NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DARLENE NELSON, EXECUTRIX OF THE ESTATE OF JAMES NELSON	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AIRCO WELDERS SUPPLY, ALLIED SIGNAL (A/K/A ALLIED CORP.), AMERICAN STANDARD, A.W. CHESTERTON, INC., BASIC, INC., BAYER CROPSCIENCE, INC., (F/K/A AVENTIS CROPSCIENCE, USA, INC.) ACHEM PRODUCTS, INC., RHONE POULENC, AG CO. AND BENJAMIN FOSTER COMPANY, BEAZER EAST (A/K/A KOOPERS CO., INC. AND KOOPER), BIRD INC., BOC GROUP, BORG-WARNER CORP., BRAND INSULATIONS, INC., CBS CORPORATION (F/K/A VIACOM, INC. AND WESTINGHOUSE ELECTRIC CORPORATION), CERTAINTEED CORPORATION, CHRYLSER CORP. (A/K/A AMC, NORTHWEAST AUTO RENTAL CO. AND CHRYSLER SERVICE CONTRACT CO.) CRANE CO., DEMMING DIVISION, CRANE PACKING, ESAB WELDING AND CUTTING EQUIPMENT, EJ LAVINO & CO., EUTECTIC CORP., FERRO ENGINEERING, FORD MOTOR CO., FOSECO, INC., FOSTER WHEELER CORPORATION, GARLOCK, INC., GENERAL ELECTRIC COMPANY, GENERAL MOTORS CORP., GEORGE V. HAMILTON, INC., GEORGIA-PACIFIC CORPORATION, GOULD PUMPS, INC., GREEN, TWEED & COMAPNY, INC., HAJOCA PLUMBING SUPPLY COMPANY, HARNISCHFEGER CORP., HEDMAN RESOURCES LIMITED (F/K/A HEDMAN MINES LTD.), HOBART BROTHERS CO., HONEYWELL INTERNATIONAL, INC., INGERSOLL RAND CO., JOY GLOBAL, INC., LINCOLN	:	No. 865 EDA 2011 866 EDA 2011 867 EDA 2011 889 EDA 2011

ELECTRIC CO., LUKENS STEEL CO., :
MALLINCKRODT GROUP, INC. (F/K/A :
INTERNATIONAL MINERALS & :
CHEMICALS CORP.), MELRATH GASKET, :
INC., MINE SAFETY APPLIANCE (MSA), :
METROPOLITAN LIFE INSURANCE :
COMPANY, NOSROCK CORPORATION, :
OWENS-ILLINOIS, INC., PEP BOYS :
(A/K/A MANNY, MOE AND JACK), :
UNTION CARBIDE CORP., UNIVERSAL :
REFRACTORIES DIVISION OF THIEM :
CORPORATION :
:

Appeal from the Judgment Entered February 23, 2011
In the Court of Common Pleas of Philadelphia County
Civil No(s).: 1335 Dec. Term 2008

BEFORE: SHOGAN, WECHT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J. **FILED SEPTEMBER 05, 2013**

Appellants/Cross Appellees, Crane Co., Hobart Brothers Company, and The Lincoln Electric Company[1] and Appellee/Cross Appellant, Darlene Nelson, appeal from the judgment entered in the Philadelphia County Court of Common Pleas in favor of Appellee in the amount of $14.5 million. Appellants contend, *inter alia*, that the trial court erred in the admission of Appellee's expert witness testimony that every asbestos exposure must be considered a cause of mesothelioma. We agree, reverse pursuant to ***Betz v.***

* Former Justice specially assigned to the Superior Court.

[1] Crane Co. filed one appellate brief and Hobart and Lincoln filed a joint appellate brief.

Pneumo Abex, ***LLC***, 44 A.3d 27 (Pa. 2012),[2] and remand for a new trial on liability. Appellants further contend that improper remarks by Appellee Nelson's counsel during closing arguments in the damages phase of the trial were prejudicial and that the trial court should have granted a mistrial. We agree, vacate the judgment, and remand for a new trial on damages. Finally we grant Appellants Hobart and Lincoln's motion to take judicial notice of Philadelphia General Court Regulation No. 2012-12.[3]

The trial court summarized the facts of this case as follows:

> James Nelson [("Decedent")] developed mesothelioma as a result of occupational exposures during his career at Lukens Steel Plant in Coatesville, Pennsylvania. [Decedent] worked as a pitman, laborer, welder and mechanic from 1973 until 2006.
>
> For the first five years, [Decedent] was a pitman, and then a general laborer. During this time, he was exposed to asbestos pipe covering, gaskets, packing, furnace cement, and "hot tops," an asbestos-containing board.
>
> In 1978, he became a welder and continued in that position until he left . . . in 2006. During his time as a welder, [Decedent] used large numbers of welding rods

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[2] Appellants Hobart and Lincoln filed a post-submission communication pursuant to Pa.R.A.P. 2501(b) advising this Court of the Pennsylvania Supreme Court's decision in ***Betz***. They acknowledge that the parties in these appeals have cited and discussed the Superior Court's ruling in ***Betz*** which was reversed by the Supreme Court.

[3] The regulation provides, *inter alia*, "There shall be no reverse bifurcation of any mass tort case, including asbestos, unless agreed upon by all counsel involved." Philadelphia General Court Regulation No. 2012-12. Appellant Crane refers to this regulation in its reply and response brief without any citation to legal authority for its application in the case *sub judice*. Appellant Crane's Reply and Response Brief at 11-13.

> per day. Some of the rods he regularly used contained asbestos through 1981. The asbestos was part of the "flux," which was the outer coating of the rod. According to [Decedent], pulling the rods out of the boxes in which they were packaged caused dust to be released from the flux and he would inhale that dust. He would also knock off the flux, which caused dust to be released into the air, and then wipe the flux on his gloves. [Decedent] testified that when he would clap his hands together to remove the dust on his gloves[, dust] was released into the air, and he would inhale it.
>
> As a welder, [Decedent] used Cranite asbestos-containing sheet packing to protect plant machinery from being damaged by welding sparks and to shield other workers from the flash of the welding arc. [Decedent] had to cut the sheet packing material in order to use them for his intended purpose. When [Decedent] cut the sheet packing, dust was released and subsequently inhaled by [Decedent]. Crane distributed all of the Cranite sheet packing, which contained asbestos until the early 1980s.
>
> In November 2008, [Decedent] was diagnosed with mesothelioma as a result of his asbestos exposure. During the year following his diagnosis, [Decedent] underwent several regimens of chemotherapy and had fluid drained from his chest. Although one of the chemotherapy regimens slowed the growth of his tumor, [Decedent] could not continue with the regimen because the side effects of the treatment were so debilitating. [Decedent] died on October 30, 2009.

Trial Ct. Op., 6/13/11, at 3-4.

On December 5, 2008, Appellee, Decedent's spouse and executrix of his estate, filed a complaint against, *inter alia*, Appellants.[4] On February 9, 2010, Appellants Hobart and Lincoln filed a motion to preclude Appellee's

[4] This case was consolidated with three other asbestos cases for trial. Trial Ct. Op. at 2.

expert Dr. Daniel DuPont's each and every breath causation opinion testimony. Appellants Hobart and Lincoln's Joint Motion to Preclude [Appellee's] Expert Daniel DuPont's Causation Opinions. On February 22, 2010, Appellant Crane filed a motion to exclude the each and every breath causation opinion testimony. Motion in *Limine* to Exclude Expert Testimony. On March 1, 2010, a motions hearing was held at which time a ***Frye***[5] hearing was requested. N.T., 3/1/10 a.m., at 51. All of the named defendants joined in the arguments and the motions. ***Id.*** at 53. The court held the motions deferred until the liability phase of the trial. ***Id.*** at 57. The trial was reverse bifurcated. On March 1, 2010, phase 1, the damages trial commenced, and as stated above, the jury found damages of $14.5 million for Appellee.

On March 11, 2010, Dr. DuPont's deposition was taken. Counsel for Appellee and counsel for Appellant Crane agreed that it would be presumed that Crane's counsel objected to the "each and every breath testimony." N.T. Dep., 3/11/10, at 2-3. On March 25, 2010, the court entered an order admitting Dr. DuPont's every/breath testimony.[6] ***See*** Docket.

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[5] ***Frye v. U.S.***, 293 F. 1013 (D.C. Cir. 1923).

[6] The order provided: "It is ordered that the joint motion in *limine* to preclude [Appellee's] expert, Daniel DuPont DO or in the alternative, motion for ***Frye*** hearing is denied." Order, 3/25/10.

At the second phase of trial, On March 23, 2010, the jury returned a verdict in favor of Appellee and against Appellants as to liability. All parties filed post-trial motions which were denied on February 22, 2011. This timely appeal followed. All parties filed timely court-ordered Pa.R.A.P. 1925(b) statements of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant Crane raises the following issues for our review:

> 1. Was the trial court correct when it determined that Crane Co. could be held strictly liable for the injuries allegedly arising from [Decedent's] use of "Cranite" brand gasket material when the trial evidence demonstrated that [Decedent] was not an intended user of Cranite, and he did not use it in an intended manner?
>
> 2. Is testimony from an expert witness that "every asbestos exposure must be considered a cause of disease" legally sufficient to establish causation under the facts presented in this case in light of ***Gregg v. V-J Auto Parts, Co.***, 596 Pa. 274, 943 A.2d 216 (2007), and did [Appellee's] evidence pass the "frequency, regularity, proximity" test?
>
> 3. Did the trial court act within its discretion in conducting the consolidated, reverse-bifurcated trial of a series of tort claims with many differences and only one significant similarity—that they involve diseases caused by asbestos?
>
> 4. Does a trial court act within its discretion in permitting a party's counsel to suggest a damages amount and discuss the conduct and actions of a defendant in closing argument when the only claim is one for strict liability?
>
> 5. Is a plaintiff in an asbestos action entitled to recover all of his or her jury—awarded damages from solvent defendants, and then to recover additional amounts on account of the same injury from "asbestos bankruptcy trusts," without any accounting by the trial court?

Appellant Crane's Brief at 4-5.

Appellants Hobart and Lincoln raise the following issues for our review:

> 1. Did the trial court commit prejudicial error in denying a mistrial and in failing to grant a new trial in response to [their] post-trial motions where the structure and size of the verdict demonstrate conclusively that the jury was improperly prejudiced, after [Appellee's] counsel repeatedly wrongfully appealed to emotion and interjected [their] conduct into his closing argument in both Phase 1 and Phase 2 of the reverse bifurcated proceeding, including:
>
> a. Improperly urging a specific minimum amount of damages by stating in his Phase 1 argument that each of twelve separate elements of non-economic damages was worth "at least $1 million;"
>
> b. Improperly injecting alleged settlement discussions into his Phase 1 closing argument by stating that [Hobart and Lincoln] did not place an adequate "value" on Decedent's life, and "has it dawned on any of you yet that the reason we're here and the only reason we're here is because I can't agree with these people with the value of my client's life" and "I can't agree with any of these people on how much money should be awarded . . . for what has been done in this case . . . ;"
>
> c. Improperly attributing bad motives to [Hobart and Lincoln] in Phase 2 arguments when the case was being tried only on a strict liability cause of action in which the conduct of [Hobart and Lincoln] was not at issue in the case; and
>
> d. Improperly injecting conduct and punitive elements into both phases of the reverse-bifurcation proceeding by asking the jury to send a message and "act as the conscience of the community," knowing that a curative instruction would not

> actually cure the harm and prejudice to [Hobart and Lincoln].
>
> 2. Did the trial court commit prejudicial error in failing to exclude testimony from [Appellee's] proffered experts and failing to grant a nonsuit or new trial in response to [Hobart and Lincoln] post-trial motions where:
>
> > a. The trial court erroneously relied on ***Donoughe v. Lincoln Electric Company***, 936 A.2d 52 (Pa. Super. 2007), to permit [Appellee's] physician, Dr. Daniel DuPont, to express the opinion that "any exposure to asbestos is a substantial contributing factor to asbestos disease," a view that has been rejected by the Pennsylvania Supreme Court in [***Gregg]***; and
> >
> > b. The trial court erroneously admitted [Appellee's] expert Dr. Daniel DuPont's testimony, even though [Appellee's] hypothetical questions to Dr. Daniel DuPont had no evidentiary support; even though Dr. Daniel DuPont had no expertise independent of the defective hypothetical questions to render any competent opinion about asbestos fiber release from welding rods; and even though neither [Appellee's] hypothetical questions nor Dr. Daniel DuPont's own testimony met the standard that [Appellee] established for causation of mesothelioma?
>
> 3. Did the trial court commit prejudicial error in permitting reverse bifurcation and consolidation of four unrelated mesothelioma cases even though the plaintiffs had different exposure histories at different plants to different manufacturers' products—and even though only one plaintiff alleged exposure to asbestos in welding rods?

Appellant Hobart and Lincoln's Brief at 9-10.

Appellee raises the following issue for our review:[7]

> 6. Did the trial court err as a matter of law in assigning a share of the judgment to a joint tortfeasor defendant who filed a petition in bankruptcy before paying [Appellee] any of its agreed-upon settlement amount and before the court entered judgment?

Appellee's Brief at 4-5.

First, we address the issue of the admissibility of Appellee's expert witness testimony, which is dispositive of the liability phase of the trial. Appellants Hobart and Lincoln argue that the trial court erroneously relied on ***Donoughe***, 936 A.2d 52, to permit Appellee's expert, Dr. Daniel DuPont, to express the opinion that "minimal exposure nonetheless substantially contributed to decedent's injury because 'mesothelioma may be caused by even a small exposure to asbestos.'" Appellants Hobart and Lincoln's Brief at 33-34. Appellants contend that this view has been rejected by the Pennsylvania Supreme Court in ***Gregg***, 943 A.2d 216. Appellant Crane also contends that ***Gregg*** is controlling. Appellants contend that Appellee failed to meet the threshold of showing causation and, therefore, they were entitled to a judgment notwithstanding the verdict or a new trial.

