At a Term of the Supreme Court of the State of New York held for the County of Onondaga at the Lewis County Courthouse, Lowville, New York on the 27th day of April, 2015.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

THE ESTATE OF LEWIS NASH, MARY NASH AS EXECUTRIX.

Plaintiff,

v.

A.W. CHESTERTON COMPANY, INC., et al.,

Defendants.

DECISION AND ORDER

Index No. 2012-000719
RJI No. 33-12-1731

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Merrell, C.C., J.S.C.

Before the Court are motions for directed verdict and a post trial motion by Defendant Navistar, Inc. ("Navistar"), for an Order pursuant to CPLR §4404(a) setting aside the jury's verdict and dismissing the action, or, in the alternative, ordering a new trial on all issues, or in the alternative on the issues of the allocation of fault and/or the award of future damages.

PROCEDURAL HISTORY

This matter proceeded to trial commencing December 3, 2014 and concluding on

December 16, 2014. The Court will not attempt to summarize the evidence here. The jury found that Plaintiff's decedent Lewis M. Nash ("Nash") was exposed to asbestos fibers manufactured, sold or distributed by Navistar, that Navistar was negligent in failing to adequately warn about the dangers of such products, and that Navistar's negligence was a proximate cause of Nash's mesothelioma. Nash was a bus driver employed by the Fayetteville-Manlius Central School District and alleged exposure to asbestos from brakes and gaskets sold by Navistar. Such exposure occurred in the bus garage at the school, where Nash would routinely spend time between his bus runs. The jury awarded Plaintiff $3 million in conscious pain and suffering, $3 million in emotional pain and suffering between the onset of Nash's disease and his death; $200,000 for loss of services and society from the onset of Nash's disease until his death; $1,000,000 for wrongful death from the date of death until date of verdict and $500,000 for wrongful death from date of verdict until the time Mr. Nash would have otherwise been expected to live, granting a total jury award of $7.7 million.

Navistar moved for a directed verdict at the close of Plaintiff's proof, on the following grounds: (a) dismissal of the punitive damages cause of action for failure to prove necessary conduct; (b) dismissal of the failure to warn claim based on no legal duty to bystanders such as Nash; and (c) failure of proof as to general and specific causation based on objections to the testimony of Dr. Abraham, plaintiff's expert.

The Court granted Navistar's motion dismissing the claim for punitive damages, as no such charge was presented to the jury. The issues of lack of duty to Nash and failure to prove causation will be considered as part of Navistar's post-trial motion.

Defendant makes the following arguments in support of its CPLR 4404(a) motion:

1. The causation opinions of Plaintiff's expert, Dr. Abraham, were inadmissible and Plaintiff presented insufficient evidence of general or specific causation.

2. Navistar owed no duty to warn a bystander like Mr. Nash and Plaintiff failed to provide sufficient evidence of causation with respect to the alleged failure to warn.

3. A new trial should be ordered to correct errors in evidentiary rulings.

4. The Court failed to instruct the jury on the issue of apportionment of liability.

5. The jury's damage awards should be substantially remitted because they were based on legal errors and were otherwise excessive.

Plaintiff opposes the motion as follows:

1. The jury's verdict that exposure to asbestos was a cause of Mr. Nash's mesothelioma was based upon convincing evidence that was correctly admitted.

2. Causation and Duty to Warn

   a. Navistar had a legal duty to warn.

   b. There was sufficient basis for the jury's verdict that Navistar's failure to warn was a proximate cause of Mr. Nash's mesothelioma.

   c. Navistar waived its argument that Plaintiff did not prove that Mr. Nash would have followed a warning had one been given.

3. The Court made no evidentiary errors that merit vacating the jury's verdict.

4. The Court properly ruled that Navistar did not meet its burden of proving that Plaintiff was exposed from any other entity's products.

5. There is no basis for reducing the jury's damages award.

   a. Navistar waived its objection to the damages questions on the verdict sheet.

   b. The jury's damages awards were not excessive.

Under CPLR §4404(a), the Court may set aside a verdict or judgment entered after trial, and direct that judgment be entered in favor of party entitled to judgment as a matter of law, if the verdict was not supported by legally sufficient evidence, since under those circumstances there is "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, 45 NY2d 493, 499 [1978]).

1. Admissibility of Dr. Abraham's testimony and evidence of general and specific causation

Navistar argues that causation opinions of Plaintiff's expert, Jerrold L. Abraham, M.D. were inadmissible and should be stricken because they lacked sufficient foundation and were based on invalid assumptions. Navistar contends Dr. Abraham had no reliable basis to support his opinions as to general causation; that exposure to dust from friction products, such as brakes, can cause mesothelioma. Navistar further contends that Dr. Abraham's opinions as to specific causation were not based on any relevant "scientific expression" of Nash's exposure to asbestos from Navistar's friction products, as required by Parker v. Mobil Oil Corp., 7 NY3d 434, 449 (2006), Cornell v. 360 W. 51st St Realty, LLC, 22 NY3d 762 (2014), and more recently In re New York City Asbestos Litigation (Juni), 148 AD3d 233 (1st Dept. 2017). In that regard, Navistar argues that Dr. Abraham's testimony should be stricken because there was no scientific foundation for his testimony that Nash's cumulative exposure to Navistar products were substantial contributing factors in causing Nash's mesothelioma, or that "each and every exposure" was capable of causing Nash's

mesothelioma. Plaintiff contends that Dr. Abraham's testimony as to general and specific causation had a sufficient foundation and were based on scientific studies; that Nash's exposure to Navistar products was substantial and constituted his only proven exposure to asbestos.

In Juni, the First Department considered the burden of proof set forth in Parker, which dealt with benzene exposure, and Cornell, which dealt with exposure to toxic molds, and applied those principles to asbestos exposure. The Juni Court clearly held as follows:

1. The fact that asbestos, or chrysotile, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendants' products to cause the disease.

2. It is not necessary to quantify a plaintiff's exposure; however, causation must be established through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies.

3. Experts are required to either quantify decedent's exposure levels or otherwise provide some scientific expression of plaintiff's exposure level, and cannot simply testify only in terms of an increased risk and association between asbestos and mesothelioma.

4. Causation based only on visible dust emanating from a particular defendant's asbestos-containing product will not be enough. Citation to studies that measure the amount of asbestos fibers released by the products at issue and showing that the amount is hazardous, will provide an adequate foundation for liability.

