

Maffei v A.O. Smith Water Prods. Co

2024 NY Slip Op 32459(U)

July 18, 2024

Supreme Court, New York County

Docket Number: Index No. 190378/2018

Judge: Mary V. Rosado

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

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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ROMEO MAFFEI,

Plaintiff,

- v -

INDEX NO. 190378/2018

MOTION DATE 06/10/2024

MOTION SEQ. NO. 013

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC., ARVINMERITOR, INC., AURORA PUMP COMPANY, BIRD INCORPORATED, BORGWARNER MORSE TEC LLC, BRYANT HEATING & COOLING SYSTEMS, BURNHAM, LLC, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CATERPILLAR, INC, CBS CORPORATION, F/K/A VIACOM INC., CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COMPUDYNE CORPORATION, CRANE CO, CROWN BOILER CO., DAIMLER TRUCKS NORTH AMERICA LLC, F/K/A, DANA COMPANIES, LLC, DAP, INC, DEERE & CO, ECR INTERNATIONAL, CORP., ELECTROLUX HOME PRODUCTS, INC., FLOWSERVE US, INC., FMC CORPORATION, FORT KENT HOLDINGS, INC., GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, TRADING AS NAPA, GOODYEAR CANADA, INC, GOULD ELECTRONICS INC, GOULDS PUMPS LLC, GRINNELL LLC, H.O. PENN MACHINERY CO. INC, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC., ITT LLC., J-M MANUFACTURING COMPANY, INC, KAMCO SUPPLY CORP, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC, LIPE-AUTOMATION CORPORATION, MAREMONT CORP., MCCORD CORPORATION, NAVISTAR, INC., A/K/A INTERNATIONAL, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PERKINS ENGINES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, REYNOLDS METALS COMPANY, STANDARD MOTOR PRODUCTS, INC, SUPERIOR BOILER WORKS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, YORK INTERNATIONAL CORPORATION, CUMMINS, INC., FEDERAL-MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., FORD MOTOR COMPANY, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC./

**DECISION + ORDER ON
MOTION**

BENDIX, MACK TRUCKS, INC., ROCKWELL
AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO
ALLEN- BRADLEY COMPANY, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 013) 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 708, 709, 710, 711, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 737, 738, 739, 740

were read on this motion to/for

SET ASIDE VERDICT

Upon the foregoing documents, and after oral argument, which took place on April 11, 2024, with Brandon Perlman, Esq. and Pierre Ratzki, Esq. appearing for the Plaintiffs Romeo Maffei (“Romeo”) and Rosa Maffei (“Rosa”) (collectively “Plaintiffs”), and Peter J. Dinunzio, Esq. appearing for Defendant Burnham LLC (“Burnham” or “Defendant”), Defendant’s motion to set aside the verdict is denied.

I. Background

After a multi-week asbestos trial, wherein Plaintiffs and their experts testified at length about the debilitating impact Romeo’s lung cancer has had on their lives, which they attributed to Burnham knowingly installing dangerous levels of asbestos in their products without warning, a jury returned a verdict. That verdict included \$6.6 million in past pain and suffering, \$19.9 million in future pain and suffering, \$5 million for loss of consortium, and \$6.5 million in punitive damages. Burnham now moves for (a) judgment notwithstanding the verdict; (b) a new trial; or (c) remitter. For the following reasons, the motion is denied.

II. Discussion

A. Judgment Notwithstanding the Verdict

i. Standard

Pursuant to CPLR § 4404(a), any party may set aside a verdict or any judgment entered thereon where the verdict is contrary to the weight of the evidence or in the interest of justice. A verdict is against the weight of the evidence where it is “utterly irrational for a jury to reach the result it has determined” (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). Absent this high bar, the Court may not conclude that the verdict is, as a matter of law, not supported by the evidence (*New York City Asbestos Litig. (McWilliams)*, 224 AD3d 597 [1st Dept 2024]). Likewise, where an issue of fact exists, the Court may not direct a verdict (*Resnick v Socolov*, 5 AD3d 125, 126 [1st Dept 2004] citing *Cohen, supra*; see also *Weiss v City of New York*, 306 AD2d 64 [1st Dept 2003]). On a motion to set aside the verdict, the Court must view the facts in the light most favorable to the nonmovant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

ii. Plaintiff's Experts' Causation Opinions

Defendant first argues that it should be granted judgment notwithstanding the verdict because Plaintiffs' experts' causation opinions were invalid. The Court finds this argument to be without merit, and a challenge to Plaintiffs' experts' opinions and the methodology and date used to formulate those opinions has already been rejected by the First Department (*New York City Asbestos Litig. (McWilliams)*, 224 AD3d 597 [1st Dept 2024]). Therefore, this portion of the motion is denied.

iii. Reckless Disregard Exception and Punitive Damages

The Court likewise rejects Defendant's argument that the reckless disregard exception was unwarranted and that the evidence was insufficient to support an award of punitive damages.

