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

IN RE: ASBESTOS LITIGATION	:	
	:	
Limited to:	:	
Turchen, Joseph	:	C.A. No. 09C-11-059 ASB
Johnston, Gerald	:	C.A. No. 09C-07-128 ASB

COURT'S FINDINGS UPON ORDERS TO SHOW CAUSE
SANCTIONS IMPOSED

Submitted: August 10, 2011
Decided: October 28, 2011

Thomas C. Crumplar, Esquire, Jacobs & Crumplar, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

ABLEMAN, JUDGE

The two Orders to Show Cause now before the Court have placed this Judge in an unfortunate and regrettable position, one that the Court hopes will not recur in this or any future litigation. In the first instance, in signed papers, Thomas Crumplar, Esquire ("Crumplar" or "Plaintiff's counsel"), a member of the Delaware Bar, implored this Court to rely upon his word as an "officer of the Court." [1] Subsequent examination revealed, however, that his word included misrepresentations and unverified assertions.

In the second circumstance giving rise to a second Order to Show Cause, the same attorney, in a response to a motion for summary judgment, ignored and failed to cite adverse authority directly on point, despite the fact that that attorney or a member of his firm had been counsel of record in each of the uncited cases and despite the fact that the defendant had identified and relied upon those cases in its briefs.

As a result of these missteps, the Court directed Plaintiff's counsel, in two separate Orders, to show cause why certain statements in the briefs did not violate Superior Court Civil Rule 11(b)(3), and why Plaintiff's counsel's failure to address contrary case law should not be sanctioned. After reviewing Plaintiff's counsel's responses, the Court concludes that Rule 11 sanctions are appropriate in light of Crumplar's conduct.

[1] Pls'. Resp. to Def. County Insulation's Mot. for Summ. J. 6 [hereinafter Pls'. Resp. to County Mot.].

Critical to this decision is an understanding of the asbestos litigation docket in Delaware and the impact that this conduct has upon the orderly processing of these cases. The Superior Court asbestos docket is enormous by any standard, and the resources available to resolve these cases are correspondingly scarce. The 500 or so additional cases that comprise this docket are, for purposes of expediency, assigned to only one judge, who, in turn, has only one law clerk. The number of summary judgment motions generated by the asbestos docket in a single month could easily occupy a judge's available time for an entire year. Adding to this scenario is the complication that the vast majority of the plaintiffs have no connection to Delaware, requiring this Court to research and apply the laws of 50 jurisdictions as well as maritime law. The cases are also highly fact-intensive and often involve complex scientific, engineering, and mechanical concepts. To suggest that these cases have taxed the limited resources of this Court is a huge understatement. In a word, they require Herculean efforts on the part of the Court to render swift justice.

It is against this backdrop that the Court is called upon to apply Rule 11 sanctions for conduct that amounts to an attorney's efforts to mislead the Court and to take advantage of the vast amount of reading generated by the high volume of the asbestos cases in the hopes that distortions of law and fact might be

overlooked. When the misconduct is viewed in this context the propriety of the Court's sanctions becomes self-evident.

Factual and Procedural Background

The facts giving rise to this ethical predicament are fairly straightforward. Joseph Turchen ("Turchen") and Gerald Johnston ("Johnston") both worked as pipefitters at the DuPont Experimental Station beginning in the mid-1950s. Turchen was employed at the Experimental Station from 1957 to 1989, and Johnston worked there from 1956 to 1968. Johnston has been diagnosed with asbestosis and lung cancer, which he alleges was caused by asbestos exposure. Turchen suffered from mesothelioma, an asbestos-related cancer, which led to his death in 2010. Turchen's family members filed separate lawsuits against various defendants, including County Insulation Company ("County") and Avalon systems, formerly known as McCardle-Desco Corporation ("McCardle-Desco"), claiming that they caused Turchen's diseases by exposing him to asbestos. Johnston and members of his family similarly filed suit against various defendants, including McCardle-Desco. Plaintiffs' counsel and his firm, Jacobs & Crumplar, P.A., represent both the Turchen plaintiffs and the Johnston plaintiffs. The Orders to show cause that were issued in these cases stem from Plaintiff's counsel's responses to motions for summary judgment filed by County against the Turchen

Plaintiffs ("County motion") and by McCardle-Desco against both the Turchen Plaintiffs and the Johnston Plaintiffs ("McCardle-Desco motion").

