STATE OF MICHIGAN

COURT OF APPEALS

LARRY L. PETTIT, Personal Representative of the Estate of LEONARD E. PETTIT, Deceased,

Plaintiff-Appellee,

v

DURO SUPPLY COMPANY,

Defendant-Appellant,

and

ACANDS, INC., ACME INSULATIONS, INC., ALEXANDER STAFFORD CORPORATION, ALLIS-CHALMERS PRODUCT LIABILITY TRUST, AMCHEM PRODUCTS, INC., A.P. GREEN REFRACTORIES COMPANY, ASBESTOS CLAIMS MANAGEMENT, ATLAS TURNER, INC., AUSTIN COMPANY, BAY CITY HARDWARE COMPANY, GOODRICH CORPORATION, BROWN INSULATION COMPANY, BW/IP INTERNATIONAL, INC., CARVER PUMP COMPANY, CERTAINTEED CORPORATION, CHICAGO FIREBRICK COMPANY, COLLINS & AIKMAN, CRANE COMPANY, CROWN CORK & SEAL COMPANY, DRESSER INDUSTRIES, DURABLA MANUFACTURING, DURAMETALLIC CORPORATION, EDWARD VOGT VALVE COMPANY, FAULKNER CONSTRUCTION COMPANY, FEL-PRO, INC., FLINTKOTE COMPANY, FOSTER WHEELER CORPORATION, FURMANITE AMERICAN, INC., GAGE COMPANY, GARLOCK, INC., GENERAL ELECTRIC COMPANY, GENERAL REFRACTORIES COMPANY, GOODYEAR TIRE & RUBBER COMPANY, GOULDS PUMPS, INC., GREENE TWEED & COMPANY, HOLLINGER & COMPANY, IMO

UNPUBLISHED
December 18, 2003

No. 238243
Midland Circuit Court
LC No. 00-003078-NP

INDUSTRIES, INC., INGERSOLL-RAND COMPANY, ITT INDUSTRIES, JENNISON HARDWARE COMPANY, J.O. GALLOUP COMPANY, MARLO SEALING COMPANY, INC., METROPOLITAN LIFE INSURANCE, MIDLAND ROSS CORPORATION, NORTH AMERICAN REFRACT COMPANY, PARKER-HANNIFIN CORPORATION, PEERLESS PUMPS, PLIBRICO COMPANY, RADIATOR SPECIALTY COMPANY, RAPID-AMERICAN CORPORATION, RILEY STOKER CORPORATION, SCHAD BOILER SETTING COMPANY, SEALITE, INC., SOUTHERN URETHANE & PACKING, SURE SEAL PRODUCTS COMPANY, TURNER & NEWALL, UNITED STATES MINERAL PRODUCTS, WICKES LUMBER COMPANY, WITCO CORPORATION, and YARWAY CORPORATION,

Defendants.

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Duro Supply appeals as of right the trial court's denial of its motion for summary disposition. Because MCL 450.1842a is a statute of repose and because plaintiff failed to commence this action within one year from the date Duro Supply published its notice of corporate dissolution, as MCL 450.1842a requires, we reverse the decision of the trial court.

Duro Supply dissolved, distributed its assets, and published notice that all potential debtors and litigants must file their lawsuits within one year or their lawsuits would be barred. More than five years after it published the notice, decedent contracted "asbestos-induced" cancer and died. His estate brought this action against Duro Supply a year later for exposing decedent to asbestos. But MCL 450.1842a does not permit a plaintiff to recover on claims that are filed after the one-year statutory period against dissolved and fully distributed corporations if the claims are contingent. Because this wrongful death claim was contingent on the decedent's unfortunate contraction of cancer and subsequent death, the trial court erred when it failed to dismiss this case against the non-existent corporation.

