Robaey v Air & Liquid Sys. Corp.

2018 NY Slip Op 32582(U)

October 11, 2018

Supreme Court, New York County

Docket Number: 190276/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11
--X INDEX NO.: 190276/13
EDWARD ROBAEY, as Administrator for the Estate of MARLENA F. ROBAEY, and EDWARD ROBAEY, Individually,

Plaintiffs,

-against-

AIR & LIQUID SYSTEMS CORPORATION, as successor-by-merger to BUFFALO PUMPS, INC., et al,

Defendants.
--X
JOAN A. MADDEN

Defendant Federal Mogul Asbestos Personal Injury Trust, as Successor to Felt Products Manufacturer's ("Fel-Pro") moves after a jury verdict in favor of Plaintiffs Marlene F. Robaey (Ms. Robaey) and her husband, Edward Robaey (Mr. Robaey) for judgment as a matter of law, or, in the alternative, for an order setting aside the verdict and ordering a new trial as against the weight of the evidence, or ordering a new trial on the grounds the court committed errors with respect to evidentiary rulings or, that the reckless finding was unsupported by the evidence, or, in the alternative, for remittitur. Plaintiffs oppose the motion arguing that the verdict is supported by legally sufficient evidence; that the verdict was not against the weight of the evidence; that the evidentiary rulings were correct; and that remittitur, if any, should be modest.

In this action plaintiffs sued various defendants alleging Ms. Robaey developed peritoneal mesothelioma as a result of exposure to asbestos from their individual products. Plaintiffs' claims against certain defendants were settled or discontinued, and at verdict, two defendants remained, Fel-Pro and Dana, both manufacturers of gaskets. The jury returned a verdict finding that defendant Fel-Pro, and co-defendant Dana were liable, and assigned the following percentages of fault: Dana 40%, Fel-Pro 30%, Crane 20%, and Cleaver-Brooks 10%.

The jury awarded damages of $50 million to Ms. Robaey for pain and suffering, $40

million for past and $10 million for future; and $25 million to Mr. Robaey for loss of consortium, $15 million for past, $10 million for future. Dana settled post verdict, and, Fel-Pro now makes this motion for the post-trial relief indicated above.

At trial, Ms. Robaey contended that she developed peritoneal mesothelioma from exposure to asbestos from various asbestos containing products, including Fel-Pro's automotive gaskets. Ms. Robaey alleged such exposure while working next to Mr. Robaey as he scraped worn gaskets and while she scraped gaskets from different parts of car engines, while sweeping asbestos containing dust after completing such work, and while laundering her husband's clothes which he wore during such work. To the extent relevant to this motion, and as argued by Fel-Pro in its papers, with respect to liability issues, Fel-Pro contends, *inter alia*, that plaintiffs failed to establish sufficient evidence of quantification of Ms. Robaey's exposure to asbestos from its gaskets. Fel-Pro contends, based on the lack of proof as to quantification, that as a matter of law, it is entitled to judgment notwithstanding the verdict, or, in the alternative, to have the verdict set aside as against the weight of the evidence. Plaintiffs contend that sufficient evidence of quantification was established from Ms. Robaey's repeated exposure to asbestos released into the air and the visible dust created by such release. Specifically, plaintiffs contend that asbestos released during the engine work Mr. and Ms. Robaey did on worn Fel-Pro gaskets, sweeping asbestos debris of such work and laundering Mr. Robaey's clothes established sufficient evidence of quantification.

CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial ... where the verdict is contrary to the weight of the evidence [or] in the interests of justice." The standard for setting aside the verdict and entering judgment for

the moving party as a matter of law is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a trial judge asked to direct a verdict." Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978). However, "in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus, a valid question of fact exists, the court may not conclude that the verdict is as a matter of law not supported by the evidence." Id (citation omitted). Moreover, "[i]n considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." See Szczerbiak v Pilak, 90 NY2d 553,556 (1997).

The standard used in determining a motion to a set aside a verdict as against the weight of the evidence is whether the evidence so preponderated in favor of the moving party, that the verdict "could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., 86 NY2d 744, 746 (1995), quoting Moffatt v. Moffatt, 86 AD2d 864 (2d Dept 1982), aff'd 62 NY2d 875 (1985). This "does not involve a question of law, but rather a discretionary balancing of factors." Cohen v. Hallmark Cards, 45 NY2d at 499.

I. MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW AND AS AGAINST THE WEIGHT OF THE EVIDENCE

As to Fel-Pro's argument that it is entitled to judgment as a matter of law on the grounds that plaintiffs failed to present legally sufficient evidence of quantification with respect to specific causation, Fel-Pro characterizes plaintiffs' theory of liability, as espoused by plaintiffs'

experts, as based on "cumulative exposure," and "visible-dust testimony, " and argues that evidence of this nature is insufficient as plaintiffs failed to quantify Ms. Robaey's exposure to asbestos from Fel-Pro's gaskets. Absent quantification evidence, Fel-Pro argues that plaintiffs' proof fails as a matter of law, as plaintiffs failed to show that Ms. Robaey was exposed to asbestos from Fel-Pro's gaskets in an amount sufficient to be a contributing cause of her peritoneal mesothelioma. In support of this argument, Fel-Pro principally relies on the opinion of the First Department in In re New York City Asbestos Litig., (Juni v A O Smith Water Prods. Co.), (Juni), 148 AD3d 233 (1st Dept 2017). Specifically, Fel- Pro argues that the causation evidence based on visible dust theory was insufficient to establish quantification, as plaintiffs failed to present evidence of a nature which it contends the court in Juni found acceptable to establish quantification, that is, mathematical modeling, product specific studies, epidemiological studies, or case reports. Fel-Pro also argues that as plaintiffs failed to present this type of evidence, that plaintiffs' proof lacks a scientific method for assessing the level of exposure to asbestos from its gaskets, and therefore lacks scientific expression of quantification as required by Parker v Mobil Oil Corp., 7 NY3d 434, 448 (2006). In addition, Fel-Pro argues that plaintiffs' causation proof is insufficient as their expert testimony, based on cumulative exposure, was rejected in Juni, and by courts in other jurisdictions.

In opposition, plaintiffs argue that contrary to Fel-Pro's position, the First Department in Juni ("the Juni Court") did not reject the visible dust nor cumulative exposure theories, but rather differentiated the quantum of proof presented in Juni from proof adduced in other cases where verdicts based on such evidence were upheld. Plaintiffs point to various appellate and trial court decisions discussing the sufficiency of visible dust evidence, and, as to Juni, argue that the opinion does not stand for the broad proposition, as urged by Fel-Pro, that certain types of proof,

such as mathematical modeling, product studies, epidemiologic studies or case reports are required to establish sufficient proof of specific causation. Plaintiffs argue that the evidence presented as to the consistency, duration and intensity of Ms. Robaey's exposure to asbestos from Fel-Pro's gaskets is sufficient to establish quantification, and in support of this argument, point to language in Parker.[1]

New York law requires that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation), and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (citations omitted)." Parker, 7 NY3d at 448. In Parker, the Court recognized that in certain cases, "a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value," and went on to say that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose- response relationship, provided that whatever methods an expert uses to establish causation, are generally accepted in the scientific community." Id at 447-448.

With respect to the sufficiency of evidence of visible dust as proof of specific causation, precedent from numerous appellate and trial court decisions establish a lengthy history of holding that proof of a plaintiff's repeated exposure to visible dust from a defendant's asbestos containing product is a sufficient evidentiary foundation for an expert to opine that exposure to asbestos from the manipulation of the product was a substantial contributing factor in causing a plaintiff's asbestos related disease. Dominick v Charles Miller & Son Co., 149 AD3d 1554 (4th

[1]Plaintiffs also argue that visible dust is a "proxy indicator" of exposure levels, similar to "odor thresholds" discussed in Sean R, v BMW of North America, 26 NY3d 801, 810-11 (2016).

Dept 2017);[2] Lustenring v AC&S, Inc., 13 AD3d 69 (1st Dept 2004), lv denied 4 NY3d 708 (2005); Penn v Amchem Prods., 85 AD3d 475 (1st Dept 2011); Matter of New York Asbestos Litig (Marshall)., 28 AD3d 255 (1st Dept 2006); Berger v Amchem Prods., 13 Misc3d 335 (Sup Ct NY Co 2006). In Lustenring, long cited for the sufficiency of visible dust evidence, the First Department found the evidence sufficient where the expert testified that clouds of dust created during the long hours plaintiff worked manipulating defendant's gaskets and packing, "necessarily contained enough asbestos to cause mesotheliom." Lustenring, 13 AD3d at 70.

Fel-Pro's attempt to undermine the visible dust theory, based on Juni, is unpersuasive. The Juni Court did not invalidate causation evidence based on the visible dust evidence, but rather characterized the expert testimony in Juni as showing only an "increased risk and association between asbestos and mesothelioma" and that "concessions" made by plaintiff's experts on general and specific causation rendered their "assertions groundless or unsupported." Juni, 148 AD3d at 237. In Juni, while the decision indicates the claims at trial involved asbestos exposure from work on defendant's brakes, clutches and manifold gaskets, the decision addresses the quantification issues only with respect to brakes. Id. at 367. According to the decision, the concessions to which it referred involved testimony from one of plaintiff's experts that there was no measurement of the asbestos to which the plaintiff was exposed from work on defendant's brakes, and while the expert testified that the visibility of dust indicates the magnitude of exposure, studies showed that 99% of the debris from brakes is not comprised of

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[2]In a post submission letter, plaintiffs point to the opinion in In re New York Asbestos Litig.:Miller v BMW of North America, 154 AD3d 441 (1st Dept 2017),lv denied 30 NY3d 909 (2018) to support their argument that notwithstanding the opinion in Juni, visible dust evidence remains a valid basis with respect to causation. The underlying decision by the trial court has a detailed analysis of the legal history and sufficiency of proof of visible dust in asbestos litigation.

asbestos. The Court also referred to testimony of plaintiff's other expert that 21 out of 22 epidemiological studies addressing asbestos exposure to mechanics working on friction products found no increased risk of mesothelioma, that asbestos mixed with resin during manufacturing would not be respirable, and that asbestos exposed to high heat in brake drums converts most of the asbestos to another mineral, forsterite.

In reaching these conclusions, the Juni Court distinguished the evidence regarding visible dust in the decisions in Lustenring and in Penn, noting in those trials the evidence linked visible dust to the defendant's product, and "expert testimony established that the extent and quantity of the dust to which plaintiff was exposed contained enough asbestos to cause mesothelioma." 148 AD3d at 239. Significantly, the Juni Court noted that in those opinions, the court found the evidence sufficient where the expert testified that the visible dust "necessarily contained enough asbestos to cause mesothelioma." Id. The Court specifically noted that in Lustenring, plaintiff was exposed to asbestos while working all day long in clouds of dust, and contrasted the expert testimony in Penn with that presented in Juni, with respect to the contents of the dust to which the decedent in Juni was exposed which it described as "equivocal at best." Id.

In the instant case, at trial Mr. Robaey testified he owned and raced various automobiles from the 1970's into the 1990's including a Chevy Impala, Ford Mustang and a Chevy Nova.[3] (Trial transcript ["Tr"] at 2786). According to plaintiffs' claims, the time period at issue with respect to Ms. Robaey's exposure to asbestos from Fel-Pro's gaskets ranged from 1973 through 1986. As racing cars require constant maintenance of the engines, Mr. Robaey testified he did this work in his garage, which work included scraping off worn gaskets and replacing them with

[3]Mr. Robey testified he purchased the 1965 Impala in 1970; and the Mustang in 1971, which he kept for 19 years. Tr at 2786.

new ones. Tr 2788–90. Mr. Robaey further testified that he raced from 1973 into the 1990's, and that Ms. Robaey participated in the engine work after their marriage in September 1974. Tr 2765-67; 2814. According to Mr. Robaey, he used Fel-Pro or Victor (Dana) gaskets, and, as gaskets never came off in one piece, they had to be scraped, which created dust that "you could see floating in front of you." Tr at 2813-14; 2799; 2816-17. Mr. Robaey also testified he would do engine work every couple of weeks; a complete engine overhaul every three to four weeks or sooner if needed; and that he and Ms. Robaey handled "thousands" of Fel-Pro and Victor gaskets. Tr at 2817; 2818. As he did not wear any protective clothing, Mr. Robaey explained the dust you would see floating in the air, would settle on his blue jeans and t-shirt, which clothing Ms. Robaey would later launder. Tr at 2794-95; 2797. In addition, Mr. Robaey testified that when Ms. Robaey helped with the work, including scraping the head and other gaskets, that "she would scrape off the parts [he] was taking off;" that the gaskets were dry and very dusty and she would get dust on her hands; and that the dust and debris from the work would wind up on the floor. Tr at 2798; 2814; 2800. In connection with her participation in the engine work, Ms. Robaey testified that Mr. Robaey did work in the garage almost every weekend after drag racing, that she would help with the scraping, including scraping gaskets, that the gaskets Mr. Robaey used had Fel-Pro and Victor on the packaging. Tr at 2731. Ms. Robaey also testified that she would see "dust particles" in the air when she swept up the debris and dust from the engine work on the garage floor, and she would also see "dust particles" when she shook out Mr. Robaey's automotive work clothing, before laundering. Tr at 2734-35.

With respect to Fel-Pros gaskets, plaintiffs called Robert Pearlstein, who testified as a representative authorized to speak on behalf of Fel-Pro. Mr. Pearlstein testified that in 1957 Fel-Pro employed 1,400 employees, and during 1974 sold millions, if not tens of millions of gaskets,

although not all gaskets contained asbestos. Tr at 2041; 2076. Relevant to the issue of visible dust, Mr. Pearlstein testified that from 1974 until the mid 1980's, Fel-Pro manufactured asbestos containing cylinder head and exhaust gaskets, and that the majority of intake manifold gaskets it manufactured[4] contained asbestos. Tr at 2045-46; 2048; 2076. Mr. Pearlstein further testified that the head gaskets manufactured by Fel-Pro during this time contained 50-85 percent asbestos.[5] Tr at 2054. Moreover, Mr. Pearlstein testified that Exhibit 52 described as a Fel-Pro MSDS sheet (Material Data Safety Sheet), originally prepared in 1977 and revised in 1986, showed that engine and diesel fuel engine gaskets material contains approximately 70 -90 percent asbestos. TR at 2115; 2198-99.

As to medical testimony regarding causation, plaintiffs called Dr. Steven Markowitz and Dr. David Schwartz. Dr. Markowitz, board certified in internal and occupational medicine, an epidemiologist and professor at Mt. Sinai School of Medicine, testified regarding general causation, specifically that asbestos can cause peritoneal mesothelioma so long as "the exposure occurred on a repeated basis over a period of time." Tr at 420. In connection with quantification, Dr Markowitz referred to the method used to assess a worker's exposure to asbestos, explaining that because workers are not able to supply measurements of their exposure in the field, the method used to assess whether a worker's exposure was significant, is to assess the task performed in interacting with the asbestos containing product, how frequently and the duration

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[4]Mr. Pearlstein first testified that some intake manifold gaskets contained asbestos, but when questioned about prior testimony, agreed he previously testified that the vast majority of such gaskets contained asbestos. Tr 2046-2052.

[5]In addition, Donna Ringo, an industrial hygienist, called by Crane Co., testified that tests she conducted on compressed asbestos sheet material contained 75-85 percent asbestos and some were lower, but that 80 percent is pretty standard. Tr at 3867. Testimony from Mr. Pearlstein indicated that Fel-Pro purchased the material for making gaskets. Tr at 2056.

of time over which the task was performed, whether the activity produced airborne dust and whether work by co-worker nearby produced dust containing asbestos. Tr at 420-21. He also testified that products containing chrysotile asbestos, the type of asbestos at issue, when used in a manner creating visible dust can cause malignant mesothelioma, as can chrysotile asbestos on work clothes which are manipulated in a manner to create visible dust. Tr at 425. Dr. Markowitz further testified that all forms of asbestos are toxic, including chrysotile asbestos, that asbestos fibers are microscopic, when an asbestos containing product is disturbed in some way such as grinding, sanding or sawing, the fibers are released into the air and become airborne, which is called their aerodynamic quality; while the fibers will eventually settle on a surfaces or clothing, they will again become airborne when disturbed. Tr at 338-340. Due to their aerodynamic quality, asbestos fibers are breathed in and eventually get into the lungs; and can travel through the blood or lymph system to other parts of the body, a process called translocation. Tr at 341; 354; 376.

According to Dr. Markowitz, toxins have target organs, "the place where they tend to do their damage;" that asbestos has a number of organs, but "primarily the lungs and various mesothelioma tissue in the body;" Tr at 348. Dr. Markowitz explained that there are four types of mesothelioma tissue, that mesothelioma tissue are layers of tissue that surround spaces in the body containing organs; and that mesothelioma tissue occurs around the lungs in the pleura, around the abdomen or peritoneum in the peritoneal layer; around the heart (pericardium), and in males in the testicles. Tr at 369-70. As to translocation, Dr. Markowitz testified that asbestos fibers, in addition to being carried to the mesothelioma tissue in the peritoneum via the blood or lymph system, when inhaled can penetrate the outer lung and get into the pleura at the base of the lung, go through the pleura into the diaphragm and then into the peritoneum. Tr at 376.

Finally, Dr. Markowitz testified that the fibers can get into the intestines and travel through the intestinal wall into the peritoneum. Tr at 377.

Dr. David Schwartz, a Professor of Medicine and Immunology at the University of Colorado School of Medicine and at the National Jewish Health in Denver Colorado, Director for Genes, Environment and Health and Chair of the Department of Medicine at Colorado, testified with respect to specific causation. To the extent relevant to this issue, in four hypothetical question, Dr. Schwartz was asked to assume with respect to Fel-Pro gaskets, under circumstances detailed in each hypothetical, that between 1974 and 1986, Mr. Robaey on a regular basis serviced and repaired various vehicles he owned, that the work entailed taking apart the engine, that the engine work he performed included scraping several asbestos containing gaskets from engine components, that the scraping caused asbestos dust to be released into the air such that the dust was visible, and that Mrs. Robaey breathed in the visible dust. Tr at 1762-67.

The first hypothetical asked Dr. Schwartz to assume that the asbestos containing dust settled on Mr. Robaey's clothing, and that when Ms. Robaey shook the clothing before laundering them, she saw visible dust emanating from the clothing; the second asked him to assume that Ms. Robaey was exposed to visible dust while standing next to Mr. Robaey while he scraped gaskets, the third asked him to assume dust and debris from scraping gaskets settled on the garage floor, and that when Ms. Robaey swept the floor the dust became re-entrained in the air, and the fourth hypothetical asked him to assume that Ms. Robaey scraped gaskets from the engine at times and that this created visible dust. Dr. Schwartz testified in response to each hypothetical that Ms. Robaey's exposure to asbestos in the visible dust under the particular circumstance described, was a substantial contributing factor in causing her peritoneal

mesothelioma. Tr at 1762-69. Dr. Schwartz later explained that such a determination is based on the consistencies, intensity and duration of a plaintiff's exposure to a defendant's asbestos containing product. Tr at 1769.[6] In this connection, Dr. Schwartz testified that the method used with respect to measuring a worker's exposure is to take an occupational history of the worker, that is, what they did in the workplace, what product they worked with, and that a product specific study is not necessary because "causal exposure is not product dependent, it's toxin dependent." Tr at 1221.

Applying the above cited precedent with respect to the viability of the visible dust theory, and based on the evidence of the consistency, intensity and duration of Ms. Robaey's exposure to asbestos from Fel-Pro's gaskets, I find the evidence is sufficient to establish general and specific causation in accordance with the dictates of Parker. The evidence established that Ms. Robaey was exposed to a toxin, asbestos, that asbestos is capable of causing peritoneal mesothelioma, and that plaintiff was exposed to sufficient levels of asbestos from Fel-Pro's gaskets to cause peritoneal mesothelioma. See Parker, 7 NY3d at 448.

I reach this conclusion, in part, for the same reasons articulated by the Juni Court as to the sufficiency of the proof in Lustenring and Penn; that the evidence establishes that the extent and quantity of the visible dust to which Ms. Robaey was exposed, necessarily contained enough asbestos to cause Ms. Robaey's mesothelioma. Both Dr. Markowitz and Dr. Schwartz testified that the method used to assess Mrs. Robaey's exposure is the method historically used in assessing a worker's level of exposure to asbestos, and as discussed above, courts have

[6]This explanation was given during questioning in connection with Dana gaskets and in response to an assumption that the work was done on a regular basis. That the work was done on a regular basis was part of the assumption in Fel-Pro hypotheticals. Moreover, the evidence as a whole referred jointly to work on Fel-Pro and Dana gaskets occurring on a regular basis.

repeatedly upheld the sufficiency of evidence of visible dust such as presented here. See Dominick, supra; Lustenring, supra; Penn, supra. Specifically, as to consistency and duration of exposure, the evidence established, that the Robaeys worked weekends on the engines in Mr. Robaeys' vehicles for approximately fifteen years.

As to intensity, Mr. Robaey testified to using thousands of Fel-Pros gaskets; evidence established Fel-Pro's gaskets contained between 50- 80 percent asbestos; the work involved scraping worn gaskets, which released asbestos fibers into the air creating visible dust which Ms. Robaey inhaled during the work, and when she swept afterwards and when she laundered Mr. Robaeys' clothing. When the Robaeys' testimony is considered with respect to the type of work performed with Fel-Pro's gaskets, that the work created visible dust, the frequency and duration of the work, together with the asbestos content of the gaskets, a sufficient foundation with respect to quantification had been laid for Dr. Schwartz's opinion as to causation.

Moreover, I find unpersuasive Fel-Pro's argument that plaintiffs' proof fails for lack of evidence of scientific expression of quantification as required by Parker. Fel-Pro's argues, inferentially, that evidence of a scientific method must be of a specific nature, such as mathematical modeling, or a product specific study or industrial hygiene evidence measuring the level of exposure from working with asbestos containing gaskets. Fel-Pro asserts that plaintiffs' experts testified "only in terms of an increased risk and association between asbestos and mesothelioma" and that plaintiffs rely on the visible dust and cumulative exposure theories. While Parker requires that evidence must show a scientific expression of quantification, as to the nature of proof, the Court neither set forth any requirement as to the nature of acceptable evidence, nor precluded types of evidence other than those discussed in its decision. The Parker Court specifically stated that there could be several ways of proving causation other than exact

quantification, as long the method used was found to be generally acceptable as reliable in the scientific community. Parker, 7 NY3d at 449. As discussed above, plaintiffs' evidence with respect to the consistency, duration and intensity of Mrs. Robaey's exposure, and the testimony of Dr. Markowitz and Dr. Schwartz, satisfies Parker's requirement of scientific expression.

As to Fel-Pro's argument that plaintiffs' theory of quantification is legally insufficient as it is based on evidence it characterizes as the cumulative exposure theory, which it asserts the Juni Court rejected, this argument is without merit. First, the Juni Court did not reject the cumulative exposure testimony, as the opinion limits its remarks with respect to the testimony, to "the manner proposed by plaintiffs" in Juni. The Court did however state that the testimony in Juni, as to cumulative exposure "is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether the exposure was sufficient to be found a contributing cause of the disease." Juni, 148 AD3d at 29 (citation omitted).

Here, as discussed above, scientific expression of quantification of exposure was established by evidence of the frequency (consistency), duration and intensity of exposure, such that the holding in Juni is factually distinguishable. In any event, plaintiffs do not rely on the cumulative exposure testimony of their experts as a "theory" to prove quantification as argued by Fel-Pro. Dr. Markowitz testified in assessing the level of exposure it's "really the total dose, the total cumulative exposure from all those opportunities for exposure and that dust from asbestos containing gaskets all contribute to the total dose that caused the disease," and that "you can't really exclude any exposure." Tr at 422-23. However, as to causation, Dr. Markowitz testified, as previously noted, that exposures can cause mesothelioma, provided the exposures occurred repeatedly over a long period of time. Similarly, Dr. Schwartz testified that Mrs.

Robaey's peritoneal mesothelioma was caused by "the cumulative aggregate exposure to asbestos during her lifetime between 1974-1990." Tr at 1774. Dr. Schwartz explained that, "mesothelioma is an unusual disease because there does not appear to be a safe level... Even small exposures to asbestos can probably cause mesothelioma. There is no safe no threshold. In other words, you don't have to be exposed to a certain amount of asbestos to cause mesothelioma. But there is a dose response to asbestos. The more you get exposed to, the higher your risk of developing mesothelioma. " Tr at 1735. Dr Schwartz also testified that he had not quantified the dose of exposure, had not conducted any industrial hygiene studies regarding the removal of automotive gaskets, and was not able to "determine the relative contribution of the exposure." TR at 1891; 1860.[7] As to specific causation, as previously noted, Dr. Schwartz testified that the consistency, intensity and duration of Mrs. Robaey's exposure to asbestos from Fel-Pro's gaskets contributed to her developing peritoneal mesothelioma. Fel-Pro's argument misconstrues the underpinnings of plaintiffs' expert opinions as to general and specific causation. Although both Dr. Markowitz and Dr. Schwartz testified that it is the cumulative dose that causes mesothelioma and that any dose cannot be excluded, each based their opinion that to establish a casual relationship between exposure and mesothelioma, the exposure to asbestos from a particular product depends upon the consistency, duration and intensity of exposure. Fel-Pro's argument that plaintiffs' experts testified only in terms of an increased risk and association between asbestos and mesothelioma absent quantification, fails for the same reason.

[7]Fel-Pro cites Dr. Schwartz's response to a question asked by counsel for co-defendant Crane Co.

Based upon the foregoing conclusions with respect to the legal sufficiency of plaintiffs' proof of quantification of exposure to asbestos from Fel-Pro's products, Fel-Pro's motion for judgment notwithstanding the verdict and to set aside the verdict on that ground is denied.

II. MOTION TO SET A VERDICT AS TO SIDE THE RECKLESSNESS

Fel-Pro argues the verdict as to recklessness should be set aside and a new trial ordered on the grounds that plaintiffs failed to produce sufficient evidence that Fel-Pro acted intentionally; specifically that the Fel-Mogul Personal Injury Trust as Successor to Felt Products Manufacturing Company, the named defendant, was created only to answer lawsuits alleging personal injuries; that the Trust Agreement precludes recovery for intentional conduct; and that insurance provisions preclude coverage for intentional conduct.[8] Plaintiffs oppose this aspect of the motion, arguing that sufficient evidence supports the jury's finding of recklessness, that a reckless finding is not based on intentional conduct, and that neither the Trust Agreement nor insurance coverage provide a basis for precluding a finding of recklessness for the purpose of molding a verdict, and that lack of insurance coverage is not a legal basis to set aside the finding of recklessness.

Under New York law, to establish a reckless disregard for the safety of others, it must be shown that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and has done so with conscious indifference to the outcome." Maltese v Westinghouse Electric Corp., 89 NY2d 955 (1997).

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[8]Fel-Pro also asserts in its memo of law at 17 that the recklessness finding is punitive in nature, and that the "Trust itself precludes any claims for punitive or exemplary damages," but fails to provide any legal argument for this statement nor any reason to set aside the recklessness finding based on this assertion.

As to its assertion that the sole purpose of the Trust is to answer claims alleging asbestos-related injuries, Fel-Pro points to section 1.2 of the Trust Agreement which states that the purpose of the Trust "[i]s to assume the liabilities of ...[Fel-Pro] for and with respect to all Asbestos Personal Injury Claims," and cites this section of the Trust Agreement together with section 1.25 of the Asbestos Bodily Injury Coverage In Place Agreement (Insurance Agreement), which, inter alia, states that a "Covered Fel-Pro Asbestos Claim" shall not include: (b) "Any Claim or portion of any Claim, that seeks damages based solely upon conspiracy or other intentional conduct."

Of significance to the issue of recklessness, it must be noted that the legal effect of the recklessness finding is to impose joint and several liability on Fel-Pro pursuant to CPLR 1602(7) without regard to percentages of fault and the limitations imposed by CPLR 1601. See Chainese v. Meirer, 98 NY2d 270, 275-276 (2002)(exceptions in CPLR 1602 are intended to prevent certain types of tortfeasors, including those committing intentional acts, from invoking the benefits of CPLR 1601 which limits joint and several liability of tortfeasors whose share of fault is 50% or less). As to Fel-Pro's argument regarding the Trust Agreement and insurance coverage, Fel-Pro fails to point to any specific provision in the Trust Agreement to support this argument so as to preclude damages based on a finding of recklessness, and fails to cite any law in support of its argument that lack of insurance coverage is a ground to deny damages flowing from the recklessness finding. Even if the lack of coverage is assumed to bar recovery, section 1.25 excludes coverage for a claim based solely on intentional conduct. As argued by plaintiffs, the recklessness finding is rooted in plaintiffs' claim of negligent failure to warn of the dangers of exposure to asbestos from use of Fel-Pro's gaskets. See Prosser and Keeton on Torts, section 34 at 213, (5th Ed. 1984) ("Recklessness applies to conduct which is still, at essence, negligent,

rather than actually intended to do harm, but which is so far from a proper state of mind, that is treated in many respects as if it were so intended"). While the charge requires that a defendant need to have acted intentionally, the intent is to act in disregard of a known or obvious risk of probable harm. Thus, in this instance, it is Fel-Pro's knowledge of the risk of harm from exposure to asbestos, that raised its conduct in failing to warn to the level of recklessnes. Accordingly, contrary to Fel-Pro's argument, it cannot be said that the finding of recklessness is based solely on "intentional conduct."

This conclusion is consistent with, and reflected in, numerous decisions where courts have upheld such findings in asbestos failure to warn trials. See In re New York City Asbestos Litig.: Sweberg v ABB, Inc (Sweberg). 143 AD3d 483, 484 (1st Dept. 2016), aff'd 28 NY3d 1165 (2017)); Peraica v A O Smith Water Prods. Co. (Peraica), 143 AD3d 448, 451 (1st Dept 2016), aff'd 28 NY3d 1167 (2017); In re New York City Asbestos Litig.: Hacksaw v ABB Inc. (Hacksaw), 143 AD3d 485, 486 (1st Dept. 2016), aff'd 28 NY3d 1165 (2017).

Fel-Pro's argument that the proof of recklessness was insufficient is also unavailing, as the evidence was more than sufficient to support this finding. Plaintiffs point to the following testimony and documentary evidence with respect to the sufficiency of Fel-Pro's knowledge of the dangers of asbestos. During the 1973-1986, time period of Ms. Robaey's exposure to asbestos from Fel-Pro's gaskets, Fel-Pro's representative, Mr. Pearlstein testified that Fel-Pro was aware of health concerns about asbestos as early as 1971-1972 and aware that inhaling asbestos caused disease. He further testified that health policies concerning asbestos went into effect in its plants at that time. Tr at1989. In this connection, Mr. Pearlstein testified that at Fel-Pro's plants, air samplings were taken, workers handling asbestos product wore respirators and would wet down asbestos dust before sweeping, and that exhaust and ventilation systems were in

place. TR at 2032; 2028 -29. Moreover, Fel-Pro was concerned about ambient levels in the plant's daycare centers, and about workers who would transport asbestos fibers on their clothing from work area to the centers. Tr at 2029-31. According to Mr. Pearlstein, OSHA audited Fel-Pro's plants between 1979 and 1986, and that in 1979, Fel-Pro was fined for permitting workers at one plant to eat in areas where asbestos was being used. This, Mr. Pearlstein testified was against company policy, as Fel-Pro knew that diseases, including cancer, are associated with asbestos. Tr at 1975-77.

In addition to the foregoing testimony, plaintiffs introduced evidence of the following: Fel-Pro would have seen a 1971 article,"Asbestos dust called a killer;" in 1971 in its plants, labels on waste containing asbestos warned of its dangers including from breathing asbestos dust; an internal memo required its employees to wear a mask while cleaning up asbestos containing dust; a 1976 OSHA industrial hygiene report regarding one of its facilities warned of the hazards of asbestos to any employees exposed to it; a 1978 internal Fel-Pro memo, "Fel-Pro Asbestos Safety Information" which reports that exposure to asbestos causes certain diseases, including mesothelioma, and that reduction of dust is the only known method of prevention and details methods to reduce exposure; a 1981 customer created document to which Fel-Pro had access, stated that when dry asbestos gasket material is ground, asbestos fibers above the permissible levels are released into the air; a 1983 internal Fel-Pro memo that asbestos fibers, once released, tend to remain in the air, and that once the dust settles, the fibers may be re-suspended even by a slight breeze or draft. Tr at 2073; 2086-87; 2088; 2088-90; 2188-90; 2183; 2186-87.

Finally, plaintiffs point to the testimony of Fel-Pro's President Ken Lehman in 1986 before the EPA that Fel-Pro stopped producing asbestos gaskets because of concerns of the

health of its customers, "that when people remove them they are exposed to asbestos," and Mr. Pearlstein's testimony that Fel-Pro knew that asbestos fibers, when released, remain suspended in the air, can become re-suspended, and that when asbestos gaskets are scraped, asbestos dust is produced, which one should not breathe because it can cause disease, including mesothelioma. Tr at 2179; 2196-97.

Despite the above evidence that Fel-Pro had knowledge of the dangers of asbestos, Fel-Pro admitted that it did not conduct any tests to determine if asbestos was released when the gaskets were manipulated, including when gaskets were scraped off engine parts, and that it did not place any warning labels on its asbestos containing gaskets. Based on the clearly detailed evidence cited above, the evidence at trial was sufficient for the jury to decide that Fel-Pro acted recklessly in not warning of the dangers of asbestos in connection with the use of its gaskets, and Fel-Pro's motion in regard to the recklessness finding is denied.

III. MOTION TO SET ASIDE THE VERDICT BASED EVIDENTIARY RULINGS

Fel-Pro argues the verdict should be set aside based on its contention that the court abused its discretion by limiting testimony of its expert where tests concerning product use and exposure were not accompanied by underlying data and fiber sheet counts. Fel-Pro also argues the Court erred with respect to other evidentiary rulings as detailed in Dana's submissions and relies on Dana's brief to support this argument. Plaintiffs oppose Fel-Pro's motion on these grounds, arguing the evidentiary rulings were correct, as experts are not permitted to bolster their opinion by referring to literature as supporting it, and the evidentiary rulings cited in Dana's brief were proper and do not provide a basis to set aside the verdict.

