



**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:

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| 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<br>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                 |

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| 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