To Be Argued By:
KATHLEEN M. SULLIVAN
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APL-2014-00317
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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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

Respondent's brief acknowledges that consolidation of asbestos cases for trial in New York continues to be "routine," but urges this Court to approve that practice by interpreting CPLR 602(a) to allow such consolidation based on only the most general similarities among cases. Respondent's interpretation departs from established precedent, raises serious due process concerns, and runs against the tide in other jurisdictions. The trial below presents a textbook example of why this Court should reaffirm the need for faithful application of CPLR 602(a) as much in the asbestos context as elsewhere.

To begin with, there is no longer any need for any "asbestos exception" to CPLR 602(a). As Respondent cannot dispute, unlike several decades ago when asbestos actions overwhelmed New York courts, there is no longer a deluge of asbestos-related cases involving plaintiffs who worked at the very same sites or were exposed to the very same asbestos materials. To the contrary, the asbestos cases being "routinely" consolidated today, like the cases at issue here, typically involve plaintiffs claiming exposure to asbestos at different worksites, in different occupations, from different products, made by different defendants, for different durations, resulting in differing diseases and health statuses, under different legal theories. Joint trial in such cases fails to promote any meaningful judicial economy.

Moreover, joint trial of such disparate cases risks fundamental unfairness and prejudice to defendants, as Respondent's brief itself unintentionally confirms. Respondent offers (Br. 18-19) a two-page list of just a few of the repeated instructions, corrections, and cautions that the trial court was compelled to give in order to try to help jurors keep the different cases straight. Respondent attempts to blame this "very, very disjointed" trial (A384) on early court closing hours and a tardy juror, but that suggestion is baseless. The very admonitions Respondent cites were necessary only because the evidence in two very different cases was confusingly intermingled at trial, increasing the chance that the jury would misattribute each case's facts to the other. A joint trial so conducted violates the basic due process principle that each case be decided on its own merits. For these reasons, the First Department's Decision and Order should be vacated, and the case remanded for a new and separate trial.

Respondent devotes little space to explaining why, alternatively, the judgment below should not be remanded for further remittitur pursuant to CPLR 5501(c). In that statute, the Legislature specifically directed the Appellate Division to scrutinize a damages award challenged as excessive by comparing it with similar cases in order to keep damages for comparable injuries in a tight range. And CPLR 5522(b) directs the Appellate Division to provide a written reasoned analysis for each remittitur decision. Those requirements enable meaningful

comparison with future cases, necessary to avoid spiraling damages awards. Respondent does not dispute that the First Department failed to follow either requirement here, suggesting merely that those rules may be ignored as too burdensome. But a court may not ignore a legislative mandate. And doing so here would risk a continued escalation of damages awards in asbestos cases. If not remanded for new trial, the case should be remanded for further remittitur.

ARGUMENT

POINT I

RESPONDENT IS UNABLE TO DEFEND THE "ROUTINE" CONSOLIDATION OF ASBESTOS CASES HAVING LITTLE IN COMMON WITH EACH OTHER

A. TLC Did Not Waive Its Objection To Consolidation

Respondent errs in suggesting that TLC's consolidation challenge is unpreserved because it did not object to the "trial ruling" joining "'these two cases.'" Resp. Br. 35 (quoting A447-48). To the contrary, TLC timely objected to consolidation by joining the papers filed by all defendants opposing plaintiffs' motion for consolidation, which objection the trial court overruled. A1167, A1171.[1] TLC's appeal from the final judgment includes that order, as the First Department held. *Matter of New York City Asbestos Litig. (Konstantin)*, 121

[1] As Respondent acknowledges (Br. 9 n.3), these joint motion papers were filed only in one case, *Altuchoff*, and not in *Dummitt* or *Konstantin*. *See* App. Br. 9 n.5, 16 n.8.

A.D.3d 230, 241 (1st Dep't 2014) (A22). TLC had no obligation to renew its objection during trial to preserve it. *See, e.g.*, *People v. Finch*, 23 N.Y.3d 408, 413 (2014) ("[A] lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected. When a court rules, a litigant is entitled to take the court at its word.") (citations omitted); *Geraci v. Probst*, 15 N.Y.3d 336, 342 (2010) ("[An] issue … placed squarely before the court" on "arguments … sufficient to alert Supreme Court to the relevant question [is] sufficiently preserved … for appellate review."). The First Department correctly so held. 121 A.D.3d at 241 (A22) ("Nor was a renewed objection to consolidation necessary after the court whittled down the cases to [Konstantin's] and Dummitt's only.").

In any event, the trial court acknowledged during trial "the fact [that] the defendants"—which included TLC—"have objected to the consolidation of the actions for trial from the inception" (A449), and it evaluated TLC's post-trial objection to consolidation on the merits (A85-86), as did the First Department, 121 A.D.3d at 242-46 (A23-31). The consolidation issue thus was squarely presented to both the trial court and the First Department, ruled on by both courts, and is properly preserved for this Court's review.[2]

[2] TLC's reference to the defendants in *Dummitt* during trial reflects its effort to help the jury distinguish between the two cases—not, as Respondent argues (Br. 37 (citing A934)), TLC's acquiescence to consolidation.

B. Respondent Misstates The Standard For Consolidation Under CPLR 602(a)

On the merits, Respondent treats asbestos-related cases as a unique category of litigation—cases that should be "routinely" joined for trial because of their purportedly broad similarities and need for expedited consideration. But there is no unstated "asbestos exception" to CPLR 602(a). Asbestos cases, like all others, must "involv[e] a common question of law or fact" before consolidation is permitted. CPLR 602(a).

1. CPLR 602(a) Does Not Create A Presumption In Favor Of Consolidation

Respondent errs at the threshold by repeatedly misstating the CPLR 602(a) standard. Respondent, for example, incorrectly asserts (Br. 60) that "consolidation is favored by the courts and should be granted unless the opposing party demonstrates prejudice …." In fact, as this Court has held, the *movant* must first show "a plain identity between the issues involved in the two controversies," before the burden shifts to the party opposing consolidation to show "prejudice to a substantial right." *Matter of Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 161-62 (1970); *see also Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) ("Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial."). Similarly, Respondent's contention (Br. 34, 65) that there is a "presumption in favor of joinder" unless the

defendant demonstrates a "miscarriage of justice," rests on a case that applied the Federal Rules of *Criminal* Procedure, under which there is indeed "a preference … for the joint trial of defendants indicted together," and "[a] defendant raising a claim of prejudicial spillover bears an extremely heavy burden[and] must show that he may suffer prejudice so substantial that a miscarriage of justice will occur." *United States v. Solomonyan*, 451 F. Supp. 2d 626, 650 (S.D.N.Y. 2006) (quotation marks omitted). No such standard applies to consolidation under CPLR 602(a).

Respondent also suggests (Br. 41) that "a single common issue suffices" for consolidation but cites only cases in which, unlike here, a single issue was the crux of the disputes in the consolidated cases. *See, e.g.*, *Harby Assocs., Inc. v. Seaboyer*, 82 A.D.2d 992, 992 (3d Dep't 1981) (common issue was a single "city-ordered demolition" of a block of buildings); *Chiacchia v. Nat'l Westminster Bank USA*, 124 A.D.2d 626, 628 (2d Dep't 1986) (common issue was parties' divorce and asset dispute); *see also Symphony Fabrics Corp. v. Bernson Silk Mills, Inc.*, 12 N.Y.2d 409, 413 (1963) (when two arbitrations arose from same set of transactions—sale of silks from manufacturer to seller to buyer—consolidation was appropriate because same issues would arise "[w]ith or without a consolidation"). Those cases comport with the principle—which Respondent disregards—that commonality must involve "at least … some *important* rules of law and some *substantial* issues of fact," *Gibbons v. Groat*, 22 A.D.2d 996, 997

(3d Dep't 1964) (emphasis added), not tangential similarities at a high level of generality, as here.

2. Practical Concerns Cannot Justify Consolidation Without Regard To CPLR 602(a)

Respondent also offers several practical reasons that purportedly support consolidation here, none of which justifies abandonment of the statutory requirements of CPLR 602(a) and constitutionally guaranteed due process.[3]

First, Respondent argues (Br. 29) that, without consolidation, future terminally-ill asbestos plaintiffs will not see their day in court. But the "accelerated trial preferences for terminally-ill asbestos plaintiffs" (*id.*) do not warrant special treatment for *consolidation*. Each of the authorities that Respondent cites addresses *when* actions should be set for trial,[4] not *whether* they should be consolidated. None allows consolidation without regard for statutory

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[3] Respondent cites (Br. 30) two cases as evidence that courts "routine[ly]" deny consolidation, but those cases are the exception that proves the rule. *See Matter of New York City Asbestos Litig. (Adler)*, No. 190181/11, 2012 WL 3276720, at *9 (Sup. Ct. N.Y. Cnty. Aug. 7, 2012) (denying consolidation of one plaintiff's case because "[n]one of the *Malcolm* factors … weigh in favor of a joint trial"); *Bischofsberger v. A.O. Smith Water Prods*., No. 107352/2005, 2012 WL 4462393, at *4 (Sup. Ct. N.Y. Cnty. Sept. 19, 2012) (denying consolidation due to overwhelmingly "unique" exposure, state-of-the-art, defenses, and defendants).

[4] *See* NYCAL Amended Case Management Order (TLC's Compendium of Unreported Authorities ("App. Comp.") 39-41 (¶¶ XIII(A)(1); XIV(A) VIII(a)(1)); CPLR 3403(a)(6), 3407; *In re Raymond Dean L*., 109 A.D.2d 87, 88 (4th Dep't 1985); *Soto v. Maschler*, 24 A.D.2d 893, 893 (2d Dep't 1965); David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3403:4 (TLC's Reply Compendium of Unreported Authorities ("Reply App. Comp.") 37).

prerequisites.[5] Moreover, consolidation does not even necessarily result in speedier dispositions,[6] and thus asbestos plaintiffs would not automatically get their day in court sooner as a result of consolidation.

Second, Respondent contends (Br. 28) that "'barring' the consolidation of asbestos actions would render administration of the entire New York County Civil Part unworkable." Faithful application of CPLR 602(a) is a far cry from a "bar" on consolidation,[7] but in any event, Respondent does not dispute TLC's showing (App. Br. 22-23) that, since 2007, the number of new asbestos-related filings nationally has hovered around 20% of 2001 levels. Indeed, Respondent admits (Br. 27-28) that there are now fewer asbestos filings than several decades ago. And again, consolidation would not help clear the courts' case load as a matter of course. A faithful application of CPLR 602(a) would not disable the New York civil justice system.

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[5] While Respondent suggests (Br. 3) that CPLR 602(a) be "liberally-construed," "even a remedial statute must be given a meaning consistent with the words chosen by the Legislature," *Enright v. Eli Lilly & Co*., 77 N.Y.2d 377, 385 n.1 (1991) (cited in Resp. Br. 45).

[6] *See* Peggy L. Ableman et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency*, 14 Mealey's Asbestos Bankruptcy Report No. 9, at 12-13 (Apr. 2015) (Reply App. Comp. 13-14); *see also infra*, at 11.

[7] Contrary to Respondent's repeated assertions (Br. 1, 23 n.7, 28), TLC does not seek to "bar" consolidation of asbestos cases but argues only that "CPLR 602(a) bars the *prejudicial consolidation* of asbestos actions *lacking any common issue of fact or law* apart from asbestos exposure." App. Br. 18 (emphasis added).

Third, Respondent questions (Br. 32-34) the well-documented conclusion that consolidated asbestos cases generate much higher average damages for plaintiffs than individual cases.[8] But Respondent's rebuttal of the scholarly studies is unpersuasive.[9] Nor is Respondent correct to assert (Br. 32) that TLC's chart (App. Br. 27) is "inaccurate" because it does not include *older* verdicts that Respondent references. *See* App. Br. 26 (chart contains verdicts "from 2009 to the present").[10] Respondent argues that *Hillyer* shows that individual awards may be high, but that only demonstrates that outlier verdicts can occur in all contexts. The evidence amply supports the conclusion that, on average, consolidated trials unfairly favor plaintiffs. Indeed, as TLC explained (App. Br. 29-30), many other

[8] Even more recent studies confirm this effect. *See* Ableman, *supra*, Reply App. Comp. 2 (from 2010 to 2014, "consolidated verdicts are 250% more per plaintiff than NYCAL awards in individual trial settings").

[9] For example, Bordens's and Horowitz's article is not an "analysis of an 80-case joint trial" (Resp. Br. 33 n.12) but a research study on the basis of which the authors conclude that consolidation "significantly affects the outcome of a trial" (App. Comp. 123), and that consolidation may work only when "the cases making up each class of plaintiffs [are] similar" (App. Comp. 118). Respondent also discounts (Br. 33 n.12) White's conclusion that asbestos plaintiffs are statistically more likely to win in a consolidated trial than plaintiffs in individual trials as limited to cases consolidating non-disabled and disabled plaintiffs. In fact, White found that in consolidation cases generally "evidence that is relevant to one plaintiff's case may affect other plaintiffs' cases." App. Comp. 153. Moreover, in a separate study that Respondent does not address, White determined that certain asbestos defendants "appear callous," which may spill over on other defendants, "mak[ing] jurors more sympathetic to plaintiffs." App. Comp. 149.

