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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| **PHYLLIS GORDON, Individually and as Executrix of the Estate of Roger Gordon,** | : | **No. 534, 2014** |
| **Plaintiff Below, Appellant,** | : | **Court Below --Superior Court of the State of Delaware** |
| **v.** | : | |
| **REICHHOLD INCORPORATED,** | : | **C.A. No. 11C-09-132** |
| **Defendant Below, Appellee.** | : | |
| **MICHAEL J. JAMESSON,** | : | **No. 219, 2016** |
| **Plaintiff Below, Appellant,** | : | **Court Below – Superior Court of the State of Delaware** |
| **v.** | : | |
| **REICHHOLD INCORPORATED,** | : | **C.A. 12C-03-149** |
| **Defendant Below, Appellee.** | : | |

# APPELLANTS' REPLY BRIEF ON APPEAL FROM THE SUPERIOR COURT

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### I. Appellants Agree that Dismissal of Gordon is Appropriate.

Upon review of the docket below, Appellants realized that there is still one remaining defendant in the Gordon case who has not been dismissed. Appellants were mistaken in thinking that the August 21, 2014 order (Ex. A to Appellants' Opening Brief) was final in the Gordon case. "Absent compliance with Rule 42, the jurisdiction of this Court is limited to the review of final judgments of trial courts." *Hecksher v. Fairwinds Baptist Church, Inc.*, 93 A.3d 654 (Del. 2014). Therefore, the Gordon appeal should be dismissed as untimely.

**II. Reichhold mischaracterizes the record evidence as it contends that "any exposure to Reichhold (asbestos phenolic molding compound materials) was trivial" and "made only a tiny contribution" to the Square D plant asbestos exposures sustained by Michael Jamesson.**

Appellee Reichhold Incorporated incorrectly claims in its Answering Brief that the many exposures which plaintiff Michael Jamesson sustained to Reichhold's asbestos-containing phenolic molding products "was trivial", and "made only a tiny contribution" to the asbestos "dose" encountered by him while he worked for years inside a comparatively small, all-indoor Square D Corporation plant[1] in Cedar Rapids, Iowa.[2]

In presenting this flawed scenario, Reichhold states that Michael Jamesson's "work as a laborer, and in shipping, would take him throughout the plant, and that Mr. Jamesson "could not say how often his work took him to the molding area . . . ".[3] Michael Jamesson worked as a laborer at the Square D Cedar Rapids plant, beginning in February 1968 for approximately one full year, before he transferred

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[1] "At the time of the Cedar Rapids plant's peak performance, there were approximately fifty-five automatic presses and eighteen semi-automatic or manual presses. ***The entirety of the plant was approximately 112,000 square feet***." (*emphasis added*). Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A to Appellants' Opening Brief), p. 2, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc.*, 2014 Del. Super. LEXIS 418, *3 (Del. Super. August 21, 2014).

[2] See, the Answering Brief of Appellee Reichhold Incorporated, at page 24.

[3] *Id.* at pages 6-7.

into the shipping and receiving department at the plant, where he worked for approximately the next ten (10) years, until approximately 1980.[4]

During the course of his one year as a laborer at the plant, Mr. Jamesson regularly performed cleanup work in the plant's assembly department, and also "(i)n the molding--the Bakelite molding department, we swept all the residue off the floor…(and) (w)e worked around the dock area which was right next to molding."[5] The plaintiff then added at his deposition that, "(a) lot of our job was trying to get rid of all the product that was on the floor or on the rafters or on the doors…(e)verything was - (i)t wasn't air conditioned….(i)t was cooled by fans - industrial fans, which didn't make it any easier to clean."[6]

Describing in detail at his discovery deposition his next ten (10) years of work at the Cedar Rapids Square D plant in shipping and receiving at the facility, Mr. Jamesson told how received incoming product, to stock it, and to deliver phenolic molding materials specifically the Bakelite molding, assembly areas, the spray paint booth, and the punch press area of the plant.[7]

Reichhold further ignores in its Answer Brief the depositon testimony of Michael Jamesson's co-worker William Hodina – ***in whose vicinity Mr. Jamesson***

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[4] Jamesson deposition 8/20/13, A429:6-A433:13; A430:14-18.
[5] Jamesson deposition 8/20/13, A430:5-8.
[6] A430:9-13.
[7] Jamesson deposition 8/20/13 (A430:22-A432:6)

