

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLETCHER McDANIEL, et al.,	)	
	)	
Plaintiffs	)	Civil Action No. 83-3520
	)	
v.	)	Judge Flannery
	)	
ARMSTRONG WORLD INDUSTRIES, et al.,	)	
	)	
Defendants	)	

FILED

MAR 9 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

NOTICE OF FILING

Plaintiffs, in further support of their Brief in Opposition to Defendant Nicolet, Inc.'s Motion to Dismiss, submit the Decision In Re: Asbestosis Cases (Court of Common Pleas for Greenville County, South Carolina, June 10, 1977).

Respectfully submitted,

Peter T. Enslein
ASHCRAFT & GEREL
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400
Attorney for Plaintiffs

LAW OFFICES
HCRAFT & GEREL
SUITE 700
00 L STREET, N. W.
HINGTON, D. C. 20036
202-783-6400

SUITE 220
50 KENMORE AVENUE
EXANDRIA, VA. 22304
703-751-7400

SUITE 1002
NE CENTRAL PLAZA
300 ROCKVILLE PIKE
CKVILLE, MD. 20852
301-770-3737

SUITE 101
ETRO 400 BUILDING
NDOVER, MD. 20785
301-459-8400

SUITE 605
ST BALTIMORE STREET
LTIMORE, MD. 21202
301-539-1122

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, this 9th day of March, 1984 to:

Michael P. Chervenak, Esquire
FORD & O'NEILL
17 West Jefferson Street
Rockville, Maryland 20850
Attorney for Armstrong World Industries, Inc.

Kevin J. McCarthy, Esquire
Charles E. Gallagher, Jr., Esquire
O'MALLEY, MILES, FARRINGTON & MCCARTHY
99 Commerce Place
Upper Marlboro, Maryland 20772
Attorneys for A. C. & S.

H. Patrick Donohue, Esquire
DONAHUE, EHRMANTRAUT & MONTEDONICO, CHARTERED
51 Monroe Street
Suite 700
Rockville, Maryland 20850
Attorneys for Atlas Turner, Inc. and Bell Asbestos Mines, Ltd.

H. Emslie Parks, Esquire
Leland S. Van Koten, Esquire
WRIGHT & PARKS
Suite 1012
409 Washington Avenue
Towson, Maryland 21204
Attorneys for Celotex Corporation

David P. Durbin, Esquire
JORDAN, COYNE, SAVITS & LOPATA
Suite 500
1030 15th Street, N.W.
Washington, D.C. 20005

Louis R. Moffa, Jr., Esquire
SCHNADER, HARRISON, SEGAL & LEWIS
1111 - 19th Street, N.W.
Washington, D.C. 20036
Attorney for National Gypsum Company

LAW OFFICES
HCRAFT & GEREL
SUITE 700
00 L STREET, N. W.
HINGTON, D. C. 20036
202-783-6400

SUITE 220
60 KENMORE AVENUE
EXANDRIA, VA. 22304
703-751-7400

SUITE 1002
NE CENTRAL PLAZA
300 ROCKVILLE PIKE
CKVILLE, MD. 20852
301-770 3737

SUITE 101
ETRO 400 BUILDING
NDOVER, MD. 20785
301-459-8400

SUITE 805
ST BALTIMORE STREET
LTIMORE, MD. 21202
301-539-1122

R. G. Guziak, Esquire
BRAULT, GRAHAM, SCOTT & BRAULT
1314 - 19th Street, N.W.
Washington, D.C. 20036
Attorney for Nicolet, Inc.

Hopewell H. Darneille, III, Esquire
BOWMAN, CONNER, TOUHEY & PETRILLO, P.C.
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007
Attorney for Turner & Newall PLC and
Turner & Newall, Ltd. and J. W.
Roberts Company

Brock R. Landry, Esquire
KECK, MAHIN & CATE
1333 New Hampshire Avenue, N.W.
Suite 1220
Washington, D.C. 20036
Attorney for United States Gypsum Co.

Patrick J. Attridge
MACLEAY, LYNCH, BERNHARD & GREGG
51 Monroe Street
Suite 806
Rockville, Maryland 20850
Attorneys for United States Mineral
Products Company

Edward J. Lopata, Esquire
JORDAN, COYNE, SAVITS & LOPATA
1030 Fifteenth Street, N.W.
Suite 500
Washington, D.C. 20005
Attorney for W. R. Grace Company

Peter T. Enslein
ASHCRAFT & GEREL
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400

LAW OFFICES
HCRAFT & GEREL
SUITE 700
00 L STREET, N. W.
HINGTON, D. C. 20036
202-783-6400

SUITE 220
50 KENMORE AVENUE
XANDRIA, VA. 22304
703-751-7400

SUITE 1002
NE CENTRAL PLAZA
300 ROCKVILLE PIKE
CKVILLE, MD. 20852
301-770-3737

SUITE 101
TRO 400 BUILDING
NDOVER, MD. 20785
301-459-8400

SUITE 805
ST BALTIMORE STREET
TIMORE, MD. 21202
301-539-1122

ASBESTOSIS CASES)

Several motions were heard in these cases on May 23, 1977, with further arguments made on May 26, 1977. An Order has been previously filed with regard to jurisdictional motions made by several defendants. After the Court's Order on the jurisdictional orders was rendered on May 26, 1977, one of these consolidated cases, William Bumgardner vs. Combustion Engineering was removed to the United States District Court. Prior to the removal of Bumgardner this court heard several evidentiary and discovery motions. A record was made of the discovery rulings and need not be repeated here. The jurisdictional order was clearly issued and recorded in the office of the Clerk of Court for Greenville County prior to the removal of Bumgardner. Counsel for the defendants in Bumgardner had agreed not to appeal those jurisdictional rulings until after the trial of that case.

As stated above, certain other evidentiary and discovery rulings were made prior to the removal of Bumgardner. By previous Order of this Court, all discovery proceedings and rulings of this Court were made applicable to all cases consolidated under the caption "In Re Asbestosis." Accordingly, the below rulings are applicable to all asbestosis cases pending in this Court. Those jurisdictional motions decided by Order rendered on May 26, 1977, prior to the removal of Bumgardner are also applicable to all cases pending in Greenville County.

1. Plaintiff's motion to be allowed to use the depositions of Dr. Kenneth W. Smith.

This Court granted plaintiff's motion to use either of two prior depositions of Dr. Smith taken in asbestosis cases pending in other states prior to Bumgardner's removal. Dr. Smith former Medical Director of the defendant, Johns-Manville Corporation, averred by affidavit that he was physically incapacitated and unable to travel or testify.

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MAR 9 1984
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EXHIBIT 9

CA 83-3520

health and his residency in Canada. There was no showing made by the defendant, Johns-Manville, that Dr. Smith's unavailability was procured by plaintiff. Dr. Smith's affidavit clearly establishes the gravity of his illness and his incapacitation. Accordingly, I find as a fact that Dr. Smith is unavailable as a witness both by reason of his health and his residence. I further find that because of his former position of responsibility with Johns-Manville, his testimony is of importance. The defendant, Johns-Manville, has had an opportunity on two separate occasions to fully cross-examine Dr. Smith. Other of the present defendants were represented at the first deposition of Dr. Smith and had an opportunity to cross-examine him. Plaintiffs have stated in their motion that they desire to use Dr. Smith's deposition solely in proof of their case against Johns-Manville. Accordingly, I additionally find that exceptional circumstances exist which justify allowing plaintiff to use either deposition of Dr. Smith at the trial of any of these actions in proving its case against Johns-Manville.

2. Jurisdictional motions and oral motion of defendant, Nicolet Industries, for summary judgment.

The defendant, Nicolet, moved to quash service of process against it and further contested the jurisdiction of this Court contending that the Bumgardner case could not be maintained here by reason of the so-called "Door-Closing Statute." Intertwined with their jurisdictional positions was Nicolet's oral motion for summary judgment which was made on May 23, 1977, as to all asbestosis cases pending in Greenville County. Simply stated, Nicolet contends that it is not responsible for the alleged tortious activities of the predecessor corporation, Keasby and Mattison, because the transaction between Nicolet and Keasby and Mattison involved only a sale of assets.

motions were argued on May 23, 1977, and the factual record was closed at that time, except for the submission of relevant depositions taken prior to May 23, 1977. All such jurisdictional motions were taken under advisement at that time. At the request of counsel, both Nicolet's jurisdictional motions and their oral motion for summary judgment were taken under advisement with leave granted for further argument on May 26, 1977. Counsel were permitted additional arguments on May 26, 1977, and this Court has reviewed the factual showing and briefs of both parties. It appears from the record that Keasby and Mattison had substantial contacts with South Carolina and that the plaintiff, Bumgardner, was exposed to their products. It further appears that after the acquisition of Keasby and Mattison by Nicolet, the plaintiff, Bumgardner, continued to be exposed to products manufactured by Nicolet. Accordingly, I find as a fact that the defendant, Nicolet, without regard to the question of liability for the acts of Keasby and Mattison had sufficient contacts with this forum to justify maintenance of this cause of action here. Nicolet's contention that the Door Closing Statute precludes suit here is rejected for the reasons stated in the May 26, 1977, Order.

