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Case No. N10C-10-315 ASB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
MICHAEL GALLIHER	)	C.A. No. N10C-10-315 ASB
	)	
Limited to: RT Vanderbilt	)	

MEMORANDUM OPINION

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JOHN A. PARKINS, JR., JUDGE

Plaintiffs filed a wrongful death action against multiple defendants alleging Michael Galliher was exposed to asbestos while working in a variety of jobs during his career, and that exposure caused him to develop malignant mesothelioma from which he died. At trial, the sole remaining defendant was R.T. Vanderbilt. The jury found R.T. Vanderbilt liable for Mr. Galliher's injuries and awarded Plaintiffs $2,864,583.33. The jury concluded Mr. Galliher's exposure to asbestos fibers from the Defendant's talc products was a substantial factor in causing his malignant mesothelioma and that the Defendant failed to adequately warn Mr. Galliher of the dangers of asbestos contained in its products.

During trial, Defendant moved for a new trial based upon references to inadmissible evidence throughout the trial. The court denied that motion. After the jury returned its verdict, Defendant filed a Renewed Motion for a New Trial, citing as the basis for the motion the cumulative impact of four instances in which plaintiff counsel or witnesses referenced inadmissible evidence, or in the alternative, the jury's failure to assess fault against Borg Warner, Mr. Galliher's employer. The Defendant also filed a Renewed Motion for a Judgment as a Matter of Law on the grounds that there was insufficient evidence to support a finding of failure to warn and causation on behalf of Defendant and its products. Finally, Plaintiffs filed a post-trial Motion for Costs and Interest. The court held argument on this issue on March 8, 2013 where the court reserved decision. This opinion constitutes the court's rulings on the reserved issues.

Facts

Darcel Galliher brought this personal injury action against various defendants on behalf of herself and the estate of her late husband, Michael Galliher. Mr. Galliher died of mesothelioma, an asbestos-related cancer, on February 3, 2011. Plaintiffs alleged Mr. Galliher contracted mesothelioma from his exposure to asbestos while working at a plant that manufactured bathroom fixtures in Mansfield, Ohio. More specifically, Plaintiffs allege Mr. Galliher became exposed to dust at work from NYTAL brand industrial talc. Plaintiffs allege R.T. Vanderbilt, the sole remaining defendant at trial, mined and sold NYTAL industrial talc and distributed it to the plant at which Mr. Galliher worked.

Plaintiffs proceeded to trial against R.T. Vanderbilt. Plaintiffs' theory of the case was that Defendant's NYTAL industrial talc contained asbestiform fibrous materials which caused Mr. Galliher's mesothelioma. Thus, Defendant was negligent in selling the asbestos-containing NYTAL industrial talc and failed to warn of the dangers caused by the talc. Ohio substantive law governed this case. Plaintiffs sought both compensatory damages and punitive damages.

Defendant conceded that industrial talc contained minerals which included asbestiform minerals, but it denied that NYTAL industrial talc contained asbestos and more importantly, denied that the minerals in its own industrial talc were capable of causing mesothelioma. Therefore, Defendant's talc could not have caused Mr. Galliher's mesothelioma. Instead, Defendant

contends Borg Warner Corporation and CertainTeed Corporation are responsible, at least in part, for Mr. Galliher's disease. Defendant further argued that Mr. Galliher was negligent in failing to protect himself from being exposed to industrial talc.

At trial, Defendant moved for a mistrial under Superior Court Civil Rule 59 based on statements made by multiple Plaintiffs' witnesses referencing evidence previously deemed inadmissible by the court. In addition, Defendant moved for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(a), arguing Plaintiff failed to prove its causation and failure to warn claims against the Defendant. The court deferred ruling on Defendant's motions[1] until after the jury returned its verdict. On July 27, 2012, the jury decided in favor of Plaintiffs in awarding $2,864,583.33 in damages. The jury found Mr. Galliher was exposed to asbestos or asbestiform fibers from Defendant's products and that that exposure was a substantial factor in causing his mesothelioma. The jury also found that Defendant failed to provide adequate warning to users of its products. Shortly thereafter, Defendants renewed its previous Motion for a New Trial and Motion for Judgment as a Matter of Law. Plaintiffs moved for costs and interests.

I. DEFENDANT'S RENEWED MOTION FOR A MISTRIAL AND A NEW TRIAL

In its Motion for a New Trial, Defendant sets forth two reasons why the court should grant its motion. First, Defendant argues the cumulative impact

[1] The court did, however, grant Defendant's Motion for Judgment as a Matter of Law with respect to the punitive damages claim only.

of four instances at trial where Plaintiffs' witnesses provided inadmissible testimony caused such prejudice to Defendant so as to require a new trial. In the alternative, Defendant argues the jury failed to consider fault on behalf of Mr. Galliher's employer, Borg Warner.

