



Plaintiff Dorothy Phillips worked at the Crewe Garment Factory in Crewe, Virginia, first as a secretary and then as a garment presser. She died from mesothelioma in October 2012. Defendant Hoffman/New Yorker manufactured machines for steaming and pressing fabric. The presses used pads for smoothing fabric. Phillips alleges asbestos exposure from these pads, which the garment pressers had to change often, and asserts that Hoffman is responsible for any exposure which resulted from replacement pads containing asbestos. Plaintiff further alleges Hoffman is liable for failure to warn of the dangers posed by using replacement pads containing asbestos.

For its part Hoffman argues that it is entitled to summary judgment because Virginia law does not impose a duty on the original manufacturer to protect users from exposure to asbestos from replacement parts sold by a third part. Alternatively Hoffman argues there is no evidence that Mrs. Phillips was exposed to asbestos from replacement pads.

The court agrees with Plaintiff that Virginia law imposes liability for exposure to asbestos from replacement parts. The record is unclear as to whether Mrs. Phillips was exposed to asbestos from replacement parts. In the exercise of its discretion the court will therefore deny Hoffman's motion.

### **FACTS**

Dorothy Phillips worked as a secretary at the Crewe Garment Factory from 1959-1967 and then as a garment presser from 1968 until 1992, when

the factory closed. Crewe is a small town in southern central Virginia, and the factory there made children's dresses.<sup>1</sup>

When working as a garment presser, Mrs. Phillips ran completed clothing through a steam press in order to remove wrinkles from the garments. At least one, and perhaps more, of the steam pressers at the Crewe facility was manufactured by Hoffman. All steam presses are equipped with a device known as a pressing pad, which came in contact with the clothing. New Hoffman presses are equipped with a starter press pad which is not manufactured by Hoffman.

Press pads need to be changed frequently, usually every two to four weeks. The Hoffman manual recommended changing the pad needed to be replaced when it became "hard, burned, powdery, worn or uneven" and that it should be replaced "us[ing] identical padding to the original factory installation." As mentioned Hoffman does not manufacture pads and rarely sells replacement pads to customers. Several entities apparently make press pads which fit Hoffman presses, and typically owners purchase replacement pads from one of these manufacturers.

Changing a press pad can be dirty business. The evidence in the record indicates that the process is dusty and that press pad fibers fill the air. There is no evidence in the record that Mrs. Phillips ever changed a starter pad supplied by Hoffman. However there is evidence that she changed replacement pads manufactured by others and presumably was exposed to dust and fibers

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<sup>1</sup> Beginning in 1980, Edward Phillips, Plaintiff's son, also worked at the Crewe factory.

as a result. Plaintiff contends that Mrs. Phillips was exposed to asbestos while changing these pads and that this exposure was a proximate cause of her fatal mesothelioma.

Two issues lie at the core of Hoffman's motion. First, under Virginia law does Hoffman have a duty of care extending to replacement pads it did not sell? If the answer is affirmative, then the court must resolve Hoffman's contention that there is no evidence that the replacement pads to which Mrs. Phillips was exposed contained asbestos.

Plaintiff bases this recommendation of using the same padding as the original used by Hoffman as the basis of a claim for liability for foreseeable injury. Edward Phillips identified the pads most often used on the Hoffman press as being tan, and recalled the name "ALLIANZ" brand on the pads. Plaintiff contends that Defendant's statement that it most often used Resillo pads, which were tan and contained asbestos until 1976, confirms Dorothy Phillips' asbestos exposure from garment press pads. Plaintiff identified the area she worked in as being very dusty from both lint and cloth fibers as well as dust released when the press pads were changed.

### **STANDARD OF REVIEW**

In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant summary judgment when "the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a

matter of law.”<sup>2</sup> The question of whether a legal duty exists “is a question of law for the Court to determine.”<sup>3</sup>

## ANALYSIS

### **A. Does Hoffman owe a duty of care for replacement parts manufactured by a third party?**

In *In re Asbestos Litigation (Merritt)*<sup>4</sup> this court held that Virginia case law imposes a duty of care on a manufacturer for exposure to toxins coming from replacement parts manufactured by a third party. In reaching this conclusion the court departed from its earlier opinion in *In re Asbestos Litigation (Hovermale)*. *Hovermale*, which was not published on Westlaw®, relied upon transcripts of three bench rulings by Virginia trial judges to conclude that in Virginia a manufacturer generally had no duty of care arising from replacement parts it did not manufacture. This court revisited the issue in *Merritt* so as to consider pertinent written Virginia opinions which were not brought to this court’s attention in *Hovermale*. Those Virginia opinions suggested to this court that the conclusion in *Hovermale* was wrong. The *Merritt* court found the written Virginia opinions to be more persuasive than the bench rulings relied upon in *Hovermale* and concluded—contrary to *Hovermale*--that Virginia recognizes a manufacturer’s duty with respect to replacement parts made by a third party.

