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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 Appeal from the Order Granting Defendant Hennessey Industries, LLC's Motion for Summary Judgment, Dated April 15, 2021, in the Superior Court of the State of Delaware in C.A. No. N19C-06-024 ASB

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The veneer of *Stigliano* appears untouched, but it is not unlike the ship of Theseus. Preserved in memorial to Theseus' return from Crete, over time, the ship came under repair. Plank after plank was swapped with a different material. After all the planks were replaced, Plutarch queried whether the ship was indeed Theseus' any longer or a new ship.

Stigliano appears as it was—simple and concise. But it has changed, decision-by-decision, to become something it was not. This appeal asks the Court to dispense with the pretense that *Stigliano* is what it once was and return to first principles of summary judgment applicable to all actions in Delaware.

STATEMENT OF FACTS

Hennessy provides a brief summary of the facts viewed in a light most favorable to Hennessy. *See* Ans. Br. 7-10. That is, of course, contrary to the standard of review. *See In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996) (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992)). Mrs. Droz provides three brief points of clarification on the record below.

First, Hennessy claims that Mr. Droz used the arc grinder "to remove miniscule amounts of brake shoe[] friction material. . . ." Ans. Br. 7 (citing A318 at 28:16-29:8). The term "miniscule" is Hennessy's adjective. Mr. Droz did not testify to removing a "miniscule" amount of brake shoe material. *See* Op. Br. 6 (describing frequent use of arc grinder); A368 (testifying to breathing in "[b]reak material dust" when grinding brakes from "a few minutes to 15, 20 minutes.").

Second, Hennessy describes Mr. Droz's testimony as "vague." Ans. Br. 8. It claims that the sworn interrogatories of Wagner and Raybestos "speak in generalities." *Id.* And that Hennessy's own corporate witness "was similarly short on specifics." *Id.* at 9. In sum, Hennessy claims that every piece of evidence in the record is "generalized." *Id. See also* Ans. Br. 40 ("five pieces of generalized evidence"). But Hennessy is not entitled to characterize the evidence in a light most favorable to itself—it can do that at trial.

Third, from Hennessy's recitation of the facts, the Court might assume that the record is closed. However, expert depositions in the Superior Court asbestos docket are performed *after* summary judgment. When Hennessy deposes Dr. Castleman, it may question him about his affidavit.

ARGUMENT

I. *Stigliano* Is Outcome Determinative

A dispute over the proper identification of a person, place, or thing during litigation is hardly limited to asbestos litigation. Hennessy maintains throughout its Answering Brief that *Stigliano* merely "tracks" or "matches" Rule 56(c)'s standard. Ans. Br. 12. But Hennessy also concedes that *Stigliano* is not used in any other context, whether in Delaware or nationally. Ans. Br. 12 n.2. That is precisely the point: *Stigliano* is largely unnecessary to resolving disputes over identification. What is more, no matter how often Hennessy implores the Court that there is nothing to see here, *Stigliano* has become what it was never intended to be: a framework.[1] Tellingly, then, Hennessy does not cite a situation where *Stigliano* was applied at summary judgment and where the plaintiff *overcame* its framework. Instead, it cites a cavalcade of decisions granting summary judgment to the manufacturer.

Hennessy's argument for maintaining *Stigliano* should be rejected for five reasons.

First, Hennessy overlooks the limited value of *Stigliano* when it was decided. The one-substantive-paragraph letter decision expresses a truism about the

[1] If referring to *Stigliano* as a framework is a "misnomer," as Hennessy contends, Ans. Br. 35 n.5, then legion Superior Court decisions referring to it in such a manner have erred. For instance, here, the Superior Court referred to it as a "burden shifting process." Op. Br., Ex. A at ¶ 11.

resolution of coin-flip identifications made in a vacuum. A situation where nothing more is presented than, "It could have been asbestos; it could not have been," is a situation where summary judgment on product identification should be granted. It does not follow that every identification must pass through *Stigliano*'s lens. Nor does it follow that, once product identification is supported with direct and circumstantial evidence, that *Stigliano* stands for the proposition that the plaintiff need show: "It *must* have been asbestos." That exceeds *Stigliano*'s remit and Rule 56(c).

