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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
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MARY MURPHY-CLAGETT, as Temporary Administrator for the Estate of PIETRO MACALUSO,
Plaintiff,

- Against -

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

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

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

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

Cross-Motion: Yes X No

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

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

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

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

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

(3). The court should grant Remittitur because:

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

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

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

(1) Burnham is not entitled to judgment as a matter of law because:

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

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

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

(3) The court should deny any Remittitur because:

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

Relevant Trial Testimony

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

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

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

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

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

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

There was rope insulation that just disintegrated and there was dust everywhere. He would break the units apart with a sledgehammer to get the boiler pieces through the door. The metal would break up into shards that created dust. Then he had to

sweep up the dust and this created more dust. He breathed the dust in, even if he wore a mask. His nose would be white with stuff. He stated the dust came in through his nose and mouth.

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

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

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

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

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

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

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

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

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

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

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

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

visible because they are very small. He defined re-entrainment as the ability of dust to get back up into the air after it has settled down.

Dr. Markowitz opined that Mr. Macaluso had pleural mesothelioma. That he was exposed to asbestos by demolishing and removing old boilers manufactured by defendants Peerless, A.O. Smith and Burnham. That the exposure to asbestos was substantial, and that exposure to asbestos from demolishing and removing Peerless, or A.O. Smith, or Burnham boilers alone was a substantial contributing factor to the development of Mr. Macaluso's mesothelioma. Dr. Markowitz further opined that Chrysotile asbestos can cause mesothelioma. He described Mr. Macaluso's course of treatment, the surgeries and the pain he endured.

Plaintiff presented Dr. David Zhang, M.D., Board Certified in Pathology and Occupational Medicine. Dr. Zhang is of the opinion that Mr. Macaluso's tumor cells show evidence of mesothelioma, that asbestos is the only cause of mesothelioma and that since the 1930's the literature states that asbestos causes mesothelioma. He stated on cross-examination that Mr. Macaluso's cumulative exposure is the cause of the mesothelioma. He further stated on cross-examination by Peerless' counsel that there are other causes for mesothelioma but they are not conclusively established.

Plaintiff presented Dr. Gerald Markowitz, PhD in history, as a state of the art expert. Dr. Markowitz opined that by 1898 there was information on the dangers of asbestos and that by the 1930's it was generally recognized that asbestos causes disease. As of 1935, 1940 and by the mid 1950s it was acknowledged that asbestos caused cancer, and that by 1930 onward it was recognized that the people at risk were workers in different occupations that breathed asbestos dust. Dr. Markowitz testified about the different studies made and reports and articles written over the years, beginning in 1906, that refer to the dangers of asbestos. He also spoke about the different commissions and manufacturing associations and societies created over the years by state institutions and Industry, the membership of the defendants in some of these associations and societies, and how these associations and societies were aware and disseminated information to its members, including the defendants, of the dangers of exposure to asbestos dust.

On cross-examination by defendant Peerless he stated that according to historical literature by the 1930's it was established that asbestos caused asbestosis; by 1950's that it caused lung cancer and that by the 1960's that it caused mesothelioma. He further stated that NIOSH in 1972 concluded that all fibers caused asbestosis, lung cancer and mesothelioma.

On cross-examination by defendant A.O. Smith he stated that by the 1930's it was understood that asbestos was a public health danger. He further stated that "a company manufacturing a product needs to know all components and the potential danger of the product. If a company incorporates asbestos into their product they have a responsibility to find out the danger of asbestos. He stated that they had a responsibility to make sure these toxins wouldn't injure the workers. The fact that the U.S. government required the use of asbestos doesn't relieve the company of this responsibility."

Plaintiff presented the testimony of Steven Paskal, Industrial Hygienist, who focused on occupational and health issues. Mr. Paskal explained what asbestos is, explained its aerodynamic qualities, and what it looks like under a microscope. He spoke about the lung function, and the permissible level of asbestos exposure. He stated that when work generates visible asbestos dust, the asbestos content of the dust is above the permissible level of exposure. He gave the ranges of average exposures for different types of work and stated that every increase in exposure creates a likelihood of developing cancer. He further stated that he read Mr. Macaluso's Examination Before Trial and opines that, based on this testimony, Mr. Macaluso's exposure falls in the one to ten million fiber per cc range, and if you add cleaning and sweeping of the asbestos dust then the exposure could be worse. He showed that asbestos-rope use exposure falls in the one hundred thousand to one million particle per cubit meter in the spectrum. He further stated that exposure from cleaning asbestos debris falls in the one million to one hundred million fiber range.

Mr. Paskal stated that swinging a sledgehammer and using a crowbar causes more fibers to enter the lungs because of the metabolic rate increases. He also stated that re-entrainment causes millions of fibers into the air. He is of the opinion that plaintiff's exposures increased his risk of mesothelioma.

On cross-examination by Burnham's counsel he agreed that he only read Mr. Macaluso's Examination Before Trial testimony. That a person can't tell how big a fiber is with the naked eye. He never tested the air flow in older homes, and was not aware of any studies regarding the removal of asbestos cement from residential boilers. He is only aware of forensic studies.

On cross-examination by Peerless' counsel he stated that he has overseen removal of boilers but in enclosed, wet, ventilated environments and has measured the exposure from the removal of plastic cement in wet methods, not in a dry setting. He has not seen any studies about removal of asbestos cement from boilers in residential settings. He is of the opinion that if insulation is hit with a sledgehammer it is more likely to cause damage. If a boiler is not externally insulated then the rope can cause damage. Yanking of rope and pounding of insulation will cause the same asbestos release.

On cross-examination by A.O. Smith's counsel he stated that he cannot describe an A.O. Smith boiler or an H.B. Smith boiler. He can't remember the names of the boilers he has worked on.

Defendant Peerless' corporate representative, Stanley Bloom, testified at the trial. Mr. Bloom talked about the history of the company and stated that Peerless boilers had the Peerless name cast on the door. Peerless stopped using asbestos-rope in the 1980's because it lost its ability to buy it. He further stated that at no time before the 1980's did Peerless warn about the hazards of asbestos. Peerless used asbestos rope for residential boilers between sections of block. He was present in the area when they cut asbestos-rope sections. The rope was fibrous. When rope was cut visible fibers were released. Peerless first learned of the hazards of asbestos in the 1980's and 1990's when the attorneys came seeking information for the asbestos litigation. Peerless provided field instruction for commercial boilers and recommended the use of

rope. Peerless did not provide a manual on how to take a boiler apart. He stated that in between sections of the boiler Peerless would place asbestos-rope, and over the rope, on the edge of the joint, would place asbestos-cement. Boilers were sold for commercial and residential applications. He further stated that the asbestos-cement and asbestos-rope were sold to Peerless by other companies: Johns-Manville and AP Greene. Peerless recommended that the boilers be covered with asbestos-cement to thickness of not less than one and a half (1 ½) inches up to 1675 pounds for greater efficiency. He described how the boilers were assembled: in sections with a rod through the sections and a nut on either end. Peerless stopped using asbestos-cement after OSHA, before the lawyers came.

On examination by defendant Peerless' attorney, Mr. Bloom described the Peerless basic boiler design and explained how the pressure rods prevented the boilers from being broken up with a sledgehammer. He explained how he was present during rope cutting without wearing a mask because he was not aware then of any hazards posed by asbestos dust. He stated that the boiler design required asbestos-rope and cement to prevent the escape of carbon monoxide. He further stated that the suppliers of asbestos-rope and cement never sent warnings to Peerless.

Defendant A.O. Smith's corporate representative, Bradley Plank, testified at the trial. He stated that it is irresponsible for a company to sell a product that can cause severe injury or death if it's reasonably foreseeable. He stated that the last boiler he saw in the field was from 1972. A.O. Smith began manufacturing boilers after World War II, around 1947. They were gas powered and electric boilers, and came in a range of sizes, some approximately five (5) feet or higher and some small enough that could fit through a door. All the boilers he has ever seen were jacketed. He agreed that the boilers contained asbestos components such as asbestos-tape, woven asbestos-tubes, asbestos-gaskets or washers, and the inner combustion chamber door had asbestos-cloth. He admitted that A.O. Smith bought asbestos products from other companies, and admitted that A.O. Smith did not warn customers about the hazards of asbestos contained in its products.

Mr. Plank stated that A.O. Smith sold cast iron sectional packaged rectangular boilers that did not require external insulation. These boilers were not assembled on site and could fit through a doorway. These sectional boilers were sold through the early 1950's, they came with a user manual, did not recommend the use of asbestos and had no warning of asbestos. He further stated that A.O. Smith boilers were marked with a label that identified the boiler as "A.O. Smith". When A.O. Smith learned that its boilers contained asbestos it didn't do a recall, didn't warn of the hazards of asbestos or take any other step. Mr. Plank doesn't know why this was not done.

