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IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

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

WILLIAM C. ROVERANO AND JACQUELINE ROVERANO, H/W

Plaintiffs-Appellants
v.

JOHN CRANE, INC. AND BRAND INSULATIONS, INC.

Defendants-Appellees

No. 26 EAP 2018

WILLIAM C. ROVERANO

Plaintiff--Appellant
v.

JOHN CRANE, INC.

Defendant-Appellee

No. 27 EAP 2018

REPLY BRIEF OF APPELLANTS WILLIAM AND JAQUELINE ROVERANO

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

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INTRODUCTION

In accordance with Pa.R.App.Proc. 2113(a), Plaintiffs-Appellants hereby reply to new matters in the Briefs of Appellees, John Crane, Brand, and the Amicus Brief for the Appellees.

ARGUMENT

I. The Fair Share Act Does Not Preclude The Trial Court From Apportioning Liability On A Per Capita Basis In Strict Liability Asbestos Cases.

John Crane and Brand argue in their opposition Briefs that the Fair Share Act requires the jury to apportion damages among liable parties on a percentage basis, including strict liability asbestos cases. John Crane and Brand's argument that Section 7102(a.1) requires apportionment in all cases overlooks the fact that the original version of Section 7102 addressed the "amount of causal negligence" of a defendant's negligence whereas the current Section 7102(a.1) addresses the question of a defendant's liability and the words "liable" and "liability" are used throughout Section 7102(a.1). In asbestos cases tried on strict liability theory, one defendant cannot be more strictly liable than another defendant. Asbestos defendants are liable for their failure to warn of the dangers of asbestos. In a strict liability asbestos case that is based on a failure to warn theory, there is no factual basis to determine that one defendant is more liable than another defendant for their respective failures to warn. There is no difference between John Crane's failure to warn and Brand's failure to warn. It was uncontroverted that John Crane and Brand failed to warn. Based on the claims plaintiffs presented at trial, there was nothing for the jury to apportion. The trial court correctly recognized that requiring a jury to apportion liability in the context of strict liability claims for relief relating to asbestos would be a fool's errand due to the fact that plaintiffs presented only a strict liability failure to warn claim. The trial judge exercised his discretion and wisely rejected John Crane and Brand's request to require the jury to apportion

liability pursuant to the plaintiffs' claims based upon "fault" (a concept that has no rational application in strict liability causes of action).

John Crane and Brand's opposition Briefs focus on the testimonies of their industrial hygiene experts to support their position that there was sufficient evidence for the jury to apportion liability on a percentage basis. John Crane and Brand simply rehash the testimony of their expert industrial hygienists, which was ultimately rejected by the jury. John Crane and Brand's industrial hygiene testimony largely ignored and/or mischaracterized the testimony of Mr. Roverano regarding Mr. Roverano's significant exposure to John Crane and Brand's asbestos products. Moreover, John Crane and Brand's industrial hygiene testimony had no relevance to the plaintiffs' failure to warn claims against John Crane and Brand.

John Crane (Brief at p. 31) and Brand (Brief at pp. 35-36) argue that this Court's decision in Rost v. Ford Motor Co., 151 A.3d 1032 (Pa. 2016), undermines the plaintiffs' reading of the Fair Share Act. John Crane and Brand explain that Rost was motivated by a recognition that it is fundamentally unfair to hold a defendant liable for a *de minimus* contribution to the plaintiff's overall exposure. John Crane and Brand's argument has no relevance to the instant case as Mr. Roverano's exposure to asbestos from John Crane and Brand's products was far from *de minimus*. Mr. Roverano testified to being exposed to asbestos from John Crane and Brand's asbestos products numerous times throughout the 1971 to 1980 time period. Mr. Roverano used or was in the vicinity of these products often and John Crane and Brand's asbestos products were also often used in conjunction with and/or in the vicinity of other companies asbestos products.

John Crane (Brief at p. 35) and Brand (Brief at pp. 38-39) acknowledge that Martin v. Owens-Corning Fiberglas, 528 A.2d 947 (Pa. 1985) and Glomb by Salopek v. Glomb, 530 A.2d 1362 (Pa. Super. 1987) stand for 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. John Crane and Brand argue that the cases are not applicable because the Fair Share Act's allocation requirement is mandatory in cases where the Fair Share Act applies and there is no exception based upon the quantum of evidence that is admitted to establish the defendants' relative liability. John Crane and Brand are wrong. Even the Superior Court's Opinion recognized that post Fair Share Act, there still must be a reasonable basis for determining the contribution of each cause to a single harm:

> 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).

(Roverano Opinion, p. 28, fn.9). In Mr. Rovernao's case, the medical experts were unable to give an opinion on the proportion of contribution of each company's asbestos product to the development of Mr. Roverano's lung cancer. If they had been asked to make an educated guess as to the percentage contribution of each defendant's products to Mr. Roverano's lung cancer, they would not have been permitted to do so. If the evidence discloses, as it does here, that the individual asbestos products that Mr. Roverano was exposed to cannot be logically or reasonably separated and apportioned by medical experts, it is error to require a lay jury to do so.

Brand cites to the verdict sheets in two Philadelphia County asbestos cases, Ihlenfeld, et al. v. Crown Cork & Seal Co., and Leaman v. Anchor Darling Valve Co, et al., for the proposition that juries have allocated damages among co-defendants on a percentage basis. The verdict sheets, which are appended to Brand's Brief as Tab C, are distinguishable because both the Ihlenfeld and the Leaman case were tried under negligence theories of liability as is evidenced by Question 1 of the respective verdict sheets, whereas the Roverano case was tried on a strict liability theory only.

John Crane requests in its Brief that it is entitled to a new trial on liability **and damages.** John Crane's request is completely inappropriate as the trial judge's Order denying Post Trial Motions was affirmed in all respects other than that portion dealing with the Fair Share Act. The Superior Court upheld the jury's damages award and 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. (See Roverano Opinion, p. 36). Plaintiffs' Petition for Allowance of Appeal was limited to the Superior Court's reversal of the trial judge's Order dealing with the Fair Share Act and this Court granted Plaintiffs' Petition on that limited basis. Thus, the issue of the jury's damages verdict is not before this Court. In addition, John Crane's assertion is incorrect as Mr. Roverano's damages were fully and fairly litigated by the parties. See Rivera v. The Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 507 A.2d 1, 12 (Pa. 1986) ("In conclusion, we find no error in the proof or calculation of the damages to which Mrs. Rivera is entitled warranting a new trial. The issue relating to plaintiff's damages were fully and fairly litigated.").

II. Asbestos Bankruptcy Trusts Should Not Be Included On The Verdict Sheet.

John Crane and Brand argue in their Briefs that allowing bankrupts on the verdict sheet would not violate the Bankruptcy Code's automatic stay provisions and not be preempted by federal law. John Crane and Brand are wrong because under the Superior Court's opinion, bankruptcy trusts would be forced to 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 expensive and administration burdens on trusts with limited assets. 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 at 11 U.S.C. Sec. 362.