***worked***[8] -- wherein Mr. Hodina testified that worked at the Square D Cedar Rapids plant from March 31, 1960 to 1991, excepting June 4, 1961 to June 4, 1965 when he served in the Navy.[9] Mr. Hodina worked as a set up and operate man in the plastic molding department from approximately 1967 through 1973 or 1974.[10] He described his work and the set-up of the molding department[11] and confirmed that there were approximately 36 automatic machines.[12] The ceiling in the Bakelite or molding department was about a story and half.[13] He explained that there were seven molding compounds that were used to dump into the hoppers on these automatic presses. They came in a 50 pound bag and there were 40 sacks on each pallet of material.[14] "We had Reichhold."[15] "...we had these seven basic materials [including Reichhold] that we used all the time."[16] It was among the molding

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[8] Jamesson deposition 8/20/13 (A437:16-22).
[9] William Hodina 9/17/12 (A1865, p. 8:16 – A1866, p. 9:5). Although plaintiffs refer to Mr. Hodina's testimony in their summary judgment answering briefs, the deposition excerpts were not attached to the answering briefs below. However, said testimony of Mr. Hodina was attached to Plaintiff Hartgrave's summary judgment answering brief, which was filed contemporaneously with Jamesson and Gordon, and was considered by the Court below when deciding all four cases. See summary judgment Opinion, Exhibit A to Appellants' Opening Brief, p. 2, fns. 3-5, p. 4 fn.11.
[10] Hodina deposition 9/17/12 (A1867, p. 28:1-25).
[11] A1868, pp. 33:12-34:10.
[12] A1869, p. 43:7-8.
[13] A1869, p. 43:25-44:2.
[14] A1869, p. 44:6-17.
[15] A1869, p. 44:25
[16] A1870, p. 45:4-5

compounds that "we used the most."[17] When making the QO circuit braker bases and covers (one of the more popular products that were made the most),[18] Reichhold 25310 was used the most.[19] The Reichhold 25310 came to the facility in heavy, 50 pound paper tan bags with red writing, and there were 40 of them on a pallet.[20] He described loading the Reichhold 23510 into the process. A forklift would lift the whole full pallet of material (ie 40 50 pound bags) with the set up man on it as well, and the set up men would manually take the material off the pallet and cut the sacks and dump them into 50 gallon drums.[21] This was "10,12 feet" off the ground.[22] A typical barrel would hold four or five bags of the Reichhold phenolic molding compound.[23] The process of dumping the Reichhold 25310 bags into the hoppers on top of the presses created dust.[24] The dust was a "blue filmy thing that would happen because we were dumping so much of it in so many presses that it was just a blue film that was in the air, and we had so many fans that were on the floor for the women and also for the automatics that just blew- that just blew this around all the time."[25] Of the 28 presses that had to be

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[17] A1870, p. 47:22-24
[18] A1873, p. 60:4-17.
[19] A1871, p. 49:7-22
[20] A1871, pp. 49:23-51:24.
[21] A1872, pp. 53:16-54:11.
[22] A1872, p.54:14.
[23] A1872, p.55:16-20.
[24] A1872, p. 55:21-25.
[25] A1872, p. 56:2-9

filled that way, they were filled that way once every shift.[26] Some high volume machines on the floor were filled throughout the shift.[27] After filling the hoppers the bags were just dropped down between the machines.[28] The Reichhold compound was dusty and the blue haze that resulted from this dumping process would last for a couple hours.[29] The dust was blown all around the molding compound area because there were 100 floor fans and several whole-house ceiling fans.[30] The entire molding area was affected with the dusty blue haze, from floor to ceiling.[31] That includes the cleaning and maintenance area and the spray booth.[32] Supervisors went out into the area a couple times a day.[33] People working in and around the molding department would have breathed in the dust and blue haze caused by the Reichhold 25310 product in the 60's and 70's.[34] "It was in the air, and if you were walking into that [air] you were going to be exposed to it."[35] "Maintenance people who came and went out of that area, supervisors, white-collar people, engineers…[]" would have walked in or out of the plastic molding area.[36]

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[26] A1872, p. 56:10- A1873, p. 57:20.
[27] A1873, p. 57:10-13.
[28] A1873, p. 57:21-25.
[29] A1873, pp. 58:10-59:12.
[30] A1873, p. 59:13-23.
[31] A1873, p. 60:18 – A1874, p. 61:11, A1875, p. 65:10-22.
[32] A1874, p. 61:18-24.
[33] A1874, pp. 63:17-64:19.
[34] A1876, p. 77:11-25.
[35] A1876, p. 78:8-10; see A1876, pp.78:11-80:24.
[36] A1876, p. 80:20-24.

