



STATE OF NEW YORK
SUPREME COURT
LEWIS COUNTY COURTHOUSE
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November 8, 2017

Via Electronic and Regular Mail

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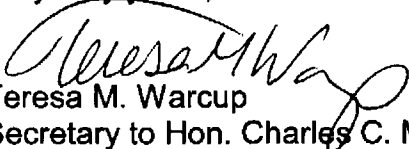
Re: Nash v. A.W. Chesterton, Co., Inc., et al.
Index No. 2012-719; RJI No. 33-12-1731

Dear Mr. Binder:

Enclosed for filing please find the original Decision and Order deciding the post trial motion and motion for directed verdict in regard to the above referenced matter. Please note that the act of signing the enclosed Decision does not constitute entry or filing under CPLR 2220. Parties are not relieved of the applicable provisions of the rule with regard to serving Notice of Entry.

Concurrently, and by copy of this letter, the Court is conveying to the Onondaga County Court Clerk's Office any original papers on the motion that were received by Chambers on behalf of each party for filing with the Onondaga County Clerk, along with a copy of the Decision. This is in accordance with the Memorandum of the Chief Administrative Judge, Ann Pfau, dated July 1, 2009.

Very truly yours,


Teresa M. Warcup
Secretary to Hon. Charles C. Merrell

/tmw

Enclosure

cc: Donald A. W. Smith, Esq., via electronic mail only
Holly M. Polglase, Esq., via electronic mail only
Anthony J. Sbarra, Jr., Esq., via electronic mail only

At a Term of the Supreme Court of the State of New York held for the County of Onondaga at the Lewis County Courthouse, Lowville, New York on the 27th day of April, 2015.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

THE ESTATE OF LEWIS NASH, MARY NASH AS
EXECUTRIX.

DECISION AND ORDER

Plaintiff,

Index No. 2012-000719

v.

RJI No. 33-12-1731

A.W. CHESTERTON COMPANY, INC., et al.,

Defendants.

APPEARANCES: LEVY KONIGSBERG, LLP
KEITH W. BINDER, Esq., of counsel
AMBER R. LONG, Esq., of counsel
Attorneys for Plaintiff

DONALD A. W. SMITH, P.C.
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HERMES, NETBURN, O'CONNOR & SPEARING, P.C.
HOLLY M. POLGLASE, Esq., of counsel
ANTHONY J. SBARRA, JR., Esq., of counsel
Attorneys for Defendant Navistar, Inc.

Merrell, C.C., J.S.C.

Before the Court are motions for directed verdict and a post trial motion by Defendant Navistar, Inc. ("Navistar"), for an Order pursuant to CPLR §4404(a) setting aside the jury's verdict and dismissing the action, or, in the alternative, ordering a new trial on all issues, or in the alternative on the issues of the allocation of fault and/or the award of future damages.

PROCEDURAL HISTORY

This matter proceeded to trial commencing December 3, 2014 and concluding on

December 16, 2014. The Court will not attempt to summarize the evidence here. The jury found that Plaintiff's decedent Lewis M. Nash ("Nash") was exposed to asbestos fibers manufactured, sold or distributed by Navistar, that Navistar was negligent in failing to adequately warn about the dangers of such products, and that Navistar's negligence was a proximate cause of Nash's mesothelioma. Nash was a bus driver employed by the Fayetteville-Manlius Central School District and alleged exposure to asbestos from brakes and gaskets sold by Navistar. Such exposure occurred in the bus garage at the school, where Nash would routinely spend time between his bus runs. The jury awarded Plaintiff \$3 million in conscious pain and suffering, \$3 million in emotional pain and suffering between the onset of Nash's disease and his death; \$200,000 for loss of services and society from the onset of Nash's disease until his death; \$1,000,000 for wrongful death from the date of death until date of verdict and \$500,000 for wrongful death from date of verdict until the time Mr. Nash would have otherwise been expected to live, granting a total jury award of \$7.7 million.

Navistar moved for a directed verdict at the close of Plaintiff's proof, on the following grounds: (a) dismissal of the punitive damages cause of action for failure to prove necessary conduct; (b) dismissal of the failure to warn claim based on no legal duty to bystanders such as Nash; and (c) failure of proof as to general and specific causation based on objections to the testimony of Dr. Abraham, plaintiff's expert.

The Court granted Navistar's motion dismissing the claim for punitive damages, as no such charge was presented to the jury. The issues of lack of duty to Nash and failure to prove causation will be considered as part of Navistar's post-trial motion.

Defendant makes the following arguments in support of its CPLR 4404(a) motion:

1. The causation opinions of Plaintiff's expert, Dr. Abraham, were inadmissible and Plaintiff presented insufficient evidence of general or specific causation.
2. Navistar owed no duty to warn a bystander like Mr. Nash and Plaintiff failed to provide sufficient evidence of causation with respect to the alleged failure to warn.
3. A new trial should be ordered to correct errors in evidentiary rulings.
4. The Court failed to instruct the jury on the issue of apportionment of liability.
5. The jury's damage awards should be substantially remitted because they were based on legal errors and were otherwise excessive.

Plaintiff opposes the motion as follows:

1. The jury's verdict that exposure to asbestos was a cause of Mr. Nash's mesothelioma was based upon convincing evidence that was correctly admitted.
2. Causation and Duty to Warn
 - a. Navistar had a legal duty to warn.
 - b. There was sufficient basis for the jury's verdict that Navistar's failure to warn was a proximate cause of Mr. Nash's mesothelioma.
 - c. Navistar waived its argument that Plaintiff did not prove that Mr. Nash would have followed a warning had one been given.
3. The Court made no evidentiary errors that merit vacating the jury's verdict.
4. The Court properly ruled that Navistar did not meet its burden of proving that Plaintiff was exposed from any other entity's products.
5. There is no basis for reducing the jury's damages award.
 - a. Navistar waived its objection to the damages questions on the verdict sheet.
 - b. The jury's damages awards were not excessive.

Under CPLR §4404(a), the Court may set aside a verdict or judgment entered after trial, and direct that judgment be entered in favor of party entitled to judgment as a matter of law, if the verdict was not supported by legally sufficient evidence, since under those circumstances there is “no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial” (Cohen v. Hallmark Cards, 45 NY2d 493, 499 [1978]).

1. Admissibility of Dr. Abraham’s testimony and evidence of general and specific causation

Navistar argues that causation opinions of Plaintiff’s expert, Jerrold L. Abraham, M.D. were inadmissible and should be stricken because they lacked sufficient foundation and were based on invalid assumptions. Navistar contends Dr. Abraham had no reliable basis to support his opinions as to general causation; that exposure to dust from friction products, such as brakes, can cause mesothelioma. Navistar further contends that Dr. Abraham’s opinions as to specific causation were not based on any relevant “scientific expression” of Nash’s exposure to asbestos from Navistar’s friction products, as required by Parker v. Mobil Oil Corp., 7 NY3d 434, 449 (2006), Cornell v. 360 W. 51st St Realty, LLC, 22 NY3d 762 (2014), and more recently In re New York City Asbestos Litigation (Juni), 148 AD3d 233 (1st Dept. 2017). In that regard, Navistar argues that Dr. Abraham’s testimony should be stricken because there was no scientific foundation for his testimony that Nash’s cumulative exposure to Navistar products were substantial contributing factors in causing Nash’s mesothelioma, or that “each and every exposure” was capable of causing Nash’s

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