Superior Court of New Jersey

Appellate Division - No. A-003642-14

Debbie Condon, individually and as Executrix and Executrix ad Prosequendum of the Estate of William Condon,

Plaintiffs/Respondents

v.

Advance Thermal Hydronics, Inc., f/k/a The Hydrotherm Corporation; Afton Pumps, Inc.; A.I.I. Acquisition, LLC as successor-in-interest to Holland Furnace Company; American Refractories Co.; A.O. Smith Water Products Company; Arcy Manufacturing, Inc., Ashland, Inc.; Atlas Turner; Aurora Pump; Automation Industries, Inc., individually and as successor to Hydrotherm, Inc.; Bechtel Corporation; Belmont Packing & Rubber Company; Borg Warner Morse Tec, as successor by merger to the Borg Warner Corporation; Bradford-White Water Heaters, Inc.; Bryan Steam, LLC a/k/a Bryan Boilers; Air & Liquid Systems Corporation, as successor by merger to Buffalo Pumps, Inc.; Burnham, LLC, individually and as successor-in-interest to Federal Boiler and Radiator Co.; Byron Jackson Pumps and United Pumps & Compressor; Calon Insulation Corporation; Cardone Industries, Inc. individually and as successor to Cardo Automotive Products Company; Carrier Corporation, CBS Corporation, a Delaware Corporation, f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Certainteed Corporation, individually and as successor to Keasbey & Mattison Co.; Cleaver Brooks Company, a division of Aqua-Chem, Inc.; Columbia Boilers Company of Pottstown; Crane Co., Inc. and as successor to Jenkins Valves, Inc. a/k/a Jenkins Bros.; Crane Packing Company; Crane Pumps and Systems, Inc.; Dana Companies, LLC f/k/a Dana Corporation, individually and as successor-in-interest to Victor and Spicer; DAP Products, Inc., individually and for its Tharco Products; DB Riley, Inc., individually and as successor to and/or f/k/a DB Riley Stoker Corporation and as successor to, and/if f/d/b/a Union Iron Works; Deming Pumps, a division of Crane Pumps Systems, Inc.; Ductmate Industries, Inc.; Dunphey Smith Company; Eaton Corporation, as successor-in-interest to Eaton Electrical, Inc. and Cutler- Hammer, Inc.; ECR International, Inc. f/k/a Dunkirk and Utica Boilers; Flexible Technologies, Inc., individually and as successor to Hydrotherm, Inc.; Flowserve Corporation; FMC

Corporation on behalf of its former Peerless Pump and Northern Pump Business; Ford Motor Company; Fort Kent Holdings, Inc., f/k/a Dunham Busch, Inc. as successor-in-interest to Iron Fireman Combustion Products; Foster Wheeler Energy Corp.; General Electric Company; Georgia Pacific; Goulds Pumps Incorporated; Hercules, Inc.; Hollingsworth & Vose Company; Honeywell International, Inc. f/k/a Allied Signal, Inc. as successor- in-interest to The Bendix Corporation; Hydrotherm, Inc.; HB Smith, Inc.; IMO Industries, Inc. as successor to and f/k/a Delaval Turbine, Transamerica Delaval and IMO Delaval; Ingersoll-Rand Company; J.H. France Refractories Company; John Crane, Inc.; Johnston Boiler Co., Kaiser Gypsum; Lawrence Pumps, Inc. as successor-in-interest to Ducan Heating Corp.; Magnatrol Valve Corp; McNally Industries, Inc.; Maremont Corporation; Mestek Inc., individually and as successor to Hydrotherm, Inc.; Oakfabco, Inc. f/k/a Kewanne Boiler Corp.; Pacific Steel Boilers, a division of Crane Company; PCC Technical Industries, Inc. f/k/a Boiler Technologies, Inc., individually and as successor to Hydrotherm, Inc.; Peerless Industries, Inc.; Pecora Corporation; Prestolite Performance, individually and for its Hays Brand; SOS Products Co.; Raypak Inc.; Reed National Financial Corp., individually and as successor to Hydrotherm, Inc.; Roper Pump Co.; SB Decking, Inc. f/k/a Selby Battersby & Company, a subsidiary of Quaker Chemical Corporation; Superior Boiler Works; Sterling Fluid Systems (USA) Inc., f/k/a LaBour Pump Co.; Taco Pumps; The Fulton Companies, individually and as successor to Fulton Boiler Works, Inc.; The Okonite Company; Thermco; Trane US, Inc., as successor to American Standard, Inc.; Tuthill Corporation; Union Carbide Corp.; Union Pump Company; United Supply Corporation; Utica Boilers; Viking Pump, Co.; Wallwork Brothers, Inc.; Warren Pumps, Inc., individually and as successor to The Quimby Pump Company; Weil-McLain Company, Inc.; Weinman Pumps; Woolsulate Corporation; Worthington Pump Corporation; York International; Zurn Industries; John Doe Corporations 1-50 and John Doe Corporations 51-75,

