IN THE SUPREME COURT OF PENNSYLVANIA

Docket Nos. 26 & 27 EAP 2018

WILLIAM C. ROVERANO AND JACQUELINE ROVERANO,
Plaintiffs-Appellants,

v.

JOHN CRANE, INC. AND BRAND INSULATIONS, INC.,
Defendants-Appellees.

WILLIAM C. ROVERANO
Plaintiff-Appellant,

v.

JOHN CRANE, INC.
Defendant-Appellee.

BRIEF OF AMICI CURIAE, THE PENNSYLVANIA ASSOCIATION FOR JUSTICE AND THE AMERICAN ASSOCIATION FOR JUSTICE

On appeal from a decision of the Superior Court in 2837, 2847 EDA 2016 reversing in part an Order entered on July 27, 2016 by the Philadelphia County Court of Common Pleas in March Term 2014, No. 1123

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I. STATEMENT OF INTEREST

The Pennsylvania Association for Justice (the "PAJ") is a non-profit organization with a membership of 2,500 men and women of the trial bar of the Commonwealth of Pennsylvania. For over 45 years, PAJ has promoted the rights of individual citizens by advocating unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual group or entity. Through its *Amicus Curiae* Committee, PAJ strives to maintain a high profile in Commonwealth Courts by promoting through advocacy the rights of individuals and the goals of its membership. In this respect, PAJ has an abiding and immediate interest in the development of objectively sound case law under Pennsylvania's "Fair Share" Act.

The American Association for Justice (the "AAJ") is a voluntary national bar association whose trial lawyer members practice in every state, including Pennsylvania. AAJ was founded in 1946 to safeguard access to the courts for workers and consumers to seek legal recourse when they have been wrongfully injured. AAJ is concerned that the lower court's erroneous construction of Pennsylvania law, as well as the law governing the asbestos bankruptcy trusts, deprives injured victims and their families of the redress afforded by the law.[1]

[1] No one other than the *amici curiae*, its members, or its counsel paid in whole or in part for the preparation of this brief or authored the brief in whole or in part.

II. ARGUMENT

The PAJ and the AAJ respectfully support Mr. Roverano's effort to reverse the Superior Court's decision in this case. First, the decision misinterprets the Pennsylvania "Fair Share" Act as requiring the jury to assign pro rata responsibility to each named defendant in this asbestos case despite the paucity of facts upon which any such apportionment could be made. It was appropriate for the trial court to assign per capita responsibility to the several defendants. The approach should apply to asbestos cases generally. Second, the decision requires the jury to adjudicate liability against non-parties that are legally incapable of bearing liability. The panel disregarded foundational issues that require a contrary result—notably the fact that the bankruptcy trusts operate under the automatic stay provisions of the Bankruptcy Code. More generally, the panel's decision violates the public policy of this Commonwealth as articulated by this Court because it interferes with the ability of an injured plaintiff who has proven liability and damages to recover the full measure of the damages that the jury has awarded. These points are developed below.

A. The Pennsylvania Comparative Negligence Act allows the trial court to apportion per capita liability in asbestos cases.

The Comparative Negligence Act, as amended by the "Fair Share" Act, requires that liability be apportioned among defendants where multiple defendants have been found liable. The rule of apportionment applies to strict liability as well as negligence actions. As Section 7102(a.1) provides:

> (a.1) Recovery against joint defendants; 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 . . . .
>
> (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.

42 Pa.C.S. § 7102(a.1). By its plain language, this provision directs trial courts to enter separate and several judgments in plaintiff's favor and against each defendant found liable in proportion to each defendant's liability.

While Section 7102(a.1) requires apportionment, it does not dictate how the apportionment should be performed or who should apportion it. In particular, this provision does not require the *jury* to apportion liability in every case. *Compare* 42 Pa.C.S. § 7102(a.1) *with* 42 Pa.C.S. § 7102(a.2) (assigning task of apportioning liability among defendants and nonparties to trier of fact). Section 7102(a.1) also does not direct that apportionment should be pro rata in all cases. It does not prohibit per capita apportionment where appropriate. It is silent on that question, leaving the matter to be determined as the evidence dictates.

Here, Mr. Roverano introduced evidence that he developed lung cancer caused by exposure to asbestos in products to which he was exposed at work. Mr. Roverano

worked as a helper and carpenter for PECO from 1971 to 2001. During that 30-year period, he was exposed to asbestos contained in John Crane, Inc.'s rope and graphite packing; Brand's pipe and block insulation; DeLaval's pumps; Ingersoll Rand's compressors; Westinghouse and General Electric turbines; Westinghouse Micarta board; and J.J. White contractors' insulation. Mr. Roverano used these products often and often used them together. During trial, he introduced evidence that none of the defendants adequately warned that exposure to asbestos in their products increased the risk of developing lung cancer. They never warned him to wear a mask or respirator when he handled these products. *See* N.T., 4/7/2016, at 31-68; N.T., 4/5/2016, at 8-55; N.T., 4/1/2016, at 14-89.

At trial, Mr. Roverano's causation experts testified that asbestos is a known carcinogen and that exposure to asbestos can cause lung cancer. They testified that as asbestos is a dose-response disease, Mr. Roverano's daily exposure to asbestos over 30 years significantly increased his risk of developing lung cancer. They concluded that Mr. Roverano's cumulative exposure to the products of each defendant was a substantial factor in developing lung cancer. *See* N.T., 4/7/2016, at 31-68; N.T., 4/5/2016, at 8-55; N.T., 4/1/2016, at 14-89.

When asked to assess the contribution of each product to Mr. Roverano's lung cancer, the plaintiff's causation experts testified that there was no medical or scientific way to differentiate or individuate the causal analysis. *See* N.T., 4/7/2016, at 31-68; N.T., 4/5/2016, at 8-55; Compton Dep. at 14-89. The defendants' experts agreed.

They also testified that for an individual with substantial, lengthy exposure to various asbestos products, there was no way to determine which product caused lung cancer and which did not, or to assess relative degrees of responsibility. *See* Crapo Dep. at 131-32; Pope Dep. at 38-39.

The evidence in this case on the issue of liability and causation is characteristic of asbestos cases. Importantly, the parties agreed that it was impossible to individualize each defendant's responsibility for Mr. Roverano's cancer.

Given this evidentiary framework, the trial court removed the issue of apportionment from the jury and molded the verdict on a per capita basis among the eight defendants found liable by the jury. *See* N.T., 4/5/2016, at 8-16.

The Superior Court reversed. The panel concluded that the Comparative Negligence Act exclusively requires apportionment of liability by the jury on a pro rata basis. *Roverano v. John Crane, Inc.*, 177 A.3d 892, 907-10 (Pa. Super. 2017). The panel reasoned that the Act was ambiguous. The panel found support for its conclusion in a reading of the statute as a whole and in the statute's legislative history. *See id.*

The panel was wrong. Section 7102(a.1) of the Act is not ambiguous and is not improved by judicial insertion of statutory language that the Assembly never wrote. Section 7102(a.1) provides for apportionment of liability among defendants found liable proportional to the amount of each defendant's liability. This provision does not direct a specific method of apportionment—pro rata or per capita. It does not require individualized determinations of liability. It does not preclude a finding that each

defendant is equally liable for a plaintiff's injury. The General Assembly carefully chose the language of Section 7102(a.1)—both as to what the language says and what it does not say—to accommodate the diversity of liability scenarios and thus to leave flexibility for trial courts to apply the statute in individual cases.

In this case, the experts agreed that the evidence did not permit individualized determination of each defendant's relative contribution to Mr. Roverano's lung cancer. They reached this conclusion because (a) Mr. Roverano had exposure to numerous asbestos-containing products contemporaneously and over a 30-year period, and (b) the very nature of asbestos-caused lung cancer is such that causation cannot be traced to distinct fibers of asbestos and thus to any particular defendant. (This problem is typical in asbestos litigation.)

What the experts say cannot be done, the jurors should not be required to do. At a minimum, given the lack of evidence on the responsibility of individual defendants, jury apportionment is unfair to individual defendants who may be asked to carry more than their share of responsibility that the evidence can justify.

The trial court appropriately removed the apportionment decision from the jury given the evidence introduced at trial. Any other outcome invited an arbitrary assignment of responsibility unsupported by the evidence, which would have required correction by the trial court anyway. The Superior Court erred in requiring the trial court to submit the issue to the jury with pro rata instructions. The panel decision should be reversed and the trial court's decision reinstated.

