

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND, by and through :
PATRICK LYNCH, ATTORNEY GENERAL :

VS. :

C.A. NO. 99-5226

ATLANTIC RICHFIELD COMPANY, :
MILLENNIUM HOLDINGS LLC, :
NL INDUSTRIES, and :
THE SHERWIN WILLIAMS COMPANY :

JURY INSTRUCTIONS

We have come to the end of this trial. Although you as the jury are the sole judges of the facts, you are duty-bound, as I have told you before, to follow the law as I instruct you and to apply that law to the facts as you find them to be from the evidence which has been presented during the trial.

I tell you now you are not to single out any one instruction that I give you as stating the law. You must consider these instructions in their entirety. You are not to be concerned with the wisdom of any rule of law regardless of any opinion which you might have as to what the law ought to be. It would be a violation of your sworn duty to base your verdict upon any version of the law other than as I now instruct you.

Of course, all parties are entitled to an impartial consideration of all of the evidence. You should consider this case and decide it as an action between parties

of equal standing. The State of Rhode Island and the Defendants are entitled to the same fair trial in your hands as if they were private individuals. All parties, including governments and corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

The State of Rhode Island has brought this suit against each of these defendants in their separate capacities either as manufacturers of lead pigment found in paints and coatings or as successors in interest to such manufacturers.

Although there are four Defendants in this action, it does not follow that if one Defendant is liable to the State, all four Defendants are liable. Each Defendant is entitled to a fair and individual consideration of the evidence admitted against it and a separate consideration of whether it is independently liable.

Throughout this trial, some evidence, including documents and testimony about those documents, has been admitted in full only as to some Defendants. You may consider such evidence of limited admission only against those particular Defendants as to whom it was admitted.

In that regard, you will be supplied with five sets of binders containing documents for your deliberations. The first set of binders contains documents that have been admitted as to each of the Defendants. There is also a binder for each Defendant that contains documents admitted in full only as to that particular Defendant.

Only evidence admitted in full as to a particular Defendant, and exhibits contained in a set of binders relevant to a particular Defendant, may be considered against that Defendant.

The evidence in this case consists of the sworn testimony of the witnesses whether given on direct, cross, redirect, or re-cross examination, regardless of who may have called them. It also consists of testimony of witnesses sworn and given before trial in depositions that have been read to you, all of the exhibits received in evidence, regardless of who may have produced them and also, all applicable inferences as I will explain to you during the course of these instructions.

You are also to take as true any facts that the parties have stipulated to.

Atlantic-Richfield Company and the State stipulated that Anaconda Lead Products Company manufactured white lead from 1920 until 1936. I now instruct you that I have made a legal determination that Atlantic-Richfield Company is not responsible for any acts or omissions of Anaconda Lead Products Company.

That same stipulation provides that International Smelting & Refining Company produced lead pigment from 1936 until 1946; that International Smelting & Refining Company merged into its parent Anaconda Company in 1973; that in 1977 Atlantic-Richfield Company acquired all of the shares of the Anaconda Company and that at the end of 1981 the Anaconda Company was merged into Atlantic-Richfield Company. I instruct you that as a matter of law upon the merger

of corporations, the surviving corporation is subject to the liabilities of the corporation which was merged into it.

I tell you now that any evidence to which an objection was sustained or any evidence which I ordered stricken must be entirely disregarded.

During the course of these proceedings, certain charts or recordings or photographs, maps, summaries, or other things that we call "demonstratives" have been shown to you in order to help explain the evidence in this case. Those matters were not received in evidence, and they will not be going to the jury room with you during your deliberations, as will all of the full exhibits, which, in fact, will be going with you to the jury room. Those demonstratives were used for convenience only and are not evidence in this case. You are to consider only the evidence.

