

Appellees.

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Introduction

In July 2007, Plaintiff Paul DaBaldo was diagnosed with asbestosis by Dr. Orn Eliasson.¹ He subsequently filed this lawsuit in May 2009 against a number of Defendants alleging their actions caused him to develop asbestosis.² Many years before, in 1992, he was diagnosed with another separate asbestos-related disease – asbestos related pleural disease.³ As a result of that 1992 diagnosis, Plaintiff followed his primary care physician’s advice and had regular medical check-ups to monitor his condition. Plaintiff never filed suit for the asbestos-related pleural disease.

In Appellees/Defendants’ answering brief, they make two arguments: (1) that the Superior Court correctly held that Mr. Dabaldo was on notice that he had had “an asbestos-related disease” as early as 1992 and no later than 1999; and (2) Appellant/Plaintiff has argued for a reversal on grounds not presented below.

Each of these two arguments are incorrect, and for the reasons set forth in our Appellant’s Opening Brief the lower court’s decision should be reversed and remanded. As stated in Plaintiff’s Complaint, in his response to Defendants’ summary judgment Briefs, at summary judgment oral argument, and his Opening

¹ Appellant’s Opening Brief, p. 7, citing Report from Dr. Orn Eliasson, Internal Medicine, Pulmonary and Critical Care, to Robert Denitzio, (July 5, 2007) (A-065-067).

² Appellant’s Opening Brief, p. 7, citing Plaintiff’s Original Compl., May 5, 2009 (A-037-063).

³ Appellant’s Opening brief, p. 5 citing Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo (Oct. 22, 1992) (A-086); Report from Dr. Clifton Hunt, Pulmonary Diagnostic Center, to Dr. William Nottingham Internal Medicine (Dec. 8, 1992) (A-119).

Brief to this Court, Paul DaBaldo filed this 2009 lawsuit against these Defendants because their actions caused him to develop a second and a new asbestos related disease, i.e., asbestosis.⁴ He did so after he was first diagnosed with asbestosis by a physician in 2007.⁵ Mr. DaBaldo has never filed a suit for his asbestos-related pleural disease, a disease he was diagnosed with in 1992.⁶

The Defendants argue that Plaintiff was on notice that he had asbestosis as early as 1992 or 1999, when in fact he did not even have this disease. Defendants' answering Brief ignores this Court's rulings regarding inquiry notice and asbestosis in cases such *In re Asbestos Litig. (Collins v. Pittsburgh Corning Corp.)* and *Brown v. E.I. Dupont de Nemours and Co., Inc.*⁷

Defendants' Answering Brief also erroneously asserts Plaintiff raises the issue of "disease confusion" for the first time in his Opening Brief. However, as set forth below, disease confusion happened because of statements below by the defense counsel in their summary judgment Briefs and at oral argument. Plaintiff responded at both occasions as to what diseases Paul DaBaldo had in 1992, 1999, and 2007, and what diseases he did not have. The record indicates confusion both

⁴ Appellant's Opening Brief, p. 7, citing Plaintiff's Original Compl., May 5, 2009 (A-037-063).

⁵ Appellant's Opening Brief, p. 7, citing Report from Dr. Orn Eliasson, Internal Medicine, Pulmonary and Critical Care, to Robert Denitzio, (July 5, 2007) (A-065-067).

⁶ Appellant's Opening Brief, p. 4-5. citing Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A-086).

⁷ *In re Asbestos Litig. (Collins v. Pittsburgh Corning Corp.)*, 673 A.2d 159, 163 (Del. 1996); *Brown v. E.I. Dupont de Nemours and Co. Inc.*, 820 A.2d 362 (Del. 2003).

on the part of defendant counsel and, more importantly, the lower court, hence its ruling that Plaintiff's suit was time barred.

Argument

I. Plaintiff's Suit For Asbestosis Was Timely Filed After He Was Diagnosed For The First Time In 2007 With Asbestosis. Plaintiff Never Filed Suit For His Asbestos-Related Pleural Disease.

