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SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In re EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

This Document Relates To:

DUREZ CONSOLIDATION - February 14, 2000

HERMAN BAISCH - Index No. 091955
DAVID T. BALLARD, Deceased - Index No. 096935
EDWARD CHRZASZCZ, Deceased - Index No. I1998-3782
ROBERT P. DiPIRRO - Index No. I1996-2220
CURTIS EDIN, Deceased - Index No. I1997-6257
WILLIAM ELLIS - Index No. 096163
THOMAS J. GORAJ, Deceased - Index No. 98-6748
ROLLAND J. GROULX - Index No. H-94350
DONALD W. HOCH - Index No. 095609
JAMES F. JAGOW - Index No. 096162
DENNIS J. KANTOR - Index No. 096165
JOHN F. KASSAY, Deceased - Index No. 096412
DENNIS M. KISIEL - Index No. 091943
CAROL J. KNAPP - Index No. 098513
DONALD J. KOENIG - Index No. 091966
JULIUS KRIZON - Index No. I1998-4966
ROBERT A. LEGER, Deceased - Index No. 095356
LOUIS W. MEYER, Deceased - Index No. 98-6748
DOYLE E. MILLER - Index No. I1996-8865
MICHAEL J. MYRTLE - Index No. 096164
GEORGE A. NIEMIEC, JR. - Index No. 097555
PHILIP D. OVERTON - Index No. I1998-4966
LOUIS T. PARISH - Index No. 095609
CHARLES A. PERGRIM, Deceased - Index No. I1997-2882
ROBERT J. PETERMAN - Index No. I1997-6908
JESSE A. PIFER - Index No. 096164
CLINTON E. PLOTNER, Deceased - Index No. 097261
FRED E. POELLER, Deceased - Index No. 093435
GARY R. RICE - Index No. 091944
LOUIS N. SCRIVANO - Index No. 094312
DAVID MICHAEL SELOVER - Index No. 098513
NORMAN O. STAHL - Index No. 1995-3164

EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

ATTORNEY'S REPLY AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE TO ADMIT POST-EXPOSURE EVIDENCE

re punitive damages
for cont. to
expert Killer
mineral

ACL denies mining &
still selling
asb to
developing
countries (?)
1/18/00

John N. Lipsitz says internet
announcement in Nov. still
value of asb-mining.

FRED C. STRINGFELLOW, Deceased - Index No. I1998-3782
BENTON W. SUTER - Index No. 095609
RAY A. TROTTER - Index No. I1998-4966
VERNON TROYER, Deceased - Index No. 98-6748
CLARENCE E. TYGER, Deceased - Index No. I1998-3782
RICHARD V. WESOLOWSKI - Index No. 084837

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

JOHN NED LIPSITZ, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice law in the State of New York and am a member of the law firm of Lipsitz & Ponterio, LLC, attorneys for plaintiffs in the above-captioned actions. As such, I am fully familiar with the facts and circumstances stated in this affidavit.

2. I submit this affidavit in support of a motion in limine to admit evidence of post-exposure conduct on the part of defendant Asbestos Corporation, Ltd. during the course of the punitive phase of the trial scheduled to commence in Niagara Falls, New York on February 14, 2000. Specifically, plaintiffs will seek to introduce evidence of post-exposure conduct on the part of defendant Asbestos Corporation, Ltd. as proof of its continuing wrongdoing and persistent and wanton disregard for the health and safety of others, such as to justify the imposition of punitive damages. This affidavit is also made in reply to opposition papers served by defendant Asbestos Corporation, Ltd. through its attorneys, Bouvier, O'Connor, James L. Kennedy, Esq., of counsel.

3. In James L. Kennedy's affidavit, sworn to on the 18th day of January, 2000, at

paragraph 5 thereof, the defendant disputes that it is engaging in mining or sale of raw asbestos product to any third world countries. In paragraph 6 of Mr. Kennedy's affidavit, the defendant sets forth that it is still "the record owner of certain mines in Quebec, no mine is actively operating at this time, contrary to the untrue and unsubstantiated allegations in the affidavit of plaintiffs' counsel."

4. Defendant objects to your deponent's affidavit sworn to on the 30th day of December, 1999 in support of plaintiffs' motion, contending that the allegations set forth in your deponent's affidavit are without supporting proof.

5. Continued mining, sales and marketing of raw asbestos to third world countries, or indeed to any location, are relevant to plaintiffs' motion to the extent they demonstrate misconduct occurring after the period of injurious exposure, which in this case would have ended for all plaintiffs in or about 1979. The issue before this Court is a legal one: may plaintiffs introduce evidence of post-exposure misconduct at the punitive phase of the forthcoming trial? It is not material, therefore, whether the alleged misconduct continues to the present day, or came to a halt six months, or even two years ago.

6. Your deponent concedes that he has no personal information or knowledge concerning the mining, sales and marketing activities of the defendant. Your deponent's information and belief is based in part on a series of three articles appearing in the *Toronto Star* in March, 1999, copies of which are attached hereto as Exhibit "A." The article published on March 20, 1999 by *Toronto Star* news feature writer Bill Schiller is entitled "Why Canada pushes killer asbestos." The article appearing on the following day is entitled "Asbestos 'king' admits fibres will kill." Finally, the concluding article in the series which appeared on March

23, 1999 is entitled "A deadly export." In his articles, Mr. Schiller quotes Jean Dupéré, a former Montreal lawyer who is the majority owner of LAB Chrysotile, Inc. According to Mr. Schiller's article, Mr. Dupéré concedes that Canadian asbestos, a carcinogenic fiber used mainly in the construction industry, will kill foreign workers in Algeria. He quotes Mr. Dupéré as saying "I may tell them as much as I want. If they don't follow and they don't practise and they don't even put into operation the equipment we give them to regulate the air, there is no doubt it's going to lead to problems." He also quotes Mr. Dupéré acknowledging that "This is a dangerous product" and "It's a carcinogen. Nobody will ever deny that, or should. Uncontrolled it will obviously cause -- as we know -- physical harm and deadly disease." Mr. Schiller's articles also quote Dr. Julian Peto, head of Epidemiology at the University of London's Institute of Cancer Research, who states in the article published on March 21, 1999 that in practice, you cannot control the use of asbestos in England "let alone in the Third World. When 17-year-olds become builders they're macho about everything: drinking, driving, smoking and sawing up asbestos in little rooms." Mr. Schiller also quotes Dr. Peto as saying that talk by the asbestos industry of getting "ventilation equipment" installed to minimize risk on worksites was just "preposterous."

7. Upon information and belief, and based upon the annual corporate report of Mazarin Inc. of Quebec, LAB Chrysotile is and has been the marketing arm of the Quebec asbestos industry, including the mines owned by Asbestos Corporation, Ltd. in Thetford, Quebec. Attached hereto as Exhibit "B" is the corporate profile of Mazarin Inc. Upon further information and belief, defendant continued to mine, sell and market asbestos through the decade of the 1990's.

8. This Court should decide at trial whether plaintiffs' witnesses are competent to testify to facts having a tendency to prove that defendant acted wantonly, recklessly, or in conscious disregard of the rights of others, not only during the years of plaintiffs' exposure, but also in later years.

9. Defendant's contention that plaintiffs are failing to advance a prima facie case for punitive damages is devoid of merit. Judgment was entered against defendant in 1997 in the Pieper case upon this Court's finding "that there was ample testimony and exhibits presented that the defendant was well aware of the risks of exposure to raw asbestos mined by the defendant for a long period of time. There was ample evidence of the danger of exposure to raw asbestos going back to 1940. Defendant's failure to warn or take any steps to protect users of raw asbestos support..." the award of punitive damages. See this Court's Memorandum of Decision in James J. Pieper v. Asbestos Corporation, Ltd., et al attached as Exhibit "A" to plaintiffs' Memorandum of Law in Support of Motion in Limine to Admit Post-Exposure Evidence. It is respectfully submitted that this Court's Memorandum of Decision in the Pieper case represents the law in our jurisdiction with regard to the showing necessary in order to sustain an award of punitive damages. The evidence which plaintiffs propose to introduce against Asbestos Corporation, Ltd. at the forthcoming trial is substantially the same evidence upon which the jury imposed punitive damages on Asbestos Corporation, Ltd. in 1997, except to the extent that plaintiffs now also seek to introduce into evidence in the punitive damage phase facts tending to prove that the defendant continued to engage in wanton and reckless misconduct through the present time.

10. Attached to defendant's Affidavit in Opposition is a verification sworn to by

Richard Dufour, Esq. on January 18, 2000. Mr. Dufour claims to be legal counsel for Asbestos Corporation, Ltd., and as such, duly authorized to affirm the truth of the contents of Mr. Kennedy's affidavit also sworn to the 18th of January, 2000, especially in regard to defendant's contention that it no longer is engaged in the mining, selling and marketing of raw asbestos on an international scale. Mr. Dufour's verification is conclusory, devoid of detail, and should be disregarded by this Court. If, as asserted by Mr. Kennedy, the defendant is no longer engaged in such activities, the pertinent question would be, when did it stop?

WHEREFORE, it is respectfully requested that this Court make a pretrial ruling that post-exposure evidence of continuing misconduct on the part of defendant Asbestos Corporation, Ltd. is relevant and admissible during the punitive damage phase of the trial scheduled for February 14, 2000, and grant such other, further and additional relief as this Court deems just and proper.

John Ned Lipsitz, Esq.

Sworn to before me this
19th day of January, 2000.

Notary Public

MARGARET M. DOSKOCZ
Notary Public, State of New York
Qualified in Erie County
My Commission Expires December 8, 2000