While it was possible weeks went by without using Reichhold, Mr. Hodina would not say months went by without using it.[37]

In its Memorandum Opinion and Order[38] granting the alleged non-exposure-based summary judgment motions brought by defendant Reichhold, Inc. in the Jamesson and Gordon cases – the Superior Court itself described the Cedar Rapids Square D plant's manufacturing operations, and specifically, the extremely dusty conditions which existed at this comparatively small manufacturing facility as follows:

> [T]hough it is likely that Reichhold products made up but a small percentage of the total molding compound used at the Cedar Rapids plant. That said, ***the Reichhold 25310 was shipped to Square D in 50-pound tan bags, forty bags to a pallet***. *[Footnote 13 Id. at 50:1-16]*. Those bags bore Reichhold's name in red lettering. ***The molding compound was granular, similar to coarse sand***. ***A forklift would lift a full pallet of molding compound ten or twelve feet off the ground, and a plant worker would cut the sacks, dumping the compound into a press's hopper***. *[Footnote 14 Id. at 54:2-14]*.***Twenty-eight presses were filled that way each work shift; other presses were filled multiple times throughout a shift***.
>
> ***The process of filling a press with molding compound created airborne dust***. ***This dust had the appearance of a "blue haze" and would remain in the air for several hours after each round of compound was dumped into the presses' hoppers***. *[Footnote 15 Id. at*

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[37] A1877, p.160:3-8.

[38] Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Exhibit A to Appellants' Opening Brief), at slip opinion pages 1-5, *In re Asbestos Litigation: Michael Jamesson, et al., v. Reichhold, Inc., e. al.*, 2014 Del. Super. LEXIS 418, *1-5 (Del. Super. August 21, 2014).

> *58:15-59:12]. **More than a hundred fans were located throughout the molding department and they blew the dust around that entire area. This dust was circulated further when the presses were opened at the end of a cycle and the machines were cleaned off with air hoses and brooms**. [Footnote 16 Id. at 66:14-67:24; 69:18-70:21]. **Significant amounts of dust would accumulate in the molding department from the operation and cleaning of the presses. That dust often collected on pipes, beams, and light fixtures throughout that department's worksite.** [Footnote 17 Pltf Weaver's Opp. to Reichhold's MSJ, Ex. C, Deposition of Lawrence McGurk, Nov. 29, 2011, 50:3-23]. **During shifts, the dust was so prevalent that clothing would be permanently stained black. And employees would expectorate residue long after a shift had ended.** [Footnote 18 Id. at 34:4-14; 49:4-25]. (bold, italicized emphasis added).*[39]

Given the nature and limited size of the manufacturing operations of this comparatively small, all-indoor, Cedar Rapids plant of some 112,000 square feet – with dimensions of approximately 300 x 325 feet)[40] – considered within the context of the extremely dusty and dirty phenolic molding granule products which were used there – along with the clean-up and product distribution activities in which Michael Jamesson engaged – surely sufficient circumstantial evidence of their exposures to Reichhold-manufactured asbestos phenolic molding compounds existed in the trial record, such that the Superior Court's entry of summary judgment was improper.

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[39] Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Exhibit A to Appellants' Opening Brief), p.4-5, *In re Asbestos Litigation: Michael Jamesson, et al., v. Reichhold, Inc.*, 2014 Del. Super. LEXIS 418, *5-7 (Del. Super. August 21, 2014).

[40] A447-A551.

This conclusion is particularly compelled by the fact that as all parties and the Superior Court agreed in the proceedings below, it is Iowa substantive law which applies in this case.

In *Heddinger v. Ashland Oil, Inc.,* 2012 Del. Super. LEXIS 8, **11-25 (Del. Super. January 13, 2012), the Superior Court conducted extensive analysis of the only two Iowa Supreme Court decisions which have addressed the appropriate legal standards to be applied to evidence of asbestos exposure in a product liability action such as the instant one.[41] Quoting from the Iowa Supreme Court's decision in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, the Superior Court in *Heddinger* observed that in Iowa, "'[q]uestions of proximate cause are for the jury,'" and that "'[o]nly in exceptional cases is proximate cause decided as a matter of law.'"[42]

The Superior Court in *Heddinger* also referenced the discussion in *Beeman* where the Iowa Supreme Court's analysis also mentioned jurisdictions that have accepted co-worker testimony as a means of proving proximate cause in asbestos

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[41] The only two Iowa Supreme Court decisions which have addressed the factual setting of that which constitutes a sufficient showing of asbestos exposure evidence are *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 249 (Iowa 1993); *and Spaur v. Owens-Corning Fiberglas Corp.,* 510 N.W.2d 854, 857-861 (Iowa 1994). In *Heddinger v. Ashland Oil, Inc.*, 2012 Del. Super. LEXIS 8, **11-25 (Del. Super. January 13, 2012), the Superior Court extensively analyzed both of these decisions in a plant worker product liability action wherein a motion for summary judgment on alleged non-exposure grounds was decided on the basis of Iowa substantive law.

