IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-02045

REBEKAH ANGLE — APPELLANT-PLAINTIFF

VS.

KOPPERS, INC. ET AL — APPELLEES-DEFENDANTS

APPEAL FROM THE CIRCUIT COURT OF
GRENADA COUNTY
HONORABLE JOSEPH H. LOPER, JR., CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT REBEKAH ANGLE

ORAL ARGUMENT REQUESTED

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SUMMARY OF REPLY ARGUMENT

This brief responds to the brief of appellees as well as the brief of *amicus curiae* Mississippi Manufacturers Association. In this reply brief, only those contentions of the original brief which require clarification in light of the responding briefs are discussed. The failure to re-urge any contention in the original brief is not intended a waiver of that contention, and Ms. Angle relies on each argument and authority in her opening brief.

REPLY ARGUMENT

I. To avoid an unjust result, Miss. Code Ann. §§15-1-35 and 15-1-49 must be construed to provide that the limitation period commences only when the plaintiff had knowledge of the facts necessary to file suit.

The appellees argue that unlike medical malpractice actions, suits concerning the surreptitious release of toxic chemicals which result in illness (the causation of which laypeople are unaware) should be held to a statute of limitations which dates from the diagnosis of the illness. Contrary to the appellees' assertions, Mississippi law does not support this position. The appellees principally cite *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704 (Miss. 1990). Of course, in *Edwards*, the plaintiff filed suit within three years of discovering that he had asbestosis. In his case, the diagnosis of asbestosis necessarily informed him of the source of the injury, since he could only have been exposed to asbestos through his work in the Owens-Illinois plant. The court never decided what would have happened had he *later* learned of the cause of his injury; any speculation about that contained in the opinion is dictum.

What *Edwards* teaches is that the "accrual" of a cause of action can be a date different from that of the wrongful act of the defendants. The defendants in *Edwards* argued that the statute of limitations started at the time of Mr. Edwards's last exposure to asbestos, which

predated his diagnosis with the illness of asbestosis. This Court squarely rejected that conclusion because at the time of the last exposure, Mr. Edwards had not manifested any symptoms of illness. The time when the cause of Mr. Edwards's illness was discovered simply was not in issue in *Edwards*.

Similarly, *Schiro v. American Tobacco Co.*, 611 So.2d 962, 965 (Miss. 1992), did not deal with the situation where an injury is discovered on one date, and the cause of the injury is discovered later. Ms. Schiro knew that her injury was caused by tobacco use at the time she was diagnosed with lung cancer. The issue in *Schiro* was whether the cause of action accrued on that date or on an earlier date. Again, this Court found that the cause of action accrued only when Ms. Schiro could reasonably have been expected to know the facts necessary to file suit. *Pollard v. Sherwin-Williams Co.*, 955 So.2d 764, 769 (Miss. 2007), is of even less help. There, not only was the cause of the injury known at the same time as the injury was discovered, but the statute of limitations was not triggered because the plaintiff was a minor. Again, this Court did not resolve the question before it here. Finally, the appellees cite *Sutherland v. Estate of Ritter*, 959 So.2d 1004 (Miss. 2004).[1] That case specifically concerned the medical malpractice statute of limitation, and, again, any reference to the application of Miss. Code Ann. §15-1-49. is dictum.

The appellees quibble with Ms. Angle's citation of *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994), suggesting that because the version of Miss. Code Ann. §15-1-49 which was in effect at the time of Mr. Sneed's case did not contain a provision for latent injury, this Court would now decide the question differently. Of course, the language of amended §15-1-49 would

[1] While the appellees also cite the Fifth Circuit decision in *Barnes v. Koppers*, 534 F.3d 357 (5th Cir. 2008), as well as other federal cases, the federal courts' interpretation of *Mississippi* law is of course not binding upon Mississippi's highest court.

not save Mr. Sneed's complaint, since his injury, wrongful imprisonment, was not latent. The reasoning of *Smith* clearly applies here:

> Illogical results, such as the finding that plaintiffs are barred from seeking relief from injuries which are undiscoverable until the pertinent time for seeking such relief has passed, would not only undermine the purposes for which statutes of limitations exist, but would also engender disrespect for our civil justice system."

Smith v. Sneed, 638 So.2d 1252, 1257 (Miss. 1994), citing *Edwards*, 573 So.2d at 708-709. This Court's statute of limitations jurisprudence, as discussed here and more fully in the opening brief, clearly supports Ms. Angle's position.

The *amici* suggest that policy considerations require that this Court not allow plaintiffs in cases involving environmental pollution additional time to discover the cause of their injuries. While it is true that statutes of limitations operate to serve the just purpose of allowing potential defendants to manage their liability and to have an opportunity to defend against claims that are not stale, such statutes must not unduly restrict the ability of plaintiffs to bring just claims. As discussed more fully in the opening brief, lay plaintiffs who are the victims of environmental pollution will often not know immediately that such pollution is the cause of their illness. The CERCLA statute at issue here is narrowly drawn to protect such plaintiffs. For example, a plaintiff who is subjected to harmful pollution in his or her workplace cannot claim the protection of this statute; it is presumed that workers will be aware of the pollutants to which they are exposed on the job and the potential harm from those substances. It is only persons such as Ms. Angle, who was exposed to pollutants merely because she worked and lived near the defendants' plant, who are protected. In such cases, the other policy of statutes of limitations must control:

> Illogical results, such as the finding that plaintiffs are barred from seeking relief from injuries which are undiscoverable until the pertinent time for seeking such relief has passed, would not only

undermine the purposes for which statutes of limitations exist, but would also engender disrespect for our civil justice system."

Owens-Illinois, Inc. v. Edwards, 573 So.2d 704, 708-709 (Miss. 1990).

II. In the alternative, 42 U.S.C. §9658 preempts Mississippi's statutes of limitation by inserting into those statutes a "discovery rule" when the alleged injury is caused, in whole or in part, by exposure to hazardous substances, pollutants and contaminants released into the environment.

Under 42 U.S.C. §9658[2], state court actions for "personal injury, or property damages" arising out of exposure to "hazardous substance(s) . . . pollutant(s) or contaminant(s), released into the environment . . . ." are governed by a "discovery rule" under which the statute of limitations does not begin to run until "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* This provision was enacted (in 1986) in part to address the inadequacy of some state laws in dealing with the delayed discovery of toxic substance pollution. H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 261 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 3276, 3354. In applying §9658, a court should bear in mind that CERCLA is a remedial statute that should be construed liberally in order to effectuate its goals. *United States. v. Alcan Aluminum Corporation*, 964 F.2d 252 (3rd Cir. 1992).[3]

The appellees make three arguments against the application of CERCLA to this case. First, they argue that "Ms. Angle has not "established that her claims arose from a 'release' of 'hazardous substances' into the 'environment. This is a summary judgment action, in which all properly pleaded facts not controverted by the defendants must be taken as true and construed in

[2] The section is also cited as §309 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

[3] It should also be noted that the definition of "release" in 42 U.S.C. §9601(22) specifically excludes "any release which results in exposure to persons solely within a workplace."

the light most favorable to the non-movant. Miss. R. Civ. P. 56, *Howard v. City of Biloxi*, 943 So. 2d 751, 754 ¶4 (Miss. App. 2006), quoting *City of Jackson v. Sutton*, 797 So. 2d 977, 979 ¶7 (Miss. 2001). Ms. Angle clearly alleged that her injuries arose out of the discharge into the environment of numerous harmful chemicals. Specifically, she alleged, "Plaintiff was exposed to harmful substances emanating from the Defendants' wood treatment facility located in Grenada County, Mississippi." R-2. Later in her complaint, she alleged,

> Plaintiffs person and property have been exposed to harmful levels of various toxic chemicals, including but not limited to creosote and its constituents, pentachlorophenol, chromium, and other metals and volatile organic compounds (VOC's) through soil, surface water, ground water, air and dust particulates emanating from the Plant, as well as from the railroad.

R-3.

The release of the chemicals is further described in the complaint:

> Reviews of documents related to the woodpreserving industry clearly reveal that certain chemicals of concern were utilized, discharged, disposed, emitted and otherwise released into the local environment by Koppers and its predecessors at the Plant. Based upon this revelation, the groups of chemicals utilized, discharged, disposed and otherwise released by Koppers and its predecessors and considered by the Plaintiffs as relevant to their injuries in this matter include, but are not limited to: coal-tar creosote, creosote mixtures with carrying liquids such as diesel fuel oil, pentachlorophenol (PCP), cooling-tower corrosion inhibitors, metals (such as chromium and arsenic), products of incomplete combustion such as furans and dioxins as well as particulates containing metallic ions and poly-cyclic aromatic hydrocarbons (PARs). **The physical forms in which Plaintiff believes her person and property were exposed to these chemicals of concern include, but are not limited to: off site migrations of wood-preservative liquids and waste-liquids resulting from the wood treatment processes used by Koppers at the Plant; offsite migrations of vapors and gases of chemicals of concern at elevated temperatures; offsite migrations of soot, products and by-products of combustion resulting from onsite fires and burning operations; and, off site migrations of aerosol droplets containing dissolved concentrations of the referenced**

chemicals of concern from a variety of onsite process operations.

R-10-11, emphasis added.

