IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 26 EAP 2018 and No. 27 EAP 2018 (Consolidated)

WILLIAM C. ROVERANO AND JACQUELINE ROVERANO, H/W

Plaintiffs-Appellants
v.

JOHN CRANE, INC. AND BRAND INSULATIONS, INC.

Defendants-Appellees

No. 26 EAP 2018

WILLIAM C. ROVERANO

Plaintiff--Appellant
v.

JOHN CRANE, INC.

Defendant-Appellee

No. 27 EAP 2018

BRIEF OF APPELLANTS WILLIAM AND JAQUELINE ROVERANO

Appeal from the Order of the Superior Court of Pennsylvania Entered on December 28, 2017 at Nos. 2837 EDA 2016 and 2847 EDA 2016 Consolidated, Reversing the July 27, 2016 Order of the Court of Common Pleas, Philadelphia County, March Term 2014, No. 1123, Dealing with the Fair Share Act, and Remanding for a New Trial to Apportion the Jury Verdicts.

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STATEMENT OF JURISDICTION

The Superior Court entered its decision on December 28, 2017. Plaintiff filed a petition for allowance of appeal on January 26, 2018. This Court granted the petition on July 31, 2018. This Court has subject matter jurisdiction under 42 Pa. C.S. Section 724(a).

ORDER IN QUESTION

On December 28, 2017, the Superior Court of Pennsylvania issued a precedential opinion that concludes:

> "Judgment vacated. Order denying Post Trial Motions affirmed in all respects other than that portion dealing with the Fair Share Act; such portion of the Order is reversed. Case remanded for a new trial to apportion the jury verdicts among the Appellants, the non-bankrupt settling defendants (excluding Georgia Pacific Cement and Hajoca because the jury determined that they were not tortfeasors) and bankrupt settling defendants. Jurisdiction relinquished.
>
> President Judge Emeritus Ford Elliott joins this Opinion Per Curiam.
>
> Judge Solano files a Concurring and Dissenting Opinion.
>
> Judgment Entered."

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This case involves a question of statutory interpretation under the Fair Share Act. "Because statutory interpretation is a question of law, [the] standard of review is *de novo*, and the scope of review is plenary." Snead v. Society for Prevention of Cruelty to Animals of Pennsylvania, 985 A.2d 909, 912 (Pa. 2009).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, under this issue of first impression, the Superior Court misinterpreted the Fair Share Act 42 Pa.C.S. Sec. 7102 in holding that the Act requires the jury to apportion liability on a percentage basis as opposed to a per capita basis in this strict liability asbestos case?

2. Whether, under this issue of first impression, the Superior Court misinterpreted the Fair Share Act in holding that the Act requires the jury to consider evidence of any settlements by the plaintiffs with bankrupt entities in connection with the apportionment of liability amongst joint tortfeasors?

STATEMENT OF THE CASE

1. Form of Action and Procedural History

Plaintiffs, William Roverano and Jacqueline Roverano, husband and wife, commenced this asbestos personal injury action by the filing of a Complaint in March, 2014. Plaintiffs' Complaint alleged that Mr. Roverano contracted lung cancer as a result of his exposure to various asbestos-containing products during portions of his working career at PECO. Named as defendants in the case were the manufacturers and suppliers of the asbestos-containing products, including defendants John Crane, Inc. ("John Crane") and Brand Insulations, Inc. ("Brand"). In addition to the claim on behalf of Mr. Roverano for his pain and suffering, there was the claim of his wife, Jacqueline Roverano, for her loss of consortium.

Plaintiffs' case was tried before the Honorable Victor DiNubile and a jury in April, 2016, in the Philadelphia County Court of Common Pleas. After all of the evidence was presented, the jury found that eight (8) companies were liable for causing Mr. Roverano's lung cancer, including defendants, John Crane and Brand. The jury awarded Mr. Roverano $5,189,265.00 as a result of his suffering from lung cancer due to his exposure to asbestos products manufactured by the defendants. The jury awarded Mrs. Roverano $1,250,000.00 for her loss of consortium.

Prior to trial, John Crane and Brand filed a motion *in limine* seeking a ruling that their liability, if any, should be apportioned by the jury according to the extent to which each defendant caused harm to the plaintiffs. The trial judge heard argument on that motion on April 5, 2016, and summarized the motion as follows:

> [W]hat you're saying is that you want an apportionment – rather than per capita, you want an apportionment instruction to the jury and you want the jury to actually apportion the share of liability if they reach that issue.

(RR 405a, N.T. p. 9). The court then explained why it would deny the motion:

> Here is my difficult[y] with this and why I've denied it in the past and I will here and you all have an exception, is that all of the testimony I've ever heard in asbestos, no one quantifies it. They say that you can't quantify it. If you can't quantify it, how can the Fair Share Act apply?
>
> ***
>
> I understand, I see your point, but still unless there's some expert testimony that says the exposure would be two percent, unless you have something like that, and I have to hear the evidence, I haven't heard anything like that before, I don't think it can be quantified as far as percentages are concerned. Now, you can argue that if there was any exposure to a John Crane packing material, it was infinitesimal and therefore it was not a substantial factor. You can argue that to your heart's content. But I don't know – I understand your position. I respect it, but I don't see how I can present it in that fashion to the jury.

(RR 405a-407a, N.T. pp. 9-10, 14-15).

Prior to trial, plaintiffs filed a motion *in limine* to preclude bankrupt entities from being placed on the verdict sheet. The trial judge granted plaintiffs motion *in limine* and explained as follows in his opinion:

> The defendants objected to the Court's preclusion of the bankrupt entities because they were not included on the verdict sheet for the determination of their liability along with the settling defendants. They assert that their inclusion could have led to a further reduction of the defendants' share of liability. The Court denied this motion at a pre-trial hearing on the grounds that these entities had already filed for bankruptcy prior to the institution of suit on behalf of the plaintiff. Under these circumstances, it would have been unfair to include the bankrupts on the verdict sheet. ***See Ottavio v. Fireboard***, 617 A.2d 1296 (Pa. Super. 1992), and ***Ball v. Johns-Manville Corp.***, 625 A.2d 650 (Pa. Super. 1993).

(Trial Court Opinion, p. 11, Appendix C). Based upon John Crane and Brand's per capita share of the verdict, John Crane and Brand were each liable to Mr. Roverano for a $1/8^{th}$ share of the total verdict, which is $648,658.00, plus delay damages. Based upon John Crane and Brand Insulation's per capita share of the consortium award, John Crane and Brand Insulation were each liable to Mrs. Roverano for a $1/8^{th}$ share of the consortium award, which is $156, 250.00.

Defendants filed motions for Post Trial Relief. On May 31, 2016, John Crane and Brand filed their Briefs in Support of their Post Trial Motions, and on July 5, 2016, plaintiffs filed their Briefs in Opposition to Defendants' Post Trial Motions. On July 27, 2016, the trial court denied defendants' motions for Post Trial Relief, and entered judgment against John Crane and Brand and in favor of Mr. Roverano and Mrs. Roverano.

On August 26, 2016, John Crane and Brand filed Notices of Appeal. On October 3, 2016, the Superior Court of Pennsylvania consolidated the appeals *sua sponte*. On April 25, 2017, the appeal was argued before a Panel of the Superior Court. By Opinion dated December 28, 2017, the Superior Court Panel affirmed the trial court's opinion and order in all respects other than that portion dealing with the Fair Share Act, which was reversed by the Superior Court.

On January 26, 2018, plaintiffs filed a petition for allowance of appeal regarding the Superior Court's reversal of the trial court's opinion and order dealing with the Fair Share Act and bankrupts on the verdict sheet. On July 31, 2018, the Pennsylvania Supreme Court granted plaintiffs' petition for allowance of appeal.

The Superior Court's opinion which was issued on December 28, 2017 is attached hereto as Appendix A. Judge Solano's concurring and dissenting opinion is attached hereto as Appendix B. Judge DiNubile's order and opinion which the Superior Court affirmed in all respects other than that portion dealing with the Fair Share Act, which was reversed by the Superior Court, is attached as Appendix C. The text of the Fair Share Act, 42 Pa.C.S. Sec. 7102 is attached as Appendix D.

2. Facts Necessary in Order to Determine Points in Controversy.

A. The Testimony of William Roverano.

William Roverano worked as a helper and carpenter for PECO from 1971 to 2001. (RR 428a-429a; N.T. April 6, 2016, pp. 60, 64). During portions of Mr. Roverano's employment

with PECO, Mr. Roverano regularly and frequently worked with and around a variety of different kinds of asbestos products. (RR 430a; N.T. pp. 66-67). Mr. Roverano's work at PECO included working with machinists, electricians, boilermakers, and pipe coverers. (RR 429-430a; pp. 65-66).

Regarding defendant John Crane, from 1971 to 1981, Mr. Roverano, on a regular and frequent basis, worked directly with and in the vicinity of John Crane's asbestos-containing rope packing and graphite packing. (RR 430a; N.T. pp. 68-69). Dust was created from cutting the John Crane packing prior to installation and Mr. Roverano breathed in the dust from the packing during the 1971 to 1981 time period. (RR 431a-434a; N.T. pp. 73-82). Mr. Roverano did not wear a mask or respirator when he worked with the John Crane packing and there were not warnings of any kind on the John Crane boxes warning of the dangers of asbestos inhalation. (RR 441a; N.T. pp. 111-112).

Regarding defendant Brand, Mr. Roverano was exposed to asbestos containing pipe and block insulation that was supplied by Brand. (RR 439a; N.T pp. 102-103). Mr. Roverano testified that he breathed in asbestos dust from the insulation supplied by Brand when Brand workers cut the insulation in his presence. (RR 439a N.T. pp. 104-105). Mr. Roverano worked around Brand workers numerous times during the 1971 to 1981 time period when the Brand workers cut and installed the insulation in his presence. (RR 439a, N.T. p. 105). Mr. Roverano did not wear a mask or respirator when he worked in the vicinity of the Brand workers who were installing asbestos-containing products in his presence and Brand did not warn Mr. Roverano of the dangers of asbestos inhalation. (RR 441a; N.T. pp. 111-112).

In addition to John Crane and Brand, Mr. Roverano testified to asbestos exposure from several other companies products. This included exposure to asbestos from DeLaval pumps,

Ingersoll Rand compressors, Westinghouse and General Electric turbines, Westinghouse Micarta board, and insulation from J.J. White contractors. (RR 458a-470a).

B. The Testimony of Plaintiffs' Expert Dr. Arthur L. Frank.

Dr. Arthur Frank, a physician and professor of medicine at Drexel University, who is world-renowned as an expert in asbestos related diseases and their causes, testified on behalf of plaintiffs at trial. Dr. Frank is board certified in internal medicine and occupational medicine. (RR 526a; N.T. April 7, 2016, p. 6). As a specialist in the field of occupational medicine and biomedical science, Dr. Frank has knowledge and expertise about the various types of asbestos products that were used in the past by American industry. (RR 528a; N.T. pp. 16-17). Dr. Frank's expertise includes asbestos packing, gaskets, pipe insulation and block insulation. (RR 528a; N.T. p. 17).

Dr. Frank testified that products that contain asbestos fibers are hazardous to human health. (RR 532a; N.T. p. 31). Dr. Frank stated that asbestos is a carcinogen or cancer-causing agent. (RR 532a; N.T. p. 31). Dr. Frank testified that there are three different types of asbestos fibers, chrysotile, amosite, and crocidolite, and that all three are carcinogens capable of causing lung cancer. (RR 537a; N.T. 51-52).

Dr. Frank testified that there is no safe level of exposure to asbestos. (RR 536a; N.T. p. 47). Dr. Frank testified that diseases associated with asbestos are dose response or cumulative diseases. (RR 531a, 537a; N.T. pp. 26-27, 52-53). Dr. Frank explained that cumulative exposure means the totality of the exposure a worker has had from all of their exposures. Dr. Frank further explained dose response means that as you add to your exposures day after day, month after month, year after year, the risk of getting lung cancer goes up. (RR 537a; N.T. 52, 53).

With respect to lung cancer, Dr. Frank indicated that asbestos exposure alone can cause lung cancer. (RR 532a; N.T. p. 33). Dr. Frank also indicated there is a synergistic or multiplicative effect for individuals who have both a smoking history and asbestos exposure history. (RR 533a-534a; N.T. pp. 36-40). Dr. Frank testified that neither pleural thickening nor asbestosis is necessary to link lung cancer to asbestos exposure. (RR p. 531a, 535a; N.T. pp. 28, 42-45).

Regarding Mr. Roverano, Dr. Frank opined that Mr. Roverano's prior exposures to asbestos in combination with cigarette smoking caused his lung cancer. (RR 538a-539a; N.T. pp. 57-58). Dr. Frank opined that there was no medical or scientific way to separate out the different asbestos companies products that Mr. Roverano was exposed to from a comparative causation standpoint. (RR. 542a-543a; N.T. 72-74).

Specific to John Crane, Dr. Frank testified that Mr. Roverano's exposure to John Crane packing was a substantial contributing cause or factual cause of his lung cancer. (RR 539a-540a; N.T. pp. 61-62). Dr. Frank explained that asbestos is a dose-response disease and Mr. Roverano's exposure to John Crane's packing was a significant part of Mr. Roverano's cumulative exposure which caused his lung cancer. (RR 539a-540a; N.T. pp. 60-65).

Specific to Brand, Dr. Frank testified that Mr. Roverano's exposure to asbestos from Brand-related asbestos materials was a factual cause and contributed to Mr. Roverano developing lung cancer. (RR 540a-541a; N.T. pp. 65-67). Dr. Frank explained that the burden from Mr. Roverano's exposure to Brand's asbestos added to Mr. Roverano's risk and it was one of the factors that contributed to the totality of Mr. Roverano's dose which resulted in Mr. Roverano getting lung cancer. (RR 541a; N.T. p. 67). Dr. Frank also opined that Mr. Roverano's exposure to Brand's block insulation and pipe covering alone was sufficient to increase Mr.

Roverano's risk of getting an asbestos-related lung cancer. (RR 541a; N.T. p. 68). Dr. Frank explained that as result of working almost shoulder to shoulder with Brand insulators, Mr. Roverano had significant bystander exposure to Brand's insulation and pipe covering. (RR 541a; N.T. p. 68).

C. The Testimony of Plaintiffs' Expert Dr. Jonathan Gelfand.

Dr. Jonathan L. Gelfand is board certified in internal medicine, pulmonary diseases, and hospice and palliative care. (RR 752a; Dr. Gelfand April 5, 2016 Video Tape Deposition., p. 8) Dr. Gelfand testified that he has been evaluating, examining, and treating individuals with asbestos-related diseases for 35 years. (RR 752a-754a; pp. 9-15). During this time period, he has treated thousands of patients with asbestos-related diseases, including lung cancer. (RR 754a; pp. 14-15). As a result of evaluating thousands of individuals with asbestos-related diseases, Dr. Gelfand is familiar with various types of asbestos-containing products in the workplace. Dr. Gelfand testified that diseases associated with asbestos are dose-response or cumulative diseases. (RR 762a-763a; pp. 49-50). Dr. Gelfand testified that asbestosis is not necessary to link lung cancer to asbestos exposure. (RR 762a; pp. 47-48).

Dr. Gelfand opined that exposure to asbestos was a substantial contributing factor to Mr. Roverano's metastatic lung cancer. (RR 756a; p. 25). Dr. Gelfand opined that cigarette smoking may have also been a contributing factor in his diagnosis of lung cancer, but because Mr. Roverano stopped smoking 17 years before his diagnosis of lung cancer, there was some uncertainty about the contribution of cigarette smoking. (RR 756a-757a, pp. 25-26). Dr. Gelfand explained that unlike asbestos, when one stops smoking cigarettes, the risk of lung cancer related to smoking drops rapidly. (RR 762a; pp. 46-47). Dr. Gelfand opined that there

was no medical or scientific way to separate out the different asbestos products that Mr. Roverano was exposed to from a comparative causation standpoint. (RR. 763a; N.T. 50).

Specific to John Crane, Dr. Gelfand testified that Mr. Roverano's exposure to asbestos from John Crane packing was a substantial contributing factor to the burden of asbestos that Mr. Roverano inhaled, and as such, was a substantial contributing factor to the development of his lung cancer and to his poor prognosis for survival. (RR 763a; pp. 52-53). Specific to Brand, Dr. Gelfand testified that Mr. Roverano's exposure to asbestos from Brand's pipe insulation was also a substantial contributing factor to the burden of asbestos that Mr. Roverano inhaled, and as such, was a substantial contributing factor to the development of his lung cancer and to his poor prognosis for survival. (RR 763a-764a; pp. 53-55).

D. The Testimony of Steven P. Compton, Ph.D.

Plaintiff proferred the expert opinion of Dr. Steven Compton. Dr. Compton is a physicist and microscopist with experience in testing asbestos-containing products for fiber release. Dr. Compton stated that individual asbestos fibers are generally invisible, but that they become visible when they come together as a whole or with other components. (RR 791a; Dr. Compton April 1, 2016 Video Tape Deposition, pp. 14-15). Dr. Compton testified that when asbestos fibers become airborne, given their size and properties, they tend to remain suspended for long periods of time. (RR 791a; pp. 15-16). Dr. Compton has tested asbestos-containing packing and gaskets for fiber release and he is familiar with studies done by others that involved fiber release from asbestos gaskets and packing. (RR 795a-796a, 802a; 33-34, 60). Specific to Mr. Roverano, Dr. Compton opined that Mr. Roverano was exposed to a significant number of airborne asbestos fibers from asbestos-containing packing made by John Crane. (RR 799a-800a, pp. 49-50, RR 808a-809a; pp. 49-50, 85-89)

E. The Testimony of Defendant John Crane's Expert, Dr. James Crapo.

John Crane, presented the expert medical testimony of Dr. James Crapo. Dr. Crapo is a pulmonologist. (RR 945a; Dr. Crapo Video Tape Deposition, p. 11). Dr. Crapo opined that asbestosis was necessary in order for lung cancer to be attributed to asbestos. (RR 958a; pp. 61-63). Dr. Crapo opined that smoking caused Mr. Roverano's lung cancer. (RR 966a-967a; pp. 95-98). Dr. Crapo further opined that asbestos did not play a causative role in the development of Mr. Roverano's lung cancer. (RR 965a; p. 89). Dr. Crapo acknowledged that if an individual had substantial and significant exposure to a variety of asbestos products and developed an asbestos disease, then one could not separate out which product caused the disease and which one did not. (RR 975a; pp. 131-132).

F. The Testimony of Brand's Expert Dr. Alan Pope.

Brand presented the expert medical testimony of Dr. Alan Pope. Dr. Pope is a pulmonologist. (RR 991a-992a; Dr. Pope April 7, 2016 Video Tape Deposition, pp. 8-11). Dr. Pope opined that asbestos did not cause Mr. Roverano's lung cancer. (RR 997a; pp. 30-33). Dr. Pope further opined that Mr. Roverano's lung cancer was related to his cigarette smoking. (RR 997a). Dr. Pope based his opinion on his belief that that the presence of asbestosis is necessary in order to attribute lung cancer to asbestos exposure. (RR 997a; pp. 32-33).

On cross examination, Dr. Pope acknowledged that asbestos-related diseases, including lung cancer, are dose-response diseases. (RR 998a; p. 36). Dr. Pope agreed that if an individual has been diagnosed with asbestos-related disease and the individual has been exposed to multiple products, one would ordinarily not be able to determine which product caused the disease and that all of the products combined would be a cause of the disease. (RR 999a; pp. 38-39).

G. The Testimony of Defendant, John Crane's, Expert Witness Dr. Frederick Toca.

Defendant, John Crane, presented the expert testimony of Dr. Toca. Dr. Toca holds a doctorate in preventive medicine, and he specializes in industrial hygiene and toxicology. (RR 613a; N.T. April 11, 2016, pp. 31-33). Dr. Toca acknowledged that he is not a medical doctor and he was not giving an opinion regarding medical causation. (RR 625a; N.T. p. 78). With respect to Dr. Toca's testimony, Dr. Toca opined that exposure to asbestos packing produces a low level of asbestos dust. (RR 621a-622a; N.T. pp. 64-66). Dr. Toca opined that John Crane's packing products were below the no effect level and would not have caused an increased risk of lung cancer. (RR 624a; N.T. p. 76).