Defendants' Answering Brief and the lower court's decision incorrectly assert that Mr. DaBaldo was on notice that he had asbestosis as early as 1992 and at least by 1999 and as a result Plaintiff's suit is time barred.⁸ There is one basic problem with this assertion: Plaintiff did not have asbestosis in 1992 or 1999. In 1992, Plaintiff was diagnosed by Dr. Majid Mansoori with "asbestos related pleural disease."⁹ This was communicated to Plaintiff by his then primary physician Dr. William Nottingham who also encouraged Plaintiff to undergo pulmonary function tests, which he did.¹⁰

When Plaintiff was diagnosed and told of his asbestos-related pleural disease in 1992, the statute of limitations for this disease began to run and became time barred in 1994. Defendants' Brief fails to highlight one of the most prominent features of Delaware law regarding asbestos: namely that the statute of limitations for a subsequent asbestos related disease (*i.e.* asbestosis) that a Plaintiff does not

⁸ 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.; Appellees' Answering Brief, p. 6-7.

⁹ Appellant's Opening brief, p. 8 citing Report from Dr. William Nottingham, Internal Medicine (Aug. 19, 1992) (A-084).

¹⁰ Appellant's Opening Brief, p. 5 citing Letter from Dr. William R. Nottingham, Internal Medicine, to Paul Dabaldo (Oct. 22, 1992) (A-086); Report from Dr. Clifton Hunt, Pulmonary Diagnostic Center, to Dr. William Nottingham Internal Medicine (Dec. 8, 1992) (A-119).

begin to because Plaintiff has already been diagnosed with another asbestos related disease (*i.e.* pleural disease).¹¹ As the Superior Court said in *Farrall v. A.C. & S. Co.*, there is an “unusual rule of law which has developed in dealing with asbestos claims that identify separate asbestos-related diseases and treats each disease independently for filing claims and for awarding damages.”¹²

The American Thoracic Society, a medical organization that focuses on respiratory and critical care medicine, has from time to time published guidelines on various asbestos related diseases. In 2004, it published a report “intended for the diagnosis of nonmalignant asbestos-related disease in an individual in a clinical setting for the purpose of managing that person’s current condition and future health.”¹³ The report gives lengthy descriptions of the various types of non-malignant asbestos diseases, including the diseases Plaintiff has: asbestos related pleural disease and asbestosis. As demonstrated in the report, while both are caused by exposure to asbestos, there is a different diagnosis and symptoms associated with each one.¹⁴

¹¹ See *Sheppard v. A.C. & S Co.* 498 A.2d 1126 (Del. Super. May 16, 1985); *Keene v. Sheppard*, 503 A.2d 192 (Del. 1986); *Farrall v. A.C. & S Co, Inc.* 586, A.2d 662, 667 (Del. Super Jan. 10, 1990).

¹² *Farrall*, 586 A.2d 662, 667 (Del. Super Jan. 10, 1990).

¹³ Plaintiff included the 1986 ATS Report in the appendix to its opening brief and for completeness Plaintiff is attaching the most current version. “Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos” *American Journal of Respiratory and Critical Care Medicine*, p. 3 (<http://ajrccm.atsjournals.org/cgi/content/full/170/6/691> (A-R __))

¹⁴ *Id.*

The ATS Report's description of asbestos-related pleural disease echoes Plaintiff's doctors reports in 1992, 1999, 2001, and 2005.¹⁵ Regarding asbestosis, the report states that "asbestosis is usually associated with dyspnea, bibasilar rales, and changes in pulmonary function: a restrictive pattern, mixed restrictive-obstructive pattern, and/or decreased diffusing capacity (emphasis added)."¹⁶ None of Plaintiff's medical reports in 1992, 1999, 2001, or 2005 mention rales. It was not until 2007 when he was examined by Dr. Eliasson that rales were discovered.¹⁷ It was at that time that Plaintiff was first diagnosed with asbestosis.

The Defendants' Brief argues the issue of "disease confusion" was not presented below and is therefore a violation under Superior Court Rules 14(b)(vi)A (1) and Supr. Ct. R. 8 and should not be heard by this Court. This argument, however, was presented to the court below. On December 21, 2011, both Defendants filed memorandums in support of a motion for summary judgment as a matter of law in this case. URS' motion for summary judgment was predicated in part that Plaintiff's suit for his "asbestos related disease" without specifying what asbestos-related disease Plaintiff had was time barred,¹⁸ a position that was

¹⁵ *Id.*

¹⁶ *Id.* p. 17.

¹⁷ Appellant's Opening Brief, p.7, citing Report from Dr. Orn Eliasson, Internal Medicine Pulmonary and Critical Care, to Robert Denitzio (July 5, 2007) (A-065-067).

¹⁸ There are a number of asbestos related diseases besides asbestosis and asbestos related pleural disease. Over the years Jacobs & Crumplar have filed suit for Delaware plaintiffs for Pleural Mesothelioma *James Farrall v. Asbestos Corporation, Ltd et al.*, C.A. No. 11c-05-257 (AR-67), Lung Cancer , *Henry Wenke v. Anchor Packing Company et al.*, C.A. 03c-10-277 (AR-61),,

subsequently adopted by Crane Co.¹⁹ In Plaintiff's response to URS's motion for summary judgment, Plaintiff explained this position was an incorrect statement of law under *Collins*.²⁰ Plaintiff agrees that he was diagnosed with *an* asbestos related disease in 1992, but that disease involved the pleura, a disease for which Plaintiff did not file suit. Instead, as Plaintiff's answering Brief below noted, after Plaintiff was diagnosed with asbestosis by Dr. Eliasson he filed a timely lawsuit for *that* disease, not for asbestos-related pleural disease that he was diagnosed in 1992.²¹

Defendants' Brief mentions that Dr. Chao said that Mr. DaBaldo had a "[k]nown history of asbestosis"²² as evidence that Plaintiff had asbestosis. He did not. Plaintiff noted in its Opening Brief the case *Sheppard v. A.C.&S Co.* as an

Peritoneum Mesothelioma: *George Hill v. Pittsburg-Corning Corporation et al.*, C.A. No. 97c-08-064(AR-64), Cancer of the Pharynx, *Robert Mercer v. A. C. & S., Inc., et al* C.A. 88c-02-001A (AR-75), Esophageal Cancer, *Christine Fowler v. A.C. & S., Inc., et al* C.A. 98c-11-207 (AR-82) , Colon Cancer, *Robert Becker v. Avalon Systems et al.*, C.A. No. 11c-03-042 (AR-85), Stomach Cancer, *Burton Schaen v. Atlas Turner, Ltd et al.*, C.A. 09c-03-294 (AR 88), Prostate Cancer, *Harry E Ball v. Amoco Chemical Corporation et al.*, C.A. No. 86c-AP-125 (AR-94), well as often filing suit for two or more asbestos related diseases. Lung Cancer and Asbestosis, *Henry Wenke v. Anchor Packing Company et al.*, C.A. 03c-10-277 (AR-61), Laryngeal Cancer, Pulmonary Asbestosis and Asbestos-related pleural disease *Stephen Hywak v. A.C. & S. Co., Inc., et al* C.A. No. 90c-05-199 (AR-72), Asbestos-related pleural disease, Pulmonary asbestosis and Asbestos-related oropharynx cancer, *Wyatt Winfree v. Abex Corporation et al.*, C.A. No. 89c-JN-253 (AR-79), Asbestos-related Cancer of the Kidney, Asbestos-related Cancer of the Tongue, Pulmonary Asbestosis and Asbestos-related Pleural Disease, *Donald Wise v. Four Star Oil & Gas Company et al.*, C.A. 07c-12-224 (AR-91), Asbestos Related Pleural Disease and Asbestosis, *Alvin Wiggins v. BP Amoco Chemical Company et al.*, C.A. 08c-06-247 (AR-97).
¹⁹ Appellant's Opening Brief, p 1, citing Defendant URS's Motion for Summary Judgment (A-074-83) at6, Defendant Crane Co. Adopted URS Energy's & Construction's Motion on the Issue of Summary Judgment. (D.I. 112).

