SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET
Suite 10400
WILMINGTON, DE 19801
PHONE: (302) 255-0656
FASCIMILE: (302) 255-2274

Date Submitted: April 19, 2007
Date Decided: July 12, 2007

Robert Jacobs, Esquire
Jacobs & Crumplar, P.A.
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899

Armand J. Della Porta, Jr., Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
1220 N. Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899-8888

Re: ***Roslyn S. McFaul v. Anchor Packing Company, et al.***
C.A. No. 05C-10-178 ASB
Upon consideration of Defendant Ransom & Randolph's Motion for Summary Judgment. **DENIED.**

Dear Counsel:

As you know, Defendant, Ransom & Randolph ("Ransom"), has moved for summary judgment on the ground that it is immune from suit in tort as an employer of the plaintiff's decedent, Joseph McFaul, under Delaware's worker's compensation immunity statute.[1] Specifically, Ransom alleges that Mr. McFaul was an employee

[1] *See* 19 *Del. C.* § 2304 ("Section 2304").

of a predecessor of Ransom's parent corporation, Dentsply International, Inc. ("Dentsply"), for the time periods before and after he allegedly was exposed to asbestos products manufactured or distributed by Ransom. According to Ransom, the affiliation between Ransom and Dentsply during the relevant time periods was such that Ransom should be entitled to avail itself of Dentsply's worker's compensation immunity. After careful consideration of the record and applicable law, the Court concludes that it is unable to engage in a meaningful analysis of the issues because the record is not fully developed. Accordingly, Ransom's motion for summary judgment must be **DENIED**.

Plaintiff, Roslyn S. McFaul, alleges that her husband developed and eventually died from mesothelioma and other asbestos-related diseases as a result of his alleged exposure to asbestos-containing products manufactured and/or distributed by several entities, including Ransom.[2] Mrs. McFaul claims that Mr. McFaul was exposed to these products while he was a manager at E.D. Caulk Company in Milford, Delaware from 1956 or 1957 to 1983.[3] E.D. Caulk Company is now known as Dentsply. Mr. McFaul was diagnosed with mesothelioma in January 2004, and passed away from

[2] T.I. 7134138, Complaint.

[3] *Id.* ¶ 1.

the disease on April 13, 2004.[4] Ransom was not affiliated with Dentsply at the time Mr. McFaul began to work at E.D. Caulk Company in the late 1950's. Dentsply acquired Ransom's assets and certain designated liabilities in 1964.[5] The Agreement and Plan of Reorganization between Ransom and Dentsply states:

> Conveyance and Transfer of Assets . . . Dentsply agrees to assume all the debts, liabilities and obligations of [Ransom] as reflected in Schedule I as subsequently changed in the normal course of business, or as reflected in Exhibits 5 and 6 to the Agreement, existing at the time of closing hereunder. Dentsply will also assume any debts, liabilities and obligations of [Ransom] which are not reflected in Schedule I or Exhibits 5 and 6, whether or not incurred in the normal course of business, but only to the extent that such debts, liabilities and obligations shall not exceed $25,000 in the aggregate; and [Ransom] will indemnify and hold Dentsply harmless against any such debts, obligations or liabilities in excess of such amount.[6]

Schedule I and Exhibits 5 and 6 have not been provided to the Court by either party.

From 1964 through 1997, Ransom operated as a division of Dentsply. On April 29, 1997, Ransom was separately incorporated as a wholly owned subsidiary of Dentsply. Mrs. McFaul maintains that her husband had no connection to Ransom during his tenure at Dentsply. Ransom did not hire or pay Mr. McFaul or in any way direct his work with Caulk/Dentsply. According to Mrs. McFaul, her husband's only

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[4] *Id.* ¶ 2(a).

[5] T.I. 11234108, Ransom Mtn. To Dismiss, Ex. C.

[6] Ransom & Dentsply Agreement ¶ 1 ("Agreement")(provided to the Court at oral argument on November 22, 2006)(not docketed on e-file).

contact with Ransom was his exposure to Ransom's asbestos-containing products.

Dentsply has moved to dismiss Mrs. McFaul's claim against Ransom pursuant to Superior Court Civil Rule 12(b)(6) claiming that Mrs. McFaul has failed to state a claim upon which relief can be granted.[7] Dentsply argues that Ransom is immune from suit under the worker's compensation exclusivity provision found in Section 2304 because Mr. McFaul, for purposes of worker's compensation immunity, was a Dentsply employee. According to Dentsply, Ransom is protected under the umbrella of Dentsply's immunity because Ransom was a division of Dentsply at the time of Mr. McFaul's alleged last injurious exposure to Ransom's asbestos-containing products in 1983.

Mrs. McFaul responds that Ransom is not entitled to the same worker's compensation protection as Dentsply.[8] The two companies are separate corporations and Ransom was never Mr. McFaul's employer. Mrs. McFaul further argues that the Court should look at Ransom's corporate identity on the date Mr. McFaul discovered he was injured in January 2004. Ransom was a wholly owned, yet legally separate subsidiary of Dentsply in 2004 and is, therefore, not entitled to avail itself of Dentsply's immunity under Section 2304.

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[7] T.I. 11234108.

[8] T.I. 11618503, Pl. Answering Br.

In order to determine whether Ransom is entitled to immunity under Section 2304, the Court must evaluate, *inter alia*, whether, and to what extent, Dentsply assumed Ransom's liabilities for the periods both before and after the acquisition in 1964; or, in the alternative, whether Ransom and Dentsply should be recognized as separate entities after 1964 within the context of Section 2304. At the conclusion of oral argument on November 22, 2006, the Court deferred ruling on the motion to dismiss[9] to allow the parties to expand the record because it could not determine the relationship between Ransom and Dentsply on the state of the record at that time.[10] Since the hearing, Ransom has elected "not to submit anything additional but rely upon [its] original Motion and Reply Brief."[11] Mrs. McFaul, likewise, has declined to provide additional evidence.[12] Therefore, the Court is left with the same record as existed on November 22, 2006, when the Court advised the parties that more

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[9] The Court noted that the motion had been converted into a motion for summary judgment because the parties had attached matters outside of the pleadings in both the motion and response. T.I. 15392030, *McFaul v. Anchor Packing Co., et* al., C.A. No. 05C-10-178-ASB, Slights, J., Hr'g Tr. 26:15-28:18 (Del. Super. Ct. Nov. 22, 2006). *See* SUPER. CT. CIV. R. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading 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.").

[10] *See* T.I. 15393897; T.I. 13702683.

[11] T.I. 13702683.

[12] McFaul ltr., Jan. 3, 2007.

information was needed to decide this motion.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist.[13] Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[14] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to apply the law to the factual record *sub judice*, then summary judgment will not be granted.[15]

The Court is unable to ascertain on this record whether Dentsply assumed Ransom's liability to third parties for injuries resulting from exposure to Ransom's alleged asbestos-containing products. The 1964 agreement, provided to the Court at oral argument, refers to a schedule and two exhibits that list the debts, liabilities, and obligations that Dentsply would not assume by virtue of its acquisition of Ransom.[16]

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[13] *Oliver B. Cannon & Sons, Inc.* v. *Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del Super. Ct. 1973). *See also* SUPER. CT. CIV. R. 56.

[14] *Id.*

[15] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244, at *3 (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more throughly into the facts in order to clarify the application of law to the circumstances.").

[16] Agreement ¶ 1.

The schedule and exhibits were not provided to the Court. The "Conveyance and Transfer of Assets" section of the agreement is silent as to whether Dentsply agreed to assume Ransom's liabilities going forward from the 1964 acquisition.[17] The separate documents that would provide additional and necessary information concerning Dentsply's assumption of Ransom's liabilities are absent from the record. Moreover, Mr. McFaul was not diagnosed with mesothelioma until January 2004. There has been no discovery as to whether Dentsply agreed to assume Ransom's potential liability for Mr. McFaul's unknown, unidentified, and unaccrued liability in 1964.

Even if no agreement between Dentsply and Ransom addressed Ransom's potential liabilities to third parties for products liability, the Court still could not resolve the motion on this record. "Delaware case law generally holds that the separate entity of a corporation is to be recognized in the absence of fraud" within the context of Section 2304.[18] The Court should treat two corporations as distinct entities "for purpose of third party actions" absent "complete economic integration."[19] In this regard, the Court looks to whether the corporations have separate management

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[17] *Id.*

[18] *Sosini v. Delaware Asphalt Products, Inc.*, 1984 LEXIS 880, at *5 (Del. Super. Ct. Dec. 11, 1984)(not available on Westlaw).

[19] *Id.* at *9-10.

systems, separate payrolls, and whether the corporations were held out as separate businesses to evaluate whether the entities should be treated as one entity for purposes of the worker's compensation exclusivity provision.[20]

Even if the Court were to focus on the date of Mr. McFaul's last alleged injurious exposure as a Dentsply employee in 1983 (as urged by Ransom) to determine whether to hold Ransom accountable for plaintiffs' injuries, the record is devoid of any evidence as to the extent of Ransom's economic integration into Dentsply after 1964, whether Ransom maintained its own management system, whether Dentsply and Ransom's employees were on the same payroll, and whether Ransom and Dentsply continued to hold themselves out as separate entities after the acquisition. The Court is, therefore, unable to determine whether Ransom maintained its own corporate identity after the 1964 acquisition.

Ransom has not sustained its initial burden to demonstrate that the undisputed facts support its legal claims that Ransom is entitled to immunity under Section 2304. Accordingly, the Court finds that "it is desirable to inquire more throughly into the facts in order to clarify the application of law to the circumstances" of this case.[21] Ransom's motion for summary judgment is **DENIED.**

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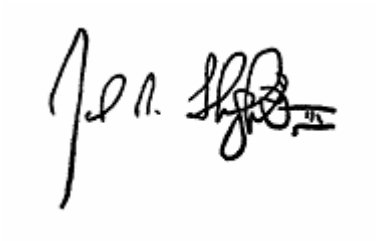
[20] *Id.* ("a substantial factor in the findings was the overlap or lack of distinction of the employee on the payrolls of the businesses involved").

[21] *Cook*, 1990 WL 35244, at *3 (citing *Ebersole*, 180 A.2d at 467).

IT IS SO ORDERED.

Very truly yours,



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