

FILE NAME: Raybestos-Manhattan (RBM)

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STATE OF SOUTH CAROLINA,)
COUNTY OF GREENVILLE.)

IN THE COURT OF COMMON PLEAS

Bennie M. Barnett, Administrator)
of the Estate of Gordon Luther)
Barnett, Deceased,)

Plaintiff,)

-vs-)

Owens-Corning Fiberglass Corp.,)
et al,)

Defendants.)

AMENDED ORDER
(Survival and Wrongful Death
Actions)

This matter is before the Court on plaintiff's motion for a new trial on the ground of discovery of new evidence after trial. This case is one of a series of product liability occupational disease suits brought by construction workers who allege the contraction of various asbestos related diseases as the result of exposure to asbestos containing thermal insulation products. The deceased, Gordon Barnett, was a former insulation worker who allegedly contracted mesothelioma, a rare cancer of the lining of the lungs, and other asbestos diseases as a result of his exposure to asbestos products manufactured and/or distributed by the defendants during his work career. The first reported case of this type, Borel v. Fibreboard Paper Products Co., 493 F.2d 1076 (5th Cir. 1973), explains in detail the two basic theories of liability advanced by diseased insulator plaintiffs in these cases - strict tort liability arising out of a failure to test the product and also a failure to warn of foreseeable risks. The duties to test and to warn are entrenched in the law of South Carolina and need not be elaborated here. See e.g., Patterson v. Orangeburg Fertilizer Co., 108 S.E. 401 (S. C. 1921) (duty to test) and Mickle v. Blackmon, 166 S.E.2d 173 (S. C. 1969) (duty to warn).

The Barnett case was the third of this series to be set for trial in Greenville, the first having been removed to Federal Court shortly before trial and the second having been settled. Barnett was set by special Order in late February, and thereafter, a pre-trial conference was held. Trial commenced on March 27th, testimony ending on April 6th, and the jury, after considerable deliberation, returned a verdict in favor of all defendants on April 7th. Thereafter, plaintiff moved for a new trial as to all defendants and judgment n.o.v. as to one defendant, said motions being denied by written Order. This Court carefully weighed the new trial motion, finding that, while this writer was persuaded by the plaintiff's case, a new trial should not be ordered.

The instant motion for new trial on the ground of after discovered evidence was filed on June 30, 1978, and was supported by three affidavits of plaintiff's counsel and numerous exhibits including excerpts from the voluminous discovery record in these cases. The defendants, of course, strongly contest this motion and have responded by way of affidavits, exhibits, returns and briefs. The parties are to be commended on their able presentations on this motion. A hearing was held in Greenville on July 17th at which all parties were represented. Because of the submission by plaintiff of additional supporting exhibits and the unavailability of copies of same to some of the defendants, the hearing was adjourned to allow such defendants an opportunity to review these documents and to file additional legal memoranda by August 20th. This Court has carefully reviewed all affidavits, exhibits, returns, briefs and its own trial notes, and for the reasons stated below, grants plaintiff's motion as to certain of the defendants.

The Newly Discovered Evidence

The evidence newly discovered by plaintiff is of two distinct types and for sake of brevity will be denominated as follows:

- (1) Raybestos-Manhattan correspondence;
- (2) Contract Unit¹ occupational disease claims.

A brief recitation of the core positions of the parties at trial is essential to an appreciation of the newly discovered evidence. A manufacturer's or distributor's duty at law (either strict tort liability or negligence) to adequately warn consumers is based on foreseeability of a risk to users of the product. See Borel v. Fibreboard Paper Products Corp., *supra*. The foreseeability of a risk from use of a product may arise from constructive knowledge or actual knowledge of the risk. Central to the former is the standard of care to which a manufacturer is held - it is an expert in the arts, sciences, technology and processes of its field of manufacture. Thus, the manufacturer has a duty to keep abreast of scientific advances and discoveries in its field and is held constructively aware of such advances. Actual knowledge of a hazard may be obtained through testing done by the company or by notice evidence as is established, for example, by prior similar claims brought against such manufacturer which show the existence of a hazard. "Where the issue is one of foreseeability evidence of what has actually been experienced in the same or comparable situations constitutes proof of the greatest probative value." Gardner v. Q.H.S., 448 F.2d 238, 244 (4th Cir. 1971).

