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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' CORRECTED REPLY BRIEF ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNY

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES OF FACT REMAINED.

A. Nosroc.

Nosroc focuses on the inadmissibility of deposition testimony and its purported evidence that it was not the exclusive supplier, which the Court below did not rule on. *Reed v. Nosroc Corp.*, C.A. No. N13C-11-188 ASB, at 3 (Del. Super. Ct. July 6, 2016) (ORDER) (Ex. A to Appellants' Opening Brief ("OB")). The Court below found that Plaintiffs "fail[ed] to meet both the time and space requirement, as well as the friable fiber requirement with respect to Ms. Reed's father in particular." *Id.* at 6.

1. Admission of Depositions Generally. Superior Court Rule of Civil Procedure 32 and Delaware Rule of Evidence 804 are independent means of admitting depositions into evidence, as are Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 804. *Angelo v. Armstrong World Indus.*, 11 F.3d 957, 962-63 (10th Cir. 1993); *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 914 (9th Cir. 2008). Cases interpreting the Federal Rules of Civil Procedure are persuasive authority where the Superior Court Rules closely follow them. *Appriva S'holder Litig. Co. v. ev3, Inc.*, 937 A.2d 1275, 1286 (Del. 2007). "A deposition previously taken may also be used as permitted by the Delaware Uniform Rules of Evidence." Superior Court Rule of Civil Procedure 32(a)4.

2. Stevens Deposition. Stevens' deposition is admissible under Delaware Rule of Evidence 804 (b) (1). First, his deposition was taken on October 25, 1985[1] in *Gill v. Consolidated Bail Corporation*, C.A. 85C-MR-83 (Del. Super.), filed on March 22, 1985.[2] Nosroc was a party to *Gill* and did have notice of the deposition. Plaintiffs' counsel do not have the original documents, but have the pleading jackets from this 1985 case which reflect the pleadings filed:[3] a praecipe issued to Nosroc on March 25, 1985,[4] Nosroc responded to interrogatories on July 3, 1985,[5] Steven's deposition was noticed on October 10, 1985[6], and Nosroc was still in the case as of October 15, 1986.[7] Thus, Stevens' deposition is admissible.[8]

Second, BEH and Keene were present at Stevens' deposition.[9] The principals of Corson sat on the Board of Directors of BEH which merged into Keene.[10] Although they were separate companies, their interests were aligned. To show that a Nosroc supplied product was not at a site would be to show that BEH or Keene product was not at a site. On the converse, if BEH and Keene show that

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[1] AR6:20, Edward Stevens deposition.
[2] AR10-AR27, Gill Complaint.
[3] AR29-AR40, Gill pleading jackets; see AR41-AR42, Affidavit of Charlene Streb.
[4] AR29, Pleading 1.
[5] AR31, Pleading 65.
[6] AR32, Pleading 98.
[7] AR33, last entry.
[8] *Pearl v. Keystone Consol. Indus., Inc*., 884 F.2d 1047, 1052 (7th Cir. 1989) (where party has notice of deposition, it is admissible against party).
[9] See Nosroc Appellee AB, p.4. (Edward Stevens is the former BEH President); AR8 (Keene present at Stevens' deposition).
[10] A372-373, A383, 389-390.

their products were not at a site, they would also show that Nosroc did not distribute products to that site and could not be liable for Plaintiffs exposed to asbestos at that site. BEH, Keene and Nosroc all would have had similar motives and opportunity to develop testimony in their joint defense because of Nosroc's exclusive distributorship of BEH and Keene products and Nosroc was in fact "present" at the depositions. These unique circumstances and the fact that Nosroc, BEH, and Keene would potentially be liable for the same product, distinguishes these circumstances from those in *In re Asbestos Litig. (Spear v. Excelsior)*, C.A. N13C-06-169 ASB (Boyer, S.M.) (Del. Super. July 18, 2014).

3. Ray Ryan's Deposition Testimony. Plaintiff argued below that Nosroc was a member of CCR ("Center for Claims Resolution") who was present at Ray Ryan's deposition.[11] Below Nosroc admitted it was part of CCR.[12] Plaintiff submits that because it was a member of CCR Nosroc was "present" at the deposition. In its Appellee Answering Brief ("AB") Nosroc admits Keene was present, and would have the same interests as Nosroc in cross-examining Mr. Ryan as to Keene's products which Nosroc distributed, as set forth above in Argument I.A.2.