On examination by defendant A.O. Smith's attorney, Mr. Plank described for the jury the parts of a sectional and a packaged boiler. Mr. Plank stated that after reviewing Mr. Macaluso's testimony he believes that Mr. Macaluso did not work on removing A.O. Smith boilers because A.O. Smith never made a cast iron boiler that made steam or that was fired by oil. All the boilers A.O. Smith made were fired by gas. A.O. Smith boilers made hot water and did not require asbestos on the outside. The exterior of an A.O. Smith boiler was not as hot and could be touched with your hand because it was made with an outer jacket and a copper coil with a heat exchanger. He

further stated that although he never personally demolished an A.O. Smith boiler, if a person were to hit the exterior of an A.O. Smith boiler with a sledgehammer it would not break, it would only be dented because of the exterior jacket. He re-iterated that he didn't believe plaintiff disassembled A.O. Smith boilers.

On continued examination by defendant A.O. Smith's attorney, Mr. Plank was shown defendant's AL (A.O. Smith boiler advertising of a boiler selling at least in the 1960's), AM (A.O. Smith boiler drawing) and AN (A.O. Smith parts list). Mr. Plank described the boilers depicted in the advertising and how these boilers worked. He stated that these boilers don't contain cast iron sections and can't be efficiently de-constructed with a sledgehammer. He stated that A.O. Smith boilers weighed at most 120 pounds and could heat a small house. He stated that he was not sure if the boilers shown in the exhibits contained any asbestos components but that some would have asbestos components (the heat exchange would have a 6 inch asbestos-tube, asbestos-cloth pitched in back of the inner combustion door, asbestos-tape under the coil support and 2 inch washers). He stated that A.O. Smith stopped using asbestos components in its boilers in 1980-1981.

Mr. Plank was shown Plaintiff's 180 in evidence (an A.O. Smith sectional boiler). He stated that A.O. Smith did not manufacture this boiler but purchased it from another company. He stated that this boiler ranges in size from four (4) to nine (9) sections and can be carried through a door. Each cast iron section weighs approximately fifty (50) pounds and if it were hit with a sledgehammer it would dent the jacket. To de-construct this boiler a person would have to remove the jacket first. He stated that he doesn't know if this boiler (as shown in 180) was insulated from section to section, or if it was fired by gas, or if it made steam. He found nothing that says this particular boiler contained asbestos.

Mr. Plank stated that the exterior of an A.O. Smith boiler would not exceed 180 degrees and could be installed on a wooden floor, within seven (7) inches of a wooden wall. He further stated that A.O. Smith boilers can't be externally insulated because insulation would impair their proper operation. Finally he stated that "H. B. Smith" is the only company he knows that makes a sectional, cast iron, oil fired boiler. Mr. Plank did not recall Mr. Macaluso ever mentioning "H.B. Smith".

Defendant Burnham's corporate representative, Roger Pepper, testified at the trial. Mr. Pepper stated that he was aware Burnham used asbestos insulation from 1873 through the 1960's, that it was the most widely used on Burnham un-jacketed boilers and that Burnham recommended its use. He further stated that although there was documentation regarding the dangers of asbestos, from 1872 through 1982 Burnham never warned about the dangers of asbestos on any of its boilers, although it had the ability to do so. He further stated that Mr. Macaluso did not accurately describe the cast iron sectional boilers made by Burnham in the 1920's through the 1960's. Mr. Pepper stated that it was foreseeable that at the end of its life a boiler would have to be removed. He was shown plaintiff exhibits 124 through 127 and acknowledged that these were the different ways that Burnham's name and logo appeared on its boilers over the years. He stated that Burnham also had its name embossed on the body of its un-jacketed boilers, so that there would be no mistaking a Burnham boiler.

Mr. Pepper stated that a Burnham boiler cast iron section weighed from forty-five (45) to one hundred and fifty (150) pounds individually, without water, and had to be separated if the boiler was being de-constructed, so that they could be carried out. He stated that the boilers were pressed, not bolted, together. He stated that every boiler Burnham has ever sold requires insulation to operate properly and for safety. In earlier years insulation was asbestos containing. Steel boilers had to be insulated in the field by placing insulation on the outside. If a boiler was properly maintained it could last an average of from twenty (20) to fifty (50) years, and it is possible that a Burnham boiler installed in the 1940's, if it was properly maintained, could last into the 1980's. The vast majority of Burnham boilers were rectangular but some older ones were cylindrical and stood vertically. All the boilers Burnham made during the 1940's through the 1970's contained asbestos-containing components in specific areas. Some boilers contained asbestos-rope up to 1982. Asbestos-rope was specified by Burnham through its engineering department, who also specified asbestos-millboard (for boiler doors), asbestos air-cell insulation and asbestos containing gaskets. Asbestos-cement was also widely used and recommended by Burnham to be placed outside un-jacketed boilers, even in residential boilers, through 1975. Asbestos insulation was most widely used by Burnham from the 1930's through the late 1970's. The Burnham boilers sold in the 1950's and 1960's would be operational into the 1980's and would contain the insulation that Burnham had specified.

Mr. Pepper was shown Plaintiff's exhibits 135 through 138 in evidence. These were magazines and catalogues where Burnham recommended that its boilers be covered with asbestos cement from fifty (50) pounds on its small round boilers, up to 1300 pounds on its large square boilers. Burnham catalogues in evidence show its recommendation of the use of asbestos-cement and insulation for pipes and boilers. Plaintiff's exhibit 150 through 161 in evidence is Burnham's erection instruction for a yellow jacket boiler and photographs depicting the boilers covered in asbestos-cement. Burnham sold the kit (boiler and asbestos) for these boilers. He stated that the asbestos-cement covering the boilers would need to be scraped or chiseled away when removing the boiler.

Mr. Pepper stated that Burnham knew asbestos was being used with its boilers, that their boilers would need to be repaired in the field and that the persons doing this work would be exposed to asbestos. He stated that it was foreseeable to Burnham that laborers would break the asbestos-cement and then clean up afterwards. He does not dispute that this work exposes a person to asbestos and that it was foreseeable to Burnham that this would happen. Mr. Pepper further admitted that Burnham was a member of associations, and was aware of laws enacted to prevent the dangers of asbestos exposure. That it advertised, received and read magazines where articles were published regarding the dangers of asbestos, and that it was aware of and read the OSHA 1972 act, but, despite this knowledge, did not warn of the dangers of asbestos.

On examination by Burnham's attorney Mr. Pepper stated that Burnham has never received any OSHA violations or had any Workers Compensation claims through 1982. Burnham never mined or milled asbestos, owned any textile factory or manufactured any asbestos component. He Stated that Mr. Macaluso stated that he worked with Burnham boilers, but did not describe one. Mr. Pepper described the

difference between a steel boiler and a cast iron boiler. He said that steel boilers are high pressure and used to heat large buildings. He stated that jacketed boilers come pre-packaged and have to be assembled in the field. There are areas in a cast iron boiler that need to be sealed. He stated that in 1927 Burnham specified the use of pipe covering and asbestos cement on the exterior of un-jacketed boilers and that 1932 was the last year that Burnham offered for sale asbestos cement. In the 1932 catalogue Burnham specified the use of, and offered for sale, asbestos pipe covering. Burnham last specified the use of asbestos cement for un-jacketed boilers in 1936. He further stated that rope was not used between the sections, instead boiler puddy was used to seal between the sections. Finally he stated that the cement provided with the boilers was for sealing between the section assembly and the canopy. Mr. Pepper does not know if the boiler puddy contained asbestos.

On further examination by Plaintiff's attorney Mr. Pepper stated that Mr. Macaluso was vague in how he described a Burnham boiler but that Mr. Macaluso was correct in the way he described the Burnham boiler fuel and size. He stated that cast iron made it more likely to be residential. He stated that Mr. Macaluso was correct in describing the boiler's shape, he was correct on where asbestos would be found in the boiler, correct in where the boiler would be located, and correct on the method of dismantling and of removing the boiler. He admitted that Burnham knew asbestos cement would be used on un-jacketed boilers up to 1962. He stated that he was not aware of any Johns-Manville warning in 1975 and that he was not aware of any Burnham warning.

Defendants presented the testimony of Dr. Brian Taylor, M.D., Board Certified in Internal Medicine, Critical Care Medicine and Pulmonary Medicine. Dr. Taylor stated that mesothelioma is a rare cancer caused by exposure to asbestos. He described what he does as a Pulmonologist, described a Thoracentesis and stated why it would be performed. Dr. Taylor is of the opinion that asbestos is the main cause of malignant mesothelioma and that both types of asbestos cause mesothelioma. He is also of the opinion that plaintiff had, and died from, malignant pleural mesothelioma. He is of the opinion that a person needs to be exposed from 75 to 100 fiber years of Chrysotile asbestos to develop mesothelioma because mesothelioma is a dose/response disease.