The major defense used by the defendants in Barnett was that the "state of the art" was such that they had no knowledge that insulators such as plaintiff were at risk to contract asbestos

1. Contract units are divisions of manufacturers which bid on, and engage in, thermal insulation contracting jobs hiring insulators as employees.

related diseases. In support of this defense of lack of subjective knowledge, the defendants, inter alia, contended that there was an utter lack of scientific and medical literature establishing a risk to insulators. The defendants conceded knowledge that asbestos caused disease in mining and manufacturing employees, but argued vigorously that insulators were different in that it was unforeseeable that the nature and quality of their exposure could cause disease. Certain of the defendants pointed with pride to their reaction to the disclosure of evidence in the 1930's that manufacturing employees were at risk and made much of their responsible promotion of medical research respecting such hazard.

Both sides called eminently qualified scientists who engaged in extended debate about what their experiences revealed, what the medical literature contained historically and their own efforts in the field of occupational and environmental medicine. This parade of subjective reconstruction of the "history of asbestos disease" was the main battleground in the case. The sole item of actual knowledge evidence introduced by plaintiff was the deposition testimony of Dr. K. W. Smith, deceased, former medical director of Johns-Manville and a fifteen page list of names of insulators who filed occupational disease claims against the defendant Armstrong Cork. The significance and import of Dr. Smith's testimony was hotly contested by Johns-Manville and the bald summary of claims against Armstrong Cork, a distributor, did not reflect that these claims were likewise brought against certain other defendants.

This Court has carefully evaluated both categories of the new evidence adduced by plaintiff. The Raybestos-Manhattan correspondence reveals written evidence that Raybestos-Manhattan and Johns-Manville exercised an editorial prerogative over the

publication of the first study of the asbestos industry which they sponsored in 1935. It further reflects a conscious effort by the industry in the 1930's to downplay, or arguably suppress, the dissemination of information to employees and the public for fear of the promotion of law suits (pre-workers compensation, common law suits by employees). At trial, plaintiff unsuccessfully attempted to reconstruct just such a concerted effort at suppressions to establish not ignorance, but indifference. After careful evaluation of this evidence and a comparison with this writer's trial notes, this court reaches the inescapable conclusion that the Raybestos-Manhattan correspondence is cogent, material, relevant, non-cummulative, non-impeaching and, indeed, substantial evidence.

The voluminous evidence of contract unit disease claims constitute compelling proof of actual notice to certain manufacturers that asbestos containing thermal insulation products indeed caused disease in insulators. These records reveal multiple disease claims by insulators against, not only Armstrong, but also Johns-Manville, Owens-Corning, Celotex (Phillip Carey), and to a lesser extent, Keene (Baldwin-Ehert-Hill), all predating the time when these companies alleged they first recognized the hazard to insulators. I conclude and find that this evidence is cogent, material, relevant, non-cummulative, non-impeaching and substantial.

The Elements of Proof Requisite to Entitlement
to a New Trial

Our system of jurisprudence places premiums on both the right to a fair trial, and on the finality of judgments obtained by adherence to this right. Plaintiff recognizes that new trials on the ground of after discovered evidence are disfavored and that the evidence must be considered in a light most favorable to the defendants.

The requirements for obtaining an Order directing a new trial on the ground of newly discovered evidence were clearly set forth by the Supreme Court in Ortowski v. Ortowski, 117 S.E.2d 360, 362 (S. C. 1961); the moving party has the burden of showing:

- (1) That the evidence is such as will probably change the result if a new trial is granted;
- (2) That it has been discovered since the trial;
- (3) That it could not have been discovered before the trial by the exercise of due diligence;
- (4) That it is material to the issue; and
- (5) That it is not merely cumulative or impeaching.

