At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie at 25 Delaware Avenue, Part 19, Buffalo, New York

PRESENT: Hon. Deborah A. Chimes, Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

BENEDICT VIGLIETTA and TERRI VIGLIETTA,

Plaintiffs,

v.

DECISION AND ORDER
Index No. E174717/2021

ASBESTOS CORPORATION, LIMITED, ET AL,

Defendants.

Defendant, Hedman Resources Limited (Hedman) filed a motion under CPLR 4404 seeking a judgement notwithstanding the verdict and an order granting a new trial. (NYSCEF 028) The Court has considered the following papers: Notice of Post-Trial Motion dated July 12, 2022; Affirmation of John J. Burbridge dated July 12, 2022, with attached exhibits; the Affirmation in Opposition of Seth Dymond, dated August 12, 2022, with attached exhibits; and the Reply Affirmation of John J. Burbridge, dated August 29, 2022 with attached exhibits. Oral argument was held on October 13, 2022.

At the trial of this action, the plaintiffs, Benedict Viglietta and Terri Viglietta (Plaintiffs) recovered for Benedict Viglietta's personal injuries from mesothelioma caused by exposure to asbestos which occurred while Benedict Viglietta was employed at the Durez chemical plant in North Tonawanda. He was employed full time during the summers of 1974 and 1976. Plaintiffs

contended at trial that Benedict Viglietta's work as a supervisor required him to work in the plastic molding department and the resins department, spending approximately equal time in each department. Plaintiff testified to being exposed to asbestos when mixers, 12-15 feet above his head, poured bags of asbestos into the mixers. He testified to seeing dust from the pour. He also testified he was exposed to asbestos when he took samples of finished products to be tested and air hoses were used to blow out debris of material while plaintiff was within five feet of this work. He contended at trial that during his work he was exposed to Hedman cationic fiber which was a substantial factor in causing his pleural mesothelioma. Plaintiff alleged the defendant failed to provide an adequate warning and acted with reckless disregard for the safety of others.

On May 27, 2022, a jury found plaintiff was exposed to asbestos from defendant's product, that defendant was negligent in failing to adequately warn and that defendant's negligence was a substantial factor in causing plaintiff's injuries. The jury further found that Hedman acted with reckless disregard for the safety of others, that Hedman was 35% at fault and that another company, Johns-Manville, was 65% at fault also for failing to adequately warn. The jury awarded plaintiff $1.5 million for past pain and suffering and $500,000 for future pain and suffering.

Hedman argues plaintiff's proof was legally insufficient to establish the plaintiff was exposed to a sufficient level of asbestos to cause his mesothelioma. Hedman also argues this Court erred in a pre-trial order quashing a trial subpoena *ad testifium* served on plaintiff's former employer; that this Court erred in denying Hedman's request for a jury charge that plaintiff's employer was an intervening superseding cause of plaintiff's injury; that this Court erred in charging the jury on reckless disregard for the safety of others and that the jury's finding of reckless disregard was against the weight of the evidence.

Plaintiff counters arguing that it's expert, Dr. David Zhang's opinion on causation was supported by a generally accepted methodology and a scientific foundation and was corroborated by the defendant's expert, Dr. Safirstein; that the quashing of the subpoena was proper and if not it was harmless error; that it was not error for the Court to deny the defendant's request for a jury instruction on an intervening superseding cause and the charge on reckless disregard for the safety of others was proper and the jury finding was based on a fair interpretation of the evidence.

CPLR 4404(a) provides that after a trial, a court may either set aside the verdict or judgment and direct judgment as a matter of law or order a new trial where the verdict is contrary to the weight of evidence or contrary to the interest of justice. A court may not set aside a verdict as a matter of law based upon insufficiency of the evidence unless "no valid line of reasoning and permissible inferences could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Alligood v Doe*, 198 A.D. 3d 1271, 1272 [4th Dept. 2021] citing to *Cohen v Hallmark Cards*, 45 N.Y. 2d 493, 499 [1978]).

In toxic tort cases, "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) (*internal citations omitted*)" (*Nemeth v Brenntag North America*, 38 N.Y.3d 336, 342-343 [2022]). As acknowledged by the Court of Appeals because there are times that "'a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value', 'it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that, whatever methods an expert uses to establish causation are generally accepted in the scientific community.' (*internal citation omitted*)" (*id* at 343).

