

## litigation lawflash

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## Pennsylvania Supreme Court: Expert Testimony Violates Admissibility Standard

*Court's opinion gives guidance on both the admissibility of novel scientific evidence and the more general question of causation in cases involving de minimis alleged exposures to toxic substances.*

In a unanimous opinion of interest to manufacturers and suppliers facing toxic exposure lawsuits, the Pennsylvania Supreme Court held in *Betz v. Pneumo Abex LLC*, No. 38 WAP 2010 (Pa. May 23, 2012), that a trial court acted appropriately in conducting a *Frye* hearing to evaluate the credibility of “novel” expert testimony in response to the defendants’ challenge to the admissibility of the evidence.

At question was the admissibility of a medical expert’s theory that “each and every exposure” to asbestos—no matter what the level or duration—contributes substantially to the development of asbestos-related disease. The plaintiffs’ bar has in many instances avoided adverse summary judgment rulings by relying in part on their experts’ claims that even miniscule exposures to asbestos contribute to a plaintiff’s cumulative dose, and that any dose is a substantial contributing cause of the diseases at issue. As a result of this stance, defendants routinely are faced with the prospect of trial based on very limited evidence of exposure. In *Betz*, the state Supreme Court upheld the trial court’s decision and found the expert’s opinion to be both internally irreconcilable and inconsistent with Pennsylvania tort law when it claimed simultaneously that a single asbestos fiber, among millions, is substantially causative and at the same time that asbestos-related disease is dose responsive. The court found that the trial judge had articulable grounds to conclude that the expert witness had not applied accepted scientific methodology in reaching his conclusions.

### Background

Pennsylvania law requires that, in order to provide a sufficient basis for liability in a toxic tort case, an exposure to a defendant’s product must be a “substantial contributing factor” in causing an injury. In *Betz*, the trial court’s ruling arose in the context of a “test case” selected to determine the admissibility of expert opinion that inhalation by a plaintiff of even a single asbestos fiber from a defendant’s product entails some level of risk and therefore constitutes a substantial contributing factor to any subsequently developed asbestos-related disease. This assertion was the linchpin of the plaintiffs’ products liability actions against various manufacturers of asbestos-containing automotive friction products, i.e., brake pads and linings and clutch facings. The plaintiffs claimed they had been exposed to asbestos from such products during the course of their employment. The defendants sought to preclude the proffered expert testimony by a pathologist on what has variously been called the “any exposure,” “any breath,” or “each and every exposure” theory of causation. Acceptance by the jury of the “each and every exposure” theory—by equating exposure with causation in every instance—could obviate the necessity for the plaintiffs to establish specific causation and discount the substantiality of each exposure.

The defendants filed a motion under Pennsylvania’s *Frye* standard asserting that the plaintiffs’ “each and every exposure” opinion was the product of a novel scientific technique not generally accepted in the relevant scientific community. The trial court granted an evidentiary hearing to determine whether the evidence was admissible under the Pennsylvania standard. During the hearing, the court heard testimony from opposing experts and conducted an examination of the plaintiffs’ expert regarding the methodology used to arrive at the opinion. Both parties and a number of amici curiae submitted substantial briefing on the issue.

The plaintiffs argued that the expert's theory was not novel, but rather had been accepted in mainstream science and any questions regarding the credibility of such an opinion are best addressed by a jury. The trial court agreed with the defendants and excluded the expert's opinion on the basis that the methodology used to arrive at the opinion was plagued by "unwarranted liberties and logical errors." The Superior Court rejected the trial court's finding that the methodology used by the plaintiffs' expert was novel and further found that the underlying challenge to the methodology was improperly raised *sua sponte*. The defendants sought review by the Pennsylvania Supreme Court.

## Pennsylvania Supreme Court Decision

The Supreme Court found that the trial court's decision to conduct a *Frye* hearing was appropriate and consistent with the trial judge's duty to screen scientific evidence prior to its presentation to a jury. The court agreed with the defendants that the term "novel" should apply not only to new science, but also to the use of recognized scientific methods in novel ways to arrive at an opinion for use in litigation. The Supreme Court also agreed with the trial court that where an expert fails to clearly articulate his or her methodology, or where the conclusions drawn by the expert are outside or beyond the scope of the expert's scientific field, scrutiny by the court is appropriate under *Frye*. In *Betz*, the Supreme Court noted that the expert in question—a pathologist—would not ordinarily be called upon to attribute specific causation, but rather that his usual focus would be upon diagnosis based on empirical review. The pathologist in question could not cite to specific research he had performed or to any other methodological basis on which he offered his "every fiber" opinion.

The court's skepticism of the competence of the expert to offer the proffered opinion was coupled with a sense that the opinion itself was a quasi-legal conclusion—that any asbestos exposure is a "substantial contributing factor" to disease—designed specifically to address, and to avoid, the need for the plaintiffs to prove substantial factor causation as to individual defendants' products. The court noted that the expert's opinion was not based on a particular plaintiff's exposure history, but rather represented a general causation opinion that conceivably might apply to any person who was exposed to any quantity of asbestos fibers. The court observed on multiple occasions in the opinion that the "each and every exposure" causation opinion of a plaintiff's expert was irreconcilable with the expert's acknowledgment that asbestos-related diseases are dose related: "[O]ne cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." The court also noted that adoption of the expert's opinion could undermine the court's prior holdings as to the quantum of evidence necessary to support a recovery in a case alleging asbestos exposure—i.e., sufficient frequency, regularity, and proximity to a defendant's product.

In reversing the Superior Court, the Supreme Court held that the expert's methodology was novel in that it did not follow any acceptable scientific practice and that circumventing the substantiality of any given exposure is fundamentally inconsistent with Pennsylvania law.

## Implications

The Supreme Court's lengthy opinion in *Betz* seems to be intended to give far-reaching guidance on the question of admissibility of novel scientific evidence generally, and specifically on the question of causation in cases involving *de minimis* alleged exposures to toxic substances. As such, while the *Betz* decision arose in the context of asbestos litigation, it could well serve as a roadblock to the presentation of evidence designed to water down the standard for causation in other types of liability cases. The court's decision may afford manufacturers and suppliers an additional defense where the plaintiffs allege they developed an asbestos-related disease or other disease caused by a toxic substance as a result of infrequent or single exposure to their products. More generally, the opinion squarely addresses the question of the extent to which a plaintiff may substitute evidence that a substance may present a risk of an adverse outcome for proof that the substance in fact caused such an outcome in the plaintiff's case, and it suggests that the Supreme Court sees in Pennsylvania tort law some limits on a plaintiff's ability to make that substitution. Whether and to what extent that approach will be applied in other types of toxic exposure cases and whether the court might conclude that such an opinion might be admissible if based on a different expert scientific foundation will remain an open question until further trial court and appellate case law develops on the issue.

# Morgan Lewis

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