

TABLE OF CONTENTS

	PAGE
NATURE OF THE PROCEEDINGS	1
SUMMARY OF ARGUMENT	3
STATEMENT OF FACTS	4
A. Plaintiff Michael Jamesson’s eleven (11) consecutive Years of work at the Cedar Rapids Square D. Plant.	4
B. Decedent Roger Gordon’s work as Plaintiff Michael Jamesson’s supervisor at the Cedar Rapids Square D Plant during the first six months of Mr. Jamesson’s Work as a laborer at the facility in the year 1968.	5
C. Reichhold, Inc. asbestos-containing phenolic molding Compound products which were used at the Square D Company plant in Cedar Rapids, Iowa.	5
D. The Superior Court’s own description of the Manufacturing operating operations and dusty use of Reichhold, Inc. asbestos-containing phenolic molding Compounds at the Cedar Rapids Square D plant.	11
ARGUMENT.	14
I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT UPON ALLEGED NON- EXPOSURE GROUNDS BECAUSE PLAINTIFFS MICHAEL JAMESSON AND PHYLLIS GORDON PRESETED SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF THEIR (DECEDENT’S) EXPOSURES TO DEFENDANT REICHHOLD, INC.’S ASBESTOS- CONTAINING PHENOLIC MOLDING COMPOUND PRODUCTS TO DEMONSTRATE THE EXISTENCE	14

OF GENUINE ISSUES OF MATERIAL FACT UNDER
IOWA SUBSTANTIVE LAW.

A.	Question Presented.	14
B.	Scope of Review.	14
C.	Merits of Argument.	
1.	Standard of Review on Motion for Summary Judgment.	15
2.	Under Iowa substantive law Plaintiffs Michael Jamesson And Phyllis Gordon presented sufficient circumstantial Evidence of their (decedent's) exposures to Defendant Reichhold, Inc,'s asbestos-containing phenolic molding Compound products to demonstrate the existence of Genuine issues of material fact.	15
3.	Insufficient Product Nexus Analysis Below.	19
	CONCLUSION	26

EXHIBIT

<i>In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.,</i> 2014 WL 4180186, 2014 Del. Super. LEXIS 418 (Del. Super. August 21, 2014).	A
Order dated November 30, 2015 in <i>Michael Jamesson, et. al., v. Reichhold, Inc., et. al.,</i> C.A. N12C-03-149-ASB	B

TABLE OF AUTHORITIES

Cases

<i>Beeman v. Manville Corp. Asbestos Disease Compensation Fund</i> , 496 N.W.2d 247 (Iowa 1993)	16,17,22,23,24
<i>Charles H. Conway v. AC&S Co., Inc.</i> , 1987 Del. Super. LEXIS 1049 (Del. Super. February 3, 1987)	17
<i>Dabaldo v. USR Energy & Const.</i> , 85 A.3d 73 (Del. 2014)	15
<i>Heddinger, et. al. v. Ashland Oil, Inc.</i> , 2012 Del. Super. LEXIS 8 (Del. Super. January 13, 2012)	16-18,23,25
<i>In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.</i> , 2014 WL 4180186, 2014 Del. Super. LEXIS 418 (Del. Super. August 21, 2014)	passim
<i>In re: Hawaii Fed. Asbestos Cases</i> , 960 F.2d 806 (9 th Cir. 1992)	17,24
<i>Jones v. Crawford</i> , 1 A.3d 299 (Del. 2010)	15
<i>Sostre v. Swift</i> , 603 A.2d 809 (Del. 1992)	15
<i>Spaur v. Owens-Corning Fiberglas Corp.</i> , 510 N.W.2d 854 (Iowa 1994)	16-18,23, 24

NATURE OF THE PROCEEDINGS

The two separately-commenced product liability actions, which have been consolidated for briefing purposes in the instant appeal, arise from asserted asbestos exposures sustained by two men — Michael Jamesson and Roger Gordon — to asbestos-containing phenolic molding products which were produced and/or supplied by Defendant Reichhold, Inc. ("Reichhold").¹ These asserted exposures to Reichhold's asbestos materials occurred during the respective years that Mr. Jamesson and Mr. Gordon worked for Square D Company ("Square D") (n/k/a Schneider Electric) at the company's Cedar Rapids, Iowa plant, which received and used these Reichhold asbestos product raw materials in the plant's manufacturing processes.

In their respective Complaints -- Plaintiff Michael Jamesson and Plaintiff Phyllis Gordon, the latter Individually, and as Executor of the Estate of decedent Roger Gordon -- alleged product liability negligence and strict products liability

¹ See, the Memorandum Opinion and Order filed by the Superior Court on August 21, 2014 (Ex. A) granting summary judgment motions by defendant Reichhold, Inc. in *Michael J. Jamesson v. Reichhold, Inc., et. al.*, C.A. No. 12C-03-149 ASB (Del. Super. August 21, 2014) and in *Phyllis Gordon, Individually and as Executor of the Estate of Roger Gordon v. Reichhold, Inc. et. al.*, C.A. No. 11C-09-132 ASB (Del. Super. August 21, 2014). This decision addressed alleged non-exposure summary judgment motions made by Defendant Reichhold, Inc., in four separate cases -- including the aforementioned two involving Plaintiffs Michael Jamesson and Phyllis Gordon – as well as two others in which the Superior Court denied Reichhold's motions. *Id.* This decision is reported as, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418 (Del. Super. August 21, 2014)

against Defendant Reichhold, Inc.² (A150-A167 (Jamesson), A1060-1083 (Gordon)).

