THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

DOROTHY MAUGER, Executrix	**:**	**CIVIL TRIAL DIVISION**
of the Estate of Russell Mauger and	**:**	**November Term, 2004**
in her own right	**:**	**No. 2154**
vs	**:**	**Superior Court.#2955 EDA 2006**
A.W. CHESTERTON, INC., et al.	**:**	

DOLORES STEA, Administratrix	**:**	**November Term, 2004**
of the Estate of Joseph Stea and	**:**	**No. 1631**
in her own right	**:**	**Superior Court #2956 EDA 2006**
vs	**:**	
A. W. CHESTERTON, INC., et al.	**:**	

O P I N I O N

PROCEDURAL HISTORY & FACTUAL BACKGROUND

Plaintiffs Appeal from this Court's Findings and Order dated July 28, 2005, wherein it granted Defendant, Crown Cork & Seal Company's Motion for Summary Judgment. The Court's Findings and Order became appealable on October 3, 2006 when the Trial Court made an entry settling the remaining asbestos cases as to all non-bankrupt parties.

By way of background the following procedural events have occurred in this case leading up to this appeal:

- On October 7, 1986 a class of plaintiffs commenced a civil action, filing a Complaint against Crown, Cork & Seal (Crown) along with 235 other defendants.
- Plaintiffs alleged that they were exposed to Defendants' asbestos, while working at various job sites that manufactured, sold or installed Asbestos products owned by Defendants.

- Crown's exposure to liability is unique in that it is not the result of any direct liability from manufacturing, selling, or installing of any asbestos product, but only from its acquisition of Mudet Cork.

- Crown purchased Mudet Cork, a company that manufactured bottle caps as did Crown. As part of the purchase, Crown also acquired the other part of Mudet Cork's business, which was the "insulation" division that manufactured, sold and installed Asbestos products.

- As a result, Crown was added as a Defendant in this case and exposed to liability as a successor to Mudet Cork's tortious activity of manufacturing, selling and installing Asbestos insulation.

- The case was captioned under the general heading "In Re: Asbestos Litigation."

- In response to the litigation explosion of asbestos cases, on December 17, 2001 a Pennsylvania Statute was enacted (15 Pa.C.S.A. §1929.1) which limits the asbestos-related liabilities of corporations incorporated in Pennsylvania before May 1, 2001 that arise out of mergers or consolidations.

- In light of the passage of this Statute, Crown filed a global Motion for Summary Judgment on February 7, 2002.

- The substance of Crown's argument in its Motion for Summary Judgment was threefold: 1) that these actions come within the definition of "asbestos claims" 2) that Crown had already paid an amount in excess of the limit on liability created by this Statute; and 3) that Crown no longer have a damages remedy for the claims they asserted against it, the Statute required that the motion be granted.

- On June 11, 2002 the Court granted Crown's Motion for Summary Judgment and effectively dismissed Crown as a Defendant from 376 cases involving Asbestos litigation.

- The Court subsequently issued a Findings and Order on June 11, 2002 setting forth, in specific detail, its basis for granting Summary Judgment in favor of Crown.

- The June 11, 2002 Findings and Order explains the history of the asbestos litigation, the parties involved and the legislative history of §1929.1

- The June 11, 2002 Findings and Order addressed issues challenging the validity of the Statute under the United States Constitution. Specifically it spoke to Plaintiffs' challenges to the Federal Commerce Clause, the Equal Protection Clause, to the lack of standing to the Federal Commerce Clause.

- The June 11, 2002 Findings and Order also addressed issues challenging the validity of the Statute under the Pennsylvania Constitution. It addressed Plaintiffs' contesting that §1929.1 violated the state ex post facto laws (Art.1, §11), that the §1929.1 impermissibly limited the amount personal injury damages which Plaintiffs' may recover (Art. 3, §18), that §1929.1 was a special law enacted impermissibly under Art. 3, §32, that §1929.1 violates Art.3, §1 and Art.3, §3.

- Plaintiffs' timely filed a King's Bench appeal to the Pennsylvania Supreme Court and argument was heard on October 22, 2002.

- By Opinion dated February 20, 2004, the Pennsylvania Supreme Court reversed the Findings and Order of this Court and held that §1929.1 did not apply to those causes of action that accrued before the passage of the Statute because it violated Article I, Section 11 of the Pennsylvania Constitution.

- The Pennsylvania Supreme Court did not address any additional constitutional challenges made by Plaintiffs and addressed by the Court.

- The case was then remanded with the instruction to add Crown back into all 376 cases as a defendant.

