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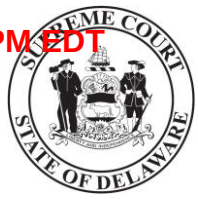

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

TED SHERMAN,	:	
	:	No.: 98, 2014
Plaintiff Below,	:	
Appellant,	:	
	:	Trial Court Below:
v.	:	Superior Court of the State of
	:	Delaware for New Castle County
GEORGIA-PACIFIC LLC,	:	
	:	C.A. No.: N11C-01-271 ASB
Defendant Below,	:	
Appellee.	:	

APPELLANT'S CORRECTED OPENING BRIEF

Joseph J. Rhoades, Esquire (I.D. 2064)
Stephen T. Morrow, Esquire (I.D. 4891)
1225 King Street, 12th Flr.
P.O. Box 874
Wilmington, Delaware 19801
(302) 427-9500
Attorneys for Appellant/Plaintiff
Below Ted Sherman

LEVY KONIGSBERG LLP
Donald P. Blydenburgh, Esquire
Jerome H. Block, Esquire
800 Third Avenue, 11th Flr.
New York, New York 10022
(212) 605-6200

DATE: April 22, 2014

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NATURE OF PROCEEDINGS

This is an appeal from: (1) the oral rulings of the Superior Court, in and for New Castle County, issued on January 24, 2014, denying Appellant/Plaintiff Below Ted Sherman (hereinafter referred to as "Appellant") the right to amend his pleadings to conform to the evidence to include a breach of warranty claim, and precluding Appellant from submitting such claim to the jury; and (2) the oral rulings of the Superior Court, in and for New Castle County, issued on January 27, 2014, limiting Appellant's negligence claim submitted to the jury to a "failure to warn" theory only.

Appellant filed an asbestos lawsuit (C.A. No. N11C-01-271) on January 28, 2011, in the Delaware Superior Court in and for New Castle County against, among others, Georgia-Pacific LLC (hereinafter referred to as "Appellee"), alleging that exposure to asbestos joint compound products designed, manufactured and sold by Appellee from 1974 to 1978 caused his mesothelioma. The case proceeded under the substantive laws of Virginia.

Trial was conducted before the Superior Court and a jury from January 13, 2014 to January 28, 2014. Thereafter, the jury returned a verdict finding in favor of Appellee.

On February 24, 2014, Appellant filed the present appeal with this Honorable Court. This is Appellant's Opening Brief in support of his appeal.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM SUBMITTING TO THE JURY A BREACH OF IMPLIED WARRANTY CLAIM UNDER VIRGINIA LAW AS SUCH CLAIM WAS PROPERLY PLED AND NOT ABANDONED BY APPELLANT. THE SUPERIOR COURT COMPOUNDED ITS ERROR IN DENYING APPELLANT'S MOTION TO AMEND HIS PLEADINGS TO CONFORM TO THE EVIDENCE TO INCLUDE A CLAIM FOR BREACH OF IMPLIED WARRANTY AS THE EVIDENCE ADMITTED AT TRIAL SUPPORTED SUCH CLAIM AND APPELLEE WOULD NOT HAVE BEEN PREJUDICED OR SURPRISED BY SUCH AN AMENDMENT.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY PRECLUDING THE JURY FROM DETERMINING WHETHER APPELLEE BREACHED A DUTY TO EXERCISE ORDINARY CARE IN THE DESIGN, MANUFACTURE AND SALE OF ITS ASBESTOS JOINT COMPOUND AND LIMITING APPELLANT'S NEGLIGENCE CLAIM SUBMITTED TO THE JURY TO A FAILURE TO WARN CLAIM ONLY.

STATEMENT OF FACTS

A. Appellant Alleged That Appellee Breached Its Duty To Appellant To Design, Manufacture And Sell A Reasonably Safe Product For Its Foreseeable Use.

Appellant filed an asbestos lawsuit (C.A. No. N11C-01-271) on January 28, 2011 against, among others, Appellee, alleging that asbestos joint compound products designed, manufactured and sold by Appellee caused his mesothelioma. Opening Brief Appendix, pages A1-A13.[1] Specifically, Appellant alleged that from 1974 to approximately 1978, while inspecting the new construction of homes as a bank inspector, he suffered bystander exposure to asbestos dust from others' foreseeable use of Appellee's asbestos joint compound. A2, A6. Appellant alleged that: (1) Appellee's asbestos joint compound product was used in its ordinary and intended manner; (2) Appellee's asbestos joint compound product was toxic, hazardous and unreasonably dangerous; and (3) Appellee failed to exercise ordinary care in the design, manufacture and/or labeling of its asbestos joint compound product, and that the such failure caused Appellant personal injury. A7. Specifically, with regard to its failure to exercise ordinary care, Appellant alleged that Appellee was negligent by: (1) including asbestos in its joint compound product despite knowledge of the hazardous effects of asbestos to those inhaling

[1] Hereinafter, all references to the Appellant's Opening Brief Appendix will be made in the following manner: "A __."

such asbestos during the foreseeable use of the product; (2) including asbestos in its joint compound when adequate substitutes were available; and (3) designing its product with asbestos components, which were hazardous and could have been substituted. A8-A9. Appellant's claims were predicated upon the substantive laws of Virginia, and, if proven, established a duty recognized under Virginia law.[2]

B. The Joint Pre-Trial Memorandum Set Forth Appellant's Claims against Appellee for Negligence And Breach Of Implied Warranty.

In the joint Pre-Trial Memorandum, agreed to and submitted to the trial court by the parties on January 6, 2014, pursuant to the Master Trial Scheduling Order, Appellant reiterated those allegations set forth in his Complaint, and stated with particularity his claims against Appellee, including that Appellee was negligent in that it: (1) designed the joint compound product to include a toxic and hazardous substance; (2) failed to substitute the asbestos in its joint compound products when adequate substitutes were available to Appellee; (3) failed to adequately test, warn and inform those who would be foreseeably affected by the ordinary use of the asbestos joint compound product; and (4) violated its warranty that the product was reasonably safe when used as intended. A14-A41. With

[2] Appellant also alleged in his Complaint that the willful and wanton nature of the actions and omissions of Appellee as described warranted an award of punitive damages. A10. Ultimately, the trial court determined that there was sufficient evidence to present the issue of punitive damages to the jury. A310, A329-A329.

respect to warranty, Appellant stated: "Defendants[3] statement about other Defendants warranted the asbestos products for their intended purpose and use. Defendants violated this warranty as their product was neither packaged nor provided in a method proper for its intended use and are liable to the Plaintiff for all injuries caused thereby." A18. Appellant stated further:

> When their asbestos and asbestos-containing products left each respective Defendant's possession and were placed on the market they were defective in that, when used in the intended or reasonably foreseeable manner, they were not reasonably safe for their intended use, they failed to perform as safely as would be expected by an ordinary user or consumer and/or created a risk of harm beyond that which would be contemplated by the ordinary user or consumer.

