Stock v Air & Liquid Sys. Corp.
2019 NY Slip Op 31201(U)
April 24, 2019
Supreme Court, Erie County
Docket Number: 807846/2017
Judge: Deborah Chimes
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SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In the Matter of the Eighth Judicial District Asbestos Litigation

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JAMES STOCK , Jr. and LYNN M. STOCK

DECISION AND ORDER
Index No: 8O7846/2017

Plaintiffs

vs.

AIR & LIQUID SYSTEMS CORP.,as
Successor by Merger to
Buffalo Pumps, Inc. et al.,

Defendants

The court has considered the following papers: Notice of Post-Trial Motion of Defendant Jenkins Bros., dated November 13, 2018; Affirmation in Support of Jeffrey C. Fegan, Esq, with attached exhibits, dated November 13, 2018; Affirmation in Opposition to Defendant Jenkins Bros.' Motion of Seth A. Dymond, Esq., dated December 10, 2018, with attached exhibits; Reply Affirmation in Further Support of Jeffrey C. Fegan, Esq, with attached exhibits, dated December 21, 2018;

Notice of Motion of Plaintiffs for Post-Verdict Relief, dated November 13, 2018; Affirmation in Support of Plaintiffs' Motion of Seth A. Dymond, Esq, with attached

exhibits, dated November 13, 2018; Affirmation in Opposition to Plaintiffs' Motion of Jeffrey C. Fegan, Esq., with attached exhibits, dated December 10, 2018; Reply Affirmation in Further Support of Plaintiffs' Motion of Seth A. Dymond, Esq, with attached exhibit, dated December 21, 2018.

Joint Request to Supplement the Record of Settled Third Parties Warren Pumps, LLC, Crane Co. and Flowserve US, Inc. regarding Defendant Jenkins Bros. Motion, dated December 11, 2018; Affirmation of David J. Goodearl, Esq. in Support of the Joint Request, with attached exhibits, dated December 10, 2019 ; Affirmation of David Oxamendi, Esq., in Support of the Joint Request, dated December 7, 2018, with attached exhibits, Affirmation of Joseph P. LaSala ,Esq., in Support of the Joint Request, with attached exhibit, dated December 7, 2018.

At the trial of this action, plaintiffs[1] recovered for James Stock, Jr.'s personal injuries from mesothelioma caused by exposure to asbestos which occurred while Mr. Stock was employed at New York Wire Mills (Wire Mills) in Tonawanda, N. Y. from 1979 until 1986. Plaintiffs contended at trial that plaintiff's work with asbestos-containing materials used in and on valves manufactured and supplied by defendant Jenkins Bros. (Jenkins) was a substantial factor in the development of his illness.

The jury trial in this matter, in which Jenkins was the sole remaining defendant, began on August 24, 2018. On September 14, 2018, a verdict was rendered which

[1]This decision and order uses plaintiffs to include both spouses and plainitff to mean James Stock, Jr., as the context requires.

found that decedent was exposed to asbestos-containing gaskets or packing used in connection with Jenkins valves ; that Jenkins failed to exercise reasonable care by not providing a warning about the hazards of asbestos-containing gaskets or packing used in connection with its valves; and that the failure to warn plaintiff was a substantial factor in causing his injuries. The jury awarded $4,500,000.00 for James Stock's past pain and suffering, including loss of enjoyment of life, $1,500,000 in future pain and suffering for a period of one year, $66,000 for past loss of earnings, $400,000 for future loss of earnings for period of six years, $50,000 for past loss of consortium to Lynn M. Stock and $450,000 for future loss of consortium for a period of 22 years. The jury found that Jenkins was fifty percent responsible for plaintiff's injuries. The jury also found four co-defendant valve and pump manufacturers responsible and allocated the following shares of responsibility: Bell & Gossett Company (Bell & Gossett), Rockwell Manufacturing Company (Rockwell) and Warren Pumps, LLC (Warren) at 12 % each and Crane Co. (Crane) for 14%.

