EFiled: Oct 17 2016 03:45PM EDT
Filing ID 59708263
Case Number 387,2016 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE CHARLES A. WAGNER COMPANY, INC.'S ANSWERING BRIEF

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Dated: October 17, 2016

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NATURE AND STATE OF PROCEEDINGS

Appellants / Plaintiffs-Below filed this personal injury action claiming that Barbara Reed was exposed to asbestos through take-home exposure resulting from the work of her father Raymond Ryan, as well as through her first husband, Gary Attix, both union insulators in the State of Delaware.

Appellee Charles A. Wagner Company, Inc. ("Appellee Wagner"), filed a timely motion for summary judgment as the Plaintiffs had not met their prima facie burden of setting forth sufficient evidence that Barbara Reed was exposed to asbestos through any product distributed by Appellee Wagner.

On June 6, 2016, the Superior Court granted Appellee Wagner's motion, holding that Plaintiffs had failed to present evidence from which a jury could reasonably infer, without undue speculation, that Barbara Reed was exposed to friable asbestos from her father's clothing, or that the alleged sweeping compound created dust.

Plaintiffs filed a timely appeal from the Superior Court's July 6, 2016 Order. Plaintiffs' Opening Brief was filed on September 12, 2016. This is Appellee Charles A. Wagner Company, Inc.'s Answering Brief.

SUMMARY OF ARGUMENT

Denied. The Superior Court did not ignore evidence submitted by Plaintiffs or resolve disputed facts in favor of Appellee Wagner. Plaintiffs simply failed to set forth sufficient evidence, absent speculation and conjecture, that Plaintiffs father was around an asbestos-containing sweeping compound when it was being used by DuPont employees, or that the use of the product created dust that was taken home on his clothing.

STATEMENT OF FACTS

Plaintiffs have alleged Barbara Reed was exposed to asbestos through second-hand household exposure from her father, Raymond Ryan, a union insulator, as well as her first husband Gary Attix. The claims against Appellee Wagner are limited to alleged exposure from her father Raymond Ryan. Among many other locations, Raymond Ryan worked at the DuPont Seaford facility where Plaintiffs claim he worked around a sweeping compound alleged to contain asbestos supplied by Appellee Wagner. Raymond Ryan worked at the DuPont Seaford plant from September 1963 to October of 1964, and again from April to September of 1966.(B1-B2).

Raymond Ryan was never deposed in this case, but was deposed over the course of several days for his own asbestos personal injury suit back in 1990. According to his testimony, the first time he was at the DuPont Seaford plant from September of 1963 to October of 1964, his primary job was working on new construction of the 501 building, as well as fabrication in the insulator's shop. (B3:5-21). There were no DuPont employees working in the insulator's shop. (B5:17-24). When Mr. Ryan went back to the Seaford plant the second time from April to September of 1966, his job was essentially the same. (B9:1-11). At no point during his deposition did Raymond Ryan ever mention or identify seeing or

using any type of sweeping compound or raw asbestos, nor did he ever identify Charles Wagner. Furthermore, neither of the Job History sheets he prepared regarding those two limited occasions he worked at the DuPont facility list or make reference to any type of sweeping compound or raw asbestos he may have used or worked around during those periods, nor does he list his brother James Ryan as a co-worker. (B1-B2).

Barbara Reed's uncle, James Ryan was deposed back on June 22, 1990, in regards to his own asbestos lawsuit, and asked at length about all the products he may have worked with or around while working at the DuPont Seaford facility. James Ryan worked for two or three months beginning in September of 1964 as an apprentice, and again from January to July of 1966 as an apprentice. At no point during his deposition in 1990 did James Ryan ever mention or identify seeing any type of sweeping compound or raw asbestos used around him, nor did he ever identify Charles Wagner. Furthermore, neither of the Job History sheets he prepared regarding those two times at the DuPont facility list or make reference to any type of sweeping compound or raw asbestos he may have worked around during those periods. (B12-B13).

James Ryan was deposed again in this action on August 11, 2014, and

testified that he worked at DuPont Seaford for three months in 1964 at the same time as his brother, Raymond Ryan. However, he could not recall if he ever worked in the same gang as his brother Raymond Ryan over that period of time. (B15:4-22). He also testified about returning to the DuPont Seaford facility in January of 1966, but could not recall whether his brother Raymond was there during that time or recall any of the jobs they might have done. (B16:19 to B17:25)

During his 2014 deposition, James Ryan testified to seeing DuPont employees throw a granular like "kitty-litter" material on the ground at the end of his shift. (B19:12-24). He recalled the employees would use this product in the area where his gang had been working to help keep down the dust while the employees swept up the dust created by the products James Ryan and his gang had been cutting in that particular location. (B20:18 to B21:14). He recalled the kitty litter like product was a grayish looking white, and at other times green.(B20:5-8). He did not know if the product contained asbestos. (B22:5-13).

William Farrall, a fellow union insulator on which Plaintiffs rely, was deposed on April 24, 1986. Mr. Farrall testified that he never saw raw asbestos used at the Seaford plant when he was working there. (B24:16-19). On one occasion sometime between 1963 and 1965, while Mr. Farrall was working in the

N-16 area, he noticed a product he thought was his insulating cement being used on the floor. (B25:3 to B26:4; B32:8-17). He believed the product was being used to soak up oil. (B29:23 to B30:5). He did not see anyone actually using the material. (B25:5-13). Prior to this one time, he had never seen a similar type of material used as a sweeping compound in the Seaford plant. (B31:3-19). He only saw the product on the floor this one time. (B28:16-21). Upon further investigation, he found one barrel in the warehouse marked Charles Wagner Company that contained the material he believed he had seen on the floor. (B38:11-20). Other than that one occasion, he never saw another Charles Wagner barrel at the Seaford plant, nor did he ever see that same material used on the floor again. (B40:13 to B41:14). Mr. Farrall could not name or identify any coworkers that were present during that one occasion when he saw the substance on the floor (B27:4-11). He also never identified Raymond Ryan as being present during the use of any sweeping compound.

James Farrall, a fellow union insulator on which Plaintiffs rely, was deposed originally in June of 1975, and again over the course of two days in February of 1985. During both of those depositions, James Farrall was asked about the periodic times he had worked at the DuPont Seaford plant through the 1960's, and all about the products he worked with and around during those occasions that he believed

might have exposed him to asbestos. James Farrall never mentioned sweeping compound during those two depositions. It was not until his own personal injury suit in 2011, when he first recalled a sweeping compound being used at the Seaford plant. However, he never identified the name, brand, manufacturer or supplier of the product, nor did he ever testify that he saw Raymond Ryan use or be in proximity to others using a sweeping compound at the DuPont Seaford facility.

Robert Lankford was also originally listed by Plaintiffs as a product identification witness who would be able to talk about the use of asbestos-containing sweeping compound at the DuPont Seaford facility. However, when Mr. Lankford was deposed on December 18, 2014, he confirmed the only sweeping compound that he worked with or around at the Seaford facility was gray, and more importantly, manufactured by Johns Manville. (B49-B51).

Plaintiffs have attempted to discredit the testimony of Mr. Lankford through reliance upon the testimony of Marguerite Warren. Plaintiffs have previously suggested that Ms. Warren's testimony confirms that she, as a former purchasing agent for the DuPont Seaford facility, purchased asbestos used for a sweeping compound from Charles Wagner, and also that DuPont never purchased any similar type of product from Johns Manville. A review of her actual testimony does not support either contention. More importantly, any of her testimony relied upon

by Plaintiffs to support their arguments in this matter should be disregarded as Ms. Warren was not working in the purchasing department between 1954 and 1969, and therefore she would not have knowledge regarding the materials used during the times Raymond Ryan was working at that facility.(B54:14-19).[1]

[1] The representation that Ms. Warren was a purchasing agent for the DuPont Seaford facility was previously considered by this Court in its decision in *Nack v. Charles A. Wagner Co., Inc.*, 803 A2.d 428 (Del. 2002). However, the fact that Ms. Warren was not the purchasing agent between 1954 and 1969 was not disclosed to the Court in that matter.

ARGUMENT

A. Question Presented

Did Plaintiffs set forth sufficient evidence, absent speculation and conjecture, to meet the applicable product nexus standards and establish that Barbara Reed was exposed to asbestos through take-home exposure from her father's work at the site where Defendant's material was delivered.

