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MASS TORT ALERT

WOLFINGER V. LINCOLN ELECTRIC - SUPERIOR COURT APPLIES (OR MISAPPLIES) BETZ

In an unpublished non-precedential opinion, *Wolfinger v. Lincoln Electric Company*, the Pennsylvania Superior Court recently applied the Supreme Court's pronouncement on pseudoscience in the courtroom, *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012).

Wolfinger was a case tried to verdict in a reverse bifurcated trial in 2010 in Philadelphia; the jury awarded the deceased plaintiff's estate over $800,000 for his asbestos related pleural thickening in Phase 1 of the trial. Lincoln's welding rods were found to be a factual cause in Phase 2. Arthur Frank, M.D. was plaintiff's expert. He testified that in his opinion, the decedent was exposed to asbestos from Lincoln welding rods that he used in the course of his employment, and that exposure contributed to his disease. Lincoln had requested a Frye hearing, which the trial court denied.

Lincoln raised several issues and sub-issues on appeal, including:

1. The trial court erred in allowing expert testimony that "any exposure" to asbestos was causative, in violation of Gregg and Betz
2. The trial court erred in admitting Dr. Frank's opinion, which was based on a factually unsupported hypothetical, and because he lacked the appropriate qualifications to opine on the level of exposure from Lincoln welding rods
3. The trial court erred in precluding all evidence regarding plaintiff's applications to bankruptcy trusts and then refused to permit setoffs for payments made by the trusts
4. The trial court erred in permitting the case to be tried in a reverse-bifurcated manner or then refusing to empanel a new jury for Phase 2.

The court rejected all of Lincoln's arguments on appeal and affirmed the trial court's denial of post-trial motions.

On appeal, Lincoln argued that *Betz* stands for the proposition that an "any-breath exposure" opinion is insufficient to support a jury finding of causation. The Superior Court rejected this, taking the narrow view that what was at issue in *Betz* was whether "the any exposure opinion [can serve as] a means in and of itself, to establish substantial-factor causation" where the plaintiff's individual history of exposure to a particular product was not considered by the plaintiff's expert. The Superior Court distinguished Dr. Frank's testimony in *Wolfinger* from that of Dr. Maddox in *Betz* by stating that "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 . . . 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. . . His responses were also grounded in his experience with welders, asbestos containing welding rods, epidemiological studies, and encapsulation methods".

Absent from the court's analysis was any discussion of "dose", industrial hygiene studies regarding airborne asbestos concentrations associated with welding rod use, the amount of asbestos in dust created with welding rod use, or any particulars regarding Dr. Frank's experience with welders and welding rods, the epidemiological studies, if any, he relied on, or encapsulation. Likewise, the hypothetical questions asked of

Dr. Frank merely mentioned that the Decedent used welding rods for 12 years, some of them contained asbestos, and dust was created when he removed them from the box and used them – without any quantification of the amount of asbestos in the dust or the airborne concentration of any asbestos.

In its ruling on a separate but equally important issue, the Superior Court then rejected Lincoln's argument that the bankruptcy trust claims were (a) admissible as admissions of exposures to other products and (b) admissible to impeach Decedent's statements in answers to interrogatories which were inconsistent with the bankruptcy claims. The Superior Court applied an abuse of discretion standard of review on this issue and cited *Ball v. Johns Manville Corp.*, 625 A.2d 650 (Pa. Super. 1993), which held that bankrupt defendants' names should not be submitted to a jury for a finding of liability. The court stated that the "proposed evidence is not relevant to Lincoln's liability, which is based on Decedent's exposure to asbestos from its own welding rods. Lincoln's insistence that Decedent could not have been exposed was a defense not dependent on possible exposure to other products." The Superior Court agreed with the trial court that reference to the trust applications "would have only served the purpose of assigning blame to unrepresented, bankrupt non-parties".

This ruling is inconsistent with trial court rulings in western Pennsylvania and elsewhere, where courts admit this evidence because it is relevant to the defense that products associated with a de minimus exposure to asbestos did not contribute to the plaintiff’s disease, but the plaintiff’s other exposures, to products associated with a significant dose and a more potent fiber type, were the likely cause of the disease.

The court also rejected Lincoln's request for a set-off for payments made by the trusts because Lincoln did not seek discovery of the status of the claims applications until after the verdict. Finally, the Superior Court held that the trial court did not abuse its discretion in holding a reverse bifurcated trial.

It is difficult to predict how the Supreme Court would ultimately rule on the application of *Betz* to expert opinion at issue. *Wolfinger* is consistent with the narrow view of *Betz* taken by judges in western Pennsylvania - that only causation opinions that fail to take a particular plaintiff's exposure history into account are inadmissible. However, one would expect the Supreme Court to at least scrutinize the hypothetical questions, Dr. Frank's opinions, the bases for his opinions (or lack thereof), and his methodology (or lack thereof). In addition, there is a reasonably good chance that the Supreme Court would reverse the Superior Court on the admissibility of statements made to bankruptcy trusts for the limited purposes that Lincoln sought.

The *Wolfinger* memorandum decision illustrates the difficulty that judges are having in applying the *Betz* decision with regard to low dose exposures.

The opinion also illustrates that the need for a legislative response concerning asbestos bankruptcy trusts - in terms of admissibility of statements made in claim forms, and with regard to set-offs or coordination of the allocation of fault among solvent parties and bankrupt entities.

This Alert is intended to keep readers current on matters affecting mass tort, and is not intended to be legal advice. If you have any questions, please contact Dan Sinclair at 412.566.2913, or any other attorney with whom you have been working.