You are permitted to draw from facts which you find have been proved such reasonable inferences as seemed justified in the light of your experience. Inferences are deductions or conclusions which reason and common sense lead to draw from facts which have been established by the evidence in this case. Sometimes we tell jurors that an inference is something that flows from what you find the facts to be. I tell you, however, that you must avoid conjecture, you must avoid speculation, you must avoid surmise and draw only those inferences which are reasonable from the evidence that is before you.

If on any particular point based on the evidence before you, you draw a reasonable inference; you may not draw a further inference on the earlier inference unless such further inference is the only reasonable inference to be drawn from the earlier inference.

Generally speaking, ladies and gentlemen, there are two types of evidence from which a jury properly may find the truth as to the facts of a case. One is what we call "direct evidence," such as the testimony of someone who saw something happen, who relates to you what he or she saw.

The other is "indirect" or "circumstantial evidence"; the proof of a chain of circumstances pointing to the existence or to the non-existence of certain facts or a fact.

The law makes no distinction between direct and circumstantial evidence. Each may be equally as persuasive, depending upon your assessment of all of the evidence, both direct and circumstantial.

I tell you now, ladies and gentlemen, the Defendants, do not have the burden of proof in this case except as to one issue which I will explain to you during the course of these instructions. The Defendants do not have an obligation to disprove that which the Plaintiff asserts or claims. The Defendants have no obligation to produce evidence or to call any witnesses.

In this case, it is the Plaintiff's burden to prove each essential element of its claim of public nuisance by a preponderance of the evidence separately as to each Defendant. To establish by a "preponderance of the evidence" means to prove that something is more likely so than not so.

In other words, a preponderance of the evidence in the case means such evidence, as when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

If you find that the evidence weighs more on the side of the Defendants or that the evidence is so equally balanced that you cannot say whether it weighs in favor of the Plaintiff or the Defendants, then I tell you now that the Plaintiff will have failed to sustain its burden of proof. And under those circumstances, your verdict must be in favor of the Defendants. On the other hand, if you find that the weight of evidence tips in favor of the Plaintiff as to any given defendant, than you should return a verdict for the Plaintiff against such defendant.

There is, ladies and gentlemen, no magical formula by which you may evaluate testimony. In your every-day affairs, you determine for yourselves the reliability or the unreliability of statements made to you by others. The same tests that you use in your every-day dealings generally are the most reliable tests to be applied during your deliberations.

In determining the credibility of a witness, you may give consideration to several factors, including, but not limited to, the following: You may be guided by the intelligence, age, appearance, of a witness. You may be guided by the conduct and the demeanor of the witness while testifying. You may be guided by your perception of the frankness and candor of the witness while that witness testified. You should consider the interest, or lack of interest, of the witness, if any, in the outcome of the case. You should take into account any bias or prejudice of the witness that you may have perceived.

You should take into account, ladies and gentlemen, the opportunity a witness had to acquire knowledge or to observe facts concerning that which the witness testified about and whether the witness impresses you as having an accurate recollection with respect to those matters. You may consider the probability or the improbability of the truth of the witness's testimony.

You may take into account any consistencies or inconsistencies between what was testified to during the trial and what was spoken about elsewhere. If you find that one or more of the witnesses who testified at trial made prior statements that were inconsistent with their testimony in court, it is up to you to determine which, if either, statement you will believe. And, you may accept their prior statements as if they were made under oath in the courtroom and disregard their inconsistent statements at trial; or you may disregard the prior statement and accept

the statement that they did make at trial; or as I previously indicated, you may determine that neither statement is credible or worthy.

From such circumstances and from all of the other facts and circumstances proved at trial, you may determine whether or not any witness or witnesses are or were credible. After making you own judgments, give the testimony of each witness such weight, if any, as you think it deserves.

Ladies and gentlemen, the Rules of Evidence ordinarily do not permit witnesses to testify as to their opinions or their conclusions. An exception to this rule exists as to those whom we call “expert witnesses”; that is to say, witnesses who by reason of their education or experience have become well-versed in some art, science, profession, or in some other area may offer their opinions as to relevant and material matters in which they profess to be expert. They also may state the reasons for their opinions.

You should consider expert testimony and give it such weight as you think it deserves. An expert’s testimony should be considered in light of all of the other factors that I have provided to you in connection with your assessment generally of the credibility of witnesses. If you should decide that the opinion of an expert witness is not based upon sufficient education and/or experience; or if you should conclude that the reasons given in support of the opinion are not sound; or if you

feel that an opinion was outweighed by other evidence, you may disregard the opinion entirely.

Ladies and gentlemen, if you find that there is evidence in the record that has not been contradicted, you may take that evidence as you see fit. You need not accept the evidence, but you may take it as evidence establishing whatever fact it was presented in connection with.

The Court must caution you that you should not make your decision about any disputed point of fact based purely upon the number of witnesses that testified one way or the other about that issue or the volume of the evidence offered on it. In other words, the test is not one of which side brings the greater number of witnesses or presents the greater quantity of evidence to prove a disputed point.

The test is which witnesses and which evidence appeals to your minds as being most accurate and trustworthy and that produce in your minds a belief in the likelihood of the truth.

Members of the jury, I remind you that your decision is to be based on your view of the evidence in this case and your application thereto of the instructions I now am giving you, and not on the closing arguments by counsel which you have heard.

The claim brought by the State against each Defendant is called public nuisance. I tell you now that during the trial there was reference to the Lead

Poisoning Prevention Act. That Act does not preclude the State from maintaining this public nuisance action. You are being asked whether the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island constitutes a public nuisance. You are not asked to decide whether each separate property that may contain such lead pigment is by itself a public nuisance but rather whether the cumulative presence of all such pigment on properties throughout the State constitutes a single public nuisance.

Because the State's public nuisance claim concerns only lead pigment contained in paints and coatings in or on buildings throughout the State, you should not take into account lead from other sources in determining whether such public nuisance exists. If you determine that the cumulative presence of lead pigment in paint and coatings on buildings throughout Rhode Island constitutes a public nuisance, you will be asked to decide whether each Defendant individually or whether more than one Defendant through collective conduct is or are responsible for creating, maintaining or substantially contributing to the creation or maintenance of such public nuisance in Rhode Island.

The first part of the State's public nuisance claim requires the State to prove that a public nuisance exists. A public nuisance is something that unreasonably interferes with a right common to the general public; it is something that unreasonably interferes with the health, safety, peace, comfort or convenience of

the general community. An essential element of a public nuisance claim is that persons have suffered harm or are threatened with injuries that they ought not to have to bear. Public nuisance concerns injury or harm caused, rather than conduct which gives rise to the injury. In this case, the State contends that the cumulative presence of lead pigments contained in paints and coatings in and on buildings throughout Rhode Island unreasonably interferes with a right common to the general public. Each Defendant denies the State's contention.

A right common to the general public is a right or an interest that belongs to the community-at-large. It is a right that is collective in nature. A public right is a right collective in nature and not like an individual right that everyone has not to be assaulted, or defamed, or defrauded, or negligently injured.

The State must prove in order to establish a public nuisance that the presence of lead pigment in paint and on buildings throughout Rhode Island as aforesaid unreasonably interferes with a right common to the general public. In this connection, an interference is an injury, invasion, disruption, or obstruction of a right held by the general public. Interference is unreasonable when persons have suffered harm or are threatened with injuries that they ought not to have to bear. Harm or injuries necessary for a public nuisance to exist may be either actual present harm or the threat of likely future harm. The threat of likely future harm means harm likely would occur in the future which the public ought not to have to

bear as a result of a condition which exists today. A threatened harm may be unreasonable if the condition is of such a continuing nature or is likely to produce such permanent or long-lasting consequences as to have a substantial affect upon the public health, safety, peace, comfort or convenience. When you consider the unreasonableness of the interference, you may consider a number of factors including the nature of the harm, the numbers of the community who may be affected by it, the extent of the harm, the permanence of the injuries and the potential for likely future injuries or harm.

