EFiled: Aug 20 2021 01:42PM EDT
Filing ID 66868324
Case Number 211,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHELLEY DROZ, individually and as Executor for the Estate of ERIC C. DROZ, deceased, Plaintiff Below, Appellant, v. HENNESSY INDUSTRIES, LLC, Defendant Below, Appellee.	No. 211, 2021

APPELLANT'S OPENING BRIEF

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Dated: August 20, 2021

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NATURE OF THE PROCEEDINGS

This appeal asks the Court to reverse the Superior Court's grant of summary judgment to a product manufacturer under *Stigliano v. Westinghouse*, 2006 WL 3026171 (Del. Super. Oct. 18, 2006) [hereinafter *Stigliano*]. Not long after *Stigliano* was decided, its narrow holding mutated. What was once a modest, single-paragraph letter decision on asbestos product identification is now a leviathan. Today—as typified in this appeal—it is a burden-shifting "framework." But this framework is merely a heightened standard of product identification set adrift from its moorings. This appeal asks the Court to reel in the resulting slack and refasten product identification to the only framework that matters: Superior Court Civil Rule 56(c).

How *Stigliano* drifted so far from the dock is a story told in a series of transcript rulings and orders from the Superior Court's asbestos docket. The combined effect of which has been to erode the summary judgment standard on product identification to its current untenable state: requiring every plaintiff who alleges exposure to asbestos—often recently diagnosed with mesothelioma, but from exposure decades earlier—to establish that they could only have been exposed to an asbestos-containing product rather than a benign version of a similar product. Such a "framework," that only serves to inculcate a distorted burden of proof on summary judgment, should be abandoned.

In this appeal, Shelley Droz alleges that her late husband, Eric Droz, was tortiously exposed to asbestos as a mechanic at Larry's Auto Repair from 1971 to 1973 in Miller, South Dakota. Mr. Droz operated an "arc grinder" at Larry's Auto. AMMCO, Hennessy's predecessor, manufactured the arc grinder. Its function was to render brake linings more efficient before installation into the vehicle. To carry out this goal, the arc grinder sanded the lining of the new brake shoe. Mr. Droz performed brake work "constantly" and "arced" brake shoe linings daily to at least once a week. He identified three brands of aftermarket brake shoe linings at Larry's Auto: Bendix, Wagner, and Raybestos.

While most brake drum linings in the early 1970s contained asbestos, Hennessy's arc grinder did not. But Hennessy knew that its arc grinder was used in a market awash with asbestos brake linings. Instead of warning mechanics like Mr. Droz about the dangers of asbestos inherent in the use of its own product, it chose not to warn at all.

On Hennessy's motion for summary judgment, it argued that it owed no duty of care under Washington law to warn Mr. Droz. Alternatively, Hennessy raised *Stigliano* to argue that Mr. Droz never identified an asbestos-containing product Hennessy manufactured, and he could not show that he was exposed only to the asbestos-containing versions of the three brands of brakes he identified.

The Superior Court accepted for purposes of summary judgment that the use of brake linings with asbestos was "near universal" in this period but held that Mr. Droz could not satisfy product identification under *Stigliano* because there were some non-asbestos brake linings on the market at this time. Accordingly, the Court granted summary judgment. That decision was in error.

This appeal followed.

SUMMARY OF THE ARGUMENT

1. The Superior Court's application of *Stigliano* and its progeny has uprooted Rule 56(c)'s standard of review to probe for genuine issues of material fact construed in a light most favorable to the non-moving party. What was a truism of a court's ability to resolve coin-flip product-identification disputes has become the moving party's talisman—invoked in situations far less binary. This *Stigliano* drift must be reversed. First, it is contrary to *Stigliano* itself. Second, it is contrary to Rule 56(c)'s governing standard. Finally, it is contrary to sound policy. For these reasons, the decision on appeal should be reversed and *Stigliano* should be cast aside.

2. Hennessy's arc grinder did not contain asbestos, but the Superior Court invoked *Stigliano* nonetheless. Hennessy should not benefit from *Stigliano*-by-proxy, arguing that Mrs. Droz was unable to establish that her husband only used the asbestos-containing versions of the three brands of brakes he identified. First, Hennessy failed to produce any evidence to meet its initial burden of proof under *Stigliano* to show the putative existence of both asbestos-containing and asbestos-free brake drum linings in the early 1970s. Second, Mrs. Droz submitted ample evidence at summary judgment that the three brakes her husband identified working with sold primarily asbestos-containing brakes at this time. But the Superior Court still required Mrs. Droz, according to *Stigliano*, to demonstrate at summary judgment that her husband *only* used an asbestos-containing brake from each of these

three manufacturers. This holding misapplies *Stigliano* and, more importantly, misapplies Rule 56(c)'s standard of review.

STATEMENT OF FACTS

A. Mr. Droz Used Hennessy's Arc Grinder at Larry's Auto Repair

While attending high school in Miller, South Dakota from 1971 to 1973, Mr. Droz worked for Larry Arbogast's auto shop, Larry's Auto Repair. A366. Larry's Auto was a small, full-service shop next to a NAPA store. A367, A376, A391-94. The shop did automotive repair on passenger cars as well as light and heavy trucks. A367. During the school year, Mr. Droz worked two to four hours each weeknight and usually four hours on Saturday mornings. A394. On school breaks, he worked full-time. A394-95.

Larry's Auto had an "AMMCO" arc grinder. A376. Mr. Droz testified to using the arc grinder daily to at least once a week. A378, A398-99. He did brake work "constantly" at Larry's Auto. A367. He identified brakes from three aftermarket brands: Bendix, Wagner, and Raybestos. A375-76. The operation of the arc grinder took anywhere from a couple minutes to 15-20 minutes at a time. A368. The grinder had a dust bag attached to its side. A369. The bag was porous and collected some of the dust that was generated from the brake linings. *Id.* Both the grinding process and cleanup were messy endeavors. A368, A370-72. Mr. Droz emptied the dust bag in a trash can and replaced it for future use. A371. At no time did he ever see a warning on the arc grinder about exposure to asbestos. A376.

B. Hennessy's Arc Grinder

Hennessy's predecessor, AMMCO, sold its "Safe-Arc" arc grinder from 1961 to 1987. A403. The arc grinder was designed for brake drum linings for cars and light trucks with standard-sized brake shoes. *Id.* It contained a "dust collection system"—the bag attachment. A404. These bags were never intended to collect all the dust from the grinding operation. A405. The grinders were sold without dust warnings until 1973 despite the expectation that, by design, the grinders functioned to create dust through the sanding of the brake friction material. A404-05.

Hennessy knew that most brakes in use in the early 1980s contained asbestos. A406. In the 1970s, Hennessy knew that brakes contained asbestos to such an extent that it referred to its dust-collection system as an "asbestos dust collector." *Id.* The bag was porous until a redesign in new 1973 models. A406-07. In Hennessy's application with the U.S. Patent and Trademark Office in 1974 and 1975, Hennessy described its pre-1973 dust-collection system as creating a "definite health hazard," explaining that the "inherent danger" to operators of its arc grinder with this system led the device to be banned in some U.S. localities. A411, A416.

C. Asbestos in Automotive Brake Linings in the Early 1970s

Asbestos use in the automotive friction industry was widespread in the 1970s. A406, A419-20. Mrs. Droz's expert, Dr. Barry Castleman, submitted an affidavit on summary judgment attesting to the pervasiveness of asbestos as a component of

brake linings. A419. It was not until well into the 1980s that brake manufacturers even began producing asbestos-free brake linings for use in the passenger vehicle and light truck markets. A419-20.

The three brake manufacturers Mr. Droz identified at Larry's Auto all sold asbestos-containing brake linings in the early 1970s. A447, A453, A460-61. Bendix did not begin to sell asbestos-free brake drum linings for passenger vehicles until the 1980s. A447. Wagner only began considering asbestos-free linings in 1978. A453. Raybestos admits that "most" of its brake linings contained asbestos. A460-61.

D. Mr. Droz Is Diagnosed with Mesothelioma and Brings Suit

Mr. Droz was diagnosed with mesothelioma in December 2018. A095-96. The Drozes originally filed this action in California state court in April 2019. A074. The California action was voluntarily dismissed and refiled in the Superior Court on June 4, 2019. A074, A001. The Complaint alleged four counts: (i) negligence; (ii) willful and wanton conduct; (iii) strict product liability; and (iv) loss of consortium. A061-67. The Superior Court ordered that Washington substantive law applied to the allegations in the Complaint. A021 (Dkt. 100; Order Granting Defendants' Motion to Establish Applicable Law). The case was set for trial in September 2021. A022 (Dkt. 105; Order Approving Agreements and Stipulations Modifying Master Trial Scheduling Order and Standing Order No. 1 Deadlines).

Mr. Droz was deposed on September 17 and 18, 2019, and October 16, 2019. A013, A017. During the pendency of this action, Mr. Droz passed away on July 4, 2020. A177. Mrs. Droz was substituted as the plaintiff in her individual capacity and as executor of Mr. Droz's estate upon the filing of an Amended Complaint on November 24, 2020. A026-27, A180-95. The Amended Complaint added a fifth count: wrongful death. A194-95.

Hennessy moved for summary judgment on January 8, 2021. A037-38. Mrs. Droz responded in opposition to the motion on February 11, 2021. A039. Hennessy filed a reply brief on March 8, 2021. A046-47. The Superior Court heard oral argument on Hennessy's motion on March 25, 2021. A047. The Superior Court granted Hennessy's motion for summary judgment in a written Order dated April 15, 2021 and docketed the Order the following day. Ex. A; A047.

E. Summary Judgment Briefing

Hennessy's motion for summary judgment argued that: (i) Mrs. Droz failed to establish "the required product nexus because [she] could not show AMMCO's product contained asbestos;" (ii) Hennessy had no duty to warn under Washington's "bare metal" defense; (iii) in his deposition testimony, Mr. Droz could not "distinguish asbestos brake shoes from non-asbestos brake shoes" under *Stigliano*; and (iv) Mrs. Droz failed to provide sufficient evidence of causation. A223, A229. Hennessy's *Stigliano* argument cited a previous decision of the Superior Court

granting summary judgment to Hennessy in *In re Asbestos Litig. (Petit)*, 2020 WL 5122939 (Del. Super. Aug. 31, 2020). A229 at n.33.

In response, Mrs. Droz argued: (i) an exception to Washington's "bare metal" defense applied according to *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012); (ii) *Stigliano* did not apply because Hennessy could neither show that it was a manufacturer of both an asbestos-containing and asbestos-free product, nor could Hennessy establish as an initial matter that Mr. Droz used an asbestos-free version of any brake linings at Larry's Auto; (iii) even if *Stigliano* applied to shift the burden of proof to Mrs. Droz, she overcame that burden; and (iv) Mrs. Droz provided sufficient evidence of causation. A342, A349, A351.

On reply, Hennessy went further in its *Stigliano* argument, claiming that *Stigliano* required dismissal because Hennessy did not manufacture an asbestos-containing product. *See* A478 at n.1 (citing *Timmons v. Bondex Int'l Inc.*, 2008 WL 2690313 (Del. Super. May 15, 2008) and *Gardner v. Union Carbide Corp.*, N12C-12-191 ASB (Del. Super. Sept. 4, 2014) (Transcript)). Hennessy also reiterated its argument on causation and maintained that *Macias* did not apply as an "outlier" case on the "bare metal" defense. A481.

F. Oral Argument and Order

At oral argument on Hennessy's motion, the Superior Court queried both parties on the applicability of *Stigliano*. *See* Ex. B at 83:6-10 (questioning counsel

for Hennessy: "Does *Stigliano* squarely apply to this, however? Because as I read *Stigliano* . . . I guess it could apply by extrapolation or analogy, but doesn't *Stigliano* deal with the manufacturer of the product?"); 98:19-23 ("So, again, under *Stigliano*, the trigger, so to speak, is you have to have asbestos containing and non-asbestos containing. You're saying we don't get there because during this relevant period of time it was all asbestos containing?"); 99:15-19 (suggesting record need show plaintiff did not work with any non-asbestos containing product). *See also id.* at 100:17-101:5, 102:10-17. The Superior Court reserved decision. *Id.* at 153:2-6.

On April 15, 2021, the Superior Court granted Hennessy's motion. Ex. A. The Order granted summary judgment based on *Stigliano* without deciding whether triable issues existed under Washington law as to duty of care and causation.

The Order assumes that *Stigliano* applies to Hennessy's motion without directly answering the question of how Hennessy could invoke *Stigliano* where it was uncontested that Hennessy did not manufacturer an asbestos-containing product. Applying *Stigliano*, the Superior Court cited Dr. Castleman's affidavit attesting to the "near universal" use of asbestos in the automotive friction industry at this time. Ex. A at ¶ 12. However, "near universal" was not sufficient proof because this expression "demonstrated that not all brake linings were asbestos containing." *Id.* Placing a finer point on this distinction, the Superior Court wrote: "Thus, although the record supports a finding that *most* brakes manufactured during the relevant time

frame contained asbestos, it necessarily follows that *some* brake linings did not contain asbestos." *Id.*

As such, the burden shifted to Mrs. Droz to rebut *Stigliano* and the Superior Court found the record wanting. *Id.* at ¶ 13. For instance, though Mr. Droz described the three brake linings he worked with hundreds of times at Larry's Auto, and the record showed that these three manufacturers sold most if not only asbestos-containing brake linings at the time of exposure, the record was insufficient under *Stigliano* to overcome Mrs. Droz's burden on summary judgment to satisfy product identification. *See id.* at ¶ 13.

After the remaining defendants were dismissed from the action by stipulation or court order, this appeal followed. *See* A053; Ex. C (July 1, 2021 Order dismissing final remaining defendant).

ARGUMENT

I. The Invocation of *Stigliano* Perpetuates a Heightened Standard of Product Identification

A. Question Presented

Whether the Superior Court erred in granting summary judgment to Hennessy by invoking *Stigliano* when Hennessy never manufactured an asbestos-containing product and where most brake linings on the market during the period of exposure contained asbestos. Ex. A; Ex. B at 97:23-98:14; A349.

B. Standard of Review

The scope of review on appeal from the grant of summary judgment is *de novo*. *In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996) (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992)). The Court views the facts in a light most favorable to the non-moving party. *Id.* (citing *Merrill*, 606 A.2d at 99-100).

C. Merits of the Argument

The Superior Court should not have invoked *Stigliano*'s burden-shifting framework to grant summary judgment. First, *Stigliano* speaks only to situations where a single manufacturer made both asbestos-containing and asbestos-free versions of the same product during the period of exposure. Second, the Superior Court's invocation of *Stigliano* was not aberrant; rather, it typifies the outsized role of *Stigliano* beyond binary product identification disputes. Given its expansion, this Court should abandon its burden-shifting framework.

i. *Stigliano* Is Limited to Resolving Binary Product Identification Disputes in a Vacuum

Just as when "fact becomes legend, print the legend," THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962), *Stigliano*'s legend in asbestos litigation stands on a mountain of sand.

The decision itself is much less the stuff of legend than its legacy lets on. For one, it is a letter opinion with a single substantive paragraph decided after supplemental briefing on summary judgment. For another, it involves a "coin-flip" identification dispute.

The plaintiff in *Stigliano* alleged that he was exposed to asbestos from the defendant-manufacturer's welding rods. It was undisputed that the manufacturer made both asbestos-containing and asbestos-free versions of the welding rods during the period of exposure.[1] Accordingly, the Court held:

> When the record reveals that a defendant manufactured both asbestos-containing and non asbestos-containing versions of a product during the time period of alleged exposure, in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product, the Court cannot draw the inference of

[1] The *Stigliano* plaintiff only ever identified a part number associated with a type of welding rod, "6010." *See* Defendant CBS Corporation's Supplemental Reply in Support of Its Summary Judgment at 2, *Stigliano v. Anchor Packing Co.*, N05C-06-263 ASB (Del. Super. Oct. 4, 2006) (Tab 1). He could recall few specifics, but did recall "Fleet weld five, fleet weld seven, 6010, various wires. . . ." *Id.* at 3. The defendant's 6010 welding rods, however, were branded "XL 610 and "XL 610 A." *See id.* at Ex. B-20. Further, the plaintiff alleged exposure in the 1970s, but the defendant ceased manufacturing asbestos-containing welding rods in 1971. *Id.* at 4.

> exposure and summary judgment on product nexus must be granted.

Stigliano, 2006 WL 3026171, at *1 (citing *Lipscomb v. Champlain Cable Corp.*, 1988 WL 102966 (Del. Super. Sept. 12, 1988)).

The *Stigliano* Court's focus was on what inference the court may draw where evidence of product identification stands in equipoise. That is, where the plaintiff presents nothing more than: "It could have been the asbestos-version, or it could have been the asbestos-free version." In such a circumstance, it is fair to hold that the plaintiff has failed to establish a genuine issue of material fact on summary judgment. For example, it is equally clear that, in the absence of additional evidence, the fact that an unwanted outcome from an allegedly negligent medical procedure could evenly be said to have occurred with or without medical negligence, the medical provider is entitled to summary judgment. *See, e.g.*, DEL. P.J.I. CIV. § 4.2 (revised Aug. 15, 2006) ("If the evidence tends equally to suggest two inconsistent views, neither has been established.").

The *Stigliano* Court cited one case in support of its decision: *Lipscomb v. Champlain Cable Corp.*, 1988 WL 102966 (Del. Super. Sept. 12, 1988). In *Lipscomb*, the Superior Court's focus was again on what inference the court may draw on product identification rather than a framework for resolving the issue. The plaintiff in *Lipscomb* failed to establish his exposure to the "type of pipe" he handled on his limited pickup runs to a manufacturing plant. *Id.* at *2. The evidence

established that "two different types of pipe were being continuously produced [at the plant] during [this] period," but "[o]nly one of these types, Chemtite, contained [defendant's] blue asbestos paper." *Id*. The *Lipscomb* Court held that, "absent evidence that the particular type of pipe to which [he] picked up contained [defendant's] asbestos product," he failed to establish product nexus. *Id.*

The holding in *Stigliano*, therefore, was not seismic. It neither produced, nor perpetuated, a framework. It set forth no quantitative balancing. It simply embodies a truism: that the plaintiff cannot rely on coin-flip identification to overcome summary judgment.

This appeal presents far better odds and evidence consistent with a plaintiff's obligation under Rule 56. Mr. Droz identified three brands that sold predominately asbestos-containing brake linings during the same time as his use of the arc grinder. There is no coin flip to be resolved: the court had sufficient evidence to base its inference that Mr. Droz did hundreds of brake jobs at Larry's Auto, rendering it certain that Mr. Droz came into frequent contact with asbestos-containing brakes while using the arc grinder. However, the court required a showing that *all* the brakes he sanded were asbestos-containing. Thus, the court required Mrs. Droz to negate the chance that her husband was exposed to an asbestos-free brake lining. This inverts the required showing.

ii. *Stigliano* Has Drifted to Become a Burden Shifting Framework that Supplants Rule 56(c)

Not long after *Stigliano*, a procession of decisions turned it into a framework that scythed down material disputes over product identification. Two recurrent scenarios of product identification are emblematic of this change: gaskets and joint compound.

a. Gaskets

A common allegation of exposure to asbestos involves a mechanic-cum-plaintiff's exposure to asbestos from manipulation of gaskets integral to the function of automotive parts, such as engines. Fel-Pro, a manufacturer of engine gaskets, was a major seller in the 1970s and 1980s. Fel-Pro's corporate representative testified that all Fel-Pro cylinder head gaskets and exhaust gaskets contained asbestos prior to 1978, except for those gaskets that were metal. Metal gaskets were "the exception" to the normal makeup of these gaskets prior to 1978.

A few years after *Stigliano*, the Superior Court addressed a common iteration on alleged exposure to Fel-Pro gaskets in *Pelzel*. *In re Asbestos Litig. (Pelzel)*, N10C-05-205 ASB (Del. Super. Aug. 17, 2011) (Order) (Tab 2) [hereinafter *Pelzel*]. The plaintiff in *Pelzel* was diagnosed with mesothelioma and died before he brought suit due to his exposure to asbestos as a mechanic, truck driver, and soldier. *Id.* at *1. His family presented evidence that the plaintiff was exposed to Fel-Pro gaskets beginning in the 1960s while performing non-occupational mechanical repairs. *Id.*

at *1-*4. Though his friends and family testified that the plaintiff frequently used Fel-Pro gaskets, they presented no evidence that the gaskets with which he worked were asbestos-containing. *Id.* at *4. Fel-Pro argued that "the vast majority of the automotive gaskets manufactured by Fel-Pro during this period (early to mid 1980s) did not contain asbestos. . . ." *Id.*

The *Pelzel* Court, upon reviewing applicable Arkansas law, found this precedent "regarding the burden of proof on summary judgment motions and its shifting to the non-moving party to be particularly instructive." *Id.* at *8 (discussing *Chavers v. General Motors Corp.*, 79 S.W.3d 361 (Ark. 2002)). The court found that the plaintiff had failed to present "*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." *Id.* Moreover, the *Pelzel* Court found the plaintiff to be misinterpreting the summary judgment standard. The court explained that Fel-Pro had met its initial burden by showing that there existed no evidence in the record of asbestos-exposure, and the plaintiff failed to identify any asbestos in response. *See id.* at *9-*10. It was no saving grace that Fel-Pro's interrogatory responses admitted that it sold asbestos-containing gaskets during the period of exposure. Regardless of this concession, the court held that Fel-Pro met its initial burden of product identification under the nascent *Stigliano* framework—it was for

plaintiff, then, to "show that any Fel-Pro gasket that Pelzel ever worked with or around was asbestos-containing."[2] *Id.* at *10.

A year later, the Superior Court addressed the same argument with one additional factor: testimony of Fel-Pro's corporate representative that "98% of [Fel-Pro's] head gaskets contain[ed] asbestos." *In re Asbestos Litig. (Vaughan)*, 2012 WL 1409732, at *1 (Del. Super. Jan. 20, 2012). The "evidence established that Plaintiff used [Fel-Pro's] head gaskets." *Id.* As such, the court found that the "fact that 98% of the gaskets contained asbestos circumstantially links Mr. Vaughan to [Fel-Pro's] asbestos-containing product and therefore the court draws the inference of exposure." *Id.*

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[2] Earlier in 2011, the court addressed allegations in another gasket case and stressed that *Stigliano* is no panacea to the defendant-manufacturer:

> Thus, *Stigliano* addresses a particular, albeit oft-recurring, evidentiary deficiency in product exposure cases; it does not stand for the proposition that a manufacturer is *always* entitled to judgment in its favor merely because it manufactured asbestos-containing and asbestos-free varieties of a product during the time period of the alleged exposure. Here, in contrast to *Stigliano*, Plaintiffs provided evidence linking Bruce and Elizabeth Henderson to asbestos-containing Victor gaskets, thereby creating a triable issue as to causation. The jury was free to credit that evidence, which it did.

In re Asbestos Litig. (Henderson), 2011 WL 684164, at *7 (Del. Super. Feb. 2, 2011) (denying defendants' post-trial motions following plaintiff verdict).

The terms "vast" and "majority" are radioactive in that those terms of a qualitatively greater nature have fleeting half-lives on the court's asbestos docket. In two 2017 decisions of the Superior Court related to Fel-Pro gaskets, the court reviewed a similar record but granted summary judgment each time to Fel-Pro. In the first of these cases, *Holstege*, the plaintiff assisted his son in performing automotive work from 1979 to 1999. *In re Asbestos Litig. (Holstege)*, N14C-06-038 ASB, at *2 (Del. Super. Apr. 24, 2017) (Order) (Tab 3) [hereinafter *Holstege*]. He alleged exposure to Fel-Pro gaskets from 11 of 20 total engine overhauls, including five head gaskets and six manifold gaskets. *Id.* at *6-*7. Weighing the competing arguments from both sides, the Superior Court held that:

> Even if the Court were to assume, however, that Mr. Holstege's son used Fel-Pro head or manifold gaskets, Plaintiffs are unable to meet their burden under the *Stigliano* burden shifting framework to produce evidence either directly of [sic] circumstantially that Mr. Holstege was exposed to the asbestos-containing versions of Fel-Pro's head or manifold gaskets as opposed to the asbestos-free versions.

Id. at *7. The second of these decisions, *Lavelle*, ruled similarly as the court rejected what it termed "collateral source evidence": the testimony of Fel-Pro's corporate representative. *In re Asbestos Litig. (Lavelle)*, 2017 WL 11025994, at *2 (Del. Super. Sept. 19, 2017) (Order), *aff'd mem.*, 208 A.3d 355 (Del. Apr. 4, 2019) (Table). Finding Fel-Pro's "understanding in certain respects relevant to [its] *Stigliano* argument" more persuasive, the court propped up Fel-Pro's summary judgment

arguments, finding: the timeframe of exposure was later than what the plaintiff argued; the plaintiff himself was unable to discern whether a product contained asbestos; and Fel-Pro was transitioning away from asbestos-containing gaskets in the 1970s. *Id.* at *2-*3. The court maintained that Fel-Pro's corporate representative's testimony "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." *Id.* at *3.

b. Joint compound

Another frequent scenario of product identification on the Superior Court's asbestos docket is whether the plaintiff can prove beyond speculation that it was likely that a supplier's asbestos fibers were used in the manufacture of joint compound the plaintiff used to prepare drywall in construction. The major seller of joint compound in the 1970s and 1980s was Georgia-Pacific. Its premiere joint compound product, Ready-Mix, was a semi-wet slurry of asbestos and other material. The user would apply the joint compound to creases and holes in the wall, sand the compound when dry, and reapply until smooth prior to painting. The sanding process was extremely dusty.

Shortly after *Stigliano*, one of the main suppliers of asbestos to Georgia-Pacific ("GP")—Union Carbide Corporation ("UCC")—used *Stigliano* effectively to attack the reliability of plaintiffs' product identification. In fact, in applying

Stigliano to this situation, UCC was able to move the goal posts at summary judgment. Instead of asking whether there existed a genuine issue of material fact as to whether UCC was more likely than not a supplier of asbestos to GP during the relevant period of exposure, UCC turned the question into one of *exclusivity*: Had plaintiff shown a genuine issue of material fact as to whether UCC was an exclusive supplier of asbestos to GP?

But exclusivity was but the first step under *Stigliano* for UCC. The next step was to determine whether GP—or another joint compound customer of UCC, such as Kaiser Gypsum—produced an asbestos-containing *and* asbestos-free version of its joint compound during the period of exposure.

The Superior Court's decision in *Timmons* is instructive. *In re Asbestos Litig. (Timmons)*, 2008 WL 2690397 (Del. Super. May 15, 2008) (Order) [hereinafter *Timmons*]. Shortly after *Stigliano*, the *Timmons* Court granted in part and denied in part summary judgment to UCC on this very fact pattern. The plaintiff in *Timmons* used GP's Ready-Mix between 1970 and 1977. *See id.* at *1. He presented evidence that GP only used UCC's asbestos from the relevant GP factory during that period. *Id.* But UCC presented evidence that it was a "minority supplier of asbestos" to Kaiser Gypsum. *Id.* at *2. The court denied summary judgment to UCC for GP's Ready-Mix, but granted it as to UCC's supply of asbestos to Kaiser Gypsum. *See generally id.* Applying *Stigliano*, the *Timmons* Court held that the plaintiff was

unable to prove that UCC "was the exclusive supplier of asbestos to Kaiser Gypsum throughout the relevant period." *Id.* at *2.[3]

Several years later, UCC's *Stigliano* argument was like whack-a-mole. Whenever UCC could establish it was not the sole or exclusive supplier of asbestos to an intermediary who sold joint compound, the result was a grant of summary judgment. *See, e.g.*, *In re Asbestos Litig. (Sturgill)*, 2017 WL 6343519 (Del. Super. Dec. 11, 2017) (granting summary judgment to UCC) ("If [UCC] was simply one of several suppliers of asbestos to joint compound manufacturers, it cannot reasonably inferred that the asbestos to which Mr. Sturgill was exposed was supplied by [UCC]." (citing *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690 (Del. Super. 1986))); *In re Asbestos Litig. (Aveni)*, 2017 WL 5594055 (Del. Super. Nov. 8, 2017) [hereinafter *Aveni*] (granting summary judgment to UCC as non-exclusive supplier and under *Stigliano*). And, if UCC was the sole supplier, it could rely on the possibility that the intermediary made an asbestos-free product during the relevant period of exposure. *See, e.g.*, *Aveni*, 2017 WL 5594055, at *2. Through clever and persistent use of *Stigliano*, therefore, UCC—a supplier of quite literally tons of asbestos—limited

[3] In a similar fact pattern less than a year later, the Superior Court stated that, "I think, at no point, does the burden shift to the defendants to sort out who among a number of suppliers is responsible and, therefore, liable to the plaintiff." *In re Asbestos Litig. (Bunting)*, C.A. No. 05C-11-255 ASB, at 28:20-23 (Del. Super. Feb. 19, 2009) (Transcript) (Tab 4).

itself to potential liability for those unicorn plaintiffs falling in the complex Venn diagram of exclusive UCC supply and only asbestos-containing joint compound.

iii. The Superior Court Has Criticized *Stigliano*'s Drift

Despite these emblematic examples of *Stigliano*'s encroachment, it has not been free of critique.[4] The central concern the court has expressed is the frequent undervaluing of circumstantial evidence in providing a link to asbestos exposure. "[W]here in asbestos law did things turn and the stamps get put on the law where you can't rely on circumstantial evidence, you got to have direct evidence[?]" *In re Asbestos Litig. (Kales)*, C.A. No. N17C-05-589 ASB, at 73:21-23 (Del. Super. Feb. 28, 2019) (Transcript) (Tab 5). The "carving [] out" of direct evidence as superior to circumstantial evidence in asbestos litigation at summary judgment—apart from every other field of law—draws a direct line from the decision in *Stigliano*. *Id.* at 81:2. And in the context of the UCC-GP conundrum, the court has expressly noted the impossible burden plaintiffs are put to based on the state of asbestos jurisprudence in this State stemming back to *Nutt*:

> In some Superior Court cases decided since *Nutt*, the Superior Court has imposed an impossible and inappropriate burden on the plaintiff. These cases require a plaintiff to provide evidence justifying an inference of certainty of exposure when two or more suppliers

[4] The rotation of jurists serving as designated asbestos judges for periods of one to two years injects new eyes on old problems. It also comes with growing pains and uncertainty over how a newly assigned judge may interpret trends in the asbestos docket's common law.

> provided asbestos to the intermediary. Such a blanket requirement does not flow from traditional concepts of tort law. Furthermore, such an approach ignores that the standard of proof is to a preponderance of the evidence and that a plaintiff may meet his or her burden of proof by circumstantial evidence alone. In fact, circumstantial evidence may establish the entire basis for recovery when a plaintiff is unable to specifically identify the manufacturers' asbestos products as the one to which he or she was directly exposed. Direct, circumstantial, or statistical evidence suffices to generate an issue of material fact regarding product identification if the evidence provides at least a reasonable inference of a greater than fifty-percent chance of exposure to the defendant's product.

Robinson v. Union Carbide Corp., 2019 WL 3822531, at *11 (Del. Super. Aug. 15, 2019). Subtle though it may be, the cumulative effect of a prioritizing direct evidence over circumstantial evidence when the plaintiff is either deceased or decades out from his or her toxic exposure cuts down many cases at summary judgment.

iv. The Use of *Stigliano* Here Is Particularly Inapt: Hennessy's Arc Grinder Never Contained Asbestos

Hennessy's grinder did not contain asbestos. Mrs. Droz never argued that it did. Instead, she alleged that Hennessy failed to warn her husband about the foreseeable risks of harm arising from the use of the arc grinder. The theory of liability, therefore, is that the grinder was defective; that its operation inevitably exposed Mr. Droz to harm about which Hennessy never warned users. As Washington law recognizes, where a product inevitably puts the plaintiff at risk of harm, the fact that the product itself did not contain asbestos is of no import: liability

may attach in such a circumstance. *See Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1077 (Wash. 2012) ("In summary, this case comes within the general rule that a manufacturer in the chain of distribution is subject to liability for failure to warn of the hazards associated with use of its own products.").

The application of *Stigliano* here, thus, displaces Washington product liability law. On one hand, *Macias* holds that an exception to the "bare metal" defense exists for a manufacturer of a product even though the product itself does not contain asbestos. On the other, *Stigliano*—as applied here—required Mrs. Droz to prove that a *different* product, *i.e.*, the brake lining, that encountered Hennessy's product, *i.e.*, the arc grinder, was always asbestos-containing. Therefore, Delaware procedural law deprives Mrs. Droz of her substantive rights under Washington law. *Cf. Chaplake Holdings, LTD. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001) ("The procedural law of a foreign state will . . . be applied 'when the law of a foreign state is applied to substantive issues [and] the procedural law of the foreign state is "so inseparably interwoven with substantive rights as to render a modification of the [general] rule necessary, lest a party be thereby deprived of his legal rights."'" (citations omitted)).

Assume, for instance, that Larry's Auto was a California business and Mr. Droz was exposed from 1971 to 1973 in California as a mechanic in precisely the same way his wife argues here. There would be no question that *Sherman v.*

Hennessy Indus., Inc., 237 Cal.App.4th 1133 (Cal. Ct. App. 2015) would apply. In *Sherman*, the court held against Hennessy and found it owed a duty under its *Tellez-Cordova* exception to California's "bare metal" defense. And there would be little question that the Superior Court would apply *Sherman* to find a duty here. However, under *Stigliano*, Delaware procedural law would short-circuit the case on product identification. It is worth considering, then, the wisdom of a framework whereby the outcome in the Delaware courts when applying the substantive law of the foreign state results in the opposite outcome then would occur in a court of the foreign state.

v. This Court Should Jettison the *Stigliano* Framework

As described above, *Stigliano* has distorted Rule 56(c). This Court has not hesitated in the past to reassess the wisdom of prior asbestos docket decisions. *See Ramsey v. Georgia So. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018) (holding manufacturer may owe a duty of care under Delaware law to take-home asbestos plaintiff; overruling *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011) and *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009)). And, of course, this Court is not compelled to give *Stigliano* and its ad hoc framework deference under *stare decisis* as a decision of a lower court. *See Gatz Properties, LLC v. Auriga Capital Corp*., 59 A.3d 1206, 1219 & n.68 (Del. 2012). The cleanest remedy here is to overrule or disavow *Stigliano* as a framework for product identification.

This would restore Rule 56(c) as the framework for assessing product identification. It would remove the meta-analysis *Stigliano* overlays in a situation such as this appeal where the governing standard on summary judgment is applied to the substantive law of the foreign state, then put through the prism of Delaware procedural law, before ever reaching the issue of causation. And it would return genuine issues of material fact back to the trier of fact: the jury.

One counterargument to maintaining *Stigliano* as a framework posits that it protects the jury from speculating over whether or not a product contained asbestos. The jury should not be asked to speculate about the existence of asbestos in a product in the same way a jury should not be asked to speculate on the color of the traffic light at the time of an accident, *see Cuonzo v. Shore*, 2008 WL 193298 (Del. Super. Jan. 24, 2008) (denying motion for new trial; parties arguing other party had red light before accident); the connection between the tort and the injuries suffered, *see Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 533 (Del. 1998) ("Without evidence of causation, the jury was forced to speculate as to how the seat defect may have caused the specific injuries resulting in death."); or the damages to award upon a showing of injury from the accident, *see Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958) ("the jury cannot supply the omission by speculation," but the "fact that there is some uncertainty as to plaintiff's damage or the fact that the damage is very difficult to measure will not preclude a jury from determining its value."). But as

simple as *Stigliano* started, its application has done substantial harm to the basic burdens of proof on summary judgment extant for decades. *See In re Asbestos Litig.*, 509 A.2d 1116, 1117-18 (Del. Super. 1986) ("The Court, however, will not indulge in speculation and conjecture; a motion for summary judgment is decided on the record presented and not on evidence potentially admissible."). The application of *Stigliano* in this appeal is emblematic: Hennessy never presented *any* evidence of asbestos-containing or asbestos-free brakes in the record. *See infra*, II.C.ii. But it shifted the burden of identification to Mrs. Droz based simply on its counsel's argument. *See id.* The fact that the Superior Court permitted Hennessy to shift the burden of proof, thus, indicates a flaw in *Stigliano*'s application. Removing *Stigliano* or disavowing it would do no harm to the typical burdens on summary judgment; rather, it would correct an errant trajectory in the Superior Court's asbestos docket.

* * *

Accordingly, the Court should reverse and remand for further proceedings.

II. The Superior Court Erred in Applying *Stigliano*

A. Question Presented

Whether, in applying *Stigliano*, the Superior Court erred in granting summary judgment to Hennessy because Mrs. Droz could not prove her husband was exposed only to asbestos-containing brake linings while using Hennessy's arc grinder. Ex. A; Ex. B at 97:23-98:14; A349.

B. Standard of Review

The scope of review on appeal from the grant of summary judgment is *de novo*. *In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996) (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992)). The Court views the facts in a light most favorable to the non-moving party. *Id.* (citing *Merrill*, 606 A.2d at 99-100).

C. Merits of the Argument

The Superior Court's application of *Stigliano* is flawed. First, Hennessy failed to shift the burden onto Mrs. Droz because it could only argue (without supporting evidence) that some asbestos-free brake linings existed on the market during the relevant period. Second, Mrs. Droz sufficiently met her burden to show direct and circumstantial evidence indicating that Mr. Droz used the asbestos-containing versions of the three brands of brakes he arced while performing hundreds of brake jobs at Larry's Auto. Finally, the Superior Court's reasoning required Mrs. Droz to show that her husband only worked with asbestos-containing brakes while using

Hennessy's arc grinder. This requirement exceeds Rule 56(c)'s standard of review and augurs an impossible standard for asbestos product identification.

i. Hennessy Failed to Present Any Evidence to Shift the Burden of Proof Under *Stigliano* to Mrs. Droz

Stigliano requires an initial showing by the moving party: that it produced both an asbestos-containing and asbestos-free version of a similar product in the period of exposure. Hennessy never made such a showing. And Mrs. Droz never argued that Hennessy sold its arc grinder with asbestos.

The Superior Court recognized this threshold issue when it questioned Hennessy's counsel at oral argument. *See* Ex. B at 83:6-10 ("Does *Stigliano* squarely apply to this, however? Because as I read *Stigliano* . . . I guess it could apply by extrapolation or analogy, but doesn't *Stigliano* deal with the manufacturer of the product?"). But the Order fails to mention this issue. And it is not clear as a policy matter why Hennessy would be able to avail itself of *Stigliano*. The alleged liability is from a failure to warn about the inevitable harm that occurs from the use of *its* arc grinder in a market that is awash with asbestos. *See* A346-47 (discussing *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012)); *Sherman v. Hennessy Indus., Inc.*, 237 Cal.App.4th 1133, 1142-43 (Cal. Ct. App. 2015) (describing and applying California's exception to "bare metal" defense in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*, 129 Cal.App.4th 577 (Cal. App. Ct. 2004)) ("When the intended use of a product inevitably creates a hazardous situation, it is

reasonable to expect the manufacturer to give warnings." (internal quotation marks omitted)). Requiring Hennessy to exercise due care where it is inevitable that the use of its product will create a hazardous situation is consistent with Washington and Delaware law. *See Macias*, 282 P.3d 1069; *Ramsey*, 189 A.3d 1255, 1260 (Del. 2018).

Further, Hennessy's attempt to shift the burden here falls woefully short as a factual matter. In its opening brief in support of its motion for summary judgment, it argued that Mr. Droz "testified generally to the manufacturers of brake shoes he encountered," and that he "could not provide testimony linking his work to a particular manufacturer's brake or even an asbestos containing brake." A230. Not so. Mr. Droz identified three brands of brakes at Larry's Auto. A375-76. Sitting at his deposition—nearly 50 years later—his recollection was not photographic. Nor did it need be. With circumstantial evidence—sworn testimony of the manufacturers of each of these three brands of brakes—Mr. Droz's identification is not generalized, as Hennessy claims.[5]

[5] Ironically, had Mr. Droz stated that he knew the brakes contained asbestos, Hennessy would discredit his testimony, despite his many years as a mechanic, as inexperienced, lacking foundation, and beyond the ken of a lay witness. A225 (Hennessy arguing that, "[Mr. Droz] had no special training or knowledge in asbestos identification, meaning he was unable to identify asbestos when observing a product such as a brake shoe or arcing machine."). *Cf. In re Asbestos Litig. (Foucha)*, 2011 WL 2347603 (Del. Super. May 31, 2011) (granting summary judgment; plaintiff's "belief that the CertainTeed three-tab shingles he used were

Hennessy's reply brief on summary judgment fares no better. Hennessy redoubled its effort to obtain dismissal based solely on Mr. Droz's testimony, implying that the witness must carry the water alone on product identification. A478-79. Hennessy then admitted it knew that its grinder would be used with asbestos-containing brakes, but claims that *Stigliano* requires dismissal. A478. This is so, Hennessy claims, because of the holding in *In re Asbestos Litig. (Petit)*, 2020 WL 5122939 (Del. Super. Aug. 31, 2020) [hereinafter *Petit*].

In *Petit*, the Superior Court ruled that *Stigliano* barred the plaintiff's alleged exposure to asbestos from his use of Hennessy's arc grinder and lathe during the 1980s.[6] *See Petit*, 2020 WL 5122939, at *3. The plaintiff described his use of the *arc grinder* as "occasional," "not regular," and "once in a blue moon." *Id.* at *1. He testified that he used Hennessy's *lathe* on "everything from Wagner, Bendix," but could not remember other brands he turned with the lathe. *Id.*

The *Petit* Court requested supplemental briefing "on the issue of whether *Stigliano* extends to manufacturers of third party machines that are used in connection with other users' products." *Id.* at *3. The court decided that it did,

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asbestos-containing is speculation based upon 'common knowledge' about shingles *generally*. . . .").

[6] Hennessy's lathe operated to "turn" brake drum linings to reshape them. Quite distinct from the operation of the grinder, the lathe could be set in motion and operate autonomously. *Petit*, 2020 WL 5122939, at *1 ("Plaintiff would usually walk away to do other tasks once the drum or rotor was set up [sic] on the lathe. . . .").

broadening *Stigliano* to apply to any situation where the defendant points to either an asbestos-containing or asbestos-free version of a product. *See id.* As to plaintiff's burden of proof under *Stigliano*, the court found that plaintiff failed to submit direct or circumstantial evidence of exposure to the asbestos-containing versions of the brakes. *Id.*

On its facts, *Petit* is clearly distinguishable.[7] The alleged timeframe of exposure was different—the 1980s. The alleged frequency of exposure was equivocal—"occasional" use of the grinder. The alleged products were two-fold—the grinder *and* the lathe. And the circumstantial evidence in support of the link to asbestos-containing brake linings while using Hennessy's products consisted only of Bendix's equivocal interrogatory responses about the existence of "some" non-asbestos-containing brakes on the market.[8]

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[7] Of course, even the substantive law differed in *Petit*. Rhode Island law applied in that case. *See Petit*, 2020 WL 5122939, at *4 (applying Rhode Island's causation standard). And this substantive law made a difference, as the Court held that, even accepting the plaintiff's testimony of exposure, it failed to meet Rhode Island's causation standard. *See id.* Here, the Superior Court never reached (nor should it have) an alternative basis for granting summary judgment.

[8] Bendix updated its interrogatory responses following *Stigliano* to include the term "some" when referencing its asbestos-containing brake lining offerings in the 1980s. *See Petit*, 2020 WL 5122939, at *3. Hennessy took the ball and ran in *Petit*, benefiting from Bendix's superficially minor alterations to its discovery responses. In fact, using the word "some" has become a common defense tactic: upon its simple invocation, the plaintiff is charged with disproving any chance she used an asbestos-free version of a product.

It is too late to put the toothpaste back in the tube of *Petit*'s factual record, but it is not too late to reassess its legal and factual application of *Stigliano* as it is used to support the order of dismissal on summary judgment here. At no point in the briefing or argument did Hennessy put any evidence into the record to show that Mr. Droz worked with an asbestos-free brake—it did not even attempt to put in the updated Bendix interrogatory responses it used in *Petit*.[9] Hennessy simply stated, without corroboration, that Mrs. Droz could not show that her husband came into contact with asbestos-containing brakes despite him having performed hundreds of brake jobs between 1971 and 1973. The only *evidence* submitted in the record is from Mrs. Droz pointing to Mr. Droz's testimony, her expert's affidavit, and the interrogatory responses of the three brake manufacturers. Therefore, Hennessy never shifted the burden of product identification to Mrs. Droz because it never put in any

[9] *See Petit*, 2020 WL 5122939, at *3 ("Defendant submitted another set of Bendix interrogatory responses from 2014 showing that Bendix also produced non-asbestos-containing products during the relevant period."). The *Stigliano* sequence in *Petit* was particularly unfair. Hennessy simply referenced "some" asbestos-free brakes on the market in the 1980s. The plaintiff then introduced evidence of asbestos use in Bendix's pre-*Stigliano* interrogatory responses. On reply, Hennessy introduced the post-*Stigliano* Bendix responses. But a brief dive into the details calls the updated responses into question. For instance, Bendix's corporate representative testified that it was not until the late 1980s that Bendix offered asbestos-free brake drum linings to the wider passenger vehicle market. *See infra* n.11 and accompanying text.

evidence to suggest that Mr. Droz was exposed to both asbestos-containing and asbestos-free brake linings.[10]

ii. Mrs. Droz Satisfied Her Burden Under *Stigliano* to Demonstrate a Genuine Issue of Material Fact on Product Identification

Even if the burden of product identification shifted to Mrs. Droz under *Stigliano*, she met that burden. Mrs. Droz needed only to demonstrate that there was a genuine issue of material fact on product identification taking reasonable inferences in her favor. The record reflects, and the Superior Court accepted for purposes of its ruling, that most brakes on the market during the early 1970s contained asbestos. The record on summary judgment is replete with evidence satisfying Mrs. Droz's burden of proof at this stage.

First, Mr. Droz identified only three brands of brakes while at Larry's Auto: Bendix, Wagner, and Raybestos. Second, Mrs. Droz provided circumstantial evidence demonstrating that Mr. Droz was certainly exposed to the asbestos-containing versions of these three brands of brakes on a regular basis. A350 n.42. Each of the three manufacturers admitted in sworn discovery that their brakes at this time were asbestos-containing:

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[10] This is in contrast with Hennessy's showing in *Sherman v. Hennessy Indus., Inc.,* 237 Cal.App.4th 1133, 1144-45 (Cal. Ct. App. 2015) (discussing Hennessy's proffered evidence on summary judgment describing existence of some asbestos-free brake linings since 1930s, including specialty performance asbestos-free brake lining that plaintiff admitted he encountered during his career).

- ***Bendix***. The corporate representative for Honeywell International, Inc., the successor-in-interest of Bendix, testified in 2003 to Bendix's use of asbestos-containing brake linings. He explained that the first asbestos-free brakes—disc or drum brakes—Bendix offered were for asbestos-free *disc* brakes for specialized, heavy-duty applications such as police and taxi usage. A445-46. It was only in 1983 that Bendix first began selling asbestos-free *drum* brakes for a Ford light truck.[11] A446. Further, it was not until 1987 that Bendix offered an asbestos-free drum brake to the wider passenger vehicle market. A447.

- ***Wagner***. In interrogatory responses in 1996, Wagner described its research plan to replace asbestos in its brakes: "It was determined in 1978 that [non-asbestos substances] could be used safely for some of the same purposes as asbestos-containing brake pads. . . . Wagner Industrial Brake products have contained no asbestos since 1984." A453.

- ***Raybestos***. Raymark Industries, Inc., successor-in-interest to Raybestos-Manahattan, Inc., explained through answers to interrogatories in 1985 that it never "withdrew any of its asbestos-containing friction products from the market because they contained asbestos." A460. As such, "most" of its trademarks in the friction market contained chrysotile asbestos. *Id.*

Third, Mrs. Droz submitted the affidavit of Dr. Barry Castleman. A419-20. Dr. Castleman, an environmental consultant and public health expert specializing in the history of asbestos described the state of the automotive friction market in the 1970s. Dr. Castleman opines that brake manufacturers did not even begin to phase out asbestos in the brake *drum* market until well into the 1980s. A419. Thus, Dr. Castleman is able to state that, in the 1980s, the "vast majority of brake drum linings"

[11] Bendix's representative remarked that he believed Bendix was the "first in the industry" to offer an asbestos-free drum brake in 1983. A446.

contained asbestos. A420 at ¶ 8. Hennessy entirely ignored Dr. Castleman's affidavit on reply and at argument. *See generally* A477-83; Ex. A at 91:6-10.

In large part, however, the Superior Court accepted this factual record. But the court appeared to rule as if it were the trial judge during a bench trial rather than determine whether a genuine issue of material fact existed as to Mrs. Droz's product identification. This undermines the jury's role in resolving factual disputes.

iii. The Superior Court's Application of *Stigliano* Embodies an Impossible Standard of Proof for Product Identification

That the Superior Court granted summary judgment despite this factual record epitomizes the elevated standard of proof on this issue for plaintiffs in asbestos cases. The only proof sufficient, according to the Superior Court's ruling, would be a showing that Mr. Droz always used asbestos-containing brake linings while operating the arc grinder. There is no basis for such an elevated standard. What is more, it is an impossible standard to meet. Even without the long latency period of mesothelioma, such a showing of certainty would be unreasonable in most contexts. This level of precision is inconsistent with our civil justice system. Trials (and summary judgment) are not crucibles of memory; they are a search for the truth. Memories, by their nature, fade. Recall fades to recollection. But the import of epistemological gradations are questions meant for the province of the jury to weigh in its hearing of the evidence. They are not, typically, questions for the trial judge at summary judgment.

In this case, as in many cases applying *Stigliano*, its invocation removes the question of product identification from the jury. Mrs. Droz respectfully requests this Court reverse the Superior Court's Order and remand.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the Order of the Superior Court granting Hennessy's motion for summary judgment.

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Dated: August 20, 2021