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

IN RE: ASBESTOS LITIGATION	:	
	:	
Limited to:	:	
Clineff, Ronald	:	C.A. No. 08C-10-191 ASB

UPON DEFENDANTS BP AMOCO CHEMICAL CO.,
BP CORPORATION NORTH AMERICA INC.,
AND KVAERNER US INC.'S
MOTIONS FOR SUMMARY JUDGMENT
GRANTED

This 8th day of July, 2011, it appears to the Court that:

Plaintiffs Karen Keeley, Edward Clineff, and Ronald Clineff, Jr. are the surviving children of Ronald Clineff, Sr. ("Clineff"), who died on September 5, 1997. Clineff was employed as a laboratory technician at the Avisun/Amoco plant in New Castle, Delaware, from 1959 until early 1970. Clineff led a troubled life in his later years, and during a period of incarceration several months before his death, he began experiencing symptoms that he attributed to a chest cold. He passed away just two weeks after being released from prison, and his death was investigated by the Medical Examiner's Office.

Two days after Clineff died, the coroner's office told Clineff's daughter Karen Keeley that he had died of cancer.[1] At that time, the coroner's office did not

[1] Karen Keeley Dep. Tr., Dec. 15, 2010, at 38:9-16.

identify the type of cancer, and Clineff's children presumed that the cancer had been related to genetics or his history of cigarette-smoking.[2]

In December 1997, a death certificate was issued. Because the family needed the certificate for Social Security purposes, Keeley obtained it. The certificate listed the cause of Clineff's death as "metastatic malignant mesothelioma." Plaintiffs read the death certificate, including the diagnosis of mesothelioma. Edward Clineff testified that the siblings "had no idea what that [*i.e.*, mesothelioma] meant," and they continued to assume that their father's cancer was caused by his smoking.[3]

In late December 2006, Ronald Clineff attended a Christmas party at which an acquaintance who worked with his father at the Avisun facility mentioned that many former Avisun workers had developed symptoms related to asbestos exposure. Soon thereafter, Edward Clineff obtained the death certificate from Keeley and showed it to an attorney, who informed him that mesothelioma was an asbestos-related disease. Plaintiffs retained counsel and filed this suit on October 16, 2008, more than eleven years after Clineff's death, alleging that various defendants were responsible for exposing Clineff to asbestos and causing his

[2] Edward Clineff Dep. Tr., Dec. 17, 2010, at 25:20-23.

[3] *Id.* at 26:11-15.

mesothelioma. Plaintiffs assert claims of negligence, strict liability, and willful and wanton conduct.

Defendants BP Amoco Chemical Company, BP Corporation North America Inc., and Kvaerner U.S. Inc. have moved for summary judgment, arguing that Plaintiffs' claims are barred by a two-year statute of limitations under 10 *Del. C.* § 8119.[4] The moving defendants argue that limitations period began to run, at the latest, in December 1997, when the plaintiffs reviewed Clineff's death certificate and learned that he had died of mesothelioma. In response, Plaintiffs argue that Clineff was never aware that he was suffering from an asbestos-related disease, and that they were "not put on notice of such a possibility until December 2006."[5]

The Court agrees with the moving defendants that the statute of limitations on Plaintiffs' claims began to run in December 1997, and therefore expired years before this suit was filed. Where a plaintiff is "blamelessly ignorant" of an "inherently unknowable" injury, such as a long-latency disease, the Court will apply the discovery rule.[6] Application of the rule tolls the running of the limitations period until the plaintiff "discovers, or in the exercise of reasonable

[4] 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained[.]").

[5] Pls.' Consolidated Mem. in Opp'n to Defs.' Statute of Limitations Mot. for Summ. J. 1.

[6] *McClements v. Kong*, 820 A.2d 377, 380 (Del. Super. 2002).

diligence should have discovered, his injury."[7] Accordingly, the limitations period in an asbestos-exposure case "begins to run when the plaintiff is chargeable with knowledge that his condition is attributable to asbestos exposure."[8] For the discovery rule to apply, the plaintiff must be able to demonstrate that he acted reasonably and promptly "in seeking a diagnosis and in pursuing the cause of action."[9]

As an initial matter, this Court previously held in the context of a pre-discovery defense motion to dismiss based upon the doctrine of laches that "[P]laintiffs knew or should have known of their rights or claim [when they reviewed the death certificate]. . . . There's no evidence at all that they made any effort whatsoever to find out that they had a claim."[10] Although the Court declined to apply laches because of an absence of prejudice resulting from Plaintiffs' inaction, the determination that Plaintiffs were on notice of their claims after receiving the death certificate was part of the Court's analysis of the elements of laches—and not, as Plaintiffs have suggested, mere commentary. Discovery did

[7] *Burrell v. Astrazeneca LP*, 2010 WL 3706584, at *5 (Del. Super. Sept. 20, 2010) (quoting *Ryan v. Gifford*, 918 A.2d 341, 359 (Del. Ch. 2007)).

[8] *In re Asbestos Litig. (Collins)*, 673 A.2d 159, 162 (Del. 1996).