²⁰ Plaintiff Paul Dabaldo's Response to Defendant Washington Group International, Inc. as Successor-In-Interest to Raytheon Constructors, F/K/A. Catalytic, Inc.'s Motion for Summary Judgment.

²¹ *Id.*

²² *Id.*

example of the erroneous usage of the term “asbestosis.”²³ In that case, Judge Poppiti’s explanation of the somewhat confusing use of the term “asbestosis” namely where physicians erroneously use the term “asbestosis” to refer to the patient’s pleural thickening or asbestos-related pleural disease.”²⁴ As Plaintiff noted in answering Brief and at summary judgment oral arguments, *Sheppard* held that there are multiple statute of limitations for different types of asbestos diseases.²⁵

An objective reading of Plaintiff’s response to Defendants’ motion for summary judgment, demonstrates that Plaintiff attempted to clarify the confusion that the Defendants created about what asbestos related diseases Plaintiff had in 1992, 1999, and 2007.

Arguments on disease confusion were also presented during summary judgment oral arguments. For example, during oral arguments the Court said,

What happened between 1992 when he had the first what I’ll call diagnosis from a radiologist where he said – I believe he said there was plaque consistent with asbestosis? What happened after that, between then and 2007 or whatever it was? ... Well, I thought in the first expert report, which was a few years earlier than this one [Dr. Eliaason’s 2007 report] that there was a reference to pulmonary plaques.²⁶

Defense counsel responded by stating,

²³ Appellant’s Opening Brief, p. 9, citing *Sheppard*, A.2d 1126, 1127 (Del. Super. May 16, 1985).

²⁴ *Sheppard*, A.2d 1126, 1127 (Del. Super. May 16, 1985).

²⁵ *Id.*

²⁶ Transcript of Summary Judgment Oral Arguments, p. 4, 6 *In Re Asbestos Litig.: Paul Dabaldo, Limited to: URS Energy & Construction and Crane Co.* (Apr. 9, 2012) C.A. No. 09C-05-048 ASB.

Yes; pulmonary plaques²⁷ and interstitial fibrosis, which are telltale signs of asbestosis. So at least by 1992 he was aware he had an asbestos related disease... This report dated July 29, 1999 says he now has asbestosis. In fact, it's a prior. It says: Given his history of asbestosis."

Defense counsel continued to try and argue that the diseases Plaintiff had in 1992, 1999, and 2007 were the same stating,

His report [Dr. Eliasson's], which is the same report plaintiff, is relying upon, dated July 5, 2007. But if you look at the first paragraph here where it says chief complaints, it says, He has a past asbestos – exposure to asbestos, and a recent chest x-ray showed asbestosis. It's the same diagnosis from 1999, and its relying on the same telltale sings, if I can skip to the second page. I'm sorry. The third page were at the top it says, A chest x-ray shows extensive bilateral interstitial fibrosis, bilateral calcified pleural plaques, all of which were caused by his asbestos exposure.²⁸

Plaintiff's counsel responded to defense counsel by explaining that disease

Plaintiff had in 1999 was not asbestosis,

If you look at the impression, the impression is: Findings are compatible with a given history, a given history of asbestosis. But if you read further, it indicates that multiple calcified plaques are identified. There is nothing else in the impression that leads to an impression or a diagnosis of asbestosis . . . And it's Mr. DaBaldo's testimony that he met with Dr. Nottingham, and at the time Dr. Nottingham said he had pleural plaques that were asbestos related... So what Mr. DaBaldo testified is that he kept track of it. He didn't have yearly follow-ups with his doctors, but he was aware that he did have this asbestos-related disease....And plaintiff's do not dispute that that the statute of limitations has run on the pleural plaquing [but it was not until] Dr. Eliasson's diagnosis at that time is that was pulmonary asbestos.²⁹

²⁷ There is no such thing as pulmonary plaques. Defense counsel confused plaques, which are on the pleural lining and not on the lungs with interstitial fibrosis which is scarring in the lungs, but not of the pleura.

²⁸ *Id.* at p. 8.

²⁹ *Id.* at 10-11.

Despite this, in part because of the complicated nature of asbestos related diseases, it was clear the lower court was confused about what disease Plaintiff had in 1992, 1999, and 2007, stating “[B]ut I have trouble getting past this report, because it says known history of asbestosis. Somebody concluded that he had asbestosis.”³⁰ Plaintiff’s counsel responded by stating that Plaintiff did not have asbestosis at that time but instead had pleural plaques.³¹ It is clear that there was confusion on the part of the lower court as to what disease Plaintiff had in 1992, and 1999, and 2007. Plaintiff repeatedly sought to clarify to the Court in its original Brief in opposition to defendant’s motion for summary judgment and again at oral arguments. As a result, Plaintiff has not violated Delaware Supreme Court Rules 8 and 14.³²

³⁰ *Id.* p. 12.

³¹ *Id.* p. 13.

³² Supr. Ct. R. 8; Supr. Ct. R. 14

II. Plaintiff Did Not Have Asbestosis Until 2007 And Could Not Be Put on Inquiry Notice Until That Time.

Plaintiff was first diagnosed with an asbestos-related disease in 1992.

Following a series of tests, Plaintiff's primary physician, Dr. William R.

Nottingham wrote to Plaintiff stating that Mr. DaBaldo had asbestos-related pleural disease.³³ Under clearly established Delaware law, Plaintiff then had two years from the date of this diagnosis to file a lawsuit for this disease.³⁴ DaBaldo, however, has never filed a lawsuit for his asbestos-related pleural disease.

As set forth for by *In re Asbestos Litig. (Collins)*, "[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."³⁵ In addition this Court said that the lower court should consider the following "(1) the plaintiff's level of knowledge and education; (2) the consistency of the medical diagnosis; and (4) Plaintiff's follow up efforts during the period of latency following the initial recourse to medical evaluation."³⁶

³³ Appellant's Opening Brief, p. 5 citing Letter from William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A -086).

³⁴ See 10 Del. C. § 8119.

³⁵ *In re Asbestos Litig.* 673, A.2d 159, 162 (Del. 1996) citing *In re Asbestos Litig. West Trial Group*, 662 A.2d 1090, 1092 (Del. Super. 1992).

³⁶ *In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996).

Plaintiff has complied with this standard regarding his claim for asbestosis. After being diagnosed with asbestos-related pleural disease, Plaintiff followed his physician's advice and had pulmonary functions tests conducted.³⁷ The pulmonary specialist Plaintiff saw, Dr. Hunt, wrote to Dr. Nottingham that results of the test were "normal."³⁸ Nowhere in his report did he mention anything about Plaintiff having asbestosis, nor did he tell Mr. DaBaldo that he had asbestosis.

Plaintiff continued to meet the *Collins* standard by having regular updates with various physicians to monitor his health. In 1999 Dr. Chao found "pleural plaques" and noted that there was no "parenchymal involvement."³⁹ Two years later he saw another doctor Dr. Myung Soo Lee who wrote, "[T]he findings are consistent with asbestos related pleural disease with no significant interval change since 7/28/99."⁴⁰

Dr. Lee's June 27, 2001 report, which Defendants fail to mention in their answering Brief, said there was no change in Plaintiff's health related to any asbestos related disease. There was no mention of asbestosis or the concern that

³⁷ Appellant's Opening Brief, p. 5 citing Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A-086).

³⁸ Appellant's Opening Brief, p. 5 citing Report from Dr. Clifton Hunt, Pulmonary Diagnostic Center, to Dr. William Nottingham, Internal Medicine (Dec. 8, 1992) (A-119).

³⁹ the Parenchyma is the lung tissue where asbestosis and lung cancer occurs, and it is different from the pleural lining where asbestos related pleural disease and the malignant pleural mesothelioma occurs.

⁴⁰ Appellant's Opening Brief, p. 6, citing Report from Dr. Myung Soo Lee, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (June 27, 2001) (A-116).

Plaintiff might have asbestosis.⁴¹ In 2005 Plaintiff again saw Dr. Lee.⁴² This report noted that there had been no change in Plaintiff's condition from 2001 stating, "[N]o interval change in the size and contour of pleural calcifications since the study of June 27, 2001."⁴³ (Emphasis added).

Dr. Eliasson, was the first physician to diagnosis Plaintiff with the pulmonary disease of asbestosis and noted that Plaintiff had rales.⁴⁴ It was at this point that Plaintiff was put on inquiry notice that he asbestosis. Under the standard set forth in *Collins*, Plaintiff had two years from the date of this diagnosis to file suit. All previous reports medical reports of Plaintiff had concluded that he had asbestos-related pleural disease. There was no medical diagnosis that Plaintiff had asbestosis nor was there any communications with Plaintiff that he had asbestosis until July 2007. It was as a result of Dr. Eliasson's July 2007 report that Plaintiff filed a lawsuit in May 2009.⁴⁵

The Defendants' analysis of *In re asbestos Litig. (Collins)* is incorrect.⁴⁶ The Defendants states *Collins*, a case in which this Court said that "Collins' subjective belief that he had an asbestos related ailment, in the absence of medical

⁴¹ Appellant's Opening Brief, p. 6, citing Report from Dr. Myung Soo Lee, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (June 27, 2001) (A116).

⁴² Defendants answering brief fails to reference this report as well.

⁴³ Appellant's Opening Brief p. 6, citing Report from Dr. Myung Soo Lee, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (June 27, 2001) A-116).

⁴⁴ Appellant's Opening Brief, p. 6.

⁴⁵ Appellant's Opening Brief, p. 7, Plaintiff's Original Compl. May 5, 2009 (A-037-063).

⁴⁶ *In re asbestos Litig.*, 673 A.2d 159 (Del. 1996).

diagnostic support, did not require him to file suit prior to 1992.”⁴⁷ Here, the Defendants attempt to distinguish *Collins* from the *DaBaldo* case, by arguing that medical reports in *Collins* had ruled out that the Plaintiff had asbestosis even though the Plaintiff was convinced he had asbestosis;⁴⁸ whereas here, “Mr. DaBaldo’s physicians documented Mr. DaBaldo’s asbestos-related conditions for years.”⁴⁹ While unlike *Collins* Mr. DaBaldo did have another asbestos-related disease prior to his diagnosis of asbestosis,⁵⁰ like *Collins* he cannot be asked, as the Defendants are asking him here, to file suit for a disease he did not have. In 1992, Plaintiff was diagnosed with asbestos-related pleural disease.⁵¹ Again, over the years Plaintiff was regularly seen by various doctors who help him monitor his health. At no point did any of them conclude that he has asbestosis or did they communicate to him that he had asbestosis. The first physician who diagnosed him with asbestosis and communicated to him that he had asbestosis was Dr. Eliasson in July 2007.⁵² Yet the Defendants essentially argue that Plaintiff be

⁴⁷ *In re asbestos Litig.*, 673 A.2d 159 (Del. 1996).

⁴⁸ *Id.*, at 163

⁴⁹ Appellee’s Answering Brief, p. 10.

⁵⁰ In *Collins* there had been a report, like here, that the plaintiff has asbestosis before he was diagnosed with it. In his 1980 hospital discharge report (twelve years before he was diagnosed with asbestosis) the discharging report said, “suspected pulmonary asbestosis.” 673, A.2d 159, 160 (Del. 1996).

⁵¹ Appellant’s Opening Brief, p. 5, citing Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A-086).

⁵² Appellant’s Opening Brief, p. 7, citing Report from Dr. Orn Eliasson, Internal Medicine, Pulmonary and Critical Care, to Robert Denitzio, (July 5, 2007) (A-065-067).

charged with being on notice as early as 1992 for a disease he was not diagnosed until 2007. This is completely contrary to the holding of *Collins*.⁵³

Defendant's analysis of *Sheppard v. A.C. & S. Co* is also incorrect.⁵⁴ The medical history of the Plaintiff in *Sheppard* is remarkably similar to DaBaldo's medical history. For example, both plaintiffs worked with asbestos and were seen by several physicians who concluded that each had pleural disease before they were ultimately diagnosed with asbestosis.⁵⁵ Both had medical reports that used the term asbestosis when neither in fact had asbestosis.⁵⁶ As a result, here Plaintiff was on inquiry notice that he had asbestosis, only after he was actually diagnosed with asbestosis by Dr. Eliasson in 2007. The lower court's decision and Defendants' Brief asks this Court to affirm that Plaintiff was on notice in the 1990's for a disease he did not have until 2007. The actions of Plaintiff from 1992 until 2007 are consistent with this Court's holding in *In re Asbestos Litig.* (*Collins*): his health was regularly monitored by physicians who time and time again noted that Plaintiff has asbestos-related pleural disease. In 2007, for the first time, Plaintiff received a medical diagnosis that he had asbestosis.

⁵³ *In re Asbestos Litig.*, 673 A.2d 159, 164 (Del. 1996). See also *Brown v. E.I. DuPont de Nemours and Co. Inc.*, in which the Court held that the Plaintiff could not be put on notice that defendant's products cause birth defects "until someone from the scientific community found and revealed publicly a link between the scientific condition and the exposure to the toxic substance." 820 A.2d 362, 368 (Del. 2003)

⁵⁴ *Sheppard*, A.2d 1126 (Del. Super. May 16, 1985);

⁵⁵ *Id.*, at 498 A.2d 1126, 1128-29 (Del. Super. May 16, 1985); Appellant's Opening brief pp 4-7.

⁵⁶ *Id.*

Finally, it should be noted that this case involves an appeal of a summary judgment ruling. It is Defendant's burden to prove there is no issue of genuine material fact regarding a plaintiff's claim.⁵⁷ In addition, it is a defendant's burden to prove its affirmative defense of statute of limitations.⁵⁸ Here, Defendants have failed to meet both burdens. The Defendants have provided no expert to state what asbestos related disease(s) (especially his asbestosis) Plaintiff had and when.⁵⁹ Even assuming *arguendo* that Defendants have raised issues of fact as to whether or not Plaintiff had asbestosis before 2007, Plaintiff has presented facts to demonstrate that he did not have the disease until 2007, and therefore Mr. DaBaldo's case should be presented to a jury.

⁵⁷ *Moore v. Sizemore*, 405 A.2d 679 (Del. Super. 1979).

⁵⁸ Del. Super. Ct. R. 8

⁵⁹ As of the date of summary judgment motions, neither defendant had filed either a Rule 26 disclosure or a report for any medical expert offering an opinion on what asbestos related disease, if any, the Plaintiff had and when he developed it. In fact, the only expert reports filed by either defendant were two industrial hygienist expert reports. The February 21, 2012 report of Charles Blake CIH makes no mention of DaBaldo's medical condition and solely deals with the level of risk from exposure to asbestos containing gaskets. Ironically, the December 3, 2012 report of Donna Ringo CIH notes on page three "that Mr. DaBaldo was diagnosed with asbestosis in July 2007." (Emphasis added.)

Conclusion

Appellant respectfully request that this Honorable Court reverse the decision of the Superior Court below and remand this case so that a jury can resolve any issues of fact.

Respectfully submitted,

Jacobs & Crumplar, P.A.

By: /s/ Thomas C. Crumplar
Thomas C. Crumplar, Esquire (#0942)
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899
(302) 656-5445
*Attorney for Plaintiff-Below/
Appellant Paul DaBaldo*

Date: November 22, 2013

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