Brand argues in its Brief that allowing bankrupts on the verdict sheet is not inconsistent with the Uniform Contribution Among Joint Tortfeasors Act ("UCATA") because without joint-and-several liability, plaintiff must seek a "separate and several" judgment for damages against each of the several defendants and granting a release to one tortfeasor does not affect a plaintiff's claims against other defendants. (Brand Brief at pp. 50-51). Brand's argument is misplaced and incorrect as the nature of the release does affect the ability of a plaintiff to have his or her damages verdict satisfied. Based on the language of the UCATA, the Superior Court in Baker v. AC&S, Inc., 729 A.2d 1140 (Pa. Super. 1999) (**Baker I**), expressly held that a plaintiff "can sign a *pro tanto* or a *pro rata* release. If the plaintiff settles pursuant to a *pro tanto* release, the plaintiff reduces his or her recovery against a non-settling joint tortfeasor by the amount of consideration paid for the release." A *pro tanto* reduction of the bankruptcy release thus enables the plaintiff to collect the entire amount of the verdict, notwithstanding the lesser value of the Trust's contribution. In this manner, a settling plaintiff is assured recovery of the full amount of the verdict regardless of the lesser amount paid by the Trust. See Baker I, 729 A.2d at 1151. Subsequently, this Court affirmed the Superior Court's holding. See, generally, Baker v. AC&S, 755 A.2d 664 (Pa. 2000) (**Baker II**).

In support of its argument that bankrupt entities should be placed on the verdict sheet, Brand erroneously states that the payment and release associated with bankruptcy claims are commonly negotiated with the entity's bankruptcy trust. (Brief at p. 57). This is incorrect as Section 544(g) bankruptcy trusts pay a set amount depending on the asbestos disease in question. The receipt of payment from a bankruptcy trust is in no way akin to settling with a non-bankrupt

tortfeasor as asbestos bankruptcy trusts pay only a small percentage of what the debtor paid prior to its bankruptcy to settle each claim – a ratio called the trust's "payment percentage." As a result, there is a shortfall between what a plaintiff would have received in compensation from a tortfeasor prior to bankruptcy and from the trust that assumed its liabilities. Plaintiff has attached as Tab A, a payout chart of several bankrupt trusts. By way of example, Mr. Roverano made a claim with the Manville Trust. As seen from the payout chart, the Manville Trust has a payout ratio of 5.1%.

Defense Amicus spends a considerable amount of time perpetuating the myth that there is widespread manipulation of the system by plaintiffs, double dipping, and substantial amounts of dollars available to asbestos victims from the bankruptcy trusts. Those familiar with the trust system know asbestos victims often go uncompensated, and *always* end up undercompensated with respect to payments made by bankruptcy trusts. In the case herein, Mr. Roverano did submit his bankruptcy claims prior to trial and the defendants were provided with Mr. Roverano's bankruptcy claims prior to the trial of the case. Mr. Roverano received a total of $36,773.52 from the bankruptcy trusts that he submitted claims to for his metastatic lung cancer, hardly the "jackpot" defense Amicus claims. (A copy of Mr. Roverano's Bankruptcy Settlements are attached as Tab "B"). Allowing bankrupts on the verdict sheet would result in a substantial reduction of Mr. Roverano's damages verdict and make it nearly impossible for Mr. Roverano to recover the damages the jury awarded him. John Crane and Brand's share of the verdict would be substantially reduced, resulting in a windfall to John Crane and Brand, which is not what the law favors. Certainly, the underlying goal of tort law – to make the plaintiff whole – is not met by the bankruptcy trust system, particularly where the solvent manufacturers and suppliers are joint tortfeasors. Because bankruptcy trusts are paying only pennies on each dollar of liability, it

remains important for the Court to follow the federal and state law that favors precluding bankruptcy trusts from verdict slips.

II. 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,

NASS CANCELLIERE

BY: Michael A. Rowe

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Date: 12-13-18

Certificate of Compliance with Rule 2135

This Reply Brief complies with the length-of-brief- limitation of Pa.R.A.P. 2135, because this Reply Brief contains 2, 077 words. This Certificate is based upon the word count of the word processing system used to prepare this Reply Brief.

NASS CANCELLIERE

By: Michael A. Rowe
MICHAEL A. ROWE

DATED: 12-13-18

IN THE
SUPREME COURT OF PENNSYLVANIA

WILLIAM C. ROVERANO and JACQUELINE ROVERANO, h/w vs. JOHN CRANE, INC. and BRAND INSULATIONS, INC.	:	SUPREME COURT OF PENNSYLVANIA 26 EAP 2018 (Consolidated)
WILLIAM C. ROVERANO vs. JOHN CRANE, INC.	:	SUPREME COURT OF PENNSYLVANIA 27 EAP 2018 (Consolidated)

CERTIFICATION

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

NASS CANCELLIERE

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The undersigned hereby certifies that on December 13, 2018 copies of Appellants' Reply Brief was served upon the following persons in the manner stated belowl.

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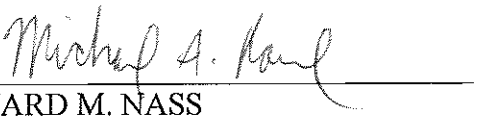

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TAB A

Updated 3-5-18 PAYMENT AMOUNTS

	MESO	Lung Cancer w/und dis	Lung Cancer-NO underlying disease	Other Cancer	Severe Asbestosis	Asbestosis	Pleural	Cash Pmt	Notes
AC&S (5.78%)	8,670.00	2,890.00	Individual Review	809.20	2,312.00	433.50	173.40	None	
APG (4.5%)	6,190.06	2,237.98	Do not file	1,047.55	1,047.55	395.23	130.95	None	mfr claims
ARTRA (.50%)	1,375.00	200.00	NOT ACCEPTED	DEFERRED	200.00	DEFERRED		None	
ASARCO (22%)	37,400.00	13,200.00	Individual Review	4,400.00	11,000.00	1,650.00	660.00	400.00	
AWI (43%)	47,300.00	18,275.00	Individual Review	9,030.00	18,275.00	4,171.00	1,591.00	400.00	
B&W (11.9%)	10,710.00	4,165.00	Individual Review	2,201.50	4,165.00	1,190.00	595.00	250.00	
Bondex (22%)	17,600.00	7,333.26	Individual Review	1,466.74	3,666.74	550.00	176.00	70.00	
Burns & Roe (32%)	19,200.00	9,600.00	Individual Review	4,800.00	8,000.00	1,600.00	640.00	200.00	
Celotex (7.7%)	10,010.00	4,466.00	3,003.00	2,002.00	2,464.00	1,232.00	616.00		These are scheduled value amts but vary based on med/exp
CE (29%)	21,750.00	7,250.00	Individual Review	1,740.00	7,250.00	1,392.00	522.00	250.00	
Congoleum (12.5%)	15,000.00	5,000.00	Individual Review	1,500.00	3,750.00	450.00	150.00	250.00	
Federal Mogul (6%)*			Individual Review						*Payable in 2 equal pmts where we will likely not receive the 2nd
FLEXITALLIC	3,000.00	637.50	Do not file	222.00	637.50	190.50	85.50	50.00	
FMP-not acc claims yet	6,000.00	1,275.00	Individual Review	442.50	1,275.00	240.00	120.00	50.00	
T&N	12,000.00	2,550.00	Individual Review	885.00	2,550.00	762.00	342.00	150.00	
Fibreboard (9%)	12,150.00	2,430.00	Individual Review	1,080.00	2,610.00	1,035.00	405.00	240.00	
Flintkote (8%)	14,720.00	1,600.00	Do not file	360.00	1,200.00	112.00	52.00	none	
GAF (7.4%)	11,470.00	3,330.00	Individual Review	1,110.00	2,220.00	614.20	194.50	150.00	
General Motors (7%)	12,250.00	3,500.00	Individual Review	700.00	3,500.00	280.00	112.00		*auto mech-no secondary exp
GM-other than auto mech	1,400.00	112.00	Individual Review	112.00	420.00	N/A	N/A		*shade tree, occasional