Turning to Nicolet's oral motion for summary judgment in all cases pending in Greenville County the Court would initially commend the parties for their excellent briefs and arguments. As stated above, it is Nicolet's contention that their acquisition of Keasby and Mattison, which was engaged in the manufacture of insulation products containing asbestos, does not subject them to suit by those claiming injury by reason of those products as the acquisition involved the transfer or purchase of assets only.

The general rule of corporate liability for acts committed by predecessors is that when a corporation sells all of its assets to another, the latter is not responsible

or merger; (3) the purchaser is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability. Golden State Bottling Co., Inc. vs. N.L.R.B., 414 U.S. 168 (1973); Holloway vs. John E. Smith's Sons Company, Division of Huban, Inc., ___F. Supp. ____C.A. No. 76948, (D.S.C. May 7, 1977); 15 Fletcher, Cyclopedia Corporations, §7122. There are several factors the courts have considered in determining the nature of a corporate sale. These factors include adequate consideration, the continuation of the predecessor's line of products, the transfer of goodwill or name, the transfer of corporate officers or executives, the transfer of the predecessor's employees to the successor, the length of time the seller continued to exist, and the amount of assets the seller retained for satisfying creditors. The courts also examine the agreement to sell to ascertain the parties' intent. However, as stated by the First Circuit, the legal designation of the transfer by the parties and corporate custom will not control where the claim involves personal injury. Cyr vs. Offen & Co., Inc., 501 F. 2d 1145, 1153 (1st Cir. 1974).

It is the plaintiff's further contention that courts are finding additional public policy grounds for denying corporate acquirer's immunity from suit by persons injured by products of the acquired corporation. Thus, in the very recent Ray vs. Alad Corp. 560 P.2d 3 (Calif. 1977) decision the California Supreme Court concluded that:

> a party which acquires a manufacturing business and continues the output of its lines of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.

The Ray Court cited the policy reasons underpinning the strict tort liability doctrine as additional support for the ruling there. See Greenman vs. Yuba Power Products 377 P.2d 897 (Calif. 1963).

evidence specifically provides that Pennsylvania law will apply to the transaction. While such designation of choice of law does not necessarily bind this court in determining the rights of injured third parties who were strangers to such agreement, Nicolet can find no comfort for its position in decisions construing the applicable Pennsylvania laws. In Knapp vs. North American Rockwell Corp., 506 F.2d 361 (3rd Cir. 1974) cert. den. 421 U.S. 965 (1975) the Court of Appeals for the Third Circuit surveyed the various jurisdictions which had decided the issue of the tort liability of successor corporations and also analyzed the applicable aspects of Pennsylvania corporate law.

The sale in Knapp was merely a sale of assets, but the selling corporation had promised to dissolve "as soon as practicable." After the sale, the predecessor corporation remained in existence for 18 months as an independent corporation. The court's decision stressed social policy with respect to the burden of costs and the allocations of risks in products liability suits. As a result the Third Circuit held the successor liable by treating the transaction as a merger.

Knapp chose a route not unlike recent court decisions in other jurisdictions. The trend in these types of personal injury suits involving a "dead" and successor corporation definitely shifts the burden of cost and risk to the successor. Various factors assigned significance include: finding a continuity of the product line, describing the successor as an entity holding itself out to be public as the responsible manufacturer; finding the injured person as a member of the public without notice (of corporate history).

Nicolet urges that a distinction between the progressive approach taken by modern courts exists here in that it only purchased one division of Keasby and Mattison and Keasby and Mattison retained vitality with respect to other divisions. However, Number 11 of the Nicolet-Keasby and Mattison agreement

brand names and patents.

Thus, a continuity of business and product identity was effectuated by the acquisition. See Holloway vs. John E. Smith's Sons Co., supra . This Court accords weight to the fact that many of Keasby and Mattison's employees began working for Nicolet and the product line was continued. Further, agreement Number 3 states that it is "expressly understood and agreed that this agreement is not to be lodged in any public office for record..." The Court in Cyr vs. Offen & Co., Inc., supra, 501 F.2d 1145 assigned weight to the clear absence of official third party notice.

