Assenzio v A.O. Smith Water Prods. Co.
2015 NY Slip Op 30201(U)
February 5, 2015
Supreme Court, New York County
Docket Number: 190008/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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SANTOS ASSENZIO,	Index No.190008/12
ROBERT BRUNCK,	Index No. 190026/12
PAUL LEVY,	Index No.190200/12
CESAR O. SERNA,	Index No.190183/12
RAYMOND VINCENT,	Index No.190184/12

Plaintiffs,

-against- DECISION AND ORDER

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

Defendants.

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MADDEN, J.

Defendants Burnham LLC, individually, and as a successor to Burnham Corp. (Burnham) and Cleaver- Brooks, Inc., (Cleaver-Brooks) move pursuant to CPLR 4404(a) to set aside the verdict in favor of plaintiffs, and for judgment in their favor as a matter of law, or, in the alternative, for a new trial, as against the weight of the evidence, or for remitter of the jury verdicts. Plaintiffs oppose the motions.

These five cases were consolidated into trial group 1 of the Weitz and Luxemberg October 2012 Extremis trial cluster.[1] Burnham is a defendant in the cases involving Robert Brunck, Cesar O. Serna, and Raymond Vincent. Cleaver-Brooks is a defendant in cases involving Santos Assenzio, Robert Brunck, Paul Levy, and Raymond Vincent. Thus, Burnham and Cleaver–Brooks are both defendants in Brunck and Vincent. In each instance, plaintiff alleged that the named plaintiff, or where the Estate has sued, the decedent, developed mesothelioma from exposure to work with or near other workers using asbestos containing

[1] Defendants' separate motions as to individual plaintiffs are consolidated for disposition herein.

products with Burnham and or Cleaver-Brooks boilers, or in Levy, with Cleaver-Brooks distillers.[2] In each case, the plaintiff's theory of liability was based on the failure of the defendant or defendants to warn about the dangers of asbestos.

The jury returned verdicts finding the defendant or defendants liable, including determinations that exposure to asbestos while working on or near one or both of the defendants' boilers or Cleaver-Brooks distillers caused the individual plaintiff to develop mesothelioma. Specifically, the jury found both Burnham and Cleaver-Brooks liable in Brunck and Vincent, Burnham liable in Serna, and Cleaver-Brooks liable in Assenzio and Levy. The jury, in each case, also returned verdicts of recklessness against defendants, and allocated percentages of fault as to defendants and Article 16 entities. In Assenzio, the jury allocated 28% of the fault to Cleaver-Brooks, and awarded $20,000,000 for past pain and suffering, and awarded $10,000,000 to his spouse for loss of consortium. In Brunck, the jury allocated 25% of fault to Burnham and 15% to Cleaver-Brooks, and awarded $20,000,000 for past pain and suffering. In Levy, the jury allocated 24.9% of fault to Cleaver-Brooks and awarded $15,000,000 in past pain and suffering, $35,000,000 for future pain and suffering, and $10,000,000 to his spouse for loss of consortium. In Serna, the jury allocated 55% of fault to Burnham and awarded $30,000,000 for past pain and suffering and $30,000,000 for future pain and suffering. In Vincent, the jury allocated 21% of fault to Burnham and 21% to Cleaver-Brooks, and awarded $20,000,000 for pain and suffering.

In their respective motions, Burnham and Cleaver-Brooks argue that the verdicts should be set aside as a matter of law, or, as against the weight of the evidence, based on the failure of individual plaintiffs to prove that exposure to asbestos used with Burnham's or Cleaver-Brooks

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[2] In this decision, plaintiff will refer to a named plaintiff or a decedent where an Estate has commenced an action.

boilers caused the plaintiff to develop mesothelioma or other asbestos related disease. Burnham and Cleaver-Brooks also move to set aside the verdicts and for new trials on the grounds that in each case, the jury's findings were against the weight of the evidence with respect to recklessness and apportionment of fault; that the court erred in charging recklessness and apportionment; that the cases were improperly consolidated for joint trial; and in individual cases, the court made errors of law on certain evidentiary issues. Finally, defendants move for remittitur or a new trial as to damages.

Plaintiffs oppose the motions, arguing that in each case, the evidence supports the jury's findings that the individual plaintiffs were exposed to asbestos used with Burnham and/or Cleaver-Brooks boilers, and that such exposures caused the plaintiff to develop mesothelioma. Similarly, as to defendants' arguments regarding recklessness and apportionment of fault, plaintiffs argue that the evidence supports the jury's findings, and that the reckless charge conveyed the proper legal standard. As to damages, plaintiffs argue that the amount awarded by the jury is fair and just compensation, and if there is remittitur, it should be modest. With respect to consolidation, plaintiffs argue that the cases were properly consolidated for trial, and that defendants' claims of errors of law with respect to evidentiary issues are without merit.[3]

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

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[3] The court heard argument on March 27, 2014, and on March 31, 2014, and again on August 1, 2014 after the First Department's decision in In re New York City Asbestos Litig. (Konstantin) (Dummit), 121 AD3d 230, 242, (1st Dept 2014), which decision addresses many of the issues raised in these motions.

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, 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 exists, the court may not conclude that the verdict is as a matter of law not supported by the evidence." Id. (citation omitted).

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 [2nd Dept 1982] , aff'd 62 NY2d 875 (1985)). This "does not involve a question of law, but rather a discretionary balancing of factors." Cohen v. Hallmark Cards, supra at 499.

I. PRODUCT EXPOSURE and EVIDENTIARY ISSUES

A. Plaintiffs

i.) Santos Assenzio

Cleaver-Brooks argues the verdict in Assenzio should be set aside as against the weight of the evidence as the record is devoid of any evidence that Mr. Assenzio was exposed to asbestos from Cleaver-Brooks boilers.[4] For the reasons discussed below, I conclude that this argument is unpersuasive. According to the deposition testimony of Mr. Assenzio, which was read into evidence at trial, Mr. Assenzio worked first as a plumber's helper between 1954 and

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[4] In its reply, Cleaver-Brooks argues that the evidence was "insufficient as a matter of law to identify [Cleaver-Brooks] as the manufacturer of the boiler that [Mr.] Assenzio claims caused his asbestos disease, or alternatively, the verdict was against the weight of the evidence." Cleaver-Brooks Reply Memorandum (C-B Reply) at 14-15.

1957, and then as a union plumber for the next seventeen years. Tr. at 1025-26. He further testified that he was exposed to asbestos while working on or near Cleaver-Brooks boilers, and boilers of American Standard, Utica, Kohler, Kewanee, Slant/Finn, and Durham-Bush. Tr. at 1029. According to Mr. Assenzio, his work on Cleaver-Brooks boilers consisted of removing boilers, which had asbestos insulation, and which work included cutting pipes, splitting sections, and stripping them. Tr. at 1124-1134. He also testified he repaired Cleaver-Brooks boilers by removing and replacing asbestos containing bricks and cement in their chambers. Id. Moreover, Mr. Assenzio testified that he identified Cleaver-Brooks boilers by a name plate at the front section of the boiler which bore Cleaver-Brooks' name. Mr. Assenzio further described the Cleaver-Brooks boilers he worked on as rectangular, unjacketed, sectional boilers, made of cast iron with cast iron doors. Tr. 1124–1126, 1128–1129.

Cleaver-Brooks points to Mr. Assenzio's testimony that he could not recall, the first or the last time, or any location where he worked on a Cleaver-Brooks boiler, and that Mr. Assenzio's description of the boilers he identified as manufactured by Cleaver-Brooks, did not describe Cleaver-Brooks boilers, as its boilers at the time in issue, were packaged, jacketed, and non-sectional. In support of this contention, Cleaver-Brooks points to the testimony of John Tornetta, Cleaver-Brooks' corporate representative. Mr. Tornetta testified that he graduated from high school in 1982, received an associate degree from Williamson Trade School in 1984, and began working as a service technician at Cleaver-Brooks in 1985. In 2001 he became manager of technical services when the former manager, George Provence, retired. He further testified that as technical manager, he is the person most knowledgeable about asbestos related issues for Cleaver-Brooks, and that he testifies on its behalf about such issues. According to Mr. Tornetta, he learned about these issues from speaking and working with George Provance and with

attorneys for Cleaver-Brooks; from being deposed by plaintiffs' attorneys; from reading some of Mr. Provance's testimony; and from Cleaver-Brooks manuals and records. He testified that he has no formal training with respect to asbestos containing material, nor has he attended any classes about identifying such material.

As to Mr. Assenzio's testimony, Mr. Tornetta stated he read some portions of Mr. Assenzio's deposition, and that he remembered that Mr. Assenzio described working on Cleaver-Brooks boilers which were made of cast iron with multiple sections. In its Memorandum in Support of the Motion (C-B Memo at 44-45, C-B Reply at 16), Cleaver-Brooks argues the evidence shows that it did not manufacture the type of boiler Mr. Assenzio described, and points to the following questions by its attorney, which were asked of, and answered by Mr. Tornetta:

> Q. Did you see the description of the boiler that he [Mr. Assenzio] identified as Cleaver-Brooks?
> A. Yes, in the past I have.
> Q. Okay. Do you remember if, he, how he described it?
> A. I, again, I have, there have been a lot of things I looked at I am pretty certain he described it as having sections and being cast iron—multiple sections, I should say.
> Q. Is that a description, an actual description of a Cleaver-Brooks boiler that would have been in Mr. Assenzio's work history until 1976?
> Would that have been an accurate description of a Cleaver-Brooks boiler during his work history?
> A. No. We didn't have boilers that fit that description in that time period. Tr. at 4686.

Cleaver-Brooks, in another part of its memorandum, states the evidence shows that during the time period when each of the plaintiffs, including Mr. Assenzio, alleges he worked on Cleaver-Brooks boilers, the boilers, which Mr. Tornetta describes as pressure vessels, were comprised of 99% steel. Tr. at 4359-4360, C-B Memo at 10, C-B Reply at 8. Cleaver Brooks argues that this testimony establishes that it did not manufacture "cast iron boilers during the time period that Mr. Assenzio worked on

boilers, and [is] prima facie proof that C-B boiler did not cause Mr. Assenzio's asbestos disease." C-B Reply at 16. Significantly, Cleaver-Brooks did not support Mr. Tornetta's testimony with catalogs, records of any type, nor with information detailing Cleaver-Brooks' manufacturing history with respect to the types of boilers, and materials used in their manufacture during specific time periods. The above answers do not to refer to a definite time period, nor does Cleaver-Brooks point to any testimony where Mr. Tornetta states whether Cleaver-Brooks, at any time, manufactured cast iron boilers. The lack of such evidence is significant, as Mr. Assenzio's testimony indicates a work history between 1954 and 1974 dismantling and repairing boilers, which boilers would have been manufactured years prior to dismantling and repair. Contrary to Cleaver Brooks' argument, specifically as to Mr. Assenzio, the above questions and answers are insufficient to establish that Mr. Assenzio was not exposed to asbestos from work on its boilers.

Moreover, this testimony and the above questions must be considered together with Mr. Tornetta's answer that Cleaver-Brooks had name plates on its boilers, which were generally about two and one –half feet wide and 8 inches in height. In evaluating Mr. Tornetta's testimony, it is significant, that while Mr. Tornetta has been employed by Cleaver-Brooks since 1985, he has no personal knowledge of Cleaver-Brooks products during the relevant time period. As Mr. Assenzio testified he identified Cleaver-Brooks boilers from the name plate affixed to it, and described the work he performed dismantling such boilers, and in connection with cutting boiler pipes and hoisting them out, there is conflicting evidence as to whether Mr. Assenzio was exposed to asbestos while working with or near Cleaver-Brooks boilers. The conflicting

evidence presented issues of fact and credibility which were properly determined by the jury. In considering the evidence as a whole, there is no basis to set aside the verdict as against the weight of the evidence, as the evidence did not preponderate in favor of Cleaver-Brooks such that the verdict "could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., supra at 746.[5]

ii.) **Brunck**

Mr. Brunck, who was deceased at the time of trial, alleged he developed mesothelioma from exposure while working as a plumber from 1960 to 1979. At his deposition, which testimony was read to the jury, Mr. Brunck testified that he was exposed to asbestos from work he did connecting water lines and working with valves and pumps. Tr. at 3876.

Mr. Brunck testified that he began working as a plumber's apprentice around 1960, worked as a plumber in Local 1, and then as a plumber/steamfitter in local 373 from 1971 to 1979. He testified that he worked at hundreds of buildings and at 500 to 700 sites. According to Mr. Brunck, he worked on or around asbestos containing equipment and products of numerous companies.

Mr. Brunck further testified that he compiled a hand written list of those companies, which he referenced during his deposition. With respect to boilers, he testified that he was exposed to asbestos while working on or around Burnham, Cleaver-Brooks, Weil-McLain, American Standard, A. O. Smith, Kohler, Peerless and Slant/Fin boilers. Mr. Brunck recognized Cleaver-Brooks boilers from their name

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[5]Based on the evidence, Cleaver-Brooks' argument in its reply that the verdict must be set aside as a matter of law as plaintiff failed to prove exposure to asbestos from Cleaver-Brooks boilers caused his mesothelioma is denied.

plates, and described their boilers as tall, with burners in the front and circulators and piping. Tr.at 3906-08. Mr. Brunck further testified that he was exposed to asbestos from Cleaver-Brooks boilers "many times," and in the same way he was exposed to asbestos from Weil-McLain boilers that is "[t]hey're packed with asbestos inside around the burners for the valves, for the pumps." Tr. At 3878-80. Mr. Brunck also testified that he was exposed to asbestos while working on boilers when "connect[ing] water lines, valves and pumps." Tr. at 3876. The sites where he worked were dirty, dusty and filthy, and he breathed the air while working.