Dr. Taylor was presented with a series of hypotheticals and as to each he responded that he is of the opinion that if Mr. Macaluso was exposed as described from 1972 or 1976-1982 the exposure would not have been sufficient to have caused the mesothelioma, because that exposure would not have reached the 75-100 fiber years per cc needed to have caused the disease.

On cross-examination by plaintiff's attorney he opined that mesothelioma is a signal malignancy of asbestos exposure and that there was no evidence that Mr. Macaluso was exposed to sufficient Chrysotile asbestos to have caused mesothelioma. He further opined that contrary to amphibole asbestos, Chrysotile asbestos requires a high exposure level. He also stated that he can't give an opinion that Mr. Macaluso's mesothelioma was caused by amphibole asbestos exposure. He stated that joint compound did not contribute to plaintiff's mesothelioma, that he is aware that there's literature that says low levels of Chrysotile asbestos exposure causes mesothelioma, but has not seen epidemiological studies to back up these conclusions.

Defendant Burnham presented Dr. James Poole, PhD., Certified Industrial Hygienist. After reviewing Mr. Macaluso's testimony and taking into account the type and intensity of the work he performed, after evaluating the data available from studies on removal of asbestos cement from residential boilers, Dr. Poole is of the opinion that Mr. Macaluso was not at an increased risk of asbestos exposure based on the work he did with Burnham, Peerless and A.O. Smith boilers.

Defendant Peerless presented Mr. Delno Malzahn, Certified Industrial Hygienist. Mr. Malzahn stated he wore asbestos gloves without needing to wear a mask or respirator because they don't create dust. He explained the Threshold Limit Value (TLV), and stated that Peerless used rope gasket between the seams of the boiler. This rope gasket had encapsulated asbestos. He further stated that boilers as depicted in the illustration shown to him are brought into a basement and taken out as a single unit. If the boiler is brought out as a single unit then there is no exposure to asbestos. To break the boiler apart one would need to remove the pressure rod.

On cross-examination by plaintiff's attorney he agreed that once the pressure rod is removed a person can break the boiler sections apart. He stated that if there is dust in an enclosed room, and the dust is asbestos, then a mask or respirator is recommended. He admitted that he has never worked as a plumber or pipe fitter and has no experience dismantling boilers in the field.

Defendants read into evidence the interrogatories and deposition testimony of corporate representatives of Trane, American Standard, Bondex, Carrier, Kohler, National Gypsum, U.S. Gypsum, Crane Co., and Weil-Mclain; companies that were either non-parties or had settled with plaintiff prior to trial.

Defendants presented the testimony of Bruno Frustaci, the person with whom Mr. Macaluso worked when he was renovating houses and removing boilers from basements in Brooklyn. Mr. Frustaci said that in 1976 he opened a small construction company named Permis, with a partner named Giuseppe Capparota. He left Permis in 1984 or 1985. The jobs were mainly in private houses. The company started doing government jobs in 1978 mainly in Governor's Island, West Point and Fort Hamilton. The company worked on private houses in Brooklyn. The work focused on renovation, and the company didn't do demolition work.

He stated that Permis didn't do plumbing work. When they started working for the government then they hired plumbers. When Permis worked at private houses they didn't do plumbing work because they didn't have a plumbing license. He also stated that Permis didn't remove boilers because it needed a license to do this type of work. He further stated that Permis was not in the business of boiler removal. He stated that a licensed plumber was required to remove a boiler, even after the boiler was off-line.

He stated that he remembers he met Mr. Macaluso in 1977 and at the insistence of Mr. Macaluso's father he hired Mr. Macaluso to work for Permis. Mr. Macaluso worked for the company two to three months, more or less. Mr. Frustaci worked with Mr. Macaluso from four to six weeks on the same site. Mr. Macaluso was a laborer who carried concrete when Permis did concrete work and other things.

On Examination by Peerless' attorney Mr. Frustaci stated that Mr. Macaluso didn't work for Permis in 1972 because the company did not exist at the time. The company was created in 1976. Mr. Macaluso did not work for Permis in 1973, 1974 or 1975.

On cross-examination by Plaintiff's attorney Mr. Frustaci re-iterated that Permis came into existence in late 1976 (October or September). He never saw any warnings on the hazards of asbestos on the work-sites at residences in Brooklyn. Starting in 1978 he started working at West Point. He would work the entire week in West Point. Mr. Macaluso did not work with him at West Point, and he couldn't say whether Mr. Macaluso worked at Permis during this time because he was not in Brooklyn. At that time Permis had projects in Brooklyn that Mr. Frustaci had nothing to do with. He doesn't know if Mr. Macaluso was working with Mr. Capparotta in Brooklyn, while he was out working in West Point. He worked with Mr. Macaluso one week but Mr. Macaluso could've worked with someone else at Permis. He wouldn't know who was working at Permis while he was out in West Point. Only Capparotta knew who was working at Permis during this time because Mr. Frustaci was out in West Point. He stated that when boilers were removed the Plumbers would break apart the boilers after they were taken off-line. However, Permis didn't do any boiler jobs before the 80's. The first job for which he had to call a plumber for a boiler was in the 80's for the Army base. When Mr. Macaluso was working with Permis it didn't have any subcontractors because it was right at the beginning and Permis was doing small jobs. Mr. Frustaci stated that he left Permis in 1984 or 1985.

At the conclusion of the trial the jury unanimously returned a verdict in favor of plaintiff and against the defendants Peerless, A.O. Smith and Burnham. It found :
(1) That Mr. Macaluso was exposed to asbestos or asbestos containing components used in association with the defendants' boilers;
(2) That the defendants failed to exercise reasonable care by not providing adequate warning to Mr. Macaluso about the hazards of exposure to asbestos or asbestos containing components used in association with the defendants' boilers; and
(3) That defendants' failure to provide an adequate warning to Mr. Macaluso about the hazards of exposure to asbestos, or asbestos containing components used in association with the defendants' boilers, was a substantial contributing factor in causing Mr. Macaluso's mesothelioma.

The Jury also unanimously found that Carrier Corp., Crane Co., Kohler, Trane U.S. Inc., National Gypsum, U.S. Gypsum and Weil-Mclain were also liable, and with one dissenting vote, apportioned 25% liability to each defendant, 10% liability to defendant Kohler and 2.5% liability to each of the remaining (Carrier Corp., Crane Co., Trane U.S. Inc., National Gypsum, U.S. Gypsum and Weil-Mclain) entities.

The Jury, with one dissent, awarded damages in the sum of $25 Million dollars for Mr. Macaluso's pain and suffering, in the sum of $17 Million dollars to Jackson Macaluso for loss of parental guidance, and in the sum of $18 Million dollars to Nora Grace Macaluso for loss of parental guidance. The award for loss of parental guidance is intended to compensate Jackson Macaluso and Nora Grace Macaluso over a period of 21 years.

Finally the jury unanimously found that the defendants Peerless, Burnham and A.O. Smith acted with reckless disregard for the safety of Pietro Macaluso.

Defendant now moves to set this verdict aside or for a reduction in the amount of damages awarded. Plaintiff opposes the motion and argues that the verdict should remain in tact because it is not against the weight of the evidence, that the amount of damages awarded is fair and reasonable, but that if the court were inclined to reduce the amount of damages then it should be a modest reduction and not a steep reduction as defendants propose.

Legal Analysis

Defendant Burnham moves to set aside the jury's verdict as being against the weight of the evidence. It argues that the plaintiff failed to prove causation, failed to prove that defendant had a duty to warn. Defendant also argues that the court erred in its duty to warn charge, in charging recklessness, in Quashing its subpoena to settled parties, in allowing plaintiff's use of his interrogatories and giving a defective curative instruction, in admitting Johns-Manville records, in failing to place Johns-Manville on the verdict sheet, in precluding evidence of Mr. Macaluso's failure to pay child support and committed other errors.

CPLR §4404(a) provides that after a jury trial, the court may, upon the motion of a party or on its own initiative, set aside the verdict and "direct that judgment be entered in favor of a party entitled to judgment as a matter of law or ... order a new trial of a cause of action.... where the verdict is against the weight of the evidence."

A jury verdict will be vacated only if the court finds the verdict could not be reached on any fair interpretation of the evidence. For a court to conclude that a jury verdict is not supported by legally sufficient evidence there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to conclusions reached by the jury on the basis of evidence presented at trial (see Nicastro v. Park, 113 A.D. 2d 129, 495 N.Y.S. 2d 194; Cohen v. Hallmark Cards, 45 N.Y. 2d 493, 410 N.Y.S. 2d 282, 382 N.E. 2d 1145); Adamy v. Ziriakus, 92 N.Y. 2d 396 [1998]; Lolik v. Big v. Supermarkets, 86 N.Y.2d 744 [1995]). The jury's decision in finding for the plaintiff, on the basis of its fair interpretation of the evidence presented, is not irrational.

