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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION

Civil Action No. 11-C-5000000
Hon. John A. Hutchison

THIS DOCUMENT APPLIES TO ALL CASES

JOINT ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT OF INTERSTATE CHEMICAL COMPANY, INC. AND MANUFACTURING DEFENDANTS

Before the Court are the *Motion for Summary Judgment Due to Plaintiffs' Failure to Identify or Disclose a Warnings Expert of Defendant, Interstate Chemical Company, Inc.*, filed on April 30, 2012) (hereinafter "*Interstate's Motion for Summary Judgment*") (Transaction Identification No. 43962125) and *Manufacturing Defendants' Motion for Summary Judgment and Combination Memorandum of Law against Interstate Chemical Co., Inc.*, filed on May 11, 2012 (hereinafter "*Manufacturing Defendants' Motion for Summary Judgment*") (Transaction Identification No. 44210121). At the June 4, 2012 hearing and Status Conference conducted in this matter, the Court advised all counsel in attendance that the Court did not require oral arguments on the above referenced Motions and that the Court would review the filings of the respective parties and issue a ruling no later than June 12, 2012. No objection was received to this announced procedure.

On June 11, 2012, the Court entered a Notice (Transaction Identification No. 44740907) instructing Defendant, Interstate Chemical Company, Inc., (hereinafter "Interstate"), and Manufacturing Defendants[1] to draft a Joint Order granting *Interstate's Motion for Summary Judgment* and *Manufacturing Defendants' Motion for Summary Judgment*. Upon careful

[1] Manufacturing Defendants are as follows: The Dow Chemical Company, ICL-IP America Inc. f/k/a Ameribrom, Inc., INEOS Chlor Americas, Inc., Legacy Vulcan Corp., f/k/a Vulcan Materials Company, Occidental Chemical Corporation, individually and as successor to Diamond Shamrock Chemicals Company, PPG Industries, Inc., Albemarle Corporation, Morre-Tec Industries, Inc. and Univar USA Inc. (hereinafter "Manufacturing Defendants").

consideration of the motions and all responses, replies and related documents, 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 finds and rules as follows:

1. Plaintiffs allege in their operative Complaints that they were exposed to perchloroethylene while working in different float-sink laboratories in West Virginia.[2]

2. Plaintiffs in their operative Complaints contend that Interstate and the Manufacturing Defendants should be strictly liable and liable for negligence for failure to warn and also should be liable for medical monitoring.

I. The Court's Findings Regarding *Interstate's Motion for Summary Judgment.*

3. The Court ordered that each Plaintiff serve a Response to the Plaintiff Fact Sheet in order to disclose information supporting their claims. *See* the Order Regarding Proposed Fact Sheets entered on June 28, 2011 (hereinafter "June 28, 2011 Order") (Transaction Identification No. 38386487) and the Order Approving Fact Sheets entered on August 12, 2011 (hereinafter "August 12, 2011 Order") (Transaction Identification No. 39248578). Plaintiffs in response to Question 9 of the fact sheet were to identify all chemicals to which they allege exposure and, if known, identify the manufacturer and the distributor of each chemical and the basis for the identification. None of the Plaintiffs in their Fact Sheet responses identified Interstate as a distributor of a chemical that they allegedly were exposed to while working at a float-sink laboratory.[3]

4. Plaintiffs were required, pursuant to the Case Management and Scheduling Order, entered on October 18, 2011 (Transaction Identification No. 40423060), to provide expert

[2] While Plaintiffs alleged in their operative Complaints that they were injured as a result of exposure to different chemicals, the Court ruled at the June 4, 2012 hearing and Status Conference that Plaintiffs' claims are limited to perchloroethylene exposure. *See* June 24, 2012 Hearing Transcript at 60.

[3] *See* Exhibit A to Interstate's Motion for Summary Judgment, Declaration of Edward A. Miller, ¶¶ 2-3.

disclosures by December 15, 2011. The Court, upon review of Motions filed by the Defendants, determined that Plaintiffs' expert disclosures were insufficient and required each Plaintiff to provide amended witness disclosures by April 13, 2012. *See* the Order Regarding Expert Witness Disclosures entered on February 13, 2012 (Transaction Identification No. 42471949) at pp. 1-2. On page 5 of this Order, paragraph 5, the Court set forth expert disclosure requirements for failure to warn claims, such as the claims Plaintiffs are asserting against Interstate. Plaintiffs were required for each expert who will address the adequacy of Defendants' warnings to provide "the identity of the Distributor or Manufacturer Defendant who provided the warning, the chemical, substance or product to which the warning relates, … [and] [f]or each warning that is listed, provide the expert's opinion as to … [t]he specific reason(s) why the expert believes the warning is inadequate … ."

5. In response to this expert disclosure Order, Plaintiffs identified Nicholas P. Cheremisinoff, Ph.D. as their warnings expert and submitted a Preliminary Summary of Expert Opinion of Nicholas P. Cheremisinoff, Ph.D., which included a report authored by Dr. Cheremisinoff, (Transaction Identification No. 43654892).[4] The only Defendant identified in Plaintiffs' expert disclosures and report of Dr. Cheremisinoff relating to failure to warn is Defendant, Preiser Scientific, Inc., (hereinafter "Preiser"). Plaintiffs did not indicate in their expert witness disclosures that a supplemental disclosure applicable to Interstate would be

[4] Plaintiffs identified other expert witnesses, including Joseph H. Guth, Ph.D., CIH and provided a Preliminary Summary of Expert Opinion of Joseph H. Guth, Ph.D., CIH, (Transaction Identification No. 4366770). Plaintiffs state in their Response to Interstate's Motion for Summary Judgment, pp. 4-5, that they submitted the expert disclosures and preliminary reports of Dr. Guth and Dr. Cheremisinoff "regarding the nature of perchloroethylene and other float-sink chemicals, plaintiffs' exposure to the chemicals, the state and federal regulations that apply to employers, manufacturers and distributors of those chemicals and of the obligation to provide an adequate warning." Plaintiffs further state that "Dr. Cheremisinoff, in particular, detailed the OSHA regulations that apply to the MSDS labeling requirements for the chemicals, as well as other regulatory requirements. He then addressed how Preiser's business approach, the MSDSs which it provided and its labels failed to comply with those regulations." The Court **FINDS** that regardless of this reference to Dr. Guth in Plaintiffs' Response the only warnings expert Plaintiffs identified and for which they provided a disclosure was Dr. Cheremisinoff.

forthcoming. Plaintiffs did not file a Motion with the Court seeking an enlargement of time to provide an expert disclosure against Interstate. Plaintiffs have not provided any real explanation as to why their expert disclosure did not cover the claims Plaintiffs are asserting against Interstate. Plaintiffs in their response to Interstate's motion simply state this was an oversight.[5] The Court **FINDS** that Plaintiffs failed to follow this Court's Orders and failed to provide the required expert witness disclosure in support of their failure to warn claims against Interstate.

6. A product distributor may potentially be liable for failure to warn of dangers which may be present when the product is used in a particular manner. *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603 (1983), syl. pt. 2. "In ascertaining whether a duty to warn exists, the fundamental inquiry is whether it was reasonably foreseeable that the product would be unreasonably dangerous if distributed without a particular warning." *Wilkinson v. Duff*, 212 W.Va. 725, 730, 575 S.E.2d 335, 340 (2002). The Court **FINDS** that the information relating to the type and substance of warnings that a reasonable distributor should have provided with sales of perchloroethylene involve issues that are not within the common knowledge and experience of a lay juror. *See Watson v. Inco Alloys Int'l, Inc.*, 209 W.Va. 234, 243, 545 S.E.2d 294, 303 (2001)(citations omitted)(In determining that an expert's testimony would have assisted the trier of fact in making a determination as to whether a lift truck is defective, the Court stated: "We believe that questions involving the design of and appropriate warnings for lift trucks are not within the common knowledge and experience of a lay juror.")

7. In order to sustain their claims against Interstate, Plaintiffs had the burden of presenting expert testimony to explain to the jury what dangers may be present when perchloroethylene is used in a particular manner and what specific warnings should have been

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[5] *See* Plaintiffs' Response to Interstate's Motion for Summary Judgment, p. 5, (Transaction Identification No. 44299900).

but were not provided by Interstate. The Court **FINDS** that Plaintiffs are unable to sustain their burden of proof because they failed to comply with this Court's Orders and have failed to timely identify any expert witness and provide the requisite disclosure establishing that the perchloroethylene allegedly distributed by Interstate was unreasonably dangerous if distributed without a particular warning, and what particular warning Interstate failed to provide with the perchloroethylene it allegedly distributed.