H. The Testimony of Brand's Expert, Patrick Rafferty.

Patrick Rafferty testified that he is an industrial hygienist. (RR 648a; N.T. April 12, 2016, p. 24). Mr. Rafferty acknowledged that he is not a medical doctor. (RR 660a; N.T. p. 72). Mr. Rafferty opined that Brand's contribution to Mr. Roverano's exposure to asbestos is within the range of background concentrations in the environment. (RR 654a, 659a-660a; N.T. pp. 48, 67-71).

SUMMARY OF THE ARGUMENT

Under Pennsylvania law, liability in strict liability cases is apportioned on a per capita basis among multiple tortfeasors. Walton v. Avco Corporation, 610 A.2d 454 (Pa. 1992); Baker v. AC&S, 755 A.2d 664 (Pa. 2000). The reason why liability must be apportioned on a per capita basis is that in a strict liability case there is no factual basis for a jury to allocate different percentages of liability between multiple defendant products. Regarding the application of the Fair Share Act to strict liability, there is no dispute that the Fair Share Act eliminated joint liability in strict liability cases, as it did with negligence cases. However, stating that the Act applies to a strict liability action does not answer the question of how it applies. There is no authority in the Fair Share Act that would override existing case law that prohibits allocation of a verdict in a strict liability case based on some calculation of comparative fault.

A per capita apportionment of liability is especially warranted in asbestos cases, where a particular defendant's product is seldom used in isolation and where a particular defendant's product is often used in conjunction with and in the immediate vicinity of many other defendants' asbestos products. A per capita apportionment of liability is also warranted in asbestos cases because an asbestos plaintiff has suffered an indivisible injury that is not capable of being apportioned. This is something the Superior Court failed to recognize in the case herein in ruling that the trial court erred in apportioning liability on a per capita basis.

In Mr. Roverano's case, both of plaintiff's medical experts, Dr. Frank and Dr. Gelfand, testified that it is the total asbestos exposure that comes from the variety of products that Mr. Roverano was exposed to which caused his lung cancer. Neither of plaintiff's medical experts offered testimony regarding the proportionate amount of plaintiff's lung cancer caused by one defendant over another defendant. John Crane and Brand's medical experts, Dr. Crapo and Dr.

Pope, testified that all of Mr. Roverano's lung cancer was the result of cigarette smoking and, thus, their testimony provided no basis for any apportionment.

In spite of the well-established case law holding that liability is apportioned on a per capita basis in strict liability cases, and the evidence in the case indicating that Mr. Roverano suffered an indivisible asbestos-related injury, the Superior Court held that the trial court erred in declining John Crane and Brand's request to require the jury to apportion damages among liable parties on a percentage basis. As a result, the standard adopted by the Superior Court now erroneously requires a percentage-based apportionment of liability in strict liability cases even in situations where there is no reasonable basis for the jury to determine the percentage contribution of each defendant to an indivisible injury such as asbestos-related lung cancer.

Regarding the issue of bankrupt entities on the verdict sheet, it is well settled that bankrupt manufacturers are excluded from the verdict sheet. Nothing in the language of the Fair Share Act supersedes the rule established in Ottavio v. Fibreboard, 617 A.2d 1296 (Pa. Super. 1992) (*en banc*) and Ball v. Johns-Manville Corporation, 625 A.2d 650 (Pa. Super. 1993), that bankrupt entities are prohibited from being included on the verdict sheet for apportionment purposes. The Superior Court interpreted the Fair Share Act as changing the law as to bankrupt entities, such that responsibility may be apportioned to them. Here, the legislature is presumed to have known that Pennsylvania courts prohibited the apportionment of liability to bankrupt entities. Yet the legislature did not expressly state in the Act that liability could be apportioned to bankrupts. In fact, the Act never uses the words "bankrupt", "bankruptcy" or any derivation thereof.

The amount of compensation available to an individual harmed by asbestos from bankrupts is limited. Allowing bankrupts on the verdict sheet would prevent the plaintiff from

being made whole, and would result in a windfall to non-settling defendants. This is the opposite of what Pennsylvania law favors. Pennsylvania law favors the injured party when determining if the law would allow a "windfall" to the innocent party, or a windfall to the tortfeasor by reducing the judgment against it. The interpretation of the Act advanced by the Superior Court contravenes this policy underlying Pennsylvania law by not only benefiting the tortfeasor, but actually penalizing the plaintiff by depriving the plaintiff of a portion of the verdict.

ARGUMENT

I. THE SUPERIOR COURT MISINTERPRETED THE FAIR SHARE ACT IN HOLDING THAT THE ACT REQUIRES THE JURY TO APPORTION LIABILITY ON A PERCENTAGE BASIS AS OPPOSED TO A PER CAPITA BASIS IN THIS STRICT LIABILITY ASBESTOS CASE.

A. Nothing In The Fair Share Act Reverses Existing Law That Provides That In A Strict Liability Case, Liability Must Be Apportioned On A Per Capita Basis.

In the case herein, the Superior Court held that the trial court erred in declining defendants' request to require the jury to apportion damages among liable parties on a percentage basis. The trial court's decision to apportion liability on a per capita basis was not in error because plaintiff presented strict liability claims only. In ruling that the trial court erred in how liability was to be apportioned, the Superior Court misinterpreted the Fair Share Act and improperly overruled longstanding Pennsylvania case law, including case law from this Court.

The express purpose of the Fair Share Act ("FSA") was to abolish joint liability in Pennsylvania except under limited circumstances where applicable. The FSA provides that each defendant is liable for that portion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned (e.g., released non-parties). 42 Pa. Cons. Stat. Ann. Sec. 7102 (a.1)(1) and (a.2). A defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability. 42 Pa. Cons. Stat. Ann Sec. 7102 (a.1)(2).

In contrast to joint liability, in which a tortfeasor bears the risk of recovering from the other tortfeasors the amount of an excess payment, where the responsibility amongst tortfeasors

is apportioned and the judgment is several and not joint, the injured party bears the risk that a tortfeasor will be unable to satisfy that portion of the judgment. Glomb by Salopek v. Glomb, 530 A.2d 1362, 1365 (Pa. Super. 1987). Thus, except in limited circumstances, the Fair Share Act eliminates joint liability in multi-defendant cases. The effect of the Fair Share Act is to limit the ability of a plaintiff to collect the full amount of damages awarded where one or more tortfeasors is unable to satisfy the portion of the judgment allocated to them.

The operative language from the Fair Share Act is "...each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned..." 42 Pa.C.S. Sec. 7102(a.1). This language does not purport to dictate how to determine what is "the ratio of the amount of that defendant's liability" to the total. Thus, although the provisions of the Act are intended to apply to strict liability causes of action, the Act does not explicitly provide how liability is to be "apportioned" amongst multiple defendants in relevant cases. The impact of the Fair Share Act – which leaves unchanged the method by which a verdict is apportioned among strictly liable defendants is confirmed by the statutory language itself, which expressly provides **that "[n]othing in this section shall be construed in any way to create, abolish or modify a cause of action. . . ."** 42 Pa. Cons. Stat. Ann. Sec. 7102 (c.2) (emphasis added).

The Superior Court acknowledges that the Fair Share Act does not explicitly say how to allocate liability among strictly liable joint tortfeasors and the Court acknowledges that the statute is ambiguous on the issue. (Roverano opinion at p. 26, Appendix "A"). Nevertheless, the Superior Court interpreted the Fair Share Act as changing the law as to the apportionment of liability in strict liability cases. The Superior Court's interpretation is contrary to the well-settled

rule of statutory construction that statutes are not intended to overturn established precedent without an express declaration of such purpose. See, e.g., In re Erie Golf Course, 992 A.2d 75, 81 (Pa. 2010) ("...statutes are not intended to overturn well-established precedent without an express declaration of such purpose....") (Justice Saylor); The Birth Center v. The St. Paul Cos., 787 A.2d 376, 387) (Pa. 2001) ("[S]tatutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions.") (quoting Rahn v. Hess, 106 A.2d 461 (Pa. 1954)).

As detailed below, Pennsylvania case law unequivocally prohibits apportionment by fault in a strict liability action: therefore, the legislature must be deemed to have intended that law to continue in the absence of any clear statement to the contrary. In Walton v. Avco Corporation, 610 A.2d 454 (Pa. 1992), the plaintiffs argued that the Superior Court erred in holding that the principles of comparative fault should be employed in apportioning liability for damages between two strictly liable defendants. This Court agreed and held that the Superior Court's introduction of "comparative fault" in allocating the damage award between strictly liable defendants was erroneous. This Court explained its holding as follows:

> In a case such as this, ***where neither defendant was found liable under the theory of negligence we believe it is improper to introduce concepts of fault in the damage-apportionment process.***

Walton, 610 A.2d at 463 (emphasis in original). In holding that liability must be per capita in a strict liability cause of action, this Court stated that **"[i]t is impossible to determine that one [defendant] was more liable than the other."** Id. (emphasis added). This Court also stated: "It would serve only to muddy the waters to introduce comparative fault into an action based solely on strict liability." Id.

In Baker v. AC&S, 755 A.2d 664 (Pa. 2000), this Court re-affirmed the well established precedent that liability is to be apportioned on a per capita basis in strict liability asbestos cases:

> In strict liability actions, liability is indeed apportioned equally among joint tortfeasors. *Walton*, *supra*. In a strict liability action, apportionment based upon fault is impermissible as this tort theory does not contain an element of fault. This is in contrast to negligence actions where liability is allocated among joint tortfeasors according to percentages of comparative fault.

Baker, 755 A.2d at 669. See also Moore v. Ericsson, Inc., 7A.3d 820, 828-29 (Pa. Super. 2010) (division of liability for the purposes of assessing damages is *per capita* and not apportioned based upon the fact-finders assessment of unidentified factors.) (citing Baker, 755 A.2d at 672); Glock v. Coca-Cola Co., 639 A.2d 1191, 1193 (Pa. Super. 1994) (same) (citing Walton, 610 A.2d at 462) ("*Walton* reversed this procedure and held that once the issue of strict liability was resolved against several defendants, the award of damages against them would be apportioned on a per capita basis, as a matter of law.").

The above holdings have been confirmed by this Honorable Court's post-Act holding in Tincher, which provides as follows regarding strict liability:

> [W]e explain: (1) that the strict liability cause of action sounds in tort; (2) that the notion of "defective condition unreasonably dangerous" is the normative principle of the strict liability cause of action, which reflects the standard of review or application of the tort, and its history; and (3) the appropriate interplay of principle and evidence.
>
> It is important to remember that the action sounds in tort, *i.e.* the cause involves breach of duties "imposed by law as a matter of social policy," rather than contract, *i.e.*, the cause involves breach of duties "imposed by mutual consensus agreements between particular individuals." Ash, 932 A.2d at 884; see Restatement (2D) of Torts §402A(2). Nevertheless, the tortious conduct at issue is not the same as that found in traditional claims of negligence and commonly associated with the more colloquial notion of "fault." In this sense, introducing a colloquial notion of "fault" into the conversation relating to strict product liability in tort detracts from the precision required to keep this legal proposition within rational bounds.

Tincher, 104 A.3d at 416. This body of unbroken law is in direct tension with the Superior Court's holding in Roverano which concludes that the allocation of liability in strict liability cases applies in the same way as negligence cases. (Roverano opinion, p. 28, Appendix "A").

The reason why liability must be apportioned on a per capita basis is that in a strict liability case it would be difficult, if not impossible, for a jury to put a particular percentage of liability on a particular defendant's product in complex multi-defendant cases. The Fair Share Act did not change the method by which strict liability damages are apportioned on a per capita basis among responsible parties. The Fair Share Act speaks only to the fact that a strict liability defendant is only severally liable for its portion of the verdict – which, in strict liability cases, is a per capita share – and that such liability is not joint.

The Superior Court's opinion states that the Act's provision that liability may be joint if a defendant's share of the responsibility for the verdict is 60% or more shows that the legislature intended to allow percentage fault in a strict liability action because if liability is per capita it would be mathematically impossible for any of those defendants to reach the 60% threshold. (Roverano opinion at pp. 31-32, Appendix "A"). This analysis is unavailing as the exceptions to the rule ending joint liability, of which the 60% threshold is but one, are all of limited applicability. 42 Pa.C.S.A. Sec. 7102(a.1)(3). The 60% threshold exception can apply only to negligence actions. That it can apply only to negligence actions hardly eliminates the Act's general applicability to strict liability actions; to the contrary, the effect is that all defendants found liable in strict liability will have several liability only – they will not be subject to the 60% threshold exception, just as they will not be subject to the other exceptions in 7102(a.1)(3). Thus, the Fair Share Act does not authorize a jury to apportion strict liability on the basis of comparative fault.

As it stands, the standard adopted by the Superior Court overrules existing case law which holds that in strict liability actions, liability is apportioned equally among joint tortfeasors and that apportionment based upon relative fault is impermissible. The Superior Court's ruling in the case herein that the Fair Share Act requires a percentage based apportionment in all strict liability cases constitutes an overly broad and incorrect reading of the statute that is wholly unsupported by the language of the Fair Share Act.

B. A Per Capita Apportionment Of Liability Is Especially Warranted in Strict Liability Cases Involving Asbestos Exposure.

A per capita apportionment of liability is especially warranted in asbestos cases, where a particular defendant's product is seldom used in isolation and where a particular defendant's product is often used in conjunction with and in the immediate vicinity of many other defendants' asbestos products. A per capita apportionment of liability is also warranted in asbestos cases because an asbestos plaintiff has suffered an indivisible injury that is not capable of being apportioned. This is something the Superior Court failed to recognize in the case herein in ruling that the trial court erred in apportioning liability on a per capita basis.

The issue to be determined in a strict liability asbestos case is whether the product contained any element that made it unsafe for use. "In the context of asbestos-related injuries, the feature that renders the product unsafe for its use is the presence of asbestos in the product or more accurately the dangers from inhalation of asbestos fibers that can be emitted from the product." Hicks v. Dana Cos., LLC, 984 A.2d 943, 968 (Pa. Super. 2011). Pennsylvania courts have recognized that "asbestos is widely accepted as an inherently dangerous product." Chenot v. A.P. Green Servs., Inc., 895 A.2d 55, 67 (Pa. Super. 2006). In Andaloro v. Armstrong World Industries, 799 A.2d 71, 87-88 (Pa. Super. 2002), the Superior Court upheld the lower court's instruction to the jury that "[a]sbestos containing products are inherently dangerous products"

and "require adequate warnings". Id. at 87. The factual issues for the jury to decide with respect to product defect are whether the product contained asbestos, and whether sufficient asbestos fibers can be emitted from the product to cause disease. Hicks, 984 A.2d at 968.

Regarding the issue of establishing causation in asbestos cases, this Court in Rost vs. Ford Motor Company, 151 A.3d 1032 (Pa. 2016) stated that pursuant to Gregg and Betz, for all exposures to asbestos that satisfy the "frequency, regularity, and proximity" test, when coupled with competent medical testimony establishing substantial factor causation, it is for the jury to determine the question of substantial causation. Id. p. 1052. In Rost, this Court also addressed the issue of multiple causes in asbestos cases. This Court stated that it has consistently held that multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff. Id. at p. 1052. The Rost Court also stated that comparison of plaintiff's other exposures to asbestos is unnecessary. Id. p. 1048-1049. The Rost Court explained that multiple asbestos-containing products may be substantial factors causative of a plaintiff's disease. Id. pp. 1050-1051.

Where multiple asbestos-containing products have combined to produce an asbestos disease, apportionment of liability on a percentage basis in a strict liability asbestos case is inappropriate as there is no reasonable basis for a jury to determine the percentage fault of each defendant to a plaintiff's asbestos disease. An additional reason why a percentage apportionment of liability in a strict liability asbestos case is inappropriate is that asbestos defendants are liable for their failure to warn of the dangers of asbestos. In a strict liability asbestos case based on failure to warn there is no factual basis to determine that one defendant is more liable than another defendant for their respective failures to warn.

Pennsylvania case law interpreting apportionment in asbestos cases indicates that an asbestos-related disease is not capable of being apportioned. Martin v. Owens-Corning Fiberglas, 528 A.2d 947 (1985), an opinion from this Court regarding apportionment of a pulmonary injury, is instructive on the issue of apportionment of an indivisible injury. In discussing the applicability of the Restatement (Second) of Torts §433A, this Court noted that:

> The trial court must determine, as a matter of law, whether the harm is capable of apportionment, and the burden of proving apportionment rests on the party seeking it....[I]t was incumbent upon the trial court to determine that there was a reasonable basis for apportioning the harm between the two causes before submitting the issue to the jury.

Id. at 949 (other citations omitted).

In Gross v. Johns-Manville Corp., 600 A.2d 558 (Pa. Super. 1991)[1], the Superior Court indicated that testimony about one asbestos defendant being more prominent than another is not a basis for apportionment of liability on a percentage basis. The Court explained as follows:

> Evidence of the amounts of asbestos present at the shipyard was presented in vague and uncertain terms. Evidence presented during trial of warnings which were placed only on the products of Fibreboard and Pittsburgh may be a defense as to liability, requiring that the jury determine the adequacy and efficacy of such warnings; however, it does not provide a basis upon which to apportion liability. *See Glomb v. Glomb*, 366 Pa. Super. 206, 530 A.2d 1362 (1987), *allocatur denied*, 517 Pa. 623, 538 A.2d 876 (1988) ("A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harms or when the court is able to identify 'a reasonable basis for determining the contribution of each cause to a single harm.'" *Restatement (Second) of Torts §* 433A(1) (1965). . . .

Gross, 600 A.2d at 566.

[1] The Gross asbestos case involved interpretation of the former Section 7102(b) and whether the trial court was required to charge the jury on the issue of comparative liability. Gross at pp. 564-565. The Gross Court interpreted Section 7102(b) as not requiring the issue of apportionment to be submitted to the factfinder: "We do not read this [Section 7102(b)] to mean that the issue of apportionment *must* be submitted to the factfinder regardless of the sufficiency of the evidence which would support such a determination." Gross, 600 A.2d at fn. 10 (emphasis in the original).

In Ball v. Johns-Manville, 625 A.2d 650, 658-659 (Pa. Super. 1991), the Superior Court held that apportionment based on causal fault in an asbestos case is barred where there is no evidence on which the jury might base such an apportionment. The Superior Court explained its holding as follows:

> The instant case was submitted to the jury on both negligence and strict liability theories. Thus, under the foregoing authorities, it would appear that apportionment among the defendants on the ground of causal fault would not be barred under that portion of *Walton* that holds that such apportionment is not permissible as between purely strictly liable defendants. *See Walton, supra; McMeekin, supra.* **However, in the instant case we find that apportionment on the basis of causal fault is barred on another independent ground. Here, apportionment on the basis of relative causal fault was impossible because there is absolutely no evidence on which the jury might base such an apportionment.**

Id. (emphasis added).

The Ball Court concluded that where there is insufficient evidence to support a jury determination of the relative causal fault of the tortfeasors, apportionment must be made on an equal share basis:

> **. . . [C]learly no apportionment charge can be given since, as a matter of law, there is insufficient evidence to support a jury determination of the relative causal fault of the tortfeasors. Thus, apportionment must be made on a pro rata basis, i.e., in relation to the total number of joint tortfeasors that the jury finds contributed to the injury of the plaintiff.**

Id. (emphasis added). See also, Glomb by Salopek v. Glomb, 530 A.2d 1362, 1365 (Pa. Super. 1987) ("A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harm or when the court is able to identify 'a reasonable basis for determining the contribution of each cause to a single harm.'") (citing Restatement Second of Torts §433A(1)).

Pennsylvania case law unequivocally prohibits apportionment based on fault in asbestos cases. The Superior Court's opinion now requires apportionment based on fault in strict liability

asbestos cases. In so holding, the Superior Court's opinion overrules a long line of appellate asbestos cases which indicate apportionment is inappropriate in asbestos cases and that liability is apportioned on a per capita basis. This asbestos case law should not have been overruled by the Superior Court.