5. That proof of causation is based on the discrete facts of each case.

Juni holds that the standards set by Parker "are not altered by" Lustenring v. A.C. & S. Inc., 13 AD3d 69 (2004) lv. denied 4 NY3d 708 (2005); Penn v Amchem Products, 85 AD3d 875 (1st Dept. 2011); Matter of New York Asbestos Litigation (Marshall), 28 AD3d 255 (1st Dept. 2006). In each of those cases the trial court was

entitled to rely on evidence linking visible dust to the use of the particular product, where expert testimony established that the extent and quantity of the dust to which plaintiff had been exposed contained enough asbestos to cause the mesothelioma. In Juni, the testimony of plaintiff's experts as to the content of the dust to which decedent was exposed was found by the court to be equivocal at best, and insufficient to prove that the dust to which the Juni plaintiff was exposed contained any asbestos, or enough to cause his mesothelioma. Id, at 237.

As noted by the Court of Appeals in Parker, "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)" 7 NY3d at 448.

The Court in Parker held that precise qualifications of exposure levels or use of the dose response relationship is not always necessary, provided whatever methods the expert uses are generally accepted in the scientific community. "So long as plaintiff's experts have provided a scientific expression of plaintiff's exposure levels, they will have laid an adequate foundation for their opinions on specific causation", (Nonnon v. City of New York, 88 AD3d 384, 396 [3rd Dept. 2011]).

As for general causation, the link between asbestos and disease is well documented, and Navistar does not dispute that it is generally accepted that inhalation of "raw" asbestos fibers can contribute to an individual risk of developing mesothelioma, as testified to by Dr. Abraham (Defendant's Reply Memorandum of Law, page 4). See Wiegman v. AC&S, Inc., 24 AD3d 375 [1st Dept. 2006]) ("The link between asbestos and disease is well-documented, and the parties merely differed as to whether the asbestos contained in this particular product could be released in

respirable form so as to cause disease. Since the parties agreed on causation, no novel scientific technique or application of science was at issue, and a Frye hearing was not warranted")

Navistar contends, as have other friction defendants, that Dr. Abraham's testimony should be stricken due to lack of epidemological studies showing an increased risk of mesothelioma in auto mechanics, and that the length of asbestos fibers in brakes and the conversion of asbestos to non-asbestos fosterite during braking eliminates brakes as a cause of mesothelioma. Dr. Abraham testified that both long (greater than five microns) and short fibers, found in brake dust, cause mesothelioma, and that if even a small percentage of such fibers are greater than five microns, they would still be in the millions. He further testified that the levels of such asbestos measured in the air in the vicinity of brake work were at least 10,000 times above background levels of asbestos, which would be sufficient to cause mesothelioma. Dr. Abraham also testified that studies have shown that not all asbestos in brakes is converted to fosterite by the braking process, although most is depending on braking conditions. Further, his testimony was that installation of new brakes, which involves grinding and riveting, does not involve conversion of asbestos to fosterite and causes the release of chrysotile asbestos, which is generally contaminated by tremolite. Plaintiff also offered expert testimony by Dr. Stephen Compton that the School's methods to clean the garage or use of water when cleaning the brakes effected the spread of asbestos throughout the garage and did not remove it from the workplace. Evidence was presented that the opinion of Defendant's expert, Dr. Beasley, that exposure to chrysotile asbestos does not cause mesothelioma, is not shared by a majority of the relevant scientific and medical community. The question

of general causation was thus the subject of competing expert opinion and properly before the jury for its consideration.

Dr. Abraham's testimony was properly admitted for consideration by the jury and was also sufficient to make a showing of specific causation. There was significant testimony as to the scope of Nash's exposure to asbestos at the Fayetteville-Manlius Central School District bus garage from 1957 to 1986. There was evidence that Navistar supplied buses and component brakes and gaskets to the School during the period of alleged exposure. Dr. Abraham's opinion was that the visible dust to which Plaintiff was exposed, which derived from bake and gasket work being performed by mechanics in the Fayetteville-Manlius Central School bus garage, contained asbestos in a quantity thousands of times greater than background and was sufficient to be a substantial contributing cause of Mr. Nash's mesothelioma, (Penn v. Amchem Products, supra 85 AD3d 475). Dr. Abraham's testimony, which was based in part on air sampling statistics testified to by Dr. Stephen Compton and the Rohl study, among others, of asbestos employees to bystanders in the vicinity of brake work, set forth a "scientific expression" of an exposure level sufficient to support the claims against Navistar, (Matter of NYS Asbestos Litigation (Dummit v. A.W. Chesterton), 36 Misc.3d 1234(A), aff'd 121 AD3d 230 [1st Dept. 2014], aff'd on other grounds 27 NY3d 765; Lustenring v. AC&S, Inc., supra, 13 AD3d 69). See Also Dominick v. Charles Millar & Sons Co., 149 AD3d 1554 (4th Dept. 2017), where Plaintiff's expert testified that, if a worker sees asbestos dust, that is a "massive exposure...capable of causing disease". In Dominick the defendant's products consisted of bags of asbestos and asbestos boards, and there was no real dispute that dust from these products contained asbestos. The opinion of Plaintiff's expert in Dominick was that the visible dust to

which Plaintiff was exposed, which derived from the cutting of asbestos millboard and dumping bags of asbestos into tubs or bins, contained asbestos in a quantity thousands of times great than background and was sufficient to cause Plaintiff's mesothelioma. Such exposure occurred at Plaintiff's workplace on a daily basis, for three months each year, over approximately five years. The Fourth Department specifically noted that the expert's overall testimony met the Parker v. Mobil Oil test for specific causation and, by implication, the holding of Juni which adheres to those requirements. To the extent Dominick may be said to depart from Juni and adopts a somewhat lesser standard of proof, Dominick would control in the instant case. The proof in this case met the level of scientific expression set forth in Juni, Parker and certainly Dominick.

Dr. Abraham's testimony that Nash's exposure to chrysotile asbestos in the bus garage was part of his cumulative exposure and was a substantial factor in causing his mesothelioma was therefore supported by the record and properly submitted to the jury. Navistar's arguments go to the weight which the jury should have given Dr. Abraham's testimony, not its admissibility.

