2019 WL 2504664
Supreme Court, Appellate Division,
First Department, New York.

IN RE NEW YORK CITY ASBESTOS LITIGATION
Mary Murphy–Clagett, etc., Plaintiff–Respondent,
v.
A.O. Smith Corporation, et al., Defendants–Appellants,
AERCO International, Inc., et al., Defendants.

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ENTERED: JUNE 18, 2019

**Attorneys and Law Firms**

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for A.O. Smith Water Products, sued herein as A.O. Smith Corporation, appellant.

Clyde & Co U.S. LLP, New York (Peter J. Dinunzio of counsel), for Burnham LLC, appellant.

Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel), for Peerless Industries, Inc., appellant.

Simmons Hanly Conroy LLC, New York (James M. Kramer of counsel), for respondent.

Sweeny, J.P., Manzanet–Daniels, Kapnick, Oing, Singh, JJ.

**Opinion**

***1** Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 30, 2019, upon a jury verdict awarding $ 25 million for the decedent's pain and suffering, $ 17 million to the decedent's son for loss of parental guidance, and $ 18 million to the decedent's daughter for loss of parental guidance, to the extent appealed from as limited by the briefs, upon plaintiff's stipulation to reduce the damages awards, awarding $ 10 million for the decedent's pain and suffering, $ 9 million to the decedent's son for loss of parental guidance, and $ 10 million to the decedent's daughter for loss of parental guidance, unanimously modified, on the facts, to direct a new trial on damages unless plaintiff stipulates, within 30 days after the date of entry of this order, to further reduce the award for the decedent's pain and suffering to $ 4 million, the award for loss of parental services for the decedent's son to $ 1 million, and the award for loss of parental services for the decedent's daughter to $ 1 million, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered December 16, 2018, October 1, 2018, on or about September 25, 2018, and on or about September 21, 2018, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

The jury's finding that, Pietro Macaluso, plaintiff's decedent was exposed to asbestos from the products manufactured by defendants is supported by legally sufficient evidence. The trial court properly permitted Macaluso to refresh his recollection with a list of manufacturers that he helped his counsel draw up in preparation for responding to interrogatories, and the issue whether his memory was properly refreshed was a matter of credibility for the jury to resolve (*People v. Phillibert,* 99 A.D.3d 531, 952 N.Y.S.2d 45 [1st Dept. 2012], *lv denied* 20 N.Y.3d 1014, 960 N.Y.S.2d 357, 984 N.E.2d 332 [2013]). The evidence adduced by defendant A.O. Smith Water Products Company was not dispositive as to whether plaintiff was exposed to its product (*see Penn v. Amchem Prods.,* 85 A.D.3d 475, 925 N.Y.S.2d 28 [1st Dept. 2011]; *Taylor v. A.C. & S., Inc.,* 306 A.D.2d 202, 762 N.Y.S.2d 73 [1st Dept. 2003]). The court's preclusion of defendant Burnham LLC from producing a witness from a similarly named company was harmless error in light of the court's admitting other evidence about that company and the possibility of "mistaken identity."

The jury's finding of recklessness is supported by legally sufficient evidence, and is not against the weight of the evidence (*see Matter of New York City Asbestos Litig.,* 121 A.D.3d 230, 247–248, 990 N.Y.S.2d 174 [1st Dept. 2014], *affd* 27 N.Y.3d 1172, 38 N.Y.S.3d 85, 59 N.E.3d 1197 [2016], 27 N.Y.3d 765, 37 N.Y.S.3d 723, 59 N.E.3d 458 [2016]). The court correctly omitted settling defendant Johns–Manville from the verdict sheet, as defendants failed to show that any of the products the decedent was

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exposed to contained asbestos manufactured by Johns–Manville (*see Bigelow v. Acands, Inc.,* 196 A.D.2d 436, 438, 601 N.Y.S.2d 478 [1st Dept. 1993]).

Plaintiff's expert testimony was sufficient to establish that the decedent's demolition of defendants' boilers resulted in exposure to asbestos dust in sufficient quantities to cause the decedent's mesothelioma (*see Matter of New York City Asbestos Litig. [Miller],* 154 A.D.3d 441, 60 N.Y.S.3d 822 [1st Dept. 2017], *lv denied* 30 N.Y.3d 909, 71 N.Y.S.3d 2, 94 N.E.3d 484 [2018]). The court properly precluded evidence of an experiment conducted by a defense expert, as the conditions under which the experiment was performed were not sufficiently similar to those experienced by the decedent during his exposure, and thus the evidence could have misled the jury (*see Bradshaw v. Lenox Hill Hosp.,* 158 A.D.3d 427, 67 N.Y.S.3d 819 [1st Dept. 2018]).

***2** The evidence that the boilers contained asbestos-containing products from third parties, and/or that asbestos-containing products would be used in conjunction with defendants' products, was sufficient to render appropriate a jury charge on the duty to warn, and the content of the court's charges on the issue of duty was correct (*see e.g. Matter of New York City Asbestos Litigation [Sweberg],* 2015 N.Y. Slip Op 30043(U), 2015 WL 246547, *5–7 [Sup. Ct., N.Y. County 2015], *mod on other grounds* 143 A.D.3d 483, 39 N.Y.S.3d 411 [1st Dept. 2016], *lv dismissed* 28 N.Y.3d 1165, 49 N.Y.S.3d 93, 71 N.E.3d 586 [2017]).

However, we find that the damages award for the decedent's pain and suffering must be reduced as it deviates materially from what would be reasonable compensation (CPLR 5501[c]; *see New York City Asbestos Litig. [Miller],* 154 A.D.3d at 441, 60 N.Y.S.3d 822; *Penn v. Amchem Prods.,* 85 A.D.3d at 475, 925 N.Y.S.2d 28). Although this reduced award is “significant and exceeds amounts set in some of our precedents,” it is supported by decedent's “severe and crippling symptoms” and “tremendous physical and emotional pain”] (*Matter of New York City Asbestos Litigation [Hackshaw],* 143 A.D.3d 485, 486, 39 N.Y.S.3d 130 [1st Dept. 2016], *affd* 29 N.Y.3d 1068, 57 N.Y.S.3d 462, 79 N.E.3d 1125 [2017]). The awards for loss of parental guidance to the decedent's children also deviate materially from what would be reasonable compensation (*see Adderley v. City of New York,* 304 A.D.2d 485, 757 N.Y.S.2d 735 [1st Dept. 2003], *lv denied* 100 N.Y.2d 511, 766 N.Y.S.2d 165, 798 N.E.2d 349 [2003]; *Grevelding v. State of New York,* 132 A.D.3d 1332, 17 N.Y.S.3d 813 [4th Dept. 2015], *lv denied* 27 N.Y.3d 905, 2016 WL 2354832 [2016]; *Vasquez v. County of Nassau,* 91 A.D.3d 855, 938 N.Y.S.2d 109 [2d Dept. 2012]). We thus remand for a new trial on damages unless plaintiff stipulates to reduce the awards as indicated.

We have considered defendants' remaining contentions and find them unavailing.

**All Citations**

--- N.Y.S.3d ----, 2019 WL 2504664, 2019 N.Y. Slip Op. 04870

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