

SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

Matter of Eighth Judicial District Asbestos Litigation

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

STEPHEN DRABCZYK, Executor of the
Estate of RONALD DRABCZYK,

Plaintiff

-v-

DECISION AND ORDER
Index No. 2005/1583

AMCHEM PRODUCTS, INC., et al.,

Defendants

BEFORE: HON. JOHN P. LANE
Judicial Hearing Officer

APPEARANCES: BELLUCK & FOX, LLP
Attorneys for Plaintiffs
By: Seth A. Dymond, Esq. and
Jordan C. Fox, Esq.

and

Michael P. Joyce, Esq.

HAGERTY & BRADY, LLP
Attorneys for Defendant Fisher Controls
International, LLC.
By: Thomas V. Hagerty, Esq and
Edwin P. Hunter, Esq.

and

VON BRIESEN & ROPER, s.c.
By: Patrick L. Wells, Esq.

The court has considered the following papers: notice of motion, dated February 18, 2010, by defendant Fisher Controls International, LLC; affidavit of Thomas V. Hagerty, Esq., sworn to February 18, 2010 ; affirmation in opposition of Seth A. Dymond, Esq., dated April 1, 2010; reply affidavit of Thomas V. Hagerty, Esq., sworn to April 23, 2010.

In this action, plaintiff Stephen Drabczyk, as executor of his father's estate, sought to recover for personal injuries and wrongful death of Ronald Drabczyk resulting from mesothelioma he contracted as a result of exposure to asbestos. Decedent's exposure at issue here occurred while he was employed at the Hooker Chemical Plant in Niagara Falls, New York. Decedent worked with valves manufactured and sold by defendant Fisher Controls International , LLC ("Fisher").

Following a four week trial before a jury, a verdict was rendered awarding plaintiff \$1,500,000 for decedent's pain and suffering . In addition, the jury found that Fisher acted with reckless disregard and that it was five percent responsible for decedent's injuries. After hearing additional summations of counsel, the jury awarded plaintiff \$750,000 in punitive damages against Fisher.

Fisher now moves to set aside the general liability finding against it or, in the alternative, for a new trial, and also to set aside the verdict that it acted with reckless disregard and enter judgment in it's favor on the issue of punitive damage, or alternatively to set aside both findings of recklessness and punitive damages and order a new trial on those issues. Finally, the court is asked in the alternative to set aside the entire verdict or, order a new trial in the interest of justice. Plaintiff opposes the relief sought and urges that Fisher's motions be denied.

In general , Fisher contends that the verdict of recklessness and the award of punitive damages are unsupported by the evidence, and that the trial record establishes that its actions did not rise to the level required for a finding either of recklessness or entitlement to punitive damages. Thus, Fisher argues, the court erred in charging the jury on both issues.

Fisher also argues that the court should have instructed the jury that the "clear and convincing" burden of proof applied to both recklessness and punitive damages and erred when it did not. Fisher also contends that the award of \$750,000.00 in punitive damages is excessive and in violation of the constitutions of both the United States and New York.¹

Defendant maintains that the jury's findings of negligence, exposure to asbestos and proximate cause were against the weight of the evidence. It maintains that the verdict

¹Defendant suggests that the excessiveness of the punitive award is attributable in part to plaintiff's counsel's suggestion to the jury that it award ten times compensatory damages. I note that statement was stricken from the record and the jury was instructed to disregard it .

must have been based on speculation since the evidence presented at trial was insufficient to support the verdicts finding Fisher negligent in manufacturing asbestos-containing products without a warning, finding that Mr. Drabczyk was exposed to such products and finding that the exposure was a substantial factor in causing his illness and death

First, the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence, not clear and convincing evidence (*see Matter of Seventh Jud. Dist. Asbestos Litig. [Wambach]*, 190 A. D. 2d 1068 [1993]).² Use of the preponderance of evidence standard in awarding punitive damages satisfies both the substantive and procedural components of Due Process under the Federal Constitution and the New York State Constitution (*see Simpson v Pittsburgh Corning Corp.* (901 F2d 277 [2 Cir 1990], *cert. dismissed* 497 US 1057 [1990]; *Western New York Land Conservancy, Inc. v Cullen*, 66 AD3d 1461 (2009)); *appeal dismissed* 13 NY3d 904 [2009]; *lv denied* 14 NY3d 705 [2010]),

In New York, punitive damages are intended to act as a deterrent to the offender and as a warning to others (*see Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 203 [1990]). Our jurisprudence permits an award of punitive damages in a strict products case, where the theory of liability is failure to warn and where there is evidence that the failure to warn was wanton or in conscious disregard of the rights of others (*id.* at 204).

² While the First and Second Departments require a higher level of proof, *Wambach* remains the rule in the Fourth Department (*see* 2A NY PJI3d 2:278, at 1516 [2010]).

