# ASBESTOS LAW

## PENNSYLVANIA
## &
## WEST VIRGINIA

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Current through Summer 2021

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# PENNSYLVANIA LAW

**Up-to-Date Developments Summary:**

First, in 2011 the Fair Share Act was passed in Pennsylvania, which affects proportionate liability and the share of damages. Generally, the Act provides that a defendant who is found to be less than 60% liable will only be responsible for its proportionate share of the award. If a defendant is found to be liable for 60% or more of the damages, joint and several liability will continue to apply. In a major ruling, the Pennsylvania Supreme Court held that in strict liability claims, apportionment must be per capita and not by percentage of liability. *Roverano v. John Crane, Inc.*, 225 A.3d 526 (Pa. 2020). This applies when a plaintiff's injury—in this case lung cancer—is not directly attributable to any one product, but rather to exposure to various asbestos-containing products. The Court held that because each defendant is wholly liable for the harm in strict liability actions, and because experts agree there is no scientific or medical basis to apportion liability among the defendants, "it is impossible to instruct a jury to apportion liability for an individual injury on a percentage basis." *Id.* at 542.

Second, the Pennsylvania Supreme Court, in *Betz v. Pneumo Abex LLC*, held that an expert's opinion – that each and every exposure to asbestos is a substantial factor in causing a Plaintiff's disease – is not permitted without providing any analysis of how that opinion was reached. 44 A.3d 27 (Pa. 2012). In cases since this decision, Plaintiffs have provided expert reports that include some overview of the Plaintiffs' exposures to asbestos containing products. Pursuant to *Betz* and its progeny, some of these reports have been successfully challenged by Defendants. In a related, subsequent decision, *Rost v. Ford Motor Company*, the Court held that evidence of *frequent*, *regular*, and *proximate* exposures to asbestos-containing products creates a question of fact regarding causation of injury, and which must be left for the jury to decide. 151

A.3d 1032, 1044. A reasonable jury can determine causation even if the plaintiff did not "exclude every other possible cause for his or her injury." *Id.* at 1051. Taken together, *Betz* and *Rost* explain that in Pennsylvania expert opinion on causation cannot rest entirely on *de minimis* exposure to toxic substance; however testimony that exposure was greater than *de minimis* and "substantially causative" suffices to create a jury question. *Walsh v. BASF Corp.*, 234 A.3d 446, 474 (Pa. 2020) (Wecht, J., concurring).[1]

Third, in *Gregg v. V-J Auto Parts Co.*, the Pennsylvania Supreme Court found that it was appropriate for trial courts at the Summary Judgment stage to distinguish cases "in which the plaintiff can adduce evidence that there is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent on account of only casual or minimal exposure to the defendant's product." 943 A.2d 216, 225 (Pa. 2007). Recently, in the 2013 case of *Howard v. A.W. Chesterton Co.*, the Pennsylvania Supreme Court opined that "proof of some *de minimis* exposure to a defendant's product is insufficient to establish substantial-factor causation for dose-responsive diseases[,]" and that "[s]ummary judgment is an available vehicle to address cases in which only bare *de minimis* exposure can be demonstrated." 78 A.3d 605, 608 (Pa. 2013).

Fourth, the decisions in *Betz* and *Gregg* have had a significant impact on the treatment of asbestos case law in Western Pennsylvania. Different jurisdictions have applied these decisions in different ways.

[1] Justice Wecht also states that a remaining aspect of *Betz* continues to reaffirm *Frye v. United States* as the Pennsylvania standard for admissibility of scientific evidence. *Frye* states that expert opinion is only admissible when the methodology is generally accepted as reliable by the relevant scientific community. *See* 293 F. 1013 (D.C. Cir. 1923). This standard differs from the *Daubert* standard, codified by Federal Rule of Evidence 702, which allows greater gatekeeping ability for federal trial judges. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); Fed. R. Evid. 702.

Fifth, in *Abrams v. Pneumo Abex Corp.*, the Supreme Court held that the prior recovery of damages for increased risk and fear of developing cancer due to asbestos exposure, awarded under the (former) one disease rule, did not preclude a plaintiff from recovering from a party he has not previously sued for damages for cancer that developed and was diagnosed after the separate disease rule, also referred to as the "Two Disease Rule." 981 A.2d 198, 212 (Pa. 2009).

**The Fair Share Act and *Roverano v. John Crane, Inc.*, 226 A.3d 526 (Pa. 2020):**

On June 28, 2011, the Fair Share Act became law, amending 42 Pa.C.S. § 7102(a.1). It applies to cases accruing on or after June 28, 2011. The Act provides that Pennsylvania is a several liability state – as opposed to joint and several liability – except in cases where a defendant is determined to be at least 60% liable to the plaintiff. The Fair Share Act applies to cases where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant. § 7102(a.1)(2). Several liability means that a defendant is liable only for the proportion of the total dollar amount awarded as damages in accordance with the percentage of that defendant's liability.

With respect to apportionment of responsibility among a defendant and certain nonparties, the question of liability of any defendant or any other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. § 7102(a.2).

As it applies to asbestos litigation, with respect to prove-ins (i.e. defendants that have previously settled with the plaintiff) the more shares that can be proved-in will ultimately decrease the amount of liability of the non-settling defendant. The non-settling defendant will only be responsible for its portion of liability assigned to it by the trier of fact, unless it is at least 60% liable.

Asbestos trusts will also reduce the amount of liability. Based on *Baker v. AC&S, Inc.*, 729 A.2d 1140 (Pa. Super. Ct. 1999), an asbestos trust can be a severally liable defendant. Strict products liability defendants are each liable on a pro rata basis for a portion of their liability (i.e. four several defendants found liable are each 25% liable). *See Walton v. Avco* Corp., 610 A.2d 454 (Pa. 1992). However, it is unclear if this pro rata apportionment will continue in strict liability cases, as the Fair Share Act eradicates joint liability, except where a defendant is 60% or more liable. *Id.* Therefore, the non-settling defendants will only be liable for their portion of liability, unless it is 60% or more. While the Fair Share Act does not actually alter "proving in" settling defendants, it does make the trust defendants severally liable. These entities do not need to be named as defendants, but instead need to be identified as settling parties. Ultimately, as more defendants and/or settling parties are "proved in," the exposure of the non-settling defendant will be proportionately reduced.

In *Roverano v. John Crane, Inc*., 2017 PA Super 415 (Dec. 28, 2017), the plaintiff alleged exposure to asbestos during his employment as a carpenter from 1971-1981. He was diagnosed with lung cancer and sued 30 defendants, 8 of which were bankrupt. Prior to trial, the court denied a motion in limine filed by several defendants, in which defendants sought a "ruling that their liability, if any, would be apportioned by the jury according to the extent to which each defendant caused harm to [plaintiff]." 2017 WL 67610772017, at *11.

Ultimately, the case went to trial against 2 defendants, and the jury returned a verdict in favor of Roverano and his wife in excess of $6 million. The judge apportioned the verdict evenly among the 8 defendants who the jury determined to be responsible for plaintiffs' injuries. In its post-trial opinion, the court opined that it "properly denied [defendants'] motion to apply the Fair Share Act to this case because the jury was not presented with evidence that would

permit an apportionment to be made by it." *Id.* The defendants appealed, arguing, among other issues, that (1) the Fair Share Act should have applied, and (2) bankrupt entities should have been considered on the verdict sheet.

The Superior Court agreed, opining that the "trial court erred in holding that the jury could not apportion liability pursuant to the Fair Share Act." *Id*. at *14. The Superior Court qualified its ruling by recognizing that "apportionment by the jury will require submission of appropriate evidence from which the jurors may make an allocation." *Id.* The Superior Court also opined that juries "must be permitted to consider evidence of any settlements . . . with bankrupt entities in connection with the apportionment of liability." *Id.*

The Supreme Court reversed the Superior Court, relying on Pennsylvania common law that liability is apportioned equally among joint tortfeasors in strict liability actions. The Court specifically differentiates this from negligence actions "where liability is allocated among joint tortfeasors according to percentages of comparative fault." 226 A.3d 526, 538 (Pa. 2020). The Court determined that strict liability is "liability without fault" then it would be "improper to introduce concepts of fault in the damage-apportionment process." Id. Because each defendant is wholly liable for the harm in strict liability actions, then the Court has held that liability must be equally apportioned. The Court further stated that since lung cancer resulting from asbestos exposure is a single, indivisible injury, then the individual contributions to the plaintiff's total dose of asbestos would be impossible to determine and as such impossible to attribute percentage-based liability. In summary, the Fair Share Act does not preempt per capital apportionment of damages in strict liability claims.

***Rost v. Ford Motor Company*, 151 A.3d 1032 (Pa. 2016):**

On November 22, 2016, the Supreme Court of Pennsylvania issued an opinion in the case of *Rost v. Ford Motor Company*, regarding the application of the "frequency, regularity and proximity" criteria in asbestos litigation.

The *Rost* case involved a mesothelioma plaintiff who commenced a trial in September 2011 in Philadelphia, PA. The *Rost* case was consolidated with two other asbestos cases for trial over the objection of Ford. In addition, the court, at the time of trial, reminded all parties that it would preclude any expert from offering testimony that "each and every breath" of asbestos may constitute an evidentiary basis for the jury to find that the defendant's product was a substantial cause of Mr. Rost's mesothelioma.

In addition to alleging significant exposure to amphibole asbestos products during his career at Metropolitan Edison from 1960-1994, Mr. Rost alleged exposure to Ford chrysotile asbestos products while working at Smith Motors for in 1950 for 3-4 months. One of the medical experts who testified on behalf of Mr. Rost was Dr. Arthur Frank. According to Dr. Frank it is not scientifically possible to identify the particular exposure or exposures that caused Mr. Rost's mesothelioma but the causative factor is the series of exposures. Therefore, he opined that all exposures to asbestos contribute to the cumulative dose of asbestos necessary to cause mesothelioma. He further testified that all of the exposures that can be documented should all be considered as contributory to the development of disease. In response to hypothetical questions, Dr. Frank testified that it was his opinion, within a reasonable degree of medical certainty, that Mr. Rost's exposure to Ford products at Smith Motors for 3-4 months was a significant contributing cause of his mesothelioma.

When Plaintiff rested his case in chief, Ford moved for a non-suit contending that Dr. Frank had offered an "each and every breath" opinion which is prohibited pursuant to *Gregg* and *Betz* cases. The non-suit was denied and a verdict was entered against Ford.

On appeal, Ford raised two issues:

1. Whether, contrary to *Howard*, *Betz* and *Gregg*, a Plaintiff in an asbestos action may satisfy the burden of establishing substantial-factor causation by an expert's "cumulative exposure" that the expert concedes is simply an "any exposure" theory by a different name; and
2. Whether the Philadelphia Court of Common Pleas mandatory practice of consolidating unrelated asbestos cases is consistent with the Pennsylvania Rules of Civil Procedure and Due Process.