From the foregoing, Dr. Abraham's testimony met the standards set forth in Juni, Lustenring, Penn and Dominick in that there was a foundation or scientific expression of an exposure level sufficient to cause Nash's mesothelioma, based on witness testimony of the frequency, duration and level of Plaintiff's exposure together with studies of the asbestos fiber content of dust generated by brake work in a garage setting, all of which constituted sufficient quantitative evidence of Nash's exposure to asbestos. It is clear that Plaintiff's experts did not solely rely on a generalized, unsupported opinion that any single exposure above background levels can be treated

as a substantial contribution to an asbestos related disease, commonly referred to as the "each and every exposure" theory.

Navistar presented several expert witnesses who testified at length that Navistar's exposure to asbestos from brakes in general and from brake work in the bus garage in particular could not have caused his mesothelioma. The jury was appropriately given the opportunity to fully consider that testimony and resolve the credibility and contentions of the various experts on these issues. Based on the evidence presented there was a valid line of reasoning and permissible inference which led the jury to reach its result.

Defendant's motions for directed verdict and its post trial motion are therefore denied as to the issues of general and specific causation. The jury verdict was supported by legally sufficient evidence that Defendant was negligent and its negligence was a proximate cause of Plaintiff's injury.

2. Duty to Warn / Proximate Cause Based on Failure to Warn

Navistar contends it owed no legal duty to warn Nash of the potential dangers of its products by reason of Nash's status as a bystander and not a direct user of their products. Navistar argues that Nash's employer was in a superior position to protect its employees and that Navistar had no duty to provide warnings specifically tailored to Nash.

The Court must determine whether an applicable duty to warn owed by the manufacturer to the injured party exists in the first instance, (Matter of New York City Asbestos Litigation (Dummitt), 27 NY 3d 765, 787 [2016]). A duty to warn may not be based entirely on the foreseeability of the harm at issue, though foreseeability defines

the scope of a duty once the duty is determined to exist, (Hamilton v. Beretta USA Corp., 96 NY2d 222, 232 [2001]). "[A] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known", (Liriano v. Hobart Corp., 92 NY2d 232, 237 [1998]). The manufacturer must warn of dangers arising from the product's "intended use or a reasonably foreseeable unintended use", (Lugo v. LJN Toys Ltd., 75 NY2d 850, 851 [1990]).

The duty extends to the original or ultimate purchasers of the product, the employees of those purchasers and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn. See Dummitt, supra (27 NY3d 788-789) and cases cited therein. In asbestos litigation Plaintiff must show facts and conditions from which defendant's liability may reasonably be inferred, that is, that plaintiff worked in the vicinity where defendant's products were used, and that plaintiff was exposed to defendant's product, (Cawein v. Flintkote Co., 203 AD2d 105 [1st Dept. 1994]; In re NYC Asbestos Litigation (Comeau), 216 AD2d 79 [1st Dept. 1995]; In re New York City Asbestos Litigation (Sweberg), 143 AD3d 483 [1st Dept. 2016]).

Injuries to bystander and co-employee plaintiffs injured by products produced by defendant manufacturers but used by third parties are recognized as actionable in New York, (Matter of New York City Asbestos Litigation (Konstantin), supra 121 AD3d 230, LaPaglia v. Sears Roebuck and Co., Inc., 143 AD2d 173 [2nd Dept. 1988] (upholding jury verdict in favor of bystander infant plaintiff based on failure to warn claim against manufacturer of lawnmower owned and driven by a co-defendant at the time of plaintiff's injury); Cover v. Cohen, 61 NY2d 261, 274-275 (bystander plaintiff's failure to warn claim against manufacturer of car operated by co-defendant); Coughlin v. Mine Safety Appliances Co., 11 NY2d 62, 68 [1962]). See also Bah v. Nordson

Corp., 2005 WL 1813023 (S.D. NY 2005) (bystander co-employee injured by hot glue sprayed from machine operated by co-employee).

In addition, the Restatement of Second Torts specifies that a supplier of a dangerous chattel may be found liable for negligent failure to warn "to those whom the supplier should expect to use the chattel....or to be endangered by its probable use". The supplier's duty to warn therefore requires warnings to be given "to those who are to use the chattel which [it] should realize to be necessary to make its use safe for them and those in the vicinity it is to be used". Restatement Second Torts Section 388, comment (g). Generally, the adequacy of a warning in a products liability case based on a failure to warn is, in all but the most unusual circumstances, a question of fact to be determined at trial, (Gabriel v. Johnston's L.P. Gas Service Inc., 143 AD3d 1228, 1231 [4th Dept. 2016], citing Johnson v. Delta International Machine Corp., 60 AD3d 1307, 1309; Cover v. Cohen, supra, 61 NY2d at 276).

In this case the manufacturer, not the employer, is in a superior position to know of and warn against the hazards of asbestos in its products. Dummitt, supra (27 NY3d 790). The scope of the manufacturer's duty to warn clearly extends to foreseeable users and co-employee bystanders or those in the vicinity. The issues of foreseeability and proximate cause were properly considered by the jury, (Voss v. Netherlands Inc. Co., 22 NY3d 728, 736 [2014]; Monahan v. St. Joseph's Hospital and Health Care Center, 82 AD2d 102 [4th Dept. 1981]). Evidence was presented that Navistar was aware of the dangers of asbestos exposure since the early 1970's and that neither Decedent nor his employer were warned by Navistar about these dangers. Since varying inferences are possible on the issue of proximate cause, the issue was properly before the jury. Monahan, supra, at 107.

Navistar further argues that Plaintiff presented no evidence that Nash's injury would have been prevented had Navistar given a different warning. Plaintiff contends Navistar failed to move for a directed verdict pursuant to CPLR §4401 on the issue of warnings and thus implicitly conceded the issue for the trier of fact, (Miller v. Miller, 68 NY2d 871, 873 [1986]; Gonyon v. MB Television, 36 AD3d 592 [2nd Dept. 2007]; Sanford v. Woodner Co., 304 AD2d 813 [2nd Dept. 2003]). Navistar's motion for a directed verdict sought a) dismissal of the punitive damages cause of action for failure to prove necessary conduct; b) dismissal of the failure to warn claim based on no legal duty to bystanders such as Nash; and c) failure of proof as to causation based on objections to Dr. Abraham's expert testimony, as previously outlined. The motion also noted that Plaintiff failed to prove that warnings were inadequate. Navistar's motion for directed verdict did not, however, specifically contend that even if warnings had been provided there was no evidence Nash would have heeded them.

In any event, despite Navistar's omission of this particular argument on its motion for a directed verdict, Navistar has preserved its ability to contest Plaintiff's claim as a matter of law by moving after the verdict pursuant to CPLR 4404(a) (City of Plattsburgh v. Borner, 38 AD3d 1047 [3rd Dept. 2007]).

Plaintiff claims no warnings were given during the bulk of Nash's period of exposure. The undisputed evidence was that Navistar (then International) did not craft or issue any warnings with regard to asbestos in its brake or gasket products until the mid to late 1980's. Prior to that time, Navistar relied on warnings that may have been provided by its suppliers. There was testimony that one of Navistar's several suppliers, Abex, placed a warning on its brake assembly packaging in the early 1970's, but no evidence was presented that Abex supplied brakes were used by the

Fayetteville-Manlius School District. The warning on the Abex packaging stated "Caution, contains asbestos fibers. Avoid creating dust. Breathing asbestos may cause serious bodily harm". There was no proof that any other suppliers provided warnings. There was no testimony from Nash or the two bus garage mechanics who testified regarding the presence or absence of warnings.

The Court of Appeals in Dummitt, supra, has reiterated that trial courts must continue to ensure that their jury instructions honor the principle that "the burden of proving proximate causation, which in a case like this one includes the burden of demonstrations that the injured party would have heeded warnings, falls squarely on plaintiffs.", citing Sosna v. American Home Products, 298 AD2d 158 (1st Dept. 2002). In Dummitt, the Court specifically declined to rule on the propriety of the Court's charge on preservation grounds. The Dummitt trial court instructed the jury to apply the presumption that, if defendant had issued warnings, plaintiff would have heeded them. Defendant excepted to the charge on the grounds that the presumption could be rebutted, and the jury charge was corrected accordingly. The charge was deemed academic because the Plaintiff in Dummitt testified he would have heeded warnings had they been given. Here, Navistar took no exceptions to the Court's standard PJI charge that Plaintiff bore the burden of proving negligence and proximate cause, nor did it argue in its motion for directed verdict that no evidence was presented to show Nash or school district employees would have heeded a warning if one was given. As a result, Plaintiff argues, there was no need to have requested a "heeding" instruction.

Where plaintiff alleges no warning was provided whatsoever the Courts recognize a presumption that the user would have heeded warnings if they had been given, and that the injury would not have occurred. A defendant may rebut this

presumption by introducing specific facts showing that the warning would have been futile because such warning would not have been heeded, (Williams v. Arctic Cat Inc., 2012 WL 6086912, [N.D.N.Y. 2012]; Gunn v. Hytrol Conveyor Co., 2013 WL 2249241 [E.D.N.Y.2013]; Peraica v. A.O. Smith Water Products, Inc., 143 AD3d 448 [1st Dept. 2016]).

Here, any warning would have been directed in the first instance to the mechanics and/or the School District, which would have a duty to take appropriate precautions to pass the warning to other employees such as Plaintiff or take appropriate safety measures, (Power v. Crown Controls Corp., 149 Misc.2d 967 [1990]; Marache v. Akzo Nobel Coatings Inc., 2010 WL 908467 [S.D.N.Y. 2010]). It cannot be said, as a matter of law, that the failure to warn the mechanics or the School District would have been futile and would not have prevented Nash's exposure to asbestos. See also, Derienzo v. Trek Bicycle Corp., 376 F. Supp.2d 537, 570 (S.D.N.Y. 2005); Anderson v. Hedstrom Corp., 76 F. Supp.2d 422, 445 (S.D.N.Y. 1998); Liriano v. Hobart Corp., supra, 170 F3d at 271-72; Roman v. Sprint Nextel Corp., ____ F. Supp.3d _____, 2014 WL 5870743 (S.D.N.Y. 2014); Adesina v. Aladan Corp., 483 F. Supp.2d 329, 338 (S.D.N.Y. 2006). Evidence was presented as to general safety precautions taken by the School District in the bus garage. The only evidence adduced which is arguably relevant to show a hazard warning would have been futile was that Nash spent time in the garage after the transportation supervisor told bus drivers to stay out of the garage work areas so the mechanics would not be distracted from their work. No evidence was presented that the School District or Mr. Nash habitually disregarded hazard warnings. This fact question was resolved by the jury which considered this evidence and found for the Plaintiff after being charged that

Plaintiff had the burden of proof. Whether or not the "heeding presumption" with rebutting language had been charged there was ample evidence to support the jury's finding of proximate cause.

In that the jury could fairly conclude from the evidence that no warnings were given with the product or contained in operations manuals, the cases cited by Defendant would not be controlling, as they deal with instances where alleged inadequate warnings were provided but not read by Plaintiff, as opposed to no warnings having been given at all. (See e.g. Sosna v. American Home Products, supra 298 AD2d 158).

At minimum, sufficient facts and circumstances were shown from which negligence and causation were reasonably inferred by the jury, (Koester v. State, 90 AD2d 357, 361 [4th Dept. 1982]; Raney v. Owens-Illinois, Inc., 897 F2d 94, 95-96 [2d Cir. 1990]; Topliff v. Wal-Mart Stores East LP, 2007 WL 911891 [N.D.N.Y. 2007]).

3. Evidentiary Rulings

The Court has considered Navistar's arguments that the 1986 EPA Gold Book and 1986 "Don't Blow It" video were improperly admitted into evidence or otherwise discussed at trial. These materials were admitted on the issue of notice and continuing duty to warn, and a limiting charge was given accordingly. Navistar now argues there was no issue as to its notice of the dangers of asbestos in 1984; however, Plaintiff had the burden of proof as to notice and there was no stipulation offered as to Navistar's knowledge of the hazards of asbestos at any point in time. As previously noted, Navistar relied upon the knowledge of its brake suppliers and any warnings they provided with their products.

The Court has also reviewed the admission of the letter dated December 28, 2010 from Dr. Paustenbach, a co-employee of Navistar's expert, Dr. Finley, to Ford Motor Company. Although the letter was not addressed to Navistar, it was material and relevant on the issue of financial bias. There was limited questioning with regard to the letter, there was no re-direct questioning on the issue and it was not reviewed by the jury during its deliberations. If it was admitted in error, it did not prejudice a substantial right of Navistar.

Navistar also contends that its expert, Dr. Beasley, was improperly cross-examined with an e-mail to her from Dr. Landrigan, a colleague at Mount Sinai Hospital, wherein Dr. Landrigan expressed disagreement with Dr. Beasley's opinions as to chrysotile asbestos exposure. The existence of the e-mail was essentially volunteered by the witness, not offered or admitted into evidence, and the very limited questioning on the issue was material and relevant to the witness's credibility.

The Court properly excluded specific fiber potency studies insofar as they purported to calculate numerical fiber potency ratios for chrysotile and crocidolite. The studies were reviewed and the Court found the studies to be speculative and based upon assumptions that lacked sufficient basis in fact. In any event, both Navistar's and Plaintiff's experts were permitted to testify to and generally agreed on the qualitative differences in the potency of chrysotile and other forms of asbestos, including amphiboles. The jury was presented with and considered substantial evidence that exposure to chrysotile from brake work did not cause Nash's mesothelioma. Further, there was no proof that Nash was exposed to any type of asbestos other than chrysotile.

4. Apportionment of Liability Pursuant to CPLR Article 16

Navistar seeks a new trial based on the Court's denial of its request to charge the jury to apportion fault among Navistar, Weil-McLain, Johns Mannville, H.B. Smith and Georgia-Pacific. Defendant has the burden of proving the proper amount of the equitable shares of culpability attributable to the other companies, including evidence of lack of warnings (In re New York Asbestos Litigation (Marshall), 28 AD 3d 255 [1st Dept. 2006]; Zalinka v. Owens-Corning Fiberglass Corp., 221 AD2d 830 [3rd Dept. 1995]; Konstantin, supra 121 AD3d 230, 246-247).

A review of the record shows the following proof was offered with regard to the Article 16 entities:

(a) Weil-McLain

Plaintiffs' answers to interrogatories, which were admitted into evidence, alleged exposure to asbestos from Weil-McLain boilers while Nash was employed at Fayetteville Manlius Schools in maintenance from 1957 to 1994. There was no testimony as to the asbestos content, if any, of such boilers. Defendant did not offer any expert testimony with regard to specific causation from Weil-McLain boilers, relying on Dr. Abraham's testimony. Dr. Abraham testified he was not asked nor did he perform an assessment of the apportionment between Plaintiff's exposures. He did testify that Plaintiff's "exposures around boilers at the foundry and as a janitor were substantial contributing causes of his mesothelioma" ... "whatever those exposures were, if they were to asbestos" (transcript p. 377). However, in contrast with Dr. Abraham's testimony regarding Nash's exposure to asbestos from brakes, there was an insufficient "scientific expression" of Nash's level of exposure from boilers. Further, there was no testimony as to the absence or inadequacy of any warnings or Weil-

McLain's negligence.

(b) Johns Manville

Johns Manville was not specifically identified in Plaintiffs' answers to interrogatories as a source of asbestos exposure. Plaintiff testified he used Johns Manville ceiling tiles in home renovation projects but did not know if they contained asbestos. He did not observe any warnings on Johns Manville tile boxes.

(c) H.B. Smith

H.B. Smith was not specifically identified in Plaintiffs' answers to interrogatories as a source of asbestos exposure. There was no testimony regarding any specific H.B. Smith asbestos-containing product to which Plaintiff was exposed, or any scientific expression of Plaintiff's levels of exposure. There was no testimony regarding absence of warnings on any H.B. Smith product.

(4) Georgia Pacific

Georgia Pacific was not specifically identified in Plaintiffs' answers to interrogatories as a specific source of asbestos exposure. Plaintiff testified he used Georgia Pacific joint compound in the 1960's and again in 2009 or 2010 in his garage. There is no reference to asbestos exposure from joint compounds manufactured by Georgia Pacific in Plaintiffs' answers to interrogatories.

Navistar adduced no evidence that these entities were negligent in failing to warn Nash, relying on Plaintiffs' experts, who did not address the negligence of any other specific companies. The only evidence that Nash may have been exposed to asbestos from products manufactured or sold by Weil McLain, the only manufacturer identified by Nash in his answers to interrogatories. Defendant had the burden of proof to prove the equitable shares of third parties by competent testimony and

evidence (Bigelow v. Acands, 196 AD2d 436 [1st Dept. 1993]). Nash's testimony was that he had no personal knowledge as to whether any of those products contained asbestos and Navistar did not present evidence as to the asbestos content of any of those products or a "scientific expression" of Nash's exposure pursuant to Parker (See Konstantin, supra, 121 AD3d 230, 247). Dr. Abraham's testimony as to causation from Weil McLain's products was conditioned on proof that Nash was actually exposed. Even assuming there was adequate "qualitative" proof of exposure, there was no prima facie evidence from which the jury could allocate liability or apportion equitable shares (Hamilton v. Garlock, 96 F.Supp. 2d 352 [S.D.N.Y. 2000]; In re New York City Asbestos Litigation (Ronsini), 256 AD2d [1st Dept. 1998]). Most importantly, Defendant failed to meet its burden to prove that any of these companies were negligent in that they had notice of or disregarded the dangers of asbestos in their products or workplaces or failed to issue adequate warnings to users of their products or bystanders, (Zalinka, supra, 221 AD2d at 831; Matter of Eighth Judicial District Asbestos Litigation (Holdsworth), 141 AD3d 1127 [4th Dept. 2016]; Dominick v. Charles Millar & Sons, Inc., supra, 149 AD3d 1554). Defendant's motion as to apportionment is denied.

5. DAMAGES

(a) **Pain and Suffering**

Defendant contends the award for pain and suffering was improper and otherwise excessive because the verdict sheet divided the award into subcategories of physical and emotional pain and suffering. The Court will first consider whether the award was excessive, which resolves the issue as to whether the jury improperly

considered physical and emotional pain and suffering as separate items of damage.

The amount of damages to be awarded for personal injuries is primarily a question for the jury (See, Ferro v. Maline, 31 AD2d 779 [4th Dept 1969]). However, an award may be set aside "as excessive or inadequate if it deviates materially from what would be reasonable compensation." (see Ortiz v. 975 LLC, 74 AD3d 485 [1st Dept 2010]; Prunty v. YMCA of Lockport, 206 AD2d 911 [4th Dept 1994]). In determining whether an award deviates from what is reasonable compensation, courts look to comparable 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" (Reed v. City of New York, 304 AD2d 1 [1st Dept. 2003], lv app den 100 NY2d 503 [2003]). However, the amount of damages awarded or sustained in prior, similar cases is not binding on courts but may be considered by this Court as guidance (In re New York City Asbestos Litigation (Konstantin), 27 NY3d 1172 (2016); Senko v. Fonda, 53 AD2d 638, 639 [2nd Dept. 1976]). "Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible" (Po Yee So v. Wing Tat Realty, 259 AD2d 373, 374 [1st Dept. 1999]). Moreover, courts have recognized that a jury's verdict should be given considerable deference (See Ortiz v. 975 LLC, supra).

Navistar contends the jury's award for future pain and suffering should be reduced to bring it in line with the recent Konstantin and Dummit awards (In re New York City Asbestos Litigation: (Konstantin/Dummit), supra, 121 AD3d at 255 and Didner v. Keene Corp., 1990 WL 10626462; Aff'd 188 AD2d 15 [1st Dept. 1993]; Aff'd as modified 82 NY2d 342). Navistar contends these awards support a maximum

verdict which reflects monthly averages in the $136,000 to $204,000 range.

There was significant evidence in the record as to Nash's pain and suffering due to his mesothelioma. The uncontroverted testimony was that Nash's physical pain and suffering increased in intensity from the summer of 2011 to his death in September 2012. The testimony showed that Nash was a very active eighty year old, who took long bike rides, was active in fishing, working on his property clearing trails and brush and otherwise maintaining his residence and other properties he owned. His symptoms began in the Summer of 2011 when he started to become short of breath and had difficulty working and was losing strength. He began to have difficulty walking and had to periodically rest. His condition deteriorated and on or about Labor Day Weekend in 2011 he was taken to the hospital. He was having trouble taking a deep breath and felt pain with any movement. He had been prescribed percocet for shortness of breath and pain, but that no longer worked. A chest x-ray was taken which showed a large mass of fluid built up in Mr. Nash's left lung. He underwent a painful thoracenteisis which drained approximately 900 milliliters of bloody fluid from his lung. After more tests and a surgical pathology consultation, he was diagnosed with malignant mesothelioma on September 9, 2011. He thereafter underwent a year long treatment regimen which included numerous medical appointments, several trips to Boston, Massachusetts for consultations, chemotherapy regimens, hospice care and other treatments. His weight dropped from over 200 pounds to 168 pounds.

Nash traveled to Boston to seek treatment and surgery at Brigham and Women's Hospital, which could have potentially extended Nash's life. However, on several occasions complications prevented the doctors from performing the necessary operation. Ultimately, chemotherapy was recommended in December, 2011, which

Nash underwent during early 2012. During the course of chemotherapy his physical and emotional state deteriorated. Ultimately the chemotherapy treatments failed and Nash's tumor did not shrink to the point that surgery would be possible, leaving the only option to be hospice home care. While he was under hospice care the majority of his care was provided by family members, including his wife, Mary Nash, who was also over eighty years old at the time. The evidence showed Nash was in significant pain and taking pain medications in increasing doses throughout his hospice care during the Summer of 2012. He had trouble breathing even with use of an oxygen machine. Walking became difficult and he fell after becoming disoriented and wandering outside. He had a hard time sleeping. He missed significant family events including his grandchildren's weddings. He was unable to participate in his previous activities, including bowling, cycling, mowing the lawn and maintaining his property.

The evidence also showed that Nash had other medical conditions, including bladder cancer and burns from an accident when he fell in a fire. However, there was testimony that the bladder cancer was treatable and there was no evidence of any potential long term impact on his life from the cancer.

The Court finds the jury's combined award as to conscious pain and suffering and emotional injuries of $6 million to be excessive as it "deviates materially from what would be reasonable compensation" (CPRL 5501(c)).

There are a number of Appellate decisions which are instructive as to what constitutes a material deviation from reasonable compensation for wrongful death claims from mesothelioma caused by asbestos exposure. The Court has reviewed and considered the following: Dominick v. Charles Millar & Sons, Inc., supra, (149 AD3d 1554, jury award of $3 million for one year of future pain and suffering upheld);

In re New York City Asbestos Litigation (Hackshaw), (143 AD3d 485 [1st Dept. 2016], one year of past pain and suffering reduced from $10 million to $3 million); In re New York City Asbestos Litigation (Sweberg), supra, (143 AD3d 483, 1.5 years of future pain and suffering reduced from $5 million to $4.5 million); Peraica v. A.O. Smith Water Products Co., supra, (143 AD3d 448, award of $9.9 million for 17 months past pain and suffering reduced to $4.25 million); In re New York City Asbestos Litigation (Konstantin), supra, (121 AD3d 230, aff'd 17 NY3d 1172 [2016], $7 million award reduced to $4.5 million for 33 months of past pain and suffering and $17 million award for 27 months of past pain and suffering reduced to $5.5 million); Penn v. Anchem Products, supra, (85 AD3d 475, award for 13 months past pain and suffering reduced from $3.65 million to $1.5 million); Lustenring v. A.C. & S., Inc., supra, (13 AD3d 69, 70, reduced award of $4.4 million for 17 months of post pain and suffering and $3 million for 18 months upheld); In re New York City Asbestos Litigation (Marshall), supra, (28 AD3d 255, awards of $7 million and $8 million reduced to $3 million each with no indication of months of suffering at issue).

The foregoing decisions reveal a range of verdicts of $115,000 to $259,000 calculated monthly. The average award is $208,000 per month with a median award of $250,000, which also reflects more recent decisions. Though not binding here, the Appellate Division, First Department appears to have consistently held awards to $3 million per year. In considering all the evidence, and including Plaintiff's proof that Mr. Nash suffered approximately 12 months of pain and suffering, the Court finds the jury's total award for pain and suffering of $6 million is excessive to the extent it exceeds $3 million.

Defendant also seeks a new trial based on the jury's separate awards for

"conscious pain and suffering" and "emotional pain and suffering". See e.g. McDougald v. Garber, 73 NY2d 246, 252-53 (1989); Eaton v. Comprehensive Care Am., Inc., 233 AD2d 875, 876 (4th Dept. 1999). Defendant argues the separate categories caused juror confusion and resulted in a double recovery.

Plaintiff correctly points out that Defendant waived its objections to the jury charge by failing to object or take an exception to the charge or verdict sheet (Passantino v. Consolidated Edison Co., 54 NY2d 840 [1981], (Defendant failed to except the charge for punitive damages); CPLR 4110-6; Byrd v. Genesee Hospital, 110 AD2d 1051 [4th Dept. 1985]; Lucas v. Weiner, 99 AD3d 1202 [4th Dept. 2012]). In the absence of preservation, a trial court may exercise its discretion to set aside a verdict because of an error in the charge only if the error is "fundamental". An error in the charge is fundamental only when it is so significant that the jury was prevented from fairly considering the issues at trial (Kilburn v. Acands Inc., 187 AD2d 988 [4th Dept. 1992]).

The charge and verdict sheet, which added the PJI 2:284 charge for emotional damages due to fear of impending death, were erroneous (Lamot v. Gondek, 163 AD2d 678 [3rd Dept. 1990]; Pallota v. West Bend Co., 166 AD2d 637 [2nd Dept. 1990]; Colezetti v. Pircio, 214 AD2d 926 [3rd Dept. 1995]).

Defendant's failure to object or take exception to the charge precluded the Court from correcting the verdict sheet before the jury retired. However, there was no evidence of jury confusion and Plaintiff's counsel, in her summation, in reliance on the charge, used the verdict sheet to clearly outline Plaintiff's proof as to both elements of damages. There is no reason to doubt that the jury intended to award $6 million for all pain and suffering.

Emotional injuries are a subset or element of damages for conscious pain and suffering (see McDougald v. Garber, supra, at 259). The Court assumes for the purposes of this motion that the jury intended to award damages for total pain and suffering, inclusive of damages for emotional suffering, in the total sum of $6 million. Having already determined the jury's award for all pain and suffering is excessive to the extent it exceeds $3 million, the Court does not reach the issue as to whether the failure to object or take exception to the charge can be excused as to the extent it can be considered a "fundamental error".

(b) **Wrongful Death**

Navistar contends the award for wrongful death of $1,000,000 from date of death to verdict (27 months) plus $500,000 from the date of verdict through Nash's life expectancy included improper non-pecuniary compensation, is not supported by the evidence, and is therefore excessive.

The Court's wrongful death damages charge, taken from PJI 2:320, specifically instructed the jury not to consider "sorrow, mental anguish, injury to feelings or loss of companionship" as part of wrongful death damages. Wrongful death damages are to compensate the distributees of decedent's estate for their monetary losses resulting from decedent's death.

Monetary or pecuniary loss is the economic value of the decedent to each distributee at the time decedent died (Huthmacher v. Dunlop Tire Corp., 309 AD2d 1176, 1175 [4th Dept. 2003]). "There are four elements of compensable loss encompassed by the general term 'pecuniary loss' (1) decedent's loss of earnings; (2) loss of services each survivor may have received from decedent; (3) loss of parental guidance from decedent; and (4) the possibility of inheritance from decedent." Id.

The costs for medical expenses incidental to death and funeral expenses are also recoverable as pecuniary loss. See Gonzalez v. New York City Hous. Auth., 77 NY2d 663, 668 (1991).

At the time of his death, Nash's sources of income consisted of Social Security and New York State Retirement benefits. There was no evidence as to the amounts of such income or whether Plaintiff sustained a loss of those benefits upon her husband's death. To establish the right to a wrongful death recovery, the Plaintiff need only show that one or more distributees had a reasonable expectation of support from decedent and therefore a pecuniary loss (Zelizo v. Ullah, 2 AD3d 273 [1st Dept. 2003]). The uncontroverted evidence was that Decedent supported his wife during their sixty year marriage. The Nash's "longstanding close and interdependent relationship" is enough to place the issue of loss of income and financial support before the jury (Milczarski v. Walaszek, 108 AD3d 1190, 1191 [4th Dept. 2013]). There was sufficient evidence that Mrs. Nash had an expectation of support from her husband. Once that showing was made, the calculation of pecuniary loss "is a matter resting squarely within the province of the jury" (Parilis v. Feinstein, 49 NY2d 984, 985 [1980]).

With respect to loss of services, the 'the standard by which to measure the value of past and future loss of household services is the cost of replacing the decedent's services.'... Thus, courts use replacement cost as a means of calculating the monetary value of those services." (Mono v. Peter Pan Bus Lines, Inc., 13 F. Supp. 2d 471, 480 (S.D.N.Y. 1998).

The absence of dollar and cents proof does not relegate the distributees the recovery of nominal damages only (Parilis v. Feinstein, supra; Motelson v. Ford Motor

Co., 101 AD3d 957, 962 [2nd Dept. 2012]). Although expert testimony on the value of such monetary losses is permitted (DeLong v. County of Erie, 89 AD2d 376 [4th Dept. 1982]; aff'd 60 NY2d 296), it is not legally required and it would be error to preclude submission of wrongful death damages to the jury (Kastik v. U-Haul Co. of Western Michigan, 259 AD2d 970 [4th Dept. 1999]; Paccione v. Greenberg, 259 AD2d 559 [2nd Dept. 1998]). Among the factors to be considered are the decedent's age, health status, life expectancy, habits, and the relationship between decedent and those claiming to suffer pecuniary loss together with their circumstances (Windus v. Bater, 67 AD2d 833 [1979]).

Here there was no evidence of pecuniary loss to decedent's adult children and the Court's instructions and the verdict sheet referenced Mary Nash's claims only.

There was significant evidence presented as to Nash's pecuniary or monetary contributions and support to his wife, Mary Nash. Prior to his illness Mr. Nash performed all of the work around the couples' properties. He worked multiple jobs throughout his life and continued to do janitorial work up until the onset of his symptoms of mesothelioma. He provided nursing services to his wife. The maintenance and repairs of the properties that Mr. and Mrs. Nash owned included roof repair, snow removal and painting, tasks which he was unable to perform due to his physical deterioration. The undisputed testimony was that Nash essentially took care of his wife during her later years. They had been married for 60+ years and were inseparable, according to the testimony of family members. At the time of his death in 2012, Mr. and Mrs. Nash had life expectancies of 7.0 and 8.6 years, respectively.

