IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| IN RE: ASBESTOS LITIGATION | : | |
| | : | |
| WAYNE R. REED, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF BARBARA REED, DECEASED, AND AMY RHODES AND COURTNEY REED, AS SURVIVING CHILDREN, | : | |
| | : | |
| Plaintiffs Below, Appellants, | : | No. 387, 2016 |
| | : | |
| v. | : | Court Below: Superior Court of the State of Delaware C.A. No. N13C-11-188 |
| | : | |
| ASBESTOS CORPORATION LIMITED, BAYER CROPSCIENCE, INC., CHARLES A. WAGNER COMPANY, INC., NOSROC CORPORATION, and COUNTY INSULATION COMPANY, | : | |
| | : | |
| Defendants Below, Appellees. | : | |

# APPELLEE ASBESTOS CORPORATION LIMITED'S ANSWERING BRIEF ON APPEAL

GOLDFEIN & JOSEPH

/s/ Willard F. Preston, III
WILLARD F. PRESTON, III, ESQ.
Attorney Bar #: 4663
3513 Concord Pike, Suite 2000
Wilmington, DE 19803
(302) 656-3301
Attorney for Appellee/Defendant below,
Asbestos Corporation Limited

October 17, 2016

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | iii |
| NATURE OF PROCEEDINGS | 1 |
| SUMMARY OF ARGUMENT | 4 |
| STATEMENT OF FACTS | 5 |
| ARGUMENT | |
| I. THE SUPERIOR COURT PROPERLY ENTERED SUMMARY JUDGMENT WHERE PLAINTIFFS FAILED TO ESTABLISH A PRODUCT NEXUS TO A SWEEPING COMPOUND SUPPLIED BY ACL | 14 |
| A. Question Presented | |
| Did the Superior Court err in granting summary judgment to ACL, finding that the record evidence did not place Reed's Father in proximity to sweeping compound attributable to ACL and did not provide any facts inferring that Reed was exposed to dust from such a product? | 14 |
| B. Scope of Review | 14 |
| C. Merits of Argument | 14 |
| 1. Standard of Review on Motion for Summary Judgment | 14 |
| 2. No Record Evidence of Reed's Father's Proximity To Sweeping Compound Allegedly Supplied by ACL | 16 |
| (a) Reed's Father Provided No Proximity Evidence | 16 |

(b) Reed's Uncle Provided No Proximity Evidence 17

(c) William Farrall Provided No Proximity Evidence 18

(d) James Farrall Provided No Proximity Evidence 19

(e) Plaintiffs' New Evidence Against ACL is Not Properly Before the Court , But Also Fails to Provide Evidence of Proximity 20

(f) The Superior Court Properly Applied Precedent Relating to Proximity 21

3. The Superior Court Properly Found that the Record Failed to Establish that Reed was Exposed To any ACL Asbestos Fiber Brought Home on Reed's Father's Clothing 27

4. Oral Argument Was Not Mandated Below 32

5. The Record Evidence In The Case *Sub Judice* Differs from That In *Nack v. Charles A. Wagner, Inc.,* 803 A.2d 428 (Del. 2002) 33

CONCLUSION 35

## TABLE OF AUTHORITIES

### CASES


*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) 15

*Betts v. Townsends,Inc.*, 765 A.2d 531, 534 (Del.2000) 33

*Burkhart v. Davies*, 602 A.2d 56 (Del. 1991) 15

*Celotex v. Catrett*, 477 U.S. 317, 325 (1986) 15

*Clark v. A.C.&S.*, Del.Super. C.A. No. 82C-DE-26, Poppiti, J. (Sept. 3, 1985) (Order), 1985 Del.Super. LEXIS 1249 22, 29

*Clemens v. Western Union Telegraph Co.*, 28 A.2d 889 (Del.Super. 1942) 16

*Collins v. Ashland, Inc.*, 2009 Del. Super. LEXIS 7, Del. Super. C.A. No. 06C-03-339, Jurden, J. (January 6, 2009) 19

*Davis v. University of Del.*, 240 A.2d 583, 585 (Del.1968) 16

*DiSabatino v. Ellis*, 184 A.2d 469 (Del.Super. 1962) 16

*Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192 (Del. 2012) 14

*Faircloth v. Rash*, 317 A.2d 871 (Del.Super. 1974) 16

*Farrall v. A.C.&S., Inc.*, 1988 WL 167320 (Del.Super. May 11, 1988), 1988 Del.Super. LEXIS 176 at *6 (Del.Super.Ct. 1988) 24, 25 26

*Gately v. Gately*, 832 A.2d 1251 (Del.2003) 20

*Hartman v. Buckson*, 467 A.2d 694, 700 (Del.Ch. 1983) 16

*Hercules Power Co. v. DiSabatino*, 188 A.2d 529 (Del.Super.1963) 16

*In re: Asb. Litig., Limited to: Caruso and Wells*, Del.Super. C.A. Nos. 11C-09246 ASB and 11C-03-184 ASB (Decision of Master Boyer, April 1, 2013) 31

*In re Asbestos Litig. (Nutt),* 509 A.2d 1116 (1986), aff'd *Nicolet, Inc. v.* Nutt, 525 A.2d 146 (Del. 1987) 14, 22 25, 27

*In re Asbestos Litig.*, Del.Super. Ct., C.A. No. 90C-04-084, Gebelein, J. (Nov. 4, 1994) 14

*In re Asbestos Litig.*, 509 A.2d 1116 (Del.Super. Ct. 1986) 14, 15 22, 25 27

*In re Asbestos Litig (Helm)*, 2007 WL 1651968, *16 (Del. Super. Ct. May 31, 2007) aff'd *sub. nom.*, 945 A.2d 593 (Del.2008) 16, 22 23-27 31

*In re Asbestos Litig.,* 2007 Del.Super. LEXIS 155 (Del.Super.Ct. 2007) 2

*In re Asbestos Litig.*, C.A. No. N10C-12-011 ASB, 2012 Del.Super. LEXIS 144, 2012 WL 1408982 at *2 (Del.Super. Apr. 2, 2012) 21,22

*In re Asb. Litig, (Truitt),* Del.Super. C.A. No. N10C-06-072 ASB, Ableman, P. (Oct.3, 2011), 2011 Del.Super. LEXIS 478 33, 34

*Jewell v. Pennsylvania Railroad Co.*, 183 A.2d 1983 (Del.Super. 1962) 16

*King v. Verifone Holdings, Inc.*, 994 A.2d 354, 361 n.21 (Del. Ch. 2010) 20

*Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 n.3 (Del. 1997) 20

*Martinez v. E.I.DuPont De Nemours and Co.*, 2012 Del.Super. LEXIS 550 (Del.Super. 2012) 33

*McGuire v. McCollum*, 116 A.2d 897 (Del.Super. 1955) 16

*Merganthaler v. Asbestos Corp. of Am., Inc.,* 1988 WL 16284 (Del.Super. July 13, 1988) 24

*Merganthaler v. Asbestos Corp. of America* 1988 WL 116405 at *1-2 (Del.Super. Oct. 25, 1988) 23, 24