Punitive damages are not recoverable alone, although they may be based upon an award of nominal compensatory damages (see *Ligo v Gerould*, 244 AD2d 852 [1997]; *Bryce v Wilde*, 39 AD2d 291 [1972], *affd* 31 NY882 [1972] *for reasons stated below*). Such damages may be awarded in negligence actions against a defendant for actions which constitute willful or wanton negligence or recklessness (see *Fordham-Coleman v National Fuel Gas Distrib. Corp.*, 42 AD3d 106 [2007]). Whether to award punitive damages is a matter to be determined by the jury (*id*), and it is not necessary to show in every case that the conduct complained of was directed at the public generally (see *Pirrotti & Pirrotti, LLP v Estate of Warm*, 8 AD3d 545 [2004]).

“Courts in this state have long recognized that those who, without specifically intending to cause harm, nevertheless engage in grossly negligent or reckless conduct showing an utter disregard for the safety or rights of others, may also be deserving of the imposition of punitive damages” (*Randi A. J. v Long Island Surgi-Center*, 46 AD3d 74 [2007]). Whether Fisher’s conduct in this case rose to a level sufficient to support an award of punitive damages presented a genuine issue of fact for the jury to resolve.

The award of punitive damages here was not grossly excessive or violative of defendant’s due process rights in light of the high level of reprehensibility evidenced by Fisher’s failure to provide warnings concerning the use of its valves containing asbestos materials (see *BMW of N. Am., Inc. v Gore.*, 517 U. S. 559 [1996]; *Western New York Land Conservancy, Inc. v Cullen, supra*; *Launders v Steinberg*, 39 AD3d 57 [2007]; *mod. on other grounds* 9 NY3d 930 [2007] [\$5 million dollars in punitive damages amounted to one-

third of the total damages awarded])).

The trial record contains substantial evidence that permitted the jury to rationally find that Fisher valves utilized gaskets, packing and external insulation containing significant amounts of asbestos, and that Fisher was aware of the risks the use of asbestos presented. The valves required routine maintenance and repair, including changing gaskets and packing and removing external insulation. Fisher had a school where they taught those skills. Fisher also provided replacement parts, including asbestos-containing packing and gaskets, that Hooker used in its valves. The fact that Fisher marketed its products through independent distributors does not insulate it from responsibility for injuries its failure to warn caused. Fisher gave no warnings about asbestos, although it did warn about other matters in its catalogs and manuals. Furthermore, Fisher knew its valves at Hooker were being insulated with asbestos because its representatives were onsite,

There was substantial evidence at trial permitting the jury to rationally conclude that Fisher had knowledge of the dangers of asbestos and that asbestos was specified and used in its valves that were delivered to Hooker during the period decedent was employed there. Despite this knowledge, Fisher failed to warn of the hazards of repair and maintenance of the asbestos-containing valves.

During the time decedent was employed at Hooker he was called upon to service valves supplied by Fisher, which included removing packing, gaskets and

insulation materials containing asbestos. This created dust, which he swept up.

“Knowledge of the hazards of asbestos support[s] not only a finding of liability, but also punitive damages” (see *Krepplein v Celotex Corp.*, 969 F2d 1424, 1427 [2 Cir 1992]). The record here contains evidence sufficient to permit the jury to find that Fisher was aware of the risks of asbestos, and that it installed asbestos-containing gaskets and packing in its valves and specified and supplied asbestos-containing gaskets and packing for use by servicemen such as decedent, but gave no warnings of the risks involved (compare *Matter of New York City Asbestos Litig. (Maltese)*, 89 NY2d 955 [1997]; see *Saarinen v Kerr*, 84 NY2d 494, 501[1994] [an act of an unreasonable character is reckless when done intentionally in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow]).

In summary, a fair interpretation of the evidence supports the jury’s determination (see *Stevens v Maimone*, 6 AD3d 1222, *lv denied* 3 NY3d 605 [2004]). Since there was a rational process by which the jury could find for the plaintiff, the verdict should not be set aside (see *Szczerbiak v Pilat*, 90 NY 2d [1997]; *Homan v Herzig*, 55 AD3d 1413 [2008]; *Cruz v Long Is. R. R. Co.*, 22 AD3d 451 [2005], *lv denied* 6 NY3d 703 [2006]; *Ruddock v Happell*, 307 AD2d 719 [2003]).

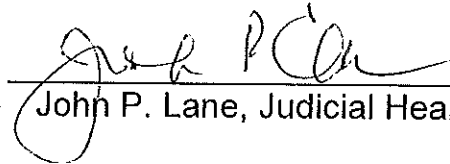
A new trial in the interest of justice is not warranted here. Fisher has failed to come forward with evidence to establish that substantial justice has not been done

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(see *Stevens v Atwal*, 30 AD3d 993 [2006]; *Shafrann v Famka*, 14 AD3d 363[2005]).

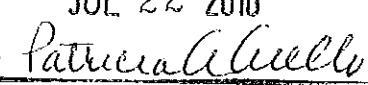
Defendant's motion to set aside the verdict is in all respects denied.

Dated: Buffalo, New York
July 22, 2010



John P. Lane, Judicial Hearing Officer

GRANTED

JUL 22 2010
BY 

PATRICIA A. AIELLO
COURT CLERK