PLAINTIFF'S EXHIBIT WRG-785

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

GREENVILLE COUNTY SCHOOL DISTRICT, Plaintiff, -versus- W. R. GRACE COMPANY, and NATIONAL GYPSUM COMPANY, Defendants.	CIVIL ACTION NO. 82-3142-14 Greenville, S. C. July 29, 1985; 9:30 a.m.
SPARTANBURG COUNTY SCHOOL DISTRICT SEVEN, Plaintiff, -versus- NATIONAL GYPSUM COMPANY, and UNITED STATES GYPSUM COMPANY, Defendants.	CIVIL ACTION NO. 83-1744-14

TRANSCRIPT OF MOTIONS

BEFORE: HON. WILLIAM W. WILKINS, JR. Presiding,
United States District Judge.

TRANSCRIPT ORDERED BY: Richardson, Plowden, Grier & Houser (Ruth Porter)

APPEARANCES:

FOR THE PLAINTIFFS: DANIEL A. SPEIGHTS, Esq.
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PLAINTIFF'S EXHIBIT

APPEARANCES (Continued)

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THE COURT: Let's take some of these motions one by one. My purpose today and I'm kind of glad today is here. I assume this will stop the paper flow coming my way. I'm going to save it all for my little boy's paper drive -- sure he's going to win next year.

Motion to sever, filed by United States Gypsum of Spartanburg and W. R. Grace in Greenville. These cases were consolidated by the Court some weeks ago. It involves identical questions of law, identical questions of fact, and consequently that motion is denied.

Plaintiffs have several motions to quash various depositions and for a protective order staying all discovery. I imagine that has been taken care of through you, gentlemen, just doing it, or on one or two I did stop. Is anything else left to be talked about as far as depositions?

MR. SPEIGHTS: Your Honor, the only thing left would be vis-a-vis some additional Greenville depositions. That would be as it relates to our motion for sanctions for the defendants failing to comply with the stipulation.

THE COURT: All right. I'll hold that right now. We'll come back to it.

Motion by the defendants to require the parties to exchange exhibits and a list of trial witnesses. This motion was filed July 12 and July 11 I had issued order, I'm sure you hadn't received it , requiring the exchange of

MR. HOYLE: We'll provide you that list and after this hearing I can call and give a time when that list can be provided and the volume of the documents.

THE COURT: If you get the list quicker, that might be easier. Then I can demand, I mean I could probably rule on it from the list. All right.

All right, motion by the defendants, motion for summary judgment in the Greenville case, and do I understand that Spartanburg case joins in all of these motions?

MR. BROWN: That's correct.

THE COURT: You would be covered then by the plaintiffs' motion for sanctions as far as these motions are concerned? I mean you would be involved in that as well.

MR. MARTIN: They have not made that motion as to us.

THE COURT: I'm just saying they moved sanctions against the Greenville case. If you want to join in the motion, I'll do that, but I'll let those sanction motions apply to you as well.

MR. MARTIN: Maybe we ought to argue our own motion.

THE COURT: Then I exclude you from these motions. You said, "I join in all motions Greenville has filed."

MR. MARTIN: What we did is reference the briefs. We have more causes of action in Spartanburg case than they have the Greenville, so there is uniqueness there. There

are portions of the brief not necessary to provide the Court again as to --

THE COURT: Do you seek motion for summary judgment on the negligence claim?

MR. MARTIN: Yes, sir.

THE COURT: Then we'll hear them all together.

All right, first is motion for summary judgment on the warranty claim. Defendants assert the warranty claimed barred because plaintiff failed to give notice within a reasonable time of any alleged defect in the product. What about that for the the plaintiffs?

MR. WESTBROOK: Your Honor, as the defendants assert in the motion the purpose of giving notice is primarily to allow a negotiated settlement of the claims. The defendants have unilaterally taken the position in this litigation -- and we're involved in 20 or 30, they're involved in over a hundred cases involved in -- nothing wrong with their product, not coming in, not going help anybody take asbestos out. Second, South Carolina authority in a case like this filed this complaint is adequate. When we filed the complaint most of the abestos had not be removed. Plenty of time for conciliation had the defendants wanted it . As a later motion today will show, Your Honor, the defendants were not interested in conciliation.

THE COURT: I looked at this, I read all this stuff pretty carefully. That motion has little merit to it. I'm going to deny that motion. How about the fraud claim?

No use to argue that. I deny that on the briefs have been submitted.

Restitution, the defendants assert the plaintiff did not state a claim under this theory because it is not the law of South Carolina. What about that?

MR. WESTBROOK: Your Honor, as Judge Smith recognized, the Restatement states the general law in this country, absent contrary authority. Has been no South Carolina Supreme Court authority ever saying Restatement of the restituion section 115 is not the law.

THE COURT: What about the case, Lexington County case, is that the one --

MR. WESTBROOK: Judge McMahan also denied the motion for summary judgment. Inquiring of United States Gypsum counsel, "What is the law generally?" Answer, "Restatement." Judge McMahan said, "I deny the motion."

THE COURT: Well, I'm going to deny it as well. No use to argue that. This can better be handled in context of trial.

Next motion is negligence claim and I want to talk about that a little bit. Defendants move for summary judgment on the negligence claim, alleging the plaintiff

suffered economic loss in the absence of physical injury, negligence action cannot be maintained. And the plaintiffs have resisted this motion, as well, they moved for sanctions claiming that this is totally frivolous motion, done for purpose of delay or harassment other bad reason. I'll be glad to hear from the defendants on this matter.

MR. HOYLE: Let me start off, if I may talk, Your Honor, about the negligence problem and I'll try to be brief. Your Honor, has reviewed all the authorities. Basically in South Carolina, South Carolina Supreme Court has recognized the Restatement position that there is a requirement of physical harm in determining a tort liability. Question of physical harm is whether the physical impairment of the actual human body or land or chattels.

Now, in this litigation, the plaintiffs move to add an allegation to their complaint, they move to amend their complaint to a assert such allegation. That was denied on March 1, 1984. So without that allegation, we are looking at a situation where we have an actual absence of any allegation of physical harm here and our basic proposition is that the majority of the law across the country is that you need an allegation of physical harm in order to establish tort liability.

Now the question of economic loss is a very

complex question, Your Honor, and the cases in a sense all over the lot. Two lines of authority if you look at the question very generally. The majority line which requires physical harm and minority line which is also referred to as the Santor line, which in fact the New Jersey Supreme Court recently, Seely vs. White case, changed slightlyly, the minority rule.

In addition, there are states that have enacted section 402 (a) in effect and eliminated the physical harm requirement as such. Take for example, the case of Pennsylvania Glass Sand, which is an exceedingly difficult case. It is a case that both sides to this issue find comfort for. Every time I've argued this, first one side will cite it then the other.

The Third Circuit recently, I guess it was in February of '85, decided the East River case, Your Honor, which was an economic loss case.

The en banke Third Circuit split three different ways over interpreting that case. It is our reading of the case that it supports our position, that you got to have a physical harm injury before you can recover.

THE COURT: How about the Sioux City case?

MR. HOYLE: The Sioux City case, Your Honor, is a case which we cite for the proposition you can't recover in strict liability, in tort without a showing of physical

harm. We do not cite it in the negligence claim as such. We cite it for the tort liability proposition under strict liability.

Now, there are a number of cases which have been decided in the school context, Your Honor. Basically this issue and I'm not sure how relevant they are, other than the ones we brought to Your Honor's attention. Basically this is a question of interpreting state law. We pointed out to you in our briefs, there are three South Carolina cases in effect can be interpreted against us. From our judgment we have two federal court cases, two Fourth Circuit cases and a South Carolina Supreme Court case that in effect adopt physical harm requirement in connection with negligence recovery under section 395 of the Restatement.

