IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PATRICIA PRICE and BOBBY PRICE, her husband,	)	
Plaintiffs,	)	C.A. No. 09C-06-084 ASB
v.	)	
ANCHOR PACKING CO., et al.,	)	
Defendants.	)	

On Plaintiffs' Exception to the Master's Report/Opinion of August 25, 2009

REPORT OF SPECIAL MASTER AFFIRMED AND ACCEPTED

Submitted: September 9, 2009
Decided: November 20, 2009

MEMORANDUM OPINION

Robert Jacobs, Esquire, Jacobs & Crumplar, P.A., Wilmington, Delaware, Attorneys for Plaintiff

John C. Phillips, Jr., Esquire, Phillips, Goldman & Spence, P.A., Wilmington, Delaware, Attorneys for Defendant E. I. du Pont de Nemours and Company

JOHNSTON, J.

At the conclusion of oral argument in unrelated asbestos litigation, the Court considered the Delaware Supreme Court's decision in *Reidel v. ICI Americas, Inc.,* 968 A.2d 17 (Del. 2009). Ruling from the bench on June 11, 2009, this Court found:

> [T]he official ruling of the [Supreme] Court does find that the Superior Court should be affirmed and the finding granting ICI's motion for summary judgment should be affirmed. The very precise and narrow ruling is on the procedural ground of failure to raise the claim [of malfeasance] below.
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> Now, if that were the only reason, or the only reasoning, the Court used in achieving its decision, it could have been by order, and it could have been in two pages. But, instead, the Court goes on in some detail to talk about the duties of the parties and the legal principles involved.
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> So, therefore, although I find that the Supreme Court did not decide the precise issue that's before me today, the decision is instructive as to the way in which the Court should analyze this issue.
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> So the first thing I'm looking at that's instructive is the Court's discussion of Section 314, and also of Comment A to Section 302 of the Second Restatement. Particularly, the Court states that Section 314 outlines the general rule that the fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not itself impose upon him a duty to take such action. And this is in the context of discussing the distinction between act and omission or misfeasance and nonfeasance.
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> So then the Court takes a look at those principles and compares them to the facts as alleged. The facts include the allegations that ICI was negligent in training, supervising, and controlling (and that controlling included laundry facilities and so on). The Court found

that the allegations supported a theory of misfeasance in relationship to Mr. Riedel and nonfeasance in relationship to Mrs. Riedel, but it did not find that those allegations constituted a claim of misfeasance with regard to Mrs. Riedel.

Again, that finding was not necessary to the Court's conclusion, but because the Supreme Court spent so much time, and effort, and care in going through this analysis, I must be informed by it in my decision.

I do not read *Riedel* as narrowly as plaintiffs do. The specific acts of misfeasance alleged by the plaintiff in *Riedel* result in a distinction without a difference for purposes of this case. I find that as the allegations of misfeasance are recharacterized, as described during argument by the plaintiff [in this case], there is no change in substance of the allegations, only in semantics.

Even if the Court were to permit an amendment to the complaint to change the characterization of the defendant's conduct in this complaint, the plaintiff still would fail to establish a *prima facie* case of misfeasance which would subject the landowner to liability for proximately causing injury to a household or take-home plaintiff. Therefore, under these circumstances I am granting the motion for summary judgment as to the landowner plaintiffs.

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For purposes of this analysis, I have asked the plaintiffs to put forward their best case. And I understand that the state of the record is hotly disputed. So for purposes of this instant analysis, I'm going to assume the facts in the light most favorable to the plaintiff, who is the nonmoving party. And I'm going to assume that the record would reflect that Amoco used a substantial amount of asbestos in its manufacturing process.

The defendants have argued that there is no record of a general or an environmental release. If, indeed, the Court were to permit this case

to go forward on an amendment which would allege a general or environmental release, which appears to be at least part of what plaintiffs argue, more discovery would be necessary.

Plaintiffs' best case alleges household and take-home exposure as a result of alleged general or environmental release, not injury directly resulting from any environmental or general release.

So when I look at these particular cases, the injured parties' spouses were essentially independent contractors on the Amoco site. So I view that as legally equivalent to being in the same position as the employees of Amoco for purposes of this particular analysis.

Now, when I asked the plaintiffs what is it that Amoco should have done that it failed to do, the response was: not use asbestos, number one; number two, not design the plant so as to allow the asbestos to be carried from the manufacturing facility into the air so that persons outside the plaint could carry it.

So the real difference between the Amoco case and the cases I just decided is in the way in which the injured persons' spouses came into contact with the asbestos fibers. And the plaintiffs would like the Court to draw a distinction – that because Amoco was allegedly more culpable in releasing those fibers, that culpability should then be used as a basis for finding misfeasance with regard to the household or take-home plaintiffs.

I find that Amoco's actions or failures to act, however characterized, are not substantially or substantively different from the acts or omissions of the landowner defendants in the other cases that I just decided so as to amount to misfeasance. This is the line that this Court chooses to draw. I'm basing that line on my understanding of the Supreme Court's *Riedel* decision.

I do not think that this ruling creates an immunity for landowners with regard to household or take-home plaintiffs. Rather, I find that something more is needed. Something more must be demonstrated to

> establish a *prima facie* case of misfeasance, vis-a-vis household or take-home plaintiffs. Therefore, these motions for summary judgment are granted.

In this case, plaintiffs moved to amend the complaint to state a claim of household exposure against DuPont based on a theory of misfeasance. DuPont argued that the motion should be denied on the grounds of futility, citing *Reidel* and the Superior Court's June 11, 2009 bench ruling applying *Reidel.*

The Special Master considered the motion. In his report, the Special Master summarized the proposed amendments:

> Second, plaintiffs seek to revise the language of Count II of their complaint to state a claim of household exposure against DuPont based on a theory of misfeasance. Plaintiffs seek to allege the plaintiff Patricia Price was exposed to asbestos as a result of the release by DuPont of asbestos fibers within and outside its Chestnut Run facility, which were brought home by her husband, plaintiff Bobby Price, who worked at the facility from 1957 through 1991. The asbestos fibers allegedly first settled on equipment, walkways, vehicles, and persons within the facility, and escaped beyond it "due to the natural pollution of the surrounding areas by water, wind and similar means of transportation." Mr. Price transported the asbestos fibers home, on his clothes and in his vehicle, where the fibers were "distributed through a laundry facility and home" from Mr. to Mrs. Price. The plaintiffs further allege that DuPont knew or should have know that persons within the Price home would be exposed to these asbestos fibers, and that "it was foreseeable that its employees' families including the employee's wife and children would handle the clothing and/or be within the vehicle which would have been contaminated." Finally, the plaintiffs allege that DuPont's conduct was "affirmative, active misconduct because it was only through the direct orders and desires of the DuPont Company that the fibers were

> released within its plant and ... escaped beyond the plant to pollute not only the surrounding area ... but [also] the homes and businesses of Plaintiff." By these allegations, the amended complaint seeks to reshape what might previously have been viewed as a claim of nonfeasance by DuPont as to Mrs. Price, into a claim of active, affirmative misfeasance by DuPont as to Mrs. Price.
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> The Special Master, concluded:
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> At argument on the pending motion, plaintiffs' counsel candidly acknowledged that he could not say that the allegations in the proposed amended complaint are "the same or are worse than [the] Amoco ... hypothetical." Nor can I find any factual allegation in the amended complaint that is substantially or significantly different from those that the Court held insufficient as a matter of law in its June 11 rulings. As such, plaintiffs' motion to amend its complaint to plead "affirmative, active misconduct" by DuPont must be denied on grounds of futility.

Plaintiffs filed an Exception to the Master's Report/Opinion of August 25, 2009. Defendant DuPont opposes the Exception.

Having reviewed all submissions of the parties *de novo*, the Court concurs with the conclusion and reasoning of the Special Master.

THEREFORE, the Court hereby AFFIRMS AND ACCEPTS the August 25, 2009 Report of the Special Master Appointed in Superior Court Asbestos Litigation.

IT IS SO ORDERED.

/s/ *Mary M Johnston*

The Honorable Mary M. Johnston