



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: GAVIN LANDFILL LITIGATION

Civil Action No. 16-C-8000

THIS DOCUMENT APPLIES TO ALL CASES

ORDER

On October 23, 2017, the Presiding Judges heard argument of counsel on Defendant Doug Workman's *Motion for Judgment on the Pleadings* (Transaction ID 60883167). The Presiding Judges have reviewed and maturely considered the briefs presented and the arguments of counsel and have conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules. For the reasons set forth in the following Findings of Fact and Conclusions of Law the Presiding Judges unanimously **GRANT** Defendant Doug Workman's motion.

Findings of Fact

1. On August 8, 2014, Plaintiffs filed their Complaint in this matter, which brought claims for wrongful death, failure to warn, failure to eliminate, failure to protect, negligence *per se*, negligence, heightened duty, strict liability, battery, fraud, fraudulent concealment, misrepresentation of a toxic substance, negligent infliction of emotional distress, medical monitoring, loss of consortium, and punitive damages against the Defendants, American Electric Power Co., Inc. ("AEP"), American Electric Power Service Corporation ("AEPSC"), Ohio Power Company ("Ohio Power"), and Doug Workman.

2. On August 1, 2016, in accordance with the first Amended Case Management Order entered by this Court, Plaintiffs filed their Amended Complaint, which included changes such as adjusting the claims of Plaintiffs who had since passed away to now be brought by the

estate of those Plaintiffs, joined additional Plaintiffs, revised the structure of the pleading of certain claims, and dropped claims for battery.

3. The Amended Complaint remained unchanged with respect to the Defendants named in this matter, including Defendant Doug Workman, and this case has proceeded under the Amended Complaint since its filing.

4. The Amended Complaint alleges the following causes of action: “Wrongful Death,” “Failure to Warn, Eliminate, Protect,” “Negligence,” “Fraud and Fraudulent Concealment,” “Negligent Infliction of Emotional Distress,” “Medical Monitoring,” and “Loss of Consortium.” Plaintiffs also allege they are entitled to punitive damages.

5. The Working Direct Claim Plaintiffs claim that they, or their decedents, suffer or suffered various health conditions and diseases as a result of their exposure to coal combustion residuals or CCRs at the Gavin Landfill. *See* Am. Compl. at ¶ 138.

6. Specifically, Plaintiffs claim exposure to CCRs caused each Direct Claim Plaintiff to develop one or more of the following diseases:

- a. Cancer, including brain cancer, lung cancer, bladder cancer, skin cancer, breast cancer, prostate cancer, ovarian cancer, colon cancer, cancer of the lymph nodes, lymphatic leukemia and/or thyroid cancer;
- b. Respiratory distress and diseases, including COPD, emphysema, bronchitis, asthma, sleep apnea, spots on the lungs, chronic cough, chest pain and/or other breathing problems;
- c. Skin lesions, scarring, skin discoloration, psoriasis, skin rashes, chronic itching and/or other skin problems;
- d. Heart failure, postural orthostatic tachycardia syndrome, mitral valve prolapse and/or other heart problems;
- e. Breast nodules, thyroid nodules and/or nodules in the throat;
- f. Psoriatic arthritis;
- g. Bladder stones;

- h. Gastrointestinal and/or stomach problems;
- i. Tumors of the thyroid and/or voice box;
- j. Raynaud's Disease;
- k. Parkinson's Disease;
- l. Memory loss; and
- m. Other harms and injuries.

Id. ¶ 138.

7. On July 21, 2017, Defendant Doug Workman filed his Motion for Judgment on the Pleadings and Memorandum in Support, contending Plaintiffs sued him in his individual capacity, but Ohio's Mixed Dust Statute does not permit claims to proceed against individual defendants like Mr. Workman except in cases of corporate veil-piercing.

8. In their Amended Complaint, Plaintiffs make the following factual allegations specifically referencing Mr. Workman:

- The Defendant, Doug Workman, is, and has at all times material and relevant herein been, a resident and citizen of Point Pleasant, Mason County, West Virginia. Amended Complaint ¶ 38.
- The Defendant, Doug Workman, was employed as Landfill Site Superintendent ("Superintendent") for the Defendant, AEP, and worked in this capacity at the Landfill, in Cheshire, Gallia County, Ohio. *Id.* ¶ 39.
- Jurisdiction exists by virtue of the Defendant, Doug Workman's, citizenship and residence in Point Pleasant, Mason County, West Virginia. *Id.* ¶ 41.
- Venue is proper under W. Va. Code § 56-1-1(a)(1) because the Defendant, Doug Workman, resides in Mason County, West Virginia. *Id.* ¶ 44.
- The Defendant, Doug Workman, worked on-site at the Gavin Landfill, in the office maintained by the Defendants, AEP, AEPSC, and Ohio Power at all times material and relevant herein. *Id.* ¶ 75.
- The Working Direct Claim Plaintiffs worked under the supervision, instruction, and in certain respects, under the control of the Defendant, Doug Workman, at all times material and relevant herein. *Id.* ¶ 76.

- On numerous occasions, the Defendant, Doug Workman, and other agents, representatives and employees of the Defendants, AEP, AEPSC, and Ohio Power, informed the Working Direct Claim Plaintiffs: that Coal Waste was a safe and non-hazardous material; that the Working Direct Claim Plaintiffs should not worry about the contents or health effects of exposure to Coal Waste; that Coal Waste “would not hurt [the Working Direct Claim Plaintiffs];” that “nothing in Coal Waste could harm [the Working Direct Claim Plaintiffs];” and that Coal Waste was “safe enough to eat.” *Id.* ¶ 84.
- On one or more occasions, Defendant, Doug Workman, responded to questions from the working direct claim Plaintiffs about the safety of the Coal Waste by sticking his finger into the Coal Waste and then placing his fly-ash covered finger into his own mouth, then misrepresented to the Working Direct Claim Plaintiffs that Coal Waste was “safe enough to eat.” *Id.* ¶ 85.
- On one or more occasions, the Working Direct Claim Plaintiffs were told, by Doug Workman and other agents, representatives, and employees of the Defendants, AEP, AEPSC, and Ohio Power, that the Coal Waste contained “such low levels of arsenic, it made no difference” to their health or safety, and that the “lime neutralizes the arsenic” in the Coal Waste. *Id.* ¶ 87.
- On one occasion during 2011, Plaintiffs, Tammy Mullens and Tracy Mullens, were cleaning out a shed at the Gavin Landfill location, as part of their work at the Gavin Landfill, and were working in the midst of a large, thick cloud of Coal Waste, without the use of personal protective gear, such as coveralls, gloves or respirators. Chris McDaniel, an employee of the Defendant, AEP, who worked at the Gavin Plant location, witnessed the Plaintiffs, Tammy Mullens and Tracy Mullens, working without personal protective equipment, and attempted to provide them with respirators, when he was stopped by the Defendant, Doug Workman, who informed Chris McDaniel that because Tammy Mullens and Tracy Mullens were not employees of Defendant AEP, they were not to be provided with respirators. *Id.* ¶ 89.
- At no time were any of the Working Direct Claim Plaintiffs offered or provided personal protective equipment, including coveralls, gloves, or respirators, by the Defendants, AEP, AEPSC, Ohio Power and/or Doug Workman. *Id.* ¶ 92.
- At no time were any of the Working Direct Claim Plaintiffs advised or instructed to obtain personal protective equipment, including coveralls, gloves or respirators, by the Defendants, AEP, AEPSC, Ohio Power and/or Doug Workman. *Id.* ¶ 93.

9. Plaintiffs are proceeding against Defendant Doug Workman on theories of Wrongful Death (*Id.* ¶¶ 96-99); Failure to Warn, Eliminate, Protect (*Id.* ¶¶ 100-107); Negligence (*Id.* ¶¶ 108-117); Fraud and Fraudulent Concealment (*Id.* ¶¶ 118-124); Negligent Infliction of Emotional Distress (*Id.* ¶¶ 125-128); Medical Monitoring (*Id.* ¶¶ 129-133); and Loss of Consortium (*Id.* ¶¶ 134-136). Additionally, Plaintiffs assert that the acts and omissions of Defendant Doug Workman entitle them to punitive damages. (*Id.* ¶¶ 147-149). Regardless of the theory, all of the actions sound in tort as they seek damages for personal injury or death.

Conclusions of Law

1. A motion for judgment on the pleadings is governed by Rule 12(c) of the Rules of Civil Procedure. *Copley v. Mingo County Bd. of Educ.*, 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). Rule 12(c) provides that:

[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

W. Va. R. Civ. P. 12(c).

2. As explained in Syllabus Point 2 of *Copley*, “[a] motion for judgment on the pleadings presents a challenge to the legal effect of given facts rather than on proof of the facts themselves. In this respect it is essentially a delayed motion to dismiss.” For this reason, “[a] circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant a motion for judgment on the pleadings only if it appears beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim or defense.” *Id.*, Syl. pt. 3. Appellate review of an order granting a motion for judgment on the pleadings is *de novo*. *Id.*, Syl. pt. 1. It is under these principles that the Court has assessed and issued its ruling on this motion.

3. As previously held by this Court, Plaintiffs have asserted mixed dust disease claims falling within the ambit of Ohio Rev. Code Ann. § 2307.84 *et seq.* See October 21, 2016 *Order Regarding Defendants’ Motion to Dismiss* (Transaction ID 59731242) ¶¶ 43-44.

4. Pursuant to Ohio Rev. Code Ann. § 2307.84(N), a “mixed dust disease claim” means:

any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust. “Mixed dust disease claim” includes a claim made by or on behalf of any person who has been exposed to mixed dust, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease of other injury, costs of medical monitoring or surveillance, or any other effects on the person’s health that are caused by the person’s exposure to mixed dust.

Ohio Rev. Code Ann. § 2307.84(N) (emphasis supplied).

5. The Ohio mixed dust statute defines a tort action as, “a civil action for damages for injury, death or loss to person.” Ohio Rev. Code Ann. § 2307.84(E) A tort action, includes, “a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code.” *Id.*

6. Ohio Rev. Code Ann. § 2307.901 sets forth the plaintiff’s burden of proof in tort actions and the factors considered:

(A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to silica or mixed dust as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was *a substantial factor* in causing the injury or loss on which the cause of action is based.

(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to silica or mixed dust has the burden of proving that the *plaintiff was exposed to* silica or *mixed dust* that was *manufactured, supplied, installed, or used by the defendant in the action and* that the *plaintiff’s exposure to the defendant’s silica or mixed dust was a substantial factor in causing the plaintiff’s injury or loss.* In determining whether exposure to a particular exposure to a particular defendant’s silica or mixed dust was a substantial factor

in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

- (1) The manner in which the plaintiff was exposed to *the defendant's* silica or mixed dust;
- (2) The proximity of *the defendant's* silica or mixed dust to the plaintiff when the exposure to *the defendant's* silica or mixed dust occurred;
- (3) The frequency and length of the plaintiff's exposure to *the defendant's* silica or mixed dust;
- (4) Any factors that mitigated or enhanced the plaintiff's exposure to silica or mixed dust.

Ohio Rev. Code Ann. § 2307.901(A)-(B) (emphasis supplied)

7. A defendant may be liable for mixed dust disease claims if the defendant qualifies as a "premises owner" under Ohio Rev. Code Ann. § 2307.89, which applies, "to all tort actions for silicosis or mixed dust disease claims brought against a premises owner to recover damages or other relief for exposure to silica or mixed dust on the premises owner's property." Ohio Rev. Code Ann. § 2307.89.

8. A shareholder may also be personally liable for mixed dust disease claims under the doctrine of piercing the corporate veil, if the person seeking to pierce the corporate veil demonstrates: (1) the shareholder exerted such control over the covered entity that it had no separate mind, will or existence of its own; (2) the shareholder caused the covered entity to be used for purpose of perpetrating an actual fraud on the person seeking to pierce the corporate veil primarily for the benefit of the shareholder; and (3) the person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of the control described in (A)(1) and the fraud described in (A)(2). Ohio Rev. Code Ann. § 2307.902(A)(1)-(3)

8. The meaning of Ohio's Mixed Dust Statute is clear and unambiguous: unless the corporate veil can be pierced to establish shareholder liability, mixed dust disease claims may be

brought only against defendants who were either: (1) manufacturing, supplying, installing, or using mixed dust; or (2) owners of premises where mixed dust was present. Ohio Rev. Code Ann. §§ 2307.902; 2307.901; 2307.89.

9. Plaintiffs make no allegations against Mr. Workman in any capacity other than as an employee of the other Defendants, and the other Defendants do not dispute that any act or omission alleged by Plaintiffs against Mr. Workman in the Amended Complaint was within the scope of his employment.

10. First, Plaintiffs do not allege that Defendant Doug Workman did not “manufacture, supply, install, or use” the mixed dust to which Plaintiffs claim exposure in his individual capacity. All of Plaintiffs’ allegations against Defendant Doug Workman are in his capacity as an employee of the other Defendants. Second, Defendant Doug Workman is not a premises owner, nor do Plaintiffs allege that he is a premises owner. Third, Plaintiffs have made no allegation that Defendant Doug Workman is a shareholder, or that the corporate veil should be pierced in order to subject Mr. Workman to individual liability for their claims under a shareholder liability theory. *See generally* Am. Compl.

11. Finally, the Presiding Judges reject Plaintiffs’ argument that West Virginia public policy prevents the entry of judgment in favor of Mr. Workman, as a similar argument has already been rejected by the Supreme Court of Appeals. *See State ex rel. American Electric Power Co., Inc. v. Swope*, 239 W.Va. 470, 801 S.E.2d 485 (2017).

Conclusion

The Presiding Judges have concluded that: (1) Plaintiffs sued Defendant Doug Workman in his individual capacity, but that all of Plaintiffs’ allegations against Mr. Workman are in his capacity as an employee of the other Defendants; (2) Plaintiffs do not allege Mr. Workman is a

premises owner; and (3) Plaintiffs do not allege that Mr. Workman is a shareholder or that the corporate veil should be pierced to establish shareholder liability. Viewing all of the facts alleged in the Amended Complaint in a light most favorable to the Plaintiffs, the Panel **GRANTS** Workman's Motion for Judgment on the Pleadings because it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claims against Mr. Workman.

It is so ORDERED.

ENTER: November 9, 2017.

/s/ Derek C. Swope
Lead Presiding Judge
Gavin Landfill Litigation