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**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

**IN RE: GAVIN LANDFILL LITIGATION** **Civil Action No. 16-C-8000**

**THIS DOCUMENT APPLIES TO ALL CASES**

**ORDER**

Pending before the Court are Defendants' *Motion for an Order Clarifying that Plaintiffs' Claims Accrued in Ohio and that Ohio's Mixed Dust Statute, Ohio Rev. Code Ann. § 2307.84 et seq. Applies to Plaintiffs' Cases in Full* (Transaction ID 61605337) and Plaintiffs' *Motion to Determine Which Components of the "Mixed Dust Law" are Procedural or Evidentiary in Nature, and Which are Substantive Law* (Transaction ID 61607062). Having reviewed the parties' respective motions, responses, and proposed orders, the Court finds the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. The Presiding Judges have conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules.

For the following reasons, the Presiding Judges unanimously rule that: (1) Ohio Rev. Code Ann. § 2307.84 *et seq.*, also referred to as the "Ohio Mixed Dust Statute," is the substantive law that applies to the Gavin Landfill Litigation; and (2) the West Virginia Rules of Civil Procedure, the West Virginia Rules of Evidence, and West Virginia law apply to the procedural and evidentiary issues in the Gavin Landfill Litigation.

## Findings of Fact

1. The Working Direct Claim Plaintiffs claim that they, or their decedents, suffer or suffered various health conditions and diseases as a result of their exposure to coal combustion waste ("CCW") while employed by third-party contractors at the General James M. Gavin Landfill, located in Cheshire, Ohio. See *e.g.*, Amended Complaint ¶¶ 3, 49, 138.

2. No Direct Claim Plaintiff claims exposure to CCW anywhere other than within the State of Ohio. See *generally* Amended Complaint.

3. Early in this litigation, the Court required the parties to submit proposed jury instructions in this case in order to clarify the applicable law. See June 16, 2016, *Case Management Order* (Transaction ID 59154236). When the parties' submitted competing jury instructions, the Court ordered them to file a consolidated set of jury instructions as to what law would apply. See Transcript of August 29, 2016, Hearing pp. 29-33. On September 9, 2016, the parties filed a set of agreed jury instructions (Transaction ID 59507727) in which they acknowledged procedural and evidentiary issues were governed by West Virginia law and substantive issues were governed by Ohio law. See, *e.g.,* questions by the jury, verdict forms, expert testimony, burden of proof and believability – West Virginia law; proximate cause, negligence and causation; and fraud – Ohio law.

4. On October 21, 2016, the Court entered an *Order Regarding Defendants' Motion to Dismiss* (Transaction ID 59731242), holding Plaintiffs had asserted "mixed dust disease" claims falling within the ambit of Ohio Rev. Code Ann. § 2307.84 *et seq*. ¶¶ 43-44. However, the Court denied Defendants' motion to dismiss Plaintiffs' cases because it held that West Virginia public policy prohibited the application of Ohio Rev. Code Ann. § 2307.89 to Plaintiffs' claims. The Court also held the pre-suit certification provision of Ohio Rev. Code Ann. § 2307.87 was procedural and, therefore, did not apply to suits brought in West Virginia Courts. *Id.*

5. Specifically, the Court held Ohio's "mixed dust" statute, Ohio Rev. Code Ann. § 2307.84 *et seq*., prohibits any claim against a premises owner based on alleged exposure to "mixed dust" unless the exposure occurred on the premises. By its express terms, that bar

applies to "any claim for damages . . . in any way related to inhalation of, exposure to, or contact with mixed dust." Ohio Rev. Code Ann. § 2307.83(N). *Id.* ¶ 42

6. The Court concluded there were sufficient allegations that Plaintiffs were exposed to "mixed dust" as defined by Ohio Rev. Code Ann. § 2307.84(m), which defines a "mixed dust" as a "mixture of dusts composed of silica and one or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity." Ohio Rev. Code Ann. § 2307.84(m). Plaintiffs' allegations describing coal combustion waste were specific and express allegations that coal combustion waste consists of mixed dust. *See, e.g.,* Amended Complaint ¶¶ 51-53, 55, 59. The Court concluded those allegations are all that is required to allege a "mixed dust" claim under Ohio's mixed dust statute. *Id.* ¶ 43

7. Ohio's mixed dust statute further defines a "mixed dust disease claim" as "any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust." Ohio Rev. Code Ann. § 2307.84(n). The definition includes claims for "mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to mixed dust." *Id.* This is exactly what the paragraphs of the Amended Complaint identified above allege. To come within the statute, no more need be alleged. Accordingly, Plaintiffs have asserted mixed dust disease claims falling within the ambit of Ohio Rev. Code Ann. § 2307.84 *et seq.* *Id.* ¶ 44

8. The Court specifically held that, "Because this case is pending before a West Virginia court, an issue which was conclusively resolved by the West Virginia Supreme Court of Appeals in *State ex rel. Am. Elec. Power Co. v. Nibert*, 237 W. Va. 14, 784 S.E.2d 713 (2016), **all procedural issues that may arise within the case are to be governed by the law of West**

**Virginia.** *See Vest v. St. Albans Psychiatric Hosp., Inc.*, 182 W. Va. 228, 229–30, 387 S.E.2d 282, 283–84 (1989) ("West Virginia procedure applies in all cases before West Virginia state courts, and a merely procedural rule of Virginia law would be ignored here.")." (emphasis added) *Id.* ¶ 46

9. The Court also held that, "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *State v. Arbaugh*, 215 W.Va. 132, 139, 595 S.E.2d 289, 296 (Davis, J., dissenting), (quoting *State v. Templeton*, 148 Wash.2d 193, 213, 59 P.3d 632, 642))." *Id.* ¶ 47

10. The Court found that, "Ohio's notice of claim requirements are unambiguously procedural in nature. *See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 1999-Ohio-123, 86 Ohio St. 3d 451, 478, 715 N.E.2d 1062, 1087; *Hiatt v. S. Health Facilities, Inc.* (1994), 68 Ohio St.3d 236, 626 N.E.2d 71. "The notion that the General Assembly can direct our trial courts to apply a legislative rule that this court has already declared to be in conflict with the Civil Rules simply by denominating it "jurisdictional" or "substantive" is so fundamentally contrary to the principle of separation of powers that it deserves no further comment." *Id.* at 479, 1087." *Id.* ¶ 48

11. As the Court noted, "Justice Davis discussed *Sheward* and *Hiatt* in her concurring opinion in *Hinchman v. Gillette*, 217 W. Va. 378, 391, 618 S.E.2d 387, 400 (2005), and concluded that '[t]he principle of law to be gleaned from *Sheward* is that a pre-complaint or post-complaint certificate of merit requirement involves procedural law, not substantive law.'" *Id.* ¶ 49

12. Thus, the Court specifically declined to apply the Ohio procedure at issue, finding the out-of-state expert report requirements set forth in Ohio Revised Code § 2307.87 are inapplicable in this matter, in which expert discovery is governed by West Virginia Rule of Civil Procedure 26, and the Panel's Case Management Order entered under Rule 16. *Id.* ¶ 50

13. On November 9, 2017, the Court granted Defendant Doug Workman's Motion for Judgment on the Pleadings, holding that, as to on-site exposure, the Ohio Mixed Dust Statute allows claims against the parties controlling or owning the premises, but not against their employees. See *Order Granting Doug Workman's Motion for Judgment on the Pleadings*, (Transaction ID 61341460), at pp. 8-9.

14. Applying the Ohio Mixed Dust Statute to Plaintiffs' Amended Complaint, the Court concluded: Plaintiffs sued Defendant Doug Workman in his individual capacity, but all of Plaintiffs' allegations against Mr. Workman are in his capacity as an employee of the other Defendants; Plaintiffs did not allege Mr. Workman is a premises owner; and Plaintiffs did not allege Mr. Workman is a shareholder or that the corporate veil should be pierced to establish shareholder liability. *Id.* Viewing all of the facts alleged in the Amended Complaint in a light most favorable to the Plaintiffs, the Court granted Defendant Doug Workman's motion for judgment on the pleadings because it appeared beyond doubt that Plaintiffs could prove no set of facts in support of their claims against Mr. Workman under the Ohio Mixed Dust Statute. *Id.*

**Conclusions of Law**

15. As the Court has held on two separate occasions, "Plaintiffs have asserted mixed dust disease claims falling within the ambit of Ohio Rev. Code Ann. § 2307.84 *et seq*." See October 21, 2016, *Order Regarding Defendants' Motion to Dismiss* (Transaction ID 59731242)

¶¶ 43-44; and November 9, 2017, *Order Regarding Doug Workman's Motion for Judgment on the Pleadings*, ¶ 3 (Transaction ID 61341460).

