

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

FILED

DEC 13 2002

U.S. DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

VERNON PROCTOR, et al.,

PLAINTIFFS,

v.

CIVIL ACTION NO. 3:02CV21

7-ELEVEN, INC., a Texas corporation,

DEFENDANT.

**PLAINTIFFS' SECOND MOTION AND MEMORANDUM
TO AMEND AND SUPPLEMENT COMPLAINT**

COME NOW the Plaintiffs, by counsel, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and for the reasons stated below, respectfully pray that this Honorable Court grant them leave to amend and supplement the Complaint filed in the instant civil action:

1. The Court's Scheduling Order in this matter, entered June 10, 2002, sets an October 1, 2002 deadline for joinder, amendments, crossclaims, counterclaims, replies thereto and similar motions.

2. The Court's Scheduling Order sets a discovery completion date of March 14, 2003 and a trial date of May 20, 2003 in this matter.

3. This case involves the subterranean release of an unknown quantity of gasoline, a substance recognized as a hazardous material by the U.S. Environmental Protection Agency, from Defendant's underground storage tanks.¹ This gasoline has migrated in an underground plume and trespassed beneath the houses of Plaintiffs and others. The contamination remains under the homes

¹The amount of the contamination is unknown because of Defendant's shoddy, inaccurate and illegal inventory and record keeping practices.

of the Plaintiffs and others as a continuing trespass while Defendant attempts to determine the extent of the contamination and the best way to clean up this environmental disaster.

4. Due to the continuing nature of Defendant's tortious actions in this litigation, and the ongoing nature of the attempts to determine the extent of the underground gasoline contamination plume, it has recently come to Plaintiffs' attention and Plaintiffs have discovered that additional residences in the area of the plume appear to be suffering from gasoline contamination. Specifically, the home of Charles Virgil Beahm, Jr. and Kathryn Belinda Beahm, at 107 West Sixth Avenue, Ranson, and the home of Kathy Ann Johnson and Randy William Johnson at 110 West Fifth Avenue, Ranson, appear to be contaminated by gasoline due to the acts and omissions of Defendants.

5. These innocent and unsuspecting homeowners have no other means to seek relief to address the contamination of their homes but to be joined as parties Plaintiff in this action.

6. Anticipating Defendant's false argument in response to this motion that the statute of limitations has run on the Beahm and Johnson claims, the Court should understand that, in the area of subterranean trespass, the statute of limitations begins to run only from the time of actual discovery of the trespass, or the time when such discovery was reasonably possible. Western Pocahontas Corp. v. Eastern Gas & Fuel Assocs., 213 F.Supp.657 (SDWV 1963), rev'd on other grounds sub nom., Cole v. Eastern Gas & Fuel Assocs. 322 F2d 506 (4th Cir. 1963).

7. Where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious acts cease. Handley v. Town of Shinnston, 289 SE2d 201 (WV 1982). Because the contamination remains in the ground and will likely remain there for many years to come, Defendant's tort continues to this very day.

8. Because of the remoteness of the discovery and trial dates in this matter, and the continuing nature of Defendant's tortious actions, granting Plaintiffs' motion to amend to add these additional parties will not prejudice Defendant. On the contrary, it will allow for the just adjudication of the claims of these persons. Plaintiffs' First Amended Complaint is attached hereto as Exhibit A.

9. Rule 15(a) of the Federal Rules of Civil Procedure provides in pertinent part the following:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend at any time within 20 days after it is served. Otherwise **a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires** (emphasis added).

10. In an effort to avoid the necessity of Court intervention into the issue, counsel for the Plaintiff has had several conversations with Defendant's counsel seeking the agreement of Defendant to amend the Complaint.

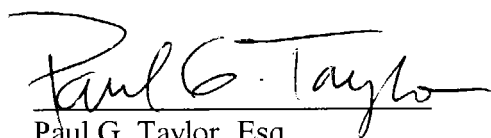
11. Defendant will not agree to an amended complaint. This position creates the necessity for Court intervention on the issue.

12. Rule 15 provides liberal practice in allowance of amendments to pleadings and should be liberally construed. Duffield v. Charleston Area Med.Center, 503 F.2d 512 (4th Cir. 1974).

13. Given the continuing nature of Defendant's trespass, the recent discovery of contamination beneath the Beahm and Johnson homes, that Rule 15 is to be liberally construed, that the Defendant will not be prejudiced by the amendment, and that there is no apparent reason to deny leave to amend Plaintiffs' Complaint, leave of Court to amend is clearly appropriate in this case.

WHEREFORE, the Plaintiffs respectfully pray that, for the foregoing reasons, this Honorable Court grant the Plaintiffs leave to amend their Complaint and add Charles V. Beahm Jr., Kathryn B. Beahm, Kathy A. Johnson and Randy W. Johnson as Plaintiffs.

Vernon Proctor, et al
By Counsel



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CIVIL ACTION NO. 3:02CV21

7-ELEVEN, INC. a Texas corporation,

DEFENDANTS.

CERTIFICATE OF SERVICE

I, Paul G. Taylor, counsel for Plaintiffs, do hereby certify that I have caused to be served the foregoing PLAINTIFFS' SECOND MOTION AND MEMORANDUM TO AMEND AND SUPPLEMENT COMPLAINT upon the named counsel of record, by first class United States mail, postage prepaid, this 12th day of December 2002.

Charles F. Printz, Jr., Esq.
Bowles Rice McDavid Graff & Love
Post Office Drawer 1419
Martinsburg WV 25402


PAUL G. TAYLOR

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**VERNON PROCTOR,
ANNIE PROCTOR,
WALLACE P. MILLS, SR.,
BETTY JO MILLS,
DEVONA SNYDER,
GLENDA PIERCE,
NANCY ROPER,
STEVEN W. JENKINS,
CHARLES V. BEAHM, JR
KATHRYN B. BEAHM,
KATHY A. JOHNSON and
RANDY W. JOHNSON,**

PLAINTIFFS,

v.

CIVIL ACTION NO. 3:02CV21

7-ELEVEN, INC. a Texas Corporation.,

DEFENDANT.

FIRST AMENDED COMPLAINT

1. Plaintiffs are residents of the State of West Virginia, and are owners in fee simple of tracts of real property situate in the Town of Ranson, Jefferson County, West Virginia. Said tracts of real property are improved with dwelling houses. Plaintiffs suffered real property damage as a result of Defendants' casting gasoline on and into their properties during 2000 and continuing.

2. Defendant, 7-Eleven, Inc. is a Texas corporation, authorized and licensed to do business in West Virginia, and is the owner in fee simple of a tract of real property situate in the Town of Ranson, Jefferson County, West Virginia. Said tract of real property is improved with a commercial building known as Store No. 10673 and said tract is further affixed with divers liquid fuels storage and dispensing paraphernalia.

3. Sometime in 1976, Defendant 7-Eleven intentionally and with total disregard for the safety and quiet enjoyment of the surrounding real property owners and residents, exposed the

aforesaid Plaintiffs' residences, and the public at large, to great risk and danger when Defendant constructed and installed on its said tract of real property, permanent facilities for the storage of ultra-dangerous, highly flammable and explosive, toxic petroleum distillates. Said permanent facilities were negligently constructed by Defendant with total disregard for the dangerous propensities of the proposed use and occupation of the tract.

4. Since the year 1976, Defendant has permitted, encouraged, suffered, and profited from the storage and dispensing of the aforesaid highly flammable, ultra-dangerous, explosive and toxic petroleum distillates on its aforesaid real property.

5. Since the year 1976, and up to and including all times relevant to this complaint, Defendant, with knowing reckless disregard for the safety of others including the Plaintiffs, and knowing the dangerous propensity therein, did permit, encourage, suffer and profit from the continual storage of large quantities (20,000 U.S. Gallons) of the said highly flammable, ultra-dangerous, explosive and toxic petroleum distillates on its real property aforesaid.

6. Defendant, knowing the risk that the community, including the Plaintiffs, were exposed to, and knowing the ultra-dangerous propensities of the aforesaid petroleum distillates, willfully failed and refused to protect the community and the Plaintiffs from the risks aforesaid by providing effective safeguards and restraints on the petroleum distillates. Defendant had a duty to exercise strict care to prevent and contain any escape of these petroleum distillates from its premises.

7. At times in 2000, and continuing to this day, Defendant intentionally and recklessly permitted, suffered and did not impede the casting of thousands of gallons of the aforesaid ultra-dangerous liquid petroleum distillates onto the real property of the Plaintiffs. Such reckless and gross negligence includes, but is not limited to, Defendant's failure to properly track gasoline inventory.

8. Because Defendant has refused to acknowledge its patent liability to the Plaintiffs for the

damage aforesaid; because Defendant has refused to pay any compensation to the Plaintiffs for the losses they have sustained as a result of the Defendant's intentional and reckless conduct; Plaintiffs believe that Defendant is acting in a wanton, meanspirited and malicious manner toward the Plaintiffs. Plaintiffs demand punitive damages from the Defendant to punish it for the reprehensibility of its conduct towards Plaintiffs. Defendant was (1) aware that harm was caused to the Plaintiffs; (2) made no efforts to make amends to the Plaintiffs once their liability became clear; (3) Defendant profited from its wrongful conduct; (4) Plaintiffs were forced to incur costs of litigation to redress the harm and damage inflicted on them by the Defendant.

COUNT I

9. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

10. Defendant 7-Eleven, caused to be, and permitted to be constructed on its aforescribed premises a petroleum distillate storage tank system, connecting pipes and dispensing equipment for the purpose of engaging in the retail sale of gasoline and kerosene. Defendant negligently constructed or negligently caused to be constructed, a petroleum distillate storage and dispensing system without adequate controls to inform the Defendant when leaks of the petroleum distillates from the tanks and lines occurred.

11. Defendant 7-Eleven, caused to be stored, at various times relevant herein, in tanks and pipelines, quantities of petroleum distillates up to a maximum capacity of 20,000 gallons at the aforescribed premises. The petroleum distillates so stored at the premises, gasoline and kerosene, are ultra-dangerous substances, and Defendant had a duty to exercise strict care to prevent and contain any escape of these petroleum distillates from its premises.

12. Defendant, (i) disregarding its duties to exercise strict care over the ultra-dangerous substances, and (ii) in total disregard for the safety and health of the community and the public at

large, negligently failed to supervise, monitor, account for and police the storage and dispensing of the petroleum distillates.

13. Plaintiffs suffered damage to their property and persons which was proximately caused by Defendant's negligence in casting gasoline in large quantities onto them.

COUNT II

14. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

15. Defendant 7-Eleven, at all times relevant to this Complaint, stored and dispensed ultra-dangerous petroleum distillates from its premises aforescribed.

16. Defendant negligently and without regard for the public safety of the community, residents and the public at large, failed and refused to inspect, monitor, identify, prevent and contain leaks of petroleum distillates from its storage and dispensing facilities at the aforescribed premises and because of its negligence, damaged Plaintiffs.

17. Defendant had knowledge that a leak in its petroleum storage and dispensing facilities had occurred as early as January 2000, but negligently, criminally and with malicious intent, concealed said leak from Plaintiffs, governmental response agencies, and public safety agencies, thereby causing damage to Plaintiffs.

18. From January 2000 or before, and continuing to this day, Defendant willfully, wantonly, and unlawfully cast large quantities of gasoline in and onto the properties and residences of the Plaintiffs causing damage to their property and persons.

19. Defendant's wilful, wanton, unlawful and negligent conduct and actions proximately caused damage to the Plaintiffs.

COUNT III

20. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs

of this Complaint.

21. Defendant 7-Eleven has failed and refused to pay to Plaintiffs compensation to recompense them for their (i) diminution of the value of their real and personal property; (ii) out-of-pocket expenses incurred; (iii) inconvenience; (iv) personal injury; (v) stress, aggravation, and mental anguish; (vi) loss of use of premises.

Notwithstanding that over 24 months time has elapsed since Plaintiffs' suffered damage, and notwithstanding the obvious liability of Defendant to Plaintiffs, Defendant 7-Eleven has refused, with utter disregard of any decency, to compensate the Plaintiffs. Such circumstances constitute grounds for the award of punitive damages to Plaintiffs to punish Defendant 7-Eleven for its mean-spiritedness and malice.

22. Notwithstanding that Defendant has refused and failed to pay any compensation to the Plaintiffs, Defendant 7-Eleven has continued for over 24 months to operate its store at the same location and continues to dispense petroleum distillates at its premises, all presumably at a profit to it.

COUNT IV

23. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

24. Defendant has violated the laws of West Virginia and Plaintiffs bring this action, in addition to other grounds and causes, under the provision of West Virginia Code §55-7-9.

DEMAND FOR TRIAL BY JURY

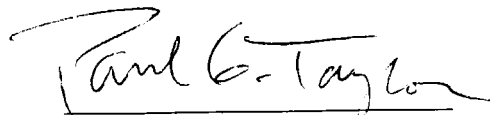
Plaintiffs demand trial by jury of all issues triable of right, in accordance with Rule 38(a) R.C.P.

WHEREFORE, Plaintiffs, DEMAND judgment against the Defendant for general and special damages in an amount to be determined by a jury for:

- (a) fair market value of their real estate prior to its destruction by Defendant;
- (b) fair market value of their tenancy prior to its destruction by Defendant;
- (c) inconvenience and loss of wages and income;
- (d) fright, stress, aggravation and mental anguish;
- (e) out-of-pocket expenses;
- (f) medical expenses, including costs of examinations and tests;
- (g) emotional distress; and
- (h) injuries to Plaintiffs' bodies.

PLAINTIFFS FURTHER DEMAND punitive damages against the Defendant, in an amount to be determined by a jury, to punish Defendant for its intentional, wanton and reckless conduct, its mean-spirited conduct and abusive conduct directed towards Plaintiffs, both before filing this action and since the filing of this action.

Vernon Proctor,
Annie Proctor and
Wallace P. Mills, Sr.
Betty Jo Mills,
Devona Snyder,
Glenda Pierce
Nancy Roper,
Steven W. Jenkins
Charles V. Beahm, Jr.
Kathryn B. Beahm,
Kathy A. Johnson and
Randy W. Johnson
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