EFiled: Oct 24 2016 11:56AM EDT
Filing ID 59736631
Case Number 387,2016 D

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| IN RE: ASBESTOS LITIGATION<br>WAYNE R. REED, INDIVIDUALLY and AS THE EXECUTOR OF THE ESTATE OF BARBARA REED, DECEASED, and AMY RHODES and COURTNEY REED, AS SURVIVING CHILDREN,<br><br>Plaintiffs Below, Appellants,<br><br>v.<br><br>ASBESTOS CORPORATION LIMITED; BAYER CROPSCIENCE, INC.; CHARLES A. WAGNER COMPANY, INC.; NOSROC CORPORATION, and COUNTY INSULATION COMPANY,<br><br>Defendants Below, Appellees. | : | No. 387, 2016<br><br>Court Below: Superior Court of the State of Delaware in and for New Castle County<br>C.A. No. 13C-11-188 |

**APPELLEE BAYER CROPSCIENCE, INC.'S CORRECTED ANSWERING BRIEF**

SWARTZ CAMPBELL, LLC.

BY: /s/ *Jennifer A. Kapes*
Beth E. Valocchi, Esquire (DE Atty. ID 2294)
Jennifer A. Kapes, Esquire (DE Atty. ID 4419)
300 Delaware Avenue, Suite 1410
Wilmington, DE 19801
(302) 656-5935
*Attorneys for Appellee Bayer CropScience, Inc.*

*Dated:* October 24, 2016

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**

**Rules**

## I. NATURE OF PROCEEDINGS

Plaintiffs-Appellants (hereinafter "Plaintiffs") appeal from the trial court's grant of summary judgment to several defendants, including Bayer CropScience, Inc., as successor to Amchem Products, Inc. (hereinafter "Amchem").

The Original Complaint in this matter was filed in the Superior Court of New Castle County on November 15, 2013. In that Complaint, Plaintiffs alleged that Barbara Reed ("decedent" or "Ms. Reed") had been exposed to asbestos through contact with her father Raymond Ryan ("Raymond") and husband Gary Attix, who allegedly had worked with asbestos-containing products attributable to numerous defendants.

Discovery proceeded in accordance with a Master Trial Scheduling Order utilized by the Superior Court in asbestos-related cases. On June 27, 2016, after the close of product identification discovery, Amchem filed a Motion for Summary Judgment (A2219-2392)[1], asserting, *inter alia*, that Plaintiffs had failed to establish that there is a triable issue as to whether Ms. Reed was exposed to respirable asbestos fibers from a product attributable to Amchem. Plaintiffs filed their Response In Opposition (A2393-2702) on August 21, 2015, and Amchem filed its Reply (A2703-2712) on September 18, 2015.

[1] Citations to "A____" are to Appellants' Appendix.

On July 6, 2016, the Superior Court entered an Order granting Amchem's Motion for Summary Judgment, holding that "Plaintiffs have not presented evidence from which a jury could reasonably infer, without undue speculation, that Plaintiff was exposed to friable asbestos from her Father's clothing, because none of the witness testimony and evidence presented by Plaintiffs specifically place Father in specific proximity to Defendant's [Amchem's] products at the time they were being used when friable asbestos was present."[2]

Plaintiffs filed their notice of appeal on July 28, 2016 and their Opening Brief on September 12, 2016.

[2] *See* Exhibit D to Appellants' Opening Brief, at pp. 2-3.

## II. SUMMARY OF ARGUMENT

1. Denial of Plaintiffs' Statement of Argument

The Superior Court did not err in granting summary judgment in favor of Amchem and concluding that there was no genuine issue of material fact upon taking into consideration all evidence and granting Plaintiffs all reasonable inferences. The evidence presented to the Court did not support a finding, absent speculation, from which a reasonable jury could infer that Raymond's work with any Foster product produced respirable asbestos fibers which attached to the clothing and person of Raymond, who then carried the asbestos fibers to the family home where Ms. Reed inhaled them, much less in sufficient amounts to cause her to develop mesothelioma.

2. Amchem's Statement of Argument

The Superior Court properly concluded, after looking at the evidence in the record in the light most favorably to the Plaintiffs, that there was no genuine issue of material fact, and that Amchem was entitled to judgment as a matter of law. In reaching its decision, the trial court properly concluded that there was insufficient evidence to determine that Ms. Reed breathed asbestos from a product for which Amchem is responsible. Plaintiffs offered no evidence from which a reasonable jury could conclude, absent speculation, that Raymond was ever exposed to friable asbestos from a product for which Amchem is responsible or that he brought any

such asbestos home so that Ms. Reed was exposed to such asbestos in an amount sufficient to cause her mesothelioma.