16. Because all of Plaintiffs' alleged exposures occurred in Ohio, the Court recognized the doctrine of *lex loci delicti* requires application of Ohio law to Plaintiffs' claims. See *generally* Amended Complaint; October 21, 2016, *Order Regarding Defendants' Motion to Dismiss* (Transaction ID 59731242); and *Swope*, *supra* at 474, 801 S.E.2d at 489 (2017) ("The MLP found that because the alleged exposures all occurred entirely within the State of Ohio, the doctrine of *lex loci delicti* required the application of Ohio law to the claims of the NWDC Plaintiffs.").

17. As the Supreme Court of Appeals of West Virginia also made clear, the Ohio Mixed Dust Statute applies to Plaintiffs' cases under choice of law principles:

> 3. "In general, this State adheres to the conflicts of law doctrine of *lex loci delicti*." Syllabus point 1, *Paul v. Nat'l Life*, 177 W.Va. 427, 352 S.E.2d 550 (1986).
>
> 4. "The mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of law principles is contrary to the public policy of the forum state." Syllabus point 3, *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W.Va. 329, 424 S.E.2d 256 (1992)

Syl. Pts. 3-4, *State ex rel. Am. Elec. Power Co. v. Swope*, 239 W.Va. 470, 801 S.E.2d 485 (2017).

18. A choice-of-law analysis looks at the difference between procedure or evidence, and substance. Substance governs the relations of the parties in the real world, who may sue and for what. Procedure and evidence are the manner in which the court conducts and orders its proceedings, including such things as who may be a witness or juror, who may (or must) file what and when, the manner and timing of hearings, and other events as the case proceeds, and matters like jurisdiction.

19. West Virginia applies the substantive law of another state, but the procedural law of West Virginia under the choice-of-law rule of *lex loci delicti*:

> Traditionally, West Virginia courts apply the *lex loci delicti* choice-of-law rule; that is, the substantive rights between the parties are determined by the law of the place of injury. *Blais v. Allied Exterminating Co.*, 198 W.Va. 674, 482 S.E.2d 659 (1996); *Paul v. National Life*, 177 W.Va. 427, 352 S.E.2d 550 (1986); *Vest v. St. Albans Psychiatric Hospital, Inc.*, 182 W.Va. 228, 229, 387 S.E.2d 282, 283 (1989). However, under the *lex loci delicti* choice-of-law rule, West Virginia procedure applies to all cases before West Virginia courts. "It is traditional that a forum court always applies its own procedural rules and practices, regardless of the procedure that might be employed if the case were tried at the place where the cause of action arose. (footnote omitted)." *American Conflicts Law, supra* § 121; *Vest, supra*, 182 W.Va. at 229–30, 387 S.E.2d at 283–84 (holding notice requirement of Virginia's statute on medical malpractice review panels to be a procedural rule); *Restatement (Second) of Conflict of Laws* § 122 (1971)("A court usually applies its own local law rules prescribing how litigation shall be conducted ...").

*McKinney v. Fairchild Int'l, Inc.*, 199 W. Va. 718, 727, 487 S.E.2d 913, 922 (1997).

20. Additionally, the remedial rights of the parties, including admissibility or inadmissibility of evidence, are controlled by the law of the forum:

> we previously have held that "[m]atters relating to the substantive rights of the parties are governed by the law of the place where the injury occurred, while matters pertaining to remedial rights are controlled by the law of the forum." Syl. pt. 2, *Forney v. Morrison*, 144 W.Va. 722, 110 S.E.2d 840 (1959). With specific regard to conflicts involving evidentiary matters, we have noted that "[t]he admissibility or inadmissibility of evidence pertains to the remedy and is governed by the law of the forum." Syl. pt. 3, *Forney, id. See generally* 4A Michie's Jur. *Conflict of Laws, Domicile and Residence* § 38 (1990).

*Kessel v. Leavitt*, 204 W. Va. 95, 184, 511 S.E.2d 720, 809 (1998)

21. Nor do West Virginia courts allow the West Virginia legislature to alter its procedures or laws of evidence:

> The Rule–Making Clause of Article VIII, § 3 provides, in relevant part, that the Supreme "[C]ourt shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W. Va. Const. art. VIII, § 3. *See also* Syl. pt. 1, *Bennett v. Warner*, 179

> W.Va. 742, 372 S.E.2d 920 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."). As a result of the authority granted to this Court by the Rule–Making Clause, " 'a statute governing procedural matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers.' " *State v. Arbaugh,* 215 W.Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting) (quoting *People v. Hollis,* 670 P.2d 441, 442 (Colo.Ct.App.1983)). *See also* Syl. pt. 5, *State v. Wallace,* 205 W.Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."); Syl. pt. 7, *in part, State v. Derr,* 192 W.Va. 165, 451 S.E.2d 731 (1994) ("The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts."). A review of some of the prior decisions of this Court indicate that we have historically invalidated statutes that conflicted with rules promulgated by this Court.

*Louk v. Cormier*, 218 W. Va. 81, 88, 622 S.E.2d 788, 795 (2005).

22. Ohio takes the same approach: "[t]he general rule is that in the trial of causes matters of evidence and the inferences to be drawn therefrom relate to the remedy and not to the right, and the law of the forum governs such matters." Syl. pt. 1, *McDougall v. Glenn Cartage Co.*, 169 Ohio St. 522, 522, 160 N.E.2d 266, 267 (1959). '

23. In other words, Ohio does what West Virginia does:

> the principle of procedure, the method of proof, is governed by the rules of the forum-*lex fori*. The law of evidence is a part of the law of procedure. Wigmore on Evidence (3 Ed.), 159, Section 5; *Enfield v. Butler*, 221 Iowa 615, 264 N.W. 546; Greaf v. Breitenstein, 97 Ind.App. 525, 187 N.E. 347; *Pilgrim v. MacGibbon*, 313 Mass. 290, 47 N.E.2d 299.

*Austin v. River*, 95 Ohio App. 400, 403, 120 N.E.2d 133, 135 (1953).

24. The United States Supreme Court has taken the same position: "[t]he rules of evidence are also supplied by the law of the forum. *Wilcox v. Hunt,* 13 Pet. 378; *Yates v. Thompson,* 3 Clark & F. 544; *Bain* v. *Whitehaven, etc., Ry. Co.* 3 H. of L. Cas.

1; *Don v. Lippmann*, 3 Clark & F. 1." *Pritchard v. Norton*, 106 U.S. 124, 133–34, 1 S. Ct. 102, 109, 27 L. Ed. 104 (1882).

25. Who may be an expert in West Virginia's courts is governed by the West Virginia Rules of Evidence and the Supreme Court of Appeals' decisions interpreting them. The West Virginia Constitution requires that only West Virginia's rules of Civil Procedure and Evidence apply:

> *W. Va. R. Evid.* 702 does not provide that the legislature may outline when a witness should be found to be qualified as an expert. This Court has complete authority to determine an expert's qualifications pursuant to its constitutional rule-making authority. *See W. Va. Const.* art. VIII, § 3 (which states, in relevant part, that the Supreme Court of Appeals of West Virginia "shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.") and syllabus point 1, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988) ("Under article [VIII], section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.") *See also* Cleckley, *supra* § 7–2(A)(1), at 30. Additionally, this Court recently held that "[t]he West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts. These rules constitute more than a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them." Syl. pt. 7, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). *See also Teter v. Old Colony Co.*, 190 W.Va. 711, 724, 441 S.E.2d 728, 741 (1994).

*Mayhorn v. Logan Med. Found*, 193 W. Va. 42, 49, 454 S.E.2d 87, 94 (1994).

26. The Court finds that the provisions of the Ohio Mixed Dust Statute which may attempt to determine who may be an expert, or on what conditions he or she may testify, or how the Court should regulate the medical evidence at trial, are not only inapplicable pursuant to the choice of law rules above, but would also violate West Virginia's Constitutional commitment of those issues to West Virginia's judicial branch. Defendants' Motion, to the extent that it seeks to

apply the Ohio Mixed Dust Statute to determine these expert and evidentiary matters to a case pending before this West Virginia Court, is DENIED.

For the foregoing reasons, the Presiding Judges unanimously conclude that: (1) Ohio Rev. Code Ann. § 2307.84 *et seq.*, also referred to as the "Ohio Mixed Dust Statute," is the substantive law that applies to the Gavin Landfill Litigation; and (2) the West Virginia Rules of Civil Procedure, the West Virginia Rules of Evidence, and West Virginia law apply to the procedural and evidentiary issues in the Gavin Landfill Litigation. The Court will not parse the Ohio Mixed Dust Statute section by section, nor will it issue an advisory opinion to the parties.

It is so **ORDERED.**

**ENTER:** February 6, 2018.

/s/ Derek C. Swope
Lead Presiding Judge
Gavin Landfill Litigation