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SUPREME COURT OF PENNSYLVANIA

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26 EAP 2018, 27 EAP 2018

WILLIAM and JACQUELINE ROVERANO, Appellants

v.

JOHN CRANE, INC. and BRAND INSULATIONS, INC., Appellees

BRIEF OF APPELLEE BRAND INSULATIONS, INC.

Appeal from the Judgment of Superior Court entered on December 28, 2017 at Nos. 2837 EDA 2016 and 2847 EDA 2016 Reversing the Order entered on July 27, 2016 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 1123 March Term, 2014.

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INTRODUCTION

The Fair Share Act unambiguously mandates that damages in most cases be allocated among co-defendants in proportion to their liability, and that the question of liability of any non-party, settled tortfeasor must be submitted to the jury. 42 Pa.C.S. § 7102(a.1)(1) and (a.2) (attached under Tab A). The purpose of the Fair Share Act is to protect defendants who have comparatively minor responsibility for a plaintiff's harm from having to bear full liability for that harm. However, the trial court flatly and erroneously refused to apply the Fair Share Act.

With respect to apportionment, the trial court assumed that it is impossible to quantify the defendants' relative liability in an asbestos case – essentially writing a blanket exception into the Fair Share Act that contradicts the law's text and legislative purpose. With respect to bankrupt settled tortfeasors, the trial court simply ignored the Fair Share Act's mandate that such entities be included on the verdict sheet.

The Fair Share Act's text – and the legislative intent behind it – are clear. The Superior Court correctly held that the statute should be followed, and this Court should affirm.

COUNTER-STATEMENT OF THE CASE

I. Procedural History

Mr. Roverano was diagnosed with lung cancer in November 2013. (R. 442a.) Plaintiffs alleged that asbestos exposure caused his lung cancer and joined 30 companies as defendants. (R. 13-21a, 27-37a.) Plaintiffs filed their complaint on March 10, 2014 and filed an amended complaint on April 11, 2014. (R. 1a, 4a.) All defendants except John Crane, Brand, and Hajoca settled or were dismissed before trial.

Before trial, defendants moved the trial court to apply the Fair Share Act. Defendants requested the court to instruct the jury to apportion liability among the defendants and to include in that apportionment entities with whom Plaintiffs settled, including bankrupt entities. (R. 112a, 405-08a.)[1] Defendants also requested the court to instruct the jury on causation using Pennsylvania's standard suggested jury instruction on factual cause. (R. 325-26a, 410a, 683a.) The trial court denied each of

[1] All defendants joined in each defense motion *in limine*. (R. 405a, 409a.)

these requests. (R. 405-08a, 410a, 593a, 683a.) The trial court explained:

> 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?

(R. 405-06a.)

The case was tried to a jury from April 6 to April 13, 2016. The trial focused on two significant causation questions: Was asbestos exposure, rather than a 30-year history of smoking, the cause of Mr. Roverano's lung cancer? And, if asbestos exposure caused Mr. Roverano's lung cancer, what (or whose) products were substantial factors in causing Mr. Roverano's cancer, in a context where there were many possible exposures for approximately 10 years, beginning nearly 45 years before the trial? Hajoca settled with Plaintiffs during the course of trial, leaving John Crane and Brand as the only defendants at the time of verdict. (R. 607a.)

Before the jury instructions, Defendants submitted a proposed verdict sheet that would have required the jury to apportion liability among ten entities, including Brand, John Crane, Hajoca, and seven entities that settled before trial and for which there was evidence of exposure.[2] (R. 393a.) However, the court instead provided a verdict sheet that only required the jury to find whether each entity was liable but not apportion liability. The jury returned a verdict in favor of Plaintiffs on April 13, 2016. (R. 1057-60a.) The jury awarded $5,189,265.14 to Mr. Roverano and $1,250,000.00 to Mrs. Roverano for loss of consortium, which the trial court divided evenly among the eight entities (John Crane, Brand, and six settled entities) whose products the jury found were factual causes of Mr. Roverano's cancer. (*Id*.)

Defendants, including Brand, filed timely post-trial motions and raised as errors, among other things, the trial court's failure to apply the Fair Share Act and the trial court's

[2] The verdict sheet did not include bankrupt entities because the trial court had already ruled that they should not be included (R. 408a, 593a.)

defective instruction on causation. (R. 1079-1103a.) The trial court denied Defendants' post-trial motions and entered judgment for Plaintiffs on the verdict by order dated July 27, 2016. (R. 9-12a.)

On appeal, Brand argued that the trial court erred by failing to require the jury to apportion liability among entities on the verdict sheet and in failing to include bankrupt settled tortfeasors on the verdict sheet. In the alternative, Brand argued that the trial court should have molded the verdict to account for payments that the Plaintiffs received from settled tortfeasors.[3]

The Superior Court entered a per curiam precedential opinion affirming in part, reversing in part, and remanding for a new trial to apportion damages among the tortfeasors (attached under Tab B). The panel unanimously held that the

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[3] Brand also argued that the trial court erred in providing the jury a confusing definition of causation. Over Judge Solano's dissent, the Superior Court panel majority concluded that the trial judge's causation instruction did not constitute an abuse of discretion. (Op. at 5-11.) The trial court's instruction on causation is not at issue before this Court.

trial court erred in failing to apply the Fair Share Act. The Superior Court concluded that "[o]ne of the main purposes of the Fair Share Act was to make joint and several liability inapplicable to most tort cases." (Op. p. 22). However, "[t]he Act's lengthy other provisions make clear … that the statute is not limited only to restricting joint and several liability." (*Id.*) After observing that the Act contains no exception for strict liability asbestos cases, the Superior Court rejected Plaintiffs' argument that "the rule of per capita apportionment applicable before the Fair Share Act's enactment remains unchanged." (*Id.* at 25.) Instead, "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." (*Id.*)

The Superior Court also concluded "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." (Op. at 32.) Noting that the Fair Share Act "contains no exception for

settling persons who are bankrupt," the Superior Court clarified that its previous decisions in *Ottavio v. Fibreboard* and *Ball v. Johns-Manville Corp.*, which "prohibited consideration of settlements with bankrupt entities … were based on policy considerations that do not apply under the Fair Share Act." (*Id.* at 33.) Because it concluded that settled bankrupt tortfeasors should be included on the verdict sheet, the Superior Court did not consider Brand's alternative argument that the verdict should be molded to account for the settlements they paid.

II. Factual background

A. Insulation products installed by Brand constituted only a small percentage of Mr. Roverano's exposure to asbestos products.

Mr. Roverano spent the majority of his career employed as a tradesman for PECO. He started at PECO in 1971 and rotated through several trades until he was promoted to be a carpenter on a permanent basis around January 21, 1974. (R. 429a, 654a). He testified that he was exposed to asbestos from many sources at PECO, including packing, gasket material, insulation material, cement, and electrical equipment including pumps, air compressors, turbines, and boilers. (R. 430a, 637a.)

In 1981 or 1982, he was made aware of the dangers of asbestos and began to take precautions against exposure. (R 441a.) Mr. Roverano testified that he also was exposed to asbestos products while remodeling part of his home. (R. 470-72a.)

Mr. Roverano identified companies that he believed manufactured or distributed the asbestos products he was exposed to, including John Crane, Hajoca, Johns Manville, Owens Corning, Pittsburgh Corning, Garlock, De Laval, Westinghouse, General Electric, Combustion Engineering, Babcock & Wilcox, J.J. White, W.R. Grace, U.S. Gypsum, and Georgia Pacific (R. 436a, 440-41a, 637a.)

The evidence shows that Mr. Roverano's possible exposure to insulation products installed by Brand employees comprised only a small fraction of his total exposure to asbestos. Mr. Roverano testified that he was exposed to asbestos-containing block and pipe insulation materials manufactured by Johns Manville, Owens Corning, and Pittsburgh Corning and installed by Brand employees when he worked in their vicinity at PECO from 1971 to 1981. (R. 439-40a.) Mr. Roverano also worked around insulation contractors

from J.J. White. (R. 497a, 637a.) Mr. Roverano testified that he did not work "directly" with Brand employees and that he could not remember whether he worked near them more or less than ten times. (R. 500-01, 638-39a.)

B. The jury heard evidence quantifying Mr. Roverano's exposure to Brand insulation and other products.

Mr. Roverano testified that he worked near asbestos-containing insulation products installed by Brand from 1971 to 1981, and the hypotheticals that were posed to Plaintiffs' causation experts were based on the assumption that Mr. Roverano worked with such products until 1981. (R. 439a, 497-98a, 540-41a, 763-64a.) However, Brand's expert industrial hygienist, Patrick Rafferty, testified that Brand "may have been installing asbestos-containing materials" only "up to July of 1973." (R. 655a.) Based on Mr. Roverano's testimony about his locations of work, Mr. Rafferty concluded that Mr. Roverano would not have been exposed to products installed by Brand before January 1973. (R. 656-57a.) Thus, according to Mr. Rafferty, Mr. Roverano's total exposure to products installed by

Brand was limited to the period from January 1973 to July 1973. (*Id*.; R. 1023a.)

According to Mr. Rafferty, Mr. Roverano's exposure to insulation installed by Brand employees was within background levels. (R. 654a, 659-60a.) Mr. Rafferty based his opinion on Mr. Roverano's testimony about his work history and his employment records, as well as studies that quantify the level of asbestos exposure that occurs from working in proximity to insulation products. (R. 654a.) Mr. Rafferty noted that Mr. Roverano was exposed to numerous asbestos-containing products during his employment at PECO and characterized Mr. Roverano's exposure to insulation installed by Brand employees as "occasional." (R. 655a.)

The jury also heard evidence quantifying Mr. Roverano's exposure to asbestos from products manufactured by John Crane, the only other remaining defendant. Steven P. Compton, Ph.D., Plaintiffs' expert on material science and microscopy, testified about the number of fibers that potentially could be released from John Crane packing (R. 809a), from clean up after gasket work was done (R. 801a, 810a), from removal of gaskets

(R. 800a, 810a), and from installation of gaskets (R. 799a, 810a.) John Crane's experts on internal medicine and industrial hygiene also provided testimony regarding Mr. Roverano's potential exposure to and risk from John Crane products. (R. 622-24a, 962a.)

C. The parties' experts agreed that any risk of lung cancer from asbestos exposure is dose-responsive.

The parties' experts disagreed about whether Mr. Roverano's lung cancer was solely caused by smoking, or whether it was also caused by his exposure to asbestos. However, the parties' experts agreed that any risk of lung cancer from asbestos exposure is dose-responsive.

Plaintiffs' occupational medicine expert, Dr. Arthur Frank, testified that the risk of asbestos-related disease depends on the level of exposure: "[A]s the dose of any outside substance including asbestos goes up, the likelihood of having a biological response or a disease goes up." (R. 531a.) This concept of dose response "applies to lung cancer like it does to anything else, the greater the amount of exposure, the greater the likelihood. As you add to your exposures day after day, month after

month, year after year, your risk of getting lung cancer goes up. That doesn't mean you're going to get it, but it increases your risk." (R. 537a; *see also* 543a (confirming that "the more exposure and the more product that a person is exposed to, the greater the risk").) Plaintiffs' internal medicine expert, Dr. Jonathan Gelfand, likewise testified that "the bigger [an exposure] is, the more likely it is you will develop a disease like lung cancer from asbestos." (R. 765a.) Defendants' experts agreed that asbestos disease is dose-responsive. (*See* R. 949-54a (John Crane's medical causation expert); R. 998a (Brand's medical expert) R. 619a, 630a (John Crane's expert industrial hygienist).)

The experts also agreed that the atmosphere ordinarily contains a background level of asbestos that does not result in disease. (R. 774a (Plaintiffs' medical expert); R. 955a, 975a (John Crane's medical expert); R. 620a (John Crane's industrial hygienist).) That is consistent with the fact that asbestos disease is dose-responsive.

SUMMARY OF THE ARGUMENT

The basic issue in this case is whether trial courts are required to apply the Fair Share Act as written. The Superior Court correctly held that they are, and this Court should affirm.

The Fair Share Act significantly modified how liability is apportioned in civil actions. It provides that liability must be apportioned among liable defendants based on their relative share of the total liability. With some exceptions, it abrogates joint liability in favor of several liability. And it expressly provides that the liability of settled tortfeasors be decided by the jury for apportionment purposes. These features of the Fair Share Act work together to accomplish the Act's purpose of ensuring that each defendant is responsible only for its proportionate share of liability. However, Plaintiffs argue that, at least in strict liability cases, all the Fair Share Act does is replace joint liability with several liability. Plaintiffs' position is contrary to the Act's text and purpose.

First, Subsection (a.1)(1) of the Fair Share Act provides that liability must be apportioned to a defendant "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." 42 Pa.C.S. § 7102(a.1)(1). Plaintiffs claim that language is not specific enough to abrogate the former rule that liability be allocated on a per capita basis in strict liability cases. Not only does that interpretation strain the Act's plain language, but it would also render Subsection (a.1)(1) superfluous, because several liability is already established by Subsection (a.1)(2). In any case, the legislative history is clear that Subsection (a.1)(1) means what it says: liability must be apportioned, even in strict liability cases. The Act contains no exception for asbestos cases, and, as this case illustrates, it needs no exception. The jury was provided with ample evidence of relative exposure to permit an apportionment of liability.

Second, the Fair Share Act provides that "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." 42 Pa.C.S. § 7102(a.2). There is no exception for bankrupt entities.

Nonetheless, Plaintiffs insist that bankrupt settled tortfeasors should be excluded, relying on outdated law that predates the Fair Share Act. Plaintiffs ignore that the rationale for those cases – that including bankrupt entities on the verdict sheet would violate the bankruptcy stay – no longer exists under the Fair Share Act. That is because the Act provides that including bankrupt settled entities on the verdict sheet is only to facilitate apportionment, not to impose liability on the bankrupt entities. Plaintiffs' argument that the Fair Share Act contradicts the Uniform Contribution Among Tortfeasors Act is also wrong because the UCATA only applies where there is joint liability, and the Fair Share Act replaces joint liability with several liability in most cases.

ARGUMENT

I. The Fair Share Act requires the factfinder to apportion liability among tortfeasors.

A. The plain language of the Fair Share Act and its legislative purpose require that liability be apportioned in strict liability asbestos cases.

The Fair Share Act provides, in relevant part:

> (a.1)(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 . . . (iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.

42 Pa.C.S. § 7102(a.1)(1)-(3).

1. The Fair Share Act's plain language requires that liability be apportioned in strict liability asbestos cases.

Plaintiffs do not dispute that the Fair Share Act applies to this case.[4] Plaintiffs also admit, as they must, that the Fair Share Act eliminates joint liability in most cases, including strict liability cases, and replaces it with several liability. (Opening Br. at 18.) Subsection (a.1)(2) of the Fair Share Act makes that clear. However, that is not all that the Fair Share Act does.

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[4] The Fair Share Act was enacted on June 28, 2011 and was effective immediately. It applies to "causes of action which accrue on or after [its] effective date." Act 2011-17, § 3. Mr. Roverano was diagnosed with lung cancer in November 2013, and the trial occurred in April 2016.

Subsection (a.1)(1) of the Fair Share Act requires that damages be apportioned based on the "ratio of the amount of [a] defendant's liability" to the total liability. Lest there be any doubt, the General Assembly made clear that Subsection (a.1)(1) applies to actions "including actions for strict liability." Plaintiffs nonetheless argue that Subsection (a.1)(1) does not do any work at all in strict liability cases and that the former rule of per capita allocation in strict liability cases remains unchanged. (*See* Opening Br. at 18-20.) The crux of Plaintiffs' argument is that Subsection (a.1)(1) is not specific enough to change the former rule. (*See* Opening Br. at 19-20.) However, the former rule is inconsistent with any fair reading of the Act's plain language and legislative purpose.

The Fair Share Act necessarily contemplates that there will be a proportional allocation of liability among defendants – not merely that each defendant has only several (and not joint) liability for its own pro rata share. The statute defines the defendant's "proportion of the total dollar amount awarded" as "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." The statute's description of damages as a "ratio" requires that both the "amount of [a] defendant's liability" and the "amount of liability attributed to all defendants and other persons" be quantified. *See* Merriam Webster's Dictionary (available online at https://www.merriam-webster.com/dictionary/ratio) (defining "ratio" as "the indicated quotient of two mathematical expressions" or "the relationship in quantity, amount, or size between two or more things.")

If, as Plaintiffs claim, liability were to be apportioned per capita, the "amount of [a] defendant's liability" would not need to be determined. The Superior Court has held that similar language in the Comparative Negligence Act before the enactment of the Fair Share Act was "designed to allow responsible defendants to contribute to the award in proportion to their degree of negligence." *See Ottavio v. Fibreboard Corp.*, 617 A.2d 1296, 1300 (Pa. Super. 1992). The Fair Share Act extended this rule, expressly, to defendants in strict liability actions. *See also Rabovsky v. Air & Liquid Sys. Corp.*, Civil Action No. 10-3202, 2016 U.S. Dist. LEXIS 78215, at *5 (E.D. Pa. June 15,

2016) (following Section 7102 and allowing jury to determine proportion of liability for each defendant).

It cannot be that the only function of Subsection (a.1)(1) is to provide for several rather than joint liability. Several liability is already provided for in Subsection (a.1)(2), which provides that "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." If it were true, as Plaintiffs argue, that the Fair Share Act does not provide for "how liability is to be 'apportioned' amongst multiple defendants in relevant cases," then Subsection (a.1)(1) would be completely superfluous. (Opening Br. at 19.) That would violate the presumption in ascertaining legislative intent "[t]hat the General Assembly intends the entire statute to be effective and certain." 1 Pa.C.S. § 1922.

Apportionment of liability is consistent with the Fair Share Act's adoption of several liability. The American Law Institute notes that "several implications follow from imposing several liability on independent tortfeasors." RESTATEMENT

(THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 11 cmt. a. "First, a defendant held severally liable is only liable for that portion of the plaintiff's damages that reflect the percentage of comparative responsibility assigned to that defendant." *Id.* And "[s]econd, because liability is limited to defendants' several share of damages, other nonparties may be submitted to the factfinder for an assignment of a percentage of comparative responsibility."