Now if you analyze the cases that Mr. Westbrook cites in connection with the school situation, as I pointed out, a great number of those cases involve an amendment to the complaint or an initial complaint that covers an allegation of physical harm. In fact, Mr. Westbrook reports 14 cases, I believe there are in fact 18, excuse me 17 rulings, there is one in Greenville, Tennessee, one in Washington County, one in Anderson that are not included. Those are cases in which the motions were denied on the basis of an allegation of physical harm. Here we don't have that. The plaintiffs attempted to amend their compliant to

assert that in March '84 and it was denied. So I think we are presented with a strict question of whether in light of South Carolina Supreme Court adopting section 395 of the Restatement which has the explicit physical harm requirement, the two Fourth Circuit cases which adopted in certain circumstances, and on the other side the three South Carolina cases in school context, which you may say have ruled against us, and deciding in this context where you do not have an allegation of physical harm whether the plaintiff should be allowed to recover economic loss. And it is is our position, Your Honor, they should not be under the law in South Carolina as we believe the South Carolina Supreme Court should interpret the law and also, under the majority cases in the country.

THE COURT: All right, thank you. Let me see that a minute, Gregg.

Page 9 of the memorandum says:

"Most helpful to an understanding of the rule, the plaintiff cannot recover for economic loss in tort, but may only recover in contract is the landmark decision Seely vs. White Motor, California case."

And you quote extensively from that decision. You rely on Seely, Mr. Hoyle?

MR. HOYLE: Seely is cited there just as that

says, Your Honor, in connection with a discussion of economic loss in tort and rationale of such. Seely was cited by the Third Circuit in East River case as indicating the statement of majority line of thinking in the economic loss area.

THE COURT: That is not the law today, is it? That case is just about eroded until it has been washed way.

MR. HOYLE: Your Honor, I suggest to you in California Seely has been limited in certain circumstances involving negligence claims.

THE COURT: You think you had a duty to point out to me in shepards it had been distinguished on many, many occasions?

MR. HOYLE: No question, Your Honor, Seely is a classic case has been cited all over the county. Two lines of authority, but courts adopt a minority they distinguish Seely. In other cases, where the Third Circuit said it represents a classic statement of the majority view in the country. So that's what Seely is stated for here is - it says it helps for understanding the rationale behind the majority view on economic loss.

THE COURT: Why in the Golden Eagle Distributing, why was sanctions imposed in that case for even citing Seely?

MR. HOYLE: That was a California case, Your

Honor.

THE COURT: I understand. So was Seely.

MR. HOYLE: It was a California case in which the defense counsel there did not set forth to the Court, I can't think of the name, there is a California case that limits it in a negligence context, Your Honor, to deal with special relationships and that case was not disclosed to the Court.

THE COURT: All right.

MR. BROWN: Your Honor, could I say a word about the Spartanburg situation?

THE COURT: Yes, sir.

MR. BROWN: We have filed a brief in Spartanburg which we adopted with respect to negligence argument made in Greenville case Mr. Hoyle alluded to. But there are a couple other facts I think Your Honor should know. Most of the cases in the country cite the Pennsylvania Glass Sand case for opposite proposition. That was a case where there was some physical harm and was a defect safety related. Some people cite it for authority you must have physical harm;

others cite it for a safety-related defect, you don't.

Now the Sentimesian case, which is the first school building case to be brought, is pending in New Jersey and I represent United States Gypsum, which is two

defendants in that case. About three months ago we filed a motion for summary judgment in that case. It was argued and the judge decided in that case economic harm would be allowed in tort under New Jersey law. That -- we have asked that judge to certify that case for interlocutory appeal to the Third Circuit and that motion is now pending. Trying to decide whether to certify or not. If it is certified, it will become the first school building case to be heard by the Third Circuit since Pennsylvania Glass Sand and they will have the opportunity to say what they really meant when they expounded on this subject. So we submit to Your Honor, that we believe sincerely that the majority law in this country is that you can't recover this kind of claim for replacement of ceiling in tort, that that is a breach of warranty or a contract claim.