## III. STATEMENT OF FACTS

### Plaintiffs' Claim Against Amchem Is Based On Ms. Reed's Alleged Take-Home Exposure Through Her Father, Raymond Ryan.

Plaintiffs do not allege that Ms. Reed personally worked with any asbestos-containing product. Instead, they assert that she "was exposed to asbestos through her father Raymond Ryan; and through her first husband, Gary Attix." Appellant's Opening Brief at 6. However, Plaintiffs' claim against Amchem is based solely on Ms. Reed's alleged exposure to asbestos brought home from work by her father Raymond Ryan. *See id.* at 20-22, 38-39. Plaintiffs allege that Ms. Reed was exposed to asbestos brought home from work by her father from the time she was born in 1957 until she married her first husband, Gary Attix, in April 1976. *See id.* at 6-9.

### Testimony Concerning Raymond Ryan's Alleged Use Of Benjamin Foster Mastics And Fibrous Adhesive Attributable To Amchem.

Ms. Reed was deposed on December 16, 2013. She did not identify any products (asbestos-containing or otherwise) that her father may have worked with or around during the relevant time period.

Ms. Reed's father, Raymond Ryan, was an insulator who worked with Local 42 from January 1957 until he retired in December 1987.[3] In a prior asbestos case, in 1990, Raymond testified at length regarding his work history as an insulator and

[3] Raymond Ryan Dep. Tr., Jan. 4, 1990, p. 4 (A2271).

his extensive use of friable dusty thermal insulation products such as Kaylo, Johns Manville, Carey, Armstrong and Ruberoid pipe covering and block. At that time, Raymond provided a written "Job History" that listed the products he recalled working with on various job sites, beginning with a summer job in 1955 and continuing through January 1976.[4] Raymond's Job History indicates that he claims to have worked with Benjamin Foster ("Foster")[5] CI mastic, HI Mastic, and Fibrous Adhesive on certain work sites during his career as an insulator.[6] Raymond testified that the CI mastic came in 5-gallon metal buckets and was applied as weatherproofing over insulation.[7] He described the product as "sort of like a tar, similar to roofing cement."[8] He stated that it appeared to be oil-based and if "you got it on you, you had to use kerosene to get it off of you."[9] Raymond described the HI Mastic as coming in a black can with a consistency more like a water-based product with a smooth texture "like an ice cream,"[10] and testified that it was troweled on and that then "you could take a brush, dip it in a little water, and just

[4] Job History of Raymond F. Ryan (A2278 – A2333).
[5] With one exception not pertinent to this appeal, the Benjamin Foster Company, and later the Benjamin Foster Division, produced all of Amchem's asbestos-containing products.
[6] Job History of Raymond F. Ryan (A2278 – A2333).
[7] Raymond Ryan Dep. Tr., January 5, 1990 at 223 (A2273).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 223-24 (A2273-A2274).

pull it over lightly, and it would come out very, very smooth."[11] Raymond further testified that the fibrous adhesive came in a 5-gallon bucket,[12] that it was gray in color and like a "heavy paste,"[13] and that it was used to stick block insulation to various surfaces.[14]

Ms. Reed's uncle James Ryan ("James") was deposed as a witness in this case. James testified that he used Foster fibrous adhesive to "butter" or stick together 90-degree pieces of insulation.[15] He testified that he recalled dust coming from the thermal block insulation when it was rasped down.[16] James also testified that he used Foster CI Mastic and Foster HI Mastic, but did not testify that those products created dust or otherwise exposed him to respirable asbestos fibers when they were used.[17]

In a prior deposition in 1990, James testified about using fibrous adhesives and mastics and described them as products that came in buckets that could be applied with a trowel.[18] The products ranged from a "tar"-like to a "pudding"-like consistency.[19] He testified that any residual CI Mastic or HI Mastic that might have

---

[11] *Id.* at 224 (A2274).
[12] *Id.*
[13] *Id.* at 225 (A2275).
[14] *Id.*
[15] James Ryan Dep. Tr., Aug. 11, 2014, pp. 84-85; 93-96 (A2336-A2342).
[16] *Id.* at 95-96 (A2341-A2342).
[17] *Id.* at 84-85; 93-96 (A2336-A2342).
[18] James Ryan Dep. Tr., June 22, 1990, pp. 33-37 (A2344-A2349).
[19] *Id.* at 35-36 (A2347-48).

