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NATURE OF THE PROCEEDINGS

On May 5, 2009, the Plaintiff, Paul DaBaldo Jr., a Delaware resident, filed a lawsuit against a number of defendants including URS Energy & Construction (hereafter “URS”) and Crane Company (hereafter “Crane”)¹ for the disease asbestosis, which he claimed he had developed as a result of his Delaware exposure to asbestos. Consistent with the applicable Scheduling Order he produced during the litigation a 2007 report by Dr. Eliasson, as the basis for his claim of asbestosis². Both URS and Crane had the opportunity to have Plaintiff examined by their medical expert. While the Defendants listed a medical witness,³ the Defendants never sent the Plaintiff to be examined by their medical witness and no report or Rule 26 expert disclosure was ever produced as to his opinion as to what asbestos disease, if any, that the Plaintiff had and, if so, where he developed it. On December 21, 2011, URS filed a motion for summary judgment alleging, in part, that the Plaintiff’s suit for “his asbestos related disease” was time barred.⁴ Crane subsequently filed a Notice of Adoption.⁵

¹ The original complaint named URS’s predecessor company Washington Group International, Inc. (A-037-A063).

² Dr. Orn Eliasson Report (A064-66)

³ Defendant’s witness list (A067-72)

⁴ Defendant URS’s Motion for Summary Judgment, (A-074-83) at 6.

⁵ Defendant Crane Co. Adopted URS Energy’s & Construction’s Motion on the Issue of Summary Judgment. (D.I. 112)

On April 9, 2012, after oral argument the Superior Court ruled from the Bench in favor of the Defendants URS and Crane, holding that the Plaintiff's claim for asbestosis was barred by Delaware's statute of limitations.⁶ Following this ruling the Plaintiff, pursuant to Superior Court Civil Rule 59(e), moved for a motion for reargument which was denied by the Superior Court on April 27, 2012.⁷ A Final Order in the *DaBaldo* case was entered on April 22, 2013 and this appeal was filed on May 14, 2013.⁸ This is Plaintiff-Appellant's Opening Brief.

⁶ Transcript of Summary Judgment Oral Arguments p. 16, *In Re: Asbestos Litig.: Paul Dabaldo, Limited to: URS Energy & Construction and Crane Co.* (Apr. 9, 2012) C.A. No. 09C-05-048 ASB.

⁷ *In re Asbestos Litig.: Paul DaBaldo*, (Order) C.A. No. N09C-05-048 ASB, Apr. 27, 2012. (D.I. 204)

⁸ Final order (D.I. 238)

SUMMARY OF ARGUMENT

1. The Trial Court Erred When It Ignored Long Established Delaware Precedent Regarding Statute of Limitations and the Distinction Between Various Asbestos Related Diseases.
2. The Trial Court Erred When It Erroneously Assumed that Plaintiff had Asbestosis and Proceeded Directly to the Issue of Inquiry Notice.

STATEMENT OF FACTS

In 1992, because he did not have a prior chest x-ray, Paul DaBaldo's primary care physician, Dr. William Nottingham, decided it would be prudent to order a chest x-ray.⁹ On August 19, 1992, Dr. Mansoor, a radiologist with Papastavros, wrote to Dr. Nottingham and stated that the x-ray revealed:

“findings of bilateral calcified pleural plaques suspicious for asbestosis [sic] exposure.”¹⁰ No definite evidence of active lung disease.”¹¹

On October 16, 1992, a CT Scan was taken by another radiologist, Dr. Myung Lee.

In his report to Dr. Nottingham he stated:

“Multiple short segments of calcified or non-calcified pleural plaques in the anterior and posterior pleural surfaces of both hemithoraces. *These are consistent with mild degree of asbestos related pleural disease.*”¹² (Emphasis added.)

As these medical reports were not directed to the Plaintiff, but only to his primary care physician, on October 22, 1992, Dr. Nottingham wrote to the Plaintiff, Paul DaBaldo, stating:

⁹ Paul DaBaldo Dep. 212, July 27, 2011 (A-105)

¹⁰ The use of the term “asbestosis exposure” is a typo: one cannot be exposed to “asbestosis” but rather, asbestosis is one of the several diseases that can develop as a result of exposure to asbestos.

