

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

Thomas E. Archie and Joyce Archie, his wife	)	C. A. No. 02C-08-204-ASB
Daniel E. Bachman	)	C. A. No. 02C-04-280-ASB
Paul Barkus and Yvonne Barkus	)	C. A. No. 02C-03-056-ASB
Cynthia G. Beam, Personal Representative of the Estate of Mary Good, Deceased	)	C. A. No. 02C-08-239-ASB
John F. Betley, Jr. and Jean Betlwey, his wife	)	C. A. No. 02C-01-041-ASB
Oda M. Biddle, as Surviving Spouse and Personal Representative of Drexel Wayne Biddle, Sr., deceased	)	C. A. No. 02C-03-194-ASB
Forrest A. Boettcher and Virginia Boettcher, his wife)	)	C. A. No. 02C-06-075-ASB
John A. Booth and Marcia Booth, his wife	)	C. A. No. 02C-04-108-ASB
Michael Bove	)	C. A. No. 02C-06-074-ASB
Robert Brady	)	C. A. No. 02C-02-204-ASB
Arthur Brobst and Michelle Brobst, his wife	)	C. A. No. 02C-04-006-ASB
Charles Brower and Nancy Brower, his wife	)	C. A. No. 02C-08-299-ASB
Mark A. Chase and Shari Chase, his wife	)	C. A. No. 02C-06-209-ASB
Francis G. Choma and Patricia Choma, his wife	)	C. A. No. 02C-03-195-ASB
Joseph D. Christopher	)	C. A. No. 02C-07-265-ASB
Antimo Cofrancesco and Brenda Cofrancesco, his wife	)	C. A. No. 02C-08-182-ASB
Albert J. Conner, Jr. and Margaret Conner, his wife )	)	C. A. No. 02C-03-206-ASB
Rocco A. DiOssi	)	C. A. No. 02C-08-291-ASB
Hugh Dougherty	)	C. A. No. 02C-09-004-ASB
Michael Federowicz and Catherine Federowicz, his wife	)	C. A. No. 02C-12-014-ASB
Richard S. Ferguson, II and Bonnie Ferguson, his wife	)	C. A. No. 02C-08-016-ASB
Marshall J. Fields, Jr. and Arnita Fields, his wife )	)	C. A. No. 02C-03-279-ASB
Harvey Fisher and Ann Fisher, his wife	)	C. A. No. 02C-08-296-ASB
John A. Flynn and Dolores Flynn, his wife	)	C. A. No. 03C-01-138-ASB
Francis A. Hackendorn and Linda Hackendorn, his wife	)	C. A. No. 02C-08-300-ASB
Charles W. Hannagan and Ellen Hannagan, his wife)	)	C. A. No. 02C-09-003-ASB
John J. Healy and Patricia Healy, his wife	)	C. A. No. 02C-07-264-ASB
Conrad Heinold and Abgline Heinold, his wife	)	C. A. No. 02C-08-095-ASB
David R. Holleran and Susan Holleran, his wife	)	C. A. No. 02C-04-281-ASB
John C. Hopkins and Mildred C. Hopkins, his wife )	)	C. A. No. 03C-01-123-ASB
Earl L. Hudson and Linda Hudson, his wife	)	C. A. No. 02C-09-002-ASB
Larre M. Jones	)	C. A. No. 02C-04-075-ASB
James A. Jones and Mae Ella Jones, his wife	)	C. A. No. 02C-05-166-ASB
Stanley N. Justis	)	C. A. No. 02C-03-005-ASB
Loretta C. Kilby, as Surviving Spouse of)	

Delmer T. Kilby, Sr., Deceased	)	C. A. No. 02C-06-110-ASB
William T. Knox and Joanne Knox, his wife	)	C. A. No. 02C-07-091-ASB
James Kossek and Joanne Kossek, his wife	)	C. A. No. 02C-08-067-ASB
George C. Koukedis, Sr. and)	
Jenny Koukedis, his wife	)	C. A. No. 02C-08-066-ASB
Ruth Krause, as Surviving Spouse of)	
Mark Krause, Deceased	)	C. A. No. 03C-01-124-ASB
Edward A. Lesniczak, Sr., and)	
Patricia Lesniczak, his wife	)	C. A. No. 02C-08-294-ASB
Ronald L. Marks and Jacqueline Marks, his wife	)	C. A. No. 02C-06-210-ASB
Larry S. Marshall and Barbara A. Marshall, his wife	)	C. A. No. 02C-07-249-ASB
Ralph A. McVey and Linda McVey, his wife	)	C. A. No. 02C-06-247-ASB
Charles H. Mecke and Oma Faye Mecke, his wife	)	C. A. No. 02C-11-001-ASB
William L. Milliken and Carol Milliken, his wife	)	C. A. No. 02C-08-292-ASB
Madeline Faye Mitsdarfer, Personal)	
Representative of the)	
Estate of Frederick Mitsdarfer, Deceased	)	C. A. No. 02C-08-001-ASB
Paige Montgomery and)	
Eugene Montgomery, her husband	)	C. A. No. 02C-02-207-ASB
Columbus A. Nacchia, Jr.	)	C. A. No. 02C-08-240-ASB
John J. Nedelka and Mary L. Nedelka, his wife	)	C. A. No. 02C-04-107-ASB
Richard Newman and Elizabeth Newman, his wife	)	C. A. No. 02C-09-001-ASB
William A. Nickel, Jr. and Sarah Nickle, his wife	)	C. A. No. 02C-08-094-ASB
Benjamin F. Nyce and Sandra Nyce, his wife	)	C. A. No. 02C-08-241-ASB
Theodore G. Pankowski and)	
Deborah Pankowski, his wife	)	C. A. No. 02C-06-225-ASB
Mary Patten and Marvin Patten, her husband	)	C. A. No. 02C-02-206-ASB
Mary Ann Pedrick, Personal Representative of the)	
Estate of Horace Pedrick, Deceased	)	C. A. No. 02C-08-183-ASB
Joseph R. Pennington and)	
Ann Marie Pennington, his wife	)	C. A. No. 02C-03-219-ASB
Gerald R. Penzoza,	)	C. A. No. 02C-10-020-ASB
Dewey L. Pierce	)	C. A. No. 02C-04-128-ASB
William O. Porter and Melanie Porter, his wife	)	C. A. No. 02C-12-093-ASB
Lucious Pringle, Jr. and Ernestine Pringle, his wife	)	C. A. No. 02C-02-066-ASB
Stephen W. Pringle	)	C. A. No. 02C-08-205-ASB
Edward H. Pugh and Sandra Lee Pugh, his wife	)	C. A. No. 02C-03-043-ASB
John W. Robson	)	C. A. No. 02C-02-205-ASB
Robert Rozenko	)	C. A. No. 02C-11-010-ASB
James Ryan and Mary Ryan, his wife	)	C. A. No. 01C-12-172-ASB
Paul A. Shannon,	)	C. A. No. 02C-09-006-ASB
Robert Shively and Priscilla Shively, his wife	)	C. A. No. 02C-03-142-ASB
William E. Simmons, Sr. and Janice R. Simmons	)	C. A. No. 02C-07-006-ASB
Edward A. Slavin, Jr. and Diana Slavin, his wife	)	C. A. No. 02C-08-042-ASB
Diana Slavin and Edward A. Slavin, her husband	)	C. A. No. 02C-09-243-ASB

