori*, and contrary to Crane's assertions, an eight figure jury award conceptually should not be deemed aberrant per se.

Nonetheless, in deciding whether remittitur is warranted here, this court has considered the precedential range of awards in mesothelioma cases while concomitantly giving deference to the deliberative process resulting in the jury verdict in issue. Accordingly, this court concludes that the jury award of $35 million for Plaintiff's pain and suffering from the onset of his terminal cancer until his untimely death deviates materially from what would be reasonable compensation and is excessive. Pursuant to CPLR §5501[c], this court grants the branch of Crane's post-verdict motion for remittitur to decrease the jury's aggregate pain and suffering award to $18 million, a sum that constitutes reasonable compensation under these circumstances.

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[14] Illustratively, see Golanski Opp Aff at ¶¶ 202-205 quoting the relevant portions of Plaintiff's daughter's sworn description of Peraica's last month of life. (In addition to the mesothelioma bilaterally impeding Plaintiff's ability to breathe, these tumors advanced to Peraica's abdomen [i.e., peritoneal carcinomatosis] and caused small bowel obstructions, intestinal strangulation, severe ascites, fecal vomiting and, of course, severe pain.) (*see* Exhibit 1 of Golanski Opp Aff at pp 4757-4759, 4765-4766, 4769, 4772-4773 and 4779). *See also*, *Hamilton v Garlock*, 96 F Supp 2d 352, 356 (SDNY 2000, Sweet, J)("It would be would difficult to imagine a more painful descent to death . . .").

Accordingly, it is

ORDERED that the branches of Crane's post-verdict motion for a judgment of dismissal, notwithstanding the verdict or, alternatively, to set aside the verdict as against the weight of the evidence is denied; and it is further

ORDERED that the branch of Crane's post-verdict motion for remittitur is granted, setting aside the jury verdict on damages for past pain and suffering and granting a new trial only on this issue of damages unless, within ten days after service of a copy of this decision and order with notice of entry, Plaintiff executes a stipulation agreeing to decrease the jury's aggregate award for pain and suffering from $35 million to $18 million; and it is further

ORDERED that the branch of Crane's post-verdict motion for otherwise privileged, settlement-specific discovery to mold the judgment is denied; and it is further

ORDERED that the parties shall submit a proposed molded judgment with due regard for adjustments contemplated by GOL §15-108.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
November 6, 2013

HON. MARTIN SHULMAN, J.S.C.