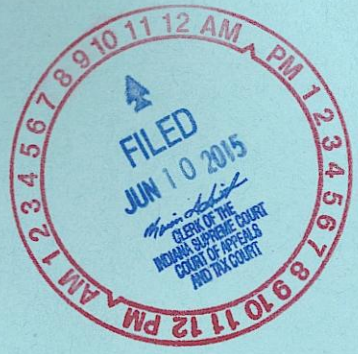
APPELLANTS LARRY AND LOA MYERS' BRIEF TO THE INDIANA SUPREME COURT



INDIANA SUPREME COURT
Cause No: 49S00-1502-MI-119

LARRY MYERS and LOA MYERS,	)	
	)	
	)	
Appellants/Plaintiffs	)	Appeal from the
	)	Marion Superior Court 2
v.	)	Trial Court Case No.:
	)	49D02-1405-MI-014372
CROUSE-HINDS DIVISION	)	
OF COOPER INDUSTRIES, INC.; and	)	Honorable Timothy W. Oakes,
LORILLARD TOBACCO COMPANY	)	Judge.
and HOLLINGSWORTH & VOSE	)	
	)	
Appellees/Defendants,	)	

APPELLANTS LARRY AND LOA MYERS' BRIEF TO THE INDIANA SUPREME COURT

Linda George, 15744-49
Kathleen A. Farinas, 20283-34
Todd Barnes, 25904-49
Ashleigh Resetarits, 28363-49
Sarah Broderick, 31908-49
George & Farinas, LLP
Attorneys for Appellants Larry and Loa Myers
151 N. Delaware Street, Suite 1700
Indianapolis, Indiana 46204
(317) 637-6071 / fax (317) 685-6505
kf@lgkflaw.com

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, Rules, and Regulations

Other Authorities

II. STATEMENT OF SUPREME COURT JURISDICTION

On March 6, 2015, the Indiana Supreme Court accepted immediate jurisdiction over this appeal pursuant to Ind. Appellate Rule 56(A).

III. STATEMENT OF ISSUES

A. Is the Indiana Product Liability Act's statute of repose unconstitutional for latent injury and disease claims?

B. Does Indiana Code 34-20-3-2 ("Section 2") apply to both miners and sellers of asbestos containing products?

C. If the Indiana Product Liability Act's Statute of Repose would bar the Myers' claims, should North Carolina law apply to their claims against Lorillard and Hollingsworth & Vose?

IV. STATEMENT OF THE CASE

On March 7, 2014, Larry Myers was diagnosed with the asbestos induced terminal cancer, mesothelioma.[1] Two months later, Larry and his wife Loa sued the companies which exposed him to asbestos.[2] Defendants included asbestos product manufacturers, owners of premises where Larry was exposed to asbestos,[3] and contractors which exposed Larry to asbestos during the course of their work.[4] The Trial Court expedited the case due to Larry's terminal condition.[5]

This appeal concerns summary judgment orders entered in favor of three manufacturers of asbestos-containing products. Lorillard and H&V (filing jointly),[6] and Crouse-Hinds[7] moved for summary judgment based upon the Indiana Product Liability Act's ("IPLA") statute of repose, Ind. Code 34-20-3-1. Summary judgment hearings were held December 5, 2014,[8] presided over by Special Master Therese Hannah, appointed to serve with Commissioner Kenneth Johnson[9] under the Honorable Theodore Sosin. On December 31, 2014, Judge Sosin and Commissioner Johnson retired, and the Marion County Superior 2 Mass Torts docket, including this matter, was assigned to the Honorable Timothy Oakes on January 1, 2015.

---

[1] Appellants' Appendix ("App"), Vol. 5, p. 1108-1111.
[2] App. Vol. 1, p. 128.
[3] A separate interlocutory appeal related to various claims against Premises Defendants Mastic Home Exteriors and Bremen Casting is currently pending before the Indiana Court of Appeals, Cause No. 49A04-1503-MI-113. The Myers currently have a pending request for this Court to assume immediate jurisdiction over that appeal.
[4] App. Vol. 1, p. 128-147, 153-157.
[5] App. Vol. 1, p. 148-152.
[6] App. Vol. 5, p. 906-923.
[7] App. Vol. 5, p. 900-905.
[8] December 5, 2014 Transcript of Evidence.
[9] Prior to his appointment as Commissioner, Judge Johnson served as the Superior Court 2 Trial Court Judge, and presided over asbestos cases for over a decade.

On January 8, 2015, Judge Oakes granted Crouse–Hinds' and Lorillard/H&V's summary judgment motions on the basis of the IPLA's statute of repose.[10] Judge Oakes recognized his predecessors recently ruled differently,[11] but felt "compelled to follow the majority opinion in *Ott*," believing "any other resolution to this issue rests with the authority of the Indiana Supreme Court or the Indiana General Assembly."[12] Judge Oakes' Crouse-Hinds rulings included immediate entry of a final judgment.[13]

Ruling on choice-of-law issues concerning Lorillard/H&V, the Trial Court applied Indiana law to bar the Myers' claims.[14] After denying a motion to reconsider his choice-of-law analysis, Judge Oakes entered final judgment for Lorillard and H&V on January 30, 2015.[15]

The Myers timely filed a notice of appeal for both the Crouse-Hinds and Lorillard/H&V orders on February 3, 2015, and the next day requested the Supreme Court assume immediate jurisdiction over this matter pursuant to Ind. Appellate Rule 56(A). Lorillard/H&V and Crouse-Hinds joined this motion. The Supreme Court accepted immediate jurisdiction over this appeal on March 10, 2015.

---

[10] App. Vol. 1, p. 110-124.
[11] Judge Theodore Sosin's orders denying summary judgment on this same issue are currently subject to appeal before this Court in the cases *General Electric Company v. Geyman,* Supreme Court Case No. 49S00-1501-MI-35 and *Owens-Illinois v. Geyman*, Supreme Court Case No. 49S00-1501MI-36.
[12] App. Vol. 1, p. 112-113, 122-123.
[13] App. Vol. 1, p. 115-117
[14] App. Vol. 1, p. 120-122.
[15] App. Vol. 1, p. 125-127.

V. STATEMENT OF FACTS

A. Asbestos and Asbestos Diseases

Larry Myers has a terminal cancer, mesothelioma, resulting from asbestos exposure.[16] Asbestos is a naturally occurring mineral mined from rocks, then crushed to extract the fibers and incorporated into numerous products.[17] It was used in pipe insulation, floor tiles, gaskets, building materials, and hundreds of other products.[18] Cutting, mixing, pounding, and disturbing asbestos containing products releases asbestos fibers into the air. [19] These fibers can remain airborne for hours, drifting hundreds of yards.[20] Fibers settling on surfaces are often disturbed again, re-suspending them in the air and creating multiple risks of exposure.[21]

When inhaled or ingested, asbestos can cause several non-malignant and malignant diseases, including pleural fibrosis, asbestosis, lung cancer, and mesothelioma.[22] There is no safe asbestos exposure level which does not present a cancer risk.[23] Each exposure carries with it some risk, which increases with each additional exposure.[24]

Cancer, including mesothelioma, is caused when specific genes controlling cell division and cell cycles develop errors or mutations.[25] Asbestos is a carcinogen, meaning it can cause such

---

[16] App. Vol. 1, p. 150, App. Vol. 5, p. 1108-1111.
[17] App. Vol. 5, p. 1116.
[18] App. Vol. 7, p. 1333-1336. See also, OSHA's description of asbestos usage, https://www.osha.gov/SLTC/asbestos/.
[19] App. Vol. 6, p. 1188, 1196.
[20] *Id.*
[21] App. Vol. 7, p. 1546.
[22] App. Vol. 6, p. 1126-1130, 1160. Tobacco smoke does not cause mesothelioma. App. Vol. 6, p. 1129. Asbestos is the only known environmental cause of the disease in North America. *Id.* The Myers' allegations against Lorillard and H&V are that the asbestos in their filter material contributed to cause Larry's mesothelioma, not smoking in-and-of itself.
[23] App. Vol. 6, p. 1160, 1193.
[24] App. Vol. 5, p. 1119; App. Vol. 6, p. 1160.
[25] App. Vol. 6, p. 1127-1128.

genetic errors when it enters the body.[26] Once injured cells accumulate a sufficient number of genetic errors, cancer occurs.[27] The number of genetic errors required varies widely amongst individuals,[28] and the time required for asbestos to cause disease can range from 10 to 50 or more years after exposure.[29]

The time period between exposure and the actual development of disease is called "latency." During the latency period, one or more cells damaged by asbestos will begin dividing and multiplying.[30] Most of those cells will be dealt with by the body's immune system, and in most individuals with asbestos exposure no cancer will occur.[31] However, in some individuals these genetic errors will keep occurring and repeating, until years or decades later when an actual tumor develops.[32] Once it develops, mesothelioma is terminal and incurable.[33]

Since 1971, the Occupational Safety and Health Act ("OSHA") has regulated asbestos exposure limits in the workplace.[34] OSHA recognizes its limits reduce, but do not eliminate, asbestos' significant health risks. Per OSHA,

> There is no 'safe' level of asbestos exposure for any type of asbestos fiber. Asbestos exposures as short in duration as a few days have caused mesothelioma in humans. Every occupational exposure to asbestos can cause injury of disease; every occupational exposure to asbestos contributes to the risk of getting an asbestos related disease.[35]

---

[26] App. Vol. 5, p. 1116-1117.
[27] *Id.*
[28] *Id.*
[29] App. Vol. 5, p. 1120-1121; App. Vol. 6, p. 1126-1130; App. Vol. 7, p. 1461-1462.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] App. Vol. 4, p. 802; App. Vol. 6, p. 1192.
[34] https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=775
[35] https://www.osha.gov/SLTC/asbestos/; App. Vol. 6, p. 1243-1244.

