

Attorneys at Law
800 Third Avenue
New York, NY 10022

Attorneys at Law
36 South Charles Street, Suite #1
Baltimore, MD 21201

Erik C. DiMarco, Esq.
Wilson Elser Moskowitz
Edelman & Dicker LLP
Attorneys at Law
150 East 42nd Street
New York, NY 10017

Re: A. Katherine Chisholm, Individually and as Personal Representative of the
Estate of Richard G. Chisholm, Deceased, vs. R.T. Vanderbilt Company,
Schenectady County Supreme Court
Index #2012-1056, RJI #46-1-13-0648

Dear Counselors:

Enclosed herewith please find a copy of the Court's Decision and Order
pending post-trial motions relative to the matter above referenced. I am, by a
forwarding the original Decision and Order to the office of the Schenectady Co
filing. It will be Mr. DiMarco's obligation to determine the date of entry and t
CPLR §2220.

Thank you.

Very truly yours,



RICHARD T. AULISI
Justice

RTA/tb
enc.
cc: John J. Woodward, Clerk



R.T. VANDERBILT COMPANY, INC.,
Individually and as successor in interest to
Gouverneur Talc Company, Inc.,

Defendant.

The above entitled asbestos action was commenced on or about June 4, 2012, by the filing of a Summons and Verified Complaint in the Schenectady County Clerk's Office. A trial date was granted a trial preference due to the plaintiff's (Richard G. Chisholm) death from a condition caused by his mesothelioma.¹ A jury trial commenced on January 20, 2015, and concluded on February 10, 2015, with the return of the jury's verdict.

The Special Verdict Sheet submitted to the jury contained six questions. The first two questions pertained to the liability of the only defendant, R.T. Vanderbilt Company, Inc. (defendant). The last three questions pertained to the damages sustained by the plaintiff.

The jury ultimately found that: 1) the decedent, Richard G. Chisholm, was exposed to asbestos from NYTAL 100HR talc mined, sold or distributed by the defendant; 2) the defendant was negligent in mining, selling and/or distributing NYTAL 100HR talc without adequate warning; 3) defendant's negligence was a substantial factor in causing Mr. Chisholm's death.

¹Richard G. Chisholm passed away on August 7, 2012, as a result of his death from mesothelioma.

The defendant seeks to set aside the jury's verdict pursuant to CPLR 4404. The Court grant judgment in its favor on the grounds that the plaintiffs' claims are dismissed because that the plaintiffs failed to establish causation or, in the alternative, the defendant's verdict is a new trial because the amount of damages awarded by the jury deviates materially from what would be considered reasonable compensation. The plaintiffs have opposed the defendant's motion and have cross moved, pursuant to CPLR 4404, for a new trial, solely on the grounds that the damages as against the defendant.

The Court will first consider the plaintiffs' motion for a new trial on the grounds that the damages. This application was considered by the Court at the time of the Court's decision. The plaintiffs had requested a charge on punitive damages and after hearing the testimony of the counsel and considering the proof which was presented to the Court during the trial, the Court denied the plaintiffs' request for the charge and a corresponding question on punitive damages. A review of the record clearly indicates that there is insufficient proof in the record to support the claim of punitive damages, which requires a much higher standard of proof.

Turning to the defendant's application, it seeks to essentially reargue the grounds that it made at the close of the proof. The defendant asserts that the plaintiffs' action is a matter of law, and that the verdict must be set aside. The defendant's argument

action, if any, accrued in the state of Indiana, not in New York State.

The record before the Court indicates that the deceased plaintiff was diagnosed with an asbestos related disease in July of 2010, and that the injured plaintiff commenced his lawsuit in June of 2012. For purposes of the statute of limitations, the action was deemed to have commenced. Turning to the Indiana Statute of Repose, the Court previously held that the Indiana statute has no application to this action, because statutes of repose are substantive matters of substantive law and CPLR §202 applies to statutes of repose that are procedural in nature. Thus statutes of repose (substantive matters) are subject to Erie analysis. (Tanges v Heidelberg N Am Inc., 93 N.Y.2d 48,53[1999]).

In the case at bar, the proof established that the deceased plaintiff's exposure to asbestos containing materials occurred in Ohio, while he was working for Ceramics. The plaintiff's disease manifested itself while he was residing in New York. The asbestos containing material (NYTAL 100HR Talc) was mined, milled, manufactured and shipped from the state of New York. In light of the facts that were developed, it is apparent that the third Neumeier rule³ applies to the facts of the within matter. Under the third Neumeier rule, the law of the state where the accident occurred governs

² Indiana Code § 34-20-3

³ Neumeier v Kuehner, 31 N.Y. 2d 121

The defendant's motion to dismiss on statute of limitations and statute of repose was again denied in its entirety.

The Court will now address the defendant's motion to set aside the jury verdict. It is well settled that a jury verdict "may be set aside as being unsupported by legally sufficient evidence if there is simply no valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence presented at trial." (Revell v Guido, 124 AD 3d 1006, 1010[3rd Dept. 2015]); also see (Plaintiff v Defendant Inc., 305 AD 2d 774, 775[3rd Dept. 2003]). "Further, a verdict may be set aside where the weight of the evidence where the court determines that the evidence so preponderates in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence" the jury could not have returned the verdict by any fair interpretation of the evidence" (Revell, supra at p. 1010) A decision to set aside the verdict involves a review of the evidence. The ultimate question is whether any viable evidence exists in the record to support the verdict.

The defendant claims that the case should be dismissed because the plaintiff has not presented adequate proof regarding causation. The defendant asserts that the plaintiff has not submit sufficient proof pursuant to Diel v Flintkote, 204 A.D. 53 [1st Dept. 1995] and Mobil Oil Corp., 7 N Y 3d 800 [2006]). A review of the testimony elicited from the defendant along with the testimony elicited from plaintiffs' expert witnesses, Dr. James

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