C. The Evidence In Mr. Roverano's Case Does Not Support A Percentage-Based Apportionment.

In Mr. Roverano's case, since medical experts were required to establish the causal relationship between Mr. Roverano's lung cancer and his exposure to John Crane and Brand's asbestos products, it would seem logical to turn to the same medical experts to determine the contribution of each defendant to the lung cancer. Plaintiff's expert, Dr. Frank, was asked:

> Q. Okay. And, doctor, regarding all of those other asbestos products that Mr. Roverano was exposed to, in your opinion is there any medical or scientific basis for anyone stating that Mr. Roverano's lung cancer was only caused by those other products and was not caused or had nothing to do with the products of these companies in the courtroom?
>
> A. **No, there's no way that any scientist can say that – the body doesn't know that it was a Hajoca product or Brand product or John Crane company or company X, Y, or Z. They don't come with little red flags on them that say it comes from this company or that company. . .**

(RR 542a, N.T. pp. 73) (emphasis added).

Specific to John Crane and Brand Insulation, Dr. Frank testified that Mr. Roverano's exposures to John Crane packing and Brand's insulation were both substantial contributing causes or factual causes of his lung cancer. Dr. Frank explained that asbestos is a dose-response disease and Mr. Roverano's exposures to John Crane's packing and Brand's insulation products were significant parts of Mr. Roverano's cumulative exposure which caused his lung cancer. (RR 539a-541a; N.T. pp. 61-68).

Plaintiff's expert, Dr. Gelfand, was asked:

Q. And Doctor, if someone who is occupationally exposed to asbestos, from various types of asbestos-containing products, over a period of years, is there any way for you or any physician to pinpoint exactly what fiber it was that caused someone's lung cancer?

A. **No, you can't say which particular fiber from any particular day. It is the total burden of exposure that is the cause and increases the risk of lung cancer.**

(RR 763a; p. 50) (emphasis added). Specific to John Crane and Brand Insulation, Dr. Gelfand opined that Mr. Roverano's exposures to asbestos from John Crane packing and Brand's insulation products were substantial contributing factors to the burden of asbestos that Mr. Roverano inhaled, and as such, were substantial contributing factors to the development of his lung cancer and to his poor prognosis for survival. (RR 763a-764a; pp. 52-55).

John Crane and Brand's medical experts, Dr. Crapo and Dr. Pope, attributed all of Mr. Roverano's lung cancer to his cigarette smoking, thus their testimony provided no basis for any apportionment. In fact, John Crane's medical expert, Dr. Crapo, testified that if the asbestos products were part of something used substantially and contributed to the dose in a major way, he could not separate them out. (RR 975a; p. 132). Brand's medical expert, Dr. Pope, agreed that if an individual has been diagnosed with an asbestos-related disease and the individual has been exposed to multiple products, all of the products combined would be considered the cause of the disease. (RR 999a; pp. 38-39).

It is anticipated that John Crane and Brand will argue that the testimonies of their industrial hygiene experts support their position that there was sufficient evidence for the jury to apportion liability on a percentage basis. This argument is incorrect as neither John Crane's industrial hygiene expert, Dr. Toca, nor Brand's industrial hygiene expert, Patrick Rafferty, were medical doctors. As such, they were not able to give medical causation testimony. (RR 625a;

N.T. p. 78) (RR 660a, N.T. p. 72). Dr. Toca opined that John Crane's packing products were below the no-effect level and would not have caused an increased risk of lung cancer. (RR 624a; N.T. p. 76). Patrick Rafferty opined that Brand's contribution to Mr. Roverano's exposure to asbestos is within the range of background concentrations in the environment. (RR 654a, 659a-660a; N.T. pp. 48, 67-71).

Defendants' industrial hygiene experts essentially opined that John Crane's asbestos products and Brand's asbestos products did not contribute at all to Mr. Roverano's lung cancer. The jury rejected their testimony as evidenced by the fact that the jury found that John Crane and Brand's asbestos products were factual causes in bringing about Mr. Roverano's lung cancer. (RR. 1058a-1059a). As John Crane's industrial hygiene expert did not attribute any of John Crane's products to Mr. Roverano's lung cancer and Brand's industrial hygiene expert did not attribute any of Brand's asbestos products to Mr. Roverano's lung cancer, and John Crane and Brand's industrial hygiene testimony was rejected by the jury, their testimony provided no reasonable basis for apportionment.

Both of plaintiff's expert medical doctors made it abundantly clear that, in their expert opinion, Mr. Roverano's lung cancer was not susceptible of any reasonable, logical or practical division. The medical experts were unable to give an opinion on the proportion of contribution of each company's asbestos product to the development of Mr. Roverano's lung cancer. If they had been asked to make an educated guess as to the percentage contribution of each defendant's products to Mr. Roverano's lung cancer, they would not have been permitted to do so. A litigant "...is not entitled to have mere conjecture, either in the witness box or the jury room, accepted as a substitute for proof." Rice v. Hill, 172 A. 289, 291 (1934).

The Superior Court's opinion in Roverano requiring a new jury on remand to give a percentage contribution of each defendant's asbestos product to the development of Mr. Roverano's lung cancer would require a jury to do something the medical experts could not do. Lung cancer is a complex disease process which requires expert medical testimony as to its identification and causation. If the evidence discloses, as it does here, that the individual asbestos products that Mr. Roverano was exposed to cannot be logically or reasonably separated and apportioned by medical experts, it is error to require a lay jury to do so.

In Mr. Roverano's asbestos case where eight defendants were found liable, the trial court did not err in apportioning liability on an equal share basis where John Crane and Brand was each responsible for a $1/8^{th}$ (12.5 percent) share of the verdict. This apportionment of liability should not have been disturbed by the Superior Court. Instead, the Superior Court erroneously reversed the trial court's order and opinion dealing with the Fair Share Act and remanded for a new trial to apportion the jury verdict.

D. Legislative History Does Not Support A Percentage-Based Apportionment In Asbestos Cases.

The Superior Court states in its opinion that the Legislature's intention to have a fact-finder allocate liability among joint tortfeasors on a percentage basis in strict liability cases is confirmed by the statute's history. (Roverano opinion at pp. 28-29, Appendix "A"). The Superior Court points to the 2002 version of the statute that was hotly debated where the Bill Floor Manager in the House, Representative Mike Turzai, was asked the question before the Court. The Superior Court states that Representative Turzai's answer made clear that liability apportionment between two strictly liable tortfeasors would not be per capita, but instead would

be based on "the degree that the jury or the judge found them causally responsible," in a manner similar to allocation among negligent joint tortfeasors. Id. at pp. 29-30.

However, the Superior Court overlooked subsequent legislative history that supports plaintiff's position that the Fair Share Act does not require percentage apportionment in multi-defendant asbestos cases. On September 2, 2012, Representative Mike Turzai issued a Memorandum to All House Members under the subject: Co-sponsorship Memo- Asbestos Trust Transparency and Fairness in Asbestos Litigation Act. (A copy of the Memorandum is attached as Appendix E). In the Memorandum, Representative Turzai states that his bill would apply the principles of the Fair Share Act to asbestos litigation such that asbestos defendants would be apportioned liability based only on their relative fault. Similarly, in a Memorandum dated January 12, 2017, Representative Warren Kampf issued a similar Memorandum under the subject Fairness in Claims and Transparency Act – Asbestos Litigation. (A copy of the Memorandum is attached as Appendix F). In the Memorandum, Representative Kampf, like Representative Turzai, states that his bill would apply the principles of the Fair Share Act to asbestos litigation.

Subsequently, on January 31, 2017, Representative Kampf introduced House Bill No. 238, providing for transparency of claims made against asbestos-related bankruptcy trusts, for compensation and allocation of responsibility, for the preservation of resources and for the imposition of liabilities. (A copy of HB 238 is attached as Appendix "G"). While HB 238 has not been enacted, there would be no reason for the legislature to pass a new law to apply the principles of the Fair Share Act to asbestos litigation if that was the law already under the FSA. Keffer v. Bob Nolan's Auto Service, 59 A.3d 621, 626 (Pa. Super. 2011) (recognizing that statutes or parts of statutes that relate to the same persons or things or to the same class of

persons or things are to be construed together, if possible). This would render the proposed HB 238 superfluous. Commonwealth v. McCoy, 962 A.2d 1160, 1168 (Pa. 2009) (courts are not permitted to deem any language of a statute to be superfluous.).

II. THE SUPERIOR COURT MISINTERPRETED THE FAIR SHARE ACT IN HOLDING THAT THE ACT REQUIRES THE JURY TO CONSIDER EVIDENCE OF SETTLEMENTS WITH BANKRUPT ENTITIES IN CONNECTION WITH THE JURY'S ROLE IN APPORTIONING LIABILITY AMONGT JOINT TORFEASORS.

A. Nothing In The Fair Share Act Reverses Existing Law Precluding Bankrupt Entities From Being Placed On The Jury Verdict Sheet.

The Superior Court's opinion in the case herein regarding the issue of bankrupt entities on the verdict sheet is contrary to well settled Pennsylvania law that bankrupt manufacturers should be excluded from the verdict sheet. Nothing in the language of the Fair Share Act supersedes the rule established in Ottavio v. Fibreboard, 617 A.2d 1296 (Pa. Super. Ct. 1992) (*en banc*) and Ball v. Johns-Manville Corporation, 625 A.2d 650 (Pa. Super. Ct. 1993).

The Superior Court interpreted the Fair Share Act as changing the law as to bankrupt entities, such that responsibility may be apportioned to them. To the contrary, it is a well settled rule of statutory construction that the legislature is presumed to know the existing state of the law as well as the construction which the courts have placed upon it when it enacts a statute. The Birth Center v. The St. Paul Cos., 787 A.2d 376 (Pa. 2001). "[S]tatutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions." Id. at p. 387 (quoting Rahn v. Hess, 106 A.2d 461 (Pa. 1954)). If the legislature intends to make changes in the law it is expected to do so expressly, and, "[b]y failing to articulate any changes [to the law], the legislature implicitly

acknowledge[s] that the existing standards remain applicable." The Birth Center, 732 A.2d at p. 387.

Here, the legislature is presumed to have known that Pennsylvania courts prohibited the apportionment of liability to bankrupt entities. Yet the legislature did not expressly state in the Act that liability could be apportioned to bankrupts. In fact, the Act never uses the words "bankrupt", "bankruptcy" or any derivation thereof. Thus, the Superior Court should have held that the legislature intended to leave the state of the law intact and continue with the prohibition against inclusion of bankrupts on the verdict sheet. The legislature is presumed to have known that the courts found apportioning liability to bankrupt defendants to be an "exercise in futility". Ottavio, 617 A.2d at pp. 1300-1301.

The Superior Court's opinion implies that silence on the application of the Act to bankrupt entities is indicative of its intent to allow the jury to apportion liability to bankrupt entities. This has it backwards. The legislature changes the law through express language. Silence, on the other hand, supports the *status quo*.

Further evidence of the legislature's intent to maintain the *status quo* is the provision that "[n]othing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure." 42 Pa.C.S. Sec. 7102(a.2). Under Ottavio, supra, and Ball, supra, bankrupt defendants could not be joined. The legislature's silence as to the treatment of bankrupt entities coupled with its express statement that it did not intend to change the rules of joinder of parties demonstrates its clear intent not to allow for the joinder of bankrupt entities.

Subsequent to the passage of the Fair Share Act, representatives in the Pennsylvania legislature have proposed a new bill, House Bill No. 1150 ("HB 1150"), intended to address how courts handle asbestos bankruptcy trusts specifically. The express language of HB 1150 Section

4(a), "General Rule", would allow responsibility to be apportioned to an "apportionment nonparty" pursuant to 42 Pa.C.S. Sec. 7102(a.1). HB 1150 was not enacted and in 2017 the Pennsylvania Legislature proposed another Bill, House Bill No. 238 ("HB 238"), also intended to address how courts handle bankruptcy trusts. While HB 238 has not been enacted, there would be no reason for the legislature to propose a new law to permit apportionment of liability to bankrupt entities if that was the law already under the FSA.

B. The Superior Court's Opinion Regarding Bankrupt Entities Is Inconsistent With Baker v. AC&S And It Is Inconsistent With The Uniform Contribution Among Joint Tortfeasors Act.

As it stands now, the Superior Court's ruling in Roverano regarding bankrupt entities is inconsistent with this Court's decision in Baker v. AC&S, Inc. 755 A.2d 664 (Pa. 2000), as well as inconsistent with the Uniform Contribution Among Joint Tortfeasors Act ("UCATA"), 42 Pa.C.S. Sec. 8326 which provides that:

> A release by an injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors, unless the release so provides, **but reduces the claim against other tortfeasors in the amount of consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.**

42 Pa. C.S. Sec. 8326 (emphasis added).

In Baker v. AC&S, Inc. 755 A.2d 664 (Pa. 2000) (**Baker II**), the Supreme Court affirmed the Superior Court's decision in Baker v. AC&S, Inc., 729 A.2d 1140 (Pa. Super. 1999) (**Baker I**). In Baker, this Court determined that in connection with the plaintiff's settlement with the Manville Bankruptcy Trust[2], the terms of the settlement release govern the allocation of liability between the remaining defendants. See Baker II at. p. 667. Accordingly, the release also

[2] Unlike the majority of asbestos bankruptcy trusts, the Manville Bankruptcy Trust permits the co-defendants to request the trial court to treat the Manville Trust as a legally responsible tortfeasor. See Baker I, 729 A.2d at 1146.

determines the amount of the set-off against liability to which the remaining defendants are entitled. See Id. at p. 669.

If the release is designated *pro tanto*, any subsequent verdict shall be reduced only by the *actual amount paid* by the Trust. Baker v. AC&S, Inc., 729 A.2d 1140, 1147-48 (Pa. Super. 1999) (**Baker I**). Apportionment of the verdict *pro tanto*, thus enables the plaintiff to collect the entire amount of the verdict, notwithstanding the lesser value of the Trust's contribution. In this manner, a settling plaintiff is assured recovery of the full amount of the verdict regardless of the lesser amount paid by the Trust. See Baker I, 729 A.2d at 1151.

As an example of this approach, in Reed vs. Allied Signal, 2010 Phila. Ct. Com. Pl. Lexis 410 (2010), the trial court, per Ball v. Johns Manville Corp., held that bankrupt parties could not be listed on the verdict sheet. Reed at p. 15. However, the trial court, per this Court's decision in Baker v. AC&S, stated that the UCATA allows a verdict reduction based on the Trust Distribution Process. Reed at p. 16. The trial court concluded that, pursuant to Baker and the UCATA, the verdict should simply be molded on a *pro tanto* basis as specified and/or implied by the releases, then paid by the non-settling defendant Honeywell after the reduction of the jury verdict by bankruptcy trust settlements accordingly. Reed at pp. 18-19.

In Mr. Roverano's case, all of the settlements with bankrupt entities were *pro tanto* settlements. By way of example, plaintiffs have attached Mr. Roverano's Armstrong bankruptcy release as Appendix "H" which states as follows:

> 9. In the event of a verdict against others, any judgment entered on the verdict that takes into account the status of the Trust as a joint tortfeasor legally responsible for the Injured Party's injuries shall be reduced by no more than the total and actual amount paid as consideration for this Release or such lesser amount as allowed by law.

Armstrong Release, Para. 9.

The release language specifically describes how reduction is to be calculated (*pro tanto* at most) in a verdict. Thus, in Mr. Roverano's case, it would not be appropriate for the jury on remand, as the Superior Court as ordered, to consider evidence of any settlements by the Roveranos with bankrupt entities in connection with the apportionment of liability, as all of Mr. Roverano's settlements with bankrupts were *pro tanto* settlements, which under both the Uniform Contribution Among Joint Tortfeasors Act and case law interpreting the Act (Baker I and Baker II) call for a *pro tanto* reduction of the verdict. To interpret the Fair Share Act to allow for apportionment of liability to bankrupt entities, as the Superior Court has ordered, would improperly yield "an absurd result or one that is impossible of execution." Board of Revision of Taxes v. City of Philadelphia, 4 A.3d. 610, 622 (Pa. 2010).

C. Public Policy Favors Precluding Bankrupt Entities From Being Apportioned.

The amount of compensation available to an individual harmed by asbestos from bankrupts is limited. Allowing bankrupts on the verdict sheet would not make the plaintiff whole and would result in a windfall to non-settling asbestos defendants. This is the opposite of what Pennsylvania law favors. Pennsylvania law favors the injured party when determining if the law would allow a "windfall" to the innocent party, or a windfall to the tortfeasor by reducing the judgment against it. This is a policy concern: should plaintiffs recover more than the jury verdict as a windfall, or should the nonsettling tortfeasor receive a windfall by having its verdicts reduced?

This general policy concern has been soundly resolved in favor of the injured plaintiffs. Baker v. AC&S, Inc. 755 A.2d 664, 670 (2000) ("Baker II") ("We determined that in windfall situations such as that presented by [Charles v. Giant Eagle Markets, 522 A.2d 1, 3 (1987)], the plaintiff rather than the nonsettling tortfeasor should benefit."); Walton v. Avco Corp., 610 A.2d

454, 461 (1992) ("[C]oncern over a windfall to the plaintiff, if appellee were to be required to pay its pro-rat[a] share, is far overshadowed by the injustice of the result they urge.") (quoting Charles, 522 A.2d at 3); Johnson v. Beane, 664 A.2d 96, 100 (Pa. 1995), (It is better for a wronged plaintiff to receive a windfall than for a tortfeasor to be relieved of responsibility for the wrong.). The Pennsylvania Supreme Court has also repeatedly held that a jury verdict need not cap a plaintiff's recovery. See Walton, supra, 610 A.2d at 461 ("There is no basis for concluding the jury verdict must serve as a cap on the total recovery that a plaintiff may receive.") (quoting Charles, 522 A.2d at 3).

The windfall to the non-settling tortfeasor by requiring the jury to consider evidence of settlements with bankrupt entities in connection with the apportionment of liability is especially acute in an asbestos case such as this where a settlement with a bankrupt entity must be drastically discounted due to the poor financial condition of the bankrupt entity. If the Superior Court's decision were to stand, the plaintiff would be harshly penalized for accepting a settlement that is reasonable in light of the settling bankrupt entities assets and liabilities.

The interpretation of the Act advanced by the Superior Court contravenes policy underlying Pennsylvania law by not only benefiting the tort-feasor, but actually penalizing the plaintiff by depriving the plaintiff of a portion of the verdict. The Superior Court's opinion that the Fair Share Act changed the law as to bankrupt entities such that responsibility may be apportioned to the bankrupt entities constitutes an overly broad and incorrect reading of the statute that is wholly unsupported by the language of the Fair Share Act. Accordingly, the Superior Court's opinion dealing with bankrupt entities should be reversed and the trial court's order entering judgment in favor of the plaintiffs and against John Crane and Brand should be affirmed.

CONCLUSION AND RELIEF SOUGHT

The per capita apportionment of liability ordered by the trial court as well as its preclusion of bankrupts from the verdict sheet should not have been disturbed by the Superior Court. Instead, the Superior Court erroneously reversed the trial court's order dealing with the Fair Share Act and remanded for a new trial to apportion the jury verdict. Plaintiffs-Appellants request that the December 28, 2017 Order of the Superior Court remanding the case for a new trial on apportionment be vacated and that the July 27, 2016, judgment by the Philadelphia Court of Common Pleas be upheld.

Respectfully submitted,

NASS CANCELLIERE

BY:_____

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Date:_____

CERTIFICATION

The undersigned hereby certifies that the filing of Appellants' Brief complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents. I further certify that there is no confidential information in the documents contained in this filing.

NASS CANCELLIERE

BY: _____
MICHAEL A. ROWE

Date: _____

Certificate of Compliance with Rule 2135

This brief complies with the length-of-brief- limitation of Pa.R.A.P. 2135, because this Brief contains 10, 737 words. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

NASS CANCELLIERE

By:_____
MICHAEL A. ROWE

DATED:_____

PROOF OF SERVICE

The undersigned hereby certifies that on this 16th day of October, 2018, two copies of the foregoing Appellants' Brief was served upon the following persons and in the manner indicated below:

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APPENDIX A

J. A10014/17

2017 PA Super 415

WILLIAM C. ROVERANO AND JACQUELINE ROVERANO, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN CRANE, INC. AND BRAND INSULATIONS, INC.	:	
APPEAL OF: BRAND INSULATIONS, INC.	:	
	:	No. 2837 EDA 2016

Appeal from the Order July 27, 2016
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): No. 1123

WILLIAM C. ROVERANO	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN CRANE, INC.,	:	
APPELLANT	:	
	:	No. 2847 EDA 2016

Appeal from the Order July 27, 2016
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): March Team, 2014 No. 1123

BEFORE: DUBOW, J., SOLANO, J., and FORD ELLIOTT, P.J.E.