The Supreme Court held that Dr. Frank did not testify that a single breath of asbestos while at Smith Motors cause Mr. Rost's mesothelioma, but rather that the entirety of his exposures during the three months he worked there cause his disease. In addition, the Court held that Mr. Rost's exposures to asbestos at Smith Motors were sufficiently frequent, regular and proximate to permit the inference that these exposures were substantially causative. Furthermore, the Supreme Court held that issues of causation are matters of fact for the jury to decide. In conclusion, for all exposures to asbestos that satisfy the frequency, regularity and proximity test, when coupled with competent medical testimony establishing substantial factor causation are then put before the jury to decide the question of substantial factor.

With respect to the second issue on appeal, the Supreme Court held that it was an error for the trial court to consolidate three cases that did not have a common question of law or fact or which arose from the same transaction or occurrence pursuant to Pa. R.C.P. 213(a). Furthermore, whether Ford is entitled to relief in the form of a new trial for this error, or on its claim of a violation of its constitutional rights to due process, depends upon whether Ford was prejudiced by the consolidation. The Supreme Court ultimately held that there was no demonstrable prejudice to Ford and therefore no relief was due to Ford on this issue.

In conclusion, we believe the *Rost* case could negatively impact summary judgment arguments and rulings for all defendants as they relate to "*Betz*" related motions and/or arguments challenging Plaintiff's expert reports and *de minimis* arguments related to asbestos exposure.

***Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012)**:

In *Betz*, the Plaintiff was the wife and executrix of the Estate of Charles Simikian, who was diagnosed with mesothelioma after working as an auto mechanic for 44 years. Plaintiff filed suit in Western Pennsylvania, contending that several Defendants, including Allied Signal and Ford Motor Company, manufactured brakes which contained asbestos, and that the Decedent's exposure to the asbestos that proximately caused his death. Defendants sought to preclude Plaintiff's expert, Dr. John C. Maddox, from testifying on the "any exposure" theory by filing motions challenging its admissibility.

The trial court judge, Robert Colville, opined that Defendants' argument had merit. During the *Frye* hearing, Dr. Maddox testified that each exposure is a substantial factor in the development of mesothelioma. In response to Dr. Maddox's testimony, Defendants offered the expert testimony of Dr. Teta, who questioned Dr. Maddox's extrapolation methodology and selective use of reports. Ultimately, the court found there was an "analytical gap" between scientific proofs and Dr. Maddox's conclusions, ruling that his methodologies were not accepted by the general scientific community.

The Pennsylvania Supreme Court determined then that Judge Colville had appropriately conducted the *Frye* hearing. The court stated it could not reconcile Dr. Maddox's own conflicting statements, concluding that "one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose

responsive."[2] *Betz*, 44 A.3d at 56. *See also Gregg*, 943 A.2d at 226-27 (stating "this Court recently rejected the viability of the 'each and every exposure' or 'any breath' theory").

*Betz* signifies the court's view of substantial factor causation, and whether sufficient causation is evident where a plaintiff cannot establish the elements of causation in Pennsylvania under the "*Eckenrod* standard" of "frequency, proximity and regularity" (as discussed below). In *Betz*, the court opined that "we do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial factor causation in every 'direct evidence' case[.]" *Betz*, 44 A.3d at 56. In criticizing Dr. Maddox's "any-exposure" theory, the court wrote that:

> the understanding that Dr. Maddox's any-exposure opinion is fundamentally risk-based undergirds the primary conceptual concern of the common pleas court. Judge Colville reasonably questioned how it was – if Dr. Maddox could say is that a risk attaches to a single asbestos fiber – the he could also say that such risk is substantial when the test plaintiffs may have been (and likely were) exposed to millions of other fibers from other sources including background exposure.

*Id.* at 55. The *Betz* decision thus signified the court's desire to conduct an individualized assessment of substantial factor causation, although *Betz* failed to provide a specific framework for such assessment. The court set forth a standard in 2013, expanding from *Betz*, that "proof of some *de minimis* exposure to a defendant's product is insufficient to establish substantial-factor causation for dose-responsive diseases," and that "[s]ummary judgment is an available vehicle to address cases in which only bare *de minimis* exposure can be demonstrated." *Howard*, 78 A.3d at 605.

[2] In a footnote, the Court cited to Appellant's Brief which argued, "simply stated, plaintiffs' experts in this case, as well as in other asbestos cases, have never been able to explain the scientific and logical implausibility of agreeing to the premise that a lifetime of breathing asbestos in the ambient air will not harm a person, while on the other hand arguing that every breath of asbestos from a defendant's product, no matter how inconsequential, will." *Betz*, 44 A.3d at 56 n.36.

***Gregg v. V-J Auto Parts Co.*, 943 A.2d 216 (Pa. 2007) and *de minimis* Exposure**:

The estate of John Gregg filed suit in Philadelphia County, Pennsylvania alleging that the decedent's pleural mesothelioma was caused, in part, by exposure to asbestos-containing brakes sold by a supplier. At the close of discovery, Defendant brake supplier argued that Plaintiff could not prove exposure to Defendant's products purchased at a store and used only two or three times by the decedent under the *Eckenrod* standard of "frequency, proximity and regularity." *See Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988).

The trial court granted Summary Judgment after determining that Plaintiff's causation proof was inadequate. On appeal to the Pennsylvania Supreme Court, the court framed the issue as whether a plaintiff must show evidence frequent use of, and regular close proximity to, a defendant's product, even if plaintiff presents evidence of direct inhalation of asbestos fibers. The court observed that "the frequency and regularity prongs become 'somewhat less cumbersome' in cases involving diseases that the plaintiff's competent medical evidence indicates can develop after only minor exposures to asbestos fibers." *Gregg*, 943 A.2d at 225 (internal citation omitted). The court further observed that:

> generalized expert opinions that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease, do not suffice to create a jury question in a case where exposure to the defendant's product is *de minimis*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources).

*Id.* at 226. Therefore, at the summary judgment stage courts may assess "whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury." *Id.* at 227.

Although the court in *Gregg* declined to fashion a specific test for determining how and when an exposure to asbestos is *de minimis*, it expanded and clarified the issue in *Howard*, as discussed below. And Allegheny County's Judge Colville has determined a specific threshold that the Allegheny County courts apply in these cases.

**Post *Betz* and *Gregg* Treatment in Western Pennsylvania**:

First, In *Howard*, the Pennsylvania Supreme Court reaffirmed its earlier rulings in *Betz* and *Gregg* by rejecting the theory set forth by Plaintiffs that "each and every exposure to asbestos must be considered a significant contributing factor" to Plaintiff's condition. 78 A.3d at 605.

Second, Cambria County Court of Common Pleas Judge Kiniry weighed in on *Betz* in a group of cases known as "Cambria Cluster 166." His decision appeared to support or endorse the single fiber theory, which was explicitly rejected in *Betz*, and it is therefore unclear whether Judge Kiniry's ruling would withstand appeal, although we are not aware that it has been so challenged.

Third, in the Allegheny County case of *Whiteman v. 84 Lumber Co.*, Judge Colville issued a Memorandum Opinion in which the court opined that it would apply the Pennsylvania Supreme Court's directive with respect to alleged exposures which are only "*de minimis*," and the court set forth its own test for determining such exposures. 2013 Pa. Dist. & Cnty. Dec. LEXIS 249 (C.P. 2013).

Fourth, the Pennsylvania Superior Court, in *Nelson v. Airco Welders Supply*, 107 A.3d 146, 157 (Pa. Super. Ct. 2014), appeal denied, 169 A.3d 589 (Pa., June 21, 2017), adopted the Pennsylvania Supreme Court's ruling in *Betz* by rejecting the theory that "each and every

exposure to asbestos must be considered a significant contributing factor" to a plaintiff's condition.

***Howard v. A.W. Chesterton Co.*, 78 A.3d 605 (Pa. 2013)**:

The executrix of decedent, John Ravert, filed suit against various manufacturers, suppliers, and distributors of products which allegedly exposed Ravert to asbestos during his employment. Ravert was diagnosed with mesothelioma from which he later died. The trial court awarded summary judgment for various Defendants, finding that Ravert's deposition testimony failed to establish that he breathed asbestos-containing dust from the products manufactured by them. The trial court also found that expert affidavits submitted by Plaintiffs represented "an artificial record which attempt[ed] to dehor Ravert's observation denying the existence of asbestos dust." *Howard*, 78 A.3d at 607.

Following oral argument, the Supreme Court noted that Plaintiffs concede that "the factual record fails to demonstrate regular and frequent enough exposure during which respirable asbestos fibers were shed by [Defendants'] products to defeat summary judgment." *Id.* The court further noted, citing its earlier decision in *Gregg*, that Plaintiffs recognize that "this court will not allow Plaintiffs to prove that a particular asbestos-containing product is substantially causative of disease by the use of affidavits in which the expert's methodology is founded upon a belief that every single fiber of asbestos is causative." *Id.* (citing *Gregg*, 943 A.2d at 216). Further explaining the *Gregg* decision, the court in *Howard* opined that:

> the usage of a particular product has to be substantial enough when measured against the totality of the exposures, such that the particular product usage was substantial enough to be a factual cause of the disease . . . the test for adequacy is the comparison of the particular product exposure to the totality of the person's exposures.

78 A.3d at 608.

The court then expanded on *Gregg* and *Betz* that: (1) the theory that each and every exposure, no matter how small, is substantially causative of the disease, may not be relied upon as a basis to establish substantial factor causation for diseases that are "dose-responsive" (i.e. mesothelioma); (2) relatedly, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions; (3) bare proof of some *de minimis* exposure to a defendant's product is insufficient to establish substantial factor causation for dose responsive diseases; (4) relative to the testimony of an expert witness addressing substantial factor causation in a dose responsive disease case, some reasoned, individualized assessment of a plaintiff's or decedent's exposure history is necessary; (5) and summary judgment is an available vehicle to address cases in which only bare *de minimis* exposure can be demonstrated and where the basis for the experts testimony concerning substantial factor causation is the any exposure theory. *Id.*

Like *Betz* and *Gregg*, the decision in *Howard* is a victory for the defense of asbestos cases, particularly in the summary judgment stage. The court now requires a plaintiff to not only develop his case along the lines of product identification exposure, but also to link that exposure directly to the plaintiff. Particularly in situations where plaintiffs do not work up the plaintiff-specific exposure portion of the case, this decision can be cited and relied upon in oral argument of summary judgment motions.

**Cambria County, Pennsylvania and Judge Kiniry's Decision in "Cluster 166"**:

The three plaintiffs from Cambria Cluster 166 filed complaints alleging that the decedents developed asbestos-related diseases by "working with or around" alleged asbestos-containing products that were manufactured or supplied by various defendants to various Penelec Power stations from 1968 until 2007. During discovery, Plaintiffs produced expert reports from

Drs. Khan and Gress which provided a diagnosis of asbestosis or lung cancer along with the physician's causation opinion, purporting to link the decedents' asbestos exposure to their condition. Both physicians arguably used the "any exposure" theory in their reports, and thus Defendants filed Motions to exclude and/or Motions for Summary Judgment.

The court framed the issues as (1) whether an expert witness is required to testify to proximate cause in an asbestos case, (2) if so, what must an expert witness testify to for a plaintiff to satisfy his proximate cause burden of proof, and (3) how does *Betz* affect future decisions in terms of how the court should analyze expert medical witness opinions with regards to proximate causation.

Judge Kiniry found as to the first issue that Pennsylvania law requires the testimony of an expert witness in an asbestos case because the proximate cause of the disease process is "beyond the knowledge of the average lay person and thus an expert medical witness must testify." The court answered the second question by finding that the expert witness is only required to testify that (1) the defective product or negligence increased the risk of the injury, and (2) that the injury stemmed from the cause alleged. It was determined by the court that the two physicians' opinions were satisfactory for Plaintiffs to satisfy their *Prima Facie* proximate cause burden. Turning to the third issue, Judge Kiniry essentially held that the court has discretion to admit or exclude evidence absent a manifest abuse of discretion. He reasoned that in *Betz*, the crux of the Pennsylvania Supreme Court's ruling was that the Common Pleas Court did not abuse its discretion in holding that the subject physician's medical opinions were novel, that *Frye* needed to be applied, and that *Frye* dictated that his opinions be excluded. Judge Kiniry reasoned, therefore, that because *Betz* was an "abuse of discretion" case, *Betz* does not affect the court's decision in the Cambria Cluster 166 cases because the court was within its discretion to admit the

expert opinions, nor would *Betz* "change the way the court will handle expert medical opinions in the future." As a result, Judge Kiniry denied all of the Motions to exclude/Motions for Summary Judgment.

Arguably, this decision by Judge Kiniry takes a step backwards for Defendants in Cambria County. It also appears to support or endorse Plaintiffs' single fiber theory, which was explicitly rejected in *Betz,* and therefore, it is unclear whether such ruling would withstand appeal, although no challenge has been made at the present time.

**Allegheny County, Pennsylvania and Judge Colville's Decision in *Whiteman v. 84 Lumber Co.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 249 (C.P. 2013)**:

Defendant filed Motions for Summary Judgment in Allegheny County alleging that Plaintiff's exposures to their products were *de minimis* pursuant to the Supreme Court decisions in *Betz, Gregg,* and *Howard*. *Whiteman,* 2013 Pa. Dist. & Cnty. Dec. LEXIS at *1. Judge Colville concluded that the statements in the *Howard* case with regard to the *Gregg* and *Betz* issues were purely dicta but, nonetheless, constituted highly persuasive authority.

After analyzing the Pennsylvania Supreme Court cases, Judge Colville held that the trial court in Allegheny County will begin the process of applying what the court perceives to be the spirit of *Howard, Gregg,* and *Betz* with respect to *de minimis* exposure cases. Judge Colville discussed the difficulty of making a determination of *de minimis* exposure as the Pennsylvania Supreme Court did not issue a clear standard for making such determination. The trial court ultimately concluded that the *Gregg* Opinion, as adopted and incorporated in *Howard,* was an invitation for trial courts "to recognize and declare glaringly, strikingly, and compellingly small exposures, when apparent, as such in the judgment of the trial court as *de minimis,* whether based upon their absolute quantitative value of exposure or their comparative value of exposure in relation to a plaintiff's overall lifetime exposure." *Id.* at *11. While Judge Colville agreed to

accept this invitation by the Pennsylvania Supreme Court, he ruled that the court will only apply the *Gregg/Howard* directive where a plaintiff's exposure constitutes only a "handful" of occasions, or involves exposures that are as ephemeral as they are tangible, and/or exposures that are the proverbial cupful in the ocean of the plaintiff's lifetime exposure.

With respect to *Betz*, Judge Colville agreed that an expert who relies upon the each and every fiber being a substantial contributing factor rationale should be rejected out of hand. He opined that an expert must address the question of dose in some manner. Judge Colville further determined that a plaintiff must provide expert reports that provide some reasonable description of the plaintiff's specific exposures to each defendant's product and the plaintiff's overall lifetime exposure to asbestos.

The court's Opinion in *Whiteman* is a clear indication that Allegheny County courts will now seriously entertain Motions for Summary Judgment and arguments for low dose defendants (i.e. valve companies where a plaintiff was neither a pipefitter nor worked around valves), and also for *de minimis* exposures (i.e. outside contractors who only performed work at a facility on a few occasions). Parties in Allegheny County have been instructed to include a *de minimis* argument in their Motions for Summary Judgment based on lack of product identification, and the court has begun hearing such arguments and ruling appropriately. Thus Defendants in Allegheny County have found some success under the *de minimis* test.

**The Pennsylvania Superior Court's Decision in *Nelson v. Airco Welding Supply*, 107 A.3d 146 (Pa. Super. Ct. 2014):**

Decedent, James Nelson, worked as a pitman, laborer, mechanic, and welder at Lukens Steel in Pennsylvania from 1973 to 2006, and was later diagnosed with mesothelioma. He filed suit in 2008 in the Philadelphia County Court of Common Pleas against numerous

manufacturers, suppliers, and distributors of alleged asbestos-containing materials. He died in December 2009.

During discovery Plaintiff's medical expert opined that "minimal exposure [to asbestos] nevertheless substantially contributed to the Decedent's injury because mesothelioma may be caused by even a small exposure to asbestos." Defendants filed a Joint Motion to Preclude Dr. DuPont's "each and every breath" causation opinion testimony. The trial court held that the motion should be deferred until liability phase of the trial, which was then reverse bifurcated.

The damages portion of the trial commenced and the jury awarded $14.5 million in damages. Subsequently, the trial court entered an Order admitting Dr. DuPont's "each and every breath" causation testimony. At the liability phase of the trial, the jury entered a verdict for Plaintiff and against Defendants. All parties filed post-trial motions which were denied, and the Defendants appealed to the Superior Court. Based on the Pennsylvania Supreme Court's 2007 ruling in *Gregg*, the Defendants alleged that the trial court erred in finding legally sufficient the testimony of Dr. DuPont that "every asbestos exposure must be considered a cause of the disease." While Defendants' appeal in *Nelson* was pending before the Pennsylvania Superior Court, the Pennsylvania Supreme Court issued its landmark ruling in *Betz*.

The Pennsylvania Superior Court in *Nelson* found that Dr. DuPont's testimony was similar to that of the expert who was rejected in *Betz*, and the court pointed to Dr. DuPont's testimony that "there are no innocent exposures; they are all equally potentially causing the disease." 107 A.3d at 156. The *Nelson* Court ultimately concluded: "we cannot ignore Dr. DuPont's admonition that no fibers are innocent and his conclusion that each individual exposure is substantially causative . . . . we conclude that Dr. DuPont's testimony was inadmissible." *Id*. at 157-58.

Like *Betz*, the decision in *Nelson* is a victory for the defense of asbestos cases. In June 2017, the Pennsylvania Supreme Court declined to review the Superior Court's decision in *Nelson*, meaning that it remains binding precedent on trial courts. *See Nelson v. Airco Welders Supply*, 641 Pa. 784 (2017).

***Abrams v. Pneumo Abex Corp.*, 981 A.2d 198 (Pa. 2009) and the "Two Disease Rule"**:

Pennsylvania has adopted a "separate disease rule" or "two disease rule" which provides that in an asbestos exposure case, recovery may only occur for a disease which has already manifested itself, or for the natural, predictable progression of that disease. However, if additional injuries from a separate disease manifest themselves in the future, a second cause of action may be filed for these separate diseases.

The Pennsylvania Supreme Court issued an opinion in *Abrams v. Pneumo Abex Corp.*, which created a significant exception for plaintiffs who sued for a non-malignant asbestos-related injury prior to 1992 and recovered damages both for the non-malignancy and for their increased risk and fear of developing cancer in the future. 981 A.2d at 198.

In *Abrams*, Plaintiffs sued multiple defendants in 1985 for non-malignant diseases allegedly caused by asbestos exposure and in 1993 settled all of their claims, including increased *risk and fear of developing cancer* in the future. In 2002, both of the Plaintiffs were diagnosed with lung cancer, which they attributed to their asbestos exposure. Shortly thereafter, Plaintiffs filed suit against multiple companies, including John Crane, Inc., which were not defendants in the 1985 suit. Crane filed a Motion for Summary Judgment, claiming that Plaintiffs' current suit was barred by their 1985 settlement, as they had already recovered for their increased risk and fear of cancer. The Pennsylvania Supreme Court disagreed, providing that "prior recovery does

not preclude a subsequent recovery, from a new defendant, of damages for the actual development of asbestos-related lung cancer." *Id.* at 201.

Ultimately, the *Abrams* decision more than likely creates a new cause of action for plaintiffs who recovered for non-malignancy claims and increased risk and fear of cancer. For those plaintiffs who recovered for non-malignancy claims under Pennsylvania's former one-disease rule, an additional second claim can be filed for a malignancy that was allegedly caused by asbestos exposure, if they can identify a defendant that was not a party to the first action. This also remains a hot button issue in Pennsylvania asbestos litigation, but, for now, plaintiffs do have the option. (*See also* Part II Two Disease Rule and Part IV Fear of Cancer below.)

**Development of *Eckenrod* under *Krauss***:

The Pennsylvania Superior Court clarified the *Eckenrod* standard with its ruling in *Krauss v. Trane U.S. Inc.*, 104 A.3d 556, 564 (Pa. Super. Ct. 2014). In *Krauss*, the court observed that the witnesses who completed affidavits testified during cross examination that they had no actual knowledge that the products at issue contained asbestos. *Id.* at 572-73. In holding that such testimony was insufficient to establish asbestos content, the Superior Court held that an issue of fact is not created when a witness maintains that a product contained asbestos unless there is evidence that his belief is based on *actual knowledge* rather than speculation or supposition. *Id.* (emphasis added).

The *Krauss* court noted that a plaintiff cannot survive summary judgment when mere speculation would be required for the jury to find in plaintiff's favor. *Id.* at 568 (citing *Juliano v. Johns-Manville Corp.*, 611 A.2d 238, 239 (Pa. Super. Ct. 1992)). The Superior Court has also held that a witness' supposition that a product contained asbestos was insufficient to support the conclusion that the product did in fact contain asbestos. *Samarin v. GAF Corp.*, 571 A.2d 398,

404, 409 (Pa. Super. Ct. 1989). Additionally, the mere presence of a product at a plaintiff's work site is insufficient evidence of exposure. *Gregg v. V-J Auto Parts, Inc., 943 A.2d 216, 220* (Pa. 2007). Rather, there must be evidence which clearly demonstrates that the plaintiff worked with sufficient regularity and frequency and in close proximity to asbestos-containing products attributable to the specific defendant. Id.

This clarification of *Eckenrod* is important for the defense of asbestos cases as plaintiffs are required to come forward with specific testimony which is not conjecture or speculation. The Court indicated that the standard is such that it must provide a sufficient foundation for a jury to infer by a preponderance of the evidence that the plaintiff was exposed to asbestos from his frequent, proximate, and regular exposure to a particular defendant's product. If this standard is met, summary judgment is appropriate.

**Changes to the Products Liability Standard under *Tincher***:

Pennsylvania products liability law is based on the Restatement (Second) of Torts § 402A, which provides:

> (1) One who sells any product in a *defective condition* unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts § 402A (emphasis added); *See Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966) (adopting Section 402A as the law in Pennsylvania).

However, in November 2014, the Pennsylvania Supreme Court changed the standard for establishing products liability in Pennsylvania. *See Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). Pursuant to *Tincher*, a plaintiff pursuing a cause upon a theory of strict liability in tort must prove that the product is in a "defective condition." The plaintiff may prove defective

condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer ("consumer expectations test"), or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions ("risk-utility test"). The burden of production and persuasion is by a preponderance of the evidence. *Id.* at 335.

Under the "Consumer Expectations Test", a product liability defendant can demonstrate that a product was not defective "if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains[.]" *Id.* at 387.

In evaluating a plaintiff's consumer expectations, the jury will be instructed to consider the nature of the specific products alleged to have been sold by a specific defendant supplier or manufacturer/supplier, the identity of plaintiff as an end-user, the specific product's intended use and plaintiff as its end-user, and any express or implied representations by the manufacturer of the specific product. *Id.*

Under the "Risk-Utility Test", the jury will be instructed to determine "whether a manufacturer's conduct in manufacturing or designing a product was reasonable[.]" *Id.* at 389. In evaluating reasonableness of conduct, the jury will be instructed to consider the following factors:

> (i) The usefulness and desirability of the product—its utility to plaintiff and to the public as a whole;
>
> (ii) The safety aspects of the product—the likelihood that the specific product will cause injury, and the probable seriousness of the injury;
>
> (iii) The availability of a substitute product which would meet the same need and not be as unsafe;

(iv) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;

(v) Plaintiff's ability to avoid danger by the exercise of care in the use of the product;

(vi) Plaintiff's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and

(vii) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

*Id.* at 389-90.

Under *Tincher*, a defendant supplier or manufacturer/supplier may demonstrate that plaintiff as an educated end-user would have been able to appreciate any attendant dangers of manipulating the defendant's products and avoid danger by exercising due care to avoid such danger, and therefore, that the products were not defective.

**Post *Tincher* Development in *Amato***:

The Pennsylvania Superior Court in *Amato v Bell & Gossett*, 116 A.3d 607 (Pa. Super. Ct. 2015), extensively discussed the *Tincher* decision. In considering Defendant Crane Co.'s argument that the court's jury instruction should include a consideration of the reasonableness of Crane's conduct under the circumstances, the Court observed that the Third Restatement, the adoption of which was under consideration by the Supreme Court in *Tincher*, provided a framework for such a factual determination. The *Amato* Court found that the *Tincher* Court, while not adopting the Third Restatement, nonetheless embraced the consideration by juries of whether a product is unreasonably dangerous.

In *Amato*, the Court found that the claim in *Tincher* was one of defective design, not failure to warn. It observed that the *Tincher* Court emphasized the limited reach of its decision, citing the prudence of an "incremental" development of the common law, "within the confines of

the circumstances of cases as they come before the court." *Id.* at 620 (quoting *Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582 (Pa. 2012)). The *Amato* Court observed that the *Tincher* Court rejected adoption of the Third Restatement, in part, because it "presumes too much certainty about the range of circumstances, factual or otherwise, to which the 'general rule' articulated should apply." *Id.*

The *Amato* Court found that, despite this emphasis on flexibility and factual nuance, the *Tincher* Court nevertheless provided something of a road map for navigating the broader world of strict liability law. The court found that although *Tincher* limited its decision to the context of a design defect claim by the facts of *Tincher*, "the foundational principles upon which we touch may ultimately have broader implications by analogy." *Id.* (quoting *Tincher* 104 A.3d at 384 n. 21. As in *Tincher*, the *Amato* Court rejected the blanket notion that negligence concepts create confusion in strict liability cases and, thus, should not be placed before a jury.

The court reasoned that in a jurisdiction such as Pennsylvania which applies the Second Restatement, the issue of whether a product is defective depends upon whether that product is unreasonably dangerous, and to entirely separate the inquiry into the former from the inquiry into the latter is incompatible with basic principles of strict liability. *Id.* Accordingly, the Court agreed with *Tincher* that the question of whether a product is unreasonably dangerous, as that determination is part and parcel of whether the product is, in fact, defective, should be decided by the finder of fact.

***Prima Facie* Case**:

In assessing the plaintiff's evidence, Pennsylvania courts employ the frequency, regularity, and proximity test. *Eckenrod v. GAF Corp.,* 544 A.2d 50 (Pa. Super. Ct. 1988), *rev'd, Krauss v. Trane U.S. Inc.*, 2014 Pa. Super. 241. Today this is not a rigid test with an absolute

threshold necessary to support liability. Rather, application of the test should be a sliding scale approach tailored to the facts and circumstances of the case; for example, its application should become somewhat less critical where the plaintiff puts forth specific evidence of exposure to a defendant's product. *Krauss,* 2014 Pa. Super. at 241. Similarly, the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases, like mesothelioma, which can develop after only minor exposures to asbestos fibers.

**Frequency, Proximity, and Regularity – The *Eckenrod* Standard**:

The plaintiff's burden of proof in Pennsylvania requires that he demonstrate that he was regularly and frequently exposed to asbestos-containing products. *Eckenrod,* 544 A.2d at 52, *rev'd, Krauss,* 2014 Pa. Super. 241. A plaintiff does not meet that burden of proof by merely demonstrating the presence of asbestos. *Id.* Rather, the law in Pennsylvania requires that a plaintiff demonstrate that he worked in close proximity to an asbestos-containing product in that he inhaled the asbestos fibers shed by that asbestos-containing product. *Wilson v. A.P. Green Indus.,* 807 A.2d 922 (Pa. Super. Ct. 2002).

*Eckenrod* was initially expanded upon in *Gregg,* where the court reasoned that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

However, as of October of 2014, the Pennsylvania Superior Court argued against the rigid *Eckenrod* standard, opting instead "a new fact-specific sliding scale approach that includes . . . [1] the test should be tailored to the facts and circumstances of the case, such that, for example, its application should become 'somewhat less critical' where the plaintiff puts forth

specific evidence of exposure to a defendant's product [, and 2] the frequency and regularity prongs become 'somewhat less cumbersome' in cases involving diseases that the plaintiff's competent medical evidence indicates can develop after only minor exposures to asbestos fibers." *Krauss,* 2014 Pa. Super at 241 (internal citations omitted).

**Strict Liability**:

Traditional products liability law in Pennsylvania is based on Section 402A of the Restatement (Second) of Torts, which states that every party in the distribution chain is strictly liable for any product defect in the product they sold. *See Bugosh v. Allen Refractories.,* 932 A.2d 901 (Pa. Super. Ct. 2007) (applying Section 402A as the law in Pennsylvania). In order for a defendant to be held liable the plaintiff must establish that his injuries were caused by a product of the particular manufacturer or supplier. *Ottavio v. Fibreboard Corp.,* 617 A.2d 1296, 1297-98 (Pa. Super. Ct. 1992).

The Third Restatement treats intermediate sellers differently than manufacturers. While under the Second Restatement, liability can be imposed on manufacturers, retailers and distributors for injuries caused by products with manufacturing, design, or informational defects, regardless of whether a defendant acted reasonably in the preparation and sale of the product at issue, the Third Restatement would require plaintiffs to prove that a defendant acted unreasonably. Restatement (Third) of Torts § 2. However, the Third Restatement has not been adopted in Pennsylvania. *See Tincher v. Omega Flex, Inc.*, 2014 Pa. LEXIS 3031, * 3 (Pa. 2014) (noting that while the court declined to adopt the third restatement, certain principles contained in that Restatement were helpful in its ruling).

The Supreme Court of Pennsylvania found "a serious misalignment between the descriptions of [Pennsylvania] strict liability and its actual operation." *Bugosh v. I.U. N. Am.,*

*Inc.*, 971 A.2d 1228, 1234 (Pa. 2009). It found the application of strict liability in design and warning cases much more problematic than in a manufacturing defect case. It thus adopted a "quasi-strict liability" doctrine, which, in design and warning-type cases, involves a notion of foreseeability and reasonableness, and importantly, includes the fact finder.

**Statute of Limitations**:

**Two Year Statute of Limitations**:

Pennsylvania statute expressly provides a two year statute of limitations for asbestos matters:

> An action to recover damages for injury to a person or for the death of a person caused by exposure to asbestos shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure or upon the date on which the person knew or in the exercise of reasonable diligence should have known that the person had an injury which was caused by such exposure, whichever date occurs first.

42 Pa.C.S. § 5524(8).

In 2013 the Pennsylvania Supreme Court deemed the former statute of limitations from Section 5524.1 unconstitutional as part of its decision in *Commonwealth v. Neiman*, 84 A.3d 603, 615 (Pa. 2013). However, it is believed that due to this situation, the same two year statute will still apply pursuant to the former limitation under Section 5524(8). *See e.g. Wygant v. GE*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 99, *6 (Pa. C. 2014) (Colville, J.) (holding "[i]n my view, because *Neiman* held that Act 152 was unconstitutional in its entirety . . . 42 Pa.C.S. § 5524(8) never went out of existence, and as a matter of law, 42 Pa.C.S. § 5524(8) has remained the law since its original creation.").

**Discovery Rule**:

Pennsylvania statute expressly provides:

> The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action accrued, the criminal offense was committed or the right of appeal arose.

42 Pa.C.S. § 5502(a).

**Direct Suit by Tort Victim or Survival Action**:

Based on Section 5502, Pennsylvania has adopted the discovery rule for asbestos cases. The discovery rule is an exception to the general rule that the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Cochran v. GAF Corp.*, 666 A.2d 245, 248 (Pa. 1995). This applies in asbestos-exposure cases where the plaintiff's injury/disease may be latent. *White v. Owens-Corning Fiberglas, Corp.*, 668 A.2d 136, 144 (Pa. Super. Ct. 1995)

Thus, when the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible. *Ingenito v. AC & S, Inc.*, 633 A.2d 1172, 1177 (Pa. Super. Ct. 1993).

However, the statute of limitations is not tolled by mistake or misunderstanding. A diligent investigation may require one to seek further medical examination as well as competent legal representation. A plaintiff is not under an absolute duty to discover the cause of his illness. Instead, he must exercise only the level of diligence that a reasonable man would employ under the facts and circumstances presented in a particular case. *Id.* at 1174.

**Statute of Repose**:

Defendants in asbestos cases in Pennsylvania may invoke the provisions of the statute of repose, 42 Pa.C.S. §5536, as a defense to liability for harms that occur later than 12 years after

the original construction that caused the harm. *See Graver v. Foster Wheeler Corp. Appeal*, 2014 Pa. Super. 132 (holding the statute of repose barred claims against entities engaged in performing or furnishing the design, planning, supervision, or observation of construction, or construction of any improvement to real property, including in asbestos matters).

The statute of repose is applicable to defendants who make improvements to real property, as defined in *Rabatin v. Allied Glove Corp.*, as "exceedingly large, permanent fixtures, meaningfully connected, and essential to the operation and use of, the industrial facilities to which they are installed." 24 A.3d 388, 395 (Pa. Super. Ct. 2011).

The Pennsylvania Superior Court has refused to carve out a special exception to Pennsylvania's statute of repose for plaintiffs who claim exposure to asbestos as a result of improvements to real property protected by the statute. *Id.*

Plaintiff alleged exposure to asbestos-containing insulation and component parts from turbines manufactured by GE and located in the U.S. Steel facility where Plaintiff worked. GE designed and constructed the turbines located in the plant where Plaintiff worked. Following the construction of the turbines, GE periodically inspected and repaired the turbines. In his deposition, Plaintiff testified that he participated in the repair and replacement of asbestos-containing block insulation in the turbines.

At the conclusion of discovery, Defendant GE moved for summary judgment. The trial court denied GE's motion on the issue of whether a question of fact existed regarding Plaintiff's exposure to asbestos from the turbine, but granted GE's subsequent motion raising a defense under the Statute of Repose because the turbines were manufactured and installed more than 12 years before Plaintiff's alleged exposure to turbines. Plaintiff appealed the summary judgment ruling.

In Pennsylvania, the Statute of Repose imposes limitations on liability by requiring that any civil action against a person "performing or furnishing the design, planning, supervision, or observation of construction, or construction of such improvement" be commenced within 12 years of the completion of the construction. § 5536(a); *Rabatin*, 24 A.3d at 392.

Viewing *Rabatin* as a whole, it is good news for defendants who manufacture and install what can truly be characterized as improvements to real property, and the decision should lead to wider use of (or at least attempts to use) the Statute of Repose. However, certain factors will limit its broader application. For instance, courts have traditionally been strict in defining a machine as an improvement to real property, and few of the products generally involved in asbestos litigation can meet that strict definition.

**The Two Disease Rule**:
(*see also Abrams v. Pnuemo Abex Corp.* summary in Part I above)

Pennsylvania has adopted a "two disease rule" in asbestos exposure cases. *Abrams*, 981 A.2d at 198. In the first action, recovery can only be for the disease which has already manifested itself from the exposure to asbestos and the natural, predictable progression, if any, of that disease. If additional injuries from a separate disease manifest themselves in the future, such injuries will support a second action.

The compensable separate diseases are:

(1) Non-malignant symptomatic asbestos-related diseases: this includes pleural (chest cavity lining) thickening in addition to disabling consequences or manifest physical symptoms, but it does not include only pleural thickening without symptoms (asymptomatic pleural thickening). *Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996); *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. Ct. 1993).

(2) Malignancies, including: Lung Cancers, Colon Cancers, Esophageal Cancers, and Mesothelioma.

(3) Subsequent Malignancies: the "two disease rule" allows an individual to bring separate lawsuits for more than one malignant disease. *See Daley v. A.W. Chesterton, Inc.*, 37 A.3d 1175 (Pa. 2012).

Since Pennsylvania is a separate disease state, the statute of limitations is separate for each disease. Discovery of one disease does not begin the running of the statute for the other disease.

**Workers' Compensation Claims / Employer Liability**:

As a result of the court's holding in *Tooey v. AK Steel Corp.*, the court provided that the "employer, like any other entity not covered by the Act, will be subject to traditional tort liability requiring a showing by the plaintiff of, *inter alia, negligence on the part of the employer,* and employers will retain their common law defenses." 81 A.3d 851, 865 (Pa. 2013) (emphasis added). These defenses may include, for example, contributory negligence and assumption of the risk.

In *Tooey*, employers filed Motions for Summary Judgment on the basis that the exclusivity provisions of the Pennsylvania Workers' Compensation Act barred Plaintiffs' respective causes of action against the Employers. *Id.* at 851. Section 303 of the Pennsylvania Workers' Compensation Act provides that the liability of an employer for injuries sustained by the employee in the workplace "shall be exclusive and in place of any and all liability to such employee . . . or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death." 77 P.S. § 481(a). Plaintiffs responded that a tort action may proceed against an employer where, as here, the disease falls outside of the jurisdiction, coverage

and scope of the Workers' Compensation Act. Plaintiffs' argument was based their interpretation of the "300-week rule," which under the Pennsylvania Workers' Compensation Act, Section 301(c)(2), provides that "whenever occupational disease is the basis for compensation, for disability or death under this Act, *it* shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to the hazards of such disease" 77 P.S. § 411(2).

Plaintiffs contended that the "it" in italics above means "this Act," such that the Workers' Compensation Act applies only when occupational disease occurs within 300 weeks of the last date of employment (and does not apply after the expiration of 300 weeks). The trial court agreed with Plaintiffs and the Employers' Motions for Summary Judgment were denied. After reversal by the Superior Court, the Pennsylvania Supreme Court granted Plaintiffs' Allowance of Appeal to determine whether, under the "plain language" of the Pennsylvania Workers' Compensation Act and Occupational Disease Act, the definition of "injury" excludes an occupational disease that first manifests more than 300 weeks after the last occupational exposure to the hazards of such disease, such that the exclusivity provisions of the Workers' Compensation Act do not apply to that injury, thus permitting Plaintiffs to proceed with their tort claims against the Employers.

The Supreme Court construed the legislative intent of the "300-week rule" to mean that the Workers' Compensation Act does not apply to occupational diseases which manifest outside of the 300-week period, such that an employee may pursue civil damages against the employer in such cases. The court pointed out that the two Plaintiffs did not, and indeed, could not seek any compensation under the Workers' Compensation provisions for their mesothelioma diagnosis

given the fact that their disease did not manifest for 780 weeks and 1300 weeks (respectively) after their employment-based exposure to asbestos, and the court added that the average latency period for mesothelioma is 30 to 50 years. The court reasoned, therefore, that it was not the intent of the drafters of the Workers' Compensation Act to use the 300-week window as a *de facto* exclusion of coverage under the Act for all mesothelioma claims.

The court's decision in this case is disappointing. As Justice Saylor aptly described in the dissenting opinion, the court's description of the latency period of 30 to 50 years in mesothelioma cases is measured from the first exposure, whereas the 300-week time period is measured from the last exposure, and as a result, some mesothelioma claims could be covered by the Workers' Compensation Act for persons who have had a long occupational history of exposure. *Tooey*, 81 A.3d at 873 n.11 (Saylor, J., dissenting). The court's ruling will have potentially significant implications for Pennsylvania mesothelioma cases going forward, particularly with respect to premises defendants and contractors, who have traditionally been immune from suit filed by former employees on the basis of the exclusivity provisions of the Workers' Compensation Act. These entities will have to defend these cases, and will no longer be able to obtain Summary Judgment based on the Workers' Compensation Act. In fact, this decision has already manifested in a large uptick of lawsuits filed against premises defendants and contractors based on their employment of asbestos Plaintiffs.

**Public Employer Liability:**

In *Geier v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh*, 153 A.3d 1189, 1204 (Pa. Cmwlth. Ct. 2017), the Commonwealth Court held that "it is possible for a local agency to be liable to an employee for workplace exposure to asbestos dust, if the condition causing exposure falls within one of the exceptions to governmental immunity."

In that case, the plaintiff school teacher sued her former employer, the Pittsburgh School District, after contracting mesothelioma. She alleged that she had been exposed to various asbestos-containing products when she worked at a high school within the district in the late 1950s.

The trial court denied the school district's motion for summary judgment—which the district had filed on governmental-immunity grounds—and then certified the following question for the Commonwealth Court to review: "Is a school district entitled to governmental immunity under [the Tort Claims Act], and the Pennsylvania Constitution, for work-based exposure to asbestos-containing products[?]." *Id.* at 1196 (alterations in original).

The Commonwealth Court concluded that the plaintiff's evidence—that the school district used "asbestos-containing products in its maintenance of its steam and water pipe coverings, and repair of its floors, ceilings and walls"—might satisfy either the utility-service or real-property exceptions to government immunity. *See* 42 Pa. Cons. Stat. § 8542.[3] For this reason, the Commonwealth Court refused to disturb the trial court's denial of summary judgment on governmental-immunity grounds, and remanded to the trial court for further proceedings. This case is scheduled to be tried in Allegheny County in 2018.

**Secondary Exposure Cases**:

The Eastern District of Pennsylvania recently held that under Pennsylvania law, an employer and premises owner does not owe a duty "to a spouse of an employee to protect against, or warn her of, the hazards of exposure to asbestos fibers allegedly transmitted at the employer's premises and carried into her home by her husband[.]" *Gillen v. Boeing Co.*, 2014

[3] The utility-service exception to governmental immunity allows liability for "[a] dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way". 42 Pa. Cons. Stat. § 8542(b)(5). The real-property exception allows liability for "[t]he care, custody or control of real property in the possession of the local agency". *Id.* at § 8542(b)(3)

U.S. Dist. LEXIS 120002, *5 (E.D. Pa. 2014). In its decision, the court considered the five "*Althaus*" factors to find there was no duty. *Id.* at *12. *See also Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000) (establishing that "the determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.").

**Premises Owner's Liability – In Possession**:

According to Pennsylvania case law, "employees of independent contractors are invitees who fall within the classification of business visitors. The duty of care owed to a business invitee is the highest duty owed to an entrant upon land." *See e.g. Chenot v. A.P. Green Servs.*, 895 A.2d 55 (Pa. Super. Ct. 2006) (internal citations omitted).

Thus, a possessor of land is liable only if he (a) knows or by the exercise of reasonable care would discover the condition, and should realize it involves an unreasonable risk of harm to such invites, and (b) should expect that the invite will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. *Id.* at 68. *See also* Restatement (Second) of Torts § 343.

Pennsylvania law imposes no general duty on property owners to prepare and maintain a safe building for the benefit of a contractor's employees who are working on that building. Rather, Pennsylvania law generally insulates property owners from liability for the negligence of independent contractors and places responsibility for the protection of the contractor's employees on the contractor and the employees themselves. Nevertheless, a landowner must protect an invitee not only against known dangers, but also against those which might be

discovered with reasonable care. Additionally, certain exceptions exist to the general rule that otherwise would limit the property owner's liability. *Chenot*, 895 A.2d at 68.

**Premises Owner's Liability – Out of Possession**:

The "peculiar risk" doctrine has been endorsed by the Pennsylvania Supreme Court. *See Farabaugh v. Pa. Tpk. Comm'n*, 911 A.2d 1264, 1277 (Pa. 2006). A "peculiar risk" (or "special danger") exists when: (1) a risk is foreseeable to the employer of an independent contractor at the time the contract is executed (that is, if a reasonable person in the position of the employer would foresee the risk and recognize the need to take special measures); and (2) the risk is different from the usual and ordinary risk associated with the general type of work done (that is, the specific project or task chosen by the employer involves circumstances that are substantially out-of-the ordinary). Courts must construe the "peculiar risk" doctrine narrowly, in recognition of the fact that most construction work contains some element of risk. *Id. See also* Restatement (Second) of Torts §§ 416, 427.

**Fear of Cancer**:

Fear of cancer is no longer a separate cause of action or damage in Pennsylvania after announcing the "two disease rule" for asbestos actions. *Abrams*, 981 A.2d at 206. Disallowing fear of cancer damages and causes of action eliminates the speculative judgments awarded. *Simmons*, 674 A.2d at 238. Fear of cancer is not compensable, but a plaintiff may bring separate causes of action for asbestosis and lung cancer. *Giffear*, 632 A.2d at 888.

**Medical Monitoring**:

Pennsylvania case law has found that allowing plaintiffs to recover for medical monitoring is appropriate and just. *Simmons*, 674 A.2d at 240. *See also Wagner v. Anzon, Inc.*,

684 A.2d 570 (Pa. Super. Ct. 1996). In order to recover the Third Circuit has held that the following factors must be met:

> (1) Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
>
> (2) As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
>
> (3) That increased risk makes periodic examinations reasonably necessary.
>
> (4) Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

*Redland Soccer Club v. Dep't of the Army*, 55 F.3d 827, 845 (3d Cir. 1995).

A plaintiff cannot recover for asymptomatic asbestos-related injuries (i.e. injuries unaccompanied by discernible physical symptoms or functional impairment). However, recovery for medical monitoring by plaintiffs suffering from asymptomatic pleural thickening caused by occupational exposure to asbestos is available. *Simmons*, 674 A.2d at 240. In that case, not only are medical monitoring costs recoverable as damages, but they support a separate cause of action.

**Insurance Punitive Damages**:

Under Pennsylvania law, "[p]unitive damages will be allowed for torts committed willfully, maliciously, or so carelessly as to indicate wanton disregard for the rights of the party injured." *Moran v. G. & W.H. Corson, Inc.*, 586 A.2d 416, 423 (Pa. Super. Ct. 1991). When assessing punitive damages, liability insurance is precluded. Punitive damage awards are designed to deter and punish an individual litigant for egregious behavior; such awards are not bodily injury or property damage awards. *G.J.D. v. Johnson*, 713 A.2d 1127, 1134 (Pa. 1998).

**The Several Liability Standard**:

Under the Fair Share Act, Pennsylvania is a several liability state, except in cases where a defendant is determined to be at least 60% liable to the plaintiff. 42 Pa.C.S. § 7102(a.1). (*See* Part I, Fair Share Act above).

**Noteworthy Verdicts**:

*Merwitz v. Allis-Chalmer,* 2:2012-CV-02317 (E.D. Pa. 2014) - A Philadelphia jury assessed a $7.25 million verdict in March 2014 against nine asbestos manufacturers in a mesothelioma case. Decedent, Edward Merwitz, was diagnosed with mesothelioma in January 2010 and died six months later. The Philadelphia County jury rendered the verdict after two weeks of trial. The jury rejected Defendant Rockbestos' arguments that a witness who worked with decedent had misidentified their product, that Rockbestos' electric wire product did not give off breathable fibers, and that decedent was not exposed to asbestos with the requisite degree of regularity, frequency, and proximity. Rockbestos was the only remaining defendant at the time of trial. It had offered $2,500 to settle the case prior to the commencement of trial. Instead, the company will pay its share of $3.6 million in survival damages and another $3.6 million for wrongful death.

*Vinciguerra v. Crane Co.,* 2013 Phila. Ct. Com. Pl. LEXIS 399 (C.P. 2013) – A Philadelphia jury returned a $2.3 million verdict against Crane Co., DAP Inc., Duro Dyne Corp., The Goodyear Tire and Rubber Co., and Goodyear Canada Inc. Plaintiff filed suit in June 2012 on behalf of decedent, Frank Vinciguerra, who died in 2010, as a result of mesothelioma. The majority of defendants settled prior to trial. Plaintiff claimed that the decedent contracted mesothelioma during his employment as a sheet metal helper and sheet metal mechanic for E.I. DuPont from 1951 to 1985. The jury found that E.I. DuPont failed to exercise reasonable care to

protect decedent from the hazardous, dangerous, and harmful conditions that existed at the property.

**Using a Deceased Plaintiff's Deposition Testimony to Oppose Summary Judgment:**

In *Kardos v. A.O Smith Corp*, GD-16-3523 (Allegheny Cty. Ct. Com. Pl., Dec. 12, 2016), Judge Arnold Klein granted a defendant's motion to preclude all parties from using the incomplete deposition testimony and affidavit of the deceased plaintiff for summary-judgment purposes. In that case, the Plaintiff died after providing three days of deposition, and the moving Defendant estimated that it needed an additional two to three days to complete its cross examination.

The Defendant thus filed a motion to preclude the parties from using the incomplete testimony—both at summary judgment and at trial—on the ground that use of the testimony would be unfairly prejudicial under Pennsylvania Rule of Evidence 403. Judge Klein granted the motion, but ordered only that the testimony could not be used "in connection with summary judgment motions in this case."

The Plaintiffs filed an appeal to the Superior Court on January 2, 2018, arguing, among other things, that "the trial court erred in refusing to consider sworn deposition testimony of the decedent which resulted in the Court granting summary judgment in favor of eight defendants." The Superior Court, in reviewing the record at the trial court level, permitted the admission of both the deposition and the Plaintiff's affidavit. In doing so, the Superior Court held that "Appellant as nonmovant can use [Plaintiff's] properly executed affidavit, signed subject to the penalties of Section 4904, as part of the record in opposition to [Defendants'] motions for summary judgment, because it is not inherently unreliable. *Kardos v. Armstrong Pumps, Inc.*, 222 A.3d

# WEST VIRGINIA LAW

**Up-to-Date Developments Summary**:

Recently, drastic tort reform has changed the legal landscape in West Virginia, and many of the new laws will have a dramatic impact on asbestos litigation. Two of the laws, the Asbestos Bankruptcy Trust Claims Transparency Act and the Asbestos and Silica Claims Priorities Act directly address various facets of asbestos litigation. Other laws were passed to address civil litigation in general, but they will impact asbestos litigation as well.

**Asbestos Bankruptcy Trust Claims Transparency Act**:

The Asbestos Bankruptcy Trust Claims Transparency Act was passed on March 11, 2015 and went into effect on June 9, 2015. It applies to cases filed on or after June 9, 2015. The text of the Asbestos Bankruptcy Trust Claims Transparency Act is located at W. Va. Code § 55-7F-3 – 55-7F-11.

The Asbestos Bankruptcy Trust Claims Transparency Act places the onus on the plaintiff to be forthcoming, or "transparent" regarding amounts received from the numerous bankruptcy trusts. Pursuant to the new law, the plaintiff, subject to penalties of perjury, is now required to identify in a sworn affidavit with an ongoing duty to supplement specific information about each trust claim, including specific amounts claimed; whether there has been a request to suspend or toll the claim; and the claim's disposition. The plaintiff is required to provide the disclosure no later than 120 days before the date set for trial. The law removes any barriers to claims of privilege by the plaintiff's counsel and makes all trust information, including the actual amounts claimed or paid, discoverable and admissible as evidence. The court will not schedule an asbestos civil action for trial until at least 120 days after the plaintiff makes the required disclosures, and if the plaintiff identifies a potential trust claim in the disclosures, the court may

impose a "stay" until the trust claim was filed and all materials for the claim were provided to a defendant.

The law also provides a defendant the opportunity to identify trusts to which the plaintiff has failed to apply and provides a defendant an ability to remedy the failure to apply. A Defendant is permitted to confer with the plaintiff regarding asbestos trusts to which a defendant believes that the plaintiff is qualified to receive and may move the court to compel the plaintiff to file said claim. The law proscribes steps that the plaintiff must take in response to the trusts identified by a defendant. Further, if the court finds a sufficient basis, the court can order the plaintiff to file the claim.

The law further provides for the assignment of a setoff or credit. If damages are awarded to the plaintiff, a defendant is entitled to a setoff in the amount of valuation established under trust documents. If multiple defendants are liable, the court shall distribute the setoff proportionately, according to the liability of each defendant. There is a rebuttable presumption at the time of trial that the plaintiff is actually entitled to, and will receive, the amounts claimed from bankruptcy trusts not yet paid. The court, through judicial notice, may then establish an attributed value to plaintiff's trust claims.

**Asbestos and Silica Claims Priorities Act**:

The Asbestos and Silica Claims Priorities Act was passed on March 11, 2015 and went into effect on June 9, 2015. It is codified at W. Va. Code § 55–7G-1 through § 55–7G-10, and it applies to cases filed on or after June 9, 2015.

The Asbestos and Silica Claims Priorities Act was passed to codify requirements for the filing of non-malignant cases in asbestos litigation. It sets up guidelines for the filing of a complaint by a plaintiff with a nonmalignant condition. Given the current case management

order in place in in West Virginia, this statute seems unnecessary, as the current case management order establishes priority for malignant cases. The introduction section of the statute provides a summary of the legislative findings that led to the passage of the new asbestos laws.

**Modified Comparative Fault**:

House Bill 2002 was passed on February 25, 2015. This law became effective on May 25, 2015 and applies to all causes of actions arising or accruing on or after this date. It established W. Va. Code § 55-7-13(a-d) and repealed W. Va. Code § 55-7-24, effectively abolishing joint & several liability and establishing modified comparative fault. The additions to the West Virginia Code also set forth the method of computation of damages in relation to the percentage of fault allocated to each defendant.

The new comparative fault standard ensures that each defendant is responsible for its share of damages. The new law will allow a trier of fact to consider fault of all entities, including parties and nonparties. Under this law, each defendant shall be liable only for the amount of compensatory damages allocated to a defendant in direct proportion to that defendant's fault. A trier of fact will consider the fault of all entities, including the plaintiff, that contributed to the alleged damages, regardless of whether the entity was or could have been named.

The new comparative fault statute establishes protocols for assigning fault to non-parties. Fault of a nonparty can be considered if the plaintiff entered into a settlement agreement with the non-party or if a defendant party gives notice to the court within the appropriate time period that a non-party was at fault. The court then shall instruct a jury to make findings indicating percentage of fault to each liable entity.

**Punitive Damages**:

By statute effective June 8, 2015, the West Virginia legislature addressed punitive damages in civil actions. The text of the new punitive damages statute is located at W. Va. Code § 55-7-29. The law creates a new standard of proof, a standard allowing for bifurcation and a statutory cap. According to the new standard of proof, the plaintiff must establish by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by a defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others. This new law also allows for bifurcation, with the first phase of trial consisting of a determination of liability, and if the jury rules against the defendant, then the court will determine whether sufficient evidence exists to proceed with a consideration of punitive damages. If the court finds that sufficient evidence exists, then the same jury shall determine if a defendant is liable for punitive damages. Lastly, the new law sets a cap on punitive damages at four times the amount of compensatory damages or $500,000, whichever is greater.

**Deliberate Intent**:

House Bill 2011 was passed on March 14, 2015 and became effective as of June 12, 2015. This law applies to all injuries occurring on or after July 1, 2015. The text of the new deliberate intent law is located at W. Va. Code § 23-4-2.

As amended in 2005, the "deliberate intent" statute requires that an employer have actual knowledge of the existence of the specific unsafe working condition prior to the injury. W. Va. Code § 23-4-2(d)(2)(ii)(B). In order to succeed in an action for "deliberate intent," a plaintiff must prove all of the following elements:

> (i) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (ii) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition.
>
> * * *
>
> (iii) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer.
>
> * * *
>
> (iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through (iii), inclusive, of this paragraph, the person or persons alleged to have actual knowledge under subparagraph (ii) nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
>
> (v) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three as a direct and proximate result of the specific unsafe working condion.

HB 2011 (Mar. 14, 2015); W. Va. Code § 23-4-2(d)(2)(B)(i)-(v).

In comparison to the prior deliberate intent statute, House Bill 2011 tightens the requirements of W. Va. Code § 23-4-2 by (1) strengthening the "actual knowledge" requirement, clarifying that it may not be proven by constructive knowledge or by proof that what an employee's immediate supervisor or management personnel should have known of that specific unsafe working condition and the risk it posed had they exercised reasonable care; (2) requiring more stringent proof that a specific unsafe working condition violates commonly accepted or well-known safety standards or a state or federal safety statute, rule or regulation; and (3) specifying three new methods by which a plaintiff may establish that he has suffered a "serious, compensable injury."

In addition to the tightened requirements to prove a prima facie case, this new law requires the plaintiff to serve a verified statement in support of his or her complaint. The statement must specify the unsafe working condition that caused the injury and the statute, rule, regulation or industry standard violated by the employer. The verified statement must be provided by a person with knowledge and expertise in the industry.

**Choice of Law**:

Revisions to W. Va. Code §55-8-16 were passed in 2015 and became effective on July 1, 2015 and apply to all civil actions commenced on or after July 1, 2015. The new choice of law statute provides that in determining the law applicable to a to a product liability claim brought by a nonresident of this state against the manufacturer or distributor of a prescription drug or other product, all liability claims at issue shall be governed solely by the product liability law of the place of injury ("lex loci delicti").

***Prima Facie* Case**:

**Two Year Statute of Limitations**:

**Actions for Bodily Injury or Survival Actions**:

West Virginia has a two year statute of limitations for personal injury actions:

> [e]very personal action for which no limitation is otherwise prescribed shall be brought: . . . (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries.

W. Va. Code § 55-2-12.

**Wrongful Death**:

West Virginia has a two year statute of limitations for wrongful death causes of action:

> [e]very such action shall be commenced within two years after the death of such deceased person, subject to the provisions of section eighteen, article two, chapter fifty-five. The provisions of this section shall not apply to actions brought for the

> death of any person occurring prior to the first day of July, one thousand nine hundred eighty-eight.

W. Va. Code § 55-7-6(d).

**Discovery Rule**:

**Actions for Bodily Injury or Survival Actions**:

West Virginia follows the discovery rule to toll the statute of limitations, which is applicable to all tort actions unless there is a clear statutory prohibition to its application. *Rucker v. Deere & Co. (In re Rucker),* 539 S.E.2d 112 (W. Va. 2000); *Hickman v. Grover*, 358 S.E.2d 810 (W. Va. 1987). Under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know: (1) that the plaintiff has been injured; (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty; and (3) that the conduct of that entity has a causal relation to the injury. Syl. pt. 4, *Gaither v. City Hospital, Inc.*, 487 S.E.2d 901 (W. Va. 1997).

**Secondary Exposure Cases**:

A search of case law from the Supreme Court of West Virginia does not reveal much analysis into the area of liability for secondary exposure. However statutes and case law from neighboring jurisdictions may shed light on how the West Virginia courts may rule.

**Premises Owners and Employers**:

In secondary exposure cases, courts have addressed the duty of premises owners and employers to a household member of a person exposed to asbestos much more frequently than cases involving the duty of manufacturers and suppliers of products to a plaintiff claiming secondary exposure to asbestos through the clothing or belongings of another. In general, courts are split on whether premises owners and employers owe a duty to plaintiffs who have never set

foot on their premises, but were allegedly exposed to a spouse or another individual who brought asbestos dust home on their clothing. The courts which reject such a duty generally focus on the absence of a special legal relationship between the plaintiff or non-employee and the premises owner or employer. For example, courts in Ohio have declined to extend the duty to warn to non-employees, based on public policy considerations such as the potential for an endless pool of plaintiffs.

Ohio has also promulgated a statute which prohibits such claims. O.R.C. § 2307.941 bars such claims as "a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property unless the exposure occurred at the owner's property."

In *Martin v. Cincinnati Gas & Elec. Co.,* 561 F.3d 439 (6th Cir. 2009), the Federal court held that an employer/premises owner owed no duty to the son of an employee who allegedly brought asbestos home on his clothing. The court found that plaintiff failed to prove that the employer knew or should have known of the danger of secondary asbestos exposure during the employment of his father from 1951 to 1963. The court further determined that the employer had no actual or constructive knowledge of the dangers of asbestos during that time, since the first studies related to bystander exposure to asbestos were not published until 1965.

Conversely, courts that have imposed a duty on premises owners and employers have based their decisions on the foreseeability of the risk of harm to third parties. These courts have reasoned that there was sufficient evidence that a defendant knew or should have known of the potential for harm to household members of workers exposed to asbestos.

In *Satterfield v. Breeding Insulation Co.,* 266 S.W.3d 347 (Tenn. 2008), the Tennessee Supreme Court held that a duty existed to the daughter of a worker who wore asbestos-

containing clothes home from work when the employer knew of the danger at the relevant time (in the 1970s and 1980s), and failed to abide by OSHA regulations regarding the danger. The court found that the employer had a duty to warn the employee of the danger. The risk of harm was foreseeable and a duty to use reasonable care to prevent exposure to asbestos extended to those who came into regular contact with its employees' work clothing over an extended period of time.

**Manufacturers and Suppliers**:

In cases involving manufacturers and suppliers of asbestos-containing products, where the action is based on a failure of the defendant's duty to warn, cases have turned primarily on the question of foreseeability of harm to the person to whom the duty is owed. In *Ga. Pac., LLC v. Ferrar*, 69 A.3d 1028 (Md. 2013), the granddaughter of an employee contracted mesothelioma, allegedly from exposure to asbestos fibers brought into her home in 1968 and 1969 on her grandfather's clothes, who was exposed to asbestos dust while working for the employer. The court held that the lower court erred by awarding the granddaughter damages because the employer did not have a duty to warn the granddaughter of the danger from contact with the asbestos dust on her grandfather's clothes because of the skimpy state of knowledge regarding the danger to household members from asbestos dust brought into the home prior to the adoption of OSHA regulations in 1972, the inability to give warnings directly to household members, and the inability of any warnings given at that time to have any practical effect. The court observed that the granddaughter had no relationship with the manufacturer, was not in contact with the product itself, and was never on the work site where the product was used.

**Fear of Cancer**:

Fear of cancer ("cancerphobia") is a compensable as a claim for negligent infliction for emotional distress caused by exposure to asbestos. *Marlin v. Wetzel Cnty. Bd. of Educ.,* 569 S.E.2d 462 (W. Va. 2002). In order to recover for negligent infliction of emotional distress based upon the fear of contracting a disease, a plaintiff must prove (1) that he was actually exposed to the disease by the negligent conduct of the defendant, (2) that his serious emotional distress was reasonably foreseeable, and (3) that he actually suffered serious emotional distress as a direct result of the exposure. *Marlin v. Bill Rich Constr.,* 482 S.E.2d 620 (W. Va. 1996).

In order to prove foreseeability, the plaintiff must show (1) that the exposure upon which the claim is based raises a medically established possibility of contracting a disease, and (2) that the disease will produce death or substantial disability requiring prolonged treatment to mitigate and manage or promising imminent death. This determination is a question of fact to be determined by the trier of fact. *Id.*

One example where a plaintiff was successful was where the court extended liability to a hospital for negligent infliction of emotional distress because an unruly AIDS patient bit a restraining officer. *See Johnson v. W. Va. Univ. Hosp.,* 413 S.E.2d 889 (W. Va. 1991).

**Medical Monitoring**:

A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct. *Carter v. Monsanto, Co.,* 575 S.E.2d 342 (W. Va. 2002).