A further consideration is the existence of product liability insurance. An acquirer often will merely "arrange for the continuation of the products liability insurance maintained by the (acquired corporation)..." Shannon vs. Samuel Langston Co., supra, 379 F. Supp. 797, 802 (D. Mich. 1974). The concept of enterprise liability is central to the ever evolving consumer oriented law of strict tort liability. To the defendant's argument in Holloway that the imposition of liability in an assets only acquisition declared "open season" on corporations, Judge Hemphill aptly responded:

> If it be argued that liability is thus made open-ended, as in the case of accidents following a long lapse of time from the date of sale, we note that even the original manufacturer may be subject to such liability or, if not, the successor should mount the same defense of age or obsolescence....

Holloway, Slip Opinion at p. 3, Citing Cyr vs. Offen & Co., supra.

This Court concludes that public policy considerations militate in favor of holding Nicolet responsible for the tortious conduct, if any, of Keasby and Mattison which results in alleged personal injury to third parties who were strangers to the corporate transaction. The South Carolina Supreme Court has been liberal in protecting the rights of injured consumers and the general public vis a' vis corporations, which market their products here and inject themselves into

formalities" dictate the conclusion reached here. This result is reached whether Pennsylvania or South Carolina law is applied. As respects product liability claimants the Nicolet-Keasby and Mattison transaction is tantamount to a merger. Accordingly, the motion of Nicolet for summary judgment is denied and said corporation is deemed responsible and liable for any acts or conduct of Keasby and Mattison which contributed to the damages allegedly suffered by plaintiffs in these actions.

3. The defendant, Johns-Manville's "in limine" evidentiary motions.

(a.) Johns-Manville moved that the Court exclude portions of a document prepared by Dr. Kenneth Smith while he was an employee of Johns-Manville. This document which is a "survey" of the health of certain employees at a Johns-Manville facility contains language which Johns-Manville contends is irrelevant and inflammatory. This Court has examined the document and finds the entire document to be relevant. The probative value of the entire document considerably outweighs any prejudice inherent in the language. The document refers to the dust conditions "inside and outside" the facility. Dr. Smith's recommendations therein are based on his "survey" of the employees and are relevant, inter alia, to the questions of notice of health hazards incident to breathing asbestos and dust control. The weight of the document is, of course, for the jury to decide.

(b.) Johns-Manville contends that testimony relative to increased cancer risks to those exposed to asbestos should be excluded as to those plaintiffs for whom there is not a prognosis, within a reasonable degree of medical certainty, of contraction of such cancer. The plaintiff submits, however, that proof of increased cancer risks to those exposed to asbestos is not offered to show a possibility of cancer as an item of damages but to establish:

handle the products which contain asbestos

(4) a duty to develop substitute products

(5) a reasonable basis for medical testimony that one who has asbestosis faces the probability of a shortened life expectancy

(6) a basis for increased medical expenses due to the need to closely monitor the plaintiff's condition

(7) as an item of damages as to mental distress incident to physical trauma.

The Fifth Circuit Court of Appeals held in Borel vs. Fibreboard Products 493 F.2d 1076 (5 Cir. 1973) that asbestos manufacturers have a duty to test and the extent of such testing "must be commensurate with the dangers involved." 493 F.2d at 1089. The duty to test a product has long been recognized in South Carolina. See Patterson vs. Orangeburg Fertilizer Co., 108 S.E. 401 (S.C. 1921). Accordingly, I am persuaded that if the plaintiff establishes by competent medical or scientific testimony that hazards are associated with asbestos exposure beyond that of asbestosis such testimony is not rendered inadmissible because the plaintiff in an individual case does not have cancer or the probability of contracting cancer.

The Borel decision also contains persuasive language relative to the duty to warn. I have carefully reviewed the facts in Borel and find that the plaintiff there did suffer from a form of cancer associated with asbestos exposure. The court in Borel held that a "duty to warn attaches whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it." 493 F.2d at 1089. Borel then assessed the sufficiency of the warning employed by the manufacturers there and concluded that: "None of these so-called 'cautions' intimated the gravity of the risk; the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers." 493 F.2d at 1104. See

of the warning given by the defendants.

The plaintiff's additional grounds either overlap with the above or deal with elements of damage which depend upon the condition of the individual plaintiff and the medical testimony in regard to his condition.

It should be pointed out that no such testimony will be permitted without testimony as to the cancer causing aspects of asbestos. Proper instructions to the jury will be given with regard to these rulings:

SUMMARY

1. Motion to use depositions of Dr. Smith granted.
2. Nicolet Motions denied.
3. Johns-Manville "in limine" Motions overruled as stated above.

AND IT IS SO ORDERED.

Hon. James H. Price, Jr.
Resident Judge
13th Judicial Circuit

June 10th, 1977.