Second, Hennessy argues that, once uttered, *Stigliano* is not an automatic win for the manufacturer. But all it can point to is *Henderson*, where the court reviewed a belated *Stigliano* argument following a plaintiff verdict. Ans. Br. 20-21 (discussing *In re Asbestos Litig. (Henderson)*, 2011 WL 684164 (Del. Super. Feb. 2, 2011)). *See also* Op. Br. 19 n.2 (discussing *Henderson*). The one case discussed in the Opening Brief that did not result in a dismissal of the action, *Vaughan*, has been abrogated by the Superior Court's persistent use of *Stigliano* to ratchet up the product identification standard. *See In re Asbestos Litig. (Vaughan)*, 2012 WL 1409732 (Del. Super. Jan. 20, 2012). *Compare* Op. Br. 19 (discussing *Vaughan* Court's denial of Fel-Pro's motion due to testimony of corporate representative that "98%" of gaskets contained asbestos) *with* Op. Br. 20-21 (discussing *In re Asbestos Litig. (Holstege)*, N14C-06-038 ASB (Del. Super. Apr. 24, 2017) (Order), and *In re Asbestos Litig. (Lavelle)*, 2017 WL 11025994 (Del. Super. Sept. 19, 2017) (Order), where Superior

Court granted summary judgment to Fel-Pro despite same corporate representative testimony).

Two of the cases that Hennessy discusses in its brief suffer from defects beyond product identification. As such, these cases fail to test the hypothesis that Hennessey posits: that *Stigliano* is nothing more than an organic application of existing summary judgment standards.

In *Hoofman*, the plaintiff, a longtime smoker, argued that he contracted lung cancer, in part, due to his alleged exposure to asbestos while working with pumps on Navy ships. *In re Asbestos Litig. (Hoofman)*, 2014 WL 605844, at *1 (Del. Super. Feb. 14, 2014). The court determined that, under either maritime or Arkansas law, the plaintiff failed to demonstrate a genuine issue of material fact on causation. *Id.* at *2. The record demonstrated that the plaintiff could only provide the "mere presence" of two brands of pumps on Navy ships he worked. *Id.* at *3. Thus, the *Hoofman* Court never addressed whether the pump manufacturers sought to shift the burden of product identification under *Stigliano* onto the plaintiff. What *Hoofman* demonstrates instead is a failure of prima facie evidence, not of product identification where one product may be either asbestos-containing or asbestos-free.[2]

[2] Some of the confusion in the Superior Court asbestos decisions may derive from the use of the term "product nexus." "Product nexus relates to proximate cause and is a term used to describe a factual connection in space and time between a particular plaintiff and a particular defendant's product." *Lipscomb v. Champlain Cable Corp.*, 1988 WL 102966, at *1 (Del. Super. Sept. 12, 1988). The term cut its teeth under

In *Gordon*, another case Hennessy cites, the court granted summary judgment for failure to demonstrate substantial factor causation under Kansas law. *In re Asbestos Litig. (Gordon)*, 2011 WL 6058302 (Del. Super. Nov. 16, 2011). The court found that the defendant gasket manufacturer "carried its initial burden of establishing the non-existence of material issues of fact by highlighting the absence of *direct evidence* that [plaintiff] received significant asbestos exposure from [the manufacturer's] product." *Id.* at *3 (emphasis added). The court never cited *Stigliano*.

Delaware law, but has bled into asbestos cases applying non-Delaware substantive law. Under Delaware law,

> In order to survive a properly supported motion for summary judgment based on product nexus, the plaintiff:
>
> > must proffer evidence that at the time [the defendant's asbestos product] was present on the site he was in the area where [the product] was used, near that area, walked past that area, or was in a building adjacent to where [the product] was used if open windows or doors would allow asbestos fibers to be carried to the area where the plaintiff was working.

Lipscomb, 1988 WL 102966, at *1 (citations omitted). Product nexus is, thus, a broader term than product identification. *Stigliano*, on the other hand, ostensibly addresses what inference may be drawn as to asbestos content solely on the issue of product identification, not product nexus. The conflation of product identification with product nexus seems to have contributed to *Stigliano*'s outsized role at summary judgment.

The final case Hennessy discusses involves an accurate—though rare—application of *Stigliano* to resolve a coin-flip identification issue.[3] In *In re Asbestos Litigation (Ruggeri)*, the court held that it could not draw an inference of asbestos exposure when two formulas of nearly identical joint compound were made from the same factory and plaintiff could not identify with any additional evidence which version he used. 2012 WL 1409400 (Del. Super. Jan. 10, 2012). "Taking the evidence in the light most favorable to Plaintiff, he has shown at most that he could have used joint compound containing asbestos or used joint compound which was asbestos free." *Id.* at *2. Citing *Stigliano*, the *Ruggeri* Court determined that the plaintiff "ha[d] adduced no evidence he was exposed to the asbestos-containing product. . . ." *Id.* As noted in the Opening Brief, if *Stigliano* were limited to these coin-flip situations, the present appeal would never have materialized. Op. Br. 15.[4]

Third, Hennessy misconstrues Mrs. Droz's argument about exclusivity. *Stigliano*, in principle, does not require a showing of exclusivity. The point in the Opening Brief was that UCC effectively employed a two-step product identification dance so contorted as to distort the summary judgment standard for product identification. *See* Op. Br. 21-24. It is not just Mrs. Droz objecting to this trend. The

[3] Both *Vaughan* and *Ruggeri* were decided by the same trial judge.

[4] As such, it is the *legend* that stands on unsolid footing, not *Stigliano*'s *reasoning*. *Compare* Op. Br. 14 (describing *Stigliano*'s "legend") *with* Ans. Br. 12 (referring to *Stigliano*'s "reasoning").

Superior Court itself has recognized that traditional summary judgment standards have been altered. *See Robinson v. Union Carbide Corp.*, 2019 WL 3822531, at *10 (Del. Super. Aug. 15, 2019) ("[T]he Court acknowledges that some prior Superior Court cases have seemingly altered the burden of proof regarding product identification."). *See also generally In re Asbestos Litig. (Kales)*, C.A. No. N17C-05-589 ASB (Del. Super. Feb. 28, 2019) (Transcript) (Tab 5 to Appellant's Compendium). Thus, the refrain that there is nothing to see here is belied by the few decisions of the asbestos docket that paused to consider whether what plaintiffs have been held to on product identification at summary judgment has gone awry.[5]

Fourth, there are echoes of a Freudian slip in Hennessy's misunderstanding of Mrs. Droz's argument regarding exclusivity. The Superior Court—*in this case*—required Mrs. Droz to show that her husband worked exclusively with asbestos-containing brakes under *Stigliano*. No amount of wordsmithing should distract from this fundamental determination in the Superior Court's Order.[6] The court below accepted that nearly all the brakes were asbestos-containing during the relevant

[5] Hennessy takes issue with the *Kales* Court's characterization of *Stigliano*. *See* Ans. Br. 29 (the court's "summary of *Stigliano* is at odds with the stated proposition of the case."). In other words, Hennessy's retort to Plutarch is: "It's still Theseus' ship."

[6] For instance, Hennessy claims Mrs. Droz mischaracterizes the Superior Court's Order. Ans. Br. 3 n.1. The Superior Court expressly found that "most" brakes at the time contained asbestos. Op. Br., Ex. A at ¶ 12. Whether the court drew a distinction between "most" and "near universal" is an academic exercise.

period of exposure, but it required more. *See* Op. Br., Ex. A at ¶ 12 ("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."). It did so under *Stigliano*, expressly. *See id.* at ¶ 13. Thus, there is at least one quite relevant occasion where *Stigliano* did require exclusivity.