[42] *Heddinger v. Ashland Oil, Inc.*, *supra*, 2012 Del. Super. LEXIS 8, at **18-19.

cases where a co-worker identifies the presence of defendant's product at the jobsite where the plaintiff worked.[43]

The Superior Court in *Heddinger* then emphasized that because the Iowa Supreme Court decisions in *Beeman* and *Spaur* both involved "appellate review of post-trial motions", and with that court being instead tasked with deciding a motion for summary judgment upon alleged non-exposure grounds, the *Heddinger* court explained as follows:

> The Court's task here is to determine whether there is a genuine issue of material fact in dispute.
>
> Moreover, on a motion for summary judgment, the facts are construed in the light most favorable to the non-moving party, in this case, the Plaintiff. Thus, the Court must draw all reasonable inferences in favor of the Plaintiff. Sherwin-Williams' burden is to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. It has not met this burden. . . .
>
> Here, as in *Spaur*, a co-worker's testimony described generally where exposure took place. Also like *Spaur*, testimony established the layout of buildings, and the possibility of exposure to a foreign substance in the air due to working conditions. . .

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[43] *Heddinger v. Ashland Oil, Inc.*, *supra*, 2012 Del. Super. LEXIS 8, at *19 & n.89, citing *In re: Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992). See, also, *Charles H. Conway v. AC&S Co., Inc.,* 1987 Del. Super. LEXIS 1049, **8-9 (Del. Super. February 3, 1987) ["While it is obvious that the locations of these four plaintiffs with respect to (asbestos product identifying co-worker) is far from exact, viewing all the facts in the light most favorable to plaintiffs, the Court finds there is sufficient product nexus evidence against (defendant) GAF to defeat the motions for summary judgment . . . there is evidence from which a reasonable person could conclude that each plaintiff worked in an area in which asbestos fibers from GAF's product probably was present."]

> The Court cannot rule as a matter of law that Mr. Heddinger was *not* exposed to Sherwin-Williams products while employed at Goss, and that Sherwin-Williams products did *not* cause his injuries. (*italicized emphasis of the repeated word "not" in original).*[44]

While acknowledging that Iowa decisional precedent addressing the appropriate causation standard to be applied in an asbestos disease products liability setting specifically makes clear that "questions of proximate cause are generally reserved for the jury",[45] the Superior Court erroneously proceeded to apply a restrictive and exacting standard to dismiss the claims of Plaintiffs Michael Jamesson on summary judgment – even as the Court impermissibly construed the record facts against these non-movants.

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[44] *Heddinger v. Ashland Oil, Inc.*, supra, 2012 Del. Super. LEXIS 8, at **20-24.

[45] Memorandum Opinion and Order of the Superior Court, entered August 21, 2014 (Ex. A to Appellants' Opening Brief), pgs. 11-12, and Footnote 41, *In re Asbestos Litigation: Michael Jamesson, et. al., v. Reichhold, Inc.*, 2014 Del. Super. LEXIS 418, *13 & 13 n. 41 (Del. Super. August 21, 2014).

## III. Reichhold had a duty to warn.

Reichhold admits that for at least part of the time Mr. Jamesson was exposed to its product Reichhold did not attempt to warn anyone.[46] Therefore, during that time period, it clearly had a duty to warn and cannot argue it relied on Square D to pass on any warning or information. Once it contends it began to warn, it cites no evidence it reasonably relied on Square D to pass on the information it provided. The only evidence Reichhold cites for this proposition is the deposition of Louis Barbaglia, Square D corporate representative, who said he did not know if Square D was aware of OSHA, that he was sure if OSHA published a regulation, Square D would be aware of it, and could offer no other details.[47] In *Nationwide Agribusiness Ins. Co. v. SMA Elevator Constr., Inc.*, 816 F. Supp. 2d 631, 691 (N.D. Iowa 2011), summary judgment was denied where the Court found issues of fact existed as to whether Defendant had a duty to warn. As to the intermediary defense the Court explained:

> ...There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances.[]

*Nationwide Agribusiness Ins. Co.*, 816 F. Supp. 2d at 654 (citing

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[46] In Reichhold's Answering Brief, p.5, it states that it began warning in the early 1970's. Mr. Jamesson's exposure began in 1968.

[47] See Reichhold Answering Brief, p.5, n.55.

Restatement (Third) § 2(c), comment i). Thus, whether Reichhold breached its duty to warn from 1968-1971 is not in dispute. Whether the intermediary defense applies after that should be resolved by the trier of fact.

## IV. Appellant Michael Jamesson is not pursuing a punitive damages claim.

Appellant Michael Jamesson is not pursuing a punitive damages claim against Reichhold in this case.

## CONCLUSION

Wherefore, Appellant Jamesson requests that this Court reverse the Superior Court's decision on summary judgment allow a jury to resolve these remaining factual issues.

Respectfully submitted,

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