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

----------X

IN RE: NEW YORK CITY ASBESTOS LITIGATION

----------X

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

Plaintiffs,

Index No.: 190339/2011

- against -

Decision and Order

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

Defendants.

----------X

HON. MARTIN SHULMAN:

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.