

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION)	
)	
LINDA SPEAR, Individually and)	
as Personal Representative of the Estate)	
of PAUL SPEAR,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. N13C-06-169 ASB
)	
AIR & LIQUID SYSTEMS)	
CORPORATION, A/K/A BUFFALO)	
PUMPS, INC., <i>et al.</i> ,)	
Defendants,)	

Submitted: December 4, 2014
Decided: December 4, 2014
Order Issued: December 5, 2014

ORDER STRIKING, *SUA SPONTE*, DEFENDANT BUFFALO PUMPS'
STATUTE OF LIMITATIONS CLAIM

The Court is, unfortunately (and in its view wholly unnecessarily), forced to again address an asbestos litigation defendant's exercise in "sandbagging" during a summary judgment proceeding. One engages this tack by raising new bases for dispositive relief for the first time in a reply pleading. Here Defendant Air & Liquid Systems Corporation ("Buffalo Pumps") does so by belatedly asserting a

claim that the statute of limitations bars Mrs. Spears's claims for relief arising from her husband's death from lung cancer.¹

Buffalo Pumps filed its July 11, 2014 motion for summary judgment raising only a single ground for dispositive relief: product identification/nexus. Mrs. Spears, as expected, filed her timely response thereto addressing only product identification/nexus. Unabashedly, Buffalo Pumps came out swinging in their reply with the argument, front and center,² that the Spears' toxic tort claims are barred by the statute of limitations.³

In that reply, Buffalo Pumps cited as record bases for its statute of limitations claim (1) Decedent Paul Spear's December 2010 symptom complaints and April 2011 medical records, (2) Mr. Spear's October 2, 2013 deposition testimony, and (3) the Spears' Diagnosing Medical Report, which was authored in

¹ See Buffalo Pumps' MSJ Repl. at 1. (Section "I. Plaintiff's Claims Are Barred By The Statute of Limitation").

² See *id.*

³ At oral argument, Buffalo Pumps informed the Court that other Defendants had raised the statute of limitations in their motions for dispositive relief or accompanying memoranda. See, e.g., Defendant Certainteed Corporation's Motion for Summary Judgment and Memorandum of Law in Support Thereof (Trans. No. 55716300) and Defendant General Electric Company's Motion for Summary Judgment (Trans. No. 55712595), *In Re: Asbestos Litigation (Spears)*, Del. Super. Ct., N13C-06-169 ASB (July 11, 2014). That these other parties' motions were filed the same day as Buffalo Pumps' with the statute of limitations claim only highlights this defendant's failure. And those companies' filings are of no aid to Buffalo Pumps in its prayer for summary judgment: each motion and each party must stand on its own. Otherwise, in a case like this where all other parties' summary judgment motions had resolved well short of hearing, the Court would be charged with rooting through the docket and those other parties' now-moot filings to find helpful claims for the errant corporate defendant.

June 2011 and filed in this case on September 30, 2013. In the Court’s view, and Buffalo Pumps has neither in writing nor at oral argument explained otherwise, all of these materials were available to this defendant well before the filing of its July 2014 summary judgment motion.⁴

In turn, the Court hereby strikes Buffalo Pumps’ claim for summary judgment based on the statute of limitations *sua sponte*. The Court finds that Buffalo Pumps has, under well-settled and established Delaware law condemning this litigation practice,⁵ waived that defensive claim here. Moving parties in asbestos litigation have been “warned” time and again that they engage in

⁴ See *supra* note 3.

⁵ See, e.g., *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (noting it is “well-settled” in Delaware that failing to raise a legal issue in the text of an opening brief generally waives that claim for that proceeding). See also *State v. Jackson*, 2014 WL 4407844, at *10 (Del. Super. Ct. Sept. 3, 2014) (“The Supreme Court disdains sandbagging in reply briefs...”); *Solway v. Kent Diagnostic Radiology Assoc., P.A.*, 2014 WL 948318, at *2 (Del. Super. Ct. Feb. 26, 2014) (dismissing later-raised discovery violation allegations that were not in movant’s opening papers); *Paikin v. Vigilant Ins. Co.*, 2013 WL 5488454, at *3 n.12 (Del. Super. Ct. Oct. 1, 2013) (“Plaintiffs’ additional argument . . . was raised for the first time in their reply brief and the Court finds it to be waived, it not having been raised in their initial motion.”); *Mateson Chem. Corp. v. Barton*, 2008 WL 142510, at *1 n.5 (Del. Super. Ct. Jan. 15, 2008) (refusing to address arguments Defendants raised for the first time in their reply pleading); *Zutrau v. Jansing*, 2013 WL 1092817, at *6 (Del. Ch. Mar. 18, 2013) (failure to raise legal issue in opening brief generally constitutes waiver of ability to raise that issue for that matter). Cf. *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) (holding movant “is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion” and “should not hold matters in reserve for reply briefs”).

“sandbagging” litigation practice at their peril.⁶ Perhaps that message has not been clear enough nor the peril understood well enough. No longer.

The Court may hereafter employ any number of measures to address this practice. One, of course, is a finding of waiver of the claim in the summary judgment proceeding itself.⁷ Another may be the sanction of completely barring consideration of the claim during any further proceedings in the case.⁸ Lastly,

⁶ *In re Asbestos Litig., (Lagrone)*, 2007 WL 2410879, at *4 (Del. Super. Ct. Aug. 27, 2007) (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958) (decision by Judge Slights addressing the “sandbagging” practice in asbestos litigation)).

Judge Ableman also addressed this practice in 2011 when the asbestos defendant engaged a belated “last ditch” effort to invoke the Delaware Builders’ Statute as support for its contention that the subject action was barred by the statute of repose. *In re Asbestos Litig., (Montgomery)*, 2011 WL 5395554, at *3 (Del. Super. Ct. Sept. 28, 2011) (refusing to consider Defendant’s invocation of Delaware’s statute of repose in an unauthorized supplemental reply brief).

More recently, Judge Parkins addressed this practice when the asbestos defendant there sought to add a claim in reply pleadings for summary judgment based on a Nebraska statute of repose. *In re Asbestos Litig., (Vala)*, 2012 WL 2389898, at *3-4 (Del. Super. Ct. June 22, 2012).

⁷ See cases cited *supra* note 6.

⁸ See, e.g., *State v. Wright*, 821 A.2d 330, 333 (Del. Super. Ct. 2003) (“Indeed, guided by considerations of justice, and ‘in the exercise of [inherent] powers, [] courts may, within limits, formulate procedural rules not specifically required by the Constitution or the [legislature].’) (citation omitted); *Projects Mgmt. Co. v. Dyncorp Int’l LLC*, 734 F.3d 366, 376 (4th Cir. 2013) (upholding district court’s dismissal of claim “in an exercise of its inherent authority . . . therefore entitl[ing] [it] to consider sanctions on its own motion and without any limitation on the types of conduct that it could consider”). Cf. *Olson v. Motiva Enterprises, L.L.C.*, 2003 WL 21733137, at *7 (Del. Super. Ct. July 22, 2003) (citing Court’s inherent authority to manage its affairs and to achieve the orderly disposition of its business in enforcing parties’ agreement to not raise collateral estoppels issue in subsequent trial); *Wilds v. Wilds*, 68 A. 447, 448 (Del. Ch. 1899) (discussing “inherent power of the court to regulate its practice according to the well-defined and authoritative precedents,” including power to “make such general orders covering classes of cases, or such special orders in any particular case, as may from time to time be found necessary”).

given what should now be the well-understood state of Delaware law on this subject, given the fairness concerns previously raised by this Court,⁹ and given the needless expenditure of valuable judicial resources¹⁰ to address a latent and delinquent claim, the Court might consider assessing the offending party the costs of addressing the claim¹¹ or counsel for the performance deficiency.¹²

Additionally, the Superior Court Rules of Civil Procedure provide sanction mechanisms for addressing certain conduct in pleadings, *see* Super. Ct. Civ. R. 11(b); 11(c)(1)(B) (allowing Court to issue sanctions *sua sponte* for Rule 11(b) violation upon notice and reasonable opportunity to show good cause), and for enforcing compliance with trial scheduling orders, *see* Super. Ct. Civ. R. 16(b)(5) (providing Court may issue “appropriate sanctions for failure to meet the deadlines and requirements established by the scheduling order to include, in the Court’s discretion, dismissal of the action or default judgment”).

⁹ *See Montgomery*, 2011 WL 5395554, at *3 (discussing fairness concerns).

¹⁰ *Saunders v. State*, 2014 WL 5460433, at * 1 (Del. Oct. 27, 2014) (reminding party, in another context, to be mindful that assessment of costs might be employed when Delaware’s “scarce judicial resources” are invested to address repetitive problematic claims or issues).

¹¹ *See e.g., Gillen v. Cont’l Power*, 2014 WL 1677554, at *2 (Del. Super. Ct. Apr. 7, 2014) (citing *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1225 (Del. 1989); *Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 159-60 (Del. 1970)), *aff’d*, Del. Supr., No. 227, 2014 (Del. Nov. 19, 2014) (affirming imposition of sanctions for violation of Superior Court Civil Rule 16); *Simmons v. Bayhealth Med. Ctr., Inc.*, 2009 WL 74005 (Del. Super. Ct. Jan. 7, 2009) (imposing sanctions in the form of costs for violations of order relating to pretrial procedure and management pursuant to Court’s inherent sanctioning power).

¹² *E.g.*, Supr. Ct. R. 33(b) (offending counsel may be sanctioned for a performance deficiency).

AND NOW, **IT IS HEREBY ORDERED** that Defendant Buffalo Pumps' Statute Of Limitations Claim, raised for the first time in its reply in this summary judgment proceeding is **STRICKEN AS WAIVED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace

PAUL R. WALLACE, JUDGE

Original to Prothonotary
Cc: All counsel via File&Serve