Fifth and finally, Hennessy never wrestles with the untenable outcome that this same case would proceed to trial in California but not in Delaware. *See* Op. Br. 26-27. That is not to say that Hennessy is estopped from arguing that it is entitled to summary judgment on any grounds applicable to a particular case. But the bottom-line is that *Stigliano*, when applied to a nearly identical factual scenario as in *Sherman v. Hennessy Indus., Inc.*, 237 Cal.App.4th 1133 (Cal. Ct. App. 2015), leads to a grant of summary judgment in Delaware and a denial in California.

A final hypothetical on the pitfalls of *Stigliano* may help. A plaintiff alleges exposure to asbestos as a mechanic performing brake jobs. He sues the manufacturer of a brake with which he worked. He identifies the time when he used the manufacturer's brake, the place where he performed the brake job, and the type of brake he used (i.e., a drum brake).

At summary judgment, the manufacturer argues that, under *Stigliano*, it made both asbestos-containing and asbestos-free brakes during the period of exposure. Is that—by itself—enough to shift the burden onto the plaintiff to prove that he more

likely than not used the asbestos-containing version? Typically, under *Stigliano*, it is, whether record evidence is present regarding how many asbestos-free brakes the manufacturer made, or whether the type of brake is the same as the one the plaintiff used. *See* Op. Br., Ex. B at 100:17-103:3. *See, e.g.*, Op. Br. 34-35 & nn.4-5 (describing Bendix's interrogatory responses that simply referred to "some" asbestos-free brakes in 1980s).[7] If it does shift the burden of proof, how much exposure must the plaintiff show in response—for product identification, not causation—to overcome this shifted burden of proof? And if he cannot recall to a sufficient level of detail or with adequate expertise whether the brake he used was, in fact, asbestos-containing or not, may he then resort to circumstantial evidence showing the manufacturer made 51% asbestos-containing brakes during the relevant period? Does it matter for product identification whether the plaintiff did five, fifty, or hundreds of brake replacements? Does it matter whether the plaintiff ultimately contracted lung cancer or mesothelioma?

In practice, the manufacturer is permitted to simply state generally that it made both asbestos-containing and asbestos-free brakes. Regardless of how many or few

[7] Bendix's own representative testified that it was not until the late 1980s that Bendix even offered an asbestos-free brake drum lining to the wider passenger vehicle market. Op. Br. 35 n.9. Is it proper, and does it shift the burden of product identification under *Stigliano*, for a brake manufacturer such as Bendix to point to it having made asbestos-free brake linings for other types of vehicles even though plaintiff never worked with such vehicles?

asbestos-free brakes it manufactured, the type of brake, or the timeframe in which its brakes contained asbestos, *Stigliano* puts the burden on the plaintiff to identify the internal composition of friction material on brakes decades earlier. Hence, the need to resort to circumstantial evidence in such a situation is manifest. But then *Stigliano* and the Superior Court overvalue direct evidence and undervalue circumstantial evidence, tying one arm behind the plaintiff's back. This Court should do away with *Stigliano*'s burden-shifting framework and return summary judgment to what is seen in every other civil action before the Superior Court outside of asbestos litigation.

* * *

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

II. Imposing Liability on Hennessy for Failing to Warn Does Not Make Hennessy a "Rescuer" or Liable Under Market-Share Liability

Hennessy's brief devotes less attention to the actual application of *Stigliano* to the case here. It is easy to see why. Hennessy cannot point to one piece of evidence in the record where it shifted any burden onto Mrs. Droz to prove that her husband was more likely than not exposed to asbestos-containing brakes while using the arc grinder. Instead, Hennessy grasps at policy reasons why applying Washington law is unfair to Hennessy. For example, it claims—as it did in the Superior Court—that holding Hennessy to a duty of care to warn about other manufacturers' asbestos-containing brakes puts Hennessy in the position of a "rescuer." Hennessy also claims that Mrs. Droz impermissibly employs a market share theory of liability.

Neither policy argument holds water. First, Hennessy need only rescue *itself* by warning users about *its* product. It admitted that it knew the grinder operated in a market saturated with asbestos products, but did not place a dust warning on the grinder until 1973.[8] *See* A404 at 15:16-25; A406 at 61:18-25, 62:2-21. That is the essence of failure-to-warn products liability. Hennessy employs the same losing argument proffered in *Macias*. An *en banc* majority of the Washington Supreme Court rejected this argument as to respirator defendants. Second, cries of market share liability are a red herring. Mr. Droz identified the actual brake manufacturers

[8] It even referred to the dust bag on its device as an "asbestos dust collector" before it began to warn of exposure to dust from the device's use. Op. Br. 7 (citing A406).

and Hennessy's grinder during a precise timeframe, at a precise location, and with a description of the frequency of his use of the grinder. Taking the inferential step that the vast majority of these brakes were asbestos-containing is grounded in the brake manufacturers' (and Hennessy's) own words, *not* on the idea that the brake manufacturers held a particular percentage of the friction market during the relevant period. And what is more, that says nothing of Hennessy's duty to warn about its own product.

A. Hennessy Need Only Rescue Itself by Warning Users of Inevitable Dangers

The argument that Hennessy is put in the position of a rescuer of other manufacturers is unconvincing. This argument was rejected in *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012). There, the Washington Supreme Court overruled the contention from respirator manufacturers that they did not owe a duty of care to warn about asbestos the respirators protected against. Notwithstanding the fact that the respirator defendants did not manufacturer any asbestos product, the court held that they owed a duty to warn the plaintiff-tool keeper (who cleaned the respirators each night) about the dangers of exposure to asbestos inherent in his contact with the respirators:

> [T]his 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. *Simonetta [v. Vlad Corp.*, 197 P.3d 127 (Wash. 2008)] and *Braaten [v. Saberhagen*

> *Holdings*, 198 P.3d 493 (Wash. 2008)] do not control because unlike in those cases, where the manufacturers' products did not, in and of themselves, pose any *inherent* danger of exposure to asbestos, here when the products were used exactly as intended and cleaned for reuse exactly as intended they *inherently* and invariably posed the danger of exposure to asbestos. Thus, the manufacturers of the respirators were not entitled to summary judgment on the issue of whether, under *Simonetta* and *Braaten,* they are proper defendants for purposes of the plaintiffs' failure to warn claims.

Macias, 282 P.3d at 1077.

In dissent, the minority in *Macias* argued this put the defendants in a position of having to rescue the asbestos manufacturers. *Macias*, 282 P.3d at 1082 (citing Victor E. Schwartz et al., *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 AM. J. TRIAL ADVOC. 13, 50-51 (2009)). But their reasoning relied on an additional policy consideration lacking in the present case. The minority viewed respirators as safety equipment that should be afforded greater protection under product liability law. *See id.* ("If anything, the safety purpose of the respirators cuts against imposing liability here. A fundamental policy underlying product liability law is the promotion of safe products."). At summary judgment, Hennessy attempted to stretch this reasoning to its arc grinder. *See* Op. Br., Ex. B at 93:8-20; A483 (Hennessy equating brake grinders with safety devices such as respirators).

The policy arguments in *Macias* are engaging. Nevertheless, they are peripheral in this appeal. The Superior Court never reached this issue under Washington law. Op. Br., Ex. A at ¶ 10 ("the Court need not decide the substantive issue addressed in *Macias*"). Instead, it decided Hennessy's motion for summary judgment on *Stigliano* alone. *Id.* at ¶¶ 10-12. As such, Hennessy cannot cherry-pick the dissent in *Macias* and argue on policy grounds that, if *Stigliano* were applied in error, Washington substantive law somehow saves it from owing a duty to warn.

B. Hennessy's Market Share Argument Is Misplaced

Demonstrating through circumstantial evidence that it is more likely than not the plaintiff was exposed to an asbestos-containing brake among the three brake manufacturers he identified is not market share, or alternative, liability. *Cf. Robinson v. Union Carbide Corp.*, 2019 WL 3822531, at *10-*11 (Del. Super. Aug. 15, 2019) (describing difference between circumstantial evidence and market share liability). The conflation of circumstantial evidence with market share liability is a straw man. It finds no application here.

The paradigm of market share liability is *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). The plaintiff was injured when two hunters shot at the same time in his direction. *Id.* at 2. It could not be determined which of the two hunters actually harmed the plaintiff. The California Supreme Court held both hunters jointly and severally liable. *Id.* The rule was based on fairness. "They are both wrongdoers both

negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can." *Id.* at 4. Were the burden placed on the plaintiff, the *Summers* Court held, the faultless plaintiff might be placed in the "unfair position" of recovering nothing from a clearly tortious act of either hunter. *Id.*

In *Sindell v. Abbott Labs.*, the California Supreme Court supplemented *Summers* in the context of a class of plaintiffs alleging harm from their mothers' ingestion of DES during pregnancy. 607 P.2d 924 (Cal. 1980). The class could not show which manufacturer of DES made the particular drug their mothers ingested. *Id.* at 925. The *Sindell* Court noted that the defendant-manufacturers produced ninety percent of the DES on the market. *Id.* at 937. Thus, there was a substantial likelihood that one of the defendant-manufacturers was the manufacturer of the particular DES ingested by any one plaintiff's mother. *Id.* The ten-percent risk that these manufacturers were not the manufacturer of the DES in question for a particular plaintiff would fall on the defendants and not on the innocent plaintiffs. *Id.* However, the manufacturers were entitled to show that they did not manufacturer the particular DES at issue to escape liability entirely. *Id.*

In Delaware, market share liability has been consistently rejected as a means of "bypassing traditional proximate cause requirements." *Robinson v. Union Carbide Corp.*, 2019 WL 3822531, at *10 (Del. Super. Aug. 15, 2019) (discussing

Nutt v. A.C. & S. Co., Inc., 517 A.2d 690 (Del. Super. 1986)). In *Nutt*, the Superior Court determined that, absent legislation, alternative or market-share liability could not be imposed under Delaware law to hold manufacturers of asbestos products liable to a plaintiff alleging wrongful exposure. *Accord Robinson*, 2019 WL 3822531, at *10; *In re Asbestos Litig.*, 509 A.2d 1116 (Del. Super. 1986).

The plaintiffs in *Nutt*, however, could not identify the manufacturer's product because the product did not carry a label. *Nutt*, 517 A.2d at 694. *See also Robinson*, 2019 WL 3822531, at *10 (noting *Nutt* Court also found that there were "*no* records [that] show[ed] shipments of the defendant's asbestos to the relevant plant"). Thus, the plaintiffs argued that it was "virtually impossible" to identify the appropriate manufacturer and some form of market-share liability should apply to balance the risk that the tortfeasor would escape liability. *Nutt*, 517 A.2d at 694.

Contrary to the plaintiffs in *Nutt*, Mrs. Droz can identify the tortfeasor here: Hennessy. Hennessy misplaces its market-share argument in the same way it fails to appreciate that the allegations of failure-to-warn concern its own product, not the products of other manufacturers. Thus, there is no market share to analyze. Hennessy, for all intents and purposes, is a monopoly. The only question is whether there was a genuine issue of material fact that Mr. Droz was wrongfully exposed to

asbestos while using Hennessy's arc grinder when it failed to warn him of the dangers inherent with the use of its own product.[9] The answer, respectfully, is yes.

[9] Hennessy claims Dr. Castleman's use of the term "vast majority" when describing the use of asbestos in the automotive friction industry is vague, suggesting it may mean anything from fifty-one to ninety-nine percent. Ans. Br. 41 & n.7. Hennessy can ask him at his deposition after summary judgment. But, even under Hennessy's interpretation of "vast majority," it signifies greater than fifty percent of the brakes were asbestos-containing. In other words, more likely than not, the brakes contained asbestos.

CONCLUSION

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

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