B. Scope of Review

This is an appeal from the entry of summary judgment by the Superior Court. The standard of appellate review is *de novo*.[2]

C. Merits of Argument

1. Standard of Review

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."[3] In considering a motion for summary judgment, the Court may not "indulge in speculation and conjecture," but should decide the

[2] *Merrill v. Crothall-American, Inc*., 606 A.2d 96, 100 (Del. 1992).
[3] *Burkhart v. Davies,* 602 A.2d 56, 58 (Del. 1991).

motion based on the evidence actually produced by the plaintiff, and "not on evidence potentially possible." [4]

Under Delaware's product nexus standard, a plaintiff must "proffer some evidence that not only was a particular defendant's asbestos containing product present at the job site, but also that the plaintiff was in proximity to that product at the time it was being used.[5] In this case, Plaintiff Barbara Reed was never at the DuPont facility. To defeat summary judgment in a case where a plaintiff is not personally able to establish exposure, a co-worker must be able to place the plaintiff, or in this case the father of Barbara Reed, in the vicinity of a specific location on the property, at a specific time, where friable asbestos is present.[6] To do so, there must be some meaningful intersection between the person who was allegedly exposed and the co-worker on the property, both in place and time.[7] In larger facilities, such as the 618 acre DuPont Seaford plant, it is incumbent upon a plaintiff to describe the location where the person allegedly exposed worked within the facility with sufficient detail to allow the Court to compare that description to the description of the location of the asbestos offered by the co-

[4] *In re Asbestos Litig*., 509 A.2d 1116, 1117 (Del. Super. Ct. 1986).

[5] *Nutt v. A.C. & S. Co.,* 517 A.2d 690, 692 (Del. Super. Ct. 1986)

[6] *In re Asbestos Litig. (Helm),* 2007 Del. Super. LEXIS 155 at 67, citing *Merganthaler v. Asbestos Corp. of Am., Inc.*, 1988 WL 116405, at *1-2 (Del. Super. Oct. 25, 1988); *Farrall v. A.C. & S., Inc.,* 1988 WL 167320, at *2 (Del. Super. May 11, 1988)

[7] *Id.*

worker in order to determine if an inference of exposure is reasonable. [8]

2. Plaintiffs Did Not Set Forth Sufficient Evidence To Meet Their Prima Facie Burden Under Delaware Law

In this case, Plaintiffs failed to meet their burden of proof as they did not present sufficient evidence from which a jury could reasonably find, absent speculation and conjecture, that Barbara Reed was exposed to friable asbestos fiber from her father's clothing as a result of his limited work at the DuPont Seaford facility. Plaintiffs did not establish that Raymond Ryan ever worked around an asbestos-containing sweeping compound, or that he brought respirable fibers home to Barbara Reed. Plaintiffs argue that "the Superior Court ignored direct evidence" in granting summary judgment. [9] However, there is no direct evidence of exposure of either Raymond Ryan or Barbara Reed, and the Superior Court reviewed all of the evidence presented by Plaintiffs.

Testimony of Raymond Ryan

Raymond Ryan never identified or mentioned workers using a sweeping compound in his presence while he was working at the DuPont Seaford facility. In pursuing his own personal injury claim, and listing all of the products he may have worked with and around over the course of his career, he never listed a sweeping

[8] *In re Asbestos Litig. (Helm),* 2007 Del. Super. LEXIS 155 at 68 (the Court noted the DuPont Seaford facility was 618 acres).

[9] Plaintiffs' Opening Brief at Pages 26-27.

compound. Considering he was a lifetime insulator, it is reasonable to assume he would have taken notice of people around him using a sweeping compound that was allegedly made up of mainly raw gray asbestos fiber, and certainly reasonable to assume he would have mentioned such a fact during the course of preparing his discovery responses and/or while being deposed in his own personal injury case.

Testimony of James Ryan

Barbara Reed's uncle James Ryan worked for two or three months at the DuPont Seaford facility in 1964, and again in January through June of 1966, but he could not recall if he ever actually worked with Raymond Ryan. While he did recall seeing workers use a whitish-gray material and a green material on the floor at Seaford, he did not identify a specific time and place when this may have occurred, never confirmed Raymond was present when this occurred, nor did he know if either of the two products contained asbestos. (B20:5-12; B22:5-8).[8] Therefore, the testimony of James Ryan fails to establish the necessary nexus regarding a specific time and specific place where friable asbestos was present.