OPINION PER CURIAM: Filed: December 28, 2017

Appellants, John Crane, Inc., and Brand Insulations, Inc., appeal from the July 27, 2016 Order denying Post-Trial Motions and entering Judgment in favor of Appellees William and Jacqueline Roverano. We affirm in part, reverse in part, and remand for a new trial to apportion damages among the tortfeasors.

We briefly summarize the relevant facts, as gleaned from the certified record, as follows.

Appellee William Roverano was employed at PECO from 1971 until his retirement in 2001. As part of his employment, Mr. Roverano was exposed to a variety of asbestos products over a ten-year period from 1971 until 1981.

In November of 2013, Mr. Roverano was diagnosed with lung cancer in both lungs. Despite extensive treatment, his prognosis is poor.

On March 10, 2014, Mr. Roverano filed a Complaint against thirty named defendants, averring that exposure to asbestos products attributable to those defendants caused his lung cancer.[1] In addition, Mrs. Roverano made a claim for loss of consortium.

Prior to trial, the trial court ruled that the Fair Share Act, 42 Pa.C.S. § 7102, did not apply to asbestos cases.

At trial, the parties presented evidence that focused primarily on Roverano's exposure to Appellants' products that contained asbestos and whether such exposure caused Roverano's lung cancer. The thrust of Appellants' defense was that it was Roverano's history of smoking that caused his lung cancer and any exposure to Appellants' products was insignificant and could not have caused his lung cancer. In contrast,

[1] More than a dozen of those named defendants had filed for bankruptcy. Of the remaining named defendants, all but Appellants Crane and Brand settled with the Roveranos prior to the jury's verdict.

Appellees' experts opined that it was both his smoking and the exposure to Appellants' products that caused his lung cancer.

After deliberating, the jury found in favor of Mr. and Mrs. Roverano and against the Appellants as well as six of the eight other defendants. The jury awarded $5,189,265 to Mr. Roverano and $1,250,000 to Mrs. Roverano.

Appellants filed separate Motions for Post-Trial Relief. On July 27, 2016, the trial court denied Appellants' Motions and entered judgment in favor of the Roveranos. The trial court apportioned the judgment equally among the eight defendants whom the jury determined to be tortfeasors. In particular, the trial court entered separate judgments against Appellant Crane and Appellant Brand each in the amount of $648,858 plus $29,604 for delay damages for the verdict in favor of Mr. Roverano and $156,250 for the verdict in favor of Mrs. Roverano.

Appellants timely appealed. The trial court did not order, and Appellants did not file, a Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b).

Although Appellants have filed separate briefs, the issues raised are largely overlapping. We, therefore, paraphrase and re-number the collective issues Appellants raised as follows:[2]

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[2] Appellant Crane also argues in one paragraph that we should reverse the trial court because its errors are cumulative. Since Appellant does not develop this argument or cite any law or references to the record to support this argument, we find this argument waived. ***See J.J. DeLuca Co., Inc. v.***

1. The trial court erred in defining "factual cause" in its instructions to the jury and in response to a written question from the jury.

2. The trial court erred by denying Appellant Crane's proposed Verdict Form that addressed whether Roverano's injuries were caused by exposure to asbestos, or, as Appellant Crane maintains, smoking.

3. The trial court erred by failing to provide the jury a Verdict Form that allowed them to determine whether Appellant Crane's packing was defective in the absence of a warning.

4. The trial court erred by allowing Roveranos' experts to offer "each and every" or "whatever" asbestos exposure causation testimony in a case where Roverano did not have mesothelioma, asbestosis, or any other medical marker of asbestos exposure.

5. The trial court erred when it refused to mold the verdict to account for named-defendants Georgia Pacific Cement and Hajoca Corporation.

6. The trial court erred in failing to apply the Fair Share Act and erred specifically as follows:

A. The trial court should have required the jury to apportion liability among the alleged tortfeasors; and

B. The trial court should have included certain alleged tortfeasors on the verdict sheet, notwithstanding the fact that those alleged tortfeasors had filed for bankruptcy protection, or to mold the verdict to reflect settlement payments received from the bankruptcy estates of alleged tortfeasors

Appellant Crane's Brief at p. 5-6; Appellant Brand's Brief at p. 3.

Toll Naval Associates, 56 A.3d 402, 412 (Pa. Super. 2012) (citing Pa.R.A.P. 2119).

Standard of Review

Our standard of review on appeal is a clear abuse of discretion or an error of law that controls the case:

> Our standard of review regarding a trial court's denial of a motion for a new trial is limited. The power to grant a new trial lies inherently with the trial court and we will not reverse its decision absent a clear abuse of discretion or an error of law which controls the outcome of the case.

Maya v. Johnson and Johnson, 97 A.3d 1203, 1224 (Pa. Super. 2014) (citation omitted). When determining whether the trial court committed an error of law controlling the outcome of the case, "our standard of review is *de novo,* and our scope of review is plenary." ***Fizzano Bros. Concrete Prods., Inc. v. XLN, Inc.***, 42 A.3d 951, 960 (Pa. 2012).

1. Factual Cause Jury Instructions

Appellants argue that the trial court erred in defining "factual cause" in its instructions to the jury and in response to a written question from the jury. In particular, Appellants argue that the "law requires a 'but for' causation standard for the definition of factual [causation], which was an error of law that controlled the outcome of the case." Crane's Brief at 30.

This Court reviews a challenge to jury instructions under the following well-settled principles of Pennsylvania law.

> [O]ur standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court

> committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.
>
> Further, a trial [court] has wide latitude in [its] choice of language when charging a jury, provided always that the court fully and adequately conveys the applicable law.

Phillips v. Lock, 86 A.3d 906, 916–917 (Pa. Super. 2014) (citation omitted).

In asbestos products liability cases, "Pennsylvania law requires that a plaintiff prove two elements: "that the product was defective, and that the defect was **the substantial factor** in causing the injury." **Rost v. Ford Motor Company,** 151 A.3d 1032, 1037 n.2 (Pa. 2016) (citations omitted; emphasis added.). When a plaintiff was exposed to more than one product that contained asbestos, the jury, when applying the "substantial factor" test, should consider the "frequency, regularity and proximity" of the plaintiff's exposure to each asbestos product. **Gregg v. V-J Auto Parts Co.**, 943 A2d 216 (Pa. 2007). This assessment requires a "focus on the precise nature of plaintiff's exposure **to the defendant's product**, not on other asbestos containing product." **Rost,** 151 A.3d at 1048 (emphasis in original).

When a jury focuses on the defendant's product, the jury should consider the plaintiff's exposure to each defendant's product "was on the one hand, a substantial factor or a substantial cause or, on the other hand,

whether the defendant's conduct was an insignificant cause or a negligible cause." ***Id.*** at 1049 (quoting ***Ford v. Jeffries***, 379 A.2d 111, 114 (Pa. 1977)).

The Supreme Court concluded that it has never "insisted that a plaintiff exclude every other possible cause for his or her injury and in fact, we have consistently held that multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff." ***Rost, supra*** at 1051.

Finally, the ***Rost*** Court noted with approval the analysis in **Tragarz v. Keene Corp.,** 980 F.2d 411 (7th Cir. 1992), adopted by ***Gregg, supra at*** 226, that rejected any notion that the test of "frequency, regularity and proximity" requires a comparative analysis of different exposures to asbestos and instead made clear that the focus must be on the level of exposure to the defendant's product. ***Rost, supra*** at 1050 n.13. Using this analysis, our Supreme Court rejected a "but for" causation analysis.

> Suppose a plaintiff shows that the amount of exposure that it received from defendant's A's asbestos product was alone sufficient to cause mesothelioma. If such a plaintiff was not exposed to any other products, the plaintiff would have sufficient evidence to support a finding that but for exposure to the defendant A's product, the plaintiff would not have gotten ill. On the other hand, under a [comparative approach], if the plaintiff was exposed to numerous other asbestos products, the plaintiff might not be able to prove cause in fact in a suit against defendant A because the same exposure to defendant A's product might not be substantial in comparison to the exposure to the other products. Such a result does not promote the purposes of the substantial factor test, which is aimed at

> alleviating the inequities that result when applying the but for test in a multi-defendant case, not at creating such inequities.

Id., quoting ***Tragarz***, 980 F.2d at 425 (emphasis omitted).

Based on our review of the foregoing precedential authority, we conclude that the trial court in the instant case properly rejected Appellant's request for a "but for causation" jury charge. The Pennsylvania Supreme Court has clearly rejected such a standard for causation and requires, when addressing a situation in which a plaintiff is exposed to more than one asbestos containing products, that the jury determine whether the plaintiff's exposure to each defendant's product was "frequent, regular and proximate" to determine whether such exposure was a substantial factor in causing the plaintiff's injury.

Appellants further argue that the "trial court's instruction did not provide a sufficient and correct legal basis to guide the jury." Crane's Brief at 33.

First, while explaining the Verdict Sheet, the court stated:

> The first question I said deals with exposure to the particular product of the defendant. Now, these are the elements the plaintiff has to prove that exposure. Number one, was the plaintiff exposed to the product of the defendant, did it contain asbestos, was the plaintiff exposed to the asbestos fibers of that particular defendant on a regular frequent and proximate basis.
>
> Now, the second question deals with whether these products manufactured, distributed, or supplied by the individual defendants was a factual cause in bringing about the plaintiff's lung cancer. In other words, did this exposure, if you find it, was it a factual cause in bringing about his lung cancer, did the

> plaintiff suffer from an asbestos-related disease, the lung cancer, that is, was it caused by the exposure.

N.T., 4/13/16, at 336-37; RR 687a.

After the attorneys made their closing arguments, the court explained to the jury the need for Mr. Roverano to establish that he was exposed to the asbestos fibers that Appellants had manufactured, distributed or supplied on a "regular, frequent and proximate basis." N.T. at 122; RR. 709a. The court then instructed the jurors on the definition of factual cause as:

> And here the question is, were the asbestos products manufactured, distributed or supplied by that particular defendant, John Crane, Brand Insulation, you discuss these separately, was it a factual cause in bringing about lung cancer.
>
> In short, did the plaintiff suffer from an asbestos-related disease, that is, was the lung cancer an asbestos-related disease.
>
> Now, what do I mean by factual cause? Well, you imagine with lawyers and with judges there's been a lot of discussion as to what do we mean by factual cause. I used to use the word substantial factor. I think they mean the same, but today we're using factual cause.
>
> Factual cause is a legal cause. In order for the plaintiff to recover in this case, the exposure to the defendant's asbestos products must have been a factual cause in bringing about his lung cancer. This is what the law recognizes as a legal cause.
>
> A factual cause is an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with Mr. Roverano's lung cancer.

N.T. at 118-19; RR at 708a.

By instructing the jury that Mr. Roverano must establish that his exposure was regular, frequent, and proximate and such exposure was a

substantial cause of plaintiff's lung cancer, the trial court "fully and adequately convey[ed] the applicable law." ***Philips***, 86 A.3d at 916-17. We, thus, conclude the trial court did not abuse its discretion or commit an error of law.

Appellants also argue that the trial court erred in responding to the jury's question regarding the definition of "factual" cause. Crane's Brief at 34; Brand's Brief at 29. In response to the question, the trial court charged the jury correctly by instructing the jury that factual cause is "legal cause, sometime referred to as substantial factor:"

> Factual cause is a legal cause, sometimes referred to as substantial factor, but it's the same—in my opinion they're the same definition, so I'm going to give you the definition of factual cause as a legal cause.
>
> In order for the plaintiff to recover in this case, the exposure to defendant's products based on the elements that I gave you must have been a substantial—must have been a factual cause in bringing about Mr. Roverano, the plaintiff's lung cancer. This what the law recognizes as legal cause.
>
> A factual cause is a real actual-a factual cause is an actual real factor, although the result may be unusual or expected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the lung cancer.
>
> Keep in mind you could have more than one cause which is a factual cause, but that's for you to decide. If you've got a couple of causes and you say one is not a factual cause and one is, the it can only be the one that you find the factual cause, but you can find that both were factual cause. That's up to you. You're the factfinders.

N.T. at 136-37; RR 712a.

Appellants contend that the court's response to the jury's inquiry was improper because it "changed [the jury's] mind." Crane's Brief at 37; ***see also*** Brand's Brief at 32-33. The trial court properly instructed the jurors on the law. It is for the jurors to apply the law and determine liability. We can only focus on the trial court's instruction to the jury and not speculation about the timing of the jury's verdict.

2. <u>Causation Question on Verdict Sheet</u>

Appellant Crane argues that a principal theory of Appellants' defense "was that Mr. Roverano's lung cancer was **not** caused by his exposure to asbestos at all; rather [the cancer,] along with his emphysema and COPD, was caused by his extensive smoking history." Crane's Brief at 29. Appellant contends that by denying a specific question on the Verdict Sheet reflecting this theory, the trial court precluded Appellant Crane from presenting this theory to the jury. ***Id.***

This is a challenge to the trial court's discretion in fashioning questions on the Verdict Sheet and we review such challenges for an abuse of discretion. "An abuse of discretion is more than just an error of judgment and, on appeal, a trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." ***Commonwealth v. Lane***, 424 A.2d 1325, 1328 (Pa. 1981) (citation and internal quotation marks omitted).

Appellant Crane argues that the trial court should have specifically included a question on the Verdict Sheet about whether smoking caused Mr. Roverano's lung cancer.

The questions on the Verdict Sheet were as follows:

1. "Was the Plaintiff, Mr. Roverano, **exposed** to asbestos products manufactured, distributed or supplied by Defendant, John Crane, Inc.

2. Were the asbestos products manufactured, distributed, or supplied by John Crane, Inc, a **factual cause** in bring about the Plaintiff's lung cancer."

RR 1058a-1059a (emphasis added.).

In explaining the second question, the trial court instructed the jury, *inter alia*: "In other words, did this exposure if you find it, did the plaintiff suffer from an asbestos-related disease, the lung cancer, that is was it caused by the exposure." N.T., 4/13/16, at 37; RR 687a.

The purpose of the Verdict Sheet is to provide a general guidepost to the jury of the general issues the jury must decide. It is not to reflect either party's specific theories.

In this case, the second question about factual cause on the Verdict Sheet required the jury to consider whether it was smoking that caused Mr. Roverno's lung cancer. If the jury had found that it was smoking that had caused Mr. Roverano's lung cancer, the jury would have answered "no" to the second question.

Therefore, we conclude that the trial court did not abuse its discretion by denying Appellant's request to include a question on the Verdict Sheet that reflected its theory of the case.

3. **"Unreasonably Dangerous" Question on Verdict Sheet**

Appellant Crane also argues that the trial court erred by failing to provide the jury a question on the Verdict Sheet asking the jury whether Crane's asbestos products were "unreasonably dangerous" and thus, defective.

The trial court rejected Crane's request for such a question because "the issue in this case was one of exposure and causation, not an issue of the defect of the product." Trial Ct. Op., dated 7/25/15, at 6. The trial court further noted that "neither defendant disputed that their products contained asbestos without proper warnings. Their defenses were based on the fact that the exposure to their products was minimal at best or, as with Crane, encapsulated." ***Id.*** The trial court concluded that "[a] question about defect was irrelevant." ***Id.*** at 7.

We agree with the trial court's conclusions that the trial was primarily focused on exposure and causation. Appellant did not dispute that its product contained asbestos. As discussed above, the questions on the Verdict Sheet are to provide generalized guideposts to the jurors. To add a question about defect when the parties did not present evidence on the issue

or argue about it in their opening or closing statements would have confused the jury.

Moreover, the trial court properly relied upon the analysis in ***Moore v. Ericsson***, 7 A.3d 820 (Pa. Super. 2010), in which this Court noted with approval the trial court's determination ***as a matter of law*** that wire and cable containing asbestos was defective. ***See id***. at 826.

> As the trial judge stated, the issue was *not* whether a product was defective because it contained asbestos; "instead, the trial issues, and therefore the factual issues remaining for the jury were limited to whether the Defendant's particular product contained asbestos, whether the Plaintiff was exposed to it, and whether such exposure caused Plaintiff's mesothelioma." We find no error or abuse of discretion.

Id. (citing Trial Court Opinion).

As the trial court in the instant case noted, "neither defendant disputed that their products contained asbestos without proper warnings." Trial Ct. Op. at 6. Therefore, the trial court properly rejected Appellant Crane's request that the Verdict Sheet contain a question about whether the asbestos was unreasonably dangerous and limited the questions on the Verdict Sheet to whether Appellee was exposed to the defendant's asbestos and whether that exposure caused his lung cancer.

4. **"Each and Every" Exposure Testimony**

Appellant Crane argues that the trial court erred by allowing Roveranos' experts to offer evidence that "each and every" or "whatever"

asbestos exposure caused Mr. Roverano's injury where Mr. Roverano did not have mesothelioma, asbestosis, or any other marker of asbestos exposure.

We disagree with Appellant Crane's characterization of the expert testimony of the Roveranos. A review of the entire testimony of the Roverano experts demonstrates that Roveranos' experts did not testify that it was a single exposure to the Appellants' products that caused Mr. Roverano's lung cancer; rather, that it was multiple exposures that were a substantial factor in causing Roverano's lung cancer.

For instance, Dr. Frank testified at length that both smoking and regular, proximate, and frequent exposure to asbestos in Appellant Crane's products caused Mr. Roverano's lung cancer. Dr. Frank first testified about general causation:

> Cigarette smoking causes lung cancer. Asbestos exposure causes lung cancer. When you put the two together, is there some interaction between the two that increases the possibility of getting lung cancer, and the answer is yes. And there are numbers on this and it varies depending on which study you look at which time...So there is what we call a multiplicative or synergistic response. And again other studies vary by what that number. Some are higher, some are lower, but it more than simply an additive effect when you put the two together.

N.T., 4/7/16, at 36-38; RR. 533a-34a.

Dr. Frank later provided testimony regarding specific causation by testifying that based upon Mr. Roverano's testimony of his regular, proximate, and frequent exposure to Appellant Crane's asbestos products, that, to a degree of medical certainty,

> whatever exposure Mr. Roverano had to John Crane packing products as described in the hypothetical would have been a substantial contributing cause or would have been a factual cause of his lung cancer and would have added to his total exposures, were part of his cumulative exposure and therefore are part of what caused his lung cancer."

N.T., at 63; RR R540a.[3]

Dr. Frank did not base his conclusions on the premise that Mr. Roverano had a single exposure to asbestos. In fact, Appellant Crane failed to point to testimony of any expert who based his opinion on the premise of a single exposure.

Appellant Crane argues that the trial court should have precluded the Roverano's experts' opinions because they failed to provide "any serious assessment of the causal attribution by assessing the frequency, regularity and proximity of Mr. Roverano's exposure to JCI's products." Appellant Crane's Brief, at 40, citing ***Rost***, ***supra***. By characterizing the experts' testimony as lacking "any serious assessment," Crane's averment challenges the weight, not the admissibility, of the evidence.

It is within the province of the jury to determine the weight to give the evidence and this Court will not disturb the fact-finder's weight

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[3] Dr. Frank also opined that "the Brand Insulation materials to which Mr. Roverano was exposed to were a factual cause and contributed to his developing his lung cancer. The basis of that is the same, that it's part of his cumulative exposure, it added to his risk, and when he got the disease, you have to say it was one of the factors that contributed to the totality of his dose which ended up giving his lung cancer." N.T., 4/7/16, at 67; RR. 541a.

determination. ***See Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (noting that "the weight of the evidence is exclusively for the finder of fact" and "an appellate court cannot substitute its judgment for that of the finder of fact."). Accordingly, we will not disturb the factfinder's weight determination.

Appellant also avers that "the Plaintiff's experts' testimony should additionally have been barred because this is not a mesothelioma case." Crane's Brief at 43. Again, Crane's argument pertains to the weight, not the admissibility, of the evidence.