B. Larry's Exposures to Lorillard, H&V, and Crouse-Hinds Asbestos

In the 1950's, Lorillard and H&V jointly produced an asbestos containing filter material utilized in Lorillard's Kent brand cigarettes which Larry smoked.[36] During that time, both Lorillard and H&V were aware asbestos caused health hazards when inhaled.[37] Larry was not aware the filters contained asbestos when he smoked them,[38] and even if he had been, he was not aware asbestos was hazardous at that time.[39]

Crouse-Hinds made an asbestos containing explosion proof fitting called "Chico X" from 1934 to 1975.[40] Larry used Chico-X starting in the early 1960's when he was still an apprentice electrician, and continuing through his career.[41] Neither Crouse-Hinds, nor anyone else, warned Larry about asbestos' hazards when he worked with Chico-X.[42]

Larry was diagnosed with mesothelioma on March 7, 2014.[43] Richard Kradin, M.D., a pathologist and expert in asbestos disease, reviewed Larry's asbestos exposure history, medical records and tissue specimens.[44] Dr. Kradin confirmed Larry's mesothelioma diagnosis,[45] and determined Larry's mesothelioma was caused by his cumulative exposures to asbestos, including from Lorillard's/H&V filter material in Kent cigarettes and working as an electrician.[46]

---

[36] App. Vol. 1, p. 174; App. Vol. 2, p. 272-274, 279-280, 284-290, 293, 295-296, 299-300, 304-305, 309-310; App. Vol. 4, p. 795-796, 799-800; App. Vol. 5, p. 907-908; App. Vol. 8, p. 1576-1577, 1579;
[37] App. Vol. 8, p. 1580-1621.
[38] App. Vol. 2, p. 309-310.
[39] App. Vol. 1, p. 208, 224; App. Vol. 4, p. 768.
[40] App. Vol. 5, p. 901.
[41] App. Vol. 3, p. 546-547, 552, 556, 558, 560; App. Vol. 4, p. 834, 886-887.
[42] App. Vol. 1, p. 208, 224; App. Vol. 4, p. 768.
[43] App. Vol. 5, p. 1108-1109.
[44] App. Vol. 5, p. 1110-1111.
[45] *Id.*
[46] *Id.*

VI. SUMMARY OF ARGUMENT

Indiana has two limitations periods which govern actions brought under the Indiana Product Liability Act ("IPLA"). The two periods are commonly referred to as "Section 1"[47] and "Section 2."[48] Section 1 establishes a ten year "repose" period, requiring negligence or strict liability product claims to be filed within ten years of when the product was delivered to the initial user or consumer.[49] Section 2 applies to asbestos actions, and establishes a "discovery rule" which permits persons injured by asbestos to file their claims within two years of being diagnosed with an asbestos related disease.

These statutes, along with similar repose and limitations periods, have been reviewed by Indiana's Appellate Courts on numerous occasions yielding inconsistent results. The Myers respectfully ask this Court to bring Indiana's product liability law into harmony both with the rest of Indiana law, and with every other jurisdiction in this country, and provide them with access to the Courts.

If Larry's injuries had been caused by medical malpractice, pollution, products manufactured by companies which happened to mine asbestos, or by simple negligence by an individual, his claims would not be barred by any Indiana repose period. If Larry's exposures had occurred in any other State, his claims would not be barred by that State's repose period.

Since *Allied Signal v. Ott*,[50] Indiana products liability law, as applied to latent injury and disease, has existed in "topsy-turvy land," where an injured person's claims are barred before they even know they are injured. Asbestos product manufacturers seek nothing less than free reign to

---

[47] Ind. Code 34-20-3-1.
[48] Ind. Code 34-20-3-2.
[49] Ind. Code 34-20-3-1(b)(2).
[50] 785 N.E.2d 1068 (Ind. 2003).

injure or even kill Indiana residents and workers, so long as those injuries and deaths take more than ten years to manifest themselves.

The Indiana Constitution does not permit such a result. The Indiana legislature did not intend such a result. This Court should not condone such a result. The Myers therefore respectfully request this Court bring justice back to Indiana, giving persons suffering latent injuries and diseases as a result of hazardous products access to the Courts and a remedy by due course of law.

VII. ARGUMENT

The Myers request this Court find "Section 1" unconstitutional as to claims based upon latent injury and disease, and rule "Section 2" applies to all claims arising from exposure to asbestos containing products. Should the Court decline to make either such ruling, the Myers request this Court apply North Carolina law to their claims against Lorillard and H&V under Indiana's choice-of-law doctrine. Each argument is separately set forth below.

A. THE INDIANA PRODUCT LIABILITY ACT'S STATUTE OF REPOSE IS UNCONSTITUTIONAL AS TO LATENT INJURY AND DISEASE CLAIMS

> *Oliver Wendell Holmes said he didn't see why tort law had to be complicated. He said even a dog knew when he'd been kicked. Well, today, sometimes the dog doesn't find out he's been kicked for thirty years.* - Irving J. Selikoff. M. D.[51]

The Indiana Constitution mandates, "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay."[52] "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."[53] A constitutional challenge to a statute is reviewed de novo, with a presumption the statute is constitutional.[54]

"A statute of limitations will comport with the constitutional demand for due process so long as it provides a reasonable time for the bringing of an action. . . . . The legislature has the

---

[51] Dr. Selikoff's efforts to publicize asbestos' hazards in the 1960's is often credited with leading to the public eventually becoming aware of asbestos' hazards, and to the implementation of asbestos regulations in the United States.

[52] Ind. Const. Art. 1, Sec. 12.

[53] Ind. Const. Art. 1, Sec. 23.

[54] *See, e.g. Morgan v. State*, 22 N.E.3d 570, 573 (Ind. 2014).

sole duty and reasonability to determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."[55]

Section 1 was originally enacted in 1978.[56] Constitutional issues were immediately apparent, and were addressed by the Indiana Supreme Court in *Barnes v. A.H. Robins Company*.[57] *Barnes* adopted the "discovery rule" for cases in which a plaintiff's injury is "caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance."[58] The Court determined applying the IPLA's statute of limitations to such cases would be inconsistent with our system of jurisprudence.

> Large numbers of new chemicals and products are being introduced into our economy and workplace that have resulted in a growing number of diseases and injuries that oftentimes do not manifest themselves until long after exposure ends. In some cases damage does not follow the negligent act of introducing the product or drug into the body for a period of years. In other cases the damage, in the form of progressive disease or injury, is not apparent to the extent it can be ascertained until long after the two year statute has run. Many jurisdictions have responded to the problems presented by this type of case by adopting a "discovery rule." The discovery rule provides that the statute of limitations in this type of cause runs from the date the negligence was or should have been discovered. The rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware a cause of action exists. In the typical tort claim, injury occurs at the time the negligent act is done and the claimant is either aware of the injury, or at least the cause of the injury, and is put on notice to determine the extent of that injury. The claimant, therefore, has the whole statutory time provided for in the limitations statutes to make his determinations and bring his cause of action. The problem comes about when the act, seemingly innocent, causes changes so subtle and latent that they are not discoverable to the plaintiff until they manifest themselves many years later.[59]

---

[55] *Bunker v. National Gypsum Company*, 441 N.E.2d 8 (Ind. 1982).

[56] Ind. Code 33-1-1.5.5. This statute was later re-codified in Ind. Code 34-20-3-1. The original statute was not limited to claims arising from negligence or strict liability in tort. Such language was added by amendment in 1983.

[57] 476 N.E.2d 84 (Ind. 1985). In *Barnes,* a consolidated matter, the complaints were filed more than two years, but less than ten years, after the products' deliveries, and were thus within Section 1's statute of repose, but outside its statute of limitations.

[58] *Id.* at 87-88.

[59] *Id* at 85-86, emphasis added.

In 1989, the Supreme Court applied this reasoning to Section 1's statute of repose in *Covalt v. Carey Canada.*[60] It held,

> [T]he present case involves protracted exposure to a foreign substance which results in slow, progressive, undetectable injury and latent disease. We cannot say that the Legislature intended the ten year statute of repose to bar claims such as this one, where the injury is the result of protracted exposure to a hazardous foreign substance.[61]

The Court went on to quote *Barnes*.

> To require a claimant to bring his action in a limited period in which, even with due diligence, he could not be aware that a cause of action exists would be inconsistent with our system of jurisprudence.[62]

Under this holding, Section 1's statute of repose did not bar latent injury or disease claims.[63]

In 1999, following *Barnes* and *Covalt*, the Supreme Court addressed the constitutionality of the Medical Malpractice Act's ("MMA") limitations period in *Martin v. Richey.*[64] As with the IPLA, the MMA contains an "occurrence" limitations period which, on its face, could bar actions before they accrue.[65] *Martin* determined such repose periods are unconstitutional when,

> plaintiff did not know, or in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice, because in such a case the statute of limitations would impose an impossible condition on plaintiff's access to courts and the ability to pursue an otherwise valid tort claim. To hold otherwise would be to require a plaintiff to bring a claim for medical malpractice before becoming aware of her injury and damages, an essential element

---

[60] 543 N.E.2d 382 (Ind. 1989).
[61] *Covalt,* 543 N.E.2d at 386.
[62] *Id.* at 387, citing *Barnes,* 476 N.E.2d at 86.
[63] *Id.* at 387.
[64] 711 N.E.2d 1273 (Ind. 1999). The limitations period of the medical malpractice act begins to run at the time of the malpractice itself, not at the time the injury caused by the malpractice is discovered. In this respect, it is identical to the IPLA statute of repose, which begins to run upon delivery of the product to the consumer, not when the injury caused by the product is actually discovered. Both are "occurrence" limitations periods, a/k/a statutes of repose.
[65] *Id.*

of any negligence claim, and this indeed would be boarding the bus to topsy-turvy land.[66]

In 2003, *Allied Signal v. Ott*[67] created an anomaly in Indiana law. This case abandoned the principals of *Barnes, Covalt,* and *Martin*, finding Section 1 constitutional even as applied to latent injury claims. The Court admitted it was difficult to reconcile its legal analysis with science,[68] but still overruled *Covalt*, limited the application of *Martin*, and failed to address *Barnes*.[69] Justice Dickson, joined by Justice Rucker, "strongly disagree[d]" with the *Ott* majority, determining Section 1 violated the Right to Remedy Clause of Article 1, Section 12, and the Equal Protection Clause of Article 1, Section 23 of the Indiana Constitution.[70]

Post *Ott*, the Appellate Courts have returned to the reasoning set forth in *Barnes, Covalt*, and *Martin* on several occasions. In both *Houser v. Kaufman*,[71] and *David v. Kleckner*,[72] the Court of Appeals and Supreme Court, respectively, found the MMA's repose period unconstitutional when a Plaintiff has no reason to know of the injury until after the repose period has run. *David,* decided just over one year ago, again recognized that requiring a Plaintiff to bring a claim before becoming aware of her injury and damages "would be boarding the bus to topsy-turvy land."[73]

In the companion case to this matter, the Honorable Theodore Sosin considered the totally of Indiana law, and *Ott*'s place within it.

---

[66] *Id.* at 1284.
[67] 785 N.E.2d 1068 (Ind. 2003).
[68] *Id.* at 1074.
[69] *Ott* indicates *Martin* would only be implicated when plaintiff's cause of action accrued within the repose period. This analysis is inconsistent with *Martin* itself, as the plaintiff's cause of action did not accrue within the limitations period for the same reason as existed in *Ott*. Both plaintiffs were not aware they had a cause of action due to the long latency period of their respective cancers.
[70] *Ott,* at 1079, 1081.
[71] 972 N.E.2d 927 (Ind. Ct. App. 2012) (transfer denied).
[72] 9 N.E.3d 147 (Ind. 2014)
[73] *David*, 9 N.E.3d at 150.