At the outset, I note that Fel-Pro fails to state any particular ruling at issue, or the grounds it alleges as error with respect to a particular ruling. Rather, Fel-Pro states generally that the

"Court limited the testimony of defense experts where any tests concerning product use and exposure were not accompanied by underlying data and fiber count sheets...[and] precluded testimony as to test results where the expert did not conduct the study on a defendant's product himself." Memo of Law at 18. Fel-Pro merely points to examples in the transcript at Tr 3287, 3732-33. Without specific context, Fel-Pro's argument as to rulings in general will not be addressed, but the court shall address specific examples cited in its memo.

The ruling on page 3287 involved a chart which defendant Dana sought to introduce during its direct examination of its epidemiologist Dr. David Garabrant, who created and published the chart in connection with a study he conducted. The chart was properly excluded as bolstering, as it showed results of 16 studies by others, or information from registries, and his meta data analysis of those studies or registry information, regarding the incidence of mesothelioma among auto mechanics. Tr at 3287; 3253-60. Moreover, contrary to Fel-Pro's argument, the ruling permitted, and Dr Garabrant did testify, to the results of the underlying studies, his analysis, and how he scored an individual study by its quality or strength. He testified that this evaluation included, as to each study, factoring in the type of study, the measure of association it calculated, the study's odds and rate ratios, and its confidence interval. Tr at 3254-55. While the published chart was not admitted, Dr. Garabrant was permitted to draw a chart and to testify to the results of his analysis and, the results of the study, and to his conclusions that his analysis showed no positive association between work as a mechanic and a risk of mesothelioma. Tr at 3262-65; 3290-96.

As to the ruling on page 2732-33, the basis of Fel-Pro's argument is unclear, as the ruling merely struck any testimony as to the contents of literature referred to by the witness, an industrial hygienist, Donna Ringo on her direct examination by co-defendant Crane Co. It is

well settled law that an expert witness is not permitted to testify to a study or treatise on direct examination in support of her opinions. Lipschitz v. Stein, 10 AD3d 634, 635 (2d Dept 2004). Next, as to the evidentiary rulings cited by Dana, these rulings struck testimony regarding the lack of a ban on the sale of asbestos containing gaskets, and excluded evidence of co-defendants' responses to interrogatories. As Fel-Pro relies on Dana's briefing of these issues, it must be noted that Dana's briefing mischaracterizes the first ruling, as striking all reference to the lack of a ban on asbestos gaskets. The instruction to the jury and the ruling, clearly struck only the testimony with respect to a ban or sale "today." Tr 2425-26. The Court instructed the jury that:

> I am striking from the record the statement "You can go out and buy an asbestos containing gasket today." You are not to consider that in your evaluation of the evidence. I am also striking from the record any photo or other evidence with respect to a ban or not a ban on asbestos containing products today.

Tr at 2426.

The issue involved testimony by Frederick Boelter, an industrial hygienist called by Dana, who, while testifying on direct about a study he conducted and a particular slide as to conclusions in the study, discussed asbestos insulation and stated "Insulation materials were banned in the 1970s. You can't buy them. You can't sell them. Gaskets -asbestos gaskets have never been banned and you can still buy them." Tr at 2351. On cross examination, plaintiffs' attorney asked whether a warning would be needed if an asbestos gasket was sold today. Dana's counsel objected and this led to an on the record discussion in the robing room which resulted in the ruling and instruction that testimony regarding a ban or sale "today" was struck. Thus, the argument that the gasket defendant or defendants were prejudiced as the instruction left the jury with the impression that asbestos gaskets were banned during the time of Mrs. Robaey's exposure, lacks a factual predicate.

Similarly, without merit is the argument of error regarding the preclusion of use of answers to interrogatories by settled defendants, as briefed by Dana and relied upon by Fel-Pro. Dana contends that the co-defendant settlor's responses to the interrogatories contain highly relevant evidence regarding their individual liability and for apportioning Article 16 fault. Dana points to CPLR 3131 which provides that answers to interrogatories may be used to the same extent as depositions, and on CPLR 3117(a)(2). However, section 3117(a)(2) must be read together with section 3117(a). CPLR 3117, encaptioned the "Use of depositions," provides

> (a) ...At the trial...any part or all of the deposition [interrogatory], so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:
> (1)...
> (2)...the deposition [interrogatory] of a party or of a person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member employee, or managing agent of a party, may be used for any purpose, by any party who was adversely interested when the deposition testimony [interrogatory] was given or who is adversely interested when the deposition testimony [interrogatory] is offered in evidence...

Dana argues in its brief that the interrogatories of settled defendants are admissible under CPLR 3117(a)(2), that hearsay or cross examination issues are inapplicable, and that objections based on the absence of proof of deponent's unavailability or of proof of representation at, or notice of, the deposition are also inapplicable. With respect to the unavailability of the witness, this requirement is based on the argument advanced at trial that the interrogatories are admissible as declarations against interest, and as discussed below, the unavailability of the witness is a requirement for admissibility under this theory. Dana argues in its brief that unavailability is not an issue, as it argues admissibility under CPLR 3117(a)(2) and CPLR 3131, based on the

NYCAL CMO provisions[9] that "responses to [plaintiff's standard liability] interrogatories shall be served on plaintiffs' Liason Counsel and when so served shall be deemed served in each case." CMO § VIII.A.2.b. Dana Memo of Law at 38-39. Dana argues that the interrogatories should be deemed given when served in this case, that at the time of this service its interests were adverse to the settled defendants, that it asserted cross claims against them in this action, and that Dana asserted an affirmative defense in this action of the right to apportionment under Article 16. This argument ignores the CPLR 3117(a) requirement that the use of interrogatories is dependent on their admissibility under the rules of evidence. This conclusion is consistent with the decision in In re New York City Asbestos Litig.: Andrews v A O Smith Water Prods., Index No. 190034/2015, (Sup Ct, NY Co., January 4, 2017 Hon Peter Moulton), where the court held that the interrogatories were not admissible as the CMO "affords no broader admissibility to the material in question than is provided in the CPLR."

Regarding admissibility under the rules of evidence, at trial, Dana and Fel-Pro argued for the admissibility of the interrogatories as declarations against interest. In order to establish admissibility as a declaration against interest, the proponent must show the unavailability of the declarant, the declaration has to be against declarant's pecuniary, proprietary or penal interest, the declarant had competent knowledge of the facts, and the declarant had no probable motive to misrepresent the facts. See Justice Helen E. Freedman, New York Objections, section 5:100 (15th Revision 2013); Richard T. Farrell, Prince, Richardson On Evidence, Section 8-403 (11th Ed. 1995). Here, the interrogatories were properly excluded as defendant was unable to show that the corporate representatives were unavailable to testify at trial. Dana also argued that

[9]As to Fel-Pro, this argument is not applicable, as at trial, counsel for Fel-Pro argued that the interrogatories were admissible as a declaration against interest. Tr. 4398-99.

unavailability should be evaluated based on CMO provisions regarding interests of efficiency, and in support of this argument pointed to the number of identifiable entities in the case and an assertion of the "inability" of "out-of state settlors ... to be subpoenaed at trial." This argument is unpersuasive, as Dana does not offer the legal basis for either its assertions that out-of-state settlors could not be subpoenaed, nor that the interests of efficiency, and in particular, that the number of entities, warrants a finding that the corporate representative of such entity is unavailable to testify at trial.[10]

Nor is there any merit to Dana's argument that the court erred in ruling plaintiff could cross examine Mr. Boelter with respect to emails exchanged with Dana's counsel. The emails concerned the design, sequencing, testing and protocols for the study Mr. Boelter conducted on a Chevy Impala, as well as Mr. Boelter's concerns as to the make and type of gaskets in the Impala. Tr at 2484-85.

Dana argues that the emails are protected as attorney work product and material prepared for litigation. With respect to Dana's argument as to attorney work product, precedent holds that the "doctrine affords protection only to facts and observations disclosed by the attorney. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure...." Beach v. Touradji Capital Mgt, LP, 99 AD3d 167, 170 (1st Dept 2012)(internal citations and quotations omitted).

Here, contrary to Dana's contention, the questioning of Mr. Boelter with respect to his emails did not reveal Dana's counsel mental impressions. The instance that Dana cites on pages

[10]Nor do these or other concerns justify admissibility due to exceptional circumstances under CPLR (a)3.(v) as argued by Dana in footnote 40 in its Trial Memo of Law.

2485-2487 of the transcript, in which Mr. Boelter is asked about his email concerning the likelihood that Victor had gaskets with asbestos in 1964, do not support a finding of privilege. Dana also contends that certain questions regarding allegedly privileged emails were used by plaintiffs' counsel to suggest that Dana controlled the study. The part of the transcript cited by Dana do not support this contention, as the questioning, for the most part, involved Mr. Boelter's emails regarding the design of, and protocols for the study.

Similarly lacking in merit is Dana's argument that based on the decision in Hudson Ins. Co. v. M.J. Oppenheim, 72 AD3d 489, 490 (1st Dept 2010), that work product protections extend to Mr. Boelter as an expert retained as a consultant in analyzing and preparing the case "as an adjunct to the lawyer's strategic thought processes..." (internal citations and quotations omitted). Hudson is inapposite as the work product at issue in that case involved documents that were generated by defense counsel's consultant retained to assist in handling forensic accounting. In reaching its conclusion, the court considered that the type of work performed by the consultant, and its relationship to the attorney's "strategic thought processes." Here, Mr. Boelter was not retained to examine evidence to assist counsel in an analysis of facts within the context of applicable legal principles. Rather, Mr. Boelter was retained to perform testing to create facts for test results and protocols for use as evidence as trial.

As to Dana's argument that Mr. Boetler's emails are privileged based on preparation the purposes of litigation shield, plaintiffs demonstrated a need for the information regarding test design sequencing and protocols as they could obtain this information by any other means. See Matter of Asbestos Litigation: Ames v. Kentile Floors Inc., 66 AD3d 600, 601 (!st Dept 2009).

IV ALLOCATION OF FAULT

Fel-Pro relies on Dana's brief as to this issue and plaintiffs rely on their brief in response.

Dana argues that the verdict must be set aside as the jury failed to assign a percentage of fault to any entities, other than those defendants who appeared at trial. Dana contends the jury's response that Ms. Robaey was not exposed to asbestos from products of the 29 Article 16 entities listed on the verdict sheet, is inexplicable as both Mr. and Ms. Robaey testified to such exposure and that plaintiff's counsel conceded such exposure in his closing statement. Dana recites unspecified testimony of Mr. Robaey regarding his work with asbestos containing products of the Article 16 entities in support of this argument. However, as argued by plaintiffs, as plaintiffs established the liability of defendants, defendants had the burden of proving the equitable share of liability of the Article 16 entities, including that Ms. Robaey was exposed to asbestos from the products of these entities. See In re New York City Asbestos Litigation; Konstantin v. 630 Third Ave. Assoc (Konstantin)., 121 AD3d 230, 247(1st Dept 2014), aff'd 27 NY3d 765 (2016).

Moreover, plaintiffs' contention is supported by evidence that as to each defendants appearing at trial, i.e. Dana, Fel-Pro, Crane, and Cleaver-Brooks, plaintiffs established evidence of Ms. Robaey's exposure to asbestos from their products, including the amount of asbestos content in their products. Defendants did not present comparable evidence as to the asbestos content of the Article 16 entities' products. Plaintiffs argue that the lack of this evidence supports the jury's determination of no exposure to asbestos from these products. Based on the lack of evidence and that defendants have the burden of proof regarding the liability of the Article 16 entities, it cannot be said that the verdict must be set aside on these grounds.

V EXCESSIVE DAMAGE AWARD

Fel-Pro moves to set aside the verdict and for a new trial with respect to damages, on the grounds that the jury's awards to plaintiffs were excessive. While the amount of damages to be awarded for personal injuries is primarily a question for the jury, and a jury's verdict should be

given considerable deference, an award may be set aside "as excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501(c); see Ortiz v. 975 LLC, 74 AD3d 485 (1st Dept 2010). While "personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification," courts look to comparable cases in deciding if an award deviates from fair and reasonable compensation. Reed v. City of New York, 304 AD2d 1, 6 (1st Dept), lv denied 100 NY2d 503 (2003). However, "[m]odification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible." So v. Wing Tat Realty, Inc, 259 AD2d 373, 374 (1st Dept 1999).

Recent appellate decisions which address the issue of the amount of damages where plaintiffs suffered from mesothelioma that have sustained or modified awards provide guidance.[11] In 2017, in In Re New York City Asbestos Litig (Miller)., 154 AD3d 441 (1st Dept 2017),lv denied 30 NY3d 909 (2018), the First Department, sustained a $5 million award for past pain and suffering and $4 million for future pain and suffering of one year.[12] In 2016, the First Department in Sweberg, supra at 483, upheld an award for past pain and suffering of $5 million for two years, and remitted future damages to $4.5 million for one and a half years; in

[11]Of note is the recent decision, In Matter of New York City Asbestos Litigation (Idell), 2018 WL 4353846 (1st Dept September 13, 2018). In Idell, the First Department sustained an additur by the trial court from the jury's verdict for past pain and suffering in the amount of $1.8 million to $4 million, and, as to future pain and suffering , while the trial court increased the amount from $1.5 million to $2.5 million, the Appellate Division reduced the amount to $1.5 million.

[12]While plaintiffs submitted Miller after the motion was fully submitted, the court will consider the Miller only with respect to the facts as to the amount of the verdict sustained in the action, and will not consider any substantive law.

Hacksaw, supra at 487, vacated an award of $6 million for past damages, unless plaintiff stipulated to a reduced award of $3 million for one year of past pain and suffering; and in Peraica, supra at 449, reduced a $9.9 million award for two years of past pain and suffering to $4.25 million. In two additional relevant decisions, in In re New York City Asbestos Litigation; (Dummitt), 121 AD3d 230 (1st Dept 2014), aff'd 27 NY3d 765 (2016), the First Department sustained a remitted award of $5.5 million for past pain and suffering of 27 months, and $2.5 million for six months of future pain and suffering; and In Konstantin, supra at 230, sustained remitted awards of $4.5 million for past pain and suffering of 33 months and $3.5 million for future damages for one and a half years.

In analyzing the above awards, it must be noted that juries in New York County are consistently, if not always, awarding substantially greater amounts for pain and suffering than the amounts remitted or modified by the trial and appellate courts. In Miller, the jury awarded $10 million for past pain and suffering and $15 million for future pain and suffering for one year. The trial court reduced the amount to $5 million and $4 million, respectively, for past and future pain and suffering, which award was upheld by the First Department. In Sweberg, the trial court upheld a jury award of $5 million for two years of past pain and suffering, and reduced the jury award of $10 million for one and a half years of future pain and suffering to $5 million. The First Department upheld the award of $5 million for past pain and suffering and reduced the future award to $4.5 million. In Hacksaw, the jury award of $10 million for one year of past pain and suffering was reduced to $6 million by the trial court and to $3 million by the First Department. As for Peraica, the First Department upheld that trial court's remittitur of a jury award of $9.9 million for seventeen months of past pain and suffering to $4.25 million.

The First Department in Peraica, recognized that "[t]he jury and trial judge, who had an opportunity to hear the testimony firsthand, believed a substantial award was appropriate in light of the testimony about the extent of [plaintiff's] suffering." 143 AD3d 448, 451. Thus, in considering remittitur, the jury's award of $40 million for Ms. Robaey's past pain and suffering and $10 million for her future pain and suffering are factors to be weighed.

Ms. Robaey was diagnosed with peritoneal mesothelioma in October or November of 2012, and she testified that in 2011, prior to the diagnosis, she fell at work, which fall plaintiffs allege was related to the mesothelioma. Ms. Robaey had worked as a nurse for 42 years, and while she had high blood pressure, type II diabetes, hypercholesterolemia, and gout before her diagnosis, she testified these conditions did not interfere with her activities, and that she led an active social live with family and friends. As a nurse, Ms. Robaey testified that she was aware of the consequences of the diagnosis and her outlook for the future, particularly that she was going to leave her family behind. By 2012, according to Dr. Schwartz, the tumor had spread. In an attempt to control the cancer, Ms. Robaey underwent numerous procedures and surgeries, including a complete hysterectomy, an oophorectomy (the removal of the ovaries), an omentectomy (the removal of the peritoneum connecting the stomach to other abdominal organs), chemotherapy and a debulking procedure. The surgeries caused constant pain and tenderness in her abdomen. Chemotherapy was necessary because the tumor was not completely resected by the surgeries and, according to Dr. Schwartz, the systemic cytotoxic therapy Ms. Robaey underwent causes nausea, vomiting and diarrhea. As to the debulking, because the tumor had spread, it involved resection of the right hemidiaphragm, small bowel resection and chemotherapy. Tr at 1784-88).

In December 2013, Ms. Robaey's mesothelioma had spread to her lungs and Mrs. Robaey was in danger of blood clots. In early 2014, Ms. Robaey suffered from a collection of fluid between the lung and chest wall, and experienced neck pain and arm swelling as a result of a blood clot. In 2015, Ms. Robaey had right side effusion in her chest cavity which prevented her lungs from fully expanding and caused shortness of breath. In January 2016, Ms. Robaey underwent a thoracentesis to withdraw fluid from her chest cavity. Additionally, she suffered gastrointestinal/stomach bleeding due to low platelet count as a result of chemotherapy.

Based on the record, the evidence shows that at the latest, from the time of her diagnosis in 2012, to the date of the verdict on January 20, 2017, Ms. Robaey suffered from chronic pain due to the growth of the tumor from the peritoneum, into the stomach, around the intestines, into the chest wall, lungs and lymph nodes. In addition to the physical pain and suffering Ms. Robaey testified she was scared and depressed, knowing the diagnosis was a death sentence.

In considering the nature and extent of Ms. Robaey's suffering, and while awards in comparable cases are not binding, they offer precedential guidance as to whether an award deviates from reasonable compensation. In evaluating whether the awards in this action deviate from reasonable compensation, and considering the foregoing awards as offering precedential value and some guidance, and giving the jury's verdicts great deference, I conclude that the jury's verdict as to damages deviate from reasonable compensation, and that reasonable compensation for Ms. Robaey's past pain and suffering of approximately four and a half years is $12 million, and for her future pain and suffering of one year is $4 million.

As for Mr. Robaey, as noted above, the jury awarded him $15 million for past loss of consortium, and $10 million for future loss of consortium of one year. At trial, Mr. Robaey testified that he relied on Ms. Robaey for her companionship, love and friendship, and that she

was his "soulmate". Mr. Robaey recounted how they met, married in 1974, "had kids and [that] she was always there for him." Throughout their marriage, they helped one another, and this was particularly important after 2010 when Mr. Robaey was having trouble walking, retired, and eventually needed a walker. Ms. Robaey not only cooked their meals, but laundered his work clothing, which work, as discussed above, was a source of her exposure to asbestos. Mr. Robaey testified that he blamed himself for Ms. Robaey's disease, that "because I was around it [asbestos], I gave it to her."

With respect to the award of $25 million to Mr. Robaey for past and future loss of consortium, based on the legal principals discussed above, this award deviates from reasonable compensation. The First Department in In re New York City Asbestos Litig.; Brown v Bell & Gosset Co (Brown), 146 AD3d 461 (1st Dept 2017), directed a new trial unless plaintiff stipulated to reduced the award to $360,000 for one and a half years of past loss of consortium,[13] citing, in support of the remittitur, Penn v Anchem, supra, where the Court remitted an award for loss of consortium of $1.67 million to $260,000. As discussed above, these awards are for guidance and are not binding upon the court, and, here, a new trial is ordered on the issue of damages in connection with loss of consortium claims, unless plaintiff stipulate to a reduction of the award for past loss of consortium from $15 million to $1 million and for future damages from $10 million to $250,000.

CONCLUSION

In view of the above, it is

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[13]The number of years for the award is based on the trial courts' decision , Brown v Bell & Gossett Co, 2014 WL 8509004 (S Ct NY Co 2014).

ORDERED that Fel-Pro's motion to set aside the verdict is granted only to the extent of vacating the awards of $50 million to Ms. Robaey for pain and suffering ($40 million for past and $10 million for future) and $25 million to Mr. Robaey for loss of services ($15 million for past and $10 million for future) and ordering a new trial on damages, unless within 30 days of service of a copy of this decision and order with notice of entry plaintiffs stipulate to reduce the award to Ms. Robaey to $12 million for past and $4 million for future pain and suffering and to reduce the award to Mr. Robaey for loss of services to $1 million for past, and $250,000 for future damages.

DATED: October 11, 2018