In order to sustain a medical monitoring claim under West Virginia law, the plaintiff must prove that (1) he has been significantly exposed; (2) to a proven hazardous substance; (3)

through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).[4]

**Insurance Punitive Damages**:

West Virginia allows for punitive damages where there is "evidence that a defendant acted with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others to appear or where the legislature so authorizes." *Michael ex rel. Estate of Michael v. Sabado,* 453 S.E.2d 419, 435 (W. Va. 1994). Therefore, punitive damages may be awarded where an asbestos manufacturer had actual or constructive knowledge of the severe health hazards caused by a product and continued to manufacture and distribute that product. *See Davis v. Celotex Corp*., 420 S.E.2d 557 (W. Va. 1992).

Punitive damages are awarded to punish the defendant and deter others from pursuing a like course of conduct. Additionally, the injured party does benefit from the award of punitive damages.

"Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." *Garnes v. Fleming Landfill*, 413 S.E.2d 897, 909 (W. Va. 1991) (explaining that where a defendant's

[4] In a subsequent decision, the West Virginia Supreme Court held that a plaintiff must show evidence of an actual contamination, not simply a "well-founded fear" that his or her property had been contaminated, in order to shift the burden of monitoring costs to the defendant. *Carter v. Monsanto Co.*, 575 S.E.2d 342, 345-46 (W.Va. 2002). A plaintiff can prevail in a public nuisance suit, "[b]ut the burden is his and he must first prove at his expense that his property has in fact been injured." *Id.* at 346.

actions which caused only slight harm, the damages should be relatively small, but where the harm is grievous, the damages should be much greater). Punitive damages must bear a "reasonable relationship" to the potential of harm caused by the defendant's actions as well as the compensatory damages. *Id.*

In awarding punitive damages, a jury may consider the reprehensibility of the defendant's conduct, including whether and how often the defendant has engaged in similar conduct in the past. *In re Tobacco Litig.*, 624 S.E.2d 738, 742 (W. Va. 2005). "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* (internal citation omitted).

The jury should take into account: (1) how long the defendant continued in his actions, (2) whether he was aware his actions were causing or were likely to cause harm, (3) whether he attempted to conceal or cover up his actions or the harm caused by them, (4) whether/how often the defendant engaged in similar conduct in the past, and (5) whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him. *Garnes*, 413 S.E.2d at 909.

West Virginia courts have recognized the duty of trial courts to review punitive damage awards. *In re Tobacco*, 624 S.E.2d at 743. When a trial court reviews an award of punitive damages, the court should consider the factors given to the jury as well as additional factors: (1) the costs of the litigation; (2) any criminal sanctions imposed on the defendant for his conduct; (3) any other civil actions against the same defendant, based on the same conduct; and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff. *Garnes*, 413 S.E.2d at 909.

West Virginia public policy does not preclude insurance coverage arising from gross, reckless, or wanton negligence. Syl. pt. 3, *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981). However there is no duty to defend or insure against punitive damages arising from intentional conduct. *Horace Mann Ins. Co. v. Leeber*, 376 S.E.2d 581, 587 (W. Va. 1988). An insurance company may decline to insure against punitive damages by an express exclusion in its policy to that effect and to the extent that the insurance company exercises this option it is protected against payment of punitive damages. *State ex rel. State Auto Ins. Co. v. Risovich*, 511 S.E.2d 498, 504 (W. Va. 1998).

**The Joint and Several Liability Standard**:

**Joint and Several Liability to Previous Cases**:

With respect to causes of action arising before May 25, 2015, West Virginia allows for joint and several liability for asbestos matters. *Strahin v. Cleavenger*, 603 S.E.2d 197 (W. Va. 2004). Under the rule of joint and several liability, among joint tortfeasors a plaintiff can elect to sue any or all of those responsible for his injuries, and he may collect damages from whomever is able to pay regardless of the percentage of their fault. *Kodym v. Frazier*, 412 S.E.2d 219 (W. Va. 1991).

However, in 2015 the West Virginia legislature largely did away with joint and several liability, shifting to a new comparative fault standard. W. Va. Code § 55-7-13a. The comparative fault standard allocates damages to each liable defendant in proportion to that defendant's percentage of fault. *Id.* However, the shift in law does allow for some exceptions in which joint and several liability can still apply. This includes when two or more defendants "consciously conspire and deliberately pursue a common plan" to commit a tortious act or omission. § 55-7-13c(a). Additionally, if a plaintiff is unable to collect from a liable defendant, he or she may

move for reallocation of damages among the other liable parties within one year of a judgement becoming final. § 55-7-13c(d).

**Contribution**

"The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." *Sydenstricker v. Unipunch Prods.*, 288 S.E.2d 511 (W. Va. 1982). The right to contribution may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff, but the amount of recovery in a third-party action based on contribution is controlled by the amount recovered by the plaintiff in the main action. *Bd. of Edu. of McDowell Cnty. v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796 (W. Va. 1990) (citing *Sydenstricker*, 390 S.E.2d at 518).

The right to contribution allows a tortfeasor to bring in a fellow joint tortfeasor as a third-party defendant in order to share by way of contribution on the verdict which was recovered by the plaintiff. *Lombard Can., Ltd. v. Johnson*, 618 S.E.2d 446, 450 (W. Va. 2005). However, a defendant cannot pursue a separate cause of action against a joint tortfeasor for contribution after the judgment has been rendered in the underlying case if that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim. *Id.* (citing *Howell v. Luckey*, 518 S.E.2d 873 (W. Va. 1999)). The foundation of a contribution claim is "a common obligation owed to an injured party." *Id.* (citing *Charleston Area Med. Ctr. v. Parke-Davis*, 614 S.E.2d 15, 23 (W. Va. 2005)).

**Set Offs**:

West Virginia courts allow the defendant against whom a verdict is rendered to reduce the damages to reflect any partial settlement the plaintiff has obtained from a joint tortfeasor.

*Zando*, 390 S.E.2d at 803. A non-settling defendant has no right to contribution from a joint wrongdoer who has settled with, and been released by, the plaintiff prior to the verdict. *Id.* "[T]he reduction of the verdict to reflect partial settlements counterbalances the loss of the right of contribution, since the remaining defendants, who would otherwise have been entitled to such right, obtain the benefit of the settlement." *Id.* at 804. This ensures against double recovery by the plaintiff.

"A release of one joint tort-feasor does not release other joint tort-feasors." *Hardin v. New York Cent. R.R.*, 116 S.E.2d 697, 698 (W. Va. 1960). There are several methods of disposing of partial settlements made by one joint tortfeasor. *Id.* at 701. One method is to introduce evidence of the settlement and the amount of the settlement during trial and have the trial court instruct the jury that it *must* deduct each sum. *Id.* (emphasis in original). A second method is to introduce no evidence of such payment and settlement during the trial, and after the verdict is returned and judgment entered, the defendant may take advantage of such payment when an attempt to satisfy the judgment is made. *Id.* A third method is to have the parties stipulate that the amount of the settlement made by one of the joint tortfeasors will be used as a credit and deducted from the amount of the jury's verdict by the court when it enters a judgment on such verdict. *Id.*

**W Va. Code § 55-7-24 (Repealed) Should Not Apply to Asbestos Matters**:

Section 55-7-24 provides:

> (a) In any cause of action involving the tortious conduct of more than one defendant, the trial court shall:
>
> (1) Instruct the jury to determine, or, if there is no jury, find, the total amount of damages sustained by the claimant and the proportionate fault of each of the parties in the litigation at the time the verdict is rendered; and
>
> (2) Enter judgment against each defendant found to be liable on the basis of the rules of joint and several liability, except that if any defendant is

> thirty percent or less at fault, then that defendant's liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.
>
> (b) Notwithstanding subdivision (2), subsection (a) of this section, *the rules of joint and several liability shall apply to:*
>
> (1) Any party who acted with the intention of inflicting injury or damage;
> (2) Any party who acted in concert with another person as part of a common plan or design resulting in harm;
> (3) Any party who *negligently or willfully caused the unlawful emission, disposal or spillage of a toxic or hazardous substance; or*
> (4) Any party *strictly liable for the manufacture and sale of a defective product.*

W Va. Code §55-7-24 (emphasis added).

The legislative history does not address applicability to asbestos cases, but strict statutory construction would point toward inapplicability, given the plain language of § 55-7-24(b)(3)+(4). No case from West Virginia had applied this statute in an asbestos matter as of the time this summary was published.

**Noteworthy Verdicts**:

*Estate of Cox v. DuPont* (W. Va. Cir. Kanawha Co. Mar. 6, 2002) - A jury returned a verdict of $6.4 million against DuPont. Leonard Cox was a 53 year old banker that was allegedly exposed to asbestos through his father's clothing. His father worked as an insulator at DuPont, Belle. Plaintiffs were represented by James Barber.

*Wood v. John Crane, Inc.* (W. Va. Cir. Kanawha Co. Nov. 3, 2010) - A jury returned a liability verdict in favor of Robert Wood, a 65 year old retired pipefitter. The jury found that John Crane was negligent in failing to warn Wood about the dangers of its products and found that the company's gaskets were defective. Damages were stipulated prior to trial. Plaintiffs were represented by The Lanier Law Firm and Motley Rice.

**Over-naming of Defendants**

On Thursday, April 15, 2021, West Virginia Governor Jim Justice signed into law House Bill 2495 relating to the over-naming of defendants in asbestos litigation. This amends West Virginia Code §55-7G-4 which relates to the filing of asbestos and silica claims. The new statute provides that Plaintiffs in asbestos or silica actions filed after June 29, 2021 must provide a sworn information form specifying the evidence that provides the bases for each claim against each individual defendant. West Virginia Code §55-7G-4.

The sworn information form must include the Plaintiff's personal information including, but not limited to, occupation, smoking history, worksites, employers, and any person through which the Plaintiff alleges exposure. If the Plaintiff alleges exposure through exposed people, then the Plaintiff must provide their relationship with the exposed person. *Id*. The Plaintiff must also provide each asbestos or silica containing product that Plaintiff alleges exposure from, as well as each physical location where they allege they were exposed. *Id*. Plaintiffs must also provide the identity of the manufacturer or seller of each specific asbestos or silica containing product, the beginning and ending dates of exposure, frequency of exposure, and the specific disease alleged. *Id*. In doing so, Plaintiffs must also provide any supporting documents related to the information required. *Id*.

Plaintiffs must provide the sworn information form within 60 days of filing their complaint. *Id*. Plaintiffs must continue to supplement the information required under the act. If a Defendant is not properly identified in the sworn information form, the Defendant can file a motion and the court must grant the motion, dismissing defendants without prejudice. Furthermore, if a Plaintiff fails to comply with the requirements of the sworn information form,

any Defendant can file a motion upon which the court must dismiss all Defendants without prejudice. *Id*.

West Virginia is at least the second state to enact such a law, after Iowa passed a similar bill in 2020. *See* Iowa Code § 686B.1