Under CERCLA, "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . ." 42 U.S.C. §9601(22). "Environment" is defined in the statute as "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." *Id.* at (8)(B). Ms. Angle's pleadings clearly allege *multiple* "releases" into the "environment." Whether Ms. Angle can *prove* such releases will be determined at trial; all that is required at this stage is the pleading of a violation. The appellees presented no summary judgment proof that any releases are protected, by permit or otherwise. That is a matter of defense, not a matter which must be pled in the complaint. Thus, for the purposes of this appeal, the appellees should not now be permitted to inject matters not in the record.

Next, the appellees argue that the CERCLA statute of limitations applies only when the plaintiff makes a claim under CERCLA. That contention has been squarely rejected. In *Tucker v. Southern Wood Piedmont Co.*, 28 F.3d 1089 (11th Cir. 1994), *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008) (CERCLA pre-empts Oregon statute of repose); and *Kowalski v. Goodyear Tire and Rubber Co.*, 841 F.Supp. 104 (W.D.N.Y. 1994) (statute of limitations extended by §9658 to the time plaintiff knew or should have known that injury resulted from exposure), cited in the opening brief, the courts held that CERCLA affected *state* statutes of limitations or statutes of repose. In all of these cases, the claims were brought under *state* law, not CERCLA. See also *Freir v. Westinghouse Electric Corp.*, 303 F.3d 176, 197 (2nd Cir. 2002) ("The scope of the FRCD is set in subsection (a)(1) of § 9658; by its terms, the section applies to '*any action*

brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance ... released into the environment from a facility.' 42 U.S.C. §9658(a)(1)." (emphasis in original)).

Finally, the appellees argue that applying the CERCLA statute of limitations to this case would violate the Commerce Clause and the Tenth Amendment to the United States Constitution. U.S. Const. Art. I, §8; U.S. Const. Amend. X. This contention, too, must be rejected. In *Freir v. Westinghouse Electric Corp.*, 303 F.3d 176 (2nd Cir. 2002), the Court found that the grafting of federal limitations periods on state statutes of limitations was within Congress's Commerce Clause authority, and did not violate the Tenth Amendment. The Court held that "In considering legislation to promote safer containment of hazardous wastes and to decrease pollution of the ambient air and navigable waters by such materials, Congress plainly sought to deal with matters that substantially affected interstate commerce." *Id.* at 202. The *Freir* court specifically rejected the defendants' challenge to the limitations provisions of CERCLA:

> [O]ne of CERCLA's goals was to "induce" companies generating, transporting, dumping, and storing, etc., hazardous wastes "voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites," CERCLA House Rep. at 17, reprinted in 1980 U.S.C.C.A.N. at 6120. We think it plain that the FRCD provides such inducement.

Id. at 203. The Court concluded, "In sum, we conclude that the FRCD is an integral part of the regulatory scheme established by CERCLA, furthering CERCLA's goals in various ways, and that the enactment of the FRCD constituted a valid exercise of Congress's powers under the Commerce Clause." *Id.*

The *Freir* court then went on to reject the defendants' Tenth Amendment challenge:

> The FRCD. . . does not conscript into federal service either the state's legislature or its executive branch. Rather, in order that persons victimized by exposure to hazardous wastes not be "deprive[d] . . . of their day in court," FRCD Conf. Rep. at 261,

> reprinted in 1986 U.S.C.C.A.N. at 3354, and that the companies that substantive state law would hold responsible not escape liability, the FRCD simply requires courts in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff knew or reasonably should have known the cause of the injury. This is a modest requirement that is squarely within Congress's long established powers under the Supremacy Clause of the Constitution.

Freir v. Westinghouse Electric Corp., 303 F.3d 176, 204 (2nd Cir. 2002). See also *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997) (CERCLA regulation of actions within states which affect the environment was within Congress's Commerce Clause authority; focus of Commerce Clause analysis is on general nature of regulations, not individual instances). See also *Hodel v. Indiana*, 415 U.S. 314, 332-334 (1981) (Statute regulating mining on farmland did not violate Commerce Clause or Tenth Amendment, "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends").

The statute at issue here, 42 U.S.C. §9658, clearly falls within Congress's authority, and must be applied in this case.

CONCLUSION

The failure to recognize the fact that this suit could not be maintained until Ms. Angle discovered both her injury and its cause will leave her, and others similarly situated, with no remedy at law for serious injuries caused by environmental pollution. For the reasons above and those discussed in the opening brief, the court's grant of summary judgment must be reversed and the case remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth Unger Carlyle, an attorney for Rebekah Angle, do hereby certify that I have this day caused to be served by United States Mail, postage prepaid, two (2) true and correct copies of the foregoing instrument to the following persons:

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