¹¹ Report from Dr. Majid Mansoor, Papastavros' Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Aug. 19, 1992) (A-73)

¹² Report from Dr. Myung Soo Lee, Papastavros' Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Oct. 19, 1992) (A- 084)

There seems to be little doubt that there is a mild degree of **asbestos related pleural disease** [emphasis added] which had been seen originally on the plain chest x-ray. In order to assess stability and function of your lung, I think we ought to obtain pulmonary function studies as a baseline at this time. I have enclosed a slip for you to use to get that done. It can be done in the pulmonary office of Dr. Hunt on the first floor. You do not need to see the doctor in order to have these done. After those are obtained, I would like to see you so that we can discuss this further and answer any question that you may have.”¹³

On December 8, 1992, the Plaintiff had the requested pulmonary function tests. On that same day Dr. Hunt wrote Dr. Nottingham noting that all the tests were normal. There was no mention anywhere in Dr. Hunt’s report of any disease process whether related to asbestos or anything else.¹⁴

Plaintiff testified in his deposition that after these series of tests he was told by Dr. Nottingham that his health should be monitored but that otherwise his physical condition was fine.¹⁵

“My doctor seemed assured that it was – use the term ‘okay,’ because he didn’t caution me on anything. And, you know, I would see him regularly.”¹⁶

Over the years, Plaintiff continued to get x-rays the results of which were sent to his primary care physician.¹⁷ In 1999, Dr. Chao found “pleural plaques”

¹³ Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A-086). The pleural disease to which his physician referred to was pleural plaques.

¹⁴ Report from Dr. Clifton Hunt, Pulmonary Diagnostic Center, to Dr. William Nottingham, Internal Medicine (Dec. 8, 1992) (A-119)

¹⁵ Paul DaBaldo Dep. 215: 1-4, July 27, 2011(A- 108)

¹⁶ *Id.* at 215: 24 – 216: 6. (A-108-109)

¹⁷ *Id.* at 212: 10 – 213: 24. (A-105)

noted and that there was no “parenchymal” involvement.”¹⁸ Two years later the Plaintiff was again seen by another radiologist. Dr. Myung Soo Lee’s June 27, 2001, report confirmed that there had been no change involving the Plaintiff’s health related to any asbestos related disease:

“The findings are consistent with asbestos related pleural disease with no significant interval change since 7/28/99.”¹⁹

In 2005, four years following his retirement the Plaintiff again saw Dr. Lee for another follow up x-ray.²⁰ Again Dr. Lee found no change:

“No interval change in the size and contour of pleural calcifications since the study of June 27, 2001.”²¹

Again, there is no reference to any disease process whatsoever in the lungs themselves, rather only changes in the pleural lining which surrounded the lungs.

In 2007, Mr. DaBaldo happened to have a chance encounter with a former co-worker who had been previously diagnosed with asbestosis.²² He told the co-worker he had been diagnosed with “asbestos related pleural disease” to which the co-worker responded he should try to find out if he also had asbestosis and

¹⁸ Report from Dr. Philip Chao, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (July 29, 1999) (A-115)

¹⁹ Report from Dr. Myung Soo Lee, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (June 27, 2001) (A- 116)

²⁰ Report Dr. Myung Soo Lee, Diagnostic Imaging Associates, to Dr. James Piacentine, Delaware Medical Group, (Oct. 18, 2005) (A-117)

²¹ *Id.*

²² DaBaldo Dep. 216: 10 – 217: 10, July 27, 2011 (A-109-110).

recommended he contact the law firm of Jacobs and Crumplar.²³ Mr. DaBaldo did so and was sent to Dr. Orn Eliasson, who on June 26, 2007, conducted a complete history and physical exam.²⁴ In his report of July 5, 2007, Dr. Eliasson wrote,

