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

PRESENT: HON. MARTIN SHULMAN **PART 1**

Justice

Frank Gondar,

- v -

A.O. Smith Water Products, et al.

INDEX NO. 190079/15

MOTION SEQ. NO. 021

The following papers, numbered 1 to 5 were read on this post-trial motion:

	Papers Numbered
Notice of Motion - Affidavits - Exhibits A-S	1
Answering Affidavits - Exhibits A-T	2
Replying Affidavits - Exhibits T-Y	3
Supp. Letter Brief in Further Opp.	4
Supp. Letter Brief in Further Support	5

Cross-Motion: ☐ Yes ☒ No

In a December 7, 2016 bench decision and order on the record, this court granted the sole remaining defendant, Burnham LLC's (Burnham) post-verdict motion (CPLR 4404), in part, for remittitur of the June 25, 2016 jury verdict, but *inter alia* upheld the verdict as to the jury finding Burnham 25% liable for plaintiff, Frank Gondar's pleural mesothelioma, an asbestos-related disease. Plaintiff was then alive.

Based on a Fourth Department decision issued two weeks after the verdict (*In re Eighth Jud. Dist. Asbestos Litig. [Pienta v A.W. Chesterton Co.]*, 141 AD3d 1127 [4th Dept 2016]), and in the absence of any controlling precedent to the contrary, this court must grant Burnham's post-verdict motion to set aside that portion of the jury verdict which found Burnham had acted with reckless disregard for the plaintiff's safety. Because this court "used the charge set forth in the Pattern Jury Instructions, i.e., PJI 2:275.2, [then in use prior to the 2017 Edition of the Pattern Jury Instructions - Civil, this was in error as] that charge does not accurately reflect the standard set by the Court of Appeals in [*Matter of New York City Asbestos Litig. (Maltese)*, 89 NY2d 955, 956-957 (1997)], . . . [and] in effect reduced plaintiff's burden of proof on . . . [his] claim that [Burnham] acted with reckless disregard for. . . [his] safety. . ." (bracketed matter added). *Pienta*, 141 AD3d at 1128. Accordingly, it is

ORDERED that the branch of Burnham's post-verdict motion for remittitur is granted setting aside the jury verdict on discrete damage awards for past and future pain and suffering and granting a new trial on the issue of damages unless, within ten days after service of a copy of this decision and order with notice of entry, plaintiff's administratrix executes a stipulation agreeing to decrease the jury's aggregate award for pain and suffering from $22 million to $7 million; and it is further

ORDERED that the branch of Burnham's post-verdict motion is granted setting aside the jury verdict's finding of recklessness and granting Burnham a new trial on the issue of Burnham's alleged recklessness, unless plaintiff's administratrix executes a stipulation agreeing to withdraw or discontinue the recklessness claim; and it is further

ORDERED that the remaining branches of Burnham's post-verdict motion are denied in their entirety as more fully set forth on the record (transcript attached).

Dated: February 10, 2017

Martin Shulman, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 1

FRANK GONDAR,

Plaintiff,

-against-

Index No.
190079/15

AO SMITH WATER PRODUCTS, et al,

Defendants.

POST-VERDICT MOTION

60 Centre Street
New York, New York
December 7, 2016

B E F O R E:

HONORABLE MARTIN SHULMAN,

JUSTICE

A P P E A R A N C E S:

BELLUCK & FOX, LLP
ATTORNEYS FOR THE PLAINTIFF
546 FIFTH AVENUE
NEW YORK, NEW YORK 10036
BY: SETH A. DYMOND, ESQ.,
JAMES C. LONG, ESQ.,

McELROY DEUTSCH MULVANEY & CARPENTER, LLP
ATTORNEYS FOR DEFENDANT BURNHAM
1300 MOUNT KEMBLE AVENUE
MORRISTOWN, NEW JERSEY 07962
BY: NANCY McDONALD, ESQ.,

VINCENT J. PALOMBO
OFFICIAL COURT REPORTER

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THE COURT: Before the Court is a post-verdict motion by Burnham seeking, among other branches of relief, an order vacating the verdict on various grounds and a new trial and/or remittitur.

In support of that motion, Burnham submitted the affirmation of Mr. Bain, as well as a motion consisting of Exhibits A through F, as well as T through Y, one includes a memorandum of law, which is part of the record.

In opposition, I have the affirmation in opposition by Mr. Dymond, which consists of Exhibits A through R, and accompanying that opposition is Mr. Dymond's memorandum of law.

There was a further reply memorandum submitted by Burnham, as well as an October 27, 2016, letter with Exhibit tabs A through C, apprising the Court of a trilogy of Appellate Division decisions, (i.e. the Peraica, Sweberg and Hackshaw decisions) to assist the Court in addressing, if at all, the remittitur branch of Burnham's motion.

Off the record.

(Discussion held off the record.)

(Case set aside; later recalled.)

THE COURT: I have outlined the papers, did I fairly cover the papers that are the subject of this

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motion?

MR. DYMOND: Yes.

THE COURT: So during the oral argument I may ask you to speak, I may ask questions, and/or just simply begin talking.

So, here's what we know. Essentially, the scope of the plaintiff's work from 1953 to about 1973 involved constructing finished basements. And in the scope of that work, Mr. Gondar testified to doing framing work, sheetrocking, where he constantly used joint compound and mixing same, and then applying three coats. It was described as a very dusty process.

He described doing electrical work where he installed a lot of outlets, which implicated Litolier and Progress products.

He described plumbing work.

He described painting.

He described installing floor tile, including the Amtico, Azrock and Kentile brand names.

He described installing Homasote fire retardant board used around boilers.

He described using roof shingles manufactured by Certainteed, and he described using DAP caulk around windows.

Essentially, for purposes of this motion, and

during the course of the trial against Burnham, claimed bystander exposure to external boiler insulation removal, and in the course of his deposition that was shown or either read to the jury or his de bene esse deposition played to the jury, he described visible dust during the boiler rip-outs. And they involved four companies including Burnham, Kohler, Peerless and --

MR. DYMOND: There were six --

THE COURT: I'm sorry, there were six.

He described six boiler companies, Burnham, Kohler Peerless --

MR. DYMOND: American Standard, Holland.

MS. McDONALD: Holland, Kohler, Lenox, Peerless.

THE COURT: Okay, good.

Now, essentially, as I understand it correctly, and if I misstate something, Ms. McDonald, jump in, but Burnham argues that during the 21 year period in which he was engaged in the construction business, at most when he was exposed to the boiler rip-outs and visible dust they generated, it totaled about 17 months and arguably only during the warm summer months, because boilers are not otherwise ripped out during the winter.

MS. McDONALD: And that's not argued. That's based on plaintiff admitting that.

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THE COURT: I understand.

MS. McDONALD: Okay.

THE COURT: Against that backdrop, Burnham claims that the Court should set aside the verdict against the weight of the evidence because the jury wrongly assumed that he worked on basement renovations for 30 hours a week.

And the argument it presented here was that while an admitted New York City police officer working full-time and working an approximate 35, 40-hour shift per week, and at the same time pursuing a college education which spanned over six years, and while pursuing a master's degree over ten months, where did he find the time to participate in basement renovations?

So, basically, Burnham calls into question the factual accuracy of the 30-hour week over the 21 year period, and therefore, the follow-up on that: The hypothetical posed to Dr. Moline, predicated in part on the assumption that Mr. Gondar was working a 30-hour week, which would include being a bystander to boiler rip-outs, was not based on solid ground.

Fair enough?

MS. McDONALD: Well, yes, and the fact that Mr. Gondar himself stated that it was only sometimes that he saw the rip-out. So that's just another fact

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that's presented to the jury and I think this Court has to consider it.

THE COURT: You further argue that this Court erred in charging the standard PJI recklessness charge, which according to Burnham is contrary to the Maltese standard. And, essentially, what you are arguing is that the actual charge should have read, "the actor had 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." This was quoted from the Maltese decision, and in accordance with your post-verdict brief, it was referred to by the Fourth Department in the Holdsworth decision issued July of this year, several weeks after the verdict was rendered in Gondar.

You further claim that even if the appropriate recklessness charge was given, that there was no basis to charge recklessness based on the evidence presented in this case, stating that the state of the art testimony presented by Dr. Rosner did not prove Burnham had the knowledge of the known risk of using asbestos in its boilers, among other findings, as set forth in your brief and supporting papers; correct?

MS. McDONALD: Yes, there are other arguments.

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THE COURT: You further argue that because Burnham never manufactured asbestos-containing materials, such as asbestos cement and the like, it did not sell or distribute asbestos-containing cement after 1932, stopped recommending the use of asbestos-containing cement or insulation material after 1936, and never had any asbestos exposure related Workers' Compensation claims based on those factors, they're just simply wasn't enough on this record to establish that Burnham was reckless in failing to give a warning when it knew its unjacketed sectional boilers were being ripped out in the 1970s.