Burnham's own corporate representative, Jacob Graham, testified that Burnham recommended that its boilers be covered with asbestos from 1906 through the 1970s, and there was testimony presented that well into the 1970s Burnham was still purchasing large quantities of asbestos. Here, Plaintiff was exposed to dusts released from asbestos gaskets installed in Burnham boilers, and although Burnham had been aware of the hazards of asbestos exposure for many decades, they failed to provide any warning about the dangers of asbestos exposure on their gaskets until at least 1986. At a minimum, this evidence created an issue of fact as to Burnham's recklessness which was for the jury to determine. Given this historical evidence and the testimony of Burnham's own corporate representative, the verdict rendered on the issue of recklessness was not utterly irrational.

Indeed, Justice Mendez, in *Maffei* noted that the allegations that Burnham knew and possessed data that asbestos was hazardous yet continued to use asbestos in its products without warning the public, prompted by pecuniary motive, could warrant recklessness and punitive damages (*New York City Asbestos Litig. (Maffei)*, 2020 WL 247266 [Sup. Ct., NY Co 2020]). Other trial courts in New York County presiding over asbestos cases with Burnham as defendant and hearing the same evidence as the evidence presented here, have also found a reckless disregard charge appropriate (*Assenzio v A.O. Smith Water Prods. Co.*, 2015 NY Slip Op 30201[U]) [Sup. Ct. NY Co. 2015] [Madden, J.].

As recently held by Justice Silvera, in ruling on a summary judgment motion brought by Burnham seeking dismissal of a punitive damages claim, "a reasonable juror could find that defendant Burnham's knowledge and use of asbestos in their boilers constituted a prioritization of their corporate benefits over plaintiff's safety" (*Giuliano v Aerco Intern., Inc.*, 2023 NY Slip Op 33442[U]) [Sup. Ct., NY Co. 2023]). Simply put, the evidentiary record set forth is insufficient for

this Court to set aside the jury's verdict (*see New York City Asbestos Litig., (Idell)*, 164 AD3d 1128, 1129 [1st Dept 2018]).

B. New Trial

i. Questioning of Dr. Ginsburg

Defendant next argues it is entitled to a new trial because it was not allowed to cross-examine Dr. Ginsburg about Romeo's "work history." This argument is without merit and contradicts the First Department's holding in *Idell, supra*. (*see also Seen v Kaiser Gympsum Co., Inc.* 2023 NY Slip Op. 30794[U] [Sup. Ct., NY Co. 2023] [Adams, J.] *aff'd as modified (on other grounds)* 227 AD3d 558 [1st Dept 2024]). The appellate decisions that Defendant relies on to avoid application of *Idell* are all outside of the First Department, which this Court is bound to follow. They are also unpersuasive as most of the cases cited by Defendant do not deal with the specific issue of coopting a Plaintiff's causation expert in an asbestos exposure case.

ii. Burnham's Apportionment Case

The Court likewise finds Burnham's argument that its inability to question Dr. Ginsburg about Romeo's work-history vitiated its apportionment case unpersuasive. Burnham was under no prohibition from calling its own experts who could have opined that Romeo's asbestos exposure came from several other products. However, it did not – and it cannot now ask the Court for a new trial based on its own tactical blunders.

Burnham instead chose to chart a defense by arguing that Romeo's cancer came from smoking and was in no way caused by asbestos exposure. The jury discredited this theory and based on the evidence presented (or lack thereof) and found Burnham primarily liable for Romeo's cancer. Rather than pursuing a defense of mitigating damages through apportionment, Burnham attempted to persuade the jury that it was not liable as a cause of Romeo's cancer at all. Burnham

was not deprived of presenting an apportionment defense, it simply chose not to present that defense. Without Burnham proving its *prima facie* case of specific causation against other entities for CPLR Article § 16 purposes, Burnham was not entitled to have these entities placed on the verdict sheet (*Nemeth v Brenntag North America*, 183 AD3d 211, 324 [1st Dept 2020], *rev'd on other grounds*, 38 NY3d 336 [2022]). Therefore, this is no basis to order a new trial.

iii. Smoking History and Apportionment of Fault

Defendant next claims that there should be a new trial because the jury found Plaintiff was only 15% responsible for the development of his lung cancer. This is no basis to grant a new trial. The jury heard evidence from several causation experts, both from Plaintiffs and the Defense, and crediting the testimony and evidence presented provided the apportionment they did. If anything, the proper apportionment of whether smoking or asbestos exposure caused Romeo's cancer is an issue of fact for the jury, and the jury's finding is not so utterly irrational for this Court to alter the apportionment on its own (*see also Drummond v 450 Partners LLC*, 210 AD3d 494 [1st Dept 2022] [comparative fault is an issue for the factfinder]; *see also Ford v A.O. Smith Water Prods.*, 173 AD3d 602, 603 [1st Dept 2019]).

