

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 89-30201-F

ALICE L. WARREN, )  
ADMINISTRATRIX OF THE ESTATE )  
OF JOHN H. WARREN, DECEASED, )  
Plaintiff )  
VS. )  
THE DOW CHEMICAL COMPANY, )  
THE B.F. GOODRICH COMPANY, )  
UNION CARBIDE COMPANY and )  
CONTINENTAL OIL COMPANY, )  
Defendants )

PLAINTIFF'S SETTLEMENT CONFERENCE MEMORANDUM

Plaintiff submits this Memorandum to help clarify for the Court certain issues of law which are central to this case and will be the subject of discussion at the Settlement Conference to be held on June 25, 1991.

I. SUMMARY OF FACTS

John Warren was an employee at Monsanto's Indian Orchard plant from 1947 to 1987. For approximately 25 years (February 1949 - July 1974) he was a production line worker involved in the manufacture of polyvinyl chloride resin (PVC). To produce the PVC, Monsanto used vinyl chloride monomer (VCM), a colorless gas and a known carcinogen. Deposition testimony establishes that Mr. Warren was exposed to large amounts of VCM. In 1987, Mr. Warren developed hemangiosarcoma of the liver, a rare form of cancer from which he died in January 1988. Expert testimony will establish that there is a strong causal link between Mr. Warren's exposure to VCM and his fatal illness.

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It is unclear what company or companies supplied the VCM to Monsanto between 1949 and 1952. Beginning in 1952, however, Monsanto began operating a plant in Texas City, Texas which produced VCM for use at the Indian Orchard plant. It appears that the great majority of VCM supplied to Monsanto between 1952 and the late 1960's was supplied by Monsanto.

However, in 1966 Monsanto entered into a requirements contract with Dow Chemical Company providing for Monsanto's purchase of up to 250,000,000 pounds of VCM per year from Dow for a ten (10) year period beginning January 1, 1969. It appears from the limited documentation that has been uncovered that Dow and B.F. Goodrich may have supplied substantial amounts of VCM to the Indian Orchard plant to supplement the Monsanto supply between 1966 and 1969. For five and one-half years beginning January 1, 1969 and ending July 1, 1974, when Mr. Warren stopped working in the PVC area, it appears that Dow was the sole source of VCM used at the Indian Orchard plant pursuant to the requirements contract. B.F. Goodrich also supplied relatively <sup>small</sup> ~~some~~ quantities of VCM to Monsanto in 1974. Monsanto suspended all PVC operations at the Indian Orchard plant in 1975.

## II. DISCUSSION

In its Memorandum in Support of Motion for Protective Order, Conoco suggests a reading of Massachusetts law that fails to address cases closely related to the case at bar. Conoco relies on decisions involving defective machinery parts, football helmets and snowmobile design. Such cases involve single isolated events and are inapposite to the insidious and cumulative effect fact patterns<sup>4</sup> involved in toxic torts. Plaintiff assumes that the other three

defendants, Dow Chemical Company, Union Carbide and B.F Goodrich, also intend to rely on the cases cited by Conoco.

Relying on the machinery, helmet and snowmobile cases, the Memorandum accurately notes that the "general rule" in Massachusetts is that a plaintiff must prove that a product causing the injury can be traced to the specific manufacturer/defendant. However, Conoco ignores the opinion of the Massachusetts Supreme Judicial Court in Payton et al v. Abbott Labs, et al., 386 Mass. 540, 437 N.E.2d 171 (1982) where the Court in a toxic tort action recognized that the traditional identification requirement should be relaxed in certain cases.

In Payton et al, the SJC declined to apply a "market share liability" theory to relax the identification requirements in a case involving multiple plaintiffs alleging personal injuries resulting from the use of DES (a miscarriage prevention drug) by their mothers. The SJC noted, however, that on an adequate record it would "recognize some relaxation of the traditional identification requirement." Id., 437 N.E.2d at 190. The plaintiffs had named only six of the many manufacturers of DES. The SJC was uncomfortable with the market share approach on the record developed in the case because plaintiffs' approach denied defendants the opportunity to admit exculpatory proof and would practically ensure that innocent defendants would be held liable for the acts of other manufacturers not joined as parties. Id., 437 N.E.2d at 189.

