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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEW YORK CITY ASBESTOS LITIGATION, KONSTANTIN,

Respondent,

-against-

No. 85

630 THIRD AVENUE ASSOCIATES,

Appellant.

20 Eagle Street
Albany, New York 12207
May 03, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 JUDGE PIGOTT: Case number 85, Matter of New
2 York City Asbestos Litigation.

3 Ms. Sullivan, good afternoon. Welcome.

4 MS. SULLIVAN: Judge Pigott, may it please
5 the court, Kathleen Sullivan for Tishman.

6 CPLR 602(a) provides for the consolidation of
7 cases for joint trial, where they involve substantial
8 common issues of fact that are susceptible to overlapping
9 proof.

10 JUDGE STEIN: Before you talk about the
11 standards and everything, here there were originally
12 - - - well, originally ten cases. Then the court
13 decided to try seven of those cases together,
14 correct, and Tishman and others objected to that
15 ruling. And they - - - and they argued why it should
16 not take place.

17 Fast forward, comes time for trial, and - -
18 - and we're left with two cases. Did Tishman make or
19 join in any argument that those two cases, which
20 really in my view presented an entirely different
21 situation from when there were seven, that that was
22 improper?

23 MS. SULLIVAN: Your Honor, there is no
24 question about preservation of the objection to
25 consolidation. And you don't have to take that from

1 me, take it from the Appellate Division, which at A22
2 said that the issue of consolidation is properly
3 before us. And under this court's decision in
4 Gorrasi v. Prost (ph.), once the Appellate Divi - - -
5 once the Appellate Courts have taken an issue on,
6 it's properly before the court.

7 So - - - but in answer to your question,
8 yes, we did object, the record cites are A1167, where
9 we joined in the initial objection to the seven, then
10 when it's cut down to trial, we object again, or were
11 considered by the supreme court to have it joined in
12 the objection at A169, and at A447 to 49.

13 And in each one of those moments, whether
14 the court was addressing a particular defendant's
15 counsel or not, supreme court referred to defendants.
16 So we were properly included; Tishman was properly
17 included in the objections to consolidation. And if
18 Your Honor is suggesting, well, how can two cases be
19 as bad as seven, or ten, or sixty four - - -

20 JUDGE STEIN: Well, they're different
21 considerations, surely.

22 MS. SULLIVAN: Well, Your Honor, we still
23 objected to consolidation when the case was tried
24 with two - - - was down to two cases. But let me go
25 back to the standard - - -

1 JUDGE STEIN: How did you do that?

2 MS. SULLIVAN: Well, Your Honor, with the
3 court - - - the supreme court, we didn't - - - we
4 didn't make a new argument where we said two is just
5 as bad. But the supreme court deemed - - -

6 JUDGE STEIN: Isn't that the point at which
7 the court could have then made a determination that
8 oh, yeah, maybe you're right, maybe there was enough,
9 you know, similarity when you looked at a - - - at a
10 spectrum of cases. But when we're left to these two,
11 the reasons and the bases for that determination
12 might be different, and you're right, maybe we should
13 have separate trial.

14 JUDGE PIGOTT: Ms. Sullivan, I apologize,
15 but I didn't ask you if you needed rebuttal time.

16 MS. SULLIVAN: And I apologize for not
17 asking for it, Your Honor, may I have three minutes?

18 JUDGE PIGOTT: Certainly.

19 MS. SULLIVAN: Thank you, Your Honor.

20 Judge Stein, if I could just say, we did in the
21 post-trial arguments specifically objected to two. And
22 that's at A85, Supreme Court acknowledges it, and says - -
23 - and goes into quite an extensive reasoning on why the
24 standard for consolidation was met.

25 And what I want to focus on with you is that

1 assuming it's preserved, and I'm going to run out of my
2 time to tell you why if it was preserved, these cases
3 shouldn't have been consolidated. And that's because, the
4 court abused its discretion as a matter of law, the
5 Appellate Division abused its discretion as a matter of
6 law.

7 I'm not asking you to come in and reweigh the
8 Malcolm factors. I'm here to tell you that as a matter of
9 law, the standard for consolidation has to be substantial
10 common issues of fact involving an overlap of proof. And
11 it's the overlap of proof that is really the key. Because
12 why do we have consolidation? We have it to speed up
13 judicial efficiency, to make it easier to clear the
14 docket.

15 JUDGE ABDUS-SALAAM: Wasn't there - - -

16 JUDGE FAHEY: Well, the statute says that
17 the common issue is of law or fact.

18 MS. SULLIVAN: That's right, Your Honor.
19 But Your Honor, it's hard for me to think about a
20 case with a common issue of law that completely
21 disparate facts, in fact, in a number of cases - - -

22 JUDGE ABDUS-SALAAM: Wasn't there - - -
23 there some overlap in the expert testimony here about
24 when the standard - - - when people know about
25 asbestos, and how these - - - these two individuals,

1 you know, might have contracted asbestos or
2 mesothelioma at some point because of asbestos use?

3 MS. SULLIVAN: Your Honor, there was not.
4 And let me - - - let me get to the re - - - let's
5 just go over what this case was about. It had no
6 common fact witnesses, there were seventeen witnesses
7 - - -

8 JUDGE FAHEY: Well, it did in the medical
9 evidence.

10 MS. SULLIVAN: It didn't, Your Honor, it -
11 - - there were three - - - the plaintiffs - - -

12 JUDGE FAHEY: I thought they had three
13 common doctors that they used.

14 MS. SULLIVAN: There were three experts who
15 did not save any time. Dr. Moline, the plaintiff's
16 causation expert, testified only in Dummitt's case,
17 not in Konstantin's; the case before you now.

18 Dr. Castleman, the state of the art expert
19 - - - plaintiff's state of the art expert, provided
20 separate testimony at separate points in the record
21 on Konstantin and on Dummitt.

22 And the dust expert, Mr. Hatfield, who you
23 heard about today, testified about both plaintiffs,
24 but the court at A4 - - - A945 said I can't tell you
25 which plaintiff Mr. Hatfield was talking about at

1 this time. So there was no judicial efficiency to
2 those three experts.

3 Remember, Crane didn't contest causation;
4 Konstantin didn't contest causation. So there was a
5 causation expert dispute in Konstantin. In Konstantin, we
6 put on Dr. Siroky at 879 to say asbestos - - - a joint
7 compound hadn't caused the cancer in our case. They put
8 on mis - - - Dr. Markowitz at A460 to say it had.

9 But those two experts on causation didn't
10 testify at all in Dummitt. So having Dummitt and
11 Konstantin tried together didn't save any expert time.

12 JUDGE STEIN: Now, it sounds like you're
13 asking us to weigh the factors.

14 MS. SULLIVAN: I'm not, Your Honor. What
15 I'm asking you to do is to set a standard and to - -
16 - what I'm asking you to do is take the standard
17 that's already been implicitly set in your case of
18 Vega, the Appellate Division cases we'd cite to you
19 in particular at the cases from - - - in our brief at
20 page A20, you'll see that we cite what we think gives
21 you the basis for the standard I'm asking for. And
22 that's the First Department decision in C.K.S. Ice
23 Cream, 1991, and the Third Department decision in
24 Gibbons v. Groat, 1964.

25 What those cases talk about is the need for

1 overlapping proof. And Your Honor, I'm not asking you to
2 weigh the factors, I'm asking you to please instruct the
3 courts that there needs to be a determination of common
4 issues of law or fact, at an issue of generality that's
5 specific enough to create overlapping proof.

6 Now, Justice Abdus-Salaam, let me go back to the
7 key question you asked. Are these the same kinds of
8 diseases from the same kinds of asbestos? And the answer
9 to that is, no, not at all. My - - - the plaintiff in
10 Konstantin, the case where I'm representing Tishman, had a
11 form of mesothelioma so rare that there are only 223 cases
12 reported in the world, including lots of - - - substantial
13 number of cases from children not exposed to asbestos.
14 There is a - - -

15 JUDGE RIVERA: So that factor may weigh in
16 favor of your client, but the other factors may weigh
17 in the other direction - - -

18 MS. SULLIVAN: That's right, Your Honor.

19 JUDGE RIVERA: - - - right, it's a
20 balancing; it is balancing.

21 MS. SULLIVAN: That's right, Your Honor.

22 And I'm not asking you to reweigh them. What I'm
23 asking you to do, is say that you can't go to such a
24 high level of generality that you don't look for
25 commonality of proof.

1 Let me read you the key passages in the
2 Appellate Division's decision. There are - - -

3 JUDGE GARCIA: Before you get to that, have
4 we ever adopted those factors at the Court of
5 Appeals?

6 MS. SULLIVAN: You have not, Your Honor,
7 they are commonly used, they've been more or less
8 adopted by the Appellate Divisions, including the
9 First Department. We're not objecting to them,
10 they're hopeful, they're not exhaustive, and we're
11 not in any way contesting that the balancing of the
12 factors is discretionary.

13 What I'm asking you to do is say there has
14 got to be a specific enough gener - - - level of
15 generality when you look at the factors that there is
16 overlapping proof.

17 Now, the key passages in the Appellate
18 Division's decision, and I really - - - I really must
19 read them because they are the key to this case. At
20 page A27, "What the Appellate Division says is enough
21 to find commonality as to work safe - - - worksite
22 occupation and manner of exposure is, fundamentally",
23 even though Konstantin was a carpenter and Dummit was
24 a boiler technician, even though Konstantin was
25 exposed to sand in the air from other workers who

1 were putting up drywall and sanding it, and Mr.
2 Dummitt, as you've heard about for an extensive
3 period this afternoon, was using valves and gaskets,
4 at a boiler, where he was touching the products that
5 were hooked up to the products with asbestos.

6 Despite all those differences, which the
7 Appellate Division acknowledges, I quote, "Konstantin
8 and Dummitt were both exposed to asbestos in a
9 similar manner which was by being in the immediate
10 presence of dust."

11 Being in the immediate presence of dust is going
12 to cover almost every asbestos case. And if that's enough
13 for similarity, then you're going to be able to
14 consolidate any two cases no matter how desperate the
15 workplace is.

16 The second key passage, and to go back to
17 questions of law, Judge Fahey, I began to say that it's
18 hard to conceive of a case where you have just commonality
19 of law, no commonality of facts.

20 You know, malpractice cases against a single
21 doctor, and malpractice cases against a single lawyer have
22 been held by the courts, including in the Groat case I
23 cited earlier, improperly joined. Even though it's the
24 same law, malpractice, if you've got a bunch of different
25 plaintiffs with different medical histories, and a bunch

1 of different clients with different litigation matters,
2 you don't consolidate.

3 So I don't think law can ever be enough, and
4 that's why I'm saying here, it's got to be facts and
5 identity of proof. Dust is not enough. And so the law
6 question is to say, when you're doing the Malcolm factors,
7 don't do them at the level of somewhere in a workplace,
8 somewhere near dust; you have to look at a lower level of
9 particularity, a more specific level of particularity.

10 You have to frame it as, I'm looking at a
11 carpenter on a building site, there is sanding of drywall
12 going on. I can bring in some other carpenters, maybe I
13 can even bring in some other carpenters, sweepers, or
14 drywall contract - - - subcontractors from another
15 building, but I don't bring them in with a guy from the
16 Navy Yard.

17 JUDGE RIVERA: They have - - - so they have
18 to work in the same place; they have to end up with
19 the same type of terminal illness.

20 MS. SULLIVAN: No. What I am not - - -

21 JUDGE RIVERA: Because that begins to sound
22 like a class action as opposed to a consolidation.

23 MS. SULLIVAN: Correct, Your Honor, and I
24 wouldn't go that far at all. What I'm saying is dust
25 is too general, only the guys at the same workplace

1 may be too specific.

2 JUDGE RIVERA: Um-hum.

3 MS. SULLIVAN: But there's got to be a form
4 of commonality that gets you to overlapping proof.

5 JUDGE GARCIA: So counsel, if we're just
6 looking at the statute, and forget the factors in
7 that case which we haven't adopted, and it says,
8 "When actions involving a common question of law or
9 fact are pending", what would your approach be to
10 that? I mean, because it clearly need some guidance,
11 right?

12 MS. SULLIVAN: Yes, Your Honor.

13 JUDGE GARCIA: "Actions involving common
14 questions of law or fact", you are writing it, what
15 would you - - - what would you have us do?

16 MS. SULLIVAN: I would look at C.K.S. Ice
17 Cream and Gibbons v. Groat, and I would combine them
18 to say there has got to be a substantial common issue
19 of fact that is important to the resolution of the
20 case on which an overlap of proof is - - - is
21 possible. An overlap of proof.

22 You got to have common fact witnesses, you can't
23 here because they are in two radically different places.
24 You've got to have common experts, can't here because one
25 has a significant causation defense because it's a rare

1 form of meso. One is pleural, that's the most common form
2 that's been associated with asbestos as in other cases.

3 JUDGE GARCIA: And there are different
4 theories of liability here, right?

5 MS. SULLIVAN: Absolutely, Your Honor. So
6 even though law alone can't be enough, I think, to
7 consolidate, the disparity in the law here is enough
8 to say that they should have been severed. Because,
9 as you've just extensively discussed in the Dummitt
10 case, failure to warn by a manufacturer of a part
11 that may or may not be combined with another asbestos
12 competing product, that's a very different product
13 liability theory than standard negligent control of
14 the workplace, which was the theory in our case.

15 That's going to create confusion as - - -
16 as Judge Feinman said in the Adler case in NYCAL.
17 You know, he said, it creates confusion if you have a
18 FELA cause of action mixed up with a negligence cause
19 of action.

20 And I see my time is up, may I reserve the
21 remainder for rebuttal?

22 JUDGE PIGOTT: Certainly.

23 MS. SULLIVAN: Thank you, Your Honor.

24 JUDGE PIGOTT: Thank you, Ms. Sullivan.

25 Mr. Dymond, welcome back.

1 MR. DYMOND: Thank you, Your Honor. It's
2 good to be here. May it please the court.

3 Seth Dymond on behalf of the plaintiff-
4 respondent, the Estate of David Konstantin.

5 Just to begin with going to Judge Stein's point
6 about preservation. The party that objected to the two
7 case joint trial is Crane. And yet, nowhere does Crane
8 take any issue with the consolidation of these cases.
9 Certainly, when we're talking about an abuse of discretion
10 as a matter of law, if one adverse party doesn't even deem
11 it to be sufficiently erroneous to challenge it on appeal,
12 presumptively, we don't have an abuse of discretion as a
13 matter of law.

14 But going to CPLR 602. I think the problem
15 arises when we try and just look at any sort of factors on
16 their surface, without regard for the purpose and intent
17 of the statute. The statute is designed to promote
18 efficiencies, judicial economy - - -

19 JUDGE STEIN: Did it do that here? How - -
20 - and if so, how?

21 MR. DYMOND: Absolutely. Well, consider
22 first that in Dummitt we called seven witnesses to
23 meet our burden; in Konstantin we called eight.
24 Three of them were the same, testifying to the same
25 subject matter, and in large part, the identical body

1 of evidence. That's forty percent commonality
2 between the two cases.

3 So first of all, Dr. Castleman, the state
4 of the art witness, provided the same body of
5 evidence in both cases. That leads to a clear
6 deficiency by saving at least a day of the court's
7 time, saving the plaintiffs' costs by allowing them
8 to split the expert fee, rather than each having to
9 bear that separately. And it's - - - and that speeds
10 the disposition of these cases.

11 JUDGE GARCIA: All the factors that seem to
12 be cited here go to either court efficiency or
13 benefit to the plaintiffs. So where do you factor in
14 the defendant's interest in this?

15 MR. DYMOND: Well, the defendant interests
16 are, first of all, safeguarded by the management of
17 the trial judge to ensure that there is no
18 deprivation of a right to a fair trial.

19 JUDGE GARCIA: But, I mean, in making this
20 analysis, those clearly are the factors, and it seems
21 to me, and I don't mean to denigrate in any way the
22 illness suffered here, but what you have is, your
23 factors are exposure to asbestos in some way, and a
24 terminal illness. And other than that, I have a hard
25 time seeing any commonality of anything here.

1 MR. DYMOND: Well, there is significant
2 commonality, and I'll list them for you. First of
3 all, on the law, failure to warn was charged in both
4 cases. It was charged as a direct claim against the
5 defendant in Dummit, but as a Article 16 nonparty
6 claim by Tishman against the nonparties. Article 16
7 was at issue in both cases. Recklessness, as an
8 exception to Article 16, was at issue on both cases.
9 And because both - - -

10 JUDGE PIGOTT: You could try two auto
11 accidents with those standards.

12 MR. DYMOND: Well, that's - - - that's
13 because this is the balancing test, Judge Pigott, and
14 we're not suggesting - - -

15 JUDGE GARCIA: What is the balance on the
16 other side, is what I am having a problem with. You
17 have got the plaintiffs' interest, you've got the
18 court's interest, what are you balancing it against?

19 MR. DYMOND: Well, certainly the statute is
20 designed to allow the trial judge the wide discretion
21 to really create efficiencies, if it can do so in a
22 way that doesn't result in prejudice to a substantial
23 right.

24 JUDGE STEIN: Would you say that it's
25 essentially a plaintiff's statute? In other words, I

1 mean, it's usually - - - it would usually be to the
2 defendant's disadvantage to have two cases tried
3 together, because one would think that maybe it's
4 human nature to say, well, jeez, you know, it's just
5 not - - - it's not just in one case, but it's more
6 than one case against these defendants or on this
7 issue that - - - that it wouldn't be beneficial to
8 defendants; would you agree with that?

9 MR. DYMOND: No, there is instances where
10 it could be beneficial to a defendant, such as - - -

11 JUDGE STEIN: But there would be the
12 exception. Go ahead.

13 MR. DYMOND: Well, there - - - there is - -
14 - it certainly could work out that way, but that's
15 really the legislature's role in enacting CPLR 602,
16 which is not just broadly worded. It is liberally
17 construed under the CPLR. And - - -

18 JUDGE GARCIA: But it's construed mainly
19 the way you're saying in asbestos cases, right, I
20 mean, Judge Pigott's point, I mean, we really don't -
21 - - courts don't apply the rule that you're saying in
22 any other context but asbestos, right?

23 MR. DYMOND: No, Your Honor. And in fact,
24 there is two other cases in our brief where similar
25 situations have arisen, one is the Megyesi case from

1 the Second Department in 1985, which was a case
2 involving two completely separate car accidents ten
3 months apart that were joined together.

4 Another example is the DeSilva case from
5 the First Department in 2011, which involved entirely
6 different legal claims. One, I think was a breach of
7 contract, and the other was unrelated divorce claim.
8 And yet, because there were sufficient commonalities
9 to balance in favor of a joint trial, and that would
10 lead to the efficiencies, and where it could be done,
11 like here in a way where it's managed where it
12 alleviates the potential for prejudice, then it's
13 valid under the broadly worded and liberally
14 construed statute. And I think there is one
15 statement in a case - - -

16 JUDGE RIVERA: If you're - - - if you're
17 the juror, where - - - where is the overlap? Right,
18 the juror has got to do the fact finding, where - - -
19 where is the overlap based on this information that's
20 presented?

21 MR. DYMOND: The overlap, first of all,
22 came from Dr. Moline's testimony about the general
23 asbestos medicine, which is the identical body of
24 evidence presented in both cases; that's in the
25 record at page A2028.

1 Secondly, is Dr. Castleman's testimony, which is
2 identical for both plaintiffs. What was knowable on the
3 public domain about the hazards of asbestos, from 1850
4 approximately until 1977, both plaintiffs' last date of
5 exposure, is the same body of testimony.

6 JUDGE GARCIA: Although the time period is
7 different, right?

8 MR. DYMOND: Well, the time period of their
9 duration. But when you talk about state of the art
10 and what's knowable, you start from the beginning,
11 and you talk about the evolution till the last date
12 of exposure. So it's the same for both plaintiffs.

13 Then, because both of these plaintiffs had
14 products-based occupational exposures, we had the
15 same testimony for Mr. Hatfield about product
16 testing, dust release from products, the methodology
17 protocols, and regulations that apply for testing of
18 products. That was the same in both cases.

19 And because we had two living plaintiffs,
20 we not just had - - - we don't - - - we didn't simply
21 have past pain and suffering, we had future pain and
22 suffering and life expectancy at issue in both cases.

23 So we had significant commonalities, and
24 when we considered this, I think it's important to
25 keep in mind the way that this trial was managed.

1 Judge Madden gave cautionary instructions when
2 appropriate, gave them notebooks to distinguish
3 between the two claims, gave them primer instructions
4 before summations to help them distinguish, separated
5 the two plaintiffs during the ultimate charge, and
6 gave them individualized verdict sheets, and
7 instructed them to evaluate these cases separately.

8 And then, consider that Judge Madden went
9 out of her way to address legal issues after hours,
10 so as not to consume the precious time we had to try
11 this case - - - these cases before the jury, in light
12 of the budgetary restrictions.

13 And when we look at that, what that leads us to
14 is two actual verdicts that don't reflect any jury
15 confusion or prejudice at all. And I think there's a
16 statement of law in a case that is perhaps the most
17 significant one here. And that comes from the Consorti
18 case in 1995 decided by the Second Circuit, which was two
19 years after the Malcolm decision.

20 And the Consorti case said it's important to
21 remember that the Malcolm factors are helpful, but they
22 are nothing more than that. They're not a substitute for
23 answering the question of consolidation itself. And here
24 is the significant part, because we have to remember the
25 procedural posture that this case presents itself with.

1 We're looking at this post judgment. So the focus point,
2 the - - - almost the only question that remains, and this
3 is what the Consorti court said, is whether there was jury
4 confusion or prejudice to the extent that it rendered the
5 jury incapable of reaching the result that it did. So - -
6 -

7 JUDGE PIGOTT: Do you think there ought to
8 be more standards applied, the 602, than what we've
9 got. You know, Judge Garcia said there isn't any.
10 Just says you could do it.

11 MR. DYMOND: Well, Malcolm - - - the
12 Malcolm factors has been used as a guideline and as a
13 suggestion for ways to try and strike inappropriate
14 valves.

15 JUDGE PIGOTT: I know, but what do you
16 think of that?

17 MR. DYMOND: Well, I think it's - - - it's
18 an appropriate way to look at it, but it can't be
19 done in a strict manner; it has to be flexible.
20 Because think about this, this is a - - - this is an
21 act of inherent discretion. And so, when a court is
22 presented with any particular joint trial
23 application, if we are to set forth a hard and fast
24 rule that says, here is what you must look at, then
25 that eliminates the discretion of an act that's

1 inherently discretionary.

2 JUDGE GARCIA: But is there something of a
3 problem with leaving it at that, and it's an act of
4 discretion where the court itself has an interest in
5 consolidating?

6 MR. DYMOND: Well, I'm sorry - - -

7 JUDGE GARCIA: Right, I mean, they are
8 self-interested in a way, right, because it's
9 beneficial to the court to consolidate the cases.

10 MR. DYMOND: Well - - - -

11 JUDGE GARCIA: So should we apply some
12 other standard or scrutiny there, where a court's,
13 certainly, interest, and the plaintiffs' interests
14 may be in consolidation, and the defendant's
15 interest, I think as Judge Stein was saying, most
16 likely would not.

17 MR. DYMOND: Well, I don't think we should
18 Your Honor, I mean, because I think if we did so, it
19 would actually be in contravention to the statute.
20 Because the statute allows our trial judges to say,
21 here are the pertinent factors in this application
22 that's presented to me right now.

23 JUDGE STEIN: So would it be enough if he
24 had two cases, and they involved medical malpractice,
25 and they were completely different, you know,

1 injuries, and allegations, and so on and so forth,
2 but you have the same expert. Would that be enough?

3 If a court were to say, well, you know,
4 this'll - - - this'll save us time, and it'll save
5 the parties money, because they can bring in - - -
6 they can share the costs of this expert, and he can
7 come in, or she can come in, are we going to say we
8 have no review of that, that's enough?

9 MR. DYMOND: No, Your Honor, under those
10 facts, if that's all we know, I would suggest that
11 that's probably not enough. But that's not what we
12 have in this case before us.

13 JUDGE STEIN: Then how do we identify the
14 rule - - - then it's not - - - it's not unlimited
15 discretion; it's - - -

16 MR. DYMOND: I would never suggest that
17 it's unlimited discretion.

18 JUDGE STEIN: That's what it sounded like
19 you were advocating for.

20 MR. DYMOND: No, Your Honor, but we have to
21 keep in mind the statutory authority. And when we
22 look at it from - - - from that context, if the
23 statute just says, a common question of law or fact,
24 a single one, that's a plain reading of the statute.
25 But here, we're already suggesting something that's

1 even stricter than that; it's the balancing of
2 factors. And this court decided a case very similar
3 - - -

4 JUDGE RIVERA: Those Malcolm factors are
5 not exhaustive, right?

6 MR. DYMOND: They're not exhaustive, and a
7 - - -

8 JUDGE RIVERA: Both sides agree.

9 MR. DYMOND: Correct. And not - - - no one
10 factor is dispositive.

11 JUDGE RIVERA: The defendant is free to
12 raise other concerns.

13 MR. DYMOND: Correct.

14 JUDGE RIVERA: And may be very specific to
15 the defendant's case.

16 MR. DYMOND: Correct.

17 And this - - - this court decided a case called
18 Maul, M-A-U-L, in 2010 in a class certification context,
19 where it noted that commonality, under CPLR Article 9,
20 cannot be evaluated by any mechanical test, and the fact
21 that there may be subsidiary questions of fact or of law,
22 peculiar to each particular plaintiff, is not a barrier
23 to, in that case, class certification.

24 And we have a consolidation statute that is
25 actually more broadly worded than Article 9 of the CPLR.

1 So certainly, that would also be true here.

2 JUDGE ABDUS-SALAAM: It's a two-way street
3 too, counsel. If defendants wanted to consolidate,
4 then the plaintiff would have to ask for a balancing
5 of these factors as well.

6 MR. DYMOND: That's absolutely true. And -
7 - - but then when we look at actually what happened
8 in this case, I think the critical point, going back
9 to that Consorti statement, that really the focus
10 should be post judgment; the focus should be where is
11 the prejudice.

12 And we have two actual verdicts that don't
13 reflect a hint of prejudice; they actually conform
14 precisely to the evidence in the case. And consider
15 that the jury was so keyed in to the distinction of
16 identity between these two cases, that they asked for
17 a read back of the Labor Law to ensure that they were
18 evaluating Tishman's liability under the appropriate
19 standard.

20 They were so keyed in that amid the 4,000
21 pages of trial transcript, there was a single
22 question and answer for each plaintiff as to life
23 expectancy, and their fact finding was spot on.
24 There is simply nothing that can be pointed to that
25 says there was prejudice to a substantial right here,

1 such that the Appellate Division's marked
2 consideration of this would constitute an abuse of
3 discretion as a matter of law.

4 And the arguments for - - -

5 JUDGE PIGOTT: Well, I worry, you know, you
6 got seven of them, and they are all together, and
7 they start peeling off, and this has got to effect
8 somebody.

9 MR. DYMOND: Well, Your Honor, if - - - I
10 think what's noteworthy about that is if the
11 appellant would have actually appealed that original
12 determination, we would have had a ruling from the
13 First Department pretrial, whether that seven cases
14 were properly joined. But the Appellate didn't even
15 deem it sufficiently erroneous to preserve an appeal
16 by following - - - by filing a notice of appeal.

17 JUDGE PIGOTT: I just couldn't think it's -
18 - - I mean, if - - - if there is an expert and
19 everyone says, the only time we can get him is, you
20 know, at a certain time, so we want to have our cases
21 consolidated and get him in, plaintiff or defendant,
22 if - - - if - - - there is common lawyers here, I
23 guess in some, and all those factors I guess factor
24 in, I just didn't know, it seems to me at some point
25 there ought to be some rule.

1 MR. DYMOND: Well, Your Honor, I think if
2 we survey what trial judges in New York County have
3 been doing, particularly in the past five years with
4 this issue, they have been really deciding this on a
5 fair and evenhanded manner.

6 JUDGE PIGOTT: You say that, but that's one
7 county. I mean, I live - - - I live in a different
8 one.

9 MR. DYMOND: That's true, Your Honor, and
10 really consolidation doesn't take place in many of
11 those counties. The reason being that the dockets
12 are significantly smaller - - -

13 JUDGE PIGOTT: That's true.

14 MR. DYMOND: - - - and the judges, in their
15 discretion, don't have any basis to do that. But
16 here, where we have - - - we have to keep in mind
17 Judge Madden and the other judges sit in general
18 assignment parts.

19 And Judge Garcia, that's not to say that
20 that's really the only consideration is the court
21 efficiency, but it is a factor. And allowing our
22 trial judges to manage their own dockets, in a way
23 like here, where they know they can do so by pro - -
24 - by protecting the defendant's rights to a fair
25 trial, by using intelligent management devices, and

1 where we see that the jury got it exactly right
2 without any indication of prejudice - - -

3 JUDGE RIVERA: Your - - - counsel, your
4 light has gone off. Can you just take a quick moment
5 to address the CPLR 5501 issue about the jury
6 verdict?

7 MR. DYMOND: Yes. Initially we would
8 submit that that really is a guise for our addressing
9 the reasonableness of the damages, which is not
10 within this court's scope of review. If you look at
11 point heading 2 of the appellant's opening brief,
12 they talk about - - - that this materially deviates.
13 And then look at page 50, in footnote 26 of the
14 appellant's opening brief, which actually suggests
15 that this court should remit the reasonableness or
16 excessiveness of the damages. So initially I would
17 submit that that's a guise.

18 But addressing the statute, 5522 just says that
19 the Appellate Division needs to set forth factors it
20 considers and the reasons for its determination. And
21 there's two citations that I think are significant.
22 First, the commentary which says, what's contemplated by
23 that statute is that the Appellate Division set forth
24 factors and reasons when it actually alters an award.

25 And even the case cited by the appellant,

1 Gasperini from the United States Supreme Court, a case
2 that took a look - - - took a look at our remittitur
3 statute, said that what our legislature contemplated was
4 the Appellate Division setting forth factors and reasons
5 for remittitur or additur, when it actually overturns an
6 award. Here, we have a case where they didn't alter or
7 overturn the damages awarded at all. The Supreme Court is
8 the one that remitted, and the Supreme Court is - - -

9 JUDGE PIGOTT: Wait, maybe I misunderstood
10 you. If they came back with too high a verdict, I
11 mean, don't they have - - - if they say it's
12 excessive - - - they have - - - they can't simply say
13 it's excessive, right, they have to say it deviates
14 materially from what would be a reasonable judgment.

15 MR. DYMOND: Correct.

16 JUDGE PIGOTT: Right.

17 MR. DYMOND: If they alter it.

18 JUDGE PIGOTT: Right. And - - -

19 MR. DYMOND: And here - - -

20 JUDGE PIGOTT: But you're saying, if they
21 don't, you know, then that doesn't even come in.

22 MR. DYMOND: I would submit that there is
23 an argument that it doesn't apply based on the
24 commentary and even the case relied on by the
25 appellant.

1 JUDGE STEIN: You're saying the supreme
2 court did that - - - that exact analysis.

3 MR. DYMOND: They did. They did it
4 extensively. And so think practically how this would
5 play out, if we remanded this case to the Appellate
6 Division to conduct a case comparison that's not even
7 necessarily mandated by the statute, all they would
8 have to do is cut and paste from the post-verdict
9 decision, the case comparisons, and put it into a new
10 order.

11 And I would submit, where they don't alter
12 the award, that would be a situation where we would
13 be giving the Appellate Division more work, needless
14 work than they already have, and they are already
15 busy enough.

16 If there is no other questions - - -

17 JUDGE PIGOTT: Thank you, Mr. Dymond.

18 Ms. Sullivan.

19 MS. SULLIVAN: Three brief points, Your
20 Honor. To begin with 5501, respectfully, the
21 Appellate Division is charged by 5501 with doing the
22 work it didn't do here, and that is to compare the
23 verdict here, even if it's been remitted by supreme
24 court, to other relevant recent verdicts, to make
25 sure there is a collar on the amount of the award

1 that wasn't done here.

2 You can look at pages A46 and A47 of the
3 record, and you'll see Appellate Division did not
4 compare the remitted award here, the 4.5 plus 3.5, to
5 any other recent judgment. Had it done so, the most
6 recent judgment in the First Department would have
7 been Penn v. Amchem, and the award here came in even
8 remitted, three million dollars higher for past pain
9 and suffering, and 1.5 million dollars higher for
10 future pain and suffering.

11 JUDGE STEIN: But the court explained why
12 it might be higher.

13 MS. SULLIVAN: Supreme did, but - - -

14 JUDGE STEIN: No, no, no, I thought the
15 Appellate Division said that there were - - - there
16 are two forms of mesothelioma here and - - -

17 MS. SULLIVAN: It did, Your Honor, give
18 some background color about this horrific disease,
19 but it didn't compare this to other relevant
20 verdicts; it didn't compare the numbers. We're - - -

21 JUDGE STEIN: No, but you're - - -

22 MS. SULLIVAN: We're suggesting 5522
23 requires you to compare the numbers.

24 If I could - - - I don't want to lose the chance
25 to just get back to my two last points, if I may, I'm

1 sorry.

2 JUDGE PIGOTT: We'll let you get them,
3 don't worry, don't worry.

4 MS. SULLIVAN: Okay, I'm sorry, Your Honor.

5 I'd like to go back to my friend's suggestion
6 that there were efficiencies in this case. There were no
7 efficiencies in this case, because this case involved two
8 disparate cases that shouldn't have been tried together.

9 Don't take that from me, take - - - you can look
10 at the Appellate Division's decision at page A20 - - -

11 JUDGE RIVERA: What would you have done
12 differently if it wasn't consolidated?

13 MS. SULLIVAN: With separate trials you
14 wouldn't have had to have an expert start on day
15 three and finish on day nine. You wouldn't have had
16 to have Mr. Dummitt's testimony read in when Mr.
17 Konstantin was being kept off the stand before he
18 came back live. You wouldn't have had to - - -

19 JUDGE RIVERA: So it's just those
20 logistics?

21 MS. SULLIVAN: It - - - it gets - - -

22 JUDGE RIVERA: Is there anything about the
23 particular evidence that you would have presented
24 that would be different?

25 MS. SULLIVAN: Well, no, Your Honor, we

1 would have had a chance at our causation case.

2 JUDGE RIVERA: Okay.

3 MS. SULLIVAN: We had a causation case
4 about a kind of cancer so rare, that there were 223
5 reported cases in the world. We were stuck in with a
6 standard pleural case, where there are 10,000 cases,
7 and there is well established literature in
8 causation. In a separate case, of course, we should
9 have had a shot.

10 Our guy was putting up - - - he was
11 sanding; he wasn't putting up drywall, and he
12 certainly wasn't a boilermaker or a steamfitter
13 working with asbestos with his hands. We had a real
14 causation defense in an individualized case that we
15 didn't have in consolidation.

16 And that brings me to the last point - - - Judge
17 Garcia, who speaks for the defendant here? I'm arguing to
18 you that the defendant - - - and one of my favorite lines
19 from Malcolm - - - Late Judge McLaughlin's great line in
20 Malcolm is, "The benefits of efficiency can never be
21 purchased at the cost of fairness."

22 Where do we get fairness? We don't get fairness
23 from juror notebooks and case management, we get fairness
24 for the defendant from CPLR 602(a), which has to be read
25 to mean common issues of law or fact, at a level of

1 generality specific enough to create common and
2 overlapping proof.

3 When Jack Weinstein brought sixty four guys from
4 the Brooklyn Navy Yard together, he could try it because
5 there was overlapping proof. There was no overlapping
6 proof in this case.

7 If you look at what happens at page A20 to A21,
8 this case goes back and forth between two guys who have
9 nothing in common, two defendants who have nothing in
10 common, two exposures that have nothing in common, or one
11 is two years, one is seventeen years; these cases had
12 nothing in common. So this is such a far cry from the
13 Brooklyn Navy Yard, it should have been an easy case of
14 severance.

15 And just the last point is, please issue a
16 standard. Malcolm factors are fine, but you have got to
17 add at the specific level of generality. And when that
18 standard comes down, two cases like this could never be
19 tried together, that doesn't mean plenty of other cases
20 can still be consolidated. You may have seven guys from
21 the Navy Yard still being tried together where it's
22 appropriate.

23 You may even have a carpenter from two sites, up
24 and down either end of Third Avenue, being exposed to
25 joint compound before their contractor knew that it had

1 asbestos. It - - - maybe they can be tried together, even
2 if it's two different sites. But these two cases couldn't
3 be tried together.

4 And please don't look to case management to
5 solve the problem. I invite your attention to my friend's
6 brief at page 19, where he lists the curative
7 instructions, and they feel a little bit like Abbott and
8 Costello, Who's On First. The judge is trying, she is
9 valiantly trying, but it's very hard to know which expert
10 testimony pertains to which case. That's not something
11 that should happen in New York courts.

12 You should reverse remand for individualized
13 trials. And with respect, we would like you to also state
14 that remittitur has to be done as a do over at the
15 Appellate Division, even if you reverse, because that
16 might create the possibility of a settlement if we get the
17 proper remittitur.

18 Thank you very much.

19 JUDGE PIGOTT: Thank you, very much.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York City Asbestos Litigation (Konstantin v. 630 Third Ave. Associates), No. 85 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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