Defendant Reichhold filed its Motion for Summary Judgment upon purported non-exposure grounds.³ Following oppositional briefing and oral argument, the Superior Court on August 21, 2014 granted Reichhold's non-exposure-based summary judgment motions.⁴

Thereafter, on October 6, 2014, defendant Reichhold filed a Chapter 11 bankruptcy petition⁵, and Reichhold was engaged in these Chapter 11 proceedings until May 2, 2016.⁶

Plaintiff Michael Jamesson filed his timely notice of appeal on May 2, 2016⁷ and Plaintiff Phyllis Gordon filed her timely amended notice of appeal on September 22, 2014.⁸ The instant filing is Plaintiffs'/Appellants' Opening Brief in support of their jointly-briefed appeals.

² See, generally, the Complaints filed August 14, 2012, in *Michael J. Jamesson v. Reichhold, Inc., et. al.* (A150-A167) and December 6, 2011, in *Phyllis Gordon, Individually and as Executor of the Estate of Roger Gordon v. Reichhold, Inc. et. al.*, (A1060-A1083).

³ Reichhold's motion for summary judgment (MSJ) in *Jamesson* (A89-A400); Reichhold's motion for summary judgment in *Gordon* (A999-A1307)

⁴ Memorandum Opinion and Order filed by the Superior Court on August 21, 2014 (Ex. A).

⁵ See Appellant's Response to Notice to Show Cause in *Jamesson v. Reichhold, Inc.*, Case No. 219, 2016 at D.I. 3.

⁶ *Id.*

⁷ Jamesson, C.A. 219, 2016, D.I. 1.

⁸ Gordon, C.A. 534, 2014, D.I. 1.

SUMMARY OF THE ARGUMENT

1. The Superior Court erred when it usurped the role of the jury and granted summary judgment in this matter upon alleged non-exposure grounds where Plaintiffs Michael Jamesson and Phyllis Gordon presented sufficient circumstantial evidence of their (decedent's) exposures to asbestos-containing phenolic molding compound products to demonstrate the existence of genuine issues of material fact under Iowa substantive law. There was evidence that Mr. Jamesson was frequently in the Bakelite molding department where Defendant Reichhold's asbestos-containing phenolic molding compound products were used, particularly in the year of 1968 when he worked as a laborer. For six months during 1968 Mr. Gordon was his supervisor.

STATEMENT OF FACTS

A. Plaintiff Michael Jamesson's eleven (11) consecutive years of work at the Cedar Rapids Square D Plant.

Beginning in the year 1968, Plaintiff Michael Jamesson worked as a laborer at the Square D Company ("Square D") (n/k/a Schneider Electric) Cedar Rapids, Iowa plant, beginning in February 1968 for approximately one full year, before he transferred into the shipping and receiving department at the plant, where he worked for approximately the next ten (10) years, until approximately 1980.⁹

Preliminarily, it should be noted that the Cedar Rapids Square D plant was a comparatively small, all-indoor, plant of some 112,000 square feet – with dimensions of approximately 300 x 325 feet).¹⁰

During the course of his one year as a laborer at the plant, Mr. Jamesson regularly performed cleanup work in the plant's assembly department, and also "(i)n the molding--the Bakelite molding department, we swept all the residue off the floor...(and) (w)e worked around the dock area which was right next to molding."¹¹ The plaintiff then added at his deposition that, "(a) lot of our job was trying to get rid of all the product that was on the floor or on the rafters or on the

⁹ Jamesson deposition 8/20/13, A429:6-A433:13; A430:14-18.

¹⁰ A447-A551.

¹¹ Jamesson deposition 8/20/13, A430:5-8.

doors...(e)verything was - (i)t wasn't air conditioned....(i)t was cooled by fans - industrial fans, which didn't make it any easier to clean.”¹²

Describing in detail at his discovery deposition his next ten (10) years of work at the Cedar Rapids Square D plant in shipping and receiving at the facility, Mr. Jamesson told how received incoming product, to stock it, and to deliver phenolic molding materials specifically the Bakelite molding, assembly areas, the spray paint booth, and the punch press area of the plant.¹³

B. Decedent Roger Gordon's work as Plaintiff Michael Jamesson's supervisor at the Cedar Rapids Square D plant during the first six months of Mr. Jamesson's work as a laborer at the facility in the year 1968.

Roger Gordon, decedent, was Michael Jamesson's supervisor for six months when Mr. Jamesson began working at the Square D Cedar Rapids plant in 1968, and Mr. Jamesson's work as a laborer at the plant during the course of those six months is described above.¹⁴

C. Reichhold, Inc. asbestos-containing phenolic molding compound products which were used at the Square D Company plant in Cedar Rapids, Iowa.

Mesothelioma victim Roy Duncan, another Square D Cedar Rapid plant employee who worked at the facility during many of the same years that Mr.

¹² A430:9-10.

¹³ A430:22-A432:6

¹⁴ A1445-A1446.

Jamesson did provided specific testimony that among the manufacturers of asbestos-containing phenolic molding compounds used at the plant during the 1960's throughout the 1970's was Reichhold (a/k/a "RCI").¹⁵ Mr. William Vosdingh served as a "molding process engineer" for Square D Company at the Cedar Rapids plant from early 1974 through the present day,¹⁶ although a special order from an Iowa circuit court was required to compel Mr. Vosdingh to testify pursuant to subpoena in the instant Delaware litigation – where in these Iowa proceedings Mr. Vosdingh was represented at all times by corporate and litigation counsel for Square D Company – a non-party in the instant litigation, but a defendant party in numerous other asbestos product liability actions nationwide.¹⁷ During his court-ordered deposition in this litigation, William Vosdingh produced records that showed that "Reichhold 25310" – also known as "RCI 25310" –

¹⁵ Deposition of Roy Duncan 10/12/11, in the case *Roy Duncan, et. al. v. A. Schulman, Inc., et. al.*, Missouri Circuit Court, 22nd Judicial District, Case No.: 1122-CC09254, at transcript Volume I at A522, p. 28:11-25; A523, p. 29:1-18; and A524, p. 37:13 to A531, p. 66:16); Deposition of Roy Duncan 10/13/11, at transcript Volume II at A534, p. 87:22-A538, p. 101:11; and A539, p. 154:12-25); see also Roy Duncan deposition dated May 1, 2012 (A1860, p.21:2-A1863, p.29:20) (The May 1, 2012 Roy Duncan deposition was referred to in the briefing below, but inadvertently not attached to the Jamesson/Gordon briefing. It was attached to the contemporaneously filed summary judgment briefing in the cases of Anna Hartgrave and Yvonne Weaver, which were decided in the same Opinion. The Superior Court considered this deposition in its summary judgment Opinion. *See* Ex. A, p. 7, n.24).

¹⁶ William Vosdingh deposition 11/30/11, (A543, p.54:18-24).

¹⁷ See, the Order entered by the Iowa District Court, Linn County, on November 29, 2011, granting the Plaintiffs' "Motion to Compel Testimony or Alternatively, for Contempt and for Sanctions" (A547-A551).

phenolic molding compound materials were used at this Square D Company plant in Cedar Rapids, Iowa.¹⁸ While Mr. Vosdingh claimed at his deposition that he “cannot say” whether “Reichhold 25310” was an asbestos-containing product¹⁹ – defendant Reichhold, Inc.’s designated corporate witness Thomas R. Madden later admitted in deposition testimony that “Reichhold 25310” was indeed an “asbestos-containing phenolic molding compound” manufactured by Reichhold.²⁰ Reichhold, Inc. designated witness Thomas R. Madden also authenticated and discussed a Material Safety Data Sheet dated “1/80” – which Mr. Madden stated meant January of 1980 – which listed “25-310” as an asbestos-containing product manufactured by Reichhold as of that time.²¹

In addition, Reichhold corporate witness Thomas R. Madden discussed Reichhold formulation sheets for RCI product 25310 which showed that Reichhold

¹⁸ A544 at 139:6-8.

¹⁹ *Id.*

²⁰ Thomas R. Madden deposition 2/14/12 (A562:16-A563:13).

²¹ See, Reichhold Chemicals, Inc. (a/k/a “RCI”) molding compounds phenolic Material Safety Data Sheet, dated January 1980, Exhibit 12 to the Deposition of Thomas R. Madden, 2/14/12 (A569-A570). See, also, the deposition testimony of Reichhold, Inc.’s corporate witness, Thomas R. Madden 2/14/12, discussing Exhibit 12 to that deposition, at pages 125:15-127:20, wherein Mr. Madden states that references to Reichhold product “25310” and “25-310” were references to the very same product, and that these were “asbestos-containing phenolic molding compounds” (A559-A561).

“25310” contained “asbestos floats” as a constituent material for Reichhold’s manufacture of this product.²²

Mr. Hodina, who Jamesson worked in the vicinity of,²³ testified on September 17, 2012. He worked at the Square D Cedar Rapids plant from March 31, 1960 to 1991, excepting June 4, 1961 to June 4, 1965 when he served in the Navy.²⁴ He worked as a set up and operate man in the plastic molding department from approximately 1967 through 1973 or 1974.²⁵ He described his work and the set-up of the molding department²⁶ and confirmed that there were approximately 36 automatic machines.²⁷ The ceiling in the Bakelite or molding department was about a story and half.²⁸ He explained that there were seven molding compounds that were used to dump into the hoppers on these automatic presses. They came in

²² See, also, the deposition testimony of Reichhold, Inc. court designated corporate witness Thomas R. Madden 2/14/12, discussing Exhibit 26 to that deposition, at pages 210:5 through 213:2, wherein Mr. Madden states that references to Reichhold product “25310” and “25-310” were references to the very same product, and that these were “asbestos-containing phenolic molding compounds” (A564-A567).

²³ Jamesson deposition 8/20/13 (A437:16-22).

²⁴ William Hodina 9/17/12 (A1865, p. 8:16 – A1866, p. 9:5). Although plaintiffs refer to Mr. Hodina’s testimony in their summary judgment answering briefs, the deposition excerpts were not attached to the answering briefs below. However, said testimony of Mr. Hodina was attached to Plaintiff Hartgrave’s summary judgment answering brief, which was filed contemporaneously with Jamesson and Gordon, and was considered by the Court below when deciding all four cases. See summary judgment Opinion, Exhibit A, p. 2, fns. 3-5, p. 4 fn.11.

²⁵ Hodina deposition 9/17/12, (A1867, p. 28:1-25).

²⁶ A1868, pp. 33:12-34:10.

²⁷ A1869, p. 43:7-8.

²⁸ A1869, p. 43:25-44:2.

a 50 pound bag and there were 40 sacks on each pallet of material.²⁹ “We had Reichhold.”³⁰ “...we had these seven basic materials [including Reichhold] that we used all the time.”³¹ It was among the molding compounds that “we used the most.”³² When making the QO circuit breaker bases and covers (one of the more popular products that were made the most,³³ Reichhold 25310 was used the most.³⁴ The Reichhold 25310 came to the facility in heavy, 50 pound paper tan bags with red writing, and there were 40 of them on a pallet.³⁵ He described loading the Reichhold 25310 into the process. A forklift would lift the whole full pallet of material (ie 40 50 pound bags) with the set up man on it as well, and the set up men would manually take the material off the pallet and cut the sacks and dump them into 50 gallon drums.³⁶ This was “10,12 feet” off the ground.³⁷ A typical barrel would hold four or five bags of the Reichhold phenolic molding compound.³⁸ The process of dumping the Reichhold 25310 bags into the hoppers on top of the presses created dust.³⁹ The dust was a “blue filmy thing that would

²⁹ A1869, p. 44:6-17.

³⁰ A1869, p. 44:25

³¹ A1870, p. 45:4-5

³² A1870, p. 47:22-24

³³ A1873, p. 60:4-17.

³⁴ A1871, p. 49:7-22

³⁵ A1871, pp. 49:23-51:24.

³⁶ A1872, pp. 53:16-54:11.

³⁷ A1872, p.54:14.

³⁸ A1872, p.55:16-20.

³⁹ A1872, p. 55:21-25.

happen because we were dumping so much of it in so many presses that it was just a blue film that was in the air, and we had so many fans that were on the floor for the women and also for the automatics that just blew- that just blew this around all the time.”⁴⁰ Of the 28 presses that had to be filled that way, they were filled that way once every shift.⁴¹ Some high volume machines on the floor were filled throughout the shift.⁴² After filling the hoppers the bags were just dropped down between the machines.⁴³ The Reichhold compound was dusty and the blue haze that resulted from this dumping process would last for a couple hours.⁴⁴ The dust was blown all around the molding compound area because there were 100 floor fans and several whole-house ceiling fans.⁴⁵ The entire molding area was affected with the dusty blue haze, from floor to ceiling.⁴⁶ That includes the cleaning and maintenance area and the spray booth.⁴⁷ Supervisors went out into the area a couple times a day.⁴⁸ People working in and around the molding department would have breathed in the dust and blue haze caused by the Reichhold 25310

⁴⁰ A1872, p. 56:2-9

⁴¹ A1872, p. 56:10- A1873, p. 57:20.

⁴² A1873, p. 57:10-13.

⁴³ A1873, p. 57:21-25.

⁴⁴ A1873, pp. 58:10-59:12.

⁴⁵ A1873, p. 59:13-23.

⁴⁶ A1873, p. 60:18 – A1874, pp. 61:11, A1875, p. 65:10-22.

⁴⁷ A1874, p. 61:18-24.

⁴⁸ A1874, pp. 63:17-64:19.

product in the 60's and 70's.⁴⁹ “It was in the air, and if you were walking into that [air] you were going to be exposed to it.”⁵⁰ “Maintenance people who came and went out of that area, supervisors, white-collar people, engineers...[]” would have walked in or out of the plastic molding area.⁵¹ While it was possible weeks went by without using Reichhold, Mr. Hodina would not say months went by without using it.⁵²

D. The Superior Court's own description of the manufacturing operating operations and dusty use of Reichhold, Inc. asbestos-containing phenolic molding compounds at the Cedar Rapids Square D plant.

In its Memorandum Opinion and Order⁵³ granting the alleged non-exposure-based summary judgment motions brought by defendant Reichhold, Inc. in the Jamesson and Gordon cases – the Superior Court itself described the Cedar Rapids Square D plant's manufacturing operations, and specifically, the extremely dusty conditions which existed at this comparatively small manufacturing facility as follows:

⁴⁹ A1876, p. 77:11-25.

⁵⁰ A1876, p. 78:8-10; see A1876, pp.78:11-80:24.

⁵¹ A1876, p. 80:20-24.

⁵² A1877, p.160:3-8.

