

WESTLAW

2019 WL 2583833

Supreme Court, Appellate Division, First Department, New York.

Ford v. A.O. Smith Water Products
Supreme Court, Appellate Division, First Department, New York, June 25, 2019, --- N.Y.S.3d ---, 2019 WL 2583833, 2019 N.Y. Slip Op. 05089 (Approx. 2 pages)

NOREEN T. FORD, as Executrix of the Estate of Frank M.
Gondar, Jr., Plaintiff–Respondent,

v.

A.O. SMITH WATER PRODUCTS, et al., Defendants,
Burnham LLC, Defendant–Appellant.

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ENTERED: JUNE 25, 2019

Attorneys and Law Firms

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel),
for appellant.

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for respondent.

Gische, J.P., Tom, Kapnick, Kern, JJ.

Opinion

*1 Judgment, Supreme Court, New York County (Martin Shulman, J.),
entered August 21, 2017, upon a jury verdict against defendant Burnham
LLC, and, after remittitur and stipulation by plaintiff, awarding plaintiff \$ 5
million for past pain and suffering over a period of 17 months and \$ 2 million
for future pain and suffering for one month, unanimously modified, on the
facts, to vacate the award for future pain and suffering and order a new trial
of those damages, unless plaintiff stipulates, within 30 days after entry of this
order, to reduce the award for future pain and suffering to \$ 500,000, and to
entry of an amended judgment in accordance therewith, and otherwise
affirmed, without costs.

This litigation arises out of the decedent's exposure to asbestos over the
course of 20 years from dust caused by the removal of asbestos insulation
placed on defendant Burnham LLC's boilers. Plaintiff's experts' testimony
was sufficient to establish that the quantities of asbestos in the dust to which
the decedent was exposed were sufficient to cause his mesothelioma (*see*
Matter of New York City Asbestos Litig., 154 A.D.3d 441, 441, 60 N.Y.S.3d
822 [1st Dept. 2017], *lv denied* 30 N.Y.3d 909, 2018 WL 358527 [2018];
Matter of New York City Asbestos Litig., 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]; *Matter of New York City Asbestos Litig.*, 148 A.D.3d 233, 236, 48
N.Y.S.3d 365 [1st Dept. 2017], *affd* 32 N.Y.3d 1116, 91 N.Y.S.3d 784, 116
N.E.3d 75 [2018]).

Under the circumstances of this case, we find that the award for future pain and suffering deviates materially from what would be reasonable compensation (CPLR 5501[c]; *see generally Matter of New York City Asbestos Litig.*, 121 A.D.3d 230, 255, 990 N.Y.S.2d 174 [1st Dept. 2014], *aff'd* 27 N.Y.3d 1172, 38 N.Y.S.3d 85, 59 N.E.3d 1197 [2016]; *Penn v. Amchem Prods.*, 85 A.D.3d 475, 925 N.Y.S.2d 28 [1st Dept. 2011]). While plaintiff presented evidence at trial that the decedent's symptoms were becoming substantially worse and would continue to do so, the jury found that the decedent would live only one more month, and its award of damages for future pain and suffering were intended to provide compensation for that period (*see* CPLR 4111[e]).

However, we find that the award, as reduced by stipulation, for past pain and suffering over a period of approximately 17 months is not excessive (CPLR 5501[c]; *Matter of New York City Asbestos Litig.*, 143 A.D.3d at 486, 39 N.Y.S.3d 130; *Peraica v. A.O. Smith Water Prods. Co.*, 143 A.D.3d 448, 451, 39 N.Y.S.3d 392 [1st Dept. 2016], *lv dismissed* 28 N.Y.3d 1167, 49 N.Y.S.3d 94, 71 N.E.3d 588 [2017]; *Matter of New York City Asbestos Litig.*, 154 A.D.3d at 441, 60 N.Y.S.3d 822). The jury and the trial court, having had an opportunity to hear testimony firsthand, concluded that a substantial award was appropriate in light of the decedent's unique characteristics and the extent of his suffering. The record shows that the decedent's symptoms were severe, that he suffered from tremendous emotional and physical pain, and that he had been particularly active before the onset of symptoms.

*2 The jury's verdict and allocation of 25% liability to Burnham, although Burnham did not actually manufacture the asbestos or distribute it directly, was not against the weight of the evidence (*see generally Matter of New York City Asbestos Litig.*, 143 A.D.3d at 485, 39 N.Y.S.3d 130; *Peraica*, 143 A.D.3d at 451, 39 N.Y.S.3d 392).

All Citations

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