EXHIBIT B

Unreported Disposition

KeyCite Yellow Flag - Negative Treatment
Decision Supplemented by Dummitt v. Chesterton, N.Y.Sup., September 19, 2012

36 Misc.3d 1234(A), 960 N.Y.S.2d 51 (Table), 2012 WL 3642303 (N.Y.Sup.), 2012 N.Y. Slip Op. 51597(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 In the Matter of New York City Asbestos Litigation
Ronald Dummitt, Plaintiff,
v.
A.W. Chesterton et al., Defendants.

1090196/10
Supreme Court, New York County
Decided on August 20, 2012

CITE TITLE AS: Matter of New York City Asbestos Litig.

ABSTRACT

Products Liability
Failure to Warn of Danger
Asbestos—Government Contractor Defense

Contribution
Apportionment of Liability among Joint Tortfeasors
Asbestos Litigation

New York City Asbestos Litig., Matter of, 2012 NY Slip Op 51597(U). Products Liability—Failure to Warn of Danger—Asbestos—Government Contractor Defense. Contribution—Apportionment of Liability among Joint Tortfeasors—Asbestos Litigation. (Sup Ct, NY County, Aug. 20, 2012, Madden, J.)

APPEARANCES OF COUNSEL

For plaintiff: Belluck & Fox, LLP, by Jordan Fox, Esq. and Seth A. Dymond, Esq., 546 Fifth Ave, 4th floor, NY NY 10036, (212) 681-1575

For defendant Crane Co.: K & L Gates, by Tara L. Pehush, Esq., Jeffrey S. King, Esq. and Angela DiGiglio, Esq., 599 Lexington Ave, NY, NY 10022, (212)536-3900

OPINION OF THE COURT

Joan A. Madden, J.

Defendant Crane Co. (Crane) moves pursuant to CPLR 4404(a) to set aside the judgment in favor of plaintiff and for judgment in its favor as a matter of law on the grounds that it is not liable for the mesothelioma plaintiff Ronald Dummitt alleges he developed as a result of exposure to asbestos while serving in the Navy. The jury found that Crane acted recklessly in failing to warn of the dangers of asbestos, and awarded damages of $32 million; $16 million for past and $16 million for future pain and suffering.[1] Specifically, Crane argues it is not liable as it did not manufacture, supply or place into the stream of commerce any of the asbestos containing products to which Mr. Dummitt was exposed; Mr. Dummitt was exposed to asbestos containing products manufactured by other companies; Crane is shielded from liability based on the government contractor defense; the Navy was a knowledgeable purchaser; the Navy's failure to warn was a supervening cause; and there was insufficient evidence of recklessness and insufficient evidence that any breach of a duty by Crane was a proximate cause of Mr. Dummitt's mesothelioma. In the event judgment is not entered in its favor, Crane moves to set aside the verdict and for a new trial on those grounds, and on the grounds that consolidation of Mr. Dummitt's case with several other cases was prejudicial; the court erred in excluding the Navy from the verdict sheet and in its instructions with respect to the burden of proof as to CPLR Article 16 apportionment; and the jury's failure to apportion damages to any companies *2 other than Crane and Elliot was against the weight of the evidence. Finally, Crane moves to set aside the verdict of $16 million each for past and future pain and suffering on the grounds that it is excessive.

Plaintiff opposes the motion with respect to Crane's argument that it is entitled to judgment as a matter of law arguing that Crane bases its motion on an incorrect standard of review, that Crane's arguments address whether there was evidence to support its contentions, not whether there was a rational basis for the jury's verdict, the correct standard of review. Plaintiff further argues that the evidence at trial was sufficient to support the

jury's verdict, the verdict was not excessive, and the court did not err as to the law with respect to the government contractor defense, the burden of proof under Article 16 and in excluding the Navy from the verdict sheet.

CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence [or] in the interests of justice." The standard for setting aside the verdict and entering judgment for the moving party as a matter of law is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in

making this assessment are essentially those required of a Trial Judge asked to direct a verdict." *Cohen v. Hallmark Cards, Inc*, 45 NY2d 493, 499 (1978). However, "in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus, a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." *Id.*

The standard used in determining a motion to a set aside a verdict as against the weight of the evidence is "whether the evidence so preponderated in favor of [the moving party], that the verdict could not have been reached on any fair interpretation of the evidence." *Lolik v. Big V Supermarkets, Inc*, 86 NY2d 744, 746 (1995) (quoting *Moffatt v. Moffatt*, 86 AD2d 864 [2ndDept 1982], aff'd 62 NY2d 875 [1984]). This does not involve a question of law, but rather "a discretionary balancing of many factors." *Cohen v. Hallmark Cards, Inc, supra* at 499.

