

# WEST VIRGINIA

## JUSTIN TAYLOR IS GRANTED COMPLETE DISMISSAL OF ASBESTOS CASE



Shareholder of Bailey & Wyant, PLLC, Justin C. Taylor was recently granted a complete dismissal on behalf of his clients Sodexo, Inc. and Chad Plymale, in a case pending in Kanawha County before the Mass Litigation Panel. This case involved alleged exposure to asbestos during a ceiling tile removal project at Alderson Broaddus University. Eleven plaintiff employees of Sodexo took part in a ceiling tile removal project in the winter of 2012, whereby they were allegedly exposed to ceiling tiles containing Amosite asbestos. Additionally, thirty-two additional plaintiffs, those being children, spouses, and relatives of these employee plaintiffs, claimed direct and secondary exposure to the asbestos. In February of 2014, these fortythree (43) plaintiffs (all asymptomatic) brought lawsuits against Sodexo and Sodexo's manager Chad Plymale, alleging the following causes of action: 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 claims); COUNT VI (Emotional Distress without physical injury); and COUNT VII (Deliberate Intent pursuant to WVC §23-4-

2(d)(2)(i) and (ii)). In 2016, plaintiffs filed an Amended Complaint, adding Count VIII (Breach of Contract).

In granting Sodexo and Chad Plymale's Motions to Dismiss, the Court, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, found that the plaintiff employees' causes of action under Count I, Count II, Count III, Count IV, Count VI, and Count VII are all essentially common law claims precluded by West Virginia statutory law (the West Virginia Workers' Compensation Statute) and case law, as employers are immune from such causes of action by their employees. The Court also dismissed plaintiff employees' medical monitoring cause of action (Count V), referencing and



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relying upon West Virginia case law and the immunity provision of West Virginia Code § 23-2-6, to hold that employees cannot assert a medical monitoring cause of action against their employer. The Court further dismissed plaintiffs' 'deliberate intent' cause of action brought pursuant to the exception to the statutory immunity of an employer under the Worker's Compensation Act in W.Va. Code §23-4-2(d)(2)(ii). The Court held that because the employee plaintiffs are asymptomatic and have not suffered a serious compensable injury or compensable death under part E of the 'deliberate intent' standard, their causes of action under Count VII of the Complaint is dismissed. The Court additionally dismissed all punitive damages claims of the employee plaintiffs based upon the law which states that (1) punitive damages may not be awarded in medical monitoring actions; (2) no punitive or exemplary damages are allowed in W.Va. Code §23-4-2(d)(2)(ii) causes of action; and (3) because all causes of action asserted by the Plaintiff Employees are dismissed, any punitive damages claims asserted by the Plaintiff Employees are also dismissed. In addition to the rulings made with respect to the employee plaintiffs, Chad Plymale's motion to dismiss for insufficient service of process, pursuant to Rule 12(b)(4) of the West Virginia Rules of Civil Procedure, was also granted by the Court as Mr. Plymale was never properly served with the Complaint or the Amended Complaint.

The Mass Litigation Panel next turned its attention to the thirty-two non-employee plaintiffs' causes of action (Counts I, II, III, IV, V and VI). The Court held that Sodexo is not a 'product liability' defendant and therefore has no duty to warn of any defects with respect to the ceiling tile/asbestos containing product. The Court further ruled that Sodexo is not the owner of the premises where the ceiling tiles were located, nor did it own the ceiling tiles at any time. The Court additionally held that under the facts and allegations presented in this case, 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 Court dismissed 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. The Court further found that the non-employee plaintiffs' causes of action against Sodexo are derivative and not directly related to the plaintiff employees' claims which arose solely due to their employment with Sodexo. Because some of these claims are solely due to and arose out of the employee plaintiffs' alleged workplace exposure claims, the Court held that said claims can only proceed if the plaintiff employees' claims are allowed. Thus, the Court dismissed the entirety of the non-employee plaintiffs' causes of action as a matter of law.