*Nack v. Charles A. Wagner, Inc.*, 803 A.2d 428 (Del. 2002) 33

*Nutt v. AC&S Co.*, 517 A.2d 690, 692 (Del.Super. Ct. 1986) 14, 22 23, 24 35

*Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966) 15

*Singletary v. Pennsylvania Dep't of Corrections*, 266 F.3d 186, 193 n.2 (3d Cir. 2001) 15

*Smith v. Advanced Auto Parts, Inc.*, 2013 WL 6920864 (Del.Super.Ct. Dec. 30, 2013) 21

*State v. Regency Group*, 598 A.2d 1123, 1127 (Del.Super. 1991) 16

*Stigliano v. Nosroc Corp.*, 2006 WL 3492209 (Del.Super. Oct. 26, 2006) 31

*Stigliano v. Nosroc Corp.*, 2006 Del.Super. LEXIS 486 (Del.Super. Nov. 21, 2006) 31

*Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983 (Del. 2013) 3

*Turnbull v. Fink*, 644 A.2d 1322 (Del. 1994) 3

*Wooten v. Kiger*, 226 A.2d 238 (Del.Super. 1967) 16

**RULES**


| | |
|---|---|
| Superior Court Civil Rule 78(c) | 33 |
| Supreme Court Rule 8 | 3 |
| Supreme Court Rule 15(b) | 3 |
| D.R.E. 801 and 802 | 19 |

## NATURE OF THE PROCEEDINGS

Appellee, Asbestos Corporation Limited, ("ACL") was one of twenty-six defendants sued by Appellant Barbara Reed ("Reed") in the Delaware Superior Court for alleged secondary household asbestos exposure she claims she suffered while living with both her father and later her first husband who were both insulation workers employed through the Local 42 Union at various work sites. As to ACL, Reed contends that she ingested asbestos fibers brought home on her father's work clothes due to third persons using sweeping compound around her father while he was employed at the DuPont Seaford plant sometime in 1963/64 and 1966. Reed contends that this particular sweeping compound was supplied by ACL to Appellee Charles A. Wagner Company, Inc. ("Wagner") who in turn supplied it to DuPont Seaford. As conceded in Reed's Answering Brief, Reed's alleged exposure from her former husband Gary Attix from 1976 to 1981 is not relevant to Reed's exposure claims against ACL.[1]

On July 27, 2015, after completion of product identification discovery pursuant to the Master Trial Scheduling Order[2], ACL moved for summary judgment on all claims including negligence, strict liability, willful and wanton conduct, conspiracy and loss of consortium. Reed filed her Response in

[1] ACL SJAB, p. 2, footnote 2; (A1517).
[2] Master Trial Scheduling Order (Amended on July 2, 2015) filed on 7/1/15 (ID 57488063); (B1-B29)

Opposition to ACL's Motion for Summary Judgment on August 21, 2015 in which she did not contest summary judgment on the conspiracy and strict liability claims and offered no evidence, argument or opposition in support of the claims of willful and wanton conduct against ACL.[3] Accordingly, all such claims are waived if not the subject of this appeal.[4] On September 18, 2015 ACL filed its Reply Brief in support of its motion for summary judgment.[5]

On July 6, 2016 the Delaware Superior Court entered an Order granting summary judgment in favor of ACL and Wagner[6] finding that Reed had not met Delaware's product nexus standard.[7] The Superior Court held that Reed failed to present evidence from which a jury could reasonably infer, without undue speculation, that she was exposed to friable asbestos brought home on her father's clothing, finding that none of the coworker witness testimony placed her father in proximity to the alleged sweeping compound at the time it was being used and further finding that no evidence was presented that the alleged sweeping compound created dust, assuming it even contained asbestos.

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[3] ACL MSJ; (A1451-1513)
[4] *In re Asbestos Litig.*, 2007 Del.Super. LEXIS 155 (Del.Super.Ct. 2007) (granting summary judgment as to all claims which plaintiffs failed to respond).
[5] ACL Reply Brief; (A1709-1769)
[6] Appellee Wagner filed its own separate Motion for Summary Judgment; (A1771-1837)
[7] Exhibit C to Reed's Opening Brief on Appeal

Reed filed a Notice of Appeal on July 28, 2016 followed by an amended Notice of Appeal on August 8, 2016. Reed filed an Opening Brief on September 12, 2016. Plaintiffs' Opening Brief did not raise any issues with respect to the claims of conspiracy, strict liability or willful and wanton conduct of ACL. Accordingly such claims are waived and not the subject of this appeal.[8] By Motion granted under Rule 15(b), ACL was granted an extension until October 17, 2016 to file its Answering Brief.

[8] *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983 (Del. 2013); *Turnbull v. Fink*, 644 A.2d 1322 (Del. 1994); and Supreme Court Rule 8.

## SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly granted summary judgment to ACL as the record supports the Court's determination that Reed failed to meet Delaware's product nexus standard in this take-home exposure case. Reed failed to present evidence of Reed's father's proximity to sweeping compound attributable to ACL. Reed failed to present evidence from which a jury could find that Reed was exposed to friable asbestos from her father's clothing as a result of others using an ACL sweeping compound in proximity to her father at the DuPont Seaford plant. When read in the light most favorable to Plaintiffs, the evidence placed more than one sweeping compound at the large Dupont Seaford plant, but not in proximity to Reed's father. In an effort to bolster their legally deficient product nexus evidence, Reed erroneously cites new evidence against ACL for the first time on appeal, but this new evidence also fails to establish the required product nexus. Additionally, Reed's newly cited generic expert evidence fails to provide any support for the claim that dust from any ACL product was carried home to Reed on the clothing of her father. Plaintiffs' general and generic evidence failed to meet Delaware's product nexus standard. The Superior court should be affirmed.

## STATEMENT OF FACTS

Barbara Reed ("Reed") alleges that she suffered household exposure to asbestos while living with her father, Raymond F. Ryan ("father"), from 1957 to 1976 and while living with her former husband, Gary Attix ("husband"), from 1976 to the late 1970s. Both father and former husband were insulation workers employed by various insulation contractors who worked at various work sites throughout Delaware, New Jersey and Pennsylvania.[9] Reed's father was a career asbestos insulator with Local 42 and personally worked with asbestos products.[10] It is undisputed that neither Reed, nor her father, nor her former husband ever personally worked with sweeping compound.

