

# RAWLE'S REPORTS

THE NATION'S OLDEST LAW OFFICE



[www.rawle.com](http://www.rawle.com)

**Philadelphia, PA**  
215. 575. 4200  
Fax 215. 563. 2583

**New York, NY**  
212. 323. 7070  
Fax 212. 323. 7099

**Marlton, NJ**  
856. 596. 4800  
Fax 856. 596. 6164

**Pittsburgh, PA**  
412. 261. 5700  
Fax 412. 261. 5710

**Harrisburg, PA**  
717. 234. 7700  
Fax 717. 234. 7710

**Wilmington, DE**  
302. 778. 1200  
Fax 302. 778. 1400

**Wheeling, WV**  
304. 232. 1203  
Fax 304. 232. 1205

## PENNSYLVANIA

### ASBESTOS LITIGATION

#### “Every Exposure” Theory Rejected



**Peter J. Neeson**

The Pennsylvania Supreme Court recently issued a unanimous opinion ruling that an expert’s testimony that “any exposure” or “every exposure” to asbestos substantially contributes to an asbestos-related disease, which in this case was mesothelioma, is in irreparable conflict with the same expert’s testimony that the asbestos-related disease is dose-responsive and, therefore, it was properly excluded under the *Frye* test. See *Diana K. Betz, Executrix of the Estate of Charles Simikian v. Pneumo Abex, LLC, et al., No. 38 WAP 2010*. Rawle & Henderson LLP represented Allied Signal, Inc., one of two defendants involved in the appeal.

In 2005, Charles Simikian filed a product liability lawsuit in the Allegheny Court of Common Pleas (Pittsburgh) against numerous companies, including Ford Motor Co. and Allied Signal, Inc., that allegedly manufactured or supplied asbestos-containing friction products. Simikian alleged that he was exposed to asbestos during his forty-year occupation as an automotive mechanic. Simikian died shortly after instituting the lawsuit, and the Executrix of his Estate, Diana Betz, was substituted in his place. After the majority of the defendants had been dismissed from the case or had settled with plaintiff, the remaining defendants filed a *Frye* motion seeking to exclude the testimony of plaintiff’s causation expert, Dr. John C. Maddox, on the ground that his opinion that “every exposure” to asbestos contributes substantially to the development of an asbestos-related disease, is not generally accepted in the relevant scientific community applicable to novel scientific evidence. The trial court held a three-day hearing on the validity of the “every exposure” theory, following which it granted the *Frye* motion finding that Dr. Maddox’s “every exposure” opinion lacked “methodologies utilizing discrete and specific principles logically applied in a manner that can be affirmatively articulated, referenced, reviewed, and tested, and empirically tested.”

The trial court subsequently granted summary judgment in favor of the remaining defendants based on its rejection of the “every exposure” theory. Plaintiff appealed the trial court’s decision to the Superior Court, and the Superior Court reversed the trial court’s *Frye* decision, after which Allied Signal and Ford Motor Co. filed petitions seeking review by the Supreme Court; the petitions were granted.

In reversing the Superior Court’s decision, and reinstating the trial court’s holding, the Supreme Court first ruled that the trial court’s decision to conduct a *Frye* hearing concerning

[www.rawle.com](http://www.rawle.com)

the “any exposure” opinion was appropriate. The Supreme Court acknowledged that there is “inherent tension among the various measures for admissibility of expert testimony,” but a *Frye* hearing is “warranted when a trial court has articulable grounds to believe that an expert witness has not applied scientific methodology in a conventional fashion in reaching its conclusions.” The Supreme Court determined that the trial court was correct in being cautious about the scientific methodology behind Dr. Maddox’s “any exposure” theory since it seemed to conflict with dose-responsive theory also espoused by Dr. Maddox. The Supreme Court also recognized the significance of the trial court’s decision to conduct a *Frye* analysis of the “any exposure” theory since the refusal to do so would “obviate the necessity for plaintiffs to pursue the more conventional route of establishing specific causation....” Accordingly, “[g]iven both the controversial nature of the any-exposure opinion and its potency in asbestos litigation, [the trial court] pursued the sensible course of permitting evidentiary development so that he could make an informed assessment.”

Next, the Supreme Court summarily rejected plaintiff’s argument that the defendants could not challenge the methodology of Dr. Maddox, a pathologist, through the testimony of risk assessors, toxicologists, and epidemiologists. Noting that Dr. Maddox expressed no familiarity with plaintiff’s individual circumstances and, instead, offered a “broad-scale opinion on causation applicable to anyone inhaling a single asbestos fiber above background exposure levels,” the Supreme Court held that Dr. Maddox’s opinions were not “couched in terms of a methodology or standard peculiar to the field of pathology.”

With respect to the “any exposure” opinion itself, the Supreme Court made several critical findings. The Supreme Court stated that plaintiff’s attempt to redirect the focus of the appeal to plaintiff’s four-decade history of occupational exposure to asbestos was inappropriate at this stage since plaintiff argued at the trial court level that such a history need not be established so long as she could establish exposure to at least one fiber from each defendant’s product and since Dr. Maddox was not aware of the circumstances of plaintiff’s exposure.

The Supreme Court also noted that Dr. Maddox’s any-exposure opinion is in “irreconcilable conflict with itself”

since “one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive.”

The Supreme Court found that the analogies offered by Dr. Maddox to support his any-exposure opinion were “fundamentally inconsistent with both science and the governing standard for legal causation” since the analogies did not account for the fact that asbestos fibers are not uniform in size or potency, are microscopic and million-fold.

This decision is one of the most significant decisions decided by the Pennsylvania Supreme Court in an asbestos case because plaintiffs can no longer rely on the “any exposure”/“every exposure” theory to meet the legal threshold for establishing causation in asbestos cases. Rather, a plaintiff’s expert will now have to include some type of both qualitative and quantitative analyses regarding a plaintiff’s exposure to a particular defendant’s product in his/her expert report to pass the *Frye* test.

***Diana K. Betz, Executrix of the Estate of Charles Simikian v. Pneumo Abex, LLC, et al., No. 38 WAP 2010, Pa. Supreme Ct.***

**Peter J. Neeson** is Chair of the Environmental Law and Toxic Torts section. He has been involved in numerous toxic tort matters in multi-district litigation and class action cases in both state and federal courts, including formaldehyde, multiple chemical sensitivity, sick building, latex glove, benzene, underground storage tank, silica, orthopedic bone screw, asbestos litigation and CERCLA Superfund cases. In 2007, he served as Chair of TIPS, the Tort Trial and Insurance Practice Section of the American Bar Association. In 2012, the ABA TIPS section awarded Mr. Neeson its most prestigious honor, the James K. Carroll Award for outstanding leadership qualities and service to the Section. In 2009, he was elected to serve as a Trustee for a three-year term on The National Judicial College’s Board of Trustees. Mr. Neeson graduated from the University of Notre Dame with a B.S. in Aerospace Mechanical Engineering in 1970 and from the University of Miami (*cum laude*) with a J.D. in 1978.

*Peter can be reached directly at:  
(215) 575-4320 • [pneeson@rawle.com](mailto:pneeson@rawle.com)*