IN THE SUPREME COURT OF DELAWARE

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

ANSWERING BRIEF OF APPELLEE REICHHOLD INCORPORATED

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Nature of Proceedings

This appeal concerns two separately-filed actions brought against defendant Reichhold Incorporated in the Superior Court of Delaware, in and for New Castle County. Plaintiffs in both cases claimed that Reichhold's asbestos-containing products caused their injuries. Following discovery, the court granted summary judgment in favor of Reichhold, holding that there was no legally sufficient evidentiary basis, viewing the existing record in each case in the light most favorable to each plaintiff, for a reasonable jury to find Reichhold liable for these injuries. Plaintiffs now assert that the lower court "made an error of law" when it granted summary judgment in favor of Reichhold in these cases (Opening brief, 1/17/17, p 14).

Summary of Argument

Rule 14(b)(iv) provides that "[a]ppellant's statement shall be admitted or denied with specificity in appellee's summary [of argument], paragraph by paragraph." Appellants' summary of argument contains only one paragraph, which states as follows:

> 1. The Superior Court erred when it usurped the role of the jury and granted summary judgment in this matter upon alleged non-exposure grounds where Plaintiffs Michael Jamesson and Phyllis Gordon presented sufficient circumstantial evidence of their (decedent's) exposures to asbestos-containing phenolic molding compound products to demonstrate the existence of genuine issues of material fact under Iowa substantive law. There was evidence that Mr. Jamesson was frequently in the Bakelite molding department where Defendant Reichhold's asbestos containing phenolic molding compound products were used, particularly in the year of 1968 when he worked as a laborer. For six months during 1968 Mr. Gordon was his supervisor. [Opening brief, p 3.]

DENIED. The lower court did not usurp the jury's role. Rather, as a review of the court's 19-page, 56-footnote opinion and order plainly reveals, the court (1) clearly understood that it was required to view the existing record in the light most favorable to plaintiffs and not to act as factfinder; (2) carefully and methodically evaluated the existing record in each case using that standard; and (3) correctly held that there was no legally sufficient evidentiary basis, viewing the record evidence in each case in the light most favorable to each plaintiff, for a reasonable jury to find Reichhold liable for these injuries.

Moreover, Gordon filed his appeal in clear violation of this Court's well-established jurisdictional requirements. As a result, this Court lacks jurisdiction over her appeal and must dismiss it.

Counter-Statement of Facts

A. The Square D facility.

The Square D Company (n/k/a Schneider Electric) manufactured electrical circuit breakers at a facility in Cedar Rapids, Iowa.[1] In 1958, it began using molding compounds, some of which contained asbestos, to make component parts for circuit breakers.[2] Molding compounds were melted, pressed into molds and hardened into rigid plastic shapes. The Square D facility operated 24 hours a day, with three shifts a day using the molding compounds in approximately 100 molding presses.[3] At one point, it was the largest molding facility of its kind in the world.[4] Square D bought molding compounds from 50-60 suppliers, including Reichhold, and used millions of pounds of molding compounds per year.[5]

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[1] Deposition of William Vosdingh, 11/30/11, pp 28:23–30:1, Exhibit B to Defendant's summary judgment filing against Jamesson (Jamesson filing), 1/6/14, docket entry #131 [courtesy copy A172–73]; Deposition of L.D. Lammey, 8/16/07, pp 5:10–6:16, Exhibit E to Jamesson filing [courtesy copy A202–03].

[2] Vosdingh Dep, pp 21:22–22:6; 31:9-18 [courtesy copy A170-71, 73]; Deposition of Sandra Brown, 8/9/11, p 14:16–19, Exhibit F to Jamesson filing [courtesy copy A207].

[3] Vosdingh Dep, p 201:3–10 [courtesy copy A545]; Deposition of L.D. Lammey, 1/29/03, p 24:8–9, Exhibit G to Jamesson filing [courtesy copy A212]; Deposition of Raymond Attwood, 3/5/09, p 43:5–8, Exhibit H to Jamesson filing [courtesy copy A215].

[4] Lammey 03 Dep, p 23:20–23 [courtesy copy A212].

[5] Lammey 03 Dep, pp 17:18-18:3 [courtesy copy A210–11]; Vosdingh Dep, p 202:8-15 [courtesy copy A181].

B. Reichhold molding compound.

From late 1964 to 1980, Reichhold manufactured chrysotile-containing molding compounds.[6] It also made asbestos-free compounds during this entire time period.[7] Reichhold's molding compounds were made with an extrusion process to eliminate dust.[8] Even though it had no reason to believe its products posed any hazard, Reichhold added a warning label to its product in the early 1970's using language from the OSHA regulations.[9] Reichhold even went beyond OSHA and included warnings based on information from other organizations.[10]

C. Use of Reichhold Molding compound at the Square D facility.

As discussed by the lower court, cement block walls separated the manufacturing/molding department from the other areas in the facility, and the different types of presses were grouped together and separated from the other groupings by large vinyl curtains.[11] The "set-up and operate" employees in the molding department used a special rack designed to hold a person and a pallet of molding compound to

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[6] Deposition of Tom Madden, 2/14/12, pp 42:23–43:11; 253:21–254:3, Exhibit K to Jamesson filing [courtesy copy A227–29].

