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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 RELATES TO ALL CASES

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

CAME THE PARTIES, before the Court, on August 29, 2016, to be heard on the parties' proposed jury instructions and discovery issues. During this hearing, the Defendants' recently filed *Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss Amneded (sic) Complaint* (Transaction ID 59426554) was also discussed. The Presiding Judges have reviewed and considered Defendants' Motion, Plaintiffs' Response, and all of the briefs presented. 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 DENY Defendants' motion for the reasons set forth in the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This case involves the claims of 79 Plaintiffs, most of whom were workers at the General James M. Gavin Landfill ("the Gavin Landfill"), a 246-acre landfill located north of the General James M. Gavin Power Plant ("the Gavin Power Plant"), which consists of two 1,300-megawatt (MW) coal combustion units that began operation in 1974 and remains in operation today. Plaintiffs allege that exposure to coal combustion waste at the Gavin Landfill caused them, their family members, or their decedents to develop numerous different health conditions listed in the Amended Complaint.

2. More specifically, Plaintiffs allege:

a. The Gavin Power Plant and the Gavin Landfill were at relevant times owned and/or operated by the Defendant entities, American Electric Power, Inc. ("AEP"), American Electric Power Service Corporation ("AEPSC"), and Ohio Power Company ("OPC"). Amended Complaint ¶ 48

b. The Gavin Power Plant generates large amounts of coal combustion waste, which is disposed of in the Gavin Landfill. *Id.*

c. Coal combustion waste poses threats to human health for many reasons. It is this waste to which Plaintiffs in this matter have been exposed, through inhalation, ingestion, and/or dermal contact. *Id.* ¶¶ 61-65

d. Exposure to coal combustion waste can also occur through these same methods of inhalation, dermal contact, and ingestion, where workers carry the material away from the work site on their clothes, shoes, bodies, and other personal effects, and into their vehicles and homes. *Id.* ¶ 65

e. Many of the Plaintiffs in this matter worked at the Gavin Landfill. Other Plaintiffs are family members of individuals who worked at the Gavin Landfill. *Id.* ¶ 1-7

f. The Plaintiffs who worked at the Gavin Landfill worked under the supervision, instruction, and/or the direction of Defendant, Doug Workman. These Plaintiffs were required to spend many hours each day in direct contact with, and/or in close proximity to, the coal combustion waste, as they shoveled, hauled, moved, and otherwise worked to dispose of the coal combustion waste at the Gavin Landfill. *Id.* ¶¶ 50, 76, 83

g. No warnings or information were provided to the Plaintiffs who worked at the Gavin Landfill about the toxic nature of the coal combustion waste, or the associated health risks with exposure to such material. *Id.* ¶¶ 84-88

h. On numerous occasions, the Defendants actively concealed and misrepresented the dangerous nature of coal combustion waste, including making false assertions to the Plaintiffs that the coal combustion waste was non-hazardous, or even "safe to eat." Plaintiffs were also told by Workman, and other representatives of the corporate Defendants, that Plaintiffs need not be concerned for their health from exposure to coal combustion waste. *Id.* ¶¶ 84-87

i. Plaintiffs were not provided any personal protective equipment, and on at least one occasion, Defendant Workman stopped other individuals from attempting to provide Plaintiffs with personal protective equipment while the Plaintiffs were at work at the Gavin Landfill. *Id.* ¶¶ 89 and 92

j. Many Plaintiffs are now seriously ill with health problems, a variety of cancers, including breast cancer, prostate cancer, throat cancer, ovarian cancer, lymphoma, bladder cancer, thyroid cancer, laryngeal cancer, and skin cancer, among others, and diseases known to be caused by exposure to coal combustion waste, and a number of Plaintiffs have died as a result of these diseases. *Id.* ¶¶ 96 and 138

k. The work in which the Plaintiffs participated dates back at least as far as the 1991 retention of VFL by the AEP entities to handle coal combustion waste at the Gavin Landfill. *Id.* ¶ 71

3. Defendant Ohio Power Company maintains that it previously owned and operated the General James M. Gavin Power Plant (the Gavin Power Plant) near Cheshire, Ohio, as well as the Gavin Landfill. Defendants maintain that Defendants American Electric Power Company, Inc., American Electric Power Service Corporation, and Doug Workman have never owned or operated the Gavin Power Plant or Landfill. Defendant Ohio Power Company divested its

interest in the Gavin Power Plant and Landfill to AEP Generation Resources, Inc. in 2013. Thus, Defendants claim that none of the named defendants were properly included as parties to this case.