I. DUTY TO WARN

With respect to Crane's motion for judgment notwithstanding the verdict or in the alternative to set aside the verdict on the grounds that Crane had no duty to warn, for the reasons below, I conclude the motion should be denied. Plaintiff's theory of liability was that Crane, as a manufacturer of valves had a duty to warn of the use of defective products with its valves. Specifically, plaintiff asserted asbestos containing products, including gaskets, packing and insulation at issue here, are dangerous, and therefore defective, and that Crane knew of the dangers and knew such products would be used with its valves. Thus, plaintiff argues, Crane is liable for failing to warn of the dangers of using asbestos containing products in conjunction with its valves.

The evidence showed that during plaintiff's 17 years of service on Navy ships, he was exposed to asbestos not only from products used with Crane's valves, but also from products of other manufacturers. As to Crane, plaintiff established that he was exposed to asbestos during the maintenance and replacement of gaskets, packing and insulation used with Crane's valves. It is undisputed that plaintiff did not allege that the proof would establish that Crane manufactured or supplied either the original or replacement asbestos containing products to which he was exposed. Rather, plaintiff alleged and offered proof that as to some of the valves which Crane supplied to the Navy on the ships where plaintiff served, Crane supplied, although it did not manufacture, the original asbestos containing gaskets and packing. Plaintiff also *3 offered proof that Crane rebranded asbestos sheet gaskets as Cranite and supplied some of its valves to the Navy with such Cranite gaskets, and sold asbestos containing gaskets and replacement parts for its valves. While plaintiff conceded he could not prove that he was exposed to original or replacement asbestos containing products supplied or sold by Crane, he offered this evidence to establish that Crane knew that asbestos containing products would be used with its valves.

In addition to the foregoing, plaintiff offered evidence that Navy drawings for Crane's valves used on the ships where he served specified internal gaskets and packing, and that Navy specifications required these components to be asbestos containing. Moreover, plaintiff produced evidence through Crane's corporate representative, Anthony Pantaleoni, that Crane was aware routine maintenance of the valves required replacement of packing and gaskets, and that such maintenance would release asbestos which would be hazardous. Plaintiff also introduced evidence that Crane knew asbestos insulation would be used with its valves. As to asbestos insulation, plaintiff's evidence showed that Crane published a manual in 1925 showing the use of asbestos containing covering and cement on Crane's valves to prevent the loss of heat, Crane contributed to a1946 Navy Machinery Manual specifying asbestos insulation for high heat applications,

and Crane advertised its valves as easier to insulate. Moreover, plaintiff

showed that the Navy required valves to be tested by the manufacturer with lagging, and that Crane sold asbestos insulation, advertising that it could be used to cover irregular surfaces like valves. Finally, plaintiff introduced ship records for the ships on which he served, showing that

insulation work was performed on valves on the ships.

The Court of Appeals in *Liriano v. Hobart Corp*, 92 NY2d 232 (1998), explains the law of products liability and negligence as follows: A manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries. A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product. A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known. A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable.

Id at 237 (internal citations omitted).

As stated above, plaintiff's theory of liability was that Crane's valves were defective as Crane failed to warn of the dangers of exposure to asbestos from asbestos containing products used with its valves. Crane argues it is entitled to judgment as a matter of law, as under the New York law of products liability and negligence, a manufacturer has no duty to warn with respect to products it did not manufacture or place into the stream of commerce. Citing *Amatulli v. Delhi Construction Corp*, 77 NY2d 525 (1991), Crane argues a two-step analysis is used to determine whether a defendant has a duty: first, whether defendant is responsible for placing the product into the stream of commerce; and second, whether the use of the product was foreseeable.[2] ***4** Crane also relies on the holding in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 NY2d 289 (1992), which Crane argues stands for the proposition that based on a stream of commerce analysis, a defendant manufacturer has no duty to warn where its product is used with a defective product of another manufacturer which product defendant did not place into the stream of commerce. In *Rastelli*, the Court of Appeals considered plaintiff's theories of liability grounded in strict products liability and negligence.[3] At issue was whether Goodyear was liable for injuries resulting from the use of a tire that exploded when mounted on a defective multi-piece rim manufactured by another company. The Goodyear tire could be used with 24 different models of multi-piece rims out of approximately 200 types of multipiece rims sold in the United States. *Id* at 293, fn 1. Plaintiff argued that the tire was made for installation on a multi-piece rim, and, as Goodyear was aware of the dangers of using its tires with such rims, it had a duty to warn of the dangers of such use. *Id* at 297. In finding that Goodyear was not liable, the Court of Appeals determined that "[u[nder the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer." *Id* at 297-298. The Court reasoned that "Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale." *Id* at 298.

Here, as to the existence of a duty, plaintiff relies on the legal analysis in *Sawyer v. AC & S, Inc*, 32 Misc 3d 1237(A) (Sup Ct, NY Co, June 24, 2011, Heitler, J.) and *DeFazio v. Crane Co*, 2011 WL 1826856 (Sup Ct, NY Co, May 2, 2011, Heitler, J). These decisions discuss Crane's argument that it has no duty to warn under *Rastelli* in light of the First Department's subsequent decision in *Berkowitz v. AC & S, Inc*, 288 AD2d 148 (1st Dept 2001). In *Berkowitz* the First Department held that a manufacturer may be liable for failure to warn of the dangers of asbestos with respect to asbestos containing products it neither manufactured nor installed, but which were used in conjunction with its equipment. At issue was whether defendant Worthington, a manufacturer of pumps used on Navy ships, was liable with respect to asbestos containing insulation it did not supply or manufacture, but which was used with its pumps.[4] ***5**

Addressing arguments of a conflict between the decisions in *Rastelli* and *Berkowitz*, Justice Heitler in *Sawyer*, found that they are neither mutually exclusive nor in conflict, and in support of this conclusion, pointed to the following analysis in *Curry v. American Standard*, 201 US Dist LEXIS 142496, (SDNY Dec. 6, 2010, Gwin, J).

The Court thus finds that a manufacturer's liability for third-party component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer. Accordingly, the issue of Crane's liability for third-party component products rests in the degree to which Crane could or did foresee that its own products would be used with asbestos- containing components. Where Crane's products merely could have been used with asbestos-containing components, the New York Court of Appeals holding in *Rastelli* cautions against liability. Yet where, as in *Berkowitz*, Crane meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components.

Id at 3. Justice Heitler distinguished the *Berkowitz* and *Rastelli* holdings, noting that while there was no duty to warn in *Rastelli* "because the combination of a manufacturer's own sound product with another defective product somewhere in the stream of commerce was too attenuated to impose such a duty," in *Berkowitz*, "if the same manufacturer knew or should have known that its product would be or ought to be combined with inherently defective material for its intended use, that gives rise to a duty to warn of known dangers attached to such use." *Sawyer v. AC & S, Inc*, *supra*.

I find the reasoning in *Curry* and *Sawyer* persuasive and conclude that sufficient evidence was adduced at trial that Crane meant for its valves to be used, or knew or should have known that its valves would be used in conjunction with asbestos containing gaskets, packing and insulation to warrant a determination that Crane was potentially liable under a failure to warn theory in strict products liability and negligence. As indicated above, plaintiff offered the following proof: Crane supplied asbestos containing gaskets, packing and insulation with certain valves it supplied to the Navy on the ships where plaintiff served; Crane supplied some of its valves to the Navy with Cranite gaskets; Crane sold asbestos containing gaskets and replacement parts; Crane knew that Navy drawings for Crane's valves specified asbestos containing internal gaskets and packing; and Crane knew asbestos insulation would be used with its valves. Moreover, the evidence showed that asbestos containing gaskets, packing and insulation were routinely used with valves.

Under these circumstances, the duty is not based solely on foreseeability, or the possibility that a manufacturer's sound product may be used with a defective product so as to militate against a finding of a duty to warn. Rather, these circumstances show a connection between Crane's product and the use of the defective products, and Crane's knowledge of this connection, such that, under *Berkowitz*, Crane could be potentially liable based on a duty to warn theory as a manufacturer who meant for its product to be used with a defective product of another manufacturer, or knew or should have known of such use. ***6**

In reaching this conclusion, I reject Crane's argument that under present New York law the existence of a duty requires a finding that defendant was responsible for placing the alleged injury causing product into the stream of commerce.[5] In addition to *Rastelli*, Crane cites two Court of Appeals decisions, *Amatulli v. Delhi Construction Corp.*, *supra* and *Codling v. Paglia*, 32 NY2d 330 (1973). While those decisions stand for the general proposition that a manufacturer who places a defective product into the stream of commerce which causes injury may be liable for such injury, they do not address the issue here, whether a defendant may be liable for injury resulting from a defective product it did not place into the stream of commerce, but which it knew or should have known would, or which was meant to be used in conjunction with its product. The additional cases Crane cites are distinguishable on their facts. *See Kazlo v. Risco*, 120 Misc 2d 586 (Sup Ct, Orange Co 1983) (manufacturer of a pool not liable where it was not aware that an allegedly defective ladder would be used); *Passeretti v. Aurora Pump Co*, 201 AD2d 475 (2nd Dept 1994) (appellant not liable where there was no evidence in the record that it had any connection with the pump in question); *Porter v. LSB Industries, Inc*, 192 AD2d 205 (4th Dept 1993) (trademark registrant not liable in products liability or negligence for a defective product); *Curry v. Davis*, 241 AD2d 924 (4th Dept 1997) (entity involved in Section 8 housing subsidy program not liable in strict products liability with respect to lead paint in an apartment rented through the program); *D'Onofrio v. Boehlert*, 221 AD2d 929 (4th Dept 1995) (trademark licensee not liable for injuries caused by a defective product); and *Smith v. Johnson Products Co*, 95 AD2d 675 (1st Dept 1983) (entity which did not manufacture the product in issue not liable in strict products liability).

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.