SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SUZANNE J. ADAMS** **PART** **39TR**

Justice

----------X

JAMES MCWILLIAMS,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC.,ARCONIC, INC, ARMSTRONG INTERNATIONAL, INC, AURORA PUMP COMPANY, BEAZER EAST, INC.,BURNHAM, LLC,BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC.,CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COMPUDYNE CORPORATION, CONSOLIDATED EDISON COMPANY, CRANE CO., CROSBY VALVE LLC,CROWN BOILER CO., ECR INTERNATIONAL, CORP., FLOWSERVE US, INC.,FMC CORPORATION, FOSTER WHEELER, L.L.C, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GRINNELL LLC,IMO INDUSTRIES, INC, ITT INDUSTRIES, INC.,ITT LLC., J.H. FRANCE REFRACTORIES COMPANY, JENKINS BROS, MARIO & DIBONO PLASTERING CO., INC, NATIONAL GRID GENERATION LLC D/B/D, NIBCO INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RESEARCH-COTTRELL INCORPORATED, RILEY POWER INC, ROPER PUMP COMPANY, SPIRAX SARCO, INC.,TACO, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN REALTY & CONSTRUCTION CO., INC.,TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WARREN PUMPS, LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

----------X

INDEX NO. 190737/2018

MOTION DATE N/A

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494

were read on this motion to/for SET ASIDE VERDICT.

Defendant Jenkins Bros. ("Jenkins") moves pursuant to CPLR 4404(a) and § 5501(a) for a judgment notwithstanding the verdict and an order for a new trial, or alternatively, a remittitur of a clearly excessive verdict. Plaintiff opposes the motion and cross-moves pursuant to 22 NYCRR § 130-1.1 against Jenkins' attorneys for sanctions. Jenkins opposes the cross-motion. Upon the foregoing documents, and for the reasons set forth hereinbelow, it is ordered that Jenkins' motion is denied in its entirety and the cross-motion is granted. (In a separate motion sequence (008), Jenkins moves to strike the cross-motion. This motion, which is denied, is being decided separately and concurrently with the instant motion.)

Background

Jenkins, incorporated in 1907, began manufacturing various types of industrial valves made of bronze steel, cast iron, stainless steel, and other materials sometime in the 1920s. By the 1980s, market conditions forced it out of business, and after a Federal bankruptcy filing and related proceedings, it was finally dissolved in 2004. Plaintiff worked as a steamfitter from 1960 until his retirement in 1996. His work consisted of installing heating, air conditioning, and sprinkler systems, including the installation of new piping systems and the renovation of existing systems. The new constructions and renovations both required him to install, maintain, and repair valves which controlled the flow of steam or water through the pipes. In September 2018, after experiencing uncomfortable physical symptoms, plaintiff sought medical treatment and was diagnosed with mesothelioma. He commenced this action in late September 2018 for damages sustained due to asbestos exposure, naming Jenkins and 45 other entities as defendants.

At the time the trial of this action commenced in November 2022, Jenkins was the sole remaining defendant. Plaintiff's principal claim at trial was that his frequent exposure to asbestos through his work on Jenkins' valves over the 36 years he was a steamfitter caused his

mesothelioma. The jury returned a unanimous verdict for plaintiff and awarded damages in the total amount of $35,000,000 for past and future pain and suffering, allocating 90% of liability to Jenkins and 10% to a non-party.

Legal Standard

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial, and direct judgment in favor of the moving party or grant a new trial, where the verdict is contrary to the weight of the evidence or in the interest of justice. In order to find that a verdict is against the weight of the evidence, the court must determine that that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978). Thus, if "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 does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." (*Id.* at 499).

A jury verdict should not be set aside as against the weight of the evidence "unless the jury could not have reached its verdict on any fair interpretation of the evidence," and "[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses." *Desposito v. City of New York*, 55 A.D.3d 659, 660-61 (2nd Dep't 2008). The jury's resolution of disputed factual issues and inconsistencies in witnesses' testimonies is also entitled to deference. *Bykowsky v. Eskenazi*, 72 A.D.3d 590 (1st Dept 2010), *lv. denied* 16 N.Y.3d 701 (2011).

Discussion

A. Judgment Notwithstanding the Verdict

Jenkins contends that a judgment notwithstanding the verdict is warranted here on the grounds that plaintiff's proof failed to establish causation with respect to Jenkins; that the trial evidence was not sufficient to impose on Jenkins a duty to warn regarding insulation made or installed by others; that proof of plaintiff's future pain and suffering claim was legally insufficient; and that it is entitled to judgment as a matter of law as to the CPLR § 1602(7) "reckless disregard exception." The court will address each argument in turn.

First, plaintiff testified extensively as to nature of his work as a steamfitter for over three decades, including the type of projects and job sites he worked on, the mechanics of particular tasks, the length of time he spent on performing such tasks, and his work with Jenkins' valves. He testified, *inter alia*, that he was exposed to asbestos dust from the installation of new gaskets on Jenkins' valves, the insulators' mixing and applying asbestos cement to Jenkins' valves, his own cutting and removal of existing insulation on Jenkins' valves, the removal of old gaskets with hand tools and the wire-brushing of the valves' flange faces, and the laborers' cleanup of the aforesaid work. The majority of his testimony was via cross-examination by Jenkins' counsel. Based on plaintiff's testimony, his expert witnesses – Kenneth Garza, C.I.H., M.S., a certified industrial hygienist, Steven Markowitz, M.D., D.P.R.H., an occupational physician and epidemiologist, and Mark E. Ginsburg, M.D., a physician specializing in thoracic medicine – all used legally sufficient methods to establish specific causation with respect to Jenkins. The experts established both quantitative and qualitative exposures of plaintiff to asbestos from Jenkins-related products using assessment methodologies that met the requirements for finding causation as articulated by the Court of Appeals in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 (2006). The holding of *Nemeth*

v. Brenntag N.A., Inc., 38 N.Y.3d 336 (2022), where the plaintiff alleged that her mesothelioma was the result of exposure to cosmetic talcum powder products, is inapplicable here. There is no reasonable comparison between the glove-box simulation unsuccessfully relied upon by the *Nemeth* plaintiff's experts in trying to estimate the asbestos exposure resulting from the application of talcum powder at home, and the well-established methods used by plaintiff's experts in this matter which were based on the more easily replicated circumstances of specific workplace exposure to asbestos. In addition, use of the "Tyndall Lighting" video was proper, as courts have regularly permitted its use. *See, e.g., In In re New York City Asbestos Litigation ("Evans")*, 2017 WL 1293127 (N.Y. Sup. Ct. Apr. 05, 2017) (Moulton, J.).

Next, the evidence at trial sufficiently demonstrated the "practical necessity" of the use of insulation with Jenkins' valves, whether it was plaintiff's testimony, Jenkins' product advertisements, or the testimony of Jenkins' own corporate representative, David Boisvert. Jenkins' annual reports also showed its valves covered in external asbestos insulation, suggesting at minimum that the application of external insulation to its valves was foreseeable. The evidence presented fully met the standard set forth in *In re New York City Asbestos Litig. ("Dummitt")*, 27 N.Y.3d 765, 793 (2016).

Further, plaintiff's proofs regarding future pain and suffering were legally sufficient. Jenkins primarily argues that plaintiff's seeming absence of pain at the time of trial augurs a pain-free future, yet does not address the evidence presented at trial that plaintiff still has mesothelioma, that it will cause his eventual death (death from other causes being highly speculative at this point in time), and that his death will indeed be very painful. While plaintiff is among the small minority of those who contract mesothelioma and remain alive five years after the initial diagnosis, there is

no dispute that such individuals do not live much beyond five years, nor proof that mesothelioma is something other than fatal.

Finally, Jenkins contends that it should not have been charged on CPLR § 1602(7) because it only sought to apportion fault to settled tortfeasors, which only implicated GOL § 15-108. However, CPLR § 1601 governs the apportionment of liability for non-economic loss to "all persons liable," and does not distinguish between settled or non-settled tortfeasors. The setoffs of GOL § 15-108 apply after the consideration of whether any comparative fault exceptions apply. Here, the reckless disregard exception contained in § 1602(7) was appropriately charged because the evidence presented at trial was sufficient to support a finding of Jenkins' recklessness. In sum, there is no basis for this court to grant a judgment notwithstanding the verdict.

B. New Trial

Jenkins maintains that a new trial of this matter should be granted solely because the OSHA-related charge given to the jury effectively and improperly decided liability against Jenkins as a matter of law, removing the liability question from the jury's deliberation. However, a plain reading of the charge does not support this contention. It is settled law that a product manufacturer cannot delegate its duty to warn of its products' hazards to another party. *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 56 (2d Cir. 2000). It is also settled that compliance with OSHA does not relieve a manufacturer of its non-delegable duty to warn. *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 658 (2d Cir. 1992). The charge merely states these principles in laypersons' terms.

In further support of its request for a new trial, Jenkins also contends that it was prejudiced by plaintiff's counsel's improper trial tactics (including its improper and misleading witness examinations), by the possibility that the jury heard the court's sidebar remarks concerning a defense witness, and by plaintiff's counsel's improper summation. As to the first contention,

Jenkins' characterization of plaintiff's counsel's "tactics" is not supported by the record. As noted above, the majority of plaintiff's testimony was via cross-examination by Jenkins' counsel, who thus had ample opportunity to challenge plaintiff's recollection of facts, etc. Jenkins does not provide examples of testimony elicited on cross-examination that significantly contradicted or called into question any direct testimony by plaintiff. Also as discussed above, use of the "Tyndall Lighting" video was proper. Further, Kenneth Garza's qualifications and possible trial testimony were disclosed by plaintiff several years before trial, and a copy of his report was provided to Jenkins in October 2022. In cross-examining Jenkins' corporate witness, Mr. Boisvert, plaintiff's counsel referred to documentary evidence of false statements and material omissions in Jenkins' discovery responses. Such questioning is not improper at trial.

Jenkins' contention that the jury possibly heard sidebar remarks regarding the testimony of its witness, Dr. Sheldon Rabinovitz, an industrial hygienist, is not supported by substantive proof. It is significant that Jenkins made no objection at the time of the sidebar and did not seek to question the jurors at that time. *See, e.g.*, *People v. Jordan*, 168 A.D.3d 458, 459 (1st Dep't 2019); *People v. Wright*, 35 A.D.3d 172, 172-73 (1st Dep't 2006). Nor did Jenkins seek to poll the jurors after the verdict. The court conducted the sidebar at issue in the same manner as every other sidebar during the trial, and the only suggestion that this particular sidebar might have been overheard by the jury are the self-described "eyewitness" statements made by Jenkins' own counsel and paralegal. One attorney participated in the actual sidebar, the other attorney was seated at the defense counsel table, and the paralegal was seated in the gallery behind the defense counsel table. The counsel table and the nearby gallery were closer to the sidebar than the jury, as the jury box was on the opposite side of the courtroom. Most significantly, the record reflects that the witness himself, Dr. Rabinovitz, did not overhear the sidebar concerning his own testimony,

and he was seated in the witness box which was closer to the sidebar than either the jury or the defense counsel table. Jenkins' counsel discussed with the court (outside the presence of the jury) on the day following his testimony whether Dr. Rabinovitz should even be told of the substance of the sidebar. Jenkins' Exhibit A at 1893:12-16. After the court spoke, Jenkins' counsel specifically stated: "I have to let the witness know that someone has said that he may have committed perjury." Jenkins' Exhibit A at 1894:2-3. Thus the granting of a new trial cannot rest on mere speculation that was not confirmed by reliable contemporaneous, or any other, verification.