The Relevant Legal Standard

One overarching procedural rule of this Court, Superior Court Civil Rule 11, is expressly designed to provide sanctions for attorney behavior that violates the duty of candor. Although it is intended to be used sparingly (and fortunately it is in Delaware) Rule 11(c) permits the Court to impose appropriate sanctions when counsel's submissions to the Court are lacking in good faith, misleading, or recklessly misrepresenting facts or case law so as to affect the Court's own efficient operations. Rule 11 requires that an attorney sign all papers submitted to the Court. In signing, filing, or otherwise submitting such pleadings, an attorney certifies that, to the best of his knowledge, and based on reasonable inquiry, such papers are factually accurate and presented for a proper purpose. Under Rule 11(b)(2) an attorney certifies that "claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Similarly, Rule 11(b)(3) requires an attorney to certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Pursuant to Rule 11(c) an attorney may be

subject to sanctions for violations of Rule 11(b)(3) following notice and a reasonable opportunity to respond. Any sanctions are to be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."

The County Insulation Motion

The County motion for summary judgment centered on the argument that the Turchen plaintiffs could not establish product nexus.[2] Delaware's product nexus standard requires a plaintiff, at the summary judgment stage, to "proffer some evidence that not only was a particular defendant's asbestos containing product present at the job site, but also that the plaintiff [or plaintiff's decedent] was in proximity to that product at the time it was being used."[3] When a plaintiff did not use the product in question directly, the plaintiff may support an inference of exposure by showing that he was in the area where the product was used or that he was "near that area, walked past that area, or was in a building adjacent to where [the product] was used if open windows or doors would allow asbestos fibers to be carried" to the plaintiff's location.[4] In response to County's motion, Plaintiffs argued that since both County employees and Turchen worked throughout the

[2] Def. County Insulation's Mot. for Summ. J. 3–5 [hereinafter County Mot.].

[3] *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 692 (Del. Super. 1986).

[4] *In re Asbestos Litig.*, 509 A.2d 1116, 1117 (Del. Super 1986) (quoting *Clark v. A.C. & S. Co.*, C.A. No. 82C-DE-26 (Del. Super. Sept. 3, 1985)).

expansive Experimental Station complex during the same time period this fact supported a satisfactory inference of exposure.[5] While the Court ultimately found this argument unpersuasive and granted summary judgment in County's favor, the Court was and remains deeply concerned with the manner in which Plaintiffs' counsel attempted to support his argument.

Plaintiffs' counsel relied, in part, upon the assertion that "this Court has previously denied County Insulation's motion for summary judgment under weaker facts than those presented here."[6] In support of this proposition Plaintiffs' counsel cited *McNulty v. Anchor Packing Co.*,[7] a previous asbestos exposure action filed by Plaintiffs' counsel, and he explained the relevance of that case as follows:

> Here [i.e., in Turchen's case] Plaintiff neither recalled County nor could be shown to be in the immediate vicinity of County operations at his worksite. However, County did work in a neighboring building. This court in McNulty found this nexis [*sic*] sufficient for purposes of summary judgment. Plaintiff has no transcript of the hearing on Summary Judgment and so can only rely on the foregoing statements offered by counsel *as officers of the Court*.[8]

[5] Pls'. Resp. to County Mot. 5–6 [hereinafter Pls'. Resp. to County Mot.].

[6] *Id.* at 6.

[7] C.A. No. 03C-11-116 (Del. Super. Nov. 13, 2003).

[8] Pls'. Resp. to County Mot. 6. (The Court's emphasis).

County's reply brief challenged Plaintiffs' version of the events in *McNulty* as "not true," pointing out that the parties settled the matter before this Court heard argument on the motion.[9]

After a careful review of its own records, the Court tentatively concluded that County's recollection of the events was likely the correct one, and that the motion for summary judgment in *McNulty* had never actually been heard, let alone decided in the manner portrayed by Plaintiff's counsel. As a result, the Court issued an Order to Show Cause ("County Order") why this dubious statement of authority did not merit the imposition of sanctions under Superior Court Civil Rule 11(b)(2) or (b)(3). The County Order and Plaintiffs' counsel's responses thereto, are the primary focus of this Opinion.

Plaintiffs' counsel sent two responses to the Court's Order to Show Cause. In the first response, dated August 1, 2011, Plaintiffs' counsel rightly admitted that he was in error when he cited *McNulty*, acknowledging that he could find no evidence "to dispute the fact that *McNulty* was settled immediately before summary judgment."[10] Notwithstanding this less than emphatic admission, Plaintiffs' counsel continues to argue that sanctions are not appropriate because he made the misstatement "in good faith." In support of this argument, Plaintiffs'

[9] Def. County Insulation's Reply Br. 3.

[10] Pls'. Resp. to Order to Show Cause 2 [hereinafter Response to County Order].

counsel states that his firm prosecuted "at least 131 cases against County Insulation," and that *McNulty* "seemed to be the most likely case" that "everyone was so certain we won on Summary Judgment against County" on the issue of product nexus.[11] Plaintiffs' counsel therefore suggests that his error was not deliberate, even though he still could neither confirm nor deny that *McNulty* was in fact the correct case. In addition, Plaintiffs' counsel offers the Court a hearing transcript from an *unrelated* case where Crumplar cited, but again could not name, the "mystery" case wherein his firm prevailed against County Insulation.[12]

In his second response, dated August 3, 2011, Plaintiffs' counsel wrote the Court to notify it that -- at long last -- he discovered the true identity of the case to which he intended to refer in his answering brief to County's motion for summary judgment.[13] Indeed, Plaintiffs' counsel indicates in this second letter that, after only a single conversation with opposing counsel who likely argued the unknown case on behalf of County, he received sufficient information to allow him to identify the correct case, *i.e.*, *Opalczynski v. County Insulation*.[14] Plaintiffs' counsel speculates that "it seems apparent that County rightfully decided to settle

[11] *Id.* at 1.

[12] *Id.* at 2.

[13] Pls'. Am. Resp. to Order to Show Cause 1 [hereinafter Amended Response to County Order].

[14] C.A. No. 04C-04-264 (Del. Super. Oct. 26, 2006).

McNulty immediately prior to the summary judgment argument realizing that it was very close to the *Opalczynski* case which we had previously won."[15]

In his response, Plaintiffs' counsel asserts that "[a]s addressed by previous Delaware Courts, a Rule 11 violation is a subjective good faith test."[16] For this proposition counsel relies upon the 1996 case of *Delaware Lumber & Millwork, Inc. v. Anecon Construction Co.*[17] Quite to the contrary, however, current Delaware case law demonstrates that "the attorney's duty [under Rule 11] is one of reasonableness under the circumstances; a subjective good faith belief in the legitimacy of a claim does *not* alone satisfy the requirements of Rule 11."[18] As recently as 2008 this Court held, in *Abbott v. Gordon*,[19] that an advocate's duty is one of "reasonableness under the circumstances, and a subjective good faith belief in the legitimacy of the claim or even an overzealous desire to repair manifest injustice does not alone satisfy the requirements of Rule 11."[20] The Delaware Supreme Court upheld this ruling summarily.[21]

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[15] Amended Response to County Order 2.

[16] Response to County Order 2.

[17] 1996 WL 280781 (Del. Super. April 19, 1996).

[18] *Fairthorne Maint. Corp. v. Rammuno*, 2007 WL 2214318, at *10 (Del. Ch. 2007) (quoting *ASX Inv. Corp. v. Newton*, 1994 WL 178147, at *2 (Del. Ch. 1994)) (applying Court of Chancery Rule 11, identical in all respects to Superior Court Civil Rule 11).

[19] 2008 WL 821522 (Del. Super. March 28, 2008).

[20] *Id.* at *25.

[21] *Abbott v. Gordon*, 957 A.2d 1 (Del. 2008) (TABLE).

In the Court's judgment, Plaintiffs' counsel did not act reasonably under the circumstances and hence did not satisfy his Rule 11 duty. In essence, Plaintiffs' counsel's response to the order to show cause asks this Court to excuse his conduct because, in a nutshell, he's done it before, apparently without consequences. The Court need not belabor the inappropriateness of this argument. Even if the Court takes Plaintiffs' counsel at his word -- that he did not intentionally misrepresent the result of the *McNulty* case -- there is no place in this complex and demanding litigation for any attorney to file papers without confirming the accuracy of authority upon which an attorney clearly intends the Court to rely. At best, it demonstrates an unjustifiable laziness in carrying out the duties of an attorney. At worst, counsel's actions evidence an intent to mislead the Court in the hopes that it would indeed be misled and thereby rule in his favor. Either of these scenarios represents the very misconduct that Rule 11 is intended to address.

What is even more disheartening is Plaintiffs' counsel's failure to conduct thorough research or to provide accurate authority *even in response* to the Court's Order to Show Cause. Plaintiffs' counsel plainly admits that, in preparing his response to the Court's Order to Show Cause, he "has *not* done an exhaustive search on all the case law surrounding Rule 11."[22] While that fact is clear from the arguments Crumplar has made to avoid sanctions, the Court cannot imagine a

[22] Response to County Order 2 (emphasis the Court's).

circumstance in which an attorney should conduct a more thorough review of Rule 11 case law than when he is faced with a Rule 11 finding. In fact, the statements of case law that counsel has included in his response are incorrect or incomplete.[23] It certainly should not have taken counsel an "exhaustive search" to discover the correct standard that applies to possible Rule 11 violations, nor that there are cases from this state that impose sanctions for "undeveloped" and "unresearched" claims and arguments.[24] This approach is deeply troubling on many levels, not the least of which is that the Court now knows that this attorney's willingness to fabricate or misstate is far more a matter of routine than it is an aberration.

As for Plaintiffs' counsel's second, amended response, the fact that Plaintiffs' counsel ultimately identified the "correct" case to support the proposition that the Court previously denied summary judgment for County has absolutely no effect on his original misrepresentation to the Court. In fact, Crumplar's ability to discover the name of the case that he meant to cite -- after only an afternoon's worth of work -- strengthens the Court's suspicion that counsel made no real attempt to ensure the accuracy and reliability of his legal arguments

[23] Plaintiffs' counsel cites only two cases in his first response. First, Plaintiffs' counsel cites a case from the State of Washington for the proposition that misstatements made without "a malicious purpose" are not deserving of sanctions under Rule 11, when in fact the primary basis of the Washington court's decision was that the motion containing the misstatements was not without merit, and the misstatements were not material to the motion in which they were contained. *Washington v. Blackcrow*, 2011 WL 3111107, at *1 (Wash. Ct. App. 2011). Second, as discussed above, Plaintiffs' counsel cites a 1996 Delaware case for a proposition that more recent cases plainly contradict.

[24] *Ramunno*, 2007 WL 221431, at * 11; *Abbott*, 2008 WL 821522, at *26.

from the outset. As the Court of Chancery explained in the context of a frivolous claim that was ultimately withdrawn:

> Baseless filing puts the machinery of justice in motion, burdening the courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions *even after a dismissal*.[25]

The fact that Plaintiffs' counsel eventually identified the case in no way justifies or discounts his indefensible, yet conscious and deliberate, decision to submit inaccurate and unverified authority to the Court with the expectation -- indeed the intention -- that the Court would rely upon it.

In the final analysis, Plaintiff's counsel's "entangled web" has unraveled as a result of the expected difficulty in maintaining a counterfactual version of events under scrutiny, but only after considerable time and effort on the part of the Court.[26] What is more, by way of his untrue assertions, counsel has abused the respect and credibility that comes with the privilege of calling oneself an "officer of the Court," in a caseload where accuracy and trust are of critical importance.

The McCardle-Desco Motion

Regrettably, Plaintiffs' counsel's inappropriate handling of relevant legal authority surfaced more than once in just one trial setting. The Court was forced to

[25] *Ramunno*, 2007 WL 2214318, at *10 (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 398 (1990)).

[26] In writing this Opinion, this Court is reminded of the admonition of a colleague that, "It is cheap for a party to throw garbage, but it is expensive for the party who must clean up the mess." *Fairthorne Maintenance Corp v. Ramunno*, 2007 WL 2214318, at *11 (Del. Ch. 2007).

issue a second Order to Show Cause ("McCardle-Desco Order) to Mr. Crumplar less than two weeks after the County Order. As an initial matter, the Court appreciates that it cannot impose monetary sanctions based on the circumstances involved in the McCardle-Desco Order, because the McCardle-Desco motion settled before the Court had an opportunity to issue its Order to Show Cause.[27] However, the Court feels that those circumstances must be addressed directly irrespective of the unavailability of monetary sanctions.

The McCardle-Desco Order arose from Plaintiffs' counsel's failure to cite and address directly adverse legal authorities in his response to the McCardle-Desco motion for summary judgment. The central issue in the McCardle-Desco motion was whether the defendant should be held to the legal standard pertaining to product installers and manufacturers, or the less stringent standard applicable to mere suppliers of products. This Court had previously decided this very *same* issue as it pertains to the *same* defendant, McCardle-Desco, in three cases in the mid-1990s: *Rotter v. Avalon Systems*,[28] *In re Asbestos Litigation (Deiterle)*,[29] and *In re Asbestos Litigation (Weber)*.[30] Members of plaintiffs' counsel's firm were

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[27] *See* Super. Ct. Civ. R. 11(c)(2)(B) ("Monetary sanctions may not be awarded on the Court's initiative unless the Court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.").

[28] C.A. No. 98C-02-170C, at 35:3–23 (Del. Super. Dec. 7, 1995) (TRANSCRIPT).

[29] C.A. No. 96C-07-167, at 2:20–3:22 (Del. Super. June 18, 1998) (TRANSCRIPT).

[30] C.A. No. 93C-11-811, at 2:13–3:3 (Del. Super. June 21, 1996) (TRANSCRIPT).

the attorneys of record in each of these cases. In each, the Court ruled that defendant McCardle-Desco, from the year 1955 onward, would be subject to the standard applicable to suppliers based on substantially similar facts to those presented in this case.

In its motion for summary judgment, McCardle-Desco cited these three cases, and provided the Court and Plaintiffs' counsel with copies of the transcripts of those decisions. McCardle-Desco also cited a case in which the Court held McCardle-Desco to the stricter manufacturer or installer standards *i.e.*, *In re Asbestos Litigation (Pawlowski)*.[31] Plaintiffs' counsel's opposition briefs referenced *none* of these cases. The Court thereupon issued the McCardle-Desco Order to Counsel to explain why he had failed to acknowledge or distinguish authority that is directly on point but adverse to Plaintiffs' counsel's position, and to show cause why sanctions should not be imposed.

In his response to the McCardle-Desco Rule to Show Cause, Plaintiffs' counsel first claims that his firm was unaware of the decisions in *Rotter*, *Deiterle*, and *Weber*.[32] In support of this argument, Plaintiffs' counsel submits that his firm,

[31] C.A. No. 06C-08-012, at 11:3–15 (Del. Super. June 4, 2009) (TRANSCRIPT).

[32] Though this opinion refers to the response to the McCardle-Desco Order as "Plaintiffs' counsel's response," it should be noted that, in the case of the McCardle-Desco Order, Counsel did not take the time to file a personal response. While Mr. Crumplar signed the motion that gave rise to the order, another attorney in his firm prepared and signed the response. Common sense dictates that an attorney should submit his or her own response when a Court issues an order to show cause based on a motion signed by that attorney. Allowing or directing another attorney to explain a filing she has not signed and which occasioned an order to show cause demonstrates a serious lack of judgment, a lack of respect for the Court issuing the order, and a failure to appreciate the seriousness of the

Jacobs & Crumplar, P.A., does not regularly order transcripts of the many asbestos-related motions that it argues. Therefore, Plaintiffs' counsel argues, "[p]laintiffs did not have a specific recollection of the *Dieterle* [sic], *Rotter* and *Weber* cases cited by the Court and Defendant, other than what was cited in the Defendant's briefs."[33]

This explanation is wholly unacceptable in many respects. First, Defendant McCardle-Desco specifically cited the cases in its Motion for Summary Judgment, placing Crumplar on notice of their application to the issues presented by the motion. Second, McCardle-Desco provided Plaintiffs' counsel with transcripts of the decisions attached to its motion. Crumplar did not even have to rely on his own firm's records. Third, members of Plaintiffs' counsel's firm were the attorneys of record in each of the cases identified. Fourth, in his response immediately after Plaintiffs' counsel denied having specific knowledge of the *Rotter*, *Deiterle*, and *Weber* cases, he states that "[w]hile Plaintiffs do not specifically recall the *Dieterle* [sic], *Rotter*, and *Weber* decisions, Plaintiffs are aware of the Court's prior bench decisions wherein the Court held that [McCardle-Desco] would be subject to the standard applicable to suppliers."[34] The only

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circumstances. After the Court notified Mr. Crumplar that it would not accept a response from another attorney, he subsequently made a filing that adopted the prior response as his own.

[33] Pls'. Resp. to Order to Show Cause 2 [hereinafter McCardle-Desco Response].

[34] *Id.*

logical conclusion the Court can derive from this admission is that counsel was indeed well aware of the adverse decisions. Moreover, although he did not specifically recall the captions, they were expressly cited in McCardle-Desco's motion. Under these circumstances, the Court finds that Crumplar's decision not to address these adverse rulings was both deliberate and an intentional effort to mislead the Court.

Crumplar's alternative argument is that "even if they were aware of the *Dieterle* [sic], *Rotter* and *Weber* decisions [Plaintiffs] would not have cited them nor would they have been under any obligation to disclose them to the Court," because they are not the controlling law.[35] Plaintiffs' counsel submits instead that *Fleetwood v. Charles A. Wagner Co., Inc.*[36] a case which he did not mention in responding to the motion, is the controlling law. However, the decision in *Fleetwood* merely rejected the application of the "reason to know" standard applicable to product suppliers *on the specific facts of that case*, which involved the supply of raw asbestos as a sweeping compound that was not a "manufactured" product.[37] In fact, the *Fleetwood* Court went on to state that, "[g]iven this disposition, we do not reach the issue of whether Section 402 should be adopted as

[35] *Id.* at 3.

[36] 832 A.2d 705 (Del. 2003).

[37] *Id.* at 709.

the law of Delaware in an otherwise applicable context."[38] Having left for another day the possibility that the mere supplier standard could apply in an appropriate asbestos products case, the holdings in the *Deiterle*, *Rotter*, and *Weber* cases, remain controlling in this case. Therefore, McCardle-Desco should be held to that standard. At the very least, counsel needed to present arguments to distinguish these three cases and at least explain why *Fleetwood* and not *Deiterle, Rotter, and Weber* should apply.

In his response to the Order to Show Cause, Plaintiffs' counsel offers a transcript from a case that, again, he did not cite in his motion. He belatedly asserts that this case establishes that *Deiterle*, *Rotter*, or *Weber* are no longer controlling law, and they should therefore be overruled. Under the specific facts presented in the *Faville*[39] case, which included magazine subscriptions from the time period *after* Johnston's alleged exposure to McCardle-Desco products in this case, and *after* the bulk of Turchen's exposure, there was an issue of fact as to whether McCardle-Desco was a mere supplier, or more than that. However, the issue of knowledge imparted by trade journals and magazines goes more to the degree of McCardle-Desco's knowledge of the dangers of asbestos than it does to whether McCardle-Desco was an installer, a manufacturer, or a mere supplier. It seems clear, then, that *Fleetwood* and *Faville* neither overruled nor rendered

[38] *Id.*

[39] *In re:Asbestos Litig. (Faville)*, C.A. No. 06C-02-098 (Del. Super. Sept. 3, 2008)(TRANSCRIPT).

inapposite this Court's rulings with regard to McCardle-Desco in *Deiterle*, *Rotter*, and *Weber*. In fact, as Plaintiffs' counsel admits, this "[c]ourt's decision in *Faville* distinguishes *Rotter*, *Dierterle* [sic] and *Weber*."[40] The act of distinguishing directly adverse authority is a critically important aspect of counsel's duty of candor to the tribunal. By ignoring these precedents, despite his knowledge of them, counsel's actions fit precisely into the language of Rule 11(b)(2) and demonstrate exactly why the Rule exists.

In each of these cases Plaintiff's counsel was free to challenge the defendants' summary judgment motions by distinguishing the case law supporting them or by identifying decisions from this or any other jurisdiction that reached contrary results, or even by a forceful and persuasive argument for the reversal of existing law. The alternative avenue that counsel chose -- to ignore these decisions and make no effort to distinguish them until after he was required to respond to the Order to Show Cause -- is a clear violation of his professional responsibility.[41] Plaintiff's counsel's response to the McCardle Order to Show Cause demonstrates at best an inability to conduct thorough legal research and properly handle legal authority and, at worst, an intent to influence the Court to rely upon inaccurate and unverified precedents.

[40] McCardle-Desco Response 3 (emphasis added).

[41] Delaware Lawyers' Rules of Professional Conduct Rules 3.1, 3.3(a).

The Precise Remedy and Sanctions

Superior Court Civil Rule 11 requires that "[w]hen imposing sanctions, the Court shall describe the conduct determined to constitute a violation of the rule and explain the basis for the sanction imposed.[42] Crumplar's conduct has already been described in great detail in the portion of this Opinion describing the County Insulation Summary Judgment Motion. What remains is for the Court to impose a sanction and to articulate the basis for it. To be clear, any monetary sanction the Court is ordering is limited to Plaintiff's counsel's activities with respect to the County motion, not the McCardle-Desco motion. The latter will be dealt with by this Court's referral of the entire matter to the Delaware Supreme Court Office of Disciplinary Counsel.

Turning to Crumplar's conduct with respect to the County motion, the Court will enter an Order requiring Thomas Crumplar, Esquire to pay an award to the Court of $25,000.00. While this sum may, at first blush, appear arbitrarily excessive, it is not when compared to the relatively high verdicts and settlements that are customary in these lawsuits.[43] Since the verdicts and settlements are typically in the millions of dollars, the contingency counsel fees generated by them

[42]Super. Ct. Civ.R. 11(c)(3).

[43]Indeed, the motion at issue in the County Insulation case was litigated against the backdrop of the most serious of the claims brought in the asbestos litigation -- a claim that the Plaintiff's exposure to asbestos as a result of Defendant's negligence proximately caused the Plaintiff to develop a terminal cancer (mesothelioma). If the *Turchen* plaintiff had prevailed in their opposition to County's motion for summary judgment, and had proven their claims at trial, they stood to recover millions of dollars in damages, and Crumplar stood to take hundreds of thousands of dollars (if not more) in fees. In proportion to these numbers, the $25,000.00 sanction is actually quite modest.

(often as high as 40 percent) render the amount the Court has chosen to impose to be rather conservative. Hopefully, it is at least sufficient to achieve some deterrent effect. The primary basis for the imposition of this monetary sanction is that Crumplar's conduct has seriously taxed the scant resources of this Court, and will continue to burden the Court in the future. It also has tainted the fairness and efficiency of the adversarial process.

Crumplar's conduct is particularly egregious in the context of the Superior Court's asbestos docket because the Court is routinely confronted with thousands of pages of reading in order to prepare for and rule on the excessive number of summary judgment motions that are presented monthly for decision. Perhaps more so than in any other litigation before the Superior Court, it is critical that the Court be able to rely upon the statements and representations of attorneys as officers of the Court. When that trust is compromised -- as it has been in these cases -- every argument, contention, representation, and citation must be double-checked and scrutinized, thereby substantially increasing the Court's workload. And, unlike the law firms that are involved in this lucrative litigation, the Court's resources cannot be increased to meet the additional workload demand. The motions must be read and decided by one Judge with the assistance of only one law clerk in the limited number of hours available from the time Parcels delivers the boxes until the

morning of the hearings a week or so later. Needless to say, the Court must use all of its working hours, evenings, and weekends to keep up with the volume.

This conduct also negatively affects the Court's future workload. When an attorney does not litigate cases in a candid and honest manner, he or she inexcusably adds to the already substantial undertaking thrust upon the asbestos judge and her clerk. If a Judge cannot accept an attorney's word at face value, she is forced to pore through lengthy exhibits and deposition transcripts, and must evaluate every case citation with extra care. Even if the sanction imposed here has its expected deterrent effect, it will still be difficult for the Court to accept counsel's future filings without affording the extra scrutiny that his conduct now demands.

Invoking Rule 11, after the *sua sponte* issuance of an Order to Show Cause by the Court, is an extraordinary measure for this or any Judge, but Plaintiff's counsel has given the Court no choice. Even after being given the opportunity to acknowledge his own responsibility for falsifying a prior holding of the Court, rather than apologize and pledge to reform his practices in the future, counsel persists in his efforts to support his submissions of false information. The high quality and moral character of the Delaware Bar is second to none and it is therefore regrettable that the Court must invoke this extreme remedy against one of its own members. Yet, for the Court to ignore the conduct that gave rise to this

Opinion would represent an unacceptable exercise in judicial restraint, which is unwarranted in the face of an opportunity to "deter repetition of such conduct or comparable conduct by others similarly situated,"[44] one that is especially timely in the context of this Court's burgeoning asbestos docket.

* * *

The Court is further required to refer this entire matter to the Office of Disciplinary Counsel in connection with counsel's responses to both the County and the McCardle-Desco motions as it appears that Rules 3.1 and 3.3(a) of the Delaware Lawyers' Rules of Professional Conduct have been implicated as well.

IT IS SO ORDERED.

/s/ Peggy L. Ableman
Peggy L. Ableman, Judge

cc: Frederick W. Iobst, Esquire
Office of Disciplinary Counsel

[44]Super. Ct. Civ.R. 11(c)(2).