4. **Nosroc's Products Contained Asbestos when Ray Ryan was Exposed to Them**. Ray Ryan clearly used and was exposed to the asbestos-containing

[11] A203, n.6.
[12] A516.

versions of Thermasil and Monoblock, even without Ray Ryan's own testimony. James Ryan's[13] work history that he prepared shows the dates he worked with Monoblock were pre-1968 and listed Ray Ryan as a co-worker.[14] James Ryan couldn't remember off the top of his head what years and sites he worked with it but referred to his job history which he had worked hard on and was an exhibit at his deposition.[15] Nosroc claims James Ryan was speculating when he said that Ray Ryan would be working with Thermasil but cites nothing in support.[16] Nosroc generally claims that Randle Meadows's testimony lacked first-hand knowledge of the "time and space" requirement but again points to nothing in the record.[17] Randle Meadows said he brought Nosroc-distributed Thermasil directly to Raymond Ryan stating explicitly "I would bring him Thermasil."[18] Randle Meadows also stated he specifically brought Monoblock (which was distributed by Nosroc) to Raymond Ryan.[19]

5. There is Evidence that Corson (Nosroc) was the Exclusive Supplier of BEH/Keene Products.

[13] There is no claim that James Ryan's testimony is not admissible against Nosroc.
[14] A313-14.
[15] A309:16-20; 310:23-A311:2.
[16] S*ee* Nosroc Appellee's AB, p. 6 citing A304:1-16.
[17] Nosroc Appellee's AB, p. 15.
[18] A292:21-25.
[19] A289:4-10.

For evidence that Nosroc was not the exclusive supplier of BEH/Keene products, it cites the testimony of Robert Hinks and some invoices.[20] However, Hinks testimony supports that Corson was the exclusive distributor.[21] It is unclear why he thought that a user or wholesaler could buy BEH products from BEH despite the agreement with Corson.[22] Stevens, former President of BEH, testified its products were sold exclusively from Corson between 1939 until 1968.[23] BEH withdrew and had no one in the area after Corson became the sole distributor in Delaware.[24] Some of the invoices Nosroc submitted post-date 1968.[25] The rest are dated from mid-1967 to the end of 1967.[26] The invoices do not indicate that Corson was excluded from the sale and are consistent with Nosroc's Answers to Interrogatories, wherein Nosroc admits it distributed BEH/Keen's products from 1936-1973 but did not ship directly to the customer.[27] At most the invoices and Hinks' testimony cited by Nosroc create a question of fact as to whether Corson was the exclusive distributor. Finally, no one testified that direct purchases

[20] Nosroc Appellee AB, p. 4, citing A523:19-A526:6; A528:5-10, and A530-A927.
[21] A365:19-22.
[22] A523:23-528:6.
[23] A383:3-14, A337:4-338:15.
[24] A337:12-A338:15.
[25] A797-A927.
[26] A530-796.
[27] A331-332.

occurred from BEH on jobs where Mr. Meadows worked with Ray Ryan.[28] This is not a situation where the plaintiff's testimony is so inconsistent that no reasonable juror could accept it, and unsupported by other evidence, as was the case in *Smith v. Del. State Univ.*, 47 A.3d 472, 478 (Del. 2012) and *Edmisten v. Greyhound Lines, Inc. (In re Asbestos Litig.)*, 49 A.3d 1192 (Del. 2012). The testimony is not necessarily inconsistent. It is the jury who is the sole judge of witness credibility and resolver of contradictions in testimony. *Maddrey v. State*, 975 A.2d 772, 775 (Del. 2009).

B. County Insulation.

Defendant castigates Appellant/Plaintiff's reliance on *Clark v. A.C.&S*[29] and *Opalczynski*[30] and instead stresses the Superior Court's reliance on *Helm*.[31] *Clark* has never been overruled. In *Opalczynski* the Superior Court denied summary judgment where the Plaintiff alleged he was exposed to asbestos from the work of County in an adjacent plant to where he was working, based on Dr. Ellenbecker's affidavit which stated that asbestos fibers could drift on air currents for hundreds of

[28] Nosroc Appellee AB, p. 3, citing A931:22-A932:14. This testimony by Meadows is not inconsistent with BEH and Keene's Monoblock and Thermasil being distributed by Nosroc. BEH and Keene manufactured and shipped the products Nosroc distributed. A331-332, 364:1-21.
[29] *Clark v. A.C.&S*, C.A. N82C-DE-26 (Del. Super. Sept. 3, 1985) (Ex. A).
[30] *In re: Asbestos Litig.: (Opalczyznski)*, C.A. N04C-03-264 (Feb. 5, 2008) (TRANSCRIPT) (Ex. E to OB).
[31] *In re Asbestos Litig. (Helm)*, 2007 Del. Super. LEXIS 155, at *1 (Del. Super. May 31, 2007).

feet.[32] In *Helm* none of the witnesses could place the Plaintiff in the vicinity of asbestos.[33]

Here, unlike *Opalczynski* and *Helm*, there was testimony that Gary Attix was in the vicinity of asbestos. Gary Attix, the Plaintiff's first husband, testified that the Defendant's workers were at Dupont Seaford at the same time he was working there and married to Barbara Reed.[34] Attix stated that he saw County "removing and applying insulation."[35] He stated that where the County Insulation workers were tearing out and removing insulation "[v]aried all the time. Sometimes they would be on the same floor with you. Sometimes they would be above you. Most of the –some of the floors had grated floors."[36] This meant he could see what they were doing above him.