You are being asked to determine if harm has occurred or if a continuing threat of likely harm exists which amounts to an unreasonable interference with the health, safety, peace, comfort or convenience of the general community. A finding of either a present harm or the potential for likely future harm, separately or together, in the manner that has been defined is sufficient to support a finding of a public nuisance.

In public nuisance cases, you must consider the legal term “proximate cause.” In this case in order to prove proximate cause or proximate causation, the State must establish two things: (1) that each Defendant’s conduct was a substantial cause of the public nuisance alleged by the State and (2) that the public nuisance was a substantial factor in causing injury or harm to the public.

Proximate cause means a cause that in a natural, continuous and unbroken sequence produces an event or injury and without which the event or injury would not have occurred. The proximate cause of an event or injury is a substantial, primary or moving cause without which the event or injury would not have happened. Causes that merely are incidental are not proximate causes.

A cause that is a proximate cause may be the sole or only cause of an event or injury; or, it may be one of two or more or even several causes of an event or injury, some of which are a proximate cause and some of which are not. Cause is a proximate cause even if it comes together with or unites with some other cause and produces the event or injury. The test to be used is whether the particular cause at issue is a substantial cause or whether it is merely incidental.

If you determine that the cumulative presence of lead pigment in paints and coatings in or on buildings throughout Rhode Island is a public nuisance, you then must next decide whether one or more of the Defendants in this case are responsible or liable for that public nuisance. You are asked to decide whether the actions of any of these Defendants, either alone or in combination with others, substantially contributed to the creation of a public nuisance in this State.

A Defendant is liable for a public nuisance if the public nuisance is caused by its activity or by an activity in which it participated to a substantial extent. When a Defendant is only one of several actors participating in carrying on an

activity that causes a public nuisance, its participation must be substantial before it can be held liable for the resulting public nuisance. The Defendant that participates to a substantial extent in the activity that causes a public nuisance is liable for the nuisance even after it has withdrawn from or stopped the activity and even if it is not in a position to stop the harm or to abate the condition.

The act or failure to act by a Defendant need not be intentional or negligent to impose liability for creating a public nuisance. Rather, the fact that the conduct which caused the public nuisance otherwise is lawful or has not been made unlawful does not preclude liability where that conduct nevertheless results in the public nuisance. Liability for public nuisance arises when the Defendant's acts set in motion a force or chain of events which proximately cause the public nuisance.

You need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable for creating, maintaining, or substantially contributing to the creation or maintenance of a public nuisance in this case nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that the conduct of such Defendants, or of any of them, is a proximate cause of a public nuisance. Instead, you must consider the totality of each Defendant's conduct individually in order to determine whether such Defendant is liable for a public nuisance as herein defined.

I also tell you that mere membership in a trade association is not sufficient to impose liability on any Defendant herein.

I tell you now that to the extent that the Defendants, or any of them, claim they are not liable because of an act or acts of others which occurred after their conduct and that such act constitutes an intervening superceding cause of the public nuisance and any harm or injury resulting therefrom, it is the burden of such Defendant, or any of them, to prove by a preponderance of the evidence such assertion. The Court calls to your attention the instructions above set forth with respect to proximate cause, burden of proof, and standard of proof.

In determining whether the acts of others constitute an intervening superceding cause, you must consider whether the conduct of the Defendants, or any of them, created or increased a foreseeable risk of harm through the intervention of such others' acts. If Defendants' conduct created or increased the foreseeable risk of harm through the intervention of the subsequent actor then the intervening acts cannot be said to be an intervening superceding cause and Defendants will not have proved their assertion. On the other hand, if you find that Defendants have proved such assertion, then any sequence of proximate causation attributable to Defendants will have been broken.