> In the eleven years since the Supreme Court's decision in *Ott*, subsequent cases and scientific/medical reality have blurred *Ott's* clarity, leading this court to believe that the dissenting opinion authored by Justices Dickson and Rucker now more closely mirrors the legislative intent embodied in Indiana Code 34-20-30-2 and Indiana's Constitutional promise of access to the courts. Ind. Const. Art. I Sec. 12 and Ind. Const. Art I, Sec 23.[74]

1. Section 1 Deprives Persons Injured by Asbestos Containing Products Equal Protection and Open Access to the Courts

Lorillard, H&V, and Crouse-Hinds sold products which cause latent disease and death. Larry Myers was exposed to these products, and they contributed to his mesothelioma diagnosis in 2014.[75] If Larry had developed cancer in any manner other than by exposure to products manufactured by entities which did not mine asbestos, his claims would not be barred under Indiana law. Physicians are not immunized from causing latent injury.[76] Polluters are not immunized from causing latent injury.[77] Asbestos miners are not immunized from causing latent injury.[78] Even ordinary persons whose routine negligence might lead to asbestos exposures are

---

[74] Judge Theodore Sosin's orders denying summary judgment on this same issue are currently subject to appeal before this Court in the cases *General Electric Company v. Geyman,* Supreme Court Case No. 49S00-1501-MI-35 and *Owens-Illinois v. Geyman*, Supreme Court Case No. 49S00-1501MI-36.

[75] App. Vol. 5, p. 1108-1111.

[76] *Martin, David, supra.*

[77] *See*, e.g. *Musgrave v. The Aluminum Company of America*, 995 N.E.2d 621 (Ind. Ct. App, 2013). In *Musgrave*, Bil [sic] Musgrave was exposed to toxic chemicals produced by Alcoa in the 1960s and 1970s. In 2000, Bil was diagnosed with a rare cancer, but this diagnosis did not include a cause of the cancer. Over the next several years Bil made various inquiries into whether Alcoa's pollutants caused his cancer, with these inquiries often taking the form of direct statements to the effect that Bil believed Alcoa's pollution caused his cancer. However, it was not until 2005 that a physician definitively diagnosed a connection, and the Musgraves did not file a complaint until 2006. The Musgrave's case was not decided on any statute of repose grounds, because no statute of repose bars pollution claims. Instead, the Musgraves' claims were untimely under the discovery rule, with the jury finding they had waited more than two years after they reasonably should have known the cause of the injury to bring the cause of action.

[78] *Ott, supra*

not immunized from causing latent injuries.[79] In each of these instances, an injured party could bring a viable claim against the physician, polluter, miner, or ordinary person, but not against the manufacturer of an asbestos-containing product, even if the exposures occurred on the exact same day.

> There are no inherent characteristics that distinguish workers with asbestos-related diseases caused by exposure to raw asbestos from those with the same diseases brought about by exposure to manufactured products containing asbestos. Thus the unequal treatment accorded to each class cannot be reasonably related to any inherent differences. . . . .[T]he product liability statute of repose clearly grants to persons whose diseases derive from raw asbestos substantial privileges and immunities that do not equally belong to identically situated persons whose diseases result from asbestos-containing products. The constitutional violation is apparent.[80]

Under *Ott*, the Myers claims are barred on an arbitrary basis – Larry happened to be exposed to asbestos by a product manufacturer which did not also mine asbestos. Such a distinction simply cannot stand Constitutional scrutiny.

Furthermore, with respect to asbestos diseases, Section 1's statute of repose acts not as a limitation of actions by persons injured by asbestos containing products, but as a complete bar to the Courts.

> Because of this long latency period, asbestos-caused cancer usually does not appear until after the ten-year statute of repose. This is precisely the circumstance that led this Court in *Martin v. Richey* to find that application of the medical malpractice two-year statute of limitations to the facts of that case violated *Article 1, Section 12*, because Martin had 'no meaningful opportunity to file an otherwise valid tort claim within the specified statutory period.'[81]

---

[79] Per Ind. Code 34-20-2-1, only persons who are "engaged in the business of selling the product" are subject to the IPLA.

[80] *Ott* at 1083 (Dickson, J. dissenting).

[81] *Ott* at 1081-1082 (Dickson, J. dissenting).

As the Trial Court questioned in the *Geyman* companion case to this matter, "How could this result, repeated many times over in Indiana courts, pass the constitutional muster of courts offering its citizens a venue to have their claims justly adjudicated?"[82]

Section 1's statute of repose acts as a complete bar to the Courts for the Myers, and others like them suffering latent injuries or disease as a result of hazardous products. Such individuals are deprived of the same right to pursue those who injured them as numerous other classes of persons, such as those injured by medical malpractice, pollution, or products sold by asbestos miners. Indiana's Constitution requires the Myers be given open access to the Court to present their injuries to an impartial jury, so that justice may be served.

2. No Other State Immunizes Asbestos Product Manufacturers

Under *Ott*, Indiana is the only State which immunizes asbestos product manufacturers from causing latent diseases and death. In the 49 other states, and the District of Columbia, either there

[82] Judge Theodore Sosin's orders denying summary judgment on this same issue are currently subject to appeal before this Court in the cases *General Electric Company v. Geyman,* Supreme Court Case No. 49S00-1501-MI-35 and *Owens-Illinois v. Geyman*, Supreme Court Case No. 49S00-1501MI-36.

is no product repose,[83] there is an exception for latent injury, disease, and/or asbestos claims,[84] or Courts have ruled the product repose statute at least in part unconstitutional.[85]

New Hampshire is one of the States which had its products statute of repose struck down by its Supreme Court.

> Except in topsy-turvy land you can't die before you are conceived, or be divorced before you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.[86]
>
> ***
>
> The effect of this absolute limitation on suits against manufacturers is to nullify some causes of action before they even arise. As compared with non-products liability causes of action, which generally must be brought within six years after they accrue, *whenever* that may be, we hold that the twelve-year bar imposed by RSA 507-D:2, II(a) is neither reasonable nor substantially related to the object of the legislation.[87]

---

[83] Arkansas, California, Delaware, District of Columbia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

[84] Alaska (Alaska Stat. 09.10.055; Arizona (A.R.S. 12-522)(also unconstitutional); Colorado (C.R.S. 13-80-107(1)(b-c); Connecticut (80 year repose period for asbestos claims, C.G.S.A 52-577a); Florida (Florida Statutes 774.206); Georgia (O.C.G.A 51-14-5); Idaho (I.C. 6-1403); Iowa (I.C.A. 614.1); Kansas (K.S.A. 60-3303, 60-4901 *et seq.*); Kentucky (repose is merely rebuttable presumption, K.R.S. 411.310); Nebraska (Neb. Rev. Stat. 25-224(5); North Carolina (*see e.g. Wilder v. Amatex Corp*, 314 N.C. 550 (1985); Ohio (O.R.C.A. 2305.10 (C)(6); Oregon (O.R.S. 30.907), Tennessee (T.C.A. 29-28-103); Texas (Tex. Civ. Prac. & Rem. Code Ann. 16012(d)(3); and Washington (repose is only rebuttable presumption, R.C.W.A. 7.72.060).

[85] Alabama, Arizona (also contains statutory exception for negligence claims), Illinois, New Hampshire, North Dakota, and Rhode Island. In Illinois, the entire "tort reform" statute which enacted a statute of repose was struck down on other grounds. *Best v. Tahlor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

[86] *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 295-6 (N.H. 1983), *quoting Dincher v. Marlin Firearms Co.*, 198 F.2d 821. 823 (2nd Cir. 1952)(J. Frank, *dissenting*).

[87] *Id.* at 295, (emphasis in original).

The Court went on to state, "Persons injured by defective products are deprived arbitrarily of a right to sue the manufacturers responsible for those defective products by virtue of a statute that has become entirely divorced from its underlying purpose."[88]

Similarly, North Dakota's Supreme Court struck down its repose statute on Equal Protection grounds, after it "expressed concern about statutes which arbitrarily deny one class of persons important substantive rights to life and safety which are available to other persons."[89] "When we are dealing with human life and safety we believe that more is required for a justification than a reference to the economics of suppliers of goods."[90]

In Alabama, product manufacturers attempted to justify that State's product repose by claiming repose would "eradicate and ease the cost increases in consumer prices and product liability insurance."[91] The Alabama Supreme Court rejected this argument. "Although a statute of repose certainly would reduce recoveries by persons injured by products, there may not be a corresponding reduction in insurance premium rates. An eight-to-ten year statute of repose, for example, would be too long to improve the predictability of insurance claims."[92]

Arizona's statute of repose was also struck down as a violation of that State's Constitution.[93] The Arizona Supreme Court found its statute of repose "goes far beyond merely 'regulating' products liability actions that accrue more than twelve years after the product is first sold for use or consumption."[94] Even though Arizona's repose statute would still have permitted

---

[88] *Id.* at 296.
[89] *Dickie v. Farmers Union Oil Company of LaMoure*, 611 N.W.2d 168, 170 (N.D. 2000), citing *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986).
[90] *Id.* at 173.
[91] *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1001 (Ala. 1982),
[92] *Id.*, citing 30 Am. U.L. Rev. 579 (1981), citing to the Final Report of the Federal Interagency Task Force on Product Liability.
[93] *Hazine v. Montgomery Elevator*, 861 P.2d 625 (Ariz. 1993).
[94] *Id.* at 627.

negligence or express warranty claims, the Court determined "Strict products liability developed because other theories of recovery proved inadequate to protect injured users and consumers. . . . Thus, a right to sue in negligence or express warranty is not a reasonable alternative to a products liability action."[95]

Rhode Island's Supreme Court also found its statute of repose unconstitutional.[96] "The total denial of access to the courts for adjudication of a claim even before it arises, however, most certainly flies in the face of the constitutional command found in art. 1 Sec. 5, and to hold otherwise would be to render constitutional protection worthless."[97]

Asbestos product manufacturers claim repose is necessary to allow them to predict their liability and to encourage them to sell their products in Indiana. But these Defendants can and do predict their liability in every other State. These Defendants can and do sell their products in every other State. Bringing Indiana in line with every other State will not subject Defendants to unpredictable liability, or cause them to stop selling their products in Indiana. It will merely give Indiana residents and workers the same rights and access to the Courts which exist in every other State.

---

[95] *Id.* at 628.
[96] *Kennedy v. Cumberland Engineering Company*, 471 A.2d 195 (RI 1984).
[97] *Id.* at 198 (citations omitted).