Apportionment of liability also fits with the Act's exceptions to several liability. The Fair Share Act provides that a defendant is jointly liable if it is at least 60% liable. 42 Pa.C.S. § 7102(a.1)(3)(iii). Thus, in all cases, a jury is required to determine a defendant's relative liability in order to determine if the exception in Subsection (a.1)(3)(iii) applies. It would be illogical to suggest that juries undertake a determination of relative liability for that purpose, only for that determination to be disregarded in favor of a per capita allocation for purposes of apportioning liability. Plaintiffs claim that "[t]he 60% threshold exception can apply only to negligence actions." (Opening Br. at 22.) However, there is no basis in the statute's

text for that assertion. And it would make no sense for the Fair Share Act's rule of several liability to apply to strict liability cases, but not the exception to that rule provided by Subsection (a.1)(3)(iii).

2. The Fair Share Act's legislative history is consistent with its unambiguous text.

Plaintiffs' assertion that strict liability cases are not subject to apportionment of liability is also inconsistent with the Act's legislative history. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). "When the words of a statute are clear and free from all ambiguity," then a court gives effect to the General Assembly's intent by adhering to the statute's "letter." 1 Pa.C.S. § 1921(b). If "the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters … [t]he occasion and necessity for the statute[, t]he circumstances under which it was enacted[, and t]he mischief to be remedied," as well as "[t]he contemporaneous legislative history." 1 Pa.C.S. § 1921(c).

As described above, the Fair Share Act is unambiguous in providing that defendants in strict liability actions must be apportioned only an amount of damages proportional to their relative liability. To the extent that there is any ambiguity, the Act's legislative history is consistent with its text.[5]

The legislative history of the Fair Share Act reveals that the "mischief to be remedied" was the imposition of substantial damages on a defendant whose relative liability was small. For instance, the prime sponsor of H.B. 1 (2011-12), the predecessor

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[5] Legislative history cannot "challenge the plain language of the statute as enacted," but it is "nonetheless instructive to [the Court's] analysis and persuasive evidence . . . of the General Assembly's intent." *See Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 624 n.10 (Pa. 2010) (some punctuation omitted). It is unnecessary to rely on legislative history to construe the Fair Share Act because its language is unambiguous. However, Plaintiffs advance a construction of the Act that is contrary to its plain text. To the extent the Court determines that there is an ambiguity in the text, the Act's legislative history confirms that Plaintiff's interpretation is inconsistent with the intent of the General Assembly.

to the bill that was eventually enacted as the Fair Share Act, explained during floor debates that

> There is a growing trend toward the abrogation of [a] joint and several liability rule, where the rule is replaced by the proportionate liability rule. Under proportionate liability, a defendant's liability is limited to that part of the plaintiff's award which corresponds to the defendant's portion of the fault contributing to the plaintiff's injury.

2011 Leg. J. House 545.

The majority leader later offered additional clarification: "Under this reform … if a jury finds you 40 percent at fault in a civil lawsuit, they can collect 40 percent of the damages awarded from you." 2011 Leg. J. House 561. Put differently:

> The underlying reform says this: If you have been brought into a suit and you have been found by a jury to be X percent at fault, then those damages against you should be X percent of those damages. So let us say you were found 10 percent at fault and the damages were $1 million; they should be able to

> come after you as a defendant for that $100,000 and no more.

2011 Leg. J. House 1526 (discussing SB 1131, which was finally enacted as the Fair Share Act).

The Act's applicability to strict liability actions was specifically addressed during the floor debate on House Bill 1. The bill's prime sponsor was asked "[w]hy is the phrase 'including … strict liability' being added? What is the effect legally and otherwise?" The bill's sponsor replied that "it means what it says on its face, and that is that strict liability, actions in strict liability or strict liability that is attributed to a defendant are included in this particular section." He confirmed that the legislation "expand[ed] this to beyond negligence . . . [t]o the extent that it covers strict liability." 2011 Leg. J. House 555. A member opposing the Fair Share Act objected to its breadth on the basis that "[s]trict liability is included in this apportionment of responsibility." 2011 Leg. J. House 1560 (discussing SB 1131). However, even though both supporters and opponents of the Act recognized that the Fair Share Act included strict liability actions, the General Assembly passed it in its current form.

In addition, as the Superior Court noted, the precise question before the Court was addressed during the floor debates on "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." (Op. at 29) (citing Fair Share Act of 2002, Act No. 2002-57, P.L. 394 (June 19, 2002)). During those debates, the bill's floor manager in the House was asked:

> 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 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 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.

(Op. at 29) (quoting 2002 Pa. Leg. J. (House) 1999 (June 4, 2002)).

Plaintiffs cite two co-sponsorship memoranda discussing un-enacted legislation considered after the Fair Share Act, as well as House Bill No. 238, which would have required disclosure of claims made against asbestos-related bankruptcy trusts but was also never enacted. (Opening Br. at 31.) However, the fact that the subsequent legislation was never enacted is as consistent with a conclusion that it was unnecessary, as it is with a conclusion that the statute needed further amendment to accomplish its purpose. Ultimately, the legislature's consideration of subsequent legislation that was never enacted says nothing about the meaning of the Fair Share Act. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a

legitimate tool of statutory interpretation."); *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."); William N. Eskridge Jr., INTERPRETING LAW 240 (1st ed. 2016) (listing "subsequent history" as the "least reliable" of all legislative history); William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 94 (1988) ("The 'intent' that is constitutionally most relevant is the intent of the Congress that actually enacted the legislation.").

Further, the text of never-enacted H.B. 238 makes clear that it is consistent with the provisions already present in the Fair Share Act. It provides that it is intended "[t]o 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*." 2017 H.B. 238 § 2(2) (emphasis added).

3. The Fair Share Act supersedes prior case law holding that apportionment should be per capita in strict liability cases.

Plaintiffs rely on cases that predate the Fair Share Act to support a rule of per capita allocation of liability. (*See* Opening Br. at 20-21.) Plaintiffs' reliance is misplaced because, as described above, the Fair Share Act changed the former rule. Statutes take precedence over common law – not the other way around. *Sternlicht v. Sternlicht*, 876 A.2d 904, 912 (Pa. 2005); N. Singer, *Sutherland Statutes and Statutory Construction* § 50:01 (7th ed. 2018); *see also* 1 Pa.C.S. § 1928(a) (strict construction of statutes in derogation of the common law not applicable to statutes enacted after September 1, 1937). In addition, "general and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." *Sternlicht*, 876 A.2d at 912; (quoting Sutherland, *supra*, § 50:05). The Fair Share Act is part of a comprehensive scheme of allocating liability among parties and non-parties to litigation, as evidenced by the inclusion of specific exceptions to

its general rules as well as specific instructions that those rules apply in particular types of cases. *See* 42 Pa.C.S. § 7102(a.1)(1) (". . . including actions for strict liability . . .")

Therefore, Plaintiffs' reliance on outdated precedent, including this Court's opinion in *Walton v. Avco Corp.*, 610 A.2d 454, 462 (Pa. 1992), is unavailing. In *Walton*, this Court held that "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 462 (emphasis omitted). This Court and the Superior Court employed similar reasoning in *Baker v. AC&S*, 755 A.2d 664, 669 (Pa. 2000), *Moore v. Ericsson, Inc.*, 7 A.3d 820, 828-29 (Pa. Super. 2010), and *Glock v. Coca-Cola Co.*, 639 A.2d 1191, 1193 (Pa. Super. 1994).

These decisions were motivated by a concern that apportionment of liability would inject principles of fault into Pennsylvania's regime of strict liability. *See Walton*, 610 A.2d at 462 (citing *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978)); *Baker* 755 A.2d at at 669 ("In a strict liability action, apportionment based upon fault is impermissible as this tort

theory does not contain an element of fault."). As this Court observed in *Walton*, "[t]his Court has continually fortified the theoretical dam between the notions of negligence and strict 'no fault' liability." *Walton*, 610 A.2d at 462. However, it was within the province of the legislature when it enacted the Fair Share Act to breach that dam if it chose. The Act's plain language and its legislative history make clear that it was intended to do just that.

Further, this Court has acknowledged that the reasoning underlying *Walton* and its progeny is outdated. In *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), this Court breached the "theoretical dam" between negligence and strict liability by holding that the jury must make a determination regarding product defect. *Tincher* did not address apportionment of liability among multiple defendants, but it did step back from the absolute separation between negligence and strict liability that the Court had endorsed in *Azzarello*.