[10] Respondent also incorrectly contends (Br. 32) that the *Peraica* and *Dietz* trials were improperly categorized in TLC's chart. *See* Ableman, *supra*, Reply App. Comp. 15.

jurisdictions have recently substantially curbed the use of trial consolidation in asbestos cases based on a widespread concern about unfair outcomes.[11]

Fourth, Respondent defends (Br. 30) "routine" consolidation of asbestos cases by arguing that "in extremis asbestos actions generally share significant common questions of law and fact." But the question is not whether, at some abstract level, actions share "general[]" common issues, but whether *particular* substantial facts and important issues overlap so significantly that consolidation could result in judicial efficiencies without prejudice to defendants. And while, as TLC explained (App. Br. 22), asbestos actions may have tended to have common

[11] Contrary to Respondent's contentions (Br. 25-26 & n.8), five jurisdictions *judicially* prohibited consolidation of asbestos actions—San Francisco, on the ground that such consolidation was improper (App. Comp. 90-91); Delaware, by ordering that multiple plaintiffs cannot litigate together unless the claims relate to the same person or his/her household (App. Comp. 67); Michigan, in view of "traditional principles of due process" (App. Comp. 156 (Markman, J., concurring)); and also Mississippi and Ohio, where the respective Supreme Courts promulgated generally applicable rules of civil procedure barring consolidation (App. Br. 29 nn.17-18).

Kentucky, Kansas, and Georgia prohibited consolidation of asbestos actions legislatively and though those dockets are smaller than those in New York (Resp. Br. 26 n.8), New York has a disproportionately large number of asbestos filings (App. Comp. 152), in part because it allows consolidation. *See* Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 517 (2008) (App. Comp. 101) ("Consolidations have provided an overly hospitable environment for weak cases.").

And still other jurisdictions have strictly limited consolidation of asbestos cases including by, for example, prohibiting consolidation of pleural mesothelioma cases with non-pleural mesothelioma cases. *See* Gen. Ct. Reg. 2012-01 (§ 6(e)) *In Re: Mass Tort & Asbestos Programs* (Pa. Ct. Comm. Pleas, Phil. Cnty. Feb. 15, 2012) (Reply App. Comp. 32).

facts and law decades ago, such as when plaintiffs worked at a single site like the Brooklyn Navy Yard, *see Matter of New York City Asbestos Litig. (Brooklyn Naval Shipyard Cases)*, 188 A.D.2d 214, 225 (1st Dep't 1993), *aff'd*, 82 N.Y.2d 821 (1993), that is no longer the case. Along similar lines, Respondent is incorrect to suggest (Br. 29) that consolidation necessarily speeds disposition of cases. *See* Reply App. Comp. 13-14. Thus, even if in cases such as *Brooklyn Naval Shipyard*, where there were substantial common facts and law, consolidation could result in judicial efficiencies, the same does not follow when there is no commonality and a trial requires constant interruption for limiting and cautionary instructions, as here (*see* Resp. Br. 18-19).

Fifth, Respondent is incorrect in suggesting (Br. 34) that any deprivation of due process at trial is "academic" because defendants can ask for remittitur. "[C]onsolidation should not be granted" at all if "prejudice to a substantial right is shown," *Skelly v. Sachem Cent. Sch. Dist*., 309 A.D.2d 917, 917 (2d Dep't 2003), and consolidation that results in prejudice requires vacatur of the judgment and new trial, *Malcolm v. National Gypsum Co*., 995 F.2d 346, 354 (2d Cir. 1993), not simply remittitur of damages.

Finally, Respondent's interpretation of CPLR 602(a) as permitting consolidation of disparate cases based on commonalities at only the highest level of generality raises serious due process concerns. Due process requires that a party

have "the opportunity to present [one's] case and have its merits fairly judged." *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 433 (1982). That is not possible where, as here, cases with only the most generic of similarities are consolidated for trial. Since "statutes are to be construed so as to avoid constitutional issues if such a construction is fairly possible," *FGL & L Prop. Corp. v. City of Rye*, 66 N.Y.2d 111, 120 (1985), CPLR 602(a) should be interpreted to prohibit consolidation based on abstract and generalized commonalities.

C. Generalizations Of Facts And Law Are Insufficient To Show The Commonalities Necessary For Consolidation Under CPLR 602(a)

The *Malcolm* factors, considered by many courts in New York in evaluating commonality in asbestos actions, are intended to assist courts in "strik[ing] the appropriate balance as to consolidation *vel non*"—to determine whether "considerations of judicial economy" are present, in view of "a paramount concern for a fair and impartial trial." 995 F.2d at 350. If the factors are applied at an impermissibly high level of generality, however, there are no efficiency gains and a substantial risk of injury to defendants' fair-trial right. The First Department here generalized commonality to such a degree as to conceal the absence of any real-world efficiency gains and the prejudice to defendants from consolidation.

Respondent seeks (Br. 43, 60-61) to insulate this error of law[12] from scrutiny by asking this Court to defer to the lower courts' decisions, but the only authority Respondent offers for this requested "deference" comes from entirely different procedural contexts.[13] As explained below, Respondent's generalizations of the facts and the law are insufficient under CPLR 602(a) to support the result here.[14]

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[12] Contrary to Respondent's contention (Br. 38), TLC repeatedly referenced this standard of review (*e.g.*, App. Br. 31, 57).

[13] *See People v. Morris*, 21 N.Y.3d 588 (2013) (admission of evidence); *Plummer v. Rothwax*, 63 N.Y.2d 243 (1984) (Article 78 petition regarding re-trial); *City of New York v. Maul*, 14 N.Y.3d 499 (2010) (class certification); *Akely v. Kinnicutt*, 238 N.Y. 466 (1924) (pre-CPLR 901 class certification); *see also Matter of New York City Asbestos Litig. (Baruch)*, 111 A.D.3d 574 (1st Dep't 2013) (not mentioning deference); *In re Seventh Judicial Dist. Asbestos Litig. (Wambach)*, 190 A.D.2d 1068 (4th Dep't 1993) (same); *Matter of New York City Asbestos Litig. (Bernard)*, 99 A.D.3d 410 (1st Dep't 2012) (same). Moreover, that the CPLR 602(a) consolidation standard *differs* from the CPLR 901 class certification standard (Resp. Br. 39 n.18), demonstrates the irrelevance of cases like *Maul* and does not support a *higher* threshold for finding "abuse of discretion as a matter of law" in consolidation cases. And in any event, in *Maul*, this Court emphasized "four common allegations that transcend and predominate over any individual matters." 14 N.Y.3d at 512. And in *Akely*, which predated both CPLR 602(a) and CPLR 901, this Court approved effectively a securities fraud class action. 238 N.Y. at 473. There are no such similarities on facts or law here.

[14] As TLC showed in its opening brief (App. Br. 31-41) and shows again below, these cases share no common issues of fact or law when considered at the appropriate level of specificity. But even if one or more of the *Malcolm* factors could be said to tip in Respondent's favor—and none does—Respondent still has not demonstrated there were sufficient "important rules of law and … substantial issues of fact" in common, *Gibbons*, 22 A.D.2d at 997, to justify consolidation here.

1. The Cases Lack Substantial Common Issues Of Fact

(a) Different Worksites, Occupations, And Products

Respondent does not contest that Mr. Konstantin and Mr. Dummitt performed different work in different occupations in different worksites and were allegedly exposed to different asbestos-containing products. Instead, Respondent treats (Br. 47) the worksite and occupation factors as a single "type of asbestos exposure" factor. Respondent's argument (*id*.) that all "occupational, products-based" exposure cases may be tried together would allow legions of disparate defendants to be swept together into consolidated trials with no efficiency gains and grave risks of prejudice.[15] Nor is there any precedent supporting such a broad and general theory of commonality. To the contrary, *Malcolm* explained that a common worksite is relevant to consolidation because it establishes, for example, "common ownership, … suppliers or … practices." 995 F.2d at 353. Evaluating the "type of exposure" bypasses such particularized considerations. Moreover,

[15] It is also not supported by the cases upon which Respondent relies. In *Matter of New York City Asbestos Litigation (Conti)*, No. 114483/02, 2011 WL 1826854, at *2 (Sup. Ct. N.Y. Cnty. May 2, 2011) (cited in Resp. Br. 47), for example, the court permitted consolidation because "[a]ll of the plaintiffs claim exposure to insulation and valves" and two defendants "are common to all" plaintiffs. *See also Matter of New York City Asbestos Litig. (Ballard)*, No. 190102/2008, 2009 WL 2996083, at *5 (Sup. Ct. N.Y. Cnty. Sept. 9, 2009) ("[A]ll plaintiffs were exposed … by working directly with the material."); Order, *Carroll v. A.W. Chesterton Co.*, No. 190259/09 (Sup. Ct. N.Y. Cnty. Aug. 25, 2010) (filed Sept. 3, 2010) (Reply App. Comp. 24) (plaintiffs had "overlapping exposures, that is, exposures to various of the same asbestos-containing products as well as exposures that occurred in the same manner").

Respondent's assertion (Br. 49) that consolidation here led to "a fairer result" because it enabled a jury "to compare one worksite to another," *In re Asbestos Litig. (McPadden)*, 173 F.R.D. 87, 91 (S.D.N.Y. 1997) (quotation marks omitted), is incorrect because, as Respondent elsewhere argues (Br. 37) and the trial court ruled (A939), such cross-references between consolidated cases are improper.

Respondent likewise contends (Br. 50) that lack of a common industry is irrelevant because "state-of-the-art evidence in asbestos actions is not industry-specific," asserting (Br. 51 n.23) that *Matter of New York City Asbestos Litigation (Abrams)*, No. 108667/07, 2014 WL 3689333 (Sup. Ct. N.Y. Cnty. July 18, 2014), was "incorrect[]" in concluding otherwise. But the authority upon which Respondent relies reaffirms that state-of-the-art evidence is common when plaintiffs worked in similar industries or settings. *See, e.g.*, *Matter of New York City Asbestos Litig. (Capozio)*, 22 Misc. 3d 1109(A), at *2 (Sup. Ct. N.Y. Cnty. 2009) (common state-of-the-art evidence where plaintiffs, "engaged in similar occupations in the construction trades," were "exposed to the same type of asbestos containing insulation … at comparable commercial work sites and residential work sites"); *Matter of New York City Asbestos Litig. (In Extremis Apr. 2011/Fifos Aug. 2009)*, No. 190323/10, 2011 WL 5118158, at *3 (Sup. Ct. N.Y. Cnty. Sept. 7, 2011) ("The state of the art testimony will be substantially the same for [plaintiffs exposed] in the 1950s and [those exposed] in the 1960s" where they "all claim

significant maritime exposure"); *see also Bischofsberger v. A.O. Smith Water Prods.*, No. 107352/2005, 2012 WL 4462393, at *4 (Sup. Ct. N.Y. Cnty. Sept. 19, 2012) (where exposed person "was in the Navy at the time of the claimed exposure," "there are unique facts related to state of the art").[16] The lack of a common industry here thus unsurprisingly led to disparate state-of-the-art testimony. *See* A598-605 (Dr. Castleman's testimony as to joint compounds used on construction sites, relevant to Mr. Konstantin's case); A607-08 (Dr. Castleman's testimony as to the packing and gaskets used in boiler rooms, relevant to Mr. Dummitt's case).

(b) Different Diseases

Respondent effectively endorses consolidation of all mesothelioma cases, asserting (Br. 5) that, "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." While Respondent relies (Br. 53) upon one expert's generalized statement that "[m]esothelioma is mesothelioma" (A1075), that statement was made in reference to an article, not the

[16] Respondent incorrectly contends (Br. 51) that the trial court ruled that state-of-the-art evidence is not industry-specific. In fact, the court noted that the jury should consider "what the defendants knew or should have known at the time" (A179), and that defendants cannot ignore that which is known generally (A884, RA67) or in "relevant other fields" (RA75).

two cases here. And Respondent cannot contest there are the substantial and important differences between the diseases.[17]

Moreover, Respondent fails to acknowledge (Br. 53-57) the evidence that Mr. Konstantin's and Mr. Dummitt's different diseases raised different issues as to causation because Mr. Dummitt's pleural mesothelioma is common whereas (as the trial court found (A449)) Mr. Konstantin's mesothelioma of the tunica vaginalis is extremely rare. There were no common causation experts in the two cases. *See* A477-99, A568-69 (Dr. Markowitz in *Konstantin*); A1075 (Dr. Siroky in *Konstantin*); A209 (Dr. Moline in *Dummitt*) (cited in Resp. Br. 5). And there was no common expert testimony on any of the purported commonalities that Respondent cites.[18]

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[17] *See Adler*, 2012 WL 3276720, at *11 (denying consolidation of peritoneal mesothelioma case with pleural mesothelioma cases because it is a "distinct disease," with a "different classification code," "different risk factors," and a "unique" "underlying etiology"). Contrary to Respondent's argument (Br. 55 n.29), *Adler* did not consider that the plaintiff at issue was female. Indeed, the Philadelphia court, *see supra*, at 10 n.11, prohibited consolidation of pleural and non-pleural mesothelioma cases on the ground that "[p]leural mesothelioma is a disease that is distinct from mesotheliomas originating in other parts of the body …." Reply App. Comp. 32.

[18] Contrary to Respondent's suggestion (Br. 56), Mr. Konstantin's case would not have required "evidence regarding pleural mesothelioma" even if tried individually, for it would have been unreasonable for Mr. Konstantin to attempt to prove defendant's failure to exercise a workplace duty of care by relying on evidence of a *different* disease than the one with which he was diagnosed.

(c) Different Health Statuses

Respondent recognizes (Br. 57) that "Mr. Konstantin testified at trial but Mr. Dummitt testified via videotape," but fails to acknowledge that Mr. Dummitt's counsel told the jury that "Mr. Dummitt is home. *He is too sick to be here*." A183 (emphasis added). Mr. Dummitt's absence—combined with his counsel's acknowledgement of the reason—"present[ed] the jury with a powerful demonstration of the fate that await[ed]" Mr. Konstantin. *Malcolm*, 995 F.2d at 351-52 (quotation marks omitted).[19] These different health statuses favored separate trials even though, as Respondent notes (Br. 57), mesothelioma is typically fatal, for such a high-level commonality would obviate the health status factor entirely. Nor is this solely an issue of prejudice, as Respondent asserts (*id.*). Before prejudice may be considered, *see infra*, at 24-28, there must be sufficient commonality of facts such as plaintiffs' health statuses, which there is not here.

(d) Different Durations

Respondent does not dispute that Mr. Konstantin and Mr. Dummitt were allegedly exposed to asbestos-containing products during different time periods, but asserts (Br. 52) that only the "last date of exposure" matters, not the relative duration of exposure. Duration matters, however, because the state of the art as to asbestos varies over time, *see Curry v. Am. Standard*, No. 08-CV-10228, 2010 WL

[19] Respondent incorrectly states (Br. 58) that a relevant inquiry is whether *Mr. Dummitt* was prejudiced because the jury saw his testimony on video.

6501559, at *2 (S.D.N.Y. Dec. 13, 2010) (no consolidation where "the variation between the degree and duration of Curry and Gitto's asbestos exposure[] would likely require presentation of different, complex evidence in each case" on the state-of-the-art). Indeed, *Malcolm* compared the *duration* of plaintiffs' asbestos exposure, 995 F.2d at 351, and the cases Respondent cites analyze whether a plaintiff's "*period*" of exposure is "outside those *periods* alleged by the other plaintiffs." *Matter of New York City Asbestos Litig. (Assenzio)*, No. 190008/12, 2013 WL 1774051, at *4 (Sup. Ct. N.Y. Cnty. Sept. 7, 2013) (emphasis added); *see also Matter of New York City Asbestos Litig. (Barnes)*, No. 010321/07, 2008 WL 1730004, at *4 (Sup. Ct. N.Y. Cnty. Apr. 7, 2008) (severing plaintiff in part due to different time periods of exposure). Respondent's suggested interpretation again sweeps too broadly, effectively advocating for consolidation of all cases where the exposure ended, for example, in the 1970s.

(e) Different Defendants, Counsel, And Witnesses

Finally, Respondent does not seriously contest that the trial had no commonality between defendants or their counsel,[20] asserting only (Br. 59) that "[b]oth Plaintiffs" called three experts: Moline, Castleman, and Hatfield. That is not correct. As to Dr. Moline, Plaintiffs' counsel represented at trial that "she is not going to be addressing the Konstantin case in any way and she is not going to

[20] Defendant Aurora Pumps, represented by different attorneys than those for TLC (A216-17), was out of the trial in the first week (A277).

be talking about testicular cancer, mesothelioma or mesothelioma of the tunica vaginalis in any way." A209. With respect to Mr. Hatfield, the trial court stated:

> [T]o the extent Mr. Hatfield testified in connection with both cases, you may consider his testimony in connection with both cases. If there was only evidence presented in one case, the evidence refers to that case only. I cannot at this point make these determinations.

A945. At best, Mr. Hatfield's "shared testimony" concerned "the methods for measuring dust release from the manipulation of products," hardly a "substantial issue[] of fact," *Gibbons*, 22 A.D.2d at 997. And, as discussed above, Dr. Castleman offered separate testimony as to state-of-the-art relevant to Mr. Konstantin's case (A598-605) and as to Mr. Dummitt's (A607-08). Moreover, Respondent's two-page bulleted list of instructions, corrections, and directions to the jury (*see* Resp. Br. 18-19, *see also* Resp. Br. 6) demonstrates the jury confusion these experts caused.

2. The Cases Lack Substantial Common Issues Of Law

Respondent does not dispute that, as the trial court acknowledged, the two cases raised "a different set of laws" (A969) and "separate legal issues" (A951). Yet, like the First Department, 121 A.D.3d at 245 (A28), Respondent argues (Br. 44) that the law was common because both cases were based in negligence. That sweeping characterization of the distinct causes of action at issue here would

permit consolidation of wholly disparate cases in virtually every asbestos context, without regard to any relevant efficiencies or prejudice.

Viewed at a more appropriate level of specificity, a failure-to-maintain-safe-workplace theory (at issue in *Konstantin*) differs markedly from a failure-to-warn theory (at issue in *Dummitt*). Even the Pattern Jury Instructions ("PJI") that Respondent cites (Br. 45) illustrate the difference: The "Labor Law § 200" instruction provides that one of the relevant inquiries is whether the employer "fail[ed] to use reasonable care to provide a safe workplace," N.Y. PJI 2:216, whereas the "Strict Products Liability" instruction provides that a company "is liable for injury" from a defective product, which "is defective if it is not reasonably safe," N.Y. PJI 2:120. Even if both refer to safety, that is all the more reason that the cases should not have been consolidated, because "similar but distinct elements" of the law are likely to cause jury confusion. *See Matter of New York City Asbestos Litig. (Adler)*, No. 190181/2011, 2012 WL 3276720, at *11 (Sup. Ct. N.Y. Cnty. Aug. 7, 2012).[21]

Nor did this Court hold in *Enright*, 77 N.Y.2d 377 (cited in Resp. Br. 45), that failure-to-warn and failure-to-maintain-safe-workplace are similar, negligence-

[21] Contrary to Respondent's argument (Br. 45 n.20), *Adler* is not distinguishable because FELA has a "greatly relaxed proximate cause burden"; rather, that court denied consolidation of one plaintiff's case because it was "the only one that will involve the negligence standard of care as provided by FELA and not that of strict product liability." 2012 WL 3276720, at *11.

based theories. Rather, in *Enright*, this Court declined to allow a "so-called 'third generation' plaintiff" to pursue a strict-liability cause of action, under precedent already forbidding a negligence cause of action in similar circumstances. *Id*. at 380, 383-84.[22]

Respondent also argues (Br. 45) that there were "numerous legal issues common to both cases … addressed at trial." But Respondent cites only five instances, each of which is a joint objection to Plaintiffs' counsel's conduct[23] or a joint request,[24] and none of which illustrates any similarity of "important rules of law." *Gibbons*, 22 A.D.2d at 997.

Finally, Respondent's reliance (Br. 45-46) on legal theories against *non*parties is also misplaced. The legal claims against the nonparty joint-compound manufacturers that appeared on the verdict sheet and were allocated liability for negligent failure to warn (A979) were not similar to the claims against Crane, which itself did not manufacture any asbestos-containing products. It also has no bearing on commonalities *at trial* that "Mr. Konstantin asserted negligent

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[22] Moreover, though *Harby Associates*, 82 A.D.2d at 992 (cited in Resp. Br. 41, 44), held that "causes of action couched generally in negligence" could be joined, there was no question in that case that the actions, arising out of a single "city-ordered demolition" of buildings, all "alleg[ed] essentially negligence."

[23] *See* RA7 (Plaintiffs' video playback); RA84 (same, during closing); RA89 (jury charge).

[24] *See* RA70 (reading names of all dismissed defendants); RA72 (specific jury instruction).

failure to warn claims against [the nonparty] joint compound manufacturers, but resolved those claims prior to trial." Resp. Br. 46 n.21. Nor is it relevant for Respondent to suggest (Br. 46) that the defendants in *Dummitt* "attempted to assert" premises liability claims against nonparty shipyards (RA42, 67-68), for as Respondent admits (Br. 13 n.5, 69), those claims were not on the verdict sheet because there was virtually no evidence submitted as to them at trial.[25]

3. TLC Had No Burden To Disprove Commonality

In response to TLC's argument (App. Br. 41-42) that the First Department further erred in placing the burden on TLC to show that the actions had no common issues of law or fact, Respondent contends (Br. 60) that the First Department's reasoning merely "identif[ied] Appellant's arguments." But that ignores that the First Department held consolidation proper *because* "TLC has failed to articulate why the differences in the environment[,] … job duties," and health statuses mattered, and "why the differences between pleural and peritoneal types of mesothelioma are sufficiently significant." 121 A.D.3d at 244 (A27). That analysis improperly shifted the burden of disproving commonality onto TLC.

[25] There is also no basis for Respondent's assertion (Br. 47) that the "illogical conclusion" of TLC's argument is "that different claims in a single case should be severed." Severance of claims in a single case is not governed by CPLR 602(a) and has no relevance here.

D. CPLR 602(a) Prohibits Consolidation Where, As Here, It Prejudices A Defendant's Substantial Right To A Fair Trial

Even if the First Department's standard for commonality were not unduly permissive, a new separate trial is still warranted because the First Department erred in determining that consolidation risked no prejudice to TLC's substantial right to a fair trial. *See* App. Br. 42-50. Respondent suggests (Br. 61) that TLC's argument raises "nothing more than the 'possibility' of prejudice" from jury confusion, unfair bolstering of claims, and the repeated recklessness charge. But that is the relevant inquiry in the post-trial context; as *Malcolm* itself stated, the issue is whether "there is an unacceptably strong chance" that prejudice infected the consolidated trial. *Malcolm*, 995 F.2d at 352; *see also Bender v. Underwood*, 93 A.D.2d 747, 748 (1st Dep't 1983) (defendant's substantial right to fair trial and due process is violated by "possibility of confusion for the jury.").

Respondent's arguments as to each asserted ground of prejudice fall similarly short. *First*, with respect to jury confusion, Respondent does not dispute that the trial court itself apologized multiple times to the jury for the fragmented and "piecemeal presentation" of evidence (A374-75), and correctly described the trial as "very, very disjointed" (A384). TLC also cited (App. Br. 45-46) at least two instances of misspeaking by the trial court (A172-73, A176); and one instance of an abdication of the court's duty to assist the jury in distinguishing between the two cases (A945), evidencing how difficult it was for even the court to keep track

of the evidence. Indeed, Respondent confirms (Br. 61) that the trial was "unwieldy" by providing (Br. 18-19) a two-page bulleted list of just some of the instructions, corrections, and directions that the court or Plaintiffs' counsel directed to the jury in an effort to disentangle the evidence in the two cases. Respondent also admits (Br. 67) that Plaintiff's counsel had to "consistently differentiat[e] between the evidence presented in these cases" (citing A208, A375, A723, A728, RA44).

Respondent nevertheless seeks to minimize the prejudice by treating the trial court's instructions as a cure-all.[26] But as the Second Circuit stated in *Malcolm*, notwithstanding "the number of precautions the district court took to assure that each case maintained its identity … the sheer breadth of the evidence made these precautions feckless in preventing jury confusion." 995 F.2d at 352. And to the extent certain cases erroneously treat prejudice in the asbestos context as curable by "jury trial innovations" such as "written juror questions," *e.g.*, *Matter of New York City Asbestos Litig. (Ballard)*, No. 190102/2008, 2009 WL 2996083, at *10

[26] The conclusion in *Solomonyan*, 451 F. Supp. 2d at 650 (cited in Resp. Br. 34, 65), that limiting instructions can cure prejudicial spillover is irrelevant because, as discussed *supra*, at 6, that case was decided under a distinct federal criminal standard. And in *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985) (cited in Resp. Br. 67), the court found limiting instructions helpful because there was already "striking similarity" between the claims of the plaintiffs, who were "insulators [who] worked out of the same union hall … frequently on the same jobs." *Id*. at 1496.

(Sup. Ct. N.Y. Cnty. Sept. 9, 2009), that only demonstrates that NYCAL courts mistakenly view consolidation of asbestos cases as "routine," and do not seriously evaluate the risk of prejudice to defendants.

Respondent attempts (Br. 63-64) to shift blame for the "disjointed" trial to Defendants (for requesting legal rulings, which the trial court found were all "appropriately raised" (A454)); to one tardy juror (for delaying proceedings); and, most significantly, to the State of New York (for budget cuts that resulted in early court closing hours). But Respondent does not explain how the closing hours policies forced "disjointed" testimony (A384), mixing of the evidence (A944-45), and a confusing bevy of instructions (Resp. Br. 18-19). *See* App. Br. 45-46. Moreover, that an individual trial "would have still been impacted by the closing hour policies" to some extent (Resp. Br. 64) is a further reason that the cases should *not* have been consolidated, as consolidation served to magnify the problems caused by the policies.

Respondent also points (Br. 68-72) to the verdicts as evidence of a lack of confusion, but the opposite is true. The skewed allocation of liability (76% to TLC and 99% to Crane, neither of which manufactured the asbestos-containing products at issue), as well as the sheer magnitude of the verdicts ($19 million and $32 million)—which the trial court reduced by nearly 70% overall—are, contrary to Respondent's contention (Br. 68), "hard to explain," *Malcolm*, 995 F.2d at 352.

The purported distinctions that Respondent raises between the verdicts, each of which the trial court remitted to the identical amount, do not suggest otherwise.[27]

Second, Respondent does not dispute that the mutual bolstering of claims is prejudicial and renders consolidation inappropriate. *See, e.g.*, *Bradford v. John A. Coleman Catholic High Sch.*, 110 A.D.2d 965, 965 (3d Dep't 1985) (reversing erroneous consolidation of "negligence actions by different plaintiffs seeking to recover for injuries sustained in two separate football games"). Indeed, the outsize verdicts—totaling $51 million—and the skewed allocation of fault, *see supra*, at 26, constitute perhaps the best evidence of bolstering here. Respondent suggests (Br. 71) only that any prejudice is harmless because of remittitur.[28] But remittitur cannot moot prejudicial errors, *Malcolm*, 995 F.2d at 354 (prejudice from consolidation requires reversal), and a party does not "benefit[] immensely" (Resp. Br. 71 n.34) from being able to seek review of an issue erroneously decided in the first place. That is particularly true because the remittitur standard is often incorrectly applied, *see* Point II, *infra*; App. Br. 54-60.

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[27] For example, the jury found nonparties liable only in Mr. Konstantin's case but not in Mr. Dummitt's case because, according to Respondent (Br. 69), Crane did not present evidence about the nonparties in *Dummitt*.

[28] Respondent's argument (Br. 71 n.34) that there is no "inflated baseline" because the "remitted awards do not 'deviate materially' from other comparable awards" assumes the conclusion in question.

Third, Respondent does not contest that as a result of the repeated erroneous recklessness charges in both cases, the jury was primed to look for recklessness, resulting in the unacceptable risk that it would find TLC liable or award substantial damages for reasons untethered to the evidence.[29] Respondent notes (Br. 64) that TLC does not "independently challenge" the recklessness finding, but that is no response to TLC's assertion of prejudice from the repeated charge.

Finally, Respondent asserts (Br. 72) that this case "exemplifies how consolidation should work." Respondent's examples (Br. 73) provide no support for depriving TLC of an individualized adjudication of the claims asserted against it: the "three common experts" in fact generated confusion and required confounding cautionary instructions; the claim of "a speedier disposition" lacks support; and consolidation did not "help[] to foster" settlement but at best unfairly forced it. Consolidation of these disparate cases was highly prejudicial to TLC and, accordingly, this Court should interpret CPLR 602(a) to warrant a new trial here.[30]

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[29] The recklessness charge against TLC, for example, was baseless (*see* App. Br. 48-50), as TLC had not "intentionally done an act of an unreasonable character in disregard of a known or obvious risk," causing a high probability of harm, "with conscious indifference to the outcome." *Matter of New York City Asbestos Litig. (Maltese)*, 89 N.Y.2d 955, 956-57 (1997).

[30] Contrary to Respondent's contention (Br. 73 n.36), potential prejudice to a plaintiff from vacatur of an improper consolidation order does not bear on the question whether such an order should be vacated.

POINT II

RESPONDENT FAILS TO DEFEND THE FIRST DEPARTMENT'S LACK OF COMPLIANCE WITH THE CPLR IN AFFIRMING THE $8 MILLION DAMAGES AWARD

In CPLR 5501(c) and 5522(b), the Legislature directed the Appellate Division to "*tighten[] the range of tolerable awards*" by comparing prior awards for similar injuries and to memorialize its reasoning for future litigants and courts. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 425 (1996) (emphasis added). Respondent does not deny that the First Department here, like other panels before and since, failed to comply with those requirements. This Court's guidance is needed now to bring the Appellate Division into compliance with the legislative mandate.

A. This Court Has Authority To Review The First Department's Misapplication Of CPLR 5501(c) And 5522(b)

Respondent argues (Br. 74) that TLC's challenge to the $8 million damages award is outside this Court's review. This Court previously rejected this very argument in denying Respondent's motion to dismiss, 24 N.Y.3d 1216 (2015), as did the First Department in granting leave to appeal (A5-6). As before, this argument mistakenly assumes that TLC seeks to have *this Court* remit damages to a lesser amount. Not so. Rather, TLC contends (App. Br. 56-60) that the First Department did not apply the correct legal standard under CPLR 5501(c) in approving the $8 million damages award or explain the "factors it considered in

complying" with that provision as CPLR 5522(b) requires. TLC thus seeks "vacatur and remand to the First Department" so that the First Department—*not* this Court—can "assess the excessiveness of the award under the proper standard." App. Br. 50. This Court is fully empowered to do so in order to ensure adherence to the legal standard that the Legislature established.[31]

Nor does TLC contend on appeal that the First Department abused its discretion because it affirmed an award that is excessive under the circumstances. Rather, as discussed, TLC contends that the First Department erred as a matter of law in not applying the correct standard to determine whether the $8 million award was excessive. Indeed, the First Department certified that "its determination was made as a matter of law and not in the exercise of discretion" (A6), which Respondent does not acknowledge.

[31] Respondent's reliance on *Rios v. Smith*, 95 N.Y.2d 647 (2001) (cited in Resp. Br. 74), is misplaced. In that case, this Court declined to review only the *amount* of the damage award, not whether the Appellate Division applied the proper legal standard. *Id*. at 654. Further, Respondent's citation to *Tate by McMahon v. Colabello*, 58 N.Y.2d 84 (1983) (cited in Resp. Br. 74), actually supports TLC's position. There, this Court was asked to consider whether, during summation, trial counsel had referred to an improper standard for measuring pain and suffering—the so-called "per diem" standard. *Id.* at 88. This Court noted that the propriety of the "per diem" standard was an unsettled issue of law, but declined to consider the issue because it concluded that counsel had not made any reference to that standard. *Id*. Here, in contrast, the legal standard for remittitur of damages is properly presented for review.

TLC's argument that the First Department did not comply with CPLR 5501(c) and 5522(b) is thus well within this Court's authority to review.