[9] *Id.*

[10] Hr'g Tr. 19:13-16, Defs.' Mot. to Dismiss, Sept. 17, 2009.

not result in any material changes to the facts underpinning the Court's conclusion, which therefore constitutes the law of the case.[11]

Moreover, even if the Court had not previously ruled on this issue, the facts do not support a contrary result because Plaintiffs were on inquiry notice of their potential claim after reviewing Clineff's death certificate in December 1997. The Court is guided by the recent decision in *Burrell v. Astrazeneca LP*, which addressed the question of whether "the statute is tolled beyond the date on which the Plaintiffs learned of their diagnoses/injuries" when the plaintiffs are unaware of the cause of injury.[12] The *Burrell* plaintiffs were three women first diagnosed with diabetes between May 2002 and early February 2004. Each plaintiff had been prescribed Seroquel prior to her diabetes diagnosis. In 2007, the plaintiffs filed suit against Seroquel's manufacturer, alleging that their use of the drug caused them to develop diabetes.[13]

The *Burrell* Court found that the plaintiffs' actions were untimely under § 8119. The Court noted that the Delaware Supreme Court's decision in *Brown v.*

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[11] *Hudak v. Procek*, 806 A.2d 140, 154 (Del. 2002) ("When facts have remained constant throughout the subsequent course of the same litigation, the trial court's previous rulings applying legal principles to a constant set of facts generally establish the 'law of the case.' . . . Although the doctrine is not inflexible, this Court has held that a prior legal ruling based on a constant set of facts should be reconsidered only if it is 'clearly wrong, produces an injustice or should be revisited because of changed circumstances.'").

[12] 2010 WL 3706584, at *5.

[13] *Id.* at *1.

E.I. DuPont de Nemours & Co. determined that the limitations period on a latent injury begins to run when the plaintiff is "on notice of a potential tort claim."[14] The *Burrell* Court, following *Brown*, found that the inquiry into when a plaintiff can be deemed on notice of a potential claim for injuries allegedly arising from exposure to or ingestion of a toxic product or substance should focus upon when "someone from the scientific community [has] found and revealed publicly a link between the physical condition and the exposure,"[15] such that the plaintiff would have discovered the information in the exercise of reasonable diligence. Because scientific support for a possible connection between Seroquel and diabetes would have been revealed by a "reasonable investigation of publicly available sources" when the last-diagnosed plaintiff was informed that she had diabetes in February 2004, the plaintiffs were deemed to have been chargeable with knowledge of their potential claims at that time.[16]

While *Burrell* was not an asbestos-exposure case, it presents a persuasive rationale on facts quite similar to this case. In December 1997, Plaintiffs had actual knowledge that Clineff had died of mesothelioma. While Plaintiffs correctly

[14] *Id.* at *5 (quoting *Brown v. E.I. DuPont de Nemours & Co.*, 820 A.2d 362, 369 (Del. 2003)).

[15] *Id.* (quoting *Brown*, 820 A.2d at 368).

[16] *Id.* at *6.

point out that lawyer advertising for mesothelioma victims may not have been as widespread in the late 1990s as it is today, it was widely known and publicized by that time that mesothelioma was a signature disease related to asbestos exposure.[17]

Plaintiffs concede that they did not know or understand what mesothelioma was at the time they first reviewed Clineff's death certificate, but they apparently made no efforts to learn anything about the diagnosis until December 2006. Their continued belief that Clineff's death resulted from smoking was the consequence of a choice to proceed on an unfounded assumption rather than make reasonable attempts to determine the cause of his mesothelioma.[18] To the extent *Burrell* is distinguishable, the existence of inquiry notice based upon publicly-available information is arguably clearer in this case, because mesothelioma is associated exclusively or almost exclusively with asbestos exposure, whereas the public is generally aware of multiple possible causes of diabetes. Even though the plaintiffs here were subjectively unaware until December 2006 that Clineff had worked with asbestos at Avisun, even basic inquiries into the cause-of-death determination they received in December 1997 would have prompted investigation

[17] Indeed, in June 1997, the United States Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor*, which rather famously noted "an asbestos-litigation crisis" in existence at that time. 521 U.S. 591, 597 (1997).

[18] *See Heizer v. Cincinnati, New Orleans & Pac. Ry. Co.*, 172 S.W.3d 796, 800 (Ky. Ct. App. 2004) ("Once he was diagnosed [with mesothelioma], James had an affirmative duty to exercise reasonable diligence to investigate the cause of his cancer.").

into their father's past and his potential asbestos exposures. On these facts, the discovery rule tolled the start of the limitations period until only December 1997.

Because Plaintiffs were on constructive notice of their claims in late 1997, the statute of limitations had expired almost nine years before this suit was instituted in 2008. Accordingly, the motions for summary judgment filed by Defendants BP Amoco Chemical Company, BP Corporation North America Inc., and Kvaerner U.S. Inc. are **GRANTED** on the basis of the limitations period set forth in § 8119.[19]

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve

[19] The Court need not and does not reach Kvaerner U.S. Inc.'s alternative arguments.