To Be Argued By:
KATHLEEN M. SULLIVAN
Time Requested: 30 Minutes

APL-2014-00317
New York County Clerk's Index No. 190134/10

Court of Appeals

STATE OF NEW YORK

In Re: New York County Asbestos Litigation

RUBY E. KONSTANTIN, Individually and as Executrix of the Estate of DAVE JOHN KONSTANTIN, deceased,

Plaintiffs-Respondents,

—against—

630 THIRD AVENUE ASSOCIATES, *et al.*,

Defendants,

TISHMAN LIQUIDATING CORPORATION,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

E. LEO MILONAS
DAVID G. KEYKO
ERIC FISHMAN
PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, New York 10036
Telephone: (212) 858-1000
Facsimile: (212) 858-1500

KATHLEEN M. SULLIVAN
SHEILA L. BIRNBAUM
JANE M. BYRNE
WILLIAM B. ADAMS
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

Attorneys for Defendant-Appellant Tishman Liquidating Corporation

April 24, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f) and 500.13(c)(3), Defendant-Appellant Tishman Liquidating Corporation hereby states that it has no parents, subsidiaries, or affiliates.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether consolidation of asbestos-based personal injury actions for trial violates CPLR 602(a) where the actions differ with respect to the worksites, occupations, products, durations of exposure, diseases, plaintiff health statuses, defendants, and legal theories at issue, and where the defendants are thus prejudiced by jury confusion and the mutual bolstering of each claim's likelihood of success.

Answer: The Appellate Division incorrectly answered this question in the negative.

2. Whether, in reviewing the excessiveness of an $8 million award for pain and suffering for asbestos-related injury, which includes a concededly unprecedented $3.5 million for 18 months of future pain and suffering, the Appellate Division must consider awards approved in comparable cases to determine whether that award "deviates materially from what would be reasonable compensation" under CPLR 5501(c).

Answer: The Appellate Division incorrectly answered this question in the negative.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to CPLR 5602(a)(1)(i) and CPLR 5611 because the underlying action originated in the Supreme Court,

New York County (A103); the decision below is an order of the Appellate Division, First Department, entered on July 3, 2014, that finally determines the action and is not appealable as a matter of right, *Matter of New York City Asbestos Litig. (Konstantin)*, 121 A.D.3d 230 (1st Dep't 2014) (A7); and the Appellate Division granted leave to appeal on December 9, 2014 (A5-6).

This Court has jurisdiction to review the questions presented, which were raised below. *See Konstantin v. 630 Third Ave. Assoc.*, 37 Misc.3d 1206(A), *12, 14-16 (Sup. Ct., N.Y. Cnty. 2012) (A85-86, A89-90).

PRELIMINARY STATEMENT

This appeal by permission of the Appellate Division, First Department, follows a decision and order of that court affirming an $8 million judgment in favor of Plaintiff David J. Konstantin and against Defendant-Appellant Tishman Liquidating Corporation ("TLC") for negligence and violation of Labor Law § 200 in connection with Mr. Konstantin's alleged exposure to asbestos at worksites where TLC's alleged predecessor, Tishman Realty & Construction, was the general contractor. The judgment arose from a 2011 trial in Supreme Court, New York County (Madden, J.S.C.), under the New York City Asbestos Litigation ("NYCAL") case management order, in which seven mesothelioma cases were initially consolidated despite the fact that they involved different worksites, occupations, exposure periods, diseases, plaintiff health statuses and legal theories;

after settlements, only the claims of Mr. Konstantin against TLC and those of Ronald Dummitt against Crane Co. remained, and the jury awarded more than $51 million in damages to the two plaintiffs.

CPLR 602(a) would normally not permit consolidation of cases like Mr. Konstantin's and Mr. Dummitt's, which have nothing in common other than allegations that asbestos exposure caused the plaintiffs' injuries. That statute limits consolidation to cases in which there are common issues of law or fact and where no substantial prejudice will arise from joint trial. Here, however, Mr. Konstantin was a carpenter while Mr. Dummitt was a boiler technician; Mr. Konstantin worked in construction while Mr. Dummitt worked in Navy shipyards; TLC was a general contractor while Crane was a component-part manufacturer; Mr. Konstantin claimed two years of exposure to asbestos at TLC's sites while Mr. Dummitt claimed exposure over twelve to fifteen years; Mr. Konstantin's case involved dust from joint compound while Mr. Dummitt's involved gaskets, valves, and pumps; Mr. Konstantin and Mr. Dummitt suffered different forms of mesothelioma; and Mr. Konstantin's legal theory was negligence and workplace liability under Labor Law § 200 while Mr. Dummitt pressed product-liability theories. Rather than yielding efficiencies, trying these disparate cases together resulted in what the trial court itself called a "very, very disjointed" trial. And the

evidence in each case improperly bolstered the claims in the other, to the defendants' prejudice.

Only in asbestos litigation would these pervasive differences between the two cases and the ensuing prejudice to the defendants be ignored, for as the First Department candidly stated in the decision below, "in asbestos cases, it has been 'routine' to join cases together for a single trial." 121 A.D.3d at 242 (citation omitted) (A24). The first issue presented asks this Court to reconsider the routine practice of NYCAL and other New York courts to consolidate asbestos cases that have virtually nothing in common. The landscape of asbestos litigation has changed dramatically since a wave of early asbestos lawsuits threatened to overwhelm the New York courts absent mass consolidation, *see Malcolm v. Nat'l Gypsum Co*., 995 F.2d 346, 348 (2d Cir. 1993). An increasing number of sister jurisdictions have accordingly limited the circumstances in which asbestos cases may be tried together because of the due process concerns implicated by trials like this one. Here, no new law is required, for faithful application of CPLR 602(a) requires vacatur and remand of the judgment below for separate trial. The First Department erred in evaluating the facts and legal theories presented in the Konstantin and Dummitt cases at such a high level of generality that the statute's requirement of common issues of law and fact was rendered meaningless. And the

decision also improperly disregarded the prejudice to TLC's substantial right to a fair trial as a result of consolidation.

Routine consolidation of dissimilar asbestos actions also poses the risk of jackpot verdicts like the $51 million verdict here, and the second issue presented asks this Court to stem that tide by enforcing CPLR 5501(c). In affirming the $8 million damages award below—consisting of $4.5 million for 33 months of past pain and suffering and $3.5 million for 18 months of future pain and suffering—the First Department failed to ensure, as required by CPLR 5501(c), that the award did not "deviate materially from what would constitute reasonable compensation." While it is true that Supreme Court granted remittitur of the jury verdict in Mr. Konstantin's case from $19.55 million to $8 million (and in Mr. Dummitt's case, from $32 million to $8 million), that remittitur started from an artificially high bar and failed to bring about the consistency across judgments intended by enactment of CPLR 5501(c). The remaining judgment still deviates materially from comparable judgments for past pain and suffering given Mr. Konstantin's activity level during that period, and the $3.5 million award for future pain and suffering—over $194,000 per month—is concededly unprecedented in amount.

For either or both of these reasons, the Decision and Order should be vacated and the case remanded for new trial or further remittitur.

STATEMENT OF FACTS

A. Mr. Konstantin's Claims

For approximately two years from late 1974 until early 1977, Mr. Konstantin worked as a carpenter for various subcontractors during new construction at 622 Third Avenue and Olympic Towers in New York City. A260, A287-95. Tishman Realty & Construction was the general contractor at both job sites. A288, A291, A295. Mr. Konstantin testified that, as he and the other carpenters installed sheetrock, other workers applied, smoothed, and sanded a joint compound applied to the sheetrock (A307, A309-11), and then swept up the dust generated from the sanding (A309-10). According to Mr. Konstantin, the joint compound was manufactured by three companies: Georgia-Pacific Corporation, Kaiser Gypsum Company Inc., and U.S. Gypsum (A313-14), each of which made both asbestos- and non-asbestos-containing joint compound (*see* A510, A681-701). Mr. Konstantin testified that he did not know if the joint compound at the worksites contained asbestos. A399-400.

In mid-2008, a hydrocele—a "collection of fluid" often unrelated to cancer—was discovered on one of Mr. Konstantin's testicles. A372, A461. In January 2010, Mr. Konstantin was diagnosed with mesothelioma of the tunica vaginalis, a rare cancer of the lining of the testicles, which purportedly later spread to his lungs. A372, A462-63, A472, A475. There are only 223 reported cases of

mesothelioma of the tunica vaginalis in the medical literature, including individuals with no history of asbestos exposure. *See* A561, A1204.

In March 2010, Mr. Konstantin filed suit in Supreme Court, New York County, against dozens of defendants, including TLC, as the alleged successor to Tishman Realty & Construction, and Georgia-Pacific and Kaiser Gypsum, two of the joint compound manufacturers. A103-54.[1] Mr. Konstantin alleged indirect exposure to asbestos dust created by drywall contractors when they sanded joint compound and cleaned up that dust by sweeping, and he asserted claims against TLC for common-law negligence and failure to maintain a safe workplace in violation of Section 200 of the New York Labor Law. *See* A130-35.[2]

Because his counsel, Belluck & Fox, designated this case as an asbestos lawsuit and filed it in New York City, Mr. Konstantin's complaint was automatically subject to the NYCAL case management order without any showing that the products to which he was allegedly exposed contained asbestos.[3] Counsel

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[1] The third joint compound manufacturer, U.S. Gypsum, was not named as a defendant because of its bankruptcy filing. *See Matter of New York City Asbestos Litig. (Tancredi)*, 194 Misc.2d 214, 219 n.11 (Sup. Ct., N.Y. Cnty. 2002). Georgia Pacific and Kaiser resolved the case by settlement and were non-parties to the judgment. A99-101.

[2] Mr. Konstantin died on June 6, 2012, approximately 9.5 months after the trial. A1244. His claims are now being pursued by his wife, Ruby E. Konstantin, individually and as executrix of Mr. Konstantin's estate. A1245.

[3] *See* Amended Case Management Order (May 26, 2011), *available at* http://www.nycal.net.

subsequently requested that the case be assigned to an *in extremis* calendar for expedited discovery. A1113-14. The trial court agreed and included Mr. Konstantin's case as part of an *in extremis* trial cluster of ten cases all brought by the Belluck & Fox firm. *See* A155-59. The cases included in Belluck & Fox's cluster varied greatly in their facts.[4]

B. Mr. Dummitt's Claims

One plaintiff in the cluster was Ronald Dummitt, who worked for twenty-eight years as a boiler technician on Navy ships. A748-49. Mr. Dummitt alleged that, over a twelve- to fifteen-year period between 1960 and 1977, he was directly exposed to asbestos-containing dust when he scraped gaskets and changed pads on valves and pumps in the ships' mechanical and boiler rooms. A753-54. In April 2010, he was diagnosed with pleural mesothelioma. A192, A196.

Mr. Dummitt asserted product-liability claims based on failure to warn against numerous manufacturers of the boiler components, including the valve manufacturer, Crane. A952. It is undisputed that the Crane valves did not contain asbestos, but they were conjoined with other parts that did contain asbestos. A952-53. Mr. Dummitt's claims raised legal issues as to when, if ever, a component part manufacturer of a safe product must give warnings when the safe product is

[4] *See, e.g.*, A1167-68 (certain of the ten plaintiffs were exposed while in the U.S. Navy, such that the government contractor defense was relevant; one was a tobacco smoker, which raised unique causation issues; and one was an ironworker, which raised unique exposure issues).

used together with an unsafe product, and whether failure to give such warnings can be presumed to cause a plaintiff's injury. A1126-27. Mr. Dummitt had no claims against TLC.

C. The Proceedings In The Trial Court

1. The Trial Consolidation Of The Konstantin And Dummitt Claims

In January 2011, Plaintiffs' counsel moved pursuant to CPLR 602(a) to consolidate all ten of the cases in their cluster for a joint trial or, in the alternative, to jointly try the seven cases in which the plaintiffs had mesothelioma followed by a joint trial of the three cases in which the plaintiffs had lung cancer. A1166.[5] Defendants opposed both requests, but in April 2011, the trial court ruled from the bench that the seven mesothelioma cases would be consolidated for a single joint trial and the three lung cancer cases would be consolidated for a second joint trial. A1161-62, A1171-78.[6] Five of the seven joined mesothelioma cases thereafter

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[5] Plaintiffs' consolidation motion was not filed in any of the ten consolidated case files, and Defendants' joint opposition to consolidation and individual affirmations were filed by the court in only one of the ten cases, *Altuchoff*. *See infra* n.8.

[6] The "standard for uniting separate actions is the same, regardless of whether the court orders consolidation or joint trial," but technically, "consolidation" refers to the merging of separate cases into one action, whereas a "joint trial" refers to hearing cases together that maintain their separate identity. *See* Vincent C. Alexander, 2014 Supplementary Practice Commentary, McKinney's Cons Laws of N.Y., Book 7B, CPLR 602. The cases here were jointly tried, not consolidated, but the First Department used the terms interchangeably.

settled, leaving only the claims of Messrs. Konstantin and Dummitt to be tried together.

2. The Jury Trial

In July 2011, fifteen months after Mr. Konstantin commenced this action, a joint jury trial of these unrelated cases commenced. At the outset of the trial, the court overruled defendants' renewed objection to the joint trial. A449 ("I will note as to the fact that defendants have objected to consolidation of the action for trial from the inception."). Mr. Konstantin attended the trial and testified. *See, e.g.*, A236. Mr. Dummitt was too ill to attend the trial, and the jury thus heard only play-back excerpts from his deposition testimony. *See, e.g.*, A748.

The trial lasted nearly two months and was, as the trial court itself acknowledged, "very, very disjointed." A384. As explained more fully below (*see infra*, at 44-46), throughout the trial, testimony and evidence was introduced out-of-sequence; witnesses in one case stopped testifying mid-way to allow for testimony by witnesses in the other case and then recommenced their testimony days later; counsel and the trial court frequently mixed up the elements of the two cases; and some witnesses offered testimony partially applicable to both cases and partially applicable to one case.

The evidence at trial showed that not all joint-compound products contained asbestos (at least 10% did not) (A510, A681-701), and Mr. Konstantin offered no

evidence that the joint compound used at his worksites actually contained asbestos (*see* A399-400). The jury nevertheless found that Mr. Konstantin was exposed to dust from asbestos-containing joint compound manufactured by Georgia-Pacific, Kaiser Gypsum, and U.S. Gypsum (A1186), that none of those companies provided warnings (A1187), and that the manufacturers' failure to warn was a substantial factor in causing Mr. Konstantin's illness (*id.*; *see also* A1015-17).

As to TLC, the jury concluded that its purported predecessor Tishman Realty & Construction exercised supervisory control over subcontractors that brought the joint compound to the worksites (A1184); that Tishman Realty & Construction knew or should have known that joint compound containing asbestos was present and that the laborers were using unsafe sanding methods (*id.*); and that Tishman Realty & Construction failed to use reasonable care to correct the unsafe work practices (A1185). The jury also concluded that Mr. Konstantin was exposed to asbestos at these worksites when Tishman Realty & Construction workers cleaned up the dust generated by sanding the joint compound, and that such exposure also substantially contributed to his mesothelioma. A1184. Although the evidence showed that Tishman Realty & Construction had at most a general awareness at the time that asbestos was dangerous, the jury was instructed on recklessness (A978-79) and found that TLC had acted with reckless disregard for Mr. Konstantin's safety (A1186).

The jury concluded that TLC was 76% liable and the three manufacturers of the joint compound were each 8% liable for Mr. Konstantin's injuries. A1016-17, A1188. The jury awarded Mr. Konstantin $19.55 million in damages: $7 million for 33 months of past pain and suffering, $12 million for 18 months of future pain and suffering, $64,832 for past lost earnings, and $485,325 for seven years of future lost earnings. A16, A1188. The jury also awarded Mr. Dummitt $32 million in damages, including $16 million for pain and suffering. A17, A1200.

3. The Trial Court's Decision On TLC's Post-Trial Motion

In September 2011, TLC moved under CPLR 4404 to set aside the jury verdict or, in the alternative, for a remittitur of the awards for past and future pain and suffering. A1099. In September 2012, the trial court denied TLC's motion to set aside the verdict. 37 Misc.3d 1206(A), at *16-17 (A93-94).

As to consolidation, the court ruled that joint trial of the two cases was proper as there was "sufficient similarity" in occupations, and the distinct mesothelioma diagnoses and different legal theories did not prejudice TLC. *Id.* at *12 (A85). The court also ruled that TLC did not suffer prejudice to its substantial rights because the court gave sufficient clarifying instructions to the jury and any sequencing issues were attributable to "budgetary restraints restricting court hours." *Id.* at *12 (A86).

The court likewise rejected TLC's substantive challenges to the verdict, ruling, among other things, that there was sufficient circumstantial evidence for a reasonable jury to conclude that the joint compounds used at the worksites contained asbestos and, similarly, that TLC knew, or should have known, of the unsafe working conditions. *See id.* at *13-14 (A87-89). The court ruled that the jury could reasonably find that TLC acted recklessly because the record supports an inference that TLC was generally aware of the dangers of asbestos prior to Mr. Konstantin's alleged exposure. *Id.* at *10 (A81-82).

The court, however, did order a new damages trial unless Mr. Konstantin agreed to accept remittitur to $8 million, reflecting $4.5 million for 33 months of past pain and suffering and $3.5 million for 18 months of future pain and suffering. *Id.* at *16-17 (A93-94). This followed the court's determination that, based on "the nature, extent and duration of Mr. Konstantin's injuries," the jury's $19 million award deviated materially from reasonable compensation under CPLR 5501(c). *Id.* at *16 (A93).

Mr. Konstantin accepted the remittitur, and judgment in the amount of $7,195,713.91 was entered against TLC in November 2012. A95-101; *see also* A1247-48.[7] Since the jury found that TLC was more than 50% percent liable (and

[7] The judgment reflects a $2,101,576.66 off-set of the damages award, plus interest, costs, and disbursements. A95-101.

had acted recklessly), it is jointly and severally liable for the entire award. *See* CPLR 1601, 1602(7).

Crane likewise requested remittitur of the $32 million verdict awarded to Mr. Dummitt. In August 2012, a month before the trial court ruled on TLC's motion, it ordered *exactly the same* relief as to Crane—a new damages trial unless Mr. Dummitt stipulated to an $8 million award for pain and suffering (37 Misc.3d 1206(A) at *15) (A94)—notwithstanding the undisputed evidence that Mr. Dummitt had experienced different pain and suffering than Mr. Konstantin, *see Matter of New York City Asbestos Litig. (Dummitt)*, 36 Misc.3d 1234(A), *22, *24 (Sup. Ct., N.Y. Cnty. 2012). Mr. Dummitt accepted the remittitur. A18.

D. The First Department's Decision And Order

TLC and Crane appealed, and, in July 2014, the First Department affirmed both judgments in a single decision and order. 121 A.D.3d 230 (A48) (per Mazzarelli, J.P.). As to Mr. Konstantin, the court held, *first*, that the trial court had properly consolidated the two cases. The decision stated that "in asbestos cases it has been 'routine' to join cases together for a single trial" (*id.* at 242 (citation omitted) (A24)), and that consolidation satisfied the factors set forth in the Second Circuit's decision in *Malcolm* (*see id*. at 242-44 (A23-28)).

As to the first two *Malcolm* factors (common worksite and occupations), the decision "recognize[d] that a shipboard boiler room is a different physical

environment than a building under construction" but held that plaintiffs' exposures were sufficiently similar because both were "in the immediate presence of dust that was released at the same time as they were performing their work." *Id*. at 244 (A26-27). Although Mr. Konstantin as the moving party bore the burden of demonstrating the existence of common facts, the First Department stated that "TLC has failed to articulate why the differences in the environments and job duties had such an impact on the manner of exposure that" separate trials were needed. *Id.* (A27). The court found the third *Malcolm* factor (similar duration of exposure) satisfied because both plaintiffs' "exposure periods ended in 1977, meaning that the state of the art was the same for both cases." *Id*. (A27). As to the fourth *Malcolm* factor (type of disease), the court found the differences between Mr. Konstantin's and Mr. Dummitt's illnesses not "sufficiently significant" to warrant separate trial without mentioning the extreme rarity of Mr. Konstantin's testicular mesothelioma. *Id*. (A27). The court found the fifth *Malcolm* factor (common health status) satisfied even though Mr. Konstantin testified and Mr. Dummitt was too ill to appear in court, incorrectly stating that the jury was not "aware that [Mr. Dummitt's] physical condition was dire at the time of trial." *Id*. (A27).

The court acknowledged that the two cases were predicated on different legal theories (workplace liability and product liability), but nonetheless held that

the legal issues were common by generalizing that "both theories ultimately required a showing that defendants failed to act reasonably in permitting the men to become exposed to asbestos." *Id*. at 245 (A28).

As to prejudice, the First Department decision held that the disjointed nature of the consolidated trial was principally due to "budgetary constraints" and that arguments about jury confusion were "speculative" given the trial court's "nearly continuous limiting, explanatory and curative instructions" and other "management devices." *Id.* (A29). The court concluded that the jury's "individualized verdict for each plaintiff" supported the absence of prejudice (*id.* at 246 (A30)), even though the trial court had reduced that verdict by almost 70% (37 Misc.3d 1206(A), at *17 (A94)).[8]

Second, the First Department decision declined to vacate or reduce the $8 million damages award for pain and suffering. *Id.* at 255 (A46-47). The court agreed with the trial court that the pain-and-suffering period covered 33 months, beginning in late 2008 when Mr. Konstantin developed a hydrocele. *Id.* (A46). It

[8] Two dissenting Justices would not have considered the consolidation issue because the record was incomplete. 121 A.D.3d 256 (A49). The majority, however, explained that the "record provides adequate facts to meaningfully determine whether consolidation was properly granted." *Id.* at 241 (citing *UBS Sec. LLC v. Red Zone LLC*, 77 A.D.3d 575, 579 (1st Dep't 2010) (issue is whether "[m]eaningful appellate review … has … been rendered impossible.") (brackets in original)) (A22). Indeed, all of the facts that bear upon the consolidation determination (*e.g.*, occupation, job site, period of exposure, product, disease, case theory) are undisputed and are in the record.

then noted that the $4.5 million award for past pain and suffering equates to $136,000 per month, which was within the range of prior awards. *Id.* (A46). The court acknowledged that the $3.5 million award for future pain and suffering was "unprecedented" but suggested that it was "supported by the fact that, until the end of his life, he suffered two mesotheliomas, in his testes and chest, tantamount to twice as much pain and suffering." *Id.* (A47). The court did not mention its obligation under CPLR 5501(c) to determine whether the award "deviates materially from reasonable compensation" and did not compare Mr. Konstantin's condition to other cases.[9]

In August 2014, TLC moved for reargument or, in the alternative, leave to appeal. On December 9, 2014, the First Department denied reargument, but granted TLC leave to appeal to this Court, certifying the question of whether the Decision and Order affirming the trial court's judgment was properly made. A5-6. Mr. Konstantin thereafter moved to dismiss the appeal; this Court denied that motion in February 2015. *Matter of New York City Asbestos Litig. (Konstantin)*, 24 N.Y.3d 1216 (2015).

[9] The First Department also held that the verdict accurately apportioned 76% liability to TLC, concluding that TLC "did not adduce any evidence demonstrating the joint compound manufacturers' responsibility" (121 A.D.3d at 246-47 (A31-32)), and that the jury rationally concluded that TLC had acted recklessly in light of evidence purportedly showing TLC's knowledge by 1969 that long-term exposure to asbestos was harmful (*id*. at 247-48 (A33-34)).

ARGUMENT

POINT I

CPLR 602(A) BARS THE PREJUDICIAL CONSOLIDATION OF ASBESTOS ACTIONS LACKING ANY COMMON ISSUE OF FACT OR LAW APART FROM ASBESTOS EXPOSURE

The decision below should be vacated and the case remanded for new trial because the First Department erred under CPLR 602(a) in affirming the consolidation for trial of Mr. Konstantin's action against TLC with Mr. Dummitt's action against Crane. Except at an impermissibly high level of generality, the actions involved no common questions of law or fact, as required for consolidation under CPLR 602(a), and in any event consolidation prejudiced TLC's substantial right to a fair trial. The lengthy and disjointed trial confused the jury and allowed each plaintiff's claims to bolster the other's, resulting in an outsize verdict of over $51 million. Only under an unstated "asbestos exception" to CPLR 602(a) could the consolidation below be sustained, and dramatic changes in the landscape of asbestos litigation in the past several decades warrant this Court's clarification that such distortion of the statute is no longer acceptable and that consolidation in asbestos actions should no longer be "routine."

A. Consolidation Under CPLR 602(a) Requires Common Issues Of Law Or Fact And No Prejudice To A Substantial Right

CPLR 602(a) provides that, "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint

trial of any or all the matters in issue." The party requesting consolidation has the threshold burden of showing "a plain identity between the issues involved in the two controversies." *Matter of Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 161 (1970). If the movant satisfies that burden, then the opposing party has the "burden of demonstrating prejudice to a substantial right." *Id.* at 162. CPLR 602(a) does not distinguish among types of cases—those involving asbestos or otherwise—that may be consolidated.

1. Common Questions Of Law Or Fact

(a) Standard Under CPLR 602(a)

This Court has recognized a limited role for consolidation where necessary to ensure consistency of outcomes or to further judicial economy and efficiency in cases with common issues of law or fact. *See, e.g.*, *Matter of Vigo*, 26 N.Y.2d at 162 ("consolidation will make it possible to determine those issues in one proceeding involving all of the interested parties and to avoid the possibility of conflicting awards as well as the additional time and expense of separate proceedings"); *see also Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 73-74 (1st Dep't 2002) (consolidation may "prevent injustice which would result from divergent decisions based on the same facts") (citation and quotation marks omitted); *Matter of New York City Asbestos Litig. (Brooklyn Naval Shipyard Cases)*, 188 A.D.2d 214, 225 (1st Dep't 1993), *aff'd*, 82 N.Y.2d

821 (1993) ("The joint trial format has the potential to" result in efficiencies). The party seeking consolidation must demonstrate "at least some important rules of law and some substantial issues of fact to be determined that are in common to both actions." *Gibbons v. Groat*, 22 A.D.2d 996, 997 (3d Dep't 1964) (citation omitted); *see also Matter of Vigo*, 26 N.Y.2d at 161. Even "[w]here lawsuits arise out of the same transactions," however, if "the proof with respect to each lawsuit does not overlap, the identity of facts is not sufficient to merit consolidation or a joint trial of the lawsuits …." *C.K.S. Ice Cream Co. v. Frusen Gladje Franchise, Inc.*, 172 A.D.2d 206, 208-09 (1st Dep't 1991) (citation and quotation marks omitted).

Outside of asbestos litigation, consolidation is infrequent but has been permitted in cases that involve a single product, *see, e.g.*, *Aikman v. Atex, Inc.*, 224 A.D.2d 180, 180 (1st Dep't 1996), a single construction project, *Sullivan Cnty. v. Edward L. Nezelek Inc.*, 42 N.Y.2d 123, 127-29 (1977), or a single course of action, *see, e.g.*, Vincent C. Alexander, 2014 Supplemental Practice Commentary, McKinney's Cons Laws of N.Y., Book 7B, CPLR 602:2 (McKinney's) (recently consolidated case "did not involve merely discrete and separate acts … by the same defendants" but an "overriding unifying … fraud[ulent] scheme by all of the defendants").

(b) Application In Asbestos Context

Although this Court has never approved any particular criteria for consolidation of asbestos cases,[10] many New York courts have purported to evaluate commonality of factual issues in such cases by considering some or all of the non-exclusive factors that the Second Circuit set forth in *Malcolm*, 995 F.2d at 350-51, decided under Fed. R. Civ. P. 42(a), the federal counterpart to CPLR 602(a): (1) worksite; (2) occupation; (3) the period of exposure; (4) the type of disease; (5) health status; (6) the status of discovery; (7) identity of plaintiffs' counsel; and (8) the type of cancer. *See, e.g.*, *Matter of New York City Asbestos Litig. (Bernard)*, 99 A.D.3d 410, 411 (1st Dep't 2012). The identity of defense counsel, *Matter of Seventh Judicial Dist. Asbestos Litig.*, 191 Misc.2d 625, 629 (Sup. Ct., Monroe Cnty. 2002), and commonality in the asbestos-containing products to which plaintiffs were allegedly exposed, *Matter of New York City Asbestos Litig. (Adler)*, 2012 N.Y. Slip Op. 32097(U), 2012 N.Y. Misc. LEXIS

[10] More than two decades ago, this Court affirmed, without opinion, consolidation of asbestos cases of employees from the Brooklyn Navy Yard, *see Matter of New York City Asbestos Litig. (Brooklyn Naval Shipyard Cases)*, 188 A.D.2d 214, 225 (1st Dep't 1993), *aff'd*, 82 N.Y.2d 821 (1993). The First Department's (pre-*Malcolm*) decision discussed only the potential efficiencies that may result from joint trial of cases involving workers who were injured at the same shipyard. *Id.*; *see also Malcolm*, 995 F.2d at 353 ("The Brooklyn Navy Yard was owned and operated for the entire relevant time period by one entity, the United States government. Because uniformity is a way of life with the military, the commonality of the … cases [of Navy Yard workers joined for trial] cannot be overstated."). This Court has not otherwise ruled on consolidation in the asbestos context.

3828, at *24 (Sup. Ct., N.Y. Cnty. Aug. 8, 2012), have also been considered. The overlap of legal issues has been considered as well. *See, e.g.*, *Matter of New York City Asbestos Litig. (Capozio)*, 22 Misc. 3d 1109(A), *5 (Sup. Ct., N.Y. Cnty. 2009).

When the Second Circuit decided *Malcolm* more than two decades ago, asbestos lawsuits were placing significant burdens on the New York state and federal court systems, *see* 995 F.2d at 348, and consolidation of asbestos cases had become increasingly "commonplace," *id.* at 350; Mary Elizabeth C. Stern et al., NERA Economic Consulting, *Snapshot of Recent Trends in Asbestos Litigation* at 1 (May 22, 2014).[11] At that time, consolidation might well have tended to increase judicial efficiency because the plaintiffs in consolidated cases worked together in the same workplace, were exposed to the same products, manifested their diseases at approximately the same time, and were suing the same defendants. *See, e.g.*, *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) (consolidating asbestos cases of employees at the Brooklyn Navy Yard).

The landscape has drastically changed since then. Since 2007, the number of new asbestos-related filings nationally has hovered around 20% of 2001 levels. *See* Stern, *supra*, at 7. Moreover, "[t]he bankruptcies of most of the major raw

[11] *Available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_Asbestos_Litigation_Trends_0514.pdf.

material providers and product manufacturers have" resulted in plaintiffs pursuing "what have been termed peripheral defendants [such as those] who owned premises where asbestos was present." Helen E. Freedman, *Selected Ethical Issues in Asbestos Litig.*, 37 Sw. U. L. Rev. 511, 512 (2008). As a result, joint trials in current asbestos cases typically involve (as here) disparate plaintiffs suing different defendants in cases involving different worksites, exposure histories, and illnesses, with few if any fact witnesses in common.

Yet, in contrast to other types of cases and without regard to the changes in asbestos litigation, New York courts (as here) continue to treat consolidation of asbestos cases as "routine"[12] and apply a highly permissive standard to such cases. *See, e.g.*, *Matter of New York City Asbestos Litig. (Assenzio)*, 2013 N.Y. Slip Op. 30801(U), 2013 N.Y. Misc. LEXIS 1630, at *5-6 (Sup. Ct., N.Y. Cnty. Apr. 19, 2013) (allowing consolidation because "historically … NYCAL cases have been consolidated" and "strict construction" of relevant factors "would undermine the purpose of consolidation"); *Matter of New York City Asbestos Litig. (Ballard)*,

[12] 121 A.D.3d at 242 (A24) ("[I]n asbestos cases, it has been 'routine' to join cases together for a single trial") (citation omitted); *see also Bischofsberger v. A.O. Smith Water Prods.*, 2012 N.Y. Slip Op. 32414(U), 2012 N.Y. Misc. LEXIS 4544, at *3 (Sup. Ct., N.Y. Cnty. Sept. 19, 2012) ("In the case of asbestos litigation, joint trials … have been routinely permitted."); *Matter of New York City Asbestos Litig. (Assenzio)*, 2015 N.Y. Slip Op. 30201(U), 2015 WL 514932, at *19 (Sup. Ct., N.Y. Cnty. Feb. 5, 2015) (citing First Department's decision below for the proposition).

2009 N.Y. Slip Op. 32104(U), 2009 WL 2996083 (Sup. Ct., N.Y. Cnty. Sept. 9, 2009) (consolidating asbestos claims despite lack of common worksite, occupation, product, time frame of exposure, diseases, and heath status); *Matter of New York City Asbestos Litig. (Altholz)*, 11 Misc.3d 1063(A), *3 (Sup. Ct., N.Y. Cnty. 2006) ("precise commonalities" not required).

2. No Prejudice To A Substantial Right

(a) Standard Under CPLR 602(a)

"[W]here prejudice to a substantial right is shown by the party opposing the motion, consolidation should not be granted even if common questions of law or fact exist." *Skelly v. Sachem Cent. Sch. Dist.*, 309 A.D.2d 917, 917 (2d Dep't 2003). For example, if "individual issues predominate[] concerning particular circumstances applicable to each plaintiff," "the resulting and cumulative prejudice to [the defendant] far outweighs the benefit derived from the conduct of a joint trial." *Bender v. Underwood*, 93 A.D.2d 747, 748 (1st Dep't 1983) (reversing consolidation of medical malpractice cases against one defendant); *see also Glussi v. Fortune Brands Inc.*, 276 A.D.2d 586, 587 (2d Dep't 2000) (reversing grant of joint trial of claims by smokers with some common questions of law and fact but also "particular circumstances surrounding each plaintiff's smoking history, as well as their medical history," which risks "cumulative prejudice" to the defendants) (internal citation and quotation marks omitted).

The U.S. Supreme Court has "emphasized time and again" that due process requires that a party have "the opportunity to present [one's] case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *see also Malcolm*, 995 F.2d at 350 ("The benefits of efficiency can never be purchased at the cost of fairness."); *Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d at 853 ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice …."). Trying disparate cases together threatens a defendant's substantial right to a fair trial and due process by creating a "possibility of confusion for the jury." *Bender*, 93 A.D.2d at 748; *see also D'Abreau v. Am. Bankers Ins. Co. of Fl.*, 261 A.D.2d 501, 502 (2d Dep't 1999) (where "issues are … dissimilar," "consolidation … will result in jury confusion and prejudice the right of the … parties to a fair trial"). Consolidation also increases the risk that one plaintiff's evidence will bolster unrelated claims, causing unfair prejudice to the defendants. *See, e.g.*, *Bradford v. John A. Coleman Catholic High School*, 110 A.D.2d 965, 966 (3d Dep't 1985).

(b) Application In Asbestos Context

These concerns have been discounted or simply ignored in the asbestos context. *See, e.g.*, *Matter of New York City Asbestos Litig. (Ballard)*, 2009 N.Y. Slip Op. 32104(U), 2009 WL 2996083 ("jury trial innovations" such as "written juror questions" will "minimize any prejudice arising from the potential confusion

of evidence"); *Matter of New York City Asbestos Litig. (Assenzio)*, 2013 N.Y. Slip Op. 30801(U), 2013 N.Y. Misc. LEXIS 1630, at *6 (with "management techniques [such as] juror notebooks … the jury should be able to differentiate and evaluate the evidence as to each defendant … so as to prevent bolstering or other prejudice to defendants").

The result is that consolidated asbestos cases generate much higher average damages outcomes than individual asbestos cases. As shown in the following chart, which contains NYCAL verdicts from 2009 to the present based on publicly available data, there is a stark disparity between the verdicts in consolidated and individual asbestos cases. The largest verdict in a consolidated asbestos case ($60 million) is nearly *three times* the largest verdict in an individual case ($20 million). And the average verdict in a consolidated asbestos case ($17.7 million) is over *three times* larger than in individual cases ($4.3 million):[13]

[13] In the following chart, cases joined for trial are grouped together in the left column, as indicated by highlighting. (The cases with which Peraica and Juni were joined settled before trial ended.) Verdicts have been rounded where appropriate and awards to spouses, which reach $10 million in certain cases, have been omitted.

Verdicts In Joint Trials		**Verdicts In Individual Trials**	
Serna No. 190183/2012	$60 million	*Hillyer* No. 190132/2013	$20 million
Levy No. 190200/2012	$50 million	*North* No. 190114/2013	$7 million
Assenzio No. 190008/2012	$20 million	*Wallace* No. 115189/2007	$5 million
Brunck No. 190026/2012	$20 million	*Benton* No. 109661/2002	$2.5 million
Vincent No. 190184/2012	$20 million	*Derogatis* No. 190150/2011	$0
Peraica No. 190339/2011	$35 million	*Dietz* No. 105736/1999	$0
Dummitt No. 190196/2010	$32 million	*Vega* No. 190409/2011	$0
Konstantin No. 190134/2010	$19.55 million	*Zaugg* No. 190008/2010	$0
Sweberg No. 190017/2013	$15 million		
Hackshaw No. 190022/2013	$10 million		
Koczur No. 122340/1999	$11.6 million		
McCarthy No. 100490/1999	$8.5 million		
Juni No. 190315/2012	$8 million		
McCloskey No. 190441/2012	$4 million		
Terry No. 190403/2012	$3 million		
Brown No. 190415/2012	$2.5 million		
Paolini No. 124397/2002	$0		
Michaelski No. 100021/2007	$0		
Average Verdict	**$17.7 million**	**Average Verdict**	**$4.3 million**

It is well documented that consolidation of tort cases "can alter the patterns of verdicts and awards handed down by jurors" in a manner that is systematically "more favorable to the plaintiffs than the defense." Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & Psychol. Rev. 43, 58, 66 (1998). One study found that asbestos plaintiffs are more likely, to a statistically significant degree, to win in a consolidated trial than plaintiffs in individual trials. *See* Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319, 1337-38 (2002). This occurs because, for example, "some asbestos defendants appear callous because they failed to label their products as dangerous, and callous defendants tend to make jurors more sympathetic to plaintiffs." Michelle J. White, *Asbestos Litigation: Procedural Innovations & Forum Shopping*, 35 J. Legal Stud. 365, 373 (June 2006).

Consolidation also may force defendants to settle weak cases on unfavorable terms rather than risk a jackpot verdict influenced by evidence from other consolidated cases. *See* Freedman, *supra*, at 517 (consolidation has "led to settlements of a huge number of cases, some of dubious value, … provid[ing] an overly hospitable environment for weak cases") (quotation marks omitted); *see also* A1173 (trial court acknowledging that "by the date for jury selection,

historically, in asbestos litigation, in this county, [the] number [of cases remaining for trial] is greatly reduced" due to settlement).

(c) Curbs On Asbestos Consolidation In Other Jurisdictions

Widespread concern about unfair outcomes in consolidated asbestos trials over the past decade has prompted courts and legislatures in sister jurisdictions to substantially curb the use of trial consolidation in asbestos cases.[14] For example, courts in Michigan,[15] Delaware,[16] Ohio,[17] Mississippi,[18] and San Francisco,[19] have prohibited consolidation of disparate asbestos trials absent party consent, as have

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[14] *See Matter of New York City Asbestos Litig. (Abrams)*, 2014 N.Y. Slip Op. 31893, 2014 WL 3689333, *4 (Sup. Ct., N.Y. Cnty. July 18, 2014) (observing trend in other States "to prohibit the consolidation of asbestos trials absent the consent of all parties").

[15] Mich. Admin. Order No. 2006-6 (Aug. 9, 2006) (prohibiting joinder of asbestos cases for trial or settlement and referencing, in a concurring opinion by Markman, J., the need to "restore the traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit").

[16] *In re Asbestos Litig*., No. 77C-ASB-2 (Del. Super. Ct. New Castle Cnty. Dec. 21, 2007) (Standing Order No. 1) (prohibiting joinder of asbestos cases for trial without the consent of all parties, unless the claims relate to same person or his/her household).

[17] Ohio Civ. R. 42(A)(2) (prohibiting joinder of asbestos cases for trial without the consent of all parties, unless the claims relate to same person or his/her household).

[18] *Alexander v. AC & S, Inc.*, 947 So. 2d 891, 895 (Miss. 2007) ("[P]laintiffs may not be joined … unless their claims are connected by a distinct, litigable event.").

[19] *In re: Brayton Group 436 v. Asbestos Defendants*, No. 424859 (Calif. Super. Ct., San Francisco Cnty. May 14, 2008) (vacating *sua sponte* order consolidating asbestos cases).

legislatures in Kansas,[20] Texas,[21] and Georgia.[22] This trend reflects the changing landscape of asbestos litigation, and calls for reconsideration of the "routine" trial consolidation of asbestos cases in New York.

B. The Two Cases Here Have No Common Issues Of Law Or Fact Supporting Consolidation Under CPLR 602(a)

Starting from the premise that, "in asbestos cases, it has been 'routine' to join cases together for a single trial," 121 A.D.3d at 242 (A24), the First Department erroneously approved a joint trial of two asbestos cases here that lack any common issue of law or fact other than the alleged inhalation of asbestos. The court applied the *Malcolm* factors at such a generalized level as to render them meaningless, disregarded the distinct issues of law in each case, shifted to TLC the burden of proof of commonality, and disregarded the plain prejudice that flowed from the consolidation. This departure from the plain text of CPLR 602(a) and from its normal application outside the asbestos context created no judicial efficiencies and gravely prejudiced the defendants. The decision should be vacated and remanded for separate trial.

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[20] Kan. Stat. Ann. § 60-4902(j) (2006) (prohibiting joinder of asbestos cases for trial without the consent of all parties, unless the claims relate to same person or his/her household).

[21] Tex. Civ. Prac. & Rem. § 90.009 (2005) (prohibiting joinder of asbestos cases for trial without consent of all parties, unless claims relate to same person).

[22] Ga. Code Ann. § 51-14-11 (2007) (prohibiting joinder of asbestos cases for trial without the consent of all parties, unless the claims relate to same person or his/her household).

1. The Cases Have No Common Issues Of Fact

(a) Different Worksites, Occupations, And Products

The First Department held that Messrs. Konstantin and Dummitt "were both exposed to asbestos in a similar manner"—namely, as dust—even though they engaged in different work in different occupations in different worksites (a ship boiler and a construction site). 121 A.D.3d at 244 (A26-27). But workers asserting an asbestos-related claim, regardless of their job or worksite or the product involved, almost invariably allege that they were in the presence of some type of dust while performing some task. In finding commonality here, the court erred as a matter of law in ignoring the important differences in the plaintiffs' worksites, occupations, and exposures to asbestos-containing products.

The existence of a common worksite is highly relevant to consolidation because it establishes, *e.g.*, "common ownership, … suppliers or … practices." *Malcolm*, 995 F.2d at 353. *Malcolm* itself held that "[t]he crucial difference between the *Brooklyn Navy Yard* case," where consolidation was approved, and *Malcolm*, where it was not, was that in *Malcolm*, "there simply was *no* primary worksite." *Id*. (emphasis in original). In *Malcolm*, although plaintiffs alleged a "primary *type* of worksite: powerhouses," there "was no showing that the powerhouses … provided anything like the uniformity at the Brooklyn Navy Yard." *Id*. (emphasis in original). Here, the building construction site where Mr.

Konstantin worked had nothing in common with the ship in a naval shipyard where Mr. Dummitt worked, and thus there was no overlapping evidence as to common practices or exposure. *See, e.g.*, *Matter of New York City Asbestos Litig. (Barnes)*, 2008 N.Y. Slip Op. 31036, 2008 N.Y. Misc. LEXIS 8397, at *12 (Sup. Ct., N.Y. Cnty. Apr. 7, 2008) (rejecting "creative[]" argument that a building is like "a land-based Naval ship") (quotation marks omitted).

Additionally, a "worker's exposure to asbestos must depend mainly on his occupation." *Malcolm*, 995 F.2d at 351. *Malcolm*, for example, held that there was no commonality between "insulators, who actually applied the asbestos [and] suffered from direct asbestos exposure, [and] sheet-metal workers [who] suffered from asbestos exposure in a bystander capacity." *Id.* Here, Mr. Dummitt, a boiler technician, suffered direct exposure (A959), while Mr. Konstantin, a carpenter, was a bystander (A970). Such differences in occupation and the related exposure "necessitat[e] a separate trial because of the … introduction of voluminous evidence that [is] wholly irrelevant to the other case[]." *Matter of New York City Asbestos Litig. (Capozio)*, 22 Misc.3d 1109(A), at *5.

Consolidation is also unwarranted where, as here, the asbestos-causing products at issue are different. *See Matter of New York City Asbestos Litig. (Barnes)*, 2008 N.Y. Misc. LEXIS 8397, at *12 (severing plaintiff in part due to lack of commonality of product exposure). In Mr. Dummitt's case there was no

dispute that, while Crane's valves did not themselves contain asbestos (A952), the gaskets used with those valves did contain asbestos (A1126). Mr. Konstantin's case, by contrast, involved joint compound (A972), and the jury had to decide whether the joint compound allegedly used on TLC's construction site contained asbestos (A1137).

The difference in products also presented different issues between the cases as to what preventive measures could have been taken. For example, Crane argued that "it had no duty to warn as it did not manufacture any of the asbestos-containing gaskets, … used with its valves" (A953), and thus the jury had to decide whether Crane had a duty to warn when it knew its product was used with an asbestos-containing product (*see* A1126). TLC, for its part, argued that it did not know that asbestos-containing joint compound was used at the relevant worksites (A973-74), and thus the jury had to decide whether TLC could have taken any preventive measure at all (*see* A1139).

Different occupations and products also created unique issues in each case as to the state of the art, which varies not only over time but also across industries. "The state of the art" is "defined in terms of whether the dangers of asbestos were reasonably foreseeable or scientifically discoverable at the time of plaintiff's exposure." *George v. Celotex Corp.*, 914 F.2d 26, 29 (2d Cir. 1990); *see also* A952. "[S]tate of the art evidence is specific to a particular occupation or industry,

and may differ among, for example, automotive or friction products, powerhouse workers, and Navy engineers." *Matter of New York City Asbestos Litig. (Abrams)*, 2014 N.Y. Slip Op. 31893, 2014 WL 3689333, at *3 (Sup. Ct., N.Y. Cnty. July 18, 2014). Here, the plaintiffs were in different industries, and the jury heard two sets of state-of-the-art evidence. *Compare* A952 (charging jury that "Mr. Dummitt contends that based on … state of the art evidence, … Crane … knew or should have known about the dangers of the release of asbestos fibers during routine maintenance and repairs on Crane's valves"), *with* A972-73 (charging jury that it "may consider all the evidence you have heard about asbestos and its use in joint compounds and the state of the art evidence" as to Mr. Konstantin's claims). Because each "defendant[] … is obligated to keep informed of scientific and technical discoveries *in its particular field*" (A957 (emphasis added)), the state of the art evidence adduced in the two cases was necessarily different, and consolidation thus presented no efficiencies for this type of evidence either.

(b) Different Durations Of Exposure

The First Department also erred in holding that consolidation was warranted merely because "both plaintiffs' decedents' exposure periods ended in 1977." 121 A.D.3d at 244 (A27). The *Malcolm* court compared the *duration* of plaintiffs' asbestos exposure, not the end date, 995 F.2d at 351, because the state of the art as to asbestos varies over time, *see Curry v. Am. Standard*, No. 08-CV-10228, 2010

WL 6501559, at *2 (S.D.N.Y. Dec. 13, 2010) (no consolidation where "the variation between the degree and duration of Curry and Gitto's asbestos exposure[] would likely require presentation of different, complex evidence in each case"). Here, duration varied dramatically: Mr. Konstantin claimed exposure for two years at TLC's sites (A287), whereas Mr. Dummitt was exposed for approximately fifteen years (*see supra*, at 8). Mr. Konstantin's relatively short duration of exposure also supported a causation defense (A571-72)—a defense Crane did not raise. *See Matter of New York City Asbestos Litig. (Barnes)*, 2008 N.Y. Misc. LEXIS 8397, at *12 (severing plaintiff in part due to different time periods of exposure).

(c) Different Diseases

In rejecting the argument "that the difference in the types of mesothelioma the plaintiffs' decedents had compels separate trials," 121 A.D.3d at 244 (A27), the First Department erred because different types of mesothelioma are "distinct disease[s]" that raise distinct issues of proof. *See Matter of New York City Asbestos Litig. (Adler)*, 2012 N.Y. Misc. LEXIS 3828, at *27. The court in *Adler*, for example, held that "the most important" reason why it refused to consolidate one plaintiff's action with several others "is that she is the only plaintiff … suffering from the disease of peritoneal, and not pleural mesothelioma." *Id*. at *26.

Here, Mr. Konstantin's and Mr. Dummitt's different diseases raised different issues as to causation. Pleural mesothelioma, which affects the lining of the lungs, has occurred in tens of thousands of persons, and asbestos is a well-documented cause of that disease. A196; *see also Matter of Seventh Judicial Dist. Asbestos Litig.*, 191 Misc.2d at 631 (mesothelioma in lining of lungs is a "signature disease for asbestos exposure") (quotation marks omitted). Thus, Crane did not contest whether Mr. Dummitt's pleural mesothelioma was caused by asbestos; rather, it argued that exposure to Crane products (as opposed to exposure to other defendants' products) was not a substantial cause of the disease. A173-74.

By contrast, mesothelioma of the tunica vaginalis (the lining of the testicles) is extremely rare, with only 223 cases recorded in the medical literature, some of which were in children who were never exposed to asbestos. A561, A1204. TLC accordingly advanced the case-specific defense that (i) asbestos does not cause mesothelioma of the tunica vaginalis (A174, A879); and (ii) even if it could, the exposure would have to exceed greatly the duration and quantity of the exposure Mr. Konstantin experienced (A571). The consolidation of Mr. Konstantin's case with a case involving a "signature" mesothelioma prevented TLC from effectively presenting this argument to the jury.

Moreover, Mr. Konstantin's and Mr. Dummitt's different diseases required the jury to consider and keep track of different operations, medical procedures, and

courses of treatment, as well as different impacts on each plaintiff's lifestyle. *Konstantin*, 37 Misc.3d 1206(A), at *15-16 (A91-92); *Matter of New York City Asbestos Litig. (Dummitt)*, 36 Misc.3d 1234(A), at *22.

(d) Different Health Statuses

The First Department also erred in holding that the fact "that Dummitt was too ill to appear in court does not confer upon him a different 'status' from Konstantin" because "[t]here is no evidence that the jury was aware that his physical condition was dire at the time of trial, so that it would have conflated his condition with that of the less ill Konstantin." 121 A.D.3d at 244 (A27). Plaintiffs' counsel in fact told the jury in the opening statement: "Mr. Dummitt is home. He is too sick to be here." A183. The jury thus was clearly aware that Mr. Dummitt was far sicker than Mr. Konstantin at the time of trial. And Mr. Dummitt's absence "present[ed] the jury with a powerful demonstration of the fate that await[ed]" Mr. Konstantin. *Malcolm*, 995 F.2d at 351-52 (quotation marks omitted) (discussing reasons not to consolidate of cases involving living and deceased plaintiffs).

(e) Different Defendants, Counsel, And Witnesses

The First Department also failed to consider several other substantial differences between the cases, which resulted in virtually no judicial economy arising from the consolidation, including the lack of overlap of defendants or their

respective counsel. A161-62. The First Department also did not consider that of the seventeen fact and expert witnesses, at best, only three offered testimony purportedly relevant, in part, to both cases. A1158-59. Even the trial judge was confused as to what expert testimony applied to which case. A944-45 (court told jury it could not "at this point make these determinations" as to in which case the expert testified).

2. The Cases Have No Common Issues Of Law

Nor were there any common issues of law that could be more efficiently raised in a joint trial than individual trials. The First Department acknowledged that the two cases were predicated on different legal theories (workplace liability versus product liability), but nonetheless held that common legal questions predominated because "both theories ultimately required a showing that defendants failed to act reasonably in permitting the men to become exposed to asbestos." 121 A.D.3d at 245 (A28). This extreme generalization of the parties' claims renders meaningless any inquiry into the existence of common issues of law under CPLR 602(a). Virtually any two causes of action can be said to involve common legal issues if discussed at a high enough level of generality; every asbestos case asks whether a defendant should have taken steps to prevent exposure to a plaintiff.

Although legal theories need not be identical in order to give rise to a common issue of law, consolidation is unwarranted when, as here, the parties'

various legal theories do not "present similar legal issues of liability." *Harby Assocs., Inc. v. Seaboye*r, 82 A.D.2d 992, 993 (3d Dep't 1981) (affirming denial of joinder of actions for conversion with those sounding in negligence); *see also Cnty. of Westchester v. White Plains Ave., LLC*, 105 A.D.3d 690, 691 (2d Dep't 2013) (affirming denial of consolidation of actions for breach of contract and legal malpractice); *Matter of New York City Asbestos Litig. (Capozio)*, 22 Misc.3d 1109(A), at *5 (declining to consolidate action implicating federal law issues with action governed by state law because it "could prove … confusing for the jury to sort out the varying elements") (quotation marks omitted); *Matter of New York City Asbestos Litig. (Adler)*, 2012 N.Y. Misc. LEXIS 3828, at *29 ("Confusion among jurors is very likely to occur between the elements of a [Federal Employers' Liability Act] claim … and the similar but distinct elements of the strict products liability claims."); *Curry*, 2010 WL 6501559, at *2 ("[P]arsing dissimilar, and potentially contradictory, defenses may result in considerable delay and jury confusion, thus further mitigating against the potential efficiency of consolidation.").

The cases here present no common questions of law because none of the legal issues could be or were resolved in a common manner. Mr. Dummitt's claims were governed by product-liability principles (A951-53), and required the jury to consider whether a valve manufacturer failed to exercise reasonable care in

not warning against latent dangers of which the manufacturer knew or should have known resulting from foreseeable uses of its non-asbestos containing product with other components containing asbestos (A954-58); the knowledge with which the manufacturer could reasonably be charged, given that it "possess[ed] all of the knowledge … which could have been possessed by an expert," including all information "available concerning the dangers of the use of the defendant's product with asbestos" (A956-58); and whether the manufacturer's failure to warn contributed substantially to plaintiff's injury (A960-61).[23] Crane also asserted a government contractor defense. A893.

In contrast, Mr. Konstantin's claims against TLC were based on negligence and Section 200 of the New York Labor Law. A969-71. Unlike a manufacturer, TLC had no duty to provide warnings and was not presumed to be an expert regarding the products that its many subcontractors brought onto its premises. None of the primary issues for Mr. Konstantin's claims overlapped with the issues presented by Mr. Dummitt's claims. Rather, Mr. Konstantin's claims required the jury to consider: whether the joint compound used at two worksites actually contained asbestos (A970, A972); whether TLC knew or should have known that

[23] Because Crane itself did not manufacture the asbestos-containing product at issue, Mr. Konstantin's allegations below that Kaiser Gypsum, U.S. Gypsum, and Georgia-Pacific manufactured joint compound with asbestos (A970, A1119) were not similar to Mr. Dummitt's allegations against Crane.

the particular joint compound that the subcontractors used contained asbestos (A973-74); whether exposure to asbestos was a cause of Mr. Konstantin's mesothelioma (A974-75); whether TLC controlled the means and methods of the subcontractors in performing their work (A975); whether TLC knew or reasonably should have known of the risk to bystanders of sanding the compound and sweeping the resulting dust (A976); and whether TLC's negligence was a substantial factor in causing Mr. Konstantin's mesothelioma (*id.*).

The divergent legal issues in these cases thus provide no basis for trial consolidation.

3. The First Department Wrongly Placed The Burden On TLC To Disprove The Existence Of Common Issues Of Law Or Facts

The First Department also erred in placing the burden on TLC to show that the actions had no common issues of law or fact. As this Court has held, the party seeking consolidation must demonstrate "a plain identity between the issues involved in the two controversies." *Matter of Vigo*, 26 N.Y.2d at 161; *see also Gibbons*, 22 A.D.2d at 997 (similar).

Here, however, rather than keeping the burden on Mr. Konstantin, the First Department found that "*TLC* has failed to articulate why the differences in the environment and job duties had such an impact on the manner of exposure that it was necessary for the evidence of exposure to be heard separately." 121 A.D.3d at 244 (A27) (emphasis added). The court faulted TLC for "point[ing] to no medical

evidence in the record suggesting why the differences between pleural and peritoneal types of mesothelioma are sufficiently significant," *id*. (A27)—failing to even mention the stark difference between the relevant diseases here, Mr. Dummitt's pleural mesothelioma and Mr. Konstantin's exceedingly rare mesothelioma of the tunica vaginalis. The court also effectively required TLC to show why Messrs. Konstantin and Dummitt's health statuses mattered, rather than requiring them to show commonalities in their health statuses. *Id*. (A27).

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Because Mr. Konstantin's and Mr. Dummitt's actions against two unrelated defendants involved different types of exposure at different worksites over different time periods, resulting in different diseases, under different legal theories, there were no common issues of law or fact that could support consolidation. Thus, no efficiencies were secured by this joint trial of two very disparate cases, and instead the jury had to absorb a vast amount of complex yet dissimilar information over the length of substantially drawn-out proceedings that lasted far longer (eight weeks) and that were considerably more complicated than if the cases had been tried individually.

C. Consolidation Prejudiced TLC's Substantial Right To A Fair Trial In Violation Of CPLR 602(a)

Even if there were common issues of fact or law that could support consolidation here (there were not), the goals of "judicial economy" and "[t]he

benefits of efficiency" cannot "be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350. In the two cases consolidated here, which involve different defendants, different plaintiffs, different worksites, different occupations, different products, different durations of exposure, different diseases, different health statuses, and different questions of law, there was "an unacceptably strong" risk of prejudice to TLC's substantial right to a fair trial.

1. Prejudice Resulting From Jury Confusion

Consolidation creates an impermissible risk of prejudice to a substantial right where it "might prove too unwieldy" because the cases involve "separate incidents and separate claims by the plaintiffs." *Stephens v. Allstate Ins. Co.*, 185 A.D.2d 338, 339 (2d Dep't 1992); *see also Brown v. Brooklyn Union Gas Co*., 137 A.D.2d 479, 480 (2d Dep't 1988) (though "actions involve a common question of law or fact," they also "involve many dissimilar issues which may confuse the jury," such that consolidation would be "unduly prejudicial") (quotation marks omitted). In such instances, "the resulting and cumulative prejudice to the defendants by permitting the jury, in one trial, to determine the multiple claims at issue …, far outweighs the benefit derived from the conduct of a joint trial." *Glussi*, 276 A.D.2d at 587 (citations, ellipses, brackets, and quotation marks omitted); *see also Skelly*, 309 A.D.2d at 918 (An "unwieldy" "joint trial" "will result in jury confusion and prejudice the rights of the … parties to a fair trial.");

Matter of New York City Asbestos Litig. (Altholz), 11 Misc.3d 1063(A), at *3 (severing case where "possibility for such confusion could greatly prejudice" defendants).

The issue in a post-trial review of a consolidation order is whether "there is an unacceptably strong chance" that prejudice infected the trial. *Malcolm*, 995 F.2d at 352 (citing *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 907 (4th Cir. 1983) (reversing consolidation where possibility that prejudice arose from improper consolidation "simply could not be eliminated")). The trial must be evaluated as a whole, including whether protective measures like curative instructions and note-taking by jurors relieved any confusion. *See Malcolm*, 995 F.2d at 352 (notwithstanding "the number of precautions the district court took to assure that each case maintained its identity … the sheer breadth of the evidence made these precautions feckless in preventing jury confusion"); *id*. (citing *Cain v. Armstrong World Indus*., 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) ("It is evident (unfortunately, in hindsight) that despite all the precautionary measures taken by the Court … the joint trial of such a large number of differing cases both confused and prejudiced the jury.")).

Here, "there is an unacceptably strong chance" that the jury was confused and thus that consolidation unfairly prejudiced TLC. The trial court itself apologized multiple times to the jury for the fragmented and "piecemeal

presentation" of evidence (A374-75), and correctly described the trial as "very, very disjointed" (A384). For example, the trial court's preliminary remarks covered, in order, Mr. Dummitt's failure-to-warn theory (A172-73), Mr. Konstantin's failure-to-maintain-a-safe-workplace theory (A173), Mr. Dummitt's causation theory (A174), Mr. Konstantin's causation theory (A174-75), a clarification of Mr. Dummitt's causation theory (A174), and a clarification of Mr. Konstantin's causation theory (A174-75). Testimony was presented out of sequence throughout the trial. For example, Dr. Jacqueline Moline, an expert witness for both plaintiffs on certain issues and only for Mr. Dummitt on other issues, began her testimony on Day 3 of trial (A208), and was followed by Mr. Dummitt's video deposition (A229), Mr. Konstantin's direct testimony (A232), the testimony of Mr. Dummitt's treating oncologist, Dr. Gerrit Kimmey (A375), then another portion of Mr. Dummitt's video deposition (A384), then, after days of testimony about Mr. Dummitt's pain and suffering, Mr. Konstantin resumed the stand (A389), and after days more of other witnesses, Dr. Moline continued her testimony on Day 9 of trial (A648).

Additionally, the plaintiffs' attorney mixed together the evidence from the two cases in closing (A944-45), and the trial court stated that it was unable to guide the jury as to which witnesses testified in which case:

> [T]o the extent [another expert] Mr. Hatfield testified in connection with both cases, you may consider his

> testimony in connection with both cases. If there was only evidence presented in one case, the evidence refers to that case only. I cannot at this point make these determinations.

A945. The trial court also confused the elements of the two actions. In its opening remarks, for example, the court acknowledged that it erred in telling the jury that "as to each plaintiff you would have to determine whether exposure to asbestos in products of the defendants caused the plaintiff to develop mesothelioma." A175-76. Because TLC was sued in its alleged capacity as successor to a general contractor, the court had to clarify that its statement regarding "products of the defendants" "refer[red] only to Mr. Dummitt, it does not refer to Mr. Konstantin." A176.

In declining to find prejudice from these cumulative errors, the First Department did not disagree that the trial was unusually disjointed, but discounted the confusion as an irrelevant and inevitable consequence of budgetary constraints. 121 A.D.3d at 245 (A29). But the operative question is whether a risk of prejudice to a substantial right exists that neither defendant would have confronted had its case been tried separately, and nothing about budgetary considerations answers that question. Absent consolidation, the presentation of evidence would have been markedly different, and thus, as the disjointed trial record indicates, there was "an unacceptably strong chance" of jury confusion that prejudiced TLC's substantial right to a fair trial. *See Malcolm*, 995 F.2d at 352.

The First Department also opined that the jury's verdicts in the two cases demonstrated the jury's "understanding of the different nuances in the two cases," noting that the jury had allocated TLC and Crane different proportions of liability and found different life expectancy and damages for each plaintiff. 121 A.D.3d at 245-46 (A30). Just the opposite is true. The skewed allocation of liability (76% to TLC and 99% to Crane, neither of which manufactured the asbestos-containing products at issue),[24] as well as the sheer magnitude of the verdicts ($19 million and $32 million)—which the trial court reduced by almost 70%—in fact strongly suggest that "the jury thr[ew] up its hands in the face of a torrent of evidence." *Malcolm*, 995 F.2d at 352.

2. Prejudice Resulting From Unfair Bolstering Of Claims

The First Department also failed to consider whether consolidation of two asbestos-related cases had improperly bolstered Mr. Konstantin's claims, as any fair review would have required. A defendant sustains prejudice to a substantial right where "[p]resentation of both claims to the same jury would tend to bolster each claim, to defendants' disadvantage." *Bradford*, 110 A.D.2d at 966; *accord Tarshish v. Assoc. Dry Goods Corp.*, 232 A.D.2d 246, 247 (1st Dep't 1996). That is particularly so where, as here, a case against a non-manufacturer (TLC) is

[24] For the reasons set forth in the Appellant's Brief in *Dummitt v. A.W. Chesterton*, APL-2014-00209 (N.Y. filed Sept. 29, 2014), at 66-77, the First Department's affirmance of the liability allocation and the recklessness finding are erroneous. *See also infra*, at 48-50.

consolidated with a case against a manufacturer whose products are at issue (Crane). *See, e.g.*, *Matter of New York City Asbestos Litig. (Altholz)*, 11 Misc.3d 1063(A), at *4 (declining to consolidate claims against premises owner outside the chain of production and distribution because "evidence of liability on the part of manufacturers, contractors and product distributors could easily 'splash' on this defendant and unduly prejudice this defendant's right to have a fair and impartial trial"). The outsize verdicts here—totaling $51 million—and the skewed allocation of fault evidence exactly the kind of prejudicial bolstering of plaintiffs' claims that results from improper consolidation.[25] As the publicly available data collected above shows (*see supra*, at 27), the $19.55 million verdict for Mr. Konstantin substantially exceeded most verdicts in cases tried individually. There thus was the clear possibility that, absent consolidation, the jury never would have arrived at such a mammoth verdict for Mr. Konstantin.

3. Prejudice Resulting From The Repeated Recklessness Charge

Consolidation of two cases in which the jury was wrongly charged on the issue of recklessness also prejudiced TLC. Recklessness under CPLR 1602(7) means that a defendant 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

[25] As discussed in Point II, *infra*, moreover, remittitur does not render the prejudice harmless because, with such an inflated baseline, even the remitted award deviates materially from what is reasonable compensation.

probable that harm would follow and has done so with conscious indifference to the outcome." *Matter of New York City Asbestos Litig. (Maltese)*, 89 N.Y.2d 955, 956-57 (1997) (affirming decision to set aside jury finding of recklessness). In Mr. Konstantin's case, there was no basis for a recklessness charge because, as the First Department itself stated, TLC's general knowledge of the dangers of asbestos pertained to unrelated fire-proofing material and "did not specifically relate to asbestos-containing joint compound." 121 A.D.3d at 248 (A34); *see also* A1063. The evidence upon which the First Department relied to purportedly bridge that gap—a 1972 Tishman Realty & Construction annual report—merely references U.S. Gypsum as a *client* of Tishman Realty & Construction, without elaboration of that relationship (A1034), and thus does not demonstrate "that TLC worked with U.S. Gypsum … to develop an asbestos-based product" (121 A.D.3d at 248 (A34)). Nor was there a basis for a recklessness charge in Mr. Dummitt's case. *See* Appellant Br. 70, *Dummitt v. A.W. Chesterton*, APL-2014-00209 (N.Y. filed Sept. 29, 2014) (recklessness charge improper because "no 'act' of Crane Co.'s caused Mr. Dummitt to be exposed to asbestos"). Yet, the jury was twice instructed to consider whether the defendants acted with reckless disregard. A963, A978-79.

Those two erroneous charges created an unacceptable risk that the jury, primed to look for reckless disregard, would find TLC liable or award substantial

damages for reasons untethered to the evidence. This risk, particularly when coupled with the skewed allocation of liability well in excess of 50% (*see supra*, at 47; CPLR 1601(1))—resulted in compounding prejudice against TLC.

For all these reasons, new trial is warranted where any evidence against TLC is heard in a separate trial.

POINT II

CPLR 5501(C) REQUIRES SEARCHING INQUIRY INTO WHETHER THE $8 MILLION DAMAGES AWARD, EVEN AFTER REMITTITUR, DEVIATES MATERIALLY FROM COMPARABLE AWARDS

In affirming the $8 million damages award, the First Department erred by failing to adhere to the requirements of CPLR 5501(c), which directs it to reduce an award that "deviates materially from what would be reasonable compensation." CPLR 5501(c). Independently of the error in the trial consolidation, this error warrants vacatur and remand to the First Department for it to assess the excessiveness of the award under the proper standard.[26]

A. The Legislature Enacted The "Deviates Materially" Standard In CPLR 5501(c) To Keep Pain-And-Suffering Awards In A "Tight Range"

In 1986, as part of a comprehensive tort reform initiative, the Legislature replaced New York's common-law shocks-the-conscience standard for excessive

[26] This Court should address remittitur even if it rules in TLC's favor as to consolidation. The properly remitted amount may be determinative of whether the parties choose to pursue a new trial.

jury awards with the present CPLR 5501(c).[27] That statute was intended to serve as "[t]he 'natural curbing force' to check the upward spiral of non-economic jury awards," *Donlon v. City of New York*, 284 A.D.2d 13, 15 (1st Dep't 2001), by "'inviting more careful appellate scrutiny'" than the shocks-the-conscience test, which the Legislature found to be "an insufficient check on damage awards," *Gasperini*, 518 U.S. at 423 (quoting 1986 N.Y. Laws 2021, Ch. 266, § 1); *see also O'Connor v. Graziosi*, 131 A.D.2d 553, 554 (2d Dep't 1987) ("inten[t]" of 1986 legislation was "to facilitate appellate changes in verdicts"); Newman & Ahmuty, Appellate Review of Punitive Damage Awards, in Insurance, Excess, and Reinsurance Coverage Disputes 409 (B. Ostrager & T. Newman eds. 1990) (CPLR 5501(c) designed to "encourage" the Appellate Division to modify excessive awards); 12 J. Weinstein, H. Korn, & A. Miller, New York Civil Practice ¶ 5501.21 (3d 2010) ("[R]eviewing court [under CPLR 5501(c)] is given greater power to review the size of a jury award than had heretofore been afforded.").[28]

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[27] Under the shocks-the-conscience standard, the Appellate Division could "not disturb an award unless the amount was so exorbitant that it shocked the conscience of the court." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 422 (1996) (citation and quotation marks omitted); *see also* McKinney's Cons. Laws of N.Y., Book 7b, CPLR § 5501:10 *Appellate Division Review* (McKinney's 2010).

[28] *See also* Executive Memoranda from Mario M. Cuomo, Governor of N.Y., on approving L. 1986, ch. 682 (July 30, 1986) as reprinted in 1986 N.Y. Sess. Laws 3182, 3184 (1987) (McKinney) (praising the amended CPLR 5501(c) because it would "assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated

Two years later, as part of a renewed effort to "foster predictability" of such awards, *Gasperini*, 518 U.S. at 429, the Legislature also amended CPLR 5522 to require the Appellate Division to "set forth in its decision the reasons" it found a damages award excessive or inadequate, "including the factors it considered in complying with [5501(c)]." CPLR 5522(b).

Thus, "[t]he 'deviates materially' standard, … in design and operation, influences outcomes by *tightening* the range of tolerable awards." *Gasperini*, 518 U.S. at 424-25 (emphasis added). It requires "New York state courts [to] look to awards approved in similar cases" by the Appellate Division, *Gasperini*, 518 U.S. at 425,[29] and permits them to approve only those awards that "fall[] within th[e] boundaries" set by prior awards for similar injuries, *Donlon*, 284 A.D.2d at 18. The "tight[] range of tolerable awards" imposed by prior approved awards for similar injuries, in other words, functions like "a statutory cap," except that "the

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defendants throughout the State," thereby "enhanc[ing] substantially the system of justice in New York State.") (hereinafter "Cuomo Memorandum").

[29] *See Gasperini v. Ctr. for Humanities, Inc.*, 66 F.3d 427, 430 (2d Cir. 1995) ("[W]e believe that published decisions of the Appellate Division are generally far better predictors of how the New York Court of Appeals would decide a question of state law than even a fair number of unpublished proceedings in the trial courts."); *Gasperini*, 518 U.S. at 421 (observing that Second Circuit was "[g]uided by Appellate Division rulings"); *see also New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 219 (1991) (Appellate Division must consider "how [an award] compared with other awards for similar injuries" approved by the Appellate Division); *Reed v. City of New York*, 304 A.D.2d 1, 7 (1st Dep't 2003) (same).

maximum amount recoverable is not set forth by statute, but rather is determined by case law." *Gasperini*, 518 U.S. at 429. The influence of outlier awards is thereby substantially curtailed.[30] This "[a]nalysis of appealed verdicts using CPLR 5501(c) is not optional but a legislative mandate." *Donlon*, 284 A.D.2d at 16.

Indeed, the purpose of CPLR 5501(c) is to promote consistency in awards, which also facilitates informed settlement because it enables parties to assess realistically the amount of likely recoveries if liability is established.[31] The reason for "[e]valuation of prior awards in similar personal injury actions is to ascertain a consensus of opinion among juries and courts regarding the relation between the particular injuries and the compensation awarded, to guide the court in resolving an award's disputed adequacy, and to achieve fairness and evenhandedness." *Medina v. Chile Commc'ns, Inc*, 15 Misc.3d 525, 531 (Sup. Ct., Bronx Cnty. 2006).

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[30] *Cf. Payne v. Jones*, 711 F.3d 85, 94 (2d Cir. 2013) (explaining harm to society from "judgments awarding unreasonable amounts as damages," including that "an excessive verdict that is allowed to stand establishes a precedent for excessive awards in later cases").

[31] *See, e.g.*, Cuomo Memorandum (harmonizing jury awards would ensure "greater fairness for similarly situated defendants"); *cf.* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 Buff. L. Rev. 103, 162 (2002) ("[T]he possibility of liability for punitive damages may have an impact on litigation strategy or settlement negotiations").

B. New York Courts Have Not Curbed The Spiraling Pain-And-Suffering Verdicts In Asbestos Cases

New York courts have not been following CPLR 5501(c)'s "legislative[] mandate[] to keep compensation reasonable and uniform." *Donlon*, 284 A.D.2d at 18; *see generally* Richard J. Montes & David A. Beatty, *Are the Appellate Courts Deviating From the "Deviates Materially" Standard of Review?*, 77 Alb. L. Rev. 13 (2013-14) (hereinafter "*Are the Appellate Courts Deviating?*"). This is particularly true in the asbestos context, where the average NYCAL verdict has *more than doubled in ten years* from approximately $7 million in 1995-1999 to over $15 million in 2010-2014, now nearly *three times* the combined average of every other U.S. jurisdiction—without any meaningful correction through CPLR 5501(c). These increases in NYCAL damages awards run counter to the fact that defendants in the latest waves of asbestos litigation are increasingly removed from the actual production and sale of products formulated to contain asbestos. *See, e.g.*, *Matter of New York City Asbestos Litig. (Tancredi)*, 194 Misc.2d at 219 (distinguishing "traditional" asbestos defendants from, *e.g.*, "downstream" users or distributors); *see also supra*, at 23.

Although the Appellate Division is specifically charged with the responsibility of reducing awards that deviate materially from reasonable compensation, it often resolves remittitur with a single summary sentence. *See, e.g.*, *Penn v. Amchem Prods.*, 85 A.D.3d 475, 477 (1st Dep't 2011) (stating only

that "[t]he damage awards deviate from what would be reasonable compensation to the extent indicated (CPLR 5501[c])"); *Matter of New York City Asbestos Litig. (Marshall)*, 28 A.D.3d 255, 256 (1st Dep't 2006) (stating only that "we find that the damages awards deviate materially from what is reasonable compensation under the circumstances (CPLR 5501(c)) to the extent indicated"); *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69, 70 (1st Dep't 2004) (stating only that "[t]he damages do not deviate materially from what is reasonable compensation under the circumstances (CPLR 5501(c))"); *Matter of New York City Asbestos Litig. (Brooklyn Naval Shipyard Cases)*, 191 A.D.2d 351, 351 (1st Dep't 1993) (stating only that "[t]he five additurs resulted in awards that do not deviate materially from what would be reasonable compensation (CPLR 5501(c)), and were not abuses of discretion" (internal citation omitted)); *see also Are the Appellate Courts Deviating?* at 32-33.

As a consequence, most of the case law regarding CPLR 5501(c) in asbestos cases emanates from trial courts, more specifically, NYCAL trial courts. This practice is troubling for at least two reasons:

First, NYCAL trial judges have been reviewing verdicts from consolidated asbestos trials, which are artificially inflated above verdicts from individual trials (*see supra*, at 27). This skews the pool of available verdicts that future courts look to under CPLR 5501(c) to determine what constitutes reasonable compensation

and a material deviation. *Cf. Payne v. Jones*, 711 F.3d 85, 94 (2d Cir. 2013). Even where a verdict is remitted, the higher starting figure will very likely have driven the adjusted damages upwards.

Second, reliance on NYCAL trial judges to self-police their own jury awards for nearly three decades is contrary to the plain language and intent of CPLR 5501(c) that the Appellate Division serve as an independent check. *See supra*, at 51.

It is thus unsurprising that pain-and-suffering damages awards in asbestos cases have continued to spiral and that this upward trend shows no sign of abating. *See supra*, at 27; *see also Matter of New York City Asbestos Litig. (Peraica)*, 2013 N.Y. Slip Op. 32846(U), 2013 WL 6003218, at *13 (Sup. Ct., N.Y. Cnty. Nov. 6, 2013) (remitting $35 million award for two years of pain and suffering only to $18 million—$750,000 per month). This Court's guidance regarding CPLR 5501(c) is thus needed now more than ever to curb soaring damages and to ensure some measure of predictability and fairness.

C. The First Department Did Not Comply With CPLR 5501(c) In Approving An Award That Deviates Materially From Reasonable Compensation

Notwithstanding its acknowledgement that portions of the $8 million damages award here were "unprecedented" (121 A.D.3d at 255 (A47)), the First Department affirmed that award without analyzing any awards approved in similar

cases or even addressing the "deviates materially" standard in CPLR 5501(c). This analysis was both insufficient and incorrect as a matter of law.

1. The $4.5 Million Award For Past Pain And Suffering Deviates Materially From Reasonable Compensation

In affirming the $4.5 million for 33 months of past pain and suffering, the First Department stated that the award "equates to $136,000 per month," which it noted was within the range of prior pain and suffering awards that TLC had identified in its briefing. 121 A.D.3d at 255 (A46). Although the math is technically correct, the First Department erroneously *assumed* that Mr. Konstantin suffered *uniformly* throughout the 33-month period for which he was awarded damages for past pain and suffering. The undisputed record shows, however, that Mr. Konstantin's suffering beginning around October 2008 (A372, A461) differed both in degree and kind from the pain he endured after his mesothelioma diagnosis in January 2010. *Compare* A372, A462-63, A472, *with* A475; *see also* 37 Misc.3d 1206(A), at *15-16 (A91-93).

In treating the harm here as uniform throughout the 33-month period, moreover, the First Department acted contrary to its mandate under CPLR 5501(c) to identify an appropriate analogue for Mr. Konstantin's pain and suffering in order to determine what constitutes reasonable compensation. *See also* CPLR 5522(b). Restated in terms of monthly compensation, even if the court remitted the first 13 months of past pain and suffering from $136,000 per month to, for example, a still-

substantial $100,000 per month, damages for the remaining 20 months would average approximately $160,000, *easily eclipsing* the First Department's most recent remittitur decision in the asbestos context, *Penn*, 85 A.D.3d at 476-77 (remitting pain and suffering damages to $115,000 per month for 13 months of past pain and suffering).[32] The First Department did not seek to differentiate the circumstances here from the circumstances in *Penn* or any other case.

2. The "Unprecedented" $3.5 Million Award For Future Pain And Suffering Deviates Materially From Reasonable Compensation

The First Department likewise erred in affirming the $3.5 million award for 18 months of future pain and suffering, which, at $194,444 per month, is both "unprecedented" (as the First Department acknowledged) and "unparalleled" (as Mr. Konstantin conceded below). While the court relied on monthly averages to sustain the $4.5 million award for past pain and suffering, it ignored those same guideposts in upholding the $3.5 million award for future pain and suffering. Such an "unprecedented" amount of damages would necessarily require "unprecedented facts" to avoid material deviation from reasonable compensation, but the First Department stated only that Mr. Konstantin "suffered two mesotheliomas, in his

[32] In *Penn*, the plaintiff was found to have developed mesothelioma from exposure to asbestos-containing dental products. The First Department remitted the $3.65 million award for 13 months of past pain and suffering to $1.5 million (approximately $115,000/month) and the $10.9 million award for 12 months of future pain and suffering to $2 million (approximately $166,000/month), for an average award of $140,000 per month. *See* 85 A.D.3d at 476-77.

testes and chest, tantamount to twice as much pain and suffering." 121 A.D.3d at 255 (A47). But metastasis is not unusual in cancer progression.[33] Affirmance of an unprecedented award based on no more such a common attribute does not comport with the "deviates materially" standard.

3. The $8 Million Award For All Pain And Suffering Deviates Materially From Reasonable Compensation

The same result would obtain even if, unlike the First Department (*see* 121 A.D.3d at 255 (A47)), this Court were to consider only the total amount awarded for pain and suffering, as the $8 million across 51 months would equal $156,862 per month.[34] This award is both *higher* on a per-month basis than *Penn*, 85 A.D.3d at 476-77, which remitted pain-and-suffering damages to an average of $140,000 per month over 25 months ($3.5 million total), and *for a significantly longer period* than any other mesothelioma-related award of which TLC is aware. The First Department's failure to compare the $8 million award here—approximately twice the average award of cases not tainted by consolidation—to any other pain-and-suffering award raises serious concerns of fairness and consistency.

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[33] *See* Am. Cancer Soc'y, Unlocking the Mysteries of Metastasis (Jan 23, 2013), http://www.cancer.org/cancer/news/expertvoices/post/2013/01/23/unlocking-the-mysteries-of-metastasis.aspx ("[W]ith upwards of 90% of all cancer suffering and death associated with metastasis, it is the single most significant challenge to management of the disease.").

[34] As noted *supra*, Mr. Konstantin was able to engage in normal activities during the pre-diagnosis period. But even after diagnosis, Mr. Konstantin played in fifteen rock band performances *well into 2011*, more than a year later. A410-20.

Finally, the $8 million award cannot be grounded in the facts of Mr. Konstantin's case when the trial court remitted both verdicts *to the same damages figure.* A searching CPLR 5501(c) analysis of these wholly dissimilar cases could have not resulted in an identical $8 million pain-and-suffering award in both cases.

For all these reasons, a remand is necessary so that the First Department may properly evaluate the excessiveness of the $8 million damages award under CPLR 5501(c).

CONCLUSION

The First Department's Decision and Order should be vacated and the case remanded for new trial, or, at the very least, further remittitur.

Dated: New York, New York
April 24, 2015

Respectfully submitted,

/s/ Kathleen M. Sullivan

E. LEO MILONAS
DAVID G. KEYKO
ERIC FISHMAN
PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, New York 10036
(212) 858-1000
eleo.milonas@pillsburylaw.com
david.keyko@pillsburylaw.com
eric.fishman@pillsburylaw.com

KATHLEEN M. SULLIVAN
SHEILA L. BIRNBAUM
JANE M. BYRNE
WILLIAM B. ADAMS
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com
sheilabirnbaum@quinnemanuel.com
janebyrne@quinnemanuel.com
williamadams@quinnemanuel.com

Counsel for Defendant-Appellant Tishman Liquidating Corporation