Discovery of the Evidence

It is not seriously contested by the defendants that plaintiff did not discover the Raybestos-Manhattan evidence in question until after the trial. Plaintiff's affidavit on this issue is substantially uncontradicted. Submitted at the hearing were xerox copies of a bill from the Knox County (Tennessee) Clerk of Court and a cancelled check for xerox costs incurred dated June 9, 1978. Plaintiff's affidavit avers procurement of the Raybestos correspondence in early June, 1978. Plaintiff's counsel strenuously argued that it was inconceivable that he would have possessed and failed to use evidence of this nature. Having witnessed the vigorous manner in which the parties prosecuted their respective causes and examined the evidence in question, this Court agrees. I find as a fact that this evidence was not procured until after the trial.

It is not sufficient that plaintiff merely discover the evidence after trial; plaintiff must also sustain the burden of establishing "that (the evidence) could not by the use of due diligence, have been discovered in time to have been offered at the former trial." Boykin v. Capehart, 31 S.E.2d 506, 508

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(S. C. 1944). While the source of the new evidence is irrelevant to this requirement, the documents in question were in the possession of certain defendants from whom plaintiff sought discovery. The failure of Raybestos-Manhattan to promptly produce the "Raybestos-Manhattan" correspondence gives this Court great concern. On two separate occasions, September, 1977, pursuant to subpoena duces tecum, and December, 1977, pursuant to Request to Produce², plaintiff sought to discover the Raybestos correspondence in question. On both occasions, Raybestos-Manhattan advised plaintiff that the documents were "being compiled" and would subsequently be made available for inspection. In contrast to this assertion, it is uncontroverted that the same documents were produced in April, 1977, in a New Jersey asbestos law suit by Raybestos-Manhattan and maintained in New Jersey in possession of Raybestos-Manhattan counsel and produced through Mr. Sims of Raybestos-Manhattan, who is in charge nationwide of the asbestos litigation. Thus, Raybestos-Manhattan has left unanswered the question: Who was compiling documents already produced and compiled five months prior to plaintiff's initial request for production? In fact, the documents in question were not produced until after the instant motion was filed fourteen months after their production in New Jersey. Raybestos-Manhattan has not explained satisfactorily to this Court why the documents were not produced following the duly noticed deposition and subpoena duces tecum in September, 1977. Nor is Raybestos-Manhattan's explanation for the failure to produce in obedience to the December, 1977, Request to Produce satisfactory. While it is true that a "moratorium" was declared in late December, 1977, in an aborted attempt to settle these cases, the suspension of discovery was dissolved when the Barnett case was set for trial. Raybestos-Manhattan's response to the December, 1977, Request

2. The parties have commendably agreed to allow discovery obtained in the United States District Court for the District of South Carolina and in State Court to be equally applicable in either Court (excepting Interrogatories).

to Produce was not filed until the trial had begun and again merely stated that documents which had been produced and compiled twelve months earlier were "in the process of being compiled" and would be available for inspection at some unspecified future date. Raybestos-Manhattan did not at time of filing, nor does it now, contest the discoverability of the instant documents.³

It is also clear that the defendant, Johns-Manville, upon whom the December Request to Produce was also served, had in its possession since April, 1977, the Raybestos correspondence which also involved its corporate agents. While Johns-Manville's explanation of its failure to produce is more plausible, plaintiff need not establish a "Watergate" cover-up to prevail, but must only negate inferences that the discovery of the evidence post-trial was caused by his failure to exercise due diligence. Here, plaintiff employed reasonable discovery procedures only to have his efforts deflected or blunted by defendants', Raybestos-Manhattan and to a lesser degree, Johns-Manville, failure to promptly respond.

The discovery after trial by plaintiff of the contract unit records presents a closer question. On March 20, 1978, one week prior to trial, plaintiff deposed certain officials of AC&S, Inc., a non-defendant contracting concern, who were former employees of Armstrong Cork. At this deposition, the defendant, Armstrong Cork, produced a summary list of occupational disease workmen's compensation claims filed by insulator employees of Armstrong Cork. The list included the name of the claimant, date and place of the claim, and, in some instances, the disposition of the claim. At the aforesaid deposition, counsel for AC&S objected to the production by Armstrong Cork of a document,

3. Indeed, the affidavit of Dennis Markusson, corporation counsel for Johns-Manville, concedes the producibility of the contested documents per the December Request to Produce.

reflecting in part, claims against AC&S and its predecessor. After questioning the deponent briefly about the list and being assured that the list summarized all such claim files, plaintiff's counsel returned the list to counsel for Armstrong Cork so that AC&S could approve release of the information. Plaintiff's counsel was given a copy of the list during the trial and the list was introduced as an exhibit during trial. According to counsel's affidavit, upon obtaining a copy of this list, plaintiff retained an investigator to obtain copies of records of claims filed by these claimants in California. The records which were subsequently obtained reflect that these claims, in a large number of cases, were also filed against additional parties in California, some of whom are defendants in these cases. Plaintiff has attached as exhibits to this motion copies of the Armstrong Cork claim files in their entirety and certain portions of the files of the California Industrial Accident Commission. These files indeed indicate a not insubstantial number of insulator claims against Armstrong Cork, Owens-Corning, Johns-Manville, Phillip Carey (Celotex) and Baldwin-Ehert-Hill (Keene) prior to the time these defendants respectively alleged inclusion of a warning label on their products and knowledge of the asbestos hazard. Further, the Armstrong Cork records contain correspondence indicating knowledge by Armstrong Cork of a disease problem in insulation work in the late 1950's.

Prior to obtaining the Armstrong Cork records, plaintiff had sought through discovery procedures to obtain whatever workmen's compensation occupational disease claims were in the possession of the defendants who had contracting divisions. It is uncontroverted that these efforts proved to be fruitless with respect to pre-labelling claims prior to the production of the Armstrong Cork list.

From an assessment of the plaintiff's efforts prior to trial and the confusion surrounding the production by Armstrong

Cork of the summary list, I conclude and find as a fact that plaintiff used due diligence in attempting to discover this contract unit evidence. I do not find that Armstrong Cork acted unreasonably or was dilatory in producing the actual files themselves, but it is not a requirement upon plaintiff that he prove delay or circumvention of discovery procedures by defendant.

Defendants unanimously and strenuously contend that the plaintiff has failed to sustain his burden that the evidence is such as will probably change the result if a new trial is granted. This Court has very carefully examined the new evidence in its entirety and compared same with the extensive trial notes taken by the writer during trial. The Raybestos-Manhattan correspondence very arguably shows a pattern of denial of disease and attempts at suppression of information which is highly probative and which constitute the cornerstone of plaintiff's case. The contract unit claims are material and substantial actual notice of a hazard the existence of which was denied by defendants. Plaintiff is not required to establish beyond all doubt that a different result would obtain, but only that the new evidence is of such decisive and important a character as to render a different result reasonably certain. See e.g., State v. Strickland, 22 S.E.2d 417 (S. C. 1942). I find as a fact that both the Raybestos-Manhattan and the contract unit claims constitute items of new evidence which are material, non-cummulative nor impeaching and are of a kind and quality such as would probably change the result if a new trial was granted. Therefore, it is the Court's considered opinion that a new trial on the grounds of newly discovered evidence be granted.

JP
4/10

To Which Defendants Should the New
Trial Be Granted?

The defendants, Covil (a distributor), Eagle-Picher, Forty-Eight Insulation, Pittsburgh Corning and Nicolet argue with vigor that as none of the new evidence is applicable to them

and as they played no part active or passive in failing to produce the documents in question, they should perforce be exempted from a new trial Order. I agree.

For the foregoing reasons, a new trial is granted as to Johns-Manville, Raybestos-Manhattan, Owens-Corning, Celotex, Keene and Armstrong Cork and denied as to the other defendants.

AND IT IS SO ORDERED.

Job P. Beach
Resident Judge, Thirteenth Judicial
Circuit

August 23rd, 1978

A Certified Copy
Rachel W. Tolly
Clerk of Court C. P. & G. S.
Ex-Officio Clerk County Court
Greenville County, S. C.
Dated AUG 24 1978