When considering a Motion for a New Trial, the court begins with the presumption that the jury's verdict is correct.[2] The court "will not disturb a jury's verdict unless it is against the great weight of the evidence, resulted from the jury's disregard for applicable rules of law, or was tainted by legal error during trial."[3] "Barring exceptional circumstances, the trial judge should set aside the jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, [there would be a miscarriage of justice if the verdict were permitted to stand.]"[4]

The court must determine whether the aforementioned comments caused sufficient prejudice to Defendant so as to warrant a new trial. In determining the prejudicial effect of improper comments during trial, the court considers "(1) [t]he closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the error.[5]

A. The alleged improper comments, taken individually, do not require a new trial

[2] *Smith v. Lawson*, 2006 WL 258310 (Del. Super.) (*citing Mills v. Telenczak*, 345 A.2d 424, 426 (Del. Super. 1975)).
[3] *Bullock v. State Farm Mutual Auto. Ins. Co.*, 2012 WL 1980806, at *4 (Del. Super) (quoting *In re Asbestos Litigation*, 2011 WL 684164, at *4 (Del. Super.)).
[4] *Messick v. Star Enterprise*, 1998 WL 110082, *1 (Del. Super. Jan. 30, 1998) *aff'd*, 723 A.2d 840 (Del. 1998) (quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).
[5] *Hughes v. State*, 437 A.2d 559.

When a Motion for a New Trial is based upon improper comments made during trial, "[t]he question is whether the comments caused sufficient prejudice to the complaining party to warrant reversal."[6] Delaware courts utilize a three-part test to determine the effect of the improper comments.[7] Under that test, the court must consider the following factors: "(1) [t]he closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the error."[8]

1. The alleged improper comments

Defendant argues the following comments were inadmissible or improper and therefore warrant a new trial:

- Plaintiffs failed to remove certain excluded hearsay statements regarding the alleged asbestos composition of R.T. Vanderbilt's talc from the edited video deposition of Thomas Rogers played for the jury.

- Dr. Castleman inappropriately suggested that R.T. Vanderbilt spent $16 million "buying senators and lobbying the government."

- Dr. Castleman made inappropriate reference to Johns-Manville calling R.T. Vanderbilt "liars" in connection with marketing its talc.

- Plaintiffs' expert Sean Fitzgerald inappropriately relied upon ratios derived from the excluded MAS report in opining that the minerals found in Mr. Galliher lung tissue were a fingerprint for New York talc. Mr. Fitzgerald also engaged in subsequent analysis of R.T.

[6] *Gallo v. Buccini/Pollin Group*, 2008 WL 836020, at *6 (Del. Super.) (quoting *Joseph v. Monroe*, 419 A.2d 927, 930 (Del. 1980))
[7] *See Hughes v. State*, 437 A.2d 559, 571 (Del. 1980) (adopting three-part test); *see also DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993) (extending three-part test to civil actions).
[8] *Id.* (citing *Adams v. Luciani*, 2003 WL 22873038, at *3 (Del. Supr.) (internal citations omitted)).

Vanderbilt talc inconsistent with his prior case-specific deposition testimony without notice to R.T. Vanderbilt.

Although the court finds the aforementioned comments improper (and found them inadmissible at trial), it holds that the improper statements do not amount to sufficient prejudice to warrant a new trial.

2. Taken individually, the alleged improper comments do not require a new trial

When viewed individually the purported improper comments do not require a new trial. Those comments are discussed separately below.

a. Thomas Rogers' Deposition Video

The Defendant first contends that hearsay testimony from Thomas Rogers' deposition video shown to the jury was prejudicial. The excluded testimony pertained to a conversation between Mr. Rogers and George Mullen, two R.T. Vanderbilt employees, involving the alleged asbestos composition of the Defendant's talc. Mr. Rodgers testified as follows:

Q: And did you know a fellow named Mullin, George Mullin?

A: Yes.

Q: Was he a foreman at the company?

A: He was a foreman, I think over in the mill is where he was located.

Q: And did – as the foreman for the company, did just George Mullin tell you anything about whether or not the minerals in the mines was asbestos?