Reed's father was previously deposed in an asbestos action on January 4, 1990 and on January 5, 1990 and identified a multitude of asbestos-containing products that he personally handled and worked with and/or around on a daily basis at various work sites throughout his thirty-two year career as a Local 42 insulator. It is undisputed that Reed's father never offered any testimony that he worked around others using asbestos-containing sweeping compound at DuPont Seaford and that in his extensive detailed job history he did not identify sweeping

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[9] Third Amended Complaint filed June 27, 2014 (ID 55652840); Superior Court Docket #141; (B30-54)

[10] Appellant's Opening Brief on Appeal, Statement of Facts, p. 6 at π2

compound as a source of asbestos exposure at DuPont Seaford. [11] Reed's father worked for a limited time at DuPont Seaford from mid-September 1963 to mid-October 1964 and again from April to September 1966.[12] While at DuPont Seaford in 1963/64, Reed's father did work somewhere in the 501 building which comprised six or seven floors but his main job was in the shop.[13] He also worked in the powerhouse. In 1966, he worked in the shop as well as the powerhouse. [14]

Reed's uncle, James Ryan ("Uncle"), testified about alleged asbestos exposure at DuPont Seaford in a deposition on June 22, 1990. It is undisputed that he also offered no testimony concerning others using sweeping compound at DuPont Seaford in that deposition nor in his Job History.[15] Uncle was deposed in in the present case twenty-four years later, on August 11, 2014, and testified that he worked at DuPont Seaford for three months in 1964 during the same general time period as Reed's father. However, he could not recall how many times he actually worked in the same gang with Reed's father. Uncle also worked at DuPont Seaford from January 1966 to July 1966. However he could not recall whether Reed's father was even there during that time nor could he recall the jobs

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[11] ACL's Reply Brief at p.2 (A1710); and Job History (Ex. F to ACL SJAB) (A1562-1564)
[12] Raymond Ryan 1/4/90 transcript; p. 48:1-6 and 62:1 (A1560 and A1561); and Job History, Ex. E and F to ACL's SJAB (A1556 and A1562-1564)
[13] Id.
[14] Id.
[15] ACL Reply Brief at p.3. (A1711); and James Ryan Job History, Ex. H to ACL SJAB (A1574-1576)

they might have done.[16] Uncle was then asked the following leading general question during his August 11, 2014 deposition by Reed's counsel:

> "Did you ever see **at any time** when you and "Reds" were at the Seaford plant the DuPont workers using a big barrel and scooping up a whitish-gray material?"

Uncle responded affirmatively and described the product as looking like granular kitty litter. He also testified that he saw a green product used in a similar manner. Uncle testified that he did not know whether the products he saw being used by others actually contained asbestos.[17] Uncle did not offer any testimony identifying the name brand, manufacturer, supplier and/or source of the products he saw being used by others.

William Farrall worked at DuPont Seaford as an insulator all over the plant from 1963 until the 1980s with the exception of some missed time in the 1970s.[18] He generally recalled Reed's father and uncle working off and on at the DuPont Seaford Plant as Local 42 insulation workers.[19] On one occasion, sometime in the early 1960s, he saw one barrel in the warehouse bearing the name Charles A. Wagner which contained a substance similar to the cement insulation product his

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[16] James Ryan 8/11/14 transcript, Ex. A to ACL Reply Brief, pp. 22, 27, 37, 41, 42 (A1717, A1719-27)
[17] Id. at 79, 89, 90, 92 (A1724-1727)
[18] William Farrall 4/24/86 Transcript, pp. 3,4, Ex. I to ACL SJAB (A1579, A1580)
[19] Id. at pp. 4-6 (A1580-A1582)

workers were using.[20] William Farrall had only seen this product on the floor one time.[21] Prior to this one time, William Farrall had never seen any material that looked similar to this substance used as a sweeping compound at DuPont Seaford.[22] He never found out what the material contained and never saw another container of that material again.[23] At other times he did see similar materials on the floor.[24] He had no recollection that raw asbestos was used at the DuPont Seaford Plant while he was employed there.[25] When questioned further about the one time that he saw the substance on the floor, he could not state who he saw using the product; he had no understanding of who had spread it on the floor; he only saw someone sweeping it up.[26] The product that he saw on the floor looked like insulating cement.[27] He did not inquire or talk to anyone about where the substance on the floor came from.[28] He could not name any coworkers that were present during that one occasion when he saw the substance on the floor.[29] He only saw the substance on the floor one time.[30] He did not look around the area to

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[20] Id. at pp. 71-73, 117 (A1584-1586, A1595)
[21] Id. at p. 103 (A1587)
[22] Id. at pp. 106, 107 (A1590, A1591)
[23] Id at pp. 118, 119 (A1596, A1597)
[24] Id. at p. 119 (A1597)
[25] William Farrall 4/24/86 Transcript, p. 91, Ex. B to ACL Reply Brief (A1730)
[26] Id. pp. 101, 102 (A1731, A1732)
[27] Id. pp. 102, 103 (A1732, A1733)
[28] Id. p. 103 (A1733)
[29] Id. p. 104 (A1734)
[30] Id. p. 106 (A1735)

see if there was any other potential source of the material he saw on the floor.[31] Prior to that one occasion, he had never seen any material that looked similar to this substance used as a sweeping compound at the Seaford plant.[32] He admitted that the substance he saw on the floor looked exactly like the cement insulation product he was using at the site and that it could have been cement.[33] He never found out what the material contained and he had seen other similar materials on the floor at Seaford.[34] William Farrall did not provide any testimony that Reed's father was in the proximity of anyone using the product he saw on one occasion on the floor in the early 1960s which he presumed had been contained in a single barrel in the warehouse and with which he associated the name Wagner.

James Farrall described seeing a sweeping compound used only around the spinning machines in the 501 building at DuPont Seaford sometime in 1963 or 1964. His cousin, William Farrall, told him it contained asbestos.[35]

Though now cited in Reed's Opening Brief, the deposition transcript of James Wheaton dated January 8, 2015 was not proffered as evidence in opposition to ACL's summary judgment motion.[36] Nor was the transcript ever identified in

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[31] Id. p. 109 (A1736)
[32] Id. pp. 109, 110 (A1736, A1737)
[33] Id. pp. 115-117 (A1738-A1739)
[34] Id. pp. 121, 122 (A1741, A1742)
[35] James Farrall 8/24/11 transcript, Ex. K to ACL SJAB (A16-6-1611)
[36] ACL SJAB (A1515-A1524)

Plaintiffs' Amended Final Witness and Exhibit List.[37] Further, in response to Defendants' Request for Admissions regarding identification of product identification witnesses, Reed admitted that Wheaton did not know and had never worked with Reed's father or her former husband and knew nothing about where and when they worked at job sites. In addition Reed admitted that Wheaton had no knowledge about any products that Reed's father and former husband worked with and/or around.[38] The testimony of Wheaton cited in Reed's Opening Brief on Appeal describes two different sweeping compounds, one gray cast and the other green but provides no evidence that Reed's father worked with and/or around either product.[39]

The deposition transcript of Victor Passwaters dated August 1, 1995 was not proffered as evidence in opposition to ACL's summary judgment motion but is now cited in Reed's Opening Brief. The cited testimony, page 33, states that Passwaters used a sweeping compound twice per day but does not provide any further details about the product nor any product nexus testimony concerning Reed's father or former husband.[40]

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[37] Plaintiffs' Amended Final Witness and Exhibit List (ID 57870589) (Superior Court Docket #286) filed on 9/15/15 at pp. 68, 69 (B55-B62)
[38] Plaintiffs' Updated Response to Defendants' Request for Admissions Regarding Product Identification Witnesses filed 6/25/14 (ID 55643436) (Superior court Docket #138) at pp. 45-49 (B63-B69)
[39] Reed's Opening Brief at page 20 citing Wheaton transcript 1/8/15 pp. 26,27
[40] Reed's Opening Brief at page 20 citing Passwaters transcript 8/1/95 p. 33

The deposition transcript of Philip Johnson dated September 30, 2014 was not proffered as evidence in opposition to ACL's summary judgment motion but is now also cited in Reed's Opening Brief. The cited testimony in Reed's Opening Brief[41] states that truckloads of a whitish gray sweeping compound were delivered to the plant but does not include any testimony relative to Reed's father or former husband.

