

[J-138A&B-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ELEANOR ABRAMS, EXECUTRIX OF	:	No. 17 EAP 2008
THE ESTATE OF KENNETH ABRAMS,	:	
	:	
Appellant	:	Appeal from the Judgment of Superior
	:	Court filed on 12/17/07 at No. 1182 EDA
	:	2005 affirming the Judgment entered on
v.	:	4/4/05 in the Court of Common Pleas,
	:	Philadelphia County, Civil Division at No.
	:	3458 February term 2003
PNEUMO ABEX CORPORATION,	:	
AMERICAN STANDARD, INC., A.W.	:	
CHESTERTON, INC., BRAND	:	
INSULATION, INC., BROWN BOVERI	:	
CORPORATION, BURNHAM BOILER	:	
CORPORATION, CERTAINTEED	:	
CORPORATION, CLEAVERBROOKS	:	
CO., CRANE CO., DEMMING DIVISION,	:	
CRANE PACKING, CROUSE-HINDS,	:	
CROWN CORK & SEAL COMPANY,	:	
INC., DANA CORPORATION, DRESSER	:	
INDUSTRIES, INC., DURABLA	:	
MANUFACTURING CO., EASTERN	:	
GUNNITE CO., INC., GEORGIA PACIFIC	:	
CORPORATION, GOULDS PUMPS, INC.,	:	
GREENE TWEED & CO., INC., HAJOCA	:	
PLUMBING CO., HALLIBURTON CO.,	:	
HONEYWELL, MCARDLE-DESCO	:	
CORPORATION, MELRATH GASKETS,	:	
INC., METROPOLITAN LIFE	:	
INSURANCE CO., NOSROC	:	
CORPORATION, PARS	:	
MANUFACTURING CO., PECORA	:	
CORPORATION, PFIZER, INC.,	:	
QUIGLEY CO., INC., RAILROAD	:	
FRICTION PRODUCTS, THE READING	:	
COMPANY, RILEY STOKER	:	
CORPORATION, ROCKBESTOS	:	
COMPANY, UNION CARBIDE	:	
CORPORATION WALTER B.	:	

GALLAGHER CO., WEIL MCLAIN CO.,
WESTINGHOUSE ELECTRIC
CORPORATION AND JOHN CRANE,
INC.,

Appellees

MARILYN SHAW, EXECUTRIX OF THE
ESTATE OF JOHN SHAW,

Appellant

v.

A.W. CHESTERSTON, INC., BRAND
INSULATION, INC., CERTAINTEED
CORPORATION, CLEAVERBROOKS
CO., CRANE CO., DEMMING DIVISION,
CRANE PACKING, CROWN CORK AND
SEAL COMPANY, INC., DANA
CORPORATION, DURABLA
MANUFACTURING CO., GEORGIA
PACIFIC CORPORATION, GOULD
PUMPS, INC., GREENE TWEED & CO.,
INC., MELRATH GASKETS, INC.,
METROPOLITAN LIFE INSURANCE CO.,
NOSROC CORPORATION, PARS
MANUFACTURING CO., PECORA
CORPORATION, RAP AMERICAN
CORPORATION, RILEY STOKER
CORPORATION, UNION CARBIDE
CORPORATION, WALTER B.
GALLAGHER CO., WEIL MCLAIN CO.,
VIACOM/WESTINGHOUSE ELECTRIC
CORP., ANCHOR PACKING CO.,
COMBUSTION ENGINEERING, INC.,
CROUSE-HINDS, DURAMETALLIC
CORP., GARLOCK, INC., GENERAL
ELECTRIC CO., HAJOCA PLUMBING
CO., INGERSOLL RAND, STUDEBAKER-
WORTHINGTON, INC., ZURN

18 EAP 2008

Appeal from the Superior Court filed on
12/17/07 at No. 1185 EDA 2005, affirming
the judgment entered on 4/4/05 in the
Court of Common Pleas, Civil Division at
No. 3459 February term 2003

ARGUED: October 20, 2008

INDUSTRIES, JOHN CRANE, INC., :
: :
Appellees : :

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: October 21, 2009

I respectfully dissent, as I would find that Appellants' claims against Crane were time-barred and incapable of revival by a subsequent change in the law.

Under the legal framework in effect at the time Appellants initiated their lawsuits in the mid-1980s, the two-year statute of limitations applied to all claims arising from asbestos exposure. This limitation applied to any claims that Appellants could have brought against Crane for both actual and foreseeable injuries stemming from such exposure. The two-year period began to run when the plaintiffs were first diagnosed with an asbestos-related condition. See generally Cochran v. GAF Corp., 542 Pa. 210, 215-20, 666 A.2d 245, 248-50 (1995) (discussing the discovery rule). A cause of action for an increased risk of contracting lung cancer was recognized at that time, see Giovanetti v. Johns-Manville Corp., 372 Pa. Super. 431, 437-38, 539 A.2d 871, 874 (1988), and indeed, Appellants' original complaints raised such a claim, albeit not against Crane. See Abrams v. Pneumo Abex Corp., 939 A.2d 388, 391 & n.3 (Pa. Super. 2007) (en banc).

Thus, well before the present suit was initiated, the statute of limitations had expired on any and all claims that Appellants could have brought against Crane arising out of the asbestos exposure that formed the basis for the 1980s litigation. As the Superior Court majority stated, "[a]ppellants and their late husbands had an opportunity

to sue John Crane for increased risk and fear of cancer during the 1980s but failed to do so, despite the fact that both couples knew they were required to assert all claims for present and future harm within two years of the initial diagnosis of an asbestos-related injury.” Id. at 394. Accordingly, when Appellants failed to name Crane as a defendant in their initial lawsuits, and two years elapsed from the date of diagnosis, Crane became entitled to the repose afforded by the statute of limitations.¹

The majority surmounts the above statute-of-limitations barrier by indicating that Appellants’ cause of action is substantively different from the one they could have raised against Crane in their original lawsuits. See Majority Opinion, slip op. at 19. Although I acknowledge that the claim is different (inasmuch as an increased risk of developing cancer is a factually distinct injury from the actual development of cancer), I do not believe that this difference properly controls the outcome because the material point, in my view, is that this claim did not exist in the relevant time period during which the parties’ rights became vested. Specifically, when a party’s right to institute and maintain a suit arises, the legal landscape is fixed in the sense that recognized causes of action in favor of the injured party may not subsequently be removed. See Ieropoli v. AC&S Corp., 577 Pa. 138, 155-56, 842 A.2d 919, 930 (2004). By the same token, defendants and potential defendants also become vested in the defenses available to them at that juncture. See generally Konidaris v. Portnoff Law Associates, 598 Pa. 55, 75, 953 A.2d 1231, 1242 (2008) (referencing “our Court’s extension of the Remedies Clause to defenses”).

¹ Statutes of limitations are designed to effectuate the preservation of evidence, the right of potential defendants to repose, and administrative efficiency and convenience. See Lesoon v. Metropolitan Life Ins. Co., 898 A.2d 620, 627 (Pa. Super. 2006).

As applied presently, at the time Appellants' original causes of action predicated upon asbestos exposure accrued in the mid-1980s, the one-disease rule pertained and Crane was potentially liable for any injury that could be remedied under the controlling law extant at that time. If, by whatever circumstance or fortuity (apart from fraud), Crane would not be named as a defendant within the applicable two-year limitations period, Crane could then rely upon the statute-of-limitations as an affirmative defense. See Peterson v. Delaware River Ferry Co., 190 Pa. 364, 365, 42 A. 955, 955 (1899). That defense, moreover, protected Crane from joinder as an additional defendant through an amendment to the pleadings, whether or not such joinder was sought relative to the same claims already pled, or within the context of a new cause of action. See Hoare v. Bell Tel. Co. of Pa., 509 Pa. 57, 59, 500 A.2d 1112, 1113 (1985) ("Where the statute of limitations has run, amendments will not be allowed which introduce a new cause of action or bring in a new party" (emphasis added) (quoting Girardi v. Laquin Lumber, 232 Pa. 1, 2, 81 A. 63, 64 (1911) (per curiam))). A fortiori, then, the limitations defense was available to Crane many years after the original litigation ended -- again, notwithstanding that the plaintiffs sought to proceed against Crane under a new cause of action after a change from the one- to the two-disease rule.

From a policy perspective, moreover, although it cannot be doubted that recognition of the two-disease rule in this Commonwealth was based on salutary considerations developed through judicial experience in the arena of asbestos litigation, it should also be recognized that countervailing considerations exist in cases, such as this one, where the action was brought at a time when the defendants and potential defendants could reasonably expect to rely on the applicable statutes of limitations or repose once the limitations period expired. As this Court has explained on multiple occasions,

statutes of limitation and repose are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation.

Berwick Industries v. WCAB (Spaid), 537 Pa. 326, 334-35, 643 A.2d 1066, 1070 (1994) (internal quotation marks omitted). Recognizing this, the Superior Court concurrence in the present matter aptly stated that

the plaintiffs in these particular cases . . . were bound by the pre-Marinari[v. Asbestos Corp., 417 Pa. Super. 440, 612 A.2d 1021 (1992) (en banc)] state of the law. In the pre-Marinari era, plaintiffs were required to file suit, within the applicable statute of limitations, against all possible asbestos defendants upon being diagnosed with an asbestos-related disease, even if they had not yet developed cancer. The [contrary] position, while appealing, would undermine the important goal of repose and finality in our judicial system with regard to the plaintiffs and defendants in these cases.

Abrams, 939 A.2d at 395 (Lally-Green, J., concurring). Of particular relevance here, and as explained above, if a party (such as Crane) was not actually named as a defendant within the limitations period, it was able to rely upon the statute of limitations in order to arrange its affairs going forward. Accord id. at 394 (“As the statute of limitations applicable to the previous lawsuits expired long ago, John Crane reasonably believed that it would not have to defend these claims, and the company is entitled to repose due to the fact that it was not named as a defendant in the prior actions.”).

As a further indication that the majority’s position is conceptually problematic, I note that the availability of compensation for an increased risk of cancer grew out of the one-disease rule in the first instance, see Simmons v. Pacor, Inc., 543 Pa. 664, 674-75, 674 A.2d 232, 237 (1996), and Appellants acknowledge that their settlements of the prior actions included compensation for increased risk. See Brief for Appellants at 14; Abrams, 939 A.2d at 394. Thus, the availability of such compensation was based on

the premise that, pursuant to the one-disease rule, later recovery would be unavailable for the actual development of cancer as the limitations period would most likely have expired. The present elimination of this logical premise by the majority now appears, retroactively, to affect the validity of the prior compensation for increased risk. See Simmons, 543 Pa. at 676, 674 A.2d at 238 (“Appellants concede that a jury may be precluded from awarding damages for an increased risk of cancer in light of Marinari.”). From a defendant’s point of view, moreover, full compensation for all cancers caused by asbestos exposure has, in theory at least, been provided to the set of plaintiffs diagnosed during the relevant time period, as all such plaintiffs have received compensation for their expected (i.e., average) harm.² If we now permit full recovery for the subset of such plaintiffs that actually contract cancer, we will be requiring the defendants as a class to provide full compensation a second time.

For the foregoing reasons, I would affirm the judgment of the Superior Court.

Mr. Chief Justice Castille joins this dissenting opinion.

² Appellants admit that the amount of compensation for each individual plaintiff was calculated by multiplying the percentage increase in their chance of contracting the cancer, times the harm that would result from the disease. See Brief for Appellants at 14 (quoting jury instruction to this effect).