Testimony of William Farrall

[8] James Ryan also described these two products as having the consistency of granular kitty litter.(B19:12-24). Plaintiffs allege the asbestos fiber sold by Wagner was a gray fibrous material.

The testimony of William Farrall only establishes that he worked at DuPont Seaford as an insulator all over the plant from 1963 through the 1980s, and that sometime in the early 1960's, he saw a substance that looked like his insulating cement being used on the floor to soak up oil. Upon further investigation, he came across a barrel of a product in the warehouse with the name Charles A. Wagner. He only ever saw this particular substance on the floor that one time. In terms of this particular case, he never identified Raymond Reed as being present when any type of product may have been used on the floor. Therefore, the testimony of William Farrall fails to establish the necessary nexus regarding a specific time and specific place where friable asbestos was used in the presence of Raymond Ryan.

Testimony of James Farrall

While the testimony of James Farrall confirms that he first worked at the DuPont facility for three or four months in 1963 or 1964, and recalled seeing a sweeping compound used on the floor around spinning machines, there is no testimony that Raymond Ryan was present when this occurred. Furthermore, Raymond Ryan did not list James Farrall as a co-worker during his time at the Seaford facility. (B1). Therefore, the testimony of James Farrall fails to establish that Raymond Ryan was in the vicinity of a specific location on the property, at a specific time, where friable asbestos was present.

Testimony of David Hynson, James Wheaton, Victor Passwaters, Phillip Johnson, Richard Ash

Plaintiffs rely on these witnesses for the general proposition that a sweeping compound that may have contained asbestos was used at the DuPont Seaford plant during various times from the 1950's to 1960's. For example, the testimony of James Wheaton relates to his use of a gray asbestos sweeping compound in 1954, four years before Appellee Wagner ever sold any products to Seaford, and nine years before Raymond Ryan ever worked there. (B42-B45). The testimony of Richard Ash relates to sweeping compound used in 1968 or later. (B46-B47). However, none of these witnesses identify Raymond Ryan. And, as the Superior Court correctly noted in its underlying decision granting summary judgment, "none of the witness testimony presented by Plaintiffs specifically place Father (Raymond Ryan) in the specific proximity to the sweeping compound at the time it was being used."

Affidavits of Experts Steve Hays and Michael Ellenbecker

Appellee objects to Appellant's reference and reliance upon the Affidavits from Steve Hays and Michael Ellenbecker on several grounds. First, neither expert was properly or timely identified as a product nexus witness. Product nexus witnesses must be properly identified in discovery before they may be used to

defeat a motion for summary judgment. [9] More importantly, neither Affidavit was timely produced in the underlying matter, nor relied upon by Plaintiffs in any of the summary judgment briefing below

Second, neither of the Affidavits contain any facts or opinions related to the use or friability of sweeping compounds, nor does either make reference or contain any specific information about the facts of this case or the conditions which may have existed at the DuPont Seaford plant in the early 1960's when Raymond Ryan was present.[10] Therefore, neither generic Affidavit should be considered as relevant or part of the record on appeal.

Plaintiffs evidence simply fails to place Raymond Ryan at a specific location in the DuPont Seaford facility at a specific location within the 618 acre multi-story facility at a time when Wagner's shipment of asbestos was allegedly being used by DuPont employees as a sweeping compound. Furthermore, the evidence fails to establish that Raymond Ryan brought said asbestos home on his clothing and exposed Plaintiff Barbara Reed.

[9] *In re Asbestos Litig. (Helm),* 2007 Del. Super. LEXIS 155

[10] See *Laugelle v. Bell Helicopter Textron, Inc.*, 2014 Del. Super. LEXIS 293, as corrected (Mar. 19, 2014) ("The Court may consider an expert's or non-expert's affidavit, but only if the affidavit is supported by a factual foundation and amounts to more than mere speculation or conjecture.")

The evidence set forth by Plaintiffs relies on speculation, conjecture and supposition to make the necessary causal connections between Appellee Wagner, Raymond Ryan and Plaintiff Barbara Reed. Therefore, the Superior Court properly granted summary judgment in finding that Plaintiffs simply failed to set forth sufficient evidence to satisfy both the time and space requirement under the applicable case law.

CONCLUSION

For all of the foregoing reasons, the trial court's grant of summary judgment to Charles A. Wagner Company, Inc., should be affirmed.

Respectfully submitted,

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