Attix testified as follows:

> Q: And again just because there was an objection, can you explain basically what you observed of how the County employees were moving asbestos?
> []
> A: Just the one time I remember them working over top of us. We had to call the shop steward because the dust was coming down through the floor.
> Q: And describe how much dust was coming down through the floor.
> A: Quite a bit. We had to move out of the area.[37]
> []

[32] *Opalczynski*, C.A. N04C-03-264, at 128:20-129:4.
[33] *Helm*, 2007 Del. Super. LEXIS 155, at *70.
[34] A1203: 11-13, 20-25, A1204: 9-15.
[35] A1205:1-5.
[36] A1205:13-17.
[37] A1209:21-A12:10:10.

> Q: Okay. And how far removed were the County people where the dust was coming down so much you had to call the shop steward?
> []
> A: 12 to 15 foot, probably.[38]

Mr. Attix saw County employees daily.[39] Mr. Attix saw County employees remove or install insulation dozens of times.[40]

Randall Meadows, Gary Attix's coworker, confirmed what Attix testified to as how County workers removed asbestos:

> Q: Okay. Just tell me how they took off the---and contrast that with how you were trying to take off the asbestos insulation.
> A. Well, like I said, they just beat it off and dropped it down on the ground and piled it up. It was all over the place, and it caused a massive problem.[41]

Appellee/Defendant attempts to downplay Attix's exposure stating that Meadows was not always working with Attix and that he recalled seeing County install not remove insulation.[42] However, Meadows' testimony is that he worked with Attix and that Attix was his apprentice.[43] He also recalled that he was in the same area as Attix when County workers caused large amounts of asbestos insulation to fall.[44] Meadows testified that County worked with asbestos, as the

[38] A1210:22-A1211:2.
[39] A1205:19-23.
[40] A1211:14-20.
[41] A1224:5-11.
[42] Appellee/Defendant County's AB at 19.
[43] A1219:1-24.
[44] A1220:19-A1221:13.

Superior Court recognized below.[45] Meadows recalled several instances where he and Gary Attix were together when County was removing asbestos insulation in a manner that caused it to fall on Gary Attix.[46]

Finally, Plaintiff has produced the affidavit of Steven Hays demonstrating the friable nature of asbestos and how asbestos particles travel.[47] As a result, the Superior Court erred when it stated that Plaintiff has not produced evidence that Gary Attix was exposed to asbestos from the actions of County Insulation.

C. ACL and Charles Wagner.

Charles Wagner shipped ACL's raw asbestos to DuPont between 1958 and 1972,[48] and as this Court found in *Nack v. Charles A. Wagner Co.*, 803 A.2d 428 (Del. 2002) and *Fleetwood v. Charles A. Wagner Co. (In re Asbestos Litig.)*, 832 A.2d 705, 707 (Del. 2003), a reasonable jury could conclude it was the only sweeping compound at DuPont Seaford during this time. Charles Wagner/ACL is the only company for whom there are invoices showing they supplied sweeping compound to DuPont during this time.[49]

James Ryan did confirm that he worked with Raymond Ryan. Raymond Ryan worked at the Dupont Seaford Plant from Mid-September 1963 to Mid-

[45] A1035:13-A1037:14, Ex. B to Appellant OB, *Reed v. County Insulation*, C.A. No. N13C-11-188 ASB (Del. Super. Ct. July 6, 2016) (ORDER), p.3.
[46] A1039:17-24.
[47] A1339 at ¶ 6.
[48] A1771; A1621:6-A1622:5; A1626:18-A1629:12.
[49] A1786-1792.

October 1964 in the plant's 501 building and then again from April 1966 to September 1966.[50] During part of the time that Raymond Ryan was working at Dupont Seaford his brother James Ryan was working with him.[51] James Ryan testified that he and his brother worked near Dupont employees at the plant.[52] The Dupont employees working near them used the ACL produced, Wagner supplied, raw asbestos as a sweeping compound during the relevant time frame these Defendants supplied it there.[53]

DuPont purchasing agent Marguerite Warren worked in the DuPont purchasing department beginning in 1943, left in 1954, and was back in purchasing in 1969.[54] Charles Wagner continued to sell ACL's asbestos until 1972. Defendant cited to nothing that says Warren did not have personal knowledge of what DuPont purchased as sweeping compound during 1958-1972. Warren testified that Dupont purchased sweeping compound from Charles Wagner.[55] Warren also testified that DuPont purchased only insulation from John Mansville, so Lankford was not correct that John Mansville supplied it.[56]

[50] A1560:1-A1561:11; A1906:1-A1907:11; A1563-64, A1909-1910.
[51] A1571:1-24; A1917:1-24; A1575-76, A1921-22.
[52] A1573:1-24, A1919:1-24.
[53] A1573:1-24, A1919:1-24.
[54] A1990:7-19.
[55] A1991:12-A1992:22.
[56] A1993:16- A1994:6.