A18. Finally, the parties stipulated that Appellant did not intend to pursue any claims based in strict liability. A25.[4]

C. Appellant Suffered Bystander Exposure To Joint Compound As A Bank Inspector From 1974-1978.

Appellant suffered regular and repeated exposures to asbestos from Appellee's asbestos joint compound products. While working as a bank inspector for Central National Bank, Appellant, as part of his normal job duties, frequented construction sites approximately fifty percent of his time in an average week to

[3] In January 2014, Appellant went to trial before the Superior Court against Appellee and Union Carbide Corporation. However, the instant appeal pertains only to Appellee.

[4] Virginia has not adopted Section 402A of the Restatement (Second) of Torts and does not permit tort recovery on a strict-liability theory in products liability cases. *See, Sensenbrenner v. Rust, Oring & Neale*, 236 Va. 419, 424 n.4 (1988). Instead, in such cases, Virginia recognizes claims for negligence and breach of implied warranty. *See, Morgen Indus. v. Vaughan*, 252 Va. 60, 65-66 (1996).

inspect the work performed by the tradesman, including drywallers. A48-A49. Appellant specifically recalled five-gallon metal buckets of Appellee's asbestos joint compound as the predominant joint compound used while he was present inspecting these sites. A50-A51. The evidence further demonstrated that, based on his description of the product, Appellant would have been exposed to Appellee's asbestos-containing "Ready-Mix" premixed joint compound. A106-107.[5] Appellee's corporate documents admitted into evidence, including formula sheets during the alleged exposure period, confirmed Appellee's premixed joint compound to be an asbestos-containing product. A132-A136, A163, A174-A175. Ultimately, the jury found that Appellant had been exposed to asbestos from Appellee's joint compound. A325-A329.

D. Appellant Suffered Substantial Exposure To Asbestos As A Result Of Others Applying, Sanding And Sweeping Up Asbestos Joint Compound.

Certified industrial hygienist George Pineda testified that during the ordinary use of joint compound, including application, sanding and cleanup, substantial amounts of asbestos fibers are released, causing individuals in the room where the work was being performed, as well as the room adjacent thereto, to suffer substantial exposures to asbestos. A55-A84. Mr. Pineda based his opinion on his

[5] During Appellant's testimony, he testified that he thought the five gallon metal buckets of joint compound contained a dry mix. A52-A53. Appellee contended at trial that, based on that testimony, Appellant was only exposed to Appellee's dry-mix, non-asbestos joint compound, which came in bags. A19, A90, A184. The jury resolved this issue in favor of the Appellant finding that he was exposed to Appellee's asbestos-containing joint compound. A325-A329.

experience and expertise, work practice studies performed by his colleagues at Material Analytical Sciences, as well as on peer-reviewed scientific and medical journal articles published during the time Appellant was being exposure and available to Appellee. A55-A84.

E. The Evidence Showed That The Hazards of asbestos were known and knowable well before Appellant began work as a bank inspector.

Appellee knew of the potential health hazards associated with asbestos dust, particularly as a result of sanding joint compound, well before Appellant ever inspected his first construction site. A52-A55, A156-A157. Appellee knew that work with its joint compound products would create dust that would have to be cleaned. A149-A150. Appellee also knew by that time that sanding would cause a user to breathe in a large amount of dust. A150. Despite this knowledge, Appellee never tested its own asbestos products to determine how much exposure to asbestos users were suffering. A144-A146.

F. The Evidence Showed That Appellee Continued To Sell Asbestos Premixed Joint Compound Even After It Developed An Entire Line Of Asbestos-Free Joint Compounds.

By 1974, Appellee was manufacturing an entire line of asbestos free joint compounds. A183-A184. However, Appellee continued to design, manufacture and sell asbestos-containing premixed joint compound, going so far as to call for a moratorium on the manufacture of asbestos-free premixed joint compound. A173. Even more egregious, after Appellee had developed an asbestos-free premixed

joint compound, it delayed the manufacture of such product, sold it as a special request item, and stocked the shelves of its distributors with its asbestos joint compound. A163, A180, A185.

In fact, even after notice in September 1976 of a petition before the Consumer Protection Safety Commission ("CPSC" or "Commission") for a ban on asbestos joint compounds, and notice of the Commission's looming ban on the use of asbestos in joint compounds due to the unreasonably dangerous nature of the product in May 1977, Appellee continued to sell its asbestos joint compound until its reserves were used up, such sales occurring during the period Appellant was being exposed. A151, A191, A330. Indeed, the evidence adduced at trial demonstrated a concerted effort by Appellee to delay the substitution of asbestos in its premixed joint compound to realize increased profit and market share during the time of Appellant's exposure. A189, A171-A172, A159, A167-A170, A178, A163, A173, A330, A182, A175, A186, A151, A181.

G. The Ordinary And Foreseeable Use Of Asbestos Joint Compound Resulted In Substantial Respirable Dust.

Appellee knew that the ordinary and foreseeable use of its joint compound involved sanding and cleanup of the resulting dust. A147-A150. The asbestos dust from the foreseeable use exposed the product user and bystanders in the room, as well as those in adjacent rooms. A55-A84, A96-A97. Asbestos joint compound,

with its inherent need to be sanded and swept, was in fact so unreasonably dangerous that the CPSC banned the use of asbestos in joint compounds:

> The Commission believes that no standard can render the defined products non-hazardous and concludes that only banning these products can adequately protect the public from unreasonable risks of injury associated with them.

A199. Thus, the CPSC recognized that a warning could not cure the unreasonably dangerous nature of asbestos joint compound use because such product was not capable of being used safely. A199.

H. The Evidence Adduced At Trial Supported Appellant's Claim That Appellee Manufactured And Sold An Unreasonably Dangerous Product With Asbestos When It Was Capable Of, And Did, Sell A Non-Asbestos Version.

In sum, during the course of the trial, Appellant submitted evidence showing: (1) Appellee designed and sold an unreasonably dangerous asbestos joint compound product; (2) Appellee had the ability to, and did, manufacture the same joint compound product without asbestos; and (3) the use of asbestos in joint compound was banned by the Consumer Protection Safety Commission during the exposure period because it was unable to be used safely. In support of its position that its product was not unreasonably dangerous, Appellee argued and admitted certain evidence that: (1) the asbestos in its joint compound is safe; (2) exposure to asbestos joint compound does not increase a person's risk of developing mesothelioma; (3) asbestos was added to improve the function and application of

the joint compound; and (4) consumers preferred the asbestos formulation of the product. A89, A90-A95, A148, A108-A113.