Defendants/Appellants.

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT/APPELLANT-CROSS RESPONDENT PECORA CORPORATION

Appeal from a Jury Verdict in the
Superior Court of New Jersey
Law Division, Middlesex County
Docket No.: MID-L-5695-13 AS
Hon. Ana C. Viscomi, J.S.C.

Phil S. Goldberg (N.J. Bar #036772001)
(Counsel of Record)
Mark A. Behrens (pro hac pending)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com
mbehrens@shb.com

Attorneys for Amici Curiae

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QUESTION PRESENTED

Whether settled defendants remain "parties" for purposes of allowing non-settling defendants to present cross-claim proofs and enable the jury to apportion fault among all defendants (settled and non-settling) that may have contributed to the plaintiff's harm.[1]

INTEREST OF AMICI CURIAE

Amici[2] are associations that include companies named as defendants in New Jersey asbestos and other multi-party tort cases and their insurers. Amici have a substantial interest in this case because the presentation of cross-claim proofs against settled defendants is critical to help ensure that non-settling defendants do not bear an unfair and disproportionate burden, and to preserve assets for future asbestos claimants that could be threatened if today's plaintiffs are able to receive windfall super-recoveries for their injuries in the tort system.

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[1] The issue is also being raised in Rowe v. Hilco, Inc., No. A-4530-14T2. Our position here is equally applicable to that case: fault should be apportioned to settled defendants.

[2] Amicus Coalition for Litigation Justice, Inc is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims. The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; Fireman's Fund Insurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

STATEMENT OF THE CASE

Amici adopt Pecora's Statement of the Case.

STATEMENT OF FACTS

Amici adopt Pecora's Statement of the Facts as relevant to our argument.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case will decide whether New Jersey plaintiffs will receive a complete recovery allocated across all defendants (settled and non-settling) or will receive windfall super-recoveries (paid by increasingly remote defendants in the context of asbestos cases). Amici file this brief to offer our broad perspective to demonstrate why the Trial Court's decision to allow Pecora to present cross-claim proofs should be affirmed as a matter of fairness and sound public policy.

The presentation of cross-claim proofs and apportionment of fault with respect to settled defendants is critical to help ensure that judgment defendants pay their equitable share of damages, as assessed by the jury, but do not have to pay for harms caused by settled defendants. This is essential as a matter of basic fairness, particularly given the attenuated connection of many of today's asbestos defendants to plaintiffs' exposures, and the fact that New Jersey asbestos defendants are already severely prejudiced by their inability to apportion fault to most companies that historically had primary

responsibility for plaintiffs' asbestos exposures but are now immune as a result of Section 524(g) bankruptcy reorganization. Furthermore, assets needed to compensate future asbestos plaintiffs could be threatened if plaintiffs are allowed to obtain windfall super-recoveries in the tort system.

Under Plaintiffs' approach, a plaintiff would be able to obtain a nearly complete recovery from settled defendants (who, in this action, were allocated 98% of the responsibility for the plaintiffs' harm), and then obtain an additional 100% recovery from any non-settling judgment defendants, as well as potential punitive damages. The plaintiff could also receive substantial recoveries outside the tort system from multiple asbestos bankruptcy trusts.

New Jersey law would be far outside the legal mainstream if there is no mechanism for non-settling judgment defendants to receive a set-off or to apportion fault to settled defendants that contributed to the plaintiff's harm. In fact, we are not aware of any jurisdiction in the United States where plaintiffs can receive a nearly double recovery in the tort system - with perhaps the most minor player in the litigation paying the most. Yet, this exactly what would happen in this case if the Court adopts Plaintiffs' extreme approach.

For these reasons, the Court should affirm the Trial Court on the issue of cross-claim proofs and allow non-settling defendants to apportion liability to settled defendants.

ARGUMENT

I. Failure To Apportion Liability To Settled Defendants Would Result In Disproportionate Liability For Non-Settling Defendants, Which Today Include Many "Solvent Bystanders"

It is important for New Jersey courts to allow fault to be apportioned to settled defendants by way of cross-claim proofs. Failure to apportion fault in this manner would result in highly unfair, disproportionate liability for non-settling defendants. This is particularly true in asbestos cases, because of the remote connection of many of today's defendants to plaintiffs' exposures to asbestos. Pecora, for example, sold a furnace cement product that was only 1.25% asbestos by weight.

Originally and for many years, asbestos litigation typically pitted a "dusty trades" worker "against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location." James S. Kakalik et al., Costs of Asbestos Litigation 3 (Rand Corp. 1983).[3] Much of this work involved insulation containing long,

[3] See also Eduardo C. Robreno, The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?, 23 Widener L.J. 97, 103 (2013) ("Miners, ship workers, construction workers, and those involved in

rigid amphibole fibers, rather than the more common, but far less toxic, chrysotile form of fiber.[4] Occupations such as shipbuilders and Navy personnel working around heavy amphibole asbestos exposures on World War II ships; insulators blowing large clouds of free amphibole or mixed fibers; and asbestos factory workers exposed to "snowstorms" of raw asbestos – these are the classic settings for older cases and for known sources of asbestos disease.[5]

By the late 1990s, the asbestos litigation had reached such proportions that the United States Supreme Court noted the "elephantine mass" of cases, Ortiz v. Fibreboard Corp., 527 U.S.

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manufacturing other asbestos-based products were at the highest risk of contracting such [asbestos-related] diseases.").

[4] See Becker v. Baron Bros., Coliseum Auto Parts, Inc., 649 A.2d 613, 620 (N.J. 1994) ("asbestos-containing products are not uniformly dangerous and thus . . . courts should not treat them all alike."); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1145 (5th Cir. 1985) ("[A]sbestos-containing products cannot be lumped together in determining their dangerousness."); Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005).

[5] See James S. Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses vi-vii (Rand Corp. 1984) ("For the sample claims closed by all or nearly all defendants in the 32 months we studied…[t]hree worker classifications accounted for the vast majority of asbestos-related litigation: shipyard workers (37 percent of all closed claims); asbestos-related factory workers (35 percent); and insulation workers (21 percent).").

815, 821 (1999), and referred to the litigation as a "crisis." Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 597 (1997).

Mass filings pressured many primary historical defendants into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation. Each of these bankruptcies put mounting and cumulative financial pressure on other primary defendants, creating a domino effect. See In re Collins, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied, 532 U.S. 1066 (2001). The result was a flood of bankruptcies between 2000-2002. See Mark D. Plevin et al., Where Are they Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases, 11:7 Mealey's Asbestos Bankr. Rep. 1, Chart 1 (Feb. 2012). (documenting four asbestos-related bankruptcies in 2000, twelve in 2001, and thirteen in 2002 - nearly as many as in the previous two decades combined).

As a result of these bankruptcies, the litigation "spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, Lawyers Torch the Economy, Wall St. J., Apr. 6, 2001, at A14.[6] "[P]laintiff

[6] See also Patrick M. Hanlon & Anne Smetak, Asbestos Changes, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) ("The surge of bankruptcies in 2000-2002 . . . triggered higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability."); Stephen J. Carroll et al., Asbestos Litigation xxiii (RAND Corp. 2005) ("When increasing

attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products." Marc C. Scarcella et al., The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010, 27:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012).[7] One plaintiffs' attorney described the asbestos litigation as an "endless search for a solvent bystander." 'Medical Monitoring And Asbestos Litigation'-A Discussion With Richard Scruggs And Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).[8]

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asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions . . . the resulting stays in litigation . . . drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

[7] See also S. Todd Brown, Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation, 23 Widener L.J. 299, 306 (2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

[8] See also Victor E. Schwartz & Mark A. Behrens, Asbestos Litigation: The "Endless Search for a Solvent Bystander," 23 Widener L.J. 59 (2013) (discussing quote from Mr. Scruggs and ways plaintiffs' lawyers have tried to expand the asbestos

The dockets reflect that the litigation has moved beyond the era in which manufacturers, producers, suppliers, and distributors of friable asbestos-containing products or raw asbestos are the principal defendants. See Congressional Budget Office, The Economics of U.S. Tort Liability: A Primer 8 (Oct. 2003) (asbestos suits have expanded "from the original manufacturers of asbestos-related products…."). The expanded range of defendants has produced exponential growth in the dimensions of the litigation. Several years ago, the Towers Watson consulting firm had already identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation." Towers Watson, Insights: A Synthesis of Asbestos Disclosures From Form 10-Ks -Updated, Feb. 2011, at 1. "Parties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries' Mass Torts Subcommittee, Overview of Asbestos Claims Issues and Trends 3 (Aug. 2007).

The trend was recently described in a significant ruling that is achieving nationwide notoriety. See In re Garlock Sealing Techs., LLC, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014) ("Beginning in early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer

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litigation to impose liability on defendants for harms caused by others).

participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock.").

This case also illustrates the peripheral nature of many of today's asbestos defendants. As stated, Pecora's furnace cement product was only 1.25% asbestos by weight. The jury's allocation of 2% of the judgment to Pecora shows that the jury clearly appreciated that, at most, plaintiff's exposure to asbestos from Pecora products was de minimis in relation to the totality of exposures from the settled defendants (not to mention any additional exposures plaintiff likely had to the products of reorganized debtor companies that are immune and therefore not subject to an allocation of fault in New Jersey).

Under Plaintiffs' approach, the jury would be forced to render a judgment that would not reflect Pecora's assessed contribution to the harm. Instead, because there would be no apportionment to the settled defendants, Pecora would have been found 100% responsible, notwithstanding the company's status as a very minor player. Furthermore, the complete recovery from Pecora would be in addition to the recoveries the plaintiff already received from the settled defendants.

It is hard to imagine a more absurd and unfair result than one where plaintiffs would receive nearly a double recovery in the tort system - with the party that perhaps contributed the least to the harm potentially paying more than anyone else. To our knowledge, no jurisdiction in the country applies such an extreme rule - and New Jersey should not either. See generally Laura Kingsley Hong & Robert E. Haffke, Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions, 26 T.M. Cooley L. Rev. 681 (2009).

II. Providing Windfall Super-Recoveries To Plaintiffs Would Harm New Jersey Employers, Draw Cases To New Jersey, And Potentially Threaten Recoveries For Future Plaintiffs

New Jersey employers and insurers, among others, would certainly be negatively impacted if the Court creates a mechanism to grossly overcompensate plaintiffs. Resources needed to compensate future plaintiffs could be threatened too.

Already, "roughly 100 companies have entered bankruptcy to address their asbestos liabilities," S. Todd Brown, Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation, 23 Widener L.J. 299, 301 (2013), leading to devastating impacts on employees, retirees, shareholders, and surrounding communities. See Joseph E. Stiglitz et al., The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, 12 J. Bankr. L. & Prac. 51 (2003). New bankruptcies continue to be filed. See Furthering Asbestos Claim Transparency (Fact) Act of 2013, H.R.

Rep. No. 113-254, at 5 (Oct. 30, 2013) ("more than half" of the asbestos-related bankruptcies have occurred since "the beginning of the year 2000."). Overpayment to plaintiffs would add to the pressures on the remaining solvent defendants.

Furthermore, the influx of asbestos claims shows no signs of abating. A 2015 review of asbestos-related liabilities reported to the Securities and Exchange Commission by more than 150 publicly traded companies showed that "[f]ilings have shown no decline in the last seven years, a finding that is perhaps inconsistent with predictions of epidemiological models." Mary Elizabeth Stern & Lucy P. Allen, Defense Costs Dropped in 2014, While Claim Filings, Dismissal Rates, and Indemnity Dollars Remained Steady, at 1 (NERA Economic Consulting June 4, 2015); see also Towers Watson, Insights: A Synthesis of Asbestos Disclosures From Form 10-Ks -Updated, Feb. 2011, at 1 (mesothelioma claim filings have "remained near peak levels since 2000."). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." Towers Watson, supra, at 5; see also Best's Special Report, Asbestos Losses Persist; A.M. Best Raises Industry's Loss Estimate to $85 Billion 1 (A.M. Best Co., Inc. Dec. 10, 2012) ("it is clear that the asbestos problem will persist for many years to come."). Industry analysts predict

that approximately 28,000 mesothelioma claims will be filed. Towers Watson, supra, at 5.

Apart from the negative impacts on defendants and future plaintiffs, New Jersey's courts should expect an influx of cases if fault cannot be allocated to settled defendants. Asbestos cases (as well as other tort cases) tend to migrate to friendly forums. See Mark A. Behrens, What's New in Asbestos Litigation?, 28 Rev. Litig. 501 (2009) (discussing a "migration" of asbestos claims to new jurisdictions in response to reforms adopted by states that were once plaintiffs' favored jurisdictions). More plaintiffs will no doubt find their way to New Jersey if this Court adopts a rule that results in higher recoveries for plaintiffs than they can obtain elsewhere.

III. New Jersey Asbestos Defendants Are Already Severely Prejudiced By Their Inability To Apportion Fault To Most Companies That Historically Had Primary Responsibility For Plaintiffs' Asbestos Exposures; Failure To Allow Non-Settling Defendants To Apportion Fault To Settled Defendants Would Add To This Unfairness

Today, many of the companies that filed for bankruptcy protection due in part to asbestos litigation "have emerged from the 524(g) bankruptcy process leaving in their place dozens of trusts funded with tens of billions in assets to pay claims." Marc C. Scarcella & Peter R. Kelso, Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance, 12:11 Mealey's Asbestos Bankr. Rep. 33, 33-34 (June 2013)

(emphasis added).[9] "These trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley et al., The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008, 23 Widener L.J. 675, 675-76 (2014).

The 524(g) asbestos bankruptcy trusts are generally immune from civil tort actions, so there is no mechanism in New Jersey to allocate fault to them as "parties."[10] Thus, plaintiffs are able to obtain both tort recoveries and asbestos bankruptcy trust payments for the same injury. Other states typically provide judgment defendants with a set-off for payments received by plaintiffs from asbestos bankruptcy trusts (and settled defendants) or allow juries to allocate fault to responsible third parties, including bankrupt entities.

The approach taken by the Trial Court and supported by Pecora is very modest. Pecora is only seeking to affirm

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[9] Over 60 asbestos bankruptcy trusts have been established. Collectively, the trusts held $36.8 billion in assets as of 2011, forming a privately-funded compensation system that operates parallel to, but wholly independent of, the civil tort system. See U.S. Gov't Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 3 (Sept. 2011).

[10] The Manville Trust is an exception.

apportionment of fault to settled defendants, not to apportion fault to every entity that may have contributed to plaintiffs' exposures to asbestos, including the bankrupt entities that sold amphibole asbestos-containing thermal insulation and were the primary defendants in the asbestos litigation for decades.

If the Court adopts plaintiffs' approach, the unfairness that already exists in New Jersey with respect to allocation of fault in asbestos cases would be exacerbated. Plaintiffs would get two tort system recoveries (settled defendant payments and judgment defendant payments) in addition to asbestos bankruptcy trust payments. Canny personal injury lawyers will be incentivized to try to boost a plaintiff's total recovery by settling with the defendants perceived to be the most culpable (to maximize pretrial settlements), and then try to get what is essentially a redundant recovery from a minimally at fault non-settling defendant. Further, the threat of being the last defendant remaining at trial - facing a potentially exorbitant judgment with no means for set-offs or apportionment - would likely force many defendants into blackmail settlements. Defendants would be chilled from exercising their right to a jury trial, including low dose defendants that believe they are not liable at all.[11]

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[11] See generally Celotex Corp. v. Copeland, 471 So. 2d 533, 538 (Fla. 1985) ("Asbestos products . . . have widely divergent

IV. Non-Settling Defendants Should Be Allowed To Introduce Settled Defendants' Prior Deposition Testimony To Prove Their Cross-Claims

Asbestos cases routinely involve dozens of defendants, as the caption in this matter illustrates. Most defendants will settle before trial. Non-settling defendants should be allowed to present the settled defendants' deposition testimony from prior cases to support their cross-claim proofs.

If defendants were required to take de benne esse depositions of all defendants in each case to secure that testimony for potential use at trial, litigation costs would soar and dying plaintiffs would have their day in court delayed while the depositions are taken. There is no sound reason to require such an added layer of "bureaucracy" to the issue of cross-claim proofs.

Furthermore, the common sense approach of allowing non-settling defendants to use the prior deposition testimony of settled defendants is fair to all. In those prior cases, the plaintiffs' lawyers and defendants being deposed stood in the same shoes, and had the same motivations, as their counterparts

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toxicities, with some asbestos products presenting a much greater risk of harm than others."); In re Asbestos Litig., 911 A.2d 1176, 1181 (Del. Super. May 9, 2006) ("[I]t is generally accepted in the scientific community and among government regulators that amphibole fibers are more carcinogenic than serpentine (chrysotile) fibers."), cert. denied, 2006 WL 1579782 (Del. Super. June 7, 2006), appeal refused, 906 A.2d 806 (Del. Super. June 13, 2006).

here. Asbestos plaintiffs routinely use corporate designee deposition testimony from other cases to prove their cases in a cost efficient manner; non-settling defendants should be permitted to do the same to prove their cross-claims - what is good for the goose is good for the gander.

CONCLUSION

For these reasons, the Court should affirm the Trial Court on the issue of cross-claim proofs and allow non-settling defendants to apportion liability to settled defendants.

Respectfully submitted,

Phil S. Goldberg (N.J. Bar #036772001)
(Counsel of Record)
Mark A. Behrens (pro hac pending)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com
mbehrens@shb.com

Attorneys for Amici Curiae

Dated: November 24, 2015

CERTIFICATE OF SERVICE

I certify that an original and 5 copies of the foregoing Brief were sent by overnight mail for filing addressed to:

Clerk
New Jersey Superior Court,
Appellate Division
Richard J. Hughes Judicial Complex
25 West Market Street
Trenton, NJ 08625
(609) 633-2259

I further certify that 2 copies were sent by U.S. Mail in a first-class postage-prepaid envelope addressed to the following:

Moshe Maimon
LEVY KONIGSBERG LLP
Quakerbridge Executive Center
101 Grovers Mill Rd., Ste. 105
Lawrenceville, NJ 08648

Robert Lytle
SZAFERMAN LAKIND BLUMSTEIN & BLADER PC
101 Grovers Mill Rd., Ste. 200
Lawrenceville, NJ 08648

Robert Picini
CARUSO SMITH PICINI, P.C.
60 Route 46 East
Fairfield, NJ 07004

Marc Gaffrey
HOAGLAND LONGO MORAN
40 Paterson Street
P.O. Box 480
New Brunswick, NJ 08903

Patricia M. Henrich
Josette Spivak
REILLY, JANICZEK, MCDEVITT, HENRICH & CHOLDEN, P.C.
Kevon Office Center, Suite 240
2500 McClellen Blvd.
Merchantville, NJ 08109

Hon. Ana C. Viscomi, J.S.C.
Middlesex County Court House
56 Paterson St., Chambers 203
New Brunswick, NJ 08093

Phil S. Goldberg

Dated: November 24, 2015