



IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	:	
PHILIP LAVELLE and his wife,	:	No. 307, 2018
LINDA LAVELLE,	:	
	:	
Appellants, Plaintiffs below,	:	Court Below: Superior Court of the State of Delaware
	:	
	:	
V.	:	C.A. No. N16C-03-079 ASB
	:	
FEDERAL-MOGUL ASBESTOS	:	
PERSONAL INJURY TRUST AS	:	
SUCCESSOR TO FELT-PRODUCTS	:	
MANUFACTURING COMPANY,	:	
	:	
Appellee, Defendant below.	:	

**APPELLANTS' REPLY BRIEF ON APPEAL
FROM THE SUPERIOR COURT**

JACOBS & CRUMPLAR, P.A.

/s/ Raeann Warner
Raeann Warner, Esq. (DE ID #4931)
750 Shipyard Drive, Suite 750
Wilmington, DE 19806
(302) 656 5445
Raeann@jcdelaw.com

Attorneys for Appellants/Plaintiffs Below

Date: November 27, 2018

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
I. THE TRIAL COURT ERRED BY DECIDING A FACT WHICH WAS THE EXCLUSIVE PROVINCE OF THE JURY	1
A. There was Evidence Below that Mr. Lavelle Removed Fel-Pro Cylinder Head Gaskets at Shilling.....	1
B. There was Evidence Below That, More Likely Than Not, the Fel-Pro Cylinder Head Gaskets Mr. Lavelle Removed and Installed Contained Asbestos.....	3
II. MR. LAVELLE PRESENTED AND PROFERRED EVIDENCE OF FRIABILITY BELOW, AND EXPERT ISSUES WERE NOT RIPE FOR DETERMINATION AT THE PRODUCT NEXUS SUMMARY JUDGMENT STAGE	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>Austin v. State</i> , 45 A.3d 148 (Del. 2012).....	11
<i>Boscov's Dep't Store v. Jackson</i> , 2007 Del. Super. LEXIS 37 (Del. Super. Feb. 12, 2007).....	11
<i>Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.</i> , 794 A.2d 1141 (Del. 2002).....	4
<i>Culver v. Bennett</i> , 588 A.2d 1094 (Del. 1991).....	8
<i>In re Asbestos Litig. 112010jr Trial Grp. Limited To: Henderson, Henderson</i> Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82 (Del. Super. Feb. 2, 2011).....	5, 10,11
<i>In re Asb. Litig. (Holstege)</i> , C.A. N14C-06-038 (Del. Super. April 24, 2017) (Wharton, J.) (ORDER)	7
<i>In re Asb. Litig. (Pelzel)</i> , C.A. N10C-05-205 (Del. Super. August 17, 2011) (Ableman, J.) (Op.)	6, 7
<i>In re Asb. Litig. (Redfearn)</i> , C.A. 16C-09-057 (Del. Super. August 17, 2018) (Wharton, J.) (TRANSCRIPT)	7, 9
<i>In re Asbestos Litig.: Vaughn</i> , 2012 Del. Super. LEXIS 29 (Del. Super. Jan. 20, 2012)	5
<i>Krik v. Exxon Mobil Corp.</i> ,	

870 F.3d 669 (7th Cir. 2017)	8
<i>Lavelle v. The Ford Motor Co.</i> , C.A. No. N16C -03-079 ASB, (Del. Super. September 19, 2017) (Wharton, J.) (ORDER).....	3, 10
<i>Lipscomb v. Champlain Cable Corp.</i> , 1988 Del. Super. LEXIS 338, 1988 WL 102966 (Del. Super. Sept. 12, 1988)	4
<i>Money v. Manville Corp. Asbestos Disease Compensation Trust Fund</i> , 596 A.2d 1372 (Del. 1991).....	8
<i>Nutt v. A.C. & S. Co.</i> , 517 A.2d 690 (Del. Super.1986)	8
<i>Sheehan v. Oblates of St. Francis de Sales</i> , 15 A.3d 1247 (Del. 2011).....	8
<i>Stigliano v. Westinghouse</i> , 2006 Del. Super. LEXIS 433, at *2 (Del. Super. Oct. 18, 2006)	4, 6
<i>Walls v. Ford</i> , <i>Walls v. Ford</i> , C.A. 14C-01-057 ASB (Del. Super. September 10, 2015) (Wallace, J.) (TRANSCRIPT).....	10, 11
<i>Young v. Frase</i> , 702 A.2d 1234 (Del. 1997).....	11
 Other Authorities	
DEL. P.J.I. CIV. § 4.1 (2000).....	4
DEL. P.J.I. CIV. § 4.3 (2000).....	5
DEL. P.J.I. CIV. § 23.9 (2000)	11

ARGUMENT

I. THE TRIAL COURT ERRED BY DECIDING A FACT WHICH WAS THE EXCLUSIVE PROVINCE OF THE JURY.

A. There was Evidence Below that Mr. Lavelle Removed Fel-Pro Cylinder Head Gaskets at Shilling.

Fel-Pro contended “Mr. Lavelle did not know the brand of any cylinder head gasket he removed at Shilling’s.”¹ The cited testimony does not support that statement. Fel-Pro contended that there was no testimony or evidence Mr. Lavelle ever removed a Fel-Pro cylinder head gasket at Shillings.² Again, the cited testimony does not support this statement. Mr. Lavelle said that he could not give Fel-Pro’s counsel a specific car at a specific date and time that he recalled removing a Fel-Pro gasket from.³ However, he repeatedly stated that he remembered removing Fel-Pro gaskets from vehicles at Shilling:

Q. Do you have a specific recollection of ever removing a Fel-Pro gasket at Joe Shilling?

A. Oh, yes. Not so much a specific recollection of a specific car at a specific point in time. But just over a period of time, just from the volume and the number of gaskets, it was very common to pull off a cover, say, the housing, and you could identify that there was a Fel-Pro gasket in place there because of markings on the gasket.⁴

¹ Fel-Pro AB, p. 10 and p. 10 n. 39, citing for proposition A584, 988:4-6.

² Fel-Pro AB, p. 10 and p. 10 n. 40, citing for proposition A584, 988:13-989:20.

³ A584, 988:15-17, 989:19-22.

⁴ A584, 988:13-22.

Q. Okay. Since you can't tell me a specific occasion when you saw a Fel-Pro gasket you removed at Joe Shilling, you couldn't tell me how you went about removing that Fel-Pro gasket; correct?

A. I could tell you the ways, various ways that gaskets were removed, including Fel-Pro gaskets, as necessitated by the particular situation.⁵

There is evidence Mr. Lavelle removed Fel-Pro cylinder head gaskets from vehicles at Shilling.⁶ Simply because he could not remember the exact date, time, or vehicle he did it on, from thirty-plus years ago, does not mean he did not know that he removed Fel-Pro cylinder head gaskets from vehicles at Shilling. Using common sense, Mr. Lavelle worked at a shop that regularly did engine work, including during the cold months in unventilated conditions while other mechanics did the same exact work. At the time the two most popular aftermarket gaskets were Fel-Pro and Victor.⁷ Removal of Fel-Pro gaskets (any gaskets) caused dust. What are the chances that he was never exposed during those three years to any dust from a Fel-Pro cylinder head gasket being removed? Further, the Court below found that Mr. Lavelle removed Fel-Pro gaskets at Shilling when it stated that “In response, Plaintiffs cite testimony from Mr. Lavelle that he removed Fel-Pro

⁵ A584, 989:3 to 989:11.

⁶ Appellant's Opening Brief (“OB”), Statement of Facts, p. 6, fns.31-33.

⁷ A747, 75:13-22.

gaskets when working at Quillen Getty, for Joe Shilling, at Deerhurst Exxon and on his own vehicles...”⁸

B. There was Evidence Below that, More Likely Than Not, the Fel-Pro Cylinder Head Gaskets Mr. Lavelle Removed and Installed Contained Asbestos.

Fel-Pro stated that “With respect to the single type of Fel-Pro gasket at issue in this appeal – Fel-Pro’s cylinder head gaskets for use in automobiles and passenger trucks – is undisputed that Fel-Pro continually manufactured asbestos – free varieties of its cylinder head gaskets since at least 1965.”⁹ For this proposition it cited A964, Pearlstein 95:11-24 and 96:2-19.¹⁰ Mr. Pearlstein, Fel-Pro’s corporate representative, states therein that prior to the late 70’s going well into the 80’s, the “exception” to the asbestos-containing cylinder head gaskets it manufactured were a few applications that were all steel, non-asbestos containing.¹¹ When asked to name for what makes or models of vehicles these non-asbestos cylinder head gaskets were used, Fel-Pro could only name one type: “At one time there was a metal gasket for a Chevrolet 350 engine that was strictly

⁸ *Lavelle v. The Ford Motor Co.*, C.A. No. N16C -03-079 ASB, p. 5-6. ¶ 6 (Del. Super. September 19, 2017) (Wharton, J.) (ORDER), (Ex. A to OB).

⁹ Fel-Pro Answering Brief (“AB”), p. 6.

¹⁰ Fel-Pro AB, p.6, n.6.

¹¹ A965:5-19.

a steel shim gasket.”¹² Mr. Lavelle therefore disputes that there is any evidence there were “varieties” of non-asbestos cylinder head gaskets prior to the late 70’s. Fel-Pro identified one type.

On a motion for summary judgment, when the moving party presents evidence that there is no issue of material fact for a jury to decide, the non-moving party must then proffer evidence from which a rational fact finder could find in favor of the non-moving party, all based on the substantive burden of proof.¹³ Here, assuming Fel-Pro met its burden below when it moved for summary judgment, Mr. Lavelle then had to proffer evidence from which a rational juror could find that, more likely than not, he was in proximity to and exposed to Fel-Pro’s asbestos-containing gaskets.¹⁴ He did so below, based on the substantive burden of proof of preponderance of the evidence. The key is that he had to proffer evidence of such, but only evidence from which a rational juror could conclude that it was more likely than not (even just 50.0001 %) ¹⁵ that he was in proximity and exposed to the asbestos version of Fel-Pro’s cylinder head gaskets.

¹² A965:22-24.

¹³ See *Cerberus Int’l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1147–51 (Del. 2002); See *Id.* at 1150 (internal citations omitted) (“In our view, the inquiry is not whether any *reasonable* juror would find the substantive evidentiary burden satisfied. Rather, the test is whether any *rational* juror could do so.”).

¹⁴ *Stigliano v. Westinghouse*, 2006 Del. Super. LEXIS 433, at *2 (Del. Super. Oct. 18, 2006) (citing *Lipscomb v. Champlain Cable Corp.*, 1988 Del. Super. LEXIS 338, at *7-8, 1988 WL 102966, at *3 (Del. Super. Sept. 12, 1988)).

¹⁵ DEL. P.J.I. CIV. § 4.1 (2000).

Below, he showed that he was occupationally (and personally) exposed to Fel-Pro's head gaskets when the vast majority of those head gaskets contained asbestos. He did not have to proffer evidence to satisfy a rational juror that he definitely was exposed to Fel-Pro's asbestos-containing head gaskets, or even that it was reasonably certain that he was, i.e. clear and convincing evidence.¹⁶

The evidence that circumstantially links Mr. Lavelle to the asbestos-containing Fel-Pro cylinder head gaskets is the "vast majority" Fel-Pro admission and the testimony of Mr. Lehman. Majority admissions or evidence provide the circumstantial evidence, as was demonstrated by *In re Asbestos Litig. 112010jr Trial Grp. To: Henderson, Henderson*.¹⁷ They were also enough to overcome summary judgment in another asbestos case involving Fel-Pro, *In re Asbestos Litig.: Vaughn*, where the Superior Court held "The evidence establishes that Plaintiff used Defendant's head gaskets. The fact that 98% of the gaskets contained asbestos circumstantially links [Plaintiff] to Defendant's asbestos-containing product and therefore the court draws the inference of exposure."¹⁸

¹⁶ DEL. P.J.I. CIV. § 4.3 (2000).

¹⁷ 2011 Del. Super. LEXIS 82, at *18-22 (Del. Super. Feb. 2, 2011); *See* Appellant's OB, p. 13-14.

¹⁸ *In re Asbestos Litig.: Vaughn*, 2012 Del. Super. LEXIS 29, at *3 (Del. Super. Jan. 20, 2012).