⁵³ Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Exhibit A), at slip opinion pages 1-5, *In re Asbestos Litigation: Michael Jamesson, et al., v. Reichhold, Inc., et al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418, **1-5 (Del. Super. August 21, 2014)

The Square D Cedar Rapids Plant

The Square D Cedar Rapids plant manufactured and assembled electrical circuit breakers. Beginning in approximately 1958, some of the component parts for the circuit breakers were fabricated using various molding compounds, some of which unquestionably contained asbestos. The circuit breakers were assembled in Square D's molding department by automatic, semi-automatic or manual hydraulic presses. [*Footnote 3 Pltf Hartgrave's Opp. to Reichhold's MSJ, Ex. B, Deposition of William Hodina, Sept. 17, 2012, 34:11-35:13*].

The automatic presses ran on a cycle, and would do so throughout an entire shift with little handwork required. The manual presses required an employee — usually a female plant employee — to open and close the presses to remove completed parts and refill the compound material. [*Footnote 4 Id. at 35:5-13*]. Employees would not have to manually open and close semi-automatic presses, as those also operated on a timer; but the workers would have to remove the finished part, blow off any residue ("flash"), and refill the molding compound to reset the machine. [*Footnote 5 Id. at 35:14-24*]. At the time of the Cedar Rapids plant's peak performance, there were approximately fifty-five automatic presses and eighteen semi-automatic or manual presses. The entirety of the plant was approximately 112,000 square feet.

The different types of presses were grouped by like kind and those groupings were usually separated in the plant by large vinyl curtains. The automatic presses were large and varied in size, weighing from twenty tons to approximately three hundred tons and were roughly four feet wide by seven or eight feet tall. [*Footnote 6 Id. at 38:8-41:18*]. The manufacturing area was separated from other areas of the plant — such as the tool room, the receiving dock, or the punch press area — by cement block walls.

Reichhold manufactured chrysotile asbestos-containing molding compounds from about 1964 to 1980. Reichhold also produced asbestos-free compounds during the same time period

The molding department was a story and a half high and contained about thirty-six automatic presses. No fewer than seven different molding compounds were used in the presses, including

Reichhold brand. [Footnote 10 Pltf Weaver's Opp. to Reichhold's MSJ, Ex. I, Deposition of Thomas R. Madden, Feb. 14, 2012, 202:16-203:13].

Reichhold product designation 25310 ("Reichhold 25310") — an "asbestos-containing phenolic molding compound" [Footnote 11 Pltf Hartgrave's Opp. to Reichhold's MSJ, Ex. B, Deposition of William Hodina, Sept. 17, 2012, 42:25-44:25] — was commonly used in the industry to manufacture circuit breaker bases and covers, [Footnote 12 *Id.* at 60:1-17] though it is likely that Reichhold products made up but a small percentage of the total molding compound used at the Cedar Rapids plant. That said, *the Reichhold 25310 was shipped to Square D in 50-pound tan bags, forty bags to a pallet.* [Footnote 13 *Id.* at 50:1-16]. Those bags bore Reichhold's name in red lettering. *The molding compound was granular, similar to coarse sand. A forklift would lift a full pallet of molding compound ten or twelve feet off the ground, and a plant worker would cut the sacks, dumping the compound into a press's hopper.* [Footnote 14 *Id.* at 54:2-14]. *Twenty-eight presses were filled that way each work shift; other presses were filled multiple times throughout a shift.*

The process of filling a press with molding compound created airborne dust. This dust had the appearance of a "blue haze" and would remain in the air for several hours after each round of compound was dumped into the presses' hoppers. [Footnote 15 *Id.* at 58:15-59:12]. *More than a hundred fans were located throughout the molding department and they blew the dust around that entire area. This dust was circulated further when the presses were opened at the end of a cycle and the machines were cleaned off with air hoses and brooms.* [Footnote 16 *Id.* at 66:14-67:24; 69:18-70:21]. *Significant amounts of dust would accumulate in the molding department from the operation and cleaning of the presses. That dust often collected on pipes, beams, and light fixtures throughout that department's worksite.* [Footnote 17 Pltf Weaver's Opp. to Reichhold's MSJ, Ex. C, Deposition of Lawrence McGurk, Nov. 29, 2011, 50:3-23]. *During shifts, the dust was so prevalent that clothing would be permanently stained black. And employees would expectorate residue long after a shift had ended.* [Footnote 18 *Id.* at 34:4-14; 49:4-25]. (bold, italicized emphasis added).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT UPON ALLEGED NON-EXPOSURE GROUNDS BECAUSE PLAINTIFFS MICHAEL JAMESSON AND PHYLLIS GORDON PRESENTED SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF THEIR (DECEDENT’S) EXPOSURES TO DEFENDANT REICHHOLD, INC.’S ASBESTOS-CONTAINING PHENOLIC MOLDING COMPOUND PRODUCTS TO DEMONSTRATE THE EXISTANCE OF GENUINE ISSUES OF MATERIAL FACT UNDER IOWA SUBSTANTIVE LAW.

A. Question Presented. Did the Superior Court err in granting the summary judgment motions made by Defendant Reichhold, Inc. upon alleged non-exposure grounds where Plaintiffs Michael Jamesson and Phyllis Gordon presented sufficient circumstantial evidence of their (decedent’s) exposures to asbestos-containing phenolic molding compound products to demonstrate the existence of genuine issues of material fact under Iowa substantive law? This issue was preserved in Plaintiffs’ Summary Judgment Answering Briefs.⁵⁴

B. Scope of Review. The Court below made an error of law in granting Defendant Reichhold, Inc.’s Motions for Summary Judgment in the Michael Jamesson and Phyllis Gordon cases. Therefore, the standard of review in

⁵⁴ A401-A570, A1308-A1446.

the instant appeal is *de novo*, both in terms of the Supreme Court’s review of the facts and the law of the attendant case.⁵⁵

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.⁵⁶

2. Under Iowa substantive law Plaintiffs Michael Jamesson and Phyllis Gordon presented sufficient circumstantial evidence of their (decedent’s) exposures to Defendant Reichhold, Inc.’s asbestos-containing phenolic molding compound products to demonstrate the existence of genuine issues of material fact.

⁵⁵ See, e.g., *Dabaldo v. USR Energy & Const.*, 85 A.3d 73, 77 (Del. 2014)[Reversing a Superior Court grant of summary judgment and stating that, “(t)his Court reviews *de novo* a trial court’s grant of a motion for summary judgment, both as to the facts and the law. (*footnote omitted*). Thus, this Court must undertake an independent review of the record and applicable legal principles ‘to determine whether, after viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law.’ (*footnote omitted*).”]; and *Jones v. Crawford*, 1 A.3d 299, 301-302 (Del. 2010)[same].

⁵⁶ *Sostre v. Swift*, 603 A.2d 809, 811-812 (Del. 1992).

As both parties agreed in the proceedings below before the Superior Court and -- as that Court correctly determined -- Iowa substantive is applicable to these actions.⁵⁷

In *Heddinger, et al. v. Ashland Oil, Inc.*, 2012 Del. Super. LEXIS 8, **11-25 (Del. Super. January 13, 2012), the Superior Court conducted extensive analysis of the only two Iowa Supreme Court decisions which have addressed the appropriate legal standards to be applied to evidence of asbestos exposure in a product liability action such as the instant one.⁵⁸ Quoting from the Iowa Supreme Court's decision in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, the Superior Court in *Heddinger* observed that in Iowa, “[q]uestions of proximate cause are for

⁵⁷ Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A) at slip opinion pages 11-13, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418, **11-13 (Del. Super. August 21, 2014).

⁵⁸ The only two Iowa Supreme Court decisions which have addressed the factual setting of that which constitutes a sufficient showing of asbestos exposure evidence are *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 249 (Iowa 1993); and *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857-861 (Iowa 1994). In *Heddinger v. Ashland Oil, Inc., et. al.*, 2012 Del. Super. LEXIS 8, **11-25 (Del. Super. January 13, 2012), the Superior Court extensively analyzed both of these decisions in a plant worker product liability action wherein a motion for summary judgment on alleged non-exposure grounds was decided on the basis of Iowa substantive law.

the jury,” and that “[o]nly in exceptional cases is proximate cause decided as a matter of law.”⁵⁹

The Superior Court in *Heddinger* also referenced the discussion in *Beeman* where the Iowa Supreme Court’s analysis also mentioned jurisdictions that have accepted co-worker testimony as a means of proving proximate cause in asbestos cases where a co-worker identifies the presence of defendant’s product at the jobsite where the plaintiff worked.⁶⁰

The Superior Court in *Heddinger* then emphasized that because the Iowa Supreme Court decisions in *Beeman* and *Spaur* both involved “appellate review of post-trial motions”, and with that court being instead tasked with deciding a motion for summary judgment upon alleged non-exposure grounds, the *Heddinger* court explained as follows:

The Court’s task here is to determine whether there is a genuine issue of material fact in dispute.

⁵⁹ *Heddinger v. Ashland Oil, Inc.*, *supra*, 2012 Del. Super. LEXIS 8, at **18-19.

⁶⁰ *Heddinger v. Ashland Oil, Inc., et. al, supra*, 2012 Del. Super. LEXIS 8, at *19 & n.89, citing *In re: Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992). See, also, *Charles H. Conway v. AC&S Co., Inc.*, 1987 Del. Super. LEXIS 1049, **8-9 (Del. Super. February 3, 1987) [“While it is obvious that the locations of these four plaintiffs with respect to (asbestos product identifying co-worker) is far from exact, viewing all the facts in the light most favorable to plaintiffs, the Court finds there is sufficient product nexus evidence against (defendant) GAF to defeat the motions for summary judgment . . . there is evidence from which a reasonable person could conclude that each plaintiff worked in an area in which asbestos fibers from GAF’s product probably was present.”]

Moreover, on a motion for summary judgment, the facts are construed in the light most favorable to the non-moving party, in this case, the Plaintiff. Thus, the Court must draw all reasonable inferences in favor of the Plaintiff. Sherwin-Williams' burden is to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. It has not met this burden. . . .

Here, as in *Spaur*, a co-worker's testimony described generally where exposure took place. Also like *Spaur*, testimony established the layout of buildings, and the possibility of exposure to a foreign substance in the air due to working conditions. . .

The Court cannot rule as a matter of law that Mr. Hedding was *not* exposed to Sherwin-Williams products while employed at Goss, and that Sherwin-Williams products did *not* cause his injuries. (*italicized emphasis of the repeated word "not" in original*).⁶¹

While acknowledging that Iowa decisional precedent addressing the appropriate causation standard to be applied in an asbestos disease products liability setting specifically makes clear that "questions of proximate cause are generally reserved for the jury",⁶² the Superior Court erroneously proceeded to apply a restrictive and exacting standard to dismiss the claims of Plaintiffs Michael Jamesson and Phyllis Gordon on summary judgment –

⁶¹ *Hedding v. Ashland Oil, Inc., et. al.*, supra, 2012 Del. Super. LEXIS 8, at **20-24.

⁶² Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A) at slip opinion pages 11-12, and Footnote 41, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418, **11-12 & n. 41 (Del. Super. August 21, 2014).

even as the Court impermissibly construed the record facts against these non-movants.

In its decision below, the Superior Court had the following to say about Plaintiff Michael Jamesson's claims against defendant Reichhold, Inc.:

3. Insufficient Product Nexus Analysis Below.

During Mr. Jamesson's time at Square D, by his own account, his exposure to any asbestos-containing material was sporadic and minimal. His first year at the Cedar Rapids plant was spent as a laborer, cleaning and performing miscellaneous other tasks throughout the entire plant. For the following decade, Mr. Jamesson worked in shipping and receiving, cataloguing incoming packages, stocking materials, and making deliveries to various departments. He recalled exposure to only a single brand of molding compound, Plenco, and cannot recall any exposure to a Reichhold product. This is unsurprising; the uncontroverted evidence is that Reichhold was a minor supplier to the Square D plant as a whole.

Mr. Jamesson's alleged exposure to any molding compound was admittedly neither frequent nor regular. He did not work in an area of the plant that commonly experienced respirable dust from such, and the layout of the plant insulated him from any regular exposure. In turn, Mr. Jamesson fails to demonstrate, even under the flexible Iowa standard, exposure to any Reichhold product, much less that such a product was a substantial factor in causing his illness. (*footnote omitted*).

Reichhold's Motion for Summary Judgment as to Mr. Jamesson is, in turn, GRANTED.⁶³

⁶³ Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A) at slip opinion pages 17-18, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418, **17-18 (Del. Super. August 21, 2014).

Put simply, this narrative by the Superior Court does not closely or accurately reflect the facts of record which were before it in the summary judgment proceedings below, relative to Michael Jamesson's exposure evidence against defendant Reichhold, Inc., circumstantial as it was.

As stated above, beginning in the year 1968, Plaintiff Michael Jamesson worked as a laborer at the Square D Company("Square D") (n/k/a Schneider Electric) Cedar Rapids, Iowa, plant for approximately one full year, before he transferred into the shipping and receiving department at the plant, where he worked for approximately the next ten (10) years, until the year 1981.⁶⁴

During the course of his one year as a laborer at the plant, Mr. Jamesson regularly performed cleanup work in the plant's assembly department, and also "(i)n the molding--the Bakelite molding department, we swept all the residue off the floor...(and) (w)e worked around the dock area which was right next to molding." (bold, italicized emphasis added).⁶⁵ The plaintiff then added at his deposition that, "(a) lot of our job was trying to get rid of all the product that was on the floor or on the rafters or on the doors...(e)verything was - (i)t wasn't air

⁶⁴ Preliminarily, it should be noted that the Cedar Rapids Square D plant was a comparatively small, all-indoor, plant of some 112,000 square feet – with dimensions of approximately 300 x 325 feet. A447-A551.

⁶⁵ Jamesson deposition 8/20/13, A430:5-8.

conditioned....(i)t was cooled by fans -industrial fans, which didn't make it any easier to clean." (bold, italicized emphasis added).⁶⁶

Describing in detail at his discovery deposition his next ten (10) years of work at the Cedar Rapids Square D plant in shipping and receiving at the facility – which was **"the dock area which was right next to molding."**⁶⁷ Mr. Jamesson told examining defense counsel at his deposition how he received incoming product, to stock it, and to deliver phenolic molding materials **specifically the Bakelite molding, assembly areas**, the spray paint booth, and the punch press area of the plant.⁶⁸

Indeed, Plaintiff Michael Jamesson's sworn deposition testimony describing his clean-up and product delivery functions within the Cedar Rapids Square D plant tracks closely the Superior Court's own conclusions about the extremely dusty manufacturing operations at the facility, as the Court noted:

The process of filling a press with molding compound created airborne dust. This dust had the appearance of a "blue haze" and would remain in the air for several hours after each round of compound was dumped into the presses' hoppers. [Footnote 15 Id. at 58:15-59:12]. More than a hundred fans were located throughout the molding department and they blew the dust around that entire area. This dust was circulated further when the presses were opened at the end of a cycle and the machines were cleaned off with air hoses and brooms. [Footnote 16 Id. at 66:14-67:24; 69:18-70:21]. Significant amounts of dust would accumulate in the

⁶⁶ A430:9-10.

⁶⁷ A430:7-8; see A431:20-A432:10.

⁶⁸ A430:22-A431:3.

molding department from the operation and cleaning of the presses. That dust often collected on pipes, beams, and light fixtures throughout that department's worksite. [Footnote 17 *Pltf Weaver's Opp. to Reichhold's MSJ, Ex. C, Deposition of Lawrence McGurk, Nov. 29, 2011, 50:3-23*]. **During shifts, the dust was so prevalent that clothing would be permanently stained black. And employees would expectorate residue long after a shift had ended.** [Footnote 18 *Id. at 34:4-14; 49:4-25*]. (bold, italicized emphasis added).⁶⁹

Further, there was evidence that Roger Gordon, decedent, was Michael Jamesson's supervisor for six months when Mr. Jamesson began working at the Square D Cedar Rapids plant in 1968, and Mr. Jamesson's work as a laborer at the plant during the course of those six months.⁷⁰ Giving all reasonable inferences to the non-moving party, there was a genuine issue of fact as to whether Mr. Gordon had been exposed to asbestos from Reichhold as well.

Although the Superior Court below expressly acknowledged that Iowa substantive law was applicable to this case, with the Court actually citing the prior Superior Court decision of *Heddinger v. Ashland Oil, Inc.*, *supra*, 2012 Del. Super. LEXIS 8, **11-25 (Del. Super. January 13, 2012), as that Court in turn referenced the Iowa asbestos causation standard decisions of *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 249-254 (Iowa 1993);

⁶⁹ Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A) at slip opinion page 5, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418, **1-5 (Del. Super. August 21, 2014).

⁷⁰ A1445-A1446.

and Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 857-861 (Iowa 1994) – the Superior Court below essentially ignored the holdings of all three of these courts.

As the Superior Court described the applicable Iowa decisional law in *Heddinger*:

The Court’s task here is to determine whether there is a genuine issue of material fact in dispute.

Moreover, on a motion for summary judgment, the facts are construed in the light most favorable to the non-moving party, in this case, the Plaintiff. Thus, the Court must draw all reasonable inferences in favor of the Plaintiff. [The defendant’s] burden is to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. It has not met this burden. . . .

Here, as in Spaur, a co-worker’s testimony described generally where exposure took place. Also like Spaur, testimony established the layout of buildings, and the possibility of exposure to a foreign substance in the air due to working conditions. . .

The Court cannot rule as a matter of law that Mr. Heddinger was not exposed to Sherwin-Williams products while employed at Goss, and that Sherwin-Williams products did not cause his injuries. (bold, italicized emphasis added).⁷¹

In fact, a reading of the direct text of the Iowa Supreme Court’s decision in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, *supra*, 496 N.W.2d at 254, makes clear that the Superior Court below applied an erroneously restrictive exposure standard to the claims of Plaintiffs Michael Jamesson and

⁷¹ *Heddinger v. Ashland Oil, Inc.*, *supra*, 2012 Del. Super. LEXIS 8, at **20-24.

Phyllis Gordon as it dismissed them upon summary judgment. As the Iowa Supreme Court emphasized in *Beeman*:

Questions of proximate cause are for the jury. *Bandstra v. Int'l Harvester Co.*, 367 N.W.2d 282, 285 (Iowa App. 1985). **Only in exceptional cases is proximate cause decided as a matter of law.** Iowa R. App. P. 14(f)(10). See also *Bandstra*, 367 N.W.2d at 285. A product defect merely has to be a proximate cause, not the proximate cause. *Id.* at 287. Other courts have held that a reasonable inference of exposure to a defendant's asbestos-containing product, coupled with expert testimony regarding asbestos fiber drift and the cumulative effects of exposure to asbestos, is enough to prove proximate cause in the asbestos products liability context. See *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 744 P.2d 605, 613 (Wash. 1987). See also *Schultz v. Keene Corp.*, 729 F. Supp. 609, 615 (N.D. Ill. 1990); *Thacker v. UNR Indus., Inc.*, ___ N.E.2d ___, (Ill. 1992); *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445, 458-60 (Md. 1992). **Additionally, other courts have held that a co-worker's testimony identifying the defendant's product and plaintiff's proximity to that product is also enough to prove proximate cause in asbestos cases, even when the plaintiff does not remember using the defendant's product.** See *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 817-18 (9th Cir. 1992); *Rotondo v. Keene Corp.*, 956 F.2d 436, 441 (3d Cir. 1992); *Eagle-Picher Indus., Inc.*, 604 A.2d at 458-60.

496 N.W.2d at 254 (bold, italicized emphasis added).

Reduced to the essentials, the Superior Court below erroneously subjected the claims of Plaintiffs Michael Jamesson and Phyllis Gordon to an exacting and restrictive asbestos exposure causation standard which was inconsistent with the flexible and liberalized exposure standards prescribed by the Iowa Supreme Court precedent of *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, *supra*, and *Spaur v. Owens-Corning Fiberglas Corp*, *supra*, particularly as this Iowa decisional law was carefully analyzed by another Delaware Superior Court in

Heddinger, et. al. v. Ashland Oil, Inc., et. al, supra – the latter being a decision which the Superior Court actually cited at one point in its own decision.⁷²

⁷² Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A) at slip opinion page 13 Footnote 47, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc., et. al.*, 2014 WL 4180186, 2014 Del. Super. LEXIS 418, *13 n. 47 (Del. Super. August 21, 2014).

CONCLUSION

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

Respectfully submitted,

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