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

IN RE: ASBESTOS LITIGATION

Carl Roca,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CA No. 01C-10-063-ASB**
	)	
E.I. du Pont de Nemours and Company;	)	
General Motors Corporation;	)	
DaimlerChrysler Corporation;	)	
Rhone-Poulenc, Inc., as	)	
Successor-in-Interest to	)	
Stauffer Chemical Company,	)	
	)	
Defendants.	)	

Submitted: July 18, 2002
Decided: September 3, 2002

Upon Defendants' Motion for Summary Judgment on the Peculiar Risk Doctrine. Motion Granted.

OPINION

Appearances:

Kathleen D. Hadley, Esquire
Attorney for Carl Roca, Plaintiff.

John C. Phillips, Esquire and James Hall, Esquire
Attorneys for E.I. du Pont de Nemours and Company.

Somers S. Price, Esquire
Attorney for General Motors Corporation and DaimlerChrysler Corporation.

Mark L. Reardon, Esquire
Attorney for Rhone Poulenc, Inc., as Successor-in-Interest to Stauffer Chemical Company.

JOHN E. BABIARZ, JR., JUDGE.

Plaintiff Carl T. Roca alleges that he was exposed to asbestos and asbestos-containing materials while working as a union pipefitter for various independent contractors. As a result of this exposure at the work sites of several Delaware employers, Plaintiff alleges that he developed malignant mesothelioma.

The record shows that Plaintiff worked for Du Pont at the following sites and times. From December 1963 to March 1964, Plaintiff worked at the Edgemoor plant repairing outdoor heating units. From January 1965 to March 1965, Plaintiff worked in the basement of the Louviers Building. From March 1966 to June 1966, and from March 1968 to September 1968, Plaintiff replaced piping at the Hotel Du Pont.

From December 1967 through March 1968, Plaintiff worked at DaimlerChrysler's Administration Building in Newark, Delaware. From December 1975 through August 1976, Plaintiff worked on new construction at the Stauffer Chemical Company[1] in Delaware City, Delaware. Plaintiff also worked at the General Motors Boxwood Assembly Plant near Wilmington, Delaware, from February through March 1967 and from September 1976 through early January 1977.

At oral argument, Plaintiff argued that Defendants had assumed control of the locations where Plaintiff had worked and had taken responsibility for all appropriate

[1]Rhone-Poulenc is a named defendant in this case as successor-in-interest to Stauffer Chemical Company.

safety precautions. The Court ruled in favor of Defendants on these issues, finding that the record evidence could not support Plaintiff's contentions. Plaintiff also argued that Defendants owed him a duty under the "peculiar risk" doctrine. The Court ordered further briefing and reserved decision on this issue.

In their supplemental briefs, Defendants argue that they owed Plaintiff no general duty of care or any duty under the "peculiar risk" doctrine, as it is defined in Chapter 15 of the Restatement (Second) of Torts (the Restatement). As a threshold matter, Defendants argue that an employee of an independent contractor is not an "other" for purposes of Chapter 15, Liability of an Employer of an Independent Contractor. That is, Defendants assert that Plaintiff is not a member of the protected class of persons under Chapter 15. Defendants also argue that Plaintiff has failed to show that they consciously ignored a known risk associated with the use of asbestos by insulators working in proximity to other trades during the 1960's and 1970's.

The peculiar risk doctrine, adopted in the Restatement Ch. 15, §§ 413, 416 and 427, reflects the principle that a "landowner who chose to undertake inherently dangerous activity on his land should not escape liability for injuries to others simply by hiring an independent contractor."[2] Under the peculiar risk doctrine, one who employs an independent contractor to do work which the employer should see is

[2]*Monk v. Virgin Islands Water & Power Authority*, 53 F.3d 1381, 1390 (3rd.Cir.1995).

likely to create a peculiar risk of physical harm unless special precautions are taken, is subject to liability for injuries caused by the absence for such precautions.[3] This type of risk is "peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable [person] would recognize the necessity of taking special precautions."[4] Application of the doctrine is limited so that employers of independent contractors will not have become conversant with all activities of their contractors.[5]

In the case at bar, the threshold question is whether a contractor's employee is a member of the protected class. The parties agree that at all pertinent times Plaintiff was an employee of a general contractor rather than an employee of any of the named Defendants. Section 409 sets forth the general principle of Chapter 15 and indicates that a contractor's employee is not a member of the class protected under this Chapter: "Except as stated in §§ 410-29, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants."[6] A plain reading of this section suggests that the Chapter

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[3] *Bryant v. Delmarva Power & Light Co.*, 1995 WL 653987 at ** 6 (Del.Super.1995) (citing Restatement (Second) of Torts § 413 (1965)).

[4] *Id.*

[5] *Id.*

[6] Restatement § 409.

provides a remedy for harm caused to third persons by contractors or their employees.

This interpretation is supported in a note to Chapter 15 entitled Harm Caused by Fault of Employers of Independent Contractors. This note distinguishes between an employer's liability based on his failure to exercise reasonable care in selecting a reasonably prudent contractor or in directing the contractor's work (§§ 410-415 inclusive) and exceptional situations where the employer owes a nondelegable duty to others to make the work reasonably safe and is subject to liability for injury caused by the contractor's negligence which results in harm to another (§§ 416-425 inclusive). In referring to both bases for liability, the drafters refer to "the contractor and his servants" as being the possible perpetrators of harm. No mention is made of a contractor's employees as being members of the protected class.

Section 413 creates liability in an employer who should recognize that the work poses a risk of physical harm to others and who fails to provide that the contractor take required precautions:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

This section does not define the class of protected "others," but a plain reading suggests that the class does not include a contractor's employees, particularly when read *in pari materia* with § 409's phrase "harm caused to another by an act or omission of the contractor or his servants." The Comment to § 413 provides that the risk is "a special danger to those in the vicinity." Although it could be argued that this phrase includes a contractor's employees, it would be an attenuated argument, at best.

Sections 416 and 427, according to the Reporter's Notes, represent different ways of stating the general rule that the employer is liable for injuries resulting from risks he should have addressed when he entered the contract and for which he cannot subsequently shift responsibility to the contractor.[7] Section 416, entitled Work Dangerous in Absence of Special Precautions, provides as follows:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such, even though the employer has provided for such precautions in the contract or otherwise.

[7]Section 416, Comment a.

Aside from the question of who is included in the class of "others," this section does not apply to the facts in this case, because Defendants did not provide for any special precautions regarding asbestos, as required in the final clause of this section.

As to the protected class, this section refers to "others" without explanation or condition. However, the Reporter's Notes makes no reference to liability to a contractor's employee, and the illustrations all pertain a contractor who is liable to a bystander or other uninvolved third party.

Section 427, entitled Negligence as to Danger Inherent in the Work, provides as follows:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

This section requires knowledge on the part of the employer but does not involve an employer's special provisos, as does § 413. Like the other two sections discussed herein, this section does not define the protected class or otherwise illuminate the phrases "others" and "such others." The threshold question remains whether "others" includes employees of independent contractors.

The comments and illustrations again indicate that the answer is "no."

Comment (c) provides in part that "the use of a scaffold in painting the wall of a building above the sidewalk involves a recognizable risk that the scaffold, paint brush or bucket, or the painter himself, may fall and injure some one passing below." This language does not provide a remedy for the painter who may be injured by taking a plunge from the scaffold, but only for some other person injured by his fall. All six illustrations of this principle involve harm to a bystander or other third person.

In *Monk v. Virgin Islands Water & Power Authority*,[8] the Third Circuit addressed the question of whether an employer is liable to a contractor's employee for harm caused at the employer's work site. The court observed that when the Restatement Second was adopted in 1962, there was little uniformity on this issue, but that since the early 1980's, "an overwhelming majority" of state and federal courts have held that employers are not so liable. This trend is based on four primary factors. First, workers' compensation statutes shield an independent contractor who pays workers' compensation insurance premiums from further liability, and property owners who hire contractors and indirectly pay the cost of such coverage, should be similarly shielded.[9] Second, a property owner's liability is not necessary to achieve

[8]53 F.3d 1381, 1391 (3rd Cir.1995).

[9]*Id.* at 1392.

the original aim of the peculiar risk doctrine because of worker's compensation.[10] Third, while an employer may easily ascertain workplace risks posed to passers-by, the employer may not have the expertise to detect the risks to a contractor's workers and the protections necessary to reduce the owner's expertise.[11] Fourth, employers need not be held liable under the peculiar risk provisions of Chapter 15 because other remedies exist under the Restatement, such as the right of the contractor's employees, like other invitees, to sue for certain defects on the land under Restatement § 343.[12]

Delaware law measures duties owed in terms of reasonableness.[13] In keeping with a majority of other jurisdictions, the Court finds that it is not reasonable to impose a duty on employers where the Restatement (Second) of Torts does not contemplate that the protected class of "others" includes a contractor's employees under the peculiar risk provisions of Chapter 15 and where there is an adequate remedy available under Delaware's workers' compensation law.

Having found that Plaintiff is not a member of the protected class of "others" for purposes of the peculiar risk doctrine, the Court need not reach the question of

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[10] *Id.*

[11] *Id.* at 1393.

[12] *Id.*

[13] *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1092 (Del.Super.1994).

whether Defendants' use of asbestos-containing insulation in the 1960's did or did not involve a peculiar risk to Plaintiff.

For these reasons, Defendants' motions for summary judgment on the issue of the peculiar risk doctrine are Granted.

It Is So ORDERED.

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Judge John E. Babiarz, Jr.

JEB,jr/BJW/RMP
Original to Prothonotary