The evidence Mr. Lavelle submitted below also differentiates this case from those cited by Fel-Pro in its AB, p.19-20. In *In re Asb. Litig. (Pelzel)*¹⁹, a case involving Fel-Pro, Fel-Pro argued that “...[] the vast majority of the automotive gaskets manufactured by [it] during this period (early to mid 1980s) did not contain asbestos...[]” and was therefore entitled to summary judgment pursuant to *Stigliano v. Westinghouse*.²⁰ Unlike that case, here Plaintiff provided evidence that the “vast majority” of cylinder head gaskets contained asbestos during this same period. In *Pelzel*, “Plaintiff [did] not address the crucial issues of whether the Fel-Pro products Pelzel used contained asbestos, but argue[d] – summarily- that ‘[Plaintiff] has provided substantial asbestos-containing product identification testimony against Fel-Pro.’”²¹ Further “The Court [was] not [] provided with *any* evidence regarding the actual - *or even probable* - content of the particular types of gaskets that the Pelzels purchased during the relevant period in issue.”²² Plaintiff did exactly this - address the probable asbestos content of the particular types of gaskets that Mr. Lavelle used - below. This case is distinguishable from Mr. Lavelle’s.

¹⁹ C.A. N10C-05-205 (Del. Super. August 17, 2011) (Ableman, J.) (Op.) (Fel-Pro’s Compendium of Unreported Cases (D.I. 23), p. 53-62.

²⁰ *Id.* at p. 4.

²¹ *Id.* at p. 5.

²² *Id.* at p. 8 (emphasis added).

In *In re Asb. Litig. (Holstege)* C.A. N14C-06-038 (Del. Super. April 24, 2017) (Wharton, J.) (ORDER)²³, the Superior Court explained that as to whether Fel-Pro had liability based on Mr. Holstege’s exposure to Fel-Pro head or manifold gaskets (through work with his son), “Mr. Holstege was unable to recall if or when his son used Fel-Pro head or manifold gaskets.”²⁴ Alternatively, even if Mr. Holstege’s son used these types of gaskets, Plaintiffs could not produce evidence that Mr. Holstege was exposed to the asbestos-containing versions of these gaskets as opposed to asbestos-free versions.²⁵ This case is certainly distinguishable because Mr. Lavelle testified as to what types of gaskets – head gaskets – he used. As to the Court’s alternative conclusion, Plaintiff is unable to ascertain what support the plaintiffs in that case offered as to the asbestos content of manifold and head gaskets in that case.

*In re Asb. Litig. (Redfearn)*²⁶ was a case involving Fel-Pro which was based on Florida law, which requires “substantial factor” causation test²⁷, as opposed to Delaware’s which is simply “but for” causation. The biggest difference between the two is that in substantial factor causation, there is a concept of *de minimis*

²³ (Fel-Pro’s Compendium of Unreported Cases (D.I. 23), p. 1-7). Plaintiff discussed the *Pelzel* and *Holstege* cases in oral argument below (Ex. B to Appellant’s OB, p. 100:2-101:14).

²⁴ *Id.* at p. 7.

²⁵ *Id.* at p. 7.

²⁶ C.A. 16C-09-057 (Del. Super. August 17, 2018) (Wharton, J.) (TRANSCRIPT) (Fel-Pro’s Compendium of Unreported Cases (D.I. 23), p. 63-125).

²⁷ *Id.* at p. 11:10-11, 19:18-20.

exposure which is too small to be causative²⁸, whereas in Delaware there is no such concept as *de minimis*. In Delaware, any exposure that contributes to the disease, no matter how small, is deemed causative under our “but for” causation standard. There is no *de minimis* exposure in Delaware because Delaware’s “but for” test merely requires the exposure from a Defendant’s products to be a cause, no matter how small.²⁹

This Court, in rejecting the “substantial factor” test found that it was more quantitative in connotation whereas “but for” is qualitative in that “it is not how little or how large a cause is that makes it a legal cause, for a proximate cause is any cause which in a natural and continuous sequence produces the injury and without which the result would not have occurred.” *Culver*, 588 A.2d at 1099. (citations omitted). Delaware has long recognized there may be more than one proximate cause. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011). But-for causation in Delaware is a **qualitative** *not* a **quantitative** standard.

²⁸ See e.g. *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (“The law of causation, however, required the plaintiff to prove that the *defendants'* acts or products were a “*substantial* contributing factor” to Krik’s illness. De minimis exposure is not sufficient.”).

²⁹ See *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 693 n.** (Del. Super.1986) (rejecting *de minimis* argument because there was evidence that any exposure caused harm); See *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991) and *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372, 1375 (Del. 1991) (explaining Delaware’s but-for standard of causation).

The Superior Court in *In re Asb. Litig. (Redfearn)* determined that where Plaintiff described that he removed 30 to 40 exhaust or intake manifold gaskets during his lifetime, he could not specify these were all Fel-Pro gaskets, nor the precise time period in which he removed them, and thus could not meet Florida's substantial factor test.³⁰ This case is completely distinguishable from the present one because Delaware does not have a substantial factor test, and expert issues were expressly reserved for a different phase of summary judgment briefing. Expert disclosures were not due until after the product nexus summary judgment oral arguments were heard.³¹ In fact, the *Lavelle* case schedule was different from most other cases in that manner. Its schedule was specifically entered into by counsel to address expert issues *after* product nexus summary judgment. The case moved to a different trial group after summary judgment was decided in order to permit this.³² *Daubert* motions were eventually filed by the four Defendants who

³⁰ C.A. 16C-09-057, p. 28:4-29:3 (Del. Super. August 17, 2018) (Wharton, J.) (TRANSCRIPT).

³¹ AR7, MTSO Order, April 2017; AR15, MTSO Order, July 2017; *see* A1019, SJAB, fn.33.

³² AR7, MTSO Order, April 2017 (explaining that in the *Lavelle* case, summary judgment was heard under the October 2017 trial setting, then, after summary judgment was heard, the case moved to the April 2018 trial setting and expert reports and motions related to expert issues were due under that trial setting); AR15, MTSO Order, July 2017; AR19, MTSO Order, October 2017; AR30-31, MTSO Order, December 2017; A237, A265-268, MTSO April 2018 TG, as of February 2018.

remained after product nexus summary judgment was decided, but the case was resolved prior to resolution of those motions.³³

In *Walls v. Ford* Plaintiff proffered no evidence which could directly or circumstantially prove by a preponderance of evidence that Mr. Walls was exposed to Bendix's asbestos-containing brakes as opposed to non-asbestos.³⁴

The Superior Court below never determined that Fel-Pro's corporate representative Pearlstein's admission was made as to the gasket industry as a whole.³⁵ If the Court below had done so with respect to Pearlstein, that would have been error, as Pearlstein was Fel-Pro's corporate representative pursuant to Delaware Superior Court Rule of Civil Procedure 30(b)(6) and because it is the province of the jury to determine motivation, intent, and credibility. The Superior Court did determine Lehman was speaking on behalf of the gasket industry as a whole and not Fel-Pro, thereby distinguishing Lehman's testimony from the Zeitz article in *In re Asbestos Litig. 112010jr Trial Grp. Limited To: Henderson,*

³³ A114-A120, D.I. 486-488, 490, 494, 495.

³⁴ *Walls v. Ford*, C.A. 14C-01-057 ASB, p. 49-50 (Del. Super. September 10, 2015) (Wallace, J.) (TRANSCRIPT) (Ex. D to Appellant's OB).

³⁵ The Court below simply said with respect to Pearlstein's testimony "Similarly, the testimony of Robert Pearlstein as Fel-Pro's corporate representative in another matter does not take out of the realm of speculation the question of whether Mr. Lavelle actually removed Fel-Pro cylinder head gaskets containing asbestos." *Lavelle v. The Ford Motor Co.*, C.A. No. N16C -03-079 ASB, p. 9-10 (Del. Super. September 19, 2017) (Wharton, J.) (ORDER) (Ex. A to OB).