MS. McDONALD: Judge, actually -- everything you just said is true, but the -- what the court's references charge is -- what you also have to look at is the evidence that plaintiffs submitted in support of their claim and where was the evidence that we had actual knowledge of the dangers of asbestos. At best, we had a general awareness, like the Maltese court found Westinghouse had based on evidence that demonstrated far more knowledge about the dangers of asbestos, in that case when you compare the facts of that case to this case, the plaintiff's evidence was 1937 -- I have it here -- the Pennsylvania occupational act -- Occupational Safety Act, I forget the precise word --

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THE COURT: What the plaintiffs have stated is because Burnham had principal places of business in at least three or four states, I'm sure Mr. Dymond can remind me, which would include Pennsylvania, New Jersey, New York, including a principal place upstate and that they were aware in those states that workers working with asbestos, either as end-users for manufacturers, distributors and/or as bystanders, et cetera, would be getting asbestos- related diseases during the scope of their employment, that they would be entitled to get Workers' Compensation. And Burnham was charged with that knowledge for a variety of reasons, charged with it because they were required to have knowledge of it, they were charged with it because Burnham's corporate representative said Burnham knew about it, and they were charged with it because Burnham learned about this and other related information by being active in the various trade associations that disseminated this kind of information from the 1930s through the 1970s.

So, respectfully, Burnham had actual knowledge of the dangers of asbestos.

The question is does this rise to the level of being reckless. That's a separate issue. So this record clearly established that they had actual knowledge.

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Moreover, if you read the gross negligence standard, it states what is known or obvious to the arguable tort feasor, so even if a defendant didn't have actual knowledge, it could be found to be reckless, if defendant should have made it its business to learn about the hazards of asbestos. But, hold that thought as I want to go back to recklessness a little later. Right now, I want to go through Burnham's shopping list of errors and problems.

Burnham also challenges the allocation of fault as being irrational or against the weight of the evidence, particularly, when the testimony came in that all six boiler companies had similar situated circumstances -- let me restate it differently.

That one could circumstantially infer from the testimony presented that Mr. Gondar was exposed in a similar manner from the various boiler rip-outs among the six companies. So it would appear to be irrational for the jury to allocate 25 percent to Burnham and only four percent to the other five companies, based on what I've summarized.

Fair?

MS. McDONALD: Almost. You said that the jury could circumstantially infer that they were similar --

THE COURT: Well, yes, because there was no

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specific causation as to the other five companies.

You see, we had specific causation testimony for some of the other products, but there were none for the other five companies, only for Burnham. That's one part of it.

So that's how Burnham was able to at least get these five companies on the verdict sheet, because through general testimony, one could infer causation.

On this record, there were no specific causation facts in a hypothetical for the experts to specifically opine that Mr. Gondar's exposure to asbestos external insulation on the boilers of the other five companies cumulatively contributed to causing his mesothelioma.

In the absence of this testimony, and as plaintiff argued in the opposition memo, this can explain the disparity in the allocation of fault percentages.

What troubles me a little bit is the claim that my comment regarding Mr. Pepper's testimony or arguably direct criticism bolstered the finding of culpability to either boost the allocation of fault percentage and/or establish a finding of recklessness.

I found this surprising because I recall vividly Mr. Radcliffe or yourself present in court and

saying nothing. I think Mr. Radcliffe made the actual motion the following Monday after the Friday, for a mistrial. I was somewhat flummoxed by this application because I didn't quite understand it. I understood it intellectually, but I didn't understand it in the context of what was going on the prior Friday. That Friday, I believe, Mr. Billasky was cross-examining Mr. Pepper. We were in the midst of cross examination after a long direct examination. During the course of cross-examination, I believe there were discussions about certain documents that describe engineering departments or matters of that nature, and there was some question about whether the Burnham engineers could have tested, something along those lines, and I did sustain the objection, and I think the nature of what was going back and forth, I more or less said, well, Burnham didn't do a lot based on what was testified to thus far. But, it was not a comment or criticism of the substantive import of his testimony, but what we heard so far.

And meanwhile, Plaintiff's counsel completed his cross. There was redirect. Recross. I must state that having been a trial Judge for 20 years and having had the privilege of having well-established competent counsel in front of the Court, there is no question that

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we were dealing with the A-team of counsel during this trial. So if I had really committed what would be serious judicial faux pas, all of the defense counsel would have jumped up and objected. Nobody jumped up, which meant that everybody understood I did nothing to compromise the impartiality of my role here during the course of this trial. There was no objection made by any of Burnham's highly-experienced, competent counsel immediately after my comment to potentially give some curative instruction. I venture to say the jury had no memory of what I said then. There was no attempt to read back anything that I may have said. More importantly, to the extent that Burnham's brief claims that I didn't provide any kind of instruction to this jury, PJI 1:25 was read to the jury very carefully. If I'm not mistaken, and remind me if I am wrong, I think we even had my charges shown on the PowerPoint -- did we do that at this trial?

