To Be Argued By:
SETH A. DYMOND
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 PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

The joint trial of Konstantin and Dummitt – two in extremis asbestos actions sharing numerous common questions of law and fact – generated substantial legal and judicial economy, and, due in large part to the careful trial management of Supreme Court, ultimately led to verdicts that conform exactly to the evidence adduced in each individual case. The joint trial of these two actions exemplifies how discretionary consolidation under C.P.L.R. 602 should work.[1]

But largely ignoring the instant joint trial, Appellant Tishman Liquidating Corporation ("TLC") spends much of its Opening Brief addressing why it believes this Court should, first, outright "bar" the discretionary consolidation of in extremis asbestos actions, and, second, "curb" damages awards for a cancer that is not just a death sentence, but is unparalleled in the magnitude of pain and suffering its victims endure leading up to their inexorable deaths. These agenda-driven issues are simply not before this Court.

What is before this Court is a joint trial challenge that is unpreserved and a quantum of damages challenge that is outside this Court's scope of review. See C.P.L.R. 5501(b). Indeed, TLC is clearly not appealing from the original consolidation order, which joined seven cases for trial, as it neither addresses the

[1] Although a technical difference exists between consolidation and joinder for trial, the terms are used interchangeably herein, as they were below.

commonalities amongst the seven cases nor includes in its Appendix the motion papers upon which that order was based. Instead, TLC seeks to appeal from a trial *ruling* that, upon the resolution of the five cases other than Konstantin and Dummitt, concluded that "these two cases" were providently joined for trial. A447-48. But since Appellant never objected to that ruling, this issue is unpreserved for review. See C.P.L.R. 5501(a)(3). The judgment, thus, should be automatically affirmed. See Vadala v. Carroll, 59 N.Y.2d 751, 752-53 (1983).

Should the consolidation issue be considered, what the certified question brings up for review is nothing more than whether the Appellate Division fulfilled its intermediate appellate court role by evaluating the merits of the joint trial format. See City of New York v. Maul, 14 N.Y.3d 499, 509 (2010). Tellingly, not once in its Opening Brief does Appellant even mention this Court's limited standard of review when the Appellate Division affirms an inherently discretionary act. To wit, this Court reviews only for an "abuse of discretion as a matter of law" (Id. at 514), which is a legal question, not a factual one. See People v. Jones, 24 N.Y.3d 623, 629 (2014). Even assuming Appellant had alleged such an abuse, it simply cannot be said that the Appellate Division committed one.

Indeed, the Appellate Division weighed the relevant factors for identifying common questions of fact or law, comparing the substantial commonalities to the minor differences between the cases (A26-28), and evaluated whether Appellant

was prejudiced to a substantial right by examining the conduct of trial, the great pains taken by Supreme Court to alleviate the risk of jury confusion, and the actual verdicts, which, when compared to the record, affirmatively dispel any notion of jury confusion. A28-30. Against this marked consideration, this Court should be more than "satisfied that the Appellate Division did not abuse its discretion as a matter of law" (Andon v. 302-304 Mott Street Assoc., 94 N.Y.2d 740, 747 (2000)), and should "pass on no other issue." Brady v. Ottaway Newspapers, Inc., 63 N.Y.2d 1031, 1033 (1984).

Yet even if a further review is conducted, the record makes clear that the "court below properly exercised the discretion vested in it by statute." Symphony Fabrics Corp. v. Bernson Silk Mills, Inc., 12 N.Y.2d 409, 413 (1963); see Vigo S. S. Corp. v. Marship Corp. of Monrovia, 26 N.Y.2d 157, 162 (1970) (trial court has "broad discretion to order consolidation"). Under the liberally-construed C.P.L.R. 602(a) and the flexible "guideline" set forth in Malcolm v. National Gypsum Co. (995 F.2d 346, 350-51 (2d Cir. 1993)), there were at least *eight* common questions between these cases, including (1) multiple overlapping legal elements, (2) occupational, products-based exposures, (3) identical state-of-the-art evidence, (4) same diseases, (5) same cancer, (6) two living Plaintiffs, (7) same Plaintiffs' counsel and, in part, defense counsel, and (8) three common expert witnesses.

Upon balancing these commonalities against the minor differences, the Appellate Division appropriately concluded that the joint trial was fully supported. Appellant's assertion that the Appellate Division should have injected rigidity into this discretionary balancing test is antithetical to the liberal construction of the statute, the intent that Malcolm be a flexible guideline, and the inherent nature of an act of broad discretion. See Black's Law Dictionary at 419 (5th ed.) (defining "discretionary acts" as "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion").

Consequently, significant legal and judicial economy was derived from the joint trial, thereby supporting the clear policy justifications underpinning the statute. See In re N.Y.C. Asbestos Litig. [Brooklyn Navy Shipyard Cases], 188 A.D.2d 214, 224-25 (1st Dept., 1993) ("joining cases together is designed to 'reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases'"), aff'd 82 N.Y.2d 821. In both cases, products liability law was charged, leading to, in part, identical failure to warn questions on the verdict sheets; and in any case, the only claims asserted against any party were couched in negligence. A954-66, A979-80, A1126-33, A1140-41. The overlap of legal and evidentiary issues was so substantial that motions were routinely "joined in" by defendants, permitting Supreme Court to decide them once rather than

twice. See, e.g., RA70 ("we join in the applications, for the record, made by Crane").[2] Since both Plaintiffs' respective last date of exposure was in 1977, virtually identical state-of-the-art testimony was presented in both cases by the same expert – Dr. Barry Castleman. RA3 ("anything before 1977 is generally the area that he is going to cover"). Both cases involved shared testimony regarding the methodology for testing for dust release from products by the same expert – Richard Hatfield. A723, A679-713. Both cases also involved the presentation of general asbestos medicine by the same expert – Dr. Jacqueline Moline. A208. And since both Plaintiffs suffered from mesothelioma – the only known cause of which is asbestos exposure – the same medical and scientific principles for causation were presented in both cases. A477-99, A568-69, A1075. Certainly, the underlying goals of consolidation were met here.

Nor has Appellant come remotely close to establishing that any prejudice to a substantial right resulted from the joint trial setting, particularly where all of the foregoing issues would have arisen had this case been tried individually. See Symphony Fabrics, 12 N.Y.2d 409, supra at 413 (no prejudice where the issue will arise "[w]ith or without a consolidation"). The conduct of trial stemmed from the closing hours policies reluctantly instituted as part of the necessary budget cuts in 2011. In fact, every effect *on individual trials* portended by the budget cuts

[2] "RA__" refers to the Respondent's Appendix.

materialized in the instant trial in August 2011, including the inability to complete witness testimony, juror tardiness, and an overall lengthening of the trial. See Preliminary Report on the Effect of Judicial Budget Cuts on New York State Courts, NYCLA (Aug. 11, 2011).

But despite those constraints, the joint trial took only 26 days, due in large part to the vigilant and creative trial management of Supreme Court, which eliminated any risk of jury confusion while advancing a speedy disposition. See C.P.L.R. 4011. Judge Madden provided notebooks to the jurors (A179-80, A998-99), spent extra time with the attorneys after hours to address legal issues (A895-96, A905, A918-19, RA7-8, RA34, RA59), used individualized verdict sheets (A951, A1126-43), and issued cautionary instructions and case-specific charges to assist the jury in differentiating between the evidence and claims in each case. A176, A219, A448, A460, A735, A738-39, A910-11, A933, A939, A951, A969, RA76-78. Plaintiffs' counsel, too, consistently differentiated between the evidence proffered in each case. A208, A375, A723, A728, RA44.

It is no surprise, then, that even the most cursory review of the verdicts establishes that the jury was not confused in the slightest as to any fact, issue, or claim involved in these cases. Conforming precisely to the evidence, the jury found nonparties liable in Konstantin but not in Dummitt, greater past pain and suffering for Mr. Dummitt, and a longer life expectancy for Mr. Konstantin. And

because the jurors were able to compare these cases, the joint trial likely led to a fairer result. Against this backdrop, Appellant's claim of the mere "possibility" of bolstered damages (App. Br. at 48) – to the extent not rendered moot by the remittitur – is nothing more than pure speculation that is woefully insufficient to meet its heavy burden of establishing prejudice to a substantial right.

Simply put, it cannot be said that the Appellate Division abused its discretion as a matter of law in affirming the joint trial. And, notably, a contrary finding would have far-reaching implications for (1) Mr. Konstantin, who is now deceased and would suffer the severe prejudice of being unable to attend a new trial, (2) future terminally-ill asbestos plaintiffs, who, without sensible consolidation, would likely never live long enough to see their day in Court, thereby effectively abrogating their accelerated trial preferences under C.P.L.R. 3403 and the New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO"), and (3) the New York County Civil Part, which would suffer the crushing burden of having to try these cases seriatim, thereby rendering administration of the Civil Part difficult, if not unworkable.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

COUNTER-STATEMENT OF THE CASE

A. The Original Consolidation Order And The Distinct Trial Ruling

i. The in extremis status of Messrs. Konstantin and Dummitt

Upon being diagnosed with mesothelioma – a terminal asbestos cancer – David Konstantin, and his wife derivatively, commenced this action in Supreme Court, New York County against, among others, Appellant TLC (f/k/a Tishman Realty & Construction), Georgia-Pacific Corp., and Kaiser Gypsum Co. A104-05. Plaintiffs asserted codified and common law negligence claims against TLC and negligent failure to warn claims against Georgia-Pacific and Kaiser. A124-27, A130-35.

Based on his in extremis status, Mr. Konstantin was granted an accelerated trial preference under C.P.L.R. 3403 and the NYCAL CMO. A155, A1113-14. He was placed into a cluster with nine other in extremis plaintiffs, and a discovery schedule was issued with the anticipation that the cases would be trial-ready in October 2010. A155-59. Ronald Dummitt, who similarly suffered from mesothelioma, was among the plaintiffs in that cluster. A155. In late December 2010 – almost three months longer than anticipated – the 10 cases were transferred to Judge Joan A. Madden as trial-ready. A160.

ii. The original consolidation order, which TLC does not appeal from

The 10 in extremis plaintiffs moved for a joint trial.[3] Supreme Court granted the motion to the extent of joining seven of the ten cases for trial, including Konstantin and Dummitt (A1160-80). TLC, however, chose not to notice an appeal, apparently not feeling aggrieved by a joint trial of the seven cases. Prior to trial, five of the seven cases resolved, leaving only Konstantin and Dummitt. Despite that, TLC never moved for renewal or sought severance under C.P.L.R. 603. It effectively acquiesced to a joint trial of just the two cases.

Indisputably, TLC is not appealing from the original consolidation order, as it makes no arguments as to the providence of joining the seven cases for trial, does not even name the five other plaintiffs, and, just as in the Appellate Division, does not include in its Appendix the original motion papers upon which the order was based.

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[3] As the Appellate Division concurring opinion notes, Appellant "neither caused the original record of the consolidation motion to be transmitted to [the Appellate Division] by the clerk of Supreme Court, as required by 22 N.Y.C.R.R. 600.5(a)(1), nor included the record of that motion in the reproduced appendix it has filed with [the Appellate Division] pursuant to CPLR 5528(a)(5)." A50. In an effort to justify its own failure to include these motion papers in its Appendix before the Appellant Division, Appellant bizarrely states that Plaintiffs did not file the consolidation motion. See App. Br. at 9, n.5. Plaintiffs, however, moved by Order to Show Cause and followed the procedure set forth by the County Clerk for motions made in more than one case on a single set of papers. The motion, *as filed*, was given Sequence No. 008 in the lead case of Altuchoff (Index No. 190058/2010). RA1; see also A1161-80.

iii. The unpreserved trial *ruling* regarding the two-case joint trial

Since the providence of joining just Dummitt and Konstantin for trial had not previously been addressed, the trial defendants *in Dummitt* objected to the consolidation of "these two cases" (A447-48) before opening statements. A169.[4]

At no point did TLC lodge an objection to the two-case joint trial or even join in any of the objections made by the Dummitt defendants; it purposefully joined in other objections (RA70), but not as to consolidation. In fact, far from taking exception, TLC used the joint trial format during summation to bolster its own defense by improperly comparing itself to the manufacturers in Dummitt. A934 ("We're not a manufacturer. You heard from Crane and Elliott and all these other companies that were involved on the ships. Tishman is not a manufacturer..."). The Dummitt defendants objected to the "cross references" (A934), but TLC defended its improper bolstering, prompting Supreme Court to instruct the jury to disregard TLC's remarks. A937, A939.

Supreme Court issued a trial *ruling* that the two cases were properly joined and that cautionary instructions would assist the jury in differentiating the cases. A448. TLC first objected to this trial ruling in its post-verdict motion. A1101.

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[4] Appellant incorrectly states that Mr. Dummitt's action was "against Crane." App. Br. at 18. Defendant Elliott Turbomachinery ("Elliott") also took a verdict in Dummitt (A1126-33), but settled the claims against it prior to a determination of its post-verdict motion. This omission is telling, as Elliot's mere 1% fault cuts against Appellant's claim of prejudice or bolstering from the joint trial setting.

Notably, although Crane in Dummitt properly preserved this issue, it apparently did not believe the joint trial to have been sufficiently erroneous or prejudicial to challenge it on appeal.

B. The Plaintiffs' Cases At Trial

i. Mr. Konstantin's case

Mr. Konstantin established that between 1974 and 1977, he worked as a carpentry subcontractor at 622 Third Avenue and Olympic Towers – two Manhattan construction sites where TLC was the general contractor. A259-60, A286-88, A293-95. The drywalling subcontractors used pre-mixed joint compound (A406), which was equally manufactured by Georgia Pacific, Kaiser Gypsum, and U.S. Gypsum (A313-14, A400), and which was asbestos-containing at all times during Mr. Konstantin's exposure period. A700-01, A869-71, A1040-41, A1046-48, A1055-56. Mr. Konstantin's exposure to the asbestos-laden joint compound dust was two-fold: first, by working in close proximity to the drywall subcontractors sanding joint compound on a daily basis (A306-13, A346-49, A430), who were under the supervisory control of TLC (A314-56); and second, by working in close proximity to TLC's own employees when they power swept the asbestos-laden dust without taking any precautions to protect surrounding workers (A296, A308-10, A356, A505, A512), despite TLC's admitted knowledge that asbestos joint compound (a/k/a plaster) was being used on all of its worksites

(A731-32, A864-66, A1034), and its actual knowledge that asbestos in construction products posed a lethal risk to its subcontractors. A864, A1060-65.

As a result, Mr. Konstantin developed mesothelioma of the tunica vaginalis – a fatal cancer of the mesothelial tissue lining the testicles. A372. He asserted that TLC was liable under codified negligence for supervising and controlling the work of the drywall subcontractors, and that it was also liable under common law negligence for its own workers' power sweeping activities that created an additional, and greater, exposure. A270-71, A969-71, RA76-78.

In its C.P.L.R. article 16 case, TLC asserted negligent failure to warn claims against the nonparty joint compound manufacturers. A979-80, RA79.

ii. Mr. Dummitt's case

Mr. Dummitt established that between 1960 and 1977, he served in the U.S. Navy as a boiler technician, where he was exposed to asbestos from the repair of products utilizing asbestos gaskets, packing, and lagging pad components. A748-827. As a result, he developed mesothelioma of the pleura – a fatal cancer of the mesothelial tissue lining the lungs. A210-11. He asserted negligent failure to warn claims against Crane and Elliott. A911. In their C.P.L.R. article 16 cases, the Dummitt defendants attempted to assert premises liability claims sounding in negligence against nonparty shipyards. RA42, RA67-68.

iii. The substantial economy derived as a result of the common issues of fact and law

Considering that these two cases shared eight commonalities of law and fact – (1) common and overlapping legal claims, (2) occupational, products-based exposures, (3) identical state-of-the-art evidence, (4) same diseases, (5) same cancer, (6) living Plaintiffs, (7) same Plaintiffs' counsel and, in part, defense counsel, and (8) three common expert witnesses – the economy derived from the joint trial is manifest in the record.

In Dummitt, Plaintiff asserted negligent failure to warn claims against Crane and Elliott (A959-60); in Konstantin, TLC asserted negligent failure to warn claims against the nonparty joint compound manufacturers. A979-80, RA81. This led to the same jury charge and identical questions on the verdict sheets. A954-66, A979-80, A1126-33, A1140-41. To an extent, both cases also involved premises liability claims. RA42, RA67-68.[5] The legal and evidentiary issues raised were so similar that Appellant repeatedly joined in motions and arguments raised by the Dummitt defendants, and vice versa, saving Supreme Court from having to decide these issues twice. See, e.g., RA7 ("the motion is similar, I believe, in both. And we join in the arguments"), RA70 ("we join in the applications, for the record, made by Crane"); see also RA72, RA84, RA89.

[5] Although the Dummitt defendants ultimately failed to present sufficient evidence to place the nonparty shipyards on the verdict sheet, during trial, they had active negligence claims against those premises owners, thereby creating an additional common issue of law.

And since all the claims in both cases sounded in negligence, both cases involved common elements addressed to reasonable care, including whether defendants knew or should have known of the dangers of asbestos, which Plaintiffs sought to prove through, inter alia, state-of-the-art testimony in both cases. Indeed, both Plaintiffs' exposure periods ended in 1977 (A358, RA61), meaning the identical testimony regarding the evolution of the state-of-the-art leading up to 1977 was presented in both cases by the same expert – Dr. Barry Castleman. RA3 ("anything before 1977 is generally the area that he is going to cover").

Both cases involved the same type of exposure to asbestos, to wit, occupational, products-based exposure, meaning there was shared testimony from the same expert – Richard Hatfield – regarding the methods for measuring dust release from the manipulation of products. A723, A679-713. Both cases also involved general asbestos medicine presented by the same expert, Dr. Jacqueline Moline (A208), and since both Plaintiffs suffered from mesothelioma – the only known cause of which is asbestos exposure – the economy derived by not rehashing the medical principles was marked. Indeed, Appellant's own expert conceded that "mesothelioma is mesothelioma." A1075.

C. The Conduct of Trial and Supreme Court's Effective Management

i. The closing hours policies that were reluctantly implemented at the time of this trial

As this Court is well aware, the year in which this case was tried – 2011 – saw significant judiciary budget cuts that unfortunately necessitated stringent controls. Chief Administrative Judge A. Gail Prudenti verified that "the 4:30 pm closing time, which we reluctantly instituted as part of our overtime control program, has affected the conduct of trials," and requested a 2012 budget that would mitigate "the more serious negative impacts of the cost-cutting efforts necessitated by our austerity budget, including...closing hours policies." Remarks of Chief Administrative Judge A. Gail Prudenti, Joint Legislative Hearing on the 2012-2013 Judiciary Budget at 5-6 (Jan. 30, 2012).

After interviews with key Administrators, the Task Force on Judicial Budget Cuts of the New York County Lawyers' Association concluded that the impact of the closing hours policies was that "[t]rials will take longer, inconveniencing lawyers, witnesses and litigants and making trials more expensive." NYCLA Preliminary Report, supra at 3. The Task Force noted that "[w]ithout flexibility to finish later in the day, the Court must either interrupt witness testimony or plan to hear fewer witnesses per day," and "the testimony of expert and other time-sensitive witnesses may take an extra day (with an extra fee in the case of experts), or get postponed in order to avoid bringing the witness back for a second day." Id.

at 5, 22. Further, the Task Force noted that "as a result of the cuts, the buildings do not open until 9 a.m. [instead of 8:30 a.m.]," meaning that "[j]urors, parties and witnesses are now often late, further shortening the trial day." Id. at 23.

ii. The impact of the closing hours policies on the instant trial

At trial in summer of 2011, Supreme Court explained that "I know a lot of the witness's testimony has been broken up and there's really nothing I can do, based upon the schedule of the witnesses and the issues, the budgetary issues which require me to close the courtroom at precise times." A633; see also A193, A199, A204, A214, A441, A714, A855, A896, A918-19, A1003. Even Appellant's own expert was affected by the closing hours policies (RA62) ("Today is his only day available"), and he was forced to finish his testimony via videotape (A1073-76, RA69), despite Supreme Court's efforts to reschedule its own commitments to accommodate him on a down day. RA63-64.

Further shortening the trial days was that one juror was consistently tardy, prompting his excusal from the panel in the middle of trial. A522-23 ("...you've been late on a number of occasions. The trial, particularly because of its length, cannot be delayed in this fashion. So I'm excusing you from service...").

Compounding this was that defendants raised an inordinate number of motions that required extensive court resources to resolve. A454-55 ("there have been numerous motions made by defendants..., to a certain extent some of the

length is due to the number of issues that have been raised..."); see also A671, A675, A726, A839, A855, A888, A901, A905, RA69, RA73.

The sequence of trial, therefore, had nothing to do with consolidation, and the closing hours policies impacted both sides equally. Nonetheless, Supreme Court pressed on with the trial while taking great pains to ensure that no prejudice to any party resulted. A633 ("Jurors, we're going to go forward with the next witness, since we have a little bit of time and I'm trying to move the trial along").

iii. Supreme Court's vigilant use of cautionary instructions and intelligent management devices

Notwithstanding the shortened trial days, the joint trial took only 26 days due in large part to the careful and creative management efforts of Judge Madden. She provided notebooks to the jurors (A179-80, A998-99), spent extra time with the attorneys after hours to address legal issues (A895-96, A905, A918-19, RA7-8, RA34, RA59, RA73), used individualized verdict sheets (A951, A1126-43), and issued cautionary instructions and case-specific charges to assist the jury in differentiating between the evidence and claims presented in each case. A219 ("given that this is a consolidated trial and that there are a number of different defendants, I think such limiting instruction is helpful for the jury to assist the jury in identifying what evidence applies to which defendant"). Supreme Court's vigilant efforts to alleviate any risk of jury confusion included the following:

- "Dr. Markowitz's testimony is only to be considered in connection with Mr. Konstantin. His testimony is not being offered in connection with Mr. Dummitt." A460.

- "Jurors, regarding who has the responsibilities for safety on the work site that is a legal issue. I will instruct you as to that issue during my final instruction. Under the law, both the GC and the owner have certain responsibilities for safety on the work site. As I indicated, I'll instruct you in more detail in my final instruction." A735.

- "[a]nd this testimony was admitted in connection with the Konstantin case. []Mr. Konstantin only alleges exposure to asbestos from asbestos-containing joint compounds that were used in the projects where he worked." A738-39.

- "...I find that the limiting and explanatory instructions, which I have given throughout the trial, which I have just indicated I will again instruct the jury as to the testimony of Dr. Markowitz and Dr. Moline specifically that testimony as to which plaintiffs the testimony is being offered to, will assist the jury in distinguishing the issues." A448.

- "That refers only to Mr. Dummitt. It does not refer to Mr. Konstantin. Mr. Konstantin's allegations are under the Labor Law that Tishman failed to maintain a safe workplace." A176.

- So the first outline I'm going to give you applies to the Dummitt case. After you've heard the summations of the defendants in the Dummitt case, I will then give you a brief outline of the law as it applies to the Konstantin case...In the Dummitt case, the issues involve a failure to warn, dangers with the product. In the Konstantin case, the issues involve the Labor Law and providing a safe workplace for workers." A910-11.

- "[t]here are two separate interrogatories: one deals with the Dummitt case and one deals with the Konstantin case. There are separate legal issues as to both cases. Each of these cases has to be evaluated separately and independently. I will refer to the Dummitt case first in my instructions." A951.

- "...I'm now going to instruct you on the law that's applicable in the Konstantin case since, as I indicated to you, that is a different set of laws. The Konstantin case involves the Labor Law. So you should have the jury questions regarding the Labor Law." A969.

iv. Plaintiffs' counsel's assistance in maintaining a clear distinction of identity between the two cases

Supreme Court did not act alone in reducing the risk of jury confusion. Plaintiffs' counsel consistently and repeatedly advised the jury when evidence was being presented in both cases or in just one case:

- "Dr. Moline is being called to testify about general principles of medicine in both cases and causation in the Dummitt case and the pain and suffering and course of disease in the Dummitt case only. Dr. Markowitz will be addressing the specifics of the Konstantin case when he testifies later in the week. But the testimony about general principles of medicine applies to both cases." A208.

- "Just to refresh the jury, the court and recollection, Dr. Moline is testifying about general principles of medicine in both cases, about causation and the course of the degrees and the exposure only in Dummitt's." A648.

- "in the Dummitt case only, your Honor, the plaintiffs call Gerrit Kimmey, M.D." A375.

- "Dr. Strauchen's testimony is being offered only on Konstantin." RA44.

- "Yesterday we had Mr. Hatfield, who he testified on both cases and then Dr. Strauchen who was Konstantin only, and now Dr. Spizman, who is Konstantin only." A723.

- "the next evidence that the plaintiffs intend to offer are readings from the deposition transcripts of Charles DeBenedettis in the Konstantin case only." A728.

D. The Distinctive Verdicts And The Remittitur Of Damages

Recognizing that these cases were separate, and to be sure that it understood all the elements of the claims against TLC, during deliberations the jury requested that the Labor Law charge be read back. A1007. It then returned a verdict finding that TLC violated both codified and common law negligence, and that TLC acted recklessly. A1137-40. The jury found that the three nonparty joint compound manufacturers were equally liable, apportioning them 8% fault each with the remaining 76% apportioned to TLC in light of its active and derivative negligence, and its actual knowledge of the dangers. A1140-42. It awarded $7 million for 33 months of past pain and suffering, $12 million for 18 months of future pain and suffering, and $550,157 for lost earnings. A1142. The awards were based on Mr. Konstantin's endurance of *five* surgeries (including the removal of his testicle and scrotum), two rounds of chemotherapy, one round of radiation, severe mental affliction, and metastasis of his cancer to his pleura, meaning his future pain and suffering would be akin to having pleural and tunica vaginalis mesothelioma simultaneously. A238-40, A359-73, A390, A461-80, A1077-98, RA9-31.

But, also in clear accord with the evidence at trial, the jury reached an entirely different verdict in Dummitt, finding Crane and Elliott liable for failing to warn with 99% fault to Crane and only 1% fault to Elliott, but not finding any

nonparties liable, awarding $16 million for both past and future pain and suffering, and setting Mr. Dummitt's life expectancy as only six months. A1126-35.

TLC moved to set aside the verdict on multiple grounds. A1099-1109. Supreme Court granted TLC's motion only to the extent of remitting damages to $4.5 and $3.5 million for past and future pain and suffering, respectively (A64-94), to which Plaintiffs stipulated. A1247-48. The remittitur in Dummitt, however, was different, with the breakdown being $5.5 and $2.5 million for past and future pain and suffering, respectively. See In re N.Y.C. Asbestos Litig. [Dummitt], 36 Misc.3d 1234(A) at *25-27 (Sup. Ct., N.Y. Cty., Aug. 20, 2012).

On November 19, 2012, judgment was entered against TLC in the pre-interest sum of $6,448,580.34, after taking into account set-offs. A95-102.[6]

E. The Appellate Division's Affirmance

On appeal, TLC challenged, inter alia, the joint trial and the damages award, but it did not challenge its liability. In a unanimous decision, the Appellate Division, First Department affirmed the judgment. A7-63.

As to consolidation, the Appellate Division concluded that "[g]iving deference to the trial court, as we must, and considering that the Malcolm factors

[6] Appellant incorrectly states that the judgment was $8 million. See App. Br. at 2. The remitted award was $8 million, but the judgment was reduced pursuant to General Obligations Law 15-108.

are to be applied flexibly, we find that the trial court properly consolidated the cases" (A26), as there were "more facts and issue in common than unique to each." A28. In light of the liberal construction of C.P.L.R. 602, the Appellate Division weighed and evaluated the relevant factors in a rational manner (A24-28). It concluded that the sequence of trial was a result of the closing hours policies, that TLC's claim of jury confusion was, at best, speculative considering the steps taken by Supreme Court to minimize any unfairness, that "[u]ltimately, the verdicts support the conclusion that consolidation was proper," and that TLC's assertion that there is no longer a policy justification for consolidation of in extremis asbestos actions was irrelevant and in derogation of C.P.L.R. 602. A28-31.

In a concurring opinion, Justices Friedman and DeGrasse agreed that the judgment should be affirmed, but concluded that the consolidation issue should not have been addressed in light of TLC's inadequate Appendix. A49-52.

TLC moved the Appellate Division for reargument or, in the alternative, leave to appeal. On December 9, 2014, the Appellate Division denied reargument, but granted leave, certifying whether its order was properly made. A5-A6. Mrs. Konstantin moved to dismiss this appeal, which was denied. See 24 N.Y.3d 1216.

ARGUMENT

I. THE APPELLATE DIVISION DID NOT COME REMOTELY CLOSE TO ABUSING ITS DISCRETION AS A MATTER OF LAW BY AFFIRMING THE JOINT TRIAL OF THESE TWO CASES

A. Appellant's Argument That This Court Should "Bar" All Joint Trials Of In Extremis Asbestos Actions Is A Patently Improper Request For Judicial Legislation That Is Not Before This Court

Rather than addressing the merits of this appeal, Appellant's first argument asks this Court to "reconsider" whether in extremis asbestos actions should ever be joined for trial. App. Br. at 4.[7] In so doing, Appellant makes speculative or, worse, wholly misleading accusations, such as the policy grounds for the consolidation of in extremis asbestos actions are no longer applicable to today's "landscape," damages awards are purportedly bolstered by joint trials, other *Legislatures* – in States that do not face the same burgeoning dockets as New York County Supreme Court – have limited joint trials, and only in an individual trial can an asbestos defendant prevail. This is a nothing more than a specious request to judicially legislate in extremis asbestos actions out of the broadly-worded C.P.L.R. 602 – an issue that is not before this Court and should not be considered.

Indeed, "[t]he courts in construing statutes should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the

[7] Point Heading I of Appellant's Argument asserts that the liberally-construed statute "bars" the consolidation of asbestos actions. App. Br. at 18. As an endowment of judicial discretion, the statute does the exact opposite.

expediency, wisdom, or propriety of its action on matters within its powers." McKinney's Statues 73; Russo v. Valentine, 294 N.Y. 338, 342 (1945) ("it is the duty of the courts to give effect to statutes as they are written and [they] may not limit or extend the scope of the statute...").

C.P.L.R. 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, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." As noted by the Appellate Division, the statute makes no distinction between types of "actions" that could be joined for trial or the type of "common question of law or fact" that could warrant such joinder. A31. See Uterhart v. Nat'l Bank of Far Rockaway, 255 A.D. 859, 859 (2d Dept., 1938) ("[t]he liberal provisions of [the predecessor statute to C.P.L.R. 602] are not to be limited by strict or literal construction, or by reason of mechanical difficulties"); cf. Majewski v. Broadalbin-Perth Cent. School. Dist., 91 N.Y.2d 577, 587 (1998).

The word "actions" in the statute is broadly construed, encompassing the consolidation of an action with a special proceeding (see C.P.L.R. 103, 105(b); see, e.g., In re Elias, 29 A.D.2d 118, 119 (2d Dept., 1967)), an action at law with one in equity (see Philip Shlansky & Bro. v. Grossman, 273 A.D. 544, 546 (1st Dept., 1948)), actions involving distinct occurrences (see, e.g., Megyesi v. Auto. Rentals,

Inc., 115 A.D.2d 596, 596 (2d Dept., 1985)), and actions involving different parties. See, e.g., Symphony, 12 N.Y.2d 409, supra at 410-11. In fact, the statute's "standard for uniting two separate actions is more liberal than that set forth in C.P.L.R. 1002 for the joinder of" plaintiffs to a single action – the former only requiring a common question whereas the latter requiring that any such commonality arise out of the same transaction or occurrence. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. C602:1. Inasmuch as the Legislature plainly intended C.P.L.R. 602 to apply to asbestos actions, among other actions, Appellant's plea to limit the statute's scope should be addressed to the Legislature. Cf. People v. Friedman, 302 N.Y. 75, 79 (1950).

It is telling, in this regard, that in the few jurisdictions that have limited joint trials of asbestos actions, it was accomplished by Legislative action, not Judicial. See, e.g., Ohio Civ. R. Rule § 42(A)(2); Ga. Code Ann. § 51-14-11; Kan. Stat. Ann. § 60-4902(j); Tex. V.T.C.A. § 90.009; Miss. R. Civ. P. § 20 (precluding the joint trial of any actions, not just asbestos, unless arising out of the same transaction).[8] Appellant's reliance on these statutes only underscores that judicial

[8] Appellant disingenuously misstates the nature of purported "prohibitions" on consolidation in other jurisdictions. App. Br. at 29. In San Francisco, for example, after the court sua sponte consolidated asbestos actions, it subsequently vacated that determination, without objection, on the basis that a sua sponte consolidation violated California procedural law, averring that "[n]o case within any such group shall be considered part of a Code of Civil Procedure section 1048(a) consolidation, unless a noticed motion is filed, a hearing conducted, and an order issued, consistent with the procedures set forth in Cal. Rules of Court, Rule 3.350." *(continued on next page...)*

legislation of C.P.L.R. 602 to create an exception that unjustly benefits asbestos defendants would be improper, especially where, by all indications, the statute's goals are met by the prudent consolidation of in extremis asbestos actions. Thus, Appellant's first argument should not even be considered.

Notwithstanding that, since Appellant's request is predicated on skewed statistics and pure conjecture that seek to assail the asbestos litigation as a whole, Respondents feel compelled to address these assertions in at least some respect.

Lujan v. Asbestos Defendants, Case No. 05-444221 (Cal. Super. Ct., San Francisco Cty., May 14, 2008) (see App.'s Compendium of Unreported Authorities at 90-91). As to Delaware, nowhere in the 2007 Standing Order cited by Appellant is there a bar on consolidation (see App.'s Compendium of Unreported Authorities at 65-84). Instead, the Order provides that "the setting of cases for trial is within the sole and exclusive province of the Court." Id. at 73. In Michigan, although a ban on "bundling" was implemented via Administrative Order (after a public hearing) for an extremely small docket of asbestos actions (comprising approximately 2700 total), there was nonetheless strenuous dissents based on, inter alia, separation of powers and the crushing burden such a rule would place on the court system. See Mich. R. Admin. Order 2006-6 (Weaver, J. dissenting to retention on June 19, 2007) ("I dissent to the retention of Administrative Order No. 2006-6 because *I remain unconvinced that this 'antibundling' order falls within the scope of our judicial powers*," and noting, in dissenting to adoption on August 9, 2006, that the Order will require an additional 10 judges to handle the increased caseload) (emphasis added); (Kelly, J. dissenting to adoption on August 9, 2006) (rather than restoring due process, the Order "makes a mockery of due process and creates serious problems" because it "virtually ensures that justice will be so delayed for many diseased plaintiffs that they will never live to see their case resolved. It promises to force a sizable and needless increase in the funds required to operate the circuit courts at a time when the state's economy is far from robust. And, until new funds have been raised, unbundled asbestos-diseases cases will clog our courts' dockets. The congestion will bring with it years of delay to individuals sick and dying of work-related lung diseases."). To this end, it is noteworthy that the asbestos dockets in the jurisdictions that have limited consolidation via *Legislative* action are not even remotely close to the size of the NYCAL docket, which is entirely commensurate with the populations in the respective jurisdictions. See generally 2013 Census Data at http://quickfacts.census.gov.

i. Even assuming that the plain language of C.P.L.R. 602 was not controlling, strong policy justifications support the consolidation of in extremis asbestos actions

Joint trials are favored by the courts and by public policy. See Firequench, Inc v. Kaplan, 256 A.D.2d 213, 213 (1st Dept., 1998). They should be used "whenever possible" (Balz v. Kauffman & Minteer, Inc., 285 A.D. 1206 (3 Dept., 1955)), as they greatly serve economy and foster settlement, particularly in asbestos actions, which this Court has explicitly recognized. See Brooklyn Navy Shipyard Cases, 82 N.Y.2d 821, supra (affirming the joint trial of 25 asbestos actions "for reasons stated" by the Appellate Division), aff'g 188 A.D.2d 214.

In asserting that the modern-day "landscape" no longer supports the consolidation of in extremis asbestos actions (App. Br. at 22-23), Appellant makes two flawed assertions. First, it asserts that the number of asbestos actions being filed is lower today than decades ago. While true as to *non*-malignancies,[9] such a statistic is irrelevant to whether C.P.L.R. 602 endows trial courts with the broad discretion to join asbestos actions for trial, as recognized by the Appellate Division. A30-31. Notably, however, the number of cases joined for trial both 20 years ago and today is wholly commensurate with the number of cases filed. Compare Brooklyn Navy Shipyard Yard, supra (25 cases providently joined in

[9] Since "mesothelioma is a very rare tumor [and] there are only about 3,000 cases a year" (RA4), the number of filings is inherently limited by the number of diagnoses, which simply does not increase or decrease to any degree.

1993), with In re N.Y.C. Asbestos Litig. [Baruch], 111 A.D.3d 574, 574 (1st Dept., 2013) (three cases providently joined in 2013).

Second, and more importantly, Appellant spuriously asks this Court to view asbestos actions in a vacuum. The number of asbestos filings speaks nothing of the overall size of the dockets that the Judges of New York County Supreme Court must manage. The handful of Judges that preside over asbestos trials sit in general assignment parts with burgeoning dockets.[10] As such, "barring" the consolidation of asbestos actions would render administration of the *entire* New York County Civil Part unworkable. See In re N.Y.C. Asbestos Litig. [Bauer], 2008 WL 3996269 at *3 (Sup. Ct., N.Y. Cty., Aug. 21, 2008) ("defendants...contend[] that all ten cases must be tried separately. To do so would create a tremendous burden for this court"); In re N.Y.C. Asbestos Litig. [Collura], 9 Misc.3d 1109(A) at *3 (Sup. Ct., N.Y. Cty., 2005) (noting "[t]he crushing burden that would be placed on the Court by trying these cases one at a time..."). Thus, Appellant's contention that there is no longer a need for joint trials in today's "landscape" is narrow-minded. Judicial efficiency weighs heavily in favor of thoughtful consolidation in instances, like here, that fall squarely within the statutory parameters. See Consorti v. Armstrong World Indus., 72 F.3d 1003, 1006 (2d Cir., 1995) ("[i]f carefully and properly administered...consolidation is also capable of producing, with efficiency

[10] See http://courts.state.ny.us/courts/1jd/supctmanh/part_assignments.shtml

and greatly reduced expense for all parties, a fairer, more rational and evenhanded delivery of justice"), vacated on other grounds 518 U.S. 1031 (1996).

Furthermore, consistent with the burgeoning dockets in New York County and the dearth of Judges presiding over asbestos trials, consolidation serves an important policy goal by helping to sustain accelerated trial preferences for terminally-ill asbestos plaintiffs. See Brooklyn Navy Shipyard Cases, supra (joint trials serve to speed the disposition of cases). Paragraph VIII(A)(1) of the NYCAL CMO, in accordance with C.P.L.R. 3403(a)(6) and 3407, provides trial preferences for dying asbestos plaintiffs. These preferences serve two important goals: first, they provide the dying plaintiff with a chance to be present at his or her day in court, which is a fundamental right of a litigant (cf. In re Raymond Dean L., 109 A.D.2d 87, 88 (4th Dept., 1985); Soto v. Maschler, 24 A.D.2d 893, 893 (2d Dept., 1965) (trial preference proper where plaintiff "will not survive the waiting period caused by the calendar delay"); and second, they serve to "enrich what little remains of the plaintiff's life" by providing an "earlier recovery." Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. C3403:4.

The average life expectancy of a person suffering from malignant mesothelioma, however, is just 12 to 18 months from the date of diagnosis. A475. Thus, even with a trial preference, a dying asbestos plaintiff's ability to be present at his or her trial is a desperate race against time. Without sensible consolidation,

it would be virtually impossible for a terminally-ill asbestos plaintiff to be present at his or her day in court, thereby frustrating – or effectively abrogating – the spirit and letter of the CMO and C.P.L.R. article 34. See Bauer, 2008 WL 3996269, supra (individual trials "would severely delay and prejudice the plaintiffs").

Therefore, the consolidation of in extremis asbestos actions continues to be undergirded by strong public policy.

ii. Joint trial determinations for terminally-ill asbestos plaintiffs are the product of fair and balanced consideration rather than a rubber stamp

Although Appellant correctly notes, as the Appellate Division did, that the consolidation of in extremis asbestos actions has been "routine," it does not follow that "routine" equates to pro forma. Rather, the routine nature of consolidation springs from the fact that in extremis asbestos actions generally share significant common questions of law and fact. See C.P.L.R. 602(a). Belying Appellant's intimation of a rubber stamp is that when no such commonalities exist, or when individual issues predominate, it is also "routine" for consolidation to be denied. See, e.g., Bischofsberger v. A.O. Smith Water Prods, 2012 WL 4462393 (Sup. Ct., N.Y. Co., Sept. 20, 2012); In re N.Y.C. Asbestos Litig. [Adler], 2012 WL 3276720

(Sup. Ct., N.Y. Cty., Aug. 7, 2012) (plaintiff Vega tried individually due to unique exposure as an "infant bystander").[11]

Defendants in this litigation have, in fact, been successful in virtually every joint trial application in arguing that individual issues predominate for certain actions. See, e.g., In re N.Y.C. Asbestos Litig. [Babravich], 2014 WL 2116092 (Sup. Ct., N.Y. Cty., May 16, 2014) (three of eight plaintiffs tried individually, with the remaining five split into joint trials of three and two); In re N.Y.C. Asbestos Litig. [Carlucci], 2013 WL 5761459 (Sup. Ct., N.Y. Cty., Oct. 17, 2013) (four of seven tried individually due to "unique" exposures, with the remaining three joined for trial). Clearly, the conscientious Judges of New York County Supreme Court are evenhandedly weighing the rights of all parties in determining, in their broad discretion, whether and to what extent to consolidate in extremis asbestos actions. By insinuating that "routine" is tantamount to a rubber stamp, Appellant unfairly criticizes our Judges who have taken great care to ensure that joint trial applications are determined in a balanced and fair manner.

[11] Appellant highlights Vega as an individual trial where a defense verdict was rendered. See App. Br. at 27. Since Vega's "infant bystander" exposure predominated over any commonalities, the case was tried individually. The defense verdict can be easily explained by the extreme difficulty in proving such a unique claim, rather than by a bald assertion that only in an individual trial can defendants receive a fair trial.

iii. Appellant's speculative and immaterial "bolstering" argument is predicated on slanted statistics and ignores that defendants have prevailed in joint trial settings

Appellant's speculative assertion that joint trials bolster damages awards is challenged by its own chart, which shows that the damages award in the individually-tried Hillyer action – $20 million – was *higher* than the damages award in the case at bar – $19 million – and that verdicts in certain joint trials (McCloskey, Terry, Brown and Paolini, Michaelski) were significantly lower than the verdicts in many of the cases tried individually. See App. Br. at 27. More importantly, Appellant's chart is self-servingly inaccurate. It fails to include, for instance, the verdicts in Croteau v. AC & S, Index No. 118793/01 (Sup. Ct., N.Y. Cty. 2008) ($43.1 million) and Brown v. AC & S, Index No. 120595/00 (Sup. Ct., N.Y. Cty. 2002) ($53 million), both cases tried individually. Appellant only vaguely recognizes in a footnote that the $35 million award in In re N.Y.C. Asbestos Litig. [Peraica], 2013 WL 6003218 (Sup. Ct., N.Y. Cty., 2013) involved a case tried individually after the resolution of all other joined cases, which can hardly be attributed to a joint trial setting. Even the Dietz case, identified by Appellant as an individually-tried defense verdict, was initially joined for trial with another case that resolved. See In re N.Y.C. Asbestos Litig. [Cole], 2010 WL 2486146 (Sup. Ct., N.Y. Cty, June 10, 2010) (joining Dietz and Pierce actions).

What is worse, Appellant's chart ignores that defense verdicts were rendered in some of the very joint trials identified, among others not identified. In the McCloskey, Terry, and Brown joint trial, for example, the jury found in favor of the McCloskey plaintiff as to one trial defendant but found no liability as to the other three trial defendants; and, strikingly, the same defendant that was found liable in the McCloskey case was found *not* liable in the jointly-tried Brown case. See McCloskey v. A.O. Smith Water Products, 2014 WL 4311725 (Sup. Ct., N.Y. Cty., Aug. 29, 2014). And in a joint trial not identified by Appellant, one plaintiff was awarded $25 million while the other received a defense verdict. See In re N.Y.C. Asbestos Litig. [D'Ulisse], 16 Misc.3d 945 (Sup. Ct., N.Y. Cty., 2007). These results wholly undermine Appellant's blanket assertion of unfairness from a joint trial setting, and highlight the skewed nature of Appellant's chart.[12]

[12] Appellant cites two law review articles to support its bolstering assertion. App. Br. at 28. Those articles, however, involve either an analysis of an *80-case* joint trial where the commentators note that the massive size of the distal plaintiff population influenced the damages awards (see 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, 45, 55 (1998)), or state that plaintiffs are more likely to win joint trials because "jurors are likely to feel sympathetic to non-disabled plaintiffs when severely disabled plaintiffs' claims are considered at the same trial." Michelle J. White, Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle, 70 U. Cin. L. Rev. 1319, 1337 (2002). Joint trials in NYCAL, however, do not involve 80 cases and do not encompass non-disabled and terminally-ill plaintiffs. In fact, our Judges have done precisely what Bordens & Horowitz suggest, namely, "to develop a jurisprudence of sampling that not only speeds resolution of mass tort cases but also respects the integrity of adjudication." 22 Law & Psychol. Rev. 43, supra at 66.

Simply put, there is not a shred of evidence that joint trials bolster damages awards; in fact, the opposite is likely true. Cf. Consorti, 72 F.3d 1003, supra at 1007 ("when each case is tried before a different jury, the relationship between the size of one judgment for intangibles and another will be largely happenstance"). Yet, even assuming there is any truth to a "bolstering" claim, the fact that defendants get two bites at the apple to remit damages – from both Supreme Court and then again from the Appellate Division – ensures that no "miscarriage of justice" can result from an excessive jury award, rendering this issue academic. United States v. Solomonyan, 451 F. Supp.2d 626, 649-50 (S.D.N.Y. 2006) ("[a] defendant raising a claim of prejudicial spillover...must show that [it] may suffer prejudice so substantial that a 'miscarriage of justice' will occur").[13]

Therefore, to the extent Appellant's request for judicial legislation is considered, it is wholly unsupported in law, fact, or policy.

[13] Instead of acknowledging that the power of remittitur limits damages to reasonable compensation, Appellant makes the conclusory and highly troubling assertion that because the "baseline" damages awards are "inflated," Supreme Court and the Appellate Division have been robotically inflating the remitted damages awards. App. Br. at 48, n.25. To the contrary, even a cursory review of remitted awards disproves any alleged "inflated baseline" trend. Compare Penn v Amchem Products, 85 A.D.3d 475, 476 (1st Dept., 2011) ($16.22 million to $3.76 million), with In re N.Y. Asbestos Litig. [Marshall], 28 A.D.3d 255, 256 (1st Dept, 2006) ($8 million to $3 million, and $14 million to $4.5 million, respectively); see also Hackshaw v ABB, Inc., 2015 WL 246547 (Sup. Ct., N.Y. Cty., 2015) ($10 million to $5 million).

B. Appellant's Challenge To The Two-Case Joint Trial Ruling Is Unpreserved

Although TLC's appeal from the judgment brings up for review the original consolidation order that joined seven cases for trial (see C.P.L.R. 5501(a)(1)), Appellant is clearly not appealing from that order, as it does not discuss the merits of consolidating the seven cases and does not include in its Appendix the motion papers upon which that order was based.[14]

This order, importantly, did not address the consolidation of just Konstantin and Dummitt. Instead, there was a trial *ruling* that the joint trial of "these two cases" was provident. A447-48. See City of Elmira v. Larry Walter, Inc., 111 A.D.2d 553, 553 (3d Dept., 1985) ("[d]ecisions made by a court during the course of a trial are deemed to be rulings, not orders"). To preserve this issue for appeal, Appellant was required to object to the ruling. See C.P.L.R. 5501(a)(3) ("[a]n appeal from a final judgment brings up for review...any ruling to which the appellant objected..."); Darwak v. Benedictine Hosp., 247 A.D.2d 771, 772 (3d Dept., 1998) ("although the record does contain various references to the fact that this was a bifurcated trial, it fails to reflect that plaintiff objected to this procedure.

[14] Appellant's conscious decision not to challenge the original order joining seven cases for trial is enlightening as to its own opinion regarding the providence of a joint trial of just two of those seven cases.

Having failed to do so, plaintiff has not preserved this issue for review."); Meyers v. Fifth Ave. Bldg. Associates, 90 A.D.2d 824, 825 (2d Dept., 1982).

Here, the record is plain that Appellant never once objected to the joint trial ruling.[15] In fact, Appellant did not even join in the Dummitt defendants' objections:

> [CRANE'S COUNSEL]: ...we renew our objection to consolidation of these actions....we believe it's prejudicial to have these *two cases combined*...
>
> [ELLIOTT'S COUNSEL]: Counsel for Elliott joins in the objection of the consolidation.
>
> THE COURT:...Regarding your objection to the consolidation of the two different types of mesothelioma, I find that the limiting and explanatory instructions, which I have given throughout the trial, which I have just indicated I will against instruct the jury as to the testimony of Dr. Markowitz and Dr. Moline specifically that testimony as to which plaintiffs the testimony is being offered to, will assist the jury in distinguishing the issues.
>
> [COLLOQUY OMITTED]
>
> THE COURT: I will note as to the fact the defendants have objected to the consolidation of the actions for trial from the inception.
>
> [CRANE'S COUNSEL]: Thank you, Your Honor.

[15] Although Respondents' motion to dismiss this appeal was denied, they did not move on preservation grounds.

A447-49 (emphasis added). Appellant disingenuously attempts to bootstrap itself to the Dummitt trial defendants' objections. See App. Br. at 10. But TLC fails to point to any part of the record where it "objected to the consolidation." A449. Only the Dummitt defendants did so "from the inception":

> [CRANE'S COUNSEL]: Your Honor, last point before we open is, I feel compelled to raise the issue of this consolidated trial again.

A169.[16] Buttressing Appellant's conscious choice not to object is its use of consolidation to bolster its own case, prompting the Dummitt defendants to object:

> [TLC'S COUNSEL]...We're not a manufacturer. You heard from Crane and Elliott and all these other companies that were involved on the ships. Tishman is not a manufacturer, seller, supplier –
>
> [CRANE'S COUNSEL]: Your Honor, I have to object. This is a consolidated case. The cross references, I apologize.

A934.[17]

Consequently, Appellant took no issue with the two-case joint trial until after a verdict was rendered against it (A1099-1109), which makes this issue

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[16] Although defendant Crane Co. properly preserved this issue, it apparently did not find it to be of sufficient error to challenge it on appeal. When two defendants conflict as to the providence of an adverse determination of discretion, there should be an inherent presumption that the act did not rise to the level of constituting an abuse of discretion as a matter of law.

[17] It is ironic that Appellant makes a "bolstering" argument when in fact the only bolstering was Appellant's affirmative attempt to strengthen its own position by differentiating itself from the trial defendants in the Dummitt action.

unpreserved for review. See C.P.L.R. 5501(a)(3); Grzesiak v. General Elec. Co., 68 N.Y.2d 937 (1986) (challenge "not raised until its posttrial motion...is not preserved for review").

C. The Standard Of Review Is Limited To The Legal Question Of Whether The Appellate Division's Affirmance Constituted An Abuse Of Discretion As A Matter Of Law

Should this issue be considered, it is telling that not once in its Opening Brief does Appellant mention the limited standard of review, i.e., whether the Appellate Division's affirmance constituted an abuse of discretion as a matter of law. See Brady, 63 N.Y.2d 1031, supra at 1033 ("appellants do not even claim" that the decision was "an abuse as a matter of law").

Supreme Court is invested with "broad discretion to order consolidation" under C.P.L.R. 602. See Vigo, 26 N.Y.2d 157, supra at 162. In Maul (14 N.Y.3d 499, supra at 514), this Court underscored the limited nature of its standard of review when acts of broad discretion are affirmed:

> The determination of whether a lawsuit qualifies as a class action under the statutory criteria "ordinarily rests within the sound discretion of the trial court" (Small v. Lorillard Tobacco Co., 94 N.Y.2d 43, 52, 698 N.Y.S.2d 615, 720 N.E.2d 892 [1999]). The Appellate Division likewise "is vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law by the nisi prius court" (id. at 52–53, 698 N.Y.S.2d 615, 720 N.E.2d 892; see also Matter of State of New York v. Ford Motor Co., 74 N.Y.2d 495, 501, 549 N.Y.S.2d 368, 548 N.E.2d 906 [1989]). Our standard of review, however, is far

> more limited. Where, as here, the Appellate Division affirms a Supreme Court order certifying a class, we may review only for an abuse of discretion as a matter of law.

Id.; see also Andon, 94 N.Y.2d 740, supra at 745-46 (standard of review for discretionary acts is whether they amounted to an abuse of discretion as a matter of law); Weinberg v. Hertz Corp., 69 N.Y.2d 979, 982 (1987).

This standard of review is so limited, in fact, that "to date, this Court has not found an abuse of discretion as a matter of law in the CPLR article 9 class certification context." Maul, supra at 510, n.7. Nor has this Court ever found that it was an abuse as a matter of law to have granted consolidation under C.P.L.R. article 6. See Brooklyn Navy Shipyard Cases, 82 N.Y.2d 821, supra; Vigo, 26 N.Y.2d 157, supra; Symphony Fabrics, 12 N.Y.2d 409, supra.[18]

Importantly, since this is a "legal, rather than factual, review" (People v. Jones, 24 N.Y.3d 623, 629 (2014)), where this Court is "satisfied that the Appellate Division properly weighed the relevant statutory factors and correctly fulfilled its intermediate appellate court role and powers," the determination cannot rise to the level of being an abuse as a matter of law. Maul, supra at 509. Under this limited

[18] Notably, the standard for joining cases for trial under C.P.L.R. 602 – "common question of law or fact" – is *broader* than the standard for class certification under C.P.L.R. 901 – "questions of law or fact common to the class which predominate over any questions affecting individual members." As such, the burden to show an abuse of discretion as a matter of law for a consolidation determination should be, in essence, greater than for a class certification determination. Cf. Maul, supra at 511, n.8 (comparing C.P.L.R. 901 to the broader Federal Rule C.P. 23(a)(2), which, like consolidation, only requires that there be "questions of law or fact common").

standard of review, there is "no reason to disturb th[e] inherently discretionary determination" affirming the Dummitt and Konstantin joint trial. Weinberg, supra.

D. The Joint Trial Affirmance Was Not An Abuse Of Discretion, Let Alone An Abuse Of Discretion As A Matter Of Law

Since it is clear that the Appellate Division weighed the relevant statutory considerations (A19-28), and evaluated whether any prejudice to Appellant's substantial right resulted from the joint trial (A28-30), it "correctly fulfilled its intermediate appellate court role and powers," and thus its determination does not rise to the level of constituting an abuse of discretion as a matter of law. Maul, supra at 509; Andon, 94 N.Y.2d 740, supra ("we are satisfied that the Appellate Division did not abuse its discretion as a matter of law" where it "evaluated defendants' request in the context of this case and in light of the evidence presented to it"); Symphony Fabrics, 12 N.Y.2d 409, supra at 413 ("court below properly exercised the discretion vested in it by statute"). Therefore, this Court need not pass on any other issue as to consolidation. See Brady, 63 N.Y.2d 1031, supra at 1033 (where appellant does not claim an abuse as a matter of law, "[t]he only issue presented by the question certified is whether the Appellate Division had the power to deny the discovery motions in the exercise of its own discretion. We conclude that the Appellate Division had that power, and pass on no other issue").

In any event, the Appellate Division was well within its discretion in affirming the joint trial. A plain reading of the statute provides that a trial court may order a joint trial if there is "*a* common question of law *or* fact." C.P.L.R. 602(a) (emphasis added); Chiacchia v. Nat'l Westminster Bank USA, 124 A.D.2d 626, 628 (2d Dept., 1986) ("[a] single common issue suffices"); Harby Associates, Inc. v. Seaboyer, 82 A.D.2d 992, 993 (3d Dept., 1981) ("[e]ach and every factual and legal issue need not be identical...A single common issue will suffice..."); cf. Weinberg v. Hertz Corp., 116 A.D.2d 1, 6 (1st Dept., 1986) (C.P.L.R. 901 "clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class"), aff'd 69 N.Y.2d 979, supra.

As to consolidation of in extremis asbestos actions, New York courts have generally looked to the eight factors set forth in Malcolm (995 F.2d 346, supra) as a "useful guideline" in an effort to "strike an appropriate balance." Id. at 350-51. The factors include (1) worksite, (2) occupation, (3) time of exposure, (4) type of disease, (5) whether Plaintiffs are living or deceased, (6) status of discovery, (7) same counsel, and (8) type of cancer. Id. at 351-52. Clearly, these factors, which are simply "suggested," must be applied flexibly, as some factors may be applicable to a particular consolidation while others may not, and factors beyond these eight may also be pertinent. In re N.Y.C. Asbestos Litig. [Altholz], 11

Misc.3d 1063(A) at *2 (Sup. Ct., N.Y. Co., 2006); see also In re N.Y.C. Asbestos Litig. [Ballard], 2009 WL 9151160 at *3-4 (Sup. Ct., N.Y. Cty., Sept. 9, 2009).

To this end, Appellant erroneously bases its argument on a mechanical application of the Malcolm factors, strangely referring to the Appellate Division's evaluation here as a "highly permissive standard," as if to intimate that a balancing test of broad discretion should not be a discretionary test at all. See Maul, 14 N.Y.3d 499, supra at 514 ("we recognize that commonality cannot be determined by any 'mechanical test' and that 'the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal...'"); In re N.Y.C. Asbestos Litig. [Assenzio], 2013 WL 1774051 at *3 (Sup. Ct., N.Y. Cty., April 17, 2013) ("[s]uch a strict construction [of Malcolm] would undermine the purpose of consolidation"); Consorti, 72 F.3d 1003, supra at 1006 (defendant "treats Malcolm as establishing a strong anti-consolidation bias. We take pains to emphasize that we have made no such suggestion").[19] Appellant's strict construction is the antithesis of a determination left to the sound discretion of the trial court. See People v. Duffy, 44 A.D.2d 298, 305 n.2 (2d Dept., 1974), aff'd 36 N.Y.2d 258 (1975) ("the very nature of judicial discretion precludes rigid standards

[19] The Malcolm factors have been applied flexibly for more than 20 years, and have resulted in *scores* of joint trial determinations in New York County. Even a cursory review of that extensive body of caselaw provides substantial guidance for all parties involved in this litigation as to which factual and legal considerations support joint trials and which do not.

for its exercise") (citing Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967)); Black's Law Dictionary at 419 (5th ed.) (defining "discretionary acts" as "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion").

Thus, great deference should be accorded to the trial court, particularly where, like here, consolidation has been demonstrated to work. Cf. People v. Morris, 21 N.Y.3d 588, 597 (2013) (a "case-specific, discretionary exercise remains within the sound province of the trial court, which is in the best position to evaluate the evidence"); Plummer v. Rothwax, 63 N.Y.2d 243, 250 (1984) ("failure of reviewing courts to accord great deference to a Trial Judge's decision...might well encourage a needless waste of judicial resources..."); Baruch, 111 A.D.3d 574, supra at 574; In re Seventh Judicial Dist. Asbestos Litig. [Wambach], 190 A.D.2d 1068 (4th Dept., 1993). Unless it is clear that individual issues predominate, a discretionary consolidation decision should not be disturbed. See In re N.Y.C. Asbestos Litig. [Bernard], 99 A.D.3d 410 (1st Dept., 2012). To hold otherwise would result in the micromanagement of Supreme Court's ability to make discretionary determinations, which this Court has declined to do in substantially similar circumstances. See, e.g., Maul, supra at 513-14 (class certification); Akely v. Kinnicutt, 238 N.Y. 466, 476 (1924) (joinder of plaintiffs).

Against this backdrop, even assuming Appellant had alleged an abuse of discretion as a matter of law, it has utterly failed to establish one.

i. Numerous common questions of law and fact supported the joint trial

Considering that numerous common questions of law and fact exist between these cases, it cannot be said that the joint trial affirmance was an abuse of discretion as a matter of law. See Akely, supra at 473 (concluding, as to common issues of law and fact for 193 plaintiffs under the joinder statute, that "it cannot be said by us as matter of law in this case that there are not present in each cause of action common issues which amply satisfy the test of the statute," even where the separate issues "may equal in number the common ones").

1. Since the only claims asserted in both cases sounded in negligence, and both cases involved failure to warn claims, multiple common questions of law supported the joint trial

Inasmuch as both cases involved only negligence claims, and both specifically involved negligent failure to warn claims regarding product manufacturers, multiple common questions of law supported the joint trial. In Harby (82 A.D.2d 992, supra at 992-93), which Appellant relies upon, the Third Department concluded that "those causes of action *couched generally in*

negligence...present *similar legal issues of liability* and should have been joined under a liberal construction of CPLR 602 to simplify practice" (emphasis added).

Here, the legal claims in both cases are "couched generally in negligence." Labor Law 200 is the codification of common law negligence. See Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 298 (1978). A failure to warn claim "is indistinguishable from a negligence claim." Enright v. Eli Lilly & Co., 77 N.Y.2d 377, 387 (1991). As such, both claims share common liability elements. Compare P.J.I. 2:120, with P.J.I. 2:216. The Appellate Division therefore appropriately concluded that these common elements "predominate[d] over any tangential elements inherent in the different theories." A28.[20]

Indeed, numerous legal issues common to both cases were addressed at trial. See, e.g., RA7 ("the motion is similar, I believe, in both. And we join in the arguments"), RA70 ("we join in the applications, for the record, made by Crane"), RA72, RA84, RA89. It was certainly economical to decide these common questions of law once rather than twice.

What is more, in claiming that the cases have "no" common issues of law, Appellant wholly ignores that its own C.P.L.R. article 16 case was predicated on

[20] Distinctions in legal claims have predominated over commonalities mainly in instances where a difference in burden of proof would lead to confusion. For example, a FELA claim has a greatly relaxed proximate cause burden (see Consol. Rail Corp v Gottshall, 512 U.S. 532, 543 (1994)), and thus has not been consolidated with actions involving failure to warn claims. See Adler, 2012 WL 3276720, supra.

failure to warn claims asserted against the nonparty joint compound manufacturers. A979, RA79, RA81. See C.P.L.R. 1601, 1603.[21] Indeed, the jury charge and liability interrogatories for both the defendant manufacturers in Dummitt and the nonparty manufacturers in Konstantin were identical. A954-66, A979-80, A1126-33, A1140-41. Moreover, the Dummitt trial defendants attempted to assert premises liability claims against nonparty shipyards. RA42, RA67-68. Thus, both cases involved products liability claims and, to an extent, premise liability claims, in addition to recklessness claims under C.P.L.R. 1602(1)(a)(7). Clearly, common questions of law supported the joint trial, and there was no abuse of discretion as a matter of law in affirming it.[22]

In this regard, since both Labor Law and failure to warn claims were asserted in Konstantin, even had this case been tried individually, products liability questions of law would have still arisen, which eliminates any notion of prejudice from the joint trial format. See Symphony Fabrics, 12 N.Y.2d 409, supra at 413 (no prejudice where the issue will arise "[w]ith or without a consolidation"). Accepting

[21] It is noteworthy that Mr. Konstantin asserted negligent failure to warn claims against these joint compound manufacturers, but resolved those claims prior to trial. This underscores that both cases inherently involved products liability claims.

[22] Appellant attempts to create a legal distinction by claiming that a government contractor defense was asserted in Dummitt. No such claim, however, was legally viable. RA92. And even assuming arguendo that it was, it did not predominate over the substantial commonality of legal and factual elements. See In re N.Y.C. Asbestos Litig. [Batista], 2010 WL 9583637 (Sup. Ct., N.Y. Cty., Feb. 19, 2010) (difference between government contractor defense and State failure to warn claim did not predominate over commonalities).

Appellant's argument would lead to the illogical conclusion that different claims asserted in *a single case* should be severed from each other. See In re Eighth Judicial Dist. Asbestos Litig. [Seymour], 106 A.D.3d 1453 (4th Dept., 2013) (denying severance of claims for a single plaintiff who had both asbestos and coal fume exposure that caused separate diseases). This is diametrically contrary to the purpose of consolidation, namely, to promote economy rather than thwart it.

At worst, any minor differences in the legal claims are not so disparate as to predominate over the other substantial common issues. Cf. Bernard, 99 A.D.3d 410, supra at 411 (differences in laws of two jurisdictions did not predominate).

2. Both Plaintiffs suffered the same "type of asbestos exposure," to wit, an occupational, products-based exposure

Consistent with the liberally-construed statute and Malcolm's function as a mere "guideline," the overarching consideration when considering the first two Malcolm factors – worksite and occupation – has been determined to be the "*type* of asbestos exposure each plaintiff is claiming..." In re N.Y.C. Asbestos Litig. [Conti], 2011 WL 1826854 (Sup. Ct., N.Y. Cty., May 2, 2011) (emphasis added).

Contrary to Appellant's assertion, this does not render these factors meaningless, as there are numerous "types of asbestos exposure" other than products-based or even occupational. These include (1) exposure to raw fiber from mining or processing, (2) environmental exposure from living in the vicinity of a

factory or mine, (3) consumer-based exposure from home renovations or from talc products or from smoking cigarettes that utilized asbestos filters, and (4) secondhand exposure from the contaminated clothing of a family member. Where cases involving these other "types" of asbestos exposure are sought to be joined with occupational, products-based exposures, this consideration may predominate, depending on the balance of other factors. See, e.g., Bischofsberger, 2012 WL 4462393, supra (plaintiff alleging occupational, products-based exposure not consolidated with plaintiff alleging secondhand exposure from laundering her husband's contaminated work clothes); In re N.Y.C. Asbestos Litig. [Barnes], 2008 WL 1730004 (Sup. Ct., N.Y. Cty., Apr. 7, 2008) ("Montross case should be tried separately, because she was the only Plaintiff, as a consumer, to have experienced exposure to asbestos-containing filters from smoking original Kents in the 1950's"). Indeed, since many of the aforementioned types of exposure are non-occupational, the "worksite" and "occupation" factors may be entirely irrelevant to some joint trial applications, and thus are clearly suited to a flexible construction rather than a strict one. See Ballard, 2009 WL 9151160, supra ("that the plaintiffs never shared a common worksite with each other is not itself a bar to joinder").

Here, as recognized by the Appellate Division (A26-27), both Plaintiffs had "fundamentally" the same type of asbestos exposure, namely, occupational, products-based exposure – Mr. Dummitt to gaskets, packing, and insulation

products and Mr. Konstantin to joint compound products (A306-13, A346-49, A430, A748-827). See Assenzio, 2013 WL 1774051, supra (consolidating actions involving joint compound exposure with actions involving other products-based exposures); Batista, 2010 WL 9583637, supra (same); Ballard, supra (same). This led to shared testimony regarding the methods for measuring dust release from the manipulation of products. A723, A679-713.

This common question supported the joint trial, and it likely led to a fairer result. See In re Asbestos Litig. [McPadden], 173 F.R.D. 87, 91 (S.D.N.Y. 1997) ("nor does [individualized work-site evidence] establish that a properly instructed jury would be unable to evaluate the working conditions and degree of exposure at the job sites of different plaintiffs less fairly...Consolidation may even lead to a fairer result if it enables a jury to compare one worksite to another.") (brackets in original). Thus, there was no abuse of discretion as a matter of law.

3. The state-of-the-art evidence was identical for both cases

Appellant either misinterprets the nature of state-of-the-art evidence or seeks to mislead this Court. Appellant correctly notes that 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." App. Br. at 33 (citing George v. Celotex Corp., 914 F.2d 26, 29 (2d Cir., 1990). But it completely

disregards that "dangers of asbestos" is stated generally, that "foreseeability" is a broad principle (see P.J.I. 2:12), and that the focus is on the "time" of exposure.

Whether a defendant knew or should have known of the "dangers of asbestos" is implicated in both a negligent failure to warn claim (see Liriano v. Hobart Corp., 92 N.Y.2d 232, 242-43 (1998)), and a Labor Law 200 claim. See Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 353 (1998) ("it is inferable that defendant knew or should have known of the danger to plaintiff"); Dube v. Kaufman, 145 A.D.2d 595, 596 (2d Dept., 1988). As a result, constructive knowledge that asbestos was hazardous in some other product, or in some other industry, or even that asbestos caused some other disease, could trigger a defendant's duty with respect to the "should have known" prong of a negligence claim, as noted by Supreme Court here. A338-39 ("in the beginning of the trial I gave you certain instructions and I referred to something as state-of-the-art evidence. And part of the issues that you are going to be asked to determine is what Tishman knew or should have known about the dangers of asbestos at the time Mr. Konstantin worked at these two projects."); RA41 ("In terms of the state of the art, it is what the defendants knew, or should have known.").

Consequently, the state-of-the-art evidence in asbestos actions is not industry-specific, case-specific, or defendant-specific; rather, it is time-specific. See In re Asbestos Litig., 2011 WL 5118158 (Sup. Ct., N.Y. Cty., Sept. 7, 2011)

("[t]he state of the art testimony will be substantially identical for all four of them in the 1960s and 1970s"); Conti, 2011 WL 1826854, supra at *5-6 ("common and overlapping state-of-the-art testimony will be necessary in all 8 cases"); In re N.Y.C. Asbestos Litig. [Capozio], 22 Misc. 3d 1109(A) (Sup. Ct., N.Y. Cty., 2009) ("Plaintiffs had such exposures during the 1960s which...will result in the same state-of-the-art").[23]

Supreme Court expressly reiterated this axiom multiple times:

> it's not within the industry, it's the state of the art knowledge, it's the state of the art; and *that was known not only within the industry but within relevant other fields such as medical and technological fields, which the jury may also consider*. It's for you to weigh the evidence that's been presented in this area, *but you're not limited to what was known within the industry.*

RA74-75 (emphasis added); see also A179, A884, RA65-67. Even Dr. Castleman – the leading asbestos state-of-the-art scholar in the world – affirmed this principle during cross examination. A623-24.[24]

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[23] Appellant cites only a single instance where it was stated, albeit incorrectly, that the state-of-the-art is industry-specific. See In re N.Y.C. Asbestos Litig. [Abrams], 2014 WL 3689333 (Sup. Ct. N.Y. Cty., July 18, 2014). And the court nonetheless joined actions for trial.

[24] In asserting that the "jury heard two sets of state-of-the-art evidence," Appellant does not cite trial *evidence* at all. App. Br. at 34. Instead, it cites to the jury charge, which does not even support its assertion, particularly in light of Supreme Court's express declarations to the contrary. See George v Celotex, supra at 28-29 (duty to warn is not confined to industry practice or what is knowable about a particular product).

Naturally, the state-of-the-art increases in breadth and accessibility over time, such that there necessarily was a greater, more accessible knowledge of the dangers of asbestos in, for example, the 1990s than there was in the 1940s. Therefore, the critical inquiry in addressing this factor is the plaintiffs' respective *last* date of exposure. See, e.g., Assenzio, 2013 WL 1774051, supra at *4 (declining to join for trial a plaintiff with only 1990s exposure because "the state of the art evidence applicable to Lieberman will be significantly different from that which is applicable to the other plaintiffs").[25]

Here, since both Plaintiffs' exposure periods ended in 1977 (A358, RA61), the state-of-the-art testimony from Dr. Castleman was virtually identical for both cases (RA3), as the Appellate Division plainly recognized. A27. Thus, had these cases been tried individually, Dr. Castleman's testimony would have been duplicated, consuming twice the judicial resources at twice the cost to Plaintiffs. See Collura, 9 Misc.3d 1109(A), supra at *3 ("state-of-the-art...can be greatly diminished by having that testimony accomplished in one trial..."); Consorti, 72 F.3d 1003, supra at 1006. This common question clearly supported the joint trial, and there was no abuse of discretion as a matter of law in affirming it.

[25] Appellant oddly reasons that "duration" is the critical element "because the state of the art as to asbestos varies over time." App. Br. at 34. But that is precisely why the last date of exposure, rather than duration, is the critical inquiry. Notably, in so arguing, Appellant further misstates that Mr. Dummitt was exposed to asbestos for 15 years (see App. Br. at 34), when in fact he was exposed for 17 years. A12, RA2.

4. Both Plaintiffs suffered from the same diseases and cancer

Both Plaintiffs had mesothelioma and pleural plaques. Appellant seeks to impose a hyper-distinction as to the disease and cancer factors that is inconsistent with the liberal construction of C.P.L.R. 602 and Malcolm's status as a "guideline." Indeed, the Malcolm Court made no distinction between *locations* of the same disease. See id. at 351-52 (noting that plaintiffs suffered from asbestosis, lung cancer, and mesothelioma, which were "three different diseases," and as to the "cancer" factor, that "[t]wo different types of cancer were alleged: lung cancer, and mesothelioma"). Instead, the Malcolm Court noted that, like here, "[w]hen the plaintiffs suffer from the same disease, the economy derived by not rehashing the etiology and pathology of the particular disease will be great, while the concomitant prejudice will be minimal." Id.

The commonality between Mr. Dummitt's and Mr. Konstantin's asbestos-caused mesotheliomas is perhaps best explained by Appellant's own expert witness, Dr. Siroky, who declared that "*mesothelioma is mesothelioma*" in response to a question about the similarities between pleural, peritoneal, and tunica vaginalis mesothelioma. A1075 (emphasis added). Appellant's about-face is completely contrary to the uncontested evidence at trial.

A mesothelioma is a cancer that can only arise in one of the four discrete places in the body where mesothelial tissue is found: pleura (lining the lungs),

pericardium (lining the heart), peritoneum (lining the abdomen), and tunica vaginalis (lining the testicles). A484-85.[26] Contrary to Appellant's contention, *all* mesotheliomas are exceedingly rare, with only 3,000 cases diagnosed each year. RA4.[27] Although tunica vaginalis mesothelioma is rarer than pleural mesothelioma, the medical principles are indisputably identical, including:

1. transmigration: asbestos is breathed into the lungs and migrates to the pleural, pericardium, peritoneum, or tunica vaginalis via the lymph nodes, bloodstream, or direct penetration of tissue. A486-88;

2. signal cancer: asbestos is the only known cause of mesothelioma in any location of the body. A490-91, A498, A530;[28]

3. latency: both have the characteristically-lengthy latency period – generally 30-40 years between exposure and disease. A492, A494;

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[26] In fact, since the testes descend from the peritoneal cavity, the tunica vaginalis is nothing more than the most distal extension of the peritoneum, comprising the same tissue. A195, A484-85. This led Appellant's own expert pathologist, Dr. Roggli, to classify Mr. Konstantin's cancer as a peritoneal mesothelioma, which he further noted was associated with asbestos exposure. RA32-33. Appellant then withdrew Dr. Roggli as an expert in this case. RA71.

[27] Although there are only a few hundred *reported* cases of mesothelioma of the tunica vaginalis in the scientific literature, both Dr. Markowitz and Appellant's own trial counsel noted that more cases existed. A490 ("There are additional cases, but they haven't been reported in the medical literature"); RA80 (TLC's counsel stating during summation that there were "probably more than that in actuality"). This is a factor of the difficulty in diagnosing mesothelioma of the tunica vaginalis – compared to pleural mesothelioma – prior to recent advancements in medicine and science; it is not a factor of a difference in causation principles. Indeed, the percentage of persons inflicted with both mesotheliomas that reported having asbestos exposure is comparable. A492, A497, RA35-39.

[28] Indeed, Mr. Konstantin, just like Mr. Dummitt, developed pleural plaques, which is a scarring of the pleura caused by asbestos, and which is a marker for heavy exposure to asbestos. RA5, RA45-56. This was yet another commonality in disease.

4. immunohistochemistry: the cancer cells of both react in the same manner when stains are applied. A493;

5. histologically: the cancer cells for both look the same under a microscope (A493, A529), i.e., "[i]t's the same tumor....it's the same type of cell because it's the same disease." A494;

6. morphology: the cell structure of both is the same. A493-94;

7. etiology: the same causation process is used for both. A498;

8. incurability: both are terminal. A211;

9. treatment: both are treated with the same chemotherapy medications. A477; and

10. epidemiological support: asbestos as a cause of both is supported by epidemiological studies. A498-99, A566-67.

In short, "*same tissue, same disease, same cancer*" (A568-69) (emphasis added)), and a mesothelioma is a mesothelioma regardless of where it presents. See Bischofsberger, 2012 WL 4462393, supra (pleural and peritoneal mesothelioma "are the same disease, albeit they present in different parts of the body").[29]

Furthermore, since a duty to provide a safe workplace is attendant to the danger at issue, not the precise injury that the plaintiff developed (see P.J.I. 2:12)

[29] The only case cited by Appellant to support its contention that mesotheliomas located in different parts of the body are "distinct diseases" is a case involving a *female* plaintiff suffering from peritoneal mesothelioma. See Adler, 2012 WL 3276720, supra. Peritoneal mesothelioma in females could present a unique causation issue because certain reproductive cancers can masquerade as a peritoneal mesothelioma. See Bischofsberger, supra ("Defendants claim that they will present a defense, that peritoneal cancer in women is not caused by asbestos exposure"); Barnes, 2008 WL 1730004, supra (defendant "contends that in many cases, peritoneal mesothelioma in women is not causally linked to asbestos exposure").

("[t]he exact occurrence or exact injury does not have to be foreseeable"), even had this case been tried individually, evidence regarding pleural mesothelioma would have been elicited as part of the general asbestos medicine testimony and the state of the art testimony. RA6. This eliminates any notion of prejudice from the joint trial format. See Symphony Fabrics, 12 N.Y.2d 409, supra at 413 (no prejudice where the issue will arise "[w]ith or without a consolidation").

Nor is there any merit to Appellant's claim that the two mesotheliomas required different proofs of damages. App. Br. at 36-37. Damages are subjective, so even two plaintiffs that suffer from pleural mesothelioma will have different proofs of damages. See Caprara v. Chrysler Corp., 52 N.Y.2d 114, 127 (1981) ("[i]n no two cases are the quality and quantity of such damages identical"). As discussed infra, any purported prejudice due to Plaintiffs' separate courses of pain and suffering was alleviated by Supreme Court's use of instructions and intelligent management devices, and, in any event, is rendered moot due to the remittitur.

Here, since both Plaintiffs suffered from mesothelioma and pleural plaques, a clear commonality existed, and the Appellate Division's affirmance certainly was not an abuse of discretion as matter of law. A27. At worst, any difference in the location of Plaintiffs' mesotheliomas is not so disparate as to predominate over the other commonalities. See Barnes, 2008 WL 1730004, supra at *10 ("this Court is not convinced the pathology and etiology of [pleural and peritoneal mesothelioma]

will be markedly disparate as to confuse the jury..."). Indeed, even the joinder of actions involving separate diseases has been endorsed when other commonalities balance in favor of a joint trial. See, e.g., Baruch, 111 A.D.3d 574, supra (joining one plaintiff with mesothelioma and two with lung cancer was provident).

5. Both terminally-ill Plaintiffs were alive at the time of trial

Both Mr. Dummitt and Mr. Konstantin were alive at the time of trial. Despite acknowledging this, as it must, Appellant erroneously focuses on a hairsplitting "health status" argument, since Mr. Konstantin testified at trial but Mr. Dummitt testified via videotape. This strict construction was properly rejected by the Appellate Division. A27 ("that Dummitt was too ill to appear in court does not confer upon him a different 'status' from Konstantin *for purposes of whether consolidation was proper*") (emphasis added).

As such, Appellant's argument is, in actuality, addressed to prejudice rather than commonality. The jury, however, was well-aware that both Plaintiffs would suffer the same fate of death. RA87 (Mr. Konstantin is "a man who is 55 years old who is about to die"); see also A381, RA82, RA85, RA88. See Altholz, 11 Misc.3d 1063(A), supra at *2 ("deaths will not prejudice the jury against the defendants, vis-a-vis, the living Plaintiffs as the latter are all terminally ill and will unfortunately suffer the same fate").

Moreover, Supreme Court alleviated any potential prejudice by providing a clear limiting instruction as to Mr. Dummitt's preserved trial testimony. A226 ("...His testimony is to be considered by you as trial testimony by Mr. Dummitt"). It then charged the jury to consider Plaintiffs' "individual prognosis and the testimony regarding their life expectancy. And you may also consider the evidence that you have heard concerning the condition of Mr. Dummitt and Mr. Konstantin's health, their individual habits, and employment status and activities." A983.

The jury clearly recognized that Mr. Dummitt was sicker than Mr. Konstantin at the time of trial by awarding him more than double the past pain and suffering it awarded to Mr. Konstantin. A1135, A1142. Thus, as the Appellate Division recognized, the jury did not conflate the two Plaintiffs' conditions (A27), and a fairer result was likely produced as a result of the comparison. See McPadden, 173 F.R.D. 87, supra at 91.

6. The common representation of Plaintiffs and of some Defendants

There is no dispute that Plaintiffs were represented by the same counsel, which Appellant fails to address. Furthermore, both TLC in this case and Defendant Aurora Pumps in Dummitt were represented by attorneys McGivney & Kluger at trial. A161-62, A200-01, A206-07. The joint trial, therefore, supported the statute's underlying purpose of promoting legal economy.

7. Plaintiffs called three common expert witnesses

Both Plaintiffs called Dr. Moline (general asbestos medicine), Dr. Castleman (state-of-the-art), and Mr. Hatfield (materials science) at a significant expense. A590, A654-55, A703-04. The joint trial avoided the unnecessary duplication of expert testimony and resulted in significant cost reduction to the dying plaintiffs. See Symphony Fabrics, 12 N.Y.2d 409, supra at 413 (no prejudice from consolidation where "same witnesses would be called, and the same testimony and evidence introduced, if Barbara were not a party"); Brooklyn Nav. Shipyard Cases, 188 A.D.2d 214, supra ("joining cases together is designed to 'reduce the cost of litigation..."). Having these experts testify once rather than twice conserved approximately three full trial days, thereby promoting judicial economy. See Collura, 9 Misc.3d 1109(A), supra at *3; Consorti, 72 F.3d 1003, supra at 1006.

Accordingly, in view of the substantial commonalities between these two cases and the Appellate Division's marked consideration, Appellant falls woefully short of establishing an abuse of discretion as a matter of law, even assuming such an abuse had been alleged.

ii. The Appellate Division's analysis was responsive rather than burden-shifting

TLC's contention that the Appellate Division improperly shifted the burden to Appellant to disprove common questions of fact and law flies in the face of the basic nature of an appeal. See App. Br. at 41-42. As Appellant was the party claiming error, the Appellate Division began by identifying Appellant's arguments. A19-20 ("TLC (but not Crane) argues that the two actions should not have been consolidated because they involved different factual and legal issues…); A24 ("TLC's argument primarily concerns the first five Malcolm factors"). The Appellate Division then simply responded to these assertions. See, e.g., A27 ("[w]e disagree with TLC that the difference in the types of mesothelioma the plaintiffs' decedents had compels separate trials"). This was responsive rather than burden-shifting, and it is consistent with a review for an abuse of discretion. Cf. Bernard, 99 A.D.3d 410, supra at 411 ("[w]e reject defendant's contention…").

iii. Appellant has utterly failed to articulate any prejudice, let alone prejudice to a substantial right, as a result of the joint trial

It is well-settled that consolidation is favored by the courts and should be granted unless the opposing party demonstrates prejudice to a substantial right. See Vigo, 26 N.Y.2d 157, supra at 160; Chinatown Apartments, Inc. v. N.Y.C. Transit Auth., 100 A.D.2d 824, 825 (1st Dept., 1984). Since this is "largely a matter of judgment," the Appellate Division's determination of no prejudice should

be accorded great deference. Akely, 238 N.Y. 466, supra at 475. A "mere desire to have one's dispute heard separately does not, by itself, constitute a 'substantial right.'" Vigo, supra at 162. Nor do bare allegations of prejudice or the "possibility" of jury confusion. See DeSilva v. Plot Realty, LLC, 85 A.D.3d 422, 423 (1st Dept., 2011) ("claim of possible jury confusion... unpersuasive"); Humiston v. Grose, 144 A.D.2d 907, 908 (4th Dept., 1988) ("bare allegations of prejudice"); accord Mascioni v. Consolidated R.R. Corp., 94 A.D.2d 738 (2d Dept., 1983). Without demonstrable evidence of prejudice, this Court "cannot assume that [the jury did] not consider and properly decide by themselves the separate issues which ar[o]se in connection with each cause of action." Akely, supra at 475; Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 340 (1st Dept., 2006) (joint trial warranted absent "demonstrated prejudice").

Here, in its own words, Appellant asserts nothing more than the "possibility" of prejudice (App. Br. at 48), rendering its argument baseless. In any event, Appellant has not explained how the joint trial of just two cases here was "unwieldy." App. Br. at 43. See Alizio v. Perpignano, 78 A.D.3d 1087, 1088 (2d Dept., 2010) ("unsubstantiated claim that a joint trial would be 'unwieldy' was not sufficient"). Instead, Appellant offers arguments that are either completely unrelated to the joint trial setting or are entirely speculative.

1. The conduct of trial resulted from the closing hours policies, which would have affected this case in the same manner had it been tried individually

In claiming jury confusion, Appellant relies predominantly on the sequence of trial. See App. Br. at 45. The Appellate Division evaluated this and appropriately concluded that the conduct of trial was due to extenuating circumstances flowing from the budget cuts rather than the joint trial setting. A28-29. Indeed, every impact – on individual trials – portended by the closing hours policies "affected the conduct of [this] trial[]," including the interruption of witness testimony, jury tardiness, and the overall lengthening of the trial. Justice Prudenti's Remarks to the Legislature, supra at 5-6.

The testimony of expert witnesses was interrupted due to the shortened days, requiring some witnesses to be taken out of order. A633 ("...I know a lot of the witness's testimony has been broken up and there's really nothing I can do, based upon the schedule of the witnesses and the issues, the budgetary issues which require me to close the courtroom at precise times"). See NYCLA Preliminary Report, supra at 5, 22 ("[w]ithout flexibility to finish later in the day," witnesses will be interrupted and forced to come back a second day).

Moreover, due to the delayed opening of the courthouse, one juror was consistently late, "further shortening the trial day." Id. at 23. Judge Madden providently acted to alleviate that problem. A522-23 ("...you've been late on a

number of occasions. The trial, particularly because of its length, cannot be delayed in this fashion. So I'm excusing you from service from this jury...").

This delay was exacerbated by the number of motions made by defendants. A454-55 ("there have been numerous motions made by defendants..., to a certain extent some of the length is due to the number of issues that have been raised..."); A671, A675, A726, A839, A855, A888, A901, A905, RA69, RA73. Defendants were certainly within their rights to seek legal rulings, but to lengthen the trial by doing so, and then claim prejudice as a result of the trial length, is misleading.

Notwithstanding those constraints – that were unrelated to the joint trial format – Appellant denigrates Supreme Court for pressing on with the trial by taking witnesses out of sequence when necessary. A633 ("Jurors, we're going to go forward with the next witness, since we have a little bit of time and I'm trying to move the trial along"). Supreme Court's trial management in this respect was provident. See C.P.L.R. 4011 ("[t]he court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition..."). In fact, Supreme Court went out of its way to shorten the trial by spending extra time with the attorneys to address legal issues. A918-19 ("[w]e continued with the discussions in the robing room until sometime after 6:00 o'clock last evening. And this is due to budgetary constraints."); A215, A895-96, A905, RA7-8, RA34, RA59, RA73.

Contrary to Appellant's contention, absent consolidation, the "conduct of trial" would have still been impacted by the closing hour policies. See Justice Prudenti's Remarks to the Legislature, supra (speaking generally of the impact on individual trials); NYCLA Preliminary Report, supra. In short, any purported prejudice due to the budgetary restrictions was equally suffered by all parties. This does not amount to *any* prejudice as a result of the joint trial setting, let alone prejudice to a substantial right, especially where Supreme Court rose to the occasion to safeguard against any deprivation of rights.[30]

2. Supreme Court's careful trial management ensured that no prejudice resulted from the joint trial

In asserting that the joint trial bolstered Plaintiffs' claims, Appellant presents inherently contradictory positions. It claims that the "skewed" apportionment and recklessness findings are only explainable by bolstering (App. Br. at 47-50), yet it does not independently challenge those findings as erroneous.[31]

[30] Any assertion in Appellant's Reply Brief that the closing hours policies are all the more reason to remit this case would lead to the slippery slope of having to remit every case tried in the last four years – individually or jointly – because the closing hours policies allegedly deprived litigants of a fair trial. In any event, as noted infra, there is no evidence whatsoever of jury confusion resulting from the conduct of trial, irrespective of its cause.

[31] Instead, in a footnote, Appellant references the case-specific arguments made by Crane Co. in its brief in the separate Dummitt appeal before this Court. See App. Br. at 47, n.24. Consistent with its actions at trial, Appellant is again attempting to use the Dummitt case to "bolster" its own position.

In any event, the Appellate Division evaluated this argument and appropriately concluded that it was speculative, particularly in light of Supreme Court's provident trial management. A29. Indeed, Supreme Court took great pains to ensure that no prejudice resulted from the joint trial setting (or even the budget cuts). A219 ("given that this is a consolidated trial and that there are a number of different defendants, I think such limiting instruction is helpful for the jury to assist the jury in identifying what evidence applies to which defendant"). For each of the perceived or minor distinctions raised by Appellant, Supreme Court issued limiting, explanatory, and curative instructions to reduce the risk of prejudice. See, e.g., A448 ("...I find that the limiting and explanatory instructions, which I have given throughout the trial, which I have just indicated I will again instruct the jury as to the testimony of Dr. Markowitz and Dr. Moline specifically that testimony as to which plaintiffs the testimony is being offered to, will assist the jury in distinguishing the issues"); A460, A735, A738-39. See Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir., 1990) ("...the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury..."); cf. Solomonyan, 451 F. Supp.2d 626, supra at 650 ("[e]ven where a risk of prejudice can be shown, the presumption in favor of joinder as a means of achieving judicial efficiency leads most courts to employ limiting instructions to cure prejudicial spillover").

Thus, not only did Supreme Court vigilantly "guide the jury as to which witness testified in which case" (App. Br. at 45), but the three comments Appellant highlights as purporting to show confusion were actually curative or explanatory. A172-73 ("let me rephrase this..."); A176 ("That refers only to Mr. Dummitt. It does not refer to Mr. Konstantin"); A945 ("I cannot at this point make these determinations. The attorneys differ. Once again, if it is an issue on which yo[u] differ during your deliberations, you may have the record reread. And I will instruct you on the law if need be").[32]

Prior to summations, Supreme Court provided the jury with a primer on the law to give them "a context in which to understand the attorney's summations." A933; A910-11 ("In the Dummitt case, the issues involve a failure to warn, dangers with the product. In the Konstantin case, the issues involve the Labor Law and providing a safe workplace for workers...This is just a brief outline, I will instruct you more fully on the law after the summations and before you begin your deliberations."); see also RA76-78. Then, during the charge, Supreme Court carefully differentiated between the claims. A951 ("I will refer to the Dummitt case first in my instructions"); A969 ("...I'm now going to instruct you on the law

[32] Supreme Court's statement that it could not "at this point make these determinations" (A945), is not indicative of confusion, but of an unwillingness to either disrupt summations or usurp the role of the jury. By omitting the ensuing statements, Appellant takes this instruction completely out of context.

that's applicable in the Konstantin case since, as I indicated to you, that is a different set of laws. The Konstantin case involves the Labor Law. So you should have the jury questions regarding the Labor Law").

Additionally, Judge Madden provided the jury with notebooks to distinguish between the evidence presented in each case (A179-80, A998-99), and with individualized verdict sheets (A951, A1126-43), which further reduced the risk of prejudice. See Johnson, 899 F.2d 1281, supra (individualized verdict sheets reduce the risk of confusion). Supreme Court instructed the jury that "[t]here are two separate interrogatories...Each of these cases has to be evaluated separately and independently." A951. See Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1497 (11th Cir., 1985) (no prejudice where court issued "a cautionary instruction, reminding the jurors that, during their deliberations, they would have to consider each of the plaintiffs' claims separately"). These cautionary instructions and intelligent management devices more than alleviated any potential for jury confusion. See Batista, 2010 WL 9583637, supra at *4.

Contrary to Appellant unfounded argument, Plaintiffs' counsel did not "mix together the evidence." App. Br. at 45. Plaintiffs' counsel assisted in relieving any potential jury confusion by consistently differentiating between the evidence presented in these cases. See, e.g., A208, A375, A723, A728, RA44.

Thus, Supreme Court resolutely "safeguarded against" Appellant's right to a fair trial and "present[ed] the different causes of action in such a manner as [to] enable the jury fairly and intelligently to pass upon the different issues." Akely, 238 N.Y. 466, supra at 476. It is no surprise, then, that even a cursory review of the verdicts eviscerates any notion of jury confusion.

3. There is not even an inkling of jury confusion evident in the verdicts, which conform exactly to the evidence adduced in each separate case

Appellant cites Malcolm for the proposition that prejudice is established when there is an "unacceptably strong chance" that jury confusion resulted. Id. at 352. That statement, however, was predicated on the jury simply giving up amid the "torrent of evidence" due to "48 plaintiffs, 25 direct defendants, numerous third-and-fourth party defendants, and evidence regarding culpable non-parties and over 250 worksites throughout the world." Id. Consequently, jury confusion in Malcolm was evidenced by an allocation that was "hard to explain," namely, that two defendants were apportioned equal fault despite a significant difference in the evidence presented against them. The "unacceptably strong chance" of jury confusion, therefore, was manifest in the *actual* verdicts.

Here, conversely, there was neither a "torrent of evidence" resulting from just two plaintiffs, three defendants, and a handful of worksites, nor anything in these two verdicts that is "hard to explain." Id. The verdicts are bereft of even a

hint of jury confusion as a result of the joint trial setting (or even the closing hours policies), as recognized by the Appellate Division. A30 ("[h]ad the jury been confused, as TLC asserts it must have been, it could not have rendered an individualized verdict for each plaintiff consistent with the specific evidence presented with reference to that plaintiff.")

The jury, in fact, did the exact opposite of "throwing up its hands." Malcolm, supra. To be extra careful that it understood the minor differences between the theories of liability, during deliberations the jury requested that the Labor Law charge be read back. A1007. Supreme Court complied, again providing the jury with a copy of the specialized verdict sheet. RA90 ("I think it's easier if you have the verdict sheet...so you can follow along").

The jury then rendered distinct verdicts that conform precisely to the evidence adduced in each case. The verdicts differ as to (1) nonparty liability, (2) apportionment, (3) damages, and (4) life expectancy.