In any case, following the Fair Share Act as written does not require that strict liability be conflated with negligence. As the Superior Court noted, juries in strict liability cases are

capable of allocating liability without determining fault – for instance, by considering the relative potency of the defendants' products and the amount of time the plaintiff was exposed to them. (Op. at 28 n.9.) Such "causation-based arguments clearly suggest bases for apportionment apart from fault." (*Id.*)

Pennsylvania is not alone in requiring that liability be apportioned among tortfeasors, including in strict liability cases. The Fair Share Act is similar to legislation in numerous other states requiring fact finders to apportion liability on a percentage basis, including in products liability actions. *See, e.g.,* Fla. Stat § 768.81(3) ("In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability"); Fla. Stat. § 768.81(1)(c) (defining "negligence action" to include strict liability and products liability); Mich. Comp. Laws § 600.6304 (requiring fact finder to make findings indicating "[t]he percentage of the total fault of all persons that contributed to the death or injury"); Mich. Comp. Laws § 600.2957(1) (providing that allocation of liability extends to nonparties); N.D. Cent. Code § 32-03.2-02 (providing

that the court "may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury" and defining "fault" to include "product liability" and strict liability); N.M. Stat. Ann. § 41-3A-1(B) (abolishing joint and several liability except for enumerated exceptions, and requiring that "any defendant who establishes that the fault of another is a proximate cause of a plaintiff's injury shall be liable only for that portion of the total dollar amount awarded as damages … that is equal to the ratio of such defendant's fault to the total fault"); N.J.S.A. 2A:15-5.2 (requiring "[i]n all negligence actions and strict liability actions" that "the trier of fact shall make … as findings of fact … [t]he extent … of each party's negligence or fault"); Ohio Rev. Code § 2307.23(A) (requiring factfinder in a "tort action" to determine "[t]he percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable . . . to each party to the tort action from whom the plaintiff seeks recovery" and "to each person from whom

the plaintiff does not seek recovery in this action"); Ohio Rev. Code § 2307.011(J) (defining "tort action" to include "a product liability claim" and "an asbestos claim.")

Likewise, fact finders in other jurisdictions routinely apportion liability among defendants in strict liability actions and in toxic tort cases. *See, e.g., Gutierrez v. IMT Integral Medizintechnik AG*, 2014 WL 11512206, at *2 (N.D. Fla. Dec. 29, 2014) (citing authority); *Fisher v. Beazer E., Inc.*, 2013-Ohio-5251, ¶ 33, 2013 WL 6221367, at *6 (Oh. 8th Dist. 2013) (Ohio's apportionment statute requiring apportionment on proportionate share basis is applicable in asbestos action); *Langness v. Fencil Urethane Sys., Inc.*, 667 N.W.2d 596, 608 (N.D. 2003) (applying North Dakota's apportionment statute to toxic tort action); *Johnson v. American Homestead Mortg. Corp.*, 703 A.2d 984, 987 (N.J.App.Div. 1997) ("[T]he effect of the Comparative Negligence Law was to replace the former *pro rata* liability of join tortfeasors … with the obligation of each tortfeasor to pay damages in accordance with its own adjudicated percentage of fault."); *O'Quinn v. Wedco Tech., Inc.*, 746 F. Supp. 38, 39 (D. Colo. 1990) (interpreting Colorado's

apportionment statute, 13–21–111.5, as applying to strict product liability cases); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427-32 (Tex. 1984), *abrogated by statute as stated in Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 107 n.7 (Tex. 2018) (adopting comparative causation and allocation of liability among defendants in strict liability actions and discussing authority from various jurisdictions).

Plaintiffs' reliance on outdated precedent is also inconsistent with this Court's recent opinion in *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), and earlier precedent including *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012), and *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216 (Pa. 2007). Citing *Rost*, Plaintiffs claim that because this Court has held that multiple asbestos-containing products may be substantially causative of a plaintiff's disease, "there is no reasonable basis for a jury to determine the percentage fault of each defendant to a plaintiff's asbestos disease." (Opening Br. at 24). However, that conflates the issue of whether there is sufficient evidence to establish substantial factor causation with the issue of whether liability can be apportioned among multiple defendants, each of which

may have some level of causal responsibility. The issue in *Rost* was whether there was sufficient admissible evidence of substantial factor causation to permit a finding of liability. It does not follow from the conclusion that there may be more than one substantial cause of a plaintiff's injury that there is no basis to apportion liability among liable defendants.

In fact, *Rost* and its predecessors undermine Plaintiffs' reading of the Fair Share Act. In *Rost*, this Court explained that its refusal to "indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation," *Gregg*, 943 A.2d at 226-27, was motivated by a recognition that "it is fundamentally unfair to hold a defendant jointly and severally liable for a mesothelioma plaintiff's injuries for a de minimis contribution to the plaintiff's overall exposure." *Rost*, 151 A.3d at 1044 n.7. However, that unfairness would still exist if, for instance, one of two defendants in a strict liability case was only 5% responsible for the plaintiff's injury, yet held liable for 50% of the total damages. That would be the result under the per capita allocation that Plaintiffs insist upon,

and is an example of the unfairness that the Fair Share Act was intended to prevent.

B. The Fair Share Act applies in strict liability asbestos cases.

1. Fact finders are capable of apportionment in cases involving indivisible injuries and in strict liability cases.

The Fair Share Act requires that liability be apportioned "including [in] actions for strict liability." 42 Pa.C.S. § 7102(a.1)(1). Plaintiffs nonetheless argue that liability for "an asbestos-related disease is not capable of being apportioned," (Opening Br. at 25), and that "[t]he reason why liability must be apportioned on a per capita basis" is because of a practical concern that "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." (Opening Br. at 22.) Plaintiffs' argument is based on the assumption that, because of the nature of asbestos disease, a jury will never have sufficient evidence to apportion liability. That is the same assumption that the trial court made in refusing to apply the Fair Share Act before any evidence was

introduced: "[A]ll 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?" (R. 405-06a.) The trial court asserted that "unless there's some expert testimony that says the exposure should 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." (R. 407a.) Plaintiffs' argument, and the trial court's assumption, are wrong for two reasons.

First, Plaintiffs rely exclusively on cases that predate the Fair Share Act. (*See* Opening Br. at 25-26 (citing *Martin v. Owens-Corning Fiberglas*, 528 A.2d 947, 949 (Pa. 1985); *Gross v. Johns-Manville Corp.*, 600 A.2d 558, 566 (Pa. Super. 1991); *Ball v. Johns-Manville*, 625 A.2d 650, 658-59 (Pa. Super. 1991)); and *Glomb by Salopek v. Glomb*, 530 A.2d 1362, 1365 (Pa. Super. 1987).) Those cases were based on the general rule, articulated in the Restatement, that damages for a single harm may be apportioned among multiple causes only where "there is a reasonable basis for determining the contribution of each

cause." *Martin*, 528 A.2d at 949 (quoting Restatement (Second) of Torts § 433A)). However, the Fair Share Act's allocation requirement is mandatory in cases where the Fair Share Act applies. There is no exception based upon the quantum of evidence that is admitted to establish the defendants' relative liability. To the extent that there is a conflict between the Fair Share Act and earlier case law adopting the Restatement rule, the Fair Share Act prevails.

Second, the cases that Plaintiffs cite merely held that there was not enough evidence in those cases to submit the issue of apportionment to the jury. It does not follow that liability cannot be apportioned in cases, like this one, where there is an evidentiary basis to do so. Juries routinely apportion liability for indivisible injuries, and there is no reason to believe that they are uniquely incapable of doing so in the asbestos context. In fact, in other asbestos cases that have been tried in the Philadelphia Court of Common Pleas, courts have followed the Fair Share Act, and juries have allocated damages among co-defendants proportionally. *See* Verdict Sheets from *Ihlenfeld, et. al. v. Crown Cork & Seal Co.,* No. 1106-00269, and *Leaman v.*

Anchor Darlling Valve Co, et. al., No. 1110-02805, appended under Tab C.

Juries and courts also routinely allocate liability in other types of cases in which it would be impossible to prove with objective evidence the exact amount of liability that each defendant is responsible for. *See, e.g., Boyajian v. United States*, Civ. No. 10-1064, 2011 U.S. Dist. LEXIS 118840, at *14 (E.D. Pa. Oct. 14, 2011) (plaintiff was 10% liable for own injuries in a bicycle accident); *St. Paul Fire & Marine Ins. Co. v. Nolen Group, Inc.*, 74 Fed. R. Evid. Serv. (Callaghan) 461 (E.D. Pa. 2007) (increased stormwater runoff caused by negligently performed construction work); *Jazbinsek v. Chang*, 611 A.2d 227, 228 (Pa. Super. 1992) (auto accident); *Werner v. Quality Service Oil Co.*, 486 A.2d 1009, 1011 (Pa. Super. 1984) (fire damage).

2. There was sufficient evidence to permit an apportionment of liability.

The trial court erred by refusing to apply the Fair Share Act even before the trial began – essentially adopting a presumption that there can never be enough evidence in an asbestos case to allow for apportionment. But contrary to the

trial court's assumption, the evidence that was introduced at trial exemplifies the type of evidence that supports an apportionment of liability.

Brand offered extensive testimony by industrial hygienist Patrick Rafferty analyzing Mr. Roverano's potential exposure to insulation products installed by Brand. Mr. Roverano's own testimony established that the bulk of his exposure to asbestos products was during his employment at PECO from 1971 until 1981, when he started to take protective measures when he learned of the dangers of asbestos. Mr. Rafferty, after reviewing Mr. Roverano's testimony and work records, and based on his review of relevant literature, concluded that Mr. Roverano's exposure to products installed by Brand would have been limited to about seven months in 1973, and he characterized Mr. Roverano's exposure to products installed by Brand as "occasional." (R. 655a.) As a result, Mr. Rafferty concluded that Mr. Roverano's overall exposure to asbestos from products installed by Brand was below the background level to which Mr. Roverano would have been exposed.

Plaintiffs claim that Mr. Rafferty's testimony is inadequate to establish a basis for apportionment because Mr. Rafferty was not a medical causation expert. (Opening Br. at 28-29.) However, as described above, Plaintiffs conflate the issue of whether there is sufficient evidence to establish substantial factor causation with the issue of whether liability can be apportioned among multiple defendants, each of which may have some level of causal responsibility. In addition, Plaintiffs ignore that there was a consensus among all the experts in this case that the risk of disease from asbestos exposure is dose-responsive. As such, evidence about Mr. Roverano's dose exposure to the defendants' products – which is exactly the type of evidence that Mr. Rafferty provided – provides a basis to apportion liability.

Ultimately, whether the jury would have been persuaded by Brand's evidence is not the point. It was Brand's right to have the jury weigh the evidence and allocate liability, and the trial court's refusal to apply the Fair Share Act deprived Brand of that right.

II. The Fair Share Act requires the jury to determine the liability of settled tortfeasors regardless of bankruptcy status.

A. The plain language of the Fair Share Act requires that all tortfeasors be included on the verdict sheet.

The Superior Court was also correct to hold that the Fair Share Act requires that settled tortfeasors be included on the verdict sheet regardless of bankrupt status. Subsection (a.2) of the Fair Share Act provides:

> 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.2) (emphasis added). As the Superior Court recognized, "Section 7102(a.2) contains no exception for settling persons who are bankrupt." (Op. at 33.)

Plaintiffs nonetheless argue that the Fair Share Act was not specific enough to change the judicially established rule that precluded apportionment of liability to bankrupt tortfeasors in asbestos cases. (Opening Br. at 32 (citing *Ball v. Johns-Manville Corp.*, 625 A.2d 650 (Pa. Super. 1993); *Ottavio v. Fibreboard*, 617 A.2d 1296 (Pa. Super. 1992)).) However, the Fair Share Act does expressly change the existing rule by providing that "the question of liability of *any* defendant or other person

who has entered into a release with the plaintiff … shall be transmitted to the trier of fact." 42 Pa.C.S. § 7102(a.2) (emphasis added). It is disingenuous to suggest, as Plaintiffs do, that the General Assembly "fail[ed] to articulate any changes [to the law]." (Opening Br. at 32-33 (quoting *Birth Center v. St. Paul Cos.*, 787 A.2d 376, 387 (Pa. Super. 2001)).) To read into the statute an exception for bankrupt entities would alter the statute's meaning by effectively adding language to it, violating the intent of the General Assembly.

More importantly, under the Fair Share Act, the reason behind the judicially created rule in *Ball* and *Ottavio* is no longer valid. Even before the Fair Share Act was enacted in 2011 to provide for allocation of liability in strict liability actions and to provide for several rather than joint liability, the Superior Court recognized that trial courts should include certain settled defendants on the verdict sheet in an asbestos action in order "to allow the jury to decide if exposure to their products had been a substantial contributing factor in [plaintiff's] development of asbestos related disease." *Ball*, 625 A.2d at 659, 661; *see also Herbert v. Parkview Hosp.*, 854 A.2d

1285, 1289-91 (Pa. Super. 2004); *Nat'l Liberty Life Ins. Co. v. The Kling Partnership*, 504 A.2d 1273, 1279 (Pa. Super. 1986) (making settled non-party a defendant for purpose of listing on the verdict sheet).

However, as an exception to this rule, the Superior Court held that bankrupt manufacturers should not be included on a verdict sheet. The reason was simple: allocating liability to bankrupt companies would make them joint tortfeasors against whom other parties could seek contribution under the Comparative Negligence Act, but the other parties would be prohibited from doing so by the stay provisions of the federal Bankruptcy Code. *See Ottavo v. Fibreboard Corp.*, 617 A.2d 1296, 1300-01 (Pa. Super. 1992) (en banc); *Ball*, 625 A.2d at 660.

Under the Fair Share Act, there is no justification for an exception to the Fair Share Act's apportionment requirement for bankrupt entities or bankruptcy trusts. The Fair Share Act does not impose liability on any bankrupt entities – indeed, Subsection 7102(a.2) expressly provides that it is "[f]or the purposes of apportioning liability only" and any such "attribution of responsibility . . . shall not be admissible or

relied upon in any other action or proceeding for any purpose." As such, the concerns motivating *Ball*, 625 A.2d at 660 and *Ottavio*, 617 A.2d at 1300-01 are absent. In particular, having the jury determine whether the bankrupt entities are partly liable for Mr. Roverano's injury will not subject those entities to liability, and thus will not violate any bankruptcy stay.

There is nothing unusual about including bankrupt entities on verdict sheets in asbestos cases. Numerous courts in Pennsylvania and elsewhere have held that the liability of bankrupt entities may be considered for apportionment purposes in asbestos and other cases. *See Slayton v. Gold Pumps, Inc.*, No. GD 03-010873, 2004 Pa. Dist. & Cnty. Dec. LEXIS 335, at *4-5 (C.P. Allegheny 2004) (Strassburger, J.); *see also Bondex Int'l v. Ott*, 774 N.E.2d 82 (Ind. App. Ct. 2002); *Bifaro v. Rockwell Automation*, 269 F. Supp. 2d 143, 148 (W.D.N.Y. 2003); *In re: NYC Asbestos Litig.*, 750 N.Y.S. 2d 469, 474, 478 (N.Y. Supreme Ct. 2002).

Plaintiffs' reliance on language in Subsection (a.2) providing that "[n]othing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil

Procedure," is unavailing. (*See* Opening Br. at 33.) Including bankrupt settled tortfeasors on the verdict sheet does not require that they be joined as co-defendants. Indeed, in this case, the verdict sheet contained eight entities, even though only two defendants remained at the time of verdict. Likewise, the Fair Share Act does not change any of the elements or standards of proof of a strict liability action, and, as such, it does not "create, abolish, or modify a cause of action." 42 Pa.C.S. § 7102(c.2) (*see* Opening Br. at 19 (quoting 42 Pa.C.S. § 7102(c.2)).) Instead, it affects how damages are apportioned among multiple defendants. That does not alter the "group of operative facts giving rise to one or more bases for suing." Black's Law Dictionary (10th ed. 2014) (defining "cause of action").

Finally, Plaintiffs again rely on proposed legislation that was never enacted. (*See* Pl. Br. at 33-34.) For the reasons discussed above, this legislation is irrelevant. *See above* at 27-28. In fact, no action was taken on House Bill 1150 (2013-14) after it was referred to committee on April 8, 2013. House Bill 238 (2017-18) was referred to committee on January 31, 2017 and no

further action has been taken on it. A never considered bill that was not even rejected by a legislative vote says nothing about the intent of the General Assembly, except, possibly, that the legislature determined the bill to be unnecessary. *See O'Gilvie*, 519 U.S. at 90. Further, House Bill 238 is consistent with the Fair Share Act. It provides that "[f]or purposes of apportioning liability, the question of liability of any entity that established an asbestos trust … shall be transmitted to the trier of fact … *consistent with 42 Pa.C.S. § 7102 (relating to comparative negligence).*" *Id.* § 4(e) (emphasis added).

B. Plaintiffs' policy concerns about including bankruptcy trusts are unfounded.

1. The Uniform Contribution Among Joint Tortfeasors Act does not apply where the Fair Share Act applies

Contrary to Plaintiffs' assertion (*see* Opening Br. at 34-36), the Superior Court's decision is not inconsistent with the Uniform Contribution Among Tortfeasors Act. The plain text of the UCATA entitles a "joint tort[]feasor" to contribution after "he has by payment discharged the *common liability* or has paid more than his pro rata share thereof" 42 Pa.C.S. § 8324(b)

(emphasis added). Consideration paid by one tortfeasor in return for a release "reduces *the claim* against the other tort[]feasors in the amount of consideration paid." 42 Pa.C.S. § 8326 (emphasis added). However, the Fair Share Act provides for several liability, rather than joint liability, in most tort cases. Thus, there is no "common liability" and no single "claim." The two statutes work in harmony and should be read consistently with each other. *See* 1 Pa.C.S. § 1932.

In contrast, Pennsylvania's prior scheme involved uniform application of joint-and-several liability. *See* 42 Pa.C.S. § 7102(b) (1978) ("The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery."). That scheme required a system of contribution. *See id*. ("Any defendant who is so compelled to pay more than his percentage share may seek contribution."). Accordingly, the legislature enacted the Uniform Contribution Among Tortfeasors Act. *See* 42 Pa.C.S. § 8321 *et seq.* (1978). This Court has recognized that joint-and-several liability underlies the UCATA. *See Carrozza v. Greenbaum*, 916 A.2d 553, 565 (Pa. 2007) ("Joint and several

liability as a principle of recovery … has a solid foundation in Pennsylvania's statutory law." (citing 42 Pa.C.S. §§ 8321, *et seq*.)); *see also, e.g., Hoch v. Allied-Signal*, 29 Cal. Rptr. 2d. 615, 622 (Cal. App. 1994) (holding that California's equivalent to the Uniform Contribution Act "presupposes the existence of multiple defendants jointly liable for the same damages").