iv. Post-Exposure Conduct and Summation Remarks

The Court finds Defendant's argument regarding questioning about Burnham's business practices after 1989 to be insufficient to warrant a new trial. Given the strength of Plaintiffs' case, any minor statements made during Plaintiffs' summation on punitive damages is insufficient to order a new trial (*see Matter of New York City Asbestos Litig.*, 224 AD3d 597 [1st Dept 2024]).

v. Constitutional Arguments Regarding Punitive Damages

Defendant's argument that it is entitled to a new trial based on a variety of constitutional arguments against punitive damages is denied. The First Department has repeatedly rejected

Defendant's constitutional arguments (*New York City Asbestos Litig. (Maseto)*, 210 AD3d 538 [1st Dept 2022]; *New York City Asbestos Litig. ("All NYCAL Cases")*, 159 AD3d 576, 578 [1st Dept 2018]). Moreover, the authority Defendant relies on runs contrary to their argument, as the United States Supreme Court has stated that out-of-state conduct which has a nexus to the specific harm suffered by the plaintiff may be probative of deliberateness and culpability of in-state wrongdoing (*State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 422 [2003]).

The Supreme Court has likewise held evidence of actual harm to nonparties, which shows substantial risk of harm to the general public arising from a defendant's behavior, may be considered by a jury to determine the reprehensibility of conduct in awarding punitive damages for harm specifically enacted on the plaintiff (*Philip Morris USA v Williams*, 549 US 346, 355 [2007]). There is no evidence before this Court that the jury went further than this and used the punitive damages verdict to punish defendant for harms visited on non-parties. The Court has considered the remainder of Defendant's arguments for a new trial and finds them to be unpreserved and/or unavailing.

C. Remitter

i. Standard

CPLR 5501(c) allows a court to review a jury award to determine if is excessive or inadequate. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation."

ii. Romeo's Pain and Suffering Award

Romeo was awarded \$6.6 million for past pain and suffering spanning from March 2017 to August 2023, and \$19.9 million for future pain and suffering of 17.5 years. There was extensive testimony regarding how active Romeo was in his everyday life prior to his diagnosis, including

working 5-6 days a week as a landscaper. He also often travelled to his home country of Italy with his wife and spent much of his free time with his many grandchildren. The jury heard that Romeo was prohibited from carrying out all these activities after receiving his lung cancer diagnosis and was told he had a 5% chance of survival. He underwent multiple rounds of chemotherapy, received two Gamma Knife surgeries, and frequently suffers from debilitating anxiety every time he goes for further cancer screenings. He can no longer play with his grandchildren, has suffered permanent cognitive decline, and still suffers from physical pain in his head and chest from radiation and his multiple Gamma Knife surgeries. Given this evidence, and the jury's finding of apportionment of fault, the Court declines to reduce the award the jury found in Romeo's favor (*see also New York City Asbestos Litig. (McWilliams)*, 224 AD3d 597 [1st Dept 2024] [award of \$13,000,000 for past pain and suffering and \$10,000,000 for future pain and suffering did not deviate materially from what would be reasonable compensation]).

iii. Rosa's Loss of Consortium Award

Rosa was awarded \$2,000,000 for of past loss of consortium and \$3,000,000 for future loss of consortium, for a total of \$17,421 per month. The jury heard evidence that Rosa and Romeo met in Italy and have been married for forty-four years. Rosa's blood family all live in Italy and Romeo would often take Rosa on trips to Italy to visit Rosa's family. Romeo financially provided for Rosa and helped around the house. Romeo was an affectionate and loving husband. He often would barbeque for the family's Sunday dinners, an important aspect of Rosa and Romeo's Italian heritage. However, ever since Romeo's cancer and subsequent chemotherapy and surgeries, Rosa and Romeo cannot go to Italy to see their hometown and visit Rosa's family. Romeo does not have the ability to financially provide for Rosa, he cannot help around the house, and he is often cranky and tired after years of medical procedures and fighting cancer. Based on this evidence, and

precedent in other New York City asbestos cases, there is no reason to disturb the jury's award to Rosa for loss of consortium. (See *New York Asbestos Litig. (Brown)*, 146 AD3d 461 [1st Dept 2017] [affirming award of loss of consortium at \$20,000 per month]; *Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011 [awarding loss of consortium at \$20,000 per month]).

iv. Punitive Damages Award

Plaintiffs were awarded \$6,500,000 in punitive damages. Defendant concedes that New York Courts limit punitive damages to single digit ratios of no greater than 4:1. The punitive damages here is well below the \$31.5 million in compensatory damages provided by the jury. Thus, there is no reason to disturb the jury's award of punitive damages.

Accordingly, it is hereby,

ORDERED that Defendant Burnham LLC's motion for a judgment notwithstanding the verdict, a new trial, or alternatively remitter, is denied in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

7/18/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER