To be Argued by:
RENNER K. WALKER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

FRANCIS NEMETH, individually and as the Personal Representative of the Estate of FLORENCE NEMETH,

Plaintiff-Respondent-Cross-Appellant,

– against –

BRENNTAG NORTH AMERICA, as a successor-in-interest to Mineral Pigment Solutions, Inc., as a successor-in-interest to Whittaker, Clark & Daniels, Inc., BRENNTAG SPECIALTIES, INC., f/k/a Mineral Pigment Solutions, Inc., as a successor-in-interest to Whittaker, Clark & Daniels, Inc., CBS CORPORATION, f/k/a Viacom, Inc., successor by merger to CBS CORPORATION, f/k/a Westinghouse Electric Corporation, GENERAL ELECTRONIC COMPANY, SHULTON, INC., individually and as successor to The Shulton Group and Shulton, Inc., THE PROCTOR & GAMBLE COMPANY, as successor-in-interest to The Shulton Group and/or Shulton, Inc. and THE SCOTTS COMPANY LLC, UNION CARBIDE CORP.,

Defendants,

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-CROSS-APPELLANT

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– and –

WHITTAKER CLARK & DANIELS, INC.,

Defendant-Appellant-Cross-Respondent,

– and –

WYETH HOLDINGS CORPORATION, f/k/a American Cyanamid Company, individually and as successor-in-interest to Shulton, Inc., DAP, INC., GEORGIA-PACIFIC LLC, OTIS ELEVATOR COMPANY, SCHINDLER ELEVATOR CORPORATION, THYSSENKRUPP ELEVATOR COMPANY, as successor-in-interest to Dover Corporation, a division of Thyssenkrupp Elevator Company, ROCKWELL AUTOMATION, as successor to Allen-Bradley, GENERAL CABLE CORP. and SCHNEIDER ELECTRIC USA, INC., f/k/a Square D,

Defendants.

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INTRODUCTION

Plaintiff-Respondent-Cross Appellant's initial brief showed that the trial court erred when it performed two separate setoffs—a dollar-for-dollar setoff based on the value of settlements with the non-Shulton defendants (despite the fact that the equitable shares of fault of those defendants had been determined by the court), and then a pro rata setoff based on Shulton's share of fault at trial—contrary to the direction of the Court of Appeals in *Matter of N.Y.C. Asbestos Litigation (Didner),* 82 N.Y.2d 342, 351 (1993). Under *Didner*'s aggregation rule, "the verdict is reduced either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater." *Id.* at 351. The trial court failed to follow this rule, and this Court should modify the trial court's G.O.L. § 15-108(a) setoff.

In its answer to Plaintiffs' cross-appeal, WCD claims that *Didner* only applies when the settling tortfeasors appear on the verdict sheet. However, neither *Didner* nor the text of G.O.L. § 15-108(a) requires an equitable share of fault to be determined only by a jury. On the contrary, treating a directed verdict as a determination of 0% fault for the purposes of aggregating equitable shares of fault is consistent with the legislature's goals in enacting G.O.L. § 15-108(a): encouraging settlement and ensuring equitable loss-sharing among joint

tortfeasors. Otherwise, a non-settling defendant would get a benefit from failing to meet its burden of proving the fault of settling defendants, resulting in a directed verdict against such defendants.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY APPLIED G.O.L. § 15-108.

WCD argues that since the non-Shulton settling defendants did not appear on the verdict sheet, there can be no way of knowing what the equitable shares of fault for those defendants are. WCD Reply Br. 28-29. Yet, WCD ignores the trial court's making that very determination by granting directed verdict against settled defendants involved with WCD's Article 16 claims. [J.R.5164.]

A trial court has the power to determine whether a settling defendant should not appear on the verdict sheet because insufficient evidence of the settling defendant's fault has been presented. *See Zalinka v. Owens-Corning Fiberglass Corp.*, 221 A.D.2d 830, 831 (3d Dep't 1995); *Bigalow v. Acands, Inc.*, 196 A.D.2d 436, 437-38 (1st Dep't 1993). Such a determination, that no fault may be apportioned to a particular settling defendant, in effect becomes an apportionment of 0% fault for that defendant. Indeed, if the trial court, in granting Nemeth's motion for directed verdict, placed all the non-Shulton settling defendants on the verdict sheet but directed the jury to apportion 0% fault to each of the non-Shulton

settling defendants, the result would have been the same, even though the court, and not the jury, made the ultimate decision.

In truth, WCD's argument can be distilled to a view that *Didner*'s aggregation principle necessarily requires *a jury* to determine a settling defendant's equitable share of fault. Neither the text of G.O.L. § 15-108(a) nor any decision interpreting it compels this unduly narrow interpretation; on the contrary, WCD's position is inconsistent with the stated goals of G.O.L. § 15-108(a) generally and *Didner*'s aggregation rule in particular.

A. The text of G.O.L. § 15-108(a) does not require an equitable share of fault to be determined by a jury.

First, nothing in the text of G.O.L. § 15-108(a) requires a jury to determine an equitable portion of fault or forecloses a court from making that determination by concluding that a defendant failed to prove its case against settling tortfeasors thus requiring a finding of 0% as a matter of law.

Notably, section 15-108(a) does not mention an apportionment by the jury; instead, it only speaks of "the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules." *See* G.O.L. § 15-108(a).[1] Therefore, as *Didner* recognized in viewing the statute's "'[failure to

[1] Article 14 governs contribution claims, which no less than other claims may be the subject of a judicial determination that no triable issue of fact exists. *See Capstone Enters. of Port Chester, Inc. v. Bd. of Educ. Irvington Union Free Sch. Dist.*, 103 A.D.3d 856, 859-60 (2d Dep't 2013); *see also Dole v. Dow*

address the case of settlements with multiple defendants], courts are left to fashion an interpretation which is consistent with the object of the statute while avoiding an absurd result.'" 82 N.Y.2d at 352-53 (quoting *In re New York City Asbestos Litig. (Dudick)*, 188 A.D.2d 214, 218 (1st Dep't 1993), *aff'd* 82 N.Y.2d 821) (other citations omitted).

Treating a directed verdict as equivalent to a jury's apportionment of fault serves the twin purposes animating G.O.L. § 15-108(a): "encourage[ing] settlements" and ensuring "equitable loss-sharing among wrong-doers." *Williams v. Niske*, 81 N.Y.2d 437, 442 (1993). Furthermore, by encouraging settlements, holding that a trial court's directed verdict constitutes an apportionment of fault also serves settlement's natural concomitant: promoting judicial economy. *See In re E. & S. Dist. Asbestos Litig.*, 772 F. Supp. 1380, 1396 (E.D.N.Y. 1991) ("In civil cases in particular, voluntary compromise of claims enhances judicial efficiency, affords the parties greater freedom and flexibility in resolving their differences and minimizes enforcement problems.").

Chem. Co., 30 N.Y.2d 143, 153 (1972) (commenting that the entirety of a contribution action could "be tried by the court"). Indeed, a defendant's equitable share of damages under Article 14 "shall be determined in accordance with the relative culpability of each person liable for contribution." CPLR 1402. Needless to say, the trial court's directed verdict as to the non-Shulton settling defendants connotes that there is no demonstration of culpability on the part of these defendants.

Treating a directed verdict as an apportionment of 0% fault to settling defendants within the meaning of G.O.L. § 15-108(a) also furthers the goals of aggregation. It not only helps avoid undercompensating injured and innocent plaintiffs, it also makes clear to defendants that they will not be placed "in an advantageous position vis-à-vis settling tortfeasors" or have their liability "greatly reduced," particularly when a court has determined that they have failed to meet their burden of proving liability of settling defendants. *See Dudick*, 188 A.D.2d at 218. In turn, this also promotes certainty.

In short, the text of G.O.L. § 15-108(a) does not compel the inequitable result WCD demands. Applying *Didner*'s aggregation rule here is more consistent with the legislative intent behind G.O.L. § 15-108(a).

B. No New York decision requires an equitable share of fault to be determined by a jury.

No New York decision has held a directed verdict cannot function as an apportionment of fault for the purposes of G.O.L. § 15-108(a).

While WCD points out that in *Didner* the jury had in fact apportioned liability for all defendants (including 0% fault for some), that fact is simply descriptive rather than prescriptive. *See Didner*, 82 N.Y.2d at 347 & n.1. More importantly, *Didner* in no way held that a trial court was precluded from determining that certain parties should be apportioned 0% fault as part of the aggregation of setoffs under G.O.L. § 15-108(a).

At most, this Court has observed that "Where, as in the matter under review, the jury apportions fault among all tortfeasors, the situation is less complicated because the question of what constitutes the 'equitable share' attributable to a defendant does not arise." *Dudick,* 188 A.D.2d at 221. But noticeably absent from *Dudick* or any other New York case is any language suggesting a jury's finding is the *sine qua non* of an apportionment of an equitable share of damages under G.O.L. § 15-108(a). In other words, no court has identified something special about a jury's apportionment that justifies treating it differently from a judge's assessment in a properly granted directed verdict. If anything, *Dudick's* observation that "the situation is less complicated" where a jury determines a settling defendant's equitable share of fault implicitly allows such an equitable share to be determined in other ways.

Moreover, no part of the reasoning in *Williams* or *Didner* limits the aggregation required by *Didner* only to instances in which the jury—as opposed to a judge—has made a finding regarding the fault of the settling party. In point of fact, the Court of Appeals actually recognized in *Williams* that "given the numerous possible variations in multi-defendant litigation, the task of formulating a single method for reducing verdicts to account for settlements 'appears all but insuperable if the state's important objectives are not to be sacrificed in the process…." *Williams*, 81 N.Y.2d at 444.

In *Williams*, no determination was made at all as to the pro rata share of liability of settling defendants either by the court or the jury. *See* David D. Siegel, New York Practice, § 176, at 313 (5th ed. 2011) ("In the *Williams* case, the fault of some of the settling tortfeasors was not injected into trial. That may have been inadvertent.").[2] Thus, the Court of Appeals could only guess as to the fault a jury might hypothetically apportion the settling defendant, and so *Williams* only sought to "determine the most appropriate method where equitable liability *has been determined* for some settling defendants but not for others." *Id.* (emphasis added).[3]

But no such guesswork is necessary here. In this case, the trial court made the determination, after a full trial and arguments by the parties, that WCD failed to meet its burden of proving the fault of the settling defendants, thus purposely omitting them from the verdict sheet. In effect, WCD did not "fail to inject [the issue of the non-Shulton settling defendants' fault] into the trial." Siegel, New

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[2] In this regard, it bears reiterating that in no way does the holding in *Williams* turn on whether a court or a jury determines the liability of settling defendants; instead, the Court of Appeals repeatedly describes the assessment of fault more generally. *See Williams*, 81 N.Y.2d at 440 ("There are six settling defendants, four of whom settled before trial with no assessment of their equitable share of the damages."); *id.* at 444 (noting that "no equitable share was determined as to the four defendants who settled before trial").

[3] Of course, as the Court in *Didner* recognized, *Williams* did not determine whether aggregation was appropriate or required, *see Didner*, 82 N.Y.2d at 345 & n.1, an inquiry *Didner* answered in the affirmative five months after *Williams* was decided.

York Practice, § 176, at 313.[4] Consequently, the trial court should have recognized the apportionment of 0% fault as to them in performing the G.O.L. § 15-108(a) setoff.

C. The secondary authority WCD cites does not actually support its position.

WCD's reliance on the Pattern Jury Instructions and New York civil practice commentary is misplaced.

First, far from supporting WCD's position, the commentary to Pattern Jury Instruction 2:275A stands for the opposite conclusion, recognizing that in *Didner* and *Pollicina v. Misericordia Hospital Medical Center*, 82 N.Y.2d 332 (1993), "the Court of Appeals ruled that the aggregate method of computing offsets under GOL § 15-108(a) should be used in an action with multiple defendants *where two or more of the defendants have settled with the plaintiff prior to the submission of the case to the jury*." New York Pattern Jury Instruction 2:275A, cmt. at 778 (2013) (emphasis added).

Second, Professor Siegel's treatise similarly does not offer WCD any support; it simply discusses *Williams* in the context of a situation where there has been no determination of a settled defendant's equitable fault, which is not the case

[4] Indeed, WCD continues to press its argument on appeal that its proof at trial as to the other defendants requires an apportionment as to them. For the reasons stated at 26-28 and 53-54 of Plaintiff-Respondent-Cross Appellant's brief, the trial court appropriately ruled that such proofs were insufficient.

here. However, Siegel does support Plaintiffs' contention that WCD's approach "would give the holdout defendant the best of both worlds" and "would not serve to encourage settlements." Siegel, New York Practice, § 176, at 313. Quite so, WCD's proposed calculation mirrors "'[t]he particular outcome which [New York courts] have attempted to avoid,'" namely "'the reduction of a non-settling defendant's liability to an amount which represents *far less than his proportionate share of fault*.'" *Didner*, 82 N.Y.2d at 352-53 (quoting *Dudick*, 188 A.D.2d at 218) (emphasis added).

Finally, the New York Practice Series article that WCD cites presupposes that no determination regarding a settling tortfeasor's fault was made—either by judge or jury. *See* 14 N.Y. Prac., New York Law of Torts § 10:26 (2016). Accordingly, it has no bearing on the issue before the Court.

CONCLUSION

In sum, a trial court's grant of directed verdict on a non-settling defendant's Article 16 claims is an apportionment of the equitable share of fault for the settling defendants; and neither the text of G.O.L. § 15-108(a) nor any New York decision requires the apportionment to be made solely by a jury. On the contrary, treating a directed verdict as an apportionment of fault better serves the legislative purposes animating G.O.L. § 15-108(a). Accordingly, this Court should modify the trial court's application of G.O.L. § 15-108(a) and correctly aggregate the value of all

settlements ($1,432,500) and all settling defendants' equitable shares of fault (50%—amounting to $3,300,000), and deduct the larger value from the verdict. That would result in a reduction of $3,300,000 leaving a net verdict of $3,300,000.[5]

Date: May 13, 2019

Respectfully submitted,

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[5] The figure above is based on the remitted verdict. For the reasons stated at 54-59 of Plaintiff-Respondent-Cross Appellant's Brief, this Court should reinstate the jury's verdict, and apply the appropriate setoff calculation based on 50% aggregate fault.

PRINTING SPECIFICATIONS STATEMENT

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