“A chest x-ray shows extensive bilateral interstitial fibrosis and bilateral calcified pleural plaques, all of which were caused by his asbestos exposure to a reasonable degree of medical certainty.”²⁵

A physical examination also revealed that, for the first time Mr. DaBaldo had rales.²⁶ As a result of this extensive examination, the Plaintiff was diagnosed and was told by a physician that he had the disease asbestosis.²⁷

Based on Dr. Eliasson’s 2007 report, on May 5, 2009 the Plaintiff filed a complaint alleging that he found the pulmonary disease of asbestosis.²⁸ He did not file suit previously for his diagnosed asbestos related pleural disease.²⁹

²³ *Id.* 217: 7-10.

²⁴ Report from Dr. Orn Eliasson, Internal Medicine, Pulmonary and Critical Care, to Robert Denitzio, (July 5, 2007) (A-065-067)

²⁵ *Id.*

²⁶ *Id.*

²⁷ Debaldo Dep. (A-104-114).

²⁸ Plaintiff’s Original Compl., May 5, 2009 (A- 037-063)

²⁹ Plaintiff made it clear throughout his deposition that it was not until 2007 when he saw Dr. Eliasson that any doctor had told him he had “asbestosis” and before that he was only told he had asbestos related pleural disease or plaques. (See Debaldo Dep. 212-215, 218, 225-26, 229-30).

Argument.

I. The Trial Court Erred When It Ignored Long Established Delaware Precedent Regarding Statute of Limitations and the Distinction Between Various Asbestos Related Diseases.

A. Questions Presented. Did the court below err in granting the Defendants' motions for summary judgment when it found that the Plaintiff's suit was time barred? This issue was preserved below by Plaintiff in his Memorandum In Opposition to Defendant's Motion For Summary Judgment, and in Oral Argument during Summary Judgment Motions.

B. Scope of Review. The court below made an error of law in granting Defendant's motion to grant summary judgment. Therefore, the standard of review on appeal is *de novo*. *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002); *Malone v. Brincatt*, 722 A.2d 5, 9 (Del. 1998).

C. Merits of Argument.

In its ruling the Trial Court essentially confused the diseases the Plaintiff had been diagnosed with as a result of his exposure to asbestos. In 1992, the Plaintiff was first diagnosed with "asbestos related pleural disease" by Dr. Majid Mansoori,³⁰ and then in 2007 with asbestosis by Dr. Orn Eliasson.³¹ Dr.

³⁰ Report from Dr. Majid Mansoori, Papastavros' Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Aug. 19, 1992) (A- 084)

Mansoor's report stated that the Plaintiff had "bilateral calcified pleural plaques."³² The Plaintiff followed his physician's advice and continued to monitor his health and have subsequent evaluations including one in 1999 when he saw Dr. Philip W. Chao, a neurologist. In his report to Plaintiff's physician Dr. Wesley Young, Dr. Chao wrote that the:

"findings are compatible with given history of asbestosis. Multiple calcified pleural plaques are identified. Comparison to previous films would be most helpful because it would be very important to know if any of those nodules or supposed calcified granuloma are new."³³

In *Sheppard v. A.C. & S. Co.*, Judge Poppiti noted the confusion surrounding the use of the term "asbestosis" stating,

Medical personnel may refer to 'asbestosis' when they clearly intend 'pulmonary asbestosis' ... Pleural thickening or asbestos related pleural disease, on the other hand, appear to be the preferred terms rather than pleural asbestosis. The Court is satisfied that in the medical records before the Court in this case, the term 'asbestosis' refers to pulmonary asbestosis; that 'pleural thickening' and 'asbestos-related pleural disease' are synonymous; and that 'pleural thickening' and "asbestos related pleural disease" refer to a disease separate and distinct from pulmonary asbestosis. The Court finds it ironic, however, that this matter, which turns on medical evidence, is based upon a record replete with such terminology and yet lacks evidence of efforts to distinguish the medical terms.³⁴

³¹ Report from Dr. Orn Eliasson, Internal Medicine, Pulmonary and Critical Care, to Robert Denitzio, (July 5, 2007) (A- 064-066)

³² Id.

³³ Report from Dr. Philip Chao, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (July 29, 1999) (A-115)

³⁴ *Sheppard v. A.C. & S. Co.*, 498 A.2d 1126, 1133 ft.3 (Del. Super. 1985). See also The Diagnosis of Nonmalignant Diseases Related to Asbestos, American Thoracic Society, Mar. 1986 (A-087-103).

The use of the word “asbestosis” was seized by the Defendant URS during summary judgment hearings. However, there is no indication that this was ever reported to Plaintiff nor was there an actual diagnosis that Plaintiff has asbestosis. A statement that findings are compatible with asbestosis is not the same thing as a medical diagnosis of asbestosis. The disease that the Plaintiff was diagnosed with in 1992 and reconfirmed in 1999 was pleural disease, not asbestosis. It was not until 2007 when after being examined by Dr. Eliasson that he was actually diagnosed with asbestosis.³⁵

Delaware Courts have consistently declared that a Plaintiff’s diagnosis of one asbestos-related disease does not mean that the statute of limitations for a subsequent asbestos-related disease also begins to run.³⁶ The 1985 Superior Court decision *Sheppard v. A.C.S. Co.*, demonstrates as such. In that case, the Plaintiff worked with asbestos.³⁷ As a result of experiencing shortness of breath in 1979 that Plaintiff in *Sheppard* saw several specialists and had an x-ray performed which led to a medical diagnosis of:

“bilateral pleural thickening . . . and is believed to be a manifestation of asbestosis.” It would be interesting to know if the patient has had such exposure. There is no manifestation of pulmonary

³⁵ Report from Dr. Orn Eliasson, (July 5, 2007) (A- 064-066)

³⁶ See *Sheppard v. A.C.&S. Co.*, 498 A.2d 1126, (Del. Super. May 16, 1985); *Farrall v. A.C.&S. Co, Inc.*, 586 A.2d 662 (Del Super. Jan. 10, 1990).

³⁷ *Sheppard v. A.C.&S. Co.*, 498 A.2d 1126, 127 (Del. Super. May 16, 1985). As in this case the doctor in *Sheppard* mistakenly used the term “asbestosis” when the plaintiff did not in fact has asbestosis.

disease.”³⁸

Following this, in 1980 the Plaintiff in *Sheppard* saw another specialist, who concluded that:

“The presence of bilateral pleural disease in a patient with asbestos exposure certainly raises the possibility that the pleural disease is consequent to asbestos exposure. I could find no other good explanation for its presence.”³⁹

The report went on to mention that Sheppard had “bilateral pleural disease.”⁴⁰ A subsequent examination in 1981 also showed that the Plaintiff had bilateral pleural thickening.⁴¹ The following year the Plaintiff was seen by an occupational specialist who finally concluded that the Plaintiff has asbestosis and asbestos related pleural disease Plaintiff then filed a lawsuit for both diseases.⁴²

The *Sheppard* Court found that Delaware’s statute of limitations barred the Plaintiff’s suit for pleural disease was but not his suit for asbestosis.⁴³ The Court concluded that the Plaintiff was charged with inquiry notice of his pleural thickening because two of his doctors “identified to the Plaintiff the health problem of ‘pleural thickening’ and the Plaintiff was put on notice of its causal link to his

³⁸ *Id.*, at 1128. In this matter the Plaintiff’s doctors made several similar findings.

