

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLETCHER McDANIEL, et ux,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES,
INC., et al.,

Defendants.

Civil Action No. 83-3520

Judge Flannery

FILED

JUN 19 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

PLAINTIFFS' REPLY TO DEFENDANT
TURNER & NEWALL PLC'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

Perhaps the most telling commentary on Turner & Newall PLC's (T & N) approach to this litigation is found in the first footnote of its supplemental memorandum. Here, T & N suggests that Judge Richey was fully informed prior to issuing the Court's July 21, 1982, Order of Dismissal in Catrett v. Johns-Manville Corp., C. A. No. 80-2232, that on May 14, 1982, T & N had filed Turner & Newall PLC v. American Mutual Liability Insurance Co., C. A. No. 82-2732 in this Court. In fact, T & N failed to disclose this jurisdictional contact to either Judge Richey or to opposing counsel at any point in the Catrett proceedings. The following exchange is illustrative of plaintiffs' position. During the course of the July 21, 1982, Catrett oral argument the following colloquy took place between Judge Richey and T & N's counsel:^{1/}

^{1/} The transcript from this hearing is attached hereto as Exhibit 1.

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long-arm statute requires much less than the District's general jurisdictional statute, D.C. Code §13-334, which permits the exercise of jurisdiction over a nonresident defendant only if the defendant has continuous and systematic contacts with the District. AMAF International Corp. v. Ralston Purina Co., 428 A.2d 849, 850 (D.C. App. 1981). See also, Calder v. Jones, ___ U.S. ___, ___, 104 S. Ct. 1482, 1485 (1984) citing Perkins v. Benguet Mining Co., 342 U.S. 437, 72 S. Ct. 413 (1952) (general jurisdictional statutes permitting the exercise of personal jurisdiction only if the defendant's contacts with the forum are "continuous and systematic"). By contrast, the District of Columbia long-arm statute which is a specific as opposed to a general source of adjudicatory authority, does not require such present day contacts. For example, subsection (a)(1) of the long-arm statute authorizes the exercise of jurisdiction even when a nonresident defendant has engaged in only a small amount or isolated forum-related activities. Such activities are "generally enough to permit the conclusion that a nonresident defendant has transacted business here." Environmental Research Institute v. Lockwood Greene Engineers, 335 A.2d 808, 811 (D.C. App. 1976). Similarly, subsection (a)(4) provides, in pertinent part, for the exercise of jurisdiction over a nonresident defendant which engages in a "persistent course of conduct" here. "The 'persistent course of conduct' to which the statute refers, denotes connections considerably less

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substantial than those required to establish general 'all purpose' jurisdiction on the basis of 'doing business' in the forum." Steinberg v. International Police Organization, 672 F.2d 927, 931 (D.C. Cir. 1981).^{3/}

Similarly, T & N's argument that this Court should ignore the filing before it of T & N's insurance litigation as a "government contacts" exception to the long-arm statute is grounded upon what must be considered a tortured reading of the authority relied upon by T & N. The "government contacts" exception "finds its source in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal departments and agencies for the national citizenry." Environmental Research Institute, supra at 813. As defined by the District of Columbia Court of Appeals, the "government contacts" exception by its very terms only applies to a nonresident

^{3/} Accordingly, T & N's reliance on Payton v. Summit Loans, Inc., 253 A.2d 459, (D.C. App. 1969) is misplaced. Payton, was decided before the enactment of our present long-arm statute, D.C. Code §13-423, and thus involved the application of the District's general jurisdictional statute, D.C. Code §13-334. The rigorous "doing business" test of that statute, however, has no place in present day long-arm statute analysis under Section 13-423. "The 'doing business' criterion of the earlier statute was amended to 'transacting any business', thereby demanding a less systematic and continuous course of conduct by a defendant Environmental Research Institute, supra 855 A.2d 813, N. 10.

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defendant's contacts with "federal departments and agencies" and not a defendant's contacts with the federal judiciary. Frankly, an elementary survey of the first three Articles of the United States Constitution reveals that the federal courts are neither departments nor agencies of the federal government, rather the judiciary comprises an entirely separate branch of government from the executive and legislative. Nor does T & N's filing of its diversity action here stem from the unique character of the District as the seat of national government. Rather, T & N has carefully shopped for a forum with law favorable to its insurance contract litigation and found such a favorable forum in the District of Columbia. See Keene Corporation v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981).^{4/}

Finally, T & N after distorting the District of Columbia's decisional law, finds it necessary to also ignore it. T & N suggests that it is not subject to this Court's jurisdiction, arguing that the record discloses "there were no sales of Limpet in the District of Columbia." T & N ignores

^{4/} T & N's argument that to hold T & N subject to jurisdiction based on the filing of its insurance contract litigation here "would have a chilling effect upon the exercise of First and Fifth Amendment rights" is without any factual or precedential support. Indeed, the Supreme Court recently held: "We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry." Calder v. Jones, supra. 104 S. Ct. at 1487.

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THE COURT: You should have.

Go ahead. Your company isn't qualified to do business here, is it?

MR. DORKEY: No.

THE COURT: It does not maintain an office or telephone.

MR. DORKEY: And has not done so for ten years.

THE COURT: It has no contacts in the district.

MR. DORKEY: No, and we have put in four affidavits on this question. We have searched our records back ten years. (emphasis supplied)

Catrett Transcript at 11.

While T & N's counsel was affirmatively questioned by the Court in order to exhaust any important jurisdictional facts, T & N's counsel chose to not take this opportunity to reveal to the Court any information concerning T & N's contacts with the District of Columbia including Turner & Newall PLC v. American Mutual Liability Insurance Co., of which it had actual knowledge.^{2/}

T & N's misleading and distorted arguments continue. For example, T & N argues that the District of Columbia long-arm statute somehow requires a showing that a nonresident defendant has present day contacts with the District of Columbia. T & N's argument represents a legal misunderstanding of the requirements of our long-arm statute. The District's

^{2/} See Code of Professional Responsibility, Disciplinary Rules 7-102 (A)(5) and 7-106 (B)(1).

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the uncontested factual record in this case which establishes that T & N's approved distributor, Krafft Murphy, sold T & N's Limpet in the District of Columbia for a period spanning three decades. Indeed, even assuming the truth of T & N's convoluted argument, it is well settled that our long-arm statute "does not require that the goods be sold in the District of Columbia" only that the defendant's goods are used here. Gatewood v. Fiat, 617 F.2d 820, 827 (D.C. Cir. 1980).

For the foregoing reasons and for the reasons set forth in Plaintiffs' Brief in Opposition to Defendant T & N's Motion to Dismiss, Plaintiffs submit that T & N's Motion to Dismiss is not well taken and should be denied.

Respectfully submitted,

ASHCRAFT & GEREL



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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED

MYRTLE NELL CATRETT,

PLAINTIFF,

- v -

JOHNS-MANVILLE SALES
CORPORATION, et al.,

DEFENDANTS.

JUN 19 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action 80-2232

Wednesday, July 21, 1982
Washington, D. C.

The above-entitled matter came on for a hearing before
the Honorable CHARLES R. RICHEY, United States District Judge,
Courtroom 11, commencing at approximately 1:35 p.m.

APPEARANCES:

PETER NICHOLL, Esq.

On behalf of the Plaintiff

CHARLES DORKEY, Esq.

FRANCIS FORD, Esq.

WILLIAM McMURTRIE, Esq.

On behalf of the Defendants

THIS TRANSCRIPT WAS PRODUCED BY C.A.T.
(COMPUTER AIDED TRANSCRIPTION)

Exhibit 1

Mindi L. Colchico
Official Court Reporter
6808 U.S. Courthouse
Washington, D.C. 20001

P R O C E E D I N G S

DEPUTY CLERK: Civil Action 80-2232, Myrtle Catrett versus Johns-Manville Sales Corporation, et al. For the plaintiff, Peter Nicholl; for the defendant, Charles Dorkey, Francis Ford, and William McMurtrie.

THE COURT: Who represents Celotex?

MR. MCMURTRIE: Mr. McMurtrie, Your Honor.

THE COURT: Come forward. Do you want to argue your motion? That is what we are here for.

MR. MCMURTRIE: Your Honor, I have two motions pending, one the motion for summary judgment and in the alternative, a motion to transfer for lack of venue. In the primary motion, Your Honor, the motion for summary judgment, I will be very brief because the Court has all the information I believe that it needs.

Our position is strikingly similar, if not exactly the same, as Johns-Manville in that although we have a registered agent in this area there has been no product identification of any Celotex products, both carries Philip Carey products, Carey Canada products, what have you, that have been used in the District of Columbia to which the decedent was exposed.

