IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	
IRA FLUITT and REGINA FLUITT,)
Plaintiffs,)
V.) C.A. No. N12C-07-241 ASB
ADVANCE AUTO PARTS, INC., et al.,)
Defendants.))

ORDER

- 1. As an initial matter, the November 4, 2013 Order dismissing Plaintiffs
 Ira and Regina Fluitt's Complaint is hereby vacated.
- 2. Whereas Plaintiffs filed the Complaint in this matter on July 19, 2012, alleging, *inter alia*, that Mr. Fluitt developed lung cancer as a result of wrongful exposure to asbestos;
- 3. Whereas the Court issued an order that Delaware law applies to all procedural issues in the case and Florida law applies to all substantive issues;¹

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Order Granted Defts' Mot. to Establish Applicable Law, C.A. No. 12C-07-241, Trans ID 54372933 (Del. Super. Ct. Oct. 11, 2013).

- 4. Whereas in 2005, the Florida legislature adopted the Asbestos and Silica Compensation Fairness Act (the "Act"),² which changed the common law elements of an asbestos claim under Florida law,³
- 5. Whereas Defendants moved to dismiss Plaintiffs' Complaint based on a failure to allege certain required elements of their claim;⁴
- 6. Whereas Plaintiffs argued (a) that no provision of the Act applies to actions filed outside Florida;⁵ (b) Delaware procedural rules and therefore Delaware general pleading standard should be applied;⁶ and (c) their claims meets Delaware's notice pleading standard;
 - 7. Defendants' Motion to Dismiss is **GRANTED** without prejudice.
- 8. The Court, as both parties acknowledge, must apply Delaware procedural law, and thus Delaware's pleading standard governs here. Dismissal is

² FLA. STAT. §§ 774.201-774.209 (2013).

American Optical Corp. v. Spiewak, 73 So. 3d 120, 123 (Fla. 2011) ("[I]t is clear that the main purpose of the Act is to alter the common law elements for an action arising from asbestos-related disease."); see also In Re: Asbestos Litigation Moore v. Volkswagen of America, Inc., Del. Super. Ct., C.A. No. N13C-01-019, Parkins, J. (July 25, 2013) (ORDER).

See FLA. STAT. § 774.203(29) (2013) ("'Smoker' means a person who has smoked cigarettes or used other tobacco products on a consistent and frequent basis within the last 15 years."); FLA. STAT. § 774.204(3) (2013) ("A person who is a smoker may not file or maintain a civil action alleging an asbestos claim which is based upon cancer of the lung, larynx, pharynx, or esophagus in the absence of a prima facie showing that includes all of the following [medical] evidence.").

See FLA. STAT. § 774.205 ("A civil action alleging an asbestos or silica claim may be brought in the courts of this state") (emphasis added).

⁶ See Super. Ct. Civ. R. 8; Super. Ct. Civ. R. 9.

warranted, however, if the Complaint fails to state a claim upon which relief can be granted.⁷

- 9. Under Delaware's notice pleading requirements, a plaintiff need only "state a short and plain statement of the claims showing that the pleader is entitled to relief." But a plaintiff must still plead each of the essential elements of his claim.
- 10. As this Court has recognized, Florida's Supreme Court determined that the Act fundamentally changed the common law elements of a Florida asbestos claim. Following the Act's effective date, under Florida law, [a] person who is a smoker may not file or maintain a civil action alleging an asbestos claim. based upon cancer of the lung... in the absence of a prima facie showing.

⁷ See Super. Ct. Civ. R. 12(b)(6).

⁸ Super. Ct. Civ. R. 8(a).

See Simmons v. Truitt, 2009 WL 3531799, at *4 (Del. Super. Ct. Oct. 20, 2009) ("Because [plaintiff] has failed to allege essential elements of the claim of malicious prosecution, that claim is dismissed for failure to state a claim."); Eisenmann Corp. v. Gen. Motors Corp., 2000 WL 140781, at *22 (Del. Super. Ct. Jan. 28, 2000) (dismissing plaintiff's breach of an oral contract claim for failure to state the "essential elements of price, terms, and duration"); see also Brown v. Perrette, 1999 WL 342340, at *8 (Del. Ch. May 14, 1999) (dismissing plaintiff's disclosure claim because plaintiff "fail[ed] to plead an essential element of her claim.").

In Re: Asbestos Litigation Moore v. Volkswagen of America, Inc., Del. Super. Ct., C.A. No. N13C-01-019, Parkins, J. (July 25, 2013) (ORDER).

FLA. STAT. § 774.204(3) (2013) (listing the elements of a prima facie showing including, *inter alia*, "[a] diagnoses by a qualified physician;" a 10-year lapse between asbestos exposure and the date of cancer diagnosis, "[r]adiological or pathological evidence of asbestosis;" evidence of "substantial occupational exposure;" "[a] conclusion by a qualified physician that

- 11. The Parties do not dispute that Mr. Fluitt is a "smoker," as that term is defined by the Act. Thus, Florida law requires Plaintiffs to plead each of the essential elements of a prima facie asbestos claim for a smoker. ¹² Because Plaintiffs have not met that standard, the Complaint is dismissed.
- 12. In requiring Plaintiffs to plead the essential elements of a Florida asbestos action, the Court does not alter the Delaware pleading standard. Nor does the Court ignore Delaware's lenient notice pleading standard. Rather, the Court recognizes that the Complaint is insufficient because it fails to state the essential elements of Plaintiffs' claims, which Delaware's pleading standard requires, under Florida's applicable statutory construct.

AND NOW, this 29th day of January, 2014, having considered Defendants' Motion to Dismiss Plaintiffs' complaint, the Plaintiffs' response thereto, and the Parties' oral arguments, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss is **GRANTED**. Plaintiffs are hereby granted 30 days leave to re-file the Complaint in conformity with this Order.

IT IS SO ORDERED.

/s/ Paul R. Wallace PAUL R. WALLACE, JUDGE

the . . . impairment is not more probably the result of causes other than the asbestos exposure"); see American Optical, 73 So. 3d at 124 (noting the "highly technical elements of a prima facie case" under the Act).

¹² See Fla. Stat. § 774.204(3) (2013).

cc: All counsel via File & Serve