IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	:	
112010JR TRIAL GROUP	:	
Limited to:	:	
	:	
HENDERSON, BRUCE	:	C.A. No. 09C-07-188 ASB
HENDERSON, ELIZABETH	:	C.A. No. 09C-04-293 ASB

UPON DEFENDANT DANA COMPANIES, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW
AND ALTERNATIVE MOTION FOR NEW TRIAL
DENIED
UPON DEFENDANT DANA COMPANIES, LLC'S
MOTION TO STRIKE PLAINTIFFS' OPPOSITION
DENIED
UPON DEFENDANT ZOOM PERFORMANCE PRODUCTS'
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS
OR, IN THE ALTERNATIVE, MOTION TO AMEND THE VERDICTS
DENIED

Submitted: January 14, 2011
Decided: February 2, 2011

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ABLEMAN, J.

I. Introduction

This is the Court's decision on post-trial motions filed by Defendants Dana Companies, LLC ("Dana") and Zoom Performance Products ("Zoom"). Both defendants seek judgment notwithstanding the verdicts in this asbestos products liability action. Dana has also requested, in the alternative, that the Court grant a new trial. In addition, Zoom's motion requests that if the Court deny its motion for judgment notwithstanding the verdict, that the Court consider amending the verdicts to apportion Zoom a 1% share of liability for the total awards in both cases, which Zoom contends is necessary under Louisiana law. For the reasons set forth hereafter, both motions must be denied.

Plaintiffs are the family members of mother and son Elizabeth and Bruce Henderson, who brought this action against various manufacturers to recover damages for Elizabeth and Bruce's deaths from mesothelioma, a fatal and virulent form of cancer that usually results from asbestos exposure. Bruce Henderson died less than a year and a half after Elizabeth. The remaining members of the Henderson family are Elizabeth's other children (and Bruce's siblings): Betty Sue Crawford; Kathy Lenzen; Tammy Blair; and Ernest Henderson, Jr.

The Henderson family ran automotive repair shops in Lacombe, Louisiana, and Bridge City, Louisiana, from the 1950s through the early 1980s. By their Complaint, Plaintiffs alleged that Elizabeth contracted mesothelioma as a result of

occupational exposure to automotive products that were used in the shops, where she worked in the parts departments throughout the existence of both businesses. Elizabeth's work primarily entailed clerical functions, which included stocking automotive parts, removing new parts from their packaging when they were ready to be used, and discarding used parts removed from vehicles in the shop. Elizabeth also experienced non-occupational exposures when she laundered the family's clothing.

While employed at the shops for only brief periods of time, Bruce Henderson worked informally in the family businesses beginning in his early adolescence, and spent much of his free time helping out at the Hendersons' garages. He also spent time during the weekends working on his personal vehicles. In addition, Plaintiffs allege that Bruce experienced asbestos exposure by participating in home-renovation and building projects, and thus several manufacturers of construction products such as joint compounds were originally names as defendants as well.

Bruce Henderson received his mesothelioma diagnosis within nine months after his mother's death in November 2008 from the same disease. Despite heroic efforts, including consultation in Boston with a renowned specialist, Bruce passed away in January 2010, approximately seven months after his diagnosis.

Following Elizabeth Henderson's death, a fiber burden analysis of her lung tissue was conducted as part of an autopsy. This analysis did not identify any chrysotile asbestos fibers (the type used in automotive friction products) in her lung tissue, but did detect the presence of amosite asbestos, a less common form of asbestos not used in automotive parts, but associated with other applications, including industrial insulation. No fiber burden analysis was conducted on Bruce's lung tissue.

Considerable evidence was adduced by all of the parties at trial concerning the Johns-Manville Marrero plant, a facility located in the Westbank area of Louisiana, in proximity to the Hendersons' home and business during the years they lived in Bridge City. In fact, the evidence before the jury included an account of Johns-Manville's practice of distributing scrap asbestos material to area homeowners and schools for use as paving material. The Hendersons also lived and worked near the Avondale Shipyard while they were in Bridge City. Both the Marrero Johns-Manville plant and Avondale Shipyard used crocidolite and amosite asbestos, which are two varieties of amphibole asbestos. Amphibole is a structurally distinct type of asbestos from chrysotile, and expert testimony at trial explained that amphibole fibers are considered more dangerous than chrysotile, in that they can cause mesothelioma at lower exposure levels than chrysotile.

II. Procedural History

The Complaints in both cases named numerous companies that allegedly manufactured or distributed asbestos-containing products. Plaintiffs voluntarily dismissed or settled with many of these defendants, and others were dismissed by the Court prior to trial. By the time of trial, only two defendants remained: Dana, which manufactured Victor-brand automotive gaskets, and Zoom, which manufactured high-performance automobile clutches.

Trial took place in November 2010. After two weeks of testimony and approximately two days of deliberation, the jury returned a verdict in Plaintiffs' favor, finding that Dana and Zoom had negligently manufactured, sold, or distributed products that were unreasonably dangerous in their normal uses, that Bruce and Elizabeth Henderson were exposed to those products, and that the exposures were a substantial contributing factor in causing their mesothelioma.

