

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

IN RE: ASBESTOS LITIGATION	:	
112010JR TRIAL GROUP	:	
Limited to:	:	
	:	
HENDERSON, BRUCE	:	C.A. No. 09C-07-188 ASB
HENDERSON, ELIZABETH	:	C.A. No. 09C-04-293 ASB

UPON PLAINTIFFS' MOTION FOR ADDITUR
OR, IN THE ALTERNATIVE, NEW TRIAL ON DAMAGES
DENIED

UPON PLAINTIFFS' MOTION TO STRIKE
DEFENDANT DANA COMPANIES, LLC'S OPPOSITION
GRANTED IN PART

Submitted: December 30, 2010

Decided: February 2, 2011

Joseph J. Rhoades, Esq. & Stephen T. Morrow, Esq., LAW OFFICE OF JOSEPH J. RHOADES, Wilmington, DE; Jerome H. Block, Esq. & Amber R. Long, Esq., LEVY PHILIPS & KONIGSBURG, LLP, Attorneys for Plaintiffs.

Beth E. Valocchi, Esq. & Joseph S. Naylor, Esq., SWARTZ CAMPBELL, LLC, Wilmington, DE, Attorneys for Defendant Dana Companies, LLC.

Timothy Jay Houseal, Esq. & William E. Gamgort, Esq., YOUNG CONAWAY, STARGATT & TAYLOR, LLP, Wilmington, DE, Attorneys for Defendant Zoom Performance Products.

ABLEMAN, J.

I. Introduction

This is the Court’s decision on a motion requesting additur, or in the alternative, a new trial on damages, filed pursuant to Superior Court Civil Rule 59 by Plaintiffs, the family members of Elizabeth Henderson and Bruce Henderson. Plaintiffs filed suit against various manufacturers and suppliers to recover damages for Bruce and Elizabeth Henderson’s deaths as a result of exposure to automotive and other asbestos-containing products. Elizabeth Henderson and her adult son Bruce both died of mesothelioma, and were survived by Elizabeth’s four other adult children. The majority of the defendants either were dismissed or settled with plaintiffs, leaving only two remaining defendants at trial: Dana Companies, LLC (“Dana”) and Zoom Performance Products (“Zoom”).

After two weeks of trial and two days of deliberation, the jury returned a verdict in favor of Plaintiffs in the following amounts:

Damages to Elizabeth Henderson for pain and suffering: \$80,000.00

Damages for Elizabeth’s children for the loss of society, support, love and affection:

Betty Sue Crawford	\$125,000.00
Kathy Lenzen	\$125,000.00
Tammy Blair	\$125,000.00
Ernest Henderson, Jr.	\$125,000.00
Bruce Henderson	\$0.00

The jury also awarded damages in the amount of \$1.16 million for Bruce Henderson’s pain and suffering, but that award is not at issue in Plaintiffs’ motion.

In seeking additur or a new trial on damages, Plaintiffs characterize the jury's award of \$80,000.00 for Elizabeth Henderson's pain and suffering as against the great weight of the evidence and "out of proportion to the enormous and prolonged suffering she endured." Plaintiffs point out that juries regularly award pain and suffering awards in the seven-figure range in asbestos-exposure mesothelioma cases—as the same jury in this case did by awarding \$1.16 million for Bruce Henderson's mesothelioma. Plaintiffs further call the Court's attention to other Delaware verdicts in mesothelioma cases that were significantly higher than the \$80,000.00 awarded here, with the implication that those verdicts should be used by the Court as guidance in modifying Elizabeth Henderson's award.

Plaintiffs also take issue with the fact that the jury did not award damages to Bruce Henderson for the death of his mother. They submit that this zero-damages award is out of proportion to the injury suffered by Bruce "to such a degree as to shock the conscience." Plaintiffs contend that Bruce's relationship with his mother was no different from those of Elizabeth's four surviving children, each of whom was awarded \$125,000.00 in damages for Elizabeth's death. A verdict of zero damages, it is urged, requires the Court to grant additur or at least a new trial on the issue of damages.

In response to Plaintiffs' motion, Zoom contends that the jury's award was within a reasonable range supported by the evidence and was not inconsistent with

Delaware verdicts for similar claims. By contrast, Dana argues “for purposes of [its] opposition only” that the verdict justifies a new trial, as Dana claims it “has all the earmarks of a compromise.”¹ Both defendants adopt the position that if the Court does determine that the award requires a new trial, any re-trial should not be limited to the issue of damages alone, because liability is inextricably intertwined with the issue of damages.

Plaintiffs moved to strike Dana’s opposition to its motion on the grounds that Dana’s argument regarding the possibility of a compromise verdict was improperly raised, as it constitutes a separate and new ground for new trial not previously presented by a Rule 59 motion, and that Dana improperly filed its response in Bruce Henderson’s case, which was not the subject of Plaintiffs’ request for additur.

For reasons that will be discussed more fully herein, the Court concludes that the jury awards of \$80,000.00 for Elizabeth Henderson’s pain and suffering and zero damages for Bruce Henderson’s loss of his mother were neither against the weight of the evidence nor so grossly out of proportion as to shock the Court’s conscience and sense of justice. Therefore, the Court declines to take any remedial action by way of additur or the granting of a new trial. Accordingly, Plaintiffs’ Motion for Additur will be denied.

¹ Def. Dana’s Opp’n to Pls.’ Mot. for Additur 1 & n.1.

II. Factual Background

Elizabeth Henderson and Bruce Henderson were two members of the same family—mother and son—who each died within about a year of each other from pleural mesothelioma, a fatal disease of the pleural lining of the lungs usually traced to exposure to asbestos-containing products. The surviving members of the Henderson family—Elizabeth’s three daughters and another son—sought damages for their mother’s wrongful death, as well as for the pain and suffering experienced by their mother and brother. Notably, no wrongful death claim was filed for Bruce Henderson, as he died without a surviving wife or children, and under Louisiana law, no beneficiaries existed to seek such damages.

The evidence at trial established that Elizabeth and Bruce lived and worked their entire lives in Louisiana, in an area known as Westbank, which is on the western side of the Mississippi River in the vicinity of New Orleans. Because of a high incidence of deaths from mesothelioma in certain Westbank communities, the area has a reputation as a “hot-spot” for asbestos-related disease. At trial, extensive testimony attributed this phenomenon to the past presence in the area of the Avondale Shipyard and a Johns-Manville manufacturing plant, which produced asbestos-containing products. Both the Avondale Shipyard and the Johns-Manville plant were located within a few miles of the Hendersons’ residences and businesses. The evidence also established that during the late 1960s and 1970s, the

Johns-Manville plant often donated its scrap asbestos to local homeowners for use in driveway paving.

From the 1950s to the early 1980s, the Henderson family owned and operated automotive repair businesses in Lacombe, Louisiana, and Bridge City, Louisiana. Mrs. Henderson worked in the parts department and performed book-keeping, accounting, and distribution functions associated with the automotive products used in the business, some of which contained asbestos. Although Bruce was employed for most of his life outside the family business, beginning in his early adolescence, he regularly helped out on weekends performing repair work on automobiles at the Hendersons' shops. He also repaired and rebuilt cars as a personal hobby during his spare time.

Trial testimony from Henderson family members supported that both Elizabeth Henderson and Bruce Henderson were exposed to asbestos-containing Zoom high-performance clutches and Dana's Victor brand automotive gaskets as a result of their roles in the garages. Elizabeth Henderson's exposure was more limited than Bruce's. She handled the products without working with them (for instance, by unpacking parts from their boxes), whereas Bruce was involved in the actual replacement of these parts in automobiles, which entailed removing old components and scraping or grinding off excess material from the new parts with wire brushes, air hoses, or other implements. In addition to this occupational and

quasi-occupational exposure at the Hendersons' businesses, Bruce also assisted in several family home-building and improvement projects in which asbestos-containing building materials were utilized.

Elizabeth Henderson was diagnosed with mesothelioma in August 2008, underwent chemotherapy treatments in late September 2008, and died of her disease a few months later in November, at the age of seventy-four. Bruce Henderson was diagnosed less than nine months after his mother's death. Bruce died of his mesothelioma on January 2010, at the age of fifty-five. Although Bruce was originally a living plaintiff in the claims involving his mother's death, he was deceased by the time of trial.

III. Standard of Review

Delaware law accords enormous deference to a jury's verdict.² By extension, a jury's finding as to damages is presumed to be valid.³ A damages award will not be disturbed except in the rare case in which it is found to be so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice.⁴

² See, e.g., *Young v. Frase*, 702 A.2d 1234, 1235 (Del. 1997).

³ *Id.*

⁴ *Mills v. Talenczak*, 345 A.2d 424, 426 (Del. 1975).

IV. Analysis

The Court is satisfied that the jury's findings in this case were fair and reasonable, that the differences in amounts for each decedent's pain and suffering were justified in light of the evidence and the jury's discretion as the ultimate finder-of-fact, and that the verdicts were neither grossly inadequate nor out of proportion to the injuries sustained. Because the Court concludes that a new trial on damages is not merited, it will disregard Dana's argument that the verdict in Elizabeth Henderson's case was the result of a jury compromise; to the extent that Dana might have relied upon that premise as a separate argument for a new trial, unrelated to the issues presented in Plaintiffs' original motion, it should have been timely raised via Dana's Rule 59 motion. Simply stated, the Court is not only *not* shocked by the jury's decision in this case, but it considers the verdicts to be the result of a thoughtful and careful assessment and consideration of a number of factors that have been overlooked by Plaintiffs in their motion.

Plaintiffs first object to the award of \$80,000.00 in damages for Elizabeth Henderson's pain and suffering as being disproportionately low in light of verdicts in other mesothelioma cases in Delaware, including the damages awarded in this same case for Bruce's pain and suffering. Plaintiffs argue that this amount was against the great weight of the evidence and out of proportion to the enormous suffering Elizabeth Henderson endured during the course of a devastating disease.

While the Court in no way wishes to diminish Elizabeth's suffering, its conscience was not shocked by the award, and it is not persuaded by any of the foregoing arguments in light of the applicable legal standards. Relevant factors justify the distinction drawn by the jury between Elizabeth and Bruce's respective circumstances.

First, Elizabeth Henderson was in her seventies when she was diagnosed with mesothelioma. Although seventy-four is hardly old by today's standards, the jury could reasonably conclude that her future life expectancy was significantly lower than her son's. Moreover, although Elizabeth's pain and suffering was intense and predated her diagnosis with mesothelioma, it was at least short-lived in comparison to that endured by plaintiffs in other types of cases, such as accident victims who may live for decades with severe chronic pain. In this case, death was swift—a fact that is indisputably one of the tragedies of a mesothelioma diagnosis, but is also a relevant consideration for the jury in calculating pain and suffering. Moreover, although Plaintiffs' counsel attempted to mitigate Elizabeth's unrelated health problems, the medical records admitted into evidence revealed that she had significant pre-existing cardiac and gastrointestinal diagnoses. The jury may also have been affected by Bruce Henderson's deposition testimony about his diagnosis and its effect on his life during his remaining months, including the loss of his relationship with his girlfriend and the impact of being diagnosed with the disease

to which he had so recently lost his mother; while there was extensive testimony regarding the course of Elizabeth's disease, she did not record a deposition prior to passing away.

Significantly, the \$80,000.00 award for Elizabeth's pain and suffering cannot be parsed or evaluated in isolation without consideration of the additional \$500,000.00 that the jury awarded on the wrongful death claim. While these separate awards are made on distinct conceptual grounds, the jury was obviously cognizant that the combined total of both awards were to be shared by the same four beneficiaries.

When viewed in light of these circumstances, the verdicts as a whole are reasonable and consistent. For the death of Elizabeth Henderson, who was seventy-four years of age when she died and not in the best of health before her mesothelioma diagnosis, the jury awarded a total that was one-half of the damages it returned for the death of fifty-five-year-old Bruce Henderson. Bruce had no other significant health issues before contracting mesothelioma, and he died at a tragically young age.

Turning to Plaintiffs' objection to the zero-damages award to Bruce Henderson for the wrongful death of his mother, the Court again is not shocked by the jury's finding, which makes sense in view of the fact that Bruce Henderson did not survive to reap the benefits of any award, nor did he have any heirs to do so.

As previously discussed, the jury was obviously well-aware that the *total* amount they were awarding—no matter how the sums were labeled—would be shared by the same four beneficiaries. The jury’s verdict reflects exacting attention to detail, including attention to the fact that awarding wrongful death damages to a deceased son without a surviving spouse or children would have made little sense. Indeed, there is some question under Louisiana law as to whether the jury could legally award damages to Bruce since he was not a “surviving” son of Elizabeth at the time of trial.⁵ While the issue was raised by Dana’s counsel during trial, the Court deferred ruling on that question because it already contemplated that the jury might see fit to exclude Bruce from any wrongful death award.

Plaintiffs’ attempts to draw comparisons between the verdicts in this case and other cases is equally unavailing. Such comparisons have no value to the

⁵ See LA. CIV. CODE ANN. art. 2315.1 (emphasis added):

A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and *child or children of the deceased*

. . .

C. *The right of action granted under this article is heritable*, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

Defendants adopted the position at trial that because Bruce Henderson died without heirs, his “heritable” survival action under Article 2315.1 was extinguished.

Court, and have even been described as “dangerous” by another Superior Court judge:

This Court has previously noted that “[i]t is difficult, if not dangerous, to refer to other cases to argue that a particular verdict is too high or too low.” It is inevitable that there will be dissimilar results in personal injury suits because no two juries will judge the effect of a plaintiff’s injuries identically.⁶

All of the facts mentioned by Plaintiffs in their motion for additur were presented at trial. It was the province of the jury, as the Plaintiffs’ *chosen* finder-of-fact, to consider all of the evidence and give that evidence the weight it deemed appropriate. The jury was instructed that it should award to Plaintiffs a sum that, in its judgment, would fairly and reasonably compensate them for their pain and suffering, and in Elizabeth’s case, for her wrongful death. These are highly fact-sensitive determinations in each individual case and defy comparison to any other situation, no matter how similar. In essence, the Court’s role in deciding a motion for additur is not to compare the verdicts in this case to those in other cases, but to determine—according to the well-established standard applied by this Court for decades—whether the award shocks the Court’s conscience and sense of justice because it is so grossly disproportionate to the injuries suffered. The verdicts here, when considered as a whole, do not shock the Court’s conscience and are not out

⁶ *Bounds v. Delmarva Power & Light Co.*, 2004 WL 343982, at *9 (Del. Super. Jan. 29, 2004), *aff’d*, 2004 WL 2850090 (Del. Dec. 2, 2004) (quoting *Berl v. Cyrus Trading Corp.*, 1998 WL 109855 (Del. Super. Feb. 19, 1998)).

of proportion to the Plaintiffs' losses. There is thus no basis to disturb the jury's decision, and nothing presented in Plaintiffs' motion justifies a new trial on the issue of damages.

Fundamentally, Plaintiffs must face the fact that litigation is risky, especially when it proceeds to a jury trial. As this Court has announced on numerous occasions, it cannot make the process risk-free. When parties demand a jury trial, as they did here, they knowingly "activate the risk inherent in the system."⁷ The Court cannot excuse Plaintiffs from the consequence of their decision to submit the matter to a jury. While Plaintiffs attempt to reargue their view of the evidence and to draw comparisons between distinctly different verdicts in other cases, the Court is not available after trial to substitute its own judgment as to Plaintiffs' damages for that of the chosen finder-of-fact.

V. Conclusion

In summary, the Court is satisfied that no basis exists to alter the jury's verdict, as the amounts awarded were both fair and reasonable. Plaintiffs' Motion to Strike Dana's Opposition is **GRANTED IN PART** so as to strike Dana's

⁷ *Galindez v. Narragansett Housing Assocs.*, 2006 WL 3457628, at *2 (Del. Super. Nov. 28, 2006) (quoting *Dunkle v. Prettyman*, 2002 WL 833375, at *3 (Del. Super. May 1, 2002)).

responsive filing from the Bruce Henderson case, in which it was improperly filed.
Plaintiffs' Motion for Additur or a New Trial in Damages is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge