



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**IN RE: ALDERSON BROADDUS
UNIVERSITY LITIGATION**

Civil Action No. 16-C-9000

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER GRANTING DEFENDANTS SODEXO, INC. AND CHAD PLYMALE'S
MOTIONS TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

On a previous day came the parties, Plaintiffs Pablo Rivera, Kimberly Cross, Victoria Hillard, Lisa Hoagland, Scott Kittle, Jonny Mayle, Troy Lee McCartney, Jr., Chad Miller, Ronda Shaw, Curtis Wilfong, Wilma Zelinsky (deceased), Gladys Rivera, Victor Cross, Thomas Hoagland, Mackenzie Kittle, Clay Wolfe, Preston Wolfe, Caleb Kittle, Kierra Kittle, and Avery Kittle, Amy Kittle, Raven McCartney, Latoya McCartney, Nevin McCartney, Estellena McCartney, Tracie McCartney, Shelton Miller, Seth Shaw, Nicolas Shaw, Michael Shaw, Josie Zelinsky, Jeffrey Collins, Gayle Miller, Aaron Fagons, Randall B. McCartney, Cadence McCartney, Raven McCartney, Troy McCartney, Sr., Arlina McCartney, Heather McCartney, and Dominica McCartney ("Plaintiffs"), by and through counsel Marvin W. Masters, Roger A. Decanio, and the Masters Law Firm, LC, and Defendants Sodexo, Inc. and Chad Plymale ("Sodexo Defendants"), by and through counsel Charles. R. Bailey, Justin C. Taylor, James W. Marshall, and Bailey & Wyant, PLLC, upon the following motions to dismiss:

Defendants', Sodexo, Inc., Chad Plymale, and Phyllis Henry, Motion to Dismiss Employee Plaintiffs' Amended Complaint (Transaction ID 59922869);

Defendants' Sodexo, Inc., Chad Plymale, and Phyllis Henry, Motion to Dismiss Plaintiff Spouses' and/or Relatives' Amended Complaint that Resided with Employee Plaintiffs (Transaction ID 59922653);

Defendants' Sodexo, Inc., Chad Plymale, and Phyllis Henry, Motion to Dismiss Amended Complaint of Non-Related Plaintiffs and Plaintiffs Not Residing with Employee Plaintiffs (Transaction ID 59922789); and

Defendant, Chad Plymale's Motion to Dismiss Plaintiffs' Amended Complaint

(Transaction ID 59922705).

A status hearing was held before the Mass Litigation Panel (hereinafter referred to as “the Panel”) on December 9, 2016, during which the Sodexo Defendants’ motions to dismiss were discussed, and certain arguments were made by both Plaintiffs’ counsel and Sodexo Defendants’ counsel.

Having reviewed and maturely considered all the applicable pleadings and motions, and the arguments made by the parties, the Panel finds the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by further oral argument. Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously **FIND, ORDER, and RULE** that the Sodexo Defendants’ Motions to Dismiss are **GRANTED** for the following reasons.

FINDINGS OF FACT

1. Eleven plaintiff employees (Pablo Rivera, Kimberly Cross, Victoria Hillard, Lisa Hoagland, Scott Kittle, Jonny Mayle, Troy Lee McCartney, Jr., Chad Miller, Ronda Shaw, Curtis Wilfong, and Wilma Zelinsky) (“Plaintiff Employees”) brought several causes of action against their employer Sodexo, Inc. and two supervisors, Chad Plymale and Phyllis Henry¹, as well as Alderson-Broaddus University, Inc., and Dr. Richard A. Creehan, related to their alleged exposure to asbestos during the course of work they performed removing ceiling tiles at the Pickett Library on the campus of Alderson Broaddus University in January and February of 2012.

2. The Plaintiff Employees allege that the ceiling tiles they removed and handled contained asbestos, and that they were improperly exposed to this asbestos during their

¹ Phyllis Henry was dismissed without prejudice by stipulation of the parties, dated September 1, 2016.

employment with Sodexo. None of the Plaintiff Employees claim any asbestos related illness or injury.

3. The Plaintiff Employees' causes of action include: Count I (Negligence and intentional/willful/wanton conduct and other claimed failures and breaches, including a claim for punitive damages); Count II (Gross Negligence, including a claim for punitive damages); Count III (Actual Knowledge of Exposure – intentional and willful conduct); Count IV (Fraud and Misrepresentation); Count V (Medical Monitoring); Count VI (Emotional Distress without physical injury); Count VII (Deliberate Intent pursuant to WVC §23-4-2(d)(2)(i) and (ii)); and Count VIII (Breach of Contract). Several of the Counts include duplicative claims and assertions.

4. Additionally, certain spouses, children, relatives, and non-relatives of the named Plaintiff Employees are also named as individual plaintiffs, including: Gladys Rivera, Victor Cross, Thomas Hoagland, Mackenzie Kittle, Clay Wolfe, Preston Wolfe, Caleb Kittle, Kierra Kittle, and Avery Kittle, Amy Kittle, Raven McCartney, Latoya McCartney, Nevin McCartney, Estellena McCartney, Tracie McCartney, Shelton Miller, Seth Shaw, Nicolas Shaw, Michael Shaw, Josie Zelinsky, Jeffrey Collins, Gayle Miller, Aaron Fagons, Randall B. McCartney, Cadence McCartney, Raven McCartney, Troy McCartney, Sr., Arlina McCartney, Heather McCartney, and Dominica McCartney (“Non-Employee Plaintiffs”).

5. The Non-Employee Plaintiffs claim they were exposed to asbestos while living or being in the same household as an Employee Plaintiff because the Employee Plaintiff carried asbestos home on their clothes or in their vehicles. Additionally, certain Non-Employee Plaintiffs allege they were directly exposed to asbestos while carrying and transporting ceiling tiles to the home of Troy McCartney, Sr. for his personal use, and claim secondary exposure

while they were in the garage where the tiles were stored. None of the Non-Employee Plaintiffs claim they have any asbestos related illness or injury.

6. The Non-Employee Plaintiffs' claims are essentially 'secondary' asbestos exposure claims. Their causes of action include: Count I (Negligence, intentional and wanton conduct, violation of OSHA regulations associated with their spouse/relative's workplace, failure to train spouse/relative, and other breaches of duties by Sodexo related to the spouse/relative's workplace which caused the spouse/relative plaintiffs to be exposed to asbestos); Count II (Gross Negligence, with factual allegations similar to Count I); Count III (Actual knowledge of presence of asbestos, and intentional and willful exposure); Count IV (Fraud); Count V (Medical Monitoring); and Count VI (Emotional Distress without physical injury).

7. Sodexo was at all relevant times a provider of professional maintenance services, ground care, custodial services and security, among other services, at Alderson Broaddus College (later University) ("Alderson Broaddus"). *Response to Defendant, Sodexo, Inc., Chad Plymale and Phyllis Henry's Motion to Dismiss Employee Plaintiffs' Amended Complaint* ("Pltffs' Resp."), p. 2.

8. Plaintiff Employees allege Sodexo provided each new employee with an employee manual wherein Sodexo contractually promised to identify hazardous materials, provide personal protective equipment, and comply with all safety laws and regulations. Pltffs' Resp, pp. 6-7

9. Based upon the allegations in the Amended Complaint and admissions in response to discovery, no Plaintiff has an actual physical injury or diagnosis of any asbestos related illness or disease. Furthermore, all Plaintiffs are asymptomatic with respect to any asbestos related illness or disease.

10. The Sodexo Defendants filed motions to dismiss with respect to the original Complaints of Plaintiffs on February 27, 2014, in the Circuit Court of Kanawha County, West Virginia, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, for failure to state a claim upon which relief can be granted. Defendant Chad Plymale also filed a separate motion to dismiss all Complaints for insufficient service of process, pursuant to Rule 12(b)(4) of the *West Virginia Rules of Civil Procedure*.

11. Plaintiffs also filed a motion to amend their Complaint in Kanawha County Circuit Court to add a claim against Sodexo for breach of contract as it relates to the Employee Plaintiffs pursuant to the employee manual and training materials. Plaintiffs' motion to amend was granted on or about March 24, 2016. On the same date, The Honorable Charles E. King transferred these cases to the Circuit Court of Barbour County, West Virginia.

12. On May 13, 2016, the Sodexo Defendants filed various Motions to Dismiss the Amended Complaint in the Circuit Court of Barbour County.

13. On June 24, 2016, The Honorable Alan D. Moats, Judge of the Circuit Court of Barbour County, and Chair of the Mass Litigation Panel, moved to refer the cases to the Panel. The Supreme Court of Appeals of West Virginia granted the motion and referred the cases to the Panel by Administrative Order entered on September 16, 2016.²

14. The Presiding Judges unanimously ruled that Defendants' motions to dismiss should be granted on February 3, 2017, and ordered Defendants to file a proposed, final judgment order with detailed findings of fact and conclusions of law. (Transaction ID 60160356) Defendants filed a proposed final judgment order on February 27, 2017. (Transaction ID

² On September 28, 2016, the Supreme Court Amended its Administrative Order to require all pending and subsequently filed asbestos exposure cases in West Virginia to automatically be referred to the Panel and transferred to the Circuit Court of Kanawha County for coordinated or consolidated resolution in In re: Asbestos Personal Injury Litigation, Kanawha County Civil Action No. 03-C-9600, the Honorable Ronald E. Wilson, presiding.

60248268) Plaintiffs filed objections to the proposed order on March 17, 2017. (Transaction ID 60347863).

CONCLUSIONS OF LAW

1. “A trial court may dismiss a pleading for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*.” *Collia v. McJunkin*, 178 W. Va. 158, 159, 358 S.E.2d 242, 243 (1987).

2. “The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint.” *Id.*, citing *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 717, 246 S.E.2d 907, 920 (1978) and *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978).

3. “Dismissal is proper pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* where ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief.’” *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104, 110 (1996) quoting Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1997)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957)).

EMPLOYEE CAUSES OF ACTION

4. The Plaintiff Employees have asserted eight separate causes of action against their employer, the Sodexo Defendants. As an employer, the Sodexo Defendants, are entitled to statutory immunity from civil lawsuits pursuant to W.Va. Code §23-2-6. The only cause of action the Employee Plaintiffs can assert against their employer is a "deliberate intention" action pursuant to W. Va. Code §23-4-2(d)(2)(i) or (ii). Therefore, any causes of action that are not brought pursuant to West Virginia Code §23-4-2(d)(2)(i) or (ii) are dismissed as a matter of law.

As discussed below, the Plaintiff Employees' remaining causes of action for medical monitoring and statutory deliberate intent are also dismissed as a matter of law.

Common Law / Non-Statutory Claims

5. Count I (Negligence and intentional/wanton conduct); Count II (Gross negligence); Count III (Actual knowledge of exposure – intentional and willful); Count IV (Fraud); Count VI (Emotional Distress without physical injury); and Count VIII (Breach of Contract) of the Plaintiff Employees' Amended Complaint are all essentially common law claims based on the same set of factual allegations.

6. The West Virginia Workers' Compensation Statute provides West Virginia employees with a no-fault claims process which allows them to be compensated for job-related injuries without having to prove negligence or fault of the employer. W.Va. Code §23-4-2(d)(1). The statute "is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter." *Id.*

7. The West Virginia Workers' Compensation Statute provides broad immunity to a participating employer from common law or statutory liability for the injury or death of an employee. West Virginia Code §23-2-6 (1991) states, in pertinent part:

Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section *is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring*, after so subscribing or electing, and during any period in which the employer is not in default in the payment of premiums or direct payments and has complied fully with all other provisions of this chapter.

(emphasis added)

8. "The legislature intended for W. Va. Code § 23-2-6 (1991) to provide qualifying

employers sweeping immunity from common-law tort liability for negligently inflicted injuries.” *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 194, 640 S.E.2d 540, 544 (2006), See also *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 659, 510 S.E.2d 486, 493 (1998)(“When an employer subscribes to and pays premiums into the Fund, and complies with all other requirements of the Act, the employer is entitled to immunity for any injury occurring to an employee and ‘shall not be liable to respond in damages at common law or by statute.’ W. Va. Code § 23-2-6 (1991)”); and *Smith v. Monsanto Company*, 822 F. Supp. 327, 331 (U.S.D.C., S.D. W. Va. 1992)(district court granted defendant’s motion for summary judgment on plaintiff’s negligence claims, opining deliberate intent statute “plainly entitles an employer in good standing to immunity from actions premised upon allegations of negligence.”)

9. The Plaintiff Employees also allege negligent/intentional infliction of emotional distress in Count VI of the Amended Complaint. However, these claims are precluded under West Virginia statutory and case law. West Virginia Code §23-4-1f (1993) provides that,

For the purposes of this chapter, no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.

10. Furthermore, the West Virginia Supreme Court held that mental injury claims without physical injury are non-actionable against one’s employer in Syllabus Point 3 of *Bias*:

An employee who is precluded by W.Va. Code § 23-4-1f (1993) from receiving workers' compensation benefits for a mental injury without physical manifestation cannot, because of the immunity afforded employers by W.Va. Code § 23-2-6 (1991), maintain a common law negligence action against his employer for such injury.

See also, Syl. Pt. 3, *State ex rel. Darling v. McGraw*, 220 W.Va. 322 (2007).

11. In light of the statutory and case law discussed above, the Panel GRANTS the

Sodexo Defendants’ motion to dismiss Counts I, II, III, IV, VI, and VIII of the Employee Plaintiffs’ Amended Complaint pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, for failure to state a claim upon which relief can be granted.

Medical Monitoring Claims

12. Count V of the Plaintiff Employees’ Amended Complaint is a medical monitoring claim due to alleged exposure to asbestos.

13. “A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant’s tortious conduct. Syl. Pt. 2, *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999).

14. In order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribe in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

Id. at Syl. Pt. 3

15. However, the West Virginia Supreme Court held that employees cannot assert a medical monitoring cause of action against their employer in Syllabus Point 4 of *State ex rel. City of Martinsburg v. Sanders*, 219 W.Va. 228, 632 S.E. 2d 914 (2006): “The immunity from liability afforded all employers participating in the Worker’s Compensation system through West Virginia Code § 23-2-6 . . . protects a political subdivision against awards of medical monitoring damages based on common law tort theories.”

16. In *City of Martinsburg*, the Supreme Court held the City firefighters’ claims that

significant exposure to diesel exhaust from fire engines and emergency vehicles increased their risk of future health problems fell within the ambit of the Worker's Compensation system as occupational disease arising out of and during the course employment. Consequently, the firefighters were statutorily barred from asserting negligence claims against the City of Martinsburg to obtain medical monitoring damages, even though the firefighters did not claim present physical injury due to the exposure to exhaust fumes. *Id.*

17. As the Supreme Court explained,

The immunity from liability afforded all employers participating in the Workers' Compensation system through West Virginia Code § 23-2-6 protects employers, including a political subdivision such as Martinsburg, against awards of medical monitoring damages based on common law tort theories. Syllabus point three of *Bowers* by its terms indicates that *medical monitoring is only a compensable item of damage when liability is established under traditional theories of recovery. Traditional theories of recovery are simply not available in this instance since Workers' Compensation is intended to insulate Martinsburg as a participating employer from incurring liability based upon common law grounds with regard to occupational disease claims.* Insofar as Respondents try to raise claims against the employer for negligent conduct, emotional distress or the like, Martinsburg is protected by the statutory remedy available through the Workers' Compensation system.

219 W.Va. at 234-35, 632 S.E.2d at 920 (emphasis added).

18. Nor can the Employee Plaintiffs claim that they are entitled to medical monitoring under the deliberate intent exception to employer immunity, as the very nature of a medical monitoring claim and its elements of proof, as set forth in *Bower*, are incompatible with the requirements of a deliberate intent claim under W.Va. Code §23-4-2(d)(2)(i) and (ii).

18. Absent from the Plaintiff Employees' medical monitoring claims are the required "deliberate intention" elements of intentional conduct to produce a specific injury or death; intentional exposure to a specific unsafe working condition that presented a high degree of risk and a strong probability of serious injury or death; and that the employee must have suffered

serious injury or death as a proximate result of the specific unsafe working condition. As previously noted, no Employee Plaintiff has alleged they suffer any asbestos related illness or injury.

19. Because employees cannot assert a medical monitoring cause of action against their employer under the immunity provision of West Virginia Code § 23-2-6 and as held in *City of Martinsburg v. Sanders*, 219 W.Va. 228, 234, 632 SE 2d 914, 920 (2006), this Court grants the Sodexo Defendants' motion to dismiss the Employee Plaintiffs' medical monitoring cause of action in Count V of the Amended Complaint for failure to state a claim upon which relief can be granted.

Statutory Deliberate Intent Claims pursuant to W. Va. Code §23-4-2

19. In Syllabus Point 2 of *Bias*, the West Virginia Supreme Court explained that there are three ways in which an employer may lose worker's compensation immunity:

An employer who is otherwise entitled to the immunity provided by W.Va. Code § 23-2-6 (1991) may lose that immunity in only one of three ways: (1) by defaulting in payments required by the Workers' Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with "deliberate intention" to cause an employee's injury as set forth in W. Va. Code § 23-4-2(d); or (3) in such other circumstances where the Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system.

220 W.Va. at 191, 640 S.E.2d at 541.

20. The Panel finds no evidence or assertion that the Sodexo Defendants lost their employer immunity because they defaulted in payments or otherwise failed to be in compliance with the Workers' Compensation Act. Nor have the Presiding Judges found any statute expressly providing the Employee Plaintiffs with a private remedy outside the workers' compensation system. The only remaining exception to employer immunity is the "deliberate intention" exception asserted by the Employee Plaintiffs in Count VII of their Amended

Complaint.

21. The deliberate intent exception to statutory immunity of an employer under the Worker's Compensation Act is set forth in W.Va. Code §23-4-2(d)(2):

The immunity from suit provided under this section and under sections six [§23-2-6] and six-a [§23-2-6a], article two of this chapter may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

(i) It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

W.Va. Code §23-4-2(d)(2)(i) and (ii)(A-E).

22. The Plaintiff Employees' deliberate intent cause of action asserts claims under both prongs of W.Va. Code §23-4-2(d)(2). The first prong of the deliberate intent statute requires proof that the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee". W.Va. Code §23-4-2(d)(2)(i). However, none of the Employee Plaintiffs allege present injury or death. Their only claim is for alleged exposure to asbestos and, therefore, under prong (i) their "deliberate intention" claim fails as a matter of law.

23. The Plaintiff Employees have also asserted a cause of action under the second prong of the deliberate intent statute, W.Va. Code §23-4-2(d)(2)(ii), where the majority of employee-employer lawsuits fall. Under the second prong, the employee must demonstrate all five statutory elements, including "[t]hat the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition." W.Va. Code §23-4-2(d)(2)(ii)(E).

24. The statutory language of §23-4-2(d)(2)(ii)(E) mandates that the employee must have suffered a serious compensable injury or compensable death. *See Addair v. Litwar Processing Co., LLC*, 2012 WL 2914980 (W.Va. 2012) at *2 ("one of the mandatory elements of a deliberate intent action requires plaintiff petitioners to establish that they '*suffered serious compensable injury or compensable death . . . as a direct and proximate result of the specific unsafe working condition.*' W. Va. Code § 23-4-2(d)(2)(ii)(E) (2005) (Repl. Vol. 2010)")(emphasis in original).

25. Because the Plaintiff Employees' Amended Complaint fails to plead paragraph "E" of W.Va. Code §23-4-2(d)(2)(ii) or claim that the Plaintiff Employees suffered a serious

compensable injury or death their “deliberate intention” claims fail as a matter of law. Accordingly, the Presiding Judges grant the Sodexo Defendants’ Motion to Dismiss Count VII of the Plaintiff Employees’ Amended Complaint, brought pursuant to W.Va. Code §23-4-2(d)(2)(i) and (ii) for failure to state a claim upon which relief can be granted.

Punitive Damages Claims

26. The Plaintiff Employees have asserted punitive damages against the Sodexo Defendants in various sections of their Amended Complaint.

27. With respect to Count V of the Plaintiff Employees’ Amended Complaint, the Supreme Court has held that “[p]unitive damages may not be awarded on a cause of action for medical monitoring.” Syl. Pt. 5, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W.Va. 482 (2010). Therefore, any punitive damages claims associated with the Employee Plaintiffs’ medical monitoring claims are dismissed as a matter of law.

28. The Employee Plaintiffs also allege punitive damages pursuant to W.Va. Code §23-4-2(d)(2)(ii). However, W.Va. Code §23-4-2(d)(2)(iii) specifically provides, “In cases alleging liability under the provisions of paragraph (ii) of this subdivision: (A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff.” Thus, any punitive damages claims alleged with respect to WVC §23-4-2(d)(2)(ii) are dismissed as a matter of law.

29. Finally, because all causes of action asserted by the Plaintiff Employees are dismissed, any punitive damages claims asserted by the Plaintiff Employees are also dismissed as a matter of law.

Chad Plymale’s Motion to Dismiss for insufficient service of process

30. Chad Plymale, a Sodexo Employee Defendant, has also moved for dismissal of Plaintiffs’ Amended Complaint for insufficient service of process, pursuant to Rule 12(b)(4) of

the *West Virginia Rules of Civil Procedure*.

31. Mr. Plymale asserts that “Plaintiffs have failed to effectuate service of Mr. Plymale in accordance with Rule 4(d)(1) the *West Virginia Rules of Civil Procedure* as the original Summons and Complaint were provided to a friend of Mr. Plymale. This friend has never been authorized by him in any capacity to accept personal service of process on his behalf.” Memo, pp. 1-2 and Affidavit of Chad Plymale, attached as Exhibit A. Mr. Plymale also asserts that he was never served with the Amended Complaint. Mot. p. 2. He argues that, because the original Complaint was never properly served on him, any filing of the Amended Complaint is deemed irrelevant and ineffectual on him. Mem. p. 3.

32. Mr. Plymale’s affidavit states that his family friend, Mary Weekley, resides with him and his wife. On or about June 13, 2014, Mary Weekley was delivered a package of documents at his residence, which happened to be a copy of the Summons and Complaint for this matter. Although Mary Weekley signed for the documents, at no point in time did Mr. Plymale “ever given Mary Weekley express, implied, or any other type of authority to accept personal service on my behalf, or in my individual capacity.” Affidavit ¶¶ 2, 4-6 .

33. Rule 4(d)(1) of the *West Virginia Rules of Civil Procedure* sets forth the requirements of service upon an individual:

(d) *Manner of service*. – Personal or substituted service shall be made in the following manner:

(1) Individuals. – Service upon an individual other than an infant, incompetent person, or convict may be made by:

(A) Delivering a copy of the summons and complaint to the individual personally; or

(B) Delivering a copy of the summons and complaint at the individual's dwelling place or usual place of abode to a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint; or

(C) Delivering a copy of the summons and complaint to an agent or attorney-in-fact authorized by appointment or statute to receive or accept service of the

summons and complaint in the individual's behalf; or

(D) The clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, and delivery restricted to the addressee; or

(E) The clerk sending a copy of the summons and complaint by first class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 14 and a return envelope, postage prepaid, addressed to the clerk.

34. Service of the Summons and Complaint on a friend does not satisfy the requirements for service set forth in Rule 4 of the West Virginia Rules of Civil Procedure. As such, plaintiffs have not complied with the service requirements of Rule 4 of the *West Virginia Rules of Civil Procedure*, with respect to the filing of the Original Complaint. Because the original Complaint was never properly served on Mr. Plymale, any filing of the Amended Complaint is deemed irrelevant and ineffectual on Mr. Plymale. Additionally, because the two year statute of limitation with respect to this action has long since passed any Amended Complaint, which has never been served on Mr. Plymale, would be improper and ineffectual. Therefore, Mr. Plymale's Motion to Dismiss pursuant to Rule 12(b)(4) of the *West Virginia Rules of Civil Procedure* is granted.

Public Policy Arguments

35. The Sodexo Defendant argue there are public policy considerations with respect to medical monitoring actions against an employer for asymptomatic / exposure only employees. Because the Panel has dismissed the Employee Plaintiffs' claims on other grounds, the Panel does not address the Sodexo Defendants' public policy arguments that: (1) a medical monitoring action against an employer by employees that have allegedly been exposed to asbestos but are asymptomatic, would be against the public policy of this State, as it would be in direct conflict with the Workers Compensation Statute; and (2) medical monitoring actions in asbestos exposure cases by asymptomatic employees against their employer would also be an unfair and

inequitable burden on the employer, and is an improper attempt to circumvent the deliberate intent statute for non-injured employees via medical monitoring claims.

36. For the reasons set forth above, the Plaintiff Employees' Amended Complaint and causes of action pled therein are dismissed as a matter of law with prejudice, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

NON-EMPLOYEE CAUSES OF ACTION

37. The Non-Employee Plaintiffs include spouses, children, parents, nephews, girlfriends, step-children, and grandchildren of the Employee Plaintiffs. The Non-Employee Plaintiffs claim they were exposed to asbestos while living or being in the same household as an Employee Plaintiff because the Employee Plaintiff carried asbestos home on their clothes or in their vehicles. Additionally, certain Non-Employee Plaintiffs allege they were directly exposed to asbestos while carrying and transporting ceiling tiles to the home of Troy McCartney, Sr. for his personal use, as well as secondary exposure while they were in the garage where the tiles were stored. These claims are essentially 'secondary' exposure claims.

38. The causes of action alleged by the Non-Employee Plaintiffs are: Count I (Negligence, intentional and wanton conduct, violation of OSHA regulations associated with their spouse/relative's workplace, failure to train spouse/relative, and other breaches of duties by Sodexo related to the spouse/relative's workplace which caused the spouse/relative plaintiffs to be exposed to asbestos); Count II (Gross negligence, with factual allegations similar to Count I); Count III (Actual knowledge of presence of asbestos, and intentional and willful exposure; Count IV (Fraud); Count V (Medical Monitoring); and Count VI (Emotional Distress without physical injury).

39. The Non-Employee Plaintiffs are all asymptomatic and do not have any asbestos

related illness or disease.

40. “In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.” Syl. Pt 3, *Aikens v. Debow*, 208 W.Va. 486, 541 SE 2d 576 (2000).

41. “The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” *Id.*, Syl. Pt. 5.

42. “To prevail in a negligence suit, the plaintiff must prove by a preponderance of the evidence that the defendant owed a legal duty to the plaintiff and that by breaching that duty the defendant proximately caused the injuries of the plaintiff.” *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197, 205 (W. Va. 2004) citing *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 118, 2 S.E.2d 898, 899 (W.Va. 1939). “Consequently, the threshold question in all actions in negligence is whether a duty was owed.” *Id.*

43. No evidence has been presented, nor have the Non-Employee Plaintiffs alleged that the Sodexo Defendants manufactured, created, sold, distributed, or installed the alleged asbestos containing ceiling tiles removed by the Sodexo employees in the course of their employment. Therefore, Sodexo is not a ‘product liability’ defendant and has no duty to warn of any defects with respect to the product. Additionally, Sodexo is not the owner of the premises where the ceiling tiles were located, nor did it own the ceiling tiles at any time.

44. Under the facts and allegations presented in this case, the Panel finds that Sodexo does not owe a duty to the Non-Employee Plaintiffs to protect them from harm caused by alleged

secondary asbestos exposure, where the Non-Employee Plaintiffs have not suffered any asbestos related injury or disease. Accordingly, the Panel dismisses the Non-Employee Plaintiffs' Amended Complaint and all causes of action against the Sodexo Defendants on the ground that the Sodexo Defendants owed no duty to the Non-Employee plaintiffs as a matter of law.

45. The Panel further finds that the Non-Employee Plaintiffs' causes of action against Sodexo are derivative and directly related to the Plaintiff Employees' claims which arose solely due to their employment with Sodexo. Because certain of these claims are solely due to and arose out of the Employee Plaintiffs' alleged workplace exposure claims, said claims can only proceed if the Plaintiff Employees' claims are allowed. Since the Plaintiff Employee claims are dismissed as a matter of law, the Non-Employee Plaintiffs' claims are also dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

46. Because the Panel has dismissed the Non-Employee Plaintiffs' claims on other grounds, the Panel does not address the Sodexo Defendants' argument that medical monitoring actions for asymptomatic plaintiffs that have allegedly been secondarily exposed to asbestos would be against the public policy of this State and would be an unfair and inequitable burden for entities and employers.

For the foregoing reasons, the Panel **GRANTS** the following motions:

Defendants', Sodexo, Inc., Chad Plymale, and Phyllis Henry, Motion to Dismiss Employee Plaintiffs' Amended Complaint (Transaction ID 59922869);

Defendants' Sodexo, Inc., Chad Plymale, and Phyllis Henry, Motion to Dismiss Plaintiff Spouses' and/or Relatives' Amended Complaint that Resided with Employee Plaintiffs (Transaction ID 59922653);

Defendants' Sodexo, Inc., Chad Plymale, and Phyllis Henry, Motion to Dismiss Amended Complaint of Non-Related Plaintiffs and Plaintiffs Not Residing with Employee Plaintiffs (Transaction ID 59922789); and

Defendant, Chad Plymale's Motion to Dismiss Plaintiffs' Amended Complaint
(Transaction ID 59922705).

The Panel **ORDERS, DECREES, and ADJUDGES** that Plaintiffs' Amended Complaint, causes of action, and claims against Sodexo, Inc. and Chad Plymale are dismissed with prejudice; that Plaintiffs' Amended Complaint, causes of action, and claims against Phyllis Henry, previously dismissed by stipulation without prejudice, are now dismissed with prejudice; and that each party shall be responsible for their own attorneys' fees and costs. Plaintiffs' objections are noted and preserved for the record.

The Court **FINDS** upon **EXPRESS DETERMINATION** that this is a final order available for the proper application of the appellate process pursuant to Rule 54(b) of the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review. The parties are hereby advised: (1) that this is a final order; (2) that any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) that a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

The Clerk is directed to close this case, and place it among the cases ended. A copy of this order is this day served on the parties of record via File & ServeXpress.

It is so **ORDERED**.

ENTER: April 12, 2017.

/s/ Alan D. Moats
Lead Presiding Judge
Alderson Broaddus University
Asbestos Litigation

