



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION CIVIL ACTION NO. 11-C-5000000

THIS DOCUMENT APPLIES TO ALL CASES

ORDER

On January 9, 2012, the Court heard oral argument on *Defendants Cliffs Natural Resources Exploration, Inc.'s and Pinn Oak Resources' Motion for Summary Judgment Against Plaintiff Lynndall Dunn* (TID 38292561) and on *Defendant Eastern Associated Coal, LLC's Motion for Summary Judgment* (TID 40467596). Having reviewed the motions and all related pleadings, and having conferred with one another to ensure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Court **DENIES** the subject motions and all other related motions for summary judgment, subject to re-filing. In support of this ruling, the Court makes the following findings of fact and conclusions of law:

1. Motions for summary judgment based on the statute of limitations have been filed in the following cases:

Boytek v. American Coal Testing, et al.	11-C-5230003	TID 37914179
Boytek v. American Coal Testing, et al.	11-C-5230003	TID 37915969
Jarvis v. Arkema, et al.	11-C-5030009	TID 37917806
Jeffrey v. American Coal Testing, et al.	11-C-5230017	TID 37919038
Dunn v. Cliffs Natural Resources, et al.	11-C-5550001	TID 37921083 and 37925053
Gallagher v. Arkema, et al.	11-C-5030006	TID 37925637
Gallagher v. Arkema, et al.	11-C-5030006	TID 37928393
Fraley v. Arkema, et al.	11-C-5030005	TID 37929239
Fraley v. Arkema, et al.	11-C-5030005	TID 37938258
Dunn v. Cliffs Natural Resources, et al.	11-C-5550001	TID 38292561
Barto v. American Coal Testing, et al.	11-C-5230032	TID 38292846
Kutcher v. Arkema, et al.	11-C-5340008	TID 38293128
Reedy v. American Coal Testing, et al.	11-C-5230022	TID 38293399
Smith v. Arkema, et al.	11-C-5340009	TID 38293616
Williams v. Arkema, et al.	11-C-5410017	TID 38294029
Webster v. American Coal Testing, et al.	11-C-5230027	TID 38303178
Atwell v. Arkema, et al.	11-C-5240001	TID 39088255

McCune v. Arkema, et al.	11-C-5300011	TID 39386264
Holt v. Arkema, et al.	11-C-5280001	TID 39702659
March v. Arkema, et al.	11-C-5200009	TID 39792678
Copley v. American Coal Testing, et al.	11-C-5230009	TID 40174235
Blevins v. Arkema, et al.	11-C-5030002	TID 40467596
Blevins v. Arkema, et al.	11-C-5030002	TID 40467977
Hicks v. Arkema, et al.	11-C-5550002	TID 41140127
Hicks v. Arkema, et al.	11-C-5550002	TID 41140785
Jones v. Arkema, et al.	11-C-5030011	TID 41151589
Williams v. Arkema, et al.	11-C-5410016	TID 41366826
McKinney v. Arkema, et al.	11-C-5410011	TID 41471493

2. The defendants in each motion generally argue that the plaintiff filed his or her complaint in this matter after the two-year statute of limitations for deliberate intent claims had expired.

3. At the January 9, 2012, hearing, the Court took the subject motions under advisement and requested from certain counsel supplemental documentation from *Addair v. Litwar Processing Co.*, No. 04-C-252, Circuit Court of Wyoming County, West Virginia (“*Addair* litigation”). The Court has received the requested records, which indicate the following relevant dates in the *Addair* litigation:

a. On September 3, 2004, the original Class Action Complaint was filed. The three named plaintiffs filed the Complaint against several defendants on behalf of themselves individually and all others similarly situated. Count 1 alleged deliberate intent of the defendants to injure the plaintiffs. Count 2 alleged that medical monitoring was necessary for the symptomatic plaintiffs and class members. Count 3 alleged that medical monitoring was necessary for the asymptomatic plaintiffs and class members. Count 4 alleged strict liability against the chemical manufacturers for manufacturing ultra-hazardous products.

b. On July 12, 2005, plaintiffs filed a Motion to Amend and a proposed Amended Complaint. The Amended Complaint most notably sought to add plaintiffs to and subtract defendants from the original Complaint, and included Count 5, which alleged strict liability against the manufacturers for design and warnings defects.

c. On April 2, 2007, Judge Hrko entered an Order granting the Motion to Amend and permitting the plaintiffs to file the revised Amended Complaint, which was attached to the Order.

d. On March 24, 2008, Judge Hrko entered an Order finding that the plaintiffs could not maintain a class action for deliberate intent claims against multiple employers, and could not maintain a class action for deliberate intent claims on behalf of unnamed former employees of any of the employer defendants. The Court therefore dismissed the class action deliberate intent claims asserted in Count 1 of the Amended Complaint.

e. On March 24, 2009, the plaintiffs filed another Motion for Leave to Amend and a proposed Second Amended Complaint, seeking to include additional plaintiffs and defendants.

f. On or about June 22, 2010, most of the present Float-Sink litigation cases were filed in various West Virginia counties.

g. On June 24, 2010, plaintiffs' counsel informed the *Addair* Court and defense counsel that the additional plaintiffs named in the proposed Second Amended Complaint no longer sought to become part of the *Addair* litigation because each had filed his or her own civil action. Plaintiffs' counsel therefore withdrew that portion of the

motion for leave to amend that sought to join additional plaintiffs, and the Court took the remainder of the motion under advisement; to date, no ruling has been issued.

4. West Virginia has a two-year statute of limitations for personal injury actions. W.Va. Code § 55-2-12(b) (“Every personal action for which no limitation is otherwise prescribed shall be brought: . . . within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries.”)

5. The statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong, and not when he or she knows of the particular nature of the injury. *Goodwin v. Bayer Corp.*, 218 W.Va. 215, 221, 624 S.E.2d 562, 568 (2005). The commencement of a class action suspends the applicable statute of limitations as to all asserted members of a class who would have been parties had the suit been permitted to continue as a class action. See *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974); see also *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Further, the filing of a motion to amend for the purpose of including additional parties tolls the statute of limitations for those parties until that motion is ruled upon or otherwise disposed of. See *Charlton v. M.P. Industries, Inc.*, 173 W.Va. 253, 255-57, 314 S.E.2d 416, 419-20 (1984).

6. Where no nominal plaintiff has standing on any issue against one of multiple defendants, a suit for damages may not be maintained as a class action against that defendant. See *Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1095 (3d Cir. 1975); see also *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1190, 28 L.Ed.2d 323 (1971).

7. The Court finds that pursuant to *American Pipe* and the dates listed above, the statute of limitations was tolled from September 3, 2004, through June 24, 2010, with regard to

deliberate intent claims against the employers of the three original plaintiffs in the *Addair* litigation. 414 U.S. 538.

8. Likewise, the Court finds that the statute of limitations was tolled from July 12, 2005, through June 24, 2010, for all potential plaintiffs with corresponding employer defendants named in the proposed Amended Complaint filed in the *Addair* litigation on July 12, 2005. See *Haas*, 526 F.2d at 1095.

9. The Court finds that the Order in the *Addair* litigation entered on March 24, 2008, which denied class certification on deliberate intent claims, did not serve as a ruling on the merits; therefore, the savings statute applies for all potential plaintiffs, resulting in tolling from that date through and including March 24, 2009, for qualified plaintiffs. See W.Va. Code § 55-2-18.

10. The Court further finds that the subsequent Motion for Leave to Amend filed on March 24, 2009, tolled the statute of limitations for qualified plaintiffs until the part of the Motion seeking to add plaintiffs was voluntarily withdrawn on June 24, 2010. See *Charlton*, 314 S.E.2d at 419-20.

11. The Court finds that pursuant to Rule 56(c) of the *West Virginia Rules of Civil Procedure*, the above motions for summary judgment should be denied at this time. In light of these findings of fact and conclusions of law, the defendants in any case in this matter, if appropriate, may file new motions for summary judgment based on the statute of limitations for the Court's consideration.

Accordingly, this Court **ORDERS** that all motions for summary judgment listed above are hereby **DENIED**, subject to re-filing, if appropriate.

The parties' objections and exceptions to the Court's ruling are noted.

It is so **ORDERED**.

ENTER: March 9, 2012

/s/ John A. Hutchison
Lead Presiding Judge
Float-Sink Litigation