The applicable statute of repose, MCL 450.1842a(3), states in pertinent part that,

> the claim . . . of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within 1 year after the publication of the newspaper notice:

* * *

> (c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

This statute encompasses more than the statute of limitations for torts, MCL 600.5805, because it bars all contingent claims regardless of their nature or date of discovery. Therefore, any claim that qualifies as a contingent claim under the statute must be brought within the yearlong period or fail. Plaintiff's claim is a contingent claim within the statute's strictures. Our Supreme Court has defined "contingent claim" as "one which does not exist but may possibly hereafter arise, one whose possible existence depends upon an uncertain future event – upon a contingency." *National Bank v Voigt Estate*, 357 Mich 647, 651; 91 NW2d 504 (1959), quoting *In Re Estate of Jeffers*, 272 Mich 127, 136; 261 NW 271 (1935).

Plaintiff's claim fits this description. Although plaintiff and the trial court argue and reason respectively that the claim is based on the "event" of being exposed to the injury producing asbestos, and therefore, not contingent, they disregard our Supreme Court's holding in *Larson v Johns-Manville Corp*, 427 Mich 301, 304-305; 399 NW2d 1 (1986). In that asbestos related action against a viable defendant, the Court held that the cause of action did not accrue at the time of exposure, but at the time of the claimant's discovery. The Court said,

> 1) the cause of action for asbestosis accrues in accordance with the 'discovery rule,' i.e., from the time the claimant knows or should have known of the disease, rather than at the time of exposure to asbestos or at the time of diagnosable injury; and 2) if a claimant chose not to bring an action for asbestosis, a later action to recover for cancer accrues at the time the claimant knows or should have known of the cancer.

By virtue of the fact that the cause of action does not accrue at exposure, if at all, but upon a later event, "the discovery'' of illness, the claim must necessarily be a contingent one. Here, it depended on the contingency of the decedent's unfortunate disease coming to fruition and death.

This Court in *Freeman v Hi Temp Products*, 229 Mich App 92, 96; 580 NW2d 918 (1998), stated:

> In Michigan, pursuant to statute, the general rule is that a dissolved corporation can sue and be sued. However, the Legislature has created a process whereby a dissolved corporation can bar future claims, thus cutting off the possibility that the corporation's potential liability could never be completely resolved. After the corporation's dissolution becomes effective, the corporation can give either actual written notice of the dissolution . . . or notice by publication . . . to potential claimants against the corporation. [Internal citations omitted.]

Unlike *Hi Temp*, where the notice was defective, Duro Supply has perfected its notice and is unchallenged in that regard. Therefore, Duro Supply's compliance with the statute forecloses its liability for plaintiff's claim.

We reject plaintiff's alternative grounds for affirming the trial court because they lack legal merit. Although MCL 450.1851 allows a court to extend the time for filing against a corporation that has not fully distributed its assets if a plaintiff shows good cause, Duro Supply has distributed all of its assets. While plaintiff argues that Duro Supply still possesses an asset in the form of insurance coverage for decedent's death, the coverage is not an undistributed "asset" as the Legislature intended the word. To hold otherwise would leave a corporation perpetually liable under MCL 450.1851 for any type of suit if the corporation ever purchased insurance coverage and has not exhausted its limits. The corporation could never distribute the coverage's value to its shareholders or otherwise diminish its value as an "asset" without suffering sufficient lawsuits to drain away the policy's limits. Considering the purpose of the Business Corporation Act, MCL 450.110, *et seq.*, the Legislature did not intend a corporation to remain forever potentially liable for any lawsuit under MCL 450.1851 simply because the corporation once held an insurance policy that covered its negligence during a long-expired span of time.

Moreover, the insurance company's promise to indemnify does not retain any value to the corporation after it completely distributes its assets because the corporation no longer has assets to protect. Therefore, the distribution of all other assets renders the extinct corporate entity unassailable, despite the existence of relevant and functional insurance coverage. Contrary statutory interpretation based on public policy rather than the Legislature's plain intent must come from our Supreme Court or the Legislature itself.

The insurance policy's existence does, however, insulate Duro Supply from allegations that it failed to adequately provide for its liabilities under MCL 450.1855a. With the benefit of hindsight, the insurance policy's limits supplied all the protection Duro Supply needed to provide for all the legally viable suits brought within MCL 450.1842a's yearlong period.

Because plaintiff failed to file this lawsuit within the one-year period provided by MCL 450.1842a, this statute of repose bars plaintiff's claim.

Reversed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O'Connell