The deposition transcript of Richard Ash dated April 18, 2008 was also not proffered as evidence in opposition to ACL's summary judgment motion but is now cited in Reed's Opening Brief also. The cited testimony in Reed's Opening Brief states that "bags would have to be refilled twice a week".[42] However, as pointed out in Appellee Charles A. Wagner Company, Inc. ("Wagner")'s Reply Brief below, Ash did not work at DuPont Seaford until 1968, years after Reed's father worked there.[43]

The deposition transcript of David Hyson dated July 31, 2009 was not proffered as evidence in opposition to ACL's summary judgment motion but is now cited in Reed's Opening Brief. Reed did attach page 39 of Hyson's transcript to its Answering Brief in Opposition to Wagner's summary judgment motion.[44]

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[41] Reed's Opening Brief at page 20 (incorrectly identified as "Philip Bailey" Dep., Sept. 30, 2014 at footnote 87)
[42] Reed Opening Brief at p. 20, footnote 88
[43] Richard Ash Transcript 4/18/08 at p. 72, Ex. 5 to CW Reply Brief (A2171)
[44] David Hyson

However, page 39 refers to sweeping compound between the years 1968 and the 1970s, years after Reed's father worked at DuPont Seaford.

ACL deposed Reed's product identification witness Robert Lankford in this case on December 18, 2014. Reed had specifically identified Lankford as being a witness who would provide testify about sweeping compound at DuPont Seaford.[45] Lankford, a DuPont employee who worked at DuPont Seaford from 1949 to 1985, identified the manufacturer/supplier of a gray sweeping compound used on the floors at DuPont Seaford as Johns Manville.[46]

The Affidavit of Steve Hayes was not proffered as evidence in opposition to ACL's summary judgment motion. Moreover, although the Affidavit had been signed on August 12, 2015, it was not produced in this case until September 14, 2015, after ACL's motion for summary judgment had been filed on July 27, 2015.[47] The Affidavit of Michael Ellenbecker signed on February 16, 2006 was also not proffered as evidence in opposition to ACL's summary judgment motion. ACL is unable to locate any record showing that the February 16, 2006 Ellenbecker Affidavit was previously produced in this action until first identified

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Transcript 7/31/09, p. 39, Ex. Q to CW SJAB (A1981)

[45] Plaintiffs' Amendment to Plaintiffs' Preliminary Product Nexus Witness & Exhibit List filed 9/29/14 (ID 56098729) (Superior Court Docket #179) (B70-B71)

[46] Robert Lankford Transcript 12/18/14 at pp. 14-19, 39, 52-54; Ex. D to ACL's Reply Brief (A1760-A1769)

[47] Notice of Service of Plaintiffs' Expert Reports dated 9/14/15 (ID 57866216) (Superior Court Docket #284) (B72)

on September 14, 2015, after ACL's motion for summary judgment had already been filed.[48] Neither expert was properly identified as a product identification/exposure witness nor tendered for deposition within the deadlines designated for completion of depositions of product identification witnesses.[49] Furthermore, neither expert affidavit contained any facts and/or opinions relative to sweeping compound and/or products used as sweeping compound at the DuPont Seaford plant.

[48] Plaintiffs' Final Witness and Exhibit List filed 9/14/15 (ID 57866390) (Superior Court Docket #285) (B73-B75)

[49] Master Trial Scheduling Order (As Amended on: July 2, 2015) filed in asbestos master case C.A. No. 77C-ASB-2 on 7/1/15 (ID 57488063) reflecting referenced deadlines for Reed case expired no later than 4/24/15 (see p. 9 reflecting Reed as February 2016 Trial Group and applicable deadlines at p. 24 - deadline nos. 1,3 and 4. (B1-29 at B9 and B24)

## ARGUMENT

### I. THE SUPERIOR COURT PROPERLY ENTERED SUMMARY JUDGMENT WHERE PLAINTIFFS FAILED TO ESTABLISH A PRODUCT NEXUS TO A SWEEPING COMPOUND SUPPLIED BY ACL

#### A. Questions Presented

**Did the Superior Court err in granting summary judgment to ACL, finding that the record evidence did not place Reed's Father in proximity to sweeping compound attributable to ACL and did not provide any facts inferring that Reed was exposed to dust from such a product?**

#### B. Scope of Review

On appeal, the Delaware Supreme Court reviews the grant of summary judgment *de novo*.[50]

#### C. Merits of Argument

#### 1. Standard Of Review On Motion For Summary Judgment

Summary judgment is appropriate if, after viewing the facts and reasonable inferences in the light most favorable to the non-moving party, an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find in that party's favor.[51] Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, that

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[50] *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192 (Del. 2012).

[51] *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192 (Del. 2012); *Nutt v. AC&S Co.*, 517 A.2d 690, 692 (Del.Super. Ct. 1986); *In re Asbestos Litig.*, 509 A.2d 1116 (Del.Super.Ct. 1986).

burden may be discharged by a showing that there is an absence of evidence to support the nonmoving party's case.[52] Once the moving party meets its initial burden by pointing out the absence of evidence supporting the non-moving party's claims, the non-moving party "is obliged to bring in some evidence showing a dispute of material fact."[53] If the non-moving party is unable to go beyond the pleadings and designate specific facts on personal knowledge showing there is a genuine issue for trial, the movant is entitled to summary judgment.[54]

A plaintiff is required to show more than a "scintilla" of evidence; instead, plaintiff must present evidence "on which the jury could reasonably find for the plaintiff."[55] The Court will not, however, "indulge in speculation and conjecture" and should decide the motion based on the evidence actually produced by the plaintiff, "not on evidence potentially possible."[56] Moreover, "[t]he Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based. 'Where there is no precedent fact, there can be no inference; an inference cannot flow from the

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[52] *Singletary v. Pennsylvania Dep't of Corrections*, 266 F.3d 186, 193 n.2 (3d Cir. 2001) (citing *Celotex v. Catrett*, 477 U.S. 317, 325 (1986); *In re Asbestos Litig.*, Del.Super.Ct., C.A. No. 90C-04-084, Gebelein, J. (Nov. 4, 1994) (showing may be satisfied by "pointing out" to court that no evidence exists to support non-moving party's case).
[53] *Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966).
[54] *See Burkhart v. Davies*, 602 A.2d 56 (Del. 1991).
[55] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).
[56] *In re Asbestos Litig.*, 509 A.2d at 1117.

nonexistence of a fact, or from a complete absence of evidence as to the particular fact.'"[57]

Delaware courts have not hesitated to grant summary judgment or directed verdicts on issues of negligence and/or proximate cause where undisputed facts compel but one conclusion.[58] When possible, disposition of litigation by motion for summary judgment should be encouraged as it can result in prompt, expeditious and economical ending of lawsuits.[59]

### 2. No Record Evidence Of Reed's Father's Proximity To Sweeping Compound Allegedly Supplied By ACL

The Superior Court's finding that none of the witness testimony placed Reed's father in proximity to an asbestos-containing sweeping compound [attributable to ACL] at a time when it was being used is supported in the record.

#### (a) Reed's Father Provided No Proximity Evidence

It is undisputed that despite being deposed over the course of several days in

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[57] *In re Asbestos Litig (Helm)*, 2007 WL 1651968, *16 (Del.Super.Ct. May 31, 2007) (quoting 32A C.J.S. Evidence §1341 at 763 (1996)), aff'd *sub. nom.*, 945 A.2d 593 (Del.2008).

[58] See, e.g., *Faircloth v. Rash*, 317 A.2d 871 (Del. 1974); *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967); *Hercules Power Co. v. DiSabatino*, 188 A.2d 529 (Del. 1963); *DiSabatino v. Ellis*, 184 A.2d 469 (Del. 1962); *Jewell v. Pennsylvania Railroad Co.*, 183 A.2d 193 (Del. 1962); *McGuire v. McCollum*, 116 A.2d 897 (Del.Super.Ct. 1955); *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889 (Del.Super.Ct. 1942).

[59] *Davis v. University of Del.*, 240 A.2d 583, 585 (Del.1968); see also *State v. Regency Group*, 598 A.2d 1123, 1127 (Del.Super. 1991); *Hartman v. Buckson*, 467 A.2d 694, 700 (Del.Ch. 1983).

1990 about alleged asbestos exposure, Reed's father did not offer any testimony that he ever worked with and/or around others using any asbestos-containing sweeping compound at DuPont Seaford.[60]

**(b) Reed's Uncle Provided No Proximity Evidence**

Although Reed's Uncle worked for three months at DuPont Seaford in 1964 during the same time period as Reed's father, he could not recall how often he even worked in the same gang or area as Reed's father. While working at the plant in 1966, Reed's uncle could not even recall whether Reed's father was at the plant. Reed's uncle was asked generally whether he, "at any time" when Reed's father was ***at the plant***, saw a whitish-gray material used on the floor at DuPont Seaford. He testified that he saw both a whitish-gray material and a green product used in a similar manner, describing both products as looking like granular kitty litter. Reed's Uncle did not know whether these two products he saw being used by others actually contained asbestos.[61] The testimony of Reed's Uncle fails to associate the products he saw with a particular time and place, fails to place them in the vicinity of Reed's Father and fails to associate the products with a particular manufacturer, supplier or source. Further, Reed's Uncle's testimony fails to provide evidence that the products contained asbestos or created friable dust which

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[60] ACL's Reply Brief at p.2 (A1710); and Job History (Ex. F to ACL SJAB) (A1562-1564)

[61] James Ryan 8/11/14 transcript, Ex. A to ACL Reply Brief, pp. 22, 27, 37, 41, 42, 79, 89, 90, 92 (A1717-A1727)

was carried home on Reed's father's clothing. The testimony of Reed's Uncle cited by Reed in her Opening Brief does not support the bold unsupported assertions that the product was raw asbestos or that it was produced by ACL and supplied by Wagner.[62]

**(c) William Farrall Provided No Proximity Evidence**

The Superior Court correctly summed up the testimony of William Farrall who worked at DuPont Seaford as an insulator all over the plant from 1963 until the 1980s and only generally identified Reed's father as a Local 42 insulation worker [63] During all those years at the plant, William Farrall only saw one barrel of a product in the warehouse sometime in the early 1960s bearing the name Charles A. Wagner containing a substance which looked similar to the cement insulation product his workers were using.[64] William Farrall had only seen this product on the floor one time.[65] He could not name any coworkers, let alone Reed's father, who were present during that one occasion when he saw the substance on the floor.[66]

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[62] Reed's Opening Brief at page 18 citing James Ryan 8/11/14 transcript at p.79 (A1724)
[63] William Farrall 4/24/86 Transcript, pp. 3-6, Ex. I to ACL SJAB (A1579-1582)
[64] Id. at pp. 71-73, 117 (A1584-1586, 1595)
[65] Id. at p. 103 (A1587)
[66] Id. p. 104 (A1588)

**(d) James Farrall Provided No Proximity Evidence**

James Farrall's testimony (referred to as "Mr. Farrall" in the Superior Court's Order), also failed to place Reed's father in proximity to a sweeping compound attributable to ACL at the time it was being used. James Farrall described a sweeping compound used only around the spinning machines in the 501 building at DuPont Seaford sometime in either 1963 or 1964 and his testimony that it contained asbestos was based on inadmissible hearsay – a statement made by his general foreman. [67] Inadmissible hearsay is insufficient to create a genuine issue of material fact.[68] As previously stated herein, Reed's father worked at DuPont Seaford from approximately mid-September 1963 to mid-October 1964. There is no evidence placing Reed's father in the same area of the plant at the same time when James Farrall saw this product being used.

As pointed out in the Superior Court's Order, none of the above testimony constitutes evidence from which a jury could reasonably infer, without undue speculation, that Reed was exposed to friable asbestos from her father's clothing because none of the witnesses place Reed's father in proximity to sweeping compound, assuming it contained asbestos and was attributable to ACL at the time it was being used in a manner creating friable dust.

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[67] James Farrall 8/24/11 transcript, Ex. K to ACL SJAB (A1608-1611)
[68] *Collins v. Ashland, Inc.*, 2009 Del. Super. LEXIS 7, Del. Super. C.A. No. 06C-03-339, Jurden, J. (January 6, 2009); D.R.E. 801 and 802.

### (e) Plaintiffs' New Evidence Against ACL Is Not Properly Before The Court, But Also Fails To Provide Evidence Of Proximity

In its Opening Brief on Appeal, Reed cites to the deposition transcripts of James Wheaton, Victor Passwaters, Philip Johnson, Richard Ash and David Hyson for the proposition that raw asbestos was used as a sweeping compound at Seaford. However, Reed did not cite to any of these witnesses in its opposition to ACL's motion for summary judgment.[69] Delaware Supreme Court Rule 8 provides that only questions fairly presented to the trial court may be presented for review. A party's failure to raise an argument in its answering brief constitutes a waiver of that argument.[70] This Court has declined to review documents that are presented for the first time on appeal.[71] Accordingly, Reed waived the right to proffer these witnesses' testimony against ACL on appeal. In any event, although these additional witnesses all generally testified as to the use of a sweeping compound at DuPont Seaford, none of them provided any testimony placing Reed's father in proximity to a particular sweeping compound attributable to ACL at the time and place it was being used at the plant. Reed admitted Wheaton had no knowledge

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[69] ACL SJAB (A1515-1524)
[70] *King v. Verifone Holdings, Inc.*, 994 A.2d 354, 361 n.21 (Del. Ch. 2010); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 n.3 (Del. 1997).
[71] *Gately v. Gately*, 832 A.2d 1251 (Del.2003).

about any products Reed's father worked with and/or around.[72] Reed failed to cite to any testimony of Passwaters or Johnson concerning the products Reed's father worked with and/or around. (See footnotes 40 and 41, *supra*). Further, the testimony of Hyson and Ash relates to sweeping compound used in 1968 or later which is not relevant to Reed's father's limited work at the plant in 1963/64 and 1966.[73]

**(f) The Superior Court Properly Applied Precedent Relating To Proximity**

The Superior Court correctly held that Reed's claims could not survive the summary judgment criteria citing several authorities. In *Smith v. Advanced Auto Parts, Inc.*, 2013 WL 6920864 (Del. Super. Ct. Dec. 30, 2013) it was held that to survive summary judgment, a plaintiff's claim must be based on more than mere speculation:

> "The presumption afforded the non-moving party in the summary judgment analysis is not absolute. The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based. Where there is no precedent fact, there can be no inference; an inference cannot flow from the nonexistence of a fact, or from a complete absence of evidence as to the particular fact. Nor can an inference be based on surmise, speculation, conjecture, or guess, or on imagination or supposition." (citing *In re Asbestos Litig.*, C.A. No. N10C-12-011 ASB, 2012 Del.Super. LEXIS 144,

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[72] Plaintiffs' Updated Response to Defendants' Request for Admissions Regarding Product Identification Witnesses filed 6/25/14 (ID 55643436) (Superior court Docket #138) at pp. 45-49 (B63-B69)

[73] Richard Ash Transcript 4/18/08 at p. 72, Ex. 5 to CW Reply Brief (A2171) ; David Hyson Transcript 7/31/09, p. 39, Ex. Q to CW SJAB (A1981)

2012 WL 1408982 at *2 (Del.Super. Apr. 2, 2012 (quoting *In re Asbestos Litig. (Helm)*, C.A. N01C-11-239, 2007 Del.Super. LEXIS 155, 2007 WL 1651968 at *16 (Del.Super. May 31, 2007).

The Superior Court also cited *Nutt v. A.C.&S, Co., Inc.,* 517 A.2d 690, 692 (Del.Super.Ct. 1986) which held that a plaintiff must 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. (citing *In Re: Asbestos Litigation*, 509 A.2d 1116 (Del.Super. 1986) and *Clark v. A.C.&S.*, Del.Super. C.A. No. 82C-DE-26, Poppiti, J. (Sept. 3, 1985), 1985 Del.Super. LEXIS 1249.

In *Nutt*, the Court denied summary judgment to a supplier of asbestos textile products. The Court found that two of the plaintiffs had clearly worked with asbestos textile products; their coworkers testified that those products were used in the areas where the plaintiffs worked; and there was no evidence that another manufacturer was supplying the products during the relevant time period. The Court noted that its ruling was based strictly on the facts developed in that record and that if there were any evidence of record that another manufacturer was in fact supplying the asbestos products, absent product identification there would be insufficient product nexus. The Court in *Nutt,* however, granted summary judgment to the same supplier against a third plaintiff whose only connection with the supplier's product came from a coworker who initially testified in a deposition

that he had not frequently used the product at issue but later submitted an affidavit made after the defendant's opening brief had been filed, stating that he had used the product extensively in the plaintiff's area during the relevant time period. The Court rejected the late affidavit as creating sham issues, finding that it was not credible evidence of the plaintiff's exposure.

In the case *sub judice*, it is undisputed that Reed's father never worked with sweeping compound, as noted above. Furthermore, the testimony of Robert Lankford, a witness specifically identified by plaintiff's counsel to testify about sweeping compound at DuPont Seaford, provided testimony that he was a DuPont employee at DuPont Seaford from 1949 to 1985 and that Johns Manville was the manufacturer/supplier of a gray sweeping compound used at the plant. Under *Nutt*, *supra,* where there is evidence of another manufacturer/supplier of the asbestos product, without specific product identification, there is insufficient product nexus. As discussed in *Nutt*, *supra,* where such evidence exists, the burden does not shift to a defendant to show that its product was not present. Moreover, to hold a defendant liable under such circumstances would amount to holding a defendant liable under a market-share liability which has been expressly rejected in Delaware.[74]

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[74] *Nutt v. A.C.&S. Co., Inc.*, 517 A.2d 690, 694 (Del. 1986).

Under Delaware law, a plaintiff asserting a claim for asbestos-related injuries must introduce evidence showing a product nexus between a particular defendant's product and plaintiff's asbestos-related injuries. Mere presence of a product at a job site is not sufficient - Delaware Courts require that a plaintiff show that he was in proximity to the product at the time it was being used. *Nutt v. A.C.&S. Co.,* 517 A.2d 690, 692 (Del.Super. 1986). Reed has presented no such evidence. The record is devoid of any evidence that Reed's father was working in close proximity to asbestos-containing sweeping compound supplied by ACL which released fibers at the time and then carried those fibers home on Reed's Father's work clothes and then ingested by Reed.

The Superior Court also correctly applied the product nexus standard as espoused in *Merganthaler v. Asbestos Corp. of Am., Inc.,* 1988 WL 16284 (Del.Super.Ct. July 13, 1988); *In re Asbestos Litig. (Helm)*, 2007 WL 1651968 (Del.Super. May 31, 2007) and *Farrall v. A.C.&S., Inc.*, 1988 WL 167320 (Del.Super. May 11, 1988). Implicit within the product nexus standard is the requirement that the particular defendant's product must be susceptible to releasing fibers which are capable of ingestion or respiration. *In re Asbestos Litig.*, 2007 Del.Super. LEXIS 155 *65 (Del.Super.Ct. 2007), aff'd 945 A.2d 593 (Del.2008) citing *Merganthaler v. Asbestos Corp. of America* 1988 WL 116405 at *1-2 (Del.Super. Oct. 25, 1988). To meet this product nexus standard, a plaintiff must

establish a connection in space and time to a particular defendant's product. 2007 Del.Super. LEXIS 155 at *65-66. Although Delaware courts have held that a plaintiff can survive summary judgment if there is testimony that asbestos-containing products were used at a worksite during the time plaintiff was employed there, it is insufficient to overcome summary judgment if the "time" and "place" testimony is based on speculation or conjecture. *Farrall v. A.C.&S. Co.*, 1988 WL 167320 (Del.Super. May 11, 1988), 1988 Del.Super. LEXIS 176 at *6 (Del.Super.Ct. 1988) (citing *In re: Asbestos Litigation*, 509 A.2d 1116 at 1117-18 (Del.Super. Ct. 1986).

In *Mergenthaler*, where summary judgment was denied on the issue of product nexus in an asbestos case, it was undisputed that the plaintiffs (Haveg plant employees) were in the vicinity, on a daily basis, of a continuous Chemite-process which utilized a defendant's asbestos-containing paper. Further, there was uncontroverted evidence of specific dates of potential exposure via saturator logs which documented use of the particular defendant's paper on specific dates within the relevant time period. In the case *sub judice*, no such evidence exists. Reed's father was previously deposed about the details of his limited period of work at DuPont Seaford as an asbestos insulator through the Local 42 union and did not offer any testimony that he worked with, or in proximity to others using, sweeping compound at DuPont Seaford. There is no testimony of coworkers who actually

worked side by side with Reed's father at any particular time and area at DuPont Seaford while sweeping compound identified as supplied by ACL was being used.

In *Farrall v. A.C.&S. Co.*, 1988 WL 167320 (Del.Super. May 11, 1988), the plaintiff was also an asbestos insulation worker who performed work at the Haveg plant on several occasions in the boiler or equipment room. Similarly, he did not provide any testimony that any Haveg employees were around him or that Haveg's operation in point of time and location would lead to a reasonable conclusion that at the time he worked there he was exposed to asbestos fibers which did not originate with his own work. The Court granted summary judgment in favor of the plant owner finding that the evidence did not establish a reasonable inference that asbestos fibers originating with Haveg were present when and where plaintiff was at the Haveg property. The Court noted that although *Farrall* involved claims by a business invitee against the owner of the premises, and therefore liability did not turn on showing that a particular manufacturer's asbestos-containing product was used in the work area, nevertheless a similar product nexus approach should be followed requiring a plaintiff to establish evidence supporting the conclusion that he was exposed to asbestos fibers emanating from the portion of the plant where asbestos was used. The Court further noted that although direct testimony concerning recollection that particular products were used at a time and place coinciding with a claimant's work has been accepted as sufficient to overcome

summary judgment, the Court would decline to sustain a claim which rests on speculation or conjecture or on testimony which can not meet the "time and place" standard. (citing *In Re: Asbestos Litigation*, Del.Super., 509 A.2d at 1117-1118 (1986), *aff'd. Nicolet, Inc. v. Nutt*, Del.Supr., 525 A.2d 146 (1987). In the case *sub judice*, there is no such "time and place" evidence.

### 3. The Superior Court Properly Found That The Record Failed To Establish That Reed Was Exposed To Any ACL Asbestos Fiber Brought Home On Reed's Father's Clothing

Reed asserts that ACL did not raise the issue of the requirement of friability. However, ACL did raise the product nexus standard in its motion, specifically asserting that the Delaware standard requires that the particular defendant's product to which the plaintiff alleges exposure must be friable - the product must be susceptible to releasing fibers which are capable of ingestion or respiration. ACL further asserted, citing the *Helm* decision, that a co-worker must place a plaintiff in the vicinity of a specific location, at a specific time, where friable asbestos is present.[75] Further, in its Reply Brief, ACL asserted that Plaintiffs had failed to establish a genuine issue of material fact that ACL's fibers were the source of any "dust" present on Reed's father's work clothes and/or that Reed

[75] ACL MSJ (A1456, 1457)

breathed in those fibers from her father's work clothes when he returned home.[76] As noted by the Superior Court's Order granting ACL summary judgment, the requirement that a particular defendant's product must be friable or capable of ingestion or respiration is implicit within the product nexus standard. It was also implicit in ACL's argument below that because Reed could not establish that her father was in proximity to others using sweeping compound attributable to ACL, in a manner which would release fibers attributable to ACL, then Reed had not met the product nexus standard in any manner, including the friability requirement.

The Superior Court's finding that Reed failed to present evidence that the alleged sweeping compound created dust was supported in the record. David Hyson's testimony (which was not proffered in opposition to ACL's motion for summary judgment below) referred to a sweeping compound he saw in 1968 or later – after Reed's father worked at DuPont Seaford. [77] There is no evidence that Reed's father was exposed to the sweeping compound that Hyson saw in 1968. Further, as noted by the Superior Court, Reed cited the testimony of James Farrall who, even after being asked a leading question by his counsel as to whether throwing the sweeping compound created dust, specifically testified that he could not say it was dust.[78]

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[76] ACL Reply Brief (A1709,A1710)
[77] David Hyson Transcript 7/31/09, p. 39, Ex. Q to CW SJAB (A1981)
[78] James Farrall Transcript 6/20/11, Ex. M to CW SJAB (A1963)

Reed alleges that *Clark v. A. C. & S. Co., Inc.,* Del.Super., C. A. No. 82C-DE-26, Poppiti, J. (September 3, 1985) (Order), 1985 Del.Super. LEXIS 1249, is the appropriate standard for product nexus. In *Clark*, there was no evidence that the plaintiff worked in an area of the plant where others were installing and/or removing the asbestos insulation product at issue. In opposition to the defendant's motion for summary judgment, the plaintiff presented an expert affidavit in which the expert opined that a worker walking past an area where workers were installing or removing asbestos insulation would be exposed to asbestos fibers. The expert further opined that if a worker was in a building adjacent to where insulation work was being performed over a period of time and windows and/or doors were open facing the area of installation, asbestos airborne particles would carry into his area and contaminate him and the air he breathed. Under these sets of facts, based on the expert's affidavit, the Court used its discretion to defer summary judgment in order to permit further inquiry into the location of the product in relation to the various locations of the plaintiff during his working hours. In the case *sub judice*, no such expert affidavit was proffered in opposition to ACL's motion for summary judgment.

Reed failed to establish that sweeping compound supplied by ACL was used in proximity to Reed's father at DuPont Seaford. ACL objects to any attempt by Reed, for the first time on appeal, to attempt to rely on the expert affidavits of

Steve Hayes and Michael Ellenbecker to establish that sweeping compound [attributable to ACL] used in other areas of the plant would have travelled to areas where Reed's father was working and then travelled home on his clothes. Neither affidavit was raised below in opposition to ACL's motion for summary judgment. Therefore, the affidavits should not be considered on appeal. Neither affidavit was even produced until after ACL had filed its motion for summary judgment nor was either expert properly timely identified as a product identification witness. Furthermore, these affidavits do not address sweeping compound or the circumstances of Reed's father's work. Like the general testimony proffered by Plaintiffs, they are cited now in an attempt to evade the legal requirement of evidence of product nexus, legal consequences of lack of evidence of product nexus.

Pursuant to the Master Trial Scheduling Order ("MTSO") in effect at the time ACL filed its motion for summary judgment, the deadlines for plaintiffs to have identified all product identification witnesses and exhibits, including those who would offer testimony establishing exposure to any particular defendant's product, had expired months before on April 24, 2015.[79] The deadline under the

[79] See MTSO (As Amended on: July 2, 2015) filed in asbestos Master Case C.A. No. 77C-ASB-2 on 7/1/15 (ID 57488063) reflecting referenced deadlines for Reed case expired no later than 4/24/15 (see p. 9 reflecting Reed as February 2016 Trial Group and applicable deadlines at p. 24 - deadline nos. 1,3 and 4. (B1-B29 at B9 and B24)

MTSO requiring plaintiffs to file initial witness and exhibit lists serve the purpose of putting defendants on notice of the plaintiffs' product identification witnesses prior to the MTSO deadline for taking their depositions which, in turn, is intended to fix the factual record upon which defendants are to decide whether to seek summary judgment.[80] On August 20, 2015, an Order was entered approving an agreement with plaintiffs to modify the deadline for Plaintiffs to respond to summary judgment motions but specifically stating that no responses filed by Reed would contain any affidavits supplementing the product identification record.[81] As noted in *Helm*[82], product nexus witnesses must be properly identified in discovery before they may be used to defeat a motion for summary judgment. In the context of asbestos litigation, a defendant must be put on notice of the specific witnesses that will be called upon to establish product nexus against that defendant. *Stigliano v. Nosroc Corp.*, 2006 Del.Super. LEXIS 486 (Del.Super. Nov. 21, 2006). Once the discovery period is closed, the defendant is then entitled to test the sufficiency of the plaintiff's evidence with confidence that the record is fixed. *Id.*

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[80] See Decision of Master Boyer dated April 1, 2013, *In re: Asb. Litig., Limited to: Caruso and Wells*, C.A. Nos. 11C-09246 ASB and 11C-03-184 ASB. (Exhibit A)
[81] Order Approving Agreements and Stipulations Modifying Applicable Master Trial Scheduling Order And/Or Standing Order No. 1 Deadlines filed on Aug. 20, 2015 (ID 47741915) (last page); (Superior Court Docket #264) (B76-B79)
[82] *In re Asbestos Litig.*, 2007 Del.Super. LEXIS 155 (Del.Super.Ct. 2007) citing *Stigliano v. Nosroc Corp.*, 2006 WL 3492209 (Del.Super. Oct. 26, 2006).

Additionally, neither expert affidavit contains any facts and/or opinions relative to the use of sweeping compound or conditions which existed at the DuPont Seaford plant at the time and in the areas where Reed's father worked. Mr. Hayes' affidavit concerns products used by insulators and Reed's father never used sweeping compound.[83] Mr. Ellenbecker's affidavit is merely a generic report providing no discussion of the DuPont Seaford plant or of Reed's father's work.[84] Plaintiffs are trying to evade the legal requirement of evidence of product nexus and fill in the gaps of the deficient product nexus evidence with generic information. Without specifically saying so, Plaintiffs were and are asking the Courts to gut the legal requirement of product nexus by finding generic evidence sufficient to defeat a motion for summary judgment. The Superior Court properly refused to do so.

### 4. Oral Argument Was Not Mandated Below

Reed mentions in its Opening Brief on appeal that the Superior Court granted summary judgment without holding oral argument. To the extent that it is suggested that this was improper, Reed has failed to cite any authority supporting that position. There is no right to oral argument on a motion except where expressly provided by statute or rule. See *Martinez v. E.I.DuPont De Nemours and*

[83] Hayes Affidavit, p. 2 (A1339-1340)
[84] Ellenbecker's Affidavit (A472-A474)

*Co.*, 2012 Del.Super. LEXIS 550 (Del.Super. 2012) noting that Superior Court Civil Rule 78(c) provides that all motions will be decided without oral argument unless argument is scheduled by the Court and that where the Standing Order governing asbestos litigation is silent on issues of procedure, including the right to oral arguments, the Court must refer to its own rules and statutes to govern.

### 5. The Record Evidence In The Case *Sub Judice* Differs From That In *Nack v. Charles A. Wagner, Inc.*, 803 A.2d 428 (Del. 2002)

ACL respectfully submits that this Court's decision in *Nack v. Charles A. Wagner, Inc.*, 803 A.2d 428 (Del. 2002) did not preclude ACL from seeking summary judgment nor should ACL be bound by the factual record presented in *Nack* fourteen years ago. In 2011, the Delaware Superior Court agreed and, in granting summary judgment in favor of ACL in *In re Asb. Litig, (Truitt),* Del.Super. C.A. No. N10C-06-072 ASB, Ableman, P. (Oct.3, 2011)[85], held that the *Nack* decision did not bar the Court from considering whether a new plaintiff has shown an appropriate nexus between the alleged exposure and ACL's products.

> "Collateral estoppel, also known as issue preclusion, bars re-litigation of issues of fact previously adjudicated. (citing *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del.2000)). To determine whether collateral estoppel bars consideration of an issue, a court must determine

[85]*In Re Asbestos Litig. (Truitt)*, Del.Super., C.A. No. N10C-06-072, Ableman, J. (Oct. 3, 2011), 2011 Del.Super. LEXIS 478; ACL Reply Brief, Exhibit C (A1744-1757)

whether:

(1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. (*Id.* At 535 (citations omitted))."

The Superior Court in *Truitt* held that it was not appropriate to apply the doctrine of collateral estoppel because ACL was not a party in the *Nack* litigation, the issues presented were not identical, and ACL did not have a "full and fair opportunity" to litigate the product nexus question in the *Nack* litigation. Countless depositions taken in asbestos litigation since *Nack* indicate that there were numerous products used as a sweeping compound at DuPont Seaford during the relevant time period. As noted by the Court in *Truitt, supra.*, Truitt worked at DuPont Seaford from 1960 until 1992 and testified he used a black compound in the 1960s as well as a green product and later a red product. Reed's uncle also described a green sweeping compound in the case *sub judice.* In addition, there is now deposition testimony taken in the present case, of Robert Lankford, a DuPont Seaford employee from 1949 to 1985, who testified that the manufacturer/supplier of a gray sweeping compound used at DuPont Seaford was Johns Manville.[86] In spite of Lankford's testimony, Reed contends that the "whitish gray material" Reed's uncle saw others using at Dupont Seaford (without

[86]ACL Reply Brief, Exhibit D, Deposition Transcript of Robert Lankford, December 18, 2014, pp. 14-19, 39, 52-54; (A1758-1769)

any nexus to Reed's father) was supplied by Wagner/ACL. However, in light of Lankford's testimony, Reed is not entitled to an inference that the sweeping compound he saw was supplied by ACL as opposed to Johns Manville because such inference would be based on speculation. It is well established under Delaware law that mere presence of a product at a job site is not sufficient; plaintiff must introduce evidence showing a product nexus between a *particular* defendant's product and plaintiff's asbestos-related injuries and further show that he was in proximity to the product at the time it was being used. *Nutt v. A.C.&S. Co.,* 517 A.2d 690, 692 (Del.Super. 1986).

The Court should only consider the record presented in this case to determine whether Reed has established sufficient evidence of her father's alleged exposure to ACL's asbestos fibers from sweeping compound and then also whether she was then later exposed to those same fibers from her father's clothes during the limited time that she lived with her father while he worked at DuPont Seaford.

## CONCLUSION

Under Delaware's product nexus standard, Reed is not entitled to a presumption of exposure for which ACL is liable based on evidence that her father worked at the DuPont Seaford plant during a time frame within which Wagner may have shipped sweeping compound to the plant. Plaintiffs' product identification

witnesses testified about sweeping compound products at the plant generally. None of the witnesses addressed Reed's father's particular work at the DuPont Seaford plant, nor did their testimony provide evidence that a sweeping compound attributable to ACL was used by others in his presence, or that respirable fibers were then taken home on his clothes and ingested by Reed. Plaintiffs failed to establish the product nexus mandated under the law of Delaware. Plaintiffs' evidence failed to raise a genuine issue of material fact. Accordingly, the Superior Court properly granted summary judgment in favor of ACL. For the same reasons, this Honorable Court should affirm the judgment.

Respectfully submitted,

GOLDFEIN & JOSEPH

/s/ Willard F. Preston, III
WILLARD F. PRESTON, III, ESQ.
Attorney Bar #: 4663
3513 Concord Pike, Suite 2000
Wilmington, DE 19803
(302) 656-3301
Attorney for Appellee/Defendant below,
Asbestos Corporation Limited