Appellants presented evidence that asbestos exposure can only cause mesothelioma,[4] and argued that because Mr. Roverano developed lung cancer, it had demonstrated that it was not asbestos that caused his lung cancer. However, Dr. Frank testified on this general causation factor and concluded that exposure to asbestos can cause lung cancer. Dr. Gelfand also testified that, based on the medical literature and his experience, Mr. Roverano's exposure to asbestos was a "substantial contributing factor to his lung cancer and to his poor prognosis for survival." ***See*** Crane Brief at 16-17, citing N.T. at RR 540a, 765a.

Appellant Crane essentially argues that because the jury believed the Roveranos' experts and not the Appellants' experts on the question of

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[4] Mesothelioma is a cancer of the lining of the lungs. ***Gregg v. V-J Auto Parts Co.***, 943 A.2d 216, 217 (Pa. 2007).

general causation, the court erred in permitting the experts to testify. We decline to disturb jury's weight determination.

5. **Molding the Verdict to Include Non-Liable Defendants**

Georgia Pacific Cement and Hajoca Corporation were both included on the Verdict Sheet, and the jury was specifically instructed to determine whether either named defendant "manufactured, distributed, or supplied" products which "were factual causes in bringing about Plaintiff's lung cancer." Jury Verdict – Questions to be Answered by the Jury, filed 4/15/16, at 3. After hearing the evidence presented at trial, the jury found that Georgia Pacific Cement and Hajoca Corporation were **not** liable for the harm to Appellees. ***Id.***

In light of the fact that the jury did not find that Georgia Pacific Cement and Hajoca Corporation to be tortfeasors,[5] the trial court did not err in refusing to mold the verdict to include them.

6. **Fair Share Act**

Appellants contend that the trial court erred as a matter of law by refusing to apply the Fair Share Act, 42 Pa.C.S. § 7102(a.1)-(a.2), to this case because the litigation involves exposure to asbestos. They argue that

[5] In light of our holding in the next section that finds that it is a jury who must apportion liability among tortfeasors, we note that since the jury did not find Georgia Pacific Cement and Hajoca Corporation to be tortfeasors, they should not be included in a jury determination apportioning damages among tortfeasors. ***See*** note 11, *infra*.

the Roveranos' claim falls within the ambit of the Act and that nothing in the plain language of the Act supports the trial court's decision to exempt asbestos litigation from the Act's requirements. We agree.[6]

Statutory interpretation is a question of law. Therefore, our standard of review is *de novo,* and our scope of review is plenary. ***Commonwealth v. Hall***, 80 A.3d 1204, 1211 (Pa. 2013). "In all matters involving statutory interpretation, we apply the Statutory Construction Act, 1 Pa.C.S. § 1501 *et seq.,* which provides that the object of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." ***Commonwealth v. McCoy***, 962 A.2d 1160, 1166 (Pa. 2009) (citation omitted).

Generally, a statute's plain language provides the best indication of legislative intent. ***In re Trust of Taylor***, 164 A.3d 1147, 1155 (Pa. 2017). We will look beyond the plain language of the statute only when the words are unclear or ambiguous, ***see id.***, or the plain meaning would lead to "a

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[6] Application of the Fair Share Act to strict liability cases involving asbestos exposure is a question of first impression in this Court. Appellants argue that *dicta* in ***Rost*** 151 A.3d at 1044 n.7, another case dealing with personal injuries caused by exposure to asbestos, establishes that the Act applies to these cases. The cited footnote in ***Rost*** discussed policy issues underlying some of the Supreme Court's decisions regarding liability from asbestos exposure, including issues stemming from application of joint and several liability, and then added: "Pennsylvania has now eliminated joint and several liability in most cases through amendment of the Fair Share Act." This sentence is a far cry from a clear statement about the statute's application to asbestos cases, and, although we address this issue mindful of the Supreme Court's guidance in ***Rost***, we do not find the footnote determinative.

result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1). Therefore, when ascertaining the meaning of a statute, if the language is clear, we give the words their plain and ordinary meaning. ***Hall***, 80 A.3d at 1211.

The Fair Share Act was enacted in 2011 as an amendment to the section of the Judicial Code, 42 Pa. C.S. § 7102, that had provided for comparative negligence. ***See*** Act No. 2011-17, P.L. 778 (June 28, 2011). It replaced subsection (b) of that statute with two new subsections:

> **(a.1) Recovery against joint defendant; contribution. —**
>
> (1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).
>
> (2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.
>
> (3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:
>
> (i) Intentional misrepresentation.
>
> (ii) An intentional tort.
>
> (iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.

> (iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act.
>
> (v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L. 90, No. 21), known as the Liquor Code.
>
> (4) Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, any defendant may recover from any other person all or a portion of the damages assessed that defendant pursuant to the terms of a contractual agreement.
>
> **(a.2) Apportionment of responsibility among certain nonparties and effect. —** For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. A person whose liability may be determined pursuant to this section does not include an employer to the extent that the employer is granted immunity from liability or suit pursuant to the act of June 2, 1915 (P.L. 736, No. 338), known as the Workers' Compensation Act. An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose. Nothing in this section shall affect the admissibility or nonadmissibility of evidence regarding releases, settlements, offers to compromise or compromises as set forth in the Pennsylvania Rules of Evidence. Nothing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure.

42 Pa. C.S. § 7102(a.1)-(a.2). The Act applies to claims that accrued after June 28, 2011, and the parties agree that the Roveranos' claims did not accrue before that time.

One of the main purposes of the Fair Share Act was to make joint and several liability inapplicable to most tort cases. The statute accomplished that objective in subsection (a.1)(2), which states that, apart from a limited class of excepted cases, "a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability." The Act's lengthy other provisions make clear, however, that the statute is not limited only to restricting joint and several liability. Rather, insofar as is relevant here, the Act also made several adjustments to the rules for allocating liability among joint tortfeasors.

Before enactment of the Fair Share Act, the Comparative Negligence Act provided for proportionate recovery against negligent joint tortfeasors according to a percentage determination that was made by the fact-finder:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. . . .

42 Pa. C.S. § 7102(b) (deleted 2011); ***see Embrey v. Borough of West Mifflin***, 390 A.2d 765, 769 (Pa. Super. 1978) (role of jury in allocating liability). Liability among joint tortfeasors who were strictly liable was not covered by the statute and, under court decisions, was calculated on a per

capita[7] basis — that is, if five defendants were found strictly liable, each would be allocated 20% of the liability regardless of how much each defendant's conduct contributed to the injury. ***See Baker v. ACandS***, 755 A.2d 664, 669 (Pa. 2000); ***Walton v. Avco Corp.***, 610 A.2d 454, 462 (Pa. 1992).

One of the new Fair Share Act provisions enacted to replace Section 7102(b) was Section 7102(a.1)(1), which employed language similar to that in Section 7102(b), but applied it to both negligent and strictly liable joint tortfeasors:

> Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).

42 Pa. C.S. § 7102(a.1)(1). A principal question in this case is whether, and to what extent, this provision changed the way to allocate liability among strictly liable joint tortfeasors.

Prior to trial, several defendants, including Brand and Crane, filed a motion *in limine* seeking a ruling that their liability, if any, would be apportioned by the jury according to the extent to which each defendant

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[7] Consistent with some of the case law, Appellees call this a "pro rata" allocation. Appellants use "per capita," and that term provides a clearer description of the result. The different terminology does not imply any substantive difference in the way liability was determined.

caused harm to Mr. Roverano. The court heard argument on that motion on April 5, 2016, and summarized the motion as follows:

> [W]hat you're saying is that you want an apportionment — rather than per capita, you want an apportionment instruction to the jury and you want the jury to actually apportion the share of liability if they reach that issue.

Tr., 4/5/16, at 9. The court then explained why it would deny the motion:

> Here is my difficult[y] with this and why I've denied it in the past and I will here and you all have an exception, is that all of the testimony I've ever heard in asbestos, no one quantifies it. They say that you can't quantify it. If you can't quantify it, how can the Fair Share Act apply?

Id. at 9-10. After a discussion during which defense counsel proposed possible ways of proving an allocation, the trial court reiterated that the motion *in limine* was denied. ***Id.*** at 10-16. In its post-trial opinion, the trial court stated that it "properly denied [Appellants'] motion to apply the Fair Share Act to this case" because the jury was not presented with evidence that would permit an apportionment to be made by it. Trial Ct. Op., 7/27/15, at 9-10.

In holding that the Fair Share Act did not "apply" to this case, the trial court erred. This was an action to hold Appellants strictly liable in tort for injuries allegedly caused by asbestos-containing products that they made or distributed, and the Fair Share Act explicitly applies to tort cases in which "recovery is allowed against more than one person, **including actions for strict liability**." 42 Pa. C.S. § 7102(a.1)(1) (emphasis added). Nothing in the statute makes an exception for strict liability cases involving asbestos.

Rather, Section 7102(a.1)(3) excepts only four specific kinds of tort actions — intentional misrepresentation, other intentional torts, certain environmental cases, and dram shop actions — and cases involving asbestos are not among them.

The Roveranos contend that Section 7102(a.1)(1)'s reference to strict liability actions was intended only to make clear that the Act's abrogation of joint and several liability applies to such cases. They contend that the Act is silent on how liability among strictly liable joint tortfeasors is to be apportioned, and that this silence means that apportionment may continue to be done in the same way as it was done before the statute's enactment — on a per capita basis. In support of this argument, they point out that Section 7102(a.1)(1) says only that each joint tortfeasor's liability shall equal "that proportion of the total dollar amount awarded as damages" that is calculated by determining "the ratio of the amount of that defendant's liability" to the total liability of all defendants. The Act does not specify how that ratio is to be determined, and therefore, they contend, the rule of per capita apportionment applicable before the Fair Share Act's enactment remains unchanged. We disagree. Rather, by explicitly making strictly liable joint tortfeasors subject to the same liability allocation section as that applicable to negligent joint tortfeasors, the Legislature made clear that it intended for liability to be allocated in the same way for each.

The fact that the Fair Share Act does not explicitly say how to allocate liability among strictly liable joint tortfeasors just means that the statute is ambiguous on that issue, not that the statute does not address it. ***See In re Trust of Taylor***, 164 A.3d at 1156 (a statute is ambiguous if it does not "contain[] any explicit language addressing the issue raised"). The statute is silent on the manner of calculating the ratio for **all** kinds of tort cases, not just strict liability cases. Any suggestion that the silence has special meaning for strict liability cases therefore is unfounded. There is nothing in the statute to suggest that the Legislature intended the ratio under Section 7102(a.1)(1) to be calculated one way for negligent tortfeasors and a different way for those strictly liable. Rather, the similarity between the language of former Section 7102(b) and new Section 7102(a.1)(1) suggests that the Legislature intended that the allocation method applicable to negligence cases was merely being expanded to apply to strict liability cases too. The "including actions for strict liability" clause in Section 7102(a.1)(1) supports this conclusion; this clause suggests that the allocations of liability that had been done by a jury in negligence cases now would "include" strict liability cases as well.

The Legislature's placement of the "including actions for strict liability" clause is revealing. If, as Appellees suggest, the Legislature intended only to make clear that the abrogation of joint and several liability applied to strict liability actions, it would have added that clause to Section

7102(a.1)(2), which abrogates joint and several liability. Instead, the Legislature added that clause to Section 7102(a.1)(1), which deals with allocation of liability among joint tortfeasors. By doing so, the Legislature clearly intended to make a change in the allocation rules that applied before the Fair Share Act's enactment, which called for a fact-based allocation in negligence cases and a per capita allocation in strict liability cases. If the Legislature did not intend to change those rules, there would be no reason to add the "including actions for strict liability clause" to Section 7102(a.1)(1).

A comparison of Section 7102(a.1)(1) to the language of Section 7102(b) that it replaced shows that the Legislature accomplished its objective by changing the allocation components from —

> the amount of [the tortfeasor's] **causal negligence** to the amount of causal negligence attributed to all defendants against whom recovery is allowed

to —

> the amount of that defendant's **liability** to the amount of liability attributed to all defendants and other persons to whom liability is apportioned.

The inclusion of strict liability cases obviously accounts for the Legislature's replacement of "causal negligence" with "liability." Because this was the only change relevant to this issue that the Legislature made to its allocation formula,[8] this comparison again supports the view that the Legislature

[8] The Legislature also added the phrase, "and other persons to whom liability is apportioned," which we discuss below.

intended allocation of liability under Section 7102(b) to carry over under the new statute and to apply to strict liability cases in the same way as it had been done previously under the comparative negligence statute.[9]

The structure and context of the Fair Share Act as a whole thus support the view that Section 7102(a.1)(1) reflects the Legislature's intention to have a fact-finder allocate liability among joint tortfeasors in all types of cases, including strict liability cases. This conclusion is confirmed by the statute's history. ***See*** 1 Pa. C.S. § 1921(c)(7) ("When the words of a statute are not explicit, the intention of the General Assembly may be

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[9] This case does not require us to opine on the factors that should be considered in allocating liability among strictly liable tortfeasors under Section 7102(a.1)(1). Prior law prohibited a fault-based allocation because of a desire in product liability actions at that time to "fortif[y] the theoretical dam between the notions of negligence and strict 'no fault' liability," ***Walton***, 610 A.2d at 462, but that dam was cracked in ***Tincher v. Omega Flex, Inc.***, 104 A.3d 328, 376-81, 399-406 (Pa. 2014) (discussing and rejecting prior law's effort to completely divorce negligence and strict liability concepts). Even if there were still some reason to avoid a fault-based allocation method, it is not apparent on this record why liability among strictly liable tortfeasors may not be allocated by a jury without consideration of wrongdoing. A court may apportion liability when it is able to identify "a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A(1) (1965); ***see Martin v. Owens-Corning Fiberglas Corp.***, 528 A.2d 947, 949 (Pa. 1987). Brand suggests that liability could have been apportioned here according to the amount of Mr. Roverano's potential exposure to each defendant's product. Brand's Br. at 19-20. Crane makes a similar argument that would factor in the potency of the type of asbestos to which Mr. Roverano was exposed (chrysotile versus amphibole). Crane's Br. at 45-46. These causation-based arguments clearly suggest bases for apportionment apart from fault. Their reasonableness is for the trial court to determine in the first instance, and the weight of their supporting evidence is a matter for the jury.

ascertained by considering, among other matters . . . [t]he contemporaneous legislative history").

The Act was a reenactment of substantially identical legislation enacted in 2002 that was later declared invalid because it was part of a bill addressing multiple subjects in violation of Article 3, Section 3 of the Pennsylvania Constitution. ***See*** Fair Share Act of 2002, Act No. 2002-57, P.L. 394 (June 19, 2002), ***held invalid in DeWeese v. Weaver***, 880 A.2d 54, 62 (Pa. Cmwlth. 2005), ***aff'd without opinion***, 906 A.2d 1193 (Pa. 2006). The 2002 statute was hotly debated in the Legislature, and during those debates the bill's floor manager in the House, Representative Mike Turzai, was asked the precise question that now is before this Court:

> Mr. GANNON. . . . Mr. Speaker, where you have a Pennsylvania manufacturer selling a product in Pennsylvania through a seller, a seller sells the product, it has got a manufacturing defect, how would that liability be apportioned under this law — proposed law; excuse me.
>
> Mr. TURZAI. Yes. If both of those defendants are present, as you have suggested, and you have strict liability claims, . . . you would not take into account the plaintiff's actions or the plaintiff's behavior in terms of reducing the ultimate award as you do in negligent situations. However, . . . you would apportion the damages between strict liability defendant number one and strict liability defendant number two. Let us assume they are 70-30 and you would go after strict liability one for the 70 and you would go after strict liability two for the 30 to the degree that the jury or the judge found them causally responsible.

2002 Pa. Leg. J. (House) 1199 (June 4, 2002).[10] Representative Turzai's answer made clear that liability apportionment between two strictly liable tortfeasors would **not** be per capita, but instead would be based on "the degree that the jury or the judge found them causally responsible," in a manner similar to allocation among negligent joint tortfeasors.

At no time during the debates on the 2002 legislation or the 2011 legislation was there ever any suggestion that Representative Turzai's view of liability allocation under the statute was incorrect or that there would be any allocation among strictly liable joint tortfeasors on a per capita basis. Rather, throughout the debates, the repeated concern was about tortfeasors (both strictly liable tortfeasors and negligent tortfeasors) who would be allocated only a small percentage of liability; the bill's opponents worried that if the legislation were enacted, recovery against such defendants would not make the plaintiff whole, while proponents worried that unless the bill were enacted such defendants would have to pay more than their fair share of the verdict. No one suggested that these implications were different for strictly liable joint tortfeasors than for others.

In fact, the general understanding that strictly liable joint tortfeasors would have liability allocated in the same way as other tortfeasors led to the

[10] Representative Turzai later clarified that if one of the two defendants was 70% liable, the case would fall within the exception in Section 7102(a.1)(3)(iii) that permits that defendant to be held jointly and severally liable. 2002 Pa. Leg. J. (House) at 1199. That clarification does not change the relevance of his answer for purposes of the issue in this case.

enactment of one of the exceptions in Section 7102(a.1)(3) of the Act. During the 2002 debates, there was concern about how the bill would affect recoveries in toxic tort actions, in which strict liability claims often are brought against multiple defendants. ***See*** 2002 Pa. Leg. J. (House) at 1204-05, 1213-14. As a result of those debates, the bill was amended to include Section 7012(a.1)(3)(iv), which preserves joint and several liability for certain strict liability environmental claims. ***See*** 2002 Pa. Leg. J. (Sen.) 1908-09 (June 12, 2002); 2002 Pa. Leg. J. (House) 1349-50 (June 17, 2002). The amendment shows that the Legislature believed allocation on a non-per capita basis in strict liability cases would be the rule, and that it had to enact an exception if it wanted a different rule.

Finally, the Legislature has instructed that we are to interpret a statute "to give effect to all its provisions." 1 Pa. C.S. § 1921(a); ***see Commonwealth v. Anderson***, 169 A.3d 1092, 1096 (Pa. Super. 2017) (*en banc*). But Appellees' interpretation would make an important provision of the Act, Section 7102(a.1)(3)(iii), inapplicable to strict liability actions. Section 7102(a.1)(3)(iii) was a compromise provision. It states that if a defendant is held liable for more than 60% of the liability in the case, joint and several liability applies to that defendant. This exception assures that those defendants who are substantially responsible for a plaintiff's injury will have to account for the full amount of the plaintiff's harm. But if liability in a strict liability case is per capita, it is mathematically impossible for any of

those defendants to reach the 60% threshold: with just two defendants, a defendant's liability can only be 50%, and the liability percentage will decrease as the number of defendants increases. That is not the result the Legislature intended.

We, therefore, conclude that liability in strict liability cases must be allocated in the same way as in other tort cases, and not on a per capita basis, and that the trial court erred in holding that the jury could not apportion liability pursuant to the Fair Share Act. Of course, apportionment by the jury will require submission of appropriate evidence from which the jurors may make an allocation. Questions regarding the nature of that evidence should be resolved by the trial court in the first instance on remand.

We also agree with Appellants that the jury on remand must be permitted to consider evidence of any settlements by the Roveranos with bankrupt entities in connection with the apportionment of liability. Section 7102(a.2) of the Fair Share Act states: "For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party." Under Section 7102(a.1)(1), the settling party's liability is included in the "amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2)" for

purposes of allocating liability among the joint tortfeasors. These provisions require that settlements with bankrupt entities be included in the calculation of allocated liability under the statute.[11]

Section 7102(a.2) contains no exception for settling persons who are bankrupt. Rather, the section refers to "**any** defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party." 42 Pa. C.S. § 7102(a.2) (emphasis added). The Roveranos claim, however, that our decisions in ***Ottavio v. Fibreboard Corp.***, 617 A.2d 1296, 1300 (Pa. Super. 1992) (*en banc*), and ***Ball v. Johns-Manville Corp.***, 625 A.2d 650 (Pa. Super. 1993), which prohibited consideration of settlements with bankrupt entities prior to enactment of the Fair Share Act, continue to bar consideration of such settlements here. Because ***Ottavio*** and ***Ball*** were based on policy considerations that do not apply under the Fair Share Act, we conclude that this argument is mistaken.

