

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2018

5 (Argued: April 17, 2019

Decided: May 18, 2020)

6 Docket No. 17-3942*

7
8 MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA
9 FORREST; MICHAEL HICKEY, individually and as parent and natural
10 guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN
11 MILLER, as parent and natural guardian of K.M., infant; JAMES
12 MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as
13 parent and natural guardian of K.P., infant; and DANIEL SCHUTTIG,
14 individually and on behalf of all others similarly situated,

15 *Plaintiffs-Appellees,*

16 - v. -

17 SAINT-GOBAIN PERFORMANCE PLASTICS CORP., HONEYWELL
18 INTERNATIONAL INC., f/k/a ALLIED-SIGNAL INC.,

* This appeal was consolidated for oral argument with the appeals in *Benoit v. Saint-Gobain Performance Plastics Corp.*, Nos. 17-3941, etc., and *R.M. Bacon, LLC v. Saint-Gobain Performance Plastics Corp.*, No. 18-2018, which are resolved today in separate decisions.

Before: KEARSE, POOLER, and CARNEY, *Circuit Judges*.

In this action, commenced as a class action by residents of the Village of Hoosick Falls, New York, defendants--the owner and a past owner of a manufacturing facility using a chemical, perfluorooctanoic acid ("PFOA"), and disposing of that chemical in a manner that contaminated the water supply in the Village--appeal pursuant to 28 U.S.C. § 1292(b) from so much of an order of the United States District Court for the Northern District of New York, Lawrence E. Kahn, *Judge*, as denied their motion under Fed. R. Civ. P. 12(b)(6) to dismiss plaintiffs' (1) claims of negligence and strict liability for (a) personal injury in the nature of accumulation of PFOA in the blood, thereby increasing risks of various types of illness, and (b) damage to property; (2) claims of trespass and nuisance for contamination of water in privately owned wells; and (3) requests for the costs of medical monitoring as consequential damages for (a) personal injury or (b) damage to property, *see Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F.Supp.3d 233 (2017). For the reasons discussed in our opinion issued today in *Benoit v. Saint-Gobain*

** The Clerk of Court is directed to amend the official caption to conform with the above.

1 *Performance Plastics Corp.*, Nos. 17-3941, etc., which was argued in tandem with the
2 present appeal and involved the same issues, we reject defendants' contentions that
3 the district court erred in denying their motion to dismiss plaintiffs' claims of
4 personal injury and requests for medical monitoring as relief for such injuries, and in
5 denying their motion to dismiss plaintiffs' claims of property damage. We conclude
6 that the district court's ruling that medical monitoring is available relief for claims
7 solely of property damage is not an order that meets the criteria for immediate review
8 under 28 U.S.C. § 1292(b), and we thus dismiss, as improvidently allowed, so much
9 of the appeal as seeks reversal of that part of the district court's order.

10 Affirmed in part; dismissed in part.

11 STEPHEN G. SCHWARZ, Rochester, New York (Faraci
12 Lange, Rochester, New York; Robin L. Greenwald,
13 James J. Bilsborrow, William A. Walsh, Weitz &
14 Luxenberg, New York, New York, on the brief), *for*
15 *Plaintiffs-Appellees*.

16 SHEILA L. BIRNBAUM, New York, New York (Mark S.
17 Cheffo, Bert L. Wolff, Lincoln Davis Wilson, Quinn
18 Emanuel Urquhart & Sullivan, New York, New York;
19 Dechert, New York, New York, on briefs), *for*
20 *Defendant-Appellant Saint-Gobain Performance Plastics*
21 *Corp.*

22 ARNOLD & PORTER KAYE SCHOLER, Washington, D.C.
23 (Michael D. Daneker, Elissa J. Preheim, Washington,

1 D.C.; Jennifer R. Kwapisz, Arnold & Porter Kaye
2 Scholer, New York, New York, of counsel), *for*
3 *Defendant-Appellant Honeywell International Inc.*

4 Natural Resources Defense Council, New York, New York
5 (Vivian H.W. Wang, of counsel), *filed a brief as Amicus*
6 *Curiae, in support of Plaintiffs-Appellees.*

7 Public Justice, Denver, Colorado (Neil Levine, of counsel),
8 *filed a brief as Amicus Curiae, in support of Plaintiffs-*
9 *Appellees.*

10 Reed Smith, New York, New York (Oliver Beiersdorf, of
11 counsel), *filed a brief for Amici Curiae Product Liability*
12 *Advisory Council, Inc. & National Association of*
13 *Manufacturers, in support of Defendants-Appellants.*

14 Alston & Bird, Charlotte, North Carolina (David
15 Venderbush, New York, New York; Brian D. Boone,
16 Charlotte, North Carolina, of counsel), *filed a brief for*
17 *Amici Curiae Chamber of Commerce of the United States*
18 *of America, Pharmaceutical Research and Manufacturers*
19 *of America, and The Business Council for New York State,*
20 *Inc., in support of Defendants-Appellants.*

21 PER CURIAM:

22 The present action is a class action--in which there have as yet been no
23 class certifications--whose putative classes include all individual owners or renters
24 of real property within the Village of Hoosick Falls, New York (the "Village"), and
25 anyone who consumed water from the Village and exhibits a heightened level of the
26 toxic chemical perfluorooctanoic acid ("PFOA") in the blood, *see Baker v. Saint-Gobain*

1 *Performance Plastics Corp.*, 232 F.Supp.3d 233, 236 & n.1, 256 (N.D.N.Y. 2017)
2 ("*Baker I*"). The complaint alleges that defendants Saint-Gobain Performance Plastics
3 Corp. and Honeywell International Inc., f/k/a Allied-Signal Inc., respectively the
4 owner and a past owner of a manufacturing facility in the Village, negligently used
5 and disposed of PFOA in a manner that contaminated the Village's water supply.
6 Defendants appeal pursuant to 28 U.S.C. § 1292(b) from so much of an order of the
7 United States District Court for the Northern District of New York, Lawrence E. Kahn,
8 *Judge*, as denied their motion under Fed. R. Civ. P. 12(b)(6) for dismissal of plaintiffs'
9 (1) claims of negligence and strict liability (a) for personal injury in the nature of
10 accumulation of PFOA in the blood, thereby increasing risks of various types of
11 illness, and (b) for damage to property; (2) claims of trespass and nuisance for
12 contamination of water in privately owned wells; and (3) requests for the costs of
13 medical monitoring as consequential damage for (a) personal injury or (b) damage to
14 property, *see Baker I*, 232 F.Supp.3d at 252-53, 256-57.

15 This appeal was argued in tandem with two others that are decided
16 today, including *Benoit v. Saint-Gobain Performance Plastics Corp.*, Nos. 17-3941, etc., ---
17 F.3d --- (2d Cir. 2020) ("*Benoit II*"). *Benoit II* was a consolidated appeal from orders in
18 16 actions before Judge Kahn, brought by residents of the Village who asserted the

1 same categories of claims as those asserted in the present action, *see, e.g., Benoit v.*
2 *Saint-Gobain Performance Plastics Corp.*, 2017 WL 3316132, at *1 (N.D.N.Y. Aug. 2, 2017)
3 ("*Benoit I*"). Defendants' motion to dismiss claims in the present action contained the
4 same arguments that defendants made in moving to dismiss the complaints in
5 *Benoit I*; the district court's decisions in this case and those cases were the same, *see,*
6 *e.g., id.* at *6, *13; and defendants' arguments in the present appeal challenging the
7 court's *Baker I* denial of their motion to dismiss are virtually identical to those they
8 have made in their appeal challenging the parallel orders entered in *Benoit I*.

9 For the reasons discussed in *Benoit II*, we conclude that the district court
10 in the present case properly denied defendants' motion to dismiss plaintiffs' claims
11 for personal injury, property damage, trespass, and private nuisance, and for medical
12 monitoring with respect to personal injuries; and that the court's ruling that costs of
13 medical monitoring can be awarded on the basis solely of injury to property is not a
14 ruling that meets the criteria for immediate review under 28 U.S.C. § 1292(b).

15 Accordingly, the appeal from so much of the order of the district court
16 as ruled that medical monitoring is available relief for a claim of property damage is
17 dismissed as improvidently granted under § 1292(b). In all other respects, the denial
18 of defendants' Rule 12(b)(6) motion to dismiss is affirmed.