MR. LONG: Didn't you give copies to them to read along with?

THE COURT: I gave them copies, but I'm not sure if I actually scrolled my charges as I was reading to them. I've done it a few times.

MR. LONG: I don't recall that you did, your Honor.

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THE COURT: Fair enough, but PJI 1:25 makes it very clear that summations, opening statements, things of that nature and anything I may have said about the evidence -- about the facts, all of it is not evidence.

I may have also given them charges on the jury's function, the Court's function and I believe in those charges I make it very clear that the finders of facts are the jurors, not the judge and no one may invade their province, only they can find the facts. Nothing I say about facts is meaningful at all. I just charge them on the law, that's what I am responsible for giving.

So under those circumstances: a) I believe it was harmless; and b) I believe any objection was clearly waived.

I want to emphasize that your request for a mistrial directly can be requested at any time, but that's not the issue here. You conflate that position with the position that I erred and you didn't timely object so that I could cure it, if I did err.

So to the extent that you rest on my comment as constituting reversible error warranting a mistrial or retrial on the issue of recklessness or allocation of fault, there is no basis for that position and so to the extent that you rely on that basis for vacatur, that

branch of your post-verdict motion is denied.

You also challenge Dr. Moline's specific causation testimony, largely on the strength of Parker and its progeny, that Dr. Moline's testimony failed to provide a scientific expression for the dose response relationship warranting the vacatur of the verdict.

What makes it interesting is that Burnham adopted Dr. Moline's causation testimony for its Article 16 burden to charge other tort feasors with liability, and from my point of view, waived any challenges to her causation testimony against Burnham.

I know we have a separate issue of alternative use, but in searching this record, it became clear that this issue wasn't going to this jury. Saying Burnham doesn't think Dr. Moline's opinion amounts to much, but adopting it wholesale to establish the liability of the other tort feasors and to allocate fault is much more than "pleading" alternative theories.

Consistent with what I stated earlier, Burnham is actually relying on the very criteria and exact methodology for plaintiff's prima facie case against Burnham for its Article 16 claims, whereas -- and at the same time it inconsistently argued the very criteria is legally insufficient.

The way I see it, you actually concede that

this evidence is legally sufficient and constitutes a valid scientific formulation.

Going back to Parker, Parker and it's progeny do not require precise quantification as to the dose response relationship or an express numerical value for specific causation. Visible dust is factually and legally sufficient for plaintiff's causation experts to opine on.

Now, I know that the plaintiff's briefs cite to Penn, and basically, in your brief, you claim that Penn decided after Parker acknowledged the visible dust standard, and in that case we were dealing with low dose release of asbestos from dental liners and constituted scientific expression. But it gets better, because in the Sweberg and Hackshaw cases, the Appellate Division had the opportunity to address a record where there was no quantification, but a description of visible dust, which was part of the hypothetical that allowed for the specific causation testimony. And, of course, there are different facts there, but essentially, there was a description of dust in the room, dust on clothes, et cetera, and the Appellate Division made clear that plaintiff's expert was in a position to consider the visible dust in giving the specific causation opinion, and there was no requirement to quantify the exposure,

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and they re-cite to Lustenring, Penn --

MR. DYMOND: Marshall.

THE COURT: I'll give the cites to these cases: Penn, 85 AD3d 475 (1st Dept., 2011), Marshall, 28 AD3d 255 (1st Dept., 2006) and Lustering, 12 AD3d 69 (1st Dept, 2004).

So, with all due respect, that particular branch of your motion to set aside the verdict as questioning the ability of Dr. Moline to give an opinion based on the description of the work environment during Mr. Gondar's exposure, is not sustainable. Moreover, the jury was in a position to weigh the credibility of Mr. Gondar and the description of how he was able to juggle his different responsibilities and weigh that against the Social Security records shown to the jury. Credibility is for the jury to determine. Evidently, they believed Mr. Gondar. It's not my place to substitute my judgment for that of the jury. They believed he was exposed to asbestos-containing products during a 30-hour work week. Far be it for me to substitute my judgement for their findings of credibility.

(Discussion held off the record.)

THE COURT: I want to go back to the general foundation, and specific causation.

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In this vein, Burnham's own expert, Dr. Poole refers to the fiber release studies regarding boiler rip outs, where the level of exposure to bystanders were reported at the highest levels in the scientific literature. Moreover, Dr. Markowitz, in his general causation testimony, refers to at least 12 or more studies which address low dose exposures causing mesothelioma.

