

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF RICHLAND) FOR TH FIFTH JUDICIAL CIRCUIT
)
 KAYLA KEITH, Individually and as)
 the Person Representative of the) C/A No.: 2019-CP-40-00533
 ESTATE OF JERRY WAYNE)
 ARCHER, SR.,)
)
 Plaintiff,)
)
 v.)
)
 AIR & LIQUID SYSTEMS)
 CORPORATION, *etc., et al.*,)
)
 Defendants.)

ROBERT E. ASPRAY,) C/A No.: 2019-CP-40-04667
)
 Plaintiff,)
)
 v.)
)
 ARMSTRONG INTRNATIONAL,)
 INC., *et al.*)
)
 Defendants.)

BETTY D'AMICO, Individually and as) C/A No.: 2019-CP-40-05235
 Executor of the Estate of JULIAN)
 D'AMICO, JR.,)
)
 Plaintiff,)
)
 v.)
)
 AIR & LIQUID SYSTEMS)
 CORPORATION, *etc., et al.*,)
)
 Defendants.)

JAMES W. SMITH and FRANCES R. SMITH,

Plaintiffs,

v.

ARMSTRONG INTERNATIONAL, INC., *et al.*,

Defendants.

) C/A No.: 2019-CP-40-04326

Linda J. White, individually and as PR for the Estate of Lubert F. White, Jr.,

Plaintiffs,

v.

Armstrong International Inc., *et al.*,

Defendants.

) C/A No.: 2019-CP-40-02858

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

) IN THE COURT OF COMMON PLEA

) FOR THE FIRST JUDICIAL CIRCUIT

RICHARD L. KNIGHT, II, as Personal Representative of the Estate of TEDDY L. KNIGHT, SR., and LINDA KNIGHT, Individually,

Plaintiffs,

v.

EASTMAN CHEMICAL COMPANY, *et al.*,

Defendants.

) C/A No.: 2019-CP-38-01045

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE THE MAY BLOCK OF CASES DENYING DEFENDANTS' MOTION TO STAY DISCOVERY ABESENT EXTRAORDINARY CIRCUMSTANCES AND DENYING PLAINTIFFS' MOTION TO CONSOLIDATE ASPRAY, WHITE, SMITH D'AMICO AND ARCHER FOR TRIAL IN

THE SEPTEMBER BLOCK. ORDER GRANTING DEFENDANTS MOTION TO CONTINUE KNIGHT AND GRANTING PLAINTIFF’S MOTION FOR ANOTHER ASBESTOS JUDGE TO TRY KNIGHT IN ORANGEBURG DURING THE SEPTEMBER BLOCK

Multiple defendants moved to continue the above captioned cases from the May 2020 trial setting. Plaintiffs opposed that motion and in the alternative to moved to consolidate cases for trial in the September 2020 trial block.

By way of background, four death cases are set for trial by this Court in May 2020. Multiple, but not all,¹ defendants seek to continue this Court’s May 2020 docket because of the COVID-19 pandemic and their contention that preparation for trial for May 2020 “is not possible.” Motion at 3. They contend that they are not able to prepare witnesses, take depositions, obtain documents, etc. *Id.* They further contend that this work requires “in person work which cannot be done legally or safely . . .” *Id.*

Defendants’ motion seeks not merely to continue the May 2020 cases, but also to suspend discovery “until business returns to normal.” Motion at 13. There is no question that the COVID-19 pandemic has created concerns surrounding public health and placed novel questions before Courts about how to proceed.

On April 3, 2020, Chief Justice Beatty of the South Carolina Supreme Court issued guidance to both trial courts and attorneys regarding the operation of the trial courts. The purpose of the order, “is to provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.” Order, 2020-000447.

¹ Several defendants have not joined this motion to continue.

Chief Justice Beatty states that, “ jury selections and jury trials in in all criminal and civil cases are continued until further notice.” Therefore, the Court grants the Defendants’ motion to continue the May block of cases. However, the Court does not agree that discovery should be stopped until “business returns to normal.” Instead, the Chief Justice again provided guidance on moving forward with depositions and the remote administration of oaths. The Order provides:

Where this order authorizes a hearing, trial or other matter to be conducted using remote communication technology, any oath necessary during that hearing, trial or other matter may be administered by the same remote communication technology. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing remote communication technology in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order.

The Supreme Court went on to address how trial courts could and should conduct hearings, stating:

3. Hearings: A hearing on a motion or other matter may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel...

4. Minimizing Hearings on Motions: While the practice has been to conduct hearings on virtually all motions, this will not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect to not hold a hearing when the judge determines the motion may be readily decided without further input from the lawyers....”

By this Order, the South Carolina Supreme Court certainly intended that discovery, including depositions and hearings continue during this pandemic.

Indeed, even the United States Supreme Court, for the first time in its long history, announced that it will hear oral arguments via teleconference.²

Defendants contend that they are unable to “prepare witnesses for testimony, respond to discovery subpoenas . . . [and] take and defend depositions” among other things. Motion at 3. This Court and, equally as important, these Defendants, know and understand that telephone (and now video conference) depositions are a routine and common practice in asbestos cases both in South Carolina and around the country. The Court knows the caliber of lawyers representing Defendants in asbestos litigation and feels confident they will be able to prepare witnesses for testimony, respond to discovery and take and defend depositions. Discovery in these cases may be less convenient than the norm. Inconvenience, in comparison to delaying justice in not just these cases, but the ones that come after, is not a valid basis to stop discovery. Ceasing workup of these cases is not necessary to protect the health of witnesses or lawyers. Therefore, discovery shall continue as scheduled.³

PLAINTIFFS’ MOTION TO CONSOLIDATE

In the event that the Court continued the May block of cases, Plaintiffs moved to consolidate the following cases for trial in Richland County⁴ in September of 2020: Aspray, White, Smith, D’Amico, and Archer. Plaintiff also proposed that the Knight case proceed separately in Orangeburg utilizing one of the other trial judges assigned to this docket.

² Wall Street Journal “Supreme Court to Break Tradition, Hold Oral Arguments by Teleconference”, April 14, 2020; <https://www.wsj.com/articles/supreme-court-to-break-tradition-hold-oral-arguments-by-teleconference-11586789676>

³ Similarly, this Court, where necessary will make itself available for teleconferences on discovery and other issues as needed *after* the parties have fully and completely exhausted all attempts to resolve the issues amongst themselves. The Court expects the parties always, but particularly now, to work to advance discovery timely and with a minimum of disagreement.

⁴ All of these cases are currently venued in Richland County.

Consolidating cases “is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state-of-the-art issues with, days of the same witnesses, exhibits and issues from trial to trial.” *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 631 (D.S.C. 1992), *aff’d*, 6 F.3d 177 (4th Cir. 1993)(quoting U.S. District Judge Robert Parker from *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.1986), *reh’g denied*, 785 F.2d 1034 (5th Cir.1986) which certified a class of more than 800 asbestos injury claims).

As this Court has learned over the last three years, the cases before it are replete with the same factual scenarios, defendants, experts and testimony. While the location of where a gasket was removed may change, the process to remove that gasket and the exposure testimony does not. The Defendants’ experts assert that there is no meaningful exposure and the Plaintiffs’ experts contradict that testimony.

Rule 42(a) of the South Carolina Rules of Civil Procedure allows this court to consolidate “actions involving a common question of law or fact.” Rule 42(a), SCRPC. The South Carolina Rules of Civil Procedure “shall be construed to secure the just, speedy, and inexpensive determination of every action.” Rule 1, SCRPC. In South Carolina, “[c]onsolidation is within the broad discretion of the trial court.” *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993) (quoting *Worthy v. Chalk*, 44 S.C.L. (10 Rich.) 141 (1856)).

As stated above, the South Carolina Rules of Civil Procedure provide for the consolidation of matters when they involve a common question of law or fact. See Rule 42(a), SCRPC. When two actions are pending before the same court, the court may order their consolidation so as to avoid unnecessary costs or delays and to avoid duplicitous litigation. *Id.* The South Carolina Supreme Court specifically enumerated the purpose of Rule 42(a), SCRPC in *Alcorn v. Ford Motor Co.*, stating that “[t]he purpose of consolidation is to prevent the multiplicity of litigation,

to save the parties unnecessary costs, to conserve court time and space and to clear congested court dockets.” 276 S.C. 180, 276 S.E.2d 925 (1981).

A consolidation order does not merge separate claims or remove the separate identity of distinct causes of action. *See Ellis by Ellis v. Oliver*, 307 S.C. 365, 415 S.E.2d 400 (1992). The merger of actions under consolidation is never so complete as to deprive any party of a substantial right. *Id.*

While the Court certainly believes that consolidation of these cases may be appropriate, at this time the Court denies Plaintiffs’ motions to consolidate. Once the facts of each case have been better developed, the Court invites the Plaintiffs to renew their motion to consolidate. As courts across the country are shut down to jury trials, the judicial system must adapt. Consolidation may be a method to adapt and to be sure that litigants get their day in court.

Additionally, having the Knight case heard in during the same time as the other September cases in Orangeburg utilizing either Judge Seals or Judge Mullen achieves Chief Justice Beatty’s order appointing the undersigned to administer and adjudicate the asbestos docket.

IT IS THEREFORE ORDERED,

- (1) Defendants’ motion to continue the May block of cases is GRANTED. All cases captioned above shall be set for a date certain on September 21, 2020 in the following order: Aspray, White, Smith, D’Amico, and Archer in Richland County;
- (2) Depositions shall proceed by fully remote tele/video platforms. The parties shall meet and confer to decide whether such depositions shall take place telephonically and/or via videoconference technology;
- (3) The Court will continue to decide motions as outlined in the South Carolina Supreme Court’s April 3rd Order.

- (4) The Plaintiffs' Motion to Consolidate the Aspray, White, Smith, D'Amico, and Archer cases for trial to being on September 21, 2020 in Richland County pursuant to Rule 42 of the South Carolina Rules of Civil Procedure is DENIED; and
- (5) The Plaintiffs Motion for the Knight case to proceed separately in Orangeburg County on September 21, 2020 with either Judge Mullen or Judge Seals is GRANTED

IT IS SO ORDERED.

[Signature appears on the following page.]