IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL

Civil Action No. 02-C-9004
Premises Damages Cases

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, MOTION FOR ADVERSE INSTRUCTION AND MOTION TO AMEND TO ASSERT CLAIM OF INTENTIONAL SPOLIATION

This is the motion and memorandum of the plaintiffs in support for (1) partial summary judgmcnt in their favor on the issue of exposure, based on cquitablc cstoppel or cstoppel in pais of the defendant's contention that there is no evidencc of cxposure to asbestos fibcrs released from the disturbance of asbestos containing products, and/or (2) an adverse instruction against defendant, and lcavc to amend to state a claim for intentional spoliation. In support thereof, the plaintiffs state as follows:

INTRODUCTION

The plaintiffs contend that Union Carbide is estopped from asserting thc lack of evidence of cxposure by the plaintiffs to asbestos containing products based on the jury's finding in Phase I regarding the defendant's conduct and the intentional nature of said conduct. The jury found in Phase I that Union Carbide maintained unreasonably dangerous premises due to the presence of breathablc asbestos fibers, failed to warn workers about the unreasonably dangerous conditions, and in doing so, "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting thc rights of others and should therefore pay punitive damages."

A cardinal principal of the law is that a wrongdoer should not profit from his wrongdoing. *Jones v Evans*, 15 S.E.2d 166,123 W.Va. 394 (1941). There, in syllabus

point three, the court stated, "Where a fraudulent or wrongful act has been committed, the result of which is subsequent loss which must be borne either by the person guilty of such wrongdoing or a person innocent thereof, such loss must fall on the person at fault." *Id.*

This fundamental principal is the underpinning for this motion.

FACTUAL BACKGROUND

In the first phase of this trial, the jury made the following findings:

> Special Interrogatory No 1. Do you find by a preponderance of the evidence that the Union Carbide premises were unreasonably dangerous due to the presence of breathable asbestos fibers in the workplace from 1945 to 1980? Answer: YES
>
> Special Interrogatory No. 4. Do you find from a preponderance of the evidence that, when non-employee workers were present on the sites owned by Union Carbide, Union Carbide acted intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others and should therefore pay punitive damages? Answer: YES
>
> Punitive damages must bear a reasonable relationship to the amount of compensatory damages awarded to a plaintiff. If you have found that Union Carbide should be required to pay punitive damages relating to its premises conduct, by what number should compensatory damages be multiplied? Answer: 3 x compensatory damages.

In 1952, the State of West Virginia issued rules and regulations providing exposure limits for asbestos fibers. These also provided that where there were multiple exposures, the limits were not applicable, and further evaluation on an individual basis was required.

There was ample evidence in the first phase of the trial that, even under the 1952 standard, levels of asbestos in the environment would be invisible. *See* Dement Test., Oct. 4, 2002, Phase I Trial Tr. 2216-19. In 1964, a Union Carbide doctor produced a report, which stated that asbestos particles had to be in the range of 8-10 million particles per cubic foot before its presence would be visible in average lighting conditions.

As established in the Phase I trial, the necessity to test to determine the nature and concentration of the dust in the air has been long known by Union Carbide, and such knowledge predated the exposures of these plaintiffs. *See*, e.g., Phase I Trial Exhs. WV 60758, 60759 & 60760 (regarding the testing of dust from Johns Manville Thermobestos in 1962). In 1941, W. H. Winans, Director, Industrial Relations Department, Union Carbide Company, New York, was on the National Committee for Conservation of Manpower in Defense Industries. The Committee published Special Bulletin No. 3, United States Department of Labor, "Protecting Plant Manpower." This Bulletin included the statement that two types of dust were known to be injurious-silica and asbestos. Air testing for asbestos was an established technique before any of the plaintiffs worked on the South Charleston premises.

Union Carbide used multiple types of insulation in its facilities, and in the South Charleston facility, including asbestos, spray on crocidolite, expanded silica insulation, mineral wool, and other types of asbestos and non-asbestos containing products. Union Carbide also specified various brands of asbestos containing insulation, including Johns Manville, Phillip Carey, Owens Illinois, Owens Corning Fiber Glass, Armstrong, and many others. *See* Phase I Trial Exhibits including Union Carbide Insulator Training Manual, 1970 and various material specifications; Deposition of Ethridge Shipley, Insulation Supervisor, Union Carbide South Charleston Plant, March 17, 1988.

The finding of the jury is that Union Carbide maintained unreasonably dangerous premises because of the presence of breathable asbestos fiber. The jury further found that Union Carbide intentionally engaged in this conduct, as defined in *Myer v Frobee*. Union Carbide now defends these cases in part on the contention that the plaintiffs cannot

identify the insulation products they worked around as asbestos containing. This defense is without merit, designed to mislead the jury and could result in an inconsistent verdict.

The plaintiffs contend that Union Carbide should not be able to assert this defense, on the grounds that it had sole possession of the knowledge of the nature of the insulation products around which the plaintiffs worked, that it had superior knowledge, skill and ability with regard to the hazards of such products, their identification after installation and during disturbance, and the means of testing the atmosphere for the presence of asbestos fibers released in the air from such products. The products at issue were the personal property of Union Carbide. Further, the testimony of the plaintiffs that they did not know insulation contained asbestos are made as a result of Union Carbide's silence about that fact at the time of their exposure.

Union Carbide concealed information regarding the presence of asbestos on its premises from contractors such as the plaintiffs and its own workers. For example, Union Carbide withheld information about asbestos containing products from its former employee and witness in the Phase I trial, Jerry Cogar. Mr. Cogar, a mechanical engineer for Union Carbide's facilities, testified that he created designs for Union Carbide's facilities. *See* Phase I Trial Tr. Oct. 11, 2002, p. 3999. Union Carbide's insulation group informed Mr. Cogar that "Kaylo 20" insulation, which Mr. Cogar specified in plans he created for Union Carbide's facilities, did not contain asbestos. *See id.* at pp. 4000-4002. Union Carbide's own internal documents clearly establish that the "Kaylo 20" insulation used by Union Carbide contained asbestos, yet this fact was concealed from Mr. Cogar. *See id.* at pp. 4001-4007. Union Carbide knew of the hazards of asbestos, did not tell the plaintiffs or its own employees about the presence of asbestos on its premises and the

corresponding hazards, and now wants to benefit from its concealment of asbestos and the hazards it presents.

Union Carbide itself recognizes that the determination of the concentration of dust is beyond commonplace experience. *See* Defendant Union Carbide's Motion In Limine and Memorandum Of Law In Support Of Its Motion In Limine To Exclude Inadmissible Evidence-A. Lay Witnesses May Not Offer Opinion Testimony As To Whether A Product Contained Or Released Breathable Asbestos Fibers.

ARGUMENT

In the instant case, Union Carbide failed to warn the plaintiffs about the asbestos-containing products on the South Charleston premises, and did so "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others." The "rights of others" in this case are the rights of Harold Jesse, Eddie Tipton, Billy Harper, Kenneth Saunders and William "Joe" Williams, who worked at the South Charleston plant. The conduct of Union Carbide stripped these plaintiffs of a degree of protection to which they were entitled—which, at the very least, meant warning them about the asbestos-containing products at the South Charleston plant—and in doing so, deprived these plaintiffs of a means of definitively establishing proof of exposure to asbestos-containing products at the facility. For the policy reasons behind the decisions in *Jones*, Union Carbide should be estopped from asserting a defense of exposure, and the plaintiffs should be granted partial summary judgment, on the issue of exposure to asbestos fibers, in their favor.

Plaintiffs request that the Court order that Union Carbide is estopped from contending that there is no evidence of exposure to asbestos fibers at its South Charleston

plant for the reason that doing otherwise would allow Union Carbide to benefit from the very same "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct" that gives rise to this trial. The conduct of Union Carbide in maintaining asbestos containing products on its premises, which when disturbed would release breathable fibers, was compounded by additional intentional conduct; namely, placing contractor employees in positions where such disturbances would occur, without warning them of the hazard, failing to identify such asbestos containing products on its premises, and not conducting contemporaneous air testing to ascertain the presence of asbestos in the air.

This is similar but not identical to concealing or destroying evidence. Union Carbide intentionally failed to take actions which, had they been taken, would have provided the definitive evidence of exposure, which Union Carbide contends is now the plaintiffs burden to show. This same conduct, however, was the very conduct that Union Carbide should have taken to protect the health of the plaintiff, and was action it intentionally failed to take.

Under *Jones*, the plaintiffs contend that their claims should not be defeated because Union Carbide's intentional conduct has resulted in the deprivation of their ability to prove their exposure with specificity. It is difficult to conceive of a clearer case of a defendant profiting from its intentional wrongdoing than the dismissal of these claims because the plaintiff does not know he worked with asbestos, when Union Carbide had the ability to know those facts, and intentionally failed to learn those facts. Union Carbide knowingly sent the plaintiffs to work in a dangerous environment and cannot claim the benefit now of their willful blindness to the hazards these men unknowingly faced.

Jones requires the Court to relieve the plaintiffs of the burden of proving that their exposures were to asbestos containing products. The Court has no discretion in this situation.

The Supreme Court has decided recently that West Virginia now recognizes the tort of intentional spoliation. *Hannah v. Heeter,* 2003 WL 21488761 (June 30, 2003.) The decision sets forth in syllabus point 3 the requirements for an adverse instruction, and additional syllabus points set forth the law regarding the claim of spoliation:

> 3. "Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed." Syllabus Point 2, *Tracy v. Cottrell,* 206 W.Va. 363, 524 S.E.2d 879 (1999).

> 4. "Rule 37 of the West Virginia Rules of Civil Procedure is designed to permit the use of sanctions against a party who refuses to comply with the discovery rules, i.e., Rules 26 through 36." Syllabus Point 1, *Shreve v. Warren Assoc., Inc.*, 177 W.Va. 600, 355 S.E.2d 389 (1987).

> 5. West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence.

> 9. West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party.

10. Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action.

11. The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

In the case of *Ryan v. Rickman*, 2003 WL 21436347 (June 19, 2003), the court again stated the definition of the doctrine of equitable estoppel or estoppel in pais:

> 3. "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

See also Christian v McCoy, 191 W. Va. 390, 446 S.E.2d 177 (1994); *Helmick v Broll*, 150 W. Va. 285, 292, 144 S.E.2d 779, 783 (1965). "Estoppel in pais" is defined in Blacks Law Dictionary as the doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Black's Law Dictionary (citing *Mitchel v. McIntee*, 15 Or. App. 85, 514 P.2d 1357, 1359).

The plaintiffs contend that the *Ryan/Stuart* standard is closer to the situation at hand. The issue addressed in this motion does not arise in the context of a discovery dispute. Indeed, while there are significant discovery disputes pending,[1] the plaintiffs do not anticipate that the defendant contends that it did not have asbestos insulated equipment on its premises. Here, there is virtual impossibility to identify precisely where in these massive facilities theses plaintiffs worked ten or twenty or thirty years ago. Even identifying the pipe rack or tank in issue, if it still exists, does not help. The equipment included all types of insulation, asbestos and non-asbestos containing, in close proximity. These insulation products were undoubtedly disturbed and released dust at the same time. The intentional wrongdoing of Union Carbide was contemporaneous with the plaintiff's exposure to a latent hazard of breathable asbestos fibers. The time to ascertain the dust content of the air was while the plaintiff was at work on the premises. The need was to strike while the iron was hot. Union Carbide willfully failed to act at the time when acting would have materially affected the rights of the plaintiffs. What is at issue in this brief is not the conduct of Union Carbide now in discovery, although Union Carbide's concealment of evidence supports the plaintiffs' position (*See supra* Footnote 1), but how it intentionally acted or intentionally failed to

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[1] Plaintiffs will refrain from briefing the entirety of Union Carbide's ongoing discovery abuses in this litigation. However, Plaintiffs learned since the pretrial hearing on Monday, August 4, 2002, that Union Carbide has concealed extensive amounts of relevant information regarding asbestos on its premises. Despite numerous discovery requests dating back to the Phase I discovery period in 2002, Union Carbide informed Plaintiffs' counsel via email sent at 10:30 p.m. Sunday, August 3, 2003, that approximately 45,000 aperture cards, in microfiche format, containing drawings of the South Charleston facility, its equipment, and insulation would be made available for Plaintiffs to review. In response, Plaintiffs' counsel sent two attorneys to defense counsel's offices in Atlanta, Georgia to assess the production of this microfiche. These attorneys have found that the microfiche contains information responsive to Plaintiffs' request to produce served in June of this year and the discovery served in the Phase I trial. For Union Carbide to produce this volume of material, one week from the scheduled trial date, after requests for such material were pending for over one year, is clearly concealment of evidence that provides additional support to the Plaintiffs' argument in this motion.

act while the plaintiff was on its premises. It was the transaction between the plaintiff and Union Carbide when the plaintiff was on its premises that made the difference, not the transaction between the lawyers in the last few months. Thus, the equitable principals of *Jones* are the most applicable here.

Union Carbide, by asserting a lack of product identification, seeks to profit from its intentional wrongdoing. Following *Jones*, the Court should apply the doctrine of equitable estoppel and estoppel in pais to the assertions of Union Carbide, and direct the jury to find that the plaintiffs were exposed to breathable asbestos fibers during the time they were present, disturbing insulation on the Union Carbide premises.

Equitable relief is appropriate here in that there is not an adequate remedy at law. *Elkhorn Sand & Supply Co. v. Algonquin Coal Co.,* 103 W. Va. 110, 136 S.E. 783 (1927) (holding that jurisdiction in equity is limited to cases in which the law does not afford a complete and adequate remedy). An adverse instruction, as opposed to a directed verdict, leaves the matter in the hands of the jury, and does not adequately protect the interests of the law in not rewarding wrongdoers for their intentional misconduct. The conduct complained of is not really one of failure to engage in discovery, which is subject to different standards of proof, (*Doulamis v. Alpine Lake Property Owners Ass'n*, 184 W. Va. 107, 399 S.E.2d 689 (1990) (stating that evidentiary hearing, full record, and a finding that the failure to make discovery was due to bad faith or fault and not the inability to comply with discovery)) and appeal (*Given v. Field,* 199 W.Va. 394, 484 S.E.2d 647 (setting forth the abuse of discretion standard)). Under *Jones*, the application of the jury finding is straightforward and allows no discretion on the part of the Court. The jury found that Union Carbide was

intentionally wrong. As a result of the intentional failure to warn and identify asbestos insulation and dust in the air there is a subsequent loss-the plaintiff in some cases cannot say he worked around asbestos dust. The plaintiff is innocent—hehad no means to know of the hazard. The loss must therefore fall on the person at fault—Union Carbide.

CONCLUSION

The plaintiffs have set forth a basis for relief under the *Stuart* and *Jones* standard, and this Court must therefore grant the relief sought. The right to relief is clear, unambiguous and leaves no room for doubt. An intentional wrongdoer is not entitled to benefit from its wrongdoing. In the alternative, the plaintiffs contend that these facts support the giving of an instruction under *Hannah*, and further support a motion to amend to add a claim of intentional spoliation.

Wherefore, the plaintiffs move for the Court to apply the doctrine of equitable estoppel or estoppel in pais to the contention of the defendant that there is no evidence of exposure to asbestos containing products in these cases, and grant the plaintiffs partial summary judgment in their favor on the issue of exposure, and such further relief as the Court may deem appropriate. In the alternative, the plaintiffs pray for an adverse instruction pursuant to *Hannah*, and leave to amend their complaints to state a claim against Union Carbide for intentional spoliation, and such further relief as the Court may deem fit.