B. Asbestos bankruptcy trusts should not be included on the verdict slip in asbestos cases.

The Superior Court also misapprehended the law regarding bankruptcy trusts and verdict slips in the Commonwealth. The Comparative Negligence Act provides that liability of any defendant or person who has entered into a release with the plaintiff and who is not party must be determined by the jury upon the evidence introduced at trial. As Section 7102(a.2) provides:

> 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. 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.

42 Pa.C.S. § 7102(a.2). The panel held that this language allows trial courts to place bankruptcy trusts on verdict slips during asbestos trials. In doing so, the panel disregarded foundational issues that require a contrary result—notably the fact that the bankruptcy trusts operate under the automatic stay provisions of the Bankruptcy Code. *See, e.g.*, *Roverano*, 2017 PA Super 415, at *32-*36.

The panel's holding overrides the Superior Court's precedent in *Ottavio v. Fibreboard*, 617 A.2d 1296, 1301 (Pa. Super. 1992) (*en banc*), which provides that "the bankruptcy rules seem to preclude an apportionment of liability for a party operating under the automatic stay provisions of the Bankruptcy Code." It likewise overrode the Superior Court's decision in *Ball v. Johns-Manville Corp.*, 625 A.2d 650, 660 (Pa. Super.

1993), which approved a trial court's refusal to submit the names of bankrupt defendants to the jurors on the same grounds.

The panel decision also runs afoul of this Court's principles of statutory construction. This Court has stated repeatedly that if a statute does not specifically articulate that it is repealing or abrogating existing precedent, the previous law may not be disregarded. *See*, *e.g.*, *Metropolitan Prop. & Liab. Ins. Co. v. Ins. Commissioner of Pennsylvania,* 580 A.2d 300, 311 (Pa. 1990) ("Under the [Statutory Construction Act, 1 Pa.C.S. §§ 1921, *et seq.*], an implication alone cannot be interpreted as abrogating existing law. The legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded.").

The Comparative Negligence Act—before or after amendment by the Fair Share Act—makes no mention of allowing for bankrupt entities on a verdict slip with regard to their liability. The Act makes no reference to bankruptcy at all. At the same time, it must be assumed that our legislature was well-aware of the gravamen of the holdings in *Ottavio* and *Ball* when the Act was adopted. *See Fletcher v. Pennsylvania Property & Cas. Ins. Guar. Ass'n*, 985 A.2d 678, 693 (Pa. 2009) (Pennsylvania's legislature is presumed to have knowledge of prior decisional law). The panel misapplied the Act for this reason as well.

In apparent recognition of this tension, the panel suggested that putting asbestos bankruptcy trusts on the instant verdict slip is not violative of *Ottavio* and *Ball*. The panel reasoned that the bankruptcy trusts are not parties and hence not subject to a

judgment or otherwise bound by a determination under the Act. *See Roverano*, 2017 PA Super 415 at *34.

In fact, *Ottavio* and *Ball* make clear that attempting to assign liability to these bankrupt entities is an exercise in futility. As a starting point, "[a]ny finding of fault against the bankrupt manufacturers would be unenforceable under the automatic stay provisions of the Bankruptcy Code." *See Ottavio*, 617 A.2d at 1301; Ball, 625 A.2d at 660 (same). Yet under the Superior Court's opinion, bankruptcy trusts would have to be named and actively participate in civil proceedings. They would be obliged to respond to discovery requests, appear at trial to testify, and participate in numerous lawsuits across the Commonwealth that will inevitably impose significant administration burdens. They will have to do so although the avoidance of such burdens is a basic policy behind the Bankruptcy Code's automatic stay and discharge provision sat 11 U.S.C. § 362. If the concept is that bankruptcy trusts would be assessed liability without being named as defendants, an equally fundamental problem emerges. "We are aware of no principle of Pennsylvania law that allows a jury to make a finding of liability against a party who has not been sued." *Ball*, 625 A.2d at 659-660.

The thrust of the panel decision to seek an adjudication of liability against non-parties that are legally incapable of bearing liability and exempt by federal law from having to participate in liability proceedings. Of course, "nothing precludes the solvent manufacturers in this case from obtaining contributions from the bankrupts when (and if) they emerge from reorganization proceedings." *See Ottavio*, 617 A.2d at 1300. In the

meantime, both federal and Pennsylvania law precludes placing bankrupt non-parties on a verdict slip.

Of course, a state statute cannot override the Bankruptcy Code by operation of the Supremacy Clause of the United States Constitution. As such, the Act cannot alter the efficacy of the Bankruptcy Code and its injunctive provisions. The panel erred for this reason as well. *See* U.S. CONST., Art. VI, cl. 2; *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (acts of state legislatures which interfere with, or are contrary to the laws of Congress, made in pursuance of U.S. Constitution are invalid under Supremacy Clause); *see also Ottavio*, *supra* (same) Ball, *supra* (same).

The panel also failed to consider the implications of *Baker v. AC&S*, an asbestos case that involved whether a non-settling defendant would be obliged to bear the burden of the shortfall between the amount paid by a settling defendant in a pro tanto release and the settling defendant's per capita share of a subsequent jury verdict. The Superior Court favorably highlighted Section 8326 of the Comparative Negligence Act, which provides:

> 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 the 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. Based on this language, the Superior Court explained that a plaintiff seeking to resolve his or her claims against fewer than all defendants can sign a pro

tanto or a pro rata release. *Baker v. AC&S*, 729 A.2d 1140, 1147 (Pa. Super. 1999).[2] With a pro tanto release, the plaintiff reduces his or her recovery against a non-settling joint tortfeasor only by the amount of consideration paid. *Id.* Applying Section 8326, the Superior Court enforced the pro tanto release as written and found that the non-settling defendant was obliged to bear the liability shortfall. This Court affirmed the Superior Court's application of Section 8326 and construction of the release. *Baker v. AC&S*, 755 A.2d 664, 670 (Pa. 2000). In doing so, the Court explained that "in windfall situations . . . the plaintiff rather than the nonsettling tortfeasor should benefit."[3]

The liability shortfall that gave rise to *Baker* continues to exist in asbestos cases. Asbestos bankruptcy trusts pay only pennies on the dollar relative to the contributions the same debtor would have paid prior to bankruptcy regarding the same claim—a ratio called the trust's" payment percentage."[4] *See* Bruce Mattock, *et al.*, "Clearing Up the False Premises Underlying the Push for Asbestos Trust 'Transparency,'" 23 WIDENER J. PUB. L. 725, 726 (June 30, 2014). Because of the pennies-on-the-dollar reality, "there

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2 The panel's interpretation of the apportionment provisions of the Act conflict with Section 8326 as well. Section 8326 became effective on June 27, 1978, whereas the Act became effective thirty-three years later on June 28, 2011. This Court's admonition in *Metropolitan Property*, *supra*, concerning the requirement that the legislature "affirmatively repeal existing law" augurs all the more strongly in favor of reversal of the Superior Court's holding in *Roverano*.

3 *See Harsh v. Petroll*, 887 A.2d 209, 218 (Pa. 2005) ("[A]s between an injured, innocent plaintiff and defendants whose breach of some duty is proximately related to the injury, it is preferable to allocate the risk of a default in the payment of due compensation to the defendants.") (*citing* 42 Pa.C.S. §§ 8321-27).

4 *See* 11 U.S.C. § 524(g).

is a shortfall between what a plaintiff would have received in compensation from a tortfeasor prior to its bankruptcy and from the trust that assumed its liabilities." *Id.*. This is not obscure information. The federal government also recognizes that bankruptcy trusts are paying only a small fraction of the amounts that their predecessors had been paying in the tort system. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, "Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts," at 2-3 (2011).

Especially because bankruptcy trusts are paying only pennies on each dollar of liability, it remains vitally important for the Court to follow the federal and state law that favors precluding bankruptcy trusts from verdict slips. The plaintiff rather than defendant should benefit from any windfall that may result. *See Baker*, 755 A.2d at 670. In the end, the Superior Court's holding in *Roverano* respecting bankrupt entities should be reversed both as a matter of law and public policy.

III. CONCLUSION

The decision of the Superior Court should be reversed with respect to the rulings concerning the apportionment of liability and the placement of bankruptcy trusts on the verdict slip.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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The undersigned hereby certifies that on this day, true and correct copies of the foregoing Brief of Amici Curiae The Pennsylvania Association for Justice and the American Association for Justice was served upon the following via first class mail:

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