

PRODUCT LIABILITY

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ROST MAY CHANGE THE TOXIC TORT LANDSCAPE

By Jay Evans

Background

A November 22, 2016 Supreme Court ruling, *Rost*, significantly changed the playing field for defendants in Pennsylvania. During trial, Plaintiffs' expert, Dr. Arthur Frank, espoused the previously-rejected opinion that each and every exposure to asbestos was a substantial contributing factor in Mr. Rost's development of mesothelioma. The Pennsylvania Supreme Court considered whether "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." This alert will focus on the causation aspects of the decision (although trial consolidation was also a subject).

Majority Opinion

Dr. Frank opined at trial that "it is not scientifically possible to identify the particular exposure or exposures that caused a patient's mesothelioma, and instead the causative agent is 'the series of exposures.' All exposures to asbestos contribute to the cumulative dose of asbestos, and the cumulative dose causes mesothelioma." *Rost*, p. 6. Dr. Frank concluded that three months of asbestos exposure at Smith Motors was sufficient to cause Mr. Rost's disease, even apart from his decade of exposures at a power plant.

In analyzing Dr. Frank's opinions, the Court determined that *Gregg* bars *de minimis* exposure cases at the summary judgment stage. The Court

limited *Betz* to the contention that "one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." *Rost*, p. 15. Relying on an *amicus* by physicians and scientists, the Court concluded "cumulative exposure is 'merely an extension of the ancient concept of dose-response, which is the 'oldest maxim in the field.'" *Rost*, p. 17. As the Court stated:

Unlike the expert witness in *Betz*, who unabashedly offered "each and every breath" testimony, in this case Dr. Frank relied upon a generally accepted methodology, taking into consideration exposure history, individual susceptibility, biological plausibility, and relevant scientific evidence (including epidemiological studies). Moreover, per *Gregg*, his testimony regarding the frequency, regularity and proximity of Rost's exposures to asbestos while at Smith Motors provided a sufficient basis to create a jury question regarding the existence of a causal connection between his exposure to asbestos-containing Ford products and the subsequent development of mesothelioma. In *Gregg*, this Court adopted the "frequency, regularity, and proximity" test as a refinement to the substantial factor requirement for proving causation in mesothelioma cases. In the context of expert testimony on substantial factor causation, *Gregg* provides **the** legal test, not an

additional legal test, for proving substantial factor causation in cases involving disease resulting from asbestos exposure.

Rost, p. 20 (internal references omitted). If a plaintiff has met the *Gregg* standard, causation is a jury question.

The Court interpreted any required dose comparison out of *Betz* as well by labeling it *dicta*. *Rost*, p. 22. The Court further criticized comparative assessment, relying on the *amicus*' claim that such quantifications are not possible. *Rost*, p. 29. The Court commented that comparative assessment only allows determination of which exposures are "most" responsible -- and thus for the jury to make a liability comparison. *Rost*, p. 30. In essence, the Court's ruling amounts to a form of burden shifting - "it is for a defendant challenging a plaintiff's evidence of substantial causation to bring to the jury's attention other potential causes, both through cross-examination and contrary expert testimony." *Rost*, p. 31.

Several footnotes in the opinion may also create ongoing confusion:

- Footnote 7 notes that in the absence of joint and several liability, defendants with lower dose exposures will no longer be held equally responsible (and thus may not need the protections of cases such as *Gregg*).
- Footnote 8 includes a favorable view of take-home exposure as extending the possible duration of exposure.
- Footnotes 10 and 13 may also weaken the effect of *Gregg* by stating that "direct" evidence of exposure or the type of disease can lessen the requirements of frequency / regularity / proximity.

Dissenting Opinions

Justice Saylor opined that the Court should have critically examined Dr. Frank's opinions to

determine if general causation and specific causation were adequately addressed. His analysis concluded that "in the absence of any sort of a meaningful assessment of proportionality, I agree with Ford's central position that the basis for Dr. Frank's opinion concerning substantial-factor causation is not materially distinguishable from . . . every exposure counts." *Rost* dissent, at p. 12. Justice Baer also dissented.

Conclusion

Rost may create significant confusion regarding toxic tort litigation in Pennsylvania, especially when lower courts read it in comparison to other recent rulings by the Pennsylvania Supreme Court on issues surrounding causation, burden(s) of proof, and motions for summary judgment. ♦

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For more information about Schnader's Product Liability Practice Group or to speak with a member of the firm, please contact:

Alice Sacks Johnston
Chair, Product Liability Practice Group
412-577-5121
ajohnston@schnader.com

Jay Evans
412-577-5122
jevans@schnader.com