The plaintiff sufficiently proved both general and specific causation. Mr. Macaluso described his job duties when he worked with Bruno Frustaci. He stated that he was a laborer in charge of dismantling boilers and cleaning up. He described how the boilers were dismantled. He described how the place turned into a dust bowl, how the dust filled the air and settled all over his hair, body and clothes. He further described how he breathed in the dust through his nose and his mouth.

Plaintiff's expert, Dr. Steven Markowitz, opined that plaintiff developed Mesothelioma. That he was exposed to asbestos by demolishing and removing old

boilers manufactured by defendants Peerless, A.O. Smith and Burnham. That the presence of visible dust makes the exposure substantial. That the exposure to asbestos was substantial and that exposure to asbestos from demolishing and removing Peerless, or A.O. Smith, or Burnham boilers alone was a substantial contributing factor to the development of Mr. Macaluso's mesothelioma.

Dr. David Zhang, pathologist, is of the opinion that Plaintiff's cumulative exposure to asbestos dust from the dismantling of the defendants' boilers is the cause of his mesothelioma.

Plaintiff's expert Mr. Steven Paskal, Industrial Hygienist, explained asbestos' aerodynamic qualities and the permissible level of asbestos exposure. He stated that when work generates visible asbestos dust, the asbestos content of the dust is above the permissible level of exposure. He further stated that after a review of Mr. Macaluso's Examination Before Trial testimony, his level of exposure is in the one to ten million fiber per cc range which is above the permissible level of exposure.

Mr. Macaluso's testimony, describing the manner and intensity of his exposure, when combined with the experts' testimony that his exposure to asbestos was substantial , above the permissible level and that it caused the development of his mesothelioma, is sufficient to prove general and specific causation and to support the jury's finding against the defendants (Lustenring v. AC&S, Inc., et al., 13 A.D.3d 69, 786 N.Y.S.2d 20 [1st. Dept. 2004]; In re New York City Asbestos Litigation (Marshall), 28 A.D.3d 255, 812 N.Y.S.2d 514 [1st. Dept. 2006]; Peraica v. A.O. Smith, 143 A.D.3d 448, 39 N.Y.S.3d 392 [1st. Dept. 2016]; Matter of New York City Asbestos Litigation(Sweberg), 143 A.D.3d 483, 39 N.Y.S.3d 411 [1st. Dept. 2016]; In Re New York City Asbestos Litigation (Hackshaw), 143 A.D.3d 485, 39 N.Y.S.3d 130 [1st. Dept. 2016]).

Plaintiff presented sufficient evidence to prove defendant had a duty to warn and was reckless. The court's instruction to the jury on these issues was proper.

Plaintiff submitted sufficient evidence through its expert witness, Dr. Gerald Markowitz, PhD., and through the testimony of defendant Burnham's corporate representative Roger Pepper, to show that defendants had been aware of the dangers of exposure to asbestos since at least the 1930s[1]. There was sufficient medical literature during at least the 1930's on the dangers of exposure to

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[1]Mr. Pepper testified that he was aware Burnham used asbestos insulation from 1873 through the 1960's, that it was most widely used on Burnham un-jacketed boilers and that Burnham recommended its use. He further stated that although there was documentation regarding the dangers of asbestos, from 1872 through 1982, Burnham never warned about the dangers of asbestos on any of its boilers, although it had the ability to do so.

asbestos. There were published studies in medical journals, industry and trade association journals and magazines about the dangers of exposure to asbestos. There were conferences to discuss the dangers of exposure to asbestos . Finally there was OSHA which came into being in 1970.

Defendants belonged to trade associations that disseminated information about the hazards of asbestos. OSHA disseminated information about the dangers of exposure to asbestos. Defendants Peerless, A.O. Smith and Burnham despite their knowledge of the dangers of exposure to asbestos, incorporated its use into their boilers [whether by recommending the use of asbestos-rope between sections of its boiler, and asbestos-cement to cover the exterior of its un-jacketed boiler to a thickness of not less than 1 ½ inches up to 1675 pounds (Peerless); using asbestos-rope, tape, tubes, gaskets, washers and cloth in its boilers (A.O. Smith); specifying, recommending and using and selling asbestos-cement and insulation to cover the exterior of its boilers (Burnham)] and failed to warn anyone about the dangers of exposure to asbestos in their product.

The evidence shows that while defendants did not manufacture asbestos, they promoted, specified and recommended asbestos with the use of their product. "The manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended" (In re New York City Asbestos Litigation (Dummitt) 27 N.Y.3d 765, 59 N.E.3d 458, 37 N.Y.S.3d 723 [2016]).

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known. It also has a duty to warn of the danger of unintended uses of its product, provided these unintended uses are foreseeable" (Liriano v. Hobart Corp., 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 [1998]). Defendants were aware of the dangers of asbestos exposure well before Mr. Macaluso's exposure and never issued a warning. They were aware, and it was foreseeable, that their boilers would be dismantled. They were also aware, and it was foreseeable, that during this process the asbestos insulation covering the boiler (which the defendant Burnham specified, recommended and sold), or the asbestos containing components inside the boiler, would be disturbed exposing the worker to the hazards of asbestos. They had a legal duty to warn individuals such as Mr. Macaluso of the hazards of asbestos exposure. Defendants did not warn Mr. Macaluso, and the jury was properly charged on their duty to warn and to consider if on these facts they were reckless (see Dummitt, Supra; Peraica v. A.O. Smith, 143 A.D.3d 448, 39 N.Y.S.3d 392 [1st. Dept. 2016]; Matter of New York City Asbestos Litigation(Sweberg), 143 A.D.3d 483, 39 N.Y.S.3d 411 [1st. Dept. 2016]; In Re New York City Asbestos Litigation (Hackshaw), 143 A.D.3d 485, 39 N.Y.S.3d 130 [1st. Dept. 2016]; In re New York City Asbestos Litigation (Ann Marie Idell), 2018 WL 4353846 [1st. Dept. 2018]).

The court properly charged the jury on the Defendants continuing duty to warn.

"A manufacturer or retailer may incur liability for failing to warn concerning dangers in use of a product which come to their attention after manufacture or sale through advancements in state of the art with which they are expected to stay abreast or through being made aware of later accidents involving dangers in the product of which warning should be given to users (Cover v. Cohen, 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 [1984]).

It was not proper to place Johns-Manville on the verdict sheet.

Defendants argue that the court erred in failing to place Johns-Manville on the verdict sheet, thereby impairing their apportionment rights. "While plaintiff has the burden of proof, in the first instance of establishing liability on the part of the non-settling defendants Peerless, Burnham and A.O. Smith, once that liability was established the defendants Peerless, Burnham and A.O. Smith bore the burden of establishing the equitable shares attributable to the settling defendants for purposes of reducing their amount of responsibility for the damages."(Bigelow v. Celotex, 196 A.D.2d 436, 601 N.Y.S.2d 478 [1st. Dept. 1993]).

The evidence the non-settling defendants presented on apportionment against the settling defendants who were placed on the verdict sheet differs from the evidence presented with respect to Johns-Manville. Against the settling defendants the evidence showed that these entities manufactured products that contained asbestos, that they were aware of the hazards of asbestos, that they failed to warn and that plaintiff was exposed to asbestos from their product. In contrast plaintiff presented evidence that defendants Peerless, Burnham and A.O. Smith purchased products from Johns-Manville (in the nature of asbestos rope and asbestos cement insulation) and that these Johns-Manville products contained a warning of the dangers of asbestos exposure. Defendants had the burden and were not able to prove that Mr. Macaluso was exposed to asbestos from Johns-Manville products (In re New York City Asbestos Litigation (Marshall), 28 A.D.3d 255, 812 N.Y.S.2d 514 [1st. Dept. 2006]). "Failure to present a prima facie case of their liability constitutes a waiver of the non-settling [defendants'] right to reduction of the verdict based on an apportionment of fault, but not based on the amount of the settlement (In re New York City Asbestos Litigation (Idell), Supra, quoting Whalen v. Kwasaki Motors Corp., U.S.A., 242 A.D.2d 919, 662 N.Y.S.2d 339 [4th Dept. 1997]).

The fact that Johns-Manville is a settled defendant, absent prima facie proof of their liability, entitles defendants Peerless, Burnham and A.O. Smith to a reduction of the verdict based on the amount of the settlement (Bonnot v. Fishman, 88 A.D.2d 650, 450 N.Y.S.2d 539 [2nd. Dept. 1982];GOL§15-108; CPLR §16) Therefore it was not proper for the court to place Johns-Manville on the verdict sheet.

Defendant Burnham argues that evidentiary errors made by the court in allowing plaintiff to claim Burnham was warned of the dangers of asbestos by improperly introducing documents from Johns-Manville ; in precluding evidence of Pietro Macaluso's Marijuana use and failure to pay child support; and, in plaintiff's counsel's statements in summation, require a new trial. Plaintiff argues that there were no errors committed by the court, and if there were any errors, these were harmless.