So there were valid lines of reasoning to support general and specific causation. Moreover, there were valid lines of reasoning to support that plaintiff was exposed to amosite, external insulation, which is more toxic than chrysotile, based on the literature and based on the evidence of record.

Interestingly enough, there was a defense expert, Dr. Crapo, who testified on behalf of Amtico, and his testimony was adopted by Burnham. And Dr. Crapo testified that the vast majority of insulating cement presumably at least an inch-and-a-half thick encasing the boilers including Burnham boilers was comprised of amosite. That's in this record.

Further, I think it's important to make a record on this score and I cite to the Tronlone decision, 297 AD2d 528 (1st Dept 2002), an important decision to understand here, because the Appellate

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Division First Department addressed the nature of exposure in reviewing an order denying defendant's motion for summary judgement. And this is what the APPELLATE COURT said: "We find plaintiff's opposition sufficient to raise triable issues of fact as to, 1), whether asbestos fibers manufactured by appellant were used at Merkin during decedent's employment there; and, 2), the frequency, regularity and proximity of the decedent's exposure to asbestos while at Merkin. And the First Department cited to Berkowitz.

So everyone argued that the Lohrman standard is not applied in New York. To me, it appears the Appellate Division, First Department cites to the very standard, factually, to support a jury hearing this kind of information, and, of course, an expert weighing in on that information.

So as far as I know this precedent is still good law. By the way, this Appellate Division decision was affirmed by the Court of Appeals.

So, against that backdrop, I don't believe there's a basis to rely on Parker and it's progeny to set aside the verdict, either on legal sufficiency grounds or against the weight of the evidence on that score.

MS. McDONALD: Judge, do you want me --

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THE COURT: You can --

MS. McDONALD: I simply want to say that we filed our motion for a directed verdict at the end of plaintiff's case. The only thing that this Court can consider on that motion -- and your Honor declined to rule at that time, and what plaintiff's counsel has done in opposing our motion now is trying to lump in all the evidence that came in after they rested, and your Honor cited some of it, Dr. Crapo's testimony. That's not appropriate for consideration on whether or not they met their burden of proof on specific causation.

THE COURT: A, I reserved on that, you are correct.

B, the very argument you are making here is not in your brief.

MS. McDONALD: That's not true. It's in our reply brief. It is absolutely in our reply brief. We spent a lot of time on it.

THE COURT: Then I stand corrected. But you are asking me to set aside the verdict based on the entire record. So I have every right to consider the entire record.

MS. McDONALD: But Judge, then what's the point of moving for a directed verdict --

THE COURT: I understand.

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MS. McDONALD: Right.

THE COURT: But, again, implicitly, I feel plaintiff met his prima facie case. And now at the end, Burnham has done what it could to counter it. Nothing has changed. So my ruling really is a kind of nunc pro tunc evaluation of your directed verdict motion.

MS. McDONALD: So your decision is based on visible dust? Because that's all there was when plaintiff rested the case.

THE COURT: It's not only that, Ms. McDonald, it's the entire record here. It's not just visible dust, it's the literature, the testimony that's been presented, the jury got to consider the very same information I did. It's the same information that was part of the record in Penn, the same information that was part of the record in Marshall, the same type of information that was part of the record in Hackshaw and Sweberg, and the same information that was part of the record in Peraica, although no one challenged the causation theory. In Peraica, Crane addressed the legal issue of whether a bare metal product or manufacturer should be liable for insulation cement put on its equipment. It is a different situation.

MS. McDONALD: Judge, you yourself pointed out that the standard -- the frequency regularity and

proximity standard. The only facts we have in this case, regarding Mr. Gondar's exposure to a Burnham product was that it happened sometimes -- and that was not just Burnham, it was all of the boiler defendants -- sometimes, as distinguished from the daily constant use of joint compound, floor tiles and other materials that he used on a daily basis for 30 years, that he sometimes encountered people who were ripping out boilers of various brands and that there was visible dust. We don't know what was in that dust. Plaintiff didn't prove what was in that dust.

THE COURT: That's not accurate. There was sufficient information on this record by both plaintiff's experts, as well as defense experts who were familiar with the literature and familiar with the studies done, particularly, with boilers and external insulation, for the jury to circumstantially infer that it was amosite in that external insulation. It's in this record.

Moreover, while you have every right to characterize or comment on the quantity of plaintiff's exposure to Burnham boilers, based on the literature and testimony relying on same, on this record, all one needs is low dose exposure for a short term duration to contract mesothelioma. I don't think you are accurate

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in characterizing the record to suggest that Plaintiff's exposure to Burnham external insulation was slight or trivial.

MS. McDONALD: You're ignoring the literature that was introduced that says that short durations -- that low dose exposures don't cause mesothelioma, that was in the case, as well.

MR. DYMOND: Which is a weight argument, not a legal sufficiency argument.

THE COURT: Right.

MR. DYMOND: And they don't challenge weight on this motion, they challenge the legal sufficiency.

THE COURT: That's correct.

I think we need to go on to the issue of damages.

MS. McDONALD: Okay.

THE COURT: We are confronted with plaintiff who was a unique person in his 80s, who had an unusual healthy constitution, who engaged in extreme sports and recreational activities, as well as volunteerism.

I don't have the time to marshal all the stuff he was doing, the record speaks for itself.

So in, January 2015, he experienced shortness of breath and his left lung collapsed.

In February 2015, he had a thoracentesis and a

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pleurodesis, the latter is an actual surgical procedure which required a four-night hospital stay. I'm doing it from memory, so if I'm not accurate, you'll correct me.

He then went from March to August 2015 and he underwent six rounds of chemotherapy.

In December of 2015, he had injections of Neupogen to boost his white cell count and increase his immune system compromised by chemotherapy. Plaintiff experienced profound stress, nervousness and fear. In fact, I think there was testimony that Plaintiff didn't want to have certain immunotherapy injections done in his home, but had it done in the hospital.

He then underwent a second series of five rounds of chemotherapy in January of 2016.

In February 2016, there was greater tumor growth.

In March of 2016, the record here discloses that the tumor expanded or actually broke through his rib cage.

He also underwent experimental immunotherapy trials at the time.

In May of 2016, he was severely anemic and hospitalized. Parenthetically, Mr. Gondar's mesothelioma spread to his pericardium, so in a sense, he experienced multiple cancers, concomitantly. I

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believe this may be comparable to either Plaintiff Dummett or Konstantin, I can't remember right now.

Nonetheless, in weighing in on the plaintiff's pain and suffering, it is noted I was the trial judge in the Peraica matter, and know that record. It is clear that the suffering of Mr. Peraica was more intensive, but I can conclude that Mr. Gondar's suffering and the symptoms he experienced during his 17 months before the jury verdict is very comparable to the Sweberg record.

So, again, the record speaks for itself and I've made clear that your respective briefs are all part of this record for the Court to review and marshal. So if I don't articulate it in an artful form, I'm asking you to all to bear with me, but I do feel there is a basis to reduce the past pain and suffering award from $12 million to $5 million.

That will be consistent with the Sweberg remittitur ruling, although the Court did not address past pain and suffering. I find that there's comparability in that record and that of Mr. Gondar for past pain and suffering for the 17 months.

Now, to address the future pain and suffering award. The jury awarded $10 million, initially, without any time period, and we sent them back to come up with a date.

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I might add that Mr. Long requested $6 million --

MR. LONG: I'm just laughing -- never mind Judge, yes, you are accurate.

THE COURT: We do know that Dr. Moline gave testimony that described his future prognosis as surviving months, without any specific time period. So it certainly could be more than one month, certainly less than a year. I know that Mr. Dymond went through the litany of cases that describes the different damage awards citing to Penn and going forward. But to the extent that I can get some guidance from the recent trilogy of decisions, in fairness, I can assume that we're dealing with a period of about six months, based on this record.

I know that defendants have generally tried to use a $250,000 a month multiplier figure. I know Burnham believes on this record that the past pain and suffering award should be reduced to roughly one million dollars and change, I don't quite remember, and the future to about $200,000. How you got those numbers, I'm not clear on, but, essentially, from an objective point of view, assuming those were the sustainable numbers, it could arguably establish a defense verdict based on the setoffs.

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MR. DYMOND: That would be an effective defense verdict.

THE COURT: I'm not sure if this is the trial strategy or not, but I have to address the remittitur sum being rooted in appellate case law. Certainly, based on the trilogy of cases we see now that Burnham's assessment of past pain and suffering is far below the sustainable value, and in the future award you accepted the one-month period here.

MS. McDONALD: I think we have no choice but to accept the one-month assessment --

THE COURT: I understand, but on this record here, I believe in addressing the remittitur, I can determine the scope of an award covering a certain period of time. I believe I can do that. You believe I cannot?

MS. McDONALD: I believe you cannot, Judge, I think you're invading the province of the jury, which you said earlier you were not allowed, not permitted to do, and we sent the jury back and said, come back with the number, with how long you are awarding this $10 million. And they went back and deliberately came back with one month. I think we're stuck with that.

