

FILED: NEW YORK COUNTY CLERK 12/15/2017 03:19 PM

INDEX NO. 190219/2016

NYSCEF DOC. NO. 925

RECEIVED NYSCEF: 12/15/2017

**SUPREME COURT OF THE STATE OF NEW YORK**  
**HON. MARTIN SHULMAN NEW YORK COUNTY**

Index Number : 190219/2016

MCGLYNN, THOMAS

vs

AERCO INTERNATIONAL INC.

Sequence Number : 040

OTHER RELIEFS

PART 1

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

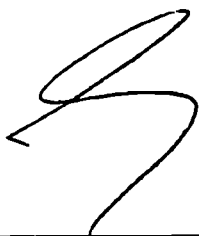
The following papers, numbered 1 to 3, were read on this motion to for post-trial relief

Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits	<u>A-Q</u>	No(s). <u>1</u>
Answering Affidavits — Exhibits	<u>1-49</u>	No(s). <u>2</u>
Replying Affidavits	<u>- Exh. 1</u>	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the decision spread upon the record on  
December 4, 2017.

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

Dated: DEC 14 2017

  
\_\_\_\_\_, J.S.C.

HON. MARTIN SHULMAN

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

1

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 NEW YORK COUNTY : CIVIL TERM : PART 1

3 THOMAS MCGLYNN,

4 Plaintiff,

5 -against-

6 AERCO INTERNATIONAL, INC., et al.,

7 Defendants.

Index No.  
190219/2016

PROCEEDING

8 December 4, 2017

9 60 Centre Street  
New York, New York

10 B E F O R E :

11 HON. MARTIN SHULMAN, Justice

12 A P P E A R A N C E S :

13 SIMMONS HANLY CONROY  
14 Attorneys for the Plaintiff  
15 112 Madison Avenue  
New York, New York 10016  
16 BY: JAMES KRAMER, ESQ.  
LAURENCE VALERE NASSIF, ESQ.

17 CLYDE & CO. US LLP  
18 Attorneys for the Defendant  
19 The Chrysler Building  
405 Lexington Avenue  
New York, New York 10174  
20 BY: JEFFREY FEGAN, ESQ.  
PETER DINUNZIO, ESQ.

21 Anne Marie Scribano  
22 Senior Court Reporter

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## Proceedings

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1 THE COURT: Good afternoon.

2 Before the Court are two post-verdict motions. We  
3 have both. On behalf of Jenkins Brothers, there is a  
4 post-verdict motion for judgment, notwithstanding the  
5 verdict, raising a number of issues. On the other side, we  
6 have the plaintiff, with a motion for additur.

7 On the table are hard copies of various papers  
8 presented on this round of post-verdict motion practice.  
9 Everything has been E-Filed. I leave it to respective  
10 counsel to make sure your respective papers are in order for  
11 purposes of appellate review.

12 I want to emphasize at this time that I'm not  
13 going to go through every single argument. Your papers,  
14 respectively and respectfully, speak for themselves. I have  
15 made it very clear from the inception of this trial -- from  
16 the inception of jury selection that I have preserved each  
17 party's rights with respect to objections, exceptions. From  
18 my point of view, there was no waiver of any of those  
19 objections or exceptions, so we don't need to reiterate all  
20 of them.

21 To the extent that I have received a stipulation  
22 on a particular point, the parties can debate the scope and  
23 breadth of that stipulation. But putting that issue aside,  
24 I believe there were discussions in the papers concerning  
25 use of interrogatories, so we understand what we're talking

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1 about, we'll get there, but that's the only area there can  
2 be a debate about waiver. From my point of view, all rights  
3 are fully preserved for all parties.

4 Fair enough?

5 MR. KRAMER: Fair enough.

6 MR. FEGAN: Yes, Judge.

7 THE COURT: There are no particular issues that  
8 are of greater importance, they are all important, but I may  
9 take certain issues out of turn, even though they were put  
10 in your respective briefs or memoranda in a certain order,  
11 just to get rid of that issue or address it earlier because  
12 I perceive it to be an easier type of issue that will not  
13 necessarily lend itself to extensive colloquy.

14 That said, to quickly summarize Jenkins Brothers'  
15 position -- hereinafter we will refer to the defendant as  
16 Jenkins and we will refer to the decedent, Thomas McGlynn,  
17 as the plaintiff on this record -- Jenkins contends that it  
18 should be awarded a JNOV because:

19 Dr. Moline's causation opinion was invalid based  
20 on Dummitt and Juni.

21 Her opinion was based on facts not in evidence.

22 Jenkins did not bear any responsibility for  
23 thermal insulation applied by others.

24 And ship owners' and Brady Marine's failure to  
25 follow workplace safety was an intervening cause and broke

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1. the chain to impose liability on Jenkins.

2. Against that backdrop, Jenkins argues that it  
3. deserves a new trial on liability, apportionment and  
4. recklessness because:

5. It was error to exclude evidence of the Scotland  
6. defense.

7. There were erroneous rulings regarding the  
8. quashing of trial subpoenas and preclusion of settled  
9. parties' interrogatories affecting Jenkins' apportionment  
10. rights.

11. GOL 15-108 requires settled parties to be on the  
12. verdict sheet even in the absence of a jury finding  
13. apportionment of liability against them.

14. It was error to charge recklessness and the  
15. finding of recklessness was against the weight of the  
16. evidence.

17. Finally, assuming we get through all these issues,  
18. Jenkins argues that the verdict was fair and reasonable.

19. In opposition, plaintiff argues that Jenkins  
20. failed to meet its burden with competent evidence that  
21. plaintiff was, in fact, exposed to asbestos during the years  
22. he worked in Scotland's navy yards. Notably, to arguably  
23. support a factual basis for the perceived Scotland defense,  
24. in the face of plaintiff's uncontroverted denial of asbestos  
25. exposure over there, Jenkins counters this testimony solely

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1 with literature and unfounded assumptions and hypotheticals  
2 posed to an industrial hygienist, who testified during the  
3 course of the trial; the literature, some of which were  
4 anecdotal in nature.

5 Plaintiff was competent to identify asbestos in  
6 packing, gaskets and thermal insulation throughout his  
7 career as a welder/burner in the United States during his  
8 various employments (even if he did not know about the  
9 hazards of asbestos).

10 Plaintiff argues that the Court correctly ruled in  
11 quashing the settled defendants' trial subpoenas and in only  
12 allowing interrogatories verified by witnesses with personal  
13 knowledge.

14 And because Jenkins' experts definitively opined  
15 that plaintiff's exposure to gaskets and packing did not  
16 contribute to mesothelioma, Jenkins could not use Dr.  
17 Moline's causation testimony to support its Article 16  
18 burden.

19 Plaintiff goes on to argue in opposition that the  
20 jury verdict on liability, apportionment and recklessness  
21 should be sustained because:

22 Dr. Moline's causation testimony is supported by  
23 record evidence and comports with New York law.

24 Her testimony was supported by plaintiff's  
25 testimonial evidence.

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1 The evidence supports the jury verdict that  
2 Jenkins failed to warn about the hazards of thermal  
3 insulation on its valves.

4 And that the Court correctly ruled; denying  
5 Jenkins a directed verdict vis-a-vis the respective  
6 employers' failure to follow mandated work safety rules and  
7 which was not an intervening cause breaking the chain as to  
8 Jenkins' liability.

9 The Court properly allowed plaintiff's testimony  
10 as to his personal knowledge about the asbestos-containing  
11 products in Jenkins' valves, while excluding testimony  
12 resting on hearsay (otherwise not consented to between  
13 counsel) during the course of this trial.

14 I think I fairly summarized the respective  
15 positions here.

16 I'm saving additur for last.

17 Let's take some of the easier issues.

18 Against this summarized backdrop: The Scotland  
19 defense. Did I fairly or inaccurately summarize what you  
20 had on this record to oppose Mr. McGlynn's uncontroverted  
21 testimony about the nature and scope of his work?

22 MR. FEGAN: Well, what I would add briefly to  
23 that, Judge, is the issue of Mr. McGlynn's medical records  
24 that we had relied on, I think, if you remember, statements  
25 that indicated the length of his time working in shipyards

## Proceedings

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1 and that it was about 10 years longer than, give or take,  
2 longer than what he described working in shipyards in  
3 America. So that was part, I think, of our circumstantial  
4 evidence that, if we had been able to show the jury, would  
5 have gone towards that Scotland defense, so to speak.

6 But other than what your Honor recited, I think  
7 that's all I would add to it.

8 THE COURT: Just so that we're clear on this  
9 record, because you know it better than me -- when I say  
10 "this record," I am not necessarily limiting the record to  
11 the trial record and at times mean the historic record --  
12 outside of questioning Mr. McGlynn during his deposition,  
13 there were no amplification of pleadings to advance this  
14 particular defense; and there were no motions for discovery  
15 or to compel discovery on this issue. As I understand it,  
16 from my perspective, and I use the term colloquially, the  
17 Scotland defense was first raised during our very first  
18 pretrial conference, as we were selecting the jury, and you  
19 and other co-defendants at the time were advancing it or  
20 attempting to advance it, and I was responding to a pretrial  
21 in limine motion precluding the Scotland defense.

22 Am I correct on that point?

23 MR. FEGAN: Yes.

24 THE COURT: Okay.

25 MR. FEGAN: The only thing I would add on that,



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1 just in terms of discovery motions, et cetera, I don't know  
2 that that really would have been in Mr. McGlynn's power to  
3 give us, in terms of what we didn't do to get that kind of  
4 information from him. I don't know --

5 THE COURT: Well --

6 MR. FEGAN: It isn't like he was a Con Ed that we  
7 could have pulled records from.

8 The other thing I was saying, you know, it's -- I  
9 don't know how much this is actually worth at this point --  
10 we were in the case for Jenkins maybe six months before the  
11 case went to trial, so, I mean, I'm not -- that's not  
12 dispositive, of course, but I just want to make sure that we  
13 don't leave an impression that we were sitting on this for,  
14 you know, a year and a half or something. It was a  
15 fast-moving case.

16 THE COURT: I understand.

17 But there are all kinds of discovery one could  
18 attempt to seek, co-worker information, or doing a search of  
19 who may have been working in Scotland, trying to trace  
20 people from that time who are in America.

21 Again, I'm not faulting Jenkins. I'm putting it  
22 in perspective on this record.

23 With the exception of certain references to  
24 medical records that you remind me of, there was no other  
25 competent evidence that controverted Mr. McGlynn's testimony

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1 as to the description of the nature of his work in Scotland,  
2 working as a burner -- my word -- on the skeleton of the  
3 ships prior to their being fitted with insulation as  
4 finished ships in that context.

5 And, again, the literature is what it is. Some of  
6 it, I recall, is anecdotal, e.g., discussing interviews of  
7 workers.

8 We're not questioning that that may have been the  
9 asbestos capital in the UK, but for purposes of this record,  
10 I want to make very clear, from my point of view, that that  
11 basis to set aside the verdict as to perceived error in not  
12 advancing that particular defense is denied.

13 Another easier issue is -- it may be something for  
14 Mr. Dinunzio to respond to -- is my ruling on the quashing  
15 of the subpoenas and my selective admission to various  
16 interrogatories.

17 And you devoted a great deal of ink on that  
18 subject in your brief.

19 Again, it is your contention that my ruling had  
20 affected your ability to be able to advance a meaningful  
21 Article 16 apportionment defense in that regard.

22 So that I'm clear, Mr. Dinunzio, I believe that  
23 the bulk of my rulings in quashing the trial subpoenas  
24 focused on the improper service of process; that most of  
25 these companies that you sought to compel the production of

## Proceedings

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1 a corporate representative or someone with personal  
2 knowledge to speak on whatever subject you wanted from that  
3 company of those settled defendants were outside of New York  
4 and, therefore, I believe, I ruled that the manner of  
5 service of the subpoena was improper and, therefore, this  
6 Court didn't really have any jurisdiction to compel their  
7 production.

8 Am I correct on that, sir?

9 MR. DINUNZIO: I would add one thing to that.

10 That certainly was one of the bases for your  
11 ruling. The other one was --

12 THE COURT: I'll get there.

13 And the other basis, because we were left with, I  
14 think, nine companies, was whether -- and if I'm mistaken  
15 don't hold me to it -- was the manner of service on the  
16 registered agent. And, again, it was the timing of the  
17 manner of service of the registered agent.

18 Again, that supports my ruling procedurally on  
19 that score.

20 Am I correct on that, sir?

21 MR. DINUNZIO: Yeah. I thought the issue was  
22 service upon the attorneys.

23 THE COURT: That was one issue. But there was a  
24 separate issue, my recollection, not from the papers, was  
25 that there was an attempt to serve the Secretary of State.

## Proceedings

11

1 Do you recall that, Mr. Kramer?

2 MR. KRAMER: Yes.

3 We mentioned this in our papers as well, an issue  
4 with the registered agent for service of process and whether  
5 or not that was appropriate. And our argument was, as  
6 theirs at the time was, that it was not.

7 THE COURT: It was not at the time.

8 And then you hang your hat, colloquially, on the  
9 notion that I perceived -- that I may have committed  
10 reversible error in foreclosing the -- in quashing the  
11 subpoenas on public policy concerns. And Jenkins quoted me  
12 in their papers as doing that because, I guess, my reaction  
13 was this is the first time I've ever had that issue.

14 There's always a concern, at least I thought about  
15 it at the time, you know, that maybe I may be mistaken. But  
16 in having time to reflect, I feel a little more confident  
17 about the notion that -- and I speak for all participants in  
18 NYCAL -- that, if you were a settled defendant, would you  
19 want to be hauled into court to testify at later trials,  
20 which could arguably chill your ability to make meaningful  
21 settlements, which is something this Court has the  
22 discretion to think about. The question in my mind at the  
23 time was whether this is a legally cognitive basis to quash  
24 a subpoena, separate from the procedural bases for quashing  
25 the subpoena. And that's why I may have said this was new

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1 ground for me. And I'm not sure there was any case law to  
2 support that particular notion.

3 Do you want to respond to that? Do you need to  
4 respond to that?

5 MR. DINUNZIO: I guess I would add that we  
6 articulated on the record why we thought the service of the  
7 subpoena was proper, both through the attorneys of record,  
8 as well as through the registered agents, through CPLR and  
9 the relevant provisions of the Business Corporation Law.

10 THE COURT: Do you need to add anything to that?

11 MR. KRAMER: I don't believe so, your Honor.

12 THE COURT: So another easier issue is Jenkins'  
13 contention that I erred in not allowing it to list all the  
14 settled defendants on the verdict sheet, even in the absence  
15 of any evidence for a jury to assign an equitable share of  
16 fault to that particular settled defendant.

17 And there was a debate between yourself and  
18 plaintiff's counsel on how one interprets GOL 15-108 and  
19 Article 16 in the context of avoiding double recovery and  
20 the various cases that address the interplay of these two  
21 statutes. And it was your view that even in the absence of  
22 meeting an Article 16 burden, the mere fact that plaintiff  
23 settled with a defendant somehow suggests implied liability,  
24 which puts the company on the verdict sheet for purposes of  
25 the jury assigning a percentage of fault.

## Proceedings

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1 Am I correct in understanding your argument on  
2 this?

3 MR. DINUNZIO: Essentially, yes.

4 We think that both the statutory framework of GOL  
5 15-108 and Article 16, as well as the Bigelow case, which we  
6 cite in our papers --

7 THE COURT: And how do you expect the jury, in the  
8 absence of any fault evidence, to assign a percentage of  
9 fault in that context?

10 MR. DINUNZIO: So I guess I was getting to that.

11 In terms of the Bigelow case, it explains what you  
12 need in order to put the issue before the jury, which is  
13 identification of the settling tortfeasor's product and some  
14 proof of the plaintiff's exposure to that product.

15 THE COURT: Do you need to respond?

16 MR. KRAMER: I'll respond insofar as, Judge, in  
17 the Bigelow case, what the Court states -- what Justice  
18 Freedman states is, over and over again, Celotex, which is  
19 the defendant there, had the burden of establishing the  
20 liability of the settled defendants. And part and parcel of  
21 that is the burden that the plaintiffs themselves have to  
22 advance, which is showing; -- ID'ing a product, showing  
23 exposure, showing causation, showing negligence. All the  
24 same elements would have to be met. It's not as simple as  
25 naming a party and showing the possibility of the exposure.

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1 This legal concept is echoed throughout the case  
2 law on the subject, most notably in the Whalen case, which  
3 defendant cites to advance their own argument.

4 The Court in Whalen acknowledges the fact that, in  
5 order to meet one of the prongs of the GOL, you either have  
6 to prove a party's share of the fault, and if that's not  
7 done, but there is an offset based on settlements, then  
8 there's an offset based there. But it has to be one or the  
9 other. There has to be a showing of fault. It's inherent  
10 in the statute.

11 THE COURT: Okay. Well, I put the issue out  
12 there.

13 A basis to set aside the verdict grounded on your  
14 interpretation of GOL 15-108, is denied.

15 I need to go back to the interrogatories.

16 There was a great deal of back and forth on this  
17 record concerning what may have been a stipulation between  
18 the parties to allow certain interrogatory answers to be  
19 read to the jury on behalf of various entities or  
20 tortfeasors so as to get those entities on the verdict  
21 sheet.

