

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RICHARD ROST & JOYCE ROST

Appellees

v.

FORD MOTOR COMPANY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 404 EDA 2012

Appeal from the Judgment Entered December 28, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2010 No. 1978

RICHARD ROST & JOYCE ROST

Appellants

v.

FORD MOTOR COMPANY

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 642 EDA 2012

Appeal from the Judgment Entered December 28, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2010 No. 1978

BEFORE: PANELLA, J., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 19, 2014

In this matter involving consolidated cross-appeals, we are asked, among other things, to apply the recent Supreme Court of Pennsylvania decision in ***Betz v. Pneumo Abex, LLC***, 615 Pa. 504, 44 A.3d 27 (2012).

* Former Justice specially assigned to the Superior Court.

Specifically, we must decide whether **Betz** prohibits all expert opinion that relies upon the premise that “any exposure” to asbestos fibers can lead to asbestos-related disease.¹ We conclude that the record before the **Betz** Court is easily distinguishable from the factual and procedural record in the present appeal, and further hold that these distinctions are material pursuant to the language from **Betz** itself. Accordingly, we conclude that **Betz** is not controlling herein, and affirm.

The genesis of this action was a complaint filed by Richard and Joyce Rost in October 2009 alleging that Richard Rost’s exposure to various products from each of the defendants, including brakes manufactured by Ford Motor Company, caused Rost to suffer mesothelioma. Prior to trial, the Rosts settled with all defendants except Ford. Rost’s trial with Ford was consolidated, over Ford’s objections, with two other cases involving plaintiffs suffering from mesothelioma. The trial court also issued a pre-trial ruling, again over Ford’s objection, that the plaintiffs could establish that a product was defective by establishing that it contained asbestos.

At trial, Richard Rost testified that he worked at a Ford dealership for several months in 1950 after he had graduated from high school. Among

¹ The Supreme Court recently reaffirmed its decision in **Betz**. **See Howard v. A.W. Chesterton Co.**, ___ Pa. ___, ___, 78 A.3d 605, 609 (2013) (*per curiam* order) (“[A]s explained in detail in the unanimous decision in **Betz**, the any-exposure opinion is simply unsupported both as a matter of law and science.”).

other things, the dealership employed automobile mechanics. One service provided by these mechanics was sanding of brakes. Rost testified that approximately 85-90% of the vehicles serviced by the dealership were Ford vehicles. Furthermore, the parties stipulated that Ford brakes from 1945-1950 were approximately 40% to 60% asbestos by weight.

The dealership's mechanics also worked on clutches for Ford vehicles. The parties stipulated that the clutches were approximately 40% to 60% asbestos by weight.

While working at the dealership, Rost was responsible for overall cleanliness of the garage. One specific aspect of his duties involved removing brake linings from brake shoes to prepare the shoes for re-use. This process generated dust from the brake drums that Rost inhaled.

Rost also testified that when mechanics performed work on brakes, they would remove all four brake drums. Each brake drum would be opened to allow inspection and service. Rost testified that the inside of the brake drums were filled with dust, which the mechanic would blow out with compressed air. The dust generated by such cleaning would carry throughout the garage, as the exhaust system was very limited.

At the end of each day, Rost was also responsible to clean the floors of the garage of dust and debris. Rost would then scoop up the dust and debris and dispose of it in a large disposable container. Rost estimated that

each day, he disposed of three shovelfuls of such dust into the disposable container, causing some of the dust to billow back into the air.

The Rosts also presented the testimony of several experts to address the contested issue of whether Rost's exposure to asbestos from Ford's products was a substantial cause of his mesothelioma. The first such expert was Arthur Frank, M.D., a physician and medical professor at the Drexel University School of Public Health and the Drexel University College of Medicine. Dr. Frank has studied asbestos since he entered medical school in 1968.

In 1977, Dr. Frank earned a Ph.D. in biomedical science based upon his research into the effect of asbestos on lung tissue. He has performed epidemiological studies on individuals exposed to asbestos. During the course of his studies, Dr. Frank has published approximately 90 peer-reviewed papers or book chapters on asbestos. Dr. Frank also testified that he had assisted in a study which found that brake mechanics could develop asbestos related disease.

Dr. Frank testified that there are case studies which indicate that individuals who were exposed to asbestos for a single day have developed mesothelioma. Furthermore, he stated that animal studies indicate that increasing the exposure from one day to one month doubles the risk of disease. When asked about the effect of background levels of asbestos present in the environment, he responded: "with low levels of exposure,

and background is indeed low levels, it is not likely, but not impossible that someone could get disease from those levels." N.T., 9/19/11, a.m., at 89. He identified a study in Japan that claimed that a small number of mesothelioma cases in Japan were caused by background levels of asbestos. As a result, he opined that the only safe level of exposure to asbestos is "zero."

