IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS KISER,	FILED	CONSOLIDATED UNDER MDL 875
Plaintiff,	APR 27 2011	CIVIL ACTION NO. 11-60039
v.	MICHAEL E. KUNZ, Clerk By_____Dep. Clerk	Transferred from the Western District of Virginia
A.W. CHESTERTON CO., et al.,		
Defendants.		

O R D E R

AND NOW, this **27th** day of **April, 2011**, it is hereby **ORDERED** that Plaintiff's Motion for Reconsideration (doc. no. 54), filed on March 24, 2011, is **DENIED**.[1]

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[1] Plaintiff makes two arguments in her Motion for Reconsideration. First, Plaintiff asserts that this Court too readily distinguished the Wade case, "which is the only state court decision from Virginia subsequent to the 1985 statutory amendment that discusses whether the separate disease rule would apply in mesothelioma cases under Virginia common law." (Pl.'s Mot. Reconsideration at 1.) Second, Plaintiff contends that, pursuant to Virginia Supreme Court Rule 5:40, this Court should have certified the question of whether Virginia adheres to the separate disease rule to the Supreme Court of Virginia or Virginia General Assembly. (Id. at 1-2.)

When evaluating a motion for reconsideration, the Court must consider whether there was a manifest error of law or fact or whether the parties have presented newly discovered evidence. Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). "A judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment, or (3) the need to

correct a clear error of law or fact or to prevent manifest injustice." 176 F.3d at 677 (citing N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). Here, plaintiff relies on the third grounds only, that this Court should reconsider its prior decision in order to "correct a clear error of law."

In Wade v. Norfolk Southern Railway Co., a plaintiff brought a FELA claim based on asbestos exposures. No. CL05-523, 2009 Va. Cir. LEXIS 26 (Va. Cir. Ct. 2009). In dicta, the court pointed to Norfolk & Western Railway Co. v. Ayers, another FELA case, and stated that in Ayers, the United States Supreme Court established the separate disease rule as the applicable rule in FELA mesothelioma cases. Id. at *17 (citing Ayers, 538 U.S. at 152 n.12). The Wade court noted that in Ayers, the United States Supreme Court cited to the case Wilson v. Johns-Manville Sales Corp. with approval and that in Wilson, the United States District Court for the District of Columbia recognized the separate disease rule. Id. The Wade court then noted that the application of the separate disease rule "is consistent with what would happen '[i]n a common law setting,' as explained in a 1989 opinion of the Supreme Court of Virginia." 2009 Va. Cir. LEXIS 26 at *20 (citing Roller v. Basic Constr. Co., 238 Va. 321, 327 (Va. 1989)).

One of the issues in Ayers was whether, in a FELA case, a plaintiff who suffers from asbestosis may be awarded damages for fear of cancer. 538 U.S. at 140. In this analysis, the Court noted that, in the event that the plaintiff later developed cancer, he could bring a separate lawsuit, thus recognizing the separate disease rule. Id. at 152-53. The Ayers Court also noted that most courts have recognized the separate disease rule. Id. at 152-53 (citing Wilson v.Johns-Mansville Sales Corp., 684 F.2d 111, 120-21 (D.C. Cir. 1982) (other internal citations omitted)). Five justices held that in a FELA case, a plaintiff who suffers from asbestosis may be awarded damages for fear of cancer. 538 U.S. at 159. Four justices dissented and expressed the view that FELA plaintiffs who suffer from asbestosis should not be awarded damages for fear of cancer. 538 U.S. at 166-87.

The Wade court cited to Roller. In Roller, plaintiff appealed the decision of the Industrial Commission in a worker's compensation case. 384 S.E.2d 323, (Va. 1989). The Industrial Commission found that plaintiff's wrongful death claim based on her husband's asbestos exposure was barred by the statute of limitations. Id. The court generally compared the Worker's

Compensation Act to the common law and noted that statutes of limitations in the Worker's Compensation Act preempt any common law provisions. Id. at 325-26. The court noted that, generally, under the common law, "[u]nless otherwise provided by statute, traditional statutes of limitations begin to run, not when a wrongful act is done, but when injury or damage results from it and the cause of action has thus ripened into a right of action." Id. at 326 (internal citations omitted).

Despite Plaintiff's arguments, neither Wade, Ayers, nor Roller established the separate disease rule as the rule of law in Virginia. First, this Court notes that both Wade and Ayers are FELA cases and thus are distinguishable from the case at hand in that FELA's three year statute of limitations applied in Wade and Ayers cases as a matter of federal substantive law. See 45 U.S.C. § 56; see also Burnett v. New York Centr. R. Co., 380 U.S. 424 (recognizing that FELA's three year statute of limitations applies to FELA claims). For this reason, the Ayers decision is not binding on any court applying Virginia law. Second, in Wade, the Virginia Circuit Court cited to the separate disease rule with approval in the FELA context and stated, in dicta, that this same principle would apply in the common law setting citing to Rolling. However, in Rolling, the Supreme Court of Virginia merely stated that "unless otherwise provided by statute," statutes of limitations begin to run when the injury ripens into a cause of action. In Rolling, the Supreme Court of Virginia examined common law statutes of limitations in general and not specifically the separate disease rule. Virginia statutory law, as interpreted by Virginia courts, has recognized the indivisible cause of action as an exception to the general rule that the statute of limitations begins to run when an injury ripens into a cause of action. See Joyce v. AC&S, Inc., 785 F.2d 1200 (4th Cir. 1986) (recognizing the indivisible cause of action theory under a prior version of Virginia's statute of limitations).

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

As to Plaintiff's second argument, the question of whether Virginia should recognize the separate disease rule need not be submitted to the Supreme Court of Virginia or the Virginia General Assembly because, as examined in this Court's decision discussing the state of the law in Virginia, Virginia adheres to the indivisible cause of action theory. See Kiser v. A.W. Chesterton Co., No. 11-60039, 2011 WL 923509 (E.D. Pa. March 16, 2011). Accordingly, Plaintiff's Motion for Reconsideration is denied.