B. Remand Is Necessary So That The First Department Can Apply The Proper Legal Standard Under CPLR 5501(c) And 5522(b)

On the merits, Respondent does not acknowledge the history, purpose, or even the language of CPLR 5501(c)—each of which demonstrates that the Appellate Division must "look to awards approved in similar cases" to ensure a "tight[] range of tolerable awards." *Gasperini*, 518 U.S. at 425; *see* App. Br. 52. Nor does Respondent confront the requirement in CPLR 5522(b) that the Appellate Division "set forth in its decision the reasons" for its remittitur ruling, including the "factors it considered." This Court should reinforce the Appellate Division's obligation to comply with these provisions and remand to the First Department for further proceedings on TLC's request for remittitur.

1. The First Department Did Not Expressly Compare Damages Awards Or Provide Its Reasoning

The First Department's decision lacks any citation to or analysis of prior asbestos-related awards, including recent decisions like *Penn v. Amchem Products*, 85 A.D.3d 475 (1st Dep't 2011). Respondent contends (Br. 76) that this omission "is of no moment," but neither of Respondent's purported justifications has merit.

First, Respondent contends (*id*.) that the First Department was not required to look to comparable precedent because "in no two cases are the quality and

quantity of such damages identical." But "analysis of appealed verdicts using CPLR 5501(c) is not optional," and "[c]ase comparison cannot be expected to depend upon perfect factual identity." *Donlon v. City of New York*, 284 A.D.2d 13, 16 (1st Dep't 2001); *see also Gasperini*, 518 U.S. at 425 ("New York state courts look to awards approved in similar cases."). Respondent offers no reason that the First Department could not undertake the required comparative analysis on remand, and any "[p]erceived difficulties" in undertaking that analysis "cannot provide a basis for judicial nullification of the current law." *Donlon*, 284 A.D.2d at 16. Indeed, Respondent's assertion (Br. 77) that on other occasions the Appellate Division may have addressed remittitur "without a comparison to other cases" only reinforces the need for this Court's guidance as to the proper interpretation and application of CPLR 5501(c) and 5522(b).

Second, Respondent suggests (Br. 77) that any error by the First Department in not following CPLR 5501(c) is harmless because the trial court "remitted damages here and clearly compared this award to others." The Legislature, however, specifically tasked the *Appellate Division*, not trial courts, with the responsibility of enforcing CPLR 5501(c) and 5522(b), seeking "'more careful *appellate* scrutiny'" of damages awards than under the prior "shocks the conscience" review. *Gasperini*, 518 U.S. at 423 (quoting 1986 N.Y. Laws 2021,

Ch. 266, § 1) (emphasis added). Reliance on the trial court's discussion of previous awards does not comply with the statutory mandate.

2. The First Department's Determination Of Past Pain And Suffering Is Legally Flawed

In contravention of CPLR 5501(c), the First Department affirmed the $4.5 million award for past pain and suffering without identifying an appropriate analogue for Mr. Konstantin's pain and suffering in order to determine what constitutes reasonable compensation. 121 A.D.3d at 255 (A46); *see* App. Br. 57-58. There is no dispute that, for the 13 months prior to his diagnosis, Mr. Konstantin's harm from a hydrocele (a "collection of fluid" often unrelated to cancer) differed *in kind* from the later pain and suffering more traditionally associated with mesothelioma and its treatment. A409; A461. The First Department was thus obligated under CPLR 5501(c) and 5522(b) to identify previous awards for injuries comparable to the hydrocele and determine whether the award here materially deviates from what New York courts have found reasonable. It did not do so. Respondent does not account for this obligation, discussing (Br. 74-75) only Mr. Konstantin's *post*-diagnosis pain and suffering.

Nor is there any merit to Respondent's footnoted assertion (Br. 75 n.37) that TLC "explicitly invited the Appellate Division to employ a uniform calculation" of pain-and-suffering damages. While TLC provided a chart of recent remitted asbestos decisions to the First Department, as Respondent acknowledges (*id.*), TLC

argued that the total amount awarded should be "at most $3.8 million" based on a maximum of $100,000 per month for 38 months, which did *not* include the 13 pre-diagnosis months. TLC has never argued that the First Department must apply a uniform per-month calculation, though the calculation of a per month average is a useful metric to compare pain-and-suffering awards that cover periods of different lengths.[32]

3. A Common Attribute Of Cancer Progression Cannot Sustain The Unprecedented Award For Future Pain And Suffering

The First Department's affirmance of the $3.5 million award for future pain and suffering based on the alleged metastasis of Mr. Konstantin's mesothelioma is legally flawed as well. Respondent does not dispute that metastasis is "not unusual in cancer progression" (App. Br. 59) and does not itself justify a concededly "unprecedented" award under CPLR 5501(c) (121 A.D.3d at 255 (A47)). Respondent instead states (Br. 76 n.38), without support, that metastasis is "entirely different" in the mesothelioma context because those individuals "typically do not live long enough for that unique type of metastasis to occur." Even accepting that argument as true, it does not account for the fact that

[32] Respondent elsewhere suggests (*e.g.*, Br. 76 n.38) that high damages are appropriate because Mr. Konstantin's pain and suffering lasted 51 months, longer than the average survival period for those diagnosed with mesothelioma. But the length of pain and suffering *without more* cannot justify materially deviating verdicts. If anything, a long pain-and-suffering period merits additional judicial scrutiny as the nature of the harm likely changed considerably over time, as was the case here.

metastasis, by itself, does not distinguish Mr. Konstantin's pain and suffering from the great majority of persons with cancer (*see* App. Br. 59 n.33). This supposed distinguishing characteristic thus cannot, as a matter of law, support an unprecedented award, and remand is necessary so that the First Department can consider the circumstances here against those in comparable cases as CPLR 5501(c) and 5522(b) require.

4. This Court's Guidance Remains Needed To Curb Spiraling Pain-And-Suffering Verdicts In Asbestos Cases

The First Department's Decision and Order reinforces the need for this Court to ensure that New York courts do not abdicate their responsibility to ensure that non-economic damages awards, particularly in the asbestos context, are not excessive. App. Br. 54-56. In light of the consistently increasing size of asbestos-related verdicts—which have doubled over the past ten years despite the increasingly peripheral nature of the defendants (*see* App. Br. 54)—clear instructions regarding the application of CPLR 5501(c) and 5522(b) are necessary to ensure the appropriate use of remittitur and a "tight[] range of tolerable awards." *Gasperini*, 518 U.S. at 425. Much in the same way, because the CPLR mandates that courts look to previous Appellate Division decisions, and the federal courts look to those decisions as well, *see id*. at 421, this Court's guidance and remand for additional consideration are necessary to allow better comparison of this case with future ones.

CONCLUSION

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

Dated: New York, New York
June 23, 2015

Respectfully submitted,

/s/ Kathleen M. Sullivan

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