



IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	:	No. 387,2016
WAYNE R. REED, INDIVIDUALLY and	:	
AS THE EXECUTOR OF THE ESTATE	:	
OF BARBARA REED, DECEASED, and	:	Court Below: Superior Court
AMY RHODES and COURTNEY REED,	:	of the State of Delaware in and
AS SURVIVING CHILDREN,	:	for New Castle County
	:	
Plaintiffs Below, Appellants,	:	C.A. No. 13C-11-188
	:	
V.	:	
	:	
ASBESTOS CORPORATION LIMITED;	:	
BAYER CROPSCIENCE, INC.; CHARLES:	:	
A. WAGNER COMPANY, INC.; NOSROC:	:	
CORPORATION, and COUNTY	:	
INSULATION COMPANY,	:	
	:	
Defendants Below, Appellees.	:	

APPELLANTS' OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

JACOBS & CRUMPLAR, P.A.

/s/ David T. Crumplar
David T. Crumplar, Esq. (DE ID. #5876)
Thomas C. Crumplar, Esq. (DE ID. #942)
Raeann Warner, Esq. (DE ID. #4931)
2 E. 7th Street, Suite 400
Wilmington, DE 19801
(302) 656 5445
Davy@jcdelaw.com
Tom@jcdelaw.com
Raeann@jcdelaw.com

Attorneys for Appellants/Plaintiffs Below

Date: September 12, 2016

TABLE OF CONTENTS

	PAGE
NATURE OF THE PROCEEDINGS	1
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	6
A. Barbara Reed’s Exposure to Asbestos Containing Products Distributed by Nosroc	10
B. Barbara Reed’s Exposure to Asbestos Through County Insulation’s Removal and Disturbance of Asbestos-Containing Products	14
C. Barbara Reed’s Exposure to Asbestos Sweeping Compound from ACL and Charles Wagner	17
D. Barbara Reed’s Exposure to Bayer’s Asbestos-Containing Products	20
ARGUMENT	23
I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES OF FACT REMAINED	23
A. Questions Presented.	23
B. Scope of Review.	23
C. Merits of Argument.	23
1. Standard of Review on Motion for Summary Judgment.	23

2. Standard for Product Nexus in Asbestos Cases.	23
3. Nosroc	27
4. County Insulation	30
5. ACL and Wagner	34
6. Bayer Cropscience	38
CONCLUSION	40

EXHIBIT

<i>Barbara Reed v. Nosroc,</i> C.A. No. N13C -11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER)	A
<i>Barbara Reed v. County Insulation,</i> C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER)	B
<i>Barbara Reed v. ACL and Charles Wagner,</i> C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER)	C
<i>Barbara Reed v. Bayer,</i> C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER)	D

EXHIBIT

Plaintiffs' Letter Memorandum In Opposition to Defendant Nosroc Corporation Motion for Summary Judgment, Aug. 21, 2006	E1 – E9
<i>Trice v. Argo Packing Company</i> , (Limited to Nosroc Corp.), C.A. No.: 03C-07-171 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER)	E10 - E11
<i>Jefferson v. Argo Packing Company</i> , (Limited to Nosroc Company), C.A. No. 03C-04-265 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER)	E12 – E13
<i>Winfree v. Anchor Packing Company</i> , (Limited to Nosroc Corp.), C.A. No. 05C-12-114 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER)	E14 – E15
<i>Saunders v. Anchor Packing Company</i> , (Limited to Nosroc Corp.), C.A. No. 03C-06-001 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER)	E16 – E17
<i>Opalczynski v. Atlas Turner</i> , (Limited to Nosroc Corp.), C.A. No.: 03C-07-171 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER)	E18 – E19
<i>Opalczynski v. County Insulation</i> , Summary Judgment Tr. (Del. Super. Ct. Oct. 25, 2006) (Johnson, J.)	E20 – E27
<i>In re: Asbestos Litig. (Francis Messick)</i> , C.A. 07C-01-234 (Del. Super. Ct. June 11, 2009) (Johnson, J.) (Summary Judgment Proceedings) (Transcript)	E28 – E55
<i>Barlow v. Owens-Illinois (Limited to Charles A. Wagner)</i> , 14C-02-024 ASB (Del. Super. Ct. March 9, 2016) (Scott, J.) (ORDER)	E56 – E59

TABLE OF AUTHORITIES

Cases

<i>Barlow v. Owens-Illinois (Limited to Charles A. Wagner),</i> 14C-02-024 ASB (Del. Super. Ct. March 9, 2016) (Scott, J.) (ORDER).....	36
<i>Cerberus Int’l v. Apollo Mgmt., L.P.,</i> 794 A.2d 1141 (Del. 2002)	24, 25
<i>Clark v.A.C. & S.,</i> C.A. No. 82C-DE-26, Poppiti, J. (Del. Super. Ct. Sept. 3, 1985)	25
<i>Dabaldo v. URS Energy & Constr.,</i> 85 A.3d 73 (Del. 2014).....	23
<i>Delmarva Power & Light Co. v. Burrows,</i> 435 A.2d 716 (Del. Aug. 19, 1981).....	32, 33
<i>Ebersole v. Lowengrub,</i> 180 A.2d 467 (Del. 1962).....	24
<i>Fleetwood v. Charles A. Wagner Co. (In re Asbestos Litig.),</i> 832 A.2d 705 (Del. 2003).....	17, 18, 19, 21, 22, 35, 36, 37
<i>In re Asbestos Litig.,</i> 509 A.2d 1116 (Del. Super. Ct. 1986).....	25
<i>In re Asbestos Litig.,</i> 2007 Del. Super. LEXIS 155 (Del. Super. Ct. May 31, 2007).....	26
<i>In re: Asbestos Litig. (Francis Messick),</i> C.A. 07C-01-234 (Del. Super. Ct. June 11, 2009) (Johnson, J.) (TRANSCRIPT).....	33
<i>John Doe No. 1 v. Cahill,</i> 884 A.2d 451 (Del. 2005).....	24

<i>Krauss v. State Farm Mut. Auto. Ins. Co.</i> , 2004 WL 2830889 (Del. Super. Ct. Apr. 23, 2004).....	36
<i>Mechell v. Palmer</i> , 343 A.2d 620 (Del. 1975).....	25
<i>Mergenthaler v. Asbestos Corp. of Am., Inc.</i> , 1988 Del. Super. LEXIS 392 (Del. Super. Ct. Sept. 12, 1988).....	26
<i>Merrill v. Crothall-Am., Inc.</i> , 606 A.2d 96 (Del. 1992).....	3, 24
<i>Nack v. Charles A. Wagner Co.</i> , 803 A.2d 428 (Del. 2002).....	17
<i>Nutt v. A.C. & S. Co.</i> , 517 A.2d 690 (Del. Super. Ct. 1986).....	25
<i>Opalczynski v. County Insulation</i> , C.A. No. 04C-03-264 (Del. Super. Ct. Oct. 25, 2006) (Johnson, J) (TRANSCRIPT).....	33
<i>Sostre v. Swift</i> , 603 A.2d 809 (Del. 1992).....	23
 <u>Constitution, Statute, or Rules</u>	
Del. Const. art. I, § 4.....	1

NATURE OF THE PROCEEDINGS

On November 15, 2013, Barbara Reed and her husband Wayne Reed, both Delaware residents, (hereinafter “Appellants”) sued, *inter alia*, Nosroc Corporation (“Nosroc”), County Insulation Company (“County”), Asbestos Corporation Limited (“ACL”), Charles Wagner Company, Inc. (“Charles Wagner”), and Bayer Cropscience, Inc. (“Bayer”), (hereinafter “Defendants”), as a result of her diagnosis of pleural mesothelioma and requested that a Delaware jury decide their case as a guaranteed by the Delaware Constitution.¹ The complaint was subsequently amended three more times, the last time to take in account her death and to add her children, Amy Rhodes and Courtney Reed, as Plaintiffs.

This case was set for trial in September 2016. On July 27, 2015, the Defendants filed motions for summary judgment. Plaintiffs filed timely answering briefs, and the defendants in turn filed reply briefs. Subsequently, on July 6, 2016, one day before oral arguments were to occur, the Superior Court granted summary judgment for each Defendant stating that Barbara Reed was not exposed to asbestos as a result of the actions of the defendants.² A final Order in *Reed* was

¹ Del. Const. Article 1 § 4.