Our standard of review of the trial court's evidentiary ruling is well-established:

> When we review a trial court's ruling on admission of evidence, we must acknowledge that decisions on

[7] Appellee's first five issues are merely counter-statements of Crane's appellate issues.

> admissibility are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion or misapplication of law. In addition, for a ruling on evidence to constitute reversible error, it must have been harmful or prejudicial to the complaining party.
>
> ***Stumpf v. Nye***, 950 A.2d 1032, 1036 (Pa. Super. 2008)[.] A party suffers prejudice when the trial court's error could have affected the verdict. ***Trombetta v. Raymond James Financial Services, Inc.***, 907 A.2d 550, 561 (Pa. Super. 2006).

Gaudio v. Ford Motor Co., 976 A.2d 524, 535 (Pa. Super. 2009).

On May 23, 2012, three weeks after this Court heard argument in the instant appeal, the Pennsylvania Supreme Court announced a decision in ***Betz***, 44 A.3d 27, which we find is dispositive.[8] Our Pennsylvania Supreme Court addressed the issue of "the admissibility of expert opinion evidence to the effect that each and every fiber of inhaled asbestos is a substantial contributing factor to any asbestos-related disease.[9] The inquiry has

[8] We note that: "The general rule followed in Pennsylvania is that we apply the law in effect at the time of the appellate decision. . . . . This means that we adhere to the principle that, 'a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occurs before the judgment becomes final.'" ***Passarello v. Grumbine***, 29 A.3d 1158, 1164 (Pa. Super. 2011) (citations omitted) *appeal granted on other grounds*, 44 A.3d 654 (Pa. 2012).

[9] "This opinion often is referred to as the 'any-exposure,' 'any-breath,' or 'any-fiber' theory of legal (or substantial-factor) causation. ***See generally Summers v. Certainteed Corp.***, 606 Pa. 294, 316, 997 A.2d 1152, 1164–65 (2010) (discussing the requirement for a plaintiff to prove that a defendant's product was a substantial factor in causing injury)." ***Betz***, 44 A.3d at 30.

proceeded under principles derived from ***Frye***."[10] ***Id.*** at 30. ***Betz*** "was selected among test cases for the any-exposure opinion as a means, in and of itself, to establish substantial-factor causation." ***Id.*** at 55. In ***Betz***, the trial court sustained the defendants' ***Frye*** challenge and found this evidence was inadmissible. ***Id.*** at 39. In a published opinion, this Court reversed and remanded. ***Betz v. Pneumo Abex LLC***, 998 A.2d 962 (Pa. Super. 2010). As stated above, at the time the parties submitted their appellate briefs to this Court and the Court heard argument, only the Superior Court decision in ***Betz*** was available. Subsequently, the Pennsylvania Supreme Court reversed this Court. ***Betz***, 44 A.3d at 58.

The expert in ***Betz***, John C. Maddox, M.D., testified:

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[10] The trial court in ***Betz*** reasoned:

> In resolving this ***Frye*** challenge I have considered the testimony of the witnesses, voluminous scientific literature, and numerous legal authorities proffered in support of the plaintiffs' and the defendants' respective positions. In the end, my decision ultimately rests upon whether the plaintiffs experts' opinions were based upon methodologies utilizing discrete and specific scientific principles logically applied in a manner that can be affirmatively articulated, referenced, reviewed, and tested, and empirically verified or whether the testimony was based upon the "best estimate," the "gut instinct," or the "educated guess" of the experts.

Betz, 44 A.3d at 39. "In the context of [a] ***Frye*** ruling, [ ] the abuse of discretion standard applies." ***Id.*** at 54.

> Asbestos-related mesothelioma, like other diseases induced by toxic exposures, is a dose response disease: each inhalation of asbestos-containing dust from the use of products has been shown to contribute to cause asbestos-related diseases, including mesothelioma. Each of the exposures to asbestos contributes to the total dose that causes mesothelioma and, in so doing, shortens the period necessary for the mesothelioma to develop. . . . **[E]ach exposure to asbestos is therefore a substantial contributing factor in the development of the disease** that actually occurs, when it occurs.

Id. at 31.[11] "**He also highlighted the long latency period between asbestos exposure and the manifestation of disease**, with the minimum time lapse being about ten years." ***Id.*** at 33 (emphasis added). "As a component of this testimony in support of the plaintiffs' claim of general causation, Dr. Maddox frequently indicated that each and every exposure 'should be considered,' 'contributes to' and 'increase[s] the risk of' asbestos-related diseases." ***Id.*** at 34. "Dr. Maddox also said that he drew his conclusions from case reports, animal studies, government regulatory assessments, and other scientific and medical literature." ***Id.*** "Additionally, while claiming some support in epidemiological science, the witness sought to avoid deeper discussion of the subject matter. ('I am not really prepared

[11] In the instant case, Dr. DuPont did not opine that asbestos-related mesothelioma was dose responsive. ***See infra***. The ***Betz*** Court found this opinion was "in irreconcilable conflict" with Dr. Maddox's any-exposure opinion. ***Betz***, 44 A.3d at 55. Unlike Dr. DuPont, "Dr. Maddox rendered his opinion without being prepared to discuss the circumstances of any individual's exposure." ***See id.***

to discuss epidemiology with you.')." ***Id.***[12] (reference to record, footnote omitted and emphasis added). He "**expressed the same opinion relative to cigarette smoking, namely, that '[a]ll the cigarettes that one smokes are considered to be contributory to the development of the lung cancer.**'" ***Id.*** at 35-36 (citation to record omitted and emphasis added). The ***Betz*** Court found:

> Dr. Maddox's any-exposure opinion simply was not couched in terms of a methodology or standard peculiar to the field of pathology. . . . Indeed, [Dr. Maddox] acknowledged that the rendition of a broad and generally applicable opinion concerning specific causation was outside the range of his usual professional activities. (**"[M]ost of my day-to-day work deals with individual patients, not with groups of patients that epidemiologic concepts will be used upon**. . . .").

Id. at 54-55 (emphasis added).

The plaintiff in ***Betz*** argued to the trial court "that [her] position was consistent with the admission of opinion evidence reflecting the any-exposure theory in other cases, most notably, ***Smalls v. Pittsburgh–Corning Corp.***, 843 A.2d 410 (Pa. Super. 2004)." ***Id.*** at 32. Further, the plaintiff averred on appeal:

> Dr. Maddox's methodology is "utterly mainstream" and has been utilized in a similar context before the Pennsylvania courts by numerous well qualified experts over many years. In support, [the plaintiff] provides pages of

[12] The ***Betz*** Court noted that because the trial court did not "squarely address these [studies] the Court's review was narrowed. ***Id.*** at 57. The Court noted: "It is very difficult to credit an expert's assessment of studies which he discounts but is unwilling or unprepared to discuss." ***Id.***

> citations to trial and deposition transcripts, as well as references to several Superior Court opinions, including ***Smalls***.[26]

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[26] ***See also Cauthorn v. Owens Corning Fiberglas Corp.***, 840 A.2d 1028, 1038–39 (Pa. Super. 2004) (approving expert testimony to the effect that "[e]ach breath of air that contained asbestos fibers substantially contributed to the development of [the plaintiff's] diseases," explaining that "[b]ecause any asbestos fiber will cause some degree of injury . . . each fiber will have some small effect and it's the cumulative effect of all the different fibers."); ***Lonasco v. A–Best Prods. Co.***, 757 A.2d 367, 375 (Pa. Super. 2000) (approving the opinion that "each exposure to asbestos . . . before the latency period . . . has . . . been a substantial, contributing cause").

Id. at 49-50 (citations to appellate brief omitted).

The ***Betz*** Court noted, "the any-exposure opinion is also very significant, in that it obviates the necessity for plaintiffs to pursue the more conventional route of establishing specific causation . . . ." ***Id.*** at 54.

The Supreme Court concluded:

> . . . Dr. Maddox's explanations do not undercut, but rather support, what we said in ***Gregg***:
>
> > We appreciate the difficulties facing plaintiffs in this and similar settings, where they have unquestionably suffered harm on account of a disease having a long latency period and must bear a burden of proving specific causation under prevailing Pennsylvania law which may be insurmountable. Other jurisdictions have considered alternate theories of liability to alleviate the burden. ***See***, ***e.g.***, ***Menne v. Celotex Corp.***, 861 F.2d 1453, 1464–70 (10th Cir. 1988). ***See generally*** Comment, The Threshold Level of Proof of Asbestos Causation: The "Frequency, Regularity and Proximity Test" and a Modified Summers v. Tice Theory of Burden–Shifting, 24 Cap.

> U.L.Rev. 735 (1995). Such theories are not at issue in this case, however, and we do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every "direct-evidence" case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.
>
> ***Gregg***, 596 Pa. at 291–92, 943 A.2d at 226–27.

Id. at 56-57 (footnote omitted). Furthermore, the Court reasoned that "with regard to the **cigarette analogy**, Dr. Maddox offered no scientific basis for concluding that a single cigarette of the potentially half-million a person might smoke in a lifetime is substantially causative of such person's lung cancer." ***Id.*** at 57 (emphasis added). Our Supreme Court found this Court erred in finding the expert's "each and every breath" testimony admissible: "Certainly a complete discounting of the substantiality in exposure would be fundamentally inconsistent with Pennsylvania law." ***Id.*** at 58.

In the instant case, the trial court opined:

> [Appellants Hobart and Lincoln] contend that Dr. Dupont's each and every breath testimony in support of causation should have been precluded because it was unreliable and invalid. However, a long line of Pennsylvania cases has held that expert testimony stating that, "[e]ach and every breath of asbestos fibers is [a] significant and substantial contributing factor to the [plaintiff's] asbestos related disease" is admissible. ***Smalls***[, 843 A.2d at 414]; ***See***

> ***also Cauthorn***, [840 A.2d at 1038-39]; ***Lonasco***, [757 A.2d at 375]. Pursuant to this line of the (sic) cases, the trial court properly allowed the each and every breath testimony.

Trial Ct. Op. at 11. Applying the Supreme Court's decision in ***Betz***, we reverse.

Dr. DuPont's testimony was similar to that of Dr. Maddox in ***Betz***, ***supra***. Dr. DuPont was board certified in general and pulmonary medicine. N.T., 3/11/10, at 10. He testified:

> [Counsel for Appellee]: Q: Doctor, do you have any special affinity or special experience in diagnosing and treating asbestos-related disease?
>
> A: I do.
>
> Q: Would you tell us just a little bit about that, please?
>
> A: Well, . . ., ou[r] office is located in an area where i[n] the past, many residents were employees at various sites that had asbestos in an occupational fashion potentially for them to be exposed; shipyards, refineries, steel mills, manufacturing facilities, locomotive works, turbine facilities, to name some of them.
>
> So as a result of where I have practiced, and the type of patients I've seen, I became more involved and typical (sic) with patients with this condition.
>
> I have since become accepted as a consultant for the U.S. Department of Labor Employment Standards Administration, which supervises individuals that worked at a federal facility, the Philadelphia Navy Shipyard.
>
> * * *
>
> Q: Doctor, you are not an industrial hygienist; is that correct.

A: I am not.

* * *

Q: You are not an epidemiologist; is that correct?

A: That is correct. I am not.

Q: An epidemiologist does what? I am not sure the jury has heard that.

A: Well, an epidemiologist is a health professional. Some are physicians. Some are not, who are involved in studies of large populations looking for trends or tendencies in the occurrence of disease, and if possible, relationship of causation of occurrence of diseases.

* * *

Q: [H]ave you ever authored any textbooks in the field of asbestos-related diseases?

A: I have not.

Q: You treat people?

A: That's what I do.

* * *

Q: . . . There are three products that I am going to be questioning you about tonight, products that were manufactured by the Crane Company, gaskets and something call (sic) Cranite Sheet Packing Material, and welding rods that are manufactured by two companies, [Appellants] Lincoln and Hobart. . . .

Let me ask this, have you ever personally inspected any of those products?

A: No.

Q: Have you ever tested any of those products?

A: No.

Q: Have you ever conducted any air samples to determine whether or not those particular products if they were asbestos-containing, gave off respirable fibers?

A: No.

Q: As I think you've made it clear already, those are not your fields of expertise, is that correct?

A: That is correct.

* * *

Q: You reviewed medical records for . . . [Decedent].

You reviewed or received occupational histories from [Decedent].

You reviewed X-rays, CAT scans, other diagnostic films pertaining to [Decedent].

You determined a latency period for [Decedent]. You reviewed pathology report for [Decedent].

And you were asked to render an opinion to a reasonable degree of medical certainty whether or not you believed that inhalation of asbestos fibers caused [him] to develop the disease of mesothelioma; is that accurate?

A: Yes.

Q: . . . And you told the jury already in your opinion it was [ ] caused by exposure to asbestos; correct?

A: Yes.

* * *

Q: [H]ow do we make a determination as to what products caused [Decedent's] disease? . . .

Q: . . . [A]re you familiar with the term "cumulative exposure?" . . .

* * *

A: That's the total exposure realized by an individual from what it is that you're asking. . . . If it (sic) cigarettes, it's how much you smoked. If it (sic) asbestos, it's how much you inhale.

* * *

Q: . . . How then, do you as a physician, make a determination as to the asbestos burden that [he] experienced in an occupational setting?

A: Well, the answer has to do with number one, the fact that there is a body of literature in the various types of asbestos diseases that clinicians or the other individuals taking care of a patient or who is answering that question rely upon.

So in your specific question about [this] specific case[ ], first off, we have to talk about the disease. The disease is malignant mesothelioma.

Q: Why is that important?

A: Well, it's important a couple of instances. Number one, it's a disease that has been directly linked to asbestos exposure.

And I as I think has been stated before, and is reflected in the literature, asbestos is the causative factor in the majority, if not all of the cases if you can dig deep enough and get a history of exposure, but the second thing about this that's important is, that it does not require the type of exposure that some of the other diseases do.

Q: Well, the jury has heard the terms pleural thickening, asbestosis, lungs (sic) cancer, and then of course, mesothelioma.

> Tell us the difference, if you would, as to the types of exposures you need to get the other diseases as opposed to mesothelioma.
>
> A: **Well, the other diseases that you just mentioned are diseases that have a dose response**[13] **relationship**. . . .
>
> The dose response relationships (sic) indicates that more intense or significant exposure over a longer period of time, the cumulative exposure is related to the likelihood of developing any of those conditions and to the severity with which those conditions can develop, particularly the fibrotic or the scar-related things, pleural thickening and asbestosis. . . .
>
> On the other hand, that is not, according to the literature, the case with malignant mesothelioma.
>
> Malignant mesothelioma occurs with significant asbestos exposure, but **it does not require the dose or duration or intensity of exposure that the other diseases do.**
>
> * * *

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[13] The ***Betz*** Court stated:

> As the United States Supreme Court has explained:
>
> > A dose-response curve shows the relationship between different exposure levels and the risk of cancer [or any other disease] associated with those exposure levels. Generally, exposure to higher levels carries with it a higher risk, and exposure to lower levels is accompanied by a reduced risk.
>
> ***Indus. Union Dep't, AFL–CIO***, 448 U.S. at 632 n. 33, 100 S.Ct. at 2859 n. 33 (quoting ***Am. Petroleum Inst. v. OSHA***, 581 F.2d 493, 504 n. 24 (5th Cir.1978)).

Betz, 44 A.3d at 53 n.33.

Q: . . . So now how do you make a determination? What these folks have to do is they have to decide, did one asbestos product cause [Decedent] to get the disease? Did two? Did three? Did five? Did ten? Did all of them? What kind of help can you provide in that area? . . . .

A: The help that I can provide is to say the following, it is accepted or believed that **there are no innocent respirable asbestos fibers.**

Q: What's (sic) that mean?

A: **What that means in English is that all of the fibers that get inhaled by the individual that contain asbestos and have an adequate time, this latency period that you've heard about, to cause disease, are to be felt or considered causative or contributing to the development of a condition.**

You cannot say that on this day or with this product or on a-at this time, that this fiber didn't do anything.

Because among other things, you can't separate all of this out. **There are no studies.**

* * *

Q: . . . If I ask you now specifically, to a reasonable degree of medical certainty what caused [Decedent] to develop [ ] mesothelioma, please tell me your answer? . . .

A: The inhalation of fibers above the negligible amount already contained in the environment is the type of exposure that causes this disease, and that **all of the fibers involved in that above the negligible amount, should be considered substantial in their causation. And furthermore, no fibers can be considered innocent or not involved** . . . .

* * *

> Q: Did **each individual exposure** that [Decedent] had above a non-negligible level, were (sic) [he] inhaled airborne asbestos dust **constitute a substantial and contributing factor to the disease** [he] developed? . . .
>
> A: **Yes**.
>
> * * *
>
> [Counsel for Appellants Hobart and Lincoln]: [H]ave you had an opportunity to review the literature regarding welding roads (sic) and published medical literature regarding welding rods?
>
> A: I mean, there is some of the literature regarding welding rods, and their risk of asbestos-related involvement that I have seen in a general review, but I—this is not what I typically study or do. So, I won't pretend to say I know all the literature on that.
>
> * * *
>
> [Counsel for Appellant Crane]: . . . Doctor, are you able to tell us the specific composition of the dust that [Decedent] inhaled with respect to [his] work with or around Cranite gaskets?
>
> A: No.

N.T. Dep., 3/11/10, at 10-12, 16-17, 20-21, 26-27, 29-32, 43-44, 49-50, 53, 88-89, 122 (emphasis added).

Counsel for Appellant Crane asked Dr. DuPont about several products that Decedent worked with and whether each exposure to visible airborne dust from those products "was a significant and substantial contributing factor to his development of mesothelioma." ***Id.*** at 136-37. Dr. DuPont responded: "Yes." ***Id.*** at 137. Dr. DuPont reiterated that "[t]here are no

innocent exposures . . . they are all equally potentially causing the disease . . . ." ***Id.*** at 163.

Like Dr. Maddox in ***Betz***, Dr. DuPont testified that there was a long latency period and found each and every exposure was a substantial controlling factor. Accordingly, we hold that Dr. DuPont's "each and every breath" opinion testimony was analogous to that of Dr. Maddox found inadmissible in ***Betz***, and that the trial court's admission of it is inconsistent with ***Betz***. ***See Betz***, ***supra***. The admission of this prejudicial evidence was reversible error. ***See Gaudio***, ***supra***. Therefore, we vacate the judgment and remand for a new trial as to liability. Because of our resolution of this issue, we need not address the other issues raised relating to the liability phase of the trial.

Next, we address the issues raised as to the damages phase of the trial. Appellant Crane argues "[t]he trial court erred in failing to account, in any way, for [Appellee's] substantial asbestos bankruptcy recoveries." Appellant Crane's Brief at 55, citing ***Ottavio v. Fibreboard Corp.***, 617 A.2d 1296, 1300-01 (Pa. Super. 1992). Appellant Crane concedes that bankruptcy trusts are not joint tortfeasors because "they cannot be 'liable in tort' for asbestos-related claims—they cannot be sued, or apportioned fault, in such claims in Pennsylvania." ***Id***. at 57.

This Court has stated:

> Apportionment of liability between joint tortfeasors poses a question of law. ***See Baker v. AC & S***, 562 Pa.

> 290, 755 A.2d 664, 667 (2000) . . . Accordingly, our scope of review of questions of apportionment is plenary, prescribing that we consider the issue de novo. ***See id.*** Our standard of review provides that we may reverse the trial court's decision upon a showing of abuse of discretion or error of law. ***See id.***, n. 4.

Andaloro v. Armstrong World Industries, Inc., 799 A.2d 71, 78 (Pa. Super. 2002).

The trial court opined:

> At trial, Crane Co. sought to present evidence regarding the amount [Appellee] had received to date from asbestos bankruptcy trusts and to present testimony regarding anticipated recoveries from bankruptcy trusts in the future.
>
> The court precluded this evidence pursuant [to] 42 Pa.C.S.A. § 6141(a), (c) (2010):
>
> > **(a) Personal injuries.**—Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.
> >
> > * * *
> >
> > **(c) Admissibility in evidence.**—Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

> 42 Pa.C.S.A. § 6141(a), (c) (2010).[14] From the plain meaning of this statute, [Appellant] Crane Co.'s request to publish to the jury [Appellee's] settlements with bankruptcy trusts is prohibited by Pennsylvania statute. Therefore, this court properly refused to allow the jury to consider [Appellee's] receipt of funds from bankruptcy trusts.
>
> Moreover, the Superior Court has established that a jury is not to consider the liability of bankrupt defendants. ***Ball v. Johns-Manville Corp.***, 625 A.2d 650, 660 (Pa. Super. Ct. 1992); [*abrogated on other grounds*, ***Baker v. ACandS***, 755 A.2d 664, 668 (Pa. 2000)], ***Octavio*** [617 A.2d at 1301]. Because none of the bankrupt companies had been adjudicated to be a joint tortfeasor, [Appellant] Crane Co. is not entitled to a set-off under [the Uniform Contribution Among Joint Tortfeasors Act, 42 Pa.C.S. § 8321 *et seq*.].

Trial Ct. Op. at 17. We discern no error of law or abuse of discretion. ***See Andaloro***, ***supra.***

Next, Appellee's sole issue on appeal is that the trial court erred in denying her amended motion to mold the verdict because Garlock, a settling defendant, filed a post-verdict voluntary federal bankruptcy petition. Appellee's Brief at 47. Appellee avers that ***Ottavio***, ***supra***, and ***Ball***, ***supra***, support a molding of the verdict because "liability cannot be apportioned among bankrupt defendants . . . ." ***Id.*** at 48. Appellee contends that "it is plain that [Appellee] appropriately and of necessity must regard the Garlock settlement as invalid." Appellee's Reply Brief at 4.

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[14] "Generally, evidence of prior settlements is inadmissible at trial on any matter. ***See*** 42 Pa.C.S.A. § 6141(c)." ***Reading Radio, Inc. v. Fink***, 833 A.2d 199, 216 (Pa. Super. 2003).

Appellee asserts that "Pennsylvania law **does** place the burden of the risk of Garlock's insolvency on defendants, not on the plaintiff." ***Id***. Appellee cites ***Ottavio***, ***Ball*** and ***Baker*** in support of this proposition.

It is well-established that "we review the trial court's refusal to mold the verdict for an abuse of discretion." ***Herbert v. Parkview Hosp.***, 854 A.2d 1285, 1288 (Pa. Super. 2004).

Instantly, the trial court reasoned:

> [Appellee argues that Garlock] should not have been assigned [its] share of the verdict because the Superior Court has refused to allow liability to be apportioned among bankrupt defendants, holding that the remedy of the nonsettling defendants would be to seek contribution from a bankrupt company when and if it emerges from reorganization. ***Ottavio*** [617 A.2d at 1300]. ***Accord Ball*** [625 A.2d at 659-60]. ***See also Baker*** [729 A.2d at 1151].
>
> However, the cases cited by [Appellee] are not directly on point. In fact, [Appellee's] cases are easily distinguishable because [Garlock] did not file for bankruptcy until well after the jury verdict. In the above cites cases, the Superior Court refused to allow liability to be apportioned among bankrupt defendants because they were bankrupt at the time of trial and were not allowed on the verdict sheet. In this case, [Appellee] reached [a] settlement agreement[with Garlock] prior to the conclusion of trial. Importantly, [Garlock was] on [the] verdict sheets and [assigned] a share of liability.
>
> The issue in this case is analogous to the issue (sic) ***Rocco v. Johns-Manville***, 754 F.2d 110 (3rd Cir. 1985).[15] In ***Rocco***, the United States Court of Appeals

[15] We note: "Federal . . . appeals court decisions are not binding precedent on this Court. We may follow their reasoning where it is persuasive."

> for the Third Circuit held that, under the Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S.A. § 8321 *et. seq.* ("UCATA"), non-settling defendants are entitled to a pro rata set off for the shares of a defendant that was adjudicated by the jury to have been a joint tortfeasor, and received a joint tortfeasor release, but declared bankruptcy after the verdict and before it paid the plaintiff. ***Rocco***, 754 F.2d at 116-17. The ***Rocco*** Court held that plaintiffs' relief against the now-bankrupt defendant must come from the bankruptcy court, not the trial court. ***Id.*** at 117.

Trial Ct. Op. at 5-6 (footnote omitted). We agree no relief is due.

Garlock was a settling defendant at the time the verdict was rendered, and it did not file a bankruptcy petition until after the jury verdict was announced.

This Court in ***Ball*** reasoned:

> [A]s to those parties **who were in bankruptcy when this case was submitted to the jury**, we need only refer once again to the recent *en banc* decision of this court in ***Ottavio v. Fibreboard Corp***., ***supra***, where we analyzed the selfsame issue. The ***Ottavio*** court concluded 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. The court opined:
>
> > 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.

Reeser v. NGK North American, Inc., 14 A.3d 896, 899 n.3 (Pa. Super. 2011).

Ball, 625 A.2d at 660. Appellee's reliance on ***Ball*** and its progeny is unavailing. We discern no abuse of discretion by the trial court in denying Appellee's amended motion to mold the verdict. ***See Parkview Hosp.***, ***supra.***

Next, Appellants Hobart, Lincoln and Crane contend improper remarks by Appellee Nelson's counsel during closing arguments in the damages phase of the trial were prejudicial and that the trial court should have granted a mistrial. Appellants Hobart and Lincoln state that Appellee's counsel improperly asked the jury to award $12 million in pain and suffering damages. Appellants Hobart and Lincoln's Brief at 22-23. Appellee Nelson counters that counsel did not suggest a specific amount and that if there were any prejudice, it was cured by the trial court's jury instructions on damages. Appellee's Brief at 37. Hobart and Lincoln aver that the trial court's instructions on damages had no curative effect. Appellants Hobart and Lincoln's Reply Brief at 6. Appellant Crane also avers that Appellee's counsel improperly suggested a value of at least $1 million on each of twelve separate items of damages. Appellant Crane's Brief at 53. We find relief is due.

Appellee's counsel stated in closing argument in the damages phase of the trial:

> Let me move you into what's known as the verdict sheet. If we can put that up, please. You're actually going to be

> handed the sheet, whoever the foreperson is, you'll take the sheet, go back and look at some of the things.
>
> * * *
>
> Under the Survival Act and there's something else called the Wrongful Death Act,[16] . . . Her Honor will describe that to you clearly . . . . For my purpose, here's what you need to know: When you go back to the jury room, ladies and gentlemen, how do you decide on a number?
>
> * * *
>
> It's up to you folks. Use your common sense. You have a sense of what these things are worth. You know what happens in your life. **I'm not permitted by law to give you a number. I can't tell you a damage award**, that

---

[16] On the verdict sheet, the elements of non-economic damages under the Survival Act were stated as follows:

> **Physical Pain**, **mental anguish**, **embarrassment** and **humiliation**, **disfigurement**, **discomfort**, and **inconvenience** [Decedent] endured from the time that [Decedent] first began to experience symptoms caused by his mesothelioma until his death as a result of mesothelioma. (Note: You are not to include economic loss in this figure.)

Jury Verdict Sheet, 3/9/10, at 1 (emphasis added). The jury returned a verdict of $7 million. ***Id.***

The elements of non-economic damages under the Wrongful Death Act were stated as follows:

> **Loss of society**, **comfort**, **support**, **assistance** and **companionship** to [Appellee] from the moment of [Decedent's] death through his life expectancy. (Note: you are not to include economic loss in this figure.

Id. at 2. The jury returned a verdict of $5 million. ***Id.***

I would be happy with that and say I think that's great. I think that's fair.

It's up to you folks to do that. How do you do it? **Think of these**, if you would, **as different awards.** Even though it's all going to go on one line, I think it will be easier for you if think of these as different elements of damages. The first and the most important, obviously, ladies and gentlemen, is the physical pain and suffering that [Decedent] went through.

This is hard because, in essence, you are awarding [him] damages just as if [he] were here. This is [his] damages; and from the evidence I heard, ladies and gentlemen, that is always, always and should be the most important part of your decision based on what you heard in the courtroom. **Physical pain**.

Mental anguish. Here's how I think of mental anguish. I think of mental anguish as somebody telling me, you're going to die from this tumor in your chest and I can't tell when you (sic).

To me, mental anguish is trying to go to bed at night being terrified if I close my eyes, I may never wake up again. I may never hug my wife, kiss my children. That's mental anguish. Embarrassment and humiliation, we covered. Disfigurement is the scar.

* * *

Economic loss. And this, . . . applies in [Decedent's] case because he was 53 and he was still working.

We have agreed. We have stipulated. That means the attorneys on this side of the courtroom, the attorneys that represent the companies that we sued in this case, we have agreed that the economic losses that you can accept as accurate and true equal $1 million. I repeat, $1 million, and that's where you start at. You start there.

You haven't even gotten to the physical pain yet. You haven't gotten to that anguish yet. You haven't gotten to the **embarrassment** and **humiliation**, the

disfigurement, **discomfort** and **inconvenience**. Again, I need somebody to remember **you must start at $1 million.**

Based on the evidence that you heard in this courtroom, ladies and gentlemen, I believe your verdict for physical pain, mental anguish, embarrassment and humiliation disfigurement should be substantially more than economic losses.

It's so important it bears repeating. **You start at $1 million, and I believe each of those elements of damages starting at physical pain are worth infinitely more than that $1 million figure**. **Now, you add a million plus whatever other numbers you assign for these and you write that number there.**

Now, we then go down to the next line. This is what's known as a consortium claim, . . . and what is it? It's a claim that all spouses have for something that happens to their wife or their husband.

* * *

Again, this is a consortium claim . . . , and you have to put an amount of money in there. I would suggest to you, ladies and gentlemen, that number should be significant and substantial based on what you heard in this case.

You now move. (sic) You may think this is somewhat similar but the measuring periods are different now. This is the loss of society, comfort, support, assistance and companionship . . . because her husband died.

Again, what you might say is those things are the same. This number is the same. I told you, this number should be significant and substantial. This should be more so. Much more than this. Why?

Because the measuring time period, ladies and gentlemen, for this number starts from the time [Decedent's wife] is deprived of her husband's life and being, from the minute he dies until the end of his life expectancy which, in this case, we showed you the chart,

> went through the doctor, is another 25 years that you need to think of, 25 years that [Decedent and his wife] cannot be together . . . .
>
> * * *
>
> I hope I helped you in that regard in my speech, but at the end of the day, ladies and gentlemen, you represent the conscience of the community, and I'm asking you to award an amount of money that is so significant and substantial that it will do just that everyone will know that justice is done, not just [Decedent's] family, . . . but everybody that's in this courtroom and everybody that's in this community. Do not let these men die in vain.

N.T., 3/8/10, at 76-84 (emphasis added).

At this point, a side-bar was held off the record as follows:

> [Appellant Crane's Counsel]: I hereby move for a mistrial based on inappropriate comments during the closing, the most egregious of which results in an automatic mistrial, and that is Your Honor is well aware of the prohibition on suggesting a dollar value for a verdict.
>
> [Appellee's Counsel] said economic damages have been stipulated to $1 million, and I suggest to you, ladies and gentlemen of the jury.
>
> The Court: Start from there. What's wrong with that?
>
> [Appellant Crane's Counsel]: That you should award significantly more than $1 million for the pain and suffering and other losses.
>
> The Court: Did you say start from there?
>
> [Appellee's Counsel]: Absolutely.
>
> [Appellant Crane's Counsel]: He said significantly. We can go back to the transcript. He specifically said, they've agreed to 1 million for economics. Now let's look at pain and suffering on (sic) the others. You should start there

> and award significantly more than that $1 million for these other items.
>
> He has put a dollar value on an element of damage . . .
>
> * * *
>
> [Appellant Crane's Counsel: P]utting a dollar value out there is grounds for a mistrial. For him to say you need to award at least $1 million for pain and suffering, Your Honor, that is a mistrial right there.
>
> The Court: That's not—I thought you were saying—go ahead.
>
> [Appellee's Counsel]: My response to that is: The law provides and I am not allowed to suggest a monetary amount.
>
> However, in a situation where there is an agreement and a stipulation that the economic loss alone is $1 million, plaintiff has the absolute right—there's no question about it—I am so sure of this, beyond sure, I can easily say to them, as I did, you can start at a million dollars and this other stuff is even more valuable than that.
>
> [Appellant Crane's Counsel]: Absolutely, you can do that, but that's not what you did . . . .
>
> The Court: What do you think he did?
>
> [Appellant Crane's Counsel]: He then pointed to pain and suffering and he said these are worth significantly more than the million dollars.

Id. at 84-87.

Counsel for Appellants Hobart and Lincoln also made a motion for a mistrial, arguing that "you cannot appeal to the conscience of the community." ***Id.*** at 90. Counsel stated: "I absolutely join the reference to infinitely greater than a million dollar (sic) for pain and suffering and

substantially greater." ***Id.*** The court denied the motion for a mistrial. ***Id.*** at 97. There was no contemporaneous request for a curative instruction.

This Court has stated:

> It is well-settled that whether to declare a mistrial is yet another decision within the discretion of the trial court, whose vantage point enables it to evaluate the climate of the courtroom and the effect on the jury of closing arguments.

Clark v. Philadelphia Coll. of Osteopathic Med., 693 A.2d 202, 206 (Pa. Super. 1997) (citation omitted).

In ***Joyce v. Smith***, 112 A. 549 (Pa. 1921), as a result of the plaintiff's counsel's closing argument, the Supreme Court reversed the judgment. Our Pennsylvania Supreme Court opined:

> Causes must be fairly presented and defended, and the duty of counsel in this regard is not less important nor less imperative than that of the trial judge. A cause is not well tried unless fairly tried, and a verdict obtained by incorrect statements or unfair argument or by an appeal to passion, or prejudice, stands on but little higher ground than one obtained by false testimony. ***Saxton v. Pittsburg Rys. Co.***, 219 Pa. 492, 68 Atl. 1022. The amount of damages claimed is not to be determined by an estimate of counsel, but by the jury from the evidence before them, and any suggestion to the jury of an arbitrary amount is highly improper. ***Quinn v. Transit Co.***, 224 Pa. 162, 73 Atl. 319. While it is true in the present case, no definite amount was mentioned, yet, if plaintiff's version be accepted, the language contained a suggestion to the jury that 'thousands of dollars' were claimed for pain and suffering. This expression suggested the amount to the minds of the jury almost as clearly as if counsel had stated a definite number of thousands. . . .

Id. at 551 (cited with approval in ***Girard Trust Corn Exchange Bank v. Philadelphia Transp. Co.***, 190 A.2d 293, 296 (Pa. 1963)). "In cases where the damages are unliquidated and incapable of measurement by a mathematical standard, statements by plaintiffs' counsel as to the amount claimed or expected are not to be sanctioned, because they tend to instill in the minds of the jury impressions not founded upon the evidence." ***Stassun v. Chapin***, 188 A. 111, 111 (Pa. 1936).

In the instant matter, the trial court relied on ***Clark***, 693 A.2d 202, and opined:

> [Appellants] also contend that [Appellee's counsel's] statement to the jury that [Decedent's] pain and suffering deserved compensation of greater than the $1 million in stipulated economic loss violated the prohibition of an attorney suggesting specific dollar amounts for non-economic damages. . . .
>
> There is no prohibition, however, on counsel arguing that a plaintiff's non-economic damages are worth substantially more than an amount of proven economic loss. . . .
>
> * * *
>
> Here, there was no suggestion of a specific amount of damages for pain and suffering. Thus, counsel's remarks did not violate Pennsylvania's rule prohibiting suggesting a dollar amount to the jury.
>
> Most importantly, the trial court's jury instructions on damages made it clear that the jury's verdicts were to be based only on the evidence and not on any extraneous factors. The court instructed the jury that the money damages awarded needed to fairly and adequately compensate the plaintiffs for their injuries. The court also instructed the jury that it was not to punish the defendants

> or to send a message to the community. The trial court's jury instructions gave the jury a clear framework from which to reach a fair and adequate verdict based on the evidence. Thus, [Appellants] can show no actual prejudice. . . .

Trial Ct. Op. at 9-10. We disagree.

Instantly, the trial court instructed the jury, *inter alia*, as follows:

> I told you that-well, I just want to remind you what I told you at the beginning of the trial, that opening speeches and closing speeches are not evidence in the case, so you don't take notes.
>
> * * *
>
> Now that all the evidence has been presented and the attorneys made their closing arguments, I will instruct you on the applicable law, and you will only apply this law to your deliberations.
>
> * * *
>
> Now, you must weigh the evidence and all logical inferences, find the facts, apply the law, then decide your verdict. You should not consider sympathy, prejudice. Your recollection of the evidence must govern.
>
> * * *
>
> I just want to remind you that we're not here to punish any of the defendants or to send a message to the community.
>
> * * *
>
> . . . [T]here are two stipulations in [Decedent's] case. And one is that (sic) parties agree that asbestos caused [Decedent's] mesothelioma. And the second stipulation is that his economic losses amounted to $1 million.
>
> * * *

> Now, I'm going to tell you now that . . . you must find an amount of money damages you believe will fairly and adequately compensate [Decedent] for all of the injuries [ ] sustained as a result of [Decedent's] injuries.
>
> * * *
>
> Now, [Decedent] ha[s] made claims for a damage award for what we call noneconomic losses. There are four items that can make up this award for noneconomic loss, and that's for pain and suffering, embarrassment and humiliation, loss of the ability to enjoy any of life's pleasures, and disfigurement.
>
> * * *
>
> Now, we have in Pennsylvania also a wrongful-what we call survival Act and a Wrongful Death Act. And when a person dies, the damages he would have been entitled to go to his estate or survivors and the estate is and survivors are just as entitled to these damages as the deceased person would have been had he survived.
>
> * * *
>
> Now, you have to make a determination as to the life expectancy of [Decedent]. And in determining the damages recoverable in this case, you must determine the number of years [D]ecedent would have lived had [he] not died as a result of this injury.
>
> According to statistics compiled by the United States Department of Health and Human Services, the average life expectancy of all persons of [Decedent's] age at the time of his death, his sex and his race, is 25.7 years.

N.T., 3/9/10, at 19-21, 24, 26, 36-37, 39, 42.

In ***Clark***, this Court opined:

> [The appellants] claim that the trial court improperly allowed counsel to suggest a formula for pain and suffering during closing argument. [They] refer to a drawing of a triangle with a horizontal line through it used by counsel

> during closing to suggest that [the appellee's] past and future medical expenses, wage loss and lost future earning capacity totaling over $2,000,000, represented only the "tip of the iceberg," and that her pain and suffering were what remained below the horizontal "water line." [The appellants] claim that this schematic drawing contravenes the prohibition against estimating or suggesting to a jury the amount of damages to be awarded, especially for pain and suffering in a personal injury case. ***Clark v. Essex Wire Corp.***, 361 Pa. 60, 63 A.2d 35 (1949); ***Atene v. Lawrence***, 456 Pa. 541, 318 A.2d 695 (1974).
>
> The trial court, within whose discretion the presentation of closing speeches remains, ***Catina v. Maree***, 272 Pa. Super. 247, 415 A.2d 413 (1979), *rev'd. on other grounds*, 498 Pa. 443, 447 A.2d 228 (1982), overruled [the appellants'] objections and motions for mistrial, concluding that the objection was "specious, frivolous, and simply a reaction" to counsel's closing. . . . The trial court in its Opinion observed that "[w]hether the tip of the iceberg argument is called rhetoric, analogy or metaphor, **it was not a direct statement suggesting any specific sum or arbitrary amount**." We agree with this assessment, and find that as such, the drawing did not justify the declaration of a mistrial.

Id. at 206 (some citations omitted).

We find ***Clark*** is distinguishable from the instant case because counsel in ***Clark*** did not make "a direct statement suggesting any specific sum or arbitrary amount." ***See id.*** In the case *sub judice*, Appellee's counsel in closing stated, *inter alia*, "You start at $1 million, and I believe that each of those elements of damages starting at physical pain are worth infinitely more than that $1 million figure. Now, you add a million plus whatever other numbers you assign for these . . ." N.T., 3/8/10, at 80-81. We agree with Appellants that Appellee's counsel suggested a value of at least $1

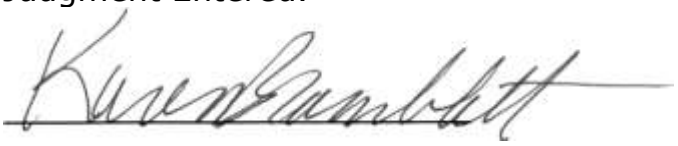
million for each of the 12 types of damages. Furthermore, we disagree with the trial court that its jury instructions cured the taint of Appellee's counsel's improper suggestion of a specific sum for non-economic damages to the jury.

Therefore, we find the trial court abused its discretion in denying Appellants motions' for a mistrial. ***See Clark***, ***supra***. Accordingly, we reverse the denial of a mistrial and remand for a new trial on damages.

Judgments vacated as to liability and damages. Case remanded for new trial on liability and damages. Jurisdiction relinquished. Appellants Hobart and Lincoln's motion to take judicial notice of new General Court Rule 2012-12 granted.

Wecht, J. files a Concurring and Dissenting Memorandum.

Judgment Entered.



Prothonotary

Date: 9/5/2013