22 Evidently, plaintiff was concerned that they were  
23 addressing a limited number of interrogatories that  
24 apparently expanded in the wee hours of that morning and  
25 they took issue with that. And I think I basically ruled

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1 against the plaintiffs in saying "No. No foul. No real  
2 surprise there. You have the ability to present to this  
3 jury any and all interrogatories that meet certain  
4 evidentiary criteria."

5 I know there was a discussion of certain core  
6 answers to certain questions, identification of the product,  
7 that it contained asbestos. I don't want to belabor that  
8 point.

9 And I believe we also discussed how the use of  
10 interrogatories made sense in light of the current CMO and I  
11 believe that the stay had been lifted or vacated at the  
12 time -- was it vacated at the time?

13 MR. DINUNZIO: It was not --

14 MR. KRAMER: The Appellate Division, I believe,  
15 ruled during the course of trial that the new CMO could go  
16 forward, but we were bound by the prior CMO at the time.

17 MR. DINUNZIO: It was actually about a month after  
18 the trial. I believe the stay was vacated by the First  
19 Department on or about September 19th.

20 MR. KRAMER: That might be true.

21 THE COURT: Then I wasn't sure.

22 MR. KRAMER: My main point being we were bound by  
23 the first CMO.

24 THE COURT: Fair enough.

25 MR. DINUNZIO: I think you did allude to it, your



## Proceedings

16

1 Honor, in fairness.

2 THE COURT: That all being said, my focus was that  
3 I had no quarrel with the interrogatories being read to the  
4 jury, provided that the verification established that the  
5 person who provided the answers did so based on personal  
6 knowledge, as opposed to on information and belief, because  
7 then it doesn't quite have the gravitas that I believe is  
8 appropriate under our rules of evidence.

9 It's your position that I erred in insisting that  
10 we only read interrogatories from individuals with personal  
11 knowledge, am I correct?

12 MR. DINUNZIO: I think that's not necessarily what  
13 we're claiming was the error.

14 THE COURT: Then what was the error?

15 MR. DINUNZIO: Well, it was both precluding the  
16 admission of the interrogatories and quashing the subpoenas,  
17 so we had no opportunity to have a witness come in with  
18 personal knowledge to cure any defect in the verification.

19 THE COURT: Okay, okay.

20 MR. DINUNZIO: I mean, I think, on the record  
21 there may have been some colloquy that we may have disagreed  
22 with some of their verifications, but don't disagree with  
23 the general course.

24 THE COURT: Anything to add on that?

25 MR. KRAMER: No, your Honor.

## Proceedings

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1 THE COURT: So let's move on the separate issue of  
2 whether there was an intervening cause or a break in the  
3 chain by virtue of the various ship owners and Brady Marine  
4 not complying with certain mandatory work-safety protocols  
5 and their failure to do so somehow absolves Jenkins Brothers  
6 of liability.

7 That is a core section in your papers and suffice  
8 it to say I didn't quite grasp the concept. I mean, I  
9 understood what you wrote, but in the face of well-settled  
10 law that a manufacturer has non-delegable duty to warn and  
11 cannot simply impose that obligation on others, plus other  
12 evidentiary factors that don't quite support the notion of  
13 an intervening cause on this record, because I don't quite  
14 grasp my understanding of what an intervening cause really  
15 is and why this should constitute that from, your point of  
16 view.

17 MR. FEGAN: I think, Judge, aside from what we  
18 have in our papers, the facts in this case, as opposed to  
19 the vast majority of the cases I have seen, involve exposure  
20 that exclusively starts so late in the game, not before and  
21 after OSHA, not right on the cusp of OSHA, but really in the  
22 mid 70s, where this area was so regulated and had been for  
23 several years, that that makes it a little bit different  
24 than what I've seen in the past in terms of what employers  
25 and site owners are required to do.

## Proceedings

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1           We had -- everyone will recall this -- the issue  
2           about the asbestos content or supposed asbestos content,  
3           alleged asbestos content. One avenue of the thermal  
4           insulation, given the years, the plaintiff's  
5           characterization of his basis of knowledge, that these  
6           materials had asbestos to begin with was under question by  
7           us. And what we felt and feel is that, given those years  
8           and the extensive regulation of this type of material and  
9           activity, in particular the activity, not just the material,  
10          in the workplace, that any breach of that, and especially  
11          the complete and total breach of it described by  
12          Mr. McGlynn, not just the breach by the site owner, but by  
13          his own employer during the entirety, not for one day or a  
14          week, but the absolute entirety of the total exposure, was  
15          so far that it would break causation. That was our  
16          argument.

17                 It really has to do with the specifics of what was  
18          being alleged in this particular case and particularly when,  
19          what the PELs were, and what these people had an affirmative  
20          duty to do. I'm not talking about us imposing a duty on  
21          someone else. I'm not talking about our duty, whether our  
22          duty was breached or not. I'm talking about somebody else's  
23          breach and the gravity of it, given the facts of the case.  
24          That was what was behind our argument.

25                 MR. KRAMER: My response, Judge, is I didn't

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1 understand the argument then, I'm not sure I understand it  
2 now.

3 THE COURT: Then I'm not alone.

4 MR. KRAMER: The non-delegable duty to warn is the  
5 same negligence that Jenkins is seeking to hang Brady Marine  
6 and others on the hook by.

7 THE COURT: But they did hang on them; they were  
8 on the verdict sheet.

9 MR. KRAMER: True.

10 THE COURT: And the jury awarded a percentage of  
11 fault to the various ship owners and Brady Marine.

12 MR. KRAMER: Based on the evidence, correctly so.

13 And I think we have to look at the evidence. The  
14 evidence in this case was that, at least until 1975, Jenkins  
15 was selling and instructing others to use  
16 asbestos-containing materials on their valves. There was  
17 the whole issue of the sale of asbestos from Johns Manville  
18 into the late 70s. There was more than enough for the jury  
19 to see that asbestos was being used on these components.

20 The issue then becomes were they warning? In  
21 spite of all the knowledge, where did they break? Did  
22 something else come out that was so unforeseeable or  
23 extraordinary, as the law would require, to break the chain.

24 That did not happen here and I think that's  
25 demonstrated over and over in cases involving the navy,

## Proceedings

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1 notably Justice Madden's decision in Dummitt, which was then  
2 upheld, where the navy didn't appear on the verdict sheet,  
3 even though they were in a position to warn as well. As  
4 Justice Madden said, as I said a few seconds ago, you can't  
5 hold the navy on the same theory of negligence and then  
6 claim that that theory somehow breaks the chain between the  
7 defendant and the plaintiff.

8 So I think the law is clear in New York, I think  
9 the facts are clear here as well, that there was no  
10 intervening cause that would get Jenkins off the hook.

11 MR. FEGAN: The only thing I would respond to  
12 that, with respect to the navy and Dummitt, I think the  
13 issue about them not being on the verdict sheet --

14 THE COURT: Was because of immunity.

15 MR. FEGAN: Yes, it was a different situation.

16 THE COURT: It was an analogy, not a close fit  
17 here.

18 Fair enough. Thank you.

19 So the basis to set aside the verdict on that  
20 theory is denied.

21 The next area that I'd like to explore or rule on  
22 is whether I erred in not allowing Jenkins to adopt Dr.  
23 Moline's causation testimony in support of its Article 16  
24 burden to put on the verdict sheet other gasket and packing  
25 companies.

## Proceedings

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1 And this is something that Mr. Dinunzio argued  
2 during the course of the trial, arguably finding support in  
3 the Gibson Dunn holding, to have allowed Jenkins to be able  
4 to take Dr. Moline's testimony, for that matter any other  
5 information in the record, chapter and verse, to support its  
6 Article 16 burden.

7 And Jenkins took issue with my ruling on this  
8 record that I found that there was no basis for an  
9 alternative theory of liability on this record when, in  
10 Jenkins' affirmative, its pulmonology expert opined  
11 categorically and unequivocally that Mr. McGlynn's exposure  
12 to gaskets and packing throughout his entire career did not  
13 contribute to his mesothelioma, addressing the issue  
14 qualitatively, quantitatively and with certainty.

15 And it was my position that, if you want to  
16 advance that particular position in the affirmative, that  
17 one could not possibly adopt another witness for its Article  
18 16 burden on that score.

19 Did I at least accurately state that position?

20 MR. DINUNZIO: Yes, your Honor.

21 MR. FEGAN: Yes.

22 THE COURT: Okay. This is separate from when one  
23 can adopt an expert -- another side's expert, in general,  
24 for its burden. Again, that is not to say that one can't  
25 utilize all evidence of record generally. But in this

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1 particular instance, I found that it was just a glaring  
2 inconsistency of position to be able to do so and that the  
3 Gibson Dunn case didn't involve that type of a scenario that  
4 took place here. The Gibson Dunn case involved the right of  
5 one party to be able to take another party's admission on  
6 the issue of traverse and say "I'm going to rely on that  
7 evidence to support my position, you know, in that  
8 particular case." The fact pattern there is certainly not  
9 the fact pattern here.

10 Arguably, if you had advanced a chrysotile defense  
11 in terms of potency, it would not have been inconceivable to  
12 say "Well, I believe my product was not as potent as some of  
13 the other products, but if you find that my product was as  
14 potent as some of the other products in causing disease,  
15 then perforce look at the other companies who made a similar  
16 type product in contributing to that plaintiff's disease."  
17 That is not what took place during this trial.

18 Is there anything you think you need to add to  
19 that? Although, again, your exception is noted for the  
20 record and fully preserved.

21 MR. FEGAN: Maybe I just misunderstood part of it,  
22 Judge.

23 THE COURT: Sure.

24 MR. FEGAN: I felt that was part of what we were  
25 trying to do. That was a big basis of our causation defense

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1 having to do with chrysotile.

2 THE COURT: No, I didn't say that. I gave an  
3 example of if you were advancing a chrysotile defense per  
4 se. That's not what you advanced here.

5 Your pulmonologist expert -- again, if I misstate  
6 something, please correct me -- was very clear. It wasn't a  
7 question of fiber. He basically said "There is no way  
8 gaskets and packing caused Mr. McGlynn's mesothelioma."  
9 That's his position. He didn't say "Because amosite or  
10 crocidolite." He said "There's no way the nature of the  
11 release," based on information that supported his opinion  
12 from your industrial hygienist -- contrarily to what  
13 Mr. Pascal described in terms of the number of fibers  
14 released, et cetera. That was his position.

15 And my understanding is that one couldn't take Dr.  
16 Moline's testimony, when your own expert controverted it,  
17 and say "Okay, we're going to now take her testimony and use  
18 it to help Jenkins with its Article 16 in that context."

19 That's what I mean. I just gave you an example.  
20 Not to cloud the record here.

21 Moving on.

22 So, on that basis, your JNOV application in that  
23 vein is denied.

24 Moving on to your concern that the plaintiff  
25 didn't meet its prima facie case with respect to Dr.



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1 Moline's testimony on causation.

2 If I understand correctly, based on Dummitt and  
3 Juni, your position is Dr. Moline just didn't meet her  
4 burden in establishing specific causation based on the  
5 holdings of those cases, correct?

6 MR. FEGAN: In addition to some of the testimony  
7 that came out, as I recall, Dr. Moline, there was an issue  
8 with her not being asked a hypothetical question concerning  
9 thermal insulation on the Jenkins valves. I think that was  
10 something that was in our papers. I wanted to make sure I  
11 mentioned that. I don't think that hypothetical was asked  
12 of her. It was something to do with another opinion of  
13 hers.

14 MR. KRAMER: Well, Dr. Moline did state that the  
15 exposure to gaskets and packing alone would have been enough  
16 to contribute to -- substantially contribute to  
17 Mr. McGlynn's disease.

18 We had Mr. Pascal -- and I'm not saying I agree  
19 with counsel's statement that Dr. Moline never opined on the  
20 insulation aspect of the case, because I specifically asked  
21 her a broken-down hypothetical based on the evidence. The  
22 fact of the matter is that the hypothetical was supported by  
23 evidence in the case -- Mr. Pascal, record evidence --  
24 showing that the materials used on the valves contained  
25 asbestos, that the use of the asbestos created dust which

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1 Mr. McGlynn breathed, all of which substantially contributed  
2 to his disease.

3 This, of course, meets all the requirements, as  
4 does the evidence of Dummitt, Juni, Penn v Amchem,  
5 Lustenring and numerous other cases in the asbestos  
6 litigation, on specific and general causation.

7 THE COURT: Okay. I think we've exhausted that.  
8 Moving on to the issue of recklessness.

9 I want to be clear here, because I know I had this  
10 issue in my other trials when I charged recklessness. There  
11 is no quarrel with the manner in which I gave the charge, as  
12 amended in the Pattern Jury Instruction based on the Maltese  
13 decision and based on the Fourth Department decision. So  
14 it's not a question of text in this context.

15 Am I correct there, so that we're clear?

16 MR. FEGAN: You're correct, Judge.

17 THE COURT: It's a question of whether I should  
18 have charged it at all under these circumstances, based on  
19 your take of the record.

20 MR. FEGAN: I believe, in terms of text, you're  
21 correct.

22 THE COURT: I just want to be clear that we didn't  
23 really have a debate about the language in the charge.

24 MR. FEGAN: No.

25 THE COURT: That has been a very big issue.

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1 And, in fact, I believe it may have been an issue  
2 in the Miller decision. I'm unclear as to whether Judge  
3 Kern charged the full PJI charge. I don't know. I mean,  
4 the way she described it, cross-referencing Judge Madden and  
5 how Judge Madden charged recklessness in Dummitt, in  
6 accordance with the other cases, that was before the Fourth  
7 Department decision.

8 MR. DINUNZIO: Holdsworth?

9 THE COURT: Holdsworth, thank you.

10 Again, I just want to be clear, for the purposes  
11 of my record, that the text was not an issue here.

12 So, essentially, your view is that, in light of  
13 the time frame in which Mr. McGlynn was working on the  
14 valves, you had no responsibility -- you were not selling  
15 gaskets and packing; you certainly did not direct the  
16 application of thermal insulation.

17 I'm trying to understand the heart of your  
18 challenge to my allowing that to go to the jury.

19 MR. FEGAN: I think, just adding to whatever we  
20 have in the papers, aside from the time frame, the issue of  
21 whether Jenkins should have had the duty, in terms of  
22 Dummitt and the facts underlying, whether there was a breach  
23 within that duty, to the extent it existed, I think that has  
24 some bearing here. That was behind what we're asking, given  
25 the time frame. Again, taking all of this information in as

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1 a whole, what the obligations of the site owners and the  
2 employers were, the availability of that material at that  
3 time, whether Jenkins really had the requisite level of  
4 knowledge to assume that this material, that this  
5 asbestos-containing thermal insulation was on their valves  
6 at this place and this time, that, I think, is behind what  
7 we are arguing here.

8 MR. KRAMER: And, again, I think the time frame  
9 here is a big factor in why the actions of this company were  
10 reckless.

11 When you look at the evidence here, the fact that  
12 they were selling asbestos-containing gaskets until at least  
13 1975, there's the issue of OSHA being in the background.  
14 Meanwhile, there's uncontested evidence that Johns Manville  
15 sent a newsletter to Jenkins wherein they stated that "Our  
16 customers" -- Jenkins included -- "should be looking at  
17 their products to see if there's a release and, by the way,  
18 accent the positive of these issues and don't talk about the  
19 negatives." All, presumably, which Jenkins did. There's  
20 the issue of continuing to buy from Johns Manville asbestos  
21 for their gaskets, uncontested again, until at least 1979.  
22 And there's the fact, also uncontested, that, during this  
23 entire time, which basically encompasses all of  
24 Mr. McGlynn's exposure, there was never a warning, there was  
25 never a statement released to Brady Marine or anyone else

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1 warning them. This rises to the intentional disregard that  
2 made the recklessness charge so applicable here.

3 THE COURT: Okay. As I see it, the jury's  
4 recklessness finding was supported by record evidence of  
5 Jenkins' conscious indifference to the outcome. Plaintiff  
6 testified to breathing visible asbestos dust from removing  
7 insulation gaskets and packing on Jenkins' valves in the  
8 1970s and 80s. For decades, Jenkins had personal knowledge  
9 of the hazards of asbestos and most recently in 1974 from  
10 communications it received from Johns Manville, its supplier  
11 of tons of raw asbestos fiber. It is undisputed that  
12 Jenkins failed to test its products for fiber release, place  
13 any warnings on its asbestos-containing valves and failed to  
14 recall any asbestos-containing valves. Moreover, having  
15 statutory, actual and constructive knowledge via OSHA,  
16 Jenkins continued to increase its purchase of raw asbestos  
17 for its valves well into the 1970s after plaintiff testified  
18 to repairing same.

19 There was record evidence from which the jury  
20 could rationally conclude that, during the period of  
21 plaintiff's exposure to asbestos insulation, gaskets and  
22 packing on Jenkins' valves, Jenkins, quote, "has  
23 intentionally done an act of an unreasonable character in  
24 disregard of a known and obvious risk that was so great as  
25 to make it highly probable that harm would follow and done

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1 so with conscious indifference to the outcome," end quote.

2 Stated differently, there was a valid line of  
3 reasoning and the existence of permissible inferences for  
4 the jury to determine Jenkins' failure to warn plaintiff of  
5 the hazards of asbestos exposure after having actual  
6 knowledge of same for decades, among other evidence, was  
7 reckless.

8 So, on that score, your application for a JNOV is  
9 denied.

10 Finally, the central issue for this Court to  
11 decide is whether the jury award of \$1.8 million for past  
12 pain and suffering and \$1.5 million for future pain and  
13 suffering was inadequate and, if so, whether a new trial  
14 should be ordered.

