NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MICHELLE WOLFINGER, ADMINISTRATRIX OF THE ESTATE OF ROBERT F. WOLFINGER Appellee v. 20TH CENTURY GLOVE CORPORATION OF TEXAS, ET AL. APPEAL OF: THE LINCOLN ELECTRIC COMPANY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1393 EDA 2011

Appeal from the Judgment Entered April 13, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): January Term, 2005, No. 3053

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.: Filed: February 14, 2013

Appellant, The Lincoln Electric Company (Lincoln), appeals from the judgment entered April 13, 2011, awarding Appellee, the Estate of Robert F. Wolfinger (Estate), the sum of $952,281.68[1] for damages caused by Decedent, Robert F. Wolfinger's, exposure to respirable asbestos fibers contained in Lincoln's welding rods. After careful review, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] The judgment amount includes the verdict award of $825,000.00 plus $127,281.68 delay damages.

On January 27, 2005, Decedent filed an asbestos product liability complaint against numerous defendants, including Lincoln, alleging he suffered from an asbestos related illness caused by his exposure to the defendants' products. Shortly thereafter, Decedent died and the administratrix of his Estate was duly substituted as plaintiff. Between March 9, 2007 and December 16, 2009, the various defendants, including Lincoln, filed myriad motions for summary judgment. On January 26, 2010, the trial court denied Lincoln's motions for summary judgment and the case proceeded to trial.

In anticipation of trial, Lincoln filed a number of motions *in limine* and pretrial motions. Among other issues, Lincoln objected to proceeding with a reversely bifurcated trial.[2] Lincoln also sought to preclude testimony or evidence from the Estate's causation expert on various grounds, including a ***Frye***[3] challenge to the scientific methodology employed when forming his opinions.

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[2] In a reversely bifurcated trial, the jury in phase one is tasked with determining whether the plaintiff had contracted the asbestos caused illness (in this case Pleural Thickening); whether that condition caused disability, impairment, or death; and what amount of damages, if any, were incurred. In phase two, the jury is tasked with determining whether the plaintiff inhaled asbestos from the defendant's product; whether the product was defective; and whether the defective product was a factual cause of the plaintiff's injury. ***See Fritz v. Wright***, 907 A.2d 1083, 1095, n.10 (Pa. 2006).

[3] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

The trial court denied Lincoln's motions. Phase one of the trial took place from April 15, 2010 to April 23, 2010, wherein the jury determined Decedent suffered from asbestos-caused Pleural Thickening and awarded a damage amount of $825,000.00. Phase two of the trial took place from April 28, 2010 to May 5, 2010, wherein the jury found Lincoln's asbestos-containing welding rods were defective and were a factual cause of Decedent's injury.

Lincoln filed timely post-trial motions, seeking judgment *non obstante verdicto* (JNOV), new trial, or molding of the verdict. The trial court denied Lincoln's post-trial motions on November 3, 2010.[4] On April 13, 2011, upon praecipe of the Estate, judgment was entered in favor of the Estate and against Lincoln in the amount of $952,281.68. Lincoln filed a timely notice of appeal on May 11, 2011.[5]

On appeal, Lincoln raises the following issues for our consideration.

> I. Did the trial court commit prejudicial error in failing to exclude testimony from Plaintiff's proffered liability expert and failing to grant a judgment n.o.v. or a new trial in response to Lincoln's post-trial motions where:
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> a. The trial court, which denied Lincoln's request for a ***Frye*** hearing, erroneously permitted Plaintiff's liability

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[4] Additionally, the Estate filed a motion for delay damages which the trial court granted, and molded the verdict accordingly. ***See*** n.1 ***supra***.

[5] Lincoln and the trial court have complied with Pa.R.A.P. 1925.

> experts in each phase of trial to opine that any exposure to asbestos is a substantial contributing factor to asbestos disease, a view that has been soundly rejected by the Pennsylvania Supreme Court in ***Gregg v. V-J Auto Parts Co.***, 943 A.2d 216 (Pa. 2007) and, more recently, in ***Betz v. Pneumo Abex LLC***, 44 A.3d 27 (Pa. 2012);[6] and
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> b. The trial court erroneously admitted the testimony of Plaintiff's sole liability expert in Phase 2, Arthur Frank, M.D., even though Plaintiff's hypothetical questions to Dr. Frank had no evidentiary support and even though Dr. Frank had no expertise independent of the defective hypothetical questions to render any competent opinion about asbestos fiber release from welding rods; and

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[6] The Estate avers that Lincoln has waived its challenge to the trial court's failure to hold a ***Frye*** hearing to test the scientific basis of Dr. Frank's expert opinion testimony by failing to include the claim in its Rule 1925(b) statement. Estate's Brief at 13. In its Rule 1925(b) statement, Lincoln, in pertinent part, averred the trial court erred "(1) in admitting the unreliable and incompetent expert testimony of Dr. Arthur Frank … in support of [the Estate's] theory of causation; (2) in admitting the unreliable and invalid "each and every breath" testimony of Dr[.] Frank … in support of [the Estate's] theory of causation." Lincoln's Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal, 6/1/11, at 2, ¶2. Accordingly, we agree Appellant has waived its challenge to the trial court's failure to conduct a ***Frye*** hearing before admitting Dr. Frank's expert testimony. However, Lincoln claims the Estate's waiver argument "misses the point" and suggests its "arguments in support of [JNOV] have never turned on the trial court's erroneous failure to hold a ***Frye*** hearing *per se*, but rather on the legal insufficiency of Dr. Frank's 'any exposure' causation opinions as the sole support for his substantial factor opinion that welding rods caused harm in this case." Lincoln's Reply Brief at 4. Accordingly, it is in this context we view Lincoln's first issue.

c. Neither Plaintiff's hypothetical questions nor his experts' testimony met the legal standard for causation of asbestos-related disease?

II. Did the trial court commit prejudicial error in precluding all evidence regarding Plaintiffs applications to bankruptcy trusts and failing to grant a new trial in response to Lincoln's post-trial motions where:

a. Decedent's admissions of significant exposure to friable asbestos products in his applications for compensation to bankruptcy trusts were a critical element of Lincoln's defense and the trial court's erroneous preclusion of this relevant and admissible evidence, even after Plaintiff opened the door to its admission, prejudiced Lincoln's defense and allowed Plaintiff to manipulate the exposure evidence and undermine Lincoln's experts' credibility; and

b. The trial court at a minimum erroneously failed to compel production of any settlements received from bankruptcy trusts and to apply the trust recoveries to reduce the Phase 1 verdict pursuant to ***Reed v. Allied Signal***, 2010 Phila. Ct. Com. Pl. LEXIS 410, 20 Pa. D. & C.5th 385 (Philadelphia County, 2010), affd, ***Reed v. Honeywell Int'l, Inc.***, 2011 Pa. Super. LEXIS 4797 (Pa. Super. 2011), appeal denied by ***Reed v. Honeywell Int'l***, 2012 Pa. LEXIS 1942 (Pa., Aug. 23, 2012).

III. Did the trial court commit prejudicial error in permitting the case to be tried in a reverse-bifurcated manner or then refusing to empanel a new jury in the Phase 2 proceedings?

Lincoln's Brief at 8-9.

In all three of its issues, Lincoln challenges the trial court's refusal to grant its post-trial motions for JNOV or new trial. Our standard and scope of review for these questions are well established.

> In reviewing a motion for [JNOV], the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, a [JNOV] should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.
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> There are two bases upon which a [JNOV] can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
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> Similarly, when reviewing the denial of a motion for new trial, we must determine if the trial court committed an abuse of discretion or error of law that controlled the outcome of the case.

Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943, 950-951 (Pa. Super. 2009) (internal quotations and citations omitted), *appeal denied*, 19 A.3d 1051 (Pa. 2011).

In its first issue, Lincoln argues that the trial court erred in allowing, Dr. Frank, the Estate's phase-two expert witness, to testify on the issue of causation. Lincoln's brief at 18. Lincoln advances three bases for this contention. First, Lincoln argues the evidence was inadmissible because the scientific basis for the opinions expressed was questionable and should have been subjected to a ***Frye*** hearing. ***Id.*** Second, Lincoln argues that Dr. Frank lacked the appropriate qualifications to opine on "Decedent's alleged level of exposure from Lincoln products," and that the hypothetical questions posed to elicit such an opinion were "incomplete and inaccurate." ***Id.*** at 19. Third, Lincoln avers the opinions expressed were legally insufficient to establish causation in an asbestos case. ***Id.*** at 26. The former claims implicate Lincoln's motion for new trial, which, as noted above, we review for an abuse of discretion. The latter claim implicates its motion for JNOV, which presents a legal question.

We begin with Appellant's first two sub-claims. With respect to the trial court's evidentiary rulings, we recognize the following additional standard of review. "Generally, an appellate court's standard of review of a trial court's evidentiary rulings is whether the trial court abused its discretion; however, where the evidentiary ruling turns on a question of law our review is plenary." ***Buckman v. Verazin***, 54 A.3d 956, 960 (Pa. Super. 2012), *quoting* ***Dodson v. Deleo***, 872 A.2d 1237, 1241 (Pa. Super. 2005).

> In order to find that the trial court's evidentiary rulings constituted reversible error, such rulings

> must not only have been erroneous but must also have been harmful to the complaining party. Appellant must therefore show error in the evidentiary ruling and resulting prejudice, thus constituting an abuse of discretion by the lower court.

Whitaker v. Frankford Hosp. of City of Philadelphia, 984 A.2d 512, 522 (Pa. Super. 2009) (internal quotation marks and citations omitted). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Commonwealth v. Dengler***, 890 A.2d 372, 379 (Pa. 2005) (internal quotation marks and citations omitted).

In support of its central assertion that Dr. Frank's testimony was inadmissible, Lincoln relies heavily on our Supreme Court's recent decision in ***Betz v. Pneumo Abex LLC***, 44 A.3d 27 (Pa. 2012). Lincoln suggests ***Betz*** stands for the proposition that an "any-breath exposure" causation opinion is "insufficient to support the Phase[-]2 verdict." Lincoln's brief at 24. We conclude Lincoln misapplies the holding of ***Betz*** to this case. At the direction of the trial judge, the ***Betz*** case was presented as a test case for the question of whether an opinion that each exposure to respirable asbestos fibers contributes to the cause of an asbestos related disease is sufficient to establish substantial causation from a particular product **without** a review of the defendant's overall history of exposure to that product. ***Betz***, ***supra*** at 31. At issue in ***Betz***, therefore, was whether "the any-exposure opinion

[can serve as] a means **in and of itself**, to establish substantial-factor causation." ***Id.*** at 55 (emphasis added). As such, the trial court was not asked to consider Betz's individual exposure history in determining whether Betz met her burden in a summary judgment context to establish that the defendant's product was a substantial factor in causing her illness. ***Id.*** Rather, the trial court questioned whether substantial factor causation can be established based solely on an expert's "every breath" causation opinion in the absence of defendant's overall history of exposure to a particular product.

In ***Betz***, the trial judge required a ***Frye*** hearing to determine whether the expert's opinion in that case was based on accepted scientific methodology. ***Id.*** at 33. The trial court focused on Betz's expert's use of extrapolation to form his opinion. ***Id.*** Specifically, could the fact that every inhalation of asbestos fibers contributes to disease scientifically support, by extrapolation, a conclusion that any exposure to asbestos fibers from a particular product is a substantial factor in the cause of the disease? ***Id.*** It was that extrapolation, which the trial court found failed to satisfy ***Frye***. ***Id.*** at 34.

> In this regard, Dr. Maddox's any-exposure opinion is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive. Indeed, it is worth repeating the following excerpt from the pathologist's own testimony making the point:

> > Now, individual exposures differ in the potency of the fiber to which an individual is exposed, to the concentration or intensity of the fibers to which one is exposed, and to the duration of the exposure to that particular material. *So those are the three factors that need to be considered in trying to estimate the relative effects of different exposures.* But all exposures have some effect.
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> N.T., Oct. 17, 2005 (p.m.), at 37 (emphasis added). The any-exposure opinion, as applied to substantial-factor causation, does not consider the three factors which Dr. Maddox himself explains "need to be considered in trying to estimate the relative effects of different exposures." ***Id.***

Id. at 56 (footnote omitted).

Instantly, Lincoln asserts that "like Dr. Maddox in ***Betz***, Dr. Frank offered a broad-scale opinion on causation applicable to anyone inhaling a single asbestos fiber above the background exposure levels even though he, again like Dr. Maddox, acknowledged that asbestos-diseases are dose-responsive." Lincoln's Brief at 25 (internal quotation marks and citation omitted). However, Dr. Frank's each and every breath theory of general causation was not proffered to **alone establish substantial factor** causation of Decedent's illness and death from exposure to Lincoln's products. Other evidence, as discussed herein, was considered by the jury to determine if Decedent's exposure to respirable asbestos fibers from Lincoln's welding rods over time was a substantial factor in causing Decedent's illness. Importantly, the ***Betz*** Court noted that it was not

confronted with reviewing the adequacy of an "any-breath" opinion coupled with a specific history of a plaintiff's exposure to an identified product in the ***Betz*** case appeal. "There may have [] been other evidence upon which [***Betz***] might have relied to avoid the summary judgment ruling which ensued in her case after the more generic ***Frye*** determination covering all the test cases. In light of our review … we refrain from comment on this separate question." ***Betz***, ***supra*** at 55 n.34 (citation omitted).

Dr. Frank's testimony that each exposure to respirable asbestos fibers contributes to asbestos-caused diseases addressed general cumulative causation and was relevant to, albeit not dispositive of, the issue of substantial factor causation from Lincoln's products. Dr. Frank did not opine by extrapolation of this fact of general causation that **any** exposure from Lincoln's products must be considered a substantial factor in causing Decedent's illness. Rather, Dr. Frank's expressed opinions regarding substantial factor causation were in response to hypothetical questions posed, which assumed particular circumstances, frequency, and duration of Decedent's exposure to respirable asbestos fibers from Lincoln's welding rods. Deposition of Arthur Frank, M.D., 4/20/10, 26-28. His responses were also grounded in his experience with welders, asbestos containing welding products, epidemiological studies, and encapsulation methods. ***Id.*** at 34-35, 38, 39.

For these reasons, we conclude the trial court did not abuse its discretion in admitting Dr. Frank's deposition testimony to the jury. Accordingly, the trial court did not err in refusing to grant Lincoln a new trial on these grounds.

We turn now to address Lincoln's third sub-claim, its assertion that the trial court erred in failing to grant its motion for JNOV where the Estate failed "to adduce any competent evidence that Decedent sustained "any exposure" to asbestos fibers from Lincoln's welding rods." Lincoln's Brief at 26. Underlying this claim is Lincoln's assertion that the hypothetical questions posed by the Estate's counsel to Dr. Frank "assumed 'facts' that had no support in the record, were never proved, and certainly were not admitted by Lincoln." ***Id.*** at 19, n.6. A portion of the pertinent testimony is as follows.

> BY [COUNSEL FOR THE ESTATE]:
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> Q. Doctor, I would like you to discuss with me the case of a gentleman who, unfortunately, has passed away, by the name of Robert Wolfinger. First I'd like you to assume that in Phase One of this trial a jury has determined that he suffered from an asbestos-related illness, and I would also like you to assume that during the course of Mr. Wolfinger's career, he worked for a company by the name of Burdett Oxygen, and he worked for them for many, many years, I think to be exact, it was approximately 27 years. And during 12 years of his work, he worked as a maintenance man. And during those 12 years that he worked as a maintenance man, he would weld. And during that welding, he would be using rods which he characterized as 6010 rods, 7014 rods and 7018 rods, some or all of which

> contained asbestos. I would also like you to assume that during the course of doing that welding over 12 years Mr. Wolfinger testified that there were times when he would take those rods out of a box and that dust would be created that he inhaled. I would also like you to assume that there were times when he indicated that welding rods would be tossed on the floor and that flux would break off of those various rods that I mentioned and create more dust, and that on some occasions he would be cleaning the area where he had welded sometimes twice a day, which would also cause this dust to dissipate. Assuming that those rods or that some or all of those rods contained asbestos, do you believe the exposure to that dust would have contributed to any asbestos disease that the jury found that Mr. Wolfinger had?
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> A. Yes.
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> ...
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> Q. Okay. And assuming that Mr. Wolfinger testified that when he would empty welding rods out of a box or when he would walk on a welding rod that still had flux it [sic] and dust would come up from that process and also cleaning up that area, dissipating the dust again, do you believe that that dust, assuming that those rods contained some asbestos fibers, would contribute to any asbestos disease that this jury has found Mr. Wolfinger had?
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> ...
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> THE WITNESS: Yes, I would believe that that asbestos, like any other asbestos, would contribute to whatever disease he is judged to have.

Deposition of Arthur Frank, M.D., 4/20/10, 26-28, 40 . The trial court noted that Decedent testified by deposition about his "regular exposure to asbestos at his full time job over the course of 25 years." Trial Court Opinion, 5/8/12,

at 7. The trial court found this evidence factually supported the hypothetical questions posed to Dr. Frank. ***Id.*** Based on our review of the record, we agree.

The trial court also found the evidence satisfied the Estate's burden to provide "evidence of frequent, regular and close exposure to Lincoln's asbestos-containing product." ***Id.***, *citing* ***Gregg v. V-J Auto Parts, Co.***, 943 A.2d 216 (Pa. 2007) (holding "each-and-every breath" theory of causation is insufficient to establish substantial factor causation without showing of frequent, regular and close exposure to asbestos from a defendant's product). Lincoln insists that Decedent's testimony about his exposure to "dust" from his handling and use of its asbestos-containing welding rods was legally insufficient to prove inhalation of respirable asbestos fibers. Lincoln's Brief at 26. Lincoln acknowledges that this Court's decision in ***Donoughe v. Lincoln Electric Co.***, 936 A.2d 52 (Pa. Super. 2007) establishes that "lay testimony can support a claim of exposure to asbestos." ***Id.*** at 72.

> In a products liability case involving asbestos exposure, a plaintiff must present evidence that he or she inhaled asbestos fibers shed by the defendant's product. Ideally, a plaintiff will be able to directly testify that he or she breathed in asbestos fibers and that those fibers came from the defendant's product. However, absent such direct evidence, a plaintiff may rely on circumstantial evidence of exposure, namely, the frequency of the use of the product and the regularity of his or her employment in proximity thereto.

Id. at 62 (internal quotation marks, brackets and citations omitted).

Indeed, the facts in ***Donoughe*** are strikingly similar to the facts presented to the jury in the instant case.

> During Phase II of the trial, Donoughe testified that he worked as a welder from 1974 to 2000, and during that time used Number 6011 welding rods, some of which were manufactured by Lincoln, and some of which were manufactured by Hobart. Donoughe knew that he had used 6011 welding rods manufactured by Lincoln and Hobart because he saw the respective manufacturer's name on the boxes of rods and the number 6011 on the rods themselves. Donoughe also testified that he inhaled dust emanating from the welding rods when he removed them from their containers and when he chipped, wire-brushed, or chiseled off a residue coating, known as slag, that was formed after the weld. He further testified that there were no warnings on the containers or rods concerning the dangers of inhaling asbestos dust. Dr. Epstein then testified that each and every inhalation of asbestos from any asbestos product, including welding rods, substantially contributes to asbestos-related diseases, such as Donoughe's lung cancer.
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> Also during Phase II of the trial, Donoughe introduced evidence that the Lincoln and Hobart 6011 welding rods, which Donoughe had worked with and which emanated dust that he breathed, contained and were manufactured with asbestos.

Id. at 64-65.

Nevertheless, Lincoln sets forth the following argument.

> ***Donoughe*** has essentially been rendered irrelevant in light of ***Betz***, ***supra***. Indeed, after Dr. Maddox's "any exposure" testimony was precluded in Betz, summary judgment was granted in favor of defendants. ***Id.*** at 40. Clearly, then, a case cannot proceed to jury based solely on lay testimony that

> "dust" is associated with a product or, for that matter, an expert opinion based on lay testimony about "dust" versus respirable asbestos fibers. ***See***, ***e.g.***, ***Betz***, 998 A.2d at 58, *citing with approval* ***Wehmeier v. UNR Industries, Inc.***, 572 N.E.2d 320, 326 (Ill. App. Ct. 1991) (discussing the relevance of factors such as the types of asbestos involved, the tendency of the defendants' products to release fibers into the air, and the character of the workplace in comparing the weight of differing exposures).

Lincoln's Brief at 26-27.

We disagree. Lincoln continues to misapply ***Betz***. As discussed above, our Supreme Court in ***Betz*** was faced with a case where the plaintiff's full history of exposure to the defendant's product was not presented and was thus faced with reviewing the trial court's determination of the ability of an expert to scientifically conclude that any exposure would be a significant factor in the cause of the defendant's asbestos-related disease. Accordingly, we conclude ***Betz*** did not render ***Donoughe*** "irrelevant."

Instantly, as in ***Donoughe***, Decedent's full history of exposure to the defendant's product was supplied to the jury together with Dr. Frank's expert opinion about general causation and substantial factor causation. The issues raised in Lincoln's defense, to wit, that its product contained only encapsulated asbestos incapable of releasing respirable asbestos fibers was just that, a defense fully presented to the jury. The jury was free to weigh, accept or reject Lincoln's evidence. ***See Donoughe***, ***supra*** at 65 (noting

testimony from defendant's expert witnesses was "a matter for the jury to accept in full, accept in part, or reject completely").

For these reasons, we conclude Lincoln's contention that the Estate failed to prove its case as a matter of law is without merit. We therefore conclude the trial court did not err in denying Lincoln's motion for JNOV.

In his second issue, Appellant argues that the trial court erred in refusing Lincoln's request to submit certain evidence to the jury. Lincoln's Brief at 29. Decedent made applications for compensation to certain bankruptcy trusts, which purportedly included admissions of exposure to those entities' products. ***Id.*** Lincoln asserts the evidence of those applications is admissible as an admission of a party-opponent. ***Id.*** at 31. Lincoln alternatively contends that even if evidence of Decedents' statements regarding exposure to products from bankrupt companies was not initially admissible, the Estate opened the door to such evidence when it read portions of Decedent's deposition referencing those products. ***Id.*** at 30. Lincoln also claims that the evidence is admissible for impeachment purposes, since Decedent's statements in his applications is at variance with his responses to Lincoln's interrogatories. ***Id.*** at 33. Lincoln maintains the trial court's ruling "severely prejudiced [its] liability defense." ***Id.*** at 31.

As noted above, we review a trial court's evidentiary decisions for an abuse of discretion. ***Dengler***, ***supra*** at 379. In denying Lincoln's motions in this regard, the trial court relied on this Court's decision in ***Ball v. Johns-***

Manville Corp., 625 A.2d 650 (Pa. Super. 1993), which addressed this issue. Trial Court Opinion, 5/8/12, at 6. Citing ***Ottavio v. Fibreboard Corp.***, 617 A.2d 1296, 1301 (Pa. Super. 1992) (*en banc*), the ***Ball*** Court held "that bankrupt defendants did not have to participate in the trial, and their names should not be submitted to the jury for a finding of liability." ***Ball***, ***supra*** at 660. Further, the ***Ball*** Court explained the reasons for that result as follows.

> Nothing precludes the solvent manufacturers in this case from obtaining contribution from the bankrupts when (and if) they emerge from reorganization proceedings. To hold otherwise would be to require an exercise in futility, for any finding of fault against the bankrupt manufacturers would be unenforceable under the automatic stay provisions of the Bankruptcy Code.

Id., *quoting* ***Ottavio***, ***supra*** at 1301.

Lincoln seeks to distinguish ***Ball*** as applying only to submitting the names of bankrupt defendants "to the jury for a finding of liability." Lincoln's Brief at 34, *quoting* ***Ball***, ***supra*** at 660. Lincoln avers that ***Ball*** does not "address … [whether] any and all evidence relating to bankrupt companies must be precluded at trial. ***Id.*** However, the import of Lincoln's proposed use of the disputed evidence is the same. Lincoln sought to have the jury consider Decedent's exposure to asbestos from products of bankrupt companies to establish their relative culpability in causing Decedent's illness. Where the bankrupt defendants were not required to participate at trial, and a jury could make no determination in connection

with those defendants, the proposed evidence is not relevant to Lincoln's liability, which is based on Decedent's exposure to asbestos from its welding rods. Lincoln's insistence that Decedent could not have been so exposed was a defense not dependent on possible exposure to other products. As noted by the trial court, reference to the trust applications "would have only served the purpose of assigning blame to unrepresented, bankrupt, non-parties." Trial Court Opinion, 5/8/12, at 5.

We also agree with the trial court that the Estate did not open the door by presenting a portion of Decedent's deposition that referenced some of the products from bankrupt companies. "[Decedent] merely gave an occupational history in order to establish a timeline of exposure to the Lincoln welding rods." ***Id.*** Accordingly, we conclude the trial court did not abuse its discretion in refusing to permit reference to Decedent's applications to the bankruptcy trusts.

Lincoln alternatively argues that the trial court should have reduced the phase-one verdict by set-off of the amount of payments received from any bankruptcy trusts. Lincoln's Brief at 34. However, the record contains insufficient facts upon which to base such a molding of the verdict. While the fact of Decedent's application to bankruptcy trusts was discussed in the context of the preceding issue, Lincoln has not cited where it sought discovery of the status of those applications until it filed its belated motion for production filed November 23, 2010, well after the jury's verdict and past

the ten-day period to file post-verdict motions. ***See*** Pa.R.C.P. 227.1(c). Accordingly, the trial court did not abuse its discretion in denying Lincoln's post-verdict motion to mold the verdict.[7]

Lincoln's final issue faults the trial court's decision to overrule Lincoln's objection to the reverse bifurcation procedure employed for trial. "A trial court's decision to bifurcate a trial is made in its discretion." ***Donoughe***, ***supra*** at 72. Lincoln avers that "[r]everse bifurcation is only appropriate in cases in which liability issues are fully conceded — and the only real remaining questions are damages and product identification." Lincoln's Brief at 35. Lincoln declares, "the trial judge denied Lincoln's motion opposing reverse bifurcation without performing the informed analysis and careful balancing of the parties' respective rights that Pennsylvania law requires." ***Id.*** at 36, *citing* ***Stevenson v. General Motors Corp.***, 521 A.2d 413, 419 (Pa. 1987).

In ***Stevenson***, the trial court held a bifurcated trial with a liability phase followed by the damages phase. Based on testimony implicating

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[7] Lincoln cites to ***Reed v. Allied Signal***, 20 Pa. D. & C.5th 385 (Philadelphia 2010), *affirmed*, ***Reed v. Honeywell Int'l***, 40 A.3d 184 (Pa. Super. 2011) (unpublished memorandum), *appeal denied*, 51 A.3d 839 (Pa. 2012) in support of its contention that molding of the verdict was required. We note a decision of a trial court does not constitute binding precedent. ***Branham v. Rohm and Hass Co.***, 19 A.3d 1094, 1103 (Pa. Super. 2011), *appeal denied*, 42 A.3d 289 (Pa. 2012), *citing* ***U.S. Bank Nat'l Ass'n v. Powers***, 986 A.2d 1231, 1234 n.3 (Pa. Super. 2009).

liability but only adduced during the damages phase, the trial court granted the defendant's post-trial motion for a new trial on both liability and damages and determined the new trial would not be bifurcated. Affirming, our Supreme Court noted that a decision to bifurcate should be made only after careful consideration including any danger that evidence relevant to both issues may be offered at only one-half of the trial. ***Stevenson***, ***supra*** at 419. Instantly, Lincoln does not allege that evidence heard only in the second liability phase implicated the issue of damages found by the jury in phase one. Rather, Lincoln argues that the reverse bifurcation process is inherently prejudicial. "In this case, Lincoln demonstrated that the prejudice from reverse bifurcation would far exceed any possible efficiency benefit." Lincoln's Brief at 37. To that end, Lincoln submitted the opinions of two behavioral scientists critical of the procedure.

This Court has rejected similar arguments challenging the reverse bifurcation procedure in ***Donoughe***.

> [The defendants] contend that this long-standing practice, noted with equanimity by our Supreme Court in ***Fritz*** [**v. Wright**, 907 A.2d 1083 (Pa. 2006)], "is an innately prejudicial procedure because it forces a jury to form preconceptions about liability before hearing key evidence. It is especially prejudicial for defendants … whose products, because of their chemical composition, could not release asbestos in respirable form." … [The defendants'] main argument is that during Phase I, the jury received evidence that [the defendants'] products shed asbestos fibers that [the plaintiff] inhaled, but that [the defendants] could not present rebuttal evidence at that time. They assert that

> because of this circumstance, the jury had already reached its conclusion as to [the defendants'] **liability** by the conclusion of Phase I. However, this is a wholly unsubstantiated allegation that is not deducible from anything of record. Moreover, [the defendants] were fully able to present their evidence during Phase II, following [the plaintiff's] more detailed evidence of exposure to asbestos shed from their products. Phase II was when the jury was asked to determine which, if any, of the many defendants were liable for [the plaintiff's] asbestos-related injuries established during Phase I. Thus, there is simply no basis to conclude that [the defendants'] defense was hampered or prejudiced by being raised at the liability stage of the proceedings any more than if the trial had not been bifurcated.

Donoughe, ***supra*** at 71 (emphasis in original, citations to brief omitted). Instantly, Lincoln seeks to distinguish ***Donoughe*** because it did not address whether a "trial court *per se* abuses its discretion by automatically employing a reverse-bifurcation procedure simply because it is 'standard' in Philadelphia," and because defendant's in ***Donoughe*** did not create a record of expert opinions critical to the practice. Lincoln's Brief at 40. Lincoln's conclusion that the trial court did not make a considered decision is based on the trial court's statement to the jury that the practice was "standard." ***Id.*** at 36. The trial court responded as follows.

> The statements made by the [trial c]ourt are not an indication that the [trial c]ourt did not take into consideration the facts of the case or the positions of both parties in order to reach its decision. The [trial c]ourt was merely acknowledging that trying the case in a reverse bifurcated fashion was a scenario that both parties should have anticipated for an asbestos case.

Trial Court Opinion, 5/8/12, at 10.

Further, Lincoln's behavioral scientists' opinions about the inherent problems with reverse bifurcation cannot serve as a substitute for a showing of actual prejudice, which as in ***Donoughe***, is lacking in this case. As noted by the trial court, Lincoln's position "implies that a jury was unable to follow the basic instructions made by [the trial c]ourt stating that the damage award in Phase [one] must not play a role in their deliberation of the liability issue in Phase [two]." ***Id.*** at 10-11. The record does not support Lincoln's assertion that the jury in this case was actually confused, misled or prejudiced. Accordingly, we conclude the trial court did not abuse its discretion in overruling Lincoln's objection to the reverse bifurcation procedure employed in this case or denying a new trial on this ground.

In sum, we deem our Supreme Court's recent decision in ***Betz***, inapposite to the issues in this appeal and Lincoln's reliance on ***Betz*** misplaced. We conclude, for all the reason discussed above, the trial court did not abuse its discretion in permitting the Estate to submit the deposition testimony of Dr. Frank to the jury or in denying Lincoln's evidence of Decedent's applications to bankruptcy trusts. We conclude the trial court did not abuse its discretion in denying Lincoln's motion for a new trial on these grounds. Likewise, we discern no error in the trial court's denial of Lincoln's motion for JNOV under the facts of this case. Finally, we conclude the trial court did not abuse its discretion in overruling Lincoln's objection to reverse

bifurcation of the trial in this matter, and further conclude Lincoln has demonstrated no prejudice from the procedure. Accordingly, we affirm the April 13, 2011 judgment entered in this matter.

Judgment affirmed.