Based on the evidence presented at this trial the Johns-Manville records were properly admitted and plaintiff was allowed to claim that Burnham was warned of the dangers of asbestos by labels on Johns-Manville products (Merryl Lynch v. Trataros Construction, 30 A.D.3d 336, 819 N.Y.S.2d 223 [1st. Dept. 2006]). The admission of this evidence went towards proving that defendant Burnham had knowledge of the hazards of asbestos and had a duty to warn of those hazards. Plaintiff submitted overwhelming evidence of Burnham's knowledge of the hazards of asbestos and of their failure to warn(see Testimony of Roger Pepper and exhibits in evidence).

It was proper for the court to exclude mention of Mr. Macaluso's marijuana use and of his arrears in paying child support. Evidence is properly excluded when its probative value is outweighed by its potential for confusing and prejudicing the jury (Bush v. International Business Machines Corporation, 231 A.D.2d 465, 647 N.Y.S.2d 468 [1st. Dept. 1996]; Salm v. Moses, 13 N.Y.3d 816, 918 N.E.2d 897, 890 N.Y.S.2d 385 [2009]). Plaintiff did not make a claim for loss of economic support. Therefore whether Mr. Macaluso paid child support or not was irrelevant to the issues to be decided by the jury. Any evidence of marijuana use, and failure to pay child support is an inadmissible, irrelevant collateral matter (Levine v. Shell Oil Company, 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 [1971]). This evidence had potential to induce the jury to decide the case on the basis of his character (Mazella v. Beals, M.D., 27 N.Y.3d 694, 57 N.E.3d 1083, 37 N.Y.S.3d 46 [2016]). A trial court has wide latitude to admit or preclude evidence weighing its probative value against any danger of confusing the main issues, unfairly prejudicing the other side, or being cumulative (People v. Rodriguez, 149 A.D.3d 464, 50 N.Y.S.3d 385 [1st. Dept. 2017]). "A deceased witness whose prior testimony is admitted at trial may not be impeached by a posthumous showing of an alleged contradictory or inconsistent statements" (Cioffi v. Lenox Hill Hospital, 287 A.D.2d 335, 731 N.Y.S.2d 169 [1st. Dept. 2001]).

The court did not err in allowing the use of Mr. Macaluso's interrogatory Responses and in giving a curative instruction following Burnham counsel's question to its corporate representative.

At the trial plaintiff sought to read portions of Mr. Macaluso's answers to questions asked at his examination before trial.[2] Mr. Macaluso answered the questions after his attorney refreshed his recollection by using responses to his verified interrogatories. Defendant Burnham argues that this court erred by allowing plaintiff's counsel to read those answers because Mr. Macaluso had his recollection refreshed with a hearsay document, and because Mr. Macaluso read his answer from the hearsay interrogatory, instead of testifying from his recollection after it had been refreshed. However, a reading of the deposition transcript shows that his recollection was properly refreshed with his verified response to the interrogatories. The relevant portions of the deposition, with counsel colloquy, reads as follows:

Starting at P. 232 Line 23:
Q- "You also– during the questions by the– the other attorneys, you mentioned that you remembered carrier, A.O. Smith, and American brand boilers that you removed; and, again, you– you indicated there were 10 or 12 total brands–"

P. 233 Line 3:
A- "I think the others I didn't mention was Crane, Peerless. But all the– all the names are on the list that we created for this document, whatever you guys call it."

DEFENSE: "Objection; move to strike the portions that are non-responsive. There was no question pending."

Q- (By Mr. DANZINGER) "Do you remember-"
A- "What?"
Q- "Don't worry about it."
"Do you remember, as we sit here, any other brands other than Carrier, A.O. Smith, and American that you removed?"
A- "Did I say Crane and Peerless?"
Q- "Okay, Any others– any other than those two, as well?"

DEFENSE: "Objection."

A- "There were a bunch of others that I don't remember, but they were all on the list.
Q- (by Mr. DANZINGER) "Okay, as you sit here today, have you exhausted your memory, or your ability to remember what those other brands are?"
A- " Yeah."

P234 Line 1:
Q- "Okay. And you've talked about a list. You provided a list of boilers that you remembered removing in your answers to interrogatories. Fair enough?"
A- "Yes."

DEFENSE: "Objection."

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[2] The portion of the deposition transcript read to the jury are found in pages 232 Line 23 to 268 Line 23. The reading can be found in the trial transcript Pages 575 Line 9 to 584 line 6.

Mr. DANZINGER: "What's the objection?"

DEFENSE: "His prior testimony is that he didn't know what that document that you're referring to was, and there is no testimony that discusses any list that he did or did not provide. So if you want to get to that foundation, perhaps then–."

Mr. DANZINGER: "Okay. I think it's there but I'll do it again."

Q- (By Mr. DANZINGER) "You've talked about– you've identified several different specific manufacturers of boilers that – that you have removed."
A- "Yes."
Q- "And you've also indicated generally that there are somewhere in the range of 10 to 12 different boilers that you remember removing. Fair enough?"
A- "Yes."
Q- "Okay. Have you exhausted your ability to remember the specific manufacturers of these boilers at this point during your deposition?"
A- "Yes."
Q- "Okay. Is there anything out there that would help you remember the other brands that you can't think of?"

Page 235 Line 4:

DEFENSE: "Objection."
A- "I mean, no."
Q- (By Mr. DANZINGER) Have you–
A- "Besides a book, maybe, with–."
Q- "Have you prepared any documents that have listed the other brands that you– that you can't remember?"
A- "No. We just went over– the ones we went over verbally with you, and you put them in that list."
Q- "What is that list?"
A- "Jesus Christ. It was in– you want to call it an interrogatory? You want to call it whatever you want to call it? Can I see the papers that you- -."
Q- "We're - - we're getting there, but they're making me go through some steps.
A- "Okay."
Q- "So at some point, you gave me a list of boilers that you remembered tearing out?"
A- "Yes."

DEFENSE: "Objection. That's not the testimony."

Q- (By Mr. DANZINGER) "And- - and I put them in the interrogatory form?"
A- "Yes."

Page 236 Line 3:

Q- "And you've seen those interrogatories correct?"
A- "Once - - yeah. Once or twice, yeah."
Q- "And if you saw that list in those interrogatories, would that help refresh your recollection."
A- "Yes."
Q- - - "as to the other brands - - that you removed while doing this type of work from 1972 to 1982?"
A. "Yes."
Q- "Okay. Let me show you what I'm going to mark as exhibit 1."

After this exchange plaintiff's counsel attempted to mark the interrogatories as an exhibit. Defense counsel objected to its admission into evidence at the deposition.

Page 237 Line 16:

Q- (By Mr. DANZINGER) "You remember going through- - giving answers to interrogatories?"
A- "Yes."
DEFENSE: "Objection."
Q- (By Mr. DANZINGER) "And Exhibit 1 in front of you, is that those answers to interrogatories?"
A- "Yeah."

Pages 238 Line 17 to Page 242 Line 2 contain colloquy between plaintiff and defense counsel. Mr. Macaluso was answering the questions, after his recollection had been refreshed, by reading into the record his answers to the interrogatories. Defense counsel objected to plaintiff reading the answers to interrogatories into the record and requested that plaintiff take the document away from Mr. Macaluso after his recollection had been refreshed. Plaintiff's attorney agreed to have Mr. Macaluso testify without looking at the document so that he wouldn't read the content of the document into the record.

Page 242 Line 3:
MR. DANZINGER: "Well, let's do it this way. I'll take it away from him each time, then."
Q- (By Mr. DANZINGER) "Okay. Pietro, so this list that's in your answers to interrogatories, you've indicated that'll refresh your recollection as to the - - the manufacturers boilers that - - that- -."
A- "Yes."
Q- "- - that you removed, correct?"
A- "Yes."
Q- "Okay. Look at the firs one on the list."
A- "Yes."
Q-" Does that refresh your recollection as to a manufacturer?"
A- "Absolutely. Carrier was a big manufacturer."
Q- "Okay. Look at the second on the list."

MR. DANZINGER: "And Just for the record, I'm removing the list as he's testifying."
THE WITNESS: "Yes."
MR. CAREATHERS: "Thank you, counsel."

Pages 242 Line 22 through 268 Line 23 contain Mr. Macaluso's answers, after having his recollection refreshed and without reading from his answers to interrogatories, identifying the manufacturer's of boilers that he removed, including defendant Burnham's boilers. This portion of his answers at the deposition was read to the jury at trial and is contained in the Trial Transcript at page 575 Line 9 through Page 584 Line 6.

"A witness may refer to any written memorandum or entry, to refresh his memory, if he can afterwards swear to the facts from his own recollection. A witness may assist his memory by looking at any written instrument, memorandum, or entry in a book, written by himself or others, but he can testify only according to his recollection" (Huff v. Bennett, 6 N.Y. 337, 2 Seld. 337 [1852]; People v. Goldfeld, 60 A.D.2d 1, 400 N.Y.S.2d 229 [4th. Dept. 1977]). "A witness may refresh his or her recollection by the use of anything whatsoever, provided it actually serves that purpose" (People v. Neff, 287 A.D.2d 809, 731 N.Y.S.2d 269 [3rd. Dept. 2001]; Seaberg v. North Shore Lincoln-Mercury, Inc., 85 A.D.3d 1148, 925 N.Y.S.2d 669 [2nd. Dept. 2011] allowing the use of 911 tape to refresh recollection; Newman v. Great Atlantic & Pacific Tea Co., 100 AD.2d 538, 473 N.Y.S.2d 231 [2nd. Dept. 1984] reversing trial court for preventing plaintiff from refreshing recollection of supermarket's assistant manager at time of accident with accident reports supplied to plaintiff by supermarket; People v. Oddone, 22 N.Y.3d 369, 3 N.E.3d 1160, 980 N.Y.S.2d 912 [2013]).

It was proper for plaintiff's counsel to have refreshed Mr. Macaluso's recollection with the verified interrogatories. Once Mr. Macaluso's recollection was refreshed it was proper for the information that he could recall to have been given by him as an answer, or to have been read from the interrogatories shown to him as embodied in his answers to interrogatories (see In re Tifft's Will, 115 AD.915, 101 N.Y.S.1072 [4th Dept. 1906]). However, after refreshing Mr. Macaluso's recollection with his verified answer to interrogatories, plaintiff's attorney removed the interrogatories from Mr. Macaluso's presence, and had him answer the question without reading from the interrogatory. The answers given by Mr. Macaluso at his deposition were not read into the record from a hearsay document. They were his answers, which resembled the answers he gave in his interrogatories, after his recollection was refreshed.

At trial counsel for defendant Burnham, while questioning Burnham's corporate witness, Roger Pepper, asked the following questions regarding Mr. Macaluso's identification of Burnham boilers:

Page 2467 Line 22:
Q- "Do you recall from the testimony that he was only able to identify Burnham boilers after he was shown a list of it – on interrogatory responses?"
Page 2468 Line 4:
Q- "Do you recall that?"
A- "Yes".
Q- "Mr. Blouin asked you a question about the Weil-Mclain boiler. Do you remember that?"
A- "Yes."
Q- "Where was that?"
A- "The Weil-Mclain boiler? It was my parent's house."
Q- "Were you able to recall that name, that boiler without being shown a list prepared by attorneys?
MR. BLOUIN: "Objection"
THE COURT: "Sustained. Sustained...."

This question improperly raised an inference, without any factual support, that Mr. Macaluso's attorneys provided the information for his answers to interrogatories.

After a bench conference, and at the request of plaintiff's counsel, the court gave the jury the following curative instruction (P.2470 Line 2 to 8):

"Before we proceed with the examination of this witness, I just want to say that the attorneys for the plaintiff prepared interrogatories based on information that they obtained from the plaintiff. Based on information that they obtained from the plaintiff, they then prepared, or answered those interrogatories."

A curative instruction is required to remove the prejudicial impact of a question containing a misstatement of fact (People v. Otero, 56 A.D.3d 350, 868, N.Y.S.2d 177 [1st. Dept. 2008];People v. Celeste, 95 A.D.2d 961, 464 N.Y.S.2d 295 [3rd. Dept. 1983]). The curative instruction cannot at times be a direction to simply disregard the answer or question; it must contain language that removes the prejudice created by an improper question or statement, because "a court's instructions to a jury to disregard matters improperly brought to their attention cannot always assure elimination of the harm already occasioned" (People v. Calabria, 94 N.Y.2d 519, 727 N.E.2d 1245, 706 N.Y.S.2d 691 [2000]). When the prejudice cannot be removed with a curative instruction, then declaring a mistrial is necessary (People v. Griffin, 242 A.D.2d 70, 671 N.Y.S.2d 34 [1st. Dept. 1998]).

A reading from his deposition transcript establishes as a fact that Mr. Macaluso provided his attorneys with a list containing the names of the manufacturers of boilers that he removed from 1972 to 1982 (see deposition P. 232 Line 23 to P. 233 Line 6; P.234 Line 1 to 4; P. 235 Line 8 to P. 236 Line 2; P.237 Line 16 to Line 22; P. 239 Line 12 to 15). There is nothing in the deposition transcript to counter that fact. A reading of the transcript also shows that Mr. Macaluso's attorneys used the information on this list in responding to the interrogatories. A reading of the transcript also shows that Mr. Macaluso read and verified the interrogatories. Finally a reading of the transcript shows that Mr. Macaluso's recollection was refreshed and that he answered the questions at the deposition without reading his answers to interrogatories into the record. His attorney had him look at the interrogatory, refresh his recollection, removed the interrogatory and then had Mr. Macaluso answer the question.

Mr. Macaluso's recollection was properly refreshed with his answers to interrogatories. His deposition testimony identifying defendant's boiler was not hearsay, it was given after his recollection was refreshed, and it was proper to have read this testimony to the jury. The question posed by defendant Burnham's counsel to Mr. Roger Pepper, its corporate witness, was factually incorrect and raised an improper inference that prejudiced the plaintiff. This required a strong curative instruction from the court to remove the prejudicial impact of the factually incorrect question.

The court did not err in quashing Burnham's subpoenas to non-settling parties.

Burnham served subpoenas on settled parties, for them to produce a witness to give testimony at trial. The settled parties moved to quash Burnham's subpoena arguing that forcing them to produce a witness at the trial of this matter is contrary to public policy fostering and encouraging settlement. The court agreed with the settled party, finding that forcing a settled party to produce a witness at the trial is contrary to the policy fostering and encouraging settlements and to the NEW YORK CITY ASBESTOS

LITIGATION (NYCAL) CASE MANAGEMENT ORDER (CMO) dated June 20, 2017.

"The CMO governs various pre-trial and trial procedures in NYCAL....and differs from the CPLR in numerous ways in an attempt to address issues that permeate asbestos litigation....Such as allowing the limited use of hearsay for article 16 purposes."(see decision accompanying CMO dated June 20, 2017, Moulton, J.)

Justice Moulton stated in his decision accompanying the June 20, 2017 CMO with respect to the limited use of hearsay for article 16 purposes..."Given the longevity of asbestos litigation, many corporate representatives with personal knowledge about a company's asbestos-related products, and the warnings, if any, given to the users of such products, have either retired or died. Accordingly, defendants sought to relax hearsay rules to admit some types of information that might otherwise be barred by strict adherence to New York State's rules of evidence. In our discussions defendants argued that they should be allowed to use both interrogatory answers and depositions of non-parties to prove that non-parties should be included on the verdict sheet for article 16 purposes.... Defendants reason these interrogatory answers are sufficiently reliable to be used by other defendants, at least for the limited purpose of demonstrating that a non-party sold a product that contained or used asbestos, and failed to warn about the dangers of asbestos.... The court agrees that this limited article 16 relief is warranted given the age of asbestos litigation and the difficulty defendants face in proving that other non-party entities should be considered by the jury as potential causes of a plaintiff's disease. Interrogatory answers concerning product identification are reliable in that it is against the answering entity's interest to admit that its product contained asbestos, or required that asbestos be used to further the product's purpose. An admission concerning a failure to warn is similarly against interest. Defendants in NYCAL generally are required to answer the standard form interrogatories contemplated by the CMO only once. The interrogatory answers are then used in all NYCAL cases.... The [CMO] signed on today's date allows for the use of interrogatory answers as described above.... Of course, a settled defendant's deposition testimony can be admissible in certain circumstances for Article 16 purposes under CPLR 3117(2). However that section applies only to settled defendants, and contains other requirements...." (see decision accompanying CMO dated June 20, 2017 pp 22-23).

The CMO, in its section XIII Use at trial of Nonparty Interrogatories and Depositions, states:

"(A) Use of Nonparty Interrogatories. Answers by non-parties of NYCAL standard sets of interrogatories may be used at trial to prove: 1) that a product or products of the non-party contained asbestos, or that asbestos was used in conjunction with the non-parties' product or products, and/or 2) any failure to warn by the nonparty concerning an asbestos-containing product and/or the use of asbestos in association with a product.....for purposes of this section a non-party shall include a settled party.

(B) Use of Non-party Depositions. Nonparty depositions may be used where allowed by the CPLR..."

In accordance with Justice Moulton's decision accompanying the CMO, and the June 20, 2017 CMO, this court allowed the use by defendants, including Burnham, of non-party and settled party interrogatories, and deposition to prove their Article 16 burden.

This court is of the opinion that this use is allowed due to the age of asbestos litigation and the difficulty defendants face in proving that other, non-party and settling, entities should be considered by the jury as potential causes of a plaintiff's disease. The use of non-party and settling defendants' interrogatories and depositions also serves to streamline the trial process, by allowing the defendants to prove the culpability of these entities without the need of producing a witness for this purpose. In essence following the CMO obviates the need to subpoena witnesses from non-parties and settling defendants in order to establish their equitable share of culpability.

This court reasoned that it is no secret that these NYCAL cases have a large number of defendants, most of which settle prior to or even during the trial. It takes weeks to select a jury and months to complete a trial of one of these cases; this is without the need for the production by a non-party or settling defendant of a witness at trial. These already complicated, lengthy trials would become even lengthier. The CMO, which governs NYCAL cases, provides the mechanism for the defendant to meet its Article 16 burden through interrogatories, and at times through depositions, without the need of producing witnesses. It streamlines the trial, saves time by reducing the number of witnesses called at trial, while affording the defendant the opportunity to meet its CPLR Article 16 burden. In sum allowing the use of a settling defendant's interrogatories and deposition testimony promotes judicial economy and efficiency, and provides a settling defendant finality.

For these reasons the court granted the settled party's motion to Quash defendant Burnham LLC's subpoena Ad Testificandum and Quashed the Subpoena; However, the court allowed Burnham, Peerless and A.O. Smith to use the settled party's interrogatories and deposition at trial. The defendants used the interrogatories and depositions to meet their Article 16 Burden of apportioning the settled party's equitable share of culpability.

Defendant Burnham, Peerless and A.O. Smith were not prejudiced in anyway. They were able to present to the jury the same evidence that they would have gotten from a live witness to meet their Article 16 Burden.

Finally, plaintiff's counsel's statements in summation were fair comment on the evidence, were not inappropriate and do not require a new trial (Cerasuoli v. Brevetti, 166 A.D.2d 403, 560 N.Y.S.2d 468 [2nd. Dept. 1990]). Many of the summation remarks were not objected to and defense counsel did not ask for any curative instruction(Komsa v. Colonial Penn Insurance Company, 188 A.D.2d 367, 591 N.Y.S.2d 36 [1st. Dept. 1992]; Penn v. Amchem Products, 85 A.D.3d 475, 925 N.Y.S.2d 28 [1st. Dept. 2011]) or seek a mistrial with regard to them, thus they were not preserved, and the statements did not create a climate of hostility that so obscured the issues as to make the trial unfair. Furthermore, the court instructed the jury that the summation remarks were not evidence, that the jury was bound to accept the law as charged and reach a verdict based on the evidence presented (Wilson v. City of New York, 65 A.D.3d 906, 885 N.Y.S.2d 279 [1st. Dept. 2009]; Boshnakov v. Board of Education of Town of Eden, 277 a.d.2d 996, 716 N.Y.S.2d 520 [4th dept. 2000]).

The evidence, fairly interpreted, permitted the liability verdicts reached by the jury, and permitted the jury to make awards for Pain and suffering and loss of parental guidance. However, those awards are excessive and must be reduced because the awards deviate materially from what is reasonable compensation under the circumstances (In re New York City Asbestos Litigation (Marshall), 28 A.D.3d 255, 812 N.Y.S.2d 514 [1st. Dept. 2006]).

When a child is involved, damages in a wrongful death action can be awarded without the need for dollars and cents proof. "Damages in a wrongful death action are limited to pecuniary injuries suffered by decedent's distributees, but in any such action, especially one involving a child of tender years, the absence of dollars and cents proof of pecuniary loss does not relegate the distributees to recovery of nominal damages only; rather, since it is often impossible to furnish direct evidence of such injuries calculation thereof is a matter resting squarely within the jury's province" (Parilis v. Feinstein, 49 N.Y.2d 406 N.E.2d 1059, 429 N.Y.S.2d 165 [1980]; Lanera v. Hertz Corp., 161 A.D.2d 183, 554 N.Y.S.2d 570 [1st. Dept. 1990])). "The loss of parental nurture and care, as well as physical, moral and intellectual training, is a proper component of pecuniary injury and may be considered by the jury in determining damages for wrongful death (Leger v. Chasky, 55 A.D.3d 564, 865 N.Y.S.2d 616 [2nd. Dept. 2008]). "Minor children can allege pecuniary injury from premature loss of educational training, instruction and guidance they would have received from their now-deceased parent, recovery of this sort is tied to the parental role of providing minor children with educational and intellectual nurturing, and the financial effect this particular loss of nurturing could have on the future of the infant" (Bumpurs v. New York City Housing Authority, 139 A.D.2d 438, 527 N.Y.S.2d 217 [1st. Dept. 1988]). " An award of damages for loss of parental guidance is not limited to minor children and the court may even award damages to financially independent adults (Gonzalez v. New York City Housing Authority, 77 N.Y.2d 663, 572 N.E.2d 598, 569 N.Y.S.2d 915 [1991]; Gardner v. State, 134 A.D.3d 1563, 24 N.Y.S.3d 805 [4th dept. 2015]).

As such courts have found sufficient, for award for loss of parental guidance "evidence that although father's work schedule often kept him away from home prior to his death, he generally spent several hours during the weekday and evenings and entire weekends with his five-year old and eight-year old sons, and had taught them to play baseball, read to them and took them to the movies, bowling, ice skating, to the park and to the zoo during the years prior to his death" (Zygmunt v. Berkowitz, 301 A.D.2d 593, 754 N.Y.S.2d 313 [2nd. Dept. 2003]); "Evidence that the [father] was providing excellent parental support to his [12 year-old child] and intended to become even more instrumental in the child's upbringing, and other positive parental figures were absent in the child's life" (Campbell v. Diguglielmo, 148 F.Supp2nd. 269 [S.D.N.Y. 2001]); "Evidence that [decedent] had provided all the children, including adult children, with parental guidance and advice, as well as nurture and care"(Kiker v. Nassau County, 175 A.D.2d 99, 571 N.Y.S.2d 804 [2nd. Dept. 1991]).

Plaintiff presented sufficient evidence at this trial to sustain an award for loss of parental guidance. The plaintiff presented evidence that Mr. Macaluso provided his children substantial nurture and care, as well as physical, moral and intellectual training. After they were born he became a stay-at-home dad and their primary care-giver. He prepared their meals, fed them, cleaned them, bathed them, took them on stroller walks, and later, when they were a little older, to parks and museums. After he was separated from the children in 2010 he talked to them on the phone everyday, face-time, and he would come out to California to be with them once a month. He moved to California to be closer to his children. He took the children to school every day and picked them up after school. Mr. Macaluso was instrumental in getting Nora Grace tested for a learning disability and accompanied her to every tutoring session. He taught the children to ride their bikes, took them to museums, parks and the Sacramento historic district. He came to every soccer, T-ball, softball and baseball game they played. He loved seeing the children develop athletically. The children spent time with him in his apartment. He was a very social individual and he taught the children to be very social as well. He and Ms. Laborde were co-parents, friends and teammates. They had joint custody of the children. Mr. Macaluso was fully integrated into the children's lives.

Plaintiff presented sufficient evidence at this trial to sustain an award for Mr. Macaluso's pain and suffering. Mr. Macaluso developed peritoneal mesothelioma from his asbestos exposure. The jury heard that at age 55, in the Spring of 2015, he began feeling ill and was diagnosed with mesothelioma in the summer of that same year. They heard about his multiple hospitalizations, and about the painful procedures that were practiced on him to alleviate some of his suffering and to try to save his life (the Thoracotomy, where 3 liters of fluid were drained from his lung; the bronchoscopy and the Pleurectomy , to remove the tumorous pleura from his left lung). Part of his diaphragm was removed and the remaining part had to be reconstructed. He developed a bone infection and was in such excruciating pain that in order to control it a catheter was placed in his spine. Mr. Macaluso described his pain as being 15 out of 10. The breakthrough pain required even more pain medication that at times made him hallucinate. He experienced weakness, nausea and lack of appetite. He looked emaciated. He could not breathe or sleep and a simple touch to the left side of his body made him cringe with pain. The jury heard that he grimaced with pain and never received medication that completely relieved the pain.

The disease affected him physically and emotionally. He was in mental anguish knowing of his impending death and that he wouldn't be there for his children. It affected his pride because he required assistance for everything (getting on or off his bed, feeding, cleaning, clothing and after he had finished using the toilet). He was required to wear a diaper because he urinated and defecated on himself and in his bed. All this was humiliating to him and made him feel less of a man. His dream of living to a ripe old age and of seeing his children grow up were shattered by this disease.

"The amount of damages awarded is primarily a question for the jury, the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony." (Ortiz v. 975 LLC, 74 A.D. 3d 485,901 N.Y.S. 2d 839 [1st. Dept. 2010]). In setting aside a jury award of damages as inadequate or excessive the court must find that such award deviates materially from what would be reasonable compensation (Harvey v. Mazal American Partners, 79 N.Y. 2d 218, 581 N.Y.S. 2d 639 [1992]; CPLR § 5501[C]). Prior damages awards in cases involving similar injuries are not binding upon the courts but serve to guide and enlighten them in determining whether a verdict constitutes reasonable compensation (Kusulas v. Saco, 134 A.D.3d 772, 21 N.Y.S.3d 325 [2nd. Dept. 2015]; Taveras v. Vega, 119 A.D.3d 853, 989 N.Y.S.2d 362 [2nd. Dept. 2014]).

This jury awarded $25 Million dollars for Mr. Macaluso's pain and suffering. Court's have found to be reasonable compensation for conscious pain and suffering an award of $900,000 for decedent who suffered excruciating crushing injuries and lived 15 to 30 minutes after being struck by the back end of a trailer truck and twice run over by the truck's two rear wheels (Ramos v. La Montana Moving & Storage, Inc., 247 A.D.2d 333, 669 N.Y.S.2d 529 [1st. Dept. 1998]);awards of $5,500,000 and $7,500,000 respectively to two plaintiffs who received crushing injuries and experienced pain and suffering, one for 16 minutes, and the other for four hours (In re 91st. Street Crane Collapse Litigation, 154 A.D.3d 139, 62 N.Y.S.3d 11 [1st. Dept. 2017]); award of $3,750,000 for decedent who suffered for three and a half days from, intermittent, but ongoing, sharp gallbladder pain, increasing anxiety and discomfort due to the regimen of no food or drink by mouth, intermittent bouts of agitation, sense of impending death, pain, respiratory distress, shivering, shaking and chills (Hyung Kee Lee v. New York Hospital Queens, 118 A.D.3d 750, 987 N.Y.S.2d 436 [2nd. Dept. 2014]).

Defendants argue that the court should consider analogous awards to plaintiff suffering from mesothelioma, such as award of $1.5 million for 13 months of pain and suffering (Penn v. Amchem, 85 A.D.3d 475, 925 N.Y.S.2d 28 [1st. Dept. 2011]); award of $4.5 million for thirty three months of pain and suffering and award of $5.5 million for 27 months of pain and suffering to plaintiffs suffering from mesothelioma (In re New York City Asbestos Litigation(Dummit and Konstantine), 121 A.D.3d 230, 990 N.Y.S.2d 174 [1st. Dept. 2014]); award of $4.25 million for 17 months of pain and suffering to plaintiff suffering from mesothelioma (Peraica v. A.O. Smith Water Products Co., 143 A.D.3d 448, 39 N.Y.S.2d 392 [1st. Dept. 2016]); award of $4.5 million for pain and suffering to plaintiff suffering from mesothelioma (Matter of New York City Asbestos Litigation (Sweberg), 143 A.D.3d 483, 39 N.Y.S.3d 411 [1st. Dept. 2016]); award of $3 million for 12 months of pain and suffering to plaintiff suffering from mesothelioma (In re New York City Asbestos Litigation (Hackshaw), 143 A.D.3d 485, 39 N.Y.S.3d 130 [1st. Dept. 2016]); award of $5 million for past pain and suffering and $4 million for one year future pain and suffering to plaintiff suffering from mesothelioma (Matter of New York City Asbestos Litigation (Miller), 2016 WL 3802961 [NY Supreme 2016]).

The cases cited by defendants state the amount that the appeals court sustained for the number of months of pain and suffering that the plaintiff in each case endured; however, these cases don't give a detailed account of the degree of suffering each decedent experienced, nor do they mention the plaintiff's emotional state or their ages at the time they received the diagnosis of mesothelioma, or at the time of their death. Furthermore, damages for pain and suffering should not be calculated on a per month basis (In Re New York Asbestos Litigation (Marshall), 28 A.D.3d 255, 812 N.Y.S.2d 514 [1st. Dept. 2006]). In contrast the jury in this case heard first hand the extent and degree of Mr. Macaluso's suffering and emotional anguish prior to his death. There is evidence in the record that he experienced severe and crippling symptoms, as well as tremendous physical and emotional pain, knowing that at the age of 55 he was about to die a horrible painful death, and would not be there for his children (the love of his life) to see them grow-up, and to care, nurture and support them when they needed him most.

Taking into account the previous awards sustained by the appeals court and taking into account the degree of physical and emotional suffering endured by Mr. Macaluso over 15 months of pain and suffering- during which he was reduced from an outgoing, vibrant man, full of life and energy, to a weakling that required the assistance of others even to clean him after going to the toilet- this court finds $10 million dollars to be reasonable compensation.

The Jury awarded Jackson Macaluso $17 million and Nora Grace Macaluso $18 million over 21 years for loss of parental guidance for the death of their father. These children were 9 years old at the time of Mr. Macaluso's death. The defendants argue that they are entitled to receive compensation for the amounts Mr. Macaluso would have provided in child support up to the time they reached the age of 21, and the verdict should be reduced to $72,000-$97,000 for each child. In support of this argument defendants cite to cases where courts have found to be reasonable compensation for loss of parental guidance an award of $1.5 million to a 12 year old child at the time of his father's death (Campbell v. Diguglielmo, 148 F.Supp2d 269 [S.D.N.Y. 2001]); awards of $750,000 to son and $850,000 to daughter (no ages stated)(Paccione v. Greenberg, 256 A.D.2d 559, 682 N.Y.S.2d 442 [2nd. Dept. 1998]); award of $1million to child (no age stated) over a period of 17 years (Adderley v. City of New York, 304 AD.2d 485, 757 N.Y.S.2d 735 [1st. Dept. 2003]); award of $1 million to plaintiff and her brother (no ages stated) (Snuszki v. Wright, 34 A.D.3d 1235, 824 N.Y.S.2d 519 [4th Dept. 2006]); award of $250,000 and $750,000 per child for past and future loss of parental guidance to decedent's three children who were each under the age of ten (Carlson v. Porter, 53 A.D.3d 1129, 861 N.Y.S.2d 907 [4th Dept. 2008]); award of $500,000 per child for past loss of parental guidance and $900,000 to decedent's son and $1 million to decedent's daughter for future loss of parental guidance (Grevelding v. State, 132 A.D.3d 1332, 17 N.Y.S.3d 813 [4th Dept. 2015]).

Plaintiff argues that defendants' random listing of lower awards without regards to the unique features of this case fails to carry its burden to demonstrate material deviation and justifies denying any remittitur of damages. Plaintiff urges this court to avoid wholesale substitution of some other view for that of the jury, and suggests that any modification of the damage awards should be an adjustment and not a complete usurpation of the jury's judgment.

None of the cases cited detail the type of relationship existing between the child and the decedent. Many of the cases cited don't list the age of the child at the time of the parent's death. Here in contrast the jury heard evidence of the relationship existing between Mr. Macaluso and his children. They heard of all the things they did together, how at one time he was their principal care giver and how he continued to be present in their lives. They heard about Nora Grace's disability, how Mr. Macaluso was instrumental in getting her tested and that he accompanied her every time she visited with her tutor.

Although the jury's award deviates materially from what can be considered to be reasonable compensation, this court is adamant to substitute its judgment for that of the jury, the trier of fact, who heard and weighed all the evidence, and came to its conclusion. However, in line with precedent, and taking into account the relationship that existed between Mr. Macaluso and his children (as presented at the trial), a modification of the verdict for loss of parental guidance is required. This court finds $ 9 million to Jackson Macaluso and $10 million to Nora Grace Macaluso to be reasonable compensation, under the circumstances, for their loss of parental guidance.

Conclusion

The Jury verdict is supported by legally sufficient and at times un-controverted evidence, and could have been reached on a fair interpretation of all the evidence submitted to the jury. The jury weighed the evidence presented to determine liability and damages. There is no basis on this record for disturbing the jury's determination regarding the weight to be accorded the evidence presented to it. The jury's verdict could have been reached on a fair interpretation of the evidence presented (Penn v. Amchem Products, 85 A.D.3d 475, 925 N.Y.S.2d 28 [1st. Dept. 2011]). However, the awards for Mr. Macaluso's pain and suffering, and for Jackson Macaluso's and Nora Grace Macaluso's loss of parental guidance deviate materially from what can be considered reasonable compensation.

Accordingly, for the foregoing stated reasons Defendant's motion to set aside the verdict and for a new trial on damages is granted, and a new trial on damages is ordered unless, within 30 days from the date of service of a copy of this order with notice of entry, plaintiff stipulates to a reduction in the award for Pietro Macaluso's pain and suffering from $25 million to $10 million, and to a reduction in the award for Jackson Macaluso's loss of parental guidance from $17 million to $9 million, and to a reduction in the award for Nora Grace Macaluso's loss of parental guidance from $18 million to $10 million, and it is further

ORDERED that in the event plaintiff so stipulates to a reduction in the damages award for pain and suffering and loss of parental guidance the motion is denied.

Enter:

Dated: October 1, 2018

MANUEL J. MENDEZ
J.S.C.

Manuel J. Mendez
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE