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Honorable Joan A. Madden
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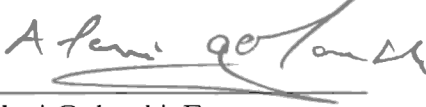
September 24, 2018

Re: *Robaey v. Air & Liquid Sys. Corp. (& FelPro)* – Index № 190276/2013

Dear Justice Madden:

I respectfully enclose herewith the Decision and Order issued by Justice Mendez last week and entered September 21, 2018, wherein the court, analyzing all of the case law and damages decisions, determined that the award for Mr. Macaluso's past pain and suffering should be \$10 million. As recited in the Decision (p. 2), Mr. Macaluso was diagnosed with mesothelioma in April 2015, and died in July 2016, a fifteen month period.

Respectfully submitted,
WEITZ & LUXENBERG, P.C.


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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

-----X
MARY MURPHY-CLAGETT, as Temporary
Administrator for the Estate of PIETRO MACALUSO,
Plaintiff,INDEX NO 190311/ 15MOTION DATE 08-31-2018

- Against -

MOTION SEQ. NO. 018A.O. SMITH WATER PRODUCTS CO., et al.,
Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to set aside the verdict.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is ordered that this motion by defendant Peerless for an order pursuant to CPLR § 4404 (a) setting aside the jury's verdict on liability and damages or in the alternative reducing the damages award for pain and suffering and loss of parental guidance is granted and a new trial on damages is ordered unless, within 30 days from the date of service of a copy of this order with notice of entry, plaintiff stipulates to reducing the damages award for Pietro Macaluso's pain and suffering from \$25 million to \$10 million, loss of parental guidance to Jackson Macaluso from \$17 million to \$9 million and loss of parental guidance to Nora Grace Macaluso from \$18 million to \$10 million. If the plaintiff so stipulates then the motion is denied.

After a jury trial in which a verdict was returned in favor of plaintiff and against the defendant, the Defendant moves to set aside the verdict and for a new trial. The Defendant alleges that the verdict was against the weight of the evidence and excessive. Defendant alleges that:

- (1) Plaintiff failed to prove specific causation;
- (2) plaintiff's failure to warn claim should have been dismissed and the court should not have charged the jury that defendant had a duty to warn;
- (3) plaintiff's claim of recklessness should have been dismissed and the court should not have charged the jury on recklessness;
- (4) the jury should not have been charged that defendant had a continuing duty to warn;
- (5) the court erred in failing to place Johns-Manville on the verdict sheet, thereby

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

- impairing defendant's apportionment rights;
- (6) the court should grant defendant a judgment notwithstanding the verdict on the jury's award for loss of parental guidance;
- (7) the court made evidentiary errors on critical issues such as:
 - (a) allowing plaintiff to claim peerless was warned of the dangers of asbestos by labels on Johns-Manville products;
 - (b) excluding expert witness Malzahn's study;
 - (c) admitting evidence of asbestos containing external insulation not manufactured by peerless; and
 - (d) precluding evidence of Pietro Macaluso's Marijuana use and failure to pay child support, that prejudiced the defendant and require a new trial;
- (8) Plaintiff's counsel's statements in summation require a new trial.

These errors, it argues, compel setting aside the verdict and granting a new trial. Alternatively the jury's award for pain and suffering and loss of parental guidance should be substantially reduced.

Plaintiff opposes the motion and argues that the verdict is not against the weight of the evidence nor excessive and that the court did not err in its evidentiary rulings or in its charge to the jury. Plaintiff contends that :

- (1) the evidence on specific causation was sufficient and based on an Acceptable Scientific Expression of Decedent's exposure;
- (2) Plaintiff made a submissible case for failure to warn;
- (3) Plaintiff made a submissible case for recklessness;
- (4) Defendant had a continuing, post-sale duty to warn and the jury was properly charged as to such duty;
- (5) the court properly determined that Defendants failed to make a submissible case for apportionment as to Johns-Manville;
- (6) Defendant is not entitled to judgment notwithstanding the verdict on plaintiff's claim for loss of parental guidance;
- (7) there were no evidentiary errors warranting a new trial because:
 - (a) there was evidence that Defendant obtained products from Johns-Manville which were accompanied by asbestos warnings;
 - (b) the court properly excluded Mr. Malzahn's experiment;
 - (c) the court properly allowed evidence of appurtenant insulation;
 - (d) the court properly excluded evidence of Mr. Macaluso's alleged Marijuana use;
- (8) Plaintiff's summation consisted of fair comment on the evidence and was within the wide latitude allowed for argument;
- (9) the court should deny any Remittitur because the amount of damages awarded by the jury for pain and suffering, and for loss of parental guidance, were adequate and should not be disturbed. Alternatively, any Remittitur should be significantly more modest than defendant proposes.

Relevant Trial Testimony

Pietro Macaluso, at the age of 55, was diagnosed with Mesothelioma in April 2015 and died, at the age of 56, in July 2016. He is survived by his two children, Jackson and Nora Grace Macaluso, a pair of twins who were each 9 years old at the time of his death. Mr. Macaluso's estate sued the defendant and other entities it

believed were responsible for his death.