THE COURT: Well, I'm not sure. I think as the presiding judge in the North trial, where no time period

was requested or discussed (although in a footnote in the memo, you've managed to suggest it's about two years, without any factual basis for that suggestion), the Appellate Division essentially sustained a future value of $3.5 million.

Anyway, under the circumstances and getting guidance from the trilogy of cases, and given my understanding of the record as it is, I am going to assess or reduce the award of $10 million to two. So --

MS. McDONALD: Just to be clear, Judge --

THE COURT: $2 million.

MS. McDONALD: Right, but you are basing that on a six-month period of pain and suffering?

THE COURT: I'm basing it on months to which, Dr. Moline testified. Months, that's what she said.

That is my remittitur, so I'm really left with recklessness. I've already determined that the allocation of fault is supported by valid lines of reasoning, so the 25 percent allocated against Burnham stands.

So we're really left with the issue of recklessness.

The Dummitt Court of Appeals clearly stated it could not decide the issue of recklessness because it was not preserved. The Appellate Division did not

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address the language of the charge, that court addressed the substantive merits of charging recklessness.

In Peraica, Sweberg and Hackshaw, I and my colleagues have uniformly resorted to the PJI charge. In none of those cases was the language of the charge objected to. It was the lawfulness of giving this instruction.

Burnham was the first, as I understand, to actually challenge the precise language of the charge. Being a consistent jurist, I believe it was perfectly appropriate to cite the charge as I understood it to be in the PJI, consistent with the charge that was given word for word in Dummitt, as well as in Hackshaw and Sweberg. There has been no appellate case law to give guidance on this question, because Dummitt certainly didn't address the language, it just addressed the merits of charging recklessness to the jury. And, of course, in addressing what the Court said in the interest of justice we believe on that record, not a biggie -- sorry, shouldn't say that, not a big deal, because we find that Crane had actual knowledge. And again, it is a different scenario to keep addressing this, applied to the facts here.

We're still left with the issue of what would any court have done if the language of the charge was

specifically challenged which is what happened in the Fourth Department. And, notably, the Fourth Department sustained the allocation of fault, sustained the evidentiary rulings and against that entire backdrop remanded the case back just to address the sole issue of recklessness. That means the jury verdict stayed in place, but the remand is for a mini trial just to determine what did they know and when did they know it and how did they act or not act, to determine whether they should be 100 percent responsible for the judgment.

Fair?

MR. LONG: Fair.

MR. DYMOND: Fair.

THE COURT: So I have two alternatives here. One would be to direct a retrial because of that language concern, and you pointed out that it's not controlling right now, and Holdsworth is the only decision that addressed the language. So while Dummitt controls, generally, on the issue of going to the jury, because there is no other department, including the First Department, that addressed the language and the propriety of having the precise language in such a charge, and we have a Fourth Department decision that says that that is error, then in a sense the Fourth Department decision arguably is binding on me, unless

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there's another decision to the contrary.

MR. DYMOND: Can I just address the issue of Dummitt and the issue of this charge in Dummitt?

So there's a nuance distinction between -- in Dummitt between what the First Department did and what the Court of Appeals did. The Court of Appeals said it was unpreserved and didn't address it. The Court of Appeals, under the scope of their powers, CPLR 5501, can only address legal questions. So if something is unpreserved, they have no ability whatsoever to address it. The First Department, however, can address, just as this Court can, issues that are unpreserved in the interest of justice.

So, what we see in appellate decisions is when an issue is unpreserved, the Appellate Division, any of the four of them, says this issue is unpreserved and either we decline to review it, or we review it in the interest of justice for A, B and C reasons. That's exactly why in the Sweberg and Hackshaw the First Department said this issue is unpreserved and we decline to review it.

In Dummitt, this was raised, and that's why we put in the briefs, this exact issue was raised. And what the First Department did was they did not say that this is unpreserved and we're not reviewing it. They

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simply affirmed the recklessness finding, which would incorporate the challenge to this charge and that's why we've argued that that's an implicit affirmance of that issue.

THE COURT: I have to tell you, I don't agree with you. I understand your argument and I respect it, but I don't agree with you.

I believe that that was not important in that case with Crane. It's not necessarily the same fact pattern with Burnham, because Crane was very involved in selling asbestos products -- I understand -- and I don't mean to conflate, did I get it wrong --

MR. DYMOND: I have a quick response to that, Holdsworth was Crane.

THE COURT: I'm sorry?

MR. DYMOND: Holdsworth was Crane. What -- Crane was the defendant in the Holdsworth decision.