In Elizabeth Henderson's case, the jury awarded $80,000.00 for pain and suffering, and $125,000.00 to each of the four Henderson children alive at the time of trial, for their loss of society, support, love, and affection. With regard to the wrongful death portion of the award in Elizabeth's case, the jury was asked to apportion liability. It concluded that Dana was 26% at fault, Zoom was 1% at fault, and non-party defendant Johns-Manville was 73% at fault. Johns-Manville was the sole non-party defendant, out of thirteen included on the verdict form, that

the jury found responsible for causing Elizabeth's mesothelioma by manufacturing or distributing asbestos-containing products without a warning.

As to Bruce Henderson, the jury awarded $1.16 million for his pain and suffering. No survival action was brought because Bruce died without a spouse or children. Again, the jury's verdict sheet reflects that Johns-Manville was the only non-party found negligent. In both cases, the jury expressly found that none of the other former co-defendants listed on the verdict sheet pursuant to Louisiana law were similarly negligent or strictly liable in either Elizabeth or Bruce Henderson's case.

III. Parties' Contentions

Dana now renews its motion for a directed verdict, which it initially made at the close of the evidence, by asking this Court to enter judgment notwithstanding the verdict pursuant to Rule 50(b) of the Superior Court Civil Rules. Dana argues that no legally sufficient evidentiary basis existed to support the jury's verdict for three reasons: (1) the Victor gaskets manufactured and sold during the relevant time periods included asbestos-free gaskets, and Plaintiffs did not show that "it was any more likely that the Victor gaskets Elizabeth and Bruce Henderson worked with or around were asbestos-containing rather than asbestos free"; (2) the jury's conclusion that Elizabeth and Bruce Henderson were exposed to asbestos as a result of working with or around Victor asbestos-containing gaskets was not

sufficiently supported by the evidence; and (3) no evidence was offered at trial regarding the frequency, regularity, or proximity of Elizabeth or Bruce's exposures to asbestos-containing Victor gaskets, such that Plaintiffs failed to carry their burden of proof under Louisiana law.[1]

In the alternative, Dana seeks a new trial pursuant to Rule 59 on the basis that the jury failed to find that the negligence of certain non-party settled co-defendants, or the defective nature of the non-parties' defective products, also caused Bruce and Elizabeth to develop mesothelioma. Dana submits that the evidence as to these non-parties, whom the jury found to have manufactured or sold asbestos products to which the Hendersons were exposed, did not materially differ from the evidence against Dana. In support of this contention, Dana cites a single question and answer during Bruce Henderson's deposition testimony in which he stated that neither Dana nor any of the non-parties provided any warnings on their automotive products. Dana further argues that Plaintiffs' counsel judicially admitted that some of the non-parties were liable during his opening statement and closing argument. Dana suggests, therefore, that the jury's verdict is "both inconsistent and contrary to plaintiffs' counsel's admissions" and against the great weight of the evidence, thus necessitating a new trial.

[1] Dana's Renewal of Mot. for J. as a Matter of Law 2-3.

In its Rule 50 motion for judgment notwithstanding the verdict, Zoom argues that "[n]o reasonable finder of fact could have returned verdicts against Zoom on the evidence presented," and thus, since the plaintiffs failed to sustain their burden of proof as to Zoom, it is entitled to judgment as a matter of law.[2] Arguing along lines similar to Dana, Zoom contends that it made asbestos-free as well as asbestos-containing clutches, and that Plaintiffs did not offer any testimony identifying from where or whom any Zoom clutch used in the Hendersons' business was obtained; the specific time periods during which any Zoom clutch was purchased; whether those Zoom clutches were asbestos-containing; or in what vehicle or vehicles the Hendersons installed or removed Zoom clutches. In the absence of such information, Zoom argues that "the Court cannot draw the inference of exposure" under *Stigliano v. Westinghouse*, and therefore "summary judgment on product nexus must be granted."[3]

As Dana does in its motion, Zoom also maintains that the jury's failure to apportion liability to several non-party companies demands relief. Zoom requests somewhat different relief with respect to the responsibility of other settled co-defendants; rather than requesting a new trial, it asks the Court to "conform" or

[2] Zoom's Mot. for JNOV or to Amend the Verdicts 1.

[3] *Id.* at 2 (quoting *Stigliano v. Westinghouse*, 2006 WL 3026171 (Del. Super. Oct. 18, 2006)).

amend the verdict to assign fault to the nine other entitles to whose asbestos products the jury concluded Bruce and Elizabeth were exposed.

In addition, Zoom further argues that comparative fault principles—rather than the virile share system based upon contributory negligence—should apply to entirety of the verdicts, rather than only to the wrongful death damages in Elizabeth Henderson's case. Zoom contends that Plaintiffs' failures to present specific evidence regarding the time periods, duration, and frequency of exposure to Zoom asbestos-containing products meant they also failed to establish that the significant exposures of which they complain occurred prior to the adoption of Louisiana's comparative negligence law. In the absence of this requisite showing, Zoom suggests that Plaintiffs are not entitled to have fault allocated amongst defendants based upon the virile share system, and Zoom's liability for the total damages awarded in both cases should be limited to the 1% fault assigned it by the jury for Elizabeth Henderson's wrongful death damages.

IV. Standard of Review

Judgment as a matter of law under Rule 50 is appropriate where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." In determining whether a defendant is entitled to judgment notwithstanding the verdict, the Court must view the jury's findings in the light most favorable to the plaintiff and determine

whether, under any reasonable view of the evidence, the jury could justifiably find in the plaintiff's favor.[4]

A request for a new trial differs from a motion for judgment NOV and is governed by a different standard.[5] In applying Rule 59(a), this Court will not disturb a jury's verdict unless it is against the great weight of the evidence, resulted from the jury's disregard for applicable rules of law, or was tainted by legal error during trial.[6] Enormous deference is accorded to a jury's verdict, such that "[i]n the face of any reasonable difference of opinion, courts will yield to the jury's decision."[7]

V. Analysis

For the reasons that will be discussed herein, the Court concludes that Plaintiffs did in fact present sufficient evidence from which a reasonable jury could conclude that Bruce and Elizabeth Henderson's deaths were caused by exposure to asbestos-containing products manufactured by Dana and Zoom. In the Court's judgment, the verdict was not based upon speculation or unwarranted inferences, but was well-grounded in the evidence presented throughout the course of the trial.

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[4] *E.g.*, *Del. Elec. Coop., Inc. v. Pitts*, 633 A.2d 369, 1993 WL 445474, at *1 (Del. 1993) (TABLE).

[5] *Luciani v. Adams*, 2003 WL 262500, at *5 (Del. Super. Feb. 6, 2003), *aff'd*, 846 A.2d 237 (Del. 2003).

[6] *E.g.*, *Crist v. Connor*, 2007 WL 2473322, at *1 (Del. Super. Aug. 31, 2007).

[7] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

The Court further finds that Dana's request for a new trial pursuant to Rule 59 and Zoom's motion to amend the verdicts must be denied. The Court finds no error in the jury's conclusion that neither party defendant sustained its burden of proof under Louisiana law to demonstrate the joint tortfeasor status of the non-party manufacturers and distributors to which the jury did not assign fault. Having failed to meet their burden—and in some instances, having failed even to mention the non-party entities—Defendants have not established any basis for a new trial or an alteration of the verdicts. Finally, because Zoom submitted a jointly approved verdict sheet without mentioning or arguing at any point during the course of this litigation that Louisiana's comparative fault law applied to this case, it has waived any argument that the Court should apply that law to apportion the verdict in Bruce Henderson's case or the award for Elizabeth Henderson's pain and suffering. Accordingly, Dana's Motion for Judgment as a Matter of Law or for a New Trial is denied, and Zoom's Motion for Judgment Notwithstanding the Verdicts or to Amend the Verdicts must also be denied.

As an initial matter, the Court emphasizes that these cases are now before it *after* a jury has considered all of the evidence and found that Elizabeth and Bruce Henderson were exposed to Defendants' products, that those exposures constituted a factual and legal cause of their mesothelioma, and that Defendants were negligent and strictly liable. The verdict lends credence to the Court's earlier

denial of summary judgment motions filed by both of the trial defendants. A motion for judgment notwithstanding the verdict is *not* the time for either defendant to rehash their summary judgment arguments. This case is far beyond that stage. Thus, for example, Zoom's argument in its *post-trial* motion that "the Court cannot draw the inference of exposure and summary judgment on product nexus must be granted" ignores the procedural posture of this case.

Both Dana and Zoom have argued that the jury could not reasonably have found that Bruce or Elizabeth Henderson's exposures to their asbestos-containing products occurred with sufficient frequency and duration to be deemed substantial contributing factors to either decedent's mesothelioma. Although Louisiana has not specifically adopted the so-called "frequency, regularity, and proximity" test for substantial-factor causation set forth in *Lohrmann v. Pittsburgh Corning Corp.*,[8] its case law supports the proposition that the plaintiff in an asbestos-exposure case must establish "frequent" and "regular" exposure to friable asbestos from a particular defendant's product in order to establish causation.[9] However, it is the courts which must apply the concepts of frequency and regularity to determine *as a matter of law* whether a plaintiff has offered evidence of non-trivial exposures sufficient to meet a *de minimis* threshold and raise a triable issue as to

[8] *See Quick v. Murphy Oil Co.*, 643 So.2d 1291, 1293 (La. Ct. App. 1994) (discussing *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986)).

[9] *See Asbestos v. Bordelon, Inc.*, 726 So. 2d 926, 948-49 (La. Ct. App. 1998).

causation. This Court agrees with the conclusion reached by other courts to consider the issue that where a jurisdiction imposes a "frequency" and "regularity" test at the summary judgment stage or upon a motion for directed verdict, importing that particular language into the jury instruction is unnecessary and potentially confusing.[10]

Notably, the Louisiana jury instructions upon which the Court based its causation instructions in this case do not directly task the jury with deciphering or applying the concepts of frequency or regularity of exposure. As the jury was instructed, Plaintiffs were required to satisfy their burden of proof that each defendant was negligent, or that the defendant's product was defective and unreasonably dangerous, and that the defendant's negligence or the product defect was a cause-in-fact in bringing about the injuries that plaintiff sustained. The jury was further instructed, that "in an asbestos case, an exposure is a 'substantial contributing factor' in causing an asbestos-related injury when the injury would not

[10] *See McMahon v. Celotex Corp.*, 962 F.2d 17 (D. Wyo. 1992) (addressing "whether an instruction on causation in a Wyoming asbestos case is complete without stating a standard for a durational and qualitative minimum exposure" and concluding that such an "expanded" instruction might be permissible, but is not required); *Johnson v. Owens-Corning Fiberglas Corp.*, 729 N.E.2d 883, 888-89 (Ill. App. Ct. 2000) ("Injecting the terms 'frequently' and 'regularly' into the jury's deliberations without further explanation carries with it the danger that jurors may interpret their instructions to mean that a plaintiff must prove that he was exposed to a substantial number of the defendant's asbestos fibers. In actuality, the substantial-factor test is not concerned with the quantity of asbestos but its legal significance."). Although the *Johnson* decision seems to contemplate that competent expert testimony could support a finding of causation based upon a single fiber—an idea which this Court little doubts Louisiana would reject—its conclusions regarding the potential for error and jury confusion are nonetheless well-taken.

have occurred without it or if the exposure played an important role in producing the injury." This language accurately reflects Louisiana's standard for substantial-factor causation.[11]

Turning first to Dana's motion for judgment notwithstanding the verdict based on the rather suspect conclusion that no "sufficient evidentiary basis" supported the jury's verdict, the Court rejects this argument for the simple reason that there was ample evidence presented to the jury in this case to establish that both Elizabeth and Bruce Henderson worked with and in close proximity to Victor asbestos-containing gaskets, and that they received non-trivial exposures by removing the gaskets from boxes (Elizabeth) and through installing and removing the gaskets in vehicles serviced at the Hendersons' garage (Bruce).

While it is true that Dana manufactured both asbestos-containing and asbestos-free gaskets, Plaintiffs presented evidence from which the jury could reasonably conclude that Elizabeth and Bruce were exposed to the asbestos-containing varieties. In particular, Plaintiffs offered a 1980 article by John E. Zeitz, then employed as the Victor Products Division chief engineer at Dana, which indicated that the applications for which gaskets were used in cylinder

[11] *See, e.g.*, *McAskill v. Am. Marine Holding Co.*, 9 So.3d 264 (La. Ct. App. 2009) ("[I]n latent mesothelioma cases, where the human body is injured over time due to chemical exposure, the plaintiff need show only that the defendant's asbestos-containing product was a substantial factor in causing his alleged disease. This burden can be met by simply showing that he was actively working with asbestos-containing materials."); *Thibodeaux v. Asbestos Corp.*, 976 So.2d 859 (La. Ct. App. 2008); *Vodanovich v. A.P. Green Indus., Inc.*, 869 So.2d 930 (La. Ct. App. 2004); *Bordelon, Inc.*, 726 So.2d at 948-49.

heads, intake manifolds, and exhaust manifolds "require[d]" the use of materials with certain qualities then only available in asbestos, which was therefore used in the "majority" of gaskets manufactured for those applications. Zeitz further indicated that heavily-loaded flanges "require the crush and extrusion resistance of asbestos," which was used in "a large number of extremely heavily loaded flanges." Zeitz suggested that it was or soon would be "possible to replace asbestos in different ways for different applications" and "present design engineers and the marketplace with an improved product with greater appeal."[12]

As the Court noted in denying Dana's motion for summary judgment, the 1980 Zeitz article could support a reasonable inference that all of the gaskets Dana manufactured for the particular applications identified up to that time contained asbestos. Indeed, because Zeitz discusses the "possible" replacement of asbestos for the applications described in the future, it is difficult to arrive at a contrary reading. Bruce Henderson testified to removing and replacing cylinder head, exhaust pipe flange, intake manifold, and exhaust manifold gaskets, and described scraping or buffing the gaskets in a manner that generated dust.[13] These particular

[12] Pls.' Trial Ex. 9.

[13] Bruce Henderson Dep. vol. 1 (Oct. 13, 2009), at 38:23-44:9; 66:10-25. Bruce Henderson also testified to using some metal head gaskets of an unknown brand, but it appears undisputed that metal gaskets would not require scraping and buffing, and thus were not the type of gaskets addressed in his description of the removal and replacement processes. According to Bruce, "most" of the head gaskets he used did not have a metal shim. *See* Trial Tr., Nov. 16, 2010 (P.M. session), at 115:5-18.

gaskets had to be replaced whenever an engine was rebuilt, which was work he described as "constant" at the shop, and during the course of certain other, less extensive repairs.[14] Bruce recounted that Victor gaskets were one of three "main" brands used in the family's shops.[15] Furthermore, Bruce explained that the shop had many repeat customers, such that his work sometimes included removing parts, including gaskets, that the Hendersons had previously installed.[16] During his years assisting in the Lacombe shop, Bruce specifically recalled that Victor was among the brands used for intake manifold, exhaust manifold, and cylinder head applications.[17] Ernest Henderson testified that Elizabeth was "always there" when he or Bruce worked in the shop, and Bruce explained that both he and his mother swept up dust in both the work areas and the parts departments.[18] In operating the parts departments of the Hendersons' shops, Elizabeth also opened and handled both new and used parts.

The Zeitz article and usage testimony were crucial in defeating Dana's argument that *Stigliano v. Westinghouse* entitled it to summary judgment, and, together with additional evidence adduced at trial, fully support the jury's verdict

[14] Bruce Henderson Dep. vol. 1 (Oct. 13, 2009), at 38:22-42:10.

[15] *Id.* at 44:13-14.

[16] *Id.* at 59:4-7; *see also* Trial Tr., Nov. 16, 2010 (P.M. session), at 76:23-77:10.

[17] Trial Tr., Nov. 16, 2010 (P.M. session), at 106:6-107:16.

[18] Trial Tr., Nov. 9, 2010 (P.M. session), at 20:10; Bruce Henderson Dep. vol. 1 (Oct. 13, 2009), at 31:5-32:9.

against Dana. *Stigliano* holds that no reasonable inference of exposure to asbestos is supported "[w]hen the record reveals that a defendant manufactured both asbestos-containing and non asbestos-containing versions of a product during the time period of alleged exposure, *in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product*."[19] Thus, *Stigliano* addresses a particular, albeit oft-recurring, evidentiary deficiency in product exposure cases; it does not stand for the proposition that a manufacturer is *always* entitled to judgment in its favor merely because it manufactured asbestos-containing and asbestos-free varieties of a product during the time period of the alleged exposure. Here, in contrast to *Stigliano*, Plaintiffs provided evidence linking Bruce and Elizabeth Henderson to asbestos-containing Victor gaskets, thereby creating a triable issue as to causation. The jury was free to credit that evidence, which it did.

Zoom's motion for judgment notwithstanding the verdict is similarly flawed in overlooking that the jury had sufficient evidence from which it could reasonably conclude that Bruce and Elizabeth experienced significant exposures to Zoom's asbestos-containing products. Plaintiffs presented testimony that certain types of automotive clutches would have *had* to include asbestos during the time period the Hendersons operated their garages, regardless of the manufacturer. Ernest

[19] *Stigliano*, 2006 WL. 3026171, at *1 (emphasis added).

Henderson had very particular memories that he and Bruce knew of Zoom clutches from their childhoods and began installing and removing Zoom clutches themselves during the family's years in Lacombe, when both brothers followed their father and uncle in taking up hot-rodding. For such high-performance uses, the Hendersons considered Zoom to be "the best clutch then," and their "standard" for working on hot rods.[20] At trial, Ernest identified a particular Zoom clutch disc from a 1969 Zoom catalog as the type used by the family, including Bruce, in both the Bridge City and Lacombe shops.[21] The clutch featured organic facing, which is visibly distinguishable from ceramic and semimetallic facings, which Zoom also manufactured but never contained asbestos.[22] Although there was conflicting testimony regarding the feasibility of non-asbestos organic clutch facings during the time period of Bruce and Elizabeth's exposures to Zoom products, Plaintiff's expert opined that asbestos-free organic clutch facings were not available until the early 1980s, and one of Dana's experts indicated that "most . . . if not all" clutch facings prior to the 1980s contained asbestos.[23] Thus, the jury's conclusions that Bruce and Elizabeth were both exposed to asbestos from Zoom clutches, and that Zoom was negligent and strictly liable for causing their mesothelioma, were

[20] Trial Tr., Nov. 9, 2010 (P.M. session), at 23:23-24:2; 25:15-21.

[21] *Id.* at 27:11-17.

[22] Trial Tr., Nov. 15, 2010 (P.M. session), at 39:13-40:6.

[23] Trial Tr., Nov. 10, 2010 (A.M. session), at 116:4-16; Nov. 17, 2010 (P.M. session), at 111:8-14.

clearly supported by the testimony. In meeting their burden, Plaintiffs were not required to provide testimony establishing the origins of the Zoom clutches to which Bruce and Elizabeth were exposed, nor the exact dates and numbers of exposures. To the extent the jury allocated Zoom a mere 1% liability with respect to Elizabeth's wrongful death, the jury apparently found that Elizabeth's exposures to Zoom products were more limited than her other causative exposures; however, this finding does not negate the jury's conclusion that Zoom's products were a substantial cause of her mesothelioma.

Zoom next asserts that the Court should apply the 1% apportionment of liability assigned to it by the jury with respect to Elizabeth Henderson's wrongful death award to the total damages in both Elizabeth and Bruce's cases. Apportionment is necessary to conform the verdicts to Louisiana law, Zoom urges, because Plaintiffs failed to present evidence suggesting that the significant exposures of which they complain arose prior to the August 1, 1980 effect date of Louisiana's comparative fault scheme.

The Court must reject Zoom's argument for several reasons. First and foremost, the joint proposed verdict sheet submitted by Zoom and the other parties during trial, as well as Zoom's counsel's failure to raise the issue during the prayer conference or at any other time prior to the end of trial, amount to a clear waiver of its new post-trial argument. At no time prior to trial, during trial, or at the prayer

conference did Zoom's counsel even mention its position that Louisiana's comparative fault law, rather than the pre-1980 contributory negligence/virile share scheme, apply to any part of the jury's award other than the wrongful death damages in Elizabeth's action. Notably, the verdict sheet submitted to the Court, to which Zoom's counsel stipulated, implicitly discounts the prospect of allocating fault among potential joint tortfeasors in Bruce Henderson's case, as it did not include any question asking the jury to assign percentages of liability to those defendants and non-parties it found at fault.

Moreover, had Zoom timely raised its comparative fault argument, Plaintiffs could have recalled witnesses such as Ernest Henderson, Jr.—Bruce's brother and Plaintiffs' surviving product identification witness, who was present throughout the trial—to the extent they might have wished to clarify the time periods at issue. The evidence at trial related to exposures spanning from the 1950s into the early 1980s, and the Court finds Zoom's implication that Plaintiffs failed to establish that the "significant exposures" did not occur before August 1, 1980 to be extremely strained. Certainly, without Zoom raising the issue prior to or during trial, the Court sees no basis for Plaintiffs to have assumed that the applicability of the comparative fault law was at issue with regard to any award in Bruce's case, or with respect to the survival damages award in Elizabeth's case. To the extent there would have been merit to Zoom's position, its failure *timely* to ask that the Court

apply comparative fault principles deprived Plaintiffs of a reasonable opportunity to respond. A finding of waiver is thus entirely appropriate.

Having waived this argument by failing to raise it and by expressly approving the Court's final verdict sheet with the tacit understanding that the virile share system would apply to any damages awarded except as to wrongful death in Elizabeth's case, the Court could simply deny this portion of Zoom's motion without further discussion. Nevertheless, the Court finds it necessary to emphasize the particular flaws in Zoom's rather creative suggestion that since the jury assigned it a mere 1% share of fault with respect to *Elizabeth* Henderson, the Court should now apply that same percentage to limit Zoom's share of the verdict in Bruce's case. Zoom's proposal is both contrary to Louisiana law and inappropriate in light of the evidence, which prevents the Court from concluding that Bruce and Elizabeth experienced identical exposures to Zoom's products. As detailed by expert testimony during trial, Elizabeth's exposures in the offices or parts departments of the Hendersons' businesses, as well as any "bystander" exposures she received when in proximity to the repair work, resulted in lower asbestos doses than Bruce would have incurred in his lengthier exposures during repairs, which required him to remove old clutches and to scrape and airbrush clutch facings as part of the installation of new clutches. Even if the Court concluded that Zoom had not waived the application of comparative fault principles in Bruce's case and

that the virile share system did not apply, it cannot render a valid factual finding that Zoom's comparative fault would amount to 1% in Bruce's case simply because the jury arrived at that figure in Elizabeth's case. Had it been asked to apportion fault in Bruce's case, the jury might well have concluded that, for instance, Johns-Manville was less at fault and the trial defendants more at fault than in Elizabeth's case based upon testimony from Plaintiffs' expert indicating that Bruce's activities in the repair shops would produce higher doses of friable asbestos than Elizabeth received.

The Court also notes that Zoom's comparative fault argument might have come to its attention in a more timely manner had the parties not waited until the last minute to submit jury instructions and the verdict sheet, contrary to this Court's exhortations throughout the trial that these items should have been prepared and submitted on the first day. At this point—after the jury has returned its verdicts in conformance with the jointly-submitted verdict sheet, which the parties and the Court understood at the prayer conference to provide for comparative fault only in Elizabeth's case, and only as to the wrongful death damages—it is far too late to ask the Court to decide this issue.

In a final effort to have this Court disregard the jury's verdict, both Dana and Zoom argue that the Court should apportion the liability imposed by this jury among several non-parties who were expressly found *not* to be liable, despite the

jury's conclusion that Bruce and Elizabeth Henderson were exposed to asbestos from the use of products manufactured or sold by the non-party entities. Had defense counsel established during the trial that these non-parties were joint tortfeasors—a burden which Louisiana law places upon defendants, not plaintiffs—the jury might well have found the non-party entities negligent and strictly liable. Unfortunately for the defendants, the jury performed its duty in a meticulous manner and culled from the evidence those facts which suggested that Bruce and Elizabeth were exposed to asbestos from these other manufacturers' and distributors' products while also concluding that there was insufficient evidence of negligence or product defect as to the non-parties. The verdict accurately reflects the dearth of proof presented by either Dana or Zoom of negligence or product defect with respect to any potential joint tortfeasor other than Johns-Manville.

Under Louisiana law, the burden of proof is on those defendants remaining at trial to establish that the other former co-defendants who have been released through settlement are indeed joint tortfeasors.[24] Plaintiffs submitted case law to this effect on the very first day of trial, putting Defendants and the Court on notice of the concept. Had counsel for Dana and Zoom reviewed the case law—or, once again, had they timely completed their proposed jury instructions—Defendants

[24] *Raley v. Carter*, 412 So.2d 1045, 1047 (La. 1982); *Wall v. Am. Employers Ins. Co.*, 386 So.2d 79, 82 (La. 1980) ("[T]he effect of the pre-trial settlement with the released defendant would be to reduce the plaintiffs' recovery if it were determined at trial that the released [defendant] were a joint tortfeasor.").

might have been more cognizant of this burden during the presentation of their cases. Unfortunately, Defendants' motions come across as an after-the-fact effort to cobble together evidence satisfying their burden in retrospect. Defendants have in essence been relegated to identifying sparse, isolated pieces of evidence that they contend were so overwhelming that they *required* the jury to reach a finding that the non-party entities were all negligent or strictly liable. This effort offers no basis for the Court to conclude that the jury was incorrect in concluding that neither Defendant established that the non-party entities were joint tortfeasors.

Defendants overlook what is meant by "burden of proof" and "preponderance of the evidence," and seriously misconstrue the role of the jury. Indeed, the Court suspects that the jury's understanding of these concepts may be more nuanced than defense counsel's, as the jury's verdict evinces careful attention to the Court's instructions. The burden of proof has not been satisfied simply because defense counsel can identify one or two snippets of evidence, out of an enormous amount of testimony of the course of a complex two-week trial. The phrase "burden of proof" connotes far more than the mere mention of a potential joint tortfeasor's name (which was more than was accomplished as to at least some of the non-parties on the verdict sheet). The term "burden" denotes that *some* effort must be made to leave the jury convinced that something is more likely than

not. The Court's instruction on the burden of proof made that point clearly for the jury:

> Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses. . . In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless I tell you otherwise, consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence, regardless of who produced them.

At the most, Defendants have identified evidence in the record which might have allowed the jury to reach a certain conclusion. That evidence, however, is so scant that the Court cannot say that the jury went against its "great weight" in reaching a different conclusion. The jury decided quite reasonably in finding that the Defendants did not meet their burden based upon *one* question and answer indicating that Bruce Henderson did not recall warning labels on any of the automotive products used at the garages.[25] The Court cannot determine what quantity or kind of additional evidence might have led the jury to conclude that the non-party entities were strictly liable or negligent, but it bears mentioning that the Defendants did not inquire into the lack of warnings with respect to non-party entities' specific products, did not address how often the products were used in the Hendersons' businesses such that Bruce Henderson's testimony that warnings were

[25] Bruce Henderson Dep. vol. 1 (Oct. 13, 2009), at 82:1-4.

not provided would be credible and applicable as to each non-party defendant's products, did not explore the level of asbestos content of the non-parties' products, and did not offer testimony regarding the non-parties' level of knowledge about asbestos hazards. For several of the non-party defendants, an appearance on the verdict sheet was the first or second time they were mentioned to the jury. Frankly, the Court wondered throughout the trial whether and when Defendants would make clear to the jury that the non-party entities could be deemed joint tortfeasors. It never happened.[26]

Defendants' reliance upon Plaintiffs' counsel's opening statement and closing argument to demonstrate that they had met their burden of proof to establish the non-parties' joint tortfeasor status is perhaps the strongest suggestion of how deficient Defendants' trial evidence regarding the non-party entities was. The portion of Plaintiffs' counsel's closing argument to which the Defendants point in an effort to suggest that the jury should have found the non-parties to be

[26] Dana cites a Sixth Circuit Case, *Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir. 1998), in support of its position. In *Strickland*, a jury apportioned 70% fault for the plaintiff's asbestos-related lung cancer to a *supplier* of Kaylo, an asbestos-containing insulation. The Sixth Circuit held that the apportionment was unreasonable because it necessarily implied that the jury considered Kaylo's manufacturer to be significantly less at fault than its supplier—a conclusion for which even the plaintiff's attorney could not offer a logically or legally tenable rationale, particularly in view of the presumption under applicable Kentucky strict liability law that a manufacturer is presumed to be aware of the condition and risks of its products. *Id.* at 356-57. In this case, by contrast, Dana was the manufacturer of gaskets to which Elizabeth and Bruce were exposed. Moreover, as explained above, there were significant differences in the quantity and quality of evidence offered as to Dana, Zoom, and Johns-Manville products versus the products associated with the non-party defendants to which the jury did not assign any liability.

joint tortfeasors is at best equivocal and at worst too inarticulate to be held as adopting any particular position:

> Before I get to damages . . . if you find that we've met our burden of proof, which I strongly believe you will, you'll find a list of other companies, again, that they [*i.e.*, trial defendants] will have the burden of proving all of the different elements. . . .
>
> Here are some companies, right: American Brake Liner . . . There's certainly evidence of exposure to the American Brake Liner product. There's certainly evidence that they were a substantial cause, but the defendants have not brought in any evidence about this company, really, what they knew, what they did. And it's up to you to find whether you believe that they've met their burden of proving fault against the other companies.
>
> But certainly NAPA, you know, there's evidence about NAPA brakes. Clutches, Borg-Warner, there's evidence there. Bendix, there's evidence about their brakes. No evidence in this case, none, of Genuine Parts Company. . . .
>
> A company named 84 Lumber, there's been no evidence about 84 Lumber. I would suggest when you get to that, you cross it out because they have to prove just like we have to prove. . . .
>
> Other companies you'll see and you'll decide what you remember from the evidence. Georgia-Pacific was one of the joint compounds. Certainly there's evidence there of exposure, and they would be part of the cause. Ford Motor company, they're certainly part of it.[27]

The Court cannot reach any firm conclusion regarding what Plaintiffs' position on the status of the named entities is from this language, and *a fortiori* it cannot conclude that the jury was obligated to do so. Did counsel mean to suggest that there was "evidence" of exposure to these companies' products or warnings on

[27] Trial Tr., Nov. 19, 2010 (A.M. session), at 98:19-100:9.

them, or that there was evidence of *no* exposure or *no* warnings on them? Plaintiffs' counsel made similar statements in his opening statement:

> We are not here to tell you that Dana and Zoom are the only two companies responsible for causing the Hendersons to die. There are other companies that certainly exposed the Hendersons to asbestos. Just like these companies did, you will hear about Bendix brakes, Abex brakes, called American Brake Block, NAPA brakes, you will hear about other clutch companies that made clutches. You will hear about a company Johns-Manville that supplied clutch facings to Zoom, then Zoom sold the finished product under their packages. The Hendersons are here to hold all companies responsible that caused them to be exposed to asbestos, [hold] all the companies responsible that caused them to get mesothelioma.[28]

As the jury was instructed, attorneys' statements are not evidence, and these particular statements are far from a judicial confession of the named non-parties' joint tortfeasor status. Plaintiffs' counsel's remarks that the jury "would hear about" exposures and that "there was evidence" of non-parties' products did not mandate that the jury had to reach a certain conclusion and cannot remedy Defendants' failure to present evidence at trial on the culpability of the non-party entities. In the single instance in which Plaintiff's counsel referenced the concept of substantial cause with regard to a non-party defendant not found liable by the jury, he referred to *evidence* of causation, and promptly made clear that the decision of how to view that evidence was "up to" the jurors.

[28] Trial Tr., Nov. 8, 2010 (A.M. Session), at 31:19-32:10.

The jury, after repeated instructions to the effect that what attorneys say is *not* evidence, was left to search for trial testimony establishing by a preponderance of the evidence that the non-party entities should bear joint tortfeasor status. To the extent *any* evidence on this point existed as to most of the non-parties, it was far from convincing. The jury's decision to single out Johns-Manville as the only joint tortfeasor from a list of thirteen potentially liable non-parties is fully supported by the extensive evidence put forth by both Plaintiffs and Defendants at trial regarding the Marrero plant's location, its dissemination of amphibole-type asbestos into the surrounding community, and the presence of amphibole asbestos in Elizabeth Henderson's lung tissue.

In contrast to the detailed circumstantial evidence that supported the jury's conclusion that Johns-Manville's asbestos products were a substantial contributing factor in causing both Elizabeth and Bruce's mesothelioma, there was virtually no evidence proffered by any party concerning the other manufacturers and distributors of asbestos products that were originally co-defendants in the case. Defendants' decision to focus on Johns-Manville and not on other non-parties, whether the result of strategy, inadvertence, or ignorance of their burden under Louisiana law, resulted in a verdict that reflects careful scrutiny by the jury and jurors' attentiveness to the Court's detailed instructions. That verdict does not offer a basis for any of the relief Defendants now seek.

Finally, Dana has moved to strike a footnote in Plaintiffs' opposition to its motion that seeks to incorporate arguments Plaintiffs made with respect to Zoom's motion, as well as an attached "Addendum" containing a multi-page table of Plaintiffs' evidence offered against Defendants. Dana contends that Plaintiffs have attempted an end-run around the Court's four-page length limitations on motions and responses.

Counsel for Plaintiffs might have done well to seek permission in advance rather than provide explanations after the fact for why they have not violated the spirit of the Court's page limitations. Nevertheless, the Court finds no basis to strike either Plaintiffs' addendum or their reference to their opposition to Zoom's motion on the issue of Plaintiffs' alleged judicial confession. As Plaintiffs note, their addendum assembles references to information contained in a voluminous record and refers *only* to evidence already attached as exhibits to their opposition. A party's choice of the particular record excerpts used as exhibits to a motion or response is always, in a sense, a part of their argument, but the addendum itself does not add to Plaintiffs' argument any more than the exhibits themselves. The addendum simply organizes those exhibits for the Court's benefit in a manner that could also have been accomplished by a detailed table of contents or by footnotes in the response itself.

Plaintiffs' decision to reference their opposition to Zoom's motion in response to Dana's motion is not the Court's preferred practice, but does not merit striking Plaintiffs' response to Dana's judicial admission argument. All of the parties were instructed to comply with the Court's four-page limitation on motions and responses, with the understanding that additional briefing might be ordered by the Court if deemed necessary (which it was not). Under these circumstances, the parties had to make strategic decisions regarding what issues merited the most page space. Resolving the identical arguments raised by both defendants required the Court to determine whether Plaintiffs' counsel's statements constituted a judicial admission, and it would have been illogical for the Court to reach a differing conclusion on that question in addressing the defendants' separate motions. Plaintiffs recognized that fact and allocated their pages accordingly. Indeed, *Dana* devoted just a single sentence to judicial admission in its motion. Had Plaintiffs used the brief footnote they allotted to the issue in their response to Dana's motion to deny conclusorily that a judicial admission occurred, or even omitted the issue entirely from their opposition, the Court's decision would not have changed.

VI. Conclusion

While they have launched a multiplicity of attacks upon the jury's conclusions, Defendants Dana and Zoom ultimately fail to make the requisite

showing that no reasonable jury could have found for Plaintiffs or that the verdicts were against the great weight of the evidence. The jury's verdicts were both reasonable and adequately supported by the evidence when viewed in the light most favorable to the Plaintiffs and with all reasonable inferences drawn in Plaintiffs' favor. Therefore, Dana's Renewed Motion for Judgment as a Matter of Law and Alternative Motion for New Trial, as well as Zoom's Motion for Judgment Notwithstanding the Verdicts or, In the Alternative, Motion to Amend the Verdicts are hereby **DENIED**. Dana's Motion to Strike portions of Plaintiffs' opposition is also **DENIED**.

IT IS SO ORDERED.

_____

Peggy L. Ableman, Judge