Defendant takes issue with the verdict in all its particulars and moves, in the alternative: for judgment notwithstanding the verdict and dismissal of the complaint; for a new trial; and remittitur to cure an excessive verdict.

Plaintiffs move for judgment as a matter of law awarding $376,307 in damages for loss of household services in the future, or in the alternative, for a new trial on that issue.

Jenkins argues that plaintiffs, in order to recover, had to prove that the Jenkins

valves plaintiff worked with and around contained asbestos or used asbestos-containing components when they left the factory. Further, defendant maintains that plaintiffs failed to establish that Mr. Stock's asbestos-related disease was caused by his work with Jenkins valves. Defendant's proposed remedy is judgment notwithstanding the verdict.

Jenkins seeks a new trial, asserting that it was deprived of a fair trial because co-defendant pump and valve manufacturers Crane, Rockwell and Warren failed to comply with its subpoena for trial testimony of their corporate representatives. This testimony was sought, Jenkins explains, on issues of liability, including allocation.

Defendant also contends that the jury's allocation of fault was against the weight of the evidence, mandating a new trial.

Further, defendant claims that the court made evidentiary errors, each requiring a new trial: the court erred in refusing to allow defendant to introduce a 1973 paper by Barry Castleman, Sc D., during the cross-examination of plaintiffs' expert David Rosner, Ph.D.; the court erred in failing to preclude the testimony of plaintiffs' economic expert, Larry Spizman, Ph.D.; and the court erred in refusing to permit Jenkins' expert industrial hygienist, Gayle McCluskey , to testify concerning a study she conducted in the 1980's.

Finally, Jenkins asserts that the jury's award for plaintiff's past and future pain and suffering is excessive and should be reduced.

Plaintiffs oppose the motion for judgment notwithstanding the verdict, asserting

that plaintiff's direct testimony, the testimony of David Boisvert, Jenkins' corporate representative, Jenkins' own product catalogs and literature and the testimony of their occupational medical expert, Jacqueline Moline, M.D. are more than sufficient for plaintiffs to meet their burden of establishing that plaintiff was exposed to asbestos used in, on and with Jenkins valves and that defendant was liable to plaintiff for injuries resulting from its failure to warn of asbestos' dangers. Further, plaintiffs argue that the testimony of its experts Dr. Moline and Dr. Rosner established specific causation.

Plaintiffs contend that it was Jenkins' own choice and a matter of trial strategy to use a summary of past deposition testimony of corporate representatives, rather than live testimony, to prove the shares of responsibility of the co-defendants and this decision does not afford a basis upon which to grant a new trial.

Plaintiffs also contend that the jury's allocation of liability was based on a fair interpretation of the evidence.

Finally, plaintiffs contend that the Court's evidentiary rulings were correct and that even if they were erroneous, they were harmless as they had no impact on the verdict and the claimed errors afford no basis for a new trial.

CPLR 4404 (a) provides that after a trial, the court may either set aside the verdict or judgment and direct judgment as a matter of law or order a new trial where the verdict is contrary to the weight of evidence or contrary to the interest of justice. A court may not set aside a verdict as a matter of law based upon insufficiency of the evidence unless no valid line of reasoning and permissible inferences could possibly

lead rational jurors to the conclusion they reached (*see Cohen v Hallmark Cards, Inc.* 45 NY2d 493, 499 [1978];*Zane v Corbett*, 82 AD3d 1603, 1606 [4th Dept 2011]). Evidence adduced at trial in a case such as this must be viewed in the light most favorable to the plaintiff (*see Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011])

A trial court has discretionary authority upon review of the trial record to set aside a verdict if it finds that the jury could not have reached it on any fair interpretation of the evidence (*see Husak v 45th Ave. Hous. Co.*, 52 AD3d 782, 783 [2nd Dept 2008]) .

Contrary to Jenkins' claim that plaintiffs failed to prove that Mr. Stock was exposed to asbestos from Jenkins valves, the trial record contains ample evidence from which the jury could conclude that Jenkins valves were manufactured and supplied with asbestos-containing materials. Plaintiff James Stock described the Wire Mills plant as "full [and] valves and pumps and gate valves and steam and water and acid going through out the whole facility." (T 8/24 p. 35)[2] With respect to his exposure to asbestos, Mr. Stock testified: "And it was a well- known fact back when I was being educated because of the high temperature and the specific elements that we ran through all of the pipework, that the only thing we used back in them days was asbestos. Between asbestos gaskets, asbestos packing -you couldn't put a piece of rubber on a valve. The temperature is a thousand degrees. It would melt. It was known

[2] "T" references are to the trial transcript, attached to the Fegan 11/13/18 Affirmation as Exhibit A.

back then. That's how I was educated on what it was. " (T 8/28 pp. 36-37) Plaintiff described his work with Jenkins valves' asbestos-containing components:

> "Q. Now what asbestos-containing products did you handle or use or replace, with respect to the Jenkins valves, the general types of products?
>
> A. Well, on that specific valve, you're going to have two gaskets, asbestos gaskets, on the bottom for your intake and exit. Where you see the bolts on the bottom, the stuffing, that's the stuffing box. You are going to have a a there. And as you take –on the–you've got the handle on top. There's a bonnet there. When you take the bonnet out, there's string. Usually it is three. Usually three strings go in there and they are cut and fit and pressed in. And that is able to handle the high heat." (T 8/28 p. 40)

A number of Jenkins' catalogues and manuals, received into evidence , confirm that its valves contained asbestos packing and gaskets as early as 1925 (T 8/31 pp. 63-90 , Pls' Exs 98, 99, 100, 105, 106, 107, 111, 112,114, 118 and 119). For example, in its 1968 and 1982 catalogues, Jenkins stated: "All Jenkins globe and angle valves have...asbestos packing." (T 8/31 pp 86-89, Pls' Exs 118 and 119).

Jenkins' Answer to Interrogatories, dated 12/11/17, and submitted in the New York City Asbestos Litigation, admitted that asbestos gaskets and packing were ingredients in its valves for " pressure sealing and mechanical integrity" (T 8/31 p. 95, Asbestos Product Information Sheet Pls' Ex 20) .

Jenkins' corporate representative, David Boisvert, testified at trial and through portions of an earlier video-taped deposition. He confirmed not only that Jenkins' valves contained asbestos gaskets and packing (see, e.g. T 9/11 pp 92-93 ; Pls' Ex 122, pp 8-

9) but also that Jenkins manufactured asbestos gaskets and packing and purchased asbestos packing for use with its valves (T. 9/11 pp. 79-80, 79-80; Pls' Ex 122, pp 14-17). Further, Jenkins continued to manufacture asbestos gaskets and packing until at least 1981 (T 9/11 p. 86).

Jenkins also contends that plaintiffs failed to prove that it had a duty to warn of the dangers of asbestos-containing parts because it had no control or knowledge of "third-party" packing and gasket used with its valves. Plaintiffs assert that the trial record supports the jury's findings that Jenkins failed to exercise reasonable care by not providing a warning about the hazards of exposure to asbestos from gaskets or packing materials used in connection with its valves.

In evaluating this aspect of defendant's motion, the court is guided by *In re New York City Asbestos Litig.*[*Dummit*]; *In re Eighth Jud. District Asbestos Litig. [Suttner]*, 27 NY3d 765 (2016). *In Dummitt,* the Court of Appeals found manufacturers liable for injuries caused by asbestos dust released by scraping and removal of insulation and gaskets from valves, the same as the cause of the injuries suffered by plaintiff here.

> "Consistent with our decision in *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, (1992), we hold that 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".

Here the it is clear that Jenkins knew that asbestos-containing parts were needed to run its valves properly. Mr. Boisvert agreed that asbestos gaskets and asbestos packing used in certain Jenkins valves were "necessary to ensure the mechanical integrity of the valve" (Pls' Ex 122 p. 19) and that asbestos gaskets would be needed, for example to connect the valve to piping (Pls' Ex 122 p. 9; T 9/11 p. 84) . He stated that Jenkins not only equipped its valves with asbestos-containing gaskets and packing which it manufactured (Jenkins also bought some packing), it manufactured and sold such asbestos-containing products as replacement parts (Pls' Ex 122 pp. 15 -16). In addition, the record contained evidence that Jenkins knew that the packing and gaskets in its valves would need to be replaced with like kind replacements as acknowledged by Mr. Boisvert (T. 9/11 p. 47, Pls' Ex 122 p. 9) . Jenkins specified asbestos gaskets as replacements (Pls' Exs 98 & 99, Pls' Ex 122 p. 8). In fact, Jenkins issued manuals detailing how to perform this work on its valves (Pls' Ex 107) . Plaintiffs ' evidence, including Mr. Stock's own testimony, quoted *supra*, supports their claim that Jenkins valves, as used in the Wire Mills plant needed asbestos-containing gaskets and packing to function as intended. The trial record shows that Jenkins knew that these components would have to be replaced, specified that asbestos should be replaced with asbestos and knew the methods of replacement. Plaintiffs have therefore satisfied the *Dummitt* standard.

Finally, it was undisputed at trial that Jenkins never gave any warnings concerning the use of asbestos with, in and on its valves.

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Jenkins next asserts that plaintiffs' causation evidence is faulty in that it does not meet the quantification standard for specific causation set forth in *Parker v Mobil Oil*, 7 NY3d 434 (2006) as applied in *In re New York City Asbestos Litigation [Juni]* 32 NY3d 1116 (2018). Further Jenkins asserts that plaintiffs' expert evidence lacks a proper foundation.

The Fourth Department's decision in *Dominick v Charles Millar & Son*, 149 AD3d 1554,1555-1556 (2017), while preceding the Court of Appeals decision in *Juni,* is instructive:

> "With respect to specific causation, the Court of Appeals held in *Parker v Mobil Oil Corp.* (7 NY3d 434, 448 [2006], *rearg denied* 8 NY3d 828 [2007]) that the expert opinion must set forth that the plaintiff "was exposed to sufficient levels of the toxin to cause the [injuries]" (*see Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 808 [2016]). However, as the Court of Appeals later wrote, "*Parker* explains that 'precise quantification' or a 'dose-response relationship' or 'an exact numerical value' is not required to make a showing of specific causation" (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784 [2014], *rearg denied* 23 NY3d 996 [2014]). There simply " 'must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' " (*id.*). Here, plaintiff's expert opined that, if a worker sees asbestos dust, that is a "massive exposure . . . capable of causing disease." Contrary to the Millar defendants' contention, the expert's opinion, considered along with the rest of her testimony, was sufficient to establish specific causation (*see Matter of New York City Asbestos Litig.*, 143 AD3d 483, 484 [2016]; *Matter of New York City Asbestos Litig.*, 143 AD3d 485, 486 [2016]; *Penn v Amchem Prods.*, 85 AD3d 475, 476 [2011])."

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Plaintiffs in *Dummitt* and the plaintiff in *Dominick* were exposed to asbestos in the same manner as Mr. Stock. All removed and replaced asbestos-containing gaskets and packing , which were used in and on valves.

The Court of Appeals decision in *Juni* did not create a new standard and continued to apply *Parker* and *Cornell,* finding the "particular evidence was insufficient to meet the required standard". Hence the *Parker/ Cornell* standard as recognized and applied by *Dummitt* and *Dominick* is still the rod by which the court is to measure the proof.

In *Juni*, as detailed in the Appellate Division, First Department's opinion (148 AD3d 233 [2017]) plaintiff automobile mechanic was exposed to brakes, clutches and automobile gaskets. Unlike this case, in *Juni,* plaintiff's experts were confronted with uncontested evidence that simply was not present here, for example: evidence that chrysolite asbestos fibers in brake pads can be transformed into a nontoxic chemical, forsterite; studies which showed that brake debris and some forms of brake dust were 99 percent non-asbestos; and that 21 of 22 epidemiological studies of mechanics working with friction products found no increased risk of mesothelioma.

In contrast, here, Mr. Stock testified that his work with asbestos-containing gaskets and packing included removing old gaskets and packing which were "crumbly, baked on, dusty" (T 8/28 p. 43) and had to be cleaned out with a wire brush 99 percent of the time. *(id.)* He also testified that the packing he replaced was burnt, and the area cleaned with an air hose before replacement (T 8/28 p. 44). This work was" always

dusty" and "created a lot of dust" (T 8/28 pp. 44,48,51,66, 68 and 111). Further, he stated that the dust covered his face, head and hair (T 8/28 pp. 53, 69) . He also worked in the vicinity of others who did this work (T 8/28 pp. 44, 46) and performed this work daily during the period 1979-1986 (T 8/28 p. 46) . He was also exposed to asbestos when he constantly cleaned up with air hoses and brooms (T 8/28 p.54), breathing in dust which contained "asbestos fibers, gaskets, asbestos gaskets, packing dust, other materials" (T 8/28 p. 55).

Further, unlike *Juni* , plaintiffs' expert Dr. Moline was able to testify with reference to studies showing that gaskets and packing contained up to 75 % asbestos (T 8/30 pp. 92). She identified studies which quantified asbestos release from gasket and packing removal and replacement, as well as debris clean-up work. For example, she testified about asbestos fiber levels reported in two of those studies:

> " That during sweeping activities, the fibers were measured at 1.7 fibers per cc [cubic centimeter] in sweeping up gasket materials. During the packing removal, there was fiber release of 1.01 fibers per cubic centimeter, and that there was a Range during the wire scraping , I believe it was .44 fibers per cubic centimeter was in one of the articles that we discussed.
>
> But they were all in the range of .04 to .44 and [but] in the packing, I know there was a measurement of 1.01 fibers per cc with removal of packing . And the sweeping was 1.7 fibers per cc of the debris removal from the gaskets"
>
> (T 8/30 pp.117-118)[3]

[3] The studies to which Dr. Moline referred were*: Releasability of Asbestos Fibers from Asbestos-Containing Gaskets and Packing,* Millette, Mount and Hays *; Evaluation of Airborne Asbestos Fiber Levels During Removal and Installation of Valve Gaskets and Packing*, McKinney and Moore.

Dr. Moline stated several times that the levels of exposure which she quantified were capable of causing mesothelioma (T 8/30 pp.114-120). Dr. Moline's testimony sufficiently met the standards set forth in *Parker* as explained in *Dominick* and the cross-examination failed to discredit such testimony.

Jenkins claims that its due process rights were violated when it was deprived of the trial testimony of co-defendants' (Rockwell, Warren and Crane) witnesses, occasioned by the failure of those witnesses to comply with its subpoenas. Defendant argues it planned to utilize these witnesses to prove co-defendants' liability for the asbestos-related illness suffered by plaintiff, and allocation of that responsibility. Jenkins contends that, in the interest of justice, the remedy for this failure to comply with the subpoenas would be a new trial.

Plaintiffs take issue with the facts as presented by Jenkins as do co-defendants Rockwell, Warren and Crane in their request to supplement the record.

Defendant issued trial subpoenas shortly before trial. On September 5, 2018, Rockwell, Warren and Crane's motions to quash were denied (Ex E to Fegan 11/13/18 Aff.) The Court also ruled that defendant could use either the deposition testimony of its adverse parties or trial testimony. (*id.*) Efforts to stay the subpoenas by motions to the Appellate Division, Fourth Department were unsuccessful (Ex P to Dymond 12/10/18 Aff.) Throughout this period, counsel for Jenkins and the co-defendants were in continuous contact concerning scheduling of these witnesses (See, e.g. Ex F to Fegan11/13/18 Aff). Finally, on September 12, 2018, counsel for plaintiffs and Jenkins

agreed the defendant could read a summary of past deposition testimony of the co-defendants corporate representatives. This summary concerned the liability of co-defendants obviating the need for live witnesses or reading of transcripts (Ex D to Goodearl Aff). Counsel for Jenkins then withdrew his subpoenas (*id.*). It is noted that defendant, through this strategy, successfully allocated 50% of the liability to the co-defendants and one other party.

Jenkins maintains that the evidence at trial mandated the jury find an equal allocation to other valve manufacturers; that its 50 percent share is not supported by the evidence.

With respect to the Jenkins' claim that the jury's allocation of fault was not supported by the evidence, questions of negligence and apportionment of fault are for the fact-finder, and must be upheld on any fair interpretation of the evidence (see *Rhoden v Montalbo*, 127 AD2d 645, 646 [4th Dept 1987]; *Ryan v New York City Health and Hosps Corp.*, 220 AD2d 734,736 [2nd Dept 1995]).

Here, as the jury was instructed, Jenkins had the burden of proving that plaintiff was exposed to products of the other entities on the verdict sheet, that those entities were negligent in failing to warn and that this negligence was a substantial factor in causing decedent's injuries. After these three findings were made, Jenkins had to prove the "equitable shares" of responsibility (see *Matter of New York City Asbestos Litig.[Marshall]*, 28 AD3d 255, 256 [1st Dept 2006]; *Matter of New York City Asbestos Litig.[Rosini]*, 256 AD2d 250,252 [1st Dept 1988]; *Zalinka v Owens-Corning Fiberglass*

Corp., 221 AD2d 830, 831(3rd Dept 1995).

Based on the proof submitted by the defendant , the apportionment made by the jury is a fair interpretation of the evidence.

Turning to the errors claimed by Jenkins to warrant a new trial in the interest of justice:

> "CPLR 4404 (subd [a]) authorizes the court, either by motion of any party, or on its own initiative, to order a new trial "in the interest of justice". It is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein (4 Weinstein-Korn- Miller, NY Civ Prac, par 4404.01). The Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected (*Matter of De Lano*, 34 AD2d 1031, 1032, affd 28 NY2d 587) and "must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision"
>
> *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter,* 39 N.Y.2d 376, 381, (1976)

During defendant's cross-examination of plaintiffs' expert David Rosner, Ph. D. counsel sought to introduce a 1973 paper titled "Asbestos & You" by Barry Castleman, Sc D. When confronted with the question whether Dr. Castleman had published the 1973 paper, the witness stated "You know, you got me" and expressed surprise that Dr. Castleman was writing as early as 1973 (T 8/29 p. 221). Defendant failed to demonstrate that the 1973 paper had been published, that Dr. Rosner was familiar with the paper or that he recognized it as authoritative. In order to use a textbook or a treatise (assuming that the 1973 paper qualifies as either), on cross-examination, it must be shown that the expert regards the book or treatise as authoritative (*Winiarski v*

Harris, 78 AD3d 1556, 1558 [4th Dept 2010], *Labate v Plotkin,* 195 AD2d 444, 445 [4th Dept 1993]). This was not done. The Court notes that Dr. Castleman's testimony about this paper at an unrelated 2018 trial, was not part of the trial proof and is mentioned for the first time in defendant's memorandum on this motion. Thus, it had no bearing on the Court's decision to preclude the paper at trial.

Defendant next argues the Court erred in failing to preclude the testimony of plaintiffs' economic expert, Larry Spizman, Ph.D., a subject of a pretrial motion in limine. While there is no question that the disclosure of the witness and his report were not provided to defendant until June 25, 2018, some 6 months after the deadline set by the discovery and trial submission schedule, it was received two months before trial. Defendant has failed, now and at the prior motion, to demonstrate that the delay was wilful or intentional or that it was prejudiced by the late disclosure , as required for preclusion (*Sisemore v Leffler*, 125 AD3d 1374 (4th Dept 2015) . Further, that plaintiff was seeking economic damages was not novel information. Plaintiffs' September 6, 2017 interrogatory responses made it clear that economic damages were sought. Additionally, this Court declines to find Dr. Spizman's testimony was speculative, as urged by Jenkins.

Finally, the Court's decision to preclude Gayle McCluskey from testifying about a study she conducted in the 1980's was not erroneous. A deposition given by the witness, in another case, reveals that the study she conducted while employed by Sun Oil Co., was never reduced to writing, was never published, the witness did not "recall

the results of every sample" and the statistical analysis that Ms. McCluskey performed was "thrown away". Contrary to defendant's contention that the witness was not permitted to testify about her study because she was guilty of spoliation, the Court held this testimony was disallowed because the witness could not be cross-examined on a study that did not exist. Further, defendant's contention that it was "ambushed " at trial because plaintiff did not move in limine to preclude this evidence is unsupported by any authority. The Court is unaware of any statute of case law mandating motions in limine. Moreover, a ruling in limine on an evidentiary issue "[M] made in advance of trial on motion papers constitutes, at best, an advisory opinion..." *Cotgreave v Pub. Adm'r of Imperial Cty.*, 91 AD2d 600, 601 (4th Dept 1982).

Defendant's claims of evidentiary errors are unavailing. Even if they were made, Jenkins has not shown that they would affect the outcome of the trial (*see, Micallef v Miehle*, 39 NY2d at 382) As " [A] new trial in the interest of justice is warranted only if there is evidence that substantial justice has not been done " *(Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 [1st Dept 2005]). Defendant has failed to show that these errors occurred or that substantial justice has not been done.

Finally, Jenkins asserts that the award for pain and suffering , in the amounts of $4.5 million for past and $1.5 million for future , deviated materially from compensation awarded in seven previous asbestos cases in this district and must be reduced. Those pain and suffering verdicts ranged from $600,000 to $2.5 million (The Court notes that $2.5 million was awarded in 3 of those 7 cases).

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Every case must be assessed on its own merits (*Juditta v Bethlehem Steel Corp.*, 75 AD2d 126 (4th Dept 1980). The facts here are that plaintiff, at the time of trial was 60 years old and far from being retired, was an inner-city police officer in Atlanta, Georgia. He underwent a number of serious surgeries and several procedures from August of 2015 until trial. He also underwent four rounds of chemotherapy, one of radiation and experienced complications from the surgeries, procedures, chemotherapy and radiation. The future course of his disease, as stated by Dr. Moline, is that "it is downhill". Plaintiff can expect to need assistance in all his activities of daily living, will require more pain medication and end up confined to bed, with difficulty breathing and on oxygen (T 8/30 pp. 150-151).

The pain and suffering award encompasses loss of enjoyment of life and here the evidence supports the view that his loss has been profound. This Court will not disturb the award.

Defendant Jenkins' motion is in all respects, denied.

Plaintiffs contend the Court erred in denying its request to charge the jury separately on loss of future household services. They claim the uncontroverted testimony of their expert economist, that the loss of future household services previously performed by Mr. Stock, had a value of $376,307 , mandates such a charge and had proposed one.

In opposition to the motion, defendant points out that under cross-examination, the economist stated that his "number" for loss of future household services was based

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on the number of hours of household services an average male would have performed. This was obtained from a chart "the Dollar Value of the Day". This is mere speculation, unrelated to any actual services that plaintiff performed, Jenkins urges. Further, defendant argues, the chart, never admitted into evidence, was inadmissible hearsay.

Plaintiffs rely on *Presler v Compson Tennis Club Assoc.*, 27 AD3d 367 (4th Dept 2006) for its argument that its proposed charge should have been given. That case, however, stands for the proposition that , where the proof warrants, the jury should be instructed " that future damages for loss of household services should be awarded ... 'for those services which are reasonably certain to be incurred and necessitated by plaintiff's injuries' (*Schultz v Harrison Radiator Div. Gen. Motors Corp.*, 90 NY2d 311 at 320-321 [1997])" . The Court does not disagree, which is why the charge at PJI 2:315 "Derivative Action re: Spouse- Loss of Services" was given to the jury. Plaintiffs continue to fail to show that the charge as given was inadequate. The plain language of the charge and its title refers to loss of services.

Plaintiffs' motion is denied.

SO ORDERED

Dated: Buffalo, New York
April 24, 2019

Deborah A. Chimes , J.S.C.