Cleaver-Brooks points to Mr. Brunck's answer to questioning by its counsel, that the first time he recalls working on or around a Cleaver-Brooks boiler was in the 1990s, and that the boilers were new. Tr. at 4076-77. Later in his deposition, when asked by his attorney, he answered when he was a member of Local 1 in the 1960s, he was present quite a few times when a Cleaver-Brooks boiler was being repaired or being ripped out. Tr. at 3912. Again, Mr. Brunck described the environment when a Cleaver-Brooks boiler was being ripped out as "dirty, filthy dusty conditions." Tr. at 3913. As to his prior testimony, when asked by his lawyer, if he gave an answer that differed from his testimony on that day, Mr. Brunck explained when he gave that testimony he was tired, and recovering from a chemotherapy treatment he received a few days prior to the deposition. Tr. at 3913-14

Cleaver-Brooks also references evidence that it searched its records and located records that Cleaver-Brooks shipped boilers to the following three sites identified by Mr. Brunck as sites where he worked, and where Cleaver-Brooks boilers were installed; Nyack Hospital, Good Samaritan Hospital, and Aqueduct Raceway. According to

Cleaver-Brooks, these records show that the boilers were insulated in the factory, covered with sheet metal or steel casings under the steel jacket and shipped to the site for installation.

While noting that Mr. Brunck believes he was exposed to asbestos at these sites from valves, pumps and gaskets, Cleaver-Brooks contends that there was no evidence that Mr. Brunck was present during installation or removal of these boilers. Cleaver-Brooks argues, as discussed below, that this evidence is relevant to medical causation; specifically, that this evidence supports its argument that the evidence as a whole is insufficient to establish that exposure to asbestos from its boilers substantially contributed to Mr. Brunck's mesothelioma.

As to work on Burnham boilers, Mr. Brunck testified that he repaired and installed its boilers, and was exposed to asbestos while doing such work in the same way he was exposed from working with the other boilers, from covering, piping and gasket material. Tr. at 3887. He further testified in the 1960s he was present when Burnham boilers were being repaired, and when they were being ripped out, and he knew a boiler was a Burnham boiler, since Burnham's name was on it. Tr. at 3911. He described the atmosphere when the boiler was being ripped out as "dirty, filthy, and dusty," Tr. at 3912, and that he breathed in the dust. In addition, Mr. Brunck testified that he was exposed to asbestos from Burnham's boiler's "a lot," "every time "the boiler was ripped out." Tr at 3911-12.

Burnham moves to set aside the verdict in Brunck as a matter of law based on the contention that the evidence is insufficient to establish that Mr. Brunck was exposed to asbestos from Burnham boilers. Primarily Burnham argues that Mr. Brunck's

testimony is vague and lacks specificity as to exposure from Burnham boilers. In support of this argument, Burnham points out that Mr. Brunck could not identify a "single specific instance" where he was exposed to asbestos from a Burnham boiler. Burnham also points to Mr. Brunck's testimony that he was exposed to asbestos in boilers when he installed burners in them, citing Mr. Brunck's testimony that "the refractory around the burners [which] had to be removed" had asbestos. Burnham Memorandum at 11. However, Mr. Brunck's complete answer was that "[t]he refractory around the burners had to be removed. The burners had to be removed. It was lined with asbestos block and refractory cement. Sometimes some of that was replaced also." Tr. 3859.

Burnham argues that the refractory cement used in its boilers did not contain asbestos, based on the testimony of its corporate representative, Donald Sweigart that "[w]ell it's my personal understanding of refractory cement is that because of the high temperature it's exposed to, that it would go beyond the temperature range that asbestos could tolerate, and asbestos would not typically be included in refractory cement." Tr. at 2723. When asked if this was his "own knowledge, but you don't know one way or the other about....speaking for Burnham," Mr. Sweigart answered "yes." Id. Moreover, Burnham did not offer any documentary evidence to support this statement.

Burnham's motion to set aside the verdict as a matter of law is denied. Mr. Sweigart's testimony, upon which Burnham relies, that refractory cement did not contain asbestos, was his personal opinion. Thus, Sweigart's statement cannot be attributed to Burnham, and the statement does not constitute competent proof that Burnham refractory cement did not contain asbestos. Furthermore, in addition to

refractory cement, Mr. Brunck testified he was exposed to asbestos while installing and repairing boilers from covering, piping and gasket material. Thus, even if Mr. Brunck's testimony about the burners is excluded, sufficient evidence was presented with respect to exposure to asbestos from covering, piping and gasket material, so that the motion is properly denied.

iii.) Paul Levy

Mr. Levy testified at trial that he was exposed to asbestos while working as a pipefitter overhauling, renovating and modifying ships at the Brooklyn Navy Yard in the early 1950s, and in 1954 and thereafter, when he began working on new construction. With respect to Cleaver-Brooks, Mr. Levy testified he was exposed to asbestos from its distillers while working on new construction on two ships; the Independence in 1962, and the Constellation in 1964. He described the distillers as large machines, eight or nine feet tall and seven feet wide which converted salt water to fresh water through a process involving steam. Pipes, flanges and gaskets were used both to bring in the saltwater and transport the fresh water. Mr. Levy testified four distillers were installed on each of the two ships, that it took months to install the distillers, and that he was exposed to asbestos while working near laggers, who were insulating the distillers with asbestos containing cement. Mr. Levy testified that the distillers were insulated by cutting large asbestos containing blocks to size. According to Mr. Levy, asbestos containing dust was created from cutting the blocks and from mixing cement for insulation, which dust floated in the air. Mr Levy further testified "I breathed all that stuff." Tr. at 3618. In addition, he testified he was exposed from breathing asbestos containing dust while working on piping to the distillers from asbestos containing

insulation used on the piping and flanges, and from asbestos containing gaskets used in the flanges.

Cleaver-Brooks moves to set aside the verdict and for a new trial on the grounds that the court erred in permitting Mr. Levy to testify to exposure to asbestos from distillers, and erred in giving a missing documents charge, and that it was error to permit Mr. Levy's direct testimony to be videotaped, when his cross-examination was not filmed.

Cleaver-Brooks' argument that it was error to permit Mr. Levy to testify to exposure from Cleaver-Brooks distillers, is based on grounds that it did not have notice of this claim, and that this claim constituted a new theory of liability. Cleaver-Brooks contends that Mr. Levy originally claimed exposure to asbestos from its boilers, and that it was not until the commencement of trial, that he claimed exposure to asbestos from its distillers. In support of its arguments, Cleaver-Brooks points to Mr. Levy's testimony that he did not identify distillers in his complaint, amended complaint, answers and supplemental answers to interrogatories, deposition, and pre-trial affidavits. Counsel for Mr. Levy does not dispute that neither the interrogatories nor supplemental interrogatories identified distillers.

As to the affidavits, Mr. Levy's counsel contends, as he did at trial, that Mr. Levy identified distillers at his deposition; and that in pre-deposition affidavits, Mr. Levy stated, in addition to the products identified in the interrogatories, he was exposed to asbestos from other equipment or machinery on the ships on which he worked. Tr. at 3488-89. Counsel for Mr. Levy further contends that in the same year, in June, 2012, product identification interrogatories were sent asking Cleaver-Brooks to search its

records for their equipment at the sites and on the ships where Mr. Levy worked, and that Cleaver-Brooks failed to respond to this demand. Id. Counsel further states that pursuant to a court order at the beginning of trial, he sent documents to Cleaver-Brooks that showed distillers were on the ships on which Mr. Levy worked, and proof that insulation on those distillers contained asbestos, as well as testimony from Cleaver-Brooks' corporate representative six years ago, where such documents were marked as exhibits. Id. Cleaver-Brooks, does not dispute these contentions.[6]

Thus, the record at trial shows that at his deposition, Mr. Levy's identified distillers as a source of exposure, without specifically identifying Cleaver-Brooks distillers. Based on this deposition testimony, the documents provided by plaintiff, and Mr. Levy's pre-deposition affidavits, Cleaver-Brooks had sufficient notice that Mr. Levy alleged exposure to asbestos from distilling units on the ships where he worked.[7] Moreover, based on plaintiff's product identification interrogatories, Cleaver-Brooks had an obligation to search its records to determine if its equipment was on the ships where Mr. Levy worked. Cleaver-Brooks' failure to respond to the interrogatories should not shield it from liability with respect to its distillers. In addition, at trial, Cleaver-Brooks had sufficient notice that Mr. Levy claimed exposure from its distillers. Thus, it was not error to admit this testimony based on lack of notice.

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[6] However, at trial, Cleaver-Brooks contended that plaintiff's counsel failed to provide proof that the distilling records were previously produced by Cleaver-Brooks. As to this contention, it is noted that Mr. Tornetta testified that he believes he previously found documents about distillers, but may have gotten them from the Navy.

[7] In its Reply Memorandum, Cleaver-Brooks alleges that plaintiff counsel's statements during trial misled the court. This issue was considered in connection with Cleaver-Brooks' objections to Mr. Levy's anticipated testimony about exposure to asbestos from Cleaver-Brooks distillers. However, the record indicates that plaintiff's counsel did not represent that Mr. Levy testified at his deposition to exposure from Cleaver-Brooks' distillers, but that he was exposed to asbestos from distillers. Moreover, as referenced by Cleaver-Brooks, I held it had sufficient notice that Mr. Levy was alleging exposure from "distilling units on certain ships." Tr. at 3492. I do note that subsequently, in a decision denying Cleaver-Brooks' motion for a directed verdict in Levy, I incorrectly stated that Mr Levy testified at his deposition that he was exposed to asbestos from Cleaver-Brooks' distillers. TR 6054-6055.

Nor is there merit to Cleaver-Brooks' argument that the allegations of exposure to asbestos from distillers is a new theory. These allegations involve the same manner and type of exposure, and allegedly occurred on the same ships, as the allegations with respect to boilers. Moreover, the allegations are based on the same theory of liability; that Cleaver-Brooks failed to warn about the dangers of exposure to asbestos. Although Cleaver-Brooks asserts generally that it did not have an opportunity to prepare a defense, it has not asserted any specific prejudice it suffered. DiMauro v Metropolitan Suburban Bus Auth., 105 AD2d 236 (2d Dept 1984), relied upon by Cleaver-Brooks, is distinguishable. DiMauro involved a motor vehicle accident where plaintiff sued the defendant bus company, which in turn brought a third party action against the driver of the vehicle in which plaintiff was a passenger, alleging that plaintiff's injuries were caused by the manner in which that driver operated that vehicle. At trial, the bus company raised the defense that plaintiff's injuries were caused by the failure of the operator of the vehicle to provide an operable seat belt. In ordering a new trial, the Second Department held this was a new or alternate theory based on previously unplead facts. Id at 240. The Court also found that the defective seat belt claim prejudiced the third party defendant who had no notice that the claim would be asserted at trial, and who required an expert to refute such a claim. Id. Here, as stated above, Cleaver-Brooks has not asserted any specific prejudice, and this argument is unavailing.

Nor was it error to give a missing documents charge in connection with Cleaver-Brooks' failure to produce records for its distillers. Mr. Tornetta testified that in this case, counsel for Cleaver-Brooks did not ask him to conduct a search for records related to its distillers on either the Constellation or Independence. Tr. at 4477-4478. Cleaver-

Brooks in its memorandum states that as "the distiller division ...was sold in 2006 and is now operated by an unrelated company Aqua-Chem, Inc., C-B no longer has possession, custody and control of any documents relating to distillers," (C-B Memo at 40), and references the following questions asked of, and answered by Mr. Tornetta:

> Q. And eventually at some point in the '60s the distilling unit broke off of Cleaver-Brooks.
> A. I am not sure I would say broke off. It became its own division, I guess I'll call it.
> Q. That's called Acqua-Chemical?
> A. That became at that time Acqua-Chemical...
> Q. Then Acqua-Chemical eventually separated from Cleaver-Brooks' parent company, correct?
> A. Correct.
> Q. So Acqua-Chem and Cleaver-Brooks are together at this point in time?
> Q. Meaning today?
> A. Actually, all the Acqua-Chem portions of the company are no longer under Cleaver-Brooks. Tr. at 4334-4335

Contrary to Cleaver-Brooks' argument, in this referenced testimony, Mr. Tornetta does not specifically state that Cleaver-Brooks no longer possessed records relating to distillers.[8]

The charge as given instructed that:

> In the Levy case, plaintiffs claim that Defendant Cleaver-Brooks has failed to produce documents and records related to Cleaver-Brooks distillers, which failure plaintiffs claim you should consider in connection with the use of asbestos containing products and material with Cleaver-Brooks distillers. Cleaver- Brooks' corporate representative, John Tornetta, testified Cleaver-Brooks sold the division responsible for distillers and that Cleaver-Brooks did not conduct a search for any documents or records.
> If you believe that the documents and records existed and if you also believe

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[8] In other testimony, Mr. Tornetta stated that Cleaver-Brooks' record keeping methodology with respect to boilers involved maintaining index cards organized under broad equipment categories, and within those categories the cards are organized by site or address where the boiler was installed. In order to obtain records from previously sold boilers, the address where the boiler was installed was needed. In addition to the index cards, Mr. Tornetta stated that commercial files and drawings are maintained with respect to each boiler. While these records relate to boilers, as to distillers, Mr. Tornetta testified that he had no way of searching for records for distilling units as he doesn't have index cards for them. Tr.at 4456.

> that that Cleaver-Brooks has not offered a reasonable explanation for not producing them, you must decide what weight, they would have had in your deliberations, if any.
> If you find that the documents and records would have been important or significant in your deliberations, you may, but you are not required to, conclude that had they been produced, they would not have contradicted the evidence offered by the plaintiff on the question.
> Additionally, you may, but you are not required to, draw the strongest possible inference against Cleaver-Brooks on that question, [as] the opposing evidence permits. Tr. at 5917-78.

An adverse inference charge is permissive and allows, but does not require, a jury to draw a negative inference for the non-production of evidence. Gogos v Modell's Sporting Goods, Inc., 87 AD3d 248, 255 (1st Dept 2011). Here, plaintiffs' evidence showed that Cleaver-Brooks produced records in an unrelated case with respect to its distillers in 2007, after it sold its distilling division. Moreover, in the Levy case, Mr. Tornetta was not asked by defense counsel to conduct a search for records. The negative inference charge was properly given, as these circumstances present conflicting inferences to be resolved by the jury, as to whether Cleaver-Brooks had a reasonable explanation for non-production of records; whether a search would have produced records; and whether the records would have supported plaintiffs' position. Id.

Finally, Cleaver-Brooks' motion based on the videotaping are without merit, as the jurors were specifically instructed to draw no inference from the taping and Cleaver-Brooks' argument as to highlighting Mr. Levy's direct testimony is speculative.

iv.) Raymond Vincent

According to Mr. Vincent's deposition testimony, he developed mesothelioma from exposure to asbestos while working at New Milford Foundry and Machine Company from 1946 to 1957, and while working as a steamfitter from 1957 to 1989. From 1946 until 1951, he worked as an apprentice, and afterwards worked as a plumber, pipefitter, and steamfitter. Mr. Vincent testified while working at the Foundry he was exposed to asbestos through "knocking down old

boilers, taking out old piping out, old pumps, valves, you name it." Tr. at 1524. He further testified while employed there, he worked on Burnham, Cleaver-Brooks, A.O. Smith, Durham-Bush, and Pacific boilers. Id. Mr. Vincent testified that he was exposed to asbestos from the boilers while removing them, as they were covered with asbestos, and from gaskets, packing nuts and rope, as they contained asbestos.

Mr. Vincent described Cleaver-Brooks boilers as horizontal, made of steel and jacketed. Tr. at 3134-35.Mr. Vincent also testified he was exposed to asbestos when installing boilers while making piping connections, from gaskets and from pipe and elbow covering. He identified Burnham, Cleaver-Brooks, A.O. Smith Peerless and Pacific as the boilers he installed. In 1957, he joined the plumbers and pipefitters union as a steamfitter. While working in the union, Mr. Vincent testified he was exposed to asbestos from making piping connections to boilers, while old pipes and covering were being broken up and removed, and when installing boilers. The connections were on Weil-McLain, probably Burnham, Cleaver-Brooks, A.O. Smith and Peerless boilers. Mr. Vincent also testified while in the union he was exposed to asbestos while removing Cleaver-Brooks boilers; that the boilers were probably in a school or factory; and that he knew it was a Cleaver-Brooks boiler because the name was stamped, usually on a plate. Tr. at 3135-3137. He testified he was exposed to asbestos from bricks in fire boxes, and from gaskets on boiler manholes or handholds on jacketed Cleaver-Brooks boilers. He further testified that it took several hours to remove a Cleaver-Brooks boiler, depending on the number of workers, and one to two days to make the piping connections for installing one. Tr. 3138-41. As to Burnham boilers, Mr. Vincent testified he was exposed to them in similar ways.

Burnham moves to set aside the verdict in Vincent as a matter of law on the grounds that Mr. Vincent was unable to say he was exposed to breathable asbestos fibers from Burnham

boilers, as he testified that he was only possibly exposed to asbestos when he installed boilers and that he testified to being exposed vaguely and generally when removing boilers. In light of Mr. Brunck's testimony as to how he was exposed to asbestos from working with boilers, and that he was exposed to asbestos from work with Burnham boilers in the same way as he was exposed to asbestos from work with Cleaver-Brooks boilers, the evidence was sufficient to establish a prima facie case, so that Burnham's motion is denied. The evidence Burnham cites created issues of fact which were for the jury to resolve.

v.) Cesar Serna

Mr. Serna testified he worked in construction doing demolition and painting from sometime in the 1970s until December, 2010. Tr. at 398; 402-03; 419. He testified that he worked as a painter for Dineen Construction (Dineen) from 1985 for approximately 17 years. Tr. at 420. At his deposition, Mr. Serna testified to bystander exposure to asbestos while painting in basements, as others worked on boilers. However, at trial, Mr. Serna testified that he was exposed to asbestos in basement spaces from bystander exposure, as plumbers were removing asbestos from the outside of boilers, but also from direct exposure, while assisting in the dismantling and removal of the boilers. In addition to his own testimony, Mr. Serna called Gilmore Ovidio Perez, one of his co-workers at Dineen, who testified that Mr. Serna helped to dismantle boilers. Mr. Serna and Mr. Perez testified that the boilers Serna helped to dismantle were manufactured by Burnham, American Standard, A.O. Smith, and Weil McLain. Mr. Serna testified the outside of the boilers were covered in asbestos, that he knew it was asbestos based on statements by other workers, and that this work created dust which he would breathe and which covered his clothing. Mr. Serna also testified to bystander exposure in basements from the work of other trades, while he was painting, and since he had to clean up the work area, while

cleaning up the dust.

Mr. Perez testified that he worked with Mr. Serna from 1994 dismantling boilers, which work involved breaking the boilers apart with sledge hammers, and removing boiler parts and connecting pipes. The boilers were "very old" and were covered with asbestos containing cement, which also covered the pipes they removed. He learned that the cement contained asbestos in 2008 during training in asbestos. The work created a great deal of dust which they swept with brooms. Perez testified that they were exposed to asbestos by breathing in the dust caused by dismantling and sweeping.

With respect to the above evidence, Burnham argues it was prejudicial error to permit Mr. Perez to testify, as Mr. Serna failed to disclose Mr. Perez as a witness until the day before jury selection, and the court erred in denying Burnham's motion for a mistrial based on Mr. Serna's trial testimony regarding direct exposure. As to Mr. Perez's testimony, Burnham primarily argues that it was surprised by the witness as it did not have notice that he would testify. In support of this argument, Burnham points to the absence of Mr. Perez's name from plaintiff's witness list in 2012. However, Burnham had notice that Mr. Perez worked with Mr. Serna, that he was a potential witness, and it had Mr. Perez's address, as of the November 12, 2012 deposition of Sean Dineen, Mr. Serna and Mr. Perez's employer. Moreover, Mr. Perez was deposed on May 30, 2013, well before Mr. Serna's June 25, 2013 cross-examination. Accordingly, since Burnham had notice of Mr. Perez as Mr. Serna's co-worker, as well as an opportunity to depose him, it was not error to deny Burnham's motion to preclude Mr. Perez's testimony, and, thus, Burnham's motion to set aside the verdict based on this alleged error is denied. Breen v Laric Entertainment Corp., 2 AD3d 298, 299 (1st Dept 2003)(although the witness was not included on the plaintiff's witness list, the trial court abused its discretion in

precluding the witness from testifying where the exclusion was not willful, defendants were aware of the existence of the witness, had a transcript of the witness' testimony, and included the witness on their own witness list); Rivera v City of New York, 253 AD2d 597, 601 (1st Dept 1998) (it was not an abuse of discretion to allow a witness to testify who did not appear on defendant's witness list, where the omission was not willful, the plaintiff had notice of the witness and her address from a police report provided to plaintiff by defendant.)

Nor was it reversible error to deny Burnham's motion for a mistrial based on Mr. Serna's trial testimony with respect to direct and bystander exposure. As indicated above, at his deposition, Mr. Serna testified to bystander exposure as a painter when other workers were demolishing boilers, and, since he was required to clean the area, while sweeping up the dust contaminated with asbestos from the dismantling. Burnham's main argument is that it was surprised and prejudiced as Mr. Serna's trial testimony conflicted with his deposition testimony, and that this prejudice was exacerbated by Mr. Perez's testimony, which bolstered Mr. Serna's testimony. Burnham also argues it was prejudiced as its experts were prepared to testify as to issues related to Mr. Serna based on bystander exposure as a painter.

At the outset, it must be noted that Mr. Serna testified on direct on May 31, 2013, and due to his scheduled radiation treatments, he was cross-examined on June 25, 2013. Thus, Burnham had more than ample time to prepare for his cross-examination and to prepare the testimony of its experts. To the extent that Mr. Serna's trial testimony may have differed from his deposition, Burnham was given a full and complete opportunity to question Mr. Serna as to this and other issues. To the extent, Mr. Perez's testimony supported Mr. Serna's trial testimony, such consistency is not a ground for a mistrial.

"A motion for a mistrial is directed to the sound discretion of the trial court." Harris v

Village of East Hills, 41 NY2d 446,451 (1977). However, there are instances where certain events are so extraordinarily prejudicial that a mistrial is required as a matter of law. Reome v Cortland Memorial Hosp., 152 AD2d 773 (3rd Dept 1989). A denial of a motion for a mistrial is reversible error "where it appears that the motion should have been granted to prevent a substantial possibility of injustice." Id at 774. Burnham points to Reome in support of its argument that the mistrial should have been granted. However, Reome is distinguishable on its facts as, in that trial, the defendant physician, who was sued for malpractice, rendered medical assistance to a collapsed juror, which assistance was observed by the other jurors. In holding that a mistrial should have been granted, the Third Department reasoned that as the jurors were told that collapsed juror did not need to be admitted to the hospital, this information permitted an inference that the collapsed juror's condition improved due to the medical assistance given by the defendant physician. Here, it cannot be said that Mr. Serna's trial testimony, although differing from his deposition testimony, even when viewed together with Mr. Perez's testimony, was "so extraordinary" that a mistrial should have been granted to prevent an injustice. Accordingly, Burnham's motion for a new trial on the grounds the court erred in denying its motion for a mistrial is denied.

Burnham also argues that the verdict should be set aside as a matter of law on the grounds that the evidence at trial showed that at the time of Mr. Serna's exposure to asbestos from boilers, any Burnham boilers would have been jacketed, and, thus, would have contained only small amounts of asbestos used inside the boiler. In support of this argument, Burnham points to testimony by its corporate representative, Mr. Sweigart, that Burnham shifted away from selling unjacketed boilers, which would have had external asbestos cement in the 1940s and 1950s, that by 1956, 95% of its boilers were jacketed, and by 1962 Burnham stopped selling

jacketed boilers. Tr. at 2787-89. Burnham also points to Mr. Sweigart's testimony that Burnham did not manufacture asbestos cement, and that it stopped selling such cement in the 1970s. Tr. at 2655-56; 2712. Burnham did not introduce documentary evidence to support Mr. Sweigart's testimony, and this evidence is insufficient to set aside the verdict as a matter of law. The boilers Mr. Serna worked on were old and were being dismantled and removed. As the evidence showed that Burnham boilers could last 40 to 50 years, it cannot be said as a matter of law, based on Burnham's evidence regarding the manufacturing history of its non-jacketed and jacketed boilers, that Mr. Serna could not have worked dismantling Burnham boilers,.

Dr. Gordon Bragg

At trial, Cleaver-Brooks alleged that Dr. Gordon Bragg was to be called on its behalf as a mechanical engineer. Cleaver-Brooks contends that "[t]he court effectively precluded the testimony of Dr. Gordon Bragg, an expert on dust exposure in mechanical environments, despite [Cleaver-Brooks'] strict compliance with CPLR §3101(d)'s disclosure requirement." C-B Memo at 51. Cleaver-Brooks moves to set aside the verdict and for a new trial on the grounds that it was prejudiced by this "effective preclusion."

Contrary to Cleaver-Brooks' contention, there was no ruling precluding Dr. Bragg from testifying. Rather Cleaver-Brooks was directed that, as previously ordered, expert reports were to be exchanged prior to the testimony of the witness. Cleaver-Brooks was ordered to produce a report prior to Dr. Gordon's testimony. This supplemental order was given on June 25, 2013. Counsel for Cleaver-Brooks stated she did not expect to call the witness until the second week after the fourth of July. Since that week began on July 15, 2013, there was more than sufficient time to obtain the report. Moreover, Cleaver-Brooks was not precluded from calling Dr. Bragg in the absence of such report. In fact, Cleaver-Brooks' counsel was directed to produce the

discovery which was exchanged, which Cleaver-Brooks asserts is the 3101(d) report upon which it now relies. When ordered to produce the exchange, counsel's response at trial was "I don't have it." Tr. at 3223. The court then stated "I will hear further argument." Id. While Cleaver-Brooks states that "the court did not appear to have had the opportunity to review" the 3101(d) disclosure relating to Dr. Gordon, it does not allege it produced it during trial, nor does it offer any explanation for not producing it at trial. Nonetheless, Cleaver-Brooks bases its argument on this document. C-B Memo at 51.

On July 11, 2013, when Cleaver-Brooks was asked if it was calling Dr. Bragg, counsel responded that he would not be called because Cleaver-Brooks was unable to get a report. Significantly, Cleaver-Brooks made no motion with respect to calling him in the absence of a report nor, as noted above, did it offer the 3101(d) disclosure. Tr. 4643

From this record, it is clear Cleaver-Brooks was never precluded from calling Dr. Bragg as a witness. Rather, the record suggests Cleaver-Brooks made a tactical decision not to pursue the disclosure issue, and not to call Dr. Bragg. In any event, a trial court has broad discretion in its supervision of disclosure. 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co., 62 AD3d 486 (1st Dept 2009), and deference is given to a trial court's discretionary determination with respect to disclosure. See Don Buchwald & Assoc. v Marber-Rich, 305 AD2d 338 (1st Dept 2003). Here, the court properly exercised its discretion in ordering Cleaver-Brooks to produce an expert report.

Based on the foregoing, Cleaver-Brooks has failed to show that it was precluded from calling Dr. Gordon. Nor did the court err, under the circumstances, in directing Cleaver-Brooks to produce an expert report, particularly as Cleaver-Brooks failed to produce the 3101 (d) disclosure. Thus, Cleaver-Brooks' motion to set aside the verdict on grounds relating to Dr.

Gordon is denied.

II. CAUSATION

Cleaver-Brooks argues that as a matter of law plaintiffs failed to establish that exposure to its products caused the plaintiffs to develop mesothelioma, or cancer related illness. In support of this argument, Cleaver-Brooks contends the testimony of plaintiffs' medical experts, that "cumulative exposures to asbestos would have been substantial contributing factors in causing an individual plaintiff's mesothelioma," is an opinion based on the same theory as opinion evidence that "each and every exposure to asbestos causes the disease." Cleaver-Brooks' argument is two-fold; the theory of "cumulative" and "each and every exposure" has been "denounced," and that there was insufficient evidence of exposure to asbestos from Cleaver-Brooks products to establish causation. Cleaver-Brooks points to cases in various federal courts and in other states where it alleges courts have rejected the each and every exposure theory under the federal standard articulated in Daubert v Merrell Dow Pharms., Inc., 509 US 579 (1993), and where courts have found the evidence insufficient to establish exposure to a defendant's products caused the asbestos related disease. These cases are not controlling, as New York law applies. In any event, the federal cases are distinguishable on their facts and do not stand for the broad propositions as posited by Cleaver-Brooks.

At the outset, it must be noted, that as the Court stated in Parker v Mobil Oil Corp., 7 NY 3d 434, 447 (2006), with respect to scientific evidence, New York has adopted the standard in Frye v United States, 293 F 1013 (DC Cir 1923), and, in Parker, declined to adopt the Daubert standard.[9] Moreover, as discussed below, under New York precedent in asbestos litigation,

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[9]"The Frye test asks 'whether the accepted techniques, when properly performed, generate results accepted as reliable in the scientific community generally.'" Parker, supra 446 (quoting People v Wesley,

plaintiffs in this trial, presented sufficient proof to establish causation.

New York law requires that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation), and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (citations omitted)." Id. at 448. Moreover, in Parker, the Court recognized that in certain cases, "a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value," and went on to say that "it is not always necessary for a plaintiff to satisfy a dose response relationship, provided that whatever methods an expert uses to establish causation, are generally accepted in the scientific community." Parker, supra, 447-448. "[S]o long as plaintiffs' experts have provided a scientific expression of plaintiffs' exposure levels, they will have laid an adequate foundation for their opinions on specific causation." Nonnon v City of New York, 88 AD3d 384, 396 (1st Dept. 2011) (quoting Jackson v Nutmeg Technologies, Inc., 43 AD3d 599, 602 [3rd Dept 2007]). The link between asbestos and disease, general causation, is well documented. In re New York Asbestos Litigation (Marshall), 28 AD3d 255 (1st Dept. 2006). The First Department has held that evidence of plaintiff's exposure to clouds of dust from the manipulation of asbestos containing products, and expert testimony that such clouds of dust contain enough asbestos to cause mesothelioma, is sufficient to establish exposure and causation. Lustering v AC&S, Inc., 13 AD3d 69 (1st Dept 2004), lv denied 4 NY3d 708 (2005). Applying the foregoing law, as discussed below, I conclude that plaintiff established sufficient evidence at trial as to causation, and Cleaver-Brooks' motion to set aside

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83 NY2d 417, 422 [1994]). As to Daubert, the court stated that "[a]lthough some amici urge the court to adopt the federal standard (or some portion of it) as expressed in Daubert v Merrell Dow Pharmaceuticals, Inc., (509 US 579, 589-590 [1993] [requiring that scientific testimony be relevant and reliable in order to assist the trier of fact under Federal Rules of Evidence Rule 702]), the parties make no such argument and acknowledge that Fryre is the current standard in New York." Parker, supra at 447, n.3.

the verdict as to this issue is denied.

Here, plaintiffs called, among other medical experts, Dr. Steven Markowitz who testified that he is board certified in internal and occupational medicine. Dr. Markowitz gave opinions as to general and specific causation. He testified that cumulative exposure is "the totality of exposures that a worker has over time," and that "[u]sually asbestos workers use different products, different settings over years, decades that they worked. And the lungs don't discriminate. The lungs see all those fibers from all that time period, and then those fibers accumulate in the lungs or the pleura. And if they develop cancer, mesothelioma, we say, okay, that is caused by their asbestos exposures and the totality of that exposure. The accumulation of all that exposure." Tr.at 503. While Dr. Markowitz testified that asbestos related diseases are considered dose response disease, he also stated that that it has not been established through scientific study that there is a safe level of exposure to asbestos, and studies have shown that persons with low levels of, or relatively brief exposures to, asbestos have developed lung cancer and mesothelioma. Tr.at 490. Dr. Markowitz further explained that a worker when using a material containing a non-trivial amount of asbestos, when sawing, cutting or scraping it, or by doing some other action which disturbs the integrity of the material, that operation produces airborne dust, and if there is visible dust, that dust contains an appreciable amount of asbestos. Tr.at 496.[10] In addition to Dr. Makowitz, plaintiffs called Dr. Strauchen in Levy and Vincent, Dr. Rothman in Assenzio and Dr. Schwartz in Brunck. Each of these witnesses testified that the cumulative exposure to asbestos from Cleaver-Brooks products was a substantial factor in contributing to the development of the individual plaintiff's asbestos related diseases.

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[10] According to Dr. Markowitz, non-trivial amounts of asbestos in a material is at least one percent, and most of the products contain 10 or 20 percent asbestos. Tr. at 496.

This evidence from the medical experts is sufficient to establish scientific expression of the basis for their opinions. Nonnon, supra; In re New York Asbestos Litigation (Marshall), supra; Lustering v AC&S, Inc., supra. With respect to exposure, to the extent Cleaver-Brooks argues that in Assenzio and Brunck, the evidence was insufficient to establish that either plaintiff worked with or near Cleaver-Brooks' boilers, this argument is without merit. As discussed above, issues of fact were raised in both cases as to whether Mr. Assenzio and Mr. Brunck worked on Cleaver-Brooks boilers.The jury decided these issues in plaintiffs' favor. With respect to Mr. Levy and Mr. Vincent, Cleaver-Brooks does not challenge the evidence of exposure. In any event, as discussed above, the evidence was clearly sufficient to establish exposure to asbestos dust in Levy, when working on or near Cleaver-Brooks distillers, and in Vincent when working on or near Cleaver-Brooks boilers.

Based on the foregoing, when the testimony of plaintiffs' medical experts is considered together with the evidence of the nature and duration of the individual plaintiffs' exposure, under New York law, there is legally sufficient evidence of general and specific causation of causation such that Cleaver-Brooks' motion on this ground is denied.

With respect to the federal cases cited by Cleaver-Brooks, even if they are considered, they are not applicable, as they are not on point. Barbarin v Asten-Johnson, Inc., 700 F3d 428 (9th Cir 2012), cert denied 135 S Ct 55 (2014), involved remand for a new trial where the court did not hold a Daubert hearing in connection with medical opinion that "each and every exposure can cause an asbestos related disease." Significantly, the basis of the opinion differs from the medical opinions of plaintiffs' experts in this trial as to causation. In Moeller v Garlock Sealing Technologies, LLC, 660 F3d 950 (6th Cir 2011), the reversal was not based on the medical causation issue raised in this motion by Cleaver-Brooks, but on the lack of evidence of exposure

to asbestos from Garlock's gaskets. Here, as previously discussed, there was sufficient evidence of exposure to Cleaver-Brooks' products. The Court in Lindstrom v A-C Product Liability Trust, 424 F3d 488 (6th Cir. 2005) found the medical affidavit that each and every exposure was a substantial contributing factor in causing plaintiff's mesothelioma insufficient, where the affidavit did not reference exposure to asbestos from the products of any particular defendant, circumstances which do not exist in this record. Finally, in Wills v Amerada Hess Corp., 379 F3d 32 (2nd Cir 2004), cert denied 564 US 822 (2005), the Court affirmed the district court's order that there was insufficient indicia of reliability as to plaintiff expert's opinion that there is a link between exposure to benzene and squamous cell cancer, based on an "oncogene theory," that for certain toxins there can be no safe level of exposure, because cancer can be triggered by the interaction of a single molecule of the toxin with a single human cell.

Accordingly, Cleaver-Brooks' motion based on insufficient evidence of causation is denied.

III. CONSOLIDATION

Burnham and Cleaver-Brooks argue that the verdicts should be set aside and a new trial ordered on the grounds that the cases were improperly consolidated for trial, and this resulted in juror confusion and prejudice to defendants. Primarily, defendants argue that based on the number of plaintiffs, lack of commonality of work sites, the extensive period of time covered in the state of the art evidence, and a purported disjointed or fragmented order in which the evidence was presented, the jurors were unable to differentiate, and fairly and objectively evaluate the evidence with respect to the individual plaintiffs and defendants. In addition, defendants argue that the consolidation of five cases resulted in the evidence in each case improperly bolstering the evidence in the other cases.

CPLR 602(a) provides for the consolidation of cases:

> When actions involving a common question of law or fact are before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

In asbestos litigation, it has been stated that "the joint trial format has the potential to reduce the cost of litigation, make more economical use of the trial court's time and speed the disposition of cases as well as to encourage settlement." Matter of New York City Asbestos Litig. (Brooklyn Navy Shipyard Cases), 188 AD2D 214, 255 (1st Dept), aff'd 82 NY 2d 821 (1993) (citations omitted). Recently, In re New York City Asbestos Litig. (Konstantin) (Dummit), 121 AD3d 230, 242, (1st Dept 2014), the Court acknowledged that courts generally consider the following set of criteria as guidelines, as enunciated in Malcolm v National Gypsum Co., 995 F2d 346, 350-351 (2d Cir 1993), in deciding whether to consolidate cases: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiff were represented by the same counsel; and (8) type of cancer alleged. In addition, the court is required to take into consideration the number of separate cases; "[n]ot all of the factors need be present; consolidation is proper so long as 'individual issues do not predominate over common questions of law and fact.'" Id. citing In re New York City Asbestos Litig., 99 AD3d 410, 411 (1st Dept. 2012).

"In asbestos cases it has been 'routine' to join cases together for a single trial." Konstantin/Dummit, supra at 242 (internal citation omitted). See eg, Baruch v. Baxter Healthcare Corp., 111 AD3d 574 (1st Dept 2013)(affirming a trial court decision consolidating three asbestos cases for joint trial where plaintiffs were exposed to asbestos during an overlapping

period of 40 years, even though there were differences among plaintiffs, including that one plaintiff had mesothelioma while two other plaintiffs had lung cancer); In re New York City Asbestos Litigation (Kestenbaum), 2013 NY Misc LEXIS 2080 (Sup Ct NY Co 2013; Scarpulla, J)(consolidating four asbestos cases for joint trial where three plaintiffs were deceased and one was living, and plaintiffs alleged they were exposed to asbestos during overlapping periods of time, while working at construction sites in various occupations, including as an electrician, a mechanic and electrician, a carpenter and engineer, and a fabricator); In re New York City Asbestos Litigation (Gische, J) 2011 NY Misc LEXIS 2248 (Sup Ct NY Co 2011)(consolidating eight asbestos cases for joint trial where plaintiffs claimed exposure to asbestos from similar products and equipment and in similar ways, while engaged in a variety of occupations and at a variety of work sites, and where one plaintiff was living and seven were deceased); In re New York City Asbestos Litigation (Ballard), 2009 WL 2996083 (Sup Ct NY Co; Feinman, J) (consolidating nine asbestos cases for joint trial where six plaintiffs were living and three were deceased, and plaintiffs alleged that their exposure to asbestos occurred while they were engaged in occupations related to maintenance, inspection and repair); In re New York City Asbestos Litigation (Bauer), 2008 WL 3996269 (Sup Ct NY Co 2008; Lobis, J)(consolidating four cases asbestos cases for joint trial where plaintiffs alleged, inter alia, exposure from joint compound and sheetrock during home renovation and construction work, and where plaintiffs, in addition to home renovation exposure, variously alleged exposure from work as a printer and mechanic, a carpenter and painter, and a laborer); In re Asbestos Litigation (Altholz), 11 Misc3d 1063(A)(Sup Ct NY Co 2006; Shulman, J)(consolidating six asbestos cases for joint trial where plaintiffs alleged exposure to asbestos products/materials in residential settings, in the military (army and navy), in the trades, and in automobiles and during overlapping periods of time); New

York City Asbestos Litigation v. A.O. Smith Water Products, 9 Misc3d 1109(A)(Sup Ct NY Co 2005; York, J)(consolidating four asbestos cases for joint trial where all the plaintiffs suffered from mesothelioma and two were living and two were deceased).

This court's April 17, 2013 consolidation decision details the factors the court considered with respect to the Malcolm guidelines. Specifically, as to the first two Malcolm factors, the decision discusses that the evidence as to all plaintiffs overlapped as to manner of exposure, types of products or equipment, and types of occupations and work sites. Plaintiffs alleged exposure while engaged in construction or maintenance related work; Mr. Assenzio and Mr. Levy as plumbers, Mr. Brunck and Mr. Vincent as steamfitters, and Mr. Serna as a laborer and painter. Plaintiffs, except Mr. Levy, claimed exposure in connection with work on, or in removing boilers; all plaintiffs alleged exposure from insulation; and four plaintiffs, with the exception of Mr. Serna, alleged exposure from work with pumps, valves and gaskets. This approach with respect to occupations, products, worksites and manner of exposure is supported by the above cases, and by the First Department's holding in Konstantin/Dummit, supra at 242-243 where, in addressing consolidation, the court noted that

> some trial courts have rejected a narrow focus on specific locations of exposures and types of work in favor of an analysis that considers whether two or more plaintiffs were "engaged in an occupation related to maintenance, inspection and/or repair and [were] 'exposed to asbestos in the traditional way, that is, by working directly with the material for years.'" (see e.g. Matter of New York City Asbestos Litig., 201 NY Slip Up 33941[U], *6 (Sup Ct, NY County 2010] (joining cases of residential drywaller, Navy pipefitter, home renovator, plant electrician, powerhouse worker, and Navy electrician for trial, where their injuries "resulted from 'insulation exposure from boilers, valves, pumps, and other insulated equipment'"). Other courts have focused on the types of asbestos product to which the plaintiffs were exposed, and whether they were manufactured and distributed by different defendants (see e.g. Bishofsberger, 2012 NY Slip Op 32414[U]).
>
> As to the periods of exposure, the periods overlapped for plaintiffs from the 1960s to the

1970s, although some plaintiffs alleged exposure prior to this period and Mr. Serna alleged exposure from the 1980s into the 1990s and 2010. However, as noted in Konstantin/ Dummitt, exact commonality need not defeat consolidation, as in "Malcolm, there was no commonality where exposures among plaintiffs began in the 1940's and ended in the 1970's, and some plaintiffs were exposed throughout that period but others were exposed for much shorter periods within it." Id., at 243. See eg, In re New York City Asbestos Litigation (Ballard), supra,(in the nine cases consolidated for joint trial, plaintiffs alleged exposure between the 1950s and the 1980s; there was an overlap of periods of exposure in the 1960s and the 1970s, as eight of the nine plaintiffs alleged exposure during this period; and one plaintiff alleged exposure between 1957 and 1962); In re New York City Asbestos Litigation (Kestenbaum), supra.

Regarding the type of disease and type of cancer, all plaintiffs presented evidence that they developed mesothelioma, so that the medical evidence with respect to the ideology and pathology of the disease overlapped.[11]

As to whether a plaintiff is living or deceased, at the time of trial, Mr. Levy and Mr. Serna were alive and testified, and Mr. Vincent, Mr. Brunck and Mr. Assenzio were deceased, and designated portions of their depositions read. While this factor is properly considered, as noted in the consolidation decision, where, as here, mesothelioma is the disease alleged, this distinction is not dispositive, since mesothelioma is fatal, and joinder did not invite speculation as to the fate of a living plaintiff. Baruch v. Baxter Healthcare Corp., supra; In re New York City Asbestos Litigation (Kestenbaum), supra; In re New York City Asbestos Litigation (Ballard), supra; In re New York City Asbestos Litigation, (Gische, J), In re New York City

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[11] Although Cleaver-Brooks disputed the diagnosis of mesothelioma as to Mr. Levy, contending he suffered from a primary carcinoma of the lungs, this dispute is not controlling. In any event, the jury was asked a specific question as to whether Mr. Levy had an asbestos related cancer.

Asbestos Litigation (Ballard), supra; New York City Asbestos Litigation v. A.O. Smith Water Products, supra. Burnham specifically argues that joining living and deceased plaintiffs for trial invited the jury to consider the pain and suffering of the living plaintiffs in evaluating the pain and suffering of the deceased, and to consider the effect of the death of the deceased plaintiffs on that plaintiff's family, when evaluating the effect that the death of Mr. Levy and Mr. Serna will have on their families. This argument is essentially that the evidence in one case, bolstered claims in other cases, and, for reasons discussed below, in connection with defendants' argument on bolstering, this argument is rejected.

With respect to the remaining two Malcolm factors, they are not challenged in the context of this consolidation, as all plaintiffs were represented by the same law firm and at the commencement of the trial, discovery was complete.

Considering the foregoing, and applying the Malcolm factors flexibly, as a guideline, defendants' arguments that the five cases should not have been consolidated is rejected, as the claims presented by plaintiffs had more factors in common than unique to each. See Konstantin/Dummitt, supra at 244.

Moreover, to oppose consolidation, a party must demonstrate prejudice to a substantial right. Id. at 245 citing Chinatown Apts. v. New York City Tr. Auth., 100 AD2d 824, 825, (1st Dept 1984). Defendants argue that they were prejudiced by consolidating the cases, as the presentation of evidence with respect to five plaintiffs improperly bolstered each of their claims, resulted in a disjointed and fragmented trial, leading to juror confusion and an inability of the jurors to separately evaluate the evidence as to each plaintiff and defendant.

In support of its argument, Cleaver-Brooks contends the jury did not consider the evidence as to each plaintiff and defendant, specifically regarding evidence as to its defenses,

due to the volume of evidence, and the fragmented nature of its presentation. Cleaver-Brooks points to the amount of time the jury deliberated; jurors' questions as to why A.O. Smith and Gosset & Borg Warner's names were not on the verdict sheet; the award of the same amount of money for pain and suffering to Mr. Assenzio, Mr. Brunck and Mr. Vincent, despite differences in the length of time of suffering and medical procedures; and the award of the same amount for the loss of consortium claims for the spouses of Mr. Assenzio and Mr. Levy. Cleaver-Brooks also points to the apportionment of liability among the companies that were not defendants at trial, i.e., the article 16 companies and settling defendants.

In support of its argument that it was prejudiced, Burnham contends that the consolidation created a fragmented trial and that each plaintiff had a "shaky recollection" of the boilers they worked on, so that the repetition of the name "Burnham" by three plaintiffs led the jury to believe that each must have been exposed to Burnham boilers, and that since all five plaintiffs could not remember particulars about their alleged exposure, such as where, when or how often it occurred, that it was normal for witnesses to be unable to remember such details. Burnham also contends plaintiff used the bolstering to its advantage in summation by arguing that there was no way any of its clients would remember the name of a boiler he worked on 30 to 50 years ago unless he had seen it enough so that "it stuck in his mind."

Burnham further points to the fact that at the commencement of trial, there were five plaintiffs and six defendants, and that during the trial, four defendants settled. According to Burnham, the court failed to instruct the jury not to draw any inference from the decreased number of defendants, until after Crane settled, which allowed the jury to speculate as to the reason for the decreased number. Burnham contends that this led the jury to believe that those defendants settled, so there must be merit to the claims against them, and therefore against

Burnham. In addition, Burnham contends that the jurors were exposed to irrelevant and needless testimony, which, based on the volume of evidence the jurors heard, added to their confusion.

As to the disjointed nature of the evidence, Burnham points out that Mr. Vincent's deposition was read on five days during a 20 day period; Mr. Brunck's deposition on two days during a 13 day period; and that 25 days passed between Mr. Serna's direct testimony and cross-examination. Burnham also argues that the sequence of witnesses created confusion, and points to testimony of Dr. David Rosner, plaintiffs' state of the art expert, who testified prior to an individual plaintiff's testimony alleging the time period of exposure.

Burnham also contends that the use of trial management techniques such as allowing jurors to take notes so as to avoid confusion is "little more than a convenient fiction that allows courts to consolidate cases and ease the backlog of asbestos litigation." Finally, Burnham contends it was denied a cross section of the population in jury selection as, due to the length of the trial, many jurors were unable to sit, describing those jurors as "more educated with greater demands from their employers," and contending, that "the more complex the trial, the less sophisticated the jurors able to serve."

Defendants' arguments are unpersuasive. As to the claim of bolstering, at the outset it must be noted that the jury was told at various times throughout the trial, that they needed to evaluate the evidence as to each plaintiff and each defendant individually. Moreover, as to each plaintiff, individualized interrogatories were asked, and in Brunck and Vincent, the interrogatories asked particularized questions as to each defendant. See Konstantin/Dummitt, supra at 242 (defendant's claim of jury confusion unsupported in light of the court's continuous limiting and explanatory instructions); Pierre-Louis v DeLonghi America, Inc., 66 AD3d 859 (2d Dept 2009)(prejudice to a party with respect to the existence of insurance in a joint trial can

be mitigated with appropriate jury instructions).

Cleaver-Brooks' argument that the jury was confused based on the length of time the jury deliberated and based on awards in the same amounts to several plaintiffs and their spouses, is speculative, particularly based on similar evidence of exposure from Cleaver-Brooks' boilers, the fact that plaintiffs suffered from the same disease, mesothelioma, and suffered similarly from the effects of the disease. As to Cleaver-Brooks' argument that the jury failed to consider the evidence separately as to each plaintiff and defendant, based on the volume of evidence and its fragmented presentation, these arguments are unavailing. The jury's verdict with respect to liability, as discussed above, is supported by the evidence, and the jury's apportionment of fault as to the defendants, Crane and the Article 16 companies, as discussed below, reflects that it considered the evidence separately as to each party.

As to the apportionment of liability, contrary to Cleaver-Brooks' argument, apportion of liability among the defendants, Cleaver-Brooks and Burnham, and, to Crane, which settled after its corporate representative testified, showed that the jury listened to the evidence, and apportioned liability most heavily against companies where the evidence presented was the most focused.[12] Notably, it was the defendants' burden to prove the liability of other companies, including article 16 entities, and the apportionment of fault as to these companies, in equal percentages of from .4 to 15%, reflects the nature and quality of the evidence, or lack thereof, presented, or relied upon by defendants with respect to their liability.

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[12] The jury allocated the following percentages of fault.
Assenzio: Cleaver-Brooks 28%; Crane 33%; 26 Article 16 entities 1.5%.
Brunck: Burnham 25%; Cleaver-Brooks 15%; Crane 20%; 25 Article 16 companies 1.6%.
Levy: Cleaver-Brooks 24.9%; Crane 59.9%; 38 Article 16 companies .4%.
Serna: Burnham 55%; 3 Article 16 companies 15%.
Vincent: Burnham 21%; Cleaver-Brooks 21%; Crane 25%; 22 Article 16 companies 1.5%.

Burnham's argument regarding the repetition of its name, and its argument as to the lack of particulars as to the place or time of exposure alleged by an individual plaintiff, caused the jury to believe that it was normal for plaintiffs not to recall particulars, is speculative. In any event, as discussed above in connection with Mr. Brunck, Mr. Vincent, and Mr. Serna, there was sufficient evidence as to the identification of Burnham boilers and how exposure to asbestos occurred in connection with work on its boilers.

As to Burnham's contention regarding plaintiff counsel's improper comments during summation, the comments were not objected to during trial, and, even assuming they constituted bolstering, the comments do not provide a basis for setting aside the verdict.

As to the decreased number of defendants, as plaintiff points out, an instruction not to speculate or draw any inference as to the absence of certain defendants, was given early on in the trial, and prior to the same instruction which was given after Crane settled. In addition, Burnham's contention that the jury speculated those defendants settled, and that this impacted on the jury's evaluation of Burnham's liability, is based on speculation. Although evidence was presented as to certain defendants who settled, there is no support in the record that such evidence overwhelmed or confused the jury.

In connection with Burnham's contentions of the fragmentation of evidence, particularly as to the reading of Mr. Vincent's and Mr. Brunck's depositions, and Mr. Serna's direct and cross-examinations, orders were given throughout the trial that witnesses were to testify on consecutive days. It must be noted, Burnham does not point to any objections it made during trial with respect to this issue. Mr. Serna was unable to be cross-examined immediately after his direct testimony due to necessary medical treatment. This break gave Burnham an opportunity to prepare fully for the cross-examination, in light of Mr. Serna's testimony at trial that he

participated in dismantling Burnham's boilers for removal. While the reading of Mr. Vincent's and Mr. Brunck's depositions were on different days, counsel for Burnham had the opportunity during summation to address and emphasize any issues raised in the depositions, particularly since the transcripts of the trial were available. As to the sequence of witnesses, Burnham points to Dr. Rosner's testimony, which was given before evidence of dates of exposure; however, the jury was instructed during Dr. Rosner's testimony that they would have to consider the state of the art evidence at the time the individual plaintiff alleged exposure.

Moreover, contrary to Cleaver-Brooks' argument, the question the jury asked as to why A.O Smith, Bell & Gosset and Borg-Warner, names which they heard during trial, did not appear on Mr. Brunck's verdict sheet, shows that the jurors paid attention to the testimony, and were considering the evidence. The jury's request for "affidavits of asbestos exposure from plaintiffs," for "hand written typed list of all companies plaintiff alleges exposure to" and for "charts detailing work history and exposure," amply demonstrated that the jury was aware of the issues as to liability, was focused, and not confused. Tr. at 5954-55.

As to Burnham's criticism of the effectiveness of trial management techniques, as stated in the consolidation decision, those techniques included not only juror notebooks, but explanatory and limiting instructions, and individualized verdict sheets and jury instructions. As Burnham itself states in its brief, explanatory instructions were given, and these instructions included instructions not only about the decreased number of defendants, but also limiting instructions. For instance, as noted above, when Dr. Rosner was testifying about the state of the art, the jury was instructed that the state of the art evidence had to be considered with respect to the date a plaintiff alleged exposure to a particular defendant's product, and a specific instruction was given that the testimony as to the evidence after 1966 did not apply to Mr. Levy, as he only

claimed exposure up to 1966. Moreover, the individualized verdict sheets as to each plaintiff asked specific questions as to exposure, causation, damages and liability as to each defendant and non-defendant companies. This provided a detailed framework for the jury to consider the evidence, and render separate and distinct verdicts with respect to each plaintiff and defendant. Thus, Burnham's argument that trial management techniques are a fiction, is without foundation in the record. Konstantin/Dummitt, supra at 245.

As to Burnham's contentions about the jury pool, the record is insufficient to support such contentions, and Burnham does not allege specific prejudice or harm from the composition of the jury pool.

Based on the foregoing, defendants' motion to set aside the verdict and for a new trial on the grounds that the cases were improperly consolidated is denied. The record shows that the court did not abuse its discretion in consolidating the case for joint trial; that the Malcolm factors were considered; that common issues of law and fact predominated; and that the joinder did not prejudice nor deny Burnham or Cleaver-Brooks a fair trial.

IV. RECKLESSNESS

Defendants move to set aside the verdict as to the finding of recklessness on the grounds that the court erred in charging recklessness, and that the charge as given failed to convey the standard applicable in asbestos litigation. Defendants, relying on Matter of New York City Asbestos Litig., (Maltese), 89 NY2d 955 (1997), argue that the state of the art evidence was insufficient with respect to the knowledge of defendants as to the dangers of asbestos, and therefore, failed to meet the standard articulated in Maltese.[13] Defendants further argue that

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[13] Cleaver-Brooks also argues that there was insufficient evidence of the individual plaintiff's exposure to asbestos from its products to infer that it was put on notice as to the dangers of asbestos. However, plaintiff does not rely on plaintiffs' exposure to Cleaver-Brooks products to establish knowledge.

while the evidence may have shown that they had a general awareness of the dangers of long term exposure to asbestos, it was insufficient to establish that Cleaver-Brooks or Burnham had a specific awareness of the dangers of asbestos to workers in trades in which plaintiffs were engaged, or of danger to the individual plaintiffs. Burnham, pointing to language in Maltese, supra, argues that the court erred in failing to include in its reckless charge, that Burnham had to act with "disregard of a known or obvious risk," and that injury resulting from a defendant's conduct must be "highly probable," and not, as charged, merely "probable."

CPLR 1601, provides, to the extent relevant, that in an action where there are two or more tortfeasors jointly liable, and the liability of a defendant is found to be 50% or less of the total liability, the liability of that defendant, as to non-economic loss, is limited to that defendant's equitable share. Under CPLR 1602(7), these limitations do "not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others." The following charge from PJI 2:275.2 was given at trial:

> In this case—in these cases, plaintiff claims that Burnham and---and/or Cleaver-Brooks, in failing to warn about the dangers of exposure to asbestos – containing products and materials used with Burnham's and Cleaver-Brooks' equipment, that Burnham and Cleaver-Brooks acted with reckless disregard for the safety of others.
>
> A person, or in this instance, a corporation, acts with reckless disregard for the safety of others when it intentionally or with gross indifference to the rights or safety of others engages in conduct which makes it probable that injury will occur.
>
> Plaintiffs have the burden of proving by a preponderance of the evidence that Burnham and Cleaver-Brooks acted with reckless disregard for the safety of others.

The jury was further instructed that "[t]his is a different standard than in failure to warn. So you have to consider this question separately in accordance with that instruction which I just read." Tr. at 5910.

As a threshold issue, Burnham's argument that the court erred in not instructing the jury

that it had to be "highly probable" that injury would result and that Burnham had to act "with a disregard to a known or obvious risk," is unpersuasive. Defendants did request during trial that the charge include the language from Maltese. However, at the pre-charge conference the defendants only objected to the reckless charge being given, and after the charge, defendants again objected to the reckless charge being given, but did not object to the specific language of the charge. Moreover, in Maltese, the court did not hold that any specific language was required, and the PJI charge as given, adequately expressed the standard. The charge instructed that the act had to have been done "intentionally," with "gross indifference," and the conduct had to be such as to make "it probable that harm would occur." Even if language from Maltese should have been included, this is not grounds to set aside the reckless findings, as ample evidence supported the verdict as to recklessness. See, Konstantin/Dummitt, supra at 248.

As to defendants' arguments that the state of the art evidence failed to meet the standard in Maltese, defendants rely on that part of the opinion which states "[a]t most, the evidence reveals Westinghouse's general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury, but not that workers such as Maltese or Stallone were at risk at any time it could have warned them." Id at 957. However, as discussed below, the evidence at trial demonstrated more than a general awareness by defendants. As the court found at trial:

> [P]laintiffs presented sufficient evidence with respect to the dangers of asbestos exposure from publically available information as well as information available in various trade journals and in other literature and in government regulations and statutes, including worker's compensation laws, so that the jury could find that defendants Cleaver- Brooks and/or Burnham knew or should have known of the dangers of exposure to asbestos.
>
> Moreover, sufficient evidence at trial was presented to establish that Burnham and/or Cleaver-Brooks specified the use of, or knew that asbestos

containing products or materials would be used in their equipment. Tr. 6057.[14]

Specifically, plaintiffs called as their state-of-the-art expert, Dr. David Rosner, who has a Ph.D. in the History of Science from Harvard University. Dr. Rosner testified that the dangers of asbestos were known in the beginning of the 1900s, and that by the 1930s, it was well known in publically available information that asbestos dust could cause disease. In support of this opinion, Dr. Rosner pointed to, among other work, the following reports, studies and articles. The 1930 Merewether & C.W. Price study "Report on Effect of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry," which discusses the occurrence of pulmonary fibrosis and other pulmonary affectations in asbestos workers, and the processes giving rise to, and methods for suppressing asbestos dust. Tr. at 709-710. In the 1942 textbook by the pathologist and researcher, W. C. Heuper, "Occupational Tumors and Allied Diseases," Dr. Rosner noted that Dr. Heuper states that exposure to asbestos is present in many industries, that asbestos was used in the manufacture of "gaskets, packing material of pumps, insulating materials of steam pipes, water pipes, [and] boilers," and the possibility of asbestosis as the evidence is "suggestive of occupational causation." Tr. at 771-2. Dr. Rosner testified that a 1955 epidemiological study by Sir Richard Doll, "Mortality from Lung Cancer in Asbestos Workers," found that workers exposed to asbestos are at a higher risk for developing lung cancer. Tr. at 774-5. Dr, Rosner discussed a 1960 Article published in the British Journal of Industrial Medicine, entitled "Diffuse Pleural Mesothelioma and Asbestos Exposure in the Northwestern Cape Province" by Wagner, Sleggs and Marchand, as significant, as finding that mesothelioma,

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[14] Cleaver-Brooks argues for the first time in its reply, that the court, in denying its motion for a directed verdict as to recklessness, failed to identify any "direct evidence" that supported such a finding. However, as this quote shows, the court denied the motion on the same grounds it is denying defendants' instant motion to set aside the reckless findings. Tr. at 6057

was showing up not only in the workforce, but also within communities living near asbestos mines. Tr. at 775-6. Dr. Rosner also pointed to the 1964 Article , "Asbestos Exposure and Neoplasia" by Irving Selikoff, Jacob Churg, and Hammond as important, since it was the first study of a large group of workers who had been exposed to asbestos, and who were found to be at a much higher risk of developing asbestosis, lung cancer, and mesothelioma. Tr.at 779-83. Moreover, Dr. Rosen testified that this study found that it was not only the workers handling asbestos who were at risk, but, since asbestos fibers float in the air, other workers were also at risk. Tr. at 782-3. In addition, Dr. Rosen testified that in 1965, Dr. Selikoff and scientists from around the world gathered at a conference in New York to exchange information about the dangers of asbestos, which resulted in the publication of numerous papers documenting diseases caused by exposure to asbestos. Tr. at 787.

As to defendants' knowledge of the dangers of asbestos, in addition to publically available information, plaintiffs point to evidence that the defendants knew, and, at times, specified the use of asbestos with their boilers, and that defendants advertised in certain journals and trade magazines which published articles about its dangers.

As to Cleaver-Brooks, there was evidence that it specified in the 1940s the use of asbestos cement and tape with its boilers, and that the part numbers for the asbestos cement and tape, as well as for gaskets for front and rear heads, appear in parts lists for other boilers. Tr. at 4361; 4379. Moreover, when asked if Cleaver-Brooks specified the use of asbestos containing cement on the inside of their boilers from the 1940s through the 1970s, an inference of such specification could be drawn from Mr. Tornetta's reply that "I'm not sure I would take it that far. Some drawings we produced in these cases have shown those components to be asbestos containing." Tr. 4416. Mr. Tornetta also testified that the drawings would show that Cleaver-

Brooks specified the use of asbestos containing gaskets for this same period. Id.

Also bearing on Cleaver-Brooks' knowledge of the dangers of asbestos, is evidence that it advertised in the American Society of Heating, Ventilating Engineers publication "Heating Ventilating Air Conditioning Guide." At least five books published in 1952 and from 1955 through 1958 were admitted into evidence. As pointed to by plaintiff, the 1951 guide discusses the hazards of air contaminants, including asbestos, and an increased risk of diseases such as pneumonia and lung cancer in areas of high concentrations of certain contaminants, and published suggested maxim working levels of exposure. See Konstantin/Dummit, supra at 248 (the evidence was sufficient to show reckless disregard for the dangers of asbestos where the defendant had received warnings as to such dangers as early as the 1930s from various trade associations and admitted knowing of the dangers by the early 1970s).

Mr. Tornetta testified that in his role as corporate representative, he did not investigate whether Cleaver-Brooks did anything to investigate the dangers of asbestos or to keep up with the medical literature, and that he is unaware of how Cleaver-Brooks obtained knowledge of the dangers of asbestos, other than through the general media. Tr. 4621-22. Since Mr. Tornetta is Cleaver-Brooks' corporate representative, this answer is reasonably imputed to Cleaver-Brooks. This evidence is relevant as to whether Cleaver-Brooks, with respect to its actions or lack of action in connection with any inquiry as to the dangers of asbestos, in light of its specification of asbestos and its knowledge of the use of asbestos with its boilers, has done "an act of unreasonable character in disregard of a known or obvious risk." Maltese, supra at 468, citing Saarinen v Kerr, 84 NY2d 494 (1994).

The above evidence establishes sufficient proof to sustain the jury's determination of recklessness; that Cleaver-Brooks knew of the dangers of asbestos, specified its use with certain

of its boilers, and that it acted with gross indifference to the rights or safety of others in failing to warn of the dangers of asbestos.

As to Burnham, plaintiff introduced evidence that in its 1927 "Handbook of Engineering Data," Burnham specified insulating its unjacketed boilers with asbestos cement, and that its 1930 and 1931 catalogs, continued to specify such insulation on unjacketed boilers. Tr. at 2630-2631; 2637-2638. Burnham's corporate representative, Mr. Sweigart testified that Burnham continued to specify asbestos cement for insulation in its catalogs for an unspecified period of time, and that at least as to one series of boilers, in certain erection instructions, specified the use of such cement in 1951. Tr. at 2650. Mr. Sweigart testified that a cast iron Burnham boiler, if properly maintained may last 40 to 50 years, that the vast majority of boilers Burnham sold in the 1930s were unjacketed; and that Burnham continued to sell unjacketed boilers into the 1960s. Tr. at 2628; 2642; 2676. Mr. Sweigart further testified that such insulation would take many pounds of cement,[15] and that Burnham sold asbestos cement in 100 pound bags and by the ton. Tr. at 2656. Evidence established that Pennsylvania enacted a Workmen's Compensation Law in 1939 and that it recognized asbestosis as an occupational disease. While Mr. Sweigart, who joined Burnham in 1975, testified he did not know if Burnham was aware of the statute, he did testify that Burnham had its corporate headquarters in Pennsylvania since the 1920s, and for the next 60 years. Tr. at 2763-64; 2742. Moreover, Mr. Sweigart testified that certain of Burnham's corporate officers were members of the American Society of Heating and Ventilating Engineers, and advertised in its 1944 Heating, Ventilating and Air Conditioning Guide. Tr. at 2771-73. The 1944 Guide contained a table "accepted standards for toxic concentrations of fumes, dust and

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[15] Mr. Sweigart testified the Handbook indicated that 100 pounds of a certain type of asbestos cement would cover 40 square feet. Tr. at 2631

mist," including standards for asbestos at "5 million particles per cubic foot." Tr. at 2773. A 1958 Guide in which Burnham advertised its boilers, also contained this same standard for asbestos under the heading "limits for mineral dust."

Evidence at trial established that although Burnham had a research laboratory, it did not test for the level of asbestos fibers which are released when dumping or mixing asbestos cement, or when boilers and the asbestos insulation on the exterior, or in the interior of its boilers are removed. Tr.at 2775-77. Asked about OSHA regulations published in 1972 with respect to regulation of asbestos in the workplace, Mr. Sweigart testified it was a reasonable assumption that Burnham knew of the regulations, and testified that Burrnham has not at any time in its 150 year history, before or after 1972, placed warnings on any boiler or on any of its other asbestos products, or sent or published any bulletin or notice about the dangers of asbestos. Tr. 2777-79.

As with Cleaver-Brooks, this evidence establishes sufficient proof to sustain the jury's determination that Burnham acted with gross indifference to the rights or safety of others, as Burnham knew of the dangers of asbestos; it had a history of selling boilers for over one hundred years; it specified the use of asbestos insulation on the exterior and interior of its boilers and sold such insulation; it failed to perform any testing with respect to exposure to asbestos, and it failed to warn about dangers of asbestos.

V. ARTICLE 16 EVIDENCE

Cleaver-Brooks and Burnham move to set aside the verdict on the grounds that the court erred in excluding evidence of deposition transcripts of corporate representatives of Article 16 entities, including settled defendants, which, with the exception of Blackmer, were taken in other NYCAL cases, and in certain instances, in asbestos related cases outside of the NYCAL jurisdiction. Defendants contend that many of the depositions had been designated for use in all

NYCAL cases and argue the depositions are admissible under CPLR 3117 and the NYCAL Case Management Order (CMO); X.C.1 and XII.A. Defendants also argue that plaintiffs designated the use of the depositions of certain of the corporate representatives at issue, and then, after they settled with those defendants, objected to use by Cleaver-Brooks and Burnham of those depositions.

Defendants do not allege that any of the five plaintiffs were present at the depositions, although Cleaver-Brooks alleges that in two cases, plaintiffs' law firm, Weitz and Luxenberg, P.C., was present, representing other plaintiffs. Defendants in their memoranda do not state whether they were parties to the action in which the depositions were taken, nor do they identify the party the attorney represented whose questioning they sought to introduce. Cleaver-Brooks argues in its memorandum that the plaintiffs' presence is not the test for admissibility, but rather what CPLR 3117 requires is the presence, or the opportunity to be present, of a party with a similar motive to question as plaintiffs in the instant trial, and that plaintiffs in those actions had similar motives as plaintiffs here.

Cleaver-Brooks also argues the depositions are admissible as evidence against the Article 16 defendants, that is, settling defendants, and points to the commentary to CPLR 3117(a)(2) that "one co-defendant may be adverse to another for the purposes of apportionment." McKinney's, Book 7B, Connors, Practice Commentaries, C3117:3 at 185 (2005), in support its position that it may use the depositions as to any "adversely interested" party. Burnham in a similar vein, in its memorandum, characterizes the depositions as "Article 16 evidence," and argues that it was prejudiced when the deposition evidence was precluded, as it was prevented from offering evidence showing the culpability of other companies.

Plaintiffs argue in their memorandum that the depositions were properly excluded as the

plaintiffs' interests in this action were not represented at the depositions, and that plaintiffs' law firm represented two other plaintiffs at two of the depositions, does not establish that plaintiffs' interests in this trial were represented at the depositions.

CPLR 3117(a)(2), to the extent relevant, provides:

> The deposition testimony of a party or of any person who was a party when the testimony was given...may be used for any purpose by any party who was adversely interested when the testimony was given or who is adversely interested when the deposition testimony is offered in evidence.

CPLR 3117(a)(3) to the extent relevant, provides, subject to the provisions of CPLR 3117(a)(3) i – v, that:

> The deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules [provided that certain conditions are met as set forth in i – iv, such as the death of the deposed person].

CMO X.C.1 provides:

> The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with Paragraph XII of this Order. No other depositions of defendants shall be taken in these cases except pursuant to Paragraph X.C.2.[16]

XII.A provides:

> Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may utilize depositions taken in other state and federal jurisdictions and cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as

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[16]X.C.2 provides "[b]y request to the Special Master, any plaintiff may seek to serve notice of intent to take nonrepetitive depositions of defendants' representatives pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant.

> provided in CPLR 3117. The issue of the admissibility of this deposition testimony at trial against a particular defendant is expressly left for resolution by the trial court.

CMO X.C.1 encourages the use of depositions, such as those of the corporate representative at issue here, in other actions pending in NYCAL and in other jurisdictions. However, CMO XII.A further provides for the use of such depositions where a party had notice and opportunity to attend and participate as provided in CPLR 3117. Here, it is undisputed that plaintiffs, the parties in this action, did not have notice nor the opportunity to participate as provided for in CPLR 3117. Thus, contrary to defendants' arguments, neither the CMO nor CPLR 3117 provide authority for the admissibility of depositions taken in unrelated cases where plaintiffs were not parties, nor represented, and where they did not have notice of the depositions.[17]

Additionally, Cleaver-Brooks' argument that plaintiffs in the actions where the deposition were taken had a similar motive or opportunity to question as plaintiffs in these actions, is unsupported in fact or law. Likewise, Cleaver-Brooks' argument that since plaintiffs' law firm, Weitz and Luxemberg was present at two of the depositions and represented other plaintiffs, that Weitz and Luxemberg adequately represented the interests of the plaintiffs in this trial, fails for the same reasons.

As to Cleaver-Brooks' argument that the use of settling defendants' depositions is permitted under CPLR 3117(a)(2), that section permits the use of depositions of a party or any person who was a party when the deposition was given. Thus, this argument is without merit, as the depositions were not taken of the settling defendants as parties to this action. Moreover, the

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[17] It must be acknowledged that the CMO contemplates the use of depositions of corporate representatives in actions other than the one in which it was taken. This issue should be addressed in the revision of the NYCAL CMO, and in specific legislation with respect to litigation of this nature.

depositions at issue were taken before this action was commenced, so the settling defendants, when deposed, were not even parties to these actions.

Burnham's argument that CPLR 3117(a)(3) does not provide a basis for precluding the depositions, as argued by plaintiffs at trial is unpersuasive. Burnham contends that the depositions were not prejudicial to plaintiffs, and were offered at trial as Article 16 evidence to show the culpability of other companies. This section requires that the party be present or represented at, or have notice of the deposition. As discussed above, plaintiffs had no notice, nor were they present or represented at the depositions. Burnham's argument that plaintiffs would not be prejudiced by the admission of the deposition testimony, which argument was not made at trial, is purely speculative.[18] Moreover, Burnham fails to provide an analysis of the evidence or proffered testimony to support this argument.

As to defendants' argument with respect to plaintiffs' designation of the deposition testimony of certain corporate representatives, such designation does not vitiate compliance with the provisions of the CPLR as to the admissibility of evidence.

Finally, nothing prevented defendants from calling the corporate representatives as witnesses.

For the foregoing reasons, defendants' motions to set aside the verdict on the grounds that the court erred in excluding evidence of depositions of settling defendants is denied.

VI. APPORTIONMENT OF FAULT

Defendants move to set aside the verdict as to the apportionment of fault, arguing that the percentages assigned to defendants and the Article 16 companies is unsupported by the evidence,

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[18] Burnham did not separately argue the admissibility of the depositions at trial, but joined in Cleaver-Brooks' argument.

and could not have been reached by any fair interpretation of the evidence. Specifically, defendants argue that based on the evidence that plaintiffs were exposed to asbestos from products of Article 16 companies, the jury failed to differentiate and evaluate the evidence as to the liability of these companies, and, consequently, the percentages are without basis in the evidence. Burnham makes the additional argument that the testimony of plaintiffs' medical expert, Dr. Markowitz, regarding the cumulative nature of exposures as substantial contributing factors in causing an individual plaintiff's mesothelioma, undermines the percentages, as the individual plaintiffs did not quantify exposures to a particular company's products. Cleaver-Brooks separately argues that the court erred in not charging language which it requested in connection with apportioning fault, that there are two main variables; degree of fault and extent of contribution to causation.[19]

Contrary to defendants' argument, in apportioning fault, the jury differentiated among the defendants, Crane and the Article 16 companies. Significantly, in Assenzio the jury allocated 28% fault to Cleaver-Brooks, and 33% to Crane, which, as noted above, participated in, but settled during the trial, and in Levy, the jury allocated 24.9% fault to Cleaver-Brooks and 59.9% to Crane. In Serna, the jury allocated 55% of fault to Burnham and 15% to each of the three Article 16 companies. In Brunck, where both Cleaver-Brooks and Burnham were defendants, Cleaver-Brooks was allocated 15%, and Burnham 25% of fault. While in Vincent, the jury apportioned the same percentage to Cleaver-Brooks and Burnham, 21%, this allocation is not contrary to the evidence, and, in light of the other percentages, cannot be said to support

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[19] Cleaver-Brooks requested the following charge. "In apportioning fault, there are two main variables. These are one, the degree of fault; and two, the extent of contribution to the causation of plaintiff's illness.
You must apportion equitable shares which are determined based on the relative culpability of the defendant and of each company liable for contributing to plaintiff's injuries. This means that the liability should be apportioned according to the relative degree of fault for the injuries which may include not only the strength of the causal link, but the magnitude of the fault."

defendants' argument. Moreover, while for each plaintiff the jury assigned the same percentage of fault to each Article 16 company, different percentages were assigned to these companies in each case. In Assenzio, the percentage assigned to the Article 16 companies was 1.5 %; in Brunck 1.6%; in Levy .4%; in Serna 15%, and in Vincent 1.5%. The different percentages assigned to the individual defendants and Crane in each case in which they were named defendants, and the different percentages, ranging from .4 to 15% assigned to the Article 16 companies, reflect the jury's consideration of the relative culpability of the individual defendants and Article 16 companies within each case.

As discussed above, sufficient evidence supported the individual plaintiff's exposure to asbestos from defendants' boilers, and in Levy, to Cleaver-Brooks' distillers, to have been a substantial contributing factor in causing a plaintiff's mesothelioma. As to the percentages of fault, while there was evidence that plaintiffs were exposed to asbestos from other companies' boilers and other products, the jury's concentration on defendants and Crane in assigning fault, reflects the emphasis in the evidence as to these companies. For instance, as to the state of the art evidence, while plaintiffs presented evidence through their expert as to what was known about the dangers of asbestos and the individual defendant's knowledge at relevant times, defendants did not present an expert with respect to such evidence as to the Article 16 companies. Rather, defendants generally relied on plaintiffs' expert for what was known about the dangers of asbestos, although they did question the expert as to a limited number of Article 16 companies' memberships in various organizations. Similarly, that the same percentage was assigned to the Article 16 companies within a case, reflects the nature of the evidence produced as to these entities. Dr. Markowitz's testimony regarding the cumulative nature of exposures was a factor for the jury to consider in evaluating the relative culpability of the various defendants and Article

16 companies, but is not dispositive in apportioning fault. Accordingly, it cannot be said that the evidence with respect to apportionment so preponderated in favor of defendants, that the verdict "could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., 86 NY2d at 746 (citations omitted).

Nor do grounds exist to set aside the verdict based on the charge as to apportionment. The charge was from PJI 2:275, and was given in conjunction with the charge as to culpability and causation. The jury was instructed:

> Cleaver Brooks and Burnham allege that the individual plaintiffs were exposed to asbestos-containing products and or materials of these companies and that these companies failed to warn of the dangers of exposure to asbestos and that the companies knew or should have known about the dangers of asbestos and that the companies failed to exercise reasonable care by not warning and that the individual company's failure to warn was a substantial contributing factor in causing the individual plaintiff's asbestos–related disease.
>
> Burnham and Cleaver Brooks have the burden of proving that an individual plaintiff was exposed to asbestos from the company's product and that a particular company failed to warn and that the failure to warn is a substantial contributing factor in causing a plaintiff to develop an asbestos–related disease…
>
> If you find that any of those companies are responsible or if you find that in the Brunck and Vincent cases that both Burnham and Cleaver-Brooks are responsible, you need to assign a percentage of fault to each defendant and to each company you find liable for an individual plaintiff's injury. You will state the percentage of fault that you have attributed to either or both Burnham and Cleaver-Brooks and to each company, if any, whose failure to warn you find is a substantial contributing factor in causing an individual plaintiff's mesothelioma or asbestos–related cancer. The total of percentage for the defendant and all companies which have been found liable must add up to a hundred percent. Tr. at 5902-04.

In addition to the charge, when instructed, the jury had verdict sheets as to each individual plaintiff, and this instruction was given with reference to the specific questions on the verdict sheet in connection with apportionment. The apportionment question contained a typed instruction that for each company which was found liable, the jury was to set forth "its

percentage of fault" and that the percentages must add up to a hundred. In instructing the jury and referencing the question, the court clearly stated that they were to assign a percentage of fault "only to those companies whose failure to warn was a substantial contributing factor in causing a plaintiff's injury," and that the total percentage must add up to a hundred percent. In context, the jury was explicitly instructed as to culpability, and was implicitly instructed as to relative degrees of fault with respect to exposure and causation, since the percentage of fault has meaning only with respect to a company's relative culpability vis-a-vis the culpability of other companies.

Cleaver-Brooks argues for the first time in its reply, that the court erred in instructing the jury that if there is an apportionment of fault, it was for the court to decide. This is not properly considered and, in any event, Cleaver-Brooks mischaracterizes the instruction. The instruction related to the amount of damages, and instructed that if the jury reaches the issue of damages, it should calculate the entire amount of compensation to which it finds an individual plaintiff is entitled, and should not take into consideration any apportionment of fault. The jury was properly instructed, if there was to be an apportionment of the amount of damages, it was for the court to decide these issues.

VII. RIMITTITUR

Defendants move to set aside the verdict and for a new trial with respect to damages on the grounds that the jury's awards as to each plaintiff were excessive. While the amount of damages to be awarded for personal injuries is primarily a question for the jury, and a jury's verdict should be given considerable deference, an award may be set aside "as excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501(c); see Ortiz v. 975 LLC, 74 AD3d 485 (1st Dept 2010). While "personal injury awards,

especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification," courts look to comparable cases in deciding if an award deviates from fair and reasonable compensation. Reed v. City of New York, 304 AD2d 1, 6 (1st Dept), lv denied 100 NY2d 503 (2003). However, "[m]odification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible." So v. Wing Tat Realty, Inc, 259 AD2d 373, 374 (1st Dept 1999).

Recent appellate decisions which address the issue of the amount of damages where plaintiffs suffered from mesothelioma have sustained remitted awards of $8 million, Konstantin, Dummitt, supra; $3.5 million, Penn v. Amchem Products, 85 AD3d 475 (1st Dept 2011). In 2006, the First Department modified awards from $8 million to $3 million, and from $14 million to $4.5 million, respectively, for plaintiffs Noah Pride and Bernard Mayer, Matter of New York Asbestos Litig. (Marshall), 28 AD3d 255 (1st Dept 2006). A recent trial court remitted an award of $35 million to $18 million, in Matter of New York City Asbestos Litig. (Peraica), Index No.: 190339/2009 (Sup Ct, NY Co 2013).

As indicated above, while awards in comparable cases are not binding, they offer precedential guidance as to whether an award deviates from reasonable compensation. In Konstantin, supra, remitted awards of $4.5 million for past pain and suffering of 33 months and $3.5 million for future pain and suffering of 18 months were sustained. Mr. Konstantin suffered from mesothelioma of the tunica vaginalis, and underwent 5 surgeries, two courses of chemotherapy and one round of radiation. In one surgery a testicle and part of his scrotum were removed, and further surgery was required as the scar did not heal properly resulting in severe pain. The disease migrated to the pleura of his lungs, causing the accumulation of fluid which

had to be drained from his lungs. Significantly, the court measured past pain and suffering from onset of a large hydrocele in his testes. In sustaining the award of $3.5 million for 18 months of future pain and suffering, the court noted that while the amount was unprecedented, it was supported as Mr. Konstantin suffered from two mesotheliomas, in his testes and in his chest.

In Dummit, supra, the court sustained an award of $5.5 million for past pain and suffering of 27 months and $2.5 million for 6 months of future pain and suffering. Mr. Dummitt had continuous medical treatment including four thoracentesises and thoracic surgery. He suffered severe side effects from three course of chemotherapy and had increasing shortness of breath, chronic "breakthrough" pain, and loss of appetite resulting in severe weight loss. As his condition deteriorated, Mr. Dummitt was unable to concentrate and was no longer able to engage in the activities he participated in prior to his illness.

In Penn v Anchem, supra, the court remitted the award for past pain and suffering from $3.65 million to $1.5 million for past pain and suffering of 25 months, and from $10.9 million to $2 million for future pain and suffering. In Pride, the award was reduced from $8 million to $3 million for approximately 11 months of pain and suffering;[20] and in Mayer the award was remitted from $7 million for past and $7 million for future pain and suffering to $3million for past, and $1.5 million for future pain and suffering with a prognosis of 7 months.

In Peraica, supra, in remitting the award to $18 million, the court points out that Mr. Peraica suffered from mesothelioma for two years, and references the following description of the progression of the disease. "in addition to mesothelioma bilaterally impeding Plaintiff's ability to breathe, these tumors advanced to Peraica's abdomen [i.e. peritoneal carcinomatosis]

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[20] This number is taken from C-B's Memo at 58 which states it is based on the briefs.

and caused small bowel obstructions, strangulation, severe ascites, fecal vomiting, and, of course, severe pain." Peraica, supra, n.14

In evaluating whether the awards in this consolidated action deviate from reasonable compensation, and considering the foregoing awards as offering precedential value and some guidance, and giving the jury's verdicts great deference, I conclude that in each of these five cases, the jury's verdict as to damages deviate from reasonable compensation.

In determining the amounts of the individual remittiturs, the First Department's recent decisions in Konstantin/Dummit and Anchem are most instructive. Moreover, since awards for pain and suffering are "subjective" and cannot be calculated with "precise mathematical quantification,"(Reed v City of New York, supra at 7), remitted amounts will be considered as a whole, while looking at the unique factors affecting each plaintiff.[21]

As to Mr. Assenzio, the jury awarded $20 million for past pain and suffering. Mr. Assenzio first developed symptoms in August of 2011. In November of 2011, due to accumulation of fluid in his lungs, he underwent a procedure to have the fluid drained, and on December 14, 2011, after a biopsy, he was diagnosed with mesothelioma. Between December 2011 and March 2012, he had four cycles of chemotherapy, and in the summer of 2012, he underwent radiation treatment. From the chemotherapy, he suffered from nausea and fatigue, sleep disruptions, night sweats and became so weak, he was unable to walk. Eventually, the cancer spread to his bones and liver causing extraordinary pain. He was unable to feed, bathe, get out of bed or go to the bathroom by himself, and needed adult diapers. He spent the last month of his life in hospice and died on March 21, 2013, at 83 years of age. While defendants seek to

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[21] In Konstantin/Dummit, while the court in reviewing the remitted amount noted it equated to $136,000 per month, it did not hold that amounts should be calculated based on a monthly formula.

measure Mr. Assenzio's, as well as the other plaintiffs' pain and suffering from the date of diagnosis, such measurement sets an artificial, arbitrary date which fails to take into account a plaintiff's pain and suffering prior to the date of diagnosis. A plaintiff's pain and suffering should be considered, at a minimum, from the time at which verifiable symptoms or pain of consequence first appear. Contrary to defendants' calculations, Mr. Assenzio suffered for approximately 20 months, measured from the time his first serious symptoms appeared. See Konstantin, supra at 255. Based upon the nature and duration of the pain Mr. Assenzio endured, including the pain from bone and liver cancer, and based on the recent awards sustained in Konstantin and Dummitt award for pain and suffering in the amount of $5.5 million is reasonable compensation.

As to the award of $10 million to Mrs. Assenzio for loss of services, this award deviates from reasonable compensation. In NYCAL litigation, in Penn v Anchem, supra, the First Department remitted an award of $1.67 million to $260,000 for loss of consortium. In Lindenman v Kreitzer, 105 AD3d 477 (1st Dept 2013), the court reduced such an award in a non-asbestos case, from $3.2 million for past and future loss of services to $500,000. While the plaintiff in Lindenman sustained brain damage, the award for plaintiff was remitted to $1.25 million for past and future pain and suffering, the court noting that plaintiff did not undergo surgery and continued to drive and play tennis. As discussed above, these awards are not binding upon the court, and, here, the amount should be reduced from $10 million to $500,000.

ii.) Robert Brunck

Mr. Brunck was awarded $20 million for pain and suffering. Mr. Brunck first began experiencing shortness of breath in the spring of 2011, and was diagnosed with mesothelioma in January 2012, at the age of 72 or 73. He underwent seven or eight cycles of chemotherapy and

several surgeries to remove fluid from his lungs. Mr. Brunck suffered from intense pain in his back and chest from the accumulation of fluid in his lungs. Since the chemotherapy was not successful, Mr. Brunck had surgery for removal of 90% of his visceral pleura. Mr. Brunck could only eat a liquid meal, his lips became dry, and he was unable to swallow. He suffered from ural and fecal incontinence and was deeply humiliated by the need for adult diapers. He developed a staff infection following the surgery, and in May 2012, was readmitted to the hospital, then discharged into a nursing home, but readmitted to the hospital on June 10, 2012. Mr. Brunck died on June 22, 2012, at 73 years of age. According to the record, Mr. Brunck first noticed his shortness of breath in the spring of 2011. However, Mr. Brunck also suffered from chronic obstructive pulmonary disease and emphysema. Under these circumstances, since he experienced shortness of breath in the spring of 2011, was diagnosed in January, 2012, and died in June, 2012, it is reasonable to infer that Mr. Brunck endured eight to ten months of pain and suffering from mesothelioma. In evaluating the last six months of Mr. Brunck's life, he was either undergoing chemotherapy, or, in the last two months, he was in the hospital undergoing surgery or being treated for an infection resulting from the surgery, or in a nursing home recuperating from the surgery. Mr. Brunck, while suffering from the disease for a shorter period of time than others diagnosed with mesothelioma, suffered severely in the last months of his life. Thus, an award for pain and suffering of $3.2 million is reasonable compensation. Cleaver-Brooks' motion to reduce the award by $700,000 to account for Mr. Brunck's chronic obstructive pulmonary disease and emphysema is denied as the amount of the award takes these factors into consideration.

iii.) Paul Levy

Mr. Levy was awarded of $15 million for past and $35 million for future pain and

suffering of two years. In the summer of 2011, at the age of 82, Mr. Levy began experiencing chest and back pains. Initially, the pain prevented him from playing tennis or golf, but eventually progressed so that he was unable to shower or put his hand above his head. In November 2011, based on an abnormality in his chest x-ray, he underwent a biopsy and PET scan, and was diagnosed with mesothelioma. He had a tumor in his lung, which due to its position and size, was inoperable. Mr. Levy underwent four cycles of chemotherapy which treatments made him nauseous, so that he was unable to eat and he lost substantial weight. Due to pain, which was described at trial as so severe at times that he was writhing on the floor, Mr. Levy was admitted to the hospital four times, and given morphine. While hospitalized he had four blood transfusions, and was so weak, he was taken for his chemotherapy treatments in a wheel chair. He developed bladder problems and needed a catheter placed in his penis. Mr. Levy testified that as a result of his treatment and diagnosis, he became depressed and that he thinks of death every day. At trial, Mr. Levy's mesothelioma was in remission, and it is reasonable to infer the duration of past pain and suffering of approximately one and one half years. Mindful that Mr. Levy has suffered not only physically from the disease, but suffers from the apprehension of his death from this disease, an award of $4 million for past pain and suffering, and $3.5 million for two years of future pain and suffering is reasonable compensation.

The jury awarded Mrs. Levy $10 million for loss of services. This award encompasses the loss of Mr. Levy's companionship and services in the past and for future. As indicated above, the jury awarded future damages for Mr. Levy for two years. Taking into consideration past awards, and Mr. Levy's prognosis, the award should be reduced to $650,000.

iv.) Cesar Serna

The jury awarded Mr. Serna $30 million for past and $30 million for future pain and

suffering for one and one half years. Mr. Serna first began experiencing symptoms in December 2009, and was diagnosed with mesothelioma in December 2010 after he underwent thoroscopic surgery. In addition, he had a right thoracotomy, pleurectomy, a decortication, and an en bloc resection of the diaphragm. The first surgery involved going through the back to access the lungs, and due to the pain from the surgery, Mr. Serna had difficulty breathing. Twenty days later, he had a second surgery to remove fluid from his lungs, during which he was given blood transfusions. When the surgeries did not relieve his pain, Mrs. Serna testified he became depressed and stopped talking and eating. In addition to the surgeries, Mr. Serna had eight cycles of chemotherapy which made him sick so that he did not eat and could not walk up the stairs. Dr. Schacter testified Mr. Serna experienced breakthrough pain, i.e. pain which is experienced despite medication, and that Mr. Serna is depressed, reports he is unable to sleep, and has had thoughts of suicide. Based on Mr. Serna's extensive medical treatments, and the effects the disease and treatments have had on Mr. Serna's mental state, an award of $4.5 million for approximately two and one half years to three years of past pain and suffering, and $3 million for future pain and suffering for one and one half years is reasonable compensation.

v.) Raymond Vincent

Mr. Vincent was awarded $20 million for pain and suffering. Mr. Vincent began experiencing symptoms in April, 2010; he was diagnosed with mesothelomia in September 2011; and he died December 29, 2012. While Mr. Vincent had some pain in April 2011, he began experiencing greater pain in the summer of 2011, and underwent a thorocentisis in 2011 to have fluid removed from his lungs. Subsequently he had a pleurectomy and pleural decortication . In addition, Mr. Vincent underwent three rounds of chemotherapy which caused him severe pain, fatigue, and discomfit. Due to constant pain, Mr. Vincent was unable to walk across the room.

He had a fentanyl patch as well as Vicodin, was hospitalized in a special facility, and despite the medication, experienced "break through pain." For the last three to four months of his life, he did not eat and lost substantial weight. He became incontinent of urine, and was mortified at the need to wear adult diapers. Since Mr. Vincent's symptoms began in April, 2010, and he experienced increased pain in the summer of 2011, it is reasonable to infer an award for pain and suffering for approximately 18 to 20 months. Based on the degree of pain Mr. Vincent experienced throughout this period and the medical treatment he received, reasonable compensation is set at $5 million.

CONCLUSION

In view of the above, it is

ORDERED that the motion by Cleaver-Brooks, Inc to set aside the verdict with respect to plaintiff Santos Assenzio is granted only to the extent of vacating the awards of $20 million for past pain and suffering, and $10 million to Mr. Assenzio's spouse for loss of consortium and ordering a new trial on the issue of damages unless plaintiff Santos Assenzio within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the awards to $5.5 million for past pain and suffering and $500,000 for his spouse's loss of consortium; and it is further

ORDERED that the separate motions by Burnham Corp. and Cleaver-Brooks, Inc. to set aside the verdict with respect to plaintiff Robert Brunck is granted only to the extent of vacating the award of $20 million for past pain and suffering and ordering a new trial on the issue of damages unless plaintiff Robert Brunck within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the award to $3.2 million for past pain and suffering; and it is further

ORDERED that the motion by Cleaver-Brooks, Inc. to set aside the verdict with respect

to plaintiff Paul Levy is granted only to the extent of vacating the awards of $15 million for past pain and suffering, $35 million for future pain and suffering and $10 million to Mr. Levy's spouse for loss of consortium and ordering a new trial on the issue of damages unless plaintiff Paul Levy within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the awards to $4 million for past pain and suffering, $3.5 million for future pain and suffering, and $650,000 for his spouse's loss of consortium; and it is further

ORDERED that the motion by Burnham Corp. to set aside the verdict with respect to plaintiff Cesar O. Serna is granted only to the extent of vacating the awards of $30 million for past pain and suffering and $30 million for future pain and suffering and ordering a new trial on the issue of damages unless plaintiff Cesar O. Serna within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the awards to $4.5 million for past pain and suffering and $3 million for future pain and suffering; and it is further

ORDERED that the separate motions by Burnham Corp. and Cleaver-Brooks, Inc. to set aside the verdict with respect to plaintiff Raymond Vincent is granted only to the extent of vacating the award of $20 million for past pain and suffering and ordering a new trial on the issue of damages unless plaintiff Raymond Vincent within 30 days of service of a copy of this decision and order with notice of entry stipulates to reduce the award to $5 million for past pain and suffering.

DATED: February 5, 2015

J.S.C.
HON. JOAN A. MADDEN
J.S.C.