I. Appellant's Initial Special Verdict Form Was Drafted To Allow The Jury To Determine Each Of Appellant's Colorable Claims Under Virginia Law.

On January 20, 2014, Appellant served the trial court and the parties with his initial proposed special verdict form. A202-A249. The proposed interrogatories included a negligent failure to warn to address Appellee's failure to provide adequate warnings to Appellant regarding the potential hazards of its product. A204-A207. Specifically, Appellant's proposed Interrogatory No. 3 read as follows:

> 3. Do you find by a preponderance of the evidence that Georgia-Pacific failed to adequately warn of such a danger?

A204. Plaintiff's special verdict form also included breach of warranty interrogatories to address Appellee's misconduct for including asbestos in joint compound when it was also manufacturing non-asbestos joint compounds. A204-A207. Specifically, Appellant's proposed Interrogatories nos. 5 and 6 read:

> 5. Do you find by a preponderance of the evidence that Appellee's joint compound was unreasonably dangerous for the use to which it would ordinarily be put or for some other reasonably foreseeable purpose?
>
> 6. Do you find by a preponderance of the evidence that the unreasonably dangerous condition existed when Appellee's joint compound left Appellee's possession?

A205.

J. The Trial Precluded Appellant From Presenting A Breach Of Implied Warranty Claim To The Jury.

Although warranty claims are not based in strict liability tort, on the objection of Appellee, the trial court ruled that Appellant had abandoned his warranty claim when he stipulated in the pretrial memorandum not to pursue strict liability claims. A114-A117. In light of the trial court's ruling, Appellant immediately made an oral application to the trial court to amend his pleadings to conform to the evidence submitted at trial pursuant to Del. Super. Ct. R. Civ. P. 15 to include a breach of implied warranty claim as both parties had admitted evidence with respect to this claim. A114-A117. Appellant's evidence admitted at trial established the unreasonably dangerous nature of Appellee's asbestos joint compound and further established that such product could not be used safely, particularly when considering the foreseeable exposures suffered by a bystander, like Appellant, not intimately familiar with the product. A191. Moreover, no further evidence was going to be admitted in support of such claim, Appellee was on notice of such a claim at least at the time of the pre-trial order, and Appellee had in fact submitted evidence during its case to rebut such claim, asserting that its product was not hazardous, its product did not and could not cause Appellant's disease, and asbestos enabled the product to function better. A89, A90-A95, A148, A108-A113. Notwithstanding the foregoing, the trial court denied the motion for inexcusable delay. A114-A117, A124.

As a result of the trial court's ruling precluding Appellant's breach of warranty claim, Appellant provided the parties an amended proposed special verdict form to express the scope of Appellant's negligence claim and the duty owed under Virginia law, i.e., that Appellee breached its duty to Appellant to exercise ordinary care in the design, manufacture and sale of its joint compound product. A250, A260-A271. Specifically, the interrogatory read:

> 5. Do you find by a preponderance of the evidence that Appellee failed to exercise ordinary care with respect to the manufacture and sale of its joint compound products?

A268. Without a breach of warranty claim, this interrogatory was necessary to allow the jury to render a verdict regarding Appellee's duty to provide a reasonably safe product under Virginia law.

K. The Trial Court Restricted The Scope Of Appellee's Duty To Exercise Ordinary Care To A Duty To Warn.

On January 23, 2014, Appellee argued its Motion for Directed Verdict pursuant to Del. Super. Ct. R. Civ. P. 50 to the trial court. A98-A102. In arguing for dismissal as a matter of law of Appellant's punitive damages claim and negligent "failure to warn" claim, Appellee admitted that, if its motion was granted, Appellant would still have his ordinary negligence claim:

> Plaintiffs have put on a negligence case and that's what should go forward to the jury.

A98. During argument, counsel for Appellee continued:

> MR. CINCILLA: What Mr. Blydenburgh just discussed is why I'm not up here asking for judgment as a matter of law on a negligence claim. That's -- that's why he has a negligence claim.

A101. Thereafter, during the prayer conference held on January 24, 2014, the trial court agreed that Appellant's negligence claim was broader than simply a failure to warn and had been substantiated at trial based on Appellee's own product literature:

> MR. PORETZ: Correct. Your Honor, the design defect claim. I don't understand what is contained within the design defect claim because that's all a failure to warn claim.
>
> MS. LONG: It's negligence, Your Honor, that they included asbestos in the product when they didn't have to. I think that's been clear from the beginning.
>
> THE COURT: It's even clear in your literature.

A118-A120.

However, on January 25, 2014, counsel for Appellee submitted to the trial court, in anticipation of a January 26, 2014 conference call with the court, all objected-to instructions and verdict form interrogatories. A250-A271. During the telephone conference, and thereafter on the record before closing argument on January 27, 2014, the trial court conflated the concepts of negligent design versus

design defect, and limited Appellant's negligence claim to a failure to warn claim, stating:

> A products liability cause of action is not just ordinary negligence. There has to be a duty: A duty to warn, a defective design defect, a breach of warranty, a strict liability claim. There has to be something that forms the type of claim that it is.

A125. The trial court then limited Appellant's negligence claim to a failure to warn, basing its decision on a case search undertaken by the court:

> The reason I ruled, we took a break, and I went, and I went through, and I basically put in the search terms of Virginia, asbestos, and negligence. And in Virginia, for asbestos, there is no ordinary care negligence claim. There just isn't. There isn't any. There isn't any ordinary care negligence claim in the State of Virginia.

A127. The trial court then ruled to preclude any interrogatory directed to the issue of negligence except whether Appellee failed to adequately warn. A325-A329. Appellant objected to the trial court's ruling limiting his negligence claim, arguing that the trial court, without motion or request, limited Appellant's negligence claim in contravention of Virginia substantive law. A122-A123.

L. The Trial Court Broadly Instructed The Jury On Negligence But Only Permitted The Jury To Determine Whether Appellee Failed To Properly Warn.

On January 28, 2014, the trial court instructed the jury on the law of the case. A272-A314. Specifically, Instruction No. 23 instructed that: "Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person

would have used under the circumstances of this case." A297. The trial court further instructed the jury on a manufacturer's duty to inspect or test in Instruction No. 29:

> A manufacturer has a duty to make inspections or tests that are reasonably necessary to see that its product is safe for its intended use and for any other reasonably foreseeable purpose. If a manufacturer fails to perform this duty, then it is negligent.