dried on his tools would have to be scraped off and might cause some dust.[20] He did not testify, however, as to the frequency with which he had to clean Foster products off of his tools and he did not testify that he ever cleaned his tools in this way in the presence of Raymond. More importantly, James did not testify that he ever saw Raymond clean dried Foster products from *his* tools. Likewise, *Raymond* did not testify that he ever had to clean Foster products off of his tools, or that Foster products created dust of any kind when he used them.[21]

**It Is Undisputed That The Foster Products At Issue Were Not Friable.**

The uncontroverted Affidavit of Robert E. Sage ("Sage Aff.") submitted by Amchem in support of its motion for summary judgment establishes that Benjamin Foster mastics and adhesives "were sold pre-mixed, and came in various sizes of pails up to 55 gallon drums and, in some instances, in caulking cartridges."[22] Consistent with Raymond's and James's own descriptions of the Foster products with which they worked, Mr. Sage's affidavit establishes that Foster mastics and

[20] *Id.* at 36 (A2348).

[21] Plaintiffs invoke James's testimony that he worked with Raymond at three locations at which they allegedly used Foster products: at Dupont Seaford, St. Mark's High School, and Allied Chemical. *See* Appellants' Opening Brief at 21. But Raymond's own Job History, which Raymond verified at his deposition, does not identify James as a co-worker at DuPont Seaford (*see* A2307) or Allied Chemical (A2315). The only one of the three worksites at which Raymond identified James as a co-worker was St. Marks High School, and Raymond's own Job History does not identify any use of any Foster product at that worksite (*see* A2319).

[22] Sage Aff., ¶ 5 (A2352).

adhesives were applied "wet" and had "a viscosity or consistency that ranged from thick liquids to honey, molasses, glue or even paste."[23]

Although some Foster products contained chrysotile asbestos, not all Foster products contained asbestos,[24] and "[a]ny asbestos in Foster products was encapsulated and bound within the product by various binders, resins, asphalt, or plasticizers."[25] As a result, "Foster products were not friable."[26] Such products have been exempt from OSHA warning label requirements since asbestos warning labels were first required in 1972. *See* 37 Fed. Reg. 11318, 11321 (June 7, 1972) (exempting products in which asbestos is "modified by a bonding agent, coating, binder, or other material") (*see* A2391); 29 CFR § 1910.1001(j)(6)(i) (2016) (same).

[23] *Id.* (A2352-2353).
[24] *Id.* ¶ 6 (A2353).
[25] *Id.* ¶ 7 (A2353).
[26] *Id.*

## IV. ARGUMENT

### A. Question Presented

Did the Superior Court properly grant summary judgment in favor of Amchem where Plaintiffs failed to offer any evidence from which a reasonable jury could conclude that Ms. Reed was exposed to friable asbestos from a product for which Amchem is responsible? This issue was preserved in the motion for summary judgment filed by Amchem. (A2219-2235).

### B. Scope of Review

In an appeal from the entry of summary judgment, the standard of appellate review is *de novo. Hoechst Celanese v. Certain Underwriters at Lloyd's, London*, 656 A.2d 1094, 1099 (Del. 1995).

### C. Merits of Argument

#### 1. Standard of Review

On appeal, the standard of review following a grant of summary judgment requires the Court "to examine the record to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment at a matter of law." *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991).

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 59 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

To overcome a motion for summary judgment, a plaintiff is required to show more than a "scintilla" of evidence; a plaintiff must present evidence "on which the jury could reasonably find for the plaintiff." *In re Asbestos Litig.*, 2012 WL 1413673, at *2 (Del. Super. Feb. 2, 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Moreover, in considering a motion for summary judgment, the Court may not "indulge in speculation and conjecture," but should decide the motion based on the evidence actually produced by the plaintiff, and "not on evidence potentially possible." *In re Asbestos Litig*., 509 A.2d 1116, 1117 (Del. Super. Ct. 1986).

In asbestos exposure cases, "Delaware courts do not allow a plaintiff to proceed against a defendant based on speculative exposure to that defendant's product." *Foucha v. Georgia Pacific, LLC,* Del.Super.Ct., C.A. No. N10C-05-042, Ableman, J. (Jun. 3, 2011).[27] *See also In re Asbestos Litig.*, 2015 WL 1406728, at *1 (Del. Super. Mar. 25, 2015) ("The Court will not sustain a claim based on

[27] (A2366-A2371)

speculative exposure to the defendant's asbestos-containing product."); *Shimko v. Honeywell Int'l Inc.*, 2014 WL 4942189, at *4 (Del. Super. Sept. 30, 2014) ("To survive summary judgment, the Shimkos must base their claims against Honeywell on more than mere speculation. … [T]he Court must decline to draw an inference for the Shimkos if the record does not contain facts upon which the inference reasonably can be based. Moreover, the Court cannot base an inference on surmise, speculation, conjecture, or guess, or on imagination or supposition.").

### 2. Product Nexus Standard

Under Delaware law, to support an asbestos personal injury claim, a plaintiff must establish exposure to respirable asbestos fibers from the defendant's asbestos-containing products. And it is well-settled that a plaintiff does not meet his burden of proof by simply placing a defendant's product at the general work site. *E.g., In re Asbestos Litig.*, 2015 WL 1406728, at *1 (Del. Super. Mar. 25, 2015) ("it is not sufficient for the plaintiff to merely identify the presence of the defendant's products at the work site") (citing cases); *Herring v. Ashland, Inc.*, 2008 WL 4335735, at *3 (Del. Super. Sept. 19, 2008), *as amended* (Nov. 5, 2008) ("Simply establishing that a defendant's product was present at plaintiff's work-site is not sufficient to establish product nexus."); *Conway v. A.C.& S*, 1987 WL 8657, at *1 (Del. Super. Feb. 3, 1987) ("It is not sufficient merely to place the product at the general site.").

Rather, to survive a properly supported motion for summary judgment, a plaintiff must establish "product nexus," *i.e.*, that:

> [a]t the time the defendant's asbestos-containing product was used at the site the plaintiff was in the area where it was used, near that area, walked past that area, or was in a building adjacent to that area if open doors or windows would allow *asbestos fibers from the defendant's product to be carried to the area where the plaintiff was working.*

*Mergenthaler v. Asbestos Corp. of America,* 1988 WL 16284, *3 (Del. Super. Ct. 1988) (emphasis added). As Plaintiffs acknowledge, "[i]mplicit within this product nexus standard is the requirement that the particular defendant's product to which the plaintiff alleges exposure *must be friable*, that is, *the product must be susceptible to releasing fibers which are capable of ingestion or respiration* into the plaintiff's body." Appellants' Opening Brief at 26 (*quoting In re Asbestos Litig.*, 2007 Del. Super. LEXIS 155, at *67-68 (Del. Super. Ct. May 31, 2007) (emphasis added); *accord In re Asbestos Litig.*, 2015 WL 1406728, at *1 ("Delaware law requires that the defendant's product to which plaintiff alleges asbestos exposure be friable, or susceptible to releasing fibers which are capable of ingestion or respiration into the plaintiff's body.") (internal quotes and citations omitted); *Shimko,* 2014 WL 4942189, at *4 ("To establish asbestos exposure, a plaintiff must present evidence that would allow an inference that he was in close proximity to specific locations at which a defendant's asbestos product was present *and was friable*.") (emphasis added); *Mergenthaler*, 1988 WL 16284, at *2-3

("The Court recognizes that prior decisions on motions for summary judgment on asbestos-related claims have rested on a showing that a defendant's product was used in proximity to a plaintiff. It was not necessary to go further where the product was known to be in such form that it was probable that asbestos fibers would be released in the use of the product. It has not and must not be overlooked that the ultimate question in determining product nexus is plaintiff's exposure to asbestos fibers supplied by a defendant.").

Thus, Delaware courts have frequently granted a defendant summary judgment where the plaintiff could not establish exposure to respirable asbestos fibers from the defendant's product. *See Clark v. A.C.& S.*, Del. Super., No. 82C-DE-26, Poppiti, J. (September 3, 1985)[28]; *Shimko*, 2014 WL 4942189, at *4-5 (granting summary judgment where plaintiff failed to provide evidence of exposure to friable asbestos from defendant's product); *In re Asbestos Litig.*, 2011 WL 5429168, at *1 (Del. Super. Oct. 6, 2011) (same); *In re Asbestos Litig.*, 2011 WL 2462569, at *2 (Del. Super. June 7, 2011) (same); *Mergenthaler*, 1988 WL 16284, at *5-6 (same).

[28] Opinion attached as Tab 1.

### 3. Plaintiffs Have Not Adduced Evidence That Would Permit A Reasonable Jury To Find That It Is More Probable Than Not That The Decedent's Illness Was Caused By Asbestos Fibers Released By An Amchem Product; Their Claim Against Amchem Rests On Speculation And Conjecture.

Here too, to survive summary judgment, Plaintiffs were required to proffer evidence that Ms. Reed was exposed to respirable asbestos fibers from an asbestos-containing product attributable to Amchem. The trial court properly entered summary judgment in favor of Amchem because Plaintiffs failed to do so.

Plaintiffs baldly assert in their Opening Brief (at 26-27) that the Superior Court "ignored direct evidence from which a jury could conclude Barbara Reed was exposed to asbestos as the result of each defendant's conduct." But Plaintiffs do not cite any "direct evidence" to establish that Ms. Reed's father, Raymond Ryan, was exposed to respirable asbestos fibers from any product attributable to Amchem, let alone that he brought respirable asbestos fibers from an Amchem product home with him and that Ms. Reed was exposed to them in any way, much less in sufficient amounts to cause any disease. Moreover, none of the evidence that Plaintiffs cite in their Opening Brief supports their argument that the trial court erred in granting summary judgment to Amchem.

First, Plaintiffs point to testimony by Ms. Reed's uncle, James, that on an unspecified number of occasions he cleaned residue from Foster products from his own tools. But this evidence is unavailing, because their claim is based on Ms.

Reed's alleged exposure to asbestos brought home by her *father*, not her *uncle*. Thus, even if James's testimony would permit a reasonable jury to find that *he* was exposed to respirable asbestos fibers from a Foster mastic or fibrous adhesive, it does not support a reasonable inference that Raymond was exposed to respirable asbestos by cleaning the residue of Foster products from *his* tools, much less that, after he cleaned his tools, he brought respirable asbestos fibers from Foster products home for Ms. Reed to breathe. There is no testimony by Raymond or any other evidence in the record that Raymond ever cleaned a Foster mastic or fibrous adhesive off his tools in the way that James may have done. To the contrary, the only evidence in the record concerning Raymond Ryan on this score is that when he got Foster mastic on his clothes, he used *kerosene* to clean it off.[29]

Second, Plaintiffs suggest that James's most recent deposition testimony "reaffirmed that the Defendant's product was dusty" (Appellants' Opening Brief at 39), citing James's testimony that dust was created, and would get on his and Raymond's clothes, "[w]hen you rasp them down." *Id.* (citing A2526:15-2527:3). Plaintiffs would have the Court believe that James's testimony was that the dust came from the Foster product that had been applied to insulation. But that is not so.

[29] Raymond Ryan Dep. Tr., January 5, 1990 at 223 (A2273) ("The product was sort of like a tar, similar to roofing cement. You patch your roof with a black cement, the sticky stuff. I guess it was—it wasn't water-based. You know, it was some kind of an oil or something like that. You got it on you, you had to get kerosene to get it off of you.").

When James was asked about "rasp[ing] them down," the reference to "them" was to "the miters."[30] Moreover, it is plain from James's testimony that his reference to "the miters" is a reference to the "insulation" they were cutting and rasping and that the dust that he was describing was dust from the insulation itself, and not from the Foster product used to stick the pieces of insulation together:

> Q: When you were talking earlier about buttering the pieces together, you then said, I think, you rasp them down?
>
> A. Rasp.
>
> Q. Rasp, R-A-S-P?
>
> A. Yeah.
>
> * * *
>
> Q. * * * *Where was the dust coming from?*
>
> A. *Off the miters.*
>
> Q. *And that's the insulation?*
>
> A. *Yeah.*
>
> Q. Okay. What type of insulation was it? Was it like a block material?
>
> A. Well, you use block; you use—yeah, everything.
>
> Q. *And the dust was coming off of that insulation?*

[30] *See* James Ryan Dep. Tr., Aug. 11, 2014, p. 84 A2526:12-14 ("A. * * * And the miters were stair-stepped. Well, you had to rasp them down, and that's what we did with it.").

A. *Oh, my God, yes.*[31]

Thus, James's testimony about the dust generated by "rasp[ing] down" the insulation provides no support whatsoever for Plaintiff's assertion that *Amchem*'s "product was dusty." Appellants' Opening Brief at 39.

Finally, Plaintiffs rely on a generic affidavit from a Dr. Michael Ellenbecker dated February of 2006.[32] However, the Ellenbecker affidavit cannot create a triable issue as to whether Ms. Reed more likely than not inhaled respirable asbestos fibers from a Foster product because Dr. Ellenbecker does not provide any foundation for his opinion and, more importantly, the affidavit is not based on the facts of this case and does not address Foster products specifically. *See Laugelle v. Bell Helicopter Textron, Inc.*, 88 A.3d 110, 117 (Del. Super. 2014), *as corrected* (Mar. 19, 2014) ("The Court may consider an expert's or non-expert's affidavit [at summary judgment], but only if the affidavit is supported by a factual foundation and amounts to more than mere speculation or conjecture."); *Lynch v. Athey Prod. Corp.*, 505 A.2d 42, 45 (Del. Super. 1985) ("[I]n the context of a motion for summary judgment, an expert must back up his opinion with specific facts… An affidavit based only on conjecture is inadequate to oppose or support a motion for summary judgment.") (internal quotes and citation omitted). Moreover, and in any

[31] *Id.*, pp. 94-96 (A2340-A2341) (emphasis added).
[32] *See* Appellants' Opening Brief at 39.

event, Dr. Ellenbecker's affidavit is completely consistent with the trial court's ruling, as the affidavit acknowledges that the asbestos in products of the type at issue here was "encapsulated" and that the asbestos in the products would not "become respirable" unless the products were "disturbed."[33] Dr. Ellenbecker's generic Affidavit does not address the fundamental issue here: whether the trial court properly found that Plaintiffs have not adduced evidence that would permit a reasonable jury to find that the Ms. Reed's father, Raymond Ryan, was ever present when a Foster product *was* "disturbed" in a way that would release respirable asbestos fibers.

It is well settled that "Delaware courts do not allow a plaintiff to proceed against a defendant based on speculative exposure to that defendant's product." *See Foucha v. Georgia Pacific, LLC, Del.Super.Ct.*, C.A. No. N10C-05-042, Ableman, J. (Jun. 3, 2011); *see also In re Asbestos Litig*., 509 A.2d 1116, 1117 (Del. Super. Ct. 1986). But Plaintiffs' claim against Amchem requires a series of inferences that rest on speculation and conjecture rather than evidence.

First, Plaintiffs ask the Court to infer that Raymond used asbestos-containing Foster products in such a way as to cause the release of respirable asbestos fibers, even though he never testified that he did so, even though it is undisputed that any asbestos in the Foster products at issue was encapsulated and that those products

[33] Ellenbecker Aff., ¶ 11 (A2560).

were applied "wet" and had the consistency of "tar" or "pudding," and even though Raymond testified that he cleaned up Foster product using a wet solvent, kerosene. The Court is next asked to infer that Raymond then brought respirable asbestos fibers from a Foster product home with him even though, again, there is no testimony by him—or, indeed, by any other witness—that he ever did so. And finally, Plaintiffs ask the Court to infer that Raymond Ryan brought home with him, and Ms. Reed then inhaled, sufficient fibers from Foster mastics and/or fibrous adhesives to have caused her to develop mesothelioma. Accordingly, the trial court properly held that even "when viewing the record in the light most favorable to Plaintiffs, Plaintiffs have not presented evidence from which a jury could reasonably infer, without undue speculation, that Plaintiff was exposed to friable asbestos from her Father's clothing, because none of the witness testimony and evidence presented by Plaintiffs specifically place Father in the specific proximity to Defendant's products at the time they were being used when friable asbestos was present."[34] *See Shimko* 2014 WL 4942189, at *4 ("To survive summary judgment, [plaintiffs] must base their claims against [the defendant] on more than mere speculation. … [T]he Court must decline to draw an inference for the [plaintiffs] if the record does not contain facts upon which the inference

[34] *See* Exhibit D to Appellants' Opening Brief, at pp. 2-3.

reasonably can be based. Moreover, the Court cannot base an inference on surmise, speculation, conjecture, or guess, or on imagination or supposition.").

## V. CONCLUSION

For all of the foregoing reasons, the trial court's grant of summary judgment to Amchem should be affirmed.

SWARTZ CAMPBELL, LLC.

BY: */s/ Jennifer A. Kapes*

Beth E. Valocchi, Esquire (DE Atty. ID 2294)
Jennifer A. Kapes, Esquire (DE Atty. ID 4419)
300 Delaware Avenue, Suite 1410
Wilmington, DE 19801
(302) 656-5935
*Attorneys for Appellee Bayer CropScience, Inc.*

Dated: October 24, 2016