There is a March 23, 1972 Dupont Seaford memo from F.J. Klein to R.V. Lauber regarding replacing the asbestos sweeping compound with non-asbestos.[57] On the bottom of the memo there are handwritten notes regarding "kleensweep" and "Oscar."[58] In addition there is a handwritten not that states, "both of these are the heavy oil soaked type. Not the asbestos type." (Id.). This document along with Marguerite Warren's testimony shows that there is no evidence of another supplier of *asbestos* sweeping compound and that the only sweeping compound suppliers other than Charles Wagner/ACL supplied non-asbestos sweeping compound after 1972. This fits because Charles Wagner/ACL stopped supplying the asbestos-containing sweeping compound in 1972. However, as this Court noted, there is evidence Charles Wagner knew its asbestos was used as a sweeping compound at DuPont Seaford. *Nack*, 803 A.2d at 428; *In Re Asbestos (Fleetwood)*, 832 A.2d at 712. The Court was referring to correspondence from Charles Wagner to Dupont Seaford dated January 31, 1969 where Charles Wagner called its product "Asbestos Sweeping Compound" and told DuPont it was not hazardous.[59]

The only post-*Nack* and *Fleetwood* evidence of a new supplier was the testimony of Mr. Lankford in 2014. The Court below's decision was premised on the purported lack of evidence that Ray Ryan was near the sweeping compound

[57] A1997.
[58] Id.
[59] A2047-49.

and that it was not dusty, not this new evidence from Lankford.[60] The same Judge previously considered Mr. Lankford's 2014 testimony and found "Mr. Lankford's mere assertion that Johns Manville manufactured the sweeping compound he used, without more[], does not conclusively establish the existence of another supplier, as would evidence of other companies' shipments or other orders from DuPont." *Barlow v. Charles Wagner,* C.A. N14C-02-024 ASB, at 2 (Del. Super. Mar. 9, 2016). There, the Court denied Wagner's motion for summary judgment on product nexus. *Id.* at 4. The Superior Court denied similar summary judgment motions recently in *Bradley v. Wagner,* C.A. 11C-03-252 (Del. Super. September 20, 2015) and *Bailey v. Wagner,* C.A. 13C-05-103 (Del. Super. September 10, 2015) (Ex. B). In *Bradley* and *Bailey* the Court found that there was sufficient product nexus evidence for the case to go to trial where there was evidence plaintiffs worked with and around sweeping compound between 1958 and 1972 (Id., p. 27:7-34:1). ACL cites *In re Asbestos Litig. To: Robert J. Truitt,* 2011 Del. Super. LEXIS 3667, at *13 (Super. Ct. Oct. 3, 2011), a Superior Court decision which found that ACL was not barred by collateral estoppel from arguing that its product was not the sweeping compound used by the plaintiff. The Court there found that ACL, who was not present in *Nack,* did not have the same interests as Charles Wagner and the issue to be decided was not the same. *Id.* at 13. Further

[60] Ex. C to Appellant's OB, p.3-4.

the Superior Court held that there was no record support for Plaintiff's allegations that he was exposed to ACL's sweeping compound. *Id.* at *15. The record submitted to the Superior Court in *Truitt* had mistakes and mis-citations. *Id.* at 5. Plaintiffs submit that *Nack*, *Fleetwood*, and the subsequent Superior Court decisions in *Bradley*, *Bailey*, and *Barlow* were correct.

The Court below decided both ACL and Charles Wagner in a single opinion, which made sense because their product is the same and there is one case below.[61] In its opening brief below, ACL did not attempt to distinguish the case from *Nack* or *Fleetwood* or cite to Lankford's "new testimony" until its reply brief, which is not permitted.[62] This is why Plaintiffs did not attach the transcripts of James Wheaton, Victor Passwaters, Philip Johnson, Richard Ash, or David Hynson to the ACL SJAB, only to the Charles Wagner SJAB, which raised the "new evidence" claim below.[63] However these witnesses were listed as product nexus witnesses for both cases.[64] Plaintiffs did not attach Dr. Ellenbecker or Dr. Hayes' affidavits to the Charles Wagner or ACL SJAB, but plaintiffs did disclose them as experts in

[61] Ex. C to Appellant's OB.
[62] *Lagrone v. AADG, Inc. (In re Asbestos Litig.)* 2007 Del. Super. LEXIS 238, at *10 (Del. Super. Aug. 27, 2007).
[63] The Seaford workers other than James Ryan and Ray Ryan were not proffered to give eyewitness testimony that Ray Ryan worked with it, but for the purpose of showing how this sweeping compound was used at DuPont Seaford. Plaintiff's responses to requests for admission, (B63-69, ACL Appendix) are not inconsistent.
[64] AR49-AR52, AR54, Plaintiff's Amended Final Witness and Exhibit List, 9/15/15.

the cases.[65] They were attached to Nosroc, Bayer's, and County's SJABs[66] which are all filed in the same case.

D. Bayer Cropscience.

1. Plaintiff has produce evidence that Raymond Ryan worked with or around Bayer's asbestos containing products.

Bayer admits some of its products during the period of time Barbara Reed was exposed to them contained asbestos.[67] These products included Foster CI mastics, Foster HI mastics, Foamseal, and Benjamin Fibrous Adhesive.[68] Bayer also concedes that Barbara Reed's father, Raymond Ryan produced a work history in which he listed using the Defendant/Appellee's products.[69] Bayer also cites to Raymond Ryan's deposition testimony in which he talked about using these products.[70] Defendant also concedes that Raymond Ryan's co-worker and brother James Ryan testified he worked with Foster HI Mastic.[71]

There is clear testimony from both Raymond Ryan and his brother that Raymond Ryan used the defendant's products.[72] Regarding the process of

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[65] AR44-AR48, Plaintiffs' Amended Final Witness and Exhibit List.
[66] A1339; A472-A474; A2558-2560.
[67] Appellee Bayer's AB, p. 7.
[68] A2452, A2454-2472.
[69] Appellee Bayer's AB, p. 5.
[70] *Id.*
[71] Appellee Bayer's AB, p. 6.
[72] A2512:23-2513:6; A2519:5-12, A2522:18-A2523:10, A2526: 9-A2527:3, A2529-A2534.

"rasping" that the Defendant/Appellee contends that James Ryan was only talking about insulation, a more complete reading demonstrates that use of the Defendant's products themselves was dusty.[73] He was asked if using Foster mastics in the "rasping process" produced dust and he stated, "Sure."[74] He went on to state that he and his brother would breath in this dust.[75]

During Defense Counsel's question he was asked again about this process and agreed with Defense Counsel's statement that dust was produced from insulation.[76] However, James Ryan never contradicted his earlier statement that the Defendant's product produced dust, nor did Defense Counsel ask him whether or not the Defendant's product did not produce dust. Plaintiffs are entitled to have the record read in the way most favorable to them, and they get the benefit of any inference.[77] Here, the inference is that James Ryan testified that working with the Defendant's products produced dust. At the very least there is a question of fact, and as a result the Court erred when it granted summary judgment.[78]

Even without this evidence, Plaintiff has produced other evidence that Defendant's product in question was dusty. James Ryan stated that he worked directly with his brother, Raymond Ryan, on numerous occasions and at many

[73] A2558-A2560
[74] A2526:9-19.
[75] A2526:21-24.
[76] Appellee AB, p. 15.
[77] *Mechell v. Palmer*, 343 A.2d 620, 621 (Del. 1975).
[78] *Merrill v. Crothall – Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

different work sites.[79] The two men had the same job and worked together.[80] Throughout their depositions they both repeatedly testified as to working with the Defendant's products.[81] In James Ryan's 1990 deposition he was asked specifically about whether using the Defendant's products gave off any dust.

> Q: Okay. When you applied the mastics, did they give off any dust?
> A: When we—after you done your tools you know, when they dried you would have to scrape them clean. Or if we were working around hot steam pipes then we would have to clean up and scrape them real good and all that. Then they were dry and dusty then.[82]

Despite such testimony, Appellee/Defendant states that no reasonable jury could conclude that although Raymond Ryan and James Ryan had the same job, worked at the same sites, and used the same products, that Raymond Ryan did not used the Defendant's products in a similar manner.

Here, a rational fact-finder could conclude that Raymond Ryan was exposed to asbestos in a similar manner to his brother was exposed using this Defendant's products. [83]

2. Plaintiff has produced evidence that Appellee/Defendant's products were friable.

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[79] James Ryan Dep. Aug. 11, 2014, A2688:7-21.
[80] James Ryan Dep. Aug. 11, 2014, A2686:13-16.
[81] A2511:7-23, A2511:24-A2512:17, A2512:23-A2513:6 (Raymond Ryan1/5/90); A2479-A2507 (Ray Ryan work history); A2516:5-A2520:17, A2521:10-22, A2522:18-A2523:10 (James Ryan 6/22/90); A2526:3-A2527:3 (James Ryan 8/11/14), A2531.
[82] A2519:5-12.
[83] *Cerberus Int.'', Ltd. v. Apollo Mgmt. L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

Appellee/Defendant produced an affidavit of Robert E. Sage which it attached as part of their motion for summary judgment answering brief ("SJAB"). The affidavit states that "[a]ny asbestos in Foster products was encapsulated and bound within the product by various binders, resins, asphalts, or plasticizers [and as a result] Foster products were not friable." Appellee/Defendant also contends that Raymond Ryan's testimony demonstrates that the product in question was not friable when testified that he cleaned up Foster products using a wet solvent, kerosene."[84] This testimony concerning kerosene was using kerosene to remove the product from his hands, not his tools.[85]

The affidavit fails to account for the testimony above from James Ryan above. A question of fact exists as to whether the Appellee/Defendant's products produced friable dust: Robert Sage's affidavit says it did not, whereas James Ryan stated that this product produced dust. As such, a question of fact exists as to the friable nature of the Defendant's products, and as a result the Superior Court erred when it granted summary judgment.[86]

Appellee/Defendant also attacks Dr. Ellenbecker's affidavit stating that it does not address Foster's products specifically or aspects of this case. Dr. Ellenbecker's affidavit is not defendant specific nor is it intended to be so, but

[84] Appellee's AB, p. 18.
[85] A2511:21-22.
[86] *Doe v. Cahill,* 884 A.2d 451, 462-63 (Del. 2005).

instead it demonstrates general principles about asbestos fibers from an industrial hygienist perspective. For example, the affidavit details that when asbestos fibers are released they generally cannot be seen even with an optical microscope in part because they are generally less than 1.0 micrometer.[87] It discusses how asbestos fibers can remain airborne for many airs and be dispersed through wide areas of a plant. [88] It discusses the ways in which airborne asbestos particles could be carried home on a worker's clothes, workers such as Raymond Ryan.[89]

The affidavit supports the earlier testimony of Raymond Ryan and James Ryan regarding the use of the Defendant's products, as well the testimony of the James Ryan regarding the friable nature of the products, and the testimony of Barbara Reed regarding her father's work clothes.

[87] A2559.
[88] *Id*.
[89] *Id*. at A2560

II. *HELM* DID NOT CHANGE THE PRODUCT NEXUS STANDARD.

Several Defendants argue that there is a difference between *Clark*, *Mergenthaler*, and *Helm* in defining what the product nexus standard is. (County Appellee AB, p. 12-16, Nosroc Appellee AB, p. 14). Plaintiffs submit they are the same. *Helm* was a case analyzing a landowner's duty to employees of independent contractors exposed to asbestos on its land. *Helm*, 2007 Del. Super. LEXIS 155, at *56 (Del. Super. May 31, 2007). For the product nexus standard it cited to *Mergenthaler v. Asbestos Corp. of Am., Inc.*, 1988 Del. Super. LEXIS 392, at *2-3, 1988 WL 116405 (Del. Super. October 2 1988), which cited to *Clark*, C. A. 82C-DE-26, at 4-5 and *In Re: Asbestos Litigation*, 509 A.2d 1116, 1117 (Del. Super. 1986). *Id.* That the plaintiff must be shown to be in proximity to the Defendant's asbestos-containing product or a co-worker using asbestos was always the standard, before and after *Helm*. *See Id.* at *68-69.*

III. COUNTY INSULATION OWED A DUTY TO BARBARA REED.

The Superior Court stated that Plaintiff had not met the product nexus standard under *Mergenthaler* and *Helm*.[90] Thus the Superior Court implicitly found a duty was owed.

As discussed in *Riedel*[91] and *Price*,[92] Restatement § 284, defining negligent conduct, distinguishes nonfeasance and misfeasance. Comment a. to Restatement § 302 explains the purpose for making the distinction:

> In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is special relationship between the actor and others which gives rise to the duty.

County applied and removed insulation.[93] At the Seaford facility the company was hired to perform an affirmative act –that of removing and installing insulation —they were not hired to simply stand around, but tear out and install installation.[94] This is what County did at Seaford and they did so in a sloppy and negligent manner: its own CEO stated that County employees at Seaford simply

[90] Ex B to Appellant's OB, p. 3-5.
[91] *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 22 (Del. 2009).
[92] *Price v. E. I. DuPont De Nemours & Co.*, 26 A.3d 162, 167 (Del. 2011); *Id.* n. 10.
[93] A1230:13-17.
[94] A1205:3-5.

threw away insulation like any other type of debris or trash.[95] County removed and installed insulation below the standard of other insulation companies.[96] Such conduct resulted in asbestos insulation been dropped in the vicinity of Gary Attix and other workers.[97] It was County's actions not a failure to act that resulted in Barbara Reed's exposure to asbestos.

The Defendants in *Riedel* and *Price* were employers[98] and in *Persinger* landowners.[99] Those Defendants were not manufacturers, suppliers, or removers/installers of asbestos products but employers/landowners at whose site asbestos was simply used. The liability was based on inaction, not action. The Defendants had taken no active role in the creation or distribution of asbestos.[100] An employer/landowner has a duty to provide a safe workplace to its employees and certain duties to all who come on the land. The scope of its duty is defined by this relationship.[101] This is why except for limited circumstances under *Riedel,*

[95] A1234:19-1235:9.
[96] A1208:13-24.
[97] Appellants' OB p. 16, A1208: 19-24; A1222: 19-A1223:10.
[98] *Riedel*, 968 A.2d at 19; *Price*, 26 A.3d at 169.
[99] *In re Asbestos Litig: Persinger,* C.A. N04C-11-241, at 5:18-6:3 (Del. Super. June 11, 2009) (TRANSCRIPT) (Ex. E to Appellants' OB).
[100] *Riedel*, 968 A.2d at 25; *Price*, 26 A.3d at 169, *Persinger,* C.A. No. N04C-11-241, at 5:18-6:3, 48:16-23, 53:3-20, 87:21-89:17 (Ex. E to Appellants' OB).
[101] *In re Asbestos Litig. (Wooleyhan)*, 897 A.2d 767 (Del. 2006); *In re Asbestos Litig. (Wenke)*, at *42-44 (Del. Super. May 31, 2007).

Price and *Persinger* there is no claim for someone who never came on the property.[102]

Since the elimination of the privity doctrine, relationship has no significance to an installer or remover of a product. It is liable to anyone who could be foreseeably be hurt by its activity. Unlike the defendants in *Riedel* and *Price*, County was not the employer of Gary Attix when he was exposed to dangerous levels of asbestos as a result of Defendant's improper and sloppy removal and installation of asbestos-containing products, which thereafter led to the further exposure to Barbara Reed. Under Restatement § 302 County's actions were misfeasance and County had a duty to any foreseeable victim including Barbara Reed.[103] The Superior Court has already held such a duty exists where an insulation contractor's employees expose someone to asbestos.[104] It is those same actions Plaintiff seeks to hold County liable for in this case. County has not argued nor could it be shown from the evidence in this record that Gary Attix's going home after being exposed to its asbestos without washing his clothes was a

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[102] In the *Persinger* transcript Plaintiffs withdrew their summary judgment oppositions in cases involving household exposure against contractors. There was no ruling. *Persinger*, C.A. No. N04C-11-241, at 97:19-103:18.

[103] *Price*, 26 A.3d at 167. ("In the case of misfeasance, the party who "does an affirmative act" owes a general duty to others "to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the [affirmative] act."); see *Id.* at 167 n.11.

[104] *In re: Asbestos Litig. (Francis Messick)*, C.A. 07C-01-234, at 104:8-121:10 (Del. Super. Ct. June 11, 2009) (TRANSCRIPT) (Ex. E to Appellant's OB); *Opalczyznski*, C.A. No. N04C-03-264, at 128:2-129:7.

superseding cause that would break the chain between County's negligence and Barbara Reed's exposure.[105]

This Defendant, like all affirmative actors, had a duty to warn to prevent harm to all foreseeable victims of its actions. In *Graham v. Pittsburgh Corning Corp.*, 593 A.2d 567, 568 (Del. Super. Ct. 1990), Judge Taylor noted with implicit approval a duty to warn instruction given in cases involving claims for asbestos-related injuries:

> A duty to warn arises when a manufacturer and distributor of a product knows, or as a reasonably prudent manufacturer and distributor should know, (when) it involves dangers to users, places that product on the market.[106]

This is consistent with the principle that a manufacturer or distributor must exercise the care of a reasonably prudent manufacturer under all the circumstances.[107] This principle is no less true for the installer or remover such as County:

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[105] "[A] **superseding** cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original tortious conduct and the injury. If the intervening negligence of a third party was reasonably foreseeable, the original tortfeasor is liable for his negligence because the causal connection between the original tortious act and the resulting injury remains unbroken. [] If, however, the intervening negligence was not reasonably foreseeable, the intervening act supersedes and becomes the sole proximate cause of the plaintiff's injuries, thus relieving the original tortfeasor of liability." *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995) (citations omitted).

[106] *Id*.

[107] *See Massey-Ferguson, Inc. v. Wells*, 383 A.2d 640, 642 (Del. 1978) (citing Restatements §§ 395 and 398).

> The standard of care required of all defendants in tort actions is that of a reasonably prudent man. That standard, however, is not a definite rule easily applicable to every state of facts. The details of the standard, of necessity, must be formulated in each particular case in the light of the peculiar facts. In each case the question comes down to what a reasonable man would have done under the circumstances. In close or doubtful cases, . . . that question is to be determined by the jury.[108]

County, as an affirmative actor, had a duty under Delaware law to protect others from harmful events that were reasonably foreseeable.[109] A tortfeasor breaches its duty to others "by not protecting against an event that a reasonably prudent man would protect against."[110] Here, it was entirely foreseeable that Barbara Reed would be exposed to asbestos as a result of the actions of County.

For acts of misfeasance, like those of the Defendant here, foreseeability is critical. The range of persons whom the negligent actor should reasonably expect to be endangered by his negligent acts, and the range of risk created from negligent acts that should be reasonably anticipated, is broad.

This broad duty is demonstrated by compelling Delaware cases such as the seminal case of *Delmarva Power & Light v. Burrows,* in which this Court upheld a jury charge requiring a company to do "everything that gives reasonable promise of preserving life ... regardless of difficulty or expense."[111] This did not create a

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[108] *Robelen Piano Co. v. Di Fonzo,* 169 A.2d 240, 244-45 (Del. 1961).
[109] *Sirmans v. Penn,* 588 A.2d 1103, 1107 (Del. 1991).
[110] *Id.*
[111] *Delmarva Power & Light Co. v. Burrows,* 435 A.2d 716, 718-19 (Del. 1981).

"limitless duty" because the "tempering concept of reasonable foreseeability is present."[112]

The plaintiff in *Delmarva* was injured after touching an uninsulated high voltage power line which ran over his neighbor's roof.[113] This Court was asked to determine the scope of a company's duty to an otherwise unconnected person. There, this Court affirmed the trial court giving the following jury instruction:

> ". . . [A] . . . company is under a duty to safeguard the public against injury arising from use of its dangerous agency. . . .
> * * * *
> The defendant . . . owes a legal duty toward *every person* who is *liable to come in contact with* [the hazard] to see that such [hazard is properly controlled] so as to avoid any physical injury [with the hazard] at a place where the person has a legal right to be. . . .
> If you find that the defendant failed to [control the hazard] and that it was *reasonably foreseeable to anticipate that persons would have come in contact with* [the hazard], then the defendant was negligent.[114]

The Delaware Superior Court also has held that a tortfeasor owes a duty to not cause foreseeable harm to strangers through its affirmative misconduct. In *Kuczynski v. McLaughlin*, the Superior Court determined that the operator of a boat owed a duty of care to the passenger in another boat involved in a collision with a third boat.[115] There, the plaintiff passenger claimed that the operator of another

[112] *Id.* at 719-20.
[113] *Id.* at 717-18.
[114] *Id.* at 718-19.
[115] *Kuczynski v. McLaughlin*, 835 A.2d 150, 151 (Del. Super. Aug. 27, 2003).

boat owed him a duty to not cause harm through his own negligent operation.[116] The Superior Court denied the defendant's motion for summary judgment and recognized that in Delaware a duty is triggered by foreseeability when a tortfeasor's own affirmative misconduct causes foreseeable harm, even if the specific victim was previously unknown to the tortfeasor.[117] Specifically, the Superior Court stated that Delaware focuses on *"foreseeable consequences* when determining whether a duty exists."[118] In this matter, it was clearly foreseeable that County's misconduct at Dupont Seaford would result in Barbara Reed being exposed to harmful asbestos fibers.

The broad range of foreseeable consequences and of persons a negligent actor should reasonably expect to be endangered by its negligent act is also seen in *Robbins v. William H. Porter, Inc.*[119] in which the plaintiff-decedent was injured in a one car automobile accident after the car was stolen from a lot operated by the defendant. The Superior Court denied summary judgment and found that the defendant owed a duty to a person who had no legal authority to be in the car.[120] The court held that "[v]ehicle owners have a duty to third parties to secure their

[116] *Id.* at 151-52.
[117] *Id*. at 153-55.
[118] *Id.* at 154.
[119] *Robbins v. William H. Porter, Inc*., 2006 Del. Super. LEXIS 201, 2006 WL 1313858 (Del. Super. April 19, 2006).
[120] Id. at * 3.

property against theft. This duty is predicated on the foreseeability that stolen vehicles will be involved in accidents."[121]

The risk to household members exposed to asbestos by individuals such as insulators who were also known as "asbestos workers" is very clear. Dr. Castleman will testify that the earliest writing specifically commenting on the ill health among families of asbestos workers was 1897.[122] This was knowable long before it was studied directly.[123]

Steve Hays, Plaintiff's industrial hygienist, will testify that wetting down of asbestos-containing materials, education of workers, and use of ventilation and dust collection were methods well known in the field of industrial hygiene by the 1930's, and that such methods would have dramatically reduced, if not eliminated, asbestos exposure by people in the position of Barbara Reed.[124]

Gary Attix will testify that had he known of the hazards of asbestos when he worked with or around it, he would never have brought his clothes home for his wife, Barbara, to wash, but instead would have taken it to a laundry service specializing in the cleaning of industrial clothes. He will also testify that he knew his father-in-law, Raymond Ryan, extremely well, and that he likewise would never have brought his clothes home where his wife and his daughter, Barbara,

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[121] *Id*. at *3-4.
[122] A1331.
[123] A1333.
[124] A1339.

lived, but that instead he, too, would have taken it to a laundry service.[125] Such laundry services were available in the 1950's through the 1970's.[126]

Given the magnitude of the risk and the gravity of the harm to persons in the position of Barbara Reed, the Defendant was under an affirmative duty well before 1957 and thereafter to take all reasonable precautions to protect Barbara Reed and persons like her against an event, serious asbestos-related harm, *i.e.*, mesothelioma, that a reasonably prudent man would protect against. *See Sirmans*, 588 A.2d at 1107; Restatement § 388, comment n.

Here, Barbara Reed was well within the zone of danger that should reasonably have been anticipated by this Defendant.

Respectfully submitted,

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[125] A1367.
[126] A1370-1382.