Here, the defendant contests the issue of specific causation. Plaintiff's expert testified to the methodology used and that the methodology was generally acceptable in the scientific community. The methodology used by the plaintiff's expert was also acknowledged to be acceptable by the defendant's expert. Notwithstanding defendant's own expert's acknowledgment, a review of the testimony is warranted since the plaintiff bears the initial burden of proof. Here plaintiff's expert testified that he considers five factors to determine whether an exposure to asbestos is a substantial factor in contributing to the development of mesothelioma. He explained each factor then relying on specific studies and literature he determined the "exposure numbers or ranges" the plaintiff was exposed to and specifically opined the "time weighted average dose for Mr. Viglietta's exposure from the Hedman product was 0.2 f/cc to .25 fiber per CC in eight hours of time-weighted level, exposure level." The expert attested he used a generally accepted method to assess the plaintiff's exposure and calculate the dose and compared the dose estimates of the plaintiff to the accepted levels that are capable of causing mesothelioma. The plaintiff's expert's testimony met the standard required under *Nemeth*. Plaintiff therefore met his initial burden, and the evidence sufficiently supports the jury's finding. Motion to set aside the verdict and for a directed verdict on the ground that the expert testimony was insufficient is denied.

Defendant next argues it was prejudiced by the Court quashing a trial subpoena *ad testificandum* served on the plaintiff's former employer. Defendant contends the quashing the subpoena prevented the introduce of documents Hedman had in its possession. As this Court previously determined the testimony sought from the plaintiff's former employer was not relevant to the defense of the failure to warn claim except for one issue, that being "caution statements". The Court finds for the reasons stated in its prior Decision and Order dated April

21, 2022, quashing the subpoena did not prejudice the defendant and does not warrant a new trial.

Defendant also argues the Court erred in failing to charge the jury on plaintiff's employer being an intervening superseding cause. "Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (*internal citation omitted*). If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus (*internal citations omitted*). (*Derdiarian v Felix Contr. Corp*, 51 NY 2d 308, 315. [1980]).

At trial the defendant submitted proof that it placed a warning on the bag of its product and argued in its closing the warning was adequate. Absent from the proof was that Durez acted in such a way that prevented the defendant's warning from reaching its employees or that Durez acted in such a way that the casual nexus between the defendant's failure to warn and the plaintiff's injury was broken. Even if the documents defendant argues it was prevented from admitting were admitted into evidence, those documents too fail to establish Durez was an intervening superseding cause. Moreover, the documents appear to be contrary to the defendant's contention. Further, by way of the defendant's offer of proof, there was nothing by way of the anticipated testimony that rose to the level of an intervening superseding cause.

Defendant argues it was error to charge the jury on reckless disregard because the defendant John Mansfield was a settled defendant. The Court notes the defendant never raised this issue at the time of trial, nonetheless, the argument is unpersuasive. The defendant

successfully sought to have John Mansfield and other tortfeasors on the verdict sheet thereby invoking Article 16 of the CPLR. In invoking the Article 16 defense, the plaintiff is allowed to assert the exception of reckless disregard. (*See*, CPLR 1602). "Article 16, as enacted, limits a joint tortfeasor's liability for noneconomic losses to its proportionate share, provided that it is 50% or less at fault (CPLR 1601 [1]). While Article 16 was intended to remedy the inequities created by joint and several liability on low-fault, "deep pocket" defendants, it is nonetheless subject to various exceptions that preserve the common-law rule." (*Rangolan v County of Nassau*, 96 N.Y. 2d 42, 46 [2001]). Those exceptions are found within CPLR 1602 and include any person held liable who acted with reckless disregard for the safety of others. (CPLR,1602 (7)). Therefore, it was proper to charge the jury with reckless disregard.

This Court further notes, Article 16 is to determine apportionment of liability among tortfeasors, while General Obligations Law 15-108 (a) "permits non-settling defendants a monetary offset against the amount of a verdict." (*Whalen v Kawasaki Motor Corp., U.S.A.,* 92 N.Y. 2d 288, 292 [1998]). Therefore, there is no inconsistency with applying Article 16 defenses and its exceptions at the time of trial and applying General Obligations Law 15-108 post-trial.

Finally, contrary to the defendant's contention, there was sufficient evidence to allow the jury to reasonably conclude the defendant acted with reckless disregard to the safety of others. Reckless disregard for the safety of others requires that, 'the actor has 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' (*Matter of New York City Asbestos Litig*. 89 NY 2d 955, 966 [1997]). Here, the plaintiff introduced evidence the defendant, prior to the plaintiff's exposure to its product, was notified on multiple occasions of the danger its product posed to its employees, that defendant

continued to deny the danger of its product as well as the need for a warning, that it intentionally reduced the warning size and modified the language of the warning on the basis that its product was not dangerous and arguably misled its customers and the end user as to the safety of its product. Based on the evidence submitted a jury could have reasonably concluded the defendant acted with reckless disregard to the safety of others. (*See, Matter of New York City Asbestos Litigation, (Dummit),* 36 Misc 3d 1234 (A) [2012]; *In re New York City Asbestos Litigation, (D'Ulisse),* 16 Misc. 3d 945, Sup Ct. N.Y. Co [2007]; *In re Asbestos Litigation (Greff, McPadden, Ciletti),* 986 F.Supp. 761 [S.D.N.Y. 1997]).

WHEREFORE, it is hereby,

ORDERED, Defendant's motion is denied in its entirety.

DATED: November 2, 2022
Buffalo, New York

Hon. Deborah A. Chimes, J.S.C.