15 The standard is whether the awards, quote,  
16 "deviate materially from what would be reasonable  
17 compensation," end quote.

18 Thus, the Court must compare the McGlynn verdict  
19 with other comparable cases and their sustainable verdicts.

20 So the record is clear -- and I know you obtained  
21 copies of Mr. Kramer's October 30, 2017 letter.

22 MR. DINUNZIO: We did, your Honor.

23 THE COURT: You did.

24 What I'm not clear on is did you put in a reply to  
25 this particular letter? If I'm missing -- I want to make

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1 sure that, if you have one, that it's part of this record  
2 for all purposes. I don't remember reading your reply. I  
3 did read your opposition to their motion for additur. You  
4 had particular exhibits that focused on the Penn record, et  
5 cetera, et cetera and you put in a reply brief. Do you  
6 understand what I'm asking here?

7 MR. DINUNZIO: Yes. I didn't know we had the  
8 opportunity for a reply.

9 THE COURT: Theoretically, he just gave me a copy  
10 of the Appellate Division decision and Judge Kern's  
11 underlying decision granting remittitur. I could take  
12 judicial notice of it.

13 MR. DINUNZIO: We're prepared to address it.

14 THE COURT: Okay. So, until plaintiff's motion  
15 papers, I thought I had the distinct honor or misfortune,  
16 from your point of view, of being the first judge to  
17 actually rule on an application for additur in my state and  
18 then I learned that a colleague of mine upstate, in the  
19 Voelker decision, did so. Although, in his decision, he  
20 somehow argued that there was never an additur application.

21 In 20 years, from my point of view, I have never  
22 read an additur decision in NYCAL. And I like to think I've  
23 read most of the cases in the last 30, 40 years on this  
24 subject. So it's a first for me under these circumstances.  
25 It required me to give a great deal of thought to your

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1 application.

2 I've reviewed your papers and, again, there's no  
3 real consistent pattern, given the manner in which the  
4 Voelker judge described the suffering of the plaintiff,  
5 going from \$250,000 to \$600,000, when it should have been  
6 millions. It was a little odd for me to try to grasp the  
7 decision. Is a very recent one, just 2016, if I'm not  
8 mistaken. So I guess maybe upstate has a different value  
9 system.

10 MR. KRAMER: That is true, Judge.

11 THE COURT: I'm not alone here.

12 So, essentially, as I understand it from your  
13 attaching copies of a number of verdict sheets and your  
14 charts that, essentially, it is your view, and I'm  
15 summarizing, that when addressing past pain and suffering  
16 for the period of time in which Mr. McGlynn experienced  
17 asbestos-related symptoms from their onset in April of 2015  
18 up through the verdict this past August, roughly 28 months,  
19 that based on the sustainable verdicts -- and when I say  
20 "sustainable verdicts," I mean verdicts that were the  
21 subject of appeal; there have been a number of verdicts that  
22 have not gone on appeal -- that this establishes a certain  
23 range that you've cited to to support your position.

24 But, essentially, as I understand your position,  
25 for past pain and suffering, you more or less suggest that



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1 \$1.8 million is wholly inadequate and that there should be  
2 an increase in the past pain and suffering sum, anywhere.  
3 from -- and I use the term "sums" in colloquial way -- from  
4 3 million to \$6 million, that sort of range and then, again,  
5 future pain and suffering should be addressed in a similar  
6 fashion because, at the time of this verdict, we were  
7 dealing with a living mesothelioma plaintiff --

8 MR. KRAMER: Correct, Judge.

9 THE COURT: -- as opposed to someone who,  
10 unfortunately, was a decedent at the time of trial, which  
11 requires a different calculation.

12 MR. KRAMER: Correct.

13 THE COURT: Fair?

14 MR. KRAMER: Fair.

15 THE COURT: Is there anything you really want to  
16 add to that?

17 MR. KRAMER: The only thing I'll add, Judge, is,  
18 in dealing with our motion for additur, the Court is  
19 correct, Judge Chimes' additur decision is really the first  
20 of its kind that I'm aware of with regard to asbestos cases.  
21 Therefore, I'm kind of forced to view our additur motion  
22 through the lens of remitted motions to see where the  
23 various courts ultimately land. And, in that instance, I  
24 think that the Miller case by the First Department that just  
25 came out months ago is particularly instructive.

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1 And I'll say this on the record, I do not believe  
2 that putting pain and suffering into the box of a monthly  
3 calculation, which some argue is appropriate, is  
4 appropriate. I don't believe it is under the law.

5 What is appropriate, however, when you view and  
6 you accept what the law states, which is that you are able  
7 to view pain and suffering with what is reasonable in  
8 comparable cases, it looks like the range is the one that we  
9 suggest in our papers.

10 That's all I wanted to add, Judge.

11 THE COURT: Messrs. Fegan or Dinunzio?

12 MR. DINUNZIO: Sure.

13 THE COURT: With respect to you finding the  
14 verdict reasonable, it appears from your papers that you  
15 rely heavily on Penn.

16 MR. DINUNZIO: Penn is one case that we rely on,  
17 but we certainly rely on --

18 THE COURT: Your record is here.

19 MR. DINUNZIO: -- more than --

20 THE COURT: The reason you're comfortable relying  
21 on Penn is because they pretty much reduce past pain and  
22 suffering from, say, a 3 million and change verdict to a 1  
23 million and change verdict for a similar time period as  
24 here.

25 Am I correct?

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1 MR. FEGAN: I think that's correct, Judge.

2 MR. DINUNZIO: Yes.

3 THE COURT: Do you want to add something?

4 MR. DINUNZIO: Sure.

5 MR. FEGAN: I wasn't going to add anything more  
6 towards the case. I think Mr. Dinunzio wanted to. If he  
7 does, he can add to it.