A: He never told me minerals in there was asbestos until I went out of there and I was trying to get court

settlement, compensation and he called me up there on day and told me then that he knew there was asbestos in the mine and he had a bag from when they first started. He said if I need it to produce that he would let me take that to court that said R.T. Vanderbilt, the best asbestos in the world.

Q: And did Mr. Mullin show you that bag?

A: Yes, he did.

Q: And did that bag say R.T. Vanderbilt on it?

A: Yes.

Q: Did it have the words asbestos on it?

A: Oh yes.

Q: And was it printed on the bag itself?

A: Yeah.

Q: And what was his – you said he was a foreman but what type of foreman was George Mullin; was he in product or –

A: I think he was in production over there; I'm pretty sure he was.

On Sunday July 15 the court conducted a lengthy hearing with counsel during which, according to Vanderbilt's counsel, a "lot of time" was spent discussing deposition testimony one or both of the parties proposed to use.[9] During that hearing the court ruled that it would allow testimony about the bag, which it concluded was not hearsay, but that it would not allow testimony about things told to the witness. Rather than sort through all of the testimony the court left

[9] The court explained:

At the pretrial conference, the court held:

it to the parties to modify the deposition designations so as to comply with these general rulings. The court told the parties:

> I've heard enough. I'm going to allow – and you can sort out the testimony. I don't want anything here where he was told this or that. But I will allow him to testify that he saw a bag. He was shown a bag that said "best asbestos in the world." You can pick through it what you want and what's not appropriate.

Neither side objected to this procedure.

After the conference Plaintiff sent defense counsel a designation of the Rogers testimony she wished to be played to the jury. Unfortunately the designation did not delete the hearsay testimony about statements purportedly made by George Mullen. Defendant voiced no objection at trial to the designation at trial, so the video tape deposition—which still contained the hearsay statement by Mullen-- was played as designated. Defendant promptly objected once the hearsay was played. The trial day was nearing an end, so the court sent the jury home.

After the jury was excused for the day, the court made the following comment to counsel:

> I think it was extraordinarily clear, I hope it was, that as I wasn't going to allow this hearsay and I wasn't going to allow scuttle butt that was being passed around at the mine about whether the materials contained asbestos ...I distinctly recall that this witness could heavy r [sic] testify that you saw a bag that had R. T. Vanderbilt, the world's best asbestos, or whatever it happened to say. Because to me that was not hearsay. But I distinctly also recall that saying that he and no one else could testify about what the rumors were, what they were told about, the composition of the talc. I don't have a copy of the transcript of Sunday's hearing. I want to look at it.

The next morning, out of the presence of the jury, the parties argued over whether a mistrial was called for. The court settled on a cautionary and limiting instruction which it gave to the jury. Though not waiving its motion for a mistrial, Defendant had no objection to the content of the instruction.

The court reaffirms its earlier conclusion that the hearsay did not warrant a mistrial. First the court was, and remains, convinced that the cautionary instruction was adequate. Second, Defendant was at least as much at fault as was Plaintiff for the introduction of this testimony. There is no question that Plaintiff's counsel erred when they included the hearsay within the designation of the Rogers testimony. Nonetheless Defendant's counsel had the opportunity to review the designation prior to the video being shown to the jury and could easily have prevented that portion of the video from being played. Defense counsel now explains that he was occupied with other matters relating to the trial and simply did not have time to review the designation. While the court is sympathetic and understands the demands placed on trial counsel during trial, Vanderbilt took a calculated risk when it sent only one counsel to try this case. Moreover Vanderbilt had capable local counsel, experienced in asbestos matters, present through most of the trial and associated hearings. Even assuming Vanderbilt's lone trial counsel was overwhelmed by matters when the deposition designations were provided to him, Vanderbilt provides why local counsel could not have assisted in the straightforward task of screening the designations for hearsay. Finally the court notes that Vanderbilt's counsel did not object to the designation

procedure when the court announced it during the weekend conference with counsel.

b. Dr. Castleman's Testimony

Barry Castleman, Ph.D. is a regular on the asbestos circuit who testifies about the state of the art of asbestos knowledge at any given time. Vanderbilt contends that two portions of Dr. Castleman's testimony required the court to grant a mistrial. First were his comments that Vanderbilt spent $16 million trying to obtain favorable reports about its talc and that Vanderbilt had politicians in its pocket. Second is his comment that Johns Manville, a Vanderbilt competitor, referred to Vanderbilt as a "liar."

Well before Dr. Castleman's testimony the court excluded evidence that Vanderbilt spent considerable sums of money trying to get favorable reports and regulatory rulings on its talc. The court also excluded any testimony about Vanderbilt having politicians in its pocket. Yet on cross-examination by Vanderbilt's counsel, Dr. Castleman offered the following

> Q. And RT Vanderbilt has been studying talc since the 1970s; correct?
>
> A. Well, since government regulatory officials started to impose duties on them. Yes, Vanderbilt has reacted by coming forth with studies and statements of various kinds. They spent millions of dollars on that.
>
> Q. How do you know they spent millions of dollars?
>
> A. Just from the volume of studies, as well as testimony that's emerged in the course of this history and unearthing this history. I figure 16 million dollars, I believe, was used in one document.

Q. Who gave the 16 million dollars, who was that testimony by?

A. I think it was by a worker at Vanderbilt talking about one of the Vanderbilt family told the workers.

Q. So a talc worker, a miner or miller; right?

A. Right.

Q. Is reporting how much Vanderbilt spent on this?

A. How much the company owners told him they spent buying senators and lobbying the government, yes.[10]

Defense counsel promptly objected to the last statement and moved to strike it, whereupon the court told the jury to disregard that testimony. Vanderbilt did not ask for any cautionary or limiting instructions, nor did it seek a conference with the court to discuss any further measures to limit the impact of this statement. It appeared at the time that Defendant was content to proceed with only the instruction to disregard Dr. Castleman's statement.

The court expressed serious concerns about this testimony at the prayer conference:

> I will tell you that . . . one of the things that troubles me most is Dr. Castleman's volunteering, what I believe to be volunteering, about the senators in the hip pocket or – I think the words were that he bought senators, plural. I don't think that was invited by the question. I think, frankly, Dr. Castleman was intent on getting that to the jury and seized upon the moment that he could to put it before the jury. And that is one of the things that makes me worry that no amount of curative instructions will erase from the minds of the jury now that they heard it.

[10] (Emphasis added).

Upon further reflection, however, the court finds that Dr. Castleman's comment, although regrettable, does not, by itself, warrant a new trial.

- First, Vanderbilt made the strategic decision not to ask for any limiting or cautionary instruction at the time the statement was made, nor did it request any such instruction in the final instructions given to the jury. Vanderbilt will therefore not be heard to now complain about the absence of any instruction beyond the one it requested—and the court gave—at trial.
- Second, this testimony did not relate directly to the central dispute in this case. Vanderbilt's primary defense was that its talc did not contain toxins which cause mesothelioma. This was a scientific dispute fought by expert witnesses. The credibility of Vanderbilt employees, and whether they had politicians in their pocket, played only a minor role in answering this essentially scientific question.
- Third, this was a stray comment in the context of a two week trial; it was not repeated, nor was there any reference to it in arguments by counsel.
- Fourth, it is evident that the jury took seriously the court's instructions to disregard testimony. During its deliberations the jury sent a note to the court asking about the scope of the court's instructions to disregard a portion of another witness's testimony.

The second portion of Dr. Castleman's testimony to which Defendant objects is his reference to Johns-Manville calling Vanderbilt "liars." This issue too was raised in a pretrial conference. At that conference the parties discussed Plaintiff's desire to introduce Johns-Manville internal documents which indicated R.T. Vanderbilt failed to provide an asbestos warning on its talc and referring to Vanderbilt personnel as "liars" when they contended that Vanderbilt's talc did not contain asbestos. The court ruled the documents were inadmissible unless Plaintiffs provided evidence that "particular documents were [contemporaneously] shared with R.T. Vanderbilt."[11] No such evidence was forthcoming. Still Dr. Castleman testified about the Johns-Manville accusations at trial:

> Q. Does your book mention RT Vanderbilt?
>
> A. Yes.
>
> Q. Is that the one paragraph, there's one paragraph on RT Vanderbilt?
>
> A. The paragraph where Johns-Manville people are calling RT Vanderbilt liars.

To a great extent this testimony was invited. Dr. Castleman's one paragraph reference to Vanderbilt in his book was not the subject of direct examination and the court therefore has difficulty seeing the value of cross-

[11] At the pretrial conference, the court noted:

> And the plaintiffs walk a tightrope here in the sense if you introduce documents from Johns-Manville and it turns out -- or if you bring to the attention of the jury documents from Johns-Manville and there is no evidence to support the conclusion that R.T. Vanderbilt had received them at the time, you do run the risk of a mistrial, because this is serious enough that I would seriously consider a motion for a mistrial under those circumstances.

examining about that reference. The book was publicly available, so the court assumes that Vanderbilt knew what was contained in the paragraph about it. Nonetheless for no obvious reason Vanderbilt's counsel decided to venture into the minefield.

c. Sean Fitzgerald's Testimony

Defendant finally objects to Sean Fitzgerald's testimony regarding an inadmissible report authored by Mark Rigler, Ph.D. Plaintiffs called Sean Fitzgerald as an expert on the mineralogical composition and origins of materials found in Mr. Galliher's lung tissue. Mr. Fitzgerald concluded that constituents of the materials found in Mr. Galliher's lung tissue were consistent with Defendant's talc, and that the ratio of the constituents was consistent with NYTAL talc. At the pretrial conference, the court allowed Mr. Fitzgerald to testify, but prohibited him from mentioning or referring to Dr. Rigler's report during his testimony.[12]

At trial, Mr. Fitzgerald used a chart to illustrate for the jury certain studies he reviewed before reaching his conclusions. The chart included findings by Dr. Rigler in his report. Plaintiffs failed to remove these findings after the court deemed use of the Rigler report inadmissible. This mistake surfaced when Defense counsel asked Mr. Fitzgerald on cross-examination about the mathematical calculations on his chart and Mr. Fitzgerald testified, "The math isn't going to work because the math that I used included an analysis that I was – I was told could not be a part of this." Defendant objected and the court

[12] The Rigler Report was excluded because Plaintiffs failed to disclose to Defendant that they intended to use information contained in the report.

issued a curative instruction. Plaintiffs claimed the chart was prepared before the court ruled Dr. Rigler's report inadmissible and although they removed any mention of that report in the slides, they forgot to re-calculate the ratios on the chart.

Defendant also alleges prejudice in Mr. Fitzgerald's testimony regarding his testing of Defendant's talc. At the time of his deposition, Mr. Fitzgerald testified he had never tested Defendant's talc. Between his deposition and trial, however, Mr. Fitzgerald had tested Defendant's talc, apparently for another case. Defendant argues this testimony inappropriately bolstered Mr. Fitzgerald's testimony.

The court finds that the jury's damages award was reasonable as the amount awarded, $2,864,583.33, is consistent with other asbestos-related disease actions.[13] The reasonable damages award, which the court finds was supported by a sufficient evidentiary basis, demonstrates that the jury was not

[13] *See Farrall v. AC&S Co., Inc.*, 1989 WL 158512 (Del. Super.) (acknowledging that for asbestos-related pleural disease, range of award between $100,000-$4,000,000 in Delaware cases, and $5,000,000 in Delaware asbestosis cases); *see also Wagner v. Bondex Intern., Inc.*, 368 S.W.3d 340 (Mo. Ct. App. 2012) (jury award against three defendants for plaintiff's exposure to asbestos and subsequent diagnosis of mesothelioma totaling $4.5 million); *Rando v. Anco Insulations Inc.*, 16 So.3d 1065 (La. 2009) (bench trial resulting in $2.8 million award for asbestos exposure resulting in mesothelioma diagnosis); *John Crane v. Scribner*, 800 A.2d 727 (Md. 2002) (jury verdict awarding damages in the amount of $5, 241,500 to the spouse and estate of Mr. Scribner who died of mesothelioma); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759 (Tex. App. 1999) (jury verdict awarding estate, widow, and parents of former serviceman who was diagnosed and died of mesothelioma over $8 million).

inflamed by the statements made my Mr. Rogers, Dr. Castleman, and Mr. Fitzgerald.[14]

In addition, the curative instructions provided by the court were sufficient to mitigate any prejudice to the Defendant. In each of the four instances of inappropriate commentary, the court issued a curative instruction or struck the testimony from the record as requested by Defense counsel. In addition, the Defendant does not challenge, and has not challenged, whether the jury was properly instructed by the court during each curative instruction or the jury instructions at the close of the case. Thus, the issue is whether the prejudice suffered by Defendant as a result of the improper statements was able to be cured by an instruction, to which the court responds in the affirmative.

For Mr. Rogers' testimony, Defendant points out that Mr. Rogers' testimony dealt with a central issue in the case - whether the Defendant's talc contained asbestos - but it did not explain how the inadmissible testimony affected its case. Instead, Defendant merely stated that the evidence "prejudicially affected R.T. Vanderbilt in a manner that no curative instruction could remedy." The court agrees with Plaintiff that there was sufficient evidence outside of the contested testimony from Mr. Rogers presented by both sides in support of its position on this issue. Therefore, the curative

[14] *See Young v. Frase*, 702 A.2d 1234, 1237 (Del. 1997) (citing *Del. Elec. Coop., Inc. v. Duphily*, 702 A.2d 1202 (Del. 1997) ("As long as there is a sufficient evidentiary basis for the amount of the award, the jury's verdict should not be disturbed by a grant of additur or a new trial as to damages.")).

instruction provided a sufficient remedy to the prejudicial effect, if any, of the inadmissible testimony presented to the jury.

The court finds the same to be true with regard to Mr. Fitzgerald's testimony. Mr. Fitzgerald's testimony undermined the credibility of Plaintiffs' case, and only minimally, if at all, impacted the Defendant's case. If it was not clear to the jury that the error was Plaintiffs' fault, the court clarified the issue through an instruction to the jury.[15] Therefore, any prejudice suffered by Defendant in this instance was corrected upon the curative instruction given by the court.

Defendant also did not suffer prejudice with regard to Mr. Fitzgerald's testimony about his experience with testing Defendant's talc. At side bar, Defense counsel raised his concern as to the inconsistent testimony of Mr. Fitzgerald, that is, at the time of his deposition he had never tested Defendant's talc, but by trial Mr. Fitzgerald had tested Defendant's talc. Defendant argues the fact that Mr. Fitzgerald tested Defendant's product after his deposition inappropriately bolstered the witness' testimony while disadvantaging defense counsel. During the side bar, the court recommended counsel ask the witness if any of his opinions were based on his new testing of Defendant's talc, which counsel agreed to do. When asked this question, the witness responded "No,

[15] The court instructed the jury, as agreed upon by counsel,

> Ladies and gentlemen, shortly before the break you will recall there was some testimony about there was a math error here in the average of 35 and 33. And the average was calculate at 22 which, of course, is not the average between those numbers. This mistake was not made by the witness, but rather this chart was prepared by – for the witness by plaintiff's counsel and it was plaintiff's counsel who has made this mistake; not this witness.

they have not." The court finds this line of questioning sufficient to cure any prejudice suffered by Defendant.

II. The verdict was not against the great weight of the evidence

Vanderbilt argues that the jury's failure to assess fault against Plaintiff's employer, Borg Warner, was against the great weight of the evidence. And therefore it is entitled to a new trial. The Delaware Supreme Court set forth the standard for "weight of the evidence motions" in *Storey v. Camper*:[16]

> Thus . . . we hold that a trial judge is only permitted to set aside a jury verdict when in his judgment it is at least against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such ground unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.[17]

At trial, Defendant asserted the affirmative defense that Mr. Galliher's employer, Borg Warner, was at fault and its fault was the proximate cause of Mr. Galliher's malignant mesothelioma. [18] The court instructed the jury on this defense and explained that it was Defendant's burden to prove Borg Warner was at fault and Borg Warner proximately caused Mr. Galliher's mesothelioma and death. On the verdict form, to the question "Has R.T. Vanderbilt proven by a preponderance of the evidence that Borg Warner/Artesian was at fault and

[16] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[17] (Internal citations omitted).
[18] Defendant also argued Mr. Galliher was at fault, which the jury rejected.

that its fault was a proximate cause of his malignant mesothelioma," the jury responded "No."

Defendant provides three arguments for why the jury's verdict was against the great weight of the evidence. First, Vanderbilt argues it warned Borg-Warner of the dangers of asbestos through Material Safety Data Sheets with all talc shipments and by placing warning labels on each bag of NYTAL talc. Second, Defendant argues Borg Warner had an independent duty to warn its employees of the dangers associated with talc. Defendant argues Borg Warner, not the Defendant, was the only party with direct access to its employees and their knowledge of working conditions and therefore, should have warned its employees of the dangers of asbestos exposure. Finally, Defendant argues that Borg Warner was negligent *per se* in failing to warn or protect its employees of or from the dangers of asbestos. Defendant directs the court to a citation from the National Institute for Occupational Safety and Health (NIOSH) as evidence of Borg Warner's negligence *per se*.

Vanderbilt's argument fails because Vanderbilt failed to introduce evidence that Mr. Gallaher's disease was proximately caused by exposure occurring *after* Borg Warner allegedly became aware of the hazards of Vanderbilt's talc. Vanderbilt had the burden of proving that Borg-Warner's conduct was a proximate cause of Mr. Galliher's disease. The Ohio formulation of proximate cause contains a "but for" element, which means that Vanderbilt needed to prove that but for Borg-Warner's conduct Mr. Galliher would not have contracted mesothelioma.