A303. Instruction No. 27 instructed on a manufacturer's duty to exercise reasonable care in the *marketing* of its products, stating:

> The manufacturer or seller of a product has a duty to exercise reasonable care in the marketing of its product to see that its product is reasonably safe for any person or persons whom the manufacturer or seller might reasonably expect to use or be affected by the reasonably foreseeable use of the product.

A301. Notably, this instruction sets out Virginia's recognition of a duty to exercise reasonable care in marketing its products to the public. Despite these instructions, the jury was not permitted to render a verdict on whether Appellee had breached any of these duties by selling asbestos-containing joint compound when it was able to sell the same product without asbestos. Instead, the jury was only asked to determine whether Appellee had adequately warned. A125-A131, A325-A329.

After two days of deliberation, the jury returned a verdict in favor of Appellee, finding that, while Appellant was exposed to Appellee's asbestos-containing joint compound products, Appellee did not fail to include an adequate warning. A325-A329.

Appellant timely appealed to this Honorable Court. This is Appellant's Opening Brief in support of his appeal.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM SUBMITTING TO THE JURY A BREACH OF IMPLIED WARRANTY CLAIM UNDER VIRGINIA LAW.

A. Question Presented

Did the trial court abuse its discretion in precluding Appellant from presenting to the jury a claim for breach of implied warranty under Virginia substantive law and in denying Appellant's motion at trial to amend his pleadings to conform to the evidence admitted by both parties under Del. Super. Ct. R. Civ. P. 15? (A403-409)

B. Standard and Scope of Review

A ruling regarding a matter in the pretrial memorandum concerns Del. Super. Ct. R. Civ. P. 16 and is reviewable on an abuse of discretion basis. *See, Cuonzo v. Shore*, 958 A.2d 840, 846 (Del. 2008). A trial court's order permitting or refusing amendment pursuant to Del. Super. Ct. R. Civ. P. 15 is reviewable on an abuse of discretion basis as well. *See, Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396 (Del. 1975).

C. Merits of Argument

1. The Trial Court Abused Its Discretion When It Ruled that Appellant Had Abandoned A Claim For Breach Of Implied Warranty

The trial court committed reversible error when it ruled that Appellant had abandoned a breach of warranty claim by stipulating to not pursue a strict liability

tort claim under Virginia law. In Virginia, warranty claims are based on principles of contract and not strict tort liability. In fact, although Virginia does not recognize strict tort liability, it allows plaintiffs who suffer personal injury to maintain claims for both negligence and implied warranty against a product manufacturer. *See, Garrett v. I.R. Witzer Co.*, 258 Va. 264 (1999). Claims for negligence and warranty are very similar under Virginia law. Specifically, in order to recover under either claim, the plaintiff "must show (1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the manufacturer's hands. *See, Vaughan*, 252 Va. at 65 *citing Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428 (1975).

Procedurally in Delaware, "a cause of action need not be set forth with all the technical exactitude of allegation necessary under the rules of common law pleading." *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952). "The present rules adopt a system of notice pleading:

> [A] plaintiff must put a defendant on fair notice in a general way of the cause of action asserted, which shifts to the defendant the burden to determine the details of the cause of action by way of discovery for the purpose of raising legal defenses."

Id.; *see Michelson v. Duncan,* 407 A.2d 211, 217 (Del. 1979); *VLIW Tech LLC v. Hewlett Packard Co.*, 840 A.2d 606, 611 (Del. 2003). Accordingly, Appellant's Complaint sets out allegations that comprise a breach of warranty claim in Virginia. A1-A13.

Moreover, Appellant's breach of warranty claim is set out in the pretrial memorandum in this case. Under Del. Super. Ct. R. Civ. P. 16, the pretrial memorandum "shall control the subsequent course of action of the trial." *Id.* In fact, the order "dictates how the trial will proceed." *Wright v. Moore,* 953 A.2d 223, 225 (Del. 2008); *Cuonzo*, 958 A.2d at 845. "The order following a final pretrial conference shall be modified only to prevent manifest injustice." Del. Super. Ct. R. Civ. P. 16(e). Here, the pretrial memorandum, which was negotiated and agreed to by the parties, including that such memorandum supplemented the parties' pleadings, set forth Appellant's claim for breach of warranty in this case under Virginia law and was not abandoned by Appellant nor shown to present a manifest injustice to Appellee. Indeed, Appellee argued at trial that its joint compound product was not dangerous, that asbestos aided the functioning and application of the product, and was generally more accepted by consumers. A89, A90-A95, A148, A108-A113. Evidently, Appellee understood the jury was going to have an opportunity to decide whether its asbestos-containing joint compound product was unreasonably dangerous.

2. The Trial Court Abused Its Discretion When It Denied Appellant's Motion To Amend Its Pleadings To Conform To The Evidence Pursuant To Del. Super. Ct. R. Civ. P. 15 As Appellant Should Have Been Permitted To Submit To The Jury That Appellee Manufactured And Sold An Unreasonably Dangerous Product.

The trial court further abused its discretion when it denied, for inexcusable delay, Appellant's motion to amend his pleading to conform to the evidence under Del. Super. Ct. R. Civ. P. 15 and precluded Appellant from submitting a claim for breach of implied warranty to the jury.

During the course of the trial, Appellant submitted evidence of the unreasonably dangerous nature of Appellee's asbestos-containing joint compound, particularly in light of the product's character as one that creates large amounts of airborne dust. This evidence included the CPSC's decision to ban the use of asbestos in joint compounds finding that they are incapable of being used safely by consumers. Appellant claimed in his Complaint that Appellee manufactured an unreasonably dangerous and hazardous product by including asbestos as a component of such product. Moreover, in the joint pre-trial memorandum, Appellant set out its claim for breach of warranty under Virginia law.

Under Delaware law, if the original pleading gives fair notice of the general fact situation out of which the claim arises, an amendment which merely makes more specific what has already been alleged generally, or which changes the legal theory of the action, will relate back even though the statute of limitations has run

in the interim. *See, Di Fonzo v. Robelen Piano Co.*, 144 A.2d 247 (Del. 1958); *Wagner v. Olmedo*, 323 A.2d 603 (Del. Super. Ct. 1974).

Notably, in *Bellanca Corp. v. Bellanca,* 169 A.2d 620 (Del. 1961), this Court upheld the trial court's grant of an amendment under Del. Super. Ct. R. Civ. P. 15 to conform the pleadings to the evidence and state a claim in quantum meruit at trial. This Court found that much of the evidence offered in support of plaintiff's theory of an express contract was admissible also in support of a claim for quantum meruit recovery. *Id.* at 621-622. This Court stated, "This rule is written upon the assumption that pleadings are not an end in themselves but are designed to assist, not deter, the disposition of litigation on its merits" and held the trial judge must weigh the "desirability of ending the litigation on its merits against possible prejudice or surprise to the other side." *Id.* at 622 *citing* 3 Moore's Federal Practice, 804, 843.

In holding the amendment was properly allowed, this Court found that, because no additional evidence was offered in light of the amendment, "no possible prejudice" was suffered by the Appellee. *Id.* Indeed, this Court concluded:

> The only result was to permit [plaintiff] to argue two alternative theories of his case, the evidence for both of which was in large part at least the same. In our view the amendment was well designed to permit a final disposition of the litigation on its merits.

Id. at 622-623.

In addition, in *Deakyne v. Commissioners of Lewes*, 416 F.2d 290 (3rd Cir. 1969), the Third Circuit, interpreting the federal version of Rule 15, held that a court's denial of a Rule 15 amendment to conform the pleadings to the evidence, despite being raised at the end of trial, constituted reversible error. *Id.* at *298.[6] Specifically, the Court held that it was error to deny such amendment considering the liberal policy of Rule 15, particularly in the second part which provides for freely amending pleadings "when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." *See Id. citing* Fed. R. Civ. P. 15(b).[7] The Third Circuit noted that "prejudice" under the rule means undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party. *Id.* at *300.

Similarly, in this case, Appellant sought amendment to the pleadings to more specifically allege what had already been alleged generally, and to allege two alternative theories of his case, the evidence for both of which was in large part the

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[6] Del. Super. Ct. Civ. R. 15 is precisely the same as the Federal Rule of Civil Procedure bearing the same designation. *See, Filliben v. Jackson*, 247 A.2d 913 (Del. 1968).

[7] The Third Circuit further cites "amendment is to be freely allowed in order to aid in the presentation of the merits of the controversy, if the opposing party is not *actually* prejudiced. The party opposing the amendment should not succeed by arguing a technical change in the 'cause of action' or 'defense,' since that merely means 'legal' and not 'actual' surprise." *Deakyne*, 416 F.2d at 299 *citing* 3 Moore's Federal Practice para. 15.14 (emphasis in original).

same, specifically, that the design of Appellee's joint compound product to include asbestos when other substitutes were available, but not used, rendered the product unreasonably dangerous. *See, Bellanca,* 169 A.2d at 622. This claim and its supporting evidence are very similar to Appellant's negligence claim set out in his Complaint. Upon making the motion, Appellant had already admitted all evidence in support of its warranty claim, including, but not limited to, the CPSC ban, and did not have to include any new evidence to support the proposed claim.

Moreover, the Appellee was not prejudiced or surprised by the amendment. Appellee was put on notice of such claim and the supporting evidence, if not upon reviewing the allegations in the Complaint, then upon approval of the parties' joint pre-trial memorandum. As discussed, Appellee evidently thought the jury was going to decide the issue of whether its asbestos product was unreasonably dangerous as it submitted evidence during the trial that its product was safe. In addition to a lack of prejudice or surprise on the part of the Appellee, the amendment would have aided in the final disposition of the Appellant's claims on the merits.

3. Precluding Appellant From Submitting A Claim For Breach Of Implied Warranty To The Jury Was Reversible Error.

An error in a ruling that affects a substantial right of a party constitutes reversible error. *See, Lagola v. Thomas*, 867 A.2d 891, 895 (Del. 2005). Indeed, the trial court's preclusion of Appellant's claim affected his substantial right to a fair trial and to present to the jury all claims available to him under the law. Moreover, the trial court's ruling prohibited the jury from determining whether the Appellee's asbestos joint compound at issue was unreasonably dangerous and incapable of being used safely, despite being presented with evidence directly on that issue. Pursuant to Rule 15 and its liberal allowance of amendments, the trial court's error constituted an abuse of discretion and entitles Appellant to a new trial.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT LIMITED APPELLANT'S NEGLIGENCE CLAIM SUBMITTED TO THE JURY TO A FAILURE TO WARN THEORY ONLY.

A. Question Presented

Did the trial court abuse its discretion and commit reversible error by limiting Appellant's negligence claim, which was appropriately pled to encompass a duty to exercise ordinary care in the design, manufacture and sale of a product, to include solely a failure to warn theory? (A410-419)

B. Standard and Scope of Review

A trial judge's evidentiary rulings are reviewed for abuse of discretion. *See, Lagola v. Thomas*, 867 A.2d at 895.

C. Merits of Argument

The trial court abused its discretion by precluding the jury from determining whether Appellee breached a duty to exercise ordinary care in the design, manufacture and sale of its asbestos joint compound product and limiting Appellant's negligence claim submitted to the jury to a failure to warn claim only. Appellant's Complaint encompassed a broader, more appropriate set of duties breached by the Appellee in its design, manufacture and sale of asbestos joint compound. A1-A13. Notwithstanding these allegations, while the trial court agreed that Appellant had alleged and proved through its evidence that Appellee's duty to Appellant was more expansive that simply a duty to warn, the trial court

retracted its finding on the day before closing argument, and limited Appellant's claim to a failure to warn, stating that the Court's search of Virginia reported cases did not reveal any cases in which negligence outside of a duty to warn is recognized. A125-A127. A review of the Virginia case law confirms that duty in negligence is based on foreseeability and the trial court in fact charged the jury on Appellee's duties outside a duty to warn. Such a flawed ruling was prejudicial and constituted an abuse of the trial court's direction.

1. Virginia Recognizes A Manufacturer's Duty To Exercise Ordinary Care To Provide A Foreseeable User With A Reasonably Safe Product, And Does Not Limit Plaintiffs To A Failure To Warn Claim Against Manufacturers Of Products.

In Virginia, to prevail on a negligence claim against the manufacturer of a product, the plaintiff must prove that the manufacturer's conduct was unreasonable; namely, that the manufacturer failed to use "ordinary care" to provide a product that was reasonably safe for its foreseeable use. *See, Turner*, 216 Va. at 251. Claims for negligence and breach of implied warranty under Virginia law involve the same elements: a product unreasonably dangerous for the use to which it is ordinarily put; and such dangerous condition existed when the product left the manufacturer's hands. *See, Vaughan*, 252 Va. at 65-66. A plaintiff may prove that a product is unreasonably dangerous if it is defective in manufacture or assembly, unreasonably dangerous in design or unaccompanied by adequate warnings concerning its hazardous properties. *See Id.* at 65 (emphasis added);

Logan, 216 Va. at 428 ("The standard of safety of goods imposed on the seller or manufacturer of a product is essentially the same whether the theory of liability is labeled warranty or negligence. The product must be fit for the ordinary purposes for which it is to be used..."); *Bly v. Otis Elevator Co.*, 713 F2d 1040, 1043 (4th Cir. 1983); *see also, Paschall v. Dover Elevator Co.*, 2012 Va. LEXIS 218 (Va. Dec. 17, 2012) (acknowledging the existence of claims against a product manufacturer for personal injury based upon negligent design, manufacture, and failure to warn or instruct).

In *Ward v. Honda Motor Co.*, 33 Va. Cir. 400 (Cir. Ct. Fairfax 1994), the Virginia Circuit Court, found a duty on behalf of an automobile manufacturer to exercise ordinary care in design. The court pointed out that it had not created a new cause of action: "Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable ..." *Id.* at 405 (citations omitted).

The *Ward* court noted that the Virginia Supreme Court has also held evidence of substantially similar accidents or injuries is admissible to show notice or actual knowledge of a defective condition, finding that such evidence can establish foreseeability. *Id. citing General Motors Corp. v. Lupica,* 237 Va. 516, 521 (1989). The court further found such evidence can establish a defendant's

duty to a plaintiff because "when a defendant has notice and actual knowledge of a defect, it owes a duty to a plaintiff 'to take steps reasonably necessary to remedy the defect.'" *Lupica,* 237 Va. at 521 *citing Roll 'R' Way Rinks v. Smith*, 218 Va. 321, 329 (1977) (Virginia Supreme Court recognized a duty owed to plaintiff to adequately warn as well as a separate and distinct duty to take steps reasonably necessary to remedy the injury causing defect).

2. Appellant Properly Pled And Admitted Evidence At Trial To Support The Full Scope Of His Negligence Claim Recognized Under Virginia Law.

The evidence at trial showed, among other things, that (1) Appellant was a bystander who did not work directly with the product at issue, yet was an individual foreseeably exposed to asbestos from the ordinary use of the product; (2) prior to the time of the Appellant's exposure, Appellee had designed and manufactured asbestos-free joint compound, yet, despite knowing of the hazards associated with asbestos dust, continued to manufacture and sell asbestos-containing joint compound for profit and increased market share; and (3) Appellee continued to sell asbestos-containing joint compound even after it was on notice that the CPSC intended to ban the use of asbestos in joint compound due the fact that to such product was unreasonably dangerous and could not be used safely. While the trial court recognized a duty owed to Appellant, it improperly restricted such duty to a warning in contravention of Virginia law.

3. The Trial Court Committed Reversible Error By Limiting The Duty Appellee Owed To Appellant Under Virginia Law.

An error in a ruling that affects a substantial right of a party constitutes reversible error. *See, Lagola,* 867 A.2d at 895. In this case, while the trial court recognized a duty owed to Appellant, it erred in restricting the manner in which Appellee had to exercise reasonable care. It was undisputed at trial that Appellee manufactured asbestos and asbestos-free formulations of joint compound during Appellant's exposure period. The jury heard evidence regarding the unreasonably dangerous nature of the asbestos version of the joint compound product. The jury was instructed by the trial court regarding several duties owed by Appellee beyond a duty to warn. Yet the jury was not permitted determine whether, pursuant to Virginia law, Appellee had acted unreasonably in failing to remove asbestos from its premixed joint compound product. Indeed, the evidence in this case established a duty owed to Appellant as a bystander that went beyond a duty to warn. The error of the trial court in restricting this duty affected Appellant's substantial right to a fair trial and expunged, without notice or basis, the heart of Appellant's negligence claim against the Appellee in this case. Accordingly, Appellant respectfully submits that he is entitled to a new trial. *See, Lagola,* 867 A.2d at 897.

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Honorable Court find that the oral rulings of the trial court precluding Appellant from submitting a breach of warranty claim under Virginia law, denying Appellant's motion for amendment of the pleading under Del. Super. Ct. R. Civ. P. 15 without any showing of prejudice or surprise suffered by the Appellee, and restricting Appellant's negligence claim to a failure to warn constituted reversible error, and a new trial should be ordered on the issues presented in this appeal.

Respectfully submitted,

LAW OFFICE OF JOSEPH J. RHOADES

/s/Joseph J. Rhoades

Joseph J. Rhoades, Esquire (I.D. 2064)
Stephen T. Morrow, Esquire (ID 4891)
1225 King Street, 12th Floor
Wilmington, Delaware 19801
(302) 427-9500

-and-

LEVY KONIGSBERG LLP
Donald P. Blydenburgh, Esquire
Jerome H. Block, Esquire
800 Third Avenue, 11th Fl.
New York, New York 10022
(212) 605-6200
Attorneys for Appellant/Plaintiff
Below Ted Sherman

DATE: April 22, 2014

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION

TED SHERMAN and SUSAN SHERMAN,

Plaintiffs,

v. C.A. No. N11C-01-271 ASB

GEORGIA-PACIFIC, LLC, and
UNION CARBIDE CORPORATION,

Defendants.

BEFORE: HONORABLE ERIC M. DAVIS, J.
and jury

TRIAL TRANSCRIPT
January 24, 2014

MICHELE R. HONAKER, RPR
DENNEL J. NIEZGODA, RMR, CRR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street, Suite 2609, 2nd Floor
Wilmington, Delaware 19801-3725

APPEARANCES:

JOSEPH J. RHOADES, ESQ.
LAW OFFICES OF JOSEPH J. RHOADES
and
AMBER R. LONG, ESQ.
DONALD P. BLYDENBURGH, ESQ.
LEVY, PHILLIPS & KONIGSBERG, LLP
for the Plaintiffs

MARIA KATINA KAROS, ESQ.
KATHERINE W. BINNS, ESQ.
SEDGWICK LLP
and
WILLIAM B. LARSON, JR., ESQ.
JASON A. CINCILLA, ESQ.
MANION GAYNOR & MANNING
for Defendant Georgia-Pacific, LLC

MICHAEL G. TERRY, ESQ.
HARTLINE DACUS BARGER DREYER & KERN LLP
and
BETH EVANS VALOCCHI, ESQ.
SWARTZ CAMPBELL, LLC
and
WALTER LYNCH, ESQ.
BAKER BOTTS, LLP
for the Defendant Union Carbide
Corporation

I N D E X

review, however you prefer.

THE COURT: Let's go to the breach of warranty because that -- I've learned more about Virginia law than I care to in the past 48 hours of research -- well, maybe it's more than 48. I'm losing time. Whenever we did the prayer conference. But I still don't -- I have the representation of the record, which talked about two claims being the negligence and that the breach of warranty is folded into the negligence and then there was a motion to amend the complaint to add breach of warranty.

In the interim, like I said, I have had to research a lot of Virginia law and I read a lot of asbestos cases. Like I said, I'm talking about in the City of Charlottesville, in the City of Roanoke, going into demurs and looking at the caselaw and I still don't see -- other than saying in both the negligence and a breach of warranty claim, they'll make these arguments, but they don't say it's the same claim.

Is there any further argument to be made on amending the complaint or arguing that Virginia law

provides that breach of warranty is subsumed into the negligence claim?

MR. BLYDENBURGH: Not further argument, Your Honor. I think I was reading Morgan Industries a couple of times and what I think -- what I believe the statement comes out of there is that design defect in the negligence case -- in the negligence claim and breach of warranty requires the same thing. So the ordinary -- it's not that breach of warrant that is subsumed into negligence.

They just happen to have the same things required for the unreasonably dangerous product for the defect claim as the breach of warranty. So it looks like -- plaintiffs would submit we have a negligence claim that includes design defect, failure to warn, but not a breach of warranty.

THE COURT: So you'd have to have it amended. And I'm going to find as I ruled earlier, delay is not enough. You can even amend a complaint when half of the case is in. But excusable delay is grounds and the prejudice of what you're preparing your case for in Count II -- or III -- I can't remember -- the strict liability

claim which claimed -- had the prove referring to breach of warranty was specifically dropped and at the pretrial. And subsequent to the pretrial I asked counsel for plaintiff are we doing two causes of action here, the negligence and the willful, wanton because I was confused about the breach of consortium claim.

And at that time, I was told that it was the two causes of action and I think -- well, I know because I'm going to hold, that the motion for leave to amend to allow a breach of implied or expressed warrant is denied. And that means that with respect to Instruction 33, Instruction 32, Instruction 31, those are all out.

That's not to say -- we're probably going to read a lot of things into the rulings. But this is a fact specific situation. If I had asked that question at the pretrial and they had asked to amend to go into breach of warranty, it may be different. I don't know, I'd have to hear the arguments made at that time.

But I think under these circumstances with the questioning that I did with respect to the

causes of action, if the plaintiff had wanted to proceed, it should have been made more clear. And so there's no express or implied litigation on that claim. That's one of the keys to allowing the amendment during the process is whether there's been an express or implied litigation on the issue. And I don't find that that happened here.

All right.

MR. CINCILLA: Your Honor, your ruling also impacts 19 and 24. Those two are the only based on whether warranty language will remain in there. So we will adjust those.

THE COURT: Right. We had already agreed it all depended on my ruling.

Any place where it says "negligence and/or breach of their warranty," it should just be "negligence."

Okay. Let's go -- and why don't we -- Ms. Long made reference to this when we were on the phone, that it was an informal -- we should give her an opportunity to put it on the record. I kind of joked about it, but this is true, I mean there are appeal points for every party in this case. I

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION:)
LIMITED TO:)
)
TED SHERMAN) C.A No. N11C-01-271 ASB

MONDAY, JANUARY 27, 2014

BEFORE: HONORABLE ERIC M. DAVIS, J

APPEARANCES:

LAW OFFICES OF JOSEPH J. RHOADES, ESQ.
BY: JOSEPH J. RHOADES, ESQ., AND
LEVY, PHILLIPS & KONIGSBERG, LLP
BY: DONALD P. BLYDENBURGH, ESQ., AND
AMBER R. LONG, ESQ.
for Plaintiffs

MANION, GAYNOR & MANNING
BY: WILLIAM B. LARSON, ESQ., AND
JASON A. CINCILLA, ESQ., AND
SEDGWICK, LLP
BY: MARIA K. KAROS, ESQ., AND
KATHERINE W. BINNS, ESQ.
For Defendant Georgia-Pacific

SWARTZ CAMPBELL, LLC
BY: BETH E. VALOCCHI, ESQ., AND
HARTLINE, DACUS, BARGER, DREYER, LLP
BAKER BOTTS
BY: MICHAEL G. TERRY, ESQ., AND
WALTER LYNCH, ESQ.
for Defendant Union Carbide

TRANSCRIPT OF CLOSING ARGUMENTS

- - - - - - - - - - - - - - - - - - -

LYNNE BELL COALE, RDR, CRR
LUCILLE MANCINI, RMR
SUPERIOR COURT REPORTERS
500 N. KING STREET WILMINGTON, DELAWARE 19801

(Courtroom 8C, 10:04 A.M.)

- - -

THE COURT: We need to put on the record the arguments made yesterday with respect to the jury instructions and my ruling on that. Miss long.

MS. LONG: Your Honor, yesterday, the parties had a teleconference about the final form in the jury instructions, and the Court made a decision to craft the jury instructions in such a way to limit plaintiff's claim to failure -- plaintiff's negligence claim to a failure to warn claim. Plaintiffs object to the Court's decision to instruct the jury and craft the verdict sheet in such a manner as to limit plaintiff's negligence claim to a failure to warn theory. The claim as pled in plaintiff's complaint is not so limited.

Defendants made no motion on plaintiff's pleadings, no summary judgment motion, nor a Rule 50 motion with respect to the scope of plaintiff's negligence claim. And plaintiff had no opportunity to fully brief the issue before the Court the limited plaintiff's claim -- plaintiff's negligence claim to failure to warn.

Plaintiff has proven through the evidence presented in this case that the defendants knew or had

reason to know that their products were hazardous to health long before Mr. Sherman began to be exposed in 1974, and that the joint compound to which Mr. Sherman was exposed could have been made without asbestos, and, in fact, was made without asbestos throughout the period of time of Mr. Sherman's exposure.

Virginia law recognizes a negligence products liability claim beyond failure to warn, and plaintiff's position is that this jury should be instructed on this theory of negligence and given a verdict form that allows them to find for plaintiff on this theory of negligence in addition to failure to warn.

THE COURT: All right.

MR. CINCILLA: Thank you, your Honor. Jason Cincilla for Georgia-Pacific.

THE COURT: We have a different court reporter.

MR. CINCILLA: I'm sorry, your Honor. Georgia-Pacific's position is that negligence has to take a form. From our review of Virginia asbestos case law, the forms appear to be failure to warn, a manufacturing defect, and a design defect. To the extent that there is others -- others under Virginia law we have not found them.

Plaintiff pled the elements of a design defect

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claim in Count 2 of their complaint, strict products liability, which they stipulated in advance of trial they were not pursuing. Plaintiff subsequently tried to resuscitate that claim by asking the Court to allow a breach of warranty design defect claim. The Court denied that request as based on inexcusable delay, I believe.

Plaintiff submitted jury instructions that contained one form of negligence, failure to warn. Plaintiff then requested to expand negligence to include some unrecognizable general negligence claim. That request came after two prayer conferences, and it came after the close of evidence, so to allow them to expand to design defect, which is really what Miss Long is describing, at this point would be untimely and prejudicial. Thank you, your Honor.

MR. TERRY: Michael Terry, Union Carbide Corporation. There were no allegations of negligence on the part of Union Carbide Corporation in the design of its asbestos or the manufacture of its asbestos. So Union Carbide Corporation has no position with respect to the argument made by the plaintiffs in this regard. Union Carbide Corporation has no objections, exceptions, or complaints about the charge of the Court as submitted.

THE COURT: The ruling of the Court was as follows: I over -- I ruled in favor of Georgia-Pacific and Union Carbide, and let me put it on the record. I also put on the record at the time that some of this has come from loose lawyering, and I continue to take that position.

The -- there was an attempt by the Court at one point to make sure that we understood what causes of action we were going forward on, and I went through that. And as I went through the case, I was checking off paragraphs of the negligence count. Up until yesterday, when I received the new instruction, I understood the claim to be negligence, and worked with that notion.

Now, let's be clear what negligence is. There is no free form negligence. Even a slip and fall has a type of negligence. In other words, a duty to inspect, and there are instructions that are created for that. We don't owe duties of care in a vacuum for an overall. They're owed in specific ways, in different ways. This is a products liability cause of action. A products liability cause of action is not just ordinary negligence. There has to be a duty: A duty to warn, a defective design defect, a breach of warranty, a strict liability claim. There has to be something that forms the type of claim that it is.

The pleading in this case had a strict liability claim. I began to understand the reason they had a strict liability claim is that some of these incidents may have occurred -- initially when the complaint was filed may have occurred in Maine and other locations where there may have been a strict liability claim.

The same thing with a loss of consortium, because it can't possibly be that the plaintiff filed a complaint asking for strict liability and loss of consortium, totally relying on Virginia law, when from the very first instance neither of those claims are recognized in that jurisdiction. It can't possibly be that way. If it's true, you were asking me to overturn the law of another jurisdiction, and I don't do that. There is no strict liability claim in -- in Virginia, and there's no loss of consortium. It had to be based off of the notion that you had other defendants and other exposure in a different location where they might recognize strict liability or they might recognize a loss of consortium. There was an opportunity prior to the start of this case at the pretrial to -- I don't know how I overruled, but to amend the complaint to allow a breach of warranty claim, which is obviously recognized in the State of Virginia.

After the argument was made -- I don't know how I was giving time for briefing, given the fact that we're supposedly going to the jury today, and we've already had these jurors since two weeks now. To ask for a day off so that we can brief an issue which isn't overly complicated I don't see that has a fair assertion against The Court. The Court has made itself available on a moment's notice, on weekends, at any time possible, and the notion that I've prejudiced you by not allowing you to brief is a little unfair. But we'll move on from that. I have a thicker skin than that. That's not how I ruled, and that wasn't brought up yesterday.

The reason I ruled, we took a break, and I went, and I went through, and I basically put in the search terms of Virginia, asbestos, and negligence. And in Virginia, for asbestos, there is no ordinary care negligence claim. There just isn't. There isn't any. There isn't any ordinary care negligence claim in the State of Virginia. Just like there isn't one in the State of Delaware. It's always based off of a landlord-tenant relationship, a store owner and an invitee relationship, something along those lines.

In a products liability cause of action in the State of Virginia, there is a design defect, there's a

failure to warn claim, there's a breach of warranty claim, and those are the claims that are generally asserted in the State of Virginia. There's no -- I told the parties yesterday on the phone, I went and I searched. And in that -- I mean, if I accepted the plaintiff's argument in this case, this could be a breach of contract claim, because the authority of just that there's this ordinary care.

The only case I found close is in a footnote where it talked about in a breach of contract, in a breach of negligence, you have these four steps that you're supposed to take. That's the closest thing that came to the argument that the plaintiffs were making.

Now, with respect to the design defect claim, if that had been forwarded at the beginning of this case, we could have discussed that. But there are a lot of things that go into defending a design defect case that weren't available. Finally, I looked at the cause of action, and I went through it, and on the record. Paragraph 30 is the negligence.

It says: 30(a), included asbestos in their products even though it was completely foreseeable and could have been anticipated persons such as Ted Sherman working with and around them would inhale, ingest, or otherwise

absorb asbestos. That's, in essence, a duty to warn.

(B), Included asbestos in their products when the defendants knew or should have known that said asbestos would have a toxic, poisonous, and a highly deleterious effect upon the health of persons inhaling, ingesting, or -- that's the proximate cause portion.

Included asbestos in their products when adequate substitutes for the asbestos in them were available.

That's the closest I could get to on that design defect. Failed to provide any or adequate warnings to persons. That's the failure to warn claim. Failed to provided adequate instructions. That's a failure to warn claim. Failed to conduct tests on the asbestos-containing products manufactured. I think that's more proximate cause on the foreseeability and the adequacy of warning based on what the product was. Failed to adequately label, warn, package, market, distribute, again that's -- that's a chain, chain claim. In other words, you have the manufacturer, you have the marketer, the distributor, and the like.

Failed to take adequate steps to remedy the above failures, which I guess I means all the paragraphs above, A through G, but not limited to failure recall or require removal of asbestos and asbestos products, coupled with

ongoing failure to conduct research as to how to cure or minimize asbestos injuries and how to use, install, or distribute asbestos so as to render it safe. That's another one, I guess, that's somewhat close to design defect, but it's not there.

And then the final one is design, manufacture, sold equipment which incorporated asbestos. That's a component for part of the claim and that's not here. So, that's why I denied and we went forward on the -- the instructions, and I made my further rulings. And that's where we are today.

I have -- I have the jury instructions that were circulated this morning by Mr. Larson. Are there any other issues we need the address with these? From the plaintiffs, guess I have to ask the question. Do you have any further --

MS. LONG: No, your Honor.

THE COURT: -- from what was circulated? Georgia-Pacific?

MS. KAROS: No, your Honor.

THE COURT: Union Carbide?

MR. TERRY: No, your Honor.

CERTIFICATION OF SERVICE

I, Carol McCool, Legal Assistant, hereby certify that on this 22nd day of April, 2014, I caused to be served upon Defendant Below-Appellee, a true and correct copy of Appellant's Corrected Opening Brief via e-file to the following:

Jason A. Cincilla, Esquire
Amaryah K. Bocchino, Esquire
William B. Larson, Jr., Esquire
Manion Gaynor & Manning LLP
1007 North Orange Street, 10th Floor
Wilmington, Delaware 19801

Donald E. Reid, Esquire
Morris, Nichols, Arsht & Tunnell
P.O. Box 1347
Wilmington, Delaware 19899

/s/Carol McCool

Carol McCool