- On December 10, 2004, Crown again filed a global Motion for Summary Judgment asking the Court, in light of the recent Supreme Court decision to dismiss those cases where the cause of action accrued subsequent to the passage of §1929.1.

- Oral Argument was heard on this motion on April 28, 2005.

- At the Oral Argument, the same identical issues were presented to the Court as those addressed in its initial Findings and Order of June 11, 2002.

- After the Oral Argument had concluded, Plaintiff's Counsel (Steven Cooperstein) subsequently submitted a letter brief dated May 18, 2005 citing a recent United States Supreme Court case to support one of his arguments that §1929.1 violates the Federal Commerce Clause because it discriminates between in-state and out-of-state Defendants.

- Defense counsel (Thomas Leonard) responded to this letter brief with a letter brief of his own dated May 25, 2005.

- By Findings and Order dated July 28, 2005, the Court again granted Crown's Motion for Summary Judgment dismissing Crown from those cases identified in Appendix "A" to Defendants' Motion for Summary Judgment and attached to this Opinion.

- This Findings and Order of July 28, 2005 took into account the Supreme Court Order of February 20, 2004 and its instructions to the Court.

- The action became final and appealable on the October 3, 2006, when the Trial Court made an entry indicating that the case had been settled as to all non-bankrupt parties.[1]

- Plaintiffs filed their Notice of Appeal to Pennsylvania Superior Court from the dispositive Order of October 3, 2006 on October 23, 2006 and filed their 1925 (b) Statements accordingly.

- Their 1925 (b) Statements contain identical issues to be addressed on appeal:

    1) Whether the Court committed an error of law or abused its discretion when it found that 15 Pa.C.S.A. §1929.1 did not violate the Federal Commerce Clause.

    2) Whether the Court committed an error of law or abused its discretion when it found that 15 Pa.C.S.A. §1929.1 did not violate the Equal Protection Clause.

    3) Whether the Court committed an error of law or abused its discretion when it found that 15 Pa.C.S.A. §1929.1 did not violates Article 3, §1 and Article 3, §3 of the Pennsylvania Constitution.

- To the extent that these issues have been addressed, in detail, in this Court's previous Findings and Orders of June 11, 2002 and July 28, 2004, the focus of this Opinion will be on the novel arguments made by Plaintiffs with regard to their Federal Commerce Clause claim.

LEGAL ANALYSIS

Preliminarily, we must first determine if the Plaintiff's 1925(b) Statement is adequate. See Pa.R.A.P. 1925(b). In *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306, 309 (Pa. 1998), the Supreme Court of Pennsylvania held that issues not included in a Rule 1925(b) Statement are deemed waived on Appeal. *Wells v. Cendant Mobility Fin. Corp.*, 2006 PA Super 363, 913 A.2d 929 (2006).

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[1] The directive as entered by Honorable Ricardo Jackson is as follows:

> Case settled as to all non-bankrupt parties except the Manville Fund without prejudice. Case dismissed against the Manville Fund without prejudice to be reopened as an arbitration matter. (See Docket 0411-1631).

Specifically, the *Lord* Court stated:

> The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process. Id. (Citing *Lord*, 719 A.2d at 308).

Similarly, "[w] hen an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." Id. (citing *In re Estate of Daubert*, 2000 PA Super 219, 757 A.2d 962, 963 (Pa. Super. 2000)). If the Rule 1925(b) Statement is so overly broad and vague that the trial Court has to guess what issue an appellant is appealing, then the Statement is insufficient to enable meaningful review. *Commonwealth v. Dowling*, 2001 PA Super 166, 778 A.2d 683, 686 (Pa. Super. 2001). “In other words, a Concise Statement which is too vague to allow the Court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all.” *Dowling*, 778 A.2d at 686-87. Therefore, the issues contained in a vague Rule 1925(b) Statement will be deemed waived on appeal. *Dowling*, 778 A.2d at 687.

In *Lineberger v. Wyeth*, 2006 PA Super 35, 894 A.2d 141 (Pa. Super. 2006), the Superior Court extended *Dowling's* vagueness doctrine into the arena of civil torts. *Wells*, 913 A.2d 929 (citing, *Lineberger*, 894 A.2d at 148 n. 4). “Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases.”) (citation omitted). In that case, the appellant took the diet pill fen-phen and later developed mitral valve regurgitation and aortic insufficiency. Id. (citing, *Lineberger*, 894 A.2d at 143). The appellant sued the manufacturer, alleging that the company's failure to issue a warning

concerning the potential side effect of valvular heart disease was the proximate cause of her injuries. Id. After Summary Judgment was entered against the Appellant for failing to present evidence of proximate cause, the Appellant filed a Rule 1925(b) Statement, which contained the following issue: "the Court committed an error of law by granting [defendant's] Motion for Summary Judgment based on lack of proximate cause[.]" Id. On Appeal, a panel of this Court noted that the Appellant's Rule 1925(b) Statement was not specific enough for the Trial Court to conduct meaningful review. *Lineberger*, 894 A.2d at 148-49. Particularly, this Court suggested that the Rule 1925(b) Statement could have been as detailed as the arguments that the Appellant raised in opposition to the Defendant's Motion for Summary Judgment. Id. at 149. The Superior Court found that the Rule 1925(b) Statement "announced a very general proposition" and was so overly broad and vague that the Appellant's issues were waived under *Dowling*. Id.

In reflecting the principles of 1925(b) and the caselaw on this issue, this Court's Order requesting that a 1925(b) Statement of Matters be filed specifically requests that "[t]he [1925] Statement ordered shall be made with *particularity and completeness*." (emphasis added).

In the case *sub judicie*, Appellants fail to state with any form of particularity how 15 Pa.C.S.A. §1929.1 violates the Federal Commerce Clause or constitutes a denial of Equal Protection. These claims are generally and vaguely made in their 1925(b) Statement as follows:

> …specifically, plaintiff claims that the Statute should not have applied because it is unconstitutional for the following reasons:
> (a) the Statute violates the federal commerce clause;
> (b) the Statute constitutes a denial of equal protection…

(Plaintiffs' Stea 1925(b) Statement of Matters Complained Of On Appeal, pg. 1). It is these general propositions that leaves the Court with the difficult task of identifying the argument and impedes the Court in preparing a legal analysis which would properly address the argument of Plaintiffs' position. Having failed to adhere to: the requirements in Pa.R.A.P. §1925(b), the caselaw on this issue, and the Court's Order requesting a 1925(b) Statement Of Matters made with particularity and completeness, the Court requests that the issues identifying the Federal Commerce Clause and the Equal Protection Clause be waived pursuant to the caselaw stated above.

ADDENDUM

If the Appellate Court finds that the issues are not waived because of their lack of specificity, then the Court should consider the following which incorporates the Findings and Order of June 11, 2002 as if fully set forth herein and the additional analysis by this Court in support thereof.

Any other issue not addressed in this Addendum was originally addressed on June 11, 2002 and July 28, 2005.

In this Court's previous Findings and Order dated June 11, 2002 it addressed the issue of Plaintiff's argument that *15 Pa.C.S.A. §1929.1* violated the Commerce Clause of the United States Constitution. According to *15 Pa.C.S.A. 1929.1(a)(1)* the operational aspects of the Bill are:

> Except as further limited in paragraph (2), the cumulative successor Asbestos-related liabilities of a domestic business corporation that was incorporated in this Commonwealth prior to May 1, 2001, shall be limited to the fair market value of the total assets of the transferor determined as of the time of the merger or consolidation, and such corporation shall have no responsibility for successor Asbestos-related liabilities in excess of such limitation.

Plaintiffs make several challenges to this Bill resting upon the argument that it violates various state and federal constitutional prohibitions.

One of Plaintiffs arguments was that §1929.1(a)(1) discriminates between in-state and out of state defendants in violation of Federal Commerce Clause. More recently, Plaintiffs cited the case of *Granholm v. Heald*, 544 U.S. 460, 125 S. Ct. 1885, (2005) (Plaintiffs' Letter Brief of Steven J. Cooperstein dated May 18, 2005) and argued that

1929.1(a)(1) has a protectionist aspect to it because it limits the liability of some Pennsylvania companies, which would have the effect of burdening other asbestos defendants, who are foreign companies, with an increased share of the asbestos liability. (Motion Hearing Transcript, dated April 28, 2005, pg. 19).

Initially, the *Granholm* case is distinguished from the case at bar because the subject matter there was the sale of wine by in-state wineries.

In an attempt to make use of the Commerce Clause and the case law developed thereunder, Plaintiffs again attempt to promote the notion that a tort is an article as commerce ???? or to put it another way, Plaintiffs want this Court to believe that a product liability lawsuit is the same as a bottle of wine. The law does not support the Plaintiff's position.

A tort is the State created right of a citizen to redress a wrong or a harm suffered by the mechanism of compensatory damages. *Moyer v. Phillips,* 462 Pa. 395, 341 A.2d 441 (1975). Although the term, "article of commerce" has been broadly defined so as to include such things as, "coal-fueled power production" [2] and "garbage waste," Plaintiff fails to present any cases and [3] this Court's search has not found any cases which expand the definition to include State tort claims.