8. Plaintiffs argue that Interstate's motion should be denied because additional discovery is necessary to find evidence that may support Plaintiffs' failure to warn claims against Interstate. A request under W. Va. R. Civ. P. 56(f) to conduct additional discovery in order to respond to a summary judgment motion must satisfy the following four (4) requirements:

> It should (1) articulate some plausible basis for the party's belief that specified discoverable material facts likely exist which have not yet become accessible to the movant; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Power Ridge Unit Owners Assoc. v. Highland Properties, Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996), syl. pt. 1. The Court **FINDS** that Plaintiffs have not met their burden and have failed to satisfy the criteria outlined in *Power Ridge*. The Court **FINDS** that Plaintiffs failed to provide sufficient proof that further discovery would fill the gaps in their cases against Interstate. Further, the Court **FINDS** that Plaintiffs failed to offer any explanation as to why they did not previously conduct necessary discovery to put themselves in a position to provide an expert disclosure against Interstate.

9. The Court **FINDS** that Plaintiffs have the burden of proving that Interstate's failure to warn or its provision of inadequate warnings was a proximate cause of Plaintiffs'

claimed injuries. "Proximate cause' must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred. The proximate cause of any injury is the last negligent act contributing to the injury and without which the injury would not have occurred." *Wilkinson*, 212 W.Va. at 731, 575 S.E.2d at 341 (citations omitted).

10. The record before the Court establishes that Interstate sold perchloroethylene to Preiser that Preiser sold to the employers of various Plaintiffs for use in float-sink laboratories. When Preiser purchased chemicals from Interstate or other suppliers or distributors, Preiser never had the product drop shipped directly to the float-sink laboratory. Rather, everything would be sent to the Preiser facility in St. Albans, WV.[6] Interstate's common practice was to provide Material Safety Data Sheets, (hereinafter "MSDS"), with the shipments of the chemicals it sold.[7] Preiser acknowledged that it received MSDSs from Interstate.[8] Plaintiffs contend that at the time of delivery of the bulk shipments a Preiser employee offloaded the perchloroethylene into 55 gallon drums, which were stored outside Preiser's warehouse until purchased by various float-sink laboratories. Plaintiffs also claim that Preiser placed its own warning label on every drum of perchloroethylene that it sold.[9] Plaintiffs' warnings expert, Dr. Cheremisinoff, criticizes on pages 33-42 of his report the sufficiency of Preiser's product labels as well as Preiser's failure

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6 *See* Depo. Christopher Cline, pp. 203-204, (Exhibit 1 to Declaration of Edward A. Miller, Esquire, Exhibit A to Interstate's Motion for Summary Judgment).

7 *See* Fact Sheet for Distributor Defendants Disclosure of Interstate Chemical Company, Inc., Exhibit B to the Affidavit of William A. Walsh; Responses to Defendant PPG Industries, Inc.'s First Combined Request for Admission, Interrogatories and Request for Production of Documents and Things to Interstate Chemical Co., Inc. Exhibit C to the Affidavit of William A. Walsh, (Transaction Identification No. 44300707).

8 *See* Depo. A. Preiser, p. 71; Depo. C. Cline, pp. 144-146, (Exhibits 1 and 2 to Declaration of Edward A. Miller, Esquire, Exhibit A to Interstate's Motion for Summary Judgment).

9 *See* Plaintiffs' Memorandum of Law Supporting Their Motion for Partial Summary Judgment on Liability Against Defendant Preiser Scientific Inc. on the Failure to Warn Cause of Action, p. 4, (Transaction Identification No. 39694810).

to ship the product-specific MSDS with the perchloroethylene it sold. However, as previously stated, Dr. Cheremisinoff does not mention Interstate in his report.

11. The record establishes that no party can identify the manufacturer of the perchloroethylene that passed through Interstate and Preiser and was sold to a particular Employer Defendant and which any particular Plaintiff used or to which he or she was allegedly exposed.[10] There is no evidence that any party can identify the specific MSDS that Interstate may have provided to Preiser with any particular sale. Plaintiffs have failed to demonstrate some realistic prospect that Plaintiffs if given the opportunity to conduct additional discovery will obtain facts or evidence that will raise a genuine issue of material fact regarding this issue. The Court **FINDS** that due to this inability to identify the specific MSDS that may have been passed on with a particular sale, Plaintiffs are unable to establish that the product warnings Interstate allegedly provided to Preiser were insufficient.

12. The Court **FINDS** that Plaintiffs are unable to identify the substance of the warnings or product information that Interstate may have provided to Preiser. As a result, Plaintiffs are unable to sustain their burden of proof and establish that any failure of Interstate to provide adequate warnings was that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred.

13. The Court **FINDS** that Plaintiffs failed to discharge their burden under W. Va. R. Civ. P. 56(c) to demonstrate that a legitimate jury question, i.e., a genuine issue of material fact,

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[10] Preiser's corporate designee admitted when he was deposed that Preiser is unable to trace the source of the shipments it made to the various Employer Defendants. Depo. C. Cline, pp. 204-207, (Exhibit 1 to Declaration of Edward A. Miller, Esquire – Exhibit A to Interstate's Motion for Summary Judgment). Plaintiffs' counsel also conceded to the Court that Plaintiffs are unable to identify the manufacturers of the perchloroethylene that Preiser sold to the Employer Defendants and due to this lack of evidence the only way Plaintiffs could potentially prevail on a claim against the Manufacturing Defendants is if the Court adopted a market share theory of liability. *See* Transcript of January 9, 2012 Hearing, p. 169.

is present. See *Jividen v. Kovachs*, 194 W.Va. 705, 461 S.E. 2d 451 (1995), syl. pt. 1. "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one-half of a trial-worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial-worthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." *Id.* at syl. pt. 5. "A non-moving party cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Brady v. Deals on Wheels, Inc.*, 208 W.Va. 636, 542 S.E. 2d 457, 462 (2000) (citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)). Plaintiffs have failed to offer any proof that Interstate failed to provide sufficient warnings with the perchloroethylene that it sold to Preiser and that this failure was a proximate cause of their claimed injuries.

WHEREFORE, it is **ADJUDGED** and **ORDERED** that the *Motion for Summary Judgment Due to Plaintiffs' Failure to Identify or Disclose a Warnings Expert of Defendant, Interstate Chemical Company, Inc.* is **GRANTED** in its entirety and that all claims asserted against Defendant, Interstate Chemical Company, Inc., including cross claims, are **DISMISSED WITH PREJUDICE.**

The Court hereby notes Plaintiffs' objections and exceptions to the Court's ruling.

II. <u>The Court's Findings Regarding *Manufacturing Defendants' Motion for Summary Judgment.*</u>

14. By Order dated February 23, 2012, the Court ruled as a matter of law that in the absence of product identification Plaintiffs may not proceed on a market-share theory of liability against Manufacturing Defendants. *See* the February 23, 2012 Order (Transaction Identification No. 42676045) at 1-2.

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15. Thereafter, Plaintiffs voluntarily dismissed their claims against Manufacturing Defendants with prejudice.[11] Employer Defendants and Distributor Defendants, Preiser and Primachem, LLC (hereinafter "Primachem"), likewise dismissed their cross-claims and third-party claims against Manufacturing Defendants. [12] Interstate continued to maintain its cross-claims for contribution or implied indemnity against Manufacturing Defendants, which was asserted via Stipulation (Transaction Identification No. 43134047) between the parties.

16. In order to maintain a claim in a products liability action, the party must "identify the manufacturer or supplier responsible for placing the injury-causing product into the stream of commerce; this is the traditional requirement that plaintiff establish causation." 63 Am Jur 2d Products Liability § 75. In order to prevail on its cross-claims, Interstate must successfully link Manufacturing Defendants' perchloroethylene to Plaintiffs' alleged exposure. *See generally, Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979); and *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983). Interstate admitted in its *Response to Manufacturing Defendants' Motion for Summary Judgment and Combination Memorandum of Law Against Interstate Chemical Co., Inc.* (hereinafter "*Interstate's Response*") the dispositive fact that neither it nor any other party in this litigation can make product identification. *See Interstate's Response* at 3-4.

17. Interstate acted as a middleman in the chain of distribution, purchasing chemicals from manufacturers and selling them to Preiser. *See* Interstate's *Memorandum of Law in Support*

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[11] *See* the Agreed Order of Dismissal of Plaintiffs' Claims Against Certain Manufacturing Defendants (Transaction Identification No. 43702750), entered on April 16, 2012.

[12] *See* the Agreed Order of Dismissal of Employer Defendants' Cross-Claims Against Certain Manufacturing Defendants (Transaction Identification No. 43930771), entered on April 27, 2012, and the Agreed Order of Dismissal of Certain Distributor Defendants' Cross-Claims and Third-Party Claims Against Manufacturing Defendants (Transaction Identification No. 44599284), entered on June 3, 2012.

of Motion for Summary Judgment Due to Plaintiffs' Failure to Identify or Disclose a Warnings Expert, filed on April 27, 2012 (Transaction Identification No. 43948358) at 2.

18. In response to Fact Sheet for Employer Defendants Question No. 2(e), which requested that Employer Defendants identify "(t)he manufacturers or distributors from which Defendant purchased PCE and other Float-Sink Chemicals which Defendant has listed above[,]" none of the Employer Defendants identified any Manufacturing Defendant as the manufacturer of the perchloroethylene used in their float-sink labs. *See* Exhibit D to *Manufacturing Defendants' Motion for Summary Judgment* at No. 2(e).

19. Preiser's actions when distributing perchloroethylene to Employer Defendants makes product identification impossible. *See* in general paragraphs 10-11 of this Order; *Manufacturing Defendants' Motion for Summary Judgment*. Preiser made sales of perchloroethylene to customers both within and outside of West Virginia. *See* Exhibit F to *Manufacturing Defendants' Motion for Summary Judgment*, pp. 310-311. Representatives of Preiser have admitted that its practice, prior to 2002, was to purchase perchloroethylene in bulk and off-load it directly from delivery trucks into 55-gallon drums on which Preiser placed only its own label. *See* Exhibit G to *Manufacturing Defendants' Motion for Summary Judgment*, pp. 52-53. Preiser's practice, when shipping the perchloroethylene to its customers, was to include with the shipment whichever MSDS was stored in a file cabinet in Preiser's warehouse, rather than matching a manufacturer's MSDS with that same manufacturer's perchloroethylene. *See id.*, pp. 223-225, 244-245; *see also* Exhibit H to *Manufacturing Defendants' Motion for Summary Judgment*, p. 70. Preiser did not keep records that would show the identity of the manufacturer of the perchloroethylene that was ultimately shipped to a customer in any particular distribution, Preiser's available purchase and sales records only go back to 1994, and

Preiser did not share its customer list with manufacturers or suppliers. *See* Exhibit G to *Manufacturing Defendants' Motion for Summary Judgment*, p. 226; Exhibit I to *Manufacturing Defendants' Motion for Summary Judgment*; Exhibit F to *Manufacturing Defendants' Motion for Summary Judgment*, pp. 259-260, 290-293. Accordingly, there is no evidence that Preiser, or any other party to this litigation, is capable of determining which perchloroethylene manufacturer's product it shipped to which customer. Interstate concedes this fact. *See Interstate's Response* at 3.

20. The Court **FINDS** that Interstate's cross-claims for indemnification and contribution fail because it cannot prove the critical element of product identification. Without the essential element of product identification, Manufacturing Defendants are entitled to judgment as to Interstate's cross-claims as a matter of law.

21. Furthermore, it is axiomatic that Interstate can only assert claims for contribution or implied indemnity against Manufacturing Defendants if Interstate was found to be liable to Plaintiffs. The Court **FINDS** that Interstate cannot have any cross-claims for contribution or implied indemnity against Manufacturing Defendants following the Court's finding that Plaintiffs are unable to sustain their claims against Interstate. *See supra.*

WHEREFORE, it is accordingly **ADJUDGED** and **ORDERED** that *Manufacturing Defendants' Motion for Summary Judgment and Combination Memorandum of Law Against Interstate Chemical Co., Inc.* is **GRANTED** in its entirety and that Interstate's cross-claims for indemnification and contribution against Manufacturing Defendants are **DISMISSED WITH PREJUDICE**.

The Court hereby notes Interstate's objections and exceptions to the Court's ruling.

Granted Judge John A Hutchison Jul 27, 2012

The Circuit Clerk is ordered to provide a certified copy of this Order to all counsel of record, any self-represented parties and the Mass Litigation Manager via LexisNexis File & Serve.

It is so **ORDERED**.

ENTERED this _____ day of June, 2012.

Hon. John A. Hutchison
Lead Presiding Judge, Float-Sink Litigation

Granted Judge John A Hutchison Jul 27, 2012

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This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

The Objections of the Plaintiffs notwithstanding this order is appropriate. The objections are preserved.
John A. Hutchison

/s/ Judge John A Hutchison