William J. Smolka and Evelyn C. Smolka, his wife	)	C. A. No. 02C-02-134-ASB
Coy W. Snow	)	C. A. No. 02C-02-267-ASB
Clarence R. Sweetman, Jr.	)	C. A. No. 02C-09-005-ASB
Gary Sylvestro	)	C. A. No. 03C-01-001-ASB
Joseph Todd	)	C. A. No. 02C-03-193-ASB
Harry Toy and Irene Toy, his wife	)	C. A. No. 02C-08-093-ASB
John Watson	)	C. A. No. 02C-08-297-ASB
John W. Whitby, Sr. and Janice Whitby, his wife	)	C. A. No. 02C-02-065-ASB
Warren Whiteside and Roberta Whiteside, his wife	)	C. A. No. 02C-08-298-ASB
Frederick Witt and Charlette Witt, his wife	)	C. A. No. 02C-05-214-ASB
James F. Wooleyhan	)	C. A. No. 00C-08-028-ASB
Stanley F. Zgleszewski and)	
Janice M. Zgleszewski, his wife	)	C. A. No. 02C-08-293-ASB
)	
Plaintiffs,)	
v.)	
)	
4520 Corp., Inc., et al.)	
)	
Defendants.)	

Submitted: January 31, 2003

Decided: March 3, 2003

***Defendant 4520 Corporation’s Motion to Dismiss. Motion Granted.
Complaint Dismissed with Leave to Amend Within 30 Days.***

OPINION

Appearances:

Richard T. Wilson, Esquire, Wilmington, Delaware.
Attorney for Plaintiffs.

Christian J. Singewald, Esquire, Wilmington, Delaware.
Attorney for Defendant 4520 Corp., Inc..

JOHN E. BABIARZ, JR., JUDGE.

This is the Court's decision on Defendant 4520 Corporation's motion to dismiss the Complaints filed by 82 Plaintiffs in an asbestos-related personal injury action against numerous Defendants. Plaintiffs oppose the motion to dismiss and have submitted a First Amended Complaint, which the Court accepts. As explained below, the motion to dismiss the Complaints is Granted with leave to amend within 30 days of the date of the issuance of this Opinion. Notices of adoption filed by certain other Defendants are therefore moot.¹

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be based will not be granted if the plaintiff may recover under any set of circumstances susceptible of proof under the complaint.² All well-pled allegations are to be taken as true, and all reasonable inferences shall be in favor of the non-moving party.³ If the Court concludes that the plaintiff cannot prevail on any set of facts inferable from

¹Defendants Atlas Turner, Inc., Bell Asbestos Mines, Ltd., and Sequoia Ventures, Inc. seek to adopt Defendant 4520's position on the motion to dismiss.

²*Spence v. Funk*, 396 A.2d 967 (Del. 1978); *Ramunno v. Cawley*, 705 A.2d 1029 (Del. 1998).

³*Ramunno v. Cawley*, 705 A.2d at 1034.

the pleadings, the complaint may be dismissed.⁴

DISCUSSION

In the First Amended Complaint,⁵ Plaintiffs allege negligence as to all Defendants (Count 1); premises liability (Count 2); contractor liability (Count 3); wilful, wanton and reckless conduct (Count 4); civil conspiracy (Count 5); strict liability (Count 6); and loss of consortium (Count 7). Plaintiffs have agreed to dismiss the counts for civil conspiracy and strict liability.⁶

Defendant 4520 moves to dismiss the Complaint in its entirety because Plaintiffs have not pled the cause with particularity and therefore fail to state a claim upon which relief can be based. Plaintiffs concede that the Complaint “paints [the allegations of negligence] with a broad brush,”⁷ but assert that it is not vague or lacking in particularity.

⁴*In re USA Cafes, L.P. Litigation*, 600 A.2d 43, 47 (Del. Ch. 1991).

⁵See Plaintiffs’ Motion in Opposition, Ex. C at 10-13. In a clerical error, the First Amended Complaint mislabels the counts for both conspiracy and wilful, wanton and reckless conduct as Count 4, resulting in a total of six counts rather than seven. For purposes of this Opinion, the Court refers to Counts 1 through 7.

Other than Plaintiffs’ names and personal information, the 82 Complaints are virtually identical and are so treated in this Opinion. The Court’s conclusions apply to each Plaintiff individually.

⁶See Transcript of Hearing (July 18, 2002) at 8.

⁷Plaintiff’s Opposition at 5.

The circumstances constituting negligence must be pled with particularity, pursuant to Super. Ct. Civ. R. 9(b),⁸ in order to inform a defendant of the acts or omissions by which a duty has been breached.⁹ As this Court has previously stated, “[i]t is not sufficient to state the result or conclusion of fact arising from circumstances not set forth in the declaration, nor to make a general statement of the facts which admits of almost any proof to sustain it.”¹⁰

In regard to time and place, which are at issue in this case, Rule 9(f) provides that “averments of time and place are material and shall be considered like all other averments of material matter.” In addressing claims of fraud under Rule 9, this Court has stated that the complaint must allege the “time, place, and contents of the false representation. . . .”¹¹ Negligence, like fraud, is a special matter that must be pled with particularity, and the Court concludes that the requisite particularity includes

⁸Rule 9(b) provides as follows:

Fraud, negligence, mistake, condition of mind. In all averments of fraud, negligence, or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

⁹*Riggs Nat’l Bank v. Boyd*, 2000 WL 303308 (Del.Super.) (citing *Macino v. Webb*, 274 A.2d 711, 713 (Del.Super.Ct.1971)).

¹⁰*Lee v. Johnson*, 1996 WL 944868 at *2 (Del. Super.) (citations omitted).

¹¹*Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. Ct.), *aff’d sub nom. Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del.1984).

some indication of the time and place of the alleged injuries.

Plaintiff Charles Hannagan's Complaint,¹² which is representative of all 82 complaints, alleges that Hannagan is an ironworker who suffers from asbestos-related injuries because all Defendants failed in their duty to protect Hannagan from the dangers of inhaling asbestos. However, there is no allegation anywhere in the Complaint of a work site or premises where Plaintiff was injured, or a time frame during which an injury occurred. The Court will accept conclusions asserted in the Complaint only if there are specific allegations of fact to support them.¹³ In this case, Plaintiffs have not provided any specifics as to the time, place or manner of the alleged injuries. Even under the standards of notice pleading, this broad brush pleading is not sufficient. Defendant 4520's motion to dismiss Counts 1, 2 and 3 is granted without prejudice.

Defendant 4520 makes a similar argument to dismiss Count 4, which alleges wilful, wanton or reckless conduct. While state of mind requirements may be averred generally pursuant to Rule 9(b), the Court again finds that some notice of time, place or manner of injury is required. The lack of particularity which is fatal to the

¹²See Motion to Dismiss, Ex. A.

¹³*In re Santa Fe Pacific Shareholders Litig.*, 669 A.2d 59, 65-66 (Del.1995).

allegations of ordinary negligence is also fatal to the allegations of the aggravated form of negligence, along with the associated claim for punitive damages.¹⁴ Defendant 4520's motion to dismiss Count 4 is therefore granted without prejudice.

Loss of consortium (Count 7) is a derivative claim which need not be addressed at this time in light of the Court's decision to allow Plaintiffs to amend their Complaints.

Finally, the notices of adoption filed by other Defendants are moot but may be renewed if Plaintiffs file a Second Amended Complaint.

CONCLUSION

For the reasons explained above, Defendant 4520's motion to dismiss the Complaint is Granted. Plaintiffs may submit a Second Amended Complaint for each Plaintiff within 30 days of the issuance of this Opinion.

It Is So ORDERED.

/s/ John E. Babiarz, Jr.

Judge John E. Babiarz, Jr.

¹⁴See *Wolstenholme v. Hygienic Exterminating Co., Inc.*, 1988 WL 77655 at *1-2 (Del. Super.) (holding that where plaintiffs fail to plead fraud with particularity, the dependent request for punitive damages must be dismissed); *Rowlands v. Phico Ins. Co.*, 2000 WL 1092134 at *6 (D. Del.).

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