By the plaintiff's own documents, its own response to the Celotex inquiry, as well as the master set of interrogatories presented to this court, the only exposure

1 to any Celotex product by the decedent was in Chicago and
2 by documents attached to their answers to interrogatories,
3 there is a letter from a T. R. Huff, who is the assistant
4 secretary for a corporation known as Annand & Johnson,
5 saying that he did work for their company during that
6 period December 22, 1970 to December 22, 1971 and at that
7 time his duties were to supervise and train crews in the
8 application of a fire-bar fireproofing.

9 Now, in 1980, or 1981, the interrogatories were
10 propounded, the master set as well as my supplemental set.
11 The Court gave them leave to file their answers to my
12 supplemental set at a later date, February 9th, I believe,
13 1982. Those answers to date still would not satisfy that
14 court as to product identification of any Celotex product
15 or co-workers who would then identify on behalf of the
16 decedent, exposure to asbestos products manufactured by
17 Celotex Corporation in this area or in any other area,
18 including Chicago.

19 Your Honor, there is only a letter from the
20 assistant secretary and that is not --

21 THE COURT: Doesn't plaintiff say that the
22 decedent was exposed to your company's products in the area
23 of Chicago.

24 MR. MCMURTRIE: He suggested that there was
25 exposure in Chicago, Your Honor. We do not admit that and

1 there is no affidavit to support that. We only have a self
2 serving answer to interrogatories.

3 THE COURT: That says?

4 MR. MCMURTRIE: It simply says -- well, all it is
5 is a letter from a Mr. T. R. Huff.

6 Now --

7 THE COURT: What does it say?

8 MR. MCMURTRIE: It simply says that his duties
9 were to supervise and train crews in the application of a
10 fire-bar fireproofing. He worked only in new construction
11 and traveled from district to district. That was in
12 Chicago. We also have, and they rely on this, the
13 deposition of the decedent that was taken of him prior to
14 his death for the compensation claim, which would not be
15 admissible in this case either.

16 THE COURT: Why?

17 MR. MCMURTRIE: Celotex was not there, had no
18 opportunity to cross-examine this defendant or this
19 decedent. But he does say, for the limited purposes of use
20 in this motion, that he was not exposed to any product in
21 the District of Columbia manufactured by Celotex. He only
22 worked in the Chicago area and its environs or in Los
23 Angeles or New York, I believe.

24 THE COURT: What about their argument that the
25 continued tortious effect of the exposure in Illinois

1 continued into the District of Columbia.

2 MR. McMURTRIE: Your Honor, I believe we would be
3 governed by your ruling in 1976 in the Leaks versus Ex-lax
4 case at 430 Fed Supp 413 that the tortious injury was in
5 Chicago if he were exposed to a Celotex product or the
6 asbestos fibers of a Celotex product in that area, but that
7 any loss after that, as far as Celotex is concerned,
8 forgetting Johns-Manville or any of the other 15 defendants
9 who started in this case, was a pecuniary loss in the
10 District of Columbia; but no further exposure in the
11 District of Columbia and there is no affidavit supporting a
12 further exposure by a Celotex product.

13 I think what we have here, Your Honor, is a time
14 when these asbestos cases were first blooming in the
15 District of Columbia, having happened in Norfolk and
16 Philadelphia long before this, but there was a race to the
17 courthouse by different law firms to gain control of a
18 union. This case was inadequately prepared at that time to
19 sufficiently identify the manufacturers of certain asbestos
20 products.

21 We know, for example, that the decedent was
22 exposed for a considerable period during World War II to
23 asbestos products.

24 This court has already ruled in the Johns-Manville
25 motion for summary judgment that although there is a

1 suggestion of exposure in 1952 and 1953 to J. M. Plaster
2 products, there is no affidavit to support that exposure by
3 way of co-workers. And that is exactly the same situation
4 as Celotex is in.

5 THE COURT: All right. Let me hear from the other
6 side.

7 MR. NICHOLL: Thank you, Your Honor.

8 Your Honor; Peter Nicholl for the plaintiff, sir.
9 Regarding our substantiation that there was an exposure to
10 a Celotex product we do have Mr. Huff's letter which states
11 that he was exposed to fire-bar during the period of time
12 for the year ending, I believe, December 1971, 1971 being
13 the year in question.

14 By virtue of attachments to Celotex's motion to
15 change venue, those attachments being the purchasing
16 records from the Carey Canadian Mine Company to Annard &
17 Johnson, the employer in Chicago, we do have indications
18 that this fire-bar product was indeed an asbestos product
19 and that that ties in the fact that this fire-bar
20 fireproofing was an asbestos product.

21 THE COURT: Let me see the Huff letter.

22 Where does it say it was done in the District of
23 Columbia?

24 MR. NICHOLL: I did not say in the District of
25 Columbia.

1 THE COURT: It had no contact with the District of
2 Columbia.

3 MR. McMURTRIE: I readily admit that there was no
4 exposure to the Celotex products in the District of
5 Columbia but that does not go to the question of the merits
6 of the case for purposes of summary judgment. It may go to
7 the question of changing venue, which is the other motion
8 that Mr. McMurtie filed.

9 THE COURT: Was your client exposed to it in the
10 in the District of Columbia?

11 MR. NICHOLL: No, sir, he was not. He was exposed
12 to it in Chicago and I believe three or four other areas
13 out west.

14 THE COURT: How can I entertain the action here
15 and avoid granting their motion for summary judgment?

16 MR. NICHOLL: Summary judgment would go to the
17 merits of the case by saying that we cannot prove exposure
18 to their product. We can show exposure to their product.

19 THE COURT: What have you shown in opposition to
20 their statement of material facts which are not in dispute?

21 MR. NICHOLL: We have opposed that, Your Honor,
22 with our own in response to their motion.

23 THE COURT: You have what?

24 MR. NICHOLL: We have stated our own in response
25 to their motion.

1 THE COURT: You don't state it was exposed here.

2 MR. NICHOLL: No, sir, we admit he was not exposed
3 to their product in Washington. But again that would go to
4 a change of venue as opposed to summary judgment. In that
5 regard --

6 THE COURT: Would they be obliged to defend an
7 action in this district?

8 MR. NICHOLL: They do business in the district.
9 They readily admit that. Mrs. Catrett is still a resident
10 of the district. Mr. Catrett was a resident of the
11 district. Our witnesses are nearby in Virginia. It would
12 be, I think, dilatory to transfer it to Chicago, I submit,
13 but on the other hand, it again does not go to the merits
14 of the case.

15 THE COURT: It can't be tried here, you know that.

16 MR. NICHOLL: I don't know that. I think it would
17 do an injustice to Mrs. Catrett to exchange or to transfer
18 the case to Chicago when it has been in front of Your Honor
19 for two years.

20 THE COURT: When it has been in front of me for
21 two years?

22 MR. NICHOLL: In front of the court here for two
23 years.

24 THE COURT: Not in front of this court.

25 MR. NICHOLL: That is right. It was previously in

1 front of another judge.

2 THE COURT: What if we transfer it out to Chicago,
3 you can't oppose that really, can you?

4 MR. NICHOLL: Your Honor, I can only oppose it on
5 grounds that it would delay the matter, that it has already
6 been approximately two years, that it would cause an
7 inordinate cost to Mrs. Catrett being that she is a
8 resident of the district, and we feel that it is her right
9 to bring her action here. She can proof exposure but not
10 in the district, and I think that should be certainly
11 sufficient for the Court here to maintain jurisdiction over
12 the action. If there is any hardship -- Mr. McMurtrie
13 doesn't really speak of any hardship that is going to
14 accrue to him by keeping the case here.

15 THE COURT: He doesn't have to. All right.
16 Anything else you want to say?

17 MR. NICHOLL: No, sir, Your Honor.

18 THE COURT: The Court will grant the defendant
19 Celotex's motion for summary judgment there being no
20 showing that the plaintiff was exposed to the defendant
21 Celotex's product in the District of Columbia or elsewhere
22 within the statutory period.

23 Let's have the Turner & Newall motion to dismiss
24 for lack of jurisdiction, insufficiency of process or
25 service of process.

1 MR. DORKEY: Yes, Your Honor. My names is Charles
2 Dorkey. I represent Turner & Newall on this motion.

3 THE COURT: Yes.

4 MR. DORKEY: I don't know whether you want me to
5 recite the procedural history of the case or go to the
6 facts.

7 THE COURT: Go to the facts.

8 MR. DORKEY: It seems to --

9 THE COURT: Why doesn't this court have
10 jurisdiction?

11 MR. DORKEY: Because plaintiff has not made out
12 the statutory prerequisites under either 13-423A3 or A4.
13 And moreover, there is insufficient contacts for this court
14 to constitutionally exercise its jurisdiction. Under A3
15 which requires an act in the jurisdiction and injury in the
16 jurisdiction, plaintiff has shown no act by Turner & Newall
17 in the jurisdiction. The cases supplied in my reply brief
18 indicate that all of those cases involve automobile
19 accidents in the district or an employee going into the
20 district and hurting somebody.

21 In this case what the most we have is we have a
22 product allegedly manufactured in England, shipped to a
23 company in Pennsylvania, which company in Pennsylvania
24 shipped it to a Virginia company, which Virginia company by
25 its own unilaterally act used in the District of Columbia.

1 Under A4 of the personal jurisdiction statute,
2 that would clearly be, as alleged, an act without the
3 jurisdiction and injury within. However, A4 requires
4 substantial affiliating circumstances.

5 THE COURT: Are you familiar with the case of
6 Collins versus New York Central? You didn't cite it.

7 MR. DORKEY: No, Your Honor.

8 THE COURT: You should have.

9 Go ahead. Your company isn't qualified to do
10 business here, is it?

11 MR. DORKEY: No.

12 THE COURT: It does not maintain an office or
13 telephone.

14 MR. DORKEY: And has not done so for ten years.

15 THE COURT: It has no contacts in the district.

16 MR. DORKEY: No, and we have put in four
17 affidavits on this question. We have searched our records
18 back ten years.

19 THE COURT: What about your wholly-owned
20 subsidiary.

21 MR. DORKEY: Keasbey & Mattison Company? First of
22 all, for a wholly-owned subsidiary, plaintiff has made the
23 insufficient allegations or indeed a showing to impute the
24 acts of the subsidiary to Turner & Newall but even assuming
25 that plaintiff has done that, there are two answers I have

1 to --

2 THE COURT: He never worked for Craft and Murphy
3 or Keasby and Mattison.

4 MR. DORKEY: Plaintiff worked for Craft Murphy,
5 that is clear. Plaintiff did not work for Keasby and
6 Mattison. However, Keasby and Mattison -- there is no
7 proof that Keasby and Mattison had the affiliating
8 circumstances with the District of Columbia. In order for
9 the act from without the jurisdiction to cause injury
10 within there has to be not only that act and injury within
11 but there has to be affiliating circumstances of Keasby and
12 Mattison. There is no showing that Keasby and Mattison had
13 any of these affiliating circumstances.

14 THE COURT: Anything else you want to tell me?

15 MR. DORKEY: The only other thing is that section
16 A4 speaks of present day affiliating circumstances Keasby
17 was involved in 1962 and therefore it could not have done
18 business anywhere for 20 years.

19 THE COURT: All right. Counsel.

20 MR. NICHOLL: Thank you, Your Honor. Your Honor,
21 Mr. Catrett, by affidavit to our opposition to their motion,
22 was exposed to a product known as limpet spray which Mr.
23 Boil, the representative of Kraft Murphy states in an
24 affidavit they purchased from Keasby Mattison and Armstrong
25 Contracting and Supply, which was in fact purchased further

1 from Turner & Newall.

2 We further have an affidavit from Mr. Timmis, a
3 co-worker, who states that he was exposed to limpet spray
4 in 1962 --

5 THE COURT: You are going awfully fast and some of
6 the words are running right together, if I don't understand
7 them, I don't think anyone else does either.

8 MR. NICHOLL: I will slow down.

9 THE COURT: You better start over again..

10 MR. NICHOLL: Okay. We have an affidavit in
11 opposition to the motion to dismiss by Mr. Dorkey that an
12 affidavit by Richard Boil of Craft Murphy, an employer of
13 Mr. Catrett, that Mr. Catrett was indeed exposed to a
14 product known as limpet spray.

15 THE COURT: Spell it.

16 MR. NICHOLL: L-I-M-P-E-T. We further have an
17 affidavit from a Mr. Timmis, a co-worker of Mr. Catrett's,
18 while he was employed at Craft Murphy.

19 THE COURT: Where?

20 MR. NICHOLL: At Craft Murphy in D.C., that he was
21 exposed to limpet spray in 1962 while working on the U.S.
22 capitol, and those affidavits are contained in our
23 opposition to the motion to dismiss, Your Honor. We
24 maintain that that of course is sufficient evidence.

25 THE COURT: That was in 1962, wasn't it?

1 MR. NICHOLL: That is correct, sir.

2 THE COURT: How do you get around the statute of
3 limitations, assuming there is sufficient jurisdiction
4 personal jurisdiction here?

5 MR. NICHOLL: The discovery rule, Mr. Catrett
6 wasn't aware of the disease process until the late
7 seventies, that in fact his exposure at that time caused
8 his mesothelioma.

9 THE COURT: What year?

10 MR. NICHOLL: What year did he contract the
11 disease, sir?

12 THE COURT: Yes.

13 MR. NICHOLL: 1978.

14 THE COURT: When did he file suit?

15 MR. NICHOLL: In 1980, within three years of the
16 date of discovery.

17 THE COURT: All right. Anything else you want to
18 tell me?

19 MR. NICHOLL: Additionally, I think that further
20 in that attachment to our opposition to their motion, I
21 have a brochure from Turner Newall which states in the
22 brochure that Keasby Mattison was one of their subsidiaries,
23 and in that brochure it states something to the effect and
24 I can cite the page, Your Honor, if you want me to, page 32
25 of that brochure -- and it states that Keasby Mattison

1 being in the United States was basically at the doorsteps
2 of the entire country of the United States for purposes of
3 distribution of their product.

4 We maintain that that knowledge on the part of
5 Turner & Newall that distribution of its limpet spray to a
6 subsidiary, Keasby Mattison, put them on knowledge within
7 the foreseeability, as stated in the Volkswagen versus
8 Woodson case, that their product could very well end up in
9 the District of Columbia, like it did, and that Mr. Catrett
10 could end up being exposed to their product, like he did,
11 and that Mr. Catrett could end up developing a cancer, like
12 he did, some 20 years later.

13 THE COURT: All right. Mr. Dorkey, do you want to
14 respond?

15 MR. DORKEY: Just a few points, Your Honor.

16 First, in 1962, Craft Murphy was located in
17 Virginia not in the District of Columbia. Second, for
18 Keasby and Mattison, the brochure, the brochure on page
19 three says, "Under the Turner & Newall's method of
20 organization, under this method of working, the separate
21 units in the organization, subsidiary companies, operate
22 with a large measure of freedom and flexibility and local
23 tradition and good will are fostered". This brochure is
24 completely consistent with the several affidavits of the
25 group solicitor of Turner Newall that Keasby was a wholly

1 owned but independently operated subsidiary of Turner
2 Newall.

3 THE COURT: It did business in the District of
4 Columbia, didn't it?

5 MR. DORKEY: Because it happened prior to 1962, I
6 am not aware that it did business other than this single
7 use of the product that Mr. Catrett's co-worker testified
8 to, which was brought unilaterally by Craft Murphy to the
9 District of Columbia.

10 It is not clear to me, and the record doesn't show
11 and I think that this is one of the great problems with
12 these cases, that you are dealing with events 20, 30, 40
13 and 50 years ago and there is no way that people can know
14 these things.

15 THE COURT: Anything else?

16 MR. DORKEY: No, Your Honor.

17 MR. NICHOLL: Your Honor, could I add something
18 very quickly, sir, and that is that in 1955 according to
19 Mr. Boil's affidavit, Craft Murphy was located at 2302
20 Wisconsin Avenue, Washington, D. C.

21 THE COURT: The motion is overruled.

22 Who wants to speak for Armstrong?

23 MR. DORKEY: Your Honor, did you deny our motion
24 to dismiss for lack of personal jurisdiction?

25 THE COURT: That is correct. I overruled it.

1 MR. FORD: Good afternoon, Your Honor.

2 THE COURT: Mr. Ford, nice to see you, sir.

3 MR. FORD: In this case, we have filed a motion
4 for summary judgment on behalf of the defendant named herein
5 as Armstrong Cork.

6 THE COURT: It is Armstrong World Industries.

7 MR. FORD: Yes, Your Honor, we have answered the
8 suit in the name of Armstrong World Industries, which is
9 the successor corporation of Armstrong Cork. There is no
10 problem on that score.

11 THE COURT: All right.

12 MR. FORD: In the complaint, the plaintiff alleges
13 that Armstrong World Industries, if you will, was negligent
14 and/or that it breached warranties in that it designed,
15 manufactured, produced, tested and labeled certain asbestos
16 products which the decedent was exposed to.

17 We filed, on behalf of ourselves and all
18 defendants, a general set of interrogatories to the
19 plaintiff, and the answers to those interrogatories failed
20 to reveal any exposure by the decedent to any asbestos
21 containing product manufactured or produced by Armstrong
22 World Industries. Subsequently, we filed a motion for
23 summary judgment on the grounds that there was no such
24 exposure.

25 The plaintiff, in her opposition to that motion,

comes back and says, in effect, "We agree that Armstrong World Industries did not manufacture or produce any such asbestos containing product, but Armstrong Contracting and Supply was a licensee of the product known as limpet, which in turn was manufactured by others, and there was such an exposure to Mr. Catrett to limpet sometime back in the mid sixties".

The opposition to the motion for summary judgment then is that in lieu of Armstrong World Industries, the Court should look to Armstrong Contracting and Supply, which was a subsidiary corporation.

Among the papers filed by the plaintiff in opposition to the motion for summary judgment, is a financial statement put out by Armstrong World Industries, and the plaintiff highlighted the following in its opposition: In 1958 a subsidiary, Armstrong Contracting and Supply Corporation, was formed to handle contract insulation business and allied sales.

The facts before the Court are that in 1958 actually in 1959 this corporation was formed as a wholly-owned subsidiary. It has continued or did continue to function as such until approximately 1969, when all of the stock was sold to another corporation and it continues to operate to this day. It is a viable, ongoing concern and has been a viable going concern since 1959. We see no reason why the

1 corporate identity of AC&S should be ignored in order to
2 allow the plaintiff to sue.

3 THE COURT: They could get leave to amend, could
4 they not?

5 MR. FORD: Absolutely.

6 THE COURT: Come up here. Stand beside Mr. Ford.
7 I don't see how I can avoid granting Armstrong World
8 Industries' motion for summary judgment, but you probably
9 would have a right to substitute the other successor
10 corporation.

11 MR. NICHOLL: Would Your Honor be stating that if
12 we filed the motion to amend bringing in AC&S that Your
13 Honor would have no problem with that?

14 THE COURT: I don't see any off the top of my head.

15 MR. FORD: I can not speak for AC&S. Patently
16 there is a limitations problem.

17 MR. NICHOLL: That is patently obvious, Your Honor.
18 Which is one of my major concerns.

19 THE COURT: You sued the wrong person.

20 MR. DORKEY: May I be here heard because we put in
21 papers the opposition to Armstrong World Industries' motion.

22 THE COURT: Are you involved in that?

23 MR. DORKEY: I object to the fact of dismissing
24 out Armstrong because I think we put in sufficient factual
25 evidence to put in issue the question of the relationship

1 between Armstrong Cork and Armstrong Contracting and Supply.

2 Even if we have not put in sufficient evidence
3 from discovery in other cases, we have not had an
4 opportunity, under Rule 56F of the Federal Rules of Civil
5 Procedure, because subject to the Court's jurisdiction we
6 were not able to take discovery on this very issue of the
7 relationship between Armstrong Cork, as it was then known,
8 and Armstrong World; as it is now known, and Armstrong
9 Contracting and Supply.

10 THE COURT: Why weren't you?

11 MR. NICHOLL: They just became a party today.

12 MR. DORKEY: By your ruling today, and I would
13 like to reargue and try to convince Your Honor that we
14 really are not subject to jurisdiction under either the
15 D.C. code or the United States constitution, but until
16 today we were not a party to the action.

17 THE COURT: You can take discovery even before you --

18 MR. DORKEY: But, Your Honor, it is inconsistent
19 with our position of jurisdiction, and to take discovery on
20 the merits, Your Honor, is oftentimes considered to be a
21 waiver of a party's jurisdictional objections and we face
22 that other problems in other jurisdictions.

23 THE COURT: You don't have that problem in the
24 federal courts anymore. That used to be the rule but not
25 today.

1 MR. DORKEY: I am sure Your Honor is more
2 understanding than other judges, but we have had this
3 problem in other courts.

4 THE COURT: That is an old rule older than Mr.
5 Ford even.

6 MR. DORKEY: But we have not had an opportunity to
7 take discovery on that issue in this case and under Rule
8 56F I think we have made out a case why in addition to the
9 affidavits and the deposition evidence we have put in this
10 case, which clearly raises a factual issue, Your Honor,
11 going to the control of Armstrong Cork over AC&S --

12 THE COURT: Why should Mr. Ford be penalized
13 because of you?

14 MR. DORKEY: He is not being penalized because of
15 me. Armstrong Contracting and Supply, when it was a
16 subsidiary of Armstrong Cork, had no legal department, had
17 no accounting department.

18 THE COURT: We are talking about Armstrong World
19 Industries' motion for summary judgment.

20 MR. DORKEY: That is right, on the grounds that it
21 is not responsible for Armstrong Contracting and Supply, a
22 subsidiary.

23 THE COURT: That is right.

24 MR. DORKEY: There is law in this district and in
25 other jurisdictions that sometimes if a parent exercises

1 overwhelming control, and given other circumstances, it is
2 responsible for the acts or omissions of its subsidiaries.

3 THE COURT: Do I understand the plaintiff to be
4 contending that the decedent was exposed to the products of
5 a subsidiary of Armstrong World Industries, namely,
6 Armstrong Contracting and Supply Company, Inc.?

7 MR. NICHOLL: That is correct, Your Honor.

8 MR. FORD: It was not a product. That is the
9 irony of Mr. Dorkey's position.

10 THE COURT: They are distributors.

11 MR. FORD: Of Mr. Dorkey product, and in effect he
12 is arguing to hold AC&S in, or Armstrong in, so he can seek
13 contribution or indemnification against them for his
14 product. And my position is very clear, that if he wants
15 to go after someone he ought to go after his distributor,
16 which was AS&C, and who he licensed. Why come after
17 Armstrong World Industries when there is a viable
18 corporation and his own papers show that they have
19 liability insurance?

20 THE COURT: Turner Newall also opposes, don't they?

21 MR. FORD: Yes, sir.

22 MR. DORKEY: One reason is that -- one reason we
23 go after both Armstrong World and Armstrong Contracting
24 Supply is because at the time, the relevant time, they were
25 essentially one entity, Your Honor. It was a division

1 prior to 1959. They made it into a subsidiary. Nothing
2 else changed. It kept the big "A", Armstrong logo during
3 that time period and throughout the time period it operated
4 under the egis, it was all part of one enterprise, same
5 logo, same advertising, everything.

6 THE COURT: Do you want to say anything else?

7 MR. DORKEY: I would like to say some things on
8 your denial of the motion for personal jurisdiction.

9 THE COURT: I am not going to let you reargue that.

10 Do you want to say anything else?

11 MR. NICHOLL: I would simply state for the record
12 that we adopt the opposition of Turner & Newall to the
13 motion for summary judgment by Armstrong World.

14 THE COURT: What would be the effect if I grant
15 Mr. Ford's motion? It seems to me the Court is almost
16 compelled to.

17 MR. NICHOLL: I would think, Your Honor, if I
18 could add something, in January of 1982 we did propound a
19 second set of interrogatories, which would perhaps go to
20 the issue of control of AC&S, or Armstrong Contracting and
21 Supply and Armstrong World.

22 Mr. Ford did answer those interrogatories, I
23 believe, a couple of weeks ago, but unfortunately when we
24 reached the questions of Armstrong Contracting and Supply
25 and their relationship with Armstrong World they were

1 silent. I would at least request, Your Honor, that we have --

2 THE COURT: You have had more than ample time.

3 How long has your motion been pending Mr. Ford?

4 MR. FORD: A number of months.

5 THE COURT: The motion will be granted, the motion
6 for summary judgment, by Armstrong World Industries.

7 MR. DORKEY: As long as I am stuck in the case now
8 that you have let everybody else out, even though there are
9 many other people's products who this plaintiff was exposed
10 to --

11 THE COURT: What else do you have?

12 MR. DORKEY: I would like to know whether you have
13 any written rulings on these?

14 THE COURT: No, I do not, counsel.

15 Who has this Huff letter? Did you hand that up to
16 me?

17 MR. MCMURTRIE: I did, Your Honor.

18 THE COURT: You can present an order, Mr. Ford, or
19 have I already gotten it?

20 MR. MCMURTRIE: I think you have an order from
21 Celotex.

22 THE COURT: You can work with Mr. Ford.

23 MR. DORKEY: Excuse me, Your Honor. So what you
24 will do is just simply sign --

25 THE COURT: I am signing an order based on the

1 authorities in the opposition given.

2 MR. DORKEY: Could you explain the reasoning why
3 you held us in on jurisdiction?

4 THE COURT: Sir, no judge has to give you the
5 reason.

6 MR. DORKEY: I know, I was just asking for some
7 guidance, that is all, Your Honor.

8 THE COURT: No thank you, sir. The Court has
9 ruled.

10 (Whereupon, at 2:07 p.m., the hearing in the
11 above-entitled case was recessed.)

12 * * *

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18 REPORTER'S CERTIFICATE

19 This record is certified by the undersigned to be the
20 official transcript in the above-entitled case.

21
22 
23 OFFICIAL COURT REPORTER
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25

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was
mailed, postage prepaid, this 19th day of June,
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