Dr. Frank related that studies have shown that 17 fibers per cubic centimeter of air are generated when a mechanic uses compressed air to clean out the dust from a brake drum. Furthermore, fiber counts greater than background were observed as far as 60 feet away from the brake drum when compressed air cleaning was performed. On cross-examination, Dr. Frank stated that a person breathes about 600 cubic centimeters of air per minute.

After being presented with a hypothetical that paralleled Rost's history, Dr. Frank opined that absent any other non-background exposure to asbestos, Richard Royce would still have developed mesothelioma due to his exposure to Ford products. Furthermore, based upon the hypothetical, Dr. Frank opined that the exposure was a significant contributing cause of Rost's mesothelioma.

The Rosts also presented the testimony of Dr. Arnold Brody, Ph.D. Dr. Brody testified that he is an experimental pathologist and professor at North Carolina State University. As an experimental pathologist, Dr. Brody

researches the processes by which diseases progress through the human body.

Dr. Brody started studying the effects of asbestos exposure in 1974 while working for the National Institutes of Health, a federal government laboratory. His research started with determining where asbestos fibers travel once they enter the body, and expanded to include determining how the fibers caused damage to lung tissue. Since then, Dr. Brody has published more than 100 peer-reviewed papers related to asbestos.

Dr. Brody testified that mesothelial cells in the pleura, or outside lining of the lung, are the cells from which mesothelioma develops. He also related that multiple studies have established that asbestos can only reach the pleura through a pathway that involves the blood stream and the lymphatic system. Due to this extended pathway, longer asbestos fibers are more likely to be filtered out before reaching the pleura. Furthermore, independent research has indicated that shorter, chrysotile asbestos fibers are the predominant fiber found in the pleura.

Dr. Brody further testified that once in the pleura, asbestos fibers are "a complete carcinogen." N.T., 9/20/11, at 56. As such, asbestos fibers are sufficient, by themselves, to cause mesothelioma. Asbestos is a complete carcinogen because it has the ability to damage the DNA in the cell during cell reproduction. However, he stated that the damage inflicted is at least partially random in nature. In other words, the result of asbestos related

damage during cell reproduction is not uniform. Sometimes, the damage is so severe that the resulting cell dies. In others, the resulting cell is unable to reproduce. A third possibility is that the damaged resulting cell has cancerous tendencies, but other genes, known as tumor suppressors, keep the cell from creating a tumor. And in yet another possibility, the tumor suppressor genes as well as the cancer promoting genes are damaged, creating a cell capable of causing a tumor.

Dr. Brody stated that asbestos fibers can cause more damage as the resulting cells reproduce, compounding the damage incurred during the first round of reproduction. In this way, damaged cells that are not cancerous can incur additional damage during reproduction. Dr. Brody further testified that only approximately 10 percent of the skin cells are reproducing at a given time in a healthy human. In contrast, he testified that only approximately 1 percent of mesothelial cells are undergoing reproduction at any given time in a healthy human. This is at least one of the reasons why asbestos related cancers can have long latency periods.

Ford presented the testimony of Michael Graham, M.D. Dr. Graham is a pathologist licensed to practice medicine in the state of Missouri and a professor of pathology at St. Louis University. Dr. Graham testified that he first became involved in occupational lung diseases after graduating from medical school and was undergoing training as a pathologist. He received

further training as a forensic pathologist from a mentor who was involved with asbestos litigation.

Dr. Graham admitted that he has performed no basic research on the pathology of asbestos. Furthermore, Dr. Graham stated that he has only published one peer-reviewed paper on asbestos-related disease. As a result, Dr. Graham admitted that his expert opinions were based mainly upon research performed by others.

Dr. Graham testified that chrysotile asbestos fibers have not been shown to cause mesothelioma in human beings. He opined, "I think most scientists would agree that if short fibers have any effect at all, it's minimal and probably doesn't have any effect whatsoever." Dr. Graham further testified that he was unaware of any study that demonstrated an increased risk of mesothelioma due to exposure to brake dust.

When asked about a list of studies addressing the issue of brake dust exposure, Dr. Graham stated that the studies generally indicated that exposures to asbestos at power plants posed a significantly higher risk than exposure to asbestos brake dust. However, Dr. Graham admitted that he could not recall the nature of all of these studies. Furthermore, he admitted that he probably could not even describe the nature of some of the studies on the list without first reviewing them.

When asked about one epidemiological study in the list, authored by Kay Teschke, M.P.H., Ph.D., Dr. Graham was able to recall that it was a case

control study. However, he was unaware that Dr. Teschke had signed a statement, along with 51 other scientists in the field, indicating that chrysotile asbestos in brakes is a potential risk for mesothelioma.

Contrary to his statement that most scientists believe that chrysotile asbestos has no role in mesothelioma, Dr. Graham testified that he was aware of the statement signed by the aforesaid 51 scientists in the field of asbestos research. Dr. Graham conceded that several of the scientists that signed the statement were among the most published scientists in the field. He also conceded that the statement sets forth many reasons for their scientific conclusion that asbestos in brakes was not safe. However, Dr. Graham testified that he merely disagreed with their conclusion.

When questioned on one paper he relied upon, Dr. Graham agreed that it was a meta-analysis; in other words, a study assessing other studies in context. He testified on direct examination that the meta-analysis concluded that chrysotile asbestos was 100 to 500 times less potent in causing disease. On cross-examination, Dr. Graham admitted that the meta-analysis found that there was no evidence for an exposure threshold for disease causation. Furthermore, he conceded that the authors of the meta-analysis had since reconsidered their conclusion about the relative toxicity of the different asbestos fibers, following a re-analysis of the data in one of the studies reviewed in the meta-analysis. After admitting that he is

not an expert in meta-analysis, Dr. Graham criticized the methodology the authors of the meta-analysis used when reaching their revised conclusion.

Dr. Graham testified that the meta-analysis authors had failed to appreciate that the exposures under review in the re-analysis were not limited to chrysotile; he stated that other forms of asbestos were also present. However, Dr. Graham admitted that he had never published his criticisms of the re-analysis nor subjected them to the peer-review process. Furthermore, he admitted that he does not agree with the conclusion presented during direct examination that chrysotile is 100 to 500 times less toxic:

I would not say that those are the exact numbers because there [are] too many variables. ... Commercial amphiboles are at least [an] order if not two or three orders of magnitude more potent.

N.T., 9/20/11, at 141. He later noted that by order of magnitude, he meant “multiplied by ten.” As such, in his opinion, chrysotile was anywhere from 10 to 1,000 times less toxic than other forms of asbestos. However, Dr. Graham testified that the exact number was unimportant to his opinion.

Dr. Graham also conceded that earlier exposures to asbestos were more important in the disease process as compared to significantly later exposures. He agreed that in the case of similar exposures spaced 10 years apart, the earlier exposure should be weighted more heavily in determining causation of the disease. However, Dr. Graham felt that it was inappropriate

to utilize such weighting in Richard Rost's circumstances, as he believes that chrysotile asbestos cannot cause mesothelioma.

Ultimately, Dr. Graham opined that no matter what the frequency, regularity or proximity of Rost's exposures to dust from Ford products, they could not have possibly been the cause of Richard Rost's mesothelioma. He admitted that chrysotile asbestos can cause asbestos, lung cancer, and pleural plaques. However, he opined that while chrysotile asbestos is a complete carcinogen for the lung, "it has not been shown to [be a complete carcinogen] in humans."

Ford also presented the testimony of Herman Gibb, a Ph.D. in epidemiology. Dr. Gibb worked for the United States Environmental Protection Agency for thirty years, working on issues such as carcinogen risk assessment. In this position, Dr. Gibb was responsible for promulgating the EPA's general guidelines for assessing the risk of carcinogens. In particular, he performed detailed studies on airborne hexavalent chromium and arsenic in drinking water. However, he did not perform any epidemiological studies of asbestos while at the EPA.

Dr. Gibb does not have any published articles on asbestos. Nor is asbestos one of his focuses, as his research focused primarily on metals. Currently, Dr. Gibb is involved in a World Health Organization study focusing on the burden of disease from chemicals found in food. Furthermore, while

he stated that he was currently involved in a study of mesothelioma, he was unable to testify as to the nature of such research.

Dr. Gibb testified that he was the author of a chapter of a textbook that discussed general standards for evaluating epidemiological data. That chapter indicates that "power" of an epidemiological study is a critical consideration in evaluating the results from the respective study.² He confirmed that he still believes that "power" is an important consideration when evaluating study results. However, he admitted that he had never analyzed the "power" of the studies he relied upon in reaching his opinions regarding mesothelioma in brake workers. Dr. Gibb also conceded that he had never performed a control case study.

Dr. Gibb opined that exposure to asbestos brakes while working as an auto mechanic did not increase the risk of getting mesothelioma. He further opined that Richard Rost's work at Metropolitan-Edison in power generation increased his risk of contracting mesothelioma.

On cross-examination, Dr. Gibb was asked about the work of Dr. John Dement, program director of epidemiology at Duke University. At first, Dr. Gibb denied knowledge of Dr. Dement. However, he later admitted that he was aware that Dr. Dement had authored several epidemiological studies of

² "Power" is a concept that involves evaluating whether the sample size of a study is large enough to detect a correlation between a circumstance and a given disease at low levels of risk. N.T., Trial, 9/27/11, p.m., at 26.

asbestos and mesothelioma in textile workers. Ultimately, he admitted that he had not read all of Dr. Dement's asbestos related work. Dr. Gibb also admitted that he did not start studying asbestos in brakes until he left the EPA and started working in litigation support.

