SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 309 EAL 2014

RICHARD AND JOYCE ROST, Appellees

v.

FORD MOTOR COMPANY, Appellant

APPEAL OF: FORD MOTOR COMPANY

BRIEF OF *AMICUS CURIAE* ATLANTIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

Appeal from the Order of the Superior Court of Pennsylvania
Entered May 19, 2014 at No. 404 EDA 2012
Affirming the Judgment of the Court of Common Pleas of Philadelphia County,
Civil Division, Number 1978, September Term 2010 (C.P. Phila. Dec. 28, 2011)

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes current and retired general counsels of some of the nation's largest and most respected corporations, partners in prominent law firms and distinguished legal scholars. In pursuit of its mandate, the Foundation has served as counsel for numerous distinguished scientists, including almost two dozen Nobel Prize winners in Chemistry, Medicine or Physiology and Physics, as *amici* in numerous cases before federal and state appellate courts, including this Court.

Atlantic Legal Foundation frequently represents physicians, chemists, geologists, physicists, epidemiologists and toxicologists as amici in cases involving issues at the intersection of law and science, and in cases involving questions of medical causation and attribution of liability. The Foundation is acutely aware of the significance of asbestos litigation nationally and in Pennsylvania, and is concerned that the mere utterance of "asbestos," together with "mesothelioma" or "cancer" can have undue impact on juries, no matter the nature or level of exposure or the asbestos fiber-type involved.

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[1] No counsel for any party authored this *amicus* brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

One of the Foundation's goals is to educate and inform judges about the correct scientific principles and methods to be applied to issues of medical causation in litigation. This case is of particular interest to the Foundation because some lower courts have deviated in important and troubling ways from this Court's approach to proof of causation in asbestos cases.

Amicus believe that the decision of the Superior Court is incorrect because the opinion of Dr. Arthur Frank, Plaintiffs' expert on medical causation, does not satisfy the legal standard articulated by this Court in *Gregg v. V-J Auto Parts Co.,* 596 Pa. 274, 943 A.2d 216 (2007) (rejecting the "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"), *Betz v. Pneumo Abex, LLC*, 615 Pa. 504, 552, 44 A.3d 27, 48 (2012) (the "every exposure" theory is "fundamentally inconsistent with both science and the governing standard for legal causation"), and *Howard v. A.W. Chesterton Co.*, 78 A.3d 605, 608 (2013) ("in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions").

The Foundation filed amicus briefs in *Betz* and *Howard* on behalf of numerous scientists. *Amicus* believe that this case presents an even more egregious example than *Betz* and *Howard* of "litigation science," that is, science that is produced for the express purpose of influencing the outcome of a case, and not for the purpose of presenting evidence-based and scientifically sound evidence to the court.

Amicus curiae respectfully submits this brief pursuant to Pa.R.App.P. 531(a).

QUESTIONS PRESENTED FOR REVIEW

1. Whether – contrary to *Howard*, *Betz*, and *Gregg* – a plaintiff in an asbestos action may satisfy the burden of establishing substantial-factor causation by an expert's "cumulative-exposure" theory that the expert concedes is simply an "any-exposure" theory by a different name?

2. Whether the Philadelphia Court of Common Pleas' mandatory practice of consolidating unrelated asbestos cases – even where the defendants suffer severe prejudice as a result – is consistent with the Pennsylvania Rules of Civil Procedure and Due Process; whether consolidation in this case was proper; and whether the Superior Court has the authority to review a trial court's case-consolidation decisions in asbestos cases?

See Order of the Supreme Court of Pennsylvania Granting the Petition for Allowance of Appeal (November 6, 2014).

Amicus will address only the first question.

STATEMENT OF THE CASE

Mr. Rost, who was 79 years of age at the time of trial, was diagnosed as having mesothelioma.

Mr. Rost's claim against Ford arose because he alleged he was exposed to asbestos from sweeping the floor in the service area of a Ford dealership while worked as a "helper" for two to four months during the summer of 1950. Mechanics at the Ford dealership did, among other work, brakes repairs and replacement and clutch repairs and replacements, but Mr. Rost was not a mechanic. The replacement brakes and clutch plates from Ford contained asbestos. The mechanics' work involved sanding brake linings and clutch plates, which produced asbestos dust to which Mr. Rost testified that he was exposed. Mr. Rost's job also included sweeping up dirt and debris in the dealership's service area. (*See* decision of Superior Court in *Rost v. Ford Motor Company*, September Term, 2010, Nos. 404 EDA 2012, 642 EDA 2012, (Super. Ct. May 19, 2014).