4. The coal combustion waste at issue is generated as a byproduct of the Gavin Plant's coal combustion process, and is transported to and stored by permit in the Gavin Landfill.

5. In the Amended Complaint, Plaintiffs allege that the coal combustion waste at issue contains "heavy metals such as . . . beryllium." Amended Complaint ¶ 55.

6. Beryllium is a "fibrogenic dust[] capable of inducing pulmonary fibrosis if inhaled in sufficient quantity." *See, e.g.*, http://rarediseases.org/rare-diseases/berylliosis.

7. Plaintiffs also allege that the coal combustion waste at issue contains silica: "Coal Waste also contains a multitude of cancer-causing contaminants that are dangerous to human health, including: a. particulates (carbon and crystalline quartz silica)"; and "Class 1 and Class 2 carcinogens in Coal Waste include . . . silica." Amended Complaint ¶¶ 58-59.

8. Plaintiffs allege that "[c]oal combustion byproduct waste . . . is subcategorized as fly ash, bottom ash, boiler slag and Flue Gas Desulfurization." *Id.* ¶ 51.

9. Plaintiffs further allege that "[f]ly ash is a product of burning finely ground coal," that bottom ash "is a coarse, gritty material," and that Flue Gas Desulfurization "varies from a wet sludge to a dry powdered material [that] consists of small, fine particles." *Id.* ¶¶ 51-53.

10. The 79 Plaintiffs named in the Amended Complaint are divided into four groups: "Working Direct Claim Plaintiffs" (40); "Non-Working Direct Claim Plaintiffs" (12); "Loss of Spousal Consortium Plaintiffs" (9); and "Loss of Parental Consortium Plaintiffs" (18). *Id.* ¶ 1.

11. Each of the Working Direct Claim Plaintiffs/Decedents claim they worked on the Gavin Landfill premises. *Id.* ¶ 3. Specifically, they claim they were employed by various

independent contractors that Defendants engaged to provide the day-to-day maintenance operations at the Landfill, including "collecting, shoveling, hauling, dumping, spreading and otherwise transporting" coal combustion waste. *Id.* ¶ 50. Plaintiffs, however, do not specify the dates or duration of their work at the Landfill. Whether Plaintiffs claim that exposure to a particular individual constituent element or elements of coal combustion waste caused their purported injuries is likewise not alleged.

12. The Working Direct Claim Plaintiffs claim they, or their decedents, suffer or suffered various health conditions and diseases as a result of their exposure to CCRs at the Gavin Landfill. *Id.* ¶ 138.

13. The Non-Working Direct Claim Plaintiffs allege the same health conditions and diseases as a result of "take-home" exposure to coal combustion waste —that is, exposure they experienced through sharing a residence with an individual who worked at the Gavin Landfill and allegedly brought coal combustion waste home on their clothing. *Id.* ¶¶ 4, 65, 106, 138.

14. Plaintiffs claim exposure to coal combustion waste caused each Direct Claim Plaintiff to develop one or more of the following diseases:

- Cancer, including brain cancer, lung cancer, bladder cancer, skin cancer, breast cancer, prostate cancer, ovarian cancer, colon cancer, cancer of the lymph nodes, lymphatic leukemia and/or thyroid cancer;
- Respiratory distress and diseases, including COPD, emphysema, bronchitis, asthma, sleep apnea, spots on the lungs, chronic cough, chest pain and/or other breathing problems;
- Skin lesions, scarring, skin discoloration, psoriasis, skin rashes, chronic itching and/or other skin problems;
- Heart failure, postural orthostatic tachycardia syndrome, mitral valve prolapse and/or other heart problems;
- Breast nodules, thyroid nodules and/or nodules in the throat;
- Psoriatic arthritis;

- Bladder stones;
- Gastrointestinal and/or stomach problems;
- Tumors of the thyroid and/or voice box;
- Raynaud's Disease;
- Memory loss; and
- Other harms and injuries.