3. Product Manufacturers Do Not Deserve More Protections than Health Care Providers

As set forth above, on multiple occasions, and as recently as last year, Indiana Appellate Courts have refused to apply the MMA's repose period to cases of latent injury.[98] To date, the only justification offered by Defendants for distinguishing between the MMA's limitations period and that of the IPLA is simply that the statutes are "different."

The MMA and IPLA are indeed different, but that difference does not support the disparate treatment afforded physicians and product manufacturers. Quite the opposite. The clear purpose of the MMA is to protect physicians and health care providers. It requires injured plaintiffs to submit claims to a "medical review panel" before a claim can be pursued in State court, and caps the liability of physicians and providers. By way of contrast, the IPLA was designed to protect consumers, by, among other things, establishing strict liability for product manufacturers. If Indiana law cannot bar latent injury claims through the MMA, then Indiana law cannot bar latent injury claims through the IPLA. To hold different is to leave Indiana in "topsy-turvy land."

Indiana residents and workers injured or killed by hazardous products which cause latent injury and disease are entitled to the same Equal Protection and Open Access to the Courts as persons injured by medical care providers. Bringing product liability law in line with the well-established principals which have been repeatedly applied to malpractice victims would harmonize Indiana law, and bring justice to this State.

---

[98] *See. e.g. Martin, Houser,* and *David, supra.*

4. Other Remedies Are Inadequate

Ott attempts to justify its result by stating "asbestos plaintiffs have additional remedies under Section 2 where they may pursue miners and sellers of commercial asbestos and asbestos bankruptcy funds without regard for Section 1's statute of repose."[99] It also considered plaintiffs' remedies under the Indiana Occupational Disease Act, but concluded such remedies "seem modest at best."[100]

As an initial matter, Larry Myers cannot pursue even the "modest" remedies of the Occupational Disease Act. Because his last exposures to asbestos occurred prior to 1985, he has no right to pursue an Occupational Disease Act claim under the provisions of Ind. Code 22-3-7-9(f)(3), which provide only a three year limitation period from the date of last exposure.

Furthermore, the September, 2011, Report of the U.S. Government Accountability Office to the Chairman, Committee on the Judiciary, House of Representatives shows the bankruptcy trust claims referenced in *Ott* are not nearly as significant as the Court was led to believe.[101] According to this report, as of 2010, "the median payment percentage across trusts is 25 percent."[102] This means the Myers can expect to receive only 25 cents on the dollar from bankrupt entities. Limiting an injured parties recoveries to a mere 25%, of their actual worth (on average) cannot be considered "adequate" compensation for the complete inability to pursue viable asbestos product manufacturers which exposed persons such a Larry to products causing latent disease.

---

[99] *Ott*, 785 NE2d at 1076.
[100] *Id.* at FN 10.
[101] Asbestos Injury Compensation – The Role and Administration of Asbestos Trusts, p. 25. A full copy of the report is available at http://www.gao.gov/products/GAO-11-819.
[102] *Id.* at p. 21.

B. Section 2 Should Apply to Both Miners and Sellers of Asbestos Containing Products

Not only is Section 1 unconstitutional as applied to latent injury and disease claims, but the Indiana legislature clearly intended for it not to apply to asbestos claims by enacting Section 2.[103] Statutory interpretation is a question of law requiring a *de novo* review.[104] Section 2 was enacted in 1989, after the claims in *Covalt* accrued, but before the Supreme Court issued its decision in that case. The Court therefore recognized and commented upon the statute even though it was not controlling. In interpreting Section 2, the Supreme Court proclaimed,"[Indiana law] now expressly provides an exception to its limitation and repose periods for asbestos related actions. [Section 2] provides in pertinent part that an asbestos-related action must be brought within two (2) years of the date when the injured person knows that he has an asbestos-related disease or injury."[105] Thus, *Covalt* recognized Section 2 was intended to apply to all asbestos product liability actions.

Ott failed to follow *Covalt*,[106] instead determining Section 2 should only apply to entities which both mined and sold raw or processed asbestos. Justice Dickson, joined by Justice Rucker, "strongly disagree[d]"[107] with this analysis, finding the majority's decision "inharmonious and irreconcilable" with the clear legislative intent behind Section 2.[108]

---

[103] Ind. Code 34-20-3-2
[104] *Andrews v. Mor/Ryde Int'l,* 10 N.E.3d 502, 504 (Ind. 2014).
[105] *Id.* at FN 1. At the time of *Covalt*, Section 2 was contained in Ind. Code 33-1-1.5-5. It has since been re-codified as Ind. Code 34-20-3-2.
[106] *Ott* 785 N.E.2d at 1073 (Ind. 2003).
[107] *Id.* at 1078.
[108] *Id.* at 1079.

1. "Commercial Asbestos" Means All Asbestos Placed in the Stream of Commerce

Section 2 applies to persons who sold "commercial asbestos."[109] Similarly, by definition the IPLA applies to "a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer . . ."[110] The American Heritage Dictionary defines "commercial" as:

1. a. Of or relating to commerce.
   b. Engaged in commerce.

2. Relating to or being goods that are produced and distributed in large quantities.

3. a. Having profit as a chief aim.
   b. Intended for or appealing to a large audience.

4. Sponsored by an advertiser or paid for by advertising.[111]

Thus the common usage of the word "commercial" is consistent with the scope of the IPLA. "Commercial asbestos" simply means "asbestos placed into the stream of commerce."

In *Ott*, the Supreme Court interpreted "commercial asbestos" to include only "either 'raw' or processed asbestos that is incorporated into other products."[112] This definition is inconsistent with common usage and the IPLA. Not only does the American Heritage Dictionary make no reference to "raw" products in defining "commercial", neither do dictionary.com,[113] Merriam-Webster,[114] the Cambridge Business English Dictionary,[115] the Cambridge American English

---

[109] Ind. Code. 34-20-3-2(d)(1).
[110] Ind. Code 34-20-2-1.
[111] https://www.ahdictionary.com/word/search.html?q=commercial
[112] *Ott*, 785, N.E.2d at 1073.
[113] http://dictionary.reference.com/browse/commercial?s=t
[114] http://www.merriam-webster.com/dictionary/commercial
[115] http://dictionary.cambridge.org/us/dictionary/business-english/commercial_1

Dictionary,[116] or the Oxford English Dictionary.[117] Nor is the IPLA's scope limited to "raw or processed" products. Instead, all of these sources refer to business or commercial activities.

Ott also looked to the EPA's use of the term "commercial asbestos." The EPA states, "commercial asbestos means any material containing asbestos that is extracted from ore and has value because of its asbestos content."[118] All asbestos containing products, not merely "raw" or "processed" asbestos, fit this definition. The EPA itself regulates all manner of asbestos products, recognizing "asbestos was used in a variety of building construction materials for insulation and as a fire retardant . . .[and] a wide range of manufactured goods, mostly in building materials (roofing shingles, ceiling and floor tiles, paper products, and asbestos cement products), friction products (automobile clutch, brake and transmission parts), heat-resistant fabrics, packing, gaskets, and coatings."[119] "Asbestos fibers may be released into the air by the disturbance of asbestos-containing material during product use, demolition work, building or home maintenance, repair, and remodeling."[120]

Neither Appellees in this matter, nor *Ott*, offer any rational explanation for <u>why</u> the legislature might have intended to immunize asbestos product manufacturers while permitting liability against asbestos miners and bankrupt manufacturers. Such a distinction cannot be rationally justified. It was asbestos product manufacturers which drove the demand for raw asbestos fibers. It was asbestos product manufacturers which had the last clear chance to warn users and consumers about the hazards of asbestos.

---

[116] http://dictionary.cambridge.org/us/dictionary/american-english/commercial
[117] http://www.oed.com/view/Entry/37081?redirectedFrom=commercial#eid
[118] 40 C.F.R. 61.141.
[119] http://www2.epa.gov/asbestos/learn-about-asbestos#asbestos
[120] <u>http://www2.epa.gov/asbestos/learn-about-asbestos#asbestos</u>. The EPA regulations regulating asbestos are codified at 40 CFR 61.140 *et. seq.*

Asbestos exposures from asbestos containing products, and not simply raw asbestos, can cause disease. The designated evidence in this case is Larry's mesothelioma was caused by his cumulative exposure to asbestos from multiple products,[121] and no Defendant has ever argued asbestos diseases are only caused by "raw" asbestos.

Appellees and the asbestos industry at large also knew asbestos could cause latent diseases. H&V's facilities were subject to repeated asbestos hazard inspections during the time they manufactured their asbestos filter material.[122] Similarly, Lorillard, aware that asbestos could cause disease, went so far as to commission studies to determine if asbestos fibers were being released from its Kent cigarettes.[123] All of Lorillard's studies conducted in 1954 showed asbestos was released from Kents when smoked.[124] Despite such knowledge, these companies marketed Kents by claiming, "No other cigarette approaches such a degree of health protection and taste satisfaction."[125] Crouse-Hinds also admits it continued to sell its asbestos containing Chico-X after becoming aware of asbestos' hazards.[126]

Knowledge of asbestos hazards was not limited to the Appellees in this case, but was available to the asbestos industry as a whole. Indiana law attributes manufacturers with the

---

[121] App. Vol. 5, p. 1110-1111. Although certain Defendants argued that their specific products did not contribute to Larry's mesothelioma, no Defendant designated evidence or argued that Larry's mesothelioma was caused only by "raw asbestos."

[122] App. Vol. 8, p. 1580-1621.

[123] App. Vol. 8, p. 1591-1597, 1600-1616.

[124] App. Vol. 8, p. 1614-1615.

[125] App. Vol. 8, p. 1623.

[126] Crouse-Hinds claims it did not know of asbestos' hazards until the passage of the 1974 version of OSHA. App. Vol. 8, p. 1673-1675. However, OSHA first promulgated rules regarding asbestos exposures on May 29, 1971. OSHA's regulatory history with respect to asbestos is more fully set forth at:
https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=775
Even if Crouse's contention is taken as true, it continued selling its asbestos containing Chico-X for another year after learning asbestos was hazardous.

knowledge of an expert in the field.[127] Dr. Richard Lemen, former Assistant Surgeon General and Deputy Director of the National Institute for Occupational Safety and Health (NIOSH) and the Centers for Disease Control and Prevention (CDC),[128] studied the historical knowledge of asbestos' dangers, and reported his findings in an article entitled *Asbestos Timetables- A Guide for Policymakers*.[129] This timetable provides a year-by-year breakdown of the information known or available to the asbestos industry regarding asbestos' dangers, showing, among other things, that asbestos has been linked to cancer since at least 1935.[130]

> First reports, from the modern uses of asbestos, of lung disease and exposure to asbestos appeared at the turn of the 20th Century and continue to the present time. By the mid-through late 1920's it became well established that the fibrotic disease of the lungs, by then named asbestosis, was causally associated with exposure to asbestos. Evidence that lung cancer was also causally associated with asbestos exposure began appearing in the mid-1930's and became well recognized as such, by the scientific community, by 1955, however, several well recognized medical organizations accepted this fact prior to then. Mesothelioma or cancer of the linings of the chest and abdomen, were first reported in asbestos exposed persons as early as 1935 and it became well established, in the scientific community, as a marker tumor in persons exposed to asbestos by early 1960's. End-product users of asbestos containing products were shown to be at risk of developing non-malignant lung diseases in the 1930's and cancer in the 1940's. . . . As long as persons inhale asbestos fibers they are at some risk of the disease processes described in this treatise.[131]

Unfortunately, the result is that *Ott* has barred justice for twelve years, allowing companies which knowingly sold products which cause latent disease to completely escape responsibility for their actions.

---

[127] *Montgomery Ward v. Gregg*, 554 N.E.2d 1145, 1163 (Ind. Ct. App. 1990).
[128] App. Vol. 6, p. 1298, *et. seq.*
[129] App. Vol. 7, p. 1333-1434.
[130] App. Vol. 7, p. 1349.
[131] App. Vol. 7, p. 1397.

2. "And" Should Be Disjunctive

In this case, Appellees argued Section 2 does not apply to them because they did not mine asbestos, seizing upon the "mined and sold commercial asbestos" language of the statute. In *Clark v. Clark*, this Court based its opinion upon a common sense distinction between the "conjunctive" and "disjunctive" use of the word "or."[132] It recognized, "In the interpretation of statutes, our goal is to determine and give effect to the intent of the legislature in promulgating it."[133] Such statements are consistent with Justice Dickson's *Ott* dissent:

> While the literal language [of Section 2] favors "both mined and sold," there is compelling evidence that the legislature intended to mean "persons who mined and persons who sold." First, as noted by the majority, interpreting the phrase to mean "both mined and sold" renders the words "and sold" superfluous "since it is unlikely that there are any entities that mine but do not sell asbestos." Second, because the obvious purpose of Section 2 is to provide for fairness due to the long latency period associated with asbestos-related illnesses, it is inconsistent for it to apply only to claims against the relatively few companies that both mine and sell asbestos, and essentially to preclude actions against all others that disseminate asbestos and asbestos-containing products. Third, the "both mined and sold" interpretation would prohibit delayed filing of actions against solvent companies that sold but did not mine asbestos, but not against such companies in bankruptcy with the funds described in *subsection (d)(2)*.
>
> ***
>
> The strict literal interpretation urged upon us by the defendants would lead to the illogical result that "asbestos-related actions" were limited to those actions brought against miners of asbestos, and did not include actions against manufacturers and sellers if they did not also mine the product. Because the statute of repose is concerned not with the introduction of the asbestos into the marketplace but with exposure to the hazardous foreign substance that causes disease, an interpretation of the statute that permits or denies recovery based solely on the nature of the entity

---

[132] 971 N.E.2d 58, at FN2 (Ind. 2012). This case also criticized jurisprudence aimed at protecting against the "benevolent thumb syndrome" and "the Robin Hood proclivity" of juries, stating such concepts improperly mischaracterize the conscientious, insightful, and reliable efforts of those who serve as jurors, and stating such concepts have "no proper place in our jurisprudence." *Clark* at FN1. This renewed faith in the ability of jurors to decide cases is another signal *Ott*'s decision to deprive jurors of the ability to decide asbestos products cases should no longer represent Indiana law.

[133] *Id.* at 61, citing *Porter Dev v. First Nat'l Bank of Valparaiso*, 866 N.E.2d 775, 778 (Ind. 2007).

> that introduced the asbestos into the marketplace cannot stand. We believe the legislature could not have intended to permit actions against an entity that both mined and sold asbestos but to preclude actions against entities that introduced asbestos into the marketplace as miners only or as sellers only.[134]

Ind. Code 34-20-3-2 itself provides another example of the disjunctive "and" in the very same sentence as that relied upon by *Ott* to deprive person's injured by asbestos products a cause of action.

> (d) This section applies only to product liability actions against:
>
> (1) persons who mined and sold commercial asbestos; and
> (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.[135]

It cannot be rationally argued the "and" which ends subsection (1) was meant to be conjunctive. The emphasized "and" is clearly disjunctive, and no one has ever suggested it does not mean "or." *Ott* itself read the second "and" as disjunctive, stating, "asbestos plaintiffs have additional remedies under Section 2 where they may pursue miners and sellers of commercial asbestos and bankruptcy funds without regard for Section 1's statute of repose."[136] In Footnote 9, *Ott* suggests actions against miners and sellers who are not bankrupt are still maintainable. These statements only make sense if the emphasized "and" from subsection (1) is read in the disjunctive. Such a disjunctive meaning is also perfectly consistent and rational when applied to the phrase, "persons who mined and sold commercial asbestos," and should apply to all claims involving asbestos containing products, not merely those filed against asbestos miners.

---

[134] *Ott* at 1080-1081 (citations omitted).
[135] Emphasis added.
[136] *Ott* at 1076 and FN9.

C. NO RATIONAL BASIS EXISTS TO DEPRIVE PARTIES SUFFERING LATENT INJURIES ACCESS TO THE COURTS

> *"As our Indiana Constitution set forth almost 200 years ago, our courts must be open to every person for every injury – so that citizens' conflicts, whether criminal or civil, are decided in an impartial forum, at an efficient price, with fair outcomes."* - Chief Justice Loretta H. Rush, Indiana Supreme Court.[137]

The Indiana Constitution does not allow those suffering latent injuries and disease to be deprived of equal protection and access to the Courts.[138] The legislature intended to give persons injured by asbestos products the right to pursue their claims by enacting Section 2. Both mandate reversal of the Trial Court's summary judgment orders. No opposing arguments should lead to a different result, as justice and equity also fully support providing those suffering latent injuries access to the Courts.

1. *Stare Decisis* and Legislative Acquiescence Do Not Justify Upholding *Ott*

Stare decisis is a maxim of judicial restraint supported by policy reasons of predictability.[139] With respect to the IPLA's statutes of repose the question becomes, what are Defendants seeking to predict?

Stated bluntly, Defendants seek to predict they may cause latent injuries, diseases, and death with impunity. They argue *Ott* allows them to freely injure and kill Indiana residents with their products, so long as the injuries and deaths take longer than ten years to manifest. But as this

---

[137] "Indiana courts: working to fulfill the promise of justice", Chief Justice Loretta H. Rush State of the Judiciary presentation to the joint session of the Indiana General Assembly, January 14, 2015.

[138] Ind. Const. Art. 1, Sec. 12, Ind. Const. Art. 1, Sec. 23.

[139] *See. e.g., Snyder v. King*, 958 N.E.2d 764, 776 (Ind. 2011).

Court recently recognized, "because 'that's the way we've always done it' is a poor excuse – the merits of stare decisis notwithstanding - for continuing to do something *wrong*."[140]

For similar reasons, the doctrine of "legislative acquiescence" should not handcuff this Court in making its decision. This doctrine states, "failure of the Legislature to change a statute after a line of decisions of a court of last resort giving the statute a certain construction, amounts to an acquiescence by the Legislature in the construction given by the court, and that such construction should not then be disregarded or lightly treated."

Ott is not "the way we've always done it." *Ott* is an anomaly in Indiana jurisprudence, existing in the "topsy-turvy land" where injured Plaintiffs have their claims barred before they could reasonably know they were injured. *Covalt* was decided in 1989, and for fourteen years stood for the proposition that Section 1 did not bar latent disease claims exactly like those presented in this case. *Ott* has only barred such claims since 2003. Thus, for the majority of time which Section 1 and Section 2 have existed, and all of the time when Larry was exposed, *Ott* was not the law. If *stare decisis* and legislative acquiescence did not prevent *Ott* from overruling *Covalt*, they should not prevent this Court from overruling *Ott*.

In addition to *Covalt*, numerous other cases decided both before and after *Ott* indicate the IPLA's statute of repose should not apply to latent injury claims. The reasoning of *Barnes*, *Martin*, *Houser*, and *David* all support the conclusion that Section 1 does not apply to latent injury claims. To the extent the doctrines of stare decisis and legislative acquiescence should be applied, it should apply to the reasoning and holdings of these cases, not *Ott*. To follow *Ott* simply because "that's the way we've done it" is *wrong*, and should not trump the Indiana Constitution or the legislature's clear intent in enacting Section 2.

---

[140] *Fry v. State*, 990 N.E.2d 429, 442 (Ind. 2013), emphasis in original.

2. The Myers' Claims are Not Stale

It is often argued limitations and repose periods are necessary to protect against "stale" claims, but such justification fails for latent disease and injury claims. As now United States Supreme Court Justice Ginsberg once stated in an asbestos case,

> in situations involving the risk of manifestation of a latent disease, unlike the mine run of litigation, the evidentiary consideration counsels narrower delineation of the dimensions of a claim. Key issues to be litigated in a latent disease case are the existence of the disease, its proximate cause, and the resultant damage. Evidence relating to these issues tends to develop, rather than disappear, as time passes.[141]

Asbestos product manufacturers claim the statute of repose is necessary to prevent stale claims. In light of the fact that no other State (or the District of Columbia) immunizes such Defendants, these arguments are without merit. The claims of Indiana residents are no more "stale" than the claims of citizens of every other State.

Justice Ginsberg's comments have also born true under the practical realities of Indiana law in cases such as *Houser* and *Musgrave, supra.* In both cases, decades passed between the time of the wrongful acts and the manifestation of injury. Yet no repose period arbitrarily barred the claims in those cases. Furthermore, even under Defendants' interpretation of Section 2, our legislature has seen fit to allow claims based upon decades old exposures against asbestos miners and asbestos bankruptcy trusts. The Myers' claims against asbestos product manufacturers are no more "stale" than they would be against miners or bankruptcy trusts.

Larry was diagnosed with mesothelioma on March 7, 2014.[142] The Myers filed the instant action on April 30, 2014,[143] a mere 54 days later. Far from "sitting on their rights," the Myers

---

[141] *Wilson v. Johns-Manville*, 684 F.2d 111, 119 (US CoA for Dist. Col., 1982).
[142] App. Vol. 5, p. 1108.
[143] App. Vol. 1, p. 128.

exercised theirs in less than two months despite Larry's diagnosis with a terminal, fast-acting cancer. The Myers acted with all possible diligence in bringing their claims, and the standard justifications for limitations periods should not apply to their latent injury claims.