THE COURT: No, no, I understand that. I understand it. I hear you. But for my purposes, there's a different kind of record, because I presided over Peraica and I also presided over Gondar. And while the companies had similar kinds of knowledge, et cetera, there were certain facts in those respective records that, arguably, might be different if the charge was given the way the Holdsworth court said it should be

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given. Again, they argue more of active malfeasance on the part of the tort feasor.

I'm not here to debate that right now, but I believe on this record, I am pausing to think about whether I committed error in not charging the Maltese language in the charge, notwithstanding that Plaintiff's counsel eloquently referred to the actual PJI page, that claimed this charge is based on Maltese.

Sir, I didn't miss it.

MR. LONG: You never do, Judge.

THE COURT: I pause to think about it, which means I'm left with two options: a retrial on the reckless issue and what that means; or, as Burnham concedes, as an alternative in its papers, to simply vacate the reckless finding and apply 25 percent against the remittitur. I believe that Burnham requested this as an alternative in its conclusion in its memo.

MR. DYMOND: Right, but let me say, the retrial would be because in the Court's opinion the charge was insufficient to convey the law. But a full vacatur would be --

THE COURT: I'm not -- it would be a retrial solely on that issue, similar to the Holdsworth case, it wouldn't be a vacatur.

MR. DYMOND: What I am saying, a full vacatur

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of the recklessness finding, which you said was the second option.

THE COURT: Right.

MR. DYMOND: That wouldn't, respectfully, be based on the error in the charge, that would be based on your Honor's finding that the recklessness evidence was --

THE COURT: No, they would have to hear all the information to support a finding of recklessness based on the gross negligent standard as set forth in Maltese. That no one raised it before, is not the issue.

MR. DYMOND: What your Honor is suggesting is a new trial on recklessness but not -- I'm somewhat confused. You said the two options, one was --

THE COURT: No, two options. A retrial on recklessness --

MR. DYMOND: Right.

THE COURT: -- or not a retrial on recklessness, vacate the recklessness finding and sustain the verdict as is without a finding of recklessness.

MR. DYMOND: Right --

THE COURT: Which means there would be several liability, which would mean that Burnham would only be responsible for 25 percent of $7 million.

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MR. DYMOND: Yes, but my point, your Honor, is to take the second option, you would have to conclude that there is -- that it's utterly irrational for any jury to reach a recklessness finding, even with the new charge, based on the record of evidence as it exists right now, which I don't think you can do, because the fact that the charge may have been in error doesn't respectfully permit the Court --

THE COURT: This is exactly what the Fourth Department did. They remanded it back -- read the decision, sir.

MR. DYMOND: For a new trial on recklessness --

THE COURT: No, a new trial solely on recklessness.

MR. DYMOND: Correct.

THE COURT: That means the apportionment stays where it is, the verdict stays where it is. Everything stays where it is. It's kind of a framed hearing on the issue of recklessness, that's what that decision does.

MR. DYMOND: That I have no issue with.

THE COURT: That's what I just said.

MR. DYMOND: But I thought the second part --

THE COURT: Keep everything in abeyance and have a new trial; or find that the recklessness finding cannot be sustained as a matter of law because of the

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error in the language and leave everything else in place.

MR. DYMOND: That's what my argument was, your Honor, because I respectfully do not believe the Court can conclude that the recklessness finding cannot be sustained at all when there is an error in the charge. The error in the charge requires that there be a new trial as to that issue unless the Court believes that the evidence in no possible way can establish a recklessness finding, even under the new language.

THE COURT: Now, I understand what you are saying -- let me go off the record for a second, very quickly.

(Discussion held off the record.)

THE COURT: You had a claim that we deprived you of an opportunity to put forward before the jury alternative exposures based on Mr. Gondar's alleged exposure in the Army and working with steel. I find in searching this record you had at least on five occasions waived that ability to be able to explore that. So there was a knowing waiver, so your failure to be able to present anything on that is of no consequence on this record.

(Discussion held off the record.)

THE COURT: I believe that there was error in

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giving the reckless charge. What I'm left with is deciding what I should do with that. Do I follow Holdsworth and order a retrial on a framed issue; or do I have the ability to simply vacate the reckless finding and simply uphold the jury's verdict, subject to the remittitur as set forth on this record. That's what I'm left with.

I will allow both parties to send me a letter determining the scope of what I can do.

Fair enough?

MR. DYMOND: Fair enough.

MS. McDONALD: Yes.

THE COURT: Thank you.

MS. McDONALD: Thank you, your Honor.

* * *

CERTIFIED THE FOREGOING IS
A TRUE AND ACCURATE TRANSCRIPTION
OF THE PROCEEDINGS, THIS DATE.

VINCENT J. PALOMBO, RMR