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<sup>2</sup> *Bantum v. New Castle County Co-Tech Educ. Ass’n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).

<sup>3</sup> *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 20 (Del. 2009) (citing *New Haverford P’ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001)); see *Simonetta v. Viad Corp.*, 197 P.3d 127, 131 (Wash. 2008) (en banc).

<sup>4</sup> 2012 WL 1409225 (Del. Super.)

Hoffman asks this court to reconsider its ruling in *Merritt* and revert to its holding in *Hovermale*. It argues that the three transcript rulings cited in *Hovermale* are more persuasive because they are more recent than the written Virginia opinions upon which this court relied in *Merritt*. The court has re-examined the Virginia case law and continues to believe that the written opinions cited in *Merritt* are more persuasive. As noted in *Merritt* the three Virginia bench rulings contain little or no analysis of Virginia law. More importantly at least two of those bench rulings, including the lead ruling referenced in the other bench rulings applied maritime, not Virginia, law. (It is unclear whether the third opinion applies Virginia or maritime law.) This court therefore adheres to its opinion in *Merritt* and holds that Hoffman's duty of care could extend to replacement parts purchased from a third party.

**B. Is there a genuine issue of fact whether Mrs. Phillips was exposed to asbestos from replacement pads?**

The next issue is whether there is evidence in the record that Mrs. Phillips was exposed to asbestos from replacement press pads. The record in this regard seems equivocal. There is evidence that the starter pads were manufactured by an entity known as Resillo, which manufactured both asbestos-containing and asbestos-free press pads. By itself the inclusion of a Resillo starter pad with a new machine is of little consequence because Mrs. Phillips never came in contact with the starter pads. Plaintiff argues, however,

that it is reasonable to conclude that Crewe would have ordered replacement pads from Resillo since that is where the original was manufactured.<sup>5</sup>

There is at least some evidence suggesting that, if Crewe used Resillo replacement pads, they were of the asbestos-containing variety. In a deposition in a California case<sup>6</sup> a Resillo representative testified that Resillo pads containing asbestos were tan in color. According to Edward Phillips, Mrs. Phillips' son who also worked at the Crewe factory, the steam presser pads used at Crewe were tan or off-white.

Hoffman counters that Mrs. Phillips' son testified that the replacement pads used at Crewe were manufactured by Allianz. It also contends that at least the original pads were blue, not tan. Hoffman also asserts that both Mrs. Phillips and her son were unable to say whether the presser pads contained asbestos. Finally Hoffman argues that there may be other tan pads on the market which were asbestos-free.

The record here is confusing, at best. There is no evidence, at least insofar as the court is aware, about Allianz and whether its pads contained asbestos. Likewise, although Hoffman contends that Crewe might have been using asbestos-free pads from another manufacturer which happened to be tan in color, the court is presented with no evidence that some other manufacturer made such pads.

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<sup>5</sup> Plaintiff supports this argument with a Hoffman owner's manual which recommends replacement with an identical pad when the original wears out.

<sup>6</sup> Hoffman did not object to Plaintiff's use of the California deposition in his opposition to the motion for summary judgment. The court expresses no opinion whether, with a proper objection, it would have considered the deposition. It emphasizes, however, that this opinion should not be read as approving the use of foreign deposition when the part against whom it is offered was not represented at that deposition.

It is well-settled that a litigant does not have a “right” to summary judgment. According to the Delaware Supreme Court, “[t]here is no ‘right’ to a summary judgment.” Rather, a “trial court's denial of summary judgment is entitled to a high level of deference and is, therefore, rarely disturbed.”<sup>7</sup> The court has discretion to deny summary judgment when the record is confusing or lacks sufficient development.<sup>8</sup> It may well be that Crewe used only asbestos free, and there may be merit to Hoffman’s contention that Plaintiff relies entirely on impermissible speculation. But in light of the state of this record—particularly with regard to the content of replacement pads--the court has decided to err on the side of letting Plaintiff having his day in court. Accordingly, summary judgment is **DENIED**.

Date: August 30, 2013

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John A. Parkins, Jr., Judge

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<sup>7</sup> *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del.2002).

<sup>8</sup> *Shepherd v. Isaacs*, 1990 WL 1104787 \*2 (Del. Ch.) (“denial of summary judgment due to insufficient facts in the record is, like any denial, always addressed to the discretion of the court.”)