

Causation Standard at Center of PA Supreme Court Asbestos Ruling

December 6, 2016

On November 22, 2016, the Pennsylvania Supreme Court issued a 4-2 Opinion in *Rost v. Ford Motor Co.*, No. 56 EAP 2014, 2016 Pa. LEXIS 2638 (Pa. Nov. 22, 2016), in which the court purported to uphold and expand upon prior asbestos causation decisions set forth in *Gregg v. V-J Auto Parts, Co.*, 596 A.2d 274 (Pa. 2007), and *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2010). However, when juxtaposed against the dissents of Chief Justice Saylor—the author of both *Gregg* and *Betz*—and Justice Baer, it becomes evident that the majority opinion creates an additional obstacle for defendants (particularly low-dose defendants) on the path toward exculpation.

In the opinion, the majority upholds a plaintiff's verdict against Ford Motor Company for a plaintiff, Mr. Rost, who alleged he had experienced direct occupational bystander exposure to asbestos from Ford products while working as a “gofer” in an automotive repair garage over a three month time period. Ford challenged the verdict on two grounds: i) the plaintiff's expert, Dr. Frank's, causation opinion was impermissibly before the jury when the opinion amounted to an “each and every breath” opinion (which the court explicitly rejected in both *Gregg* and *Betz*) and, with respect to substantial factor causation, Dr. Frank's opinion failed to take into account plaintiff's other industrial occupational exposure during which Mr. Rost was exposed to asbestos “at pretty high levels” over at least a ten year period; and ii) the trial court erred in consolidating Mr. Rost's case with other non-related mesothelioma cases.

Dr. Frank testified generally that mesothelioma is a dose-response disease wherein as the dose increases, the likelihood of developing the disease increases. He also testified that it is scientifically impossible to identify a particular exposure that caused the plaintiff's disease where there were four sources of exposure, but that the causative agent was a series of exposures. Mr. Frank asserted that all documented exposures should be considered as contributing to the plaintiff's development of disease, and concluded that it is not possible to quantify how much asbestos initiates the disease process and that it also varies according to individual susceptibility. After testifying to those opinions generally, Dr. Frank testified using a hypothetical that exposure to Ford products specifically was a substantial contributing factor to the plaintiff developing mesothelioma. Dr. Frank asserted “if [the three month exposure to Ford products] would have been [Mr. Rost's] only exposure, I would be sitting here saying that that was the cause of his disease. Given that he had other exposures, it was all contributory.” *Rost*, No. 56 EAP 2014, 2016 Pa. LEXIS 2638, at *13.

Plaintiff's Expert's Conclusory Opinion Satisfied the Causation Standard

The majority began its analysis by revisiting two prior decisions—*Gregg* and *Betz*. In *Gregg*, the court rejected the “each and every breath” theory of causation as insufficient to create a factual issue to submit to the jury. In *Betz*, the court determined that a plaintiff must adduce evidence that exposure to a particular defendant's asbestos-containing product was sufficiently “frequent, regular, and proximate” to support a jury's finding that a defendant's product was substantially causative of the disease.

In differentiating this case from *Gregg* and *Betz*, the court found that “while Dr. Frank clearly testified that every exposure to asbestos cumulatively contributed to Rost's development of mesothelioma, he never testified that every exposure to asbestos was a 'substantial factor' in contracting the disease.” *Id.* at *27. (emphasis added). The court decided that Dr. Frank did not testify that a single breath of asbestos while at the garage caused Mr. Rost's mesothelioma but that the entirety of his three month exposure caused his disease based on the fact that mesothelioma may develop after only small levels of exposure. The court explained that “[u]nlike the expert witness

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in *Betz*, who unabashedly offered 'each and every breath' testimony, in this case Dr. Frank relied upon a generally accepted methodology, taking into consideration exposure history, individual susceptibility, biological plausibility, and relevant scientific evidence (including epidemiological studies)." *Id.* at *29-30.

The majority also explicitly rejected Ford's argument that *Gregg* and *Betz* require asbestos plaintiffs to prove relative exposure as part of the "substantial factor" test, stating that "[c]omparison of Rost's other occupational exposures to asbestos was unnecessary." *Id.* at 36. However, this finding contradicts what the court previously set forth in both *Gregg* and *Betz*, where the court indicated that a comparative analysis was warranted. In *Gregg*, the Court noted 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." *Gregg* 943 A.2d 216, 226-27 (Pa. 2007)(emphasis added). In *Betz*, the court also noted that "a comparative assessment of impact among differing exposures...is required for causal attribution as a matter of science, as it is under Pennsylvania law." *Betz* 44 A.3d 27, 58 (Pa. 2012).

Chief Justice Saylor, joined by Justice Baer, best sums up the difficulties for defendants inherent in the majority's opinion when he critiques that

[The plaintiff's expert], however, did not provide the jury with any standards, or benchmarks, or other scientifically-accepted premises for assessing the substantiality of the risk associated with Mr. Rost's "relatively low dose" exposure to [Ford's] products in the context of Mr. Rost's overall exposure. Rather, in response to a hypothetical question generally presenting the circumstances of Mr. Rost's exposure to Ford products, [the plaintiff's expert] merely affirmed, in a conclusory fashion, his belief that the exposure was substantially causative...By way of explanation or otherwise, the expert then reverted to various reaffirmations of his other opinions on general and specific causation, *i.e.*, that "all [exposures] contributed[.]"...Where the issue is simply risk—I fail to appreciate how the substantiality of relatively low-dose exposures can be fairly demonstrated in the absence of some sort of reasonably-developed comparative risk assessment accounting for higher-dose industrial exposures. *Rost*, No. 56 EAP 2014, 2016 Pa. LEXIS 2638, at *69-70, 74.

Ford Suffered No Prejudice as a Result of Improper Consolidation

On the issue of consolidation, the majority found that the trial court's apparently mandatory practice of consolidating asbestos cases based solely on the type of disease alleged violated Pennsylvania Rule of Civil Procedure 213(a). Under that rule, the trial court is permitted to consolidate cases, at its discretion, when there are common issues of law or fact, or which arise from the same occurrence or transaction. Instead, the trial court conducted no analysis and denied Ford's several requests to sever the case on the sole rationale that consolidation has been a long-standing practice in asbestos matters before the trial court.

Despite the violation, the Pennsylvania Supreme Court found that Ford suffered no prejudice from the trial court's error because Ford had an opportunity to cross-examine the other defendants' witnesses but chose not to; Ford did not object to any portion of other defendants' expert testimonies or closing arguments; and the jury was not confused on the issues when the trial court repeatedly instructed the jury to treat each case individually and decide each on its own merits.

Chief Justice Saylor also dissented from the court's finding that the trial court's error in consolidating several matters was not prejudicial and asserted that it is difficult to articulate specific prejudice but, when the court subsumes all of the differences among the various plaintiffs and their circumstances in unrelated cases, prejudice is inherent.

Key Takeaways for Asbestos Defendants

Asbestos defendants, particularly low-dose asbestos defendants, are in a precarious situation in Pennsylvania. The

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Pennsylvania Supreme Court appears to have approved conclusory opinions as satisfaction of a plaintiff's burden to establish substantial factor causation and, perhaps even more disturbing for defendants, the Court has also apparently sanctioned the trial court's improper consolidation of unrelated same-disease asbestos cases without consequence. So what is a defendant to do (besides hope that they don't get sued in Pennsylvania and/or vote out the majority Justices)?^[1] Unfortunately, the answer is not clear given the conflicting views between *Rost with Gregg* and *Betz*, but it is clear that it will be more unpredictable for defendants to litigate asbestos cases in Pennsylvania as the current court takes a more plaintiff-friendly stance.

^[1] The author of this article is both a proud resident and licensed attorney of the Commonwealth of Pennsylvania and, therefore, believes she has license to speak tongue in cheek about her state and the process by which judicial positions are filled.

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