8 The only thing I would add is, in terms of what  
9 the jury saw, I think their award at least had a basis in  
10 some fact, aside from the evidence that came in from the two  
11 live pain and suffering witnesses.

12 As the Court will recall, there were also  
13 substantial -- there was substantial, at least in my mind,  
14 substantial evidence from his medical records that --

15 THE COURT: That's correct.

16 MR. FEGAN: That's all I wanted to --

17 THE COURT: I'm glad you raised that, Mr. Fegan.  
18 Good point.

19 You find record support for sustaining the verdict  
20 as granted by the jury based on, among other issues or among  
21 other evidence, your showing the jury various references in  
22 the medical records to certain impressions by physicians  
23 suggesting that Mr. McGlynn was not suffering as the live  
24 witnesses have made it out to this jury.

25 MR. FEGAN: Exactly.

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1 THE COURT: And we also know that Dr. Moline, in  
2 her testimony, said "You can't just look at these  
3 impressions in a vacuum. You have to recognize that, at a  
4 particular point in time, when a patient is either being  
5 medicated for pain or coming out of the surgery and all the  
6 bells and whistles are not firing, one can write an  
7 impression that patient is comfortable." Something of that  
8 nature.

9 I'm not making light of what you did. What you  
10 did was perfectly fair, appropriate advocacy in an effort to  
11 try and mitigate against some of the damages testimony.

12 MR. FEGAN: Sure.

13 THE COURT: -- live testimony.

14 But mindful -- your period, as I understand from  
15 plaintiffs, you were selective -- not in a negative -- in  
16 cataloging some of the medical records; you skipped the  
17 whole record of the pain and suffering from 2017. You were  
18 much earlier in your presentation.

19 MR. FEGAN: Well, I'll --

20 THE COURT: You skipped seven months.

21 MR. FEGAN: The record -- I think that -- I don't  
22 remember every word I said, Judge, but I will say Dr. Moline  
23 testified to -- I specifically remember her testifying to  
24 the fact that mesothelioma is an excruciating and painful  
25 disease generally; that it grows in an area of the chest

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1 that there are nerve endings that cause pain generally. She  
2 had not seen Mr. McGlynn's medical records, at least the  
3 complete set of it, she admitted to that. So what I wanted  
4 to do is go through the whole of it.

5 And I don't think that I was -- I'm trying to  
6 figure out how to characterize this. But taking something  
7 that was an outlier and putting it in front of her: "This  
8 was this one day and it was a zero out of 10, Doctor, isn't  
9 that right?" There was substantial evidence to that effect.

10 And my only point in bringing this up is the jury  
11 had a chance to evaluate the medical records, Dr. Moline's  
12 testimony and the two nonparty witnesses. This was all  
13 addressed by both sides in the summations. And they came  
14 somewhere between what we both suggested. So my only thing  
15 I want to add here is that their consideration is not based  
16 solely on nothing. They had something to go on.

17 THE COURT: Fair enough.

18 MR. FEGAN: That's what I wanted to --

19 THE COURT: Fair enough.

20 I know in plaintiff's motion papers and memoranda  
21 of law, counsel highlights a number of bullet points that  
22 describe Mr. McGlynn's treatment, presentation,  
23 circumstances from the onset of asbestos-related symptoms in  
24 April of 2015. Among them, you list three hospital stays  
25 totaling over eight weeks; three major surgeries; multiple

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1 drainings of liters of pleural fluid; metastases to his rib  
2 cage; rounds of chemotherapy and radiation resulting in  
3 severe side effects; inability to hold food or liquid down;  
4 inability to breathe without forced oxygen; inability to  
5 sleep due to severe pain and discomfort; breakthrough pain  
6 despite pain medication; loss of life enjoyment. And record  
7 testimony focuses on him being away from his family or his  
8 grandson. And, again, we heard testimony from the live  
9 witnesses describing his decline. And I think, although he  
10 was here for opening statements, there was discussion during  
11 the course of the close of the trial that he was about to  
12 enter hospice care or have that type of care in Mrs. Idell's  
13 home.

14 Am I correct?

15 MR. KRAMER: Correct, Judge.

16 And I'll note also that Mrs. Idell, one of the  
17 pain and suffering witnesses, was herself --

18 THE COURT: A nurse.

19 MR. KRAMER: -- a registered nurse.

20 THE COURT: So, again, I had the opportunity to  
21 look at this record and, in a sense, compare it to some of  
22 the other records of some of the other trials that I  
23 presided over, which had comparable courses of treatment and  
24 comparable type bullet points as to the quality -- I  
25 shouldn't say quality -- poor quality of his life, as he

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1 decompensated in the 28 months.

2 Based on the Court's analysis of the verdict in  
3 asbestos litigation in NYCAL and in New York State, and  
4 giving due regard to the record testimonial evidence  
5 corroborating the extreme physical, mental and emotional  
6 suffering the plaintiff has had to endure from the onset of  
7 his asbestos-exposure-related symptoms in April 2015 through  
8 the date of the verdict, the jury award of \$1.8 million for  
9 past pain and suffering and \$1.5 million for future pain and  
10 suffering (to cover a minimum period of six months and up to  
11 a maximum period of one year) deviates materially from what  
12 will be reasonable compensation.

13 Pursuant to CPLR 5501(c), these respective awards  
14 are vacated and a new trial will be ordered on the issue of  
15 damages, unless the Defendant Jenkins, within 30 days of  
16 service of this bench decision and order with notice of  
17 entry, stipulates to increase the award of damages for past  
18 pain and suffering to \$4 million and future pain and  
19 suffering to \$2.5 million, in which event the verdict will  
20 be modified accordingly.

21 This constitutes the decision and order of the  
22 Court.

23 Okay. I think we're done.

24 MR. KRAMER: Thank you, Judge.

25 MR. FEGAN: Thank you, Judge.

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(Proceedings adjourned)

Certified to be a true and  
accurate transcript of the  
foregoing proceedings

Anne Marie Scribano  
Anne Marie Scribano