Lastly, Jenkins contends that plaintiff's counsel's summation was improperly prejudicial so as to necessitate a new trial. The trial transcript provides no basis for this contention. The court instructed the jury at the outset that "arguments, remarks and summations of the attorneys are not evidence." Jenkins' Exhibit A at 2629:19-20. Moreover, plaintiff's counsel's remarks did not stray beyond fact-based commentary, and based on the strength of the evidence presented (as discussed in part hereinabove), were unlikely to have affected the outcome of the trial. *See, e.g., Wilson v. City of New York*, 65 A.D.3d 906, 908 (1st Dep't 2009). The court acted within its authority to prohibit objections during closing statements, and Jenkins had the opportunity to raise any objections to plaintiff's summation at its conclusion, which it did. To the extent new objections have been raised in the instant motion, they are waived. *Wilson*, 65 A.D.3d at 908.

Based upon the foregoing, there is no justification for a new trial.

C. *Remittitur*

Pursuant to CPLR 5501(c), the court may review a money judgment to determine whether the award is excessive or inadequate and whether a new trial should be granted, unless the parties stipulate to the entry of a different award. The standard to be applied is whether the award

"deviates materially from what would be reasonable compensation." Siegel, N.Y. Prac. § 407 (5th ed., 2014). In deciding whether an award deviates materially, courts must look to awards approved in similar cases, "bearing in mind that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification [citation omitted]." *Reed v. City of New York*, 304 A.D.2d 1, 7 (1st Dep't 2003), *lv. denied,* 100 N.Y.2d 503. The amount of damages awarded for a personal injury is generally and primarily a jury question, "which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony[citation omitted]." *Ortiz v. 975 LLC*, 74 A.D.3d 485, 486 (1st Dep't 2010).

Jenkins maintains that the jury's award in this matter does not fall within the range of other awards to living mesothelioma plaintiffs that have been approved by the First Department. The jury awarded plaintiff $13,000,000 for 51 months of past pain and suffering and $10,000,000 for 2 years of future pain and suffering, including his death, or approximately $307,000 per month for a total of 75 months. While some awards cited by Jenkins amounted to under $200,000 per month, other awards were close to, or have exceeded, that awarded to plaintiff herein. For example, in *In Re New York City Asbestos Litig.* ("*Macaluso*"), 173 A.D.3d 529, 530-31 (1st Dep't 2019), after the damages were reduced by the First Department, the plaintiff stipulated to a $4,000,000 damage award for approximately 15 months of pain and suffering, or roughly $266,667 per month. In *In re New York City Asbestos Litig.*(*D'Ulisse*), 16 Misc. 3d 945 (Sup. Ct., N.Y. Cty. 2007), an award of $10,000,000 for past pain and suffering, representing approximately $300,000 per month was upheld. In *In re New York City Asbestos Litig.* (*Koczur*), Index No. 122340/1999 (Sup. Ct., N.Y. Cty. 2011) an award of $6,000,000 for approximately five and half months of pain and suffering (or around $1,000,000 per month) was sustained. The court in *In re New York City Asbestos Litig.*

(*McCarthy*), Index No. 100490/1999 (Sup. Ct., N.Y. Cty. 2011) upheld an $8,000,000 verdict for 24 months of pain and suffering (approximately $333,000 per month). This court recently declined to overturn an award of $15,000,000 for 43 months of pain and suffering, or $348,847 per month. *Seen v. Kaiser Gypsum Co., Inc.*, Index No. 190225/2018 (Sup. Ct. N.Y. Cty. 2023) (2023 WL 2539036. Plaintiff in this action is unique in many respects, as even Jenkins acknowledges: he was older than most plaintiffs at the time of his initial diagnosis, he had been arguably more active than average, he underwent a different course of treatment, and he has survived longer than is typical. It is not the purview of the court to second-guess a jury's consideration of these factors in light of the evidence presented at trial, or to speculate, for example, that perhaps the jury has considered that the longer plaintiff continues to live, the longer he will suffer (including mentally) before his eventual death, and wishes to compensate him accordingly. Thus, given the deference that New York courts traditionally accord a jury's deliberation in a subjective analysis of pain and suffering, the court does not find a basis for remittitur in this action.

D. Cross-motion for Sanctions against Jenkins' Counsel

Plaintiff cross-moves for sanctions pursuant to 22 NYCRR § 130-1.1 against Jenkins' attorneys on the grounds that they knowingly elicited false testimony from Jenkins' expert, Dr. Rabinovitz, and repeatedly submitted discovery responses containing materially false statements. Section 130-1.1(a) allows the court in its discretion to "impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." Section 130-1.1(c) in turn provides that conduct is frivolous if, *inter alia*, "(3) it asserts material factual statements that are false. . . In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not

the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

In light of this standard, the trial record in this matter, including both testimony and exhibits, provides a clear basis for imposition of sanctions on Jenkins' counsel. Exhibits introduced at trial show that as far back as at least 1932, Jenkins has recommended, supplied, and sold gaskets containing asbestos. *See* Exhibit 2 to plaintiff's cross-motion; *see also* Exhibits 3-10 to the cross-motion. Nevertheless, Jenkins' May 2017 responses to plaintiff's first set of interrogatories stated that "Jenkins *may* have at *some unspecified point* or points during its existence, *suggested* the use of asbestos-containing gasket and packing material in connection with the sale of certain types of valve product [emphasis added]." *See* Exhibit 12 to the cross-motion. Its December 2017 interrogatory responses stated that "Jenkins did not manufacture asbestos-containing products but purchased them from other companies." *See* Exhibit 13 to the cross-motion. Its expert disclosure filed in September 2022 with respect to Dr. Rabinovitz acknowledged that Jenkins would sometimes provide its valves with original gaskets supplied by the factory, but Dr. Rabinovitz's case-specific report, filed a few weeks later, stated several times that valve manufactures "like Jenkins" did not recommend or supply gaskets. *See* Exhibits 14, 16 to the cross-motion. These contentions were the basis of Dr. Rabinovitz's opinion that plaintiff would have had little or no asbestos exposure through working with Jenkins' gaskets. Dr. Rabinovitz testified to that effect during his direct examination at trial. *See* Jenkins' Exhibit A at 1775:13-24. However, under cross-examination, Dr. Rabinovitz testified that the night before his direct examination he was advised by Jenkins' counsel that Jenkins did in fact make and supply gaskets, of which fact he said he was unaware. *See* Jenkins' Exhibit A at 1827:2-25; 2187:3-25, 2188:6-17. Yet, Dr. Rabinovitz further testified that as a Jenkins witness at another asbestos trial

in 2017 he acknowledged that his understanding that valve companies did not supply gaskets did not apply to Jenkins. *See* Jenkins' Exhibit A at 1845:1-9.

In short, Jenkins' counsel filed interrogatory responses that contained demonstrably false information, served an expert witness report that also contained demonstrably false information, and allowed said expert witness to give material testimony at trial that was false, with no correction. This is unquestionably sanctionable behavior under § 130-1.1(c), and as such, this court sanctions Jenkins' counsel, Clyde & Co. US LLP, in the amount of $10,000.00.

Conclusion

Accordingly, it is hereby

ORDERED that defendant Jenkins' motion is denied in its entirety; and it is further

ORDERED that the court having determined that Clyde & Co. US LLP, counsel for defendant Jenkins, has engaged in frivolous conduct as defined in Section 130-1.1 (c) of the Rules of the Chief Administrator as set forth above, and having set out above the reasons why the conduct has been found frivolous and that sanctions should be awarded, and having found that the amount of sanctions to be awarded is appropriate as set forth above, plaintiff's cross-motion for sanctions is granted and Jenkins' counsel Clyde & Co. US LLP, without any charge to its client, is hereby sanctioned in the amount of $ 10,000.00, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part 39 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an

affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)]; and it is further

ORDERED that, in accordance with § 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection.

This constitutes the decision and order of the court.

8/28/2023
DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE