

16-0166

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: PERSONAL INJURY ASBESTOS LITIGATION

CIVIL ACTION NO. 03-C-9600

OCTOBER 2015 TRIAL GROUP

THIS DOCUMENT APPLIES TO:

SHARON HUDSON, Executrix of the
Estate of THEODORE RAY HUDSON,
Deceased, Spouse

CIVIL ACTION NO. 12-C-636 KAN

v.

A.O. SMITH CORPORATION, et al.

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order addresses the motion for summary judgment filed by the Defendant Edlon, Inc., the successor-in-interest to Process Supply. On June 14, 2010, Theodore Ray Hudson died from mesothelioma. After the court orally denied Edlon's motion for summary judgment shortly before the start of the trial set in this case that involved not only the death of Theodore Ray Hudson but also approximately 19 other mesothelioma and lung cancer injuries and, in most cases, deaths caused by exposure to asbestos fibers. The court was asked to continue this defendant's trial and make findings of fact and conclusions of law to support its decision to deny Edlon's motion to give Eldon's counsel the opportunity to appeal the court's decision.

Because this is not the typical issue addressed in a motion for summary judgment and because of the absence of any clear West Virginia authority on the issue presented to the court, Eldon's request was granted and the court continued

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the trial. The analysis by the court is set forth in the following findings of fact and conclusions of law.

To get right to the point the Court was either right or wrong in denying Edlon's summary judgment motion when the court concluded that the relationship between John Elliott, Cyclops Industries, Inc. ("Cyclops"), and Process Supply, Inc. ("Process Supply") was so interwoven that it created a duty on Process Supply to warn Mr. Hudson, an employee of Cyclops, of the hazards associated with the handling of blue asbestos.

The court determined that Mr. Elliott's knowledge, combined with his crisscrossed responsibility with Cyclops and Process Supply, conjoined with his duty to investigate and to know how asbestos was being used in the construction of Cyclops glasses, and OSHA guidelines, established upon him, as an agent of Process Supply, a duty to warn employees at Cyclops about the dangers of working with asbestos.

Edlon is the defendant in this case because on February 3, 1997, Edlon, Inc. merged with Process Supply. Then, in 2005, Edlon sold Process Supply to Crane, but Edlon assumed, with limited exceptions for specific legal matters pending at the time, all liabilities of Process Supply. The transaction from Edlon to Crane was an asset only purchase, so the liabilities for Process Supply stayed with Edlon. This liability does not appear to be a contested issue. See *Billmyer Lumber Co. v. Merchants' Coal Co.*, 66 W.Va. 696, 66 S.E. 1073 (1910) and West Virginia Code §31D-11-107.

FINDINGS OF FACT

The following facts that detail the relationship among Cyclops, Process Supply and John Elliott are as contended by the plaintiff, but are, for the most part, when presented as facts, not in dispute:

1. Theodore Ray Hudson ("Mr. Hudson") died from mesothelioma on June 14, 2010. Mr. Hudson worked at Cyclops from August 1972, when he was about 22 years old, where he was exposed to asbestos until at least 1983. Plaintiff's contention in this case is that Mr. Hudson was exposed to asbestos-containing materials while working for Cyclops from 1972 until 1983.
2. Cyclops manufactured sight glasses to be sold to customers. In the Cyclops' website it states:

During the late 40's, early 50's several localized plant explosions were experienced by a major chemical facility were directly attributed to the failure of conventional or sandwich type sight glasses. As a result an engineer, Gene LeRoy was given the task of developing a sight glass that when broken, would maintain its integrity and not rupture or blow out, even while under extreme pressure at high temperature. After much trial and error, he hit upon the idea of peripherally sealing the lens assembly instead of vertically clamping and sealing the sight glass against the top and bottom lens gaskets.

3. In a workers' compensation proceeding Mr. Hudson testified that he worked with African Blue Asbestos Felt at Cyclops, which he used to make sight glasses. Safety sight glass was manufactured at Cyclops pursuant to purchase orders from various customers and was used to allow visual observation of the contents of processing tanks, pipelines, and related

equipment at the Kanawha Valley chemical companies. The evidence at trial will be that Mr. Hudson was not provided with any protective mask or respirator while cutting the African Blue Felt that was used to make the glasses. This process, that involved Mr. Hudson's use of a handsaw to cut asbestos material, produced dust, which contributed to his development of the mesothelioma that eventually took his life.

4. It is the belief of plaintiff's counsel that Mr. Hudson never had any significant asbestos employment exposure prior to or subsequent to his work at Cyclops. Mr. Hudson did not work for others during the time that he worked for Cyclops. Mr. Hudson only left his job at Cyclops in 2008.
5. Cyclops, from its inception on June 31, 1959, was owned by John Elliott, Gene LeRoy, and others (the number of other owners is unknown to the court). When Mr. Hudson worked at Cyclops John Elliott was a shareholder and member of Cyclops' Board of Directors and was also its President from 1976 to 1983. Cyclops shared space with Process Supply, until approximately 1971 when Cyclops moved into its present location in South Charleston, West Virginia.
6. Process Supply, Inc. ("Process Supply") was incorporated on February 27, 1958, by John Elliott. During the period of Mr. Hudson's employment at Cyclops, Process Supply, a company owned by John Elliott, was a sales distributor for various manufacturers. Process Supply was incorporated not just to sell equipment and supplies but also **"To render technical and**

engineering services and advisory and consultative services of a technical nature to industrial and commercial users of all types of instruments, machinery and supplies." Process Supply Incorporated, Agreement of Incorporation, February 27, 1958.

7. In 1976, approximately four years after Mr. Hudson went to work for Cyclops, Cyclops retained Process Supply as its general sales agent. John Elliott, from 1972 to 1983, was stockholder in both Process Supply and a sales representative for Cyclops through Process Supply.
8. In 1977, Cyclops designated Process Supply as its sales agent in West Virginia and portions of Ohio, Kentucky, Tennessee, and Pennsylvania and in at least eight (8) other states to be its sales agents in those states and regions of the country. While a stockholder in Cyclops, Mr. Elliott contracted to distribute its products, and in 1972, was specifically paid to investigate the use of sight glasses in industry, and the OSHA implications.
9. The purchase orders from various customers regularly stated that the products were manufactured according to OSHA regulations. Many of these purchase orders for Cyclops Products were addressed to Process Supply. Mr. Elliott submitted invoices to Cyclops for marketing services on his own and Process Supply letterhead. Those invoices also show that Process Supply received orders "in care of" for Cyclops. Sales commissions were made payable by Cyclops to either Mr. Elliott, personally, or Process Supply, at Mr. Elliott's direction. Ledger pages obtained in discovery also show that on

various occasions that Process Supply sold "shop supplies" to Cyclops. One such invoice, dated December 28, 1972, is for research and sales survey for sight glass use in industry and "also OSHA." The purchase orders from various customers regularly stated that the products were manufactured according to OSHA regulations.

10. Although Mr. Elliott was a shareholder of Cyclops, there is no evidence of record that he was involved in the manufacturing process--but that is not an issue in the court's decision on the motion before it. What is an issue is that Plaintiff has circumstantial evidence that Mr. Elliott knew or should have known about the hazards of asbestos. Mr. Elliott knew or should have known that exposure to free crocidolite asbestos fiber is associated with mesothelioma.
11. This knowledge that Mr. Elliott had or should have had is based upon Plaintiff's evidence that OSHA may have inspected the Cyclops facility in 1972, and because of Mr. Elliott's position at both Cyclops and Process Supply, he had a responsibility to know the OSHA regulations. In addition to that argument Plaintiff also assert that there is evidence that Process Supply knew or should have known about the asbestos hazards because it was a distributor of asbestos-containing products during the time of Mr. Hudson's employment sense Process Supply sold asbestos filters to Union Carbide on multiple occasions.
12. Taken together, there exist issues of material fact concerning whether

Process Supply itself, as well as by and through Mr. Elliott, knew or should have known of the hazards associated with the use of crocidolite asbestos fibers released by cutting gasket material. If Process Supply had that knowledge could it--considering its knowledge and connection with Cyclops--stand by and do nothing while Mr. Hudson and others working at Cyclops were risking their lives cutting gasket material that was releasing crocidolite asbestos fibers in the air around them that could--and would-- kill Mr. Hudson.

13. Obviously, by denying Edlon's motion for summary judgment, it is the opinion of this court that they did have a duty to warn Cyclops and its employees of the dangers of released asbestos fibers.

To summarize the critical facts behind the decision to deny the summary judgment motion are as follows:

- The relationship between Process Supply and Cyclops was long standing, extending from the formation of Cyclops, when it actually shared space with Process Supply, until at least 1983.
- Mr. Elliott, owner of Process Supply, was a shareholder in both companies. At Cyclops, he was paid an officer's salary and was paid a commission on behalf of Process Supply for Cyclops' sales. A strong argument is made by plaintiff's counsel that their evidence is that the two companies did not even attempt to hold themselves out as legally, or even geographically, distinct. For example, purchase orders show

numerous occasions where products were shipped to Cyclops c/o Process Supply, or where orders were shipped to the Process Supply address and ledger pages show many of these purchase orders for Cyclops Products were addressed to Process Supply.

- Mr. Elliott was the owner and Sales Manager for Process Supply while he also acted as an agent for Cyclops. Cyclops invoices refer to Process Supply as its “representative.” Therefore, as an agent for Cyclops, Process Supply may be “subject to liability to a third party harmed by the agent’s tortious conduct.”

CONCLUSIONS OF LAW

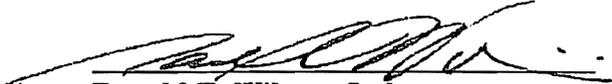
1. Process Supply, Inc., had a duty to warn employees of Cyclops, specifically, Mr. Hudson, of the hazards associated with the handling of Blue Asbestos between 1972 and early 1983.
2. Process Supply, as sales agent, and Mr. Elliott by way of that relationship, had a duty to exercise reasonable care in the sales and marketing of sight glasses. This duty included warning individuals who could foreseeably be injured as a result of Process Supply’s activities about the health effects of handling asbestos.
3. There is evidence indicating that Process Supply knew or should have known about the hazards of asbestos and that exposure to free crocidolite asbestos fibers was associated with mesothelioma.

4. Under West Virginia law, the plaintiffs have shown that there is a genuine issue of material fact for the jury to determine whether Edlon is liable for any actions or omissions attributable to Process Supply, Inc. This includes actions and omissions committed by Mr. Elliott, its agent, and also by Process Supply, Inc., in its capacity as sales and marketing agent for Cyclops. Accordingly, for the foregoing reasons, the Court **DENIES** the Defendant's motion for summary judgment.

Copies of this Order have been transmitted to counsel through File and ServeXpress and email on this date.

IT IS SO ORDERED.

Entered on this 27th day of January, 2016.


Ronald E. Wilson, Judge

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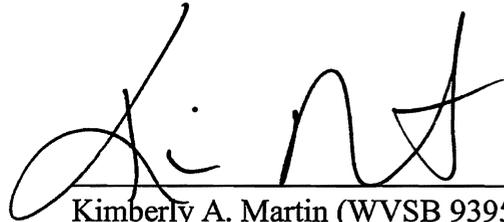
Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 37 of the West Virginia Rules of Appellate Procedure, the undersigned hereby certifies that a copy of the foregoing **APPENDIX RECORD** was served upon counsel of record via U.S. Mail this 22nd day of February, 2016, addressed as follows:

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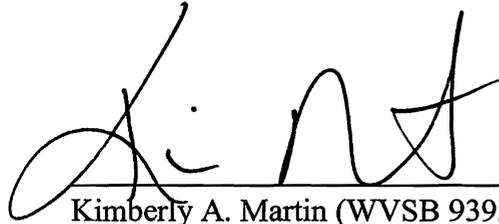
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