Plaintiff's argument also fails because the challenged Statute simply does not do what he claims it does.

The legislation does not treat foreign corporations differently than domestic corporations when liability is based upon direct culpability. Therefore, there is no

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[2] *Wyoming v. Oklahoma,* 502 U.S. 437, 112 S.Ct. 789, (1992).
[3] *City of Phila. v. N.J., et al.,* 437 U.S. 617, 98 S.Ct. 2531 (1978).

discrimination against foreign companies or discrimination in favor of domestic companies.

The legislation does limit the liability of domestic companies when the liability is based upon Pa. 15 Pa.C.S. § 1929 which is generally referred to as the "successor liability statute."

Successor liability is the statutorily created principle which requires a surviving or new corporation to assume the liabilities of the former corporation which ceases to exist as a result of the merger or consolidation into the new entity.

> "The surviving or new corporation shall henceforth be responsible for all the liabilities of each of the corporations so merged or consolidated." 15 Pa. C.S.1929(b).

This principle has survive intact from the Act of May 5, 1933 (P.L.364. No. 106) § 907.

By amending the Statute which created the principle of successor liability, the Legislature does no more than regulate its own creation.

The United States Supreme Court has said of this symbiotic relationship, "State regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *CTS Corp v. Dynamics Corp of America*, 481 U.S. 69, 107 S.Ct. 1637 (1987).

This principle of state governance has been firmly established in Constitutional jurisprudence.

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.

> These are such as are supposed best calculated to effect the object for which it was created.

I.D., citing *Trustees of Dartmouth College v. Woodward & Wheat,* 518 4 L. Ed 518 (1819).

Accepting this principle of State governance of domestic corporations, what is at work in this Statute is obvious.

The Legislature limited itself to regulating domestic corporations

Plaintiff attempts to transform this legislative act into an attempt to discriminate against foreign corporations. The plain answers appear to be that the Pennsylvania Legislature may not regulate the internal affairs of a Foreign Corporation or amend the laws of the jurisdiction under which the Foreign Corporation was incorporated. *See* generally, Title 15, Chapter 41, Sub-Chapter C, *Powers, Duties and Liabilities of Foreign Business Corporation.*[4]

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[4] Although Plaintiff maintains that Foreign Corporations are not affected by the requirements of § 1929.1, some sections of Title 15, also known as the Business Corporation Law, might suggest otherwise. *See* e.g., 15 Pa. C.S. §4142(a) and Committee Comment thereunder.

§ 4142 General powers and duties of qualified foreign corporations.

(a)GENERAL RULE --A qualified foreign business corporation, so long as its certificate of authority is not revoked, shall enjoy the same rights and privileges as a domestic business corporation, but no more, and, except as in this subpart otherwise provided, shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter imposed upon domestic business corporations, to the same extent as if it had been incorporated under this sub-part.

AMENDED COMMITTEE COMMENT--1990:

The effect of qualification in Pennsylvania of a foreign business corporation is, in effect, to domesticate the corporation under Pennsylvania law with respect to external matters (as opposed to internal affairs). Thus the corporation acquires the privileges of a domestic corporation vis a vis third parties, even in such an exceptional area as the acquisition of the power of eminent domain. See, *e.g. Warren Silica Company's Petition,* 21 Pa.Dist. 367 (1911), *Lindsay v. Keystone State Tel. & Tel Co.,* 295 (1904), *In re Ohio Valley Gas Co.,* 6 Pa. Dist 200 (1897), *Gralapp v. Mississippi Power Co.,*194 So.2d 527 (Ala.1967), 29A C.J.S. Eminent Domain § 25 at Philadelphia, PA. 242-43 (1965). And the corporation is subject to the burdens of domestic status, *e.g.* process may be served on it under 42 Pa. C.S. 8371 Pa. C.S. § 5301(a)(2)(i) with respect to any cause of action, including a cause of action not qualifying for service of process under 41 Pa. C.S. § 5322 or another similar long arm statute. Of course, this concept of equality can be superseded by express statutory provision, *e.g.,* in the area of state corporate taxation. Qualification under the 1988 BCL has no effect on the application of Pennsylvania law to the internal affairs of a foreign business corporation, other than as provided in 15 Pa. C.S. § 4145 and 4146.

THIS IS REMAINDER OF TEXT FROM PAGE 7 BEFORE ADDUNDUM ADDED.

Should the Appellate Court deem these issues addressable in their substantive form, this Opinion will expound upon the Findings and Order of June 11, 2002 incorporating further support against Plaintiffs' argument that §1929.1 violates the Commerce Clause of the United States Constitution. All other issues are dealt with by this Court's previous Findings and Orders of June 11, 2002 and July 28, 2005.