Dr. Gibb criticized, as an inappropriate use of the literature, a published, peer-reviewed article by Dr. Richard Lemon that contradicted Dr. Gibbs's opinion on the increased risk of mesothelioma in people who worked with asbestos brakes. However, he has not published his criticism of Dr. Lemon's methods. He further conceded that his opinion was contrary to the opinion of 52 scientists who are directly involved in asbestos research, including at least two whose other work he cites as supporting his opinion that asbestos brake workers suffered from no increased risk in contracting mesothelioma.

After the trial, the jury found Ford, General Electric, Westinghouse, and Ingersoll Rand liable for the Rosts' injuries. Furthermore, the jury awarded Richard Royce \$844,800 in damages and Joyce Rost \$150,000 for loss of consortium. After the trial court denied Ford's post-trial motions, Ford and the Rosts filed timely cross-appeals. This court consolidated the cross-appeals, and designated Ford as the primary Appellant.

For organizational purposes, we will address Ford's issues on appeal first, but in a different order. Ford argues that it is entitled to judgment as a matter of law, or a new trial, pursuant to the Supreme Court of

Pennsylvania's decision in **Betz**, filed during the appeal the course of this appeal. The Rosts first contend that **Betz** does not apply, as it only applies prospectively.

We conclude that, given the procedural posture of this case, **Betz** is less dispositive than the Supreme Court's decision in **Gregg v. V-J Auto Parts Co.**, 596 Pa. 274, 943 A.2d 216 (2007). **Betz** dealt with a challenge to the exclusion of expert testimony pursuant to a **Frye**³ hearing. Under **Frye**, the proponent of the challenged testimony bears the burden of establishing its admissibility. **See Betz**, 615 Pa. at 547, 44 A.3d at 54. In contrast, in **Gregg**, the Supreme Court of Pennsylvania was reviewing an appeal from an order granting summary judgment. In addressing the appeal, the Court held that it was

appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

Gregg, 596 Pa. at 292, 943 A.2d at 227. In reviewing a challenge to the grant of summary judgment, the appellate court is to review the record in a

³ **Frye v. United States**, 293 F. 1013 (D.C.Cir.1923). Under **Frye**, novel scientific evidence must be generally accepted in the relevant scientific community before it will be admitted. Pennsylvania courts utilize the **Frye** test. **See Betz**, 615 Pa. at 509, 44 A.3d at 30.

light most favorable to the non-moving party. **State Farm Fire & Cas. Co. v. PECO**, 54 A.3d 921, 925 (Pa. Super. 2012)

In the case presently before us, we are faced with a third type of challenge: Ford argues that the trial court erred in denying Ford's post-trial motion for judgment as a matter of law. Thus, neither **Betz** nor **Gregg** is directly on point. In reviewing a challenge to the denial of a post-trial motion for judgment as a matter of law, we must review the record in the light most favorable to the verdict winner to determine if there is sufficient evidence to support the verdict. **See Underwood ex rel. Underwood v. Wind**, 954 A.2d 1199, 1206 (Pa. Super. 2008). In addressing the current issue, the Rosts are the verdict winner and non-moving party.

Accordingly, the procedural posture in the present appeal is more like the procedural posture faced by the Supreme Court in **Gregg** than the one it faced in **Betz**.⁴ Thus, we find that it is **Gregg** that is most on-point with the case before us. Since **Gregg** was decided in 2007, well before the 2011 trial in the current case, we conclude that there is no issue of retroactivity in our evaluation of the Rosts' proffered expert opinion under **Gregg**.

In **Gregg**, the record revealed that the plaintiff had breathed dust scraped from asbestos containing brake pads, obtained from the defendant,

⁴ Moreover, the Supreme Court of Pennsylvania in **Betz** refused to opine on whether other evidence of record could have overcome the defendant's summary judgment motion. **See** 615 Pa. at 549 n.34, 43 A.3d at 55 n.34.

“on two or three occasions.” 596 Pa. at 289, 943 A.2d at 225. The court of common pleas granted summary judgment to the defendant on the basis that there was insufficient evidence of frequency, regularity, and proximity to establish that the defendant’s product was a substantial cause of the plaintiff’s mesothelioma. **See id.**, 596 Pa. at 281, 943 A.2d at 220. The Supreme Court of Pennsylvania granted allowance of appeal on a single issue: whether a plaintiff must “show frequent use of, and regular close proximity to” asbestos products in order to survive a motion for summary judgment. The Supreme Court ultimately affirmed the trial court’s decision, holding that a plaintiff is required to adduce sufficient frequency, regularity, and proximity evidence to establish substantial causation in order to survive a motion for summary judgment. **See id.**, 596 Pa. at 292, 943 A.2d at 227.

Turning to the substance of the current issue, Ford argues that pursuant to **Betz** and **Gregg**, the Rosts were “required to offer competent expert opinion demonstrating that the exposure to asbestos attributable to Ford was sufficient to qualify as a substantial factor” in causing Richard Rost’s mesothelioma. Initially, we note that this argument is refuted explicitly by language contained in both **Betz** and **Gregg**. As noted previously, the **Betz** Court explicitly refused to address the issue of whether other evidence of record was sufficient to meet the plaintiff’s burden pursuant to a motion for summary judgment. **See** 615 Pa. at 549 n.34, 43

A.3d at 55 n.34. Similarly, in **Gregg**, the Court explicitly ended its opinion with the following passage:

It remains to be determined on remand whether, in light of Appellee's evidence concerning the frequency, regularity, and proximity of Mr. Gregg's exposure to asbestos-containing products sold by Appellant, the common pleas court correctly determined that a jury issue was not present.

596 Pa. at 292, 943 A.2d at 227. Clearly, neither of these opinions required the dismissal of the plaintiff's cause of action merely due to the problems with the plaintiff's expert's opinion on causation.

Additionally, Ford misrepresents the actual conclusion reached by the Supreme Court of Pennsylvania in **Betz**. As noted above, **Betz** involved the review of the trial court's decision pursuant to a **Frye** hearing. The appropriate standard of review of **Frye** decisions is whether the trial court committed an abuse of discretion. **See Betz**, 615 Pa. at 547, 43 A.3d at 54. The **Betz** opinion ends its discussion by concluding that "Judge Colville did not abuse his discretion" in determining that there was no support in the record for the plaintiff's expert's opinion on specific causation. 615 Pa. at 554, 43 A.3d at 58. A conclusion that a trial court did not abuse its discretion by coming to a given legal determination is not equivalent to a conclusion that a trial court must make that same legal determination. In other words, the **Betz** Court did not mandate that every judge, no matter what the record, reject the expert opinion of any expert that testifies there is no known threshold for a safe exposure to asbestos. Rather, the **Betz** Court

held that, based upon the record before it, the trial court did not abuse its discretion in determining that the expert in that case had not established the legitimacy of his legal conclusion that any exposure was a substantial cause of the plaintiff's disease.

Furthermore, our scope and standard of review require that we review the record as a whole, in a light most favorable to the verdict winner. In this context, the Rosts were the verdict winner. As such, we must review not only the expert opinions proffered in support of causation, but the entire record, including the testimony of Richard Rost and the other experts called by the Rosts.

Under this review, we conclude that the record is more than sufficient to support the verdict reached by the jury. First, we note that in contravention to the record before the Supreme Court in **Gregg**, the current record reveals that the Rosts presented significant evidence of frequency, regularity and proximity. Dr. Frank testified that testing has shown that brake drum "blow outs" generate 17 asbestos fibers per cubic centimeter of air. N.T., Trial, 9/19/11, a.m., at 100. Elevated levels of asbestos were measured as far away as 60 feet from the job. **See id.** Dr. Frank also testified that a person breaths about 600 cubic centimeters per minute. **See** N.T., Trial, 9/19/11, p.m., at 8.

Richard Rost testified that such "blow outs" were a daily occurrence in the garage when he worked there. N.T., 9/13/11, a.m., at 108. The brake

work at the garage was approximately 30-40 feet away from his bay. **See id.**, at 150. However, he was responsible for cleaning up the area where brake “blow outs” were performed. **Id.**, at 108. Finally, he testified that he worked at the garage approximately 3 to 4 months. **See id.**, at 114. Combined with Dr. Frank’s testimony, this testimony could support a finding that Richard Rost was directly exposed to a million asbestos fibers while he worked at the garage.

However, the evidence of exposure does not end there. Dr. Frank testified that he was

well aware of spouses and children of workers who wear contaminated clothing home, asbestos on their person will contaminate the household and has given rise to mesotheliomas of lung cancers in family members because of bringing it home on their person or clothing.

N.T., Trial, 9/19/11, at 118. As such, Dr. Frank opined that if a worker at the garage wore his work clothes home every day, the exposure caused by the brake “blow outs” could have persisted for decades. **Id.** Richard Rost testified that he wore his “pretty filthy” work clothes home from the garage at the end of his workday. N.T., Trial, 9/14/11, at 131. This combined testimony can support an inference that the asbestos exposure attributable to Rost’s employment at the garage continued for years after he stopped working there.

Furthermore, in reviewing the expert opinions offered by Dr. Frank and Dr. Brody, we note that they do not contain the same problems that so

troubled the Court in **Betz**. Unlike the expert witness in **Betz**, Dr. Frank and Dr. Brody were familiar with epidemiological studies, and testified that their opinions were based in part on such studies. **See, e.g.**, N.T., Trial, 9/19/11, a.m., at 23-25; 52; 91; N.T., Trial, 9/20/11, a.m., at 119. Dr. Brody provided, in exhaustive detail, a description of the process by which asbestos causes mesothelioma. He testified that asbestos fibers interfere with the cell division process, causing the resultant "daughter" cells to have damaged genetic material. N.T., Trial, 9/20/11, a.m., at 61-64. Not all damaged cells are cancerous; indeed, many such damaged cells die. **See id.**, at 64-67. However, damaged cells that are cancerous can remain for months without having to divide again. **See id.**, at 67. It is only after multiple generations of reproduction of cancerous cells that a cancerous tumor actually forms. **See id.**, at 64. Through decades of this process, a single cell can become a cancerous tumor. **See id.**, at 68. Dr. Graham, Ford's expert in pathology, testified that an exposure in 1950 would be weighted as presenting a greater risk than an exposure in 1960, due to the time period necessary for the disease to progress. **See** N.T., Trial, 9/22/11, at 127-128.

Dr. Brody testified that due to the nature of the process, it is impossible to devise a scientifically valid method to attribute a causal relationship to any single exposure. **See id.**, at 71. Animal studies are not appropriate for studying the effects of low-level exposures, as the decades-

long latency period is an order of magnitude greater than the life-span of the subject animals. **See id.**, at 101. Dr. Frank testified that low-level exposures are not amenable to study in human beings, as it is unethical to knowingly expose a healthy person to a known carcinogen. **See** N.T., Trial, 9/19/11, a.m., at 84. What is known about the process at this time is that it takes between 3 and 20 genetic errors in a cell to cause mesothelioma. **See** N.T., Trial, 9/20/2011, a.m., at 77. The exact number varies depending on the individual exposed. **See id.**

Both Dr. Brody and Dr. Frank testified that at least some scientists studying mesothelioma believe that long-fiber asbestos is more carcinogenic than the short fiber asbestos that was commonly found in Ford brakes at the time of Richard Rost's employment at the garage. **See id.**, at 82; N.T., Trial, 9/19/11, p.m., at 10-11. However, Dr. Brody explained that chrysotile fibers are more likely to reach mesothelial tissue through the fluid flow of the lung, as the larger fibers are more difficult to clear from the lung into the fluid flow. **See** N.T., 9/20/11, a.m., at 41. As such, when researchers actually studied the mesothelial tissue, "they found a predominance of small chrysotile fibers at the target site." **Id.**, at 117; **see also** N.T., Trial, 9/19/11, a.m., at 94.

In contrast, the experts offered by Ford had not published any research on asbestos during their long careers. **See** N.T., Trial, 9/22/11, at 26; N.T., Trial, 9/27/11, at 82; N.T. Trial, 9/28/11, at 36. Nor had they

published their critiques of published studies that contradicted their opinions on chrysotile asbestos. **See** N.T., Trial, 9/22/11, at 139-140; N.T., 9/27/11, at 16. Furthermore, Dr. Graham admitted that he is not an expert in the statistical weighting of different asbestos exposures. **See** N.T., Trial, 9/22/11, at 128. He also stated that “[w]hat the exact number [of asbestos threads necessary to trigger disease] is I don’t really think is that terribly important.” **Id.**, at 141. Dr. Graham conceded that several published studies have shown that chrysotile asbestos is the predominant fiber present in cases of mesothelioma. **See id.**, at 161. Furthermore, he admitted that chrysotile asbestos can cause asbestosis and lung cancer. **See id.**, at 150. However, he was unshaken in his belief that chrysotile asbestos from brakes could not cause mesothelioma. **See id.**, at 162.

We conclude that this record is nearly the mirror image of that described in **Betz**. The Rosts’s experts provided detailed testimony about the nature of mesothelioma and its causes, backed up by published research on the subject. Their testimony was internally consistent, and by the admission of Ford’s own experts, supported by at least 50 asbestos scientists around the world. In contrast, Ford’s expert’s critiques were at times internally inconsistent and generally consisted of subjective beliefs that had not been subjected to peer-review by the appropriate scientific community. Accordingly, while it is true that the “every exposure” theory does not, by itself, meet the standard for establishing substantial causation in a legal

sense, this record is more than sufficient to establish its general scientific legitimacy. As we have already determined that the rest of the certified record is sufficient to establish a triable issue on whether Richard Rost's exposure at the garage was a substantial cause of his mesothelioma, this defect in the "every exposure" theory is not sufficient to warrant reversal in this case.

In Ford's second issue on appeal, it argues that the trial court erred in ruling that the Rosts were not required to prove that the asbestos brakes were defective under products liability law. As such, Ford argues that it is entitled to a new trial.

There is a two-step process that a trial court must follow when responding to a request for new trial ... First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial ... The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Harman v. Borah, 562 Pa. 455, 467, 756 A.2d 1116, 1122 (2000). Unless an error of law controls the outcome of a case, we will not reverse an order denying a new trial. ***See Lockley v. CSX Transportation***, 5 A.3d 383, 388 (Pa. Super. 2010). "[A] litigant is entitled only to a fair trial and not a

perfect trial.” *Id.* (quoting *Kelley v. Wegman’s Food Markets, Inc.*, 2003 WL 21091390 (E.D. Pa. 2003)).

Here, as the trial court notes in its opinion on appeal, a panel of this court has recently addressed this issue and affirmed the same trial court’s identical ruling:

Next, Ericsson claims the court abused its discretion or committed an error of law when it instructed the jury that the products in question were defective because they contained asbestos where the verdict form did not require a finding of defect. In a strict liability design defect case, the issue is whether the product contained any element that made it unsafe for its intended use. With respect to asbestos cases, what renders the product unsafe for its intended use is the presence of asbestos in the product, or the dangers from inhalation of asbestos fibers.

Here, Ericsson stipulated that Moore’s mesothelioma was caused by asbestos. The court determined as a matter of law that the asbestos wire was defective or unreasonably dangerous. As the trial judge stated, the issue was *not* whether a product was defective because it contained asbestos; “instead, the trial issues, and therefore the factual issues remaining for the jury were limited to whether the Defendant’s particular product contained asbestos, whether the Plaintiff [][was] exposed to it, and whether such exposure cause Plaintiff’s mesothelioma.”

Moore v. Ericsson, Inc., 7 A.3d 820, 826 (Pa. Super. 2010) (citations omitted) (emphasis in original).

We conclude that ***Moore*** is controlling on this issue. Thus, the trial court did not err in its instructions to the jury, and Ford’s second issue merits no relief. For the same reasons set forth above, we find that Ford’s

argument based upon **Azzarello v. Black Brothers Company**, 480 Pa. 547, 391 A.2d 1010 (1978), merits no relief.

Next, Ford argues that the trial court erred in consolidating the Rost case with two other cases based upon the grounds that all three involved plaintiffs suffering from mesothelioma. However, we note that Ford does not cite to any Pennsylvania appellate authority to support its argument that consolidation of asbestos trials by disease constitutes reversible error. Indeed, we observe that the Supreme Court of Pennsylvania has in the past determined that the problem presented by the volume of asbestos litigation in the Court of Common Pleas of Philadelphia County is critical in nature. **See Pittsburgh Corning Corp. v. Bradley**, 499 Pa. 291, 298, 453 A.2d 314, 317 (1982). As such, the Court exercised its “general supervisory and administrative authority over all the courts ...” to direct the implementation of procedural measures, in particular mandatory preliminary non-jury trials, to address the problem. **Id.** Furthermore, the Supreme Court of Pennsylvania stated that it “will closely monitor the course of [] [asbestos-related] litigation to ensure that the program is meeting its objectives.” **Id.**, 499 Pa. at 299, 453 A.2d at 318. In the absence of contrary authority from the Supreme Court of Pennsylvania, we conclude that under the **Bradley** decision, we do not have authority to address procedural issues such as this absent a claim of violation of constitutional rights. As Ford’s argument in

this case is premised on an alleged abuse of discretion under Pa.R.C.P., Rule 213(a), we decline to address it at this time.

Turning to the issues raised by the Rosts on appeal, we note that both concern the status of settling co-defendants Ingersoll-Rand, General Electric, and Westinghouse. These three parties were included on the verdict sheet, but had settled with the Rosts prior to trial. However, Ford's defense was based on the contention that Richard Rost's mesothelioma arose solely from exposure to the settling defendants' products.

The Rosts argue that the questions on the verdict sheet, in conjunction with the trial court's jury instructions on damages, confused the jury, causing them to set forth only such damages as the jury felt were caused by Ford, and not the gross amount of damages suffered by the Rosts. As such, the Rosts contend, the damage award was not amenable to molding by the trial court.

Our standard of review of this issue is as follows:

Under Pennsylvania law, our standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.

Patton v. Worthington Associates, Inc., 43 A.3d 479, 490 (Pa. Super. 2012) (citation omitted). "Further, a trial judge has wide latitude in his or

her choice of language when charging a jury, provided always that the court fully and adequately conveys the applicable law." ***Id.*** (citation omitted).

At the close of the trial, the trial court provided a verdict sheet for the jury's use. This sheet contained five questions. First, whether Richard Rost was exposed to asbestos linked to Ford products. Second, was any such exposure to Ford products containing asbestos a substantial cause of Richard Rost's mesothelioma. Question three asked the jury to state the amount of damages Richard Rost was entitled to recover "due to his exposure to the asbestos-containing products [] [linked to] Defendant, Ford[,]" while question four sought the juror's determination of damages suffered by Joyce Rost for loss of consortium. The fifth question asked the jurors to determine whether exposure to asbestos from each of the settling defendants products was a substantial cause of Richard Rost's mesothelioma. Interestingly, the most significant difference from the Rosts's proposed verdict sheet was the inclusion of question 5; question three of the Rosts's proposed verdict sheet contains similar language qualifying the damage award as "due to his exposure to asbestos-containing products ... [linked to] Defendant, Ford."

While instructing the jury on damages, the trial court repeatedly qualified its instruction on damages as limited to those "caused by" or "arising from" exposure to Ford brakes. N.T., Trial, 10/6/11, at 20-23. At the close of jury instructions, counsel for the Rosts objected to the jury instructions, contending that the jury should have been instructed to give

the full measure of damages from all the defendants on the verdict sheet, rather than just the share attributable to Ford. **See id.**, at 56.⁵

We agree with the Rosts that the qualifying language was inappropriate, and, in isolation, likely served to confuse the jury on the issue of damages.⁶ However, taken in context with the entirety of the jury charge, we do not believe that this error was significant enough to vitiate the adequacy and clarity of the jury charge. The jurors were never asked to apportion blame amongst the defendants. The Rosts point to no evidence in the record where the jury was given a basis to distinguish between damages flowing from separate defendants. Indeed, the Rosts' theory of the case, and propounded expert opinion, was that there was no viable way to distinguish between exposures. Accordingly, we conclude that the inclusion of the qualifying language did not control the ultimate verdict.

In the alternative, the Rosts argue that the trial court's molding of the verdict was contrary to **Peair v. Home Association of Enola Legion 752**, 430 A.2d 665 (Pa. Super. 1981). In **Peair**, this court held that in

⁵ The trial court instructed the parties that all exceptions made in the pre-charge conference were preserved, that the parties were permitted to raise objections at the end of the jury charge, and that no exception to the jury instruction had been waived prior to the jury charge. **See** N.T., Trial, 9/29/11, a.m., at 141.

⁶ It is also important to note that the offending qualifying language is not present on the verdict sheet with respect to Joyce Rost's loss of consortium claim.

comparative negligence cases, a jury should be informed that a possible finding of comparative negligence would result in no recovery for the plaintiff. **See id.**, at 671-672. We find the current case distinguishable, in that the jury's award of damages is not akin to the apportionment of liability. As noted previously, the jury in the present case was not tasked with apportioning liability amongst defendants, let alone amongst defendants and plaintiffs. As such, we conclude that the Rosts' first issue on appeal merits no relief.

In the Rosts' second and final issue, they contend that there was insufficient evidence at trial to include the three settling defendants on the verdict sheet and that they are therefore entitled to judgment notwithstanding the verdict. As noted above, we must review the record in a light most favorable to the verdict winner, which in this issue is Ford, in order to determine whether sufficient competent evidence exists to support the jury's findings that the settling defendants were a substantial cause of Richard Rost's mesothelioma.

We conclude that there is sufficient evidence of record to support the trial court's inclusion of settling defendants on the verdict sheet. First, there was testimony that while Richard Rost was working at Metropolitan Edison, "[t]he asbestos was coming down like snow" in the area that Richard Rost was working in. N.T., Trial, 9/29/11, a.m., at 98. The turbines Richard Rost worked on while at Metropolitan Edison were GE turbines. **See** N.T., Trial,

9/14/11, at 32. These turbines were insulated with asbestos. **See** N.T., Trial, 9/29/11, a.m., at 85. Richard Rost breathed in dust from the insulation on the GE turbines while he was employed at Metropolitan Edison. Thus, we conclude that the evidence was sufficient to include GE on the verdict sheet.

Richard Rost also testified that there were many pumps at Metropolitan Edison when he worked there. **See** N.T., Trial, 9/14/11, at 36. Some of these pumps were manufactured by Westinghouse; some by Ingersoll Rand. **See id.** The Westinghouse pumps were insulated with asbestos. **See id.**, at 43. The Ingersoll Rand pumps were also insulated with asbestos. **See id.**, at 38. Richard Rost was a pump operator for four or five years, during which time he was present while others worked on the pumps. **See id.**, 43-44. The work included removal of the asbestos insulation. **See id.**, at 40-41. Based upon this and other evidence presented by Ford, we conclude that Ingersoll Rand and Westinghouse were properly included on the verdict sheet. Therefore, the Rosts' second issue on appeal merits no relief.

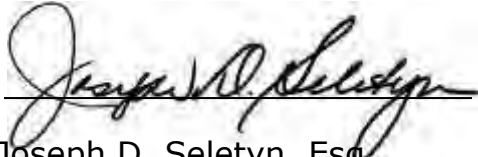
In summary, we conclude that none of the issues raised by either party merit relief on appeal. As such, we affirm the judgment entered by the trial court.

Judgment affirmed. Jurisdiction relinquished.

Olson, J. concurs in the result.

J-A29011-12

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/19/2014