Nonparty liability: The jury found nonparties liable in this case but not in Dummitt. A1130-33, A1140-42. In Dummitt, the jury recognized that no evidence was presented regarding the negligence of the nonparties. A1128-33; RA83, RA86 ("You've heard virtually nothing about these other companies in terms of their negligence"). By contrast, here, the jury recognized that a failure to warn claim

against the nonparty joint compound manufacturers was proven. A1140-42. This inured to TLC's benefit by reducing its own share of fault. See C.P.L.R. 1603.

Apportionment: Understanding that Mr. Dummitt was exposed to asbestos from hundreds of Crane products, thousands of times, whereas he was exposed to asbestos from one Elliott product only 23 times (A748-827), the jury apportioned 99% fault to Crane and 1% fault to Elliott. A1133. Certainly, the claims against Elliott were not "bolstered." Conversely, the jury understood that since Mr. Konstantin was equally exposed to asbestos from the joint compound manufacturers (A313-14, A400), they deserved equal fault. A1142.

Moreover, the jury recognized that TLC was more culpable than the joint compound manufacturers based on overwhelming evidence that it (1) was liable both actively (for sweeping) and derivatively (for supervisory control), (2) was in the best position to protect Mr. Konstantin, who was exposed as a bystander, and (3) had actual knowledge of the dangers compared to the nonparty tortfeasors' mere constructive knowledge. A308-57, A430, A505, A512, A731-32, A864-66, A1034, A1060-65. See Murphy v. Columbia University, 4 A.D.3d 200, 201-02 (1st Dept., 2004) (75% fault to general contractor and 25% fault to subcontractor supported where G.C. was actively liable).

Damages: Recognizing that up to the time of trial, Mr. Dummitt's pain and suffering had been more extensive than Mr. Konstantin's, the jury awarded Mr.

Dummitt $16 million for past pain and suffering while only awarding Mr. Konstantin $7 million – less than half. A1135, A1142.[33] Appellant's allusion to the "possibility" that absent consolidation, the jury never would have arrived at this verdict is insufficient to constitute prejudice to a substantial right, and, in any case, is simply untrue. App. Br. at 48. As Appellant acknowledges, a virtually identical damages award was rendered in the individually-tried Hillyer action (see App. Br. at 27), among other *higher* individual damages awards that Appellant does not even acknowledge. See Argument Section I(A)(iii) supra at p.32.

In any event, Appellant's bolstering argument is moot in light of Supreme Court's remittitur, which, notably, also reflects the distinction in past pain and suffering between these cases, to wit, $5.5 million for Mr. Dummitt compared to $4.5 million for Mr. Konstantin. A89-94; Dummitt, 36 Misc.3d 1234(A), supra.[34]

Life expectancy: The verdicts were so precise that the jury set Mr. Konstantin's life expectancy as 18 months (A1142) based on just one question and

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[33] Appellant claims that Mr. Konstantin continued to engage in "normal activities," including playing drums in a band. App. Br. at 59, n.34. He did so in pain, on a very limited basis, and often hired a replacement drummer because he was in too much pain to play. A416-24, A436. In any event, the jury clearly took this into account by awarding him less than half of what it awarded Mr. Dummitt for past pain and suffering.

[34] The mootness of Appellant's bolstering argument is, perhaps, why Appellant advances an unfounded "inflated baseline" argument. App. Br. at 48, n.25. These remitted awards do not "deviate materially" from other comparable awards irrespective of the "baseline" jury award (see Argument Section I(A)(iii) supra at p.34, n.13), and Appellant benefitted immensely from being permitted to ask for remittitur twice. See Cochetti v. Gralow, 192 A.D.2d 974, 975 (3d Dept., 1993) (Supreme Court, in addition to Appellate Division, can remit damages post-verdict).

answer (A479) ("one to two years is probably the most appropriate time frame for him"), and Mr. Dummitt's life expectancy as six months (A1135) based, again, on one question and answer. A381.

Simply put, the jury "consider[ed] and properly decide[d] by themselves the separate issues which ar[o]se in connection with each cause of action." Akely, 238 N.Y. 466, supra at 475. Therefore, Appellant's speculative – and largely disproven – allegations of prejudice are insufficient to show an abuse as a matter of law.

iv. The joint trial promoted the salutary goals of consolidation

Far from depriving Appellant of its right to a fair trial, the result here exemplifies how consolidation should work. See C.P.L.R. 602 (joint trials "avoid unnecessary costs or delay"); Brooklyn Nav. Shipyard Cases, 188 A.D.2d 214, supra ("joining cases together is designed to 'reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases'"); Siegel, N.Y. Prac. 128 (5th ed.) ("joint trials are today preferred remedies because they reduce calendar congestion and economize legal and judicial effort").

The joint trial greatly reduced the cost of litigation since Plaintiffs avoided having to each pay for three common experts and their trial counsel was able to economize expenses. Even Appellant had a cost reduction because its trial counsel also represented a defendant in the Dummitt action. A161-62, A200-01, A206-07. Judicial economy was clearly promoted, as at least three full trial days were

conserved by avoiding the duplication of testimony from three experts, and a number of legal issues were considered and decided in one trial rather than two. RA7-8, RA57-58, RA60, RA70. Since only one jury was empaneled, a significant number of jurors were preserved for use on other cases. Cf. Consorti, 72 F.3d 1003, supra at 1006 ("[t]he waste of time and expense involved in empaneling separate juries to decide the same sorts of questions over and over again is staggering"). The joint trial also helped to foster settlement. See Brooklyn Navy Shipyard Cases, supra at 224-25. Of the seven cases originally joined for trial, five resolved in their entirety prior to trial, and of the seven defendants that began this joint trial amid the two cases, only three took a verdict.[35]

Further, the joint trial led to a speedier disposition and preserved the Plaintiff's trial preferences. See id. Due to Supreme Court's busy docket, it is likely that at least one Plaintiff would not have lived to see his day in court but for the joint trial, as both died during the pendency of their intermediate appeals.[36]

Thus, the salutary goals of consolidation were met by the joint trial, and there is not a scintilla of evidence that Appellant was deprived of a fair trial in any

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[35] Any conclusory assertion in Appellant's Reply Brief that the joint trial somehow forced defendants to settle would be contradicted by the fact that three defendants chose to defend themselves to verdict.

[36] Notably, Mr. Konstantin would be severely prejudiced by a new trial. Since he is deceased, he would be unable to testify at his own trial and he does not have videotaped testimony. His death should not inure to Appellant's benefit, particularly where Appellant has not contested on appeal that its negligence caused Mr. Konstantin's injury.

way. By all indications, the joint trial led to a fairer result in light of the jury's ability to compare these cases. See McPadden, 173 F.R.D. 87, supra at 91.

II. APPELLANT'S CHALLENGE TO THE QUANTUM OF DAMAGES IS NONREVIEWABLE AND, IN ANY EVENT, BASELESS

Appellant's challenge to the reasonableness of the remitted damages award is outside this Court's scope of review. See Rios v. Smith, 95 N.Y.2d 647, 654 (2001) ("to the extent [defendant] contends that the award of damages [as remitted] was excessive, this raises an issue beyond the scope of our powers of review"); Tate by McMahon v. Colabello, 58 N.Y.2d 84, 86 n.1 (1983). Indeed, Appellant cites to *subsection (c)* of C.P.L.R. 5501, which authorizes the "Appellate Division" to remit damages; Appellant does not cite to subsection (b), which governs this Court's power and omits remittitur. See McKinney's Statutes 240 ("where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"). This should result in an automatic affirmance. See Vadala v. Carroll, 59 N.Y.2d 751, supra at 752-53.

In any event, the remitted damages do not deviate "materially," or at all, from what would be reasonable compensation. C.P.L.R. 5501(c). Beginning at age 52, Mr. Konstantin endured *five* surgeries (including the removal of his testicle and scrotum), two rounds of chemotherapy and one round of broad-range radiation

with debilitating side effects, "unbearable" pain as well as severe mental affliction for 33 months, and metastasis of his mesothelioma to his pleura, meaning his future pain and suffering would be akin to having both pleural and tunica vaginalis mesothelioma simultaneously for an 18 months period. A238-40, A359-73, A390, A461-80, A1077-98, RA9-31. The Appellate Division thus appropriately concluded that the remitted award was "supported by the fact[s]." A47.[37]

Strikingly, Appellant does not mention any of the foregoing facts, except the metastasis of Mr. Konstantin's mesothelioma to his pleura, which is certainly

[37] Appellant speciously labels the Appellate Division's approach to damages as a "uniform" per month calculation, and then criticizes the Appellate Division for purportedly using that approach. App. Br. at 57. Initially, Appellant explicitly invited the Appellate Division to employ a uniform calculation, going so far as to include in its brief an entire chart identifying "compensation per month" of prior awards, before avowing that the amount awarded in this case "*should have been, at most, $100,000 per month*" and that "reasonable compensation is at most $3.8 million, *using the $100,000 per month figure.*" (App.'s First Dept. Br. at 45-48) (emphasis added). This should not be condoned, particularly where a monthly calculation was not even employed by the Appellate Division. Rather, in response to TLC's improper per month invitation, the Appellate Division merely stated that the past pain and suffering award "equates to $136,000 per month, [which is] plainly within the range of what even TLC argues is accurate." A46. This was a reflection of why Appellant's argument was baseless, rather than an approbation of a "uniform" monthly calculation, which the Appellate Division has previously rejected. See Marshall, 28 A.D.3d 255, supra at 256 ("Defendant argues that damages for pain and suffering should be calculated on a per month basis. We reject this argument."); cf. Reed v. City of New York, 304 A.D.2d 1 (1st Dept., 2003), lv denied 100 N.Y.2d 503. Indeed, the very next sentence in the Order begins with the word "Moreover," and goes on to discuss in detail Mr. Konstantin's extensive, escalating, and individualized pain and suffering. A46-47. See Caprara, supra (a damages "evaluation does not lend itself to neat mathematical calculation"). What is worse, Appellant next claims that the average monthly award here of $156,862 deviates materially from what would be reasonable compensation, but it suggested to the Appellate Division that an award of $156,000 was within the range of reasonable compensation (see App. First Dept. Br. at 45) ("recent asbestos awards for pain and suffering in mesothelioma cases range from approximately $85,000 to $156,000 per month"). This, too, should not be condoned.

"unprecedented." In arguing to the contrary, Appellant does not cite a single case in which a plaintiff had metastasis of mesothelioma to another location of mesothelial tissue in the body, or even a case involving an 18-month life expectancy.[38] The future damages award was thus quite reasonable. Compare Cardinal v. Garlock, Inc., 1997 WL 34611530 (Sup. Ct., N.Y. Cty., 1997) ($1.75 million for six months future damages), aff'd by Ronsini v. Garlock, 256 A.D.2d 250, 252 (1st Dept., 1998), lv denied 93 N.Y.2d 818.

In this regard, it is of no moment that the Appellate Division did not expressly compare other damages awards. Reasonable compensation "cannot be based upon case precedent alone" (Po Yee So v. Wing Tat Realty, 259 A.D.2d 373, 374 (1st Dept., 1999)), since "[i]n no two cases are the quality and quantity of such damages identical." Caprara, 52 N.Y.2d 114, supra at 127. Thus, although helpful, similar awards are not "in any way binding upon the courts in the exercise of their discretion." Senko v. Fonda, 53 A.D.2d 638, 639 (2d Dept., 1976).

[38] Instead, Appellant cites to an article from www.cancer.org, which states only generally that 90% of cancer suffers have metastasis. See App. Br. at 59, n.33. The spread of cancer generally to surrounding tissue, which is common, is entirely different from the spread of mesothelioma to one of the three other discrete locations in the body where mesothelial tissue exists. A484. Unlike suffers of many other cancers, mesothelioma victims typically do not live long enough for that unique type of metastasis to occur. A475 (average survival is "12 to 18 months" from diagnosis). That Mr. Konstantin lived long enough for that to occur, and that it actually did occur, more than justifies the remitted future damages award.

Nevertheless, Appellant fails to acknowledge that Supreme Court remitted damages here and clearly compared this award to others. A89-93. Cf. Reed, 304 A.D.2d 1, supra at 7 (trial court's decision accorded great weight since it is in the best position to assess the evidence presented at trial). Moreover, the Appellate Division was presented with numerous awards for comparison. See App.'s First Dept. Br. at 45-48; Resp.'s First Dept. Br. at 59-62. The fact that the Appellate Division did not explicitly cite to other cases is not indicative of a failure to comply with C.P.L.R. 5501(c). Cf. Caprara, supra (declining to delineate "more rigid guidelines for the evaluation of an always varying pattern of damages"); Senko, supra. Indeed, as Appellant acknowledges (see App. Br. at 54-55), remittitur – for all types of injuries – is routinely addressed without a comparison to other cases, including where members of this Court sat on the panel. See, e.g., Lauto v. Catholic Health Sys., Inc., 125 A.D.3d 1352 (4th Dept., 2015) (Fahey, J.); Penn, 85 A.D.3d 475, supra at 477 (Abdus-Salaam, J.); Popolizio v. Cty of Schenectady, 62 A.D.3d 1181 (3d Dept., 2009) (Stein, J.); Vogt v. Paradise Alley, 30 A.D.3d 1039 (4th Dept., 2006) (Pigott, J.).

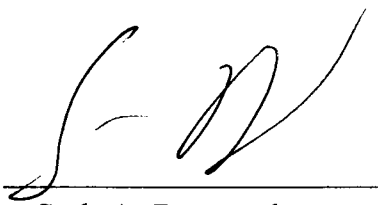
Therefore, the Appellate Division acted in accordance with its statutory mandate, and even if considered (for now a third time), the remitted damages award should not be further disturbed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Appellate Division should be affirmed, with costs to Respondents, and the certified question answered in the affirmative.

Dated: New York, New York
June 5, 2015

Respectfully submitted,
BELLUCK & FOX, LLP

By: 

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