² *Barbara Reed v. Nosroc*, C.A. No. N13C -11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (Ex. A); *Barbara Reed v. County Insulation*, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (Ex. B); *Barbara Reed v. ACL and Charles Wagner*, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER), (Ex. C); *Barbara Reed v. Bayer*, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (EX. D)

entered on July 28, 2016 and a notice of appeal was filed on July 28, 2016. (D.I.

1). This is Plaintiffs-Appellants' Opening Brief.

SUMMARY OF ARGUMENT

1. The Superior Court erred when it usurped the role of the jury and granted summary judgment in this matter, despite there being material facts in dispute: namely, whether Barbara Reed was exposed to asbestos through the Defendants' actions. The Superior Court clearly violated this Court's direction that the trial court in deciding summary judgment must accept "the non-moving party's version of disputed facts." *Merrill v. Crothall-Am. Inc.*, 606 A.2d 96, 99-100 (Del. 1992). In summary, the Superior Court either ignored evidence which Plaintiffs submitted and/or resolved disputed facts in favor of the Defendants.

As to Nosroc, the Superior Court found that Plaintiffs' "fail[ed] to meet both the time and space requirement, as well as the friable fiber requirement with respect to Ms. Reed's father in particular." *Reed v. Nosroc Corp.*, C.A. No. N13C-11-188 ASB, at 6 (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (Ex.A). However, Plaintiffs below submitted evidence that co-workers brought Nosroc-distributed asbestos-containing materials directly to Ms. Reed's father to work with, and submitted evidence of its friability. *See* Argument, I.C.3, p.25-28, *infra*.

As to County Insulation, the Superior Court held that Barbara Reed could not meet the product nexus standard there was no evidence that insulation removed and installed by County Insulation was asbestos-containing, *Reed v. County Insulation*, C.A. No. N13C-11-188 ASB, at 3 (Del. Super. Ct. July 6, 2016) (Scott,

J.) (ORDER) (Ex. B), because County's Insulation's negligence was premised on their conduct in removing and installing asbestos insulation, not in selling or manufacturing it, and Plaintiffs had failed to show friability with respect to Mr. Attix, Barbara Reed's husband. *Id.* at 4. Yet as the Superior Court's Opinion acknowledges, Plaintiffs submitted evidence that Mr. Attix was frequently in close proximity to County Insulation employees removing and installing asbestos-containing insulation and liability for such has been recognized by the Superior Court. *See* Argument, I.C.4, p.28-33, *infra*.

As to Charles Wagner and ACL, the Superior Court held, "Plaintiffs have presented no evidence that the alleged sweeping compound created dust, even assuming it contained asbestos." *Reed v. ACL and Charles Wagner*, at 3-4 C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (Ex. C). Yet Plaintiffs presented to the Superior Court David Hyson's testimony which raises an issue of fact as to whether the sweeping compound was dusty as he testified, "It was a gray sweeping compound. You spread it on the floor to hold dust down, and you created more dust." (A1981:5-7).³ Plaintiffs submitted other evidence that Charles Wagner and ACL's sweeping compound was friable as discussed at Argument I.C.5, p.3-47, *infra*.

³ David Hyson Dep., July 31, 2009. Ex. Q to CW SJAB .

Finally, as to Defendant Bayer, The Superior Court held that, “Although Plaintiff claims that Ms. Reed’s Father worked at various locations throughout the years where he identified Defendant’s products as being some of the many he recalled using and that his brother, Uncle, testified to how he, himself, was exposed to friable asbestos from these products, Plaintiffs fail to satisfy the product nexus standard with respect to Ms. Reed’s father and Defendant’s products in particular.” *Reed v. Bayer Cropscience Inc.*, at 3, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER (Ex. D)). Yet Plaintiffs presented evidence that Ms. Reed’s father breathed in the dust from Bayer’s asbestos-containing products which he worked with. See Argument I.C.6, *infra*.

STATEMENT OF FACTS

On May 22, 2014, at the age of 56, Barbara Reed died of pleural mesothelioma. (A214).⁴ Barbara Reed never worked with asbestos, but was exposed to asbestos through her father, Raymond Ryan; and through her first husband, Gary Attix. (A262:8-19, A263:8-19, A263:13-15, A264:7-23).⁵ Barbara Reed spent the majority of her career working for Nationwide Insurance and during the last few years of her life as a real estate agent. (A262:8-25).⁶ None of the Defendants in their moving papers disputed that Raymond Ryan or Gary Attix worked with asbestos or that Barbara Reed died of pleural mesothelioma – a cancer caused by exposure to asbestos.

Raymond Ryan was a career asbestos insulator with Local 42 and held this position while his daughter Barbara lived with him. (A242:18-19, A968:1-A969:8, A973:7-17).⁷ Raymond Ryan, who passed away before this litigation, also had an asbestos case in Delaware. (A2713-A2725).⁸ Barbara Reed was born on September 29, 1957. (A242:18-19).⁹ She lived with her father at 9 West Hillview

⁴ Barbara Reed Death Certificate, Ex. A to Plaintiff's Answering Brief to Defendant Nosroc motion for Summary Judgment.

⁵ Barbara Reed Trial Dep. Dec. 16, 2013, Ex. D to Plaintiffs' Answering Brief to Defendant Nosroc's Motion for Summary Judgment ("Nosroc SJAB").

⁶ Barbara Reed Trial Dep., Ex. D to Nosroc SJAB .

⁷ Barbara Reed Discovery Dep, Ex. C to Nosroc SJAB and Barbara Reed Trial Dep, Ex. B to County Motion for Summary Judgment ("County MSJ").

⁸ Raymond Ryan Complaint, June 6, 1986.

⁹ Barbara Reed Discovery, Ex. C to Nosroc SJAB .

in New Castle from 1957 to 1970. (A243:22-25).¹⁰ It was during this time she was routinely and regularly exposed to asbestos from contact with her father's work clothes that were covered in asbestos dust.

During her discovery and trial depositions she described that when her father came home from work his clothes were white and covered in dust. (A244:4-9, A264:7 -23)¹¹ As soon as he came home she would give him hugs and kisses. (A264:12-17).¹² She recalled that her mother washed her father's work clothes on a daily basis and in the process would shake them out which would release dust from the pants and cuffs. (A244:4-9, 24-25, A245:1-2, A254:20-22, A256:9-19).¹³ Barbara Reed recalled that the laundry room was in a small room in the basement of the family home and she has no memory of the windows ever being opened. (A245:3-6, 22-23, A247:1-14)¹⁴ Her mother would perform this chore everyday while Barbara Reed and her sister would sit on the basement steps and watch. (A248:12-13, A249:4-14).¹⁵ She also stated they would sweep the floors after her mother loaded the washing machine. (A250:7-17).¹⁶ She recalled that she and her sister were constantly in her mother's presence while she was doing the laundry.

¹⁰ *Id.*

¹¹ Barbara Reed Discovery and Trial Deps., Exs. C and D to Nosroc SJAB .

¹² Barbara Reed Trial Dep., Ex. D to Nosroc SJAB .

¹³ Barbara Reed Discovery Dep., Ex. C to Nosroc SJAB .

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

(A251:23-A252:1)¹⁷ Tragically, Barbara Ryan, Barbara Reed's mother, died from asbestos-related lung cancer; and like her daughter, her only exposure to asbestos was secondary exposure from members of her family. (A492, p. 47:22-p. 48:5, A502-506)¹⁸ Barbara Ryan's testimony taken in her own household exposure case is very consistent with her daughter's testimony. (A492-493 at 47:22-53:5).¹⁹

In 1970 Barbara Reed moved with the rest of her family from New Castle to Smyrna where she lived until April of 1976. (A257:2-5,10-17).²⁰ At this home she continued to be exposed to asbestos from her father's clothes while she helped with the laundry. (A258:6-A259:17).²¹

Barbara Reed was not only exposed to asbestos while doing laundry but from other daily activities such as riding in the family car. (A265:1-A267:19).²² Her father would use the car to drive to and from work, and when Barbara Reed and her mother and sister would use the car her mother instructed her and her sister to wipe off the dust in the car before sitting down. (*Id.*)

¹⁷ *Id.*

¹⁸ See deposition of Barbara A. Ryan, Mrs. Reed's mother, taken in her own household exposure case on August 23, 1993, Ex. Y to Nosroc SJAB and Barbara Ryan's Medical Record, Dec. 6, 2006, Ex. Z to Nosroc SJAB .

¹⁹ Barbara Ryan's Dep, Ex. Y to Nosroc SJAB .

²⁰ Barbara Reed Discovery Dep., Ex. C to Nosroc SJAB .

²¹ *Id.*

²² Barbara Reed Trial Dep., Ex. D to Nosroc SJAB .

In 1976 she married her first husband, Gary Attix, who like her father was an insulator. (A1184:18-21, A1186:6-10).²³ The two were married from 1976 to 1981 and during this time she was regularly exposed to asbestos as a result of his work. (A1185:7-9, A1186:14-A1189:17).²⁴ Again, all her exposure to asbestos was from secondary exposure from her family.

Plaintiffs' industrial hygienists, Steve Hayes and Michael Ellenbecker, both produced affidavits in this case. (A472-A474, A1339-A1340, ¶ 6).²⁵ Steve Hayes' affidavit demonstrates that several methods were historically available to reduce a person like Raymond Ryan's exposure to asbestos. (A1339-A1340).²⁶ In Dr. Ellenbecker's affidavit he states asbestos fibers are so small they cannot be seen with an optical microscope. (A473, ¶ 6).²⁷ Most of these fibers are extremely small, but they can be easily transported throughout a facility, from location to location, like the ones at which Raymond Ryan worked. (A473-A474, ¶ 6).²⁸ The asbestos fibers that Raymond Ryan worked with and around "can take over twelve hours to settle eight to ten feet" and "[a]sbestos can be borne on air currents for hundreds of feet, and even over a mile from the source." (A473, ¶ 6).²⁹ Also, and

²³ Barbara Reed Discovery Dep, Ex. C to County SJAB .

²⁴ *Id.*

²⁵ Dr. Michael Ellenbecker Aff. Feb. 16, 2006, Ex. W to Nosroc SJAB ; Steve Hayes Aff. Aug. 12, 2015, Ex. 6 to County SJAB .

²⁶ Steve Hayes Aff. ¶ 6.

²⁷ Dr. Michael Ellenbecker Aff. ¶ 6.

²⁸ *Id.*

²⁹ *Id.*

significant for Barbara Reed's exposure, asbestos fibers that got on clothes of workers such as Raymond Ryan would easily be carried on their clothes home, where a person such Barbara Reed could be exposed to asbestos fibers. (A474, ¶ 9).³⁰

A. Barbara Reed's Exposure to Asbestos-Containing Products

Distributed by Nosroc. During the time period that Barbara Reed was exposed to asbestos, Nosroc's predecessor, Corson, was the exclusive distributor in the Delaware Valley of asbestos containing products manufactured by Baldwin, Ehret and Hill ("BEH"), Baldwin Hill, and Keene Corporation. (A331, A362:13-21, A364:4-21, A365:19-22).³¹ Corson was not only the exclusive distributor of these products, but two of the principals of the company sat on the Board of Directors of Baldwin Ehret Hill and helped negotiate the merger between it and Keene. (A372-373, A383, 389-390).³² Edward R. Stevens stated in his deposition that everything that Baldwin Hill and Baldwin Ehret Hill sold in Delaware went through Corson. (A383:6-7, A337:4-338:15).³³ He also stated that Corson remained the exclusive

³⁰ *Id.* at ¶ 9.

³¹ Nosroc's Answers to Interrogatories, at 2. Ex. M to Nosroc SJAB . The distribution agreement between Nosroc and these companies existed from 1936 to 1973. Robert Hinks, an employee for Corson from 1953 1984 stated that Corson was the exclusive distributor of Baldwin Hill, then Baldwin Ehret and Hill, and finally Keene products. *See* Robert Hinks Dep. Jan. 3, 1986 at 10, 35, 46, Ex. O to Nosroc SJAB .

³² Edward Stevens Dep., April 22, 1980, Ex. P to Nosroc SJAB ; Edward Stevens Dep., Oct. 25, 1985, Ex. Q to Nosroc SJAB .

³³ Stevens Dep., Oct. 25, 1985, Ex. Q to Nosroc SJAB ; Edward Stevens Dep. Dec. 10, 1981, Ex. N to Nosroc SJAB .

distributor after Baldwin Hill merged with Ehret. (A383-384, 389-390).³⁴ He also stated that Corson was the exclusive distributor for BEH Spray insulation. (A394:9-16).³⁵ In addition, Baldwin Ehret Hill forwarded their sales and technical data brochures to Corson for distribution along to contractors using those products at facilities such as Dupont. (A399:23-A401:3).³⁶ Stevens stated that after Corson became the exclusive distributor for Baldwin Ehret Hill it discontinued its sales compartment for the Philadelphia, Delaware Valley, and Delaware sales area since Corson handled its entire distribution. (A337:4-21).³⁷ In short, any asbestos containing products of Baldwin Hill, BEH or Keene that were used at any of the sites at which Raymond Ryan was exposed to asbestos were distributed by Nosroc.

Keene Corporation's mono-block high temperature insulation was manufactured with asbestos from 1940 to 1968. (A408).³⁸ This product was used to insulate steam boilers, ovens, kilns, furnaces, refinery towers, large piping, and vessels of up to 180 degrees. (*Id.*).³⁹ The company's Thermasil pipe and block covering was manufactured with asbestos from 1956 to 1972 and was used on pipe and copper tubing as well as flat or curved surfaces at temperatures up to 1200

³⁴ Stevens Dep., Ex. Q to Nosroc SJAB .

³⁵ *Id.*

³⁶ *Id.* at 115-117.

³⁷ Stevens Dep., Dec. 10, 1981, Ex. N to Nosroc SJAB .

³⁸ Keene Corporation's Answers to Plaintiffs' Interrogatories. Ex. R to Nosroc SJAB .

³⁹ *Id.*

degrees Fahrenheit.⁴⁰ Again, Nosroc was the exclusive supplier of these materials in Delaware.

Barbara Reed's father, Raymond Ryan was deposed on January 4, 1990. (A269).⁴¹ He started his career with Local 42 in 1955-56, was promoted to the position of mechanic in 1961, and retired from Local 42 in 1987. (A270-A271).⁴² One of the places at which he was exposed to Nosroc distributed asbestos containing products was the Dupont Seaford Plant. Raymond Ryan worked at the Dupont Seaford Plant on three separate occasions: mid-September 1963 to mid-October 1964, April to September 1966, and in January 1974. (A273-275).⁴³

One of his coworkers at Dupont starting in April of 1966 was Randle Meadows. (A286:5-A287:16).⁴⁴ When Mr. Meadows started working at the plant he was assigned to the warehouse and specifically recalled delivering Thermasil and Monoblock to Raymond Ryan. (A295:15-25).⁴⁵ He said the Thermasil was supplied by BEH. (A294:22-295:12).⁴⁶

Meadows remembered that the Monoblock came from BEH or Baldwin Ehret Hill and later Keene. (A293:14-21, A294:22-A295:1).⁴⁷ Meadows said

⁴⁰ *Id.*

⁴¹ Raymond Ryan Dep. Jan. 4 1990, Ex. E to Nosroc SJAB .

⁴² *Id.* at 4-5.

⁴³ Raymond Ryan Job History. Ex. F to Nosroc SJAB .

⁴⁴ Randall Meadows Dep., June 6, 2014. Ex. G to Nosroc SJAB .

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Dupont Seaford began receiving asbestos free products in 1973 or 1975, but this did not mean that use of asbestos stopped: everything that was still in the warehouse was used – no products were thrown away. (A296:3-18).⁴⁸

Raymond Ryan also worked at the Getty refinery on several occasions from 1956 until July 1975 and while there he worked all over the plant. (A276-283).⁴⁹ He worked there from October 1966 to April 1967 and recalled using BEH Monoblock. (A277).⁵⁰ In October of 1968 he returned to Getty and worked there until January 1969 and recalled also using BEH Monoblock at that time. (A278).⁵¹ He knew it was BEH Monoblock because the box was marked “Baldwin Hill” and he described it as dark brown with fibers pressed together, and described the substance as being one and one half inches thick, 6 or 12 inches wide and 3 feet high. (A300:16-24).⁵²

James Ryan, Barbara Reed’s Uncle and Raymond Ryan’s co-worker, also provided testimony of Raymond Ryan working with asbestos containing products distributed by Nosroc. He testified that Raymond Ryan worked with Theramsil pipe covering. (A304:1-16).⁵³ In his deposition he testified to working with BEH Thermasil and when the product was “scored,” dust was created. (A308:23-

⁴⁸ *Id.*

⁴⁹ Raymond Ryan Work History, Ex. F to Nosroc SJAB.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Raymond Ryan Dep., Jan. 5, 1990, Ex. H to Nosroc SJAB.

⁵³ James Ryan Dep. Aug. 11, 2014, I to Nosroc SJAB.

A309:15).⁵⁴ Mr. Ryan stated he used Monoblock at several job sites and in his work history he identified BEH Monoblock as a product he recalled using at Dupont Seaford in 1964 and 1966. (A313-A314).⁵⁵ He recalled that Raymond Ryan was also at Seaford during that time and recalled sawing and scoring the product and this process was **very dusty**. (A310:23-A311:10, A313-314) (emphasis added).⁵⁶

B. Barbara Reed's Exposure to Asbestos Through County Insulation's Removal and Disturbance of Asbestos-Containing Products. County Insulation, a Delaware company, was formed in 1970 and incorporated in 1971. (A1229).⁵⁷ As the name suggests, County Insulation was and is an insulation company. (A1230:13-17).⁵⁸ James Bentley, the current chief executive officer and an individual who has worked at County since its inception, stated that throughout the 1970s no one who worked at County received training as to what the insulation they were working with contained. (A1232:9-23).⁵⁹ During the removal of insulation, County employees took no special steps to dispose of insulation – it was simply thrown away like any other trash. (A1234:19-1235:9).⁶⁰ He confirmed that

⁵⁴ James Ryan Dep., June 22, 1990. Ex. J to Nosroc SJAB.

⁵⁵ James Ryan Work History, Ex. K to Nosroc SJAB .

⁵⁶ James Ryan Dep., June 22, 1990. Ex. J to Nosroc SJAB; James Ryan's Work History, Ex. K to Nosroc SJAB .

⁵⁷ James Betley Dep., July 29, 2015. Ex. G to County SJAB .

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

County removed insulation at the Dupont Seaford plant as well as at other various locations. (A1246-A1249).⁶¹

Barbara Reed's first husband, Gary Attix, confirmed that County Insulation was at Dupont Seaford at the same time he was working and was married to Barbara Reed. (A1203:11-13, 20-22, A1204:9-15).⁶² He confirmed that County Insulation employees removed and installed insulation at the plant while he was there. (A1205:3-5).⁶³ He said their proximity to him while they performed daily insulation work varied stating, "Sometimes they would be on the same floor with you. Sometimes they would be on the same floor with you, sometimes they would be above you. Most of the –some of the floors had grated floors." (Id. at 14-17).⁶⁴

That County did not really know what they were doing (as suggested by their own CEO) was confirmed by Attix. (A1208:13-A1209:5).⁶⁵ Attix stated that County Insulation's safety practices were not "up to par." (A1208:13-15).⁶⁶ He elaborated on this by stating that County's work created so much dust that he and other workers moved to another area of the plant to avoid them. He said at the time this occurred County Insulation workers were between **12 to 15 feet** away from

⁶¹ James Betley Dep., Jan. 11, 1985. Ex. H to County SJAB .

⁶² Gary Attix Dep., May 12, 2014., Ex. E to County SJAB .

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

him. (A1210:7-A1211:2).⁶⁷ He said that in contrast to another local insulation company, Delaware Insulation, County Insulation did not take steps to control dust stating, “A lot of times we were told to put plastic down before we do any removal or any cutting or anything like that and try to keep all our dust in one area. And I see times before where they [County] did have things and try to control the dust some more.”(A1208:19-24).⁶⁸

Randle Meadows, who served as Attix’s apprentice at the Plant, confirmed Attix and Bentley’s statements that County employees were not careful while installing and removing asbestos insulation at the Plant. He said,

They dropped down I’m talking a massive amount of insulation on the ground. And it was the only way they could probably get it down without doing some kind of scaffolding under it and picking –let it fall on the scaffold. They let it fall right on the ground. And they were doing it for a long period of time is why I even –I got upset with them. I went and talked to them....It got so bad that the Dupont Company made them come in and dig up the stones that was all under the pipe rack all the way up the side there where they had dropped this insulation, and they had it everywhere. (A1222:19-A1223:10).⁶⁹

He went on to say that County was not careful when removing “asbestos insulation” stating, “Well, like I said, they just beat it off and dropped it down on

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Randle Meadows Dep., June 6, 2014. Ex. F. to County SJAB .

the ground and piled it up. It was all over the place, and it caused a massive problem.” (A1224:8-11).⁷⁰

C. Barbara Reed’s Exposure to Asbestos Sweeping Compound from ACL and Charles Wagner. From the early 1950s until the early 1970s, Charles Wagner was the area distributor for Asbestos Corporation Limited, Thetford Mines (“ACL”). (A1621:6-A1622:5, A1626:18-A1627:9).⁷¹ ACL produced a 100% raw asbestos product that was distributed by Charles Wagner and was used as a sweeping compound at the Dupont Seaford facility.⁷² In all, Wagner shipped almost 38 tons of asbestos fibers to the Dupont plant from the 1950s to the early 1970s.⁷³ As noted previously by this Court in *Fleetwood v. Charles A. Wagner*, the very nature of this asbestos product was that it created dust.⁷⁴ Charles Wagner’s President Edward Rabon testified their product was dusty. (A2039:8-15, A2042:17-2043:8).⁷⁵ He testified that any product Charles Wagner sold was a powder. *Id.*

⁷⁰ *Id.*

⁷¹ Edward Rabon Dep., June 19 1985. Ex. N to Plaintiffs’ Answering Brief to Defendant ACL’s Motion for Summary Judgment (“ACL SJAB”). Edward Rabon Dep., June 13, 1989, Ex. O to ACL SJAB. *See also, Fleetwood v. Charles A. Wagner. (In re: Asbestos Litg.)* 832 A.2d 705, 707 (Del. 2003).

⁷² *Fleetwood v. Charles A. Wagner. (In re: Asbestos Litg.)* 832 A.2d 705, 707-08 (Del. 2003).

⁷³ *Nack v. Charles A. Wagner Co. Inc.*, 803 A.2d 428 (Del. 2002).

⁷⁴ *Fleetwood*, 832 A.2d 705, 710 (Del. 2003).

⁷⁵ Edward Rabon Dep., Sept. 21, 1988, Ex. AA, to Plaintiffs’ Answering Brief to Defendant Charles Wagner’s Motion for Summary Judgment (“CW SJAB”) p.35, *Id.* p. 38-39.

As with the other defendants, Barbara Reed's exposure to the ACL produced and Charles Wagner supplied asbestos was as a result of exposure from her father, Raymond Ryan. Raymond Ryan worked at the Dupont Seaford Plant from Mid-September 1963 to Mid-October 1964 in the plant's 501 building and then again from April 1966 to December 1966. (A1560-A1561, A1563-A1564).⁷⁶

During part of the time that Raymond Ryan was working at Dupont Seaford his brother James Ryan was working with him. (A1570:24-A1571:21, A1575).⁷⁷ James Ryan testified that he and his brother worked near Dupont employees at the plant. (A1573:1-4).⁷⁸ The Dupont employees working near them used the ACL produced, Wagner supplied, raw asbestos as a sweeping compound. (*Id.* at 5-24).⁷⁹

Raymond Ryan was very close to the DuPont employees when they threw this raw asbestos on the ground:

Q: Did you ever see at any time when you and "Reds" [Barbara Reed's father] were at the Seaford plant the Dupont workers using a big barrel and scooping up a whitish gray material?

A: Yeah.

Q. Tell us about that:

A: Well, we were only allowed to pick up big stuff. The laborers or the Dupont people, they would come about ten minutes before you're done. You had to take all your stuff down because that safety – they were safety, safety. And then they'd throw it on the floor, sweep it up, in the trash.

⁷⁶ Raymond Ryan Dep., Jan. 4, 1990. Ex. E to ACL SJAB and Raymond Ryan's Work History. Ex. F to ACL SJAB.

⁷⁷ James Ryan Dep., Aug. 11, 2014, Ex. G to ACL SJAB; James Ryan Work History. Ex. H to ACL SJAB.

⁷⁸ James Ryan Dep., August 11, 2014

⁷⁹ *Id.* 79: 5-24.

Q: And this white stuff that they would throw on the floor and sweep it up, how close were you and “Reds” to the men who were working –
A. You were still taking your stuff down the whole time when they were doing it. (*Id.*).⁸⁰

Other co-workers of Raymond Ryan confirmed the presence of ACL/Wagner’s asbestos. For example, William Farrall, who worked at the Dupont Seaford Plant during the time period that Ryan was working at the Plant, stated that Charles Wagner was the name of the asbestos sweeping compound used at the Plant. (A1583:17-A1586:8, A1587:7-A1588:2).⁸¹ At one point Farrall and other insulators thought that Dupont workers were using their asbestos insulation only to discover that the asbestos in question as not theirs but Wagner’s. (A1585:5-A1586:5, A1589:20-A1594:23).⁸²

James Farrall also worked in the 501 Building during part of the time Raymond Ryan was working there. Farrall stated that this sweeping compound was not only confined to the 501 Building but saw it “from footprints out of the door.” (A1611:18-19).⁸³ He also stated that this asbestos sweeping compound would stay on the floor for hours: “If I go walk past it one time and its [sweeping compound] still there, you come back from coffee break or something like that, it’s still there, what’s that, two hours?” (A1608:17-20).⁸⁴

⁸⁰ *Id.* at 79: 5-24.

⁸¹ William Farrall Dep. April 24, 1986, Ex. I to ACL SJAB .

⁸² *Id.*

⁸³ James Farrall Dep., Aug. 24, 2011. Ex. K to ACL SJAB .

⁸⁴ *Id.*

Other witnesses such as James Wheaton, Victor Passwaters, Philip Johnson, Richard Ash, and David Hyson all testified as to the presence of this raw asbestos used as the sweeping compound at Seaford. James Wheaton stated he would use the compound multiple times during his shift and that it was also used every evening on the floor of the job. (A1977:13-A1978:20).⁸⁵ Victor Passwaters stated that the sweeping compound was used twice a day. (A1984 at p. 33:10-18).⁸⁶ Mr. Johnson stated that truckloads of a whitish gray sweeping compound were delivered to the plant. (A1987).⁸⁷ Ash stated that bags would have to be refilled twice a week. (A1974:17-20).⁸⁸

Importantly, co-worker David Hynson testified that when someone “spread it on the floor to hold dust down, and you created more dust.” (A1981:3-7).⁸⁹

D. Barbara Reed’s Exposure to Bayer’s Asbestos-Containing Products.

Defendant Bayer produced many products that contained asbestos fibers including Foster CI mastics, Foster HI mastic, Foamseal, and Benjaim Foster Fibrous Adhesive.(A2452, A2454-2472).⁹⁰ Raymond Ryan was exposed to asbestos through using such products and in turn exposed his daughter Barbara Reed. In his work history, Ryan Ryan listed he worked with Foster CI mastics

⁸⁵ James Wheaton Dep., Jan. 8, 2015. Ex. P to CW SJAB.

⁸⁶ Victor E. Passwaters Dep., Aug. 1, 1995. Ex. R to CW SJAB.

⁸⁷ Philip Bailey Dep., Sept. 30, 2014. Ex. S to CW SJAB.

⁸⁸ Richard Ash Dep., April 18, 2008. Ex. O to CW SJAB.

⁸⁹ David Hynson Dep., July 31, 2009, Ex. Q to CW SJAB.

⁹⁰ Response of Amchem Products Inc. to Standing Order No. 1 Interrogatories, Ex. F to Plaintiffs Answering Brief to Defendant Bayer’s Motion for Summary Judgment (“Bayer SJAB”).

(“CI”), Foster HI mastics (“HI”), Foster Fibrous Adhesive, and Foster Foamseal at several different work locations from the 1960s up through 1974. (A2479-A2507).⁹¹ Raymond Ryan discussed his use of Foster’s CI mastic, (A2511:7-23)⁹² HI mastic, (A2511:24-A2512:17)⁹³ and Foster’s fibrous mastic. (A2512:23-A2513:6).⁹⁴

James Ryan also testified that Raymond Ryan was exposed to asbestos from using and being around Bayer products. For example, James Ryan recalled Raymond Ryan as a co-worker at Duport Seaford and there he and Raymond Ryan used CI, HI, and Fibrous Adhesive. (A2516:5-A2520:17, A2521:10-22, A2523:3-10, A2526:3-A2527:3).⁹⁵ He recalled using Foster CI at St. Mark’s High School in 1969.(A2516:10-20, A2532).⁹⁶ He also recalled Raymond Ryan at Allied Chemical from April 1967 to February 1968 and he identified the use of Foster Fibrous adhesive on this job. (A2522:18-A2523:10, A2531).⁹⁷

James Ryan described the process of using Foster mastics, “You buttered the pieces up, put them all together till they dried. And the miters were stair-stepped.

⁹¹ Raymond Ryan’s Work History, Ex. H to Bayer SJAB.

⁹² Ex. I, Raymond Ryan Dep., Jan. 5, 1990. Ex. I to Bayer SJAB.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ James Ryan Dep. June 22, 1990. Ex J to Bayer SJAB ; James Ryan Dep. Aug. 11, 2014. Ex. K to Bayer SJAB.

⁹⁶ James Ryan Dep., June 22, 1990, Ex. J to Bayer SJAB MSJ.; James Ryan Work History, Ex. L to Bayer SJAB.

⁹⁷ James Ryan Dep. June 22, 1990, Ex. J to Bayer SJAB; James Ryan’s Work History, Ex. L to Bayer SJAB.

Well you had to rasp them down and that's what we did with it." (A2526:3-14).⁹⁸

He said that this was a dusty process, and that he and Raymond would breathe in this asbestos containing product and that they would get in on their clothes (A2526:21-A2527:3)⁹⁹ – the same clothes he would wear as he hugged his daughter and same clothes that Barbara helped her mother wash.

⁹⁸ James Ryan Dep, August 11, 2014, Ex. K to Bayer SJAB.

⁹⁹ *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES OF FACT REMAINED.

A. Questions Presented. Did the Superior Court err in granting the Defendants' motions for summary judgment when numerous disputes of material fact remained? This issue was preserved in Plaintiffs' summary judgment answering briefs to the motions for summary judgment filed by Nosroc (A197-A506), County, (A1153-A1422), ACL, (A1515-A1708), Charles Wagner (A1839-A2108) and Bayer (A2393-A2702).

B. Scope of Review. The Court below made an error of law in granting Defendants' motion to grant summary judgment. Therefore, the standard of review on appeal is *de novo*.¹⁰⁰

C. Merits of Argument.

1. Standard of Review on Motion for Summary Judgment.

“Following the grant of a motion for summary judgment, the applicable standard of appellate review requires this Court to examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.”¹⁰¹ It has long been

¹⁰⁰ *Dabaldo v. USR Energy & Const.*, 85 A.3d 73, 77 (Del. 2014).

¹⁰¹ *Sostre v. Swift*, 603 A.2d 809, 811-12 (Del 1992).

established that issues of negligence are generally not appropriate for resolution by summary judgment.¹⁰²

Summary judgment is granted only when the record shows no genuine issue of material fact.¹⁰³ The burden of proof is on the moving party, here the Appellees/Defendants Below, to prove there is no issue of genuine material fact.¹⁰⁴ The trial court should accept all undisputed facts and the non-moving party's version of disputed facts.¹⁰⁵ “[I]f the parties are in disagreement concerning the factual predicate for the legal principles they advance,” summary judgment must be denied.¹⁰⁶ “[I]f it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate.”¹⁰⁷ “The role of the trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues.”¹⁰⁸ “The question is whether any rational finder of fact could find, on the record presented to the [Court] on **summary judgment** viewed in the light most favorable to the non-moving party, that the substantive evidentiary burden had been satisfied.”¹⁰⁹

¹⁰² *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).

¹⁰³ *Doe v. Cahill*, 884 A.2d 451, 462-63 (Del. 2005).

¹⁰⁴ *Id.*

¹⁰⁵ *Merrill v. Crothall – Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

¹⁰⁶ *Id.* at 99-100.

¹⁰⁷ *Doe*, 884 A.2d at 463.

¹⁰⁸ *Merrill*, 606 A.2d at 99.

¹⁰⁹ *Cerberus Int’l, Ltd. V. Apollo Mgmt. L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

The judge who decides the summary judgment motion may not weigh qualitatively or quantitatively the evidence adduced on the summary judgment record. The test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail.¹¹⁰ Plaintiffs are, of course, entitled to have that record read in the way most favorable to them, and they get the benefit of any inferences therefrom.¹¹¹

2. Standard for Product Nexus in Asbestos Cases.

The appropriate standard for product nexus was set out by the Superior Court in *Clark v. A.C. & S.*, Del. Super., C.A. No. 82C-DE-26, Poppiti, J. (Sept. 3, 1985). In order to withstand a motion for summary judgment, the plaintiff "must proffer evidence that at the time [the defendant's asbestos product] was present on the site he was in the area where [the product] was used, near that area, walked past that area, or was in a building adjacent to where [the product] was used if open windows or doors would allow asbestos fibers to be carried to the area where the plaintiff was working." *Clark*, at 4-5. In short, "a plaintiff must show . . . that a particular defendant's asbestos-containing product was used at the job site and that the plaintiff was in proximity to that product at the time it was being used."¹¹²

¹¹⁰ *Id.*

¹¹¹ *Mechell v. Palmer*, 343 A.2d 620, 621 (Del. 1975).

¹¹² *In re Asbestos Litig.*, 509 A.2d 1116, 1117 (Del. Super. 1986); *accord Nutt v. A.C. & S. Co.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986).

Product nexus relates to proximate causes and is a term used to describe a factual connection in space and time between a particular plaintiff and a particular defendant's product...[]

Implicit within this product nexus standard is the requirement that the particular defendant's product to which the plaintiff alleges exposure must be friable, that is, the product must be susceptible to releasing fibers which are capable of ingestion or respiration into the plaintiff's body.¹¹³

To defeat summary judgment in a case where the plaintiff himself is not able to establish exposure, a co-worker must be able to place the plaintiff in the vicinity of a specific location on the defendant's property, at a specific time, where friable asbestos is present. To do so, there must be some meaningful intersection between the plaintiff and the co-worker on the property, both in place and time.¹¹⁴

In re Asbestos Litig., 2007 Del. Super. LEXIS 155, *67-68 (Del. Super. Ct. May 31, 2007).

In its opinion the Superior Court emphasized that the Plaintiffs had failed to meet the friability requirement. (Exs. A – D).¹¹⁵ However, the only the Defendant that raised the issue as to whether it products created friable dust was Bayer.

(A2228-A2232).¹¹⁶ Moreover, Plaintiffs produced evidence that the actions of all defendants produced friable asbestos dust. In addition, the Superior Court ignored

¹¹³ *Mergenthaler v. Asbestos Corp. of America, Inc.*, 1988 Del. Super. LEXIS 392, * 2-3 (Del. Super. Ct. Sept. 12, 1988).

¹¹⁴ *In re Asbestos Litig.*, 2007 Del. Super. LEXIS 155, * 67-68 (Del. Super. Ct. May 31, 2007).

¹¹⁵ *Barbara Reed v. ACL and Charles Wagner*, C.A. No. N13 C-11-188 ASB (Del. Super. Ct. July 6) (Scott, J.) (ORDER); *Barbara Reed v. County Insulation Company*, C.A. No. N13C -11-188 ASB, (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER); *Barbara Reed v. Nosroc*, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER); *Barbara Reed v. Bayer Cropsience, Inc.*, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER).

¹¹⁶ Defendant Bayer Cropsience's Motion for Summary Judgment, at 10-14, July 27, 2015.

direct evidence from which a jury could conclude that Barbara Reed was exposed to asbestos as the result of each defendant's conduct. (Ex. A).¹¹⁷

3. Nosroc. The Superior Court determined that:

Although Plaintiffs claim that Ms. Reed's Father worked at the Seaford plant and Getty refinery during certain periods of time when the products at issue were identified on various job histories as being present and that others identified on various job histories as being present and that others identified and/or used the products at issue in roughly the same time period, they fail to meet both the time and space requirement, as well as the friable fiber requirement with respect to Ms. Reed's father in particular. (Ex. A)¹¹⁸

Yet Plaintiffs presented evidence that demonstrates that at both Dupont Seaford and the Getty Refinery Raymond Ryan was exposed to asbestos distributed by Nosroc. During the period of time he was at Dupont Seaford (September – mid –October 1964; April to September 1966) asbestos containing products distributed by Nosroc were at this work site. (A273-275, A295:15-25, A407-408)¹¹⁹

Two of Raymond Ryan's co-workers who were deposed in this case, Randle Meadows and James Ryan, testified that Raymond Ryan used asbestos products distributed by Nosroc. Randle Meadows said he brought Nosroc-distributed Thermasil directly to Raymond Ryan stating explicitly "I would bring him

¹¹⁷ Nowhere did the Court conclude that a rational juror could not conclude that Barbara Reed was secondarily exposed to asbestos from her father or that the Defendants had no duty to Barbara Reed.

¹¹⁸ *Reed v. Nosroc Corp.*, C.A. No. N13C-11-188 ASB, at 6 (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (Ex. A).

¹¹⁹ Raymond Ryan Job History. Ex. F to SJAB Nosroc; Randy Meadows Dep, Ex. G to Nosroc SJAB ; Keene Corporation's Answers to Plaintiffs Interrogatories. Ex. R to Nosroc SJAB .

Thermasil.” (A292:21-25).¹²⁰ Thermasil was not an encapsulated material, but was very friable: he described that the material was cut and chunks would be ripped out by the workers, workers who would have included Raymond Ryan. (A297:10-17).¹²¹ He said, “[t] definitely had asbestos because I never forgot Thermasil had big, big hunks of asbestos that men would take it out and put it in a cigarette lighter and make a wick out of it. You can’t imagine the fibers being that big. But when you cut it with a saw, you’d hit that and it would take a chunk out of the section.” (*Id.*).¹²²

James Ryan also testified as to the friable nature of Monoblock, a product identified in Raymond Ryan’s work history, stating that when this asbestos containing product distributed by Nosroc was “scored” and sawed it was very dusty and would be breathed in. (A310:23-A311:10).¹²³ Randle Meadows also stated he specifically brought Monoblock (which was distributed by Nosroc) to Raymond Ryan. (A289:4-10).¹²⁴ Thus, it is clear from the testimony of Randle Meadows that Barbara Reed’s father worked with the defendant’s friable asbestos containing product. This is direct testimony that demonstrates that Raymond Ryan worked with this asbestos containing products and that it was friable. Further as the Superior Court has previously recognized the friability of this material, “[i]t is

¹²⁰ Randle Meadows Dep., Ex. G to Nosroc SJAB .

¹²¹ *Id.* 214.

¹²² *Id.*

¹²³ James Ryan Dep., June 22, 1990. Ex. J to Nosroc SJAB .

¹²⁴ Randle Meadows Dep., June 6, 2014, Ex. G to Nosroc SJAB .

generally recognized that asbestos insulation for pipes is in such a form that it is probable that asbestos fibers will be released.”¹²⁵

Plaintiffs attached to their answering brief the affidavit of their industrial hygienist, Dr. Michael Ellenbecker. (A472-A474).¹²⁶ As his affidavit demonstrates, asbestos fibers are extremely small (less than 1.0 micrometer) and these fibers can easily travel from various parts of a building where asbestos installation or asbestos removal occurs. (A473, ¶ 6).¹²⁷ In addition, he stated “these fibers would be respirable by the worker and could also be carried home on the worker’s clothing and person where no change of clothing and showering occurred prior to go home.” (Id. at ¶ 9).¹²⁸ Here, there is not only testimony that Raymond Ryan was in the general vicinity where Nosroc supplied asbestos containing products were used but also that he was around others who used such products and he himself used such asbestos containing products.

In several other cases, the Superior Court has denied Nosroc’s summary judgment motions involving Plaintiffs who either worked with products distributed

¹²⁵ *Lake Forest School Dist. v. De Long*, 1988 (citing *Conway v. A.C.&S. Co., Inc.*, Del. Super., C.A. No. 82-AP-77, Taylor J. (May 22, 1987) (ORDER)).

¹²⁶ Dr. Michael Ellenbecker Aff. Feb. 16, 2006, Ex. W to Nosroc SJAB .

¹²⁷ *Id.*

¹²⁸ *Id.*

by Nosroc or worked in facilities when other workers were using products distributed by Nosroc. (Ex E at 1-19).¹²⁹

In summary, the Superior Court erred when it granted summary judgment to this defendant.

4. County Insulation.

First, the Superior Court held that Barbara Reed could not meet the product nexus standard because “none of the evidence presented by Plaintiffs establish that the old insulation as asbestos-containing such that Attix was exposed to friable asbestos.” (Ex. B).¹³⁰ However, the Superior Court also noted that Plaintiff’s first husband Gary Attix, “[c]ould only testify to one time when County Insulation workers were working over top of him, causing dust to come through the grate floor. [Randle Meadows a co-worker of Mr. Attix] testified that he was in the area when County Insulation dropped a massive amount of insulation on the ground in the process of removing it, which created such a mess that he reported it to Dupont Safety. He further testified that this was asbestos insulation.” *Id.* (see A1219:5-24,

¹²⁹ *Trice v. Argo Packing Company, (Limited to Nosroc Corp.)*, CA. No.: 03C-07-171 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER); *Jefferson v. Argo Packing Company (Limited to Nosroc Company)*, C.A. No.: 03C-04-265 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER); *Winfree v. Anchor Packing Company (Limited to Nosroc Corp.)*, (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER); *Saunders v. Anchor Packing Company (Limited to Nosroc Corp.)*, (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER); *Opalczynski v. Atlas Turner (Limited to Nosroc Corp.)*, C.A. No.: 03C-07-171 (Del. Super. Ct. Oct. 27, 2006) (Johnson, J.) (ORDER) See *Plaintiffs’ Letter Memorandum In Opposition to Defendant Nosroc Corporation Motion for Summary Judgment*, Aug. 21, 2006.

¹³⁰ *Reed v. County Insulation*, C.A. No. N13C-11-188 ASB, at 3 (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER) (Ex. B).

A1220:19-1221:13, A1222:3-1224:13).¹³¹ Based on this alone the Superior Court should have denied summary judgment. However, the Court below ignored evidence the Plaintiffs submitted which showed Gary Attix was regularly **around** County Insulation employees as they were removing and installing asbestos containing insulation and he saw them on a daily basis. (A1205:3-23, A1206:1-5).¹³² In addition to frequently seeing them work, he was also in close proximity to them as they worked –sometimes only twelve to fifteen feet away. (A1210:22-A1211:2).¹³³ He also said that their work was dusty and that they failed to control the dust. (A1208:16-A1209:5, 7-20).¹³⁴ Randle Meadows’ testimony is consistent with Mr. Attix’s testimony regarding the dust created by County employees - “They dropped down I’m talking a massive amount of insulation on the ground....They had it everywhere.” (A1222:19-A1223:10).¹³⁵ Furthermore, Mr. Meadows testified that County Insulation was removing “asbestos insulation,” and he was working with Gary Attix while this occurred. (A1217:8-18, A1218:14-20, A1219:12-18, A1220:19-A1221:13, A1222:19-A1223:10, A1224:5-13)¹³⁶

Second, the Superior Court found that since Barbara Reed’s alleged exposure from County was as a result of the removal of a product by a Defendant

¹³¹ Randle Meadows Dep., June 6, 2014, Ex. F to County SJAB.

¹³² Gary Attix Dep. May 12: 2014, Exhibit E to County SJAB .

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Meadows Dep, June 6, 2014, Ex. F to County SJAB .

¹³⁶ *Id.*

rather than exposure to a Defendant’s product, Barbara Reed had not satisfied the product nexus standard. (Ex. B).¹³⁷ (“as Plaintiffs’ merely allege that Attix was exposed to asbestos through Defendants’ *removal* of insulation, they fail “proffer some evidence that not only was a particular defendant’s asbestos containing *product* present at the job site, but also that the plaintiff was in proximity to that product at the time it was being used.”)).

Barbara Reed’s cause of action against County Insulation is one for negligent use and removal of asbestos. “One’s duty is to act reasonably, as a reasonably prudent man (or entity) would.”¹³⁸ In the asbestos context the Superior Court has previously confirmed there is a cause of action for a Defendant’s negligent removal and disturbance of asbestos and that it does not have to be Defendant’s product that is being removed or disturbed:

The question in this motion is whether during the relevant time the plaintiff was exposed to defendant’s employees using an asbestos-containing product in the area where the plaintiff was near, or whether plaintiff walked by the area or was in a building adjacent to the area. (Ex. E at 53:14-20).¹³⁹

Third, the Superior Court also that noted Barbara Reed “failed to present any evidence of the asbestos *content* of the insulation allegedly removed by

¹³⁷ *Reed v. County Insulation*, at 4. (Del. Super. Ct., July 6, 2016) (Scott, J.) (ORDER).

¹³⁸ *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718, 1981 Del. LEXIS 360, * 3 (Del. 1981).

¹³⁹ *In re: Asbestos Litig. (Francis Messick)*, Tr. 120: 14-20, 14-20 C.A. 07C-01-234 (Del. Super. Ct. June 11, 2009) (Johnson, J.) (Summary Judgment Proceedings). *See Id.* at 120: 3-13 (Defendant, Catalytic, negligently removing and installing asbestos; did not supply or manufacture it).

Defendant...[.]” (Ex. B).¹⁴⁰ However, nowhere in any decision of this Court is it required that a Plaintiff must offer testimony as to the amount or type of asbestos that the plaintiff was exposed to (e.g the product in question was 25% asbestos containing or was amosite asbestos), only that it is an asbestos-containing product.

Furthermore, as the affidavit of Plaintiffs’ industrial hygienist Steve Hayes demonstrates several techniques were available to companies such as County Insulation to prevent, or at least minimize, the dissemination of asbestos dust. (A1339 at ¶ 6).¹⁴¹ As Plaintiffs have demonstrated there is evidence that County did not take such preventive steps.

In *Opalczynski v. County* the Plaintiff was working at the Amoco facility at the same time County Insulation was present at the facility. (Ex. E21, pp. 107-108).¹⁴² However, in that case the Plaintiff worked in a separate adjacent building to where County Insulation was present and there was no evidence presented that the Plaintiff worked near or around County Insulation workers. (Ex. E26, p. 128:13-E27, p. 129:7).¹⁴³ Plaintiff presented evidence in the form of an affidavit from its industrial hygienist about the nature of the asbestos particles and as result

¹⁴⁰ *Reed v. County*, at 4.

¹⁴¹ Steven Hayes Aff., Aug. 12, 2015., Ex. 6 to County SJAB .

¹⁴² *Opalczynski v. County Insulation*, Summary Judgment Tr. (Del. Super. Ct. Oct. 25, 2006) (Johnson, J).

¹⁴³ *Id.*

the Superior Court denied County's motion for summary judgment. (Ex. E27, P. 128:20 – Ex. E27, p. 129:7).¹⁴⁴

Here, Plaintiffs have presented much more evidence that Gary Attix was exposed to asbestos from the work of County Insulation: County workers were only twelve to fifteen feet away from Attix and Randle Meadows, and they were tearing off large amounts of asbestos insulation.

In summary, the Plaintiffs have met the product nexus standard and as such, the Court erred when it granted summary judgment for Defendant County.

5. ACL and Wagner.

The Superior Court in granting in summary judgment for ACL and Charles Wagner stated that Plaintiffs had not presented evidence under *Helm* to survive summary judgment and specifically, "Plaintiffs have presented no evidence that the alleged sweeping compound created dust, even assuming it contained asbestos." (Ex. C).¹⁴⁵

The Superior Court erred when it found that Plaintiffs presented no evidence that this product created dust. Plaintiffs presented to the Superior Court David Hyson's testimony which raises an issue of fact as to whether the sweeping compound was dusty as he testified, "It was a gray sweeping compound. You

¹⁴⁴ *Id.* at 129.

¹⁴⁵ *Reed v. ACL and Charles Wagner*, at 3-4 C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER).

spread it on the floor to hold dust down, and you created more dust.” (A1981:5-7).¹⁴⁶ Thus, contrary to the Superior Court’s assertion, Plaintiffs have presented ample evidence demonstrating the friable nature of the Defendants’ products and as such it erred when it granted summary judgment as to these two defendants.

In footnote four of its opinion the Superior Court disputes the notion that this product was dusty stating, “In fact the testimony presented by Plaintiffs specifically disagrees with counsel’s assertion that there was dust.” (Ex. C).¹⁴⁷ However, James Farrall never specifically stated the sweeping compound was not dusty, only when asked whether dust was created from putting the compound on the floor he said “I can’t say it was dust.” (A1963:11-14).¹⁴⁸ In fact, the totality of James Farrall’s testimony demonstrates that the sweeping compound was friable as he said workers walked through the sweeping compound – it was “tracked from footprints out of the doors.” (A1957:18-19).¹⁴⁹

As this Court noted in *Fleetwood v. Charles Wagner* the very nature of this product is that it created dust.¹⁵⁰ In that case, Wagner tried to remove itself of liability by contending that it had no reason to believe that its asbestos containing products were any more dangerous than any of its other products and “that the work-related hazards in its field involve the **creation of dust**, [emphasis added]

¹⁴⁶ David Hyson Dep., July 31, 2009. Ex. Q to CW SJAB .

¹⁴⁷ *Reed v. ACL and Charles Wagner*, at 4 n. 4

¹⁴⁸ James Farrall Dep., June 20, 2011, Ex. M to CW SJAB .

¹⁴⁹ James Farrall Dep., Aug. 24, 2011., Ex. K to CW SJAB .

¹⁵⁰ *Fleetwood v. Charles Wagner*, 832 A.2d 705, 710 (Del. 2003).

and that **dust [emphasis added]** from any of Wagner’s products poses a risk if workers inhale the dust particles over a long period of time.”¹⁵¹ This Court disagreed stating that a “rational juror could infer that Wagner was on notice that asbestos posed a hazard to DuPont employees.”¹⁵²

Additionally, Wagner’s own admission that its product was dusty constitutes an admission on its part.¹⁵³ Also, earlier this year, in denying Wagner’s motion for summary judgment that Wagner’s product was used as a sweeping compound at Dupont Seaford, the Superior Court noted that according to the Plaintiff that the sweeping compound “was always gray and **fibrous** [emphasis added].” (Ex. E57).¹⁵⁴ In short, the very nature of this raw asbestos product was that it was dusty.

As addressed earlier, Plaintiff has produced evidence that ACL’s raw asbestos was distributed by Wagner to the Dupont Seaford facility and any asbestos containing product that was used as a sweeping compound was distributed by Wagner. (A1621:6-A1622:5, A1626:18-A1628:25).¹⁵⁵ Plaintiff has also produced evidence that Plaintiff’s father worked at Dupont Seaford in the 501

¹⁵¹ *Id.* at 710.

¹⁵² *Id.*

¹⁵³ *Id.* at 710; *See Krauss v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2830889 *15 (Del. Super. Ct. April 23, 2004) (“A judicial admission is a formal statement by a party or his or her attorney, in the course of a judicial proceeding, which removes an admitted fact from the field of controversy.”) *Id.*

¹⁵⁴ *Barlow v. Owens-Illinois (Limited to Charles A. Wagner)*, C.A. N14C-02-024 ASB (Del. Super. Ct. March 9, 2016) (Scott, J.) (ORDER).

¹⁵⁵ Edward Rabon Dep., June 19, 1985. Ex N to ACL SJAB ; Edward Rabon Dep., June 13, 1989., Ex. O to ACL SJAB ; *Fleetwood v. Charles A. Wagner (In re: Asbestos Litig.)* 832 A.2d 705, 707 (Del. 2003).

building during this time period (mid-September 1963 mid-October 1964 and mid April 1966 to December 1966). (A1560-A1561,A1563-A1564).¹⁵⁶

While Raymond Ryan and his brother, James Ryan were working at DuPont Seaford, they worked close to the DuPont employees when these employees were throwing the sweeping compound on the floor. (A1573:5-24).¹⁵⁷ During his deposition, James Ryan was asked about this sweeping compound:

Q: Did you ever see at any time when you and “Reds” [Raymond Ryan] were at the Seaford Plant the Dupont Workers using a big barrel and scooping up a whitish-gray material?

A: Yeah.

Q. Tell us about that:

A. Well, we were only allowed to pick up big stuff. The laborers or the Dupont People, they would come about ten minutes before you’re done. You had to take all your stuff down because that safety –they were safety, safety. And then you’d throw it on the floor, sweep it up, in the trash.

Q: And this white stuff that they would throw on the floor and sweep it up, how close were you and “Reds” to the men who were working –

A. You were still taking your stuff down the whole time when they were doing it. (*Id.*)¹⁵⁸

Thus, there is ample evidence to demonstrate that Raymond Ryan was in close proximity to this friable asbestos sweeping compound. This meets the standard for product nexus and summary judgment should have been denied.

¹⁵⁶ Raymond Ryan Dep., Ex. E to ACL SJAB ; Raymond Ryan Work Hitory., Ex. F to ACL SJAB .

¹⁵⁷ James Ryan Dep., Aug. 11, 2014., Ex. G to ACL SJAB .

¹⁵⁸ *Id.*

6. Bayer Cropscience.

The Superior Court held that, “Although Plaintiff claims that Ms. Reed’s Father worked at various locations throughout the years where he identified Defendant’s products as being some of the many he recalled using and that his brother, Uncle, testified to how he, himself, was exposed to friable asbestos from these products, Plaintiffs fail to satisfy the product nexus standard with respect to Ms. Reed’s father and Defendant’s products in particular.” (Ex. D).¹⁵⁹

Here, Plaintiff’s father testified that he specifically recalled working with this defendant’s products stating, “Ok, the fibrous adhesive, Foster’s came in a five gallon bucket, the same type of lid.” (A2512:23-24).¹⁶⁰

There is also clear testimony from James Ryan of Raymond Ryan using this product and being around others when Bayer’s products were used. (A2522:18-A2523:10, A2526:9-A2527:3, A2529-A2534).¹⁶¹ There is also clear testimony from James Ryan that Defendant’s products in question were friable. He was asked the following questions about them:

Q: Okay when you applied the mastics, did they give off any dust?

A: When we –after you get done your tools, you know, when they dried you would have to scrape them, clean them. Or if we were working around

¹⁵⁹ *Reed v. Bayer Cropscience Inc.*, at 3, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (Scott, J.) (ORDER).

¹⁶⁰ Raymond Ryan Dep., Jan. 5, 1990., Ex. I to Bayer SJAB .

¹⁶¹ James Ryan Dep. June 22, 1990. Ex. J to Bayer SJAB ; James Ryan Dep., Aug. 11 2014. Ex. K to Bayer SJAB ; James Ryan Work History. Ex. L to Bayer SJAB .

hot steam pipes then we would have to clean up and scape them real good and all that. Then they were **dry and dusty** then. (A2519:5-12).¹⁶²

In his most recent deposition he reaffirmed that the Defendant's product was dusty stating:

Q: When you rasp them down, would that produce any dust?

A. Sure.

Q. And , would that be dust you, Ray Ryan, and others would breath?

A. Yeah.

Q. Would that dust also get on your clothes and Ray's clothes?

A. Most certainly. (A2526:15-A2527:3).¹⁶³

The affidavit of Plaintiffs' industrial hygienist Dr. Michael Ellenbecker also demonstrates that individuals such as Raymond Ryan would have been exposed to massive amount of asbestos fibers through such work. (A2558-A2560).¹⁶⁴

Asbestos that would have been carried home on his clothes where these fibers would have exposed Barbara Reed. (A2560 at ¶ 9).¹⁶⁵

As such, it is abundantly clear that Plaintiffs have produce evidence that demonstrates that Raymond Ryan worked with the defendant's products, which were dusty, that they got on his clothes, and as a result his daughter Barbara Reed was exposed to asbestos from this defendant's products. The Superior Court's decision to grant summary judgment as to this defendant was in clear error.

¹⁶² James Ryan Dep., June 22, 1990.

¹⁶³ James Ryan Dep., August 11, 2014.

¹⁶⁴ Michael Ellenbecker Aff., Ex. P to Bayer SJAB .

¹⁶⁵ *Id.* at ¶ 9.

CONCLUSION

Wherefore, Plaintiff requests that this Court reverse the Superior Court's decisions on summary judgment allow a jury to resolve these remaining factual issues.

Respectfully submitted,

Jacobs & Crumplar, P.A.

/s/ David T. Crumplar

David T. Crumplar, Esq. (# 5876)

Thomas C. Crumplar, Esq. (# 942)

Raeann Warner, Esq. (#4931)

2 East 7th Street

Wilmington, DE 19801

Attorneys for Plaintiffs

Below/Appellant