

FILE NAME: Pecora Chemical (PEC)

DATE: 2017 May 25

DOC#: PEC007

DOCUMENT DESCRIPTION: Legal - Motion for Clarification

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

BRIAN BELL, <i>et ux.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 2016 CA 003998 A
	:	Hon. Anita Josey-Herring
AC&R INSULATION CO., INC., <i>et al.</i> ,	:	Next Event: Pretrial Conference
	:	05/25/2017
Defendants.	:	
	:	

MOTION FOR CLARIFICATION and/or RECONSIDERATION

By order dated May 22, 2017, the court granted – conditionally – Pecora Corporation, Inc.’s (“Pecora”) Motion *in Limine* to Preclude Any and All Documents and Subsequent Testimony, of Pecora’s Facilities or its Employees’ Alleged Asbestos Injuries. The court noted that this issue “may be revisited at trial.” Because trial is only two weeks away and due to the significance of this issue, Plaintiffs hereby move the court for reconsideration of its Order *only* insofar as the order purports to preclude the use of certain documentation regarding Pecora’s facilities as set forth below.

The *sine qua non* of a failure to warn claim against an asbestos manufacturer is the ability of the plaintiff to demonstrate that the manufacturer knew or should have known of the potential hazards of asbestos in its products such that it should have warned about them. *See, e.g., Owens Corning Fiberglas Corp. v. Henkel*, 689 A.2d 1224, 1229-1230 (D.C. 1997). In the District of Columbia, evidence of what a manufacturer should have known often takes the form of “state of the art” evidence. In *Henkel*, the Court of Appeals recognized that “a manufacturer is held to the degree of knowledge and skill of experts”. *Id.* The Court held in that case that the plaintiffs were entitled to show that experts in the field, including other manufacturers, were aware of the hazards of asbestos regardless of whether or not Owens Corning Fiberglas had actual knowledge of these

dangers. Specifically, the Court ruled admissible evidence that Johns Manville was aware of certain dangers and thus permitted the jury to conclude that Owens Corning, too, should have been aware of the hazards. *Id.* (“the actual knowledge of an individual manufacturer is not the issue”) (citing *Dartez v. Fibreboard*, 765 F.2d 456 (5th Cir. 1985)).

In this case, Pecora has stated under oath in sworn interrogatory responses that it was unaware of the health hazards of asbestos until 1985, and that *as soon as it became aware*, it promptly removed asbestos from its furnace cement:

INTERROGATORY NO. 67: State when and by what means you became aware of the alleged hazards of exposure to asbestos dusts, fibers and/or products to the health of persons coming into contact with, handling or using asbestos products.

ANSWER: Pecora corporation objects to this interrogatory as it call for the production of attorney-client information. Without waving (sic) the forgoing (sic), Pecora Corporation learned of the alleged hazard of asbestosis (sic) in late 1985 or early 1986 and promptly removed asbestos from its furnace cement.

Pecora Corporation, Inc.’s Answers to Plaintiffs’ Master Set of Interrogatories to Defendants, Interrogatory No. 67, excerpt attached hereto as **Exhibit A**.

Contrary to this assertion and notwithstanding that Pecora became subject to the OSHA asbestos regulations commencing in 1972, Plaintiffs have proffered evidence that Pecora had **direct knowledge** of the hazards of asbestos at least since 1964 because the Pennsylvania Department of Health, Division of Occupational Health inspected its facility to examine persons who may have been exposed to asbestos dust in its plant. In the plant, workers were being protected from asbestos dust by exhaust ventilating systems and respirators approved by the U.S. Bureau of Mines. After a 1964 asbestos survey of its plant, Pecora was told expressly by the Department of Health: **“It should also be emphasized that cases of lung disease have occurred among workers exposed to low dust concentrations.”** See Certified Records of the Pennsylvania Department of Environmental Records, **Exhibit B**, attached hereto (emphasis added) at 10. The

specific hazard identified during the plant inspection was asbestos dust. *See id.*¹ The cover letter transmitting the survey to Pecora indicated:

Gentlemen:

A survey was conducted in your plant to evaluate employees' exposure to asbestos dust. Because of our findings, the following recommendations are made.

1. Continue the program of requiring employees to wear approved-type respirators whenever engaged in mixing operations.
2. Continue the program of providing annual chest x-ray examinations for all employees exposed to dust.

A copy of the survey report, our booklet entitled "Dust", our Hygienic Information Guide entitled "Asbestos" and Article 432, as amended, are enclosed.

Id. at 8.

Under *Henkel*, such evidence of Pecora's actual knowledge of the hazards of asbestos is relevant to its liability for failing to warn of such dangers. *See Henkel*, 689 A.2d at 1229-1230; *see also Artis v. Corona Corp. of Japan*, 703 A.2d 1214, 1217 n.6 (D.C. 1997) (*Henkel* stands for the proposition that "state of the art evidence could be admitted as to whether the risks of asbestos were 'scientifically discoverable' at the time of manufacture"). In fact, information about a defendant's conduct with regard to asbestos use in its own facilities is routinely admitted to show its knowledge of asbestos-related hazards at a given time. *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1318 (5th Cir. 1985); *U.S. Gypsum Co. v. Mayor & City Council of Baltimore*, 647 A.2d 405, 416 (Md. 1994). As the Fifth Circuit explained in the context of letters analogous to the Pennsylvania Department of Health documents:

¹ There are additional documents from the Pennsylvania Department of Health which reflect that in 1968, 1970 and 1971 Pecora's facility continued to be inspected for hazards arising from the use of asbestos in its plant. *Id.* at 2-7.

We note as an initial matter that the texts of the letters themselves do not limit their discussion to miners or plant workers. Rather, on their face, the letters appear to pertain to the problems of asbestos dust control in general. Nevertheless, even assuming that the defendants are correct in their contention that the letters refer only to certain groups of workers, we think that such a distinction plainly goes more to the weight than to the admissibility of the evidence. A study indicating that exposure to asbestos fibers is likely to cause harm to one group of workers is at least suggestive of the fact that other groups of workers who are also exposed to asbestos fibers face similar dangers.

Jackson, 750 F. 2d at 1318. The Pennsylvania Department of Health documents tend to show that Pecora had actual knowledge that asbestos dust in general could be harmful as early as 1964 and, as such, Plaintiffs are entitled to present such evidence to show that Pecora is liable for its failure to warn the users of its product.

WHEREFORE, Plaintiffs respectfully request that, with regard to these specific documents from the Pennsylvania Department of Health, Division of Occupational Health, the court deny Pecora's motion insofar as the order purports to potentially preclude the use of this documentation regarding Pecora's facilities.

Respectfully submitted,

/s/ Daniel A. Brown

Daniel A. Brown (Bar No. 444772)
Matthew E. Kiely (Bar No. 428560)
Eileen M. O'Brien (Bar No. 483451)
BROWN | GOULD | KIELY, LLP
7316 Wisconsin Avenue, Suite 200
Bethesda, MD 20814
301.718.4548 (phone)
301.718.8037 (fax)
dbrown@bgklawfirm.com
mkiely@bgklawfirm.com
eobrien@bgklawfirm.com

Counsel for Plaintiffs

RULE 12-I CERTIFICATION

The undersigned hereby certifies that Plaintiffs sought the consent of the Defendant to the relief requested herein and consent was denied.

/s/ Daniel A. Brown
Daniel A. Brown

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served this 24th day of May 2017 on all counsel of record *via* CaseFileXpress.

/s/ Daniel A. Brown
Daniel A. Brown

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_____	:	

ORDER

Upon review and consideration of Plaintiffs' Motion for Clarification and/or Reconsideration, any opposition thereto, and a review of the entire record herein, it is hereby, this ____ day of _____, 2017

ORDERED that the Motion be and the same is GRANTED; and it is further

ORDERED that the Court's prior Order of May 22, 2017 granting Pecora Corporation, Inc.'s Motion *in Limine* to Preclude Any and All Documents and Subsequent Testimony, of Pecora's Facilities or its Employees' Alleged Asbestos Injuries is hereby reversed, and such motion is hereby denied insofar as it purports to preclude the use of certain documentation concerning Pecora's facilities.

**Hon. Judge Anita Josey-Herring
District of Columbia Superior Court**

Copies to all parties *via* CaseFileXpress