In this Court's previous Findings and Order dated June 11, 2002 it addressed the issue of Plaintiff's argument that *15 Pa.C.S.A. §1929.1* violated the Commerce Clause of the United States Constitution. According to *15 Pa.C.S.A. 1929.1(a)(1)* the operational aspects of the Bill are:

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Plaintiffs make several challenges to this Bill resting upon the argument that it violates various state and federal constitutional prohibitions.

One of Plaintiffs arguments was that §1929.1(a)(1) discriminates between in-state and out of state defendants in violation of Federal Commerce Clause. More recently, Plaintiffs cited the case of *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, (2005) (Plaintiffs' Letter Brief of Steven J. Cooperstein dated May 18, 2005) and argued that

1929.1(a)(1) has a protectionist aspect to it because it limits the liability of some Pennsylvania companies, which would have the effect of burdening other asbestos defendants, who are foreign companies, with an increased share of the asbestos liability. (Motion Hearing Transcript, dated April 28, 2005, pg. 19). This is where Plaintiff believes the discrimination lies and, now makes his argument for unconstitutionality on that basis.

The Plaintiffs in *Granholm* challenged the constitutionality of New York and Michigan regulatory schemes that allowed in-state wineries to sell wine directly to consumers in their respective states. Id. at 470. Under Michigan law a limited number of in-state wine producers granted a license allowing direct shipment to in-state consumers. Id. Out-of-state wineries were only able to obtain a license to sell to wholesalers and not directly to consumers. Id.

Similarly, under New York's regulations, in-state wineries were permitted to sell directly to consumers, but prohibited out-of-state wineries from doing so, unless the out-of-state wineries established an in-state distribution operation and branch office. Id.

The *Granholm* case, deals more specifically with the application of the Section Two of the Twenty-first Amendment to a State's control over the sale and distribution of liquor.

The *Granholm* Court found that a State's power to regulate liquor under Section Two of the Twenty-first Amendment does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. Id. at 493. The Court held that such restrictions placed on out-of-state wine producers violated the Commerce Clause. Id.

In citing such, this case in support of their position that §1929.1 violates the Federal Commerce Clause by discriminating against out-of-state asbestos defendants, Plaintiffs misconstrue the issue addressed in *Granholm*. Plaintiffs cite to *Granholm* for the general proposition stated by Justice Kennedy:

> Time and again, this Court has held that, in all but the narrowest circumstances, state laws violate Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interest that benefits the former and burdens the latter.' Id. at 472.

However, Plaintiffs never analogize the principles of *Granholm* and how they apply to the principles of successor liability. Plaintiffs have also failed to articulate how §1929.1 discriminates in-state defendants from out-state-defendants.

Plaintiffs would argue that the Statute was enforced only to Crown, Cork & Seal Defendants, which are Pennsylvania residents, and not enforced as to any other Defendants. Again this causes Plaintiffs to neglect the facts of this case. The enforcement of §1929.1 protections are being applied equally to in-state and out-of-state Defendants regardless of their company's origin, as long as it was a successor to an asbestos claim arising in Pennsylvania.

In contrast to the Statutes challenged in *Granholm*, the protections of §1929.1 is not applied differently between domestic and foreign corporations. It was enacted to provide protection to successor corporations, who obtained interest in a predecessor corporation having an asbestos claim brought in the State of Pennsylvania. As is evidence in the Appendix "A" Summary to this Court's Findings & Order, *In Re: Asbestos Litigation* contains both Pennsylvania Resident Defendants (7,347) and Non-

Pennsylvania Resident Defendants (5,462)[5]. The successor liability protection under §1929.1 is afforded to all defendants, both resident and non-resident, except for those plaintiffs whose cause of action arose prior to the enactment of this Statute. See *Ieropoli v. AC&S Corporation*, 577 Pa. 138, 842 A.2d 919, 930 (2004). Converse to the Plaintiffs theory, §1929.1 places all the applicable successor defendants on a level playing field by affording them limited liability to asbestos claims.

By providing this protection to all corporations where §1929.1 is applicable, the Statute can hardly be said to discriminate against out-of-state companies and cannot be compared to the Statutes at issue in *Granholm*.

CONCLUSION

Therefore, this Court believes that §1929.1 does not violate the Federal Commerce Clause and the Statute should remain as enforced by this Court.

BY THE COURT:

6/25/2007

_____ _____

Date **ALLAN L. TERESHKO, J.**

[5] As stated in Appendix "A," the total number of Defendants includes duplication of Defendants since many of the same Defendants are sued in each case.

cc: