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

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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SELWYN HACKSHAW
IVAN SWEBERG,

Plaintiffs,

Index No.190022/13
Index No. 190017/13

-against-

DECISION/ORDER

ABB, INC. ET AL.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	5

Defendant Crane Co. ("Crane") 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 plaintiffs Ivan Sweberg ("Sweberg") and Selwyn A. Hackshaw ("Hackshaw") in a consolidated asbestos trial. In the alternative, it argues that the court should reduce the amount of the verdict so as to award reasonable compensation.

The underlying joint trial initially involved three plaintiffs and numerous defendants. There were two plaintiffs remaining at the time of trial, Sweberg and Hackshaw, and the only defendant remaining at the time of trial was Crane. The jury rendered a verdict in favor of the

plaintiffs and against defendant Crane. The jury awarded plaintiff Hackshaw $10,000,000 for pain and suffering from the date of diagnosis to the date of death. The jury awarded Sweberg $5,000,000 for past pain and suffering and $10,000,000 for future pain and suffering, for a total award of $15,000,000. The jury found Crane 9% liable for plaintiff Sweberg contracting mesothelioma and 20% liable for Hackshaw contacting mesothelioma and also found that Crane was reckless in failing to warn of the toxic hazards of asbestos.

Crane makes numerous arguments as to why the verdicts should be set aside. It argues that (1) the court erred in applying a forseeability standard in the jury instruction regarding duty to warn as it was contrary to the First Department's recent decision in *In re New York City Asbestos Litig. (Konstantin and Dummitt)*, 121 A.D.3d 230 (1st Dept 2014) ("Dummitt"): (2) the court erred in instructing the jury that there is a presumption that a plaintiff will heed a warning if it is provided and there was insufficient evidence that plaintiffs would have heeded a warning; (3) the jury's recklessness findings were not supported by the evidence; (4) the court's instruction on recklessness was improper; (5) plaintiffs failed to sufficiently establish that plaintiffs' exposures to any materials for which Crane was responsible were a substantial factor in causing their diseases; (6) the court erred in the instructions the jury was given on the duties of a manufacturer or seller of a product; (7) the court erred in not permitting the jury to consider the superseding/intervening cause doctrine; (8) Crane was unduly prejudiced by the consolidation; (9) the jury's allocation of fault is not supported by the evidence; and (10) potential external influences affecting the verdict were not properly investigated. In the alternative, Crane argues that the jury's award exceeds what is a reasonable award under the circumstances.

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

The court will first address Crane's argument that the court erred in applying a forseeability standard in the jury instruction regarding duty to warn as it was contrary to the First Department's recent decision in *In re New York City Asbestos Litig. (Konstantin and Dummitt)*. 121 A.D.3d 230 (1st Dept 2014). The jury instruction which Crane challenges, which is taken directly from the language contained in PJI 2:120, stated:

> The manufacturer or seller of a product which is reasonably certain to be harmful if used in a way that the manufacturer should reasonably foresee is under a duty to use reasonable care to give adequate warning of any dangers known to it or which in the use of

reasonable care it should have known and which the user of the product ordinarily would not discover.

Crane argues that the foregoing instruction is prohibited by the First Department's decision in *Dummitt,* which prohibits the use of the term foreseeable.

Initially, separate and apart from the First Department's discussion of the use of the term foreseeability in *Dummitt,* there was no error in the court providing the jury with this charge based on Crane's sale, marketing and distribution of Cranite, an asbestos product, under its own name and brand. There was evidence during the trial that one of the plaintiffs, Hackshaw, was exposed to Cranite, which was an asbestos product sold and distributed by Crane under its own name. With respect to the sale of Cranite, there is no basis whatsoever for challenging the foregoing jury instruction.

With respect to Crane's argument that the use of the term foreseeable was improper as Crane did not otherwise manufacture or sell asbestos products, the court finds that any argument that the use of the term foreseeable was improper is waived as Crane never objected to the use of the foreseeability language in the jury charge. Although Crane made a general objection that it did not have any duty to warn on the ground that it did not actually place the products into the stream of commerce, it never made any specific objection to the use of the foreseeability language in the jury charge provided to the jury.

However, even if the court does entertain Crane's argument regarding the use of the term foreseeability, Crane made the same exact argument to the First Department that it is now making to this court and the First Department rejected this argument. Crane argued to the First Department "that the use of the word foreseeability in the jury charge was so prejudicial to it that,

at the very least, a new trial is necessary." *Id.* at 252. The court rejected this argument, holding as follows;

> There is a place for the notion of foreseeability in failure to warn cases, where, as here, the manufacturer of an otherwise safe product purposely promotes the use of that product with components manufactured by others that it knows not to be safe. To be sure, mere foreseeability is not sufficient (see Surre, 831 F.Supp.2d at 802 [" a duty to warn against the dangers of a third party's product does not arise from foreseeability alone"]). This explains why the manufacturer was absolved of liability in Rastelli, where it was not concerned with what type of rims would be used with its tires. However, this case is not even close to Rastelli because of Crane's demonstrated interest in the use of asbestos components with its valves. Accordingly, the charge as given had no potential to communicate the wrong standard to the jury.

Id.

The court further stated that the cases on the topic of the scope of the duty to warn:

> together stand for the rather unremarkable proposition that where there is no evidence that a manufacturer had any active role, interest, or influence in the type of products to be used in connection with its own product after it placed its product into the stream of commerce, it has no duty to warn. The cases cited by the Dummitt plaintiff, however, demonstrate that where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product.

Id. at 250.

In the present case, as in Dummitt, the charge provided by the court had "no potential to communicate the wrong standard to the jury" as there was abundant evidence introduced during the trial which demonstrated Crane's "significant role, interest, or influence in the type of component used with its product." *Dummitt,* 121 A.D.3d at 250. There was ample evidence presented during the trial that Crane designed and supplied its products with asbestos containing gaskets, packing, insulation and cement and that it promoted the sale of asbestos insulation to be applied to its boilers. There was evidence presented at trial that Crane first incorporated an

asbestos component into a Crane product in approximately 1858; that throughout Crane's history, some of its valves, pumps and boilers contained asbestos and that it sold products on a regular basis which had asbestos components; that it knew that many of the products it sold contained asbestos components inside of them; that Crane knew that some of the pumps it sold throughout its history contained asbestos components, including packing and gaskets; that Crane knew that some of its boilers would have asbestos containing components; that Crane knew that many of the valves it sold contained asbestos components, including gaskets which contained asbestos; that Crane sold asbestos containing gaskets, asbestos containing sheet gasket material, asbestos containing packing, asbestos cement pipes, asbestos pipe covering, asbestos millboard, asbestos block and asbestos cement through Crane supply houses; that Crane sold asbestos block insulation and asbestos cement insulation; and that Crane knew that some of the asbestos block insulation and cement insulation it sold would be used to insulate boilers and that the asbestos materials would be used to insulate other Crane products. Trial transcript pgs. 1674-1703. In fact, Crane's corporate representative testified at trial that "part of the reason that Crane sold these associated products, the asbestos gaskets, packing and insulation materials was to be used with the metal products that Crane actually made in their factories, the valves, the pumps and the boilers". Trial transcript, pg. 1698. There was also evidence that Crane "sold asbestos gaskets and packing because Crane knew that at times asbestos gaskets and packing had to be replaced out in the field by someone maintaining Crane valves, Crane pumps, or Crane boilers". Trial transcript, pg. 1698. There was also testimony that it "was common knowledge in the industry that when asbestos gaskets and asbestos packing were replaced, that the customer would replace those parts they're taking off with asbestos gaskets and packing"; that "Crane recommended

where possible, when you remove the gasket or packing from a Crane valve, pump or boiler, come back to Crane and buy the original part, the gasket or packing that went into that valve, pump or boiler"; that Crane "knew that there would be folks out there in the field who bought a Crane valve, pump or boiler who would also buy from Crane asbestos thermal insulation [to] insulate Crane boilers" and insulate Crane valves; and that "Crane recommended in its own catalogues... the use of this asbestos thermal insulation on Crane valves, pumps and boilers." Trial transcript pgs. 1699-17001. Based on the foregoing evidence introduced at trial, which amply demonstrated Crane's significant role, interest, or influence in the asbestos components used with its products after they entered the stream of commerce, the charge on duty to warn in the present case had no potential to communicate the wrong standard to the jury.

Crane next argues that the court erred in instructing the jury that there is a presumption that a plaintiff will heed a warning if it is provided and there was insufficient evidence that plaintiffs would have heeded a warning. The jury instruction which Crane is challenging stated as follows;

> There is a presumption that a user would have heeded warnings if they had been provided and the injury avoided. However, the presumption may be rebutted by specific facts showing that the warning would have been futile.

The court in the present case finds that there is no basis for granting a new trial based on the rebuttable heeding presumption provided by the court. With respect to both plaintiffs, the issue is irrelevant as it was in *Dummitt* because both plaintiffs testified that they would have heeded a warning if it had been provided to them.

Crane next argues that the court's instruction on recklessness was improper and that the jury's recklessness findings were not supported by the evidence. These arguments are both

without merit. Initially, Crane has waived any objection it may have had to the court's instruction on recklessness as it failed to preserve any objection to the charge given by the court. See CPLR § 4110-b ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection.") Although Crane objected to the jury being provided with a recklessness charge, it did not make any objection to the language of the charge itself. Moreover, the language which the court used in the recklessness charge tracked the standard language contained in the New York Pattern Jury Instructions.

Moreover, the jury's finding of recklessness was supported by the evidence. Just as the First Department found in the *Dummitt* case against Crane, there was;

> sufficient evidence showing Crane's reckless disregard for the hazards posed by asbestos. The evidence demonstrated that Crane had received warnings about the dangers of asbestos as early as the 1930's from various trade associations, and Crane admitted it knew of the dangers of asbestos by the early 1970's.

Similarly, Justice Shulman in *Peraica v. A.O. Smith Water Prods. Co,* Index No. 190339/2011 (Sup Ct. NY Co 2013) rejected the same claim made by Crane that there was insufficient evidence of recklessness, based on essentially the same evidence, concluding "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 [Crane] acted with reckless disregard for decedent's safety for failing to warn him of the dangers associated with... [insulating ACMs [asbestos-containing materials] others manufactured and supplied that was meant to be/was applied to its boilers]." Similarly, Justice Madden upheld the recklessness finding in *Dummitt,* concluding as follows:

> Giving plaintiff the benefit of all favorable inferences, this evidence supports an inference

> that Crane had knowledge in the 1930's and 1940's of the dangers of asbestos, well before plaintiff's exposure in the 1960's. This knowledge and Crane's failure to test its valves for release of asbestos during maintenance and repairs, together with an inference of Crane's knowledge that asbestos insulated gaskets and packing would be used with its valves, establish sufficient evidence from which a jury could infer that in failing to warn, Crane acted intentionally concerning a known risk with conscious indifference as to harm that was highly probable.

In Re New York City Asbestos Litig: Dummitt v. A.W. Chesterton, Index No. 1090196/2010 (Sup Ct N.Y. Co 2012). For the same reasons articulated by the First Department in *Dummitt,* by Justice Madden in *Dummitt* and by Justice Shulman in *Peraica,* this court finds that there was sufficient evidence before the jury to sustain a recklessness finding.

Crane next argues that plaintiffs failed to sufficiently establish that their exposures to any materials for which Crane was responsible were a substantial factor in causing their diseases. Specifically, it argues that plaintiffs failed to establish specific causation as required under the holding in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006). This argument is rejected for the same reasons articulated by Justice Madden in her decision in *Dummitt,* where she concluded that plaintiff had established legally sufficient evidence of specific causation. Both Hackshaw and Sweberg sufficiently testified in detail to their extensive exposure to asbestos emanating either from Crane's products or from products manufactured by Crane which used asbestos during their respective careers.

Crane also argues that it is entitled to a new trial because the instructions on the duties of a manufacturer or seller of a product usurped the role of the jury and did not accurately reflect the law. The instructions which Crane objects to stated as follows:

> If information was available concerning the dangers of a product, the manufacturer or seller of the product is conclusively presumed to know that information....Further, a manufacturer or seller of a product must keep abreast of knowledge of the effect of its

> product as gained through research, testing, scientific literature and other available sources or methods. It is obligated to keep informed of scientific and technical discoveries in its particular field.

However, the language in these instructions is supported by the commentary to Pattern Jury Instruction, Products Liability and the relevant case law. The commentary to PJI section 2:120 provides as follows:

> The manufacturer is required to keep abreast of developments in the state of the art, through research, accident or other reports, scientific literature, and other available methods and may be held liable for failure to warn of dangers and risks which come to its attention following user operation of the product. Cover v. Cohen, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (citing PJI); Andre v Mecta Corp, 186 AD2d 1, 587 NYS2d 334.
>
> The manufacturer is under a duty to ascertain the nature of its product and is presumed to have superior knowledge of it, Noone v. Fred Perlberg, Inc., 268 AD 149, 49 NYS2d 460, aff'd, 294 NY 680, 60 NE2d 839. Thus, evidence that defendant distributor had not tested or investigated the safety of its asbestos containing dental liners was sufficient to permit the jury to conclude that the distributor had failed to adequately warn potential users of the danger, Penn v Amchem Products, 73 A.D.3d 493, 903 NYS2d 1.

PJI section 2:220, pg. 762. *See also George v. Celotex Corp.*, 914 F.2d 26, 27 (2d Cir. 1990) (manufacturer "is held to the knowledge of an expert in its field (citations ommitted) and therefore has a duty 'to keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted thereby'".)

Crane also argues that the verdict should be set aside on the ground that the court failed to give a superceding/intervening cause instruction to the jury. This argument is without basis. The Court of Appeals has held as follows:

> 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 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 N.Y.2d 308, 315 (1980). In the present case, as in the *Peraica* case tried before Justice Shulman, Crane did not prove that any alleged negligence of Sweberg or Hackshaw's employers or property owners in failing to protect plaintiffs from work-site exposure "was so extraordinary as to be unforeseeable to Defendant thereby shielding Crane from any culpability for its own negligence in failing to warn." *Peraica*, pg. 13. As a result, there was no basis for charging the jury with a superceding/intervening cause instruction.

Crane's argument that it is entitled to a new trial on the ground that it was unduly prejudiced by the consolidation of the cases is without merit. This court has already provided the reasons why it found it appropriate to consolidate these particular cases in the court's initial decision allowing consolidation of certain of these cases.

Crane's argument that it is entitled to a new trial because the jury's allocation of fault is not supported by the evidence is without basis. The court finds that there was a sufficient evidentiary basis for the jury's determination as to the allocation of fault based on the evidence presented at trial, which allocated 20% of the fault to Crane in the Hackshaw case and awarded 9% of the fault to Crane in the Sweberg case.

Crane's argument that it is entitled to a new trial because potential external influences affecting the verdict were not properly investigated is without basis. This claim of external influence is based on a letter to the court from one of the jurors in which she stated that she was a dissenting juror during deliberation and that her regret was that she did not submit her name as such. She specifically stated in the letter that "I am fully aware that this letter comes after the fact. I just need to express this to follow my conscience." During the actual trial, the verdict

finding defendant Crane liable was unanimous without any dissenting jurors and each of the jurors was individually polled as to each question on each verdict sheet and confirmed their individual verdicts in open court. Under these circumstances, there was no basis for this court to conduct any further investigation regarding the letter received from the juror as it was clear from the circumstances of the trial and the letter itself that the juror was simply expressing her second thoughts after the trial about agreeing to a verdict against Crane at the time of trial.

The next issue the court must address is whether the jury's award to Hackshaw of $10,000,000 for past pain and suffering from the onset of mesothelioma to the date of his death and award to Sweberg of $5,000,000 for past pain and suffering from the onset of his mesothelioma to the date of verdict and $10,000,000 for future pain and suffering was excessive and if so, whether a new trial on the issue of damages should be ordered. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation." CPLR §5501 (c). In order to determine whether the award was excessive, the court must compare the instant case with analogous cases with awards that have been previously upheld. *See Donlon v. City of New York*, 284 A.D.2d 13, 18 (1st Dept 2001). In addition to comparing the instant case with previous awards that have been upheld, this court finds that it is also appropriate to consider that the juries in the asbestos litigation in New York County have frequently awarded sums far greater than those upheld by the appellate courts. This court cannot ignore the fact that if the juries are frequently awarding higher amounts than the amounts upheld by the appellate courts, that these higher amounts are considered reasonable by the juries of New York County who are ultimately charged with determining what constitutes reasonable compensation.

The most recent decision from the First Department addressing the issue of the amount of damages to be awarded in a mesothelioma case is *Dummitt.* In that case, the First Department upheld an award of past pain and suffering of $4.5 million and $3.5 million for future pain and suffering. It also upheld an award of past pain and suffering of $5.5 million and an award for future pain and suffering for $2.5 million. In other decisions, the First Department upheld an award of $1.5 million for past pain and suffering and $2 million for future pain and suffering *(Penn v. Achem Products*, 85 A.D.3d 475) (1st Dept 2011) and $3 million and $4.5 million respectively (*Matter of New York Asbestos Litig, Marshall*, 28 A.D.3d 255) (1st Dept 2006).

With respect to Hackshaw, who was deceased at the time of trial, the jury awarded $10,000,000 for past pain and suffering from the date of diagnosis until the time of death, which was a period of twelve months. During that period, he went through debilitating chemotherapy treatments; he underwent surgery, a pleurectomy where the pleura had to be removed to get to the tumor; he was in intense pain; he had great difficulty breathing and was placed on a bipap breathing machine and was unable to communicate at the end of his life. Based on all the circumstances of Mr. Hackshaw's injuries, the award of $10,000,000 for past pain and suffering deviates materially from what would be reasonable compensation. Pursuant to CPLR 5501 (c), the award for past pain and suffering is vacated and a new trial ordered on the issue of damages unless plaintiff within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the award to $6 million.

With respect to Sweberg, who was alive at the time of trial, the jury awarded $5 million for past pain and suffering up until the time of trial (June 11, 2014) and $10,000,000 for future pain and suffering for a period of 1.5 years. Sweberg first started experiencing symptoms from

mesothelioma in the summer of 2012. In January 2013, he had pleurectomy surgery where they took out the lining of his lungs, repaired part of the diaphragm and gave him heated chemotherapy. He then had six cycles of chemotherapy; underwent stereotactic body radiation; had further chemotherapy; and had further radiation treatments. He suffers from an enormous amount of pain as a result of his disease and the various procedures he has endured. Based on all of the circumstance of this case, the court finds that award of $5 million for past pain and suffering for Sweberg does not deviate materially from what would be reasonable compensation. However, the award of $10,000,000 for future pain and suffering does deviate materially from what would be reasonable compensation. Pursuant to CPLR 5501 (c), the award for future pain and suffering is vacated and a new trial ordered on the issue of damages for future pain and suffering unless plaintiff within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the award of damages for future pain and suffering to $5 million.

Crane's requests with respect to discovery and moulding the judgment have been addressed at the oral argument of this motion.

Accordingly, it is hereby

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

ORDERED that the motion of Crane to set aside the verdict is granted only to the extent of vacating the award of past pain and suffering to Hackshaw and future pain and suffering to Sweberg and ordering a new trial on these issues unless plaintiffs within thirty days of service of a copy of this decision and order with notice of entry stipulate in the Hackshaw case to reduce the

amount of past pain and suffering to $6 million and in the Sweberg case to reduce the amount of future pain and suffering to $5 million; and it is further

ORDERED that the balance of the motion of Crane to set aside the verdict is denied..

Dated: 1/7/15

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.