Without joint-and-several liability, there is neither common liability nor a single claim against multiple tortfeasors. *See* 42 Pa.C.S. § 7102(a.1)(2). Plaintiffs must seek a "separate and several" judgment for damages against each of the several defendants. *Id.* Because claims are "separate and several," granting a release to one tortfeasor does not affect a plaintiff's claims against other defendants. "Since overlapping liability *cannot* occur, severally liable defendants will not have any right to assert a contribution claim." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 11, cmt. c (emphasis added); *see also, e.g., Hoch*, 29 Cal. Rptr. 2d. at 622 ("Under the scheme of purely several liability … a personal injury plaintiff's valid 'claim' against one such tortfeasor … can never be the liability of 'the others'"); *Krieser v. Hobbs*, 166 F.3d 736, 743 (5th Cir.

1999) ("[W]here liability is not joint-and-several . . . there *is no* assessment of liability for damages common to the settling and non-settling defendants. Accordingly, the settlement has an entirely separate basis from the apportioned damages.") (emphasis in original); DAN B. DOBBS ET AL., THE LAW OF TORTS § 489, 79 ("In a several liability system, a non-settling tortfeasor is held liable only for his comparative responsibility share. Thus the issue of pro rata or pro tanto credits, so much a part of managing a joint and several liability system, does not arise.")

The UCATA defines "joint tort[]feasors" as "two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them." 42 Pa.C.S. § 8322. However, this definition must be read in light of the joint-and-several liability scheme that prevailed at the time of its passage and at common law. At common law, "'several' actually referred to the fact that each joint tortfeasor was severally (or separately) liable for all of the damages caused to the plaintiff." *St. Vincent Infirmary Med. Cent. v. Shelton*, 425 S.W. 3d 761, 766 (Ark. 2013), *later superseded by statute as recognized in J-McDaniel*

Constr. Co. v. Dale E. Peters Plumbing Ltd., 436 S.W. 3d 458, 465-66 (Ark. 2014) (citing *Prosser and Keeton on the Law of Torts* § 46, at 322-23, § 47, at 324-29 (5th ed. 1984)). That is distinct from the "typical modern understanding of the word 'several,'" which "is that tortfeasors are liable for only a proportion of the harm." *Id.* Thus, "the use of the disjunctive in the statute" does not "indicate[] that the UCATA still applies." *Id.*

Applying the UCATA in cases of several liability would be inconsistent with the legislative intent behind the adoption of several liability. Legislation like the Fair Share Act "reflect[s] a legislative policy favoring an apportionment of liability in accord with each party's responsibility." *Neil v. Kavena*, 859 P.2d 203, 205 (Ariz. App. 1993). Such legislation renders contribution "essentially unnecessary," except for the "few instances" where "joint and several liability still applies." *Id.* This Court has recognized as much: "'[t]he right to contribution is … based on a *common liability* to the plaintiff.'" *Walton v. Avco Corp.*, 610 A.2d 454, 461 (Pa. 1992) (quoting *Brown v. Dickey Equip. Rental Corp.*, 155 A.2d 836, 838 (Pa. 1959) (emphasis added)). Tellingly, the Uniform Law Commission rescinded the

UCATA as obsolete with the publication of the Uniform Appointment of Tort Responsibility Act. *See* UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT, prefatory note ("Given the state of the law today, the Uniform Apportionment of Tort Responsibility Act (2002) is intended to replace … the Uniform Contribution Among Joint Tortfeasors Act.") (UNIF. LAW. COMM'N 2003); *Apportionment of Tort Responsibility Act Summary*, 2 ("Joint and several liability when multiple tortfeasors act in concert remains … Otherwise, joint and several liability is not continued. If there is joint and several liability, there is also a right of contribution.") (UNIF. LAW COMM'N 2018).[6]

The majority rule is clear: "a *pro-tanto* … rule has *no* application to liability no longer both joint *and* several." *Krieser*, 166 F.3d at 744 (emphasis in original); *see also Nilsson v. Bierman*, 839 A.2d 25, 30 (N.H. 2003) ("The pro tanto credit is premised and rooted in joint-and-several liability." (citation and internal

[6] The Summary is available at http://www.uniformlaws.org/ActSummary.aspx?title=Apportionment%20of%20Tort%20Responsibility%20Act.

quotations omitted)). Most states have held that their equivalent to the Uniform Contribution Act applies only where a defendant is held jointly-and-severally liable. S*ee Krieser*, 166 F.3d at 743-44 (listing state court cases); *see also Nilsson*, 839 A.2d at 30.[7] Consequently, "[w]here proportionate liability applies, … a defendant can never be liable for more than his percentage share, because recovery is limited to his proportionate share of the total damages." *Waite v. Morisette*, 843 P.2d 1121, 1124 (Wash. App. 1993); *see also Wells v. Tallahassee Mem. Reg. Med. Cntr.*, 659 So.2d 249, 253 (Fla. 1995) ("Because a party is only liable … in proportion to the percentage of fault by which that party contributed to the accident, … a plaintiff cannot sue one party for the … damages caused by another party.").

Just as the application of joint-and-several liability occasioned the need for the UCATA, the Fair Share Act limits

[7] "Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." 1 Pa.C.S. § 1927.

the UCATA's application to the diminished sphere of joint-and-several liability. *See* 1 Pa.C.S. § 1921(c)(1) (pointing to the "occasion and necessity for the statute" as the first order of probative history of legislative intent).[8]

2. The Legislature expressed its policy intent by passing the Fair Share Act.

Plaintiffs' final argument is that the Superior Court erred because its decision contradicts a policy in Pennsylvania law "favor[ing] the injured party." (Opening Br. at 36.) Plaintiffs are wrong for two reasons. First, applying the Fair Share Act does not provide a "windfall" to any nonsettling tortfeasor. In no case, under the Fair Share Act, is a nonsettling tortfeasor responsible for a smaller share of damages than its proportion of total liability. The fact that the Fair Share Act prevents a defendant from being responsible for more than its share of liability can hardly be described as a windfall. Second, and most importantly, the text and purpose of the Fair Share Act are

[8] Even if there were a conflict between the UCATA and the Fair Share Act, then the Fair Share Act must apply because it was enacted later in time. 1 Pa.C.S. § 1936.

clear. Regardless of any judicially expressed preference for plaintiffs in tort actions, it was the Legislature's prerogative to modify that policy by enacting the Fair Share Act. PA. CONST., Art. V § 10(c).

C. There was sufficient evidence in this case for bankrupt tortfeasors to have been included on the verdict sheet.

There is no dispute that there were "appropriate requests and proofs" for the settled bankruptcy trusts to be included on the verdict sheet. *See* 42 Pa.C.S. § 7102(a.2).

In an asbestos case, plaintiffs will often release bankrupt tortfeasors from liability in exchange for a settlement payment. The payment and release are most commonly negotiated with the entity's bankruptcy trust. Asbestos plaintiffs in Philadelphia are required to identify the bankruptcy trusts to which they have applied for compensation. (R. 2a, 23a) (case management order). In this case, Plaintiffs filed bankruptcy trust claim applications with 13 different asbestos bankruptcy trusts, including 1) AC&S Asbestos Settlement Trust; 2) Armstrong World Industries, Inc. Asbestos Personal Injury Trust Settlement; 3) The Babcock & Wilcox Company Asbestos

Personal Injury Settlement Trust; 4) Celotex Asbestos Settlement Trust; 5) Combustion Engineering Asbestos Trust; 6) G-I Holdings, Inc. Asbestos Personal Injury Trust; 7) DII Industries, LLC Asbestos Personal Injury Trust (Halliburton); 8) H.K. Porter Asbestos Trust; 9) Manville Personal Injury Settlement Trust; 10) The Owens Corning/Fibreboard Asbestos Personal Injury Trust; 11) Porter Hayden Company Asbestos Trust; 12) USG Asbestos Personal Injury Trust; and 13) W.R. Grace Asbestos Personal Injury Trust. (*See* 1090a) (Brand post-trial motion).

Plaintiffs did not identify the terms of any releases they entered into.[9] However, Plaintiffs admit receiving, at a minimum, settlements from 1) Armstrong World Industries, 2) Babcock & Wilcox, 3) Celotex, 4) Fibreboard, 5) Manville, 6)

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[9] For the first time in this case, Plaintiffs have produced one of the releases (with Armstrong), by attaching it to their opening brief in this Court. However, that release was never produced in the trial court and should not be considered as part of the record on appeal. *See* Pa.R.A.P. 1921. In any case, because the UCATA does not apply, it is irrelevant whether the releases Plaintiffs entered into were pro rata or pro tanto.

Owens Corning, and 7) United States Gypsum. (*See* R. 1179-80a.) Mr. Roverano's submission of claims to these trusts is an admission by Mr. Roverano that he was exposed to asbestos products attributable to them and therefore constitutes evidence justifying their inclusion on the verdict sheet. Further, a number of these entities, including Babcock & Wilcox, Combustion Engineering, Owens Corning, Johns-Manville, US Gypsum, and W.R. Grace were specifically mentioned by Mr. Roverano in his testimony, *see* above at 8, thus providing sufficient "proof[]" for them to be included on the verdict sheet pursuant to the Fair Share Act. *See* 42 Pa.C.S. § 7102(a.2).

Brand was particularly prejudiced by the trial court's refusal to include Johns-Manville on the verdict sheet. Not only did Mr. Roverano identify Johns-Manville as the manufacturer of certain insulation products to which he was exposed (R. 440a), he testified that it was actually Johns-Manville that manufactured the insulation that Brand's installers used. (R. 498a.) Accordingly, the Fair Share Act required that the

question of Johns-Manville's partial liability be transmitted to the jury.[10]

D. In the alternative, the trial court should have molded the verdict to account for payments received from bankruptcy trusts.