Mr. Rost's work history is not in dispute. Subsequent to the summer job at a Ford dealership, he was employed for several years at Tung-Sol and then at Metropolitan Edison (hereinafter "Met Ed") for 34 years until he retired in 1994. Mr. Rost was exposed to asbestos products during his professional work years, particularly at Met Ed. (Opinion of Court of Common Pleas (C.P. Phila. Dec. 28, 2011, DiNubile, J.) (hereafter "C.P. Op.") at 2. Mr. Rost testified that he was exposed to "pretty high levels of asbestos dust" at Met Ed. (R 1046a.) Mr. Rost also worked as an electrician in the boiler room at Tung-Sol, a TV vacuum tube manufacturer, from 1952 to 1953 and 1955 to 1960. (R 930a-931a, R 977a, R

981a), where he performed maintenance on the boiler and controls in the boiler room weekly (R 930a-931a, R 981a) and he worked in the in the vicinity of workers mixing asbestos cement and removing old firebrick and other asbestos products during annual boiler maintenance shutdowns, which created a dusty environment. ® 985a-987a).

The Plaintiffs' experts, principally Arthur Frank, M.D., asserted that there is no safe level of asbestos exposure. Dr. Frank based his opinion on a "cumulative exposures" theory, which he conceded was the same as the "every exposure" opinion he has advanced in prior asbestos and he admitted that his methodology has not changed in the past 30 years. ® 1269a-1272a, R 1280a, R 1338a.)[2] Dr. Frank testified "Any exposure that can be documented would, in my opinion, play a role and be causative in the development of this particular disease." ® 1376a-1377a.)[3] Dr. Frank also maintained that chrysotile fibers, which are the type in automobile friction products such as brakes and clutches, are extremely dangerous, causing mesothelioma. Another plaintiffs' expert, Arnold Brody, a cell biologist, asserted

[2] Dr. Frank's "every breath" theory was criticized and rejected by this Court in *Howard v. A.W. Chesterton Co.*, 78 A.3d 605 (2013).

[3] Dr. Frank acknowledged that there are millions of asbestos fibers in the lungs of the general population (R 1394a-1395a), that there are no qualitative differences between these background levels of asbestos and occupational exposures, but he would not testify that the background levels cause disease to a reasonable degree of medical certainty. (R 1395a.) But he did testify that one fiber above background level from a defendant's product causes disease. *(See, e.g.,* R 1395.)

that all fibers cause mesothelioma and the greater the exposure, the greater the risk. (*See* C.P. Op. at 4.)[4,5]

The trial court instructed the jury that if they found that the products in question contained asbestos, the Plaintiffs were exposed to them on a regular, frequent, and proximate basis, and this exposure contributed to the Plaintiffs mesothelioma, then there must be a finding of liability. (C.P. Op. at 7.)

The jury found in favor of both Mr. and Mrs. Rost[6], awarding the gross sum of $844,800.00 and $150,000.00, respectively. Because the jury also found three settling defendants liable, this Court molded the verdicts by reducing them one-quarter, awarding the net sum of $211,200.00 for Mr. Rost and $37,500.00 for his wife, a total of $248,700.00.

Defendant Ford Motor Company argued that the testimony of the Plaintiffs experts, particularly that of Dr. Frank, was contrary to Pennsylvania case law, which precludes the

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[4] Ford's objections at trial to the testimony of Drs. Frank and Brody were overruled.

[5] Although Dr. Frank testified about studies that measured the amount of asbestos fibers generated by use of compressed air to clean brakes during repairs, he had no measurements of Mr. Rost's exposure – or exposure of any persons who were not mechanics – to asbestos fibers during the *few months* Mr. Rost worked near dust from Ford brakes and clutches. Dr. Frank had no information about Mr. Rost's proximity, frequency, or the duration of Mr. Rost's exposure to asbestos from brakes. (R 1403a-1405a.) Dr. Frank did not know which asbestos-containing products Mr. Rost was exposed to at other companies, although he admitted that other exposures were relevant. Dr. Frank had no specific information as to the types or volume of asbestos fibers to which Mr. Rost was exposed during the *34 years* Mr. Rost worked at Met Ed or the several years Mr. Rost worked at Tung-Sol. Nevertheless, Dr. Frank's opinion remained that "[t]he cumulative exposures contributed to his disease. I still will contend whatever exposures you can show he had would have been contributory." ® 1408a).

[6] Mrs. Rost sued for loss of consortium.

"each and every breath" statement in concluding that asbestos exposure causes disease and that testimony should have been excluded. The Court of Common Pleas disagreed, holding that Dr. Frank's testimony that there is no safe level of asbestos exposure and that the greater the exposure, the greater the risk of developing mesothelioma was "in keeping with the dictates of *Gregg v. V.J, Auto Parts*, 943 A.2d 216 (Pa. 2007)." [Op. at 7]

SUMMARY OF ARGUMENT

In *Gregg v. V-J Auto Parts, Co.,* 596 Pa. 274, 292, 943 A.2d 216, 226-27 (2007), this Court explained that a plaintiff in an asbestos action must present "reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm." The Court noted further that the "fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures" is not "reasonably developed scientific reasoning." In *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (2012), this Court was critical of expert opinions which find no individual differences in the potency of the fiber, the concentration or intensity of the fibers, or the duration of exposure to a particular product. The plaintiff's expert's testimony in *Betz* that "each and every exposure to asbestos – no matter how small – contributes substantially to the development of asbestos-related diseases" is essentially no different from the testimony of Mr. Rost's experts in the instant case.

ARGUMENT

The Expert Opinions Proffered By Plaintiffs Were Based On A "Cumulative Exposures" Theory that is Indistinguishable From The "Each and Every Breath" or "Single Fiber" Theory Of Causation That This Court Has Found To Be Inadmissible

A. General and Specific Causation.

General causation addresses the question of whether exposure to the agent of concern has ever caused the disease in question. General causation considers the issue whether an agent increases the incidence of disease in a group and not whether the agent caused any given individual's disease. A toxic agent generally will not cause disease in every exposed individual because of individual varied physiological and biochemical characteristics and because of differing degrees of exposure. Michael D. Green, D. Michal Freedman & Leon Gordis, *Reference Guide on Epidemiology*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 623 (3d ed. 2010).

If general causation cannot be proven, then it is superfluous to ask the specific causation question. If general causation is established than specific causation can be addressed for the exposure history specific to the case.

Specific causation asks whether a particular individual developed his or her disease as a result of his or her exposure to the agent at issue. This requires knowledge of the individual's exposure level to the suspected causal agent. Dr. Frank did not even attempt to estimate Mr. Rost's exposure to asbestos. This implies a rejection by Dr. Frank of the generally accepted distinction between general causation and specific causation.

Specific causation is a necessary legal element in a toxic substance case. The plaintiff must establish not only that an agent is capable of causing disease, but also that it did cause the plaintiff's disease. Specific causation considers whether a specific exposure to an agent was responsible for a given individual's disease. Specific causation asks whether a chemical did cause an adverse effect under a specific set of exposure and personal circumstances. Specific causation requires a number of steps, including determination that general causation exists. The plaintiff must also show that the amount of the toxin to which he was exposed and that the mode of exposure can cause the illness he contracted.[7]

B. The Burden Of Proof In Asbestos Cases In Pennsylvania.

In *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988), the initial case in Pennsylvania setting forth a plaintiff's burden of proof in an asbestos case, the Superior Court discussed the plaintiff's burden of proof in an asbestos case:

> In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. Additionally, in order for a plaintiff to defeat a motion for summary judgment, *a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product*. Therefore, a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. Summary judgment is proper when the plaintiff has failed to establish that the defendants' products were the cause of plaintiff's injury.

Eckenrod, 544 A.2d at 52-53 (citations omitted)(emphasis added).

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[7] An additional causation issue arises when multiple defendants are allegedly responsible for exposing an individual to a harmful substance. A common example is a plaintiff who contracts an asbestos-related disease, such as mesothelioma, lung cancer or asbestosis, and, as here, was exposed to asbestos from multiple sources.

The burden of proof standard for asbestos cases established by the Superior Court in *Eckenrod* was adopted by this Court in *Gregg*, 943 A.2d 216 (2007). This Court said in *Gregg*:

> We appreciate the difficulties facing plaintiffs in this and similar settings, where they have unquestionably suffered harm on account of a disease having a long latency period and must bear a burden of proving specific causation under prevailing Pennsylvania law which may be insurmountable. . .[but] we do not believe that it is a viable solution 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 in every "direct-evidence" case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.

Gregg 943 A.2d at 226-27 (2007).

In *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (2012) this Court unanimously held that an expert opinion that each breath of even a single asbestos fiber from a defendant's product was a substantial factor in the development of asbestos-related disease is not supported by an accepted scientific methodology and does not meet Pennsylvania's test for admissibility of scientific opinion derived from *Frye v. United States,* 293 F. 1013 (D.C. Cir.1923).

In *Betz*, this Court was critical of expert opinions which find no individual differences in the potency of the fiber, the concentration or intensity of the fibers, or the duration of exposure to a particular product. 44 A.3d at 56-57. In *Betz*, this Court said the any-exposure opinion is "fundamentally inconsistent with both science and the governing standard for legal

causation." *Id*.[8] This Court also made plain that the "any exposure" theory as used by plaintiff's expert was an attempt to use general causation evidence to end run a plaintiff's burden to prove actual harm in a particular case (specific causation).

In this case, the Superior Court mistakenly believed that Betz and Gregg were somehow at odds. The clear and emphatic opinion of this Court in *Howard v. A.W. Chesterton Co.*, 78 A.3d 605 (Pa. 2013) (per curiam), should have made clear that that notion was wrong. This Court emphatically held[9]:

> "we *reaffirm* the following:
>
> • The theory that each and every exposure, no matter how small, is substantially causative of disease may not be relied upon as a basis to establish substantial-factor causation for diseases that are dose-responsive. *See Betz v. Pneumo Abex, LLC,* 615 Pa. 504, 44 A.3d 27, 55-58 (2012).
>
> • Relatedly, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions. *See id.*
>
> • Bare proof of some *de minimus* exposure to a defendant's product is insufficient to establish substantial-factor causation for dose-responsive diseases. *See Gregg v. V-J Auto Parts, Inc.,* 596 Pa. 274, 943 A.2d 216, 225-26 (2007).

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[8] *Betz* was prefigured by *Summers v. Certainteed Corp.*, 997 A.2d 1152 (Pa. 2010); while the Court in *Summers* was divided on what constituted injury, the Court was unanimous in criticizing the "every exposure above background" expert testimony for plaintiff. The majority, concurring, and dissenting opinions each stated that the "every exposure" theory was disfavored.

[9] In this case, the Superior Court seemed to think that *Gregg* and *Betz* are in tension with one another; the decision in *Howard* shows that they complement and reinforce one another. In *Howard* this Court noted that the principles enumerated are "now unremarkable propositions," and that it was highlighting this fact because "we believe, [this] may be of some benefit to Pennsylvania litigants, in terms of crystalizing the essential burdens of proof." *Howard* at 609.

> • Relative to the testimony of an expert witness addressing substantial-factor causation in a dose-responsive disease case, some reasoned, individualized assessment of a plaintiff's or decedent's exposure history is necessary. *See Betz,* 44 A.3d at 55-58.

78 A.3d at 608 (emphasis supplied).

The *Betz* and *Howard* decisions should have closed the door to the "every breath" or "single fiber" theory, but in the case at bar plaintiffs seek to avoid this Court's holdings in the *Betz*, *Gregg and Howard* trilogy, merely by engaging in a purely semantic change of "every breath" or "each fiber" to "cumulative exposure" to which each and every breath "contributes" "substantially" to causing mesothelioma.

Despite these clear holdings, plaintiffs continue to proffer "any exposure" expert opinions, usually with purely verbal differences, and sometimes, as in this case, using the very same experts whose earlier "any exposure" testimony has been disapproved and rejected by this Court, and trial courts have allowed such testimony. Unfortunately, the Superior Court has tolerated or even encouraged this approach, finding factual or procedural distinctions between the case before it ans this Court's. *See Wolfinger v. 20th Century Glove*, No. 1393 EDA 2011 (Opinion February 14, 2013) and *Campbell v. A.W. Chesterton*, No. 2005 EDA 2012 (Memorandum Opinion September 5, 2013). Ironically, in *Nelson v. Airco Welders Supply*, No. 865 EDA 2011 (Memorandum Opinion September 5, 2013) a different panel of the Superior Court rejected the opinion of the very same plaintiff's expert whose evidence was accepted in *Campbell*; the exposures in Nelson and Campbell were very similar.