In determining whether the jury's award of $1.5 million deviated materially from what would be adequate compensation, the Court has considered the following

decisions to be instructive: Schaffer v. Batheja, (76 AD3d 970, 972 [2nd Dept. 2016], $500,000 awarded for loss of services over four years despite "limited proof" of value of services); Merola v. Catholic Medical Center, (24 AD3d 629 [2nd Dept. 2005], spousal award of $4 million reduced to $50,000, plaintiff failed to produce evidence of value of services); Gerdick v. VanEss, (5 AD3d 726 [2nd Dept. 2004], award of $1,500,000 for pecuniary damages, other than lost earnings, reduced to $250,000); Mono v. Peter Pan Bus Lines, Inc., supra 13 F.Supp.2d 471, $301,000 awarded for loss of household services even though surviving spouse performed the work himself); Knight v. Holland, (148 AD3d 1726 [4th Dept. 2017], award of $300,000 for future loss of household services for nine years reduced to $100,000, lack of testimony regarding the value of plaintiff's household services).

It would not be beyond the general knowledge of a lay jury to have insight into the cost of hiring a maintenance person, nurse, driver or any other individual to perform the types of services Mr. Nash provided for his wife. However, given the absence of any specific values offered in evidence, the Court is constrained to reduce the total award for loss of support and pecuniary losses from $1.5 million to $270,000, based also upon the parties' life expectancies and the strength of their marriage.

(c) **Loss of Services and Society Prior to Death**

The jury awarded $200,000 for loss of services and society prior to Nash's death. Navistar contends the award is duplicative of damages for wrongful death, was unsupported by the evidence and excessive as a matter of law. A surviving spouse's individual claim for loss of services may be joined with the wrongful death and survival actions. CPLR 1002(a). The cause of action here was not duplicative of the wrongful death damages as the surviving spouse may properly seek damages for the loss of

consortium suffered between the dates of the deceased's injury and death, and not for future losses (Liff v. Schildkrout, 49 NY2d 622, 634 [1980]; Ruiz v. New York City Health & Hospitals Corp., 165 AD2d 75, 80 [1st Dept. 1991]). The jury charge and verdict sheet properly directed the jury to consider Plaintiffs' claim for loss of services limited to the period of time between the onset of Nash's mesothelioma until his death, in accordance with PJI 2:315.

Loss of services encompasses compensation to the spouse for such elements as "love, companionship, affection, society, sexual relations, solace and more", Millington v. Southeastern Elevator Co., 22 NY2d 498, 502 [1968]).

Initially, Navistar did not except the jury charge or move for a directed verdict on the grounds of legally insufficient evidence from which to find this element of damages (Smith v. M.V. Woods Construction Co., 309 AD2d 1155, 1157 [4th Dept. 2003]). But see Knight v. Holland, supra, 148 AD3d 1726.

In any event, the jury's award of $200,000 is not excessive. The common law right of a spouse to maintain a cause of action for loss of consortium must be based upon "the real injury done to the marital relationship" (Millington v. Southeastern Elevator Co., supra, 22 NY2d at 504). Included is the loss of physical services such as maintenance of the household, yard care or child care and intangible items such as loss of love, companionship, affection and sexual relations PJI 2:315. In assessing the intangible elements of spousal loss, the jury may consider the nature and happiness of the marriage prior to the injury or death (Christman v. Bailey, 38 AD2d 773 [3rd Dept. 1972]). The uncontroverted testimony was that the Nash's had a long marriage and that Mrs. Nash depended on decedent for not only a miriad of household assistance but also for assistance with her health issues. Her life was

changed drastically for the twelve plus months after Mr. Nash started treatment for mesothelioma up until his death. The Court finds that under all the circumstances, the sum of $200,000 for a period of approximately one year is not excessive. See e.g. Didner v. Keene Corp., (supra, 1990 WL 10626462; aff'd on other grounds 188 AD2d 15, mod. on other grounds 82 NY2d 342 (1993), award for loss of consortium for 27 months reduced to $500,000 from $1.5 million); Penn v. Amchem Prods., supra, 85 AD3d 475, award of $1,670,000 reduced to $260,000); Lindenman v. Kreitzer, (105 AD3d 477 [1st Dept. 2013], award of $1,200,000 for past loss of services reduced to $200,000, and award of $2,000,000 for future loss of services reduced to $300,000); Wild v. Catholic Health Sys., (85 AD3d 1715 [4th Dept. 2011], Award of $500,000 reduced to $200,000); Schaffer v. Batheia, (76 AD3d 970 [2nd Dept. 2010], award of $3,000,000 for four year loss of service reduced to $500,000; limited proof of value of services provided by spouse); Capwell v. Muslim, 80 AD3d 722 [2nd Dept. 2011], award of $4,000,000 reduced to $1,000,000); Bissell v. Town of Amherst, (56 AD3d 1144 [4th Dept. 2008], award of $2,000,000 for past loss of services reduced to $250,000, and award of $2,000,000 for future loss of services reduced to $750,000). Plaintiff's motion is therefore denied as to damages for loss of services and society.

Navistar further contends it is entitled to a setoff or reduction on the remitted verdict for settlements collected from other entities. Plaintiff has not opposed this aspect of the motion.

Accordingly, it is

ORDERED that Defendant's motion for a directed verdict is denied except as to punitive damages; and it is further

ORDERED that Defendant Navistar's motion to set aside the verdict is granted

only to the extent of granting a new trial solely on the issues of damages for conscious pain and suffering and wrongful death unless Plaintiff, within thirty (30) days of service on counsel of a copy of this Order with Notice of Entry, stipulates to reduce the total award for pain and suffering from $6 million to $3 million, and to reduce the award for wrongful death from $1.5 million to $270,000, making the total damage award $3,470,000; to be thereafter reduced by amounts collected from and/or to be paid by settled entities, and to entry of judgment in accordance therewith; and it is further

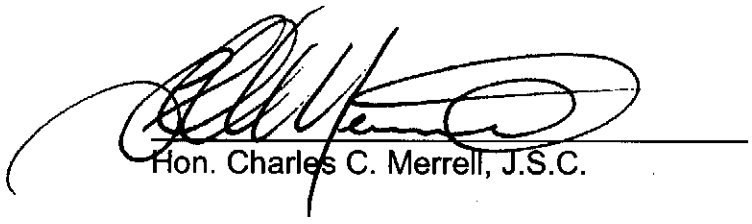
ORDERED that in all other respects the motions pursuant to CPLR §§4401 and 4404(a) are denied.

Thereafter, the parties shall submit a proposed money judgment for signature consistent with this Decision and Order.

The foregoing shall constitute the Decision and Order of this Court.

ENTER.

Dated: November 8, 2017
Lowville, New York



Hon. Charles C. Merrell, J.S.C.