In the alternative, to the extent that this Court decides that bankrupt settled tortfeasors may not be included on the verdict sheet because the UCATA applies, then the trial court should have molded the verdict to account for payments that

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[10] The Manville Trust's trust distribution procedures provide that the Manville Trust does not object to being identified on the verdict sheet in any personal injury action. 2002 Manville Trust Distribution Procedures (TDP) – January 2012 Revision, at 22, *available at* http://www.claimsres.com/documents/MT/2002%20TDPJanuary%202012%20Revision.pdf (accessed on Nov. 17, 2016) (stating that "Third-party claims may be asserted against the Trust for the sole purpose of listing the Trust on a verdict form or otherwise as necessary to ensure that any verdict reduction in respect of the Manville (or Trust) liability share is made pursuant to applicable law."). Accordingly, John Crane filed a third-party complaint against the Manville Trust for the sole purpose of including it on the verdict sheet. Because of that limited purpose, the Manville Trust should still be considered a non-party settled tortfeasor subject to 42 Pa.C.S. § 7102(a.2).

Plaintiffs received from settled tortfeasors. The UCATA provides that

> A release by the injured person of one joint tort[]feasor, whether before or after judgment, does not discharge the other tort[]feasors unless the release so provides, *but reduces the claim against other tort[]feasors in the amount of the 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. § 8326 (emphasis added). Accordingly, if the UCATA applies, then it requires that a verdict be molded to account for the terms of a settlement with a released tortfeasor. *See Baker v. ACandS*, 755 A.2d 664, 667 (Pa. Super. 2000). Not only is molding the verdict consistent with the UCATA, it is also consistent with equity. Under common law, "although a plaintiff may obtain a judgment against several . . . tortfeasors for the same harm, he or she is entitled to only one satisfaction for that harm." *Brandt v. Eagle,* 602 A.2d 1364, 1367 (Pa. Super. 1992); *see also Brown v. City of Pittsburgh*, 186 A.2d 399, 402-03 (Pa. 1962).

It is undisputed that there are settlement agreements and releases in this case, and that the verdict should therefore be molded to account for them. Accordingly, in the alternative, this Court should remand with instructions to the trial court to permit limited discovery on what releases the Plaintiffs executed, their nature (i.e., whether they are *pro rata* or *pro tanto*), and the amount that Plaintiffs have or will receive in exchange for them.

Further, as suggested by amici curiae, the Court should also consider charging the Civil Rules Committee with developing appropriate rules concerning the disclosure of settlements with bankruptcy trusts in asbestos cases.

CONCLUSION

This Court should affirm the Superior Court's December 28, 2017 order and remand to the trial court for further proceedings. Alternatively, only if this Court finds that bankrupt settled defendants should not be included on the verdict sheet, this Court should remand with instructions to the trial court to permit limited discovery on any releases entered into by the Plaintiff with bankruptcy trusts and with further instructions to mold the verdict to account for payments received or expected to be received in exchange for such releases.

Respectfully submitted,

November 19, 2018

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CERTIFICATE OF WORD COUNT

I certify that this brief is 11,366 words long and therefore complies with the word count limits in Pa.R.A.P. 2135.

/s/ Robert L. Byer

APPENDIX

TAB A

Text of 42 Pa.C.S. § 7102

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.)

TAB B

Opinion of the Pennsylvania Superior Court

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 Term, 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]

[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. **<u>"Each and Every" Exposure Testimony</u>**

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

[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

[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

[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

[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

[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

[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).

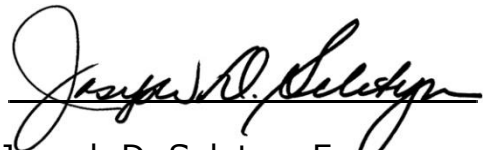
For these reasons, we hold that the trial court failed to apply the Fair Share Act in the manner intended by the Legislature and that we therefore need to remand this case for a new trial on the question of apportionment of liability.

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: 12/28/17

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.

TAB C

Verdict sheets in
Ihlenfeld, et. al. v. Crown Cork & Seal Co., No. 1106-00269 (C.P. Phila.), and
Leaman v. Anchor Darlling Valve Co, et. al., No. 1110-02805 (C.P. Phila.)

COMMON PLEAS COURT OF PHILADELPHIA
TRIAL DIVISION - CIVIL
TRIAL WORKSHEET

Event: _____, at __/__/__ __:__ in _____
Scheduled: __/__/__ , JURY MT - MASS TORT

Judge's Name: Barry I. Djerassi

Signature: X _____

Caption:
IHLENFELD ETAL VS CROWN CORK & SEAL COMPANY, INC.

Case Type:
T1 -
MASS TORT
ASBESTOS

Term and Number:
#1106-00269

If Consolidated:
Term and Number(s)

TRIAL DATE:	ACTUAL:	TOTAL AMOUNT	NUMBER OF DAYS	DATE SHEET PREPARED
May 12, 2014 May 20, 2014	(✓) JURY ( ) NON-JURY	500,251.61	12	May 20, 2014

Disposition Date: May 20, 2014

FULL DESCRIPTION OF DISPOSITION (To Be Entered VERBATIM On The Docket):

Jury Awards the Estate of William Ihlenfeld $476,251.61. Jury Awards $24,000.00 Mrs. Ihlenfeld for Loss of Consortium.
Jury Finds Default Firm Exposure is 24% at fault.

( ) DEFAULT JUDGMENT/COURT ORDERED
( ) DISPOSITIVE MOTION GRANTED
( ) DIRECTED VERDICT
( ) DISCONTINUANCE ORDERED
( ) DISCONTINUE/TRANSFER BINDING ARB

( ) FINDING FOR DEFENDANT
( ) FINDING FOR PLAINTIFF
( ) DAMAGES ASSESSED

( ) JUDGMENT ENTERED BY AGREEMENT
( ) JUDGMENT ENTERED

(✓) JURY VERDICT FOR PLAINTIFF
( ) JURY VERDICT FOR DEFENDANT
( ) MISTRIAL
( ) HUNG JURY

( ) NON-PROS ENTERED
( ) NON-SUIT ENTERED

( ) SETTLED PRIOR TO ASSIGNMENT FOR TRIAL (TEAM LEADERS, only)
( ) SETTLED AFTER ASSIGNMENT FOR TRIAL
( ) TRANSFERRED TO OTHER JURISDICTION

( ) OTHER (EXPLAIN) _____

(CONTINUED NEXT PAGE)

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

Brenda Ihlenfeld, Administratrix of the Estate of William and Brenda Ihlenfeld *Plaintiff*	:	
v.	:	**Docket No. 110600269**
Ferro Engineering, et al. *Defendants*	:	

VERDICT SHEET

Question No. 1:

Do you find that any of the following companies were negligent?

Ferro Engineering:	Yes X	No
Insul Co.:	Yes X	No
McCann Shields Paint Co.:	Yes	No X
Foseco Inc.:	Yes X	No
Universal Refractories:	Yes X	No

Proceed to Question 2.

Question No. 2:

Do you find that the products manufactured, sold, and/or supplied by the following companies were defective in that they lacked an adequate warning necessary to make them reasonably safe for their intended use?

Ferro Engineering:	Yes X	No
Insul Co.:	Yes X	No
McCann Shields Paint Co.:	Yes X	No
Foseco Inc.:	Yes X	No
Universal Refractories:	Yes X	No

If you answered "Yes" to any of the companies in Question 1 or Question 2, proceed to the next question.

If you answered "No" to all of the companies in Question 1 and Question 2, then there is no liability and you may return to the Courtroom after your foreperson has signed and dated the verdict sheet.

Question No. 3:

For any company for which you marked "Yes" in Question 1 or Question 2, please answer whether or not that company was a factual cause of William Ihlenfeld's asbestos-related mesothelioma:

Ferro Engineering:	Yes X	No
Insul Co.:	Yes X	No
McCann Shields Paint Co.:	Yes X	No
Foseco Inc.:	Yes X	No
Universal Refractories:	Yes X	No

If you answered "Yes" to any of the companies in Question 3, then proceed to Question 4.

If you answered "No" to all of the companies in Question 3, then there is no liability and you may return to the Courtroom after your foreperson has signed and dated the verdict sheet.

Question No. 4:

For any and all of the companies for which you marked "Yes" in Question 3, please determine the percentage of fault you attribute to that company or companies. The total must add up to 100 percent.

Ferro Engineering: 24 %

Insul Co.: 24 %

McCann Shields Paint Co.: 4 %

Foseco Inc.: 24 %

Universal Refractories: 24 %

TOTAL: 100%

After you have completed the percentage computation totaling 100%, please proceed to Question 5.

Question No. 5:

State the amount of damages you award as a result of William Ihlenfeld's suffering from mesothelioma under the Survival Act.

1. Damage award for physical pain, mental anguish, discomfort, inconvenience, distress, embarrassment and humiliation, loss of enjoyment of life, and disfigurement that William Ihlenfeld endured as a result of mesothelioma up until the date of his death.

$ 120,000.00

Proceed to Question 6.

Question No. 6:

State the amount of damages you award to William Ihlenfeld's survivors under the Wrongful Death Act for:

1. All medical expenses incurred to the time of death.

$ 116,251.61

2. Losses to Mrs. Ihlenfeld from Mr. Ihlenfeld's death going forward to the time Mr. Ihlenfeld would have died absent mesothelioma. This is for loss of society, comfort, services, support, assistance, and companionship to Mrs. Ihlenfeld.

$ 240,000.00

Proceed to Question 7.

Question No. 7:

Has Brenda Ihlenfeld, wife of the decedent, suffered a loss of consortium measured from the time of William Ihlenfeld's first symptoms of mesothelioma until his death? Loss of consortium is the loss of her husband's services and companionship from the onset of his illness to the date of his death.

Yes X No_____

If your answer is "No," Plaintiff Brenda Ihlenfeld cannot recover for loss of consortium, and you should sign and date the verdict sheet as completed and return to the Courtroom.

If your answer is "Yes," please proceed to Question 8.

Question No. 8:

State the amount of damages that you award to Brenda Ihlenfeld, wife of decedent, for loss of consortium.

$ 24,000.00

PLEASE SIGN AND DATE THE VERDICT SHEET AND RETURN TO THE COURTROOM.

5/20/14
Dated:

FOREPERSON

COMMON PLEAS COURT OF PHILADELPHIA
TRIAL DIVISION - CIVIL
TRIAL WORKSHEET

Event: _____ , at __/__/__ __:__ in _____
Scheduled: __/__/__ , JURY MT - MASS TORT

Judge's Name: Ramy I. Djerassi | Signature: X _____

Caption: LEAMAN VS ANCHOR DARLLING VALVE COMPANY ETAL

Case Type: T1 - MASS TORT ASBESTOS

Term and Number: #1110-02805

If Consolidated: Term and Number(s)

TRIAL DATE:	ACTUAL: (✓) JURY ( ) NON-JURY	TOTAL AMOUNT $ 1,379,000	NUMBER OF DAYS 9	DATE SHEET PREPARED Oct. 7, 2013

Disposition Date: Oct. 4, 2013

FULL DESCRIPTION OF DISPOSITION (To Be Entered VERBATIM On The Docket):

See attached case disposition sheet.

( ) DEFAULT JUDGMENT/COURT ORDERED
( ) DISPOSITIVE MOTION GRANTED
( ) DIRECTED VERDICT
( ) DISCONTINUANCE ORDERED
( ) DISCONTINUE/TRANSFER BINDING ARB
( ) FINDING FOR DEFENDANT
( ) FINDING FOR PLAINTIFF
( ) DAMAGES ASSESSED
( ) JUDGMENT ENTERED BY AGREEMENT
( ) JUDGMENT ENTERED

(✓) JURY VERDICT FOR PLAINTIFF
( ) JURY VERDICT FOR DEFENDANT
( ) MISTRIAL
( ) HUNG JURY
( ) NON-PROS ENTERED
( ) NON-SUIT ENTERED
( ) SETTLED PRIOR TO ASSIGNMENT FOR TRIAL (TEAM LEADERS, only)
( ) SETTLED AFTER ASSIGNMENT FOR TRIAL
( ) TRANSFERRED TO OTHER JURISDICTION
( ) OTHER (EXPLAIN)_____

(CONTINUED NEXT PAGE)

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

CLIFFORD LEAMAN	:	
	:	
Plaintiff,	:	OCTOBER TERM, 2011
	:	
vs.	:	NO.: 02805
	:	
JOHN CRANE, INC., et al.,	:	Docket No. 111002805
	:	
Defendants.	:	

On September 20, 2013, Plaintiff and Defendant Crane Co. settled after testimony before the jury.

On October 4, 2013, jury verdict in favor of Plaintiff and against Defendant John Crane, Inc. in the amount of $1,000,000.00 for noneconomic damages, $229,000.00 for past medical expenses and $150,000.00 for future medical expenses. Addressing cross-claims of Defendant John Crane, Inc. against non-bankrupt released defendants, the jury apportions liability as follows pursuant to the Fair Share Act, 42 Pa. C.S.A. § 7102 (a.2):

John Crane, Inc.	76%
Armstrong International	2 %
Atwood & Morrill	2%
Honeywell (Bendix)	2%
Crane Co.	2%
Edwards Valves	2%
General Electric	2%
Ingersoll Rand	2%
Velan Valves	2%
Warren Pumps Co.	2%
Westinghouse	2%
William Powell Valves	2%
Yarway Corp.	2 %

TOTAL 100%

BY THE COURT:

RAMY I. DJERASSI, J.

Date: October 7, 2013

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

CLIFFORD LEAMAN	:	
	:	
Plaintiff,	:	OCTOBER TERM, 2011
	:	
vs.	:	NO.: 02805
	:	
JOHN CRANE, INC.,	:	Docket No. 111002805
	:	
Defendant.	:	

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

CLIFFORD LEAMAN	:	
	:	
Plaintiff,	:	JANUARY TERM, 2012
	:	NO.: 00002
vs.	:	
	:	
JOHN CRANE, INC.,	:	Docket No. 120100002
	:	
Defendant.	:	

Incorrect caption. See cover page. PBJ

QUESTIONS TO BE ANSWERED BY THE JURY

QUESTION 1: Do you find that any of the following companies were negligent?

John Crane, Inc.	Yes ✓	No _____
Armstrong International	Yes ✓	No _____
Atwood & Morrill	Yes ✓	No _____
Honeywell (Bendix)	Yes ✓	No _____
Crane Co.	Yes ✓	No _____
Edwards Valves	Yes ✓	No _____
General Electric	Yes ✓	No _____
Ingersoll Rand	Yes ✓	No _____
Velan Valves	Yes ✓	No _____
Warren Pumps Co.	Yes ✓	No _____
Westinghouse	Yes ✓	No _____
William Powell Valves	Yes ✓	No _____
Yarway Corp.	Yes ✓	No _____

Proceed to Question 2.

QUESTION 2: Do you find that the products manufactured, sold and/or supplied by the following companies were defective in that they lacked an adequate warning necessary to make them reasonably safe for their intended use?

John Crane, Inc.	Yes ✓	No _____
Armstrong International	Yes ✓	No _____
Atwood & Morrill	Yes ✓	No _____
Honeywell (Bendix)	Yes ✓	No _____
Crane Co.	Yes ✓	No _____
Edwards Valves	Yes ✓	No _____
General Electric	Yes ✓	No _____
Ingersoll Rand	Yes ✓	No _____
Velan Valves	Yes ✓	No _____
Warren Pumps Co.	Yes ✓	No _____
Westinghouse	Yes ✓	No _____
William Powell Valves	Yes ✓	No _____
Yarway Corp.	Yes ✓	No _____

If you answered "YES" as to any of the companies in Questions 1 or 2, proceed to the next question.

If you answered "No" to Questions 1 and 2, then there is no liability and you may return to the Courtroom after your foreperson has signed and dated the verdict sheet.

QUESTION 3: For any company that you marked "YES" in Questions 1 or 2, please decide the issue whether or not that company was a factual cause of Clifford Leaman's asbestos related mesothelioma.

John Crane, Inc.	Yes ✓	No _____
Armstrong International	Yes ✓	No _____
Atwood & Morrill	Yes ✓	No _____
Honeywell (Bendix)	Yes ✓	No _____
Crane Co.	Yes ✓	No _____
Edwards Valves	Yes ✓	No _____
General Electric	Yes ✓	No _____
Ingersoll Rand	Yes ✓	No _____
Velan Valves	Yes ✓	No _____
Warren Pumps Co.	Yes ✓	No _____
Westinghouse	Yes ✓	No _____
William Powell Valves	Yes ✓	No _____
Yarway Corp.	Yes ✓	No _____

If you answered "Yes" to any of the companies in Question 3, then proceed to Question 4.

If you answered "No" to all companies in Question 3, then there is no liability and you may return to the Courtroom after your foreperson has signed and dated the verdict sheet.

QUESTION 4: For any and all companies for which you marked "YES" in Question 3, please write down the percentage of fault you attribute to that company or companies. The total must add up to 100 percent.

If you answered "No" to all of the companies in Questions 1 and 2, or to all the companies in Question 3, then there is no liability and you may return to the Courtroom after your foreperson has signed and dated the verdict sheet.

John Crane, Inc.	76
Armstrong International	2
Atwood & Morrill	2
Honeywell (Bendix)	2
Crane Co.	2
Edwards Valves	2
General Electric	2
Ingersoll Rand	2
Velan Valves	2
Warren Pumps Co.	2
Westinghouse	2
William Powell Valves	2
Yarway Corp.	2
	TOTAL 100%

If you have marked any company in an amount greater than 0 percent in Question 4, then proceed to Question 5.

QUESTION 5:

Please fix the amount of money that will fairly and adequately compensate Clifford Leaman for the damages he has sustained in the past and is reasonably expected to sustain in the future:

(a) Pain and suffering, embarrassment and humiliation, and the loss of the ability to enjoy the pleasures of life:

$ 1,000,000

(b) Past medical expenses:

$ 229,000

(c) Future medical expenses:

$ 150,000

Date: 10/4/2013

Signed: _____
Jury Foreperson