Now, there is a split of authority all over the country and Mr. Hoyle has given you the reasons why he thinks South Carolina should decide this issue the way the majority has. So we submit in connection with this motion for sanctions, there is a legitimate split of authority here and we have told you the authority we believe South Carolina ought to adopt.

THE COURT: You rely on Seely vs. White Motor Company in support of your position?

MR. BROWN: For the limited proposition Mr. Hoyle

referred to, that it explains the theory or the majority as to why economic harm should not be. That is the only purpose for which it was cited.

THE COURT: All right, sir. From the plaintiff.

MR. WESTBROOK: Your Honor, it is difficult to know where to begin. Split of authority. Your Honor, I have, the fortunate or unfortunate opportunity to read hundreds of cases to argue this around the country. Your Honor, I have found no case, no radiation case, no formaldehyde case, no sodium case, no asbestos case where any court has ever said you couldn't recover for negligence in those types of damages. No split of authority whatsoever.

Now, Your Honor, if the defendants had a good-faith argument why South Carolina law should be this or should be that, that's one thing. But they cite Seely and they didn't tell the Court about Seely. They cite Sioux City and I believe, Your Honor, believe the Court has that disposition. As Your Honor knows, the judge in there said the negligence claim is in there, that will allow the school to recover. They cite Cooley vs. Salopian, Your Honor, Judge Hemphill's case. Judge Hemphill's case also notes the negligence claim is going to go to trial. They cite Purvis, Fourth Circuit authority. Those are two the federal cases they talked about. Purvis a tobacco barn that didn't cure tobacco

correctly and was a strict tort case, was no negligence claim, Your Honor. This is a result of them filing a canned brief around the country. I got 15 in my office look just about the same. They never change it according to jurisdiction. They change a word here or there, take awful lot of our time and awful lot of the Court's time. I'll answer any question you got, Your Honor, but really is no argument from our viewpoint.

THE COURT: Thank you very much. Any response to that? When you cite one of these cases, why don't you tell me the court did find that negligence would go to trial? That's what concerns me. As I read your brief, I hate to go to the library and look the cases up, have my law clerk bring me a stack of books so I can read the thing. That's what I have to do if you don't give me the whole picture.

MR. BOYLE: Your Honor, we thought, maybe we didn't do it very artfully.

THE COURT: You did very artfully, well written, well read.

MR. BOYLE: We didn't cite Seely for any proposition other than a general understanding as it said there on page 9 of the brief, for the prosition it sets forth and in all the treaties and general court opinions it is recognized as a landmark case in setting forth the rationale of the decision.

THE COURT: But, you maintain it is still the law of the country.

MR. HOYLE: Your Honor, we maintain that it sets forth and is understood as a landmark case in describing the rationale of that view. This is an extremely complex issue. Interestingly enough if you take the Pennsylvania Glass Sand case, cited by both sides in the Third Circuit, you got two district court opinions. One, Pearl, which decided, relied on Pennsylvania Glass Sand and decided for the plaintiffs, in effect you could recover economic loss; and you got Mount Airy Lodge that relied on Pennsylvania Glass Sand and cited you couldn't. Both involve formaldehyde foam insulation. We're talking about an extremely complex matter in which the rationale and the logic of the opinions is much more important than the authority in the various jurisdictions. It is extremely complex issue if you try to look at the country and we put together what we think persuasive rationale. Set forth all the South Carolina law, set forth the adverse South Carolina authority, and then we tried to argue to Your Honor the reasons and rationale behind the law, why we should prevail.

THE COURT: Let me ask you, Sious City, did it go to trial? I mean did the judge allow the case to go to trial?

MR. HOYLE: My understanding it eventually went to

trial and on the representation of the other side, they say it was settled. Don't know, but I accept if they -

THE COURT: Well, I mean did it go to trial on the issue of negligence?

MR. BOYLE: My understanding from -

THE COURT: Well did the case say, "I'm going to deny your motion; negligence is a good cause of action"?

MR. BOYLE: Yes.

THE COURT: Why didn't you tell me that? You led me to believe the only thing the plaintiff did was bring an action on strict liability and your theory prevailed and dismissed the case. But the judge said, "Now wait a minute. I'm going to rule against you, Mr. Defendant, on negligence", just the issue you bringing to me, but you don't cite it for that proposition.

MR. BOYLE: Your Honor, the law is split in jurisdiction from jurisdiction. Some consider strict liability and negligence together. Some treat strict liability one way and negligence another. We cite that in connection with strict liability argument only.

THE COURT: Why don't you tell me though, footnote, "You better look at this case, Judge, because the judge evently did allow this case to go forward on the issue of negligence, same basis on which we're trying to get you to kick this one out on."

MR. BOYLE: In our judgment at the time, Your Honor, is what that adds is no rationale, no logic. It just adds another authority, which we pointed out many to you, which say "sure there are some jurisdiction which allow this claim to go forward on negligence." It doesn't help you understand why. It is one more of many.

THE COURT: I know, but just don't cite it. You cite it to support your position when in effect it is just the opposite.

MR. BOYLE: We don't cite it, we do not cite it, Your Honor, for anything other than strict liability.

THE COURT: I understand that, by reference there and by inference this means this is another case fallen on your side. Granted, it's strict liability, but the same approach should be applied, the same theory of law should be applied as far as dismissing this case. Yet in fact the judge ruled against you in that case and that's what gives me some concern. You cite a case as dead against you as your case and if I didn't read your brief, don't look behind you, then I'm going to have to believe this is the law and do something that's wrong, based what you tell me.

MR. BOYLE: Your Honor, I respectfully suggest that is incorrect. We do not in any way hide from this Court the fact there are two lines of authority, that there is split in some jurisdictions.

THE COURT: Did you hide from me the judge ruled negligence was a proper claim in Sioux City?

MR. HOYLE: No, I don't believe, we did. We cite it in the strict liability section. Point out the cases go every different way from jurisdiction to jurisdiction. I don't see that it would have assisted Your Honor in deciding this case in any fashion to have put it in the negligence section. There are other cases can say the same thing that have some logic and reason some rationale stated. This one doesn't and I don't see that this particular case adds to that argument on that side, Your Honor.

THE COURT: All right. What was the case you cited to me just now, Mr. Westbrook, South Carolina case?

MR. WESTBROOK: Your Honor, the two cases they talk about is Fourth Circuit, Purvis and the tobacco barn, Cooley vs. Salopian. That is Judge Hemphill's.

THE COURT: Where is that cited in their brief?

MR. WESTBROOK: It is cited, Your Honor, on page 7, with the reference clearly negligence action involving defective products recovery is precluded under South Carolina law. Two federal cases have so held and they certainly have not. First is a strict tort case, as was Cooley, challenge the strict tort count.

THE COURT: Wait a minute, where you reading, page 7?

MR. WESTBROOK: Page 6.

THE COURT: I got you. I got it. I had it, okay.

MR. WESTBROOK: One other point, Your Honor, the Sioux City negligence situation is no surprise to Mr. Hoyle. Look at my footnote, it was upset two years ago, I told him two years ago exact same thing and they continue to cite Sioux City.

THE COURT: Okay. I going to withhold my ruling a little while. I may go back and reflect on that.

Motion on the issue, summary judgment, on the basis of negligence is denied. The issue of sanctions, I will rule on that very shortly.

Now let's look at Spartanburg just a second. Spartanburg moves summary judgment on the issue of strict liability. Is that an issue in Greenville?

MR. WESTBROOK: No, Your Honor, I don't believe it is.

THE COURT: Is it going to be a issue in Spartanburg?

MR. WESTBROOK: No issue.

THE COURT: Motion is granted, strict liability, summary judgment is granted.

All right. Unfair Trade Practices Act. It is not an issue in Greenville case.