There is ample evidence in the record upon which a reasonable trier of fact could conclude that Borg Warner's conduct was not a proximate cause of Mr. Galliher's disease. The function of the Court in deciding a motion for a new trial is not to challenge the jury's verdict, or substitute its judgment for that of the jury's, simply because the Court may have reached a different conclusion."[19] It should be kept in mind that a reasonable trier of fact could have concluded that for several years during Mr. Galliher's employment Borg Warner was unaware that Vanderbilt's talc contained toxins. Indeed there was evidence that Vanderbilt employees assured Borg Warner that its talc did not contain asbestos. Further there was sufficient evidence in the record for a reasonable trier of fact to conclude that for Mr. Galliher the die was already cast before Borg Warner allegedly learned of the dangerous nature of Vanderbilt's talc. That is, by the time Borg-Warner allegedly learned of the dangers of Vanderbilt's talc it was already inevitable that Mr. Galliher would be afflicted with mesothelioma. It would have been reasonable, therefore, for a trier of fact to conclude that Borg Warner's allegedly wrongful conduct was not a but for cause of Mr. Galliher's disease.

The court finds Plaintiffs presented sufficient evidence from which a jury could conclude that Mr. Galliher died as a result of his exposure to Defendants product. "The Defendant has identified evidence from which the jury *could* have concluded that Borg Warner was at fault, but the evidence supporting that conclusion does not amount to such a level that the jury's verdict was

[19] *Cohen v. Cavalier's Country Club*, 2002 WL 499881, at *1 (Del. Super.).

against the great weight of the evidence in not reaching that conclusion.[20] Plaintiffs presented evidence, and the jury found, that Mr. Galliher was exposed to Defendant's talc product, that Defendant's talc contained asbestos or asbestiform materials, the Defendant failed to warn of the dangers resulting from the asbestos or asbestiform materials in its product, and that the Defendant's talc was a proximate cause and substantial factor in causing his malignant mesothelioma. Therefore, Defendant's Motion for a New Trial on the basis of the jury's failure to assess fault against Borg Warner is also denied.

For the foregoing reasons, Defendant's Renewed Motion for a New Trial is **DENIED**.

III. DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant next moves for Judgment as a Matter of Law under Delaware Superior Court Civil Rule 50. Defendant claims there is no legally sufficient evidentiary basis for finding (1) Defendant's products were a substantial factor in Plaintiff's injury or (2) Defendant failed to adequately warn users of its products. During trial, Defendant moved for a Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(a) before jury deliberations began.[21]

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[20] *See In re Asbestos Litigation 112010JR Trial Group*, 2000 WL 684164, at *10 (Del. Super.). Plaintiff analogizes the present cases to *Henderson*. It should be noted that while parallels exist between the two cases, this Defendant deliberately pursued its claim against Borg Warner in its defense and presented evidence in support of that claim, whereas the defendants in *Henderson* relied upon "one or two snippets of evidence" to support its claims against other non-party entities.

[21] Super. Ct. Civ. R. 50(a) states,

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that

The court granted Defendant's motion with respect to punitive damages, but delayed ruling on the remaining issues until after the jury returned its verdict (if a ruling still proved necessary). Because the jury ultimately returned a verdict in favor of Plaintiffs, Defendant now renews its Motion for Judgment as a Matter of Law under Superior Court Rule 50(b).

Superior Court Civil Rule 50(b) provides, in pertinent part:

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.

In considering a Motion for Judgment as a Matter of law, the court "views the evidence most favorable to the party against whom it is moved, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, he determines whether or not, under the law, a verdict might be found for the party having the burden."[22] In other words, a party is entitled to judgment as a

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> issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

[22] *McCloskey v. McKelvey*, 4 Storey 107, 111 (Del. 1961). A Motion for a Judgment as a Matter of Law can be distinguished from a Motion for a New Trial in that in the former, the court does not weigh the evidence but determines if the verdict was properly supported by the evidence, whereas the latter requires the court to "weigh[ ] the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached." *Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997).

matter of law where the facts support only one reasonable inference adverse to the non-moving party.[23]

Defendant sets forth four reasons why the court should grant its motion:

> (1) Plaintiffs failed to offer evidence sufficient to find that Mr. Galliher ever worked with or around R.T. Vanderbilt's NYTAL talc, let alone the frequent, regular and proximate exposure required under Ohio law.
>
> (2) Plaintiffs failed to offer evidence sufficient to find that "asbestiform" fibers caused Mr. Galliher's mesothelioma.
>
> (3) Plaintiffs failed to offer evidence regarding when (if ever) R.T. Vanderbilt was reasonably on notice of a potential link between "asbestiform fibers" in its talc and claims that it causes mesothelioma sufficient to give rise to a duty to warn.
>
> (4) Plaintiffs failed to offer evidence sufficient to find that R.T. Vanderbilt's warning was inadequate.

As with Defendant's Motion for a New Trial, the court finds the jury's verdict reasonable and supported by the evidence. Defendant's arguments pertain to two factual issues at trial: whether Defendant's product was a substantial factor in causing Mr. Galliher's injuries and whether Defendant failed to adequately warn Mr. Galliher. Both of these questions were submitted to the jury, and the jury answered both questions in the affirmative.

The Delaware Supreme Court has expressly provided that "[T]he factual findings of a jury will not be disturbed if there is 'any competent evidence upon which the verdict could reasonably be based.'"[24] The court finds a reasonable review of the evidence shows sufficient support in the record for the jury's

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[23] *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983) (internal citations omitted).
[24] *Mercedes-Benz of N.A., Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1362 (Del. 1991)

verdict.[25] Mr. Galliher worked at a Borg Warner factory that manufactured toilets and bathroom sinks. Mr. Galliher testified he worked in the cast shop, which was located next to the slip-house. In the slip-house, the workers made glaze using NYTAL talc. Mr. Galliher also testified to using talc and that he remembered, albeit vaguely, seeing Defendant's name on bags materials handlers would bring into the area in which he worked. Mr. Galliher worked at the cast shop for multiple decades, working five days a week, forty hours a week, and approximately fifty weeks a year.

Plaintiffs also submitted NIOSH investigative reports that referenced the use of Defendant's talc in the shop where Mr. Galliher worked. The report further indicated the slip-house emitted dust into the cast shop. A reasonable juror could find Mr. Galliher was exposed to Defendant's talc at the factory.

Plaintiffs also called multiple expert witnesses to establish medical causation. Dr. Abraham and Dr. Frank, Plaintiff's exert medical doctors, testified the asbestiform minerals in Defendant's industrial talc caused Mr. Galliher's mesothelioma. In addition, Dr. James Millette testified Defendant's talc contained asbestiform fibers and asbestos. The court ruled prior to jury instructions that Plaintiffs could submit to the jury that Mr. Galliher was exposed to either or both asbestos and asbestiform fibers. While it is unclear whether the jury found Mr. Galliher was exposed to asbestiform or asbestos (or both), it is clear that the jury found Defendant's products contained asbestos

[25] *Contra Harrison v. Extreme Nite Club*, 2007 WL 2428477, at *1 (Del. 2007) (internal citations omitted) ("[A] defendant is entitled to judgment as a matter of law if the plaintiff fails to establish a prima facie case of negligence, or under no reasonable view of the evidence could a jury find in favor of the plaintiff.").

in some form, and that asbestos caused Mr. Galliher's injuries. Based on the evidence, there was a reasonable basis for their finding.

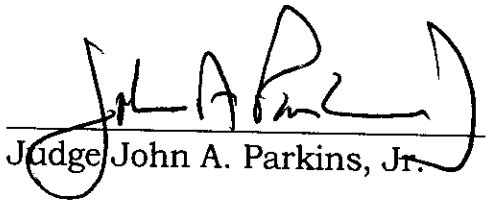
The jury's finding of facts with regard to Defendant's failure to adequately warn is also adequately supported by the record. There was testimony at trial that Borg Warner had received citations from OSHA for asbestos violations. Plaintiffs also introduced evidence that Defendant's material safety data sheets on NYTAL never contained the word asbestos, cancer, or mesothelioma. Finally, Mr. Kelse testified that NYTAL talc warnings contained the phrase "non-asbestiform" on the label.

Defendants argue there was no evidence that Defendant had notice of the harmful effects of asbestos or asbestiform fibers and therefore, it did not have a duty to warn. But the standard under Ohio law, as provided for in the jury instructions, is that Defendant had a duty to warn for dangers it "knew or, in the exercise of reasonable care, should have known."[26] Based on the evidence at trial, a reasonable jury could find Defendant should have known the dangers of asbestos or asbestiform at the time Mr. Galliher worked at Borg Warner, and it should have adequately warned users of its products of those dangers.

Because the court finds the jury's findings are reasonably supported by the evidence, Defendant's Renewed Motion for Judgment as a Matter of Law is **DENIED**.

[26] *See Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1182 (Ohio 1990).

IT IS SO ORDERED.



Judge John A. Parkins, Jr.

Dated: July 31 2013

oc: Prothonotary
cc: All counsel via e-file