If you determine that the cumulative presence of lead pigments in paints and coatings on buildings throughout Rhode Island is a public nuisance and that the

Defendants, or any of them, are liable for that public nuisance, you will be asked to decide whether any of such Defendants, as you have found liable, should abate the public nuisance.

For the purposes of this instruction, I tell you that abatement means the public nuisance is to be rendered harmless or suppressed.

I also tell you that if you decide that abatement shall take place, it will be for the Court to determine the manner in which such abatement will be carried out.

Ladies and gentlemen, if during this trial or during the course of these instructions, I have said or done anything that has caused you to believe that I was indicating an opinion as to what the facts in this case are, I tell you now, and I underscore it, I intended to indicate no such opinion. Whatever impressions I may or may not have formed about this case in a very real sense is totally beside the point. My job essentially is completed for now after I, in a few minutes, have finished giving you these instructions on the law.

Under our system, it is you and you alone who have the responsibility for making credibility and factual determinations and the ultimate determination as to the proper verdict in this case. Remarks, statements, or personal opinions expressed by counsel during the trial or in final argument are not evidence and are not to be considered by you as evidence during your deliberations. The fact that I may have admitted evidence over a lawyer's objection should not be permitted by

you to influence you in determining the weight that you will give such evidence. Statements made by counsel either for or against the admission of any offered evidence should not influence your determination of the weight that you will give to that evidence, if I admitted it.

Let me put it differently. You should determine the weight that you will give such evidence on the basis of your own independent consideration of it without regard to the statements of counsel concerning its admissibility to the extent that you heard those statements. You should not permit any objection by counsel to the admission of evidence or to the rulings of the Court to create any bias or any prejudice toward that attorney or to the party he or she represents.

I tell you now that it is the duty of counsel to vigorously represent their clients and to defend their clients' rights and interests. In the performance of that duty, an attorney may freely make objection to the admission of any offered evidence or to any other ruling of the Court. Neither the attorney nor his or her client should be penalized for having done so. Nor should any client be penalized for having defended against any claim asserted against it.

Ladies and gentlemen, to render a verdict, all six jurors must agree. Your verdict must be unanimous. During your deliberations, you should exercise reasonable and intelligent judgment. Utilize your common sense. Do not approach your consideration in an intellectual vacuum. You are not required to

disregard your experiences, your observations, in the ordinary, every-day affairs of life. It is not required that you yield your opinion simply because a majority holds a contrary view. You should keep, however, your minds reasonably open with respect to any point in dispute so that you will not be prevented from reaching a unanimous verdict by mere stubbornness.

Let me put that in the vernacular. In your deliberations, don't paint yourself into a corner. However, having said that, I tell you now that it is your right to maintain your opinion. I also tell you that the vote of each juror is as important as the vote of any other juror.

I'm about to appoint one of you as the foreperson of this jury. And, in that connection, I am going to appoint Juror No. 241, in Seat 3 as the foreperson of the jury. But, I want to repeat what I just said. The vote of each juror is as important as the vote of any other juror.

Mr. Foreperson, it is not my province to tell you how to conduct the affairs in the jury room. But, I would tell you by way of suggestion that if I were the foreperson, I would look at that responsibility as if I were the chairperson of a board, and I would make sure that each member of the jury had an ample opportunity to review the binders of evidence that will be going upstairs with you. I would further make sure that when the evidence had been reviewed that each juror not only has the opportunity but avail themselves of the opportunity to

express their position. And, beyond that, sir, I can't offer any suggestion, and that's a suggestion only.

I'm going to now end these instructions by saying something that probably need not be said, but I am going to say it anyhow. Prejudice, sympathy, compassion, none of those qualities should be permitted to influence you. All that any party is entitled to, all that any party expects, is a verdict based upon your fair, scrupulous, and conscientious examination of the evidence and the application thereto of the law as I now have instructed you.