Halliburton (50%)	29,174.86	4,696.50	Individual Review	4,080.40	4,794.47	1,224.12	561.05	102.01	*cytology accepted only with CT scan
Harbison Walker (50%)	69,621.82	22,901.24	Individual Review	12,241.20	15,046.47	3,667.36	1,938.19	306.03	*cytology accepted only with CT scan
Hercules (6.7%)	4,690.00	938.00	N/A	261.30	435.00	73.70	73.70	None	$15 filing fee. LC does not require underlying dis.
HK Porter (3%)	600.00	360.00	360.00	225.00	112.50	112.50	112.50	None	*requires causation *or* underlying dis *or* 10 yrs exp.
Kaiser (35%)	24,500.00	9,625.00	Individual Review	4,830.00	7,262.50	1,697.50	245.00	200.00	
Keene (.8%) (fee 25%)	1,000.00	329.60	Individual Review	172.00	329.60	84.80	38.40	None	
Kentile (18%)	24,300.00	11,700.00	Individual Review	3,150.00	11,700.00	990.00	450.00	100.00	Metex trust
Leslie Controls (5%)	5,000.00	1,250.00	Individual Review	750.00	875.00	225.00	75.00	None	
Manville (5.1%)	17,850.00	4,845.00	Individual Review	2,295.00	4,845.00	1,275.00	612.00	600.00	
NARCO (100%)	75,000.00	18,000.00	DO NOT FILE	9,000.00	18,000.00	7,500.00	1,200.00	None	Do not file any IR claims
Nat'l Gypsum (28%)	6,300.00	1,050.00	NOT ACCEPTED	448.00	280.00	140.00	70.00	None	
Owens Corning (11.1%)	23,865.00	4,440.00	Individual Review	2,442.00	4,662.00	2,109.00	888.00	400.00	
PC (20%)	35,000.00	9,500.00	Individual Review	5,500.00	9,500.00	2,350.00	1,100.00	400.00	
Plibrico (1.36%)	4,760.00	1,632.00	Individual Review	884.00	1,632.00	204.00	20.00	None	
Porter Hayden (3%)	10,500.00	1,200.00	1,200.00	345.00	1,200.00	262.50	262.50	None	$1 filing fee
Quigley (14.5%)	29,000.00	5,075.00	Individual Review	2,175.00	5,075.00	725.00	290.00	None	
Raytech (.92%)	1,245.43	410.49	NOT ACCEPTED	214.21	410.49	None	None	None	
UGL (11%)	22,000.00	2,310.00	Individual Review	990.00	1,320.00	165.00	108.00	None	$50 filing fee. Only if PID
US Gypsum (25%)	38,750.00	11,250.00	Individual Review	3,750.00	7,500.00	2,075.25	656.25	400.00	
US Mineral (21.4%)	1,400.00	560.00	NOT ACCEPTED	70.00	70.00	70.00	70.00	None	
WRG (26%)	46,800.00	10,920.00		5,200.00	13,000.00	1,950.00	650.00	300.00	
Yarway (25%)	13,750.00	4,375.00	Individual Review	1,250.00	2,500.00	500.00	125.00	None	Only if Pos Q and 6 mos PID

TAB B

NASS CANCELLIERE WILLIAM ROVERANO - BANKRUPCY SETTLEMENTS CHART		
	SETTLE	
DEFENDANT	AMOUNT	DATE
Celotex	$5,180.56	02/01/16
Babcock & Wilcox	$2,018.61	02/01/16
Armstrong World Industries	$7,972.10	02/01/16
Fibreboard	$805.12	02/01/16
Manville	$1,093.75	03/21/16
Owens Corning	$1,105.97	04/06/16
U.S. Gypsum	$8,220.95	06/01/16
Armstrong World Industries	$1,822.19	12/21/16
W.R. Grace	$3,859.82	02/16/17
A.P. Green	$683.75	02/16/17
H.K. Porter	$360.00	03/03/17
Combustion Engineering	$2,175.00	05/10/17
G-I Holdings	$1,475.70	06/28/17
GRAND TOTAL	**$36,773.52**	
DIFF (UNDER)/OVER		