Id. ¶ 138.

15. The Loss of Consortium Plaintiffs seek damages for loss of consortium related to the alleged diseases of their family members.

16. This lawsuit was first filed on August 8, 2014, in the Circuit Court of Mason County, West Virginia.

17. On September 11, 2014, Defendants responded to Plaintiffs' Complaint by filing a motion to dismiss moved to dismiss pursuant to Rule 12(b)(6), for failure to state a claim, and/or the doctrine of *forum non conveniens*.

18. Following briefing and oral argument, the Circuit Court of Mason County DENIED Defendants' Motion to Dismiss on August 5, 2015, and ordered that Defendants respond to outstanding discovery requests that the Plaintiffs had served.

19. Defendants filed a Petition for Writ of Prohibition before the West Virginia Supreme Court of Appeals on August 26, 2015. The basis of the Writ was to challenge the Circuit Court's denial of the motion to dismiss on the issue of *forum non conveniens*. No appeal was taken from the Circuit Court's 12(b)(6) ruling.

20. The West Virginia Supreme Court of Appeals heard oral argument on the Writ on January 13, 2016.

21. On February 15, 2016, Defendants' Petition for a Writ of Prohibition was DENIED. The opinion issued by the Supreme Court of Appeals included a referral of this matter to the Mass Litigation Panel.

22. Before the case was transferred to the Mass Litigation Panel, Defendants filed a Petition for Rehearing on March 10, 2016.

23. The West Virginia Supreme Court of Appeals DENIED Defendants' Petition for Rehearing on April 6, 2016.

24. On April 14, 2016 an Administrative Order from the Supreme Court of Appeals was issued, and the matter was officially transferred to the Mass Litigation Panel ("MLP").

25. On April 18, 2016, an Order was entered setting the matter for a status conference before the MLP on June 10, 2016. Counsel for all parties appeared at the status conference, and a case management order was subsequently entered by the on June 16, 2016.

26. Pursuant to the MLP's Case Management Order, counsel for the parties conferred a number of times to discuss, among various matters, the deadlines set forth in the Case Management Order. The parties were able to reach agreement regarding these deadlines, and on July 18, 2016, an *Amended Case Management Order* (Transaction ID 59289943) was entered by agreement of the parties.

27. The Amended Case Management Order provided for a deadline of August 1, 2016 for any amendments to the Complaint, to add counts or parties, including third parties.

28. On August 1, 2016, Plaintiffs filed their Amended Complaint, which adjusted the claims of Plaintiffs who had since passed away to now be brought by the estate of those Plaintiffs, joined additional Plaintiffs, revised the structure of the pleading of certain claims, and dropped a claim for battery.

29. On August 15, 2016, Defendants filed their *Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss Amneded (sic) Complaint* (Transaction ID 59426554), raising, for the first time, issues related to Ohio's "mixed dust" statute. Defendants' motion cited Ohio Rev. Code Ann. § 2307.84 *et seq.* and Plaintiffs' failure to adhere to those statutory requirements as a bar to all of Plaintiffs' claims.

30. Defendants further moved to dismiss the Non-Working Direct Claim Plaintiffs' claims notwithstanding Plaintiffs' failure to adhere to the statutory requirements, as Ohio Rev. Code Ann. § 2307.84 *et seq*. bars claims for "mixed dust" exposure against premises owners if the exposure did not occur on the premises.

31. Defendants also moved to dismiss Plaintiffs' "Medical Monitoring" and "Failure to Warn, Eliminate, Protect" claims on the separate and independent grounds that those claims are not recognized as stand-alone causes of action in Ohio.

32. A hearing before the Mass Litigation Panel on the proposed jury instructions had previously been set at 10:00 a.m. on August 29, 2016. *Amended Case Management Order* (Transaction ID 59289943).

33. Plaintiffs' response to Defendants' *Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss Amended Complaint* had a filing deadline of August 29, 2016, but had not been filed as of the 10:00am hearing. It was filed later that day. (Transaction ID 59486272)

34. During the August 29, 2016 hearing, the Court inquired about the arguments raised in the *Motion to Dismiss*, though the motion was not formally argued and briefing was not complete as of that time.

35. On September 12, 2016, Defendants filed their *Reply Memorandum of Law in Support of Motion to Dismiss* (Transaction ID 59548357).

CONCLUSIONS OF LAW

36. The purpose of a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). For purposes of the motion, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. *Id.* Thus, Rule 12(b)(6) is designed to "weed out unfounded suits." *Harrison v. Davis*, 197 W. Va. 651, 658, 478 S.E.2d 104, 111 (1996) (emphasis added); *McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).

37. A Rule 12(b)(6) motion "seeks a determination whether the plaintiff is entitled to offer evidence to support the claims made in the complaint." *Dimon v. Mansy*, 198 W. Va. 40, 48, 479 S.E.2d 339, 347 (1996) (citation omitted). It does so by "test[ing] the formal sufficiency of the complaint." *Collia v. McJunkin*, 178 W. Va. 158, 159, 358 S.E.2d 242, 243 (1987); *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 717, 246 S.E.2d 907, 920 (1978), superseded on other grounds by statute; *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157, 158 (1978).

38. To survive a motion to dismiss pursuant to Rule 12(b)(6), "[a]ll that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the

pleadings." *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 605-06, 245 S.E.2d 157, 159 (1978), quoting Wright & Miller, Federal Practice and Procedure: Civil § 1216 (1969). However, a plaintiff must plead more than bald statements or conclusory allegations to withstand a motion to disimss. *Fass v. Nowsco Well Service*, 177 W. Va. 50, 53, 350 S.E.2d 562, 564 (1986).

39. A motion to dismiss for failure to state a claim is viewed with disfavor, particularly in actions to recover for personal injuries. *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E.2d 207, 212 (1977). Only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," is dismissal is appropriate. *Collia*, 178 W. Va. at 160, 358 S.E.2d at 244; *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

40. The West Virginia Supreme Court of Appeals has disfavored the resolution of disputes on motions to dismiss, particular in cases of negligence:

> As this Court stated in syllabus point two of *McDaniel v. Romano,* 155 W.Va. 875, 190 S.E.2d 8 (1972), "[a]lthough courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits." This Court also expressed this principle in *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996), wherein we stated: "[W]e recognize that dismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit." 198 W.Va. at 45-46, 479 S.E.2d at 344-45.

Gray v. Mena, 218 W. Va. 564, 570–71, 625 S.E.2d 326, 332–33 (2005).

41. As recently as 2014, the Supreme Court of Appeals has noted *Gray's* holding that dismissal of cases where lack of compliance with notice requirements is a "disproportionately harsh sanction" and that allowing an opportunity to comply is the better course for trial courts. *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 73, 763 S.E.2d 73, 89 (2014).

42. 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).

43. Based upon the findings of fact, the Panel concludes that there are sufficient allegations that the Plaintiffs were exposed to "mixed dust" as defined by Ohio Rev. Code Ann. § 2307.84(m). That statute 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 are specific and express allegations that coal combustion waste consists of mixed dust. *See, e.g.,* Amended Complaint ¶¶ 51-53, 55, 59. These allegations are all that is required to allege a "mixed dust" claim under Ohio's mixed dust statute.

44. 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*.

45. Nonetheless, this Court declines to dismiss the Plaintiffs' cases at this stage for the following reasons:

The expert report provisions of the Ohio "mixed dust" law are procedural and therefore do not apply in West Virginia.

46. 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.").

47. "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)).

48. 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.

49. 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."

50. The Panel declines to apply the Ohio procedure at issue, and finds that 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. For this reason, the Defendants' Motion to Dismiss is denied.

Application of the Ohio Mixed Dust Statute Violates the Public Policy of West Virginia

51. In general, West Virginia adheres to the conflicts of law doctrine of *lex loci delicti. Paul v. Nat'l Life,* 177 W.Va. 427, 352 S.E.2d 550 (1986).

52. While West Virginia continues to adhere to this doctrine as a general matter, there is an important exception which has been recognized and remains in effect today. This "public policy exception" to the doctrine of *lex loci delicti* states that "comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of [West Virginia]." *Dallas v. Whitney,* 118 W.Va. [106], 188 S.E. 766 (1936).

53. West Virginia has a strong public policy that persons injured by the negligence of another should be able to recover in tort. West Virginia has long "adhere[d] to the rule that the doctrine of *lex loci delicti* will not be invoked where 'the application of the substantive law of a foreign state ... contravenes the public policy of this State.'" *Mills v. Quality Supplier Trucking, Inc.*, 203 W. Va. 621, 624, 510 S.E.2d 280, 283 (1998) (quoting *Paul*, 177 W.Va. at 433, 352 S.E.2d at 556).

54. The public policy exception is designed to enforce the public policy of West Virginia in actions filed in the state of West Virginia. *Mills v. Quality Supplier Trucking, Inc.*,

203 W. Va. 621, 624, 510 S.E.2d 280, 283 (1998); *see also, Woodcock v. Mylan, Inc.*, 661 F. Supp. 2d 602, 605 (S.D.W. Va. 2009) ("In a tort action, West Virginia applies the law of the place of injury ("*lex loci delicti*"). It will not, however, apply a foreign state's law that contravenes West Virginia public policy.") (internal citations omitted).

55. The Supreme Court of Appeals noted, in this very case, that West Virginia and its citizens have an important interest in the proper resolution of this case, the conduct of the Defendants, and the claims of the Plaintiffs, whether they are West Virginians or citizens of other states. Beyond public policies at stake, the Supreme Court found that West Virginia has a direct interest in this case:

> [W]e conclude that the consideration of this State's public interest also weighs in favor of retention of the Plaintiffs' claims in West Virginia . . . to the extent that the corporate defendants operate coal-fired power plants both in Gallia County, Ohio, and Mason County, West Virginia, and the coal waste generated by such power plants has adversely affected the residents of Mason County, West Virginia, these citizens have an interest in deciding the instant controversy.

State ex rel. Am. Elec. Power Co. v. Nibert, 237 W. Va. 14, 784 S.E.2d 713, 726 (2016).

56. Moreover, the causes of action Defendants would seek to dismiss through the application of foreign law exist under West Virginia law on public policy grounds. For example, in *Bower v. Westinghouse*, the Supreme Court of Appeals explicitly grounded the adoption of a medical monitoring claim on public policy grounds. *See id.*, 206 W. Va. 133, 140, 522 S.E.2d 424, 431 (1999), The Court adopted at least four separate policies in *Bower*:

a. "First, there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients."

b. "Second, there is a deterrence value in recognizing medical surveillance claims—"[a]llowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants . . ."

c. "Third, "[t]he availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties". . . In this regard, the early detection of cancer may improve the prospects for cure, treatment, prolongation of life and minimization of pain and disability.

d. "Finally, societal notions of fairness and elemental justice are better served by allowing recovery of medical monitoring costs. That is, it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary."

Id.

57. The policies described in *Bower*, for the benefit of those who are not yet sick, apply *a fortiori*, to the claims of those who have actually contracted disease and for which West Virginia clearly imposes liability.

58. Moreover, application of the Ohio mixed dust statute would bar the Non-Working Direct Claim Plaintiffs from any recovery because they were not exposed to coal combustion waste while at the Gavin Landfill. Under Ohio Rev. Code Ann. § 2307.89(a), "a premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property." Because the Non-Working Direct Claim Plaintiffs claim they were exposed when the

Working Direct Claim Plaintiffs brought coal combustion waste home on their clothes after working at the Gavin Landfill they would have no remedy at all if the Ohio mixed dust statute was applied to their claims.

59. This Panel has also previously recognized that "the doctrine of *lex loci delicti* will not be invoked where 'the application of the substantive law of a foreign state … contravenes the public policy of this State," citing to *Mills*, in *In re Zoloft Litigation*, 2014 WL 7387274 (W. Va. Cir. Ct.), at 10.[1]

60. As in *Mills v. Quality Supplier Trucking, Inc.*, where the court declined to apply the contributory negligence laws of another jurisdiction where such laws operated to bar a plaintiff's recovery, on the grounds that to do so violated the public policy of West Virginia, this Court also declines to apply Ohio Revised Code § 2307.84, *et seq.* where it would operate to bar the recovery of Plaintiffs who have filed their cause of action before the courts of West Virginia. *Mills at* 623, 282 (1998). For this reason, the Motion to Dismiss will be Denied. See *Mace v. Mylan Pharmaceuticals, Inc.*, 227 W.Va. 666, 668, 714 S.E.2d 223, 225 (2011)("[A]n alternate forum is presumed to "exist" where the defendant is amenable to process. Such presumption may be defeated, however, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all. In such cases, the alternate forum ceases to "exist" for purposes of forum non conveniens, and dismissal in favor of that forum would constitute error.")

Defendants are simply incorrect that Ohio would not allow medical monitoring claims.

61. In any event, Ohio law permits recovery for periodic future medical treatment(s), including tests, that are required to monitor and treat injuries sustained as a result of a

[1] The public policy exception to the doctrine of *lex loci delicti* was not applied by the court in *In re Zoloft Litigation*, 2014 WL 7387274 (W. Va. Cir. Ct.), as the issues in that litigation were superseded by W. Va. Code § 55-8-16(a), which governs product liability cases. That statute is not applicable to the instant matter, as the instant matter does not involve any claims for product liability.

defendant's negligence or misconduct. *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 361 (6th Cir. 2011) (citing *Wilson v. Brush Wellman*, 103 Ohio St.3d 538, 817 N.E.2d 59, 63–65 (2004); *Day v. NLO*, 851 F.Supp. 869, 880 (S.D. Ohio 1994)). Plaintiffs bear the burden to ultimately establish by the greater weight of the evidence that such expenses are reasonable. *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 363 (6th Cir. 2011) (citing *Friends for All Children*, 746 F.2d at 825; *Day v. NLO*, 851 F.Supp. 869, 880 (S.D. Ohio 1994)).

62. Plaintiffs have pled sufficient factual allegations to support their claims for recovery of future medical treatment and testing, to monitor and treat the various medical conditions that the Plaintiffs have already contracted, or stand at an increased risk to develop, as a result of their exposure to coal combustion waste at the Gavin Landfill. *See* Amended Complaint, ¶¶ 129-133.

The other counts Defendants seek to dismiss are, in fact, simply elements or illustrations of negligence and not stand alone counts. Therefore they should not be dismissed.

63. In the Amended Complaint, Plaintiffs have pled allegations regarding Defendants' failure to warn, failure to eliminate, and failure to protect the Plaintiffs while working at the Gavin Landfill from exposure to coal combustion waste. *See* Amended Complaint, ¶¶ 100-107. These are manners in which the Defendants are alleged to have engaged in wrongful conduct. The Amended Complaint makes clear that Plaintiffs have not pled these as separate causes of action, but rather have pled them as additional issues and examples of negligence.

64. Plaintiffs have sufficiently pled all of the claims set forth in the Amended Complaint, including claims for fraud and fraudulent concealment. *See* Amended Complaint, ¶¶ 118-124. Plaintiffs have set forth allegations that Defendants knowingly made false representations and concealments of a material nature to the Plaintiffs, and that the Plaintiffs justifiably relied, to their detriment, upon these false statements and concealments, and were

injured as a result. *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986)*; Gaines v. Preterm-Cleveland, Inc.,* 33 Ohio St.3d 54, 514 N.E.2d 709 (1987); *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, at 169, 462 N.E.2d 407 (1984); *Levy v. Seiber, 12th Dist. Butler, Nos.* CA2015–02–019, --- N.E.3d ----, 2016 -Ohio- 68, 2016 WL 115881; *Word of God Church v. Stanley*, 2d Dist. Montgomery, No. 07–CV–4467, 2011-Ohio-2073, 2011 WL 1641714; *State v. Warner*, 55 Ohio St.3d 31, 54, 564 N.E.2d 18 (1990). Even if any other claims could be dismissed, it would be improper to dismiss the Amended Complaint in its entirety.

CONCLUSION

65. For all of the reasons set forth herein, this Panel finds that dismissal of any of the Plaintiffs' claims would be improper at this stage. The Defendants' *Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss Amended Complaint* is hereby DENIED.

It is so ORDERED.

ENTER: October 21, 2016.

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