2013 IL App (4th) 120608-U

NO. 4-12-0608

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 26, 2013
Carla Bender
4th District Appellate
Court, IL

LARRY DUNHAM and MARY VENTURINI DUNHAM,	)	Appeal from
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	McLean County
HONEYWELL INTERNATIONAL, INC.	)	No. 08L158
Defendant-Appellee,	)	Honorable
and	)	Scott Drazewski,
OWENS-ILLINOIS, INC.; PNUEMO ABEX CORPORATION; PNEUMO ABEX, LLC; METROPOLITAN LIFE INSURANCE COMPANY; RAPID-AMERICAN CORPORATION; JOHN CRANE, INC.; MINE SAFETY APPLIANCES COMPANY; and SPRINKMAN SONS CORPORATION,	)	Judge Presiding.
Defendants.	)	

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part and reversed in part, concluding the trial court (1) erred by granting defendant judgment notwithstanding the verdict on plaintiff's negligence claim but (2) properly granted defendant judgment notwithstanding the verdict on plaintiff's civil conspiracy claim.

¶ 2 Following a trial, in November 2010, a jury returned a verdict against defendant, Honeywell International, Inc. (Honeywell), on the negligence and civil conspiracy claims of plaintiff, Larry Dunham. The jury awarded Dunham $0 in compensatory damages and $700,000 in punitive damages.

¶ 3 Both parties filed posttrial motions, agreeing because the jury awarded punitive

damages but not compensatory damages, the jury's verdict could not stand. The parties disputed the appropriate form of posttrial relief, however. Honeywell requested the trial court grant judgment notwithstanding the verdict (judgment *n.o.v.*) for Honeywell or, in the alternative, grant a new trial. For his part, Dunham argued the court should grant him judgment *n.o.v.* or grant a new trial either solely on the issue of damages or, in the alternative, on all issues. Following a June 2012 hearing, the court granted Honeywell's motion and denied Dunham's motion, entering judgment *n.o.v.* for Honeywell on both the negligence and conspiracy claims.

¶ 4 Dunham appeals, arguing the trial court erred by granting Honeywell judgment *n.o.v.* on Dunham's negligence and conspiracy claims and denying Dunham's posttrial motion.

¶ 5 We affirm in part and reverse in part.

¶ 6 I. BACKGROUND

¶ 7 In October 2008, Dunham filed a complaint against Honeywell, the successor to the Bendix Corporation (Bendix); Owens-Illinois, Inc. (Owens-Illinois); Pneumo Abex Corporation; Pneumo Abex, LLC; and Metropolitan Life Insurance Company, alleging he developed mesothelioma as a result of asbestos exposure during his career as a firefighter. Dunham's complaint as to Honeywell, who is the only defendant in this appeal, included counts of negligence and civil conspiracy. Specifically, Dunham's negligence claim asserted Honeywell knew exposure to asbestos dust caused mesothelioma but, despite that knowledge, Honeywell failed to warn about the dangers of asbestos exposure or provide instruction as to safe handling methods, thereby proximately causing Dunham's mesothelioma. Dunham's conspiracy claim alleged Honeywell, along with the other named corporations, agreed to (1) falsely assert it was safe for people to be exposed to asbestos and (2) withhold information about the harmful effects

of asbestos.

¶ 8 A. The Evidence Presented at Trial

¶ 9 A jury trial commenced in October 2010 on the allegations against Honeywell and Owens-Illinois, at which the parties presented the following evidence.

¶ 10 1. *Evidence of Exposure to Asbestos from Brakes*

¶ 11 Larry Dunham testified in 1974, he started working as a firefighter for the Springfield Fire Department, a position he held for the next 30 years. During his first three years of employment, Dunham was stationed at Firehouse No. One, a two-story building consisting of living quarters on the top floor and a shop and rigs on the bottom floor. The firefighters worked 24-hour shifts, living and sleeping upstairs and sliding down firepoles to the lower level when an alarm sounded.

¶ 12 According to Dunham, the station house serviced fire engines, staff cars, a pickup truck, and a couple of dump trucks. As part of his duties, Dunham cleaned the shop on his weekday shifts, sweeping the "dust, debris, [and] papers" and taking out the trash. Dunham also entered the shop at times to obtain tools and to "kill time" with Bob Babiak, a mechanic that worked on the vehicles' brakes.

¶ 13 In the late 1970s or early 1980s, the shop moved to another location. Dunham still visited the shop "daily" to complete such tasks as filling out paperwork, replacing tools, and fueling and repairing the rigs. Depending on the nature of the repair, Dunham would sometimes "stay with the rig" while the mechanics worked on it. Dunham remembered occasions that he stayed with the rig for the entire day. The shop's location also served as a training facility, and

Dunham frequently passed through the shop to attend training sessions.

¶ 14 Mark Venegonia started working as a master mechanic for the Springfield Fire Department in 1986. Venegonia testified he and the other mechanics performed brake work on the trucks at least once a month and performed brake work on the cars "most all the time." The mechanics used Bendix and Raybestos brakes more frequently than other brands of brakes because "[t]hey were the best." Venegonia did not recall seeing warnings against lung cancer or disease on the packaging of Bendix or Raybestos brakes, nor did Venegonia remember a Bendix or Raybestos employee coming to the shop to tell employees the brake dust contained asbestos and could cause lung cancer. Venegonia was not sure the Bendix brakes they used at the garage contained asbestos.

¶ 15 Venegonia testified when he serviced the brakes, dust "would fall out of the drum" and accumulate in the brakes' shoes, hardware, and axle. Babiak, who worked at the station before Venegonia, "always" used an air hose to clean the drums. Venegonia, on the other hand, used a rag to wipe the brakes, throwing the rags in a bin afterward. Liquid brake cleaner did not yet exist.

¶ 16 When the mechanics were performing brake work, the firefighters, including Dunham, continued to enter and move about the shop. Venegonia estimated Dunham visited the shop about once every two weeks from 1986 until the early 2000s, although Venegonia did not recall seeing Dunham "actually coming in the garage when the brake work was being done." Venegonia denied having a "specific recollection of any particular day," remembering only that brake work was repeatedly performed at the shop and Dunham repeatedly visited the shop.

¶ 17 Kevin Pierce testified he worked as a delivery person for Brake & Clutch

Exchange from about 1975 to 1978, and he recalled delivering Raybestos Grey Rock brakes to the Springfield Fire Department. Pierce was not asked, nor did he testify, whether Brake & Clutch delivered Bendix brakes to the fire department.

¶ 18 Dunham entered into evidence a June 1986 United States Environmental Protection Agency publication entitled "Guidance for Preventing Asbestos Disease Among Auto Mechanics." According to the publication, millions of asbestos fibers are released during brake and clutch servicing. Using a compressed air hose to clean drum brakes can release up to 16 million asbestos fibers in the cubic meter of air around a mechanic's face, and millions of asbestos fibers can be released from drum brakes by wiping the brakes with a rag and brush. Asbestos fibers released from brake work can be scattered throughout a garage and can linger "around a garage long after a brake job is done and can be breathed in by everyone inside a garage." According to the publication, although lowering exposure lowers risk, "there is no known level of exposure to asbestos below which health effects do not occur." Asbestos can be carried on work clothing, and mesothelioma, which can be caused by "very low exposures to asbestos," was known to have occurred among brake mechanics, their wives, and their children.

¶ 19 Constance Hanna, Honeywell's corporate director of health services, testified the amount of asbestos a person can be exposed to before developing a disease varies. Hanna acknowledged the Occupational Safety and Health Administration (OSHA) placed an asbestos exposure limit at 0.1 fibers per cubic centimeter, but even at that level of exposure, people may still develop lung cancer and mesothelioma. Hanna could not provide a level below which all people can be exposed without someone becoming sick. She acknowledged a person does not have to work hands-on with an asbestos-containing product to develop asbestos disease, but

rather, a person may be exposed as a bystander.

¶ 20 Although Hanna assumed mesothelioma was idiopathic, meaning doctors are unable to pinpoint the cause of the disease, she also testified she did not know of anything other than asbestos that could cause mesothelioma. Hanna reiterated she was not a cancer specialist or mesothelioma expert.

¶ 21 David Garabrant, who is board-certified in internal medicine, occupational medicine, and preventive medicine, testified as an expert witness on behalf of Honeywell. In 2004, Garabrant and his colleagues published a meta-analysis investigating whether people who do motor vehicle and brake repair work are at an increased risk for mesothelioma. Before trial, Garabrant reviewed (1) Dunham's medical records; (2) various depositions; (3) various expert reports from both the plaintiff and defense sides; (4) an "exposure notebook" containing such legal documents as the complaint and the answers to interrogatories; (5) Dunham's chest X-ray report, ultrasound reports, computer topography (CT) scan, and pathology reports; and (6) Dunham's employment records. Based on his review, Garabrant opined, to a reasonable degree of medical certainty, that Dunham's exposure to brake dust did not cause his mesothelioma or put him at an increased risk of mesothelioma. Garabrant also opined (1) Dunham's exposure to brake dust did not result in exposure to fibers that placed him at an increased risk; (2) epidemiologic studies have consistently shown no association between working as a motor vehicle mechanic or brake mechanic and an increased risk of mesothelioma; and (3) because studies have not shown doing brake repair work causes mesothelioma, no basis existed to think it played any role in Dunham's case. Garabrant explained automotive brakes in the United States were made with chrysotile asbestos, a substance that is only weakly capable of causing mesothelioma. Moreover,

when a driver applies the brakes, the heat of the braking causes the chrysotile asbestos to change into forsterite, which has not been linked to mesothelioma. Thus, Garabrant said, when a mechanic bangs on a brake drum, only about 1% of the brake dust that comes out of the drum is chrysotile asbestos.

¶ 22 Honeywell's corporate representative, Joel Charm, testified Bendix placed caution labels on brake boxes beginning in 1973, but the warnings did not mention cancer, mesothelioma or asbestosis. Prior to 1986, OSHA regulations did not require the word "cancer" or "lung disease" hazard to appear on warnings. Charm testified Bendix continued to sell asbestos brake lining until 2001.

¶ 23 2. *Evidence of Exposure: Pipes*

¶ 24 Dunham testified that one of his duties as a firefighter was to conduct "overhaul" after putting out a fire, which consisted of hunting for fire behind walls, crawl spaces, attics, and other hidden places to ensure a fire was completely out. As part of overhaul, Dunham sometimes had to tear off duct work or pipes using axes and pipe poles, which created dust. At times, Dunham did not wear respiratory protection. At other times, Dunham wore respiratory protection but would "break the seal" by allowing the mask to separate from his face. According to Larry McMasters, another Springfield firefighter, some of the insulation torn off was asbestos-containing pipe covering; however, on cross-examination, McMasters acknowledged he could not always tell the difference between nonasbestos- and asbestos-containing pipes.

¶ 25 Dunham recalled conducting overhaul on the John Hay Homes, a complex of 15 to 30 buildings. During Dunham's career, he was called to put out fires at the John Hay Homes "once every couple of months or so." Larry Hill, a pipe insulator, testified in the late 1970s or

early 1980s, while working in the crawl space of the John Hay Homes, he noticed although the pipes of the homes had been stripped of asbestos, "lots" of pieces of asbestos piping still lay in the crawl space. Hill testified these pieces of piping looked like the Kaylo and Thermobestos asbestos he had installed in other projects, although he acknowledged the pieces were not labeled. McMasters testified at times when he conducted overhaul at the John Hay homes, he had to remove asbestos-containing insulation from the pipes. McMasters believed Dunham would have worked on the same types of tasks as him.

¶ 26 Dunham did not know, until the late 1980s, that asbestos was harmful. He also did not know he had been exposed to asbestos.

¶ 27 3. *Medical Evidence*

¶ 28 The trial court admitted into evidence, without objection, Dunham's medical bills up until the time of trial. These bills totaled $108,176.54.

¶ 29 Eugene Wenthe, a treating physician board-certified in family medicine, opined, to a reasonable degree of medical certainty, Dunham had mesothelioma and his condition was terminal. Dunham's attorney asked Wenthe whether he had an opinion, to a reasonable degree of medical certainty, as to whether Dunham's asbestos exposure was a cause of his mesothelioma, assuming that (1) Dunham worked in an old-style station house; (2) the fire department had its shop in the station and asbestos-containing brake linings were used in the shop; (3) Dunham swept the shop area; (4) Dunham continued to attend training sessions at the shop after it moved; (5) Dunham would take his rig to the shop for repairs; and (6) he conducted overhaul in the John Hay Homes, which had asbestos-containing pipe insulation. Wenthe responded he thought Dunham's mesothelioma was caused by his asbestos exposure. On cross-examination, Wenthe

acknowledged he (1) based his opinions on Dunham's treating oncologist's reports; (2) had not written any articles on mesothelioma; and (3) did not actually know if some of the factors he assumed in the hypothetical were true of Dunham's case.

¶ 30 Dunham testified that before getting sick, he enjoyed golfing, helping friends with small construction projects, exercising, and spending time with his grandchildren. As a result of chemotherapy, Dunham gradually started sleeping "all the time" and experienced nausea, hair loss, and a feeling of "not being a part of society." He developed liver failure and could not perform daily functions, like making coffee or putting a key in the lock. Mary Dunham, who was living with Dunham at the time, testified Larry was hospitalized over Thanksgiving and needed a blood transfusion due to the chemotherapy's side effects. Although Dunham subsequently stopped chemotherapy, he testified as a result of his diagnosis, he has "become a recluse" and considers his diagnosis a "death sentence" that he cannot shake.

¶ 31 4. *Conspiracy Evidence*

¶ 32 Because the parties and this court are familiar with Honeywell's corporate activities and interactions with the other defendants in this case, and because Dunham's main argument on appeal is that this court should follow the decision in *Dukes v. Pneumo Abex Corp.*, 386 Ill. App. 3d 425, 900 N.E.2d 1128 (2008), rather than the decision in *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, 957 N.E.2d 107, we provide only a brief recitation of the conspiracy evidence presented at trial.

¶ 33 Like the plaintiffs in *Rodarmel*, Dunham presented evidence showing the following: (1) in 1968, Johns-Manville sent a letter to Bendix, informing Bendix that Johns-Manville's asbestos shipments would henceforth contain a warning that "inhalation of this

material over long periods may be harmful"; (2) in January 1969, Johns-Manville sent a position paper to Bendix explaining the hazards of asbestos; (3) from 1930 to 1934, Arthur L. Humphrey, the chairman of the Westinghouse Air-Brake Company, served on the board of directors of Bendix and the American Brake Shoe and Foundry Company (Abex's predecessor); (4) from 1959 to 1963, John D. Biggers served on the board of directors of Bendix and Johns-Manville; (5) Abex, Bendix, Johns-Manville and other corporations were members of a trade organization created in 1948 to resolve issues regarding automobile brakes; and (6) in 1936, American Brake Shoe and Foundry Company and eight other corporations—not including Honeywell—commissioned a series of scientific experiments with asbestos dust at the Saranac Laboratory. See *Rodarmel*, 2011 IL App (4th) 100463, ¶¶ 10-68, 957 N.E.2d 107.

¶ 34 In addition, Dunham presented additional evidence, not considered by this court in any of our prior decisions, that from 1936 to 1939, UNARCO sold brake lining material to First Marshall Asbestos and, from 1939 to 1941, sold brake lining material to Bendix.

¶ 35 B. The Motions for a Directed Verdict

¶ 36 At the close of Dunham's evidence, Honeywell and Owens-Illinois each made a motion for a directed verdict. The court denied the motions. Following the presentation of their evidence, Honeywell and Owens-Illinois again moved for a directed verdict, and the court again denied their motions.

¶ 37 C. The Jury Instructions

¶ 38 On October 28, 2012, the trial court held a jury instruction conference. The parties agreed the court should provide the jury plaintiff's instruction No. 7, which states, "If you decide for a defendant on the question of liability, you will have no occasion to consider the

question of damages as to that defendant." With respect to Dunham's negligence claim, the jury was instructed as follows:

> "As to the claim for negligence, the plaintiff has the burden of proving each of the following propositions as to defendant Bendix:
>
> First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;
>
> Second, that the negligence of the defendant was a proximate cause of the injury to plaintiff.
>
> If you find from your consideration of all the of the [*sic*] evidence that each of these propositions has been proved as to the defendant then your verdict should be for the plaintiff and against defendant, Honeywell International, Inc.
>
> If you find from your considerations of all of the evidence that either of these propositions has not been proved as to the defendant then your verdict should be against the plaintiff and for the defendant Honeywell International, Inc."

¶ 39 The trial court also agreed to provide plaintiff's instruction No. 29A, which provides as follows:

> "If you decide for the plaintiff, Larry Dunham, on the question of liability, you must then fix the amount of money which

will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the wrongful conduct of a defendant taking into consideration the nature, extent, and duration of the injury;

(a) shortened life expectancy;

(b) the loss of his normal life experienced and reasonably certain to be experienced in the future;

(c) the pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries;

(d) the emotional distress experienced and reasonably certain to be experienced in the future; and

(e) the reasonable expense of necessary medical care, treatment and services received and the present cash value of the reasonable expense of necessary medical care, treatment and services reasonably certain to be received in the future."

¶ 40 With respect to the conspiracy claim, the trial court gave the following instruction:

"As to the claim for conspiracy, the plaintiff has the burden of proving each of the following propositions as to Bendix:

First, that Bendix agreed with another to do one or more of

the acts claimed by the plaintiff as stated to you in these instructions;

Second, that one or more acts in furtherance of an agreement was performed by one or more parties to the agreement;

Third, that one or more acts in furtherance of the agreement was a proximate cause of the injury to plaintiff.

If you find from your consideration of all of the evidence that any of these propositions has not been proved, then your verdict should be for the defendant, Honeywell International, Inc."

¶ 41 The trial court provided the jury with two verdict forms. Verdict form A states, "We, the jury, find for the plaintiff, Larry Dunham and against the following defendant or defendants" and contains a space to mark either "Yes" or "No" next to Honeywell and Owens-Illinois. The form also provides a blank to fill in for "damages for injuries sustained by Larry Dunham" and states, "As to the conspiracy claims, we further assess punitive damages, if any, as follows" with a blank next to Honeywell and a blank next to Owens-Illinois. Verdict form B states only, "We, the jury, find for both defendants and against the plaintiff, Larry Dunham."

¶ 42 With respect to which verdict form to use, the court provided the jury the following instruction: "If you find for the plaintiff and against one or both defendants, you should use Verdict Form A. If you find in favor of both defendants and against the plaintiff, you should use Verdict Form B."

¶ 43 D. The Jury's Deliberations and Verdict

¶ 44 During deliberations, the jury inquired how verdict form A should be filled out

"in regards to the two claims against Honeywell," explaining that "with only one line for Honeywell" on verdict form A, "it is difficult to identify where to mark the separate claims." The trial court responded, "If you find for Plaintiff against Honeywell on either the negligence claim or the conspiracy claim or both, you use Verdict form A and mark 'yes' as to Honeywell."

¶ 45 On November 9, 2010, the jury returned a verdict, on verdict form A, in favor of Dunham and against Honeywell and Owens-Illinois. In the blank next to "damages for injuries sustained by Larry Dunham," the jury marked "0." In the blanks allowing for punitive damages, the jury awarded $700,000 against Honeywell and $1,680,000 against Owens-Illinois. The trial court entered a written order consistent with the verdict.

¶ 46 E. The Parties' Posttrial Motions

¶ 47 Each party filed a posttrial motion, and in June 2012, the parties appeared before the trial court on their motions. Honeywell requested the court grant judgment *n.o.v.*, or, in the alternative, a new trial, based on the jury's award of punitive damages without compensatory damages. Dunham requested the trial court enter judgment *n.o.v.* in his favor or grant a new trial on either the issue of damages or all issues.

¶ 48 The trial court granted Honeywell and Owens-Illinois' motions for judgment *n.o.v.*, denied Dunham's motion for judgment *n.o.v.*, and denied all parties' motions for a new trial. The court reasoned that "punitive damages may not be recovered in the absence of compensatory damages." Further, the court found Dunham "did not prove that Bendix failed to warn, that there was no evidence that Bendix conspired with any other alleged co-conspirator" and Dunham "failed to prove medical causation" even though "the evidence was uncontroverted" as to the amount of Dunham's medical bills. The court concluded "the jury found against the

plaintiff" and "there [was] certainly evidence that would support the verdict that was rendered by the jury, that being that it was not proximately caused."

¶ 49 This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, Dunham argues the trial court erred by granting Honeywell judgment *n.o.v.* on Dunham's negligence and conspiracy claims and by denying Dunham's posttrial motion.

¶ 52 Initially, we note both Dunham and Honeywell acknowledge that the jury's award in this case cannot stand. We agree. The jury returned a verdict awarding $0 in compensatory damages and $700,000 in punitive damages against Honeywell. However, Illinois does not recognize a cause of action for punitive damages alone; thus, a plaintiff can be awarded punitive damages only where actual damage is shown. *Kemner v. Monsanto Co.*, 217 Ill. App. 3d 188, 199, 576 N.E.2d 1146, 1153 (1991).

¶ 53 The dispute in this case concerns the appropriate form of posttrial relief in light of the jury's verdict. Dunham contends the trial court should have entered a directed verdict in his favor, applied the doctrine of *additur*, or awarded a new trial on either the sole issue of damages or on all issues. Honeywell asserts the court properly granted Honeywell judgment *n.o.v.*

¶ 54 A trial court should enter a directed verdict or judgment *n.o.v.* "[o]nly in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand.' " *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, ¶ 86, 957 N.E.2d 107 (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967)). By contrast, a court should grant a new trial if the court determines a jury's verdict is

contrary to the manifest weight of the evidence. *McClure v. Owens Corning Fiberglass Corporation*, 188 Ill. 2d 102, 132, 720 N.E.2d 242, 257 (1999). "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." (Internal quotations omitted.) *McClure*, 188 Ill. 2d at 132, 720 N.E.2d at 257. Thus, "[a] more nearly conclusive evidentiary situation ought to be required before a judgment *n.o.v.* is entered than is necessary to justify a new trial." *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174, 696 N.E.2d 1271,1277 (1998).

¶ 55 We review *de novo* a trial court's decision on a motion for judgment *n.o.v.*, while we review a trial court's decision on a motion for a new trial for an abuse of discretion. *McClure*, 188 Ill. 2d at 132-33, 720 N.E.2d at 257.

¶ 56 Honeywell, citing *Kemner v. Monsanto Company*, 217 Ill. App. 3d 188, 576 N.E.2d 1146 (1991), asserts the trial court did the "only thing" it could do when it awarded judgment *n.o.v.* to Honeywell. In *Kemner*, a jury returned individual verdicts in favor of 63 plaintiffs, assessing compensatory damages of $1 for economic loss and $0 for noneconomic loss. *Kemner*, 217 Ill. App. 3d at 197, 576 N.E.2d at 1151. The jury also awarded punitive damages of approximately $16 million. *Id.* On appeal, the Fifth District concluded the trial court abused its discretion by not granting a judgment notwithstanding the verdict to the defendants. *Kemner*, 217 Ill. App. 3d at 201, 576 N.E.2d at 1154. The court reasoned because the jury found the plaintiffs suffered no actual damage and the plaintiffs did not appeal that verdict, no underlying tort existed. *Kemner*, 217 Ill. App. 3d at 200, 576 N.E.2d at 1154. Accordingly, the jury's verdict could not stand. *Kemner*, 217 Ill. App. 3d at 200, 576 N.E.2d at 1154.

¶ 57 We do not interpret *Kemner* as standing for the proposition that, in every instance in which a jury awards the plaintiff punitive damages but does not award compensatory damages, the trial court *must* grant judgment *n.o.v.* in favor of the defendant. What *Kemner* makes clear is that when there is no underlying tort, an award for punitive damages cannot stand. Crucial to the *Kemner* decision was the fact that the plaintiffs did not appeal the jury's verdict awarding $1 in economic losses and $0 in noneconomic losses. Based on the plaintiffs' failure to appeal, the *Kemner* court reasoned "no underlying tort" existed. *Kemner*, 217 Ill. App. 3d at 200, 576 N.E.2d at 1154. In this case, Dunham has appealed the trial court's decision to grant judgment *n.o.v.*, arguing the jury's verdict was a finding for Dunham on the underlying torts of negligence and civil conspiracy despite the jury's failure to award damages. Thus, before vacating the punitive damage award and granting judgment *n.o.v.* to Honeywell, we must first determine whether an underlying tort existed in this case to support the punitive damage award. We address Dunham's negligence and conspiracy claims separately.

¶ 58 A. Dunham's Negligence Claim

¶ 59 We first consider the jury's verdict on Dunham's negligence claim. In doing so, we are guided by this court's decisions in *Kleiss* and *Tindell v. McCurley*, 272 Ill. App. 3d 826, 651 N.E.2d 713 (1995).

¶ 60 In *Kleiss*, the jury returned a verdict for the plaintiffs on their negligence claim but awarded the plaintiffs zero damages. *Kleiss*, 297 Ill. App. 3d at 175, 696 N.E.2d at 1278. The plaintiffs sought a new trial, arguing the jury's finding of liability against the defendant included, by definition, a finding of damages. *Kleiss*, 297 Ill. App. 3d at 175, 696 N.E.2d at 1278. Concluding the trial court did not abuse its discretion by denying the plaintiffs' motion for a new

trial on damages, this court stated as follows:

> "Plaintiffs would have us assume the only possible interpretation of the jury's verdict was that the jury found plaintiffs had proved each element of their negligence claim, duty, breach of duty, causation, and damages, but the jury mistakenly failed to award damages. The more logical conclusion is that the jury found [defendant] had breached his duty to plaintiffs *** but either that [defendant]'s negligent spraying was not a proximate cause of plaintiff's injury or plaintiffs did not sustain damage as a result of [defendant]'s negligence. In this case, the jury found for [defendant], but simply used the wrong verdict form." *Kleiss*, 197 Ill. App. 3d at 176, 696 N.E.2d at 1278.

¶ 61 In reaching our decision in *Kleiss*, we noted the jury (1) assessed damages against every other defendant in the case, showing the jury knew how to assess damages; (2) returned a verdict that was not against the manifest weight of the evidence; and (3) specifically asked whether it had to award monetary damages if it found a party negligent, to which the court replied "no." *Kleiss*, 197 Ill. App. 3d at 176-77, 696 N.E.2d at 1279. Thus, the *Kleiss* court concluded the jury's intent to award the plaintiffs zero damages was "crystal clear" and the trial court did not abuse its discretion by denying the plaintiffs' motion for a new trial on damages. *Kleiss*, 197 Ill. App. 3d at 176, 696 N.E.2d at 1278.

¶ 62 Prior to *Kleiss*, this court reached a different conclusion in *Tindell v. McCurley*, 272 Ill. App. 3d 826, 651 N.E.2d 713 (1995). There, the plaintiff brought a claim against a

general contractor after falling from a stepladder on a construction job. *Tindell*, 272 Ill. App. 3d at 827, 651 N.E.2d at 714-15. The jury returned a verdict in favor of the plaintiff but awarded the plaintiff no damages. *Id.* On appeal, this court remanded the case for a new trial on all issues, reasoning as follows:

> "[B]ecause of the nature of the jury's verdict there is no way—other than an absolute guess—for this court to say whether the jury found liability. The verdict form was filled in by the jury with zero damages for four separate categories of damages despite uncontradicted evidence plaintiff suffered some damages from the accident. However, to say the jury meant to find for defendant on the issue of liability, we would have to assume the jury ignored the instructions both as to which verdict form to use and that there would be no occasion to consider damages if it found for defendant." *Tindell*, 272 Ill. App. 3d at 830, 651 N.E.2d at 717.

¶ 63 We conclude the facts in this case are more like the facts in *Tindell* than those in *Kleiss*. In *Kleiss*, the jury sent a note specifically asking whether it could find negligence and not award damages. *Kleiss*, 297 Ill. App. 3d at 177, 696 N.E.2d at 1279. In addition, the jury assessed damages against the other defendants, showing the jury understood how to assess damages. *Kleiss*, 297 Ill. App. 3d at 176, 696 N.E.2d at 1278. The *Kleiss* court concluded the jury's intent to award zero damages was "crystal clear." *Kleiss*, 297 Ill. App. 3d at 176, 696 N.E.2d at 1278.

¶ 64 We cannot say the same for the jury's intent in this case. The jury was instructed

it should only use verdict form A if it found for Dunham and against either Honeywell or Owens-Illinois. Verdict form A did not give the jury the option of indicating whether the finding in favor of Dunham was for negligence and/or conspiracy. The jury elected to use verdict form A and to award punitive damages; thus, to conclude the jury actually found in favor of Honeywell, we would have to assume the jury ignored the court's instructions. In addition, in response to the jury's question regarding how verdict form A should be filled out as to each claim against Honeywell, the jury was told, "If you find for plaintiff against Honeywell on either the negligence claim or the conspiracy claim or both, you use Verdict Form A and mark 'yes' as to Honeywell." On the other hand, as Honeywell points out, the jury explicitly wrote "0" in the compensatory damages blank, arguably showing the jury considered the question of compensatory damages and nonetheless concluded Dunham failed to prove his asbestos exposure caused his mesothelioma. See *Strange v. Collins*, 2007 U.S. Dist. LEXIS 33289, *5 (2007) (concluding the proper remedy, where the jury awarded $0 in compensatory damages and $25,000 in punitive damages, was to grant judgment as a matter of law in favor of defendant because "[t]he jury clearly considered the question of compensatory damages" when it wrote "zero" into the space for compensatory damages).

¶ 65 In sum, we are unable to decipher the jury's inconsistent verdict, particularly in light of the conflicting testimony as to whether Dunham's exposure to brake dust caused his mesothelioma. Although Honeywell emphasizes Venegonia did not testify with certainty that Dunham was present when brake work was being performed, we note Venegonia stated he did not have a "specific recollection of any particular day" at the shop, only a recollection of the mechanics constantly performing brake work and Dunham frequently visiting the shop. Dunham

also testified after the shop moved, he visited the shop "daily," sometimes staying with the rig for an entire day while mechanics performed repairs on the rig. Venegonia testified he and the other mechanics used Bendix and Raybestos brakes because "[t]hey were the best," and although Venegonia was not sure whether the Bendix brakes they used at the shop contained asbestos, Joel Charm stated Bendix did not sell its last asbestos brake lining until 2001.

¶ 66 In light of the foregoing, we cannot conclude the evidence in this case so overwhelmingly favored Honeywell that no contrary verdict could ever stand. On the other hand, we cannot say the evidence so overwhelmingly favored Dunham that the court should have granted judgment *n.o.v.* in Dunham's favor. The jury had reasonable evidence to consider from both sides, and we would be making an "absolute guess" in this case as to whether the jury found for Dunham or for Honeywell. Thus, we remand for a new trial on Dunham's negligence claim.

¶ 67 Having concluded the jury's verdict is indecipherable, we conclude the use of *additur* or remand for a new trial solely on damages would be inappropriate. *Additur* is a practice that "should never be adopted except in clear cases." *Ragan v. Williams*, 219 Ill. App. 3d 945, 948, 579 N.E.2d 1267, 1269 (1991). Further, it has traditionally been used in Illinois to correct the "omission of a liquidated or easily calculated item of damages." *Dobyns v. Chung*, 399 Ill. App. 3d 272, 286, 926 N.E.2d 847, 859 (2010). Here, it is unclear whether the jury found for Dunham but omitted awarding damages or, in fact, found for Honeywell. Accordingly, we decline to use *additur* to award Dunham compensatory damages.

¶ 68 Likewise, a new trial solely on the issue of damages is inappropriate here. A new trial on damages only may be granted where (1) the jury's verdict on the question of liability is amply supported by the evidence; (2) the questions of damages and liability are so separate and

distinct that a trial limited to the question of damages is not unfair to the defendant; and (3) the record suggests neither that the jury reached a compromise verdict or that the error which resulted in the jury's awarding inadequate damages also affected the jury's finding of liability. *Hollis v. R. Latoria Construction, Inc.*, 108 Ill. 2d 401, 408, 485 N.E.2d 4, 7 (1985). Here, the questions of liability and damages are inextricably linked, as the issue of whether Honeywell proximately caused Dunham's mesothelioma is an element of Dunham's negligence claim. While Dunham asserts the jury found for him but mistakenly failed to award damages, we agree with Honeywell that another possible hypothesis for the jury's verdict is that it found a lack of causal link between Honeywell's actions and Dunham's injuries. Accordingly, granting a new trial on the sole issue of damages would be inappropriate.

¶ 69 B. Dunham's Conspiracy Claim

¶ 70 We next turn to the jury's verdict on Dunham's conspiracy claim. As we previously noted, the jury's verdict in this case was inconsistent and impossible to decipher; however, in light of this court's decision in *Rodarmel*, we conclude the trial court properly granted judgment *n.o.v.* to Honeywell on Dunham's conspiracy claim.

¶ 71 A civil conspiracy is a combination of two or more people "for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means." (Internal quotation marks omitted.) *McClure*, 188 Ill. 2d at 133, 720 N.E.2d at 258. To recover under a civil conspiracy theory, the plaintiff must prove an agreement and a tortious act committed in furtherance of the agreement. *McClure*, 188 Ill. 2d at 133-34, 720 N.E.2d at 258. While coconspirators' parallel conduct may serve as circumstantial evidence of a civil conspiracy, parallel-conduct evidence is insufficient, by itself, to establish the existence of an agreement to

commit the civil conspiracy. *McClure*, 188 Ill. 2d at 135, 720 N.E.2d at 259. "Because a civil conspiracy is almost never susceptible to direct proof, the conspiracy is usually established through circumstantial evidence and inferences drawn from the evidence." *Menssen v. Pneumo Abex Corp.*, 2012 IL App (4th) 100904, ¶ 13, 975 N.E.2d 345. However, when the plaintiff seeks to show a civil conspiracy through circumstantial evidence, that evidence must be clear and convincing. *McClure*, 188 Ill. 2d at 134, 720 N.E.2d at 258.

¶ 72 Dunham concedes that, with the exception of two additional exhibits, he presented the same evidence as the plaintiffs in *Rodarmel* and *Dukes* but urges this court to follow *Dukes* rather than *Rodarmel*. We decline to do so.

¶ 73 In *Dukes*, the plaintiff sued Honeywell after the plaintiff's husband, who was employed at a UNARCO plant, died from mesothelioma following his exposure to asbestos. *Dukes*, 386 Ill. App. 3d at 428, 900 N.E.2d at 1131. The plaintiff sought to recover damages from Honeywell under a theory of civil conspiracy, alleging Honeywell, UNARCO, and others agreed to positively assert it was safe for people to work with asbestos and to suppress information about the harmful effects of asbestos. *Dukes*, 386 Ill. App. 3d at 428, 900 N.E.2d at 1131. Like Dunham, the plaintiff presented evidence showing the following: (1) Johns-Manville was the exclusive supplier of asbestos fiber to Bendix for many decades; (2) Johns-Manville assisted Bendix with a position paper on asbestos in the late 1960s; (3) Bendix, Johns-Manville, Raybestos and Abex were members of the same trade organizations; and (4) Bendix and Johns-Manville shared a common director. *Dukes*, 386 Ill. App. 3d at 445, 900 N.E.2d at 1144. The jury returned a verdict for the plaintiff and against Honeywell, and Honeywell appealed, arguing the trial court should have entered judgment *n.o.v.* in Honeywell's favor. *Dukes*, 386 Ill.

App. 3d at 427-28, 900 N.E.2d at 1130-1131. The *Dukes* court disagreed, concluding the evidence did not "so overwhelmingly favor defendant that the jury's verdict in favor of plaintiff could never stand." *Dukes*, 386 Ill. App. 3d at 446, 900 N.E.2d at 1144.

¶ 74 Approximately three years later, this court concluded in *Rodarmel* that *Dukes* was incorrect in holding that the four pieces of aforementioned evidence justified the denial of Honeywell's motion for a judgment *n.o.v.* *Rodarmel*, 2011 IL App (4th) 100463, ¶ 118, 957 N.E.2d 107. First, the *Rodarmel* court concluded the evidence that Johns-Manville was Bendix's exclusive supplier of asbestos fibers did not reasonably support an inference that Bendix and Johns-Manville entered into an agreement to conceal the dangers of asbestos. *Rodarmel*, 2011 IL App (4th) 100463, ¶ 106, 957 N.E.2d 107. Likewise, Johns-Manville's sharing of its position paper with Bendix showed only that Johns-Manville "assisted" Bendix by providing Bendix information on the adverse health effects of asbestos—which was not a "wrongful thing to do." *Rodarmel*, 2011 IL App (4th) 100463, ¶ 108, 957 N.E.2d 107. The *Rodarmel* court also concluded the corporations' membership in a trade organization "was just as consistent with innocence as with guilt," and accordingly did not meet the "clear and convincing evidence" threshold. *Rodarmel*, 2011 IL App (4th) 100463, ¶ 113, 957 N.E.2d 107. Finally, the court held "[i]mplying a conspiratorial agreement from a shared director would be speculation, and '[l]iability based on such speculation is contrary to tort principles in Illinois [citation] and to the clear and convincing standard of proof applicable in civil conspiracy cases.' " *Rodarmel*, 2011 IL App (4th) 100463, ¶ 117, 957 N.E.2d 107 (quoting *McClure*, 188 Ill. 2d at 152, 720 N.E.2d at 242)).

¶ 75 We conclude the analysis in *Rodarmel* was well-reasoned, thoroughly comparing

the evidence presented in *Dukes* to the evidence deemed insufficient in *McClure*. We also note that this court recently adhered to the *Rodarmel* court's decision in *Menssen v. Pneumo Abex Corp.*, 2012 IL App (4th) 100904, 975 N.E.2d 345. The decisions in *Rodarmel* and *Menssen* are binding on this court, and we see no reason to depart from them.

¶ 76 We note that Dunham also presented additional evidence in this case showing that, from 1939 to 1941, UNARCO sold brake lining material to Bendix. However, in *Rodarmel*, we concluded the evidence that Johns-Manville was Bendix's exclusive asbestos supplier did not support the inference that Bendix and Johns-Manville entered into an agreement to conceal the dangers of asbestos. *Rodarmel*, 2011 IL App (4th) 100463, ¶ 106, 957 N.E.2d 107. Likewise, here, the evidence that UNARCO sold brake lining material to Bendix from 1939 to 1941 does not clearly and convincingly show Honeywell (as successor to Bendix) agreed to disguise the harmful effects of asbestos fibers.

¶ 77 Based on the foregoing, we conclude the trial court properly granted Honeywell judgment *n.o.v.* with regard to Dunham's conspiracy claim.

¶ 78 III. CONCLUSION

¶ 79 For the reasons stated, we affirm in part and reverse in part, remanding for a new trial on Dunham's negligence claim.

¶ 80 Affirmed in part, reversed in part; cause remanded.