

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WJH
OCT 30 1986

MARY A. DENDINGER, et al.,

Plaintiffs,

-vs-

CHRYSLER PLASTIC PRODUCTS
CORP., et al.,

Defendants.

No. C 87-7117

MEMORANDUM and ORDER

WALINSKI, J.

This matter is before the Court on a motion for partial summary judgment made by various defendants including The Goodyear Tire & Rubber Company ("Goodyear"), the BF Goodrich Company ("BF Goodrich") Firestone Tire & Rubber Company ("Firestone"), Conoco, Inc., ("Conoco"), Union Carbide Corporation ("Union Carbide"), Uniroyal, Inc. ("Uniroyal"), Diamond Shamrock Chemicals Company ("Diamond Shamrock"), Tenneco, Inc. ("Tenneco"), and Occidental Chemical Corporation ("Occidental") (hereinafter "manufacturing defendants"). Also before the Court are plaintiff Etta W. Wallace's opposition and manufacturing defendants' reply thereto. Jurisdiction is based on diversity of citizenship, 28 U.S.C. §1332.

FACTS

Fred A. Wallace ("Wallace") originally filed suit on September 28, 1984 alleging injuries from exposure to

RECEIVED FAN KAD

DATE: 11/2/87

ROUTE: LET, PAW

FILE: 3861-1

carcinogenic substances while employed at Chrysler Plastic Products Corporation ("Chrysler"). Manufacturing defendants supplied Chrysler with the substances which allegedly caused Wallace's cancer.

Wallace worked at Chrysler from October of 1972 to April of 1978. Wallace worked in and around the "ink room" where dyes were mixed for Chrysler's vinyl coatings. The dyes were made by mixing various colors and compounds together in a base of polyvinyl chloride ("PVC") resin. When heated for use as the base, the PVC produced vinyl chloride ("VC"), an invisible carcinogenic gas.

In October of 1982, Wallace discovered he had cancer. In a letter dated October 30, 1982, Wallace informed Walter Butz ("Butz"), an attorney in Bellevue, Ohio, that he believed the cancer was connected to his exposure to "the fumes from the chemicals" in the "ink room & cast coating mixing room" at Chrysler. (Letter from Fred A. Wallace to Walter Butts (sic)(Oct. 30, 1982)). In the letter, Wallace did not refer to Chrysler's suppliers nor did he state to what chemicals he had been exposed. In fact, Wallace asked Butz if Butz had a list of the chemicals because Wallace heard that Butz had a similar case pending against Chrysler.

Butz did not respond to Wallace's letter and Wallace did not contact another attorney concerning the matter until he retained the services of plaintiffs' present counsel, Mr. Kirk Delli Bovi, in September, 1984. After consulting with Mr.

carcinogenic substances while employed at Chrysler Plastic Products Corporation ("Chrysler"). Manufacturing defendants supplied Chrysler with the substances which allegedly caused Wallace's cancer.

Wallace worked at Chrysler from October of 1972 to April of 1978. Wallace worked in and around the "ink room" where dyes were mixed for Chrysler's vinyl coatings. The dyes were made by mixing various colors and compounds together in a base of polyvinyl chloride ("PVC") resin. When heated for use as the base, the PVC produced vinyl chloride ("VC"), an invisible carcinogenic gas.

In October of 1982, Wallace discovered he had cancer. In a letter dated October 30, 1982, Wallace informed Walter Butz ("Butz"), an attorney in Bellevue, Ohio, that he believed the cancer was connected to his exposure to "the fumes from the chemicals" in the "ink room & cast coating mixing room" at Chrysler. (Letter from Fred A. Wallace to Walter Butts (sic)(Oct. 30, 1982)). In the letter, Wallace did not refer to Chrysler's suppliers nor did he state to what chemicals he had been exposed. In fact, Wallace asked Butz if Butz had a list of the chemicals because Wallace heard that Butz had a similar case pending against Chrysler.

Butz did not respond to Wallace's letter and Wallace did not contact another attorney concerning the matter until he retained the services of plaintiffs' present counsel, Mr. Kirk Delli Bovi, in September, 1984. After consulting with Mr.

Delli Bovi, Wallace filed suit on September 28, 1984 against Chrysler and five "John Doe" defendants. Wallace sought to recover damages for injuries allegedly caused from his exposure to carcinogenic substances at Chrysler. Wallace added Goodyear, BF Goodrich, Firestone, Conoco, Union Carbide, Uniroyal and Diamond Shamrock as defendants on May 6, 1985. Tenneco and Occidental were added as defendants on October 23, 1985. Etta Wallace, decedent Wallace's spouse and executrix of his estate, asserts that Wallace did not recognize the role which these manufacturing defendants played in causing his injuries nor did he understand the technical chemical properties of PVC or VC until after Wallace contacted his attorney in September, 1984.

Wallace died on July 23, 1985. On October 23, 1985, Etta Wallace, as personal representative of Wallace's estate, filed a supplemental first amended complaint alleging counts for personal injuries under Ohio's Survival Actions Statute, O.R.C. §2305.21, and for wrongful death. Manufacturing defendants now move for partial summary judgment on the grounds that Etta Wallace's survival claim for Wallace's personal injuries is barred by the two year statute of limitations set forth in O.R.C. §2305.10 and that Etta Wallace may not recover punitive damages on her wrongful death claim.

DISCUSSION

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. United States v. Articles of Device, 527 F.2d 1008, 1011 (6th Cir. 1976); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. Smith v. Pan Am World Airways, 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims and defenses." Celotex Corp. v. Catrett, 106 S.Ct 2548, 2553

(1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett, 106 S.Ct. at 2553.

A. Statute of Limitations

Manufacturing defendants contend that the claim for Wallace's personal injuries is barred by the two year statute of limitations imposed by O.R.C. §2305.10. Because this action is before the Court on diversity jurisdiction, Ohio law controls. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

The parties agree that the claim for Wallace's personal injuries is governed by O.R.C. §2305.10, which reads in part: "An action for bodily injury . . . shall be brought

within two years after the cause thereof arose." However, the statute fails to define the time at which such a cause of action arises.

In O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983), the Ohio Supreme Court adopted a "discovery rule" for the accrual of claims for bodily injury resulting from latent diseases. The court stated in the second syllabus of its ruling:¹

When an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant, for purposes of the statute of limitations contained in R.C. 2305.10.

O'Stricker, 4 Ohio St. 3d at 84, 447 N.E.2d at 727 (emphasis added).

Manufacturing defendants contend that Wallace's personal injury claim arose in October of 1982 when "Wallace discovered that he suffered from cancer and believed that the cancer was related to his exposure to chemicals" at Chrysler. (Brief in Support of Various Defendants for Partial Summary Judgment at 6). Manufacturing defendants assert that Wallace did not have to know the actual identities of the PVC suppliers in order for the statute of limitations to begin running. In Viocck v. Stow-Woodward Co., 13 Ohio App. 3d 7, 467 N.E.2d 1378

¹In Ohio, the law as stated in the syllabus of a decision of the Ohio Supreme Court is the governing law. Witt v. Lockwood, 39 Ohio St. 141 (1883); O.R.C. §2503.20.

(1983), an Ohio court of appeals considered the issue of whether, before the limitations period begins to run, a plaintiff must know or by the exercise of reasonable diligence should know that he has been harmed by a particular defendant. In Viock, the plaintiff became ill in 1976 from toxic substances he was exposed to while working at defendant's plant. Plaintiff knew at the time of his illness that there was a "'probable' link between his illness and his exposure to dust and chemicals" at defendant's plant. Id. at 13 n.10, 467 N.E.2d at 1385 n.10. Plaintiff did not bring suit against his employer until 1982 when he discovered his employer had withheld information concerning the effects of exposure to toxic substances in its plant. The trial court granted the employer's motion for summary judgment on the grounds that plaintiff's claim was barred by the applicable statute of limitations.

In reversing the Viock trial court the court of appeals noted that Ohio's "discovery rule," as stated by the Ohio Supreme Court in O'Stricker,

. . . is a two-pronged rule requiring both prongs to be satisfied before the statute of limitations begins to run. First, a plaintiff must know or reasonably should have known that he has been injured, and second, a plaintiff must know or reasonably should have known that his injury was proximately caused by conduct of the defendant This articulation of the "discovery rule," we note, is consistent, congruent, and harmonious with articulations in other jurisdictions which have adopted and applied the discovery

rule. See, e.g., Schille v. Hobart Corp., (Ore. 1978), 587 P.2d 1010, 1014 ("The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition").

Viock, 13 Ohio App. 3d at 12, 467 N.E.2d at 1384.

Manufacturing defendants in the present case attempt to distinguish Viock by stating that "[t]he Viock court never considered the issue of an unknown possible tortfeasor in the context of the 'discovery rule.'" (Defendants' Reply at 4). The Viock court did consider such an issue, however, and the unknown possible tortfeasor there was the defendant-employer. The plaintiff's cause of action in Viock did not arise until he learned or should have learned that he was ill as a result of the defendant's tortious conduct. Viock, 13 Ohio App. 3d at 13, 467 N.E.2d at 1384. See also Nolan v. Johns-Manville Asbestos & Magnesite Materials Co., 74 Ill. App. 3d 778, ___, 392 N.E.2d 1352, 1359 (1979), aff'd and remanded, 85 Ill. 12 161, 421 N.E.2d 864 (1981) ("the cause of action accrues and the statute of limitations begins to run when the diseased party discovered or should have discovered that he is ill as a result of some neglect or negligence on the part of another party . . .")

In the case sub judice, Etta Wallace contends that Wallace did not realize what role, if any, Chrysler's PVC suppliers played in causing his cancer until September of 1984. Although Wallace became aware of his cancer and its alleged

connection with PVC as early as October of 1982, his cause of action against the manufacturing defendants did not necessarily arise then for statute of limitations purposes. In order for the statute of limitations to have begun running, Wallace must have "know[n] or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct" of defendants herein. O'Stricker, 4 Ohio St. 3d at 84, 447 N.E.2d at 727.

The determinative issue here is when did Wallace know or when should he have known that manufacturing defendants may have caused his injuries. That is when the statute of limitations began to run as to manufacturing defendants. Because Wallace brought suit against seven of the manufacturing defendants on May 6, 1985 and the other two manufacturing defendants were included on October 23, 1985, the statute of limitations had to have started running by these dates in 1983 for Etta Wallace's survival claims to be barred.

Manufacturing defendants rely heavily on Wallace's October 20, 1982 letter to Butz to show that Wallace knew or should have known then that they could have caused his injuries. However, Wallace's letter to Butz only shows that Wallace believed Chrysler may have been responsible for his injuries. The letter did not mention any of the chemicals Wallace worked with nor the companies which supplied them to Chrysler. The depositions of Fred and Etta Wallace also lead to the conclusion that although Wallace knew he worked around

carcinogenic substances, he did not know nor should he have known that manufacturing defendants may have caused his injuries by failing to adequately warn about the substances. After viewing the evidence in a light most favorable to the non-moving party, the Court cannot say whether or not Wallace knew or should have known by May 6, 1983 or October 23, 1983 that manufacturing defendants could have caused his injuries. Thus, a genuine issue of material fact remains as to exactly when plaintiff should have known the identity of manufacturing defendants. Therefore, this Court finds manufacturing defendants motion for partial summary judgment not well taken on the statute of limitations grounds.

PUNITIVE DAMAGES

Manufacturing defendants also assert that Etta Wallace may not recover punitive damages on her wrongful death claim. In Ohio, wrongful death claims are governed by O.R.C. §2125.02, which limits damages to "compensatory damages" only. O.R.C. §2125.02(B). Punitive damages are not recoverable in wrongful death claims in Ohio. See, e.g., Rubeck v. Huffman, 54 Ohio St. 2d 20, 23, 374 N.E.2d 411, 413 (1978). Accordingly, the Court finds manufacturing defendants' motion for partial summary judgment well taken as to Etta Wallace's request for punitive damages on the wrongful death claims.

It is therefore,

ORDERED that manufacturing defendants' motion for partial summary judgment is granted in part and denied in

part. Manufacturing defendants are granted summary judgment on Etta Wallace's claim for punitive damages in her wrongful death action.


SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio.
October 29, 1987

RECEIVED

JUN 22 1988

LAW DEPARTMENT
GEN. FILE

UCC
062772