3. Asbestos Product Manufacturers Defendants Are Named as Non-Parties

Allowing asbestos product manufacturers to escape responsibilities is doubly-unjust. Not only are injured Plaintiffs barred from recovering against such Defendants, but other Defendants are permitted to reduce their liability by naming asbestos product manufacturers as "non-parties." Ind. Code 34-51-2-7 permits Defendants to reduce their liability by the percentage of fault allocated to "non-parties," and Ind. Code. 34-6-2-88 defines non-party as "a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant." This definition applies to dismissed Defendants,[144] and includes Defendants who may not be held legally liable to plaintiffs.[145] In asbestos matters, Defendants routinely name asbestos product manufacturers as non-parties.

Thus, barring the Court house doors against asbestos product manufacturers doubly punishes injured Plaintiffs. Not only are those Plaintiffs prevented from recovering against manufacturers of asbestos-containing products, but other Defendants are permitted to use the fault of those same manufacturers to reduce their liability and further reduce Plaintiffs' recoveries. This inconsistent treatment is grossly unjust, shifting the responsibility for product manufacturers' conduct onto injured and dying workers and their families.

---

[144] *Osterloo v. Wallar*, 758 N.E.2d 59 (Ind. Ct. App. 2001)
[145] *Bulldog Battery Corp. v. Pica Invs.*, 736 N.E.2d 333 (Ind. Ct. App. 2000).

The Indiana Constitution mandates the Myers be given equal protection and open access to the Courts. The Indiana legislature intended to comply with this mandate by enacting Section 2. There exists no rational basis to immunize product manufacturers from selling products which cause latent injuries, diseases, and death. For these reasons, the Myers respectfully request this Court reverse the Trial Court's summary judgment orders in this matter, and allow them the opportunity to have their claims heard.

D. CHOICE-OF-LAW (Lorillard and H&V Only)

In the event this Court upholds *Ott*, the Myers should still be allowed to pursue their claims against Lorillard and H&V under Indiana's choice-of-law doctrine. Unlike the remaining Defendants in this lawsuit, Larry's exposures to these companies' asbestos occurred primarily in North Carolina, not Indiana. In the event there is a conflict between Indiana and North Carolina law, the latter should apply under Indiana's modified *lex loci* doctrine.[146]

"In analyzing each of the counts of the Plaintiffs' complaint, it is first necessary to determine which state's law applies to that count. Once a particular State's laws are deemed controlling of a count for a particular defendant, that State's laws control all issues within that count for that defendant.[147] "The answer may differ for different counts and may differ between defendants as to a single count."[148] Indiana does not allow separate issues within any particular count for a particular defendant to be analyzed using different states laws (a concept known as "*depecage*").[149] In tort actions, Indiana courts generally apply the substantive law of the state "where the last event necessary to make an actor liable for the alleged wrong takes place."[150] This methodology is referred to as *lex loci delecti*.

---

[146] After the Myers filed a motion to reconsider, Lorillard and H&V for the first time raised the argument that the Myers had waived the choice-of-law argument. Given that Lorillard and H&V fully addressed choice-of-law issues in their initial summary judgment brief, App. Vol. 5, p. 912-918, this argument is without merit. *See, Sword v. NKC Hosp*, 714 N.E.2d 142, 147 (Ind. 1999), "The Purpose of the notice requirement is to allow the other party time to prepare by studying the applicable law." *See also, Williams v. Graber*, 485 N.E.2d 1369, 1373 (Ind. Ct. App. 1985), stating that in determining whether reasonable notice of foreign law was given, the "emphasis lies upon notice occurring prior to trial."

[147] *Simon v. United States,* 805 N.E.2d 798, 801-2 (Ind. 2004).

[148] *Allen v. Great Am. Reserve*, 766 N.E.2d 1157, 1162 (Ind. 2002).

[149] *Simon, supra.*

[150] *Hubbard Manufacturing v. Greeson*, 515 N.E.2d 1071 (Ind. 1987).

Lex loci should not be used when the last event's location bears little connection to the legal action.[151] In such cases, courts should look to other factors to decide which state's laws should apply. Although there is no definitive list of facts, Courts have considered 1) the place where the conduct causing the injury occurred, 2) the residence or place of business of the parties, and 3) the place where the relationship is centered.[152] If the state of conduct has a law regulating how the tortfeasor or victim is supposed to act in a particular situation, courts will apply that standard rather than the law of the party's residence. In fact, this preference for the conduct-regulating law of the conduct state is virtually absolute, winning out even over the law of other interested states.[153]

In this matter the Trial Court correctly found the place of the "last event," Larry's diagnosis, has little to do with his actual exposures, which mostly occurred in North Carolina.[154] The fact Larry was diagnosed with mesothelioma in Indiana is irrelevant. Given mesothelioma's long latency period, Larry could have resided anywhere between the time of his exposures and his mesothelioma diagnosis.[155]

By way of contrast, Larry did purchase, use, and consume Lorillard's and H&V's asbestos-containing products in North Carolina. The majority of Larry's exposures to Lorillard's and H&V's products took place in North Carolina, and as such, the relationship between the parties was "centered" in North Carolina. North Carolina has enacted laws regarding the products used within its borders, and it, not Indiana, has the most significant interest in regulating the purchase, use and consumption of products in North Carolina. Applying North Carolina law is logical and

---

[151] *Simon, supra.*
[152] *Id.*
[153] *Id.*
[154] App. Vol. 1, p. 121.
[155] Larry's diagnoses occurred approximately 58 years after his exposures to Lorillard and H&V asbestos products.

consistent, given that the majority of the Parties' relevant relationship took place there, and allows Defendants to anticipate their potential liability in actions such as these. [156]

With a single exception, Courts have repeatedly and unanimously held North Carolina's statute of repose does not apply to latent disease claims.[157] Beginning with *Wilder v. Amatex Corp.* in 1985, Courts have ruled North Carolina's repose statutes[158] do not apply to latent disease claims, as opposed to general injury claims, based upon the legislature's conscious omission of the word "disease" from the statute. Most recently, in 2011, the Honorable Eduardo C. Robreno, presiding Judge of the Federal Court asbestos multi-district litigation docket, followed *Wilder* and subsequent authorities in accord with it, determining "The North Carolina statute of repose is more aptly suited to personal injury claims where the injury is traceable to single moment in time and therefore, the statute of repose does not apply to claims stemming from latent diseases."[159]

To the extent this Court determines Indiana's statute of repose bars latent disease claims, there is a conflict of laws between North Carolina and Indiana. Given the Trial Court found a majority of Larry's exposures to Lorillard's and H&V's asbestos occurred in North Carolina,

---

[156] Although Lorillard and H&V's summary judgment motion argued Tennessee law "in-the-alternative", neither these Defendants nor Plaintiff actually asserted Tennessee law should apply to this matter.

[157] *See, Wilder v. Amatex Corp.*, 314 N.C. 550 (1985). *Silver v. Johns-Manville Corp.*, 789 F.2d 1078 (4th Cir. 1986); *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30 (4th Cir. 1986); *Gardner v. Asbestos Corp.*, 634 F. Supp. 609 (W.D.N.C. 1986), *Guy v. E.I. DuPont de Nemours & Co.*, 792 F.2d 457 (4th Cir. 1986) (obstructive lung disease); *Burnette v. Nicolet, Inc.*, 818 F.2d 1098 (4th Cir. 1986) (asbestos-related lung disease); *Bullard v. Dalkon Shield Claimants Trust,* 74 F.3d 531 (4th Cir. 1996) (pelvic inflammatory disease); *Adams v. A.J. Ballard Jr., Tire & Oil Co.*, 2006 NCBC 9, 98 (N.C. Super. Ct. 2006). *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 9 (N.C. 1992), *In re Asbestos Litigation*, 2012 Del. Super. Lexis 256 (2012), Order denying summary judgment, *Malpass v. Armstrong World Industries*, USDC EDPA, consolidated under MDL 875, App. Vol. Vol. p. 1617. But see *Klein v. Dupuy, inc.* 506 F.3d 553 (7th Cir. 2007) for the only case to ever apply North Carolina's statute of repose to latent disease claims.

[158] Originally N. C. Gen Stat. §1-15(b).

[159] *Malpass* , App. Vol. 8, p. 1620. *See also, In re Asbestos Litigation*, 2012 Del. Super. Lexis 256 (2012).

North Carolina law should apply to claims against these Defendants. As North Carolina law permits the Myers to present their claims to a jury, they respectfully request this Court reverse the Trial Court's order granting summary judgment to Lorillard and Hollingsworth & Vose.

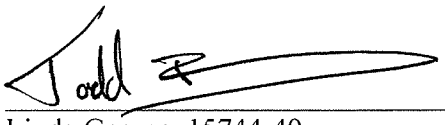
VIII. CONCLUSION

Ott represents an anomaly in Indiana jurisprudence. Numerous cases decided both before and after it decline to apply limitations periods to latent injury claims. Overturning *Ott* would bring harmony to Indiana law, and more importantly, justice to its citizens.

Asbestos product manufacturers such as Lorillard, Hollingsworth & Vose, and Crouse-Hinds sold products containing asbestos which they knew could cause latent diseases. No legitimate purpose is served by allowing such companies to escape responsibility for their decision to put profits over the lives and health of those who used their products.

Accordingly, Larry and Loa Myers respectfully request this Court reverse the Trial Court's orders granting summary judgment to Lorillard, Hollingsworth & Vose, and Crouse-Hinds, and allow them the opportunity to present their claims to a jury.

Respectfully submitted, June 10, 2015



Linda George, 15744-49
Kathleen A. Farinas, 20283-34
Todd Barnes, 25904-49
Ashleigh Resetarits, 28363-49
Sarah Broderick, 31908-49
An Attorney for Plaintiff/Appellants Larry and Loa Myers
GEORGE & FARINAS, LLP
151 N. Delaware Street, Suite 1700
Indianapolis, Indiana 46204
317-637-6071/fax 685-6505
lg@lgkflaw.com; kf@lgkflaw.com; tb@lgkflaw.com;
ar@lgkflaw.com; sb@lgkflaw.com

STATE OF INDIANA	)	**MARION COUNTY SUPERIOR COURT**
	)	**CIVIL DIVISION ROOM NO. 2**
COUNTY OF MARION	)	**CAUSE NO. 49D02-1311-MI-041208**

Electronically Filed
Jan 08 2015 09:42AM
Myla A. Eldridge
Clerk of the Marion Circuit Court
Case Number: 49D02-1405-MI-014372
Transaction ID: 56569946

LARRY AND LOA MYERS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
A.W. CHESTERTON,Co., et al	)	
	)	
Defendants.	)	

ORDER ON DEFENDANT, CROUSE-HINDS DIVISION OF COOPER INDUSTRIES INC.'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court as a motion for summary judgment filed by Defendant, Crouse-Hinds Division Of Cooper Industries Inc. [hereinafter referred to as "Crouse-Hinds"]. Consequently, The Court construes all facts in favor of Plaintiffs, the non-moving party.

FACTS

Plaintiff Larry Myers [hereinafter "Myers"] is ill with malignant pleural mesothelioma, a form of cancer which sometimes develops many years after exposure to asbestos. On July 24, 2014, Myers and his wife filed suit against a number of defendants claiming damages. (*Case-Specific Complaint for Damages and Demand for Jury Trial* TID 55373368.)

Beginning in 1961, Myers worked for Koontz-Wagner Electric, an electrical contractor, as an electrician. (Meyer Dep. 39:13-15.) Myers worked as an electrician from 1959 to 1980 at various jobsites in northern Indiana and southern Michigan. (Plaintiffs' *Preliminary Verified Disclosure Statement for the Purpose of Showing a Basis for Naming Each Defendant,* TID 55531947.) During the course of his work, Myers was exposed to asbestos materials at many work sites or while handling various products. Myers's work as an electrician required him to handle or work "around asbestos

materials on pipes, boilers, pumps, turbines, generators, machinery, ducts, precipitators, condensers, pumps, hoppers, and other devices and equipment located at the facilities. He worked alongside other tradesmen including other insulators, pipefitters, boilermakers, laborers, insulators, and maintenance crews who prepared materials for application." (Plaintiff's VID at p. 2, TID 55531947.)

Myers worked on several occasions during the 1970's at various facilities in Indiana and Michigan. (VIDS, TID 55531947.) Plaintiffs contend Myers worked with asbestos containing products, specifically an asbestos containing explosion proof fitting product called Chico packing which was used as a seal-off and manufactured by Crouse-Hinds. (Myers Dep. p. 605:5-606:6.) Myers used Chico between 50 and 100 times over the course of his career. Myers last used Chico in 1980. (Myers Dep. 629:3-6.) Plaintiffs' Master Complaint (TID 42304935) and their case specific complaint allege that Crouse-Hinds product asbestos exposures caused or contributed to Myers's asbestos related illness. Plaintiffs also allege that Defendant failed to adequately warn Myers about the dangers of asbestos. Defendant Crouse-Hinds filed a motion for summary judgment premised upon the Indiana product liability act statute of repose [hereinafter "PLA/SR"].[1]

ISSUE

Whether the Indiana product liability act ten year statute of repose bars Myers claim?

PARTIES CONTENTIONS

Defendant Contends Myers product exposures were more than ten years ago and his claim is barred by the Indiana product liability act statute of repose.

---

[1] **34-20-3-1 Negligence and strict liability in tort actions**

Sec. 1. (a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Plaintiffs Contend the *Ott* majority opinion no longer represents Indiana law with respect to the statute of repose in asbestos cases and should not be followed. Also, Section 1 of the PLA/SR should be declared unconstitutional as applied to the Myers' claim.

DECISION

The Court GRANTS Crouse Hinds motion for summary judgment based upon the PLA/SR.

STANDARD OF REVIEW

When ruling on a summary judgment motion, a trial court must draw all reasonable inferences in favor of the non-moving parties. Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " Williams v. Tharp, 914 N.E.2d 756, 761 (Ind.2009) (quoting T.R. 56(C)). As our Supreme Court has recently observed, when considering a summary judgment motion it is the trial court's province to "dispose of cases where only legal issues exist." *Hughley v. State*, 15 N.E. 3d1000, 1003 (Ind. 2014). "Under Indiana's standard, the party seeking summary judgment must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence." *Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc.*, 644N.E.2d 118, 123 (Ind.1994).

DISCUSSION

As all parties to this litigation are aware, lately this Court faced the conundrum that *Ott* and its progeny presents: a plaintiff must have more than mere exposure to a toxic agent to file a cause of action yet an asbestos plaintiff will not develop a diagnosable disease within the ten year PLA/SR. Further, this Court reviewed Supreme Court cases which may have called into question the theoretical underpinnings of *Allied Signal v. Ott*, 785 N.E. 2d 1068 (Ind. 2003) and questioned whether recent developments in the law undermine *Ott's* interpretation of the PLA/SR. Finding the reasoning of the dissenting opinion in Ott persuasive and believing that it more closely mirrored the legislative intent embodied in Ind. Code §34-20-30-2 and Indiana's Constitutional promise of access to the courts, Ind. Const. art. I, § 12 and Ind. Const. art.

I, § 23, this Court denied summary judgment premised upon the PLA/SR. (*Geyman*, TID 56074741; 56074643)

While acknowledging the valid reasons that prompted this Court's prior judge to choose this path, this Court is compelled to follow the majority opinion in *Ott* and GRANT Crouse-Hinds motion for summary judgment. The doctrine of stare decisis requires a court to abide by, or adhere to, decided cases. *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS. This maxim of judicial restraint is "supported by compelling policy reasons of predictability that we should be 'reluctant to disturb long-standing precedent,' and 'a rule which has been deliberately declared should not be disturbed by the same court absent urgent reasons and a clear manifestation of error.' " *Fry v. State*, 990 N.E. 2d 429, 443 (Ind. 2013) (quoting *Snyder v. King,* 958 N.E.2d 764, 776 (Ind.2011) (internal citations omitted).

Trial Courts from time to time may lack enthusiasm for some higher court decisions. However, the doctrine of stare decisis "imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 583 (7th Cir. 2005) quoting *Midlock v. Apple Vacations West, Inc.,* 406 F.3d 453, 457 (7th Cir.2005) (citations omitted). In the final analysis, a trial court is obligated to follow precedent. Any other resolution to this issue rests with the authority of the Indiana Supreme Court or the Indiana General Assembly.

Defendant Crouse-Hinds motion for summary judgment based on the PLA/SR is GRANTED.

All of the above is SO ORDERED.

/s/ Timothy W. Oakes (original signature on file with Court.)
Judge Timothy W. Oakes

Distribution via ELECTRONIC SERVICE.

	Granted Marion County Circuit & Superior Court	The moving party is hereby ORDERED to provide a copy of this Order upon receipt to any pro se parties or non-electronically served attorneys in this action.	/s/ Oakes, Timothy W Judge Dated: Jan 08, 2015

STATE OF INDIANA) IN THE MARION SUPERIOR COURT
)SS CIVIL DISVISION, ROOM NUMBER TWO
COUNTY OF MARION) CAUSE NO. 49D02-1405-MI-0014372

LARRY MYERS and
LOA MYERS

Plaintiffs,

vs.

A.W. CHESTERTON, et al.,

Defendants.

PROPOSED ORDER ON DEFENDANT, CROUSE-HINDS DIVISION OF COOPER INDUSTRIES INC.'S MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF REPOSE DEFENSE

Defendant, Crouse-Hinds Division of Cooper Industries Inc.'s (Crouse-Hinds) filed its motion for summary judgment along with its designation of evidence, supporting brief, and the Court is duly advised in the premises.

The Court rules as indicated above, and on the Information Comments Page.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Crouse-Hinds is hereby granted summary judgment in its favor and against the Plaintiffs, that there is no genuine issue of material fact, and that there is no just reason for delay in entry of final judgment in favor of Defendant, Crouse-Hinds, and directs the entry of such final judgment against the Plaintiffs.

DISTRIBUTION via Electronic Service

This document constitutes a ruling of the court and should be treated as such.

Court:	IN Marion County Circuit & Superior Courts
Judge:	Timothy W Oakes
File & Serve Transaction ID:	56070429
Current Date:	Jan 08, 2015
Case Number:	49D02-1405-MI-014372
Case Name:	Myers, Larry vs A W Chesterton Co et al ACTIVE (Jan. 2015)
Court Authorizer:	Oakes, Timothy W

Court Authorizer Comments:

order issued at TID 56569946.

/s/ Judge Oakes, Timothy W

Ruling with Comments Marion County Circuit & Superior Court	The moving party is hereby ORDERED to provide a copy of this Order upon receipt to any pro se parties or non-electronically served attorneys in this action.	/s/ Oakes, Timothy W Judge Dated: Jan 08, 2015

STATE OF INDIANA)
COURT
)
COUNTY OF MARION)

MARION COUNTY SUPERIOR

CIVIL DIVISION ROOM NO. 2
CAUSE NO. 49D02-1311-MI-041208

Electronically Filed
Jan 08 2015 11:20PM
Myla A. Eldridge
Clerk of the Marion Circuit Court
Case Number: 49D02-1405-MI-014372
Transaction ID: 56577513

LARRY AND LOA MYERS,)
)
Plaintiffs,)
)
v.)
)
A.W. CHESTERTON,Co., et al)
)
Defendants.)

ORDER ON DEFENDANT, LORILLARD TOBACCO COMPANY'S AND HOLLINGSWORTH & VOSE COMPANY MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court as a motion for summary judgment filed by Defendant, Lorillard Tobacco Company's and Hollingsworth & Vose Company [hereinafter referred to as "Lorillard and H & V"] Consequently, The Court construes all facts in favor of Plaintiffs, the non-moving party.

FACTS

Plaintiff Larry Myers [hereinafter "Myers"] is an Indiana resident who is ill with malignant pleural mesothelioma, a form of cancer which sometimes develops many years after exposure to asbestos. On July 24, 2014, Myers and his wife filed suit against a number of defendants claiming damages. (*Case-Specific Complaint for Damages and Demand for Jury Trial,* TID 55373368.)

The facts relevant to Myers claim against Lorillard and H & V differ from those of the other defendants. H & V manufactured an asbestos containing cigarette filter used by Lorillard in its Kent brand cigarettes from about 1952 until 1956. Myers' began smoking Kent cigarettes in March or April of 1956 while he was stationed at Camp Lejeune, North Carolina. (Myers Dep. 339.) Myers was attracted to the Kent brand by the advertisements touting their superior filter and by his preference for their taste. In

September of 1956, Myers was transferred to Nashville, Tennessee. (*Id* at 351.) At least by 1960, Myers had moved back to Indiana where he still resides. Myers continued to smoke for many years. Plaintiffs' contend Myers' inhalation of asbestos from the Kent filter material contributed to cause his mesothelioma.

Defendant Lorillard and H & V filed a motion for summary judgment premised upon the Indiana product liability act statute of repose [hereinafter "PLA/SR"].[1]

ISSUE

1. Whether North Carolina or Indiana substantive law should apply to Myers' claim?
2. Whether the Indiana product liability act ten year statute of repose bars Myers claim?

PARTIES CONTENTIONS

Defendant Contends Myers product exposures were more than ten years ago and his claim is barred by the Indiana product liability act statute of repose and that both Indiana and North Carolina law would preclude Myers claim.

Plaintiffs Contend the *Ott* majority opinion no longer represents Indiana law with respect to the statute of repose in asbestos cases and should not be followed. Also, Section 1 of the PLA/SR should be declared unconstitutional as applied to the Myers' claim. Lastly, Plaintiffs contend that North Carolina law should apply as the location of most of Myers exposures.

DECISION

The Court GRANTS Lorillard and H & V motion for summary judgment based upon the PLA/SR.

---

[1] **34-20-3-1 Negligence and strict liability in tort actions**

Sec. 1. (a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

STANDARD OF REVIEW

When ruling on a summary judgment motion, a trial court must draw all reasonable inferences in favor of the non-moving parties. Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " Williams v. Tharp, 914 N.E.2d 756, 761 (Ind.2009) (quoting T.R. 56(C)). As our Supreme Court has recently observed, when considering a summary judgment motion it is the trial court's province to "dispose of cases where only legal issues exist." *Hughley v. State*, 15 N.E. 3d1000, 1003 (Ind. 2014). "Under Indiana's standard, the party seeking summary judgment must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence." *Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc.*, 644N.E.2d 118, 123 (Ind.1994).

DISCUSSION

I.

It is appropriate for this Court to determine which state substantive law should applies because Myers' claim is pending in this state court. *Hubbard Mfg. Co. v. Greeson*, 515 N.E. 2d 1071, 1073 (Ind. 1987); *Melton v. Stephens*, 13 N.E. 3d 533, 539 (Ind. Ct. App. 2014).

> As a preliminary premise, the trial court must determine whether the differences between the laws of the states are "important enough to affect the outcome of the litigation." Hubbard, 515 N.E.2d at 1073. If such a conflict exists, the presumption arises that the traditional *lex loci delicti* rule—the place of the wrong—will apply. *Id.* Under this initial step, the trial court applies the substantive law of "the state where the last event necessary to make an actor liable for the alleged wrong takes place."

Id. at 539. Myers suit would not be barred by the North Carolina statute of repose while Indiana's PLA/SR would bar his claim. Hence, there is a conflict of law.

The last event necessary to make an actor liable for an alleged wrong is when an asbestos defendant is diagnosed with an asbestos related disease. The VIDS do not indicate where Myers was diagnosed, however except for his time of service in the military, Myers has lived in Indiana and all of his listed medical providers are in Indiana. (Plaintiffs' VIDS, TID 55531947.) We conclude Indiana is the location where the last event necessary to make Lorillard and H & V liable occurred.

This Court has previously ruled that if a plaintiff's last event is diagnosis of a latent asbestos related disease, then the state would bear little connection to an asbestos tort action. The place of the tort would be insignificant to the action. (See, *Order on Defendant A.W. Chesterton Company and Foster Wheeler, LLC's Motion to Dismiss Foreign Law Application*, TID 37600387 (all Plaintiff's exposures occurred in Ohio.))

If the place of the tort is insignificant to the action, the Court must examine other contacts according to their relative importance to the litigation and apply the law of the state with the most significant relationship to the case. A non-exclusive list of contacts is: 1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered. *Simon v. United States*, 805 N.E. 2d 798, 806 (Ind. 2004).

In the case before us, Myers began smoking the asbestos containing Kent cigarette in March or April of 1956. Of the possible ten months of exposures to the Kent cigarettes before the asbestos filter was withdrawn from the market, Myers smoked for six or seven months in North Carolina and three months in Tennessee. The wrong took place in at least two states, with the greater number of exposures occurring in North Carolina. The cigarettes were manufactured in New Jersey and Kentucky. Defendants corporate offices were in New York. Defendants products were available nationwide, but the evidence is that Myers purchased the cigarettes in North Carolina and Tennessee. Lastly, Myers has lived for over the last 55 years in Indiana and filed suit here. The contacts of the injury in this case are splintered. Likewise, the contacts between the allegedly negligent party and the plaintiff are few and there is no real place where their

relationship can be centered. Given these facts, along with Myers' long residence in Indiana, the Court finds that Indiana has a more significant relationship with the case and under Indiana's choice of law rules, Indiana law applies.

II

As all parties to this litigation are aware, lately this Court faced the conundrum that *Ott* and its progeny presents: a plaintiff must have more than mere exposure to a toxic agent to file a cause of action yet an asbestos plaintiff will not develop a diagnosable disease within the ten year PLA/SR. Further, this Court reviewed Supreme Court cases which may have called into question the theoretical underpinnings of *Allied Signal v. Ott*, 785 N.E. 2d 1068 (Ind. 2003) and questioned whether recent developments in the law undermine *Ott's* interpretation of the PLA/SR. Finding the reasoning of the dissenting opinion in Ott persuasive and believing that it more closely mirrored the legislative intent embodied in Ind. Code §34-20-30-2 and Indiana's Constitutional promise of access to the courts, Ind. Const. art. I, § 12 and Ind. Const. art. I, § 23, this Court denied summary judgment premised upon the PLA/SR. (*Geyman*, TID 56074741; 56074643)

While acknowledging the valid reasons that prompted this Court's prior judge to choose this path, this Court is compelled to follow the majority opinion in *Ott* and GRANT Lorillard Tobacco Company's and Hollingsworth & Vose Company motion for summary judgment. The doctrine of stare decisis requires a court to abide by, or adhere to, decided cases. *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS. This maxim of judicial restraint is "supported by compelling policy reasons of predictability that we should be 'reluctant to disturb long-standing precedent,' and 'a rule which has been deliberately declared should not be disturbed by the same court absent urgent reasons and a clear manifestation of error.' " *Fry v. State*, 990 N.E. 2d 429, 443 (Ind. 2013) (quoting *Snyder v. King,* 958 N.E.2d 764, 776 (Ind.2011) (internal citations omitted).

Trial Courts from time to time may lack enthusiasm for some higher court decisions. However, the doctrine of stare decisis "imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering

court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 583 (7th Cir. 2005) quoting *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir.2005) (citations omitted). In the final analysis, a trial court is obligated to follow precedent. Any other resolution to this issue rests with the authority of the Indiana Supreme Court or the Indiana General Assembly.

Defendant Lorillard Tobacco Company's and Hollingsworth & Vose Company motion for summary judgment based on the PLA/SR is GRANTED.

All of the above is SO ORDERED.

/s/ Timothy W. Oakes (original signature on file with Court.)
Judge Timothy W. Oakes

Distribution via ELECTRONIC SERVICE.

This document constitutes a ruling of the court and should be treated as such.

Court:	IN Marion County Circuit & Superior Courts
Judge:	Timothy W Oakes
File & Serve Transaction ID:	56075585
Current Date:	Jan 08, 2015
Case Number:	49D02-1405-MI-014372
Case Name:	Myers, Larry vs AW Chesterton Co et al ACTIVE (Jan. 2015)
Court Authorizer:	Oakes, Timothy W

/s/ Judge Oakes, Timothy W

Granted Marion County Circuit & Superior Court	The moving party is hereby ORDERED to provide a copy of this Order upon receipt to any pro se parties or non-electronically served attorneys in this action.	/s/ Oakes, Timothy W Judge Dated: Jan 30, 2015

STATE OF INDIANA	)	**MARION COUNTY SUPERIOR COURT**
	)	**CIVIL DIVISION ROOM NO. 2**
COUNTY OF MARION	)	**CAUSE NO. 49D02-1405-MI-014372**

Electronically Filed
Jan 30 2015 11:20AM
Myla A. Eldridge
Clerk of the Marion Circuit Court
Case Number: 49D02-1405-MI-014372
Transaction ID: 56691697

LARRY AND LOA MYERS,

Plaintiffs,

v.

A.W. CHESTERTON CO., et al.,

Defendants.

DEFENDANTS LORILLARD TOBACCO COMPANY AND HOLLINGSWORTH & VOSE COMPANY'S PROPOSED ORDER AND FINAL JUDGMENT DENYING PLAINTIFFS LARRY AND LOA MYERS' MOTION TO RECONSIDER ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS LORILLARD AND HOLLINGSWORTH & VOSE

Plaintiffs Larry and Loa Myers, having filed their Motion to Reconsider Order Granting Summary Judgment to Defendants Lorillard and Hollingsworth & Vose ("Motion to Reconsider"), and Defendants, Lorillard Tobacco Company and Hollingsworth & Vose Company having filed their Response to Plaintiffs' Motion to Reconsider Order Granting Summary Judgment to Defendants Lorillard and Hollingsworth & Vose, and the Court is duly advised in the premises.

The Court rules as indicated above, and on the attached Information/Comments Page.

IT IS THEREFORE ORDERED, that Plaintiffs' Motion to Reconsider is DENIED. The Court's January 8, 2015 Order on Defendant Lorillard Tobacco Company's and Hollingsworth & Vose Company Motion for Summary Judgment (TID 56577513) shall remain in full force and effect.

IT IS THEREFORE FURTHER ORDERED, that pursuant to Rule 54(B) of the Indiana Rules of Trial Procedure, there is no just reason for delay and Final Judgment is hereby entered in favor of Lorillard Tobacco Company and Hollingsworth & Vose Company.

DISTRIBUTION via Electronic Service

KD_6962533_1.DOCX

This document constitutes a ruling of the court and should be treated as such.

Court:	IN Marion County Circuit & Superior Courts
Judge:	Timothy W Oakes
File & Serve Transaction ID:	56608502
Current Date:	Jan 30, 2015
Case Number:	49D02-1405-MI-014372
Case Name:	Myers, Larry vs AW Chesterton Co et al ACTIVE (Jan. 2015)
Court Authorizer:	Oakes, Timothy W

/s/ Judge Oakes, Timothy W

X. WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

Linda George, 15744-49
Kathleen A. Farinas, 20283-34
Todd Barnes, 25904-49
Ashleigh Resetarits, 28363-49
Sarah Broderick, 31908-49
An Attorney for Plaintiff/Appellants Larry and Loa Myers
GEORGE & FARINAS, LLP
151 N. Delaware Street, Suite 1700
Indianapolis, Indiana 46204
317-637-6071/fax 685-6505
lg@lgkflaw.com; kf@lgkflaw.com; tb@lgkflaw.com;
ar@lgkflaw.com; sb@lgkflaw.com

XI. CERTIFICATE OF SERVICE

The undersigned attorney certifies that the foregoing was served via U.S. Mail, postage prepaid, on the following counsel of record, on June 10, 2015:

Susan Swing
JOHNSON & BELL, PC
11051 Broadway, Ste. B
Crown Point, IN 46307
Counsel for Cooper Crouse-Hinds

Thomas J. Costakis
Catherine E. Sabatine
KRIEG DEVAULT, LLP
One Indiana Sq., Ste. 2800
Indianapolis, IN 46204
Counsel for Lorillard Tobacco Company and Hollingsworth & Vose Company

Pursuant to Marion County Mass Tort Local Rule LR49-TR5 Rule 603(A)(4), the Trial Court and remaining parties of record were served on June 10, 2015, via eFile and Serve.

Kathleen A. Farinas
Todd Barnes