Plaintiff is not asking this Court to apply a market share theory, but believes the Payton case is important for two reasons: (1) as authority for the proposition that the traditional identifi-

cation requirement can be relaxed at appropriate circumstances, and (2) because the factual record in this case is more than sufficient to address the SJC's concerns in Payton about relaxation of the traditional identification requirement.

In contrast to Payton, et al, this case involves only one plaintiff. Thus, the problem of the innocent DES defendant is inapplicable, i.e., that the DES of defendant X was ingested by plaintiff A but not plaintiff B yet defendant X is liable for A's and B's injuries. In this case, plaintiff alleges that Mr. Warren ingested the VCM of all defendants, causing indivisible injury.

In addition, plaintiff does not seek to prevent any defendant from offering exculpatory evidence to show that Mr. Warren did not ingest its VCM. Indeed, such shifting of the burden to defendants is fair to Mr. Warren and to defendants.

Conoco's Memorandum ignores McCormack v. Abbott Laboratories, et al., 617 F. Supp. 1521 (D. Mass. 1985) where the Court, applying Massachusetts <sup>law</sup> to a single plaintiff DES case, allowed a market share theory to defeat defendants' Motions to Dismiss but granted two defendants' Motions for Summary Judgment where the uncontroverted facts showed that they had not manufactured or distributed the DES causing plaintiff's injury.

Mr. Warren's difficulty in identification stems from two factors, i.e., fungibility of VCM and the latency of the disease, neither of which are any fault of his own. Judge Weinstein of the U.S. District Court for the Eastern District of New York found in the "Agent Orange" cases that the identification problems stemmed

from factors beyond the plaintiffs' control. See In Re: "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 821 (E.D.N.Y. 1984). The cause of the identification problem, along with other grounds, persuaded the Court to find that entry of a settlement was in the public interest. See also McCormack, supra, at 1527 where the Court noted the fundamental difficulties in identification were not plaintiff's fault. VCM, like "Agent Orange", is virtually indistinguishable from one manufacturer to another. In contrast, the DES pills in Payton et al, although chemically identical, were marketed by different manufacturers in different shapes, sizes and colors, as well as in capsule and tablet form.

Plaintiff also feels compelled to address another point raised by Conoco. Conoco contends that the "identification requirement mandates more than 'mere proof' that the product and the injured person were simultaneously at the work site, which has not been shown here." Conoco further contends that the plaintiff must demonstrate exposure "on a regular basis over some period of time where . . . [the decedent] was actually working with the product himself or in proximity to where others were working with the product."

Conoco erroneously cites O'Connor v. Raymark Industries, Inc., 401 Mass. 586, 588, 518 N.E.2d 510, 511 (1988) in support of both contentions. Although the SJC's opinion quotes a Superior Court jury instruction substantially similar to Conoco's recital, the SJC did not hold that the instruction was proper. Instead, the SJC ruled that the instruction did not constitute error because the jury's finding was favorable to plaintiff and, thus, there was no harm. The Court went no further on that issue.

In fact, the O'Connor case supports the plaintiff's case because it reaffirms the well-established rule in Massachusetts that "if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable." Citing, inter alia, Burke v. Hodge, 217 Mass. 182, 184-185 (1914).

THE PLAINTIFF  
ALICE L. WARREN, ADMINISTRATRIX OF  
THE ESTATE OF JOHN H. WARREN,  
DECEASED

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CERTIFICATE OF SERVICE

I, Keith A. Minoff, Esq., hereby certify that on this 21st day of June, 1991, I served a copy of the above upon the parties in the action by mailing, postage prepaid, to counsel, SHARON R. BURGER, ESQ., of Nutter, McClennen & Fish, One International Place, Boston, MA 02110-2699; and MARK S. GRANGER, ESQ., of Morrison, Mahoney & Miller, 250 Summer Street, Boston, MA 02210.

Subscribed under the penalties of perjury.

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