³⁹ *Id.* at 1129.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1133.

asbestos exposure.”⁴⁴ Regarding his asbestosis claim the Court ruled that the earliest time that the statute of limitations could begin to run was when the Plaintiff was diagnosed with the disease.⁴⁵

The *Sheppard* Court noted there were several different asbestos related diseases that one could contract as a result of exposure and that sometimes medical reports use the term “asbestosis” even when the Plaintiff does not in fact have asbestosis just in the instant case with the 1999 report by Dr. Chao on Paul DaBaldo.⁴⁶

The *Sheppard* Court also noted that several other jurisdictions had held similarly and concluded that the statute of limitation for one a later undiagnosed latent asbestos disease does not begin to be run simply because the Plaintiff knows that he has an another asbestos related disease.⁴⁷ This Court affirmed that decision.⁴⁸ Subsequent Delaware decisions as in *Farrall v. A.C.&S Co, Inc.* have noted the *Sheppard* Court’s decision.⁴⁹

⁴⁴ *Id.* at 1132.

⁴⁵ *Id.* at 1134.

⁴⁶ Report from Dr. Majid Mansoor, Papastavros’ Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Aug. 19, 1992) (A- 73); *Sheppard*, 498 A.2d 1126, 1133 n. 3.

⁴⁷ *Sheppard*, at 1133.

⁴⁸ *Keene v. Sheppard*, 503 A.2d 192 (Del. 1986).

⁴⁹ *See Farrall v. A.C.&S Co, Inc.* 586 A.2d 662, 667 (Del. Super Jan. 10, 1990), noting the “unusual rule of law which has developed in dealing with asbestos claims that identifies separate asbestos-related diseases and treats each disease independently for filing claims and for awarding damages.”

Here, the trial court's decision effectively reverses nearly 30 years of Delaware law on statute of limitations for asbestos-related diseases. The Plaintiff has two asbestos-related diseases: pleural disease and asbestosis. The first was diagnosed in 1992, the later in 2007. Plaintiff never filed a suit for his pleural disease, but did file (a timely) complaint for his asbestosis claim.

II. The Trial Court Erred When It Erroneously Assumed that Plaintiff had Asbestosis and Proceeded Directly to the Issue of Inquiry Notice.

A. Questions Presented. Did the court below err in granting the Defendant's motion for summary judgment when it determined Plaintiff was under Inquiry Notice of His Asbestosis? This issue was preserved below by Plaintiff in its Memorandum In Opposition to Defendant's Motion For Summary Judgment, and in Oral Argument during Summary Judgment Motions.

B. Scope of Review. The court below made an error of law in granting Defendant's motion to grant summary judgment. Therefore, the standard of review on appeal is *de novo*. *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002); *Malone v. Brincatt*, 722 A.2d 5, 9 (Del. 1998).

C. Merits of Argument.

The Trial Court erred as a matter of law in finding that Plaintiff's claim was barred under the Delaware Statute of Limitations. Under Delaware law the statute of limitation for tort claims is two years.⁵⁰ However, as the Trial Court correctly

⁵⁰ 10 Del. C. § 8119.

noted, under *Layton v. Allen* when an injury occurs of the type that is “inherently unknowable” the Plaintiff’s statute of limitation does not begin to run until the Plaintiff has actual or inquiry notice of the injury.⁵¹ The Trial Court summarized *Layton* saying, “The key was in that case that the statute began to run when the Plaintiff was on inquiry notice, that is to say, that there was some reason existent that the Plaintiff knew or should have inquired as to whether she had a disease that was attributable, in this case, to surgery.”⁵²

Layton was expanded by this Court in *Bendix v. Stagg* in which this Court extended the *Layton* discovery rule to latent diseases such as asbestosis.⁵³ This Court subsequently elaborated on this issue in *In re Asbestos Litigation* and *Brown v. E.I. Dupont de Nemours and Co, Inc.*⁵⁴ In *In Re Asbestos Litigation*, the Court ruled “A plaintiff who seeks to toll the statutory period through reliance on the discovery rule must show that he acted reasonably and promptly in seeking a diagnosis and in pursuing the cause of action.”⁵⁵ The Court further elaborated on the factors the trial court should consider including “(1) the plaintiff’s level of knowledge and education; (2) the consistency of the medical diagnosis; and (4)

⁵¹ *Layton v. Allen*, 246 A.2d 794 (Del. 1968).

⁵² Transcript of Summary Judgment Oral Arguments p. 16, *In Re: Asbestos Litig.: Paul Dabaldo, Limited to: URS Energy & Construction and Crane Co.* (Apr. 9, 2012) C.A. No. 09C-05-048 ASB.

⁵³ *Bendix Corp. v. Stagg*, 486 A.2d 1150, 1152-53 (Del. 1984).

⁵⁴ *In re Asbestos Litig.*, 673 A.2d 159 (Del. 1996); *Brown v. E.I. Dupont de Nemours and Co. Inc.*, 820 A.2d, 362, 368 (Del. 2003).

⁵⁵ *Id.* at 162 citing *In re Asbestos Litig. West Trial Group*, 662 A.2d 1090, 1092 (Del. Super. 1992).

Plaintiff's follow-up efforts during the period of latency following initial recourse to medical evaluation."⁵⁶ *In Brown* the Court stated the plaintiffs were not on inquiry notice until they received notice of the cause of their injuries.⁵⁷

Here, the evidence demonstrates that Plaintiff meets the standard set forth by this Court in *Layton*, *Bendix*, *In Re Asbestos Litigation*, and *Brown*. Plaintiff testified under oath that in 1992 his then primary physician, Dr. Nottingham, determined that Plaintiff should have an x-ray examination of his chest and lungs and subsequently Plaintiff was diagnosed with asbestos related pleural disease, not asbestosis.⁵⁸

In 2007, Plaintiff was for the first time diagnosed with asbestosis, yet despite this clear fact the Trial Court ruled that Plaintiff had, or was on inquiry notice, that he has asbestosis in 1999 or even as early as 1992.⁵⁹ The parallels between this case and *In Re Asbestos Litig.* (1996) are evident. In that case, the plaintiff, a pipefitter, who had spent his career working with asbestos, began having health problems and was worried that he had an asbestos-related disease.⁶⁰ In 1980, two years before his retirement he had several tests performed, which had negative results but included a discharge report that said, "suspected pulmonary

⁵⁶ *In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996).

⁵⁷ *Brown v. E.I. DuPont de Nemours and Co., Inc.*, 820 A.2d 362, 368 (Del. 2003).

⁵⁸ DeBaldo Dep. 213: 10-15, July 27, 2011 (A-107).

⁵⁹ Transcript of Summary Judgment Oral Arguments, 16, *In Re: Asbestos Litig.: Paul Dabaldo, Limited to: URS Energy & Construction and Crane Co.* (Apr. 9, 2012) C.A. No. 09C-05-048 ASB

⁶⁰ *In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996).

asbestosis.”⁶¹ In 1992 he was diagnosed with asbestosis and he subsequently filed a lawsuit.⁶² The Trial Court granted summary judgment stating that the Plaintiff’s belief that he an asbestos related disease in 1980 meant he was required to exert a claim for asbestosis by 1982.⁶³ *In Re Asbestos Litig.* this Court disagreed stating that regardless of the Plaintiff’s belief, he could not be put on inquiry notice for a disease he did not have: it was not until 1992 that there was in medical diagnosis that he had asbestosis.⁶⁴ Similarly, here Plaintiff cannot be placed on inquiry notice for a disease that he did not have: it was not until Dr. Eliasson’s report in 2007 that there was any medical report that contained a claim of an unequivocal diagnosis of asbestosis.⁶⁵ No previous medical report stated that Plaintiff had asbestosis. In 1992 the Plaintiff was diagnosed with pleural disease.⁶⁶ As a result, the statute of limitations for Plaintiff’s pleural disease began to run in 1992 and became time barred in 1994. Plaintiff did not sue for his pleural disease, but did file a timely suit in 2007 for his asbestosis claim after he was diagnosed with asbestosis.

Conclusion

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 162.

⁶⁴ *Id.* at 163.

⁶⁵ Report from Dr. Orn Eliasson, , (July 5, 2007) (A- 065-067)

⁶⁶ Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A- 086).

Wherefore, the Plaintiff asks that this Court reverse the Trial Court's ruling.

Respectfully submitted,

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