

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

PRESENT: MANUEL J. MENDEZPART 13*Justice*

IN RE: NEW YORK CITY ASBESTOS LITIGATION

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MARY MURPHY-CLAGETT, as Temporary
Administrator for the Estate of PIETRO MACALUSO,
Plaintiff,

INDEX NO 190311/ 15MOTION DATE 08-31-2018MOTION SEQ. NO. 021

MOTION CAL. NO. _____

- Against -

A.O. SMITH WATER PRODUCTS CO., et al.,
Defendants.

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-23-45Cross-Motion: Yes ☒ No

Upon a reading of the foregoing cited papers it is ordered that this motion by defendant Burnham 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 defendants, the Defendant Burnham 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) Burnham should be granted judgment notwithstanding the verdict because :

- A- Dr. Markowitz causation opinion was invalid;
- B- The court improperly allowed plaintiff's hearsay interrogatory Response and gave a curative instruction which decided a contested factual issue against Burnham;
- C- Plaintiff failed to prove proximate cause;
- D- The court should grant a directed verdict as to the children's claim for loss of parental guidance.

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

(2) Burnham should be granted a new trial because :

- A- The court erred in its duty to warn instruction;**
- B- The court erred in admitting the Johns-Manville records;**
- C- Burnham's apportionment defense was prejudiced by the quashing of its subpoena;**
- D- The Court erred in refusing to place Johns-Manville on the verdict sheet;**
- E- The Court erred in charging the jury on Recklessness;**
- F- The Court erred in precluding evidence of Mr. Macaluso's failure to pay child support.**

(3). The court should grant Remittitur because:

- A- The pain and suffering award is excessive;**
- B- The award for loss of parental guidance is excessive.**

These errors, it argues, compel setting aside the verdict and granting a new trial. Alternatively the jury's award for pain and suffering and for wrongful death 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) Burnham is not entitled to judgment as a matter of law because:

- A- plaintiff presented sufficient evidence of specific causation;**
- B- Decedent's interrogatory responses were properly used;**
- C- Plaintiff provided sufficient evidence from which the jury could infer that decedent would have heeded a warning;**
- D- defendant is not entitled to Judgment Notwithstanding the verdict on plaintiff's claim for loss of parental guidance.**

(2) Defendant is not entitled to a new trial because:

- A- The Jury Charge as to Duty to warn was proper;**
- B- The court properly admitted Johns-Manville records to cross-examine Burnham's corporate witness as to its purchase from Johns-Manville;**
- C- The court properly quashed defendant's trial subpoena and the Jury's verdict on apportionment is not against the weight of the evidence;**
- D- Defendant failed to make a submissible case for apportionment to Johns-Manville;**
- E- The Jury's determination of Recklessness was not against the weight of the evidence;**
- F- The court properly excluded evidence of decedent's failure to pay child support.**

(3) The court should deny any Remittitur because:

- A- Defendant fails to show that the award for Pain and suffering deviates materially from what is reasonable under the circumstances;**
- B- Defendant fails to show that the award for wrongful death deviates materially from what is reasonable compensation.**

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 defendants 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 deconstruct 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.

Ms. Laborde testified that she was married to Mr. Macaluso- but legally separated since 2010- until he died. They had two children, Jackson and Nora Grace Macaluso, who were both 9 at the time of his death. When the children were born Mr. Macaluso became a stay-at-home dad. He was the children's care-giver: He prepared their meals, fed them, cleaned them, bathed them, took them on stroller walks, and later when they were a little older to parks and museums. They separated in 2010 and the children went to live with her in California; however, Mr. Macaluso talked to the children on the phone everyday, face-time, and he would come out to California to be with them once a month, because the kids were his life. When he visited in California the first time he stayed in a hotel, but afterwards he stayed with Ms. Laborde and the children in their home. While there he would make breakfast for the children. In 2012 or 2013 Mr. Macaluso moved to Sacramento California to be closer to the children, and moved one mile away from where they lived. He took the children to school and picked them up after school every day. Nora Grace has a learning disability, Mr. Macaluso was instrumental in getting her tested. When it was determined that she required tutoring for her disability Mr. Macaluso made sure she got to the tutor, and accompanied her to every session.

Ms. Laborde further testified that Mr. Macaluso taught the children to ride their bikes, took them to museums, parks and the Sacramento historic district. The children played team sports and he came to every soccer, T-ball, softball and baseball game. He loved seeing the children develop athletically. The children spent time with him in his apartment. He was a very social individual and he taught the children to be very social as well. He and Ms. Laborde were co-parents, friends and teammates. They had joint custody of the children but there was no document. Mr. Macaluso was fully integrated into the children's lives. Even after he became too sick to be an active care-giver he saw his children as much as he could. Mr. Macaluso was devastated when he realized he was not going to be around to do any of the things he thought about doing with the children, that he wouldn't be there to walk Nora Grace down the aisle or see Jackson graduate from college.

Both Ms. Murphy-Clagett and Ms. Laborde stated that Mr. Macaluso was a careful person. Ms. Laborde gave examples of his driving habits and how he acted when she was pregnant with the twins. Ms. Laborde, in response to a question answered that she never knew Mr. Macaluso to smoke marijuana.

Plaintiff presented Dr. Arnold Brody, PhD., expert with a doctorate in lung cell biology. He opined that asbestos causes and is the main cause of mesothelioma.

Plaintiff presented Dr. Steven Markowitz, M.D., Board Certified in Occupational and Environmental Medicine. He stated that there is no established safe level of asbestos. That asbestos related cancer is not rare among asbestos exposed workers. That he took the history of persons who removed and cleaned up boilers using sledgehammers, crowbars, screwdrivers and scrapers and found substantial levels of exposure to asbestos in these individuals. He further stated that if someone saw visible dust it tells him that the exposure is substantial. Many asbestos fibers are not

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