Henderson.³⁶ This was error because if there is a question as to whether Fel-Pro's "vast majority" testimony or Lehman's testimony to the EPA pertained to Fel-Pro, the gasket industry in general, or both, it should be answered by a jury, who determines the determines the credibility, intent and motivations of a witness's testimony.³⁷

"Motivation, intention, and credibility are intensely factual determinations influenced by various factors including reasonableness, consistency, contradictions and **demeanor** which are appropriately assessed by the finder of facts." [].³⁸

Juries are recognized as the "sole trier of fact responsible for assessing the credibility of witnesses, resolving conflicting testimony and drawing inferences from proven facts."³⁹ "It is the sole province of the jury to determine witness credibility, resolve any conflicts in the testimony and draw any inferences from the proven facts."⁴⁰

Mr. Lavelle's point in citing *Walls v. Ford* is that where Mr. Walls could only establish that he removed brakes from "new" vehicles the Superior Court permitted an inference that he removed "original" brakes from these vehicles,

³⁶ Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82, at *18 (Del. Super. Feb. 2, 2011). See *Lavelle C.A. No. N16C -03-079 ASB*, p. 8-10 (Del. Super. September 19, 2017) (Wharton, J.) (ORDER) (Ex. A to OB).

³⁷ "You are the sole judges of each witness's credibility.[]" DEL. P.J.I. CIV. 23.9 (2000).

³⁸ *Boscov's Dep't Store v. Jackson*, 2007 Del. Super. LEXIS 37, at *38 (Del. Super. Feb. 12, 2007) (emphasis added and internal citations omitted).

³⁹ *Young v. Frase*, 702 A.2d 1234, 1237 (Del. 1997).

⁴⁰ *Austin v. State*, 45 A.3d 148, * 4 (Del. 2012).

despite the fact that “new” is not exactly the same as “original” brakes – there was a rational inference permitted.⁴¹ Mr. Lavelle is asking this Court to allow a rational inference that when in the course of his job for at least three years he removed and replaced Fel-Pro cylinder head gaskets, the “vast majority” of which were asbestos-containing during that time, he was exposed to asbestos from them.

⁴¹ Appellant’s OB, p. 15-16.

II. MR. LAVELLE PRESENTED AND PROFERRED EVIDENCE OF FRIABILITY BELOW, AND EXPERT ISSUES WERE NOT RIPE FOR DETERMINATION AT THE PRODUCT NEXUS SUMMARY JUDGMENT STAGE.

Fel-Pro contended that Mr. Lavelle conceded that all cylinder head gaskets he installed were pre-cut and installation did not release any dust.⁴² For that proposition Fel-Pro cited A573, Lavelle V at 945:2-23.⁴³ In that testimony Mr. Lavelle spoke about one engine job that he recalled on his GTO, not all Fel-Pro gaskets he installed during his work.⁴⁴

Fel-Pro contended that Mr. Lavelle testified that "...[] Fel-Pro cylinder head gaskets generally came off in one piece when removed, obviating the release of any dust during the process."⁴⁵ The cited testimony does not support this. Instead, Mr. Lavelle testified that there was always residue left over when he removed the Fel-Pro cylinder head gasket from his GTO which he had to scrape off with both scraping tools and high speed rotary abrasive tools.⁴⁶ He did not testify that there was no dust associated with this process. To the contrary, he testified that removal of gaskets was sometimes dusty, and required scraping of residue.⁴⁷

⁴² Fel-Pro AB, p. 10.

⁴³ Fel-Pro AB, p. 10, n.38.

⁴⁴ A572, 942:11 – A573, 945:23.

⁴⁵ Fel-Pro AB, p. 13 and p. 13, n.63, citing A579, 967:9-14.

⁴⁶ A579, 967:9-14, *see* A578-579, 966:13-968:19.

⁴⁷ A578-A579, 966:24-968:23 (this was specifically as to a Fel-Pro cylinder head gasket); A743, Lavelle 12/1/16 dep., 59:8-60:4. This was a description of gasket

Below, Mr. Lavelle cited the federal register, for the proposition that “It has been specifically noted that asbestos fibers are “extremely durable,” and their size and shape permit them to remain airborne for long periods of time. When fibers settle, any number of activities, including dusting, sweeping, repair activities and even ordinary movement can cause re-suspension in the air.”⁴⁸ Asbestos, when disturbed, is friable and there are no safe levels of asbestos exposure.⁴⁹ In addition to citing this evidence, Mr. Lavelle made the proffer that “Plaintiff will offer expert testimony regarding the friability of Defendant’s products at the appropriate time under the scheduling order. Expert disclosures are not due until September 8, 2017, after the summary judgment on product nexus are determined.”⁵⁰

As explained earlier, expert issues on causation were expressly reserved for a different phase of summary judgment. Expert disclosures were not due until after the summary judgment decisions on product nexus were briefed and heard by the Superior Court.⁵¹ The *Lavelle* case schedule was different from most other cases in that manner. Its schedule was specifically entered into by counsel to

removal and replacement at Quillen Getty, but he explained that the methodology was the same throughout his work. A747-A748, 76:20-77:8.

⁴⁸ A1019.

⁴⁹ A1071-A1074, Ex. H Ellenbecker 10/23/13 Friction Aff’d, at A1072, ¶ 5, A1073, ¶¶ 10-14; A1075-1078, Ex. I, Ellenbecker 2/16/06 general Aff’d, at A1077 ¶ 6, A1078, ¶ 11.

⁵⁰ A1019, fn. 33.

⁵¹ AR7, MTSO Order, April 2017; AR15, MTSO Order, July 2017; *see* A1019, SJAB, fn.33.

address expert reports and issues *after* product nexus summary judgment. After summary judgment on product nexus, the case jumped to a different trial group, then expert reports or disclosures were due, and subsequently summary judgment motions or *Daubert* motions regarding expert issues were permitted to be filed.⁵² *Daubert* motions were eventually filed by the four Defendants who remained after product nexus summary judgment was decided, all addressing Plaintiff's causation experts, but the case was resolved prior to resolution of these motions.⁵³

Mr. Lavelle also disagrees with Fel-Pro's contention, made at AB, p. 30, and p. 30 n.11, that any of the Superior Court cases cited in AB, fn. 82, found that installation of gaskets did not cause exposure to asbestos. None of those cases hold anything like that.

Simply because Mr. Lavelle did not testify there was visible dust during installation does not mean installation of the gaskets did not result in exposure to asbestos. Plaintiff provided affidavits from an expert Industrial Hygienist, despite the fact that expert reports on causation were not due yet under the scheduling order at the time of summary judgment resolution below. As Dr. Ellenbecker

⁵²AR7, MTSO Order, April 2017 (explaining that in the Lavelle case, summary judgment was heard under the October 2017 trial setting, then, after summary judgment was heard, the case moved to the April 2018 trial setting and expert reports and motions related to expert issues were due under that trial setting); AR15, MTSO Order, July 2017; AR19, MTSO Order, October 2017; AR30-31, MTSO Order, December 2017; A237, A265-268, MTSO April 2018 TG, as of February 2018.

⁵³ A114-A120, D.I. 486-488, 490, 494, 495.

explained, airborne asbestos fibers are not even visible with an optical microscope.⁵⁴ Once gaskets are disturbed, the asbestos within them can become respirable, according to Dr. Ellenbecker.⁵⁵

With regard to Fel-Pro, Mr. Lavelle said it was his favorite brand because they stuck less than other brands of gaskets, not that they did not stick or there was no dust associated with them. He said there was “less material removal required and surface preparation to put a new gasket on....[.]” not that there was none, and this testimony further confirmed he removed Fel-Pro’s gaskets.⁵⁶

Mr. Lavelle disagrees with Fel-Pro’s interpretation of the Superior Court’s decision below as discussed at AB, p. 33, where it claimed that “...it noted this fact was another key distinction from the Henderson case where there was uncontested evidence that the Henderson plaintiff created dust from work with asbestos-containing Victor cylinder head gaskets.” (emphasis omitted). The Superior Court made no such note or distinction below. The Superior Court appropriately did not address Fel-Pro’s causation argument, as it was not ripe.

⁵⁴ A1077, ¶ 6, A1073, ¶ 10.

⁵⁵ A1078, ¶ 11.

⁵⁶ A644, 1223:11-1224:5.

CONCLUSION

Wherefore, Plaintiffs request that this Court reverse the Superior Court's decision on summary judgment.

Respectfully submitted,

Jacobs & Crumplar, P.A.

/s/ Raeann Warner

Raeann Warner, Esq. (#4931)

750 Shipyard Drive, Suite 200

Wilmington, DE 19806

Attorneys for Plaintiffs

Below/Appellants