In ***Ottavio***, the defendant, one of several manufacturers of products containing asbestos, objected to an apportionment of liability among such manufacturers on the ground that bankrupt manufacturers were not included in the calculation. ***Ottavio***, 617 A.2d at 1300. In holding that the federal

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[11] Appellants concede that this requirement is subject to the qualification that they "submit evidence to establish that the non-parties were joint tortfeasors." ***See Amato v. Bell & Gossett***, 116 A.3d 607, 617 (Pa. Super. 2015), ***appeal dismissed sub nom. Vinciguerra v. Bayer CropScience, Inc.***, 150 A.3d 956 (Pa. 2016). In addition, we agree with Appellees that Section 7102(a.2) does not apply to bankrupt entities (or their successors in interest) with whom they have not settled and received releases.

Bankruptcy Code prohibited inclusion of bankrupt companies in the calculation, we observed that an allocation of fault pursuant to the Comparative Negligent Act[12] made the other parties to the allocation joint tortfeasors against whom, under the then-prevailing rules of joint and several liability, another tortfeasor could seek contribution. That result would violate the automatic stay provisions of the Bankruptcy Code[13] and therefore was preempted by federal law. ***See id.*** In ***Ball***, we reached the same result on the basis of our holding in ***Ottavio***. ***See Ball,*** 625 A.2d at 660.

The Fair Share Act does not permit a similar result here. Not only does it do away with joint and several liability in most cases, but it contains the following mandate in Section 7102(a.2): "An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose." The Act thus **prohibits** use of an allocation against a bankrupt company as a basis for seeking contribution or any other recovery against that company; indeed, the Act makes the allocation finding **inadmissible** in any other case.

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[12] The case apparently included a negligence claim.

[13] Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . [an] action or proceeding against the debtor . . . to recover a claim against the debtor that arose before the commencement of the case under this title" and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1), (6).

The finding, therefore, cannot expose the bankrupt company to any sort of claim forbidden by the Bankruptcy Code. As a result, it does not conflict with the Code and is not preempted by it.[14]

This is the same conclusion as that reached by our colleague Judge Strassburger when he confronted this issue as a trial judge under the 2002 statute. Finding cases like ***Ball*** and ***Ottavio*** "inapposite," he observed:

> Under the *Act*, it is a new ball game[.] The defendant in ***Ball*** was seeking a judgment against bankrupt entities. Clearly that would have violated the automatic stay. The new Act provides:
>
> > An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose.
>
> Thus, no judgment violative of the automatic stay can eventuate.

Slayton v. Gold Pumps, Inc., No. GD 03-010873, 2004 Pa. Dist. & Cnty. Dec. LEXIS 335, *5 (C.P. Alleg., Oct. 25, 2004). Courts in other jurisdictions have reached similar conclusions when confronted with legislation similar to the Fair Share Act. ***See, e.g.***, ***Bondex v. Ott***, 774 N.E.2d 82, 87 (Ind. App.

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[14] In this respect, we note that "there is a presumption *against* preemption." ***Dooner v. DiDonato***, 971 A.2d 1187, 1194 (Pa. 2009) (emphasis in original). A statute that is preempted by federal law is unconstitutional because it violates the Supremacy Clause (Art. VI, cl. 2) of the federal Constitution. ***Id.*** at 1193. But "acts passed by the General Assembly are strongly presumed to be constitutional," and "a statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution." ***Pa. State Ass'n of Jury Comm'rs v. Commonwealth***, 64 A.3d 611, 618 (Pa. 2013) (citations and quotation marks omitted). The presumption against preemption and corollary presumption against unconstitutionality strongly weigh against following ***Ottavio*** as a basis for declining to apply the Fair Share Act according to its terms.

2002); ***see also In re Shondel***, 950 F.2d 1301, 1306-07 (7th Cir. 1991) (discussing effect of bankruptcy discharge under Section 524 of Code).

For these reasons, we hold that the trial court failed to apply the Fair Share Act in the manner intended by the Legislature and that we therefore need to remand this case for a new trial on the question of apportionment of liability.

Judgment vacated. Order denying Post Trial Motions affirmed in all respects other than that portion dealing with the Fair Share Act; such portion of the Order is reversed. Case remanded for a new trial to apportion the jury verdicts among the Appellants, the non-bankrupt settling defendants (excluding Georgia Pacific Cement and Hajoca because the jury determined that they were not tortfeasors) and bankrupt settling defendants. Jurisdiction relinquished.

President Judge Emeritus Ford Elliott joins this Opinion Per Curiam.

Judge Solano files a Concurring and Dissenting Opinion.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/28/2017

APPENDIX B

J-A10014-17

2017 PA Super 415

WILLIAM C. ROVERANO AND JACQUELINE ROVERANO, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN CRANE, INC. AND BRAND INSULATIONS, INC.	:	No. 2837 EDA 2016
APPEAL OF: BRAND INSULATIONS, INC.	:	

Appeal from the Judgment Entered July 27, 2016
In the Court of Common Pleas of Philadelphia County, Civil Division at
No(s): March Term, 2014, No. 1123

WILLIAM ROVERANO	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN CRANE, INC.	:	
Appellant	:	No. 2847 EDA 2016

Appeal from the Judgment Entered July 27, 2016
In the Court of Common Pleas of Philadelphia County, Civil Division at
No(s): March Term, 2014, No. 1123

BEFORE: DUBOW, J., SOLANO, J., and FORD ELLIOTT, P.J.E.

CONCURRING AND DISSENTING OPINION BY SOLANO, J.:

FILED DECEMBER 28, 2017

I join in full the portion of the Majority Per Curiam Opinion under the heading "6. Fair Share Act." Because I believe the jury charge failed clearly to explain what proof of causation was needed to establish liability, I would remand for a new trial on liability, and not just on apportionment of damages.

A trial court has wide latitude in framing its charge to a jury, and we will order a new trial "only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue." ***Phillips v. Lock***, 86 A.3d 906, 916-17 (Pa. Super. 2014); ***see Tincher v. Omega Flex, Inc.***, 104 A.3d 328, 351, 407 (Pa. 2014) (jury charge is inadequate if "the issues are not made clear" or "the jury was misled by the instructions").

Here, the relevant portion of the trial court's instructions to the jury came in four parts. First, while explaining the Verdict Sheet, prior to closing arguments, the court stated:

> The first question I said deals with exposure to the particular product of the defendant. Now, these are the elements the plaintiff has to prove that exposure. Number one, was the plaintiff exposed to the product of the defendant, did it contain asbestos, was the plaintiff exposed to the asbestos fibers of that particular defendant on a regular, frequent, and proximate basis. And they're the elements that must be proven by this fair preponderance or fair weight of the evidence that I'll get to later in order for you to answer yes.
>
> Now, the second question deals with whether these products manufactured, distributed, or supplied by the individual defendants was a factual cause in bringing about the plaintiff's lung cancer. In other words, did this exposure[,] if you find it, was it a factual cause in bringing about his lung cancer, did the plaintiff suffer from an asbestos-related disease, the lung cancer, that is, was it caused by the exposure.

N.T., 4/13/16, at 36-37. Second, following closing arguments, the court instructed:

> You must determine whether or not the asbestos product either manufactured, distributed, or supplied by the individual defendant contained asbestos and was the – did it emit, did it give

off fibers, these asbestos fibers, on a regular – to the defendant – I mean to the plaintiff, was the plaintiff exposed to these fibers on a regular, frequent, and proximate basis.

Now what do I mean by regular? Usual, recurring, habitual in action.

Frequent: Occurring often, happening repeatedly.

Proximate: Close, near in space.

So the elements are dealing with, and you deal with each one individually, did the product contain asbestos, was the plaintiff exposed to the asbestos fibers coming out of that product on a regular, frequent, and proximate basis. That's your initial exposure question and that would deal with John Crane on question one and Brand Insulation on question three.

The second question deals with causation. Now, obviously – and I give you road instructions, I've gone over this. If you answer no on the exposure question, you don't get to causation. You get to causation if you answer yes to the exposure question. And here the question is, were the asbestos products manufactured, distributed, or supplied by that particular defendant, John Crane, Brand Insulation, you discuss these separately, was it a factual cause in bringing about lung cancer.

In short, did the plaintiff suffer from an asbestos-related disease, that is, was the lung cancer an asbestos-related disease.

Now, what do I mean by factual cause? Well, you can imagine with lawyers and with judges there's been a lot of discussion as to what do we mean by factual cause. I used to use the word substantial factor. I think they mean the same, but today we're using factual cause.

Factual cause is a legal cause. In order for the plaintiff to recover in this case, the exposure to the defendant's asbestos products must have been a factual cause in bringing about his lung cancer. This is what the law recognizes as a legal cause.

A factual cause is an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with Mr. Roverano's lung cancer.

> And again, as I said, and I think this makes sense, you would treat each defendant separately, but your inquiry is the same as far as the liability is concerned.

Id. at 116-19. Third, following the charge, counsel for the Roveranos pointed out that the court had not given a charge on concurring causes. The court then told the jury:

> In my defining the causation question, that is the factual cause, I'm not sure if I said this, but I should. You can have more than one factual cause in bringing about a given end.

Id. at 130. Finally, after the jury began deliberations, it sent a question to the court that asked, "Can you please give us the definition of factual?" ***Id.*** at 134. In response, the court instructed:

> Now, you want me to define this causation question, a legal causation question, which, as you know, would apply to both defendants. So the definition of factual cause in question two and in question four are the same. It's the same area of inquiry. Was the plaintiff Mr. Roverano exposed to asbestos products manufactured, distributed, and supplied by the particular defendant? Now – I'm sorry, strike that.
>
> Were the asbestos products manufactured, distributed, supplied by the particular defendant a factual cause in bringing about plaintiff's lung cancer?
>
> Factual cause is a legal cause, sometimes referred to as substantial factor, but it's the same – in my opinion they're the same definition, so I'm going to give you the definition of factual cause as a legal cause.
>
> In order for the plaintiff to recover in this case, the exposure to the defendant's products based on the elements that I gave you about that must have been a substantial – must have been a factual cause in bringing about Mr. Roverano[,] the plaintiff's[,] lung cancer. This is what the law recognizes as a legal cause.

> A factual cause is a real actual – a factual cause is an actual real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only a significant connection with the lung cancer.
>
> Keep in mind you could have more than one cause which is a factual cause, but that's for you to decide. If you've got a couple of causes and you say one is not a factual cause and one is, then it can only be the one that you find the factual cause, but you can find that both were factual cause. That's up to you. You're the fact finders.

Id. at 135-37.

The instruction regarding the Verdict Sheet properly told the jury that it had to determine "whether [each Appellant's] products . . . w[ere] a factual cause in bringing about the plaintiff's lung cancer," or, more simply, was Mr. Roverano's lung cancer "caused by the exposure" to those products. N.T., 4/13/16, at 36-37. But then the court sought to define "factual cause." The court told the jury that it used to use the words "substantial factor" to explain the requirement, but it then did not explain what that phrase meant. Instead, it said that a "[f]actual cause is a legal cause," that exposure to Appellants' products "must have been a factual cause in bringing about [Mr. Roverano's] lung cancer," and that "[t]his is what the law recognizes as legal cause." ***Id.*** at 118-19. The court said a "factual cause is an actual real factor," rather than an imaginary or insignificant one, and that more than one factual cause can bring about a "given end." ***Id.*** at 119, 130.

The jury apparently perceived that the court's tautological definitions of "factual cause" as "a legal cause" and of "legal cause" as being what the law recognizes when there is a "factual cause" provided little guidance regarding

what it was to determine, and it therefore asked the court to define "factual." N.T., 4/13/16, at 134. In response, the court said, "Factual cause is a legal cause, sometimes referred to as substantial factor, but it's the same . . ., so I'm going to give you the definition of factual cause as a legal cause." ***Id.*** at 136. The court said that exposure to Appellants' products "must have been a substantial — must have been a factual cause in bringing about Mr. Roverano['s] lung cancer." ***Id.*** The court then repeated that a factual cause had to be "an actual real factor," and not an imaginary or insignificant one, and that there could be concurrent factual causes. ***Id.*** at 137.

The clearest portions of the court's charge are those that incorporate material from Section 13.20 of Pennsylvania's proposed standard jury instructions for civil cases. That material includes instructions that a factual cause must be an actual, real causative factor that is not imaginary or insignificant and that there can be concurrent causes of an injury. But despite those are subsidiary, I am left with the conviction that the charge as a whole tended to sow confusion, rather than clarity, on one of the key contested issues in this case.

My concern is that the charge was confusing; what was said was not necessarily erroneous. The main purpose of the "but for" aspect of a causation instruction is to inform the jury that it may not hold liable a defendant whose conduct did not in some way cause the plaintiff's harm. ***See*** Pa. Standard Jury Inst. (Civ.) § 13.20 (2016) (charge that defendant's misconduct "must have been a factual cause in bringing about harm"). But the trial court's

charge conveyed that message. Under general tort law, "but for" causation is subsumed within the more stringent requirement that a cause must be sufficiently "proximate" or "substantial" to permit recovery, ***see, e.g., Alumni Ass'n, Delta Zeta Zeta v. Sullivan***, 535 A.2d 1095, 1098 (Pa. Super. 1987), ***aff'd***, 572 A.2d 1209 (Pa. 1990), and this remains true in asbestos cases. ***See Rost v. Ford Motor Co.***, 151 A.3d 1032, 1050 (Pa. 2016) ("our law regarding proof of substantial causation is the same for exposure to asbestos as it is in other tort contexts"), 1049 ("[t]o establish proximate causation, a plaintiff must adduce evidence to show that the defendant's act was a substantial factor in bringing about the plaintiff's harm"). The two causation concepts therefore may be conflated in describing the elements of proof. ***See id.*** at 1037 n.2 (stating, with respect to causation, only that plaintiff must prove "that the defect was the substantial factor causing the injury").

Because physical harm may result from exposure to relatively small amounts of asbestos, the Supreme Court has required "evidence that exposure to defendant's asbestos-containing product was sufficiently 'frequent, regular, and proximate' to support a jury's finding that defendant's product was substantially causative of the disease." ***Rost***, 151 A.3d at 1044; ***see id.*** at 1043, 1047; ***Gregg v. V-J Auto Parts, Co.***, 943 A.2d 216 (Pa. 2007). The trial court instructed the jury on this requirement, but it did not clearly identify the requirement as an element of causation. The court also charged about concurrent causes of indivisible injuries, which was important for resolution of the conflicting claims about which, if any, of the defendant's

products was a cause of Mr. Roverano's cancer and whether the cancer was caused by a factor unrelated to the defendants, such as his smoking. ***See Rost***, 151 A.3d at 1051 (explaining that "multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff"); ***Summers v. Certainteed Corp.***, 997 A.2d 1152, 1164-65 (Pa. 2010) (same).

The trial court's charge thus did not materially depart from the governing legal principles, but it did not clearly explain them either. Instead, it substituted terms such as "factual cause" and "legal cause" for more sophisticated concepts that required explanation, and it failed to provide clear definitions of the terms it used. The resulting charge, as I read it, generates more confusion than clarity. I understand my colleagues' reluctance to overturn a jury verdict where the trial court made a good-faith effort to simplify such a complex area of the law. But because the purpose of a charge is "to clarify the issues so that the jury may comprehend the questions it must decide," ***Lee v. Pittsburgh Corning Corp.***, 616 A.2d 1045, 1049 (Pa. Super. 1992), and because the court's charge failed to clarify the issues here, I believe a new trial on liability is warranted.

APPENDIX C

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

William Roverano and Jacqueline Roverano,	:	**March Term, 2014**
	:	
Plaintiffs	:	**No. 01123**
	:	
	:	
	:	**Control Nos. 16043503**
VS.	:	**16043294**
	:	**16043276**
	:	**16043277**
	:	
John Crane, Inc. and Brand Insulation, Inc.,	:	
	:	
Defendants	:	

ORDER

And now this **27th day of July, 2016**, the Post-Trial Motions of Defendant, John Crane, Inc., and Defendant, Brand Insulation, Inc., are hereby **DENIED**.

Plaintiff's Motions for Delay Damages against Defendant, John Crane, Inc., and Defendant, Brand Insulation, Inc., are hereby **GRANTED IN PART** and **DENIED IN PART**.

Judgment is entered in favor of Plaintiff William Roverano and against Defendant, John Crane, Inc., in the amount of $648,658 plus the sum of $29,604 for delay damages, for a total sum of $678,262. Judgment is entered in favor of Plaintiff William Roverano and against Brand Insulation, Inc., in the amount of $648,658 plus the sum of $29,604 for delay damages, for a total sum of $678,262.

Judgment is entered in favor of Plaintiff Jacqueline Roverano in the amount of $156,250 against Defendant John Crane, Inc., for loss of consortium. Judgment is entered in favor of

Plaintiff Jacqueline Roverano against Brand Insulation, Inc., in the amount of $156,250 for loss of consortium.

The Petition of Plaintiff Jacqueline Roverano for delay damages is **DENIED**.

BY THE COURT:

July 27, 2016

Hon. Victor J. DiNubile, Jr. J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

William Roverano and Jacqueline Roverano,	:	**March Term, 2014**
Plaintiffs	:	**No. 01123**
	:	
VS.	:	
	:	**Control Nos. 16043503**
	:	**16043294**
	:	**16043276**
	:	**16043277**
John Crane, Inc. and Brand Insulation, Inc.,	:	
Defendants	:	

OPINION

BY: HONORABLE VICTOR J. DINUBILE, JR.

This opinion arises from the denial of Defendants' post-trial motions stemming from a jury verdict in favor of Plaintiffs in an asbestos lung cancer case. Plaintiff William Roverano brought suit for pain and suffering against a number of companies stemming from exposure to their asbestos products while employed at PECO as a helper and later a carpenter. He alleged that this exposure caused him to develop lung cancer. His wife, Plaintiff Jacqueline Roverano, brought suit for loss of consortium as a result of her husband's illness. Mr. Roverano began his employment at PECO in December, 1971, and worked there until his forced retirement about thirty years later in 2001. His exposure to asbestos products occurred during a ten year period, from 1971-1981. In 1981 PECO began to undertake safety measures to protect employees from asbestos exposure; according to Plaintiff's testimony, he was no longer exposed to asbestos after that point.

Trial commenced against three non-settling defendants, namely, John Crane, Inc. (hereinafter "Crane"), Brand Insulation, Inc. (hereinafter Brand") and Hajoca Corporation (hereinafter "Hajoca"). Hajoca settled during trial. At the conclusion of the trial the jury returned a gross verdict of $5,189,265.14 against the two remaining defendants as well as the gross sum of $1,250,000 for Plaintiff's wife, Jacqueline Roverano, for loss of consortium. The Court subsequently molded the verdicts to reflect the fact that the jury also found six settling defendants liable. A verdict was entered for 1/8 of the gross amount of $648,658 in favor of Plaintiff against each defendant as well as $156,250 against each of the defendants in favor of Plaintiff's wife for loss of consortium. Delay damages are hereby assessed against each defendant in the amount of $29,604 as to Mr. Roverano's verdict only. Judgment is accordingly entered in the sum of $678,262 in his favor against each defendant. Judgment is also entered in the amount of the verdicts of $156,250 against each defendant, Crane and Brand, in favor of Mrs. Roverano for loss of consortium.

Both the defendants Crane and Brand raise the following issues in their post-trial motions: (1) They assert that the verdict was against the weight of the evidence, and that either NOV or a new trial should be granted. (2) They object to the questions submitted to the jury, asserting that they were prejudiced because these questions did not address the issue of whether their product was defective. They also seek a new trial on this basis. (3) Interwoven with Defendants' objection to the verdict sheet is their assertion that the question of causation, whether Plaintiff had an asbestos related disease, should have been the first question posed to the jury. (4) Defendants also seek a new trial on the basis of the purportedly inadmissible testimony offered by Plaintiffs' experts, Arthur Frank, M.D., and Jonathan Gelfand, M.D. They assert in post-trial motions that these experts' opinions concerning the relationship between Mr.

Roverano's exposure to Defendants' products and his lung cancer should have been excluded. (5) Defendants take issue with the Court's charge to the jury on causation, stating that the wording of the charge, and the Court's subsequent answer to a question from the jury on the standard for causation, was confusing to the jury. They also assert that the charge failed to use the language "but for" when defining factual cause. They argue that the resulting prejudice entitles them to a new trial. (6) Defendants also assert that the Court failed to instruct the jury as to supplier liability and that the Court erred in not permitting any evidence of government standards. (7) Defendant Crane objects to the admissibility of Plaintiffs' expert Stephen Compton, Ph.D., who testified that Crane's packing products emit dangerous levels of asbestos fibers. A new trial is sought. (8) Both Defendants maintain that a new trial should be granted because the trial court failed to apply the Fair Share Act and permit the jury to apportion liability among the defendants. (9) In the alternative, Defendants request additional molding of the verdicts to reflect the liability of two settling defendants, Hajoca and Georgia-Pacific, LLC (hereinafter "Georgia-Pacific") who were absolved by the jury. They also objected because the issue of the liability of certain bankrupt defendants were not submitted to the jury for their consideration. They also sought set-offs based on possible future recovery by the plaintiff from the bankrupt trust funds of these bankrupt entities. These assertions are without merit and will be discussed *ad seriatim*. Consequently, as stated, Defendants' post-trial motions are denied and judgment is accordingly entered, including delay damages, the rationale of which will be discussed later in this opinion.

The evidence was clear and undisputed that during the relevant ten year period, 1971-1981, while employed at PECO, Plaintiff was exposed to a number of asbestos products manufactured, distributed, or supplied by various companies. These products were principally in

the nature of insulation and packing material. The insulation products consisted of cement and spray, pipe covering, and block used in boilers and turbine compressors. The evidence further indicated that Plaintiff was exposed to asbestos fibers emanating from packing material used in valves and gaskets. Plaintiff asserted he was exposed to Crane asbestos packing material from the installation as well as the removal by cutting and sawing of its rope and graphite packing in valves and boilers. Plaintiff testified that he was exposed while performing this work as well as when he was in the vicinity while the work was performed by others. He was further exposed during the clean-up process. He also testified that he was exposed to Brand asbestos products, particularly their pipe covering and block insulation, while performing this work on the inside walls of boilers. Pursuant to the Court's charge the jury found that Plaintiff was exposed to these asbestos products of the two defendants, as well as those of six other settling companies, on a regular, frequent, and proximate basis. The jury also found, despite the fact that Plaintiff had smoked extensively from about 1967 to 1997, that exposure to asbestos was a factual cause in bringing about his lung cancer.

Plaintiff, who is now 67 years old, was diagnosed with lung cancer in both lungs in November of 2013. He underwent extensive radiation and chemotherapy. His cancer had metastasized to a brain tumor requiring additional radiation therapy. To date there has been no further spread of the cancer in his lungs; his brain tumor has diminished in size. Despite these fortunate events, his prognosis for long term survival is poor.

It became evident at the outset of trial that the issue of both exposure and causation were hotly contested. Both defendants offered the testimony of expert witnesses who opined that, based on Plaintiff's exposure history, there was insufficient testimony to impose liability. In particular, Crane argues that the asbestos found in their products was encapsulated, such that it

could not have escaped and cause harm to the plaintiff. In other words, Defendants asserted that Plaintiff's exposure to their respective asbestos products were basically the same as that of the general public and therefore their products could not have caused his lung cancer. They asserted at trial that Plaintiff's lung cancer was due solely to his smoking. To the contrary, Plaintiffs' experts opined that the greater the exposure to asbestos products the greater the risk of harm. The exposure to the defendants' products must be considered in relation to his total exposure. The exposure to a particular asbestos product cannot be quantified or extricated from other exposure, therefore all the products in conjunction with each other caused Plaintiff harm (lung cancer). In addition to arguing that Plaintiff's exposure was insufficient to cause Plaintiff's lung cancer, Defendants presented evidence that smoking was the sole cause of Plaintiff's illness. They presented experts asserting that in order to attribute lung cancer to asbestos exposure where a plaintiff has a significant smoking history there must first be evidence of some asbestos disease such as asbestosis and/or pleural thickening or pleural plaques. Since Plaintiff had no such history, asbestos could not have caused Plaintiff's lung cancer. To the contrary, Plaintiff offered the testimony of Dr. Arthur Frank, and internist and occupational medicine expert, who asserted that Plaintiff's smoking, coupled with his asbestos exposure, created a synergistic effect causing his lung cancer. Both he and Jonathan Gelfand, M.D., a pulmonologist asserted that the combination of the two, asbestos exposure and smoking, extensively increased his risk of lung cancer. The fact that there was no evidence of any other asbestos related disease was of no importance since lung cancer and asbestos diseases such as asbestosis and pleural thickening are maladies that are completely different in nature. The jury accepted the evidence presented by the plaintiff as to both exposure and causation, therefore the Defendants' argument that the evidence was insufficient or against the weight of the evidence must be denied. ***Solomon v. Baum***, 560

A.2d 878 (Pa. Cmwlth. 1989), appeal denied, 578 A.2d 930, 525 Pa. 636 (Pa. 199) and ***Dorsey v. Continental Associates***, 591 A.2d 716 (Pa. Super. 1991).

Defective Product/Jury Question Issue

Besides the general argument dealing with the sufficiency of the evidence, Defendants also argue that the questions submitted to the jury were prejudicial because they did not give the jury the opportunity to determine whether their products were defective.

It was not necessary for the jury to make this determination because the issue of defect was subsumed by the jury questions themselves. The jury was given the opportunity to consider the various defenses of the defendants without having to answer the specific question of defect. It is a given that the products containing asbestos without a proper warning are defective. ***Chenot v. A.P. Green Servs. Inc.***, 895 A.2d 55 (Pa. Super. 2006). The issue in this case was one of exposure and causation, not an issue of the defect of the product. The jury was instructed pursuant to the questions submitted that they must first find that the plaintiff was exposed to the defendants' asbestos containing products on a regular, frequent, and proximate basis. The second question involved whether this exposure was a factual cause in bringing about Plaintiff's lung cancer. Therefore, it was not necessary to burden the jury with the superfluous and possibly confusing issue of defect.

It must be noted that neither defendant disputed that their products contained asbestos without proper warnings. Their defenses were based on the fact that the exposure to their products was minimal at best or, as with Crane, encapsulated; in any event, smoking was the cause of Plaintiff's lung cancer and not their products.

The defendants were given ample opportunity to defend on the grounds of exposure and causation; the questions presented to the jury reflected their defenses. In essence, if the jury had found there was no or minimal exposure to the defendants' asbestos products they would have answered question one in the negative; the defendants would have prevailed. Under these circumstances, their product would not have been defective as it applied to this case. If the jury would have answered "yes" to the exposure question but found that smoking was the sole cause, answering question two in the negative, the defendants would have prevailed. A question involving defect was irrelevant. The Court did not need to have the jury initially answer whether Plaintiff suffered from an asbestos-related disease, as requested, since this issue clearly was covered by the causation question.

All of the defenses asserted by the defendants were covered by the jury questions. This very issue was raised on appeal in ***Moore v. Ericsson, Inc., et al.***, 7 A.3d 820 (Pa. Super. 2010), and rejected by the Superior Court.

Validity of the Testimony of Arthur Frank, M.D., and Jonathan Gelfand, M.D.

The defendants' next assertion deals with the exclusion of the testimony principally of Arthur Frank, M.D., on the grounds that his opinions concerning asbestos exposure and causation are insufficient to create liability. Dr. Frank opined that Plaintiff's exposure to Defendants' asbestos fiber, coupled with his smoking, caused his lung cancer. In essence, Dr. Frank stated that there is no safe level of asbestos exposure, and the greater the exposure the greater the risk to the Plaintiff. He also asserted that asbestos exposure cannot be quantified; in considering the causal connection between the exposure to the defendants' products and harm, the total exposure to all asbestos products must be taken into consideration.

Defendants also attack the testimony of Jonathan Gelfand, M.D., the pulmonologist who examined the plaintiff, reviewed his records, and concluded that asbestos exposure was a contributing factor in causing Plaintiff's lung cancer. Both physicians concluded that it is impossible to quantify the amount of asbestos exposure caused by each of the defendants' products. This issue was raised first in ***Gregg v. V-J Auto Parts***, 943 A.2d 216 (Pa. 2007), as well as in ***Rost v. Ford Motor Company***, 2014 WL 2178528 (Pa. Super. 2014), which was tried before this Court and affirmed. The ***Rost*** case is presently before the Supreme Court. 628 Pa. 56, 102 A.3d 1251 (2014). In the absence of any further decision modifying ***Gregg***, this Court's decision in the instant case permitting the testimony of these experts is legally binding. Until there is a change in the law, the Court correctly admitted their testimony for the jury's consideration.

The Court's Charge on Factual Cause

The defendants object to the Court's charge on factual cause because the Court did not use the term "but for." During the course of deliberations the jury asked for additional instructions on factual cause, which were given by the Court. The defendants argue that the second definition further compounded the error. Their claims are without merit. Both instructions speak for themselves. (N.T. 4/13/16 pgs. 118-119, 135-137). Contrary to Defendants' assertions, the charge was clear, concise, and far from confusing. Wide latitude is given the trial judge in charging the jury. ***Burch v. Sears, Roebuck and Co.***, 467 A.2d 615 (Pa. Super. 1983). The charge was consistent with Pennsylvania jurisprudence on causation in asbestos cases. *See* ***Lilley v. Johns-Manville Corp.***, 596 A.2d 203 (Pa. Super. 1991), and ***Samarin v. GAF Corp.***, 571 A.2d 398 (Pa. Super. 1989), and ***Junge v. Garlock, Inc.***, 629 A.2d

1027 (Pa. Super 1993). As such, it was not necessary for the Court to include this "but for" terminology in defining factual cause.

Validity of the Testimony of Steven Compton, Ph.D.

Both defendants, in particular Crane, attack the testimony of Stephen Compton, Ph.D., a physicist, material scientist, and expert microscopist. He opined through various studies that Defendants' products, particularly Crane's packing, emit significant breathable asbestos fibers. These emissions occur primarily during the cutting and removal stages. He concluded that Mr. Roverano would have been exposed to asbestos fibers emanating from Crane's packing products during the performance of this work. The defendants' attack his qualifications because he was not an industrial hygienist nor a physician. Expertise in these fields of study were not required for the opinions he rendered. Besides his Ph.D. as a material scientist, he had extensive experience in studying asbestos fibers under a microscope. He also participated in various studies and reviewed others concerning the emission of asbestos fibers from asbestos products. His testimony was properly admitted; its validity was a question for the jury. ***See Primavera v. Celotex, Corp.***, 608 A.2d 515 (Pa. Super. 1992). His testimony was properly admitted as was the testimony of Defendants' expert Dr. Frederick Toca; their validity was a question for the jury.

Fair Share Act

Defendants' in their Motion in Limine requested the Court to apply the Fair Share Act, 42 Pa. C.S.A. § 7102 et. seq., to this case. The Act provides that where recovery is allowed against more than one party in negligence or a strict liability case the liability of each party shall be

apportioned. The defendants seem to argue that the jury should have been given a question dealing with the proportionate liability of each of the defendants. There was no evidence, however, that the jury had the ability to make this determination. The plaintiff's testimony was clear and unequivocal that asbestos exposure from individual products cannot be quantified. The defendants presented no evidence to the contrary. Consequently the Court properly denied their motion to apply the Fair Share Act to this case. The defendants' liability was instead apportioned properly on a per capita basis; the total gross share of the verdict was divided by the two defendants along with six other settling defendants who also were found liable by the jury. *Baker v. AC&S*, 755 A.2d 664 (Pa. 2000).

Miscellaneous

The defendants seem to argue that the trial court in its charge failed to instruct the jury that a supplier is liable for all harm caused by the product even if the supplier did not manufacture it. To the contrary, the jury was well aware of this fact. During its instructions throughout the trial, as well as the questions submitted to the jury, the jury was made aware of the fact that liability can be imposed where the asbestos product was either manufactured, distributed, or supplied by a particular defendant. In any event, neither defendant took specific exception to this issue at the charge; any objection is therefore waived.

Defendants also maintain that the Court committed error in not permitting the introduction of government standards. Since this was a products liability case, they are inadmissible. ***See Hicks v. Dana Company, LLC***, 984 A.2d 943 (Pa. Super. 2009). Contrary to Defendants' assertions, the Supreme Court case of ***Tincher v. Omega Flex, Inc.***, 104 A.3d 328 (Pa. 2014), did not alter the law on this issue as it applies to this asbestos case.

Molding of the Verdict

The defendants objected to the Court's preclusion of the bankrupt entities because they were not included on the verdict sheet for the determination of their liability along with the settling defendants. They assert that their inclusion could have led to a further reduction of the defendants' share of liability. The Court denied this motion at a pre-trial hearing on the grounds that these entities had already filed for bankruptcy prior to the institution of suit on behalf of the plaintiff. Under these circumstances, it would have been unfair to include the bankrupts on the verdict sheet. ***See Ottavio v. Fireboard***, 617 A.2d 1296 (Pa. Super. 1992), and ***Ball v. Johns-Manville Corp.***, 625 A.2d 650 (Pa. Super. 1993).

Closely related to this issue is the request by the defendants in their post-verdict motions for a set-off for any financial compensation Plaintiff may receive from multiple bankruptcy trusts. At this time the Court was uncertain what, if any, payments the plaintiff has received from any of these trusts and the Court is unsure what claims were made or will be made in the future. Consequently it would be impossible for the Court to calculate any set-off, even assuming the plaintiff has made such application.

Finally, the defendants request a further molding of the verdict to include the liability of Hajoca and Georgia-Pacific. Hajoca was originally a non-settling defendant but had settled during trial. Plaintiff presented evidence that he was exposed to asbestos containing gaskets that were supplied by Hajoca. Plaintiff also stated that he was exposed to Georgia-Pacific asbestos sheet-rock product while he did some home remodeling. The Plaintiffs' counsel seemed to concede liability of these companies during his speech. However the jury found otherwise. There were certainly viable issues created as to their liability. As to Hajoca, there was a question concerning Plaintiff's identification of gaskets it may have supplied to Plaintiff's employer,

PECO. Plaintiff stated that he used Georgia-Pacific joint compound while doing home remodeling. The jury most probably concluded that the product was used on a limited basis; his exposure to it was minimal. The Court specifically instructed the jury that it was their determination as to whether these and the other settling entities were liable. The jury found six of the eight entities liable but absolved Hajoca and Georgia-Pacific. The Defendants had the burden of proof; the jury found they did not meet it as to these parties. The jury had a right to do so. The Court will not disturb their verdict.

Delay Damages

Counsel for Plaintiffs timely filed a petition for delay damages. The petition mistakenly included a claim on behalf of Plaintiff's wife. Clearly Mrs. Roverano cannot recover delay damages on her loss of consortium claim. ***Anchorstar v. Mack Truck, Inc.***, 620 A.2d 1120 (Pa. 1993). Thus, delay damages awarded in the amount of $29,604 against each defendant on Mr. Roverano's verdicts only. Judgment therefore was accordingly entered in the amount of $678,262 against each defendant on behalf of Mr. Roverano. Judgment was also entered in favor of Mrs. Roverano as previously stated.

BY THE COURT:

July 27, 2016

Hon. Victor J. DiNubile, Jr. J.

APPENDIX D

42 Pa.C.S. 7102

§ 7102. Comparative negligence.

(a) General rule.--In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(a.1) Recovery against joint defendant; contribution.--

(1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).

(2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

(3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:

(i) Intentional misrepresentation.

(ii) An intentional tort.

(iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.

(iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L.756, No.108), known as the Hazardous Sites Cleanup Act.

(v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L.90, No.21), known as the Liquor Code.

(4) Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, any defendant may recover from any other person all or a portion of the damages assessed that defendant pursuant to the terms of a contractual agreement.

(a.2) Apportionment of responsibility among certain nonparties and effect.-- For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. A person whose liability may be determined pursuant to this section does not include an employer to the extent that the employer is granted immunity from liability or suit pursuant to the act of June 2, 1915 (P.L.736, No.338), known as the Workers' Compensation Act. An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose. Nothing in this section shall affect the admissibility or nonadmissibility of evidence regarding releases, settlements, offers to compromise or compromises as set forth in the Pennsylvania Rules of Evidence. Nothing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure.

(b) Recovery against joint defendant; contribution.--(Deleted by amendment).

(b.1) Recovery against joint defendant; contribution.--(Unconstitutional).

(b.2) Apportionment of responsibility among certain nonparties and effect.-- (Unconstitutional).

(b.3) Off-road vehicle riding.--

(1) Off-road vehicle riding area operators shall have no duty to protect riders from common, frequent, expected and nonnegligent risks inherent to the activity, including collisions with riders or objects.

(2) The doctrine of knowing voluntary assumption of risk shall apply to all actions to recover damages for negligence resulting in death or injury to person or property brought against any off-road vehicle riding area operator.

(3) Nothing in this subsection shall be construed in any way to abolish or modify a cause of action against a potentially responsible party other than an off-road vehicle riding area operator.

(c) Downhill skiing.--

(1) The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.

(2) The doctrine of voluntary assumption of risk as it applies to downhill skiing injuries and damages is not modified by subsections (a) and (a.1).

(c.2) Savings provisions.--Nothing in this section shall be construed in any way to create, abolish or modify a cause of action or to limit a party's right to join another potentially responsible party.

(d) Definitions.--As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Defendant or defendants." Includes impleaded defendants.

"Off-road vehicle." A motorized vehicle that is used off-road for sport or recreation. The term includes snowmobiles, all-terrain vehicles, motorcycles and four-wheel drive vehicles.

"Off-road vehicle riding area." Any area or facility providing recreational activities for off-road vehicles.

"Off-road vehicle riding area operator." A person or organization owning or having operational responsibility for any off-road vehicle riding area. The term includes:

(1) Agencies and political subdivisions of this Commonwealth.

(2) Authorities created by political subdivisions.

(3) Private companies.

"Plaintiff." Includes counter claimants and cross-claimants.

(Apr. 28, 1978, P.L.202, No.53, eff. 60 days; Oct. 5, 1980, P.L.693, No.142, eff. 60 days; Dec. 20, 1982, P.L.1409, No.326, eff. 60 days; June 19, 2002, P.L.394, No.57, eff. 60 days; July 15, 2004, P.L.736, No.87, eff. imd.; June 28, 2011, P.L.78, No.17, eff. imd.)

2011 Amendment. See sections 2 and 3 of Act 17 in the appendix to this title for special provisions relating to construction of law and applicability.

2007 Effectuation of Declaration of Unconstitutionality. The Legislative Reference Bureau effectuated the 2005 unconstitutionality.

2005 Unconstitutionality. Act 57 of 2002 was declared unconstitutional. Deweese v. Weaver, 880 A.2d 54 (Pa. Commonwealth 2005).

2002 Amendment. Section 6 of Act 57 provided that the amendment of section 7102 shall apply to all causes of action that accrue after the effective date of section 6.

APPENDIX E

MEMORANDUM

TO: All House Members

FROM: Representative Mike Turzai
House Majority Leader

DATE: September 6, 2012

RE: Co-sponsorship Memo - Asbestos Trust Transparency and Fairness in Asbestos Litigation Act

In the near future, I plan to introduce legislation creating the Asbestos Trust Transparency and Fairness in Asbestos Litigation Act. This bill is intended to address two loopholes in our current system of assessing responsibility for damages in asbestos-related suits.

Asbestos lawsuits date to the 1970's when companies that mined and milled asbestos or that incorporated significant percentages of the material in products used in the workforce were the primary targets of damage suits. Beginning in the 1980's and substantially accelerating in the last decade through today, however, many of those companies have used federal bankruptcy laws to shield them from suit in exchange for funding stand-alone trusts. These trusts, formed by asbestos miners, manufacturers and fabricators of asbestos products, make over $30 billion available to qualifying injured parties through a simplified federal asbestos claim process. However, some claimants who receive money from these trusts through that claim process have also filed civil lawsuits in state courts against businesses down the supply chain. These businesses, often with peripheral connection to any injury, have in some cases been forced to shoulder massive liability as a result of these lawsuits.

Two problems have arisen based on the operation of the asbestos trust claim system and the civil tort system in tandem. First, clever manipulation of the litigation and claims processes can result in "double-dipping" by which an asbestos claimant can receive full recovery twice for the same injury, once through tort litigation and a second time through the asbestos trust claim process. Second, because the representations made by asbestos claimants in the asbestos trust claim system are not public and are difficult to obtain through civil discovery,

it is possible for asbestos claimants to make inconsistent statements within the different systems. For example, a claimant may represent a particular set of facts to an asbestos trust in order to qualify for compensation from that trust, while simultaneously asserting a contradictory set of facts in that claimant's civil litigation.

My bill corrects these two problems in the following manner. First, the bill would apply the principles of our Fair Share Act to asbestos litigation such that asbestos defendants would be apportioned liability based only on their relative fault. Second, the bill would require plaintiffs to disclose all asbestos exposure information and to indicate whether they have submitted a claim based on asbestos exposure to a trust or are eligible to submit a claim for asbestos exposure to a trust. Disclosure of this information will allow a judge or jury to consider all asbestos exposures, claims which have been or could be submitted to a trust and claims which have been paid by a trust, in some cases as much as $1.6 million per claimant, as part of an asbestos-related suit.

Should you wish to join me in co-sponsoring this legislation, please contact Stacy Bowie in my Harrisburg office at 772-9943 or email sbowie@pahousegop.com.

Note that Rep. Cutler previously circulated a co-sponsorship memo for this bill and was gracious enough to allow me to become the prime sponsor. Please note that the following signed on to co-sponsor the bill previously: Rep. Boyd, Rep. Creighton, Rep. Everett, Rep. Farry, Rep. Geist, Rep. Grell, Rep. Helm, Rep. Hickernell, Rep. Kampf, Rep. Kauffman, Rep. Miller, Rep. Schroder, Rep. Swanger, and Rep. Truitt.

APPENDIX F

House Co-Sponsorship Memoranda

House of Representatives
Session of 2017 - 2018 Regular Session

MEMORANDUM

Posted: January 12, 2017 01:46 PM
From: Representative Warren Kampf
To: All House members
Subject: Fairness in Claims and Transparency Act (FaCT) – Asbestos legislation

In the near future, I plan to introduce legislation creating the Fairness in Claims and Transparency (FaCT) Act. This bill addresses a loophole in our current system of assessing responsibility for damages in asbestos-related suits which impose burdens on many Pennsylvania businesses.

Asbestos lawsuits date to the 1970s when companies that mined and milled asbestos or that incorporated significant percentages of the material in products used in the workplace were the primary targets of lawsuits. Beginning in the 1980s, many of those companies went bankrupt to shield themselves from suits in exchange for funding stand-alone trusts. These trusts currently make an estimated $30-60 Billion available to qualifying injured parties through a simplified claim process. A company declaring bankruptcy and using the trust process can never be sued in court.

Some claimants who receive money from these trusts now also file court cases against other businesses. These businesses are not part of the bankruptcy trust and therefore they can be held liable in court even after the claimant has already received compensation from the trust. These businesses, often with very limited connection to any injury, have been forced to shoulder massive liability as a result of these lawsuits. The juries in these cases are rarely if ever even made aware that the claimant has made claims against others.

Two particular problems have arisen. First, clever manipulation of the litigation and bankruptcy trusts can result in "double-dipping" where a claimant can recover twice for the same injury – once through the courts, and a second time through the bankruptcy trusts. Second, because the representations made by claimants in the asbestos bankruptcy trust system are not public, it is possible for claimants to make inconsistent statements within the different systems. In a recent federal bankruptcy case, Garlock Industries, the court found massive manipulation and inconsistent statements by claimants and their counsel.

My bill corrects likely problems in the following manner: First, the bill would apply the principles of our Fair Share Act to asbestos litigation such that defendants would pay only for their individual fault. Second, the bill would require claimants to make and disclose all their bankruptcy claims up front. Disclosure of this information will allow a judge or jury to consider all exposures.

The bill is simple, and it would make our law fair. I ask you to join me in co-sponsoring this beneficial legislation. If you have any questions, please call my office 717-260-6166. Thank you in advance for your consideration.

Previous Co-sponsors include: TURZAI, CUTLER, MUSTIO, DIAMOND, MILLARD, TOPPER, KAUFFMAN, ZIMMERMAN, PHILLIPS-HILL, SCHEMEL, CORBIN, WHEELAND, BARRAR, DELOZIER, SAYLOR, GODSHALL, A. HARRIS, AND TOEPEL

Introduced as HB238

APPENDIX G

PRINTER'S NO. 204

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 238 Session of 2017

INTRODUCED BY KAMPF, PICKETT, IRVIN, TOPPER, JAMES, MILLARD, KAUFFMAN, ORTITAY, RADER, EVERETT AND SCHEMEL, JANUARY 31, 2017

REFERRED TO COMMITTEE ON JUDICIARY, JANUARY 31, 2017

AN ACT

Providing for transparency of claims made against asbestos-related bankruptcy trusts, for compensation and allocation of responsibility, for the preservation of resources and for the imposition of liabilities.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Fairness in Claims and Transparency (FaCT) Act.

Section 2. Purpose.

The purposes of this act are:

(1) To provide transparency of claims made against bankruptcy trusts and in the tort system.

(2) To facilitate fair and appropriate compensation to plaintiffs with a rational allocation of responsibility to all persons, whether current defendants or not, consistent with existing State law.

(3) To preserve the resources of defendants involved in

tort claims and bankruptcy trusts to help promote adequate recoveries for deserving plaintiffs.

(4) To ensure that liabilities properly borne by bankruptcy trusts are not imposed upon defendants in the tort system.

Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Asbestos action." Any civil lawsuit in which the plaintiff seeks damages for an asbestos-related injury.

"Asbestos trust." Any trust or claims facility created as a result of bankruptcies or other settlements that are intended to provide compensation to plaintiffs alleging asbestos-related injuries, including trusts created under 11 U.S.C. § 524(g) (relating to effect of discharge).

"Defendant." Any party to an asbestos action other than a plaintiff or an asbestos trust.

"Plaintiff." Any of the following:

(1) An individual filing an asbestos action on the individual's behalf.

(2) A person permitted by law to represent an individual filing an asbestos action during the individual's lifetime or as the legal representative of the estate of an individual claiming injury from asbestos during the individual's lifetime.

Section 4. Apportionment of responsibility.

(a) File.--Not later than 90 days prior to trial of an asbestos action, or at another time as ordered by the court, whichever is earlier, a plaintiff shall file with the court and

serve on all parties:

(1) a statement listing all claims the plaintiff has filed or has a reasonable basis to file against any asbestos trust; and

(2) a statement listing all payments or funds the plaintiff has received or reasonably believes the plaintiff may be entitled to receive from each asbestos trust.

(b) Statement.--The statement provided under subsection (a) shall:

(1) be supported by a certification made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) from the plaintiff that the plaintiff has conducted a reasonable investigation and has disclosed all claims the plaintiff has filed or has a reasonable basis to file against an asbestos trust;

(2) disclose when each claim was or will be submitted to each asbestos trust and the status of each claim, including whether there has been a response from the asbestos trust and whether the plaintiff has requested deferral, delay or tolling of any aspect of the asbestos trust claims process; and

(3) disclose the amount of compensation, if any, the plaintiff has received or reasonably believes the plaintiff may receive from the asbestos trust along with a statement explaining any contingencies that may cause the amount of compensation to change in the future.

(c) Service.--

(1) When the plaintiff files and serves the statement required under subsection (a), the plaintiff shall serve on all parties to the asbestos action copies of the plaintiff's

submissions to and communications with each asbestos trust identified, including copies of electronic data and e-mails, proof-of-claim forms and all other materials or information provided to the asbestos trust or received from the asbestos trust in relation to a claim, including all of the following:

(i) Work histories, exposure allegations, affidavits, depositions and trial testimony of the plaintiff and others knowledgeable about the plaintiff's exposure history.

(ii) All medical documentation relating to the plaintiff's claim, including, but not limited to, x-rays, test results, diagnostic reports, CT reports, cytology reports, all other medical reports and pathology results.

(iii) The trust governance documents, including the payment amounts specified in the documents.

(2) If a defendant seeks discovery from an asbestos trust, the plaintiff shall provide consent, a signed authorization and permission for the release of relevant information and materials, if required by the asbestos trust.

(d) Duty.--The plaintiff shall have a continuing duty, until final resolution of the action, to supplement the statement provided under subsection (a) and the production of materials under subsection (c)(1), as follows:

(1) If the plaintiff learns that the statement filed under subsection (a) was incomplete or incorrect when filed or, although complete and correct when filed, is no longer complete and correct, the plaintiff shall file and serve a supplemental statement on all parties to an asbestos action. The supplemental statement must be filed and served within 30 days after the plaintiff discovers the necessity for

supplementation or within the time as ordered by the court.

(2) If the plaintiff files or provides a claim form or other materials to an asbestos trust after the plaintiff's initial service of materials under subsection (c)(1), the plaintiff must serve copies of the additional materials on all parties to the action. The supplemental materials must be served within 30 days after the plaintiff provides the materials to the asbestos trust.

(3) A plaintiff's asbestos action shall be stayed in its entirety until the plaintiff certifies that all claims identified in the statement provided under subsection (a), as supplemented, have been filed. An asbestos action may not begin trial until at least 30 days after a statement is supplemented under paragraph (1) or mandatory disclosures are supplemented under paragraph (2).

(e) Liability.--For purposes of apportioning liability, the question of liability of any entity that established an asbestos trust or an asbestos trust disclosed in the statement required under subsection (a) shall be transmitted to the trier of fact upon appropriate requests and proofs by any party, consistent with 42 Pa.C.S. § 7102 (relating to comparative negligence).

Section 5. Applicability.

This act shall apply to asbestos actions arising on or after the effective date of this section.

Section 6. Effective date.

This act shall take effect in 90 days.

APPENDIX H

WILLIAM ROVERANO
***-**-2483
AWI#10599901
December 21, 2015
Release ID: 2687093

ARMSTRONG WORLD INDUSTRIES, INC.
ASBESTOS PERSONAL INJURY SETTLEMENT TRUST

RELEASE AND INDEMNITY AGREEMENT

NOTICE: THIS IS A BINDING DOCUMENT THAT AFFECTS YOUR LEGAL RIGHTS. PLEASE CONSULT YOUR ATTORNEY IN CONNECTION WITH EXECUTING THIS DOCUMENT. IF YOU DO NOT PRESENTLY HAVE AN ATTORNEY, YOU MAY WISH TO CONSIDER CONSULTING ONE.

WHEREAS, the undersigned, who is either the "Injured Party" or the/an "Official Representative" (either being referred to herein as the "Claimant"), has filed a claim (the "Claim") with the Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust (the "Trust") pursuant to the Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures (the "TDP") established in In Re: Armstrong World Industries, Inc., et al., Case No. 00-4471, and such Claim asserts an Asbestos Personal Injury Claim for which Armstrong World Industries, Inc. (the "Debtor") is alleged to have legal responsibility (all capitalized terms not defined herein shall have the respective meanings ascribed to them in either the TDP or the Fourth Amended Plan of Reorganization of Armstrong World Industries, Inc. (as modified)(the "Plan") confirmed in Jointly Administered Case No. 00-4471 by the United States District Court for the District of Delaware on August 18, 2006; and

WHEREAS, the Claimant has agreed to settle and compromise the Injured Party's Claim, for and in consideration of the allowance of the Claim by the Trust and its payment pursuant to the TDP in accordance with the terms set forth therein and herein;

NOW, THEREFORE, the Claimant hereby agrees as follows:

1. On behalf of the Injured Party, the Injured Party's estate, the Injured Party's heirs and/or anyone else claiming rights through the Injured Party, now and in the future, the Claimant hereby fully and finally RELEASES, ACQUITS and FOREVER DISCHARGES the Trust, the Debtors, the Debtor's Estates and the Reorganized Debtors and their respective settlors, trustors, trustees, directors, officers, agents, consultants, financial advisors, servants, employees, attorneys, heirs, executors, and any Protected Party (collectively "Releasees") from any and all Asbestos Personal Injury Claims (and any claims related thereto), except as expressly provided herein.

2. Notwithstanding the paragraph immediately above or anything to the contrary contained herein, if the Claim involves a non-malignant asbestos-related disease (Disease Levels I-IV under the TDP), the Injured Party may file a new Asbestos Personal Injury Claim against the Trust for a malignant disease (Disease Levels V-VIII under the TDP) that is diagnosed after the date of the Claimant's original submission of a proof of claim form to the Trust with respect to the Claim.

3. The Claimant expressly covenants and agrees forever to refrain from bringing any suit or proceeding at law or in equity, against the Releasees with respect to any Asbestos Personal Injury Claim released herein.

4. Except as expressly provided herein, the Claimant intends this Release and Indemnity Agreement to be as broad and comprehensive as possible so that the Releasees shall never be liable, directly or indirectly, to the Injured Party or the Injured Party's heirs, legal representatives, successors or assigns, or any other Entity claiming by, through, under or on behalf of the Injured Party, for or on account of any Asbestos Personal Injury Claim, whether the same is now known or unknown or may now be latent or may in the future appear to develop, including all spousal claims for the Injured Party's claims. If the Claimant is an Official Representative, the Claimant represents and warrants that the Claimant has all requisite legal authority to act for, bind and accept payment on behalf of the Injured Party and all heirs of the Injured Party on account of any Asbestos Personal Injury Claim against the Trust and hereby agrees to indemnify and hold harmless, to the extent of payment hereunder, excluding attorney's fees and costs, the Releasees from any loss, cost, damage or expense arising out of or in connection with the rightful claim of any other Entity to payments with respect to the Injured Party's Asbestos Personal Injury Claim against the Trust.

5. This Release and Indemnity Agreement is not intended to bar any cause of action, right, lien or claim which the Claimant may have against any alleged tortfeasor, or any other person or entity, not specifically named herein. The Claimant hereby expressly reserves all his or her rights against such persons or entities. This Release and Indemnity Agreement is not intended to release or discharge any Asbestos Personal Injury Claim or potential Asbestos Personal Injury Claim that the Injured Party's heirs (if any), spouse (if any), the Official Representative (if any) or the Official Representative's heirs (if any) (other than the Injured Party) may have as a result of their own exposure to asbestos or asbestos-containing products.

6. The Claimant will hold the Releasees harmless, to the extent of payment hereunder, excluding attorney's fees and costs, from any and all liability arising from subrogation, indemnity or contribution claims, related to the Asbestos Personal Injury Claim released herein, from any compensation or medical payments due, or claimed to be due, under any applicable law, regulation or contract.

7. It is further agreed and understood that if the Claimant has filed a civil action against the Trust, the Claimant shall dismiss such civil action and obtain the entry of an Order of Dismissal with Prejudice with respect to any Asbestos Personal Injury Claim released herein no later than 30 days after the date hereof.

8. The Claimant understands that the Asbestos Personal Injury Claim released herein has been allowed by the Trust, and a liquidated value of $22,777.42 has been established for such Claim. The Claimant acknowledges that, pursuant to the TDP, the Trust will only be able to pay the Claimant a percentage

(the "Payment Percentage") of the liquidated value of such Claim (Other Asbestos Disease (Level 1) claims are not subject to the Payment Percentage). The Payment Percentage applicable to the Claim will be determined in the manner set forth in the TDP. The Claimant further acknowledges that the Payment Percentage is based on estimates that change over time, and that other claimants may have in the past received, or may in the future receive, a smaller or larger percentage of the value of their claims than the Injured Party. The Claimant further acknowledges that, other than as specifically set forth in the TDP, the fact that earlier or later claimants may in the future be paid a smaller or larger percentage of the value of their claims shall not entitle the Injured Party to any additional compensation from the Trust.

9. In the event of a verdict against others, any judgment entered on the verdict that takes into account the status of the Trust as a joint tortfeasor legally responsible for the Injured Party's injuries shall be reduced by no more than the total and actual amount paid as consideration for this Release or such lesser amount as allowed by law.

10. The Claimant understands, represents and warrants this Release and Indemnity Agreement to be a compromise of a disputed claim and not an admission of liability by, or on the part of, the Releasees. Neither this Release and Indemnity Agreement, the compromise and settlement evidenced hereby, nor any evidence relating thereto, will ever be admissible as evidence against the Trust in any suit, claim or proceeding of any nature except to enforce this Release and Indemnity Agreement. However, this Release and Indemnity Agreement is and may be asserted by the Releasees as an absolute and final bar to any claim or proceeding now pending or hereafter brought by or on behalf of the Injured Party with respect to the Asbestos Personal Injury Claim released herein, except as expressly provided herein.

11. The Claimant (1) represents that no judgment debtor has satisfied in full the Trust's liability with respect to the Injured Party's Asbestos Personal Injury Claim as the result of a judgment entered in the tort system and (2) upon information and belief, represents that the Claimant has not entered into a release (other than this Release and Indemnity Agreement) that discharges or releases the Trust's liability to the Claimant with respect to the Injured Party's Asbestos Personal Injury Claim.

12. The Claimant represents that he or she understands that this Release and Indemnity Agreement constitutes a final and complete release of the Releasees with respect to the Injured Party's Asbestos Personal Injury Claim, except as expressly provided herein. The Claimant has relied solely upon his or her own knowledge and information, and the advice of his or her attorneys (if any), as to the nature, extent and duration of the Injured Party's injuries, damages, and legal rights, as well as the alleged liability of the Trust and the legal consequences of this Release and Indemnity Agreement, and not on any statement or representation made by or on behalf of the Trust.

13. This Release and Indemnity Agreement contains the entire agreement between the parties and supersedes all prior or contemporaneous, oral or written agreements or understandings relating to the subject matter hereof between or among any of the parties hereto, including, without limitation, any prior agreements or understandings with respect to the liquidation of the Claim.

14. This Release and Indemnity Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, without giving effect to the principles of conflicts of law thereof and shall be binding on the Injured Party and his or her heirs, legal representatives, successors and assigns.

15. To the extent applicable, the Claimant hereby waives all rights under Section 1542 of the California Civil Code, and any similar laws of any other state. California Civil Code Section 1542 states:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The Claimant understands and acknowledges that because of the Claimant's waiver of Section 1542 of the California Civil Code, even if the Injured Party should eventually suffer additional damages, the Injured Party will not be able to make any claim against the Releasees for those damages, except as expressly provided herein. The Claimant acknowledges that he or she intends these consequences.

16. If the Claimant's counsel directed the Delaware Claims Processing Facility, LLC (the "Facility") to transmit to the Trust any information from the Facility for purposes of settling the Claim, the Claimant acknowledges that the Claimant consented to the disclosure, transfer and/or exchange of information related to the Claim (including medical information) between the Trust and the Facility in connection with the Delaware Claims Processing Facility, LLC's processing of the Claim.

17. The Claimant authorizes payment pursuant to Paragraph 8 to the Claimant or the Claimant's counsel, as trustee for the Claimant.

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WILLIAM ROVERANO
***-**-2483
AWI#10599901
12/21/2015
Release ID: 2687093

CERTIFICATION

I state that I have carefully read the foregoing Release and Indemnity Agreement and know the contents thereof, and I sign the same as my own free act. I additionally certify, under penalty of perjury, that the information that has been provided to support the Claim is true according to my knowledge, information and belief and further that I have the authority as the Claimant to sign this Release and Indemnity Agreement.

I am: X the Injured Party
____ the/an Official Representative of the Injured Party, the Injured Party's Estate or the Injured Party's Heirs

EXECUTED this 4th day of JAN, 2016

William Roverano
Signature of the Claimant

Name of the Claimant: WILLIAM ROVERANO SSN: ***-**-2483

Name of the Injured Party if different from the Claimant: _____

SWORN to and subscribed before me this 4th day of JAN, 2016

If Claimant is not executing this Release and Indemnity Agreement electronically using the electronic signature process, the Claimant's signature must be authenticated by the signatures of two persons unrelated to the Claimant who witnessed the signing of this Release and Indemnity Agreement or by a notary public.

Louis Carino Sr.
Notary Public
My Commission Expires: 6-30-18

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
LOUIS CARINO, SR., Notary Public
City of Philadelphia, Phila. County
My Commission Expires June 30, 2018

OR

Signatures of two persons unrelated to the Claimant by blood or marriage who witnessed the signing of this Release and Indemnity Agreement

_____
Witness Signature

_____
Witness Signature