In this case the Superior Court affirmed a judgment based on an expert opinion that relied on a "cumulative exposure" theory that is the "any exposure" opinion re-packaged, but substantively and scientifically no different from the causation opinions rejected in *Gregg*, *Betz,* and *Howard*. Plaintiffs' experts' opinions in this case, like those in *Gregg*, *Betz,* and *Howard* are based on the fiction that each exposure, no matter of what type or duration, are a "substantial" causes of plaintiff's condition. The opinions here, like those in *Gregg*, *Betz,* and *Howard* fail to provide any reasoned basis for supporting the conclusion that the quantity and quality of the exposure to Ford products was a substantial factor in causing Mr. Rost's disease.

C. The Inadequacies of Plaintiffs' Expert Evidence.

In this case, Dr. Frank failed to investigate the dose to which Mr. Rost was exposed, either cumulatively, by asbestos type, or by location, or by each defendant's products. Consequently, plaintiffs argue, at least implicitly, that *any* amount of exposure, no matter how trivial, was a "cause" of the plaintiff's injury.

Determining the minimum threshold of fiber levels is critical to any consideration of medical causation. Plaintiffs' experts in this case ignore one of the "central tenets" of toxicology – "the dose makes the poison." *See* Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 651 (3d ed. 2010) ("There are three central tenets of toxicology. First, 'the dose makes the poison'. . . ."); *see also* David L. Eaton, Scientific Judgment and Toxic Torts-A Primer in Toxicology for Judges and Lawyers, 12 *J.L. & Pol'y* 5, 10, 11 (2003) (in toxicology "[d]ose

is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect"); David L. Faigman, The Limits of Science in the Courtroom, in E. Borgida & S. T. Fiske, eds., *Beyond Common Sense* 303, 309 (2008) ("The first principle of toxicology is that the dose is the poison . . . .") (citation and internal quotation marks omitted).[10]

While general causation for generic "asbestos" is generally accepted, general causation is not so clear for chrysotile asbestos used in the Ford products. Dr. Frank admitted that chrysotile is considered by some experts to be less carcinogenic than other forms of asbestos in causing mesothelioma. ® 1397a). He also admitted that exposures from brakes are lower than the types of exposures at Met Ed. ® 1408a-1412a.) Plaintiffs' experts did not consider the physical, chemical and toxicological differences among various types of asbestos products from each of the defendants. Mr. Rost worked with or in the vicinity of numerous asbestos-containing products over the years including, but not limited to, brake shoes and brake linings, automobile clutches, boilers, valves, sheet packing, pipe insulation, furnace cement, radiator products and perhaps other products.

Of these exposures, the most important would be pipe insulation, boilers and furnace cement. These products can contain amphibole asbestos and are known to be (and

[10] As Dr. Irving Selikoff (whose seminal epidemiological studies on shipyard and insulation workers are credited as raising awareness of the hazards of occupational exposure to asbestos) observed, "different occupations vary widely in important respects; in intimacy, intensity and duration of exposure, in variety and grade of asbestos used, in working conditions, in concomitant exposure to other dusts or inhalants." I. J. Selikoff, *et al.,* The Occurrence of Asbestosis Among Insulation Workers in the United States, 132 *Ann. N.Y. Acad. Sci*. 139 (1965).

characterized by Mr. Rost as) dusty; they are known to be associated with an increase risk of asbestos-related diseases. *See* World Health Organization, International Programme on Chemical Safety, *Asbestos and Other Natural Minerals*, Environmental Health at 12 (1986); A. M. Langer & R. P. Nolan, Asbestos in the Lungs of Persons Exposed in the USA, in 53:2 *Monaldi Archive for Chest Disease* 168 (1998).

The length, proximity, intensity and, most important, duration of Mr. Rost's exposures varied, but his exposure to asbestos from boilers and pipes he worked on and near at Met Ed for 34 years overwhelms his exposure to Ford automotive products during a summer job that lasted two to four months.

CONCLUSION

Amicus believes that the decisions in this case of the trial court and Superior Court ignore or seriously misconstrue this Court's holdings in *Gregg, Betz* and *Howard* because it permits a plaintiff in an asbestos exposure case to dispense with the frequency, regularity, and proximity requirements and to defeat summary judgment by use of generic and scientifically inadequate "expert" affidavits.

For the foregoing reasons, the Court should reverse the decision of the Superior Court.

January 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

Martin S. Kaufman, Counsel for *Amicus Curiae* Atlantic Legal Foundation, hereby certifies that two copies of the Brief *Amicus Curiae* in Support of Defendant-Appellant Ford Motor Company were served by Federal Express on January 19, 2015 on counsel listed below:

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