Mr. Macaluso stated that he was exposed to asbestos when he worked for Bruno Frustaci removing heating systems from residences in Brooklyn from between 1972, or 1973, and 1982. Mr. Macaluso stated that he worked for Mr. Frustaci for about 10 years, part-time on weekends before and during college, and full-time during the summer. He mostly worked renovating homes. Mr. Macaluso stated that he assisted the plumber as a helper clean-up guy. He worked on heaters smashing out old units and removing them to the dumpster. He replaced Peerless, A.O. Smith and Burnham boilers. Before the new boiler was installed he would take out the old boiler by smashing it with a sledgehammer, heavy hammer or crowbar. He came into contact with asbestos dust from breaking up these units. He stated that he used a mask when he worked with Bruno Frustaci because it was very dusty, but he never wore a respirator.

Mr. Macaluso described the Peerless, A.O Smith and Burnham boilers that he removed. He stated that the A.O. Smith boiler had a stamp on it that said "A.O. Smith" and described its size and dimensions. He stated that the defendants' boilers were sectional boilers that came in pieces, they looked like sections when he was taking them apart. Some of the boilers were rectangular and some were oval on top. They were cast iron and he could not remember the fuel type that they used. Some of these boilers had already been taken off-line, the fuel source removed, when he came to de-construct them.

The boilers were in basements of houses that were built in the 1940's after World War II. He would use a crowbar to separate the sections and then used a sledgehammer. He saw external insulation on the outside of the boilers, caked on joints like a mummy.

There were boilers that looked like a refrigerator, that were oval and vertically oriented, and there were boilers that were smaller and had a horizontal shape. The boilers could be made bigger or smaller by adding or removing sections. These boilers were in the basements of one and two-family homes. They had white insulation on top. He stated he always used the same technique to take out the boilers: He used a scraper to scrape-off the white stuff on the outside of the boiler, then used a sledgehammer and crowbar to break the unit apart.

He stated there was dust when he removed insulation from the boilers. The place turned into a dust bowl. The dust permeated the room, it was a lot. It would be all over his body, his hair, his mouth, and he breathed it.

There was rope insulation that just disintegrated and there was dust everywhere. He would break the units apart with a sledgehammer to get the boiler pieces through the door. The metal would break up into shards that created dust. Then he had to sweep up the dust and this created more dust. He breathed the dust in, even if he wore a mask. His nose would be white with stuff. He stated the dust came in through his nose and mouth.

He stated that he removed Peerless boilers, A.O. Smith boilers and Burnham boilers using the same tools and practice as previously described. He further stated that he received no warnings from Peerless, A.O. Smith or Burnham. He assumed the thing (white stuff) between the pieces was asbestos.

Mr. Macaluso began to feel ill in the spring and was diagnosed with Mesothelioma in the summer of 2015. He had a bronchoscopy, then he had a Thoracotomy, where approximately three (3) liters of fluid were removed from his left chest cavity. On December 2015 he had a Pleurectomy to remove the pleura in his left lung and scrape the chest cavity. Part of his diaphragm was removed and the remaining part had to be reconstructed. He developed a bone infection. As a result of this surgery he experienced significant pain, and a catheter was placed in his spine to control the pain. He had breakthrough pain which required even more pain medication.

He was hospitalized for approximately eight to ten days. On discharge he was required to take Percocet and morphine, pain medication, to alleviate the pain he was experiencing. Mr. Macaluso stated that the pain came and went to different parts of the low back, the chest and the left side. He stated that when the doctor told him he had Mesothelioma he knew he was going to die no matter what, and that this made him feel terrible.

Mr. Macaluso stated that he experienced nausea and lack of appetite, and was too weak to take chemotherapy. He stated that food tasted different and that he had to be helped to go to the bathroom. Once he didn't make it to the bathroom and defecated on the floor and held it in his hand. He had to wear diapers and urinated on himself in the bed. He stated that these things affected his pride and reminded him that he was going to die.

Ms. Murphy-Clagett testified that one time she came home during lunch to check on Mr. Macaluso and found him on the floor of the bathroom. He didn't know how long he had been there. He looked emaciated. He was very weak and could not get out of bed without support. She further testified that after the surgery he was in severe pain, (reported in his medical chart as being 15/10). He could not breathe, could not sleep at night because he was kept awake by a tingling sensation at the incision on his left side, which he said felt like something crawling all over his skin. Mr. Macaluso was given morphine which made him itch terribly. He could not touch the left side of his body because it gave him too much pain. Mr. Macaluso grimaced with pain and never received medication that completely relieved the pain. The Chemotherapy also caused pain and discomfort.

Mr. Macaluso could not clothe, clean or toilet on is own. He was helped in these activities by Ms. Murphy-Clagett and this was humiliating for him. Mr. Macaluso was again hospitalized in February 2016 and afterward was placed in a nursing home. Mr. Macaluso hallucinated a lot, and experienced mental anguish in knowing his impending death and that he would not be there for his children.

Ms. Murphy-Clagett further testified that Mr. Macaluso died on the early morning of July 8, 2016.

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