[7] Madden 12 Dep, p 42:1–4 [courtesy copy A227]; Reichhold's interrogatory answers, no. 1, 3/9/12, Exhibit L to Jamesson filing [courtesy copy A234].

[8] Madden 12 Dep, pp 250:20–251:4 [courtesy copy A228]; Reichhold's interrogatory answers, no. 9 [courtesy copy A242].

[9] Deposition of Tom Madden, 9/1/10, p 50:13–56:10, Exhibit N to Jamesson filing [courtesy copy A302].

[10] Madden 10 Dep, pp 53:24–56:6; 65:21–66:8 [courtesy copy A301–04].

[11] Opinion and order, 8/21/14, pp 2–3.

fill some of the presses.[12] A forklift would lift the rack 10 or 12 feet off the ground next to a press, and the person on the rack would cut the bags of molding compound and pour the material into the press hopper.[13] This process produced a "blue haze" of airborne dust that would remain in the molding department for hours.[14]

With respect to Reichhold brand molding compounds, only seven of twenty four witnesses recalled seeing it at all—five of whom said it was present in very small quantities or asbestos free.[15] The other two witnesses were evasive about whether it was present in very small quantities. They would go weeks without opening a bag of Reichhold molding compound. It was used far less than the molding compounds from other suppliers.[16]

D. Plaintiff Michael Jamesson.

Jamesson started working at the Square D facility in 1968 and spent less than one year as a laborer, ten years in shipping and receiving, and finally one year in

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[12] *Id.*, pp 4–5. Reichhold's molding compound was granular, similar to coarse sand, and came in 50lb bags, 40 bags per pallet. *Id.*

[13] *Id.*

[14] *Id.*, p 5.

[15] Compendium of testimony, Appendix A to Jamesson filing [courtesy copy A346–48].

[16] *Id.*; see Jamesson filing, p 3 (discussing relevant testimony) [courtesy copy A95]; see also Opinion and order, p 4 ("it is likely that Reichhold products made up but a small percentage of the total molding compound used at the Cedar Rapids plant.").

the metal plating department from about 1980 to 1981.[17] His work as a laborer, and in shipping, would take him throughout the plant.[18] Although Jamesson testified that he could not say how often his work took him to the molding area, he did say that the molding department "didn't want you to hang out there … you were in there for a matter of minutes maybe."[19] Plaintiff smoked up to a pack a day from 1967 to 2010, but he occasionally stopped during this time period.[20]

E. Roger Gordon (Plaintiff Phyllis Gordon's decedent).

As for Roger Gordon, the representative of his estate was not deposed, and she did not depose any other witnesses. The only evidence about where and when Gordon worked at the facility is from the affidavit of "private investigator" Ed Colvin.[21] Colvin claims he spoke to Jamesson and asserts states that Jamesson worked with Gordon for six months.[22] Colvin never states that he learned this information from Jamesson or that Jamesson told him that he worked with Gordon.[23]

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[17] Jamesson Dep, pp 36:5–8; 37:14–18; 39:15–20; 40:7–24 [courtesy copy A194-95].

[18] *Id*., pp 36:9–23; 112:12–113:8 [courtesy copy A194, 196–97].

[19] *Id*., pp 44:3–9; 122:14–123:3 [courtesy copy A198, 437].

[20] Jamesson Dep, p 129:7-17 [courtesy copy A199].

[21] Affidavit of Ed Colvin, 1/31/14, Exhibit J to Gordon's filing opposing summary judgment, 1/31/14 [courtesy copy A1445].

[22] *Id*.

[23] *Id*.

F. The lower court's opinion.

Before granting summary judgment to Reichhold on the ground that there is no legally sufficient evidentiary basis for a reasonable jury to find Reichhold liable for plaintiffs' injuries, the lower court carefully and methodically evaluated the existing record in each case, viewing it in the light most favorable to each plaintiff. This is entirely clear from the opinion itself.

1. The lower court viewed the facts in the light most favorable to each plaintiff.

With respect to Jamesson, the lower court set forth the following "viewed in the light most favorable" facts: "Michael Jamesson was diagnosed with lung cancer. Mr. Jamesson was a smoker for approximately fifty years, which all agree was a substantial contributing factor to his cancer. He began as a laborer at the Cedar Rapids plant in 1968 and remained in that position for about a year."[24] The court discussed the duties of this first job: "Mr. Jamesson was responsible for cleaning up all areas of the plant and performing any other tasks that were required, such as rearranging shelving or other configurations of equipment at the plant."[25]

The court then discussed the job Jamesson had after his one year as a laborer: "Mr. Jamesson moved into the shipping and receiving department. He remained there for approximately ten years. In shipping and receiving, Mr. Jamesson was

[24] Opinion and order, p 6.

[25] *Id*.

responsible for receiving incoming packages, stocking products after delivery, and transporting products to the various other departments, including the molding areas."[26] Finally, the court added these details: "The only molding product manufacturer that Mr. Jamesson recalled was Plenco. Mr. Jamesson also worked for approximately one year in the plating department, though he stated that he did not believe that he was exposed to asbestos during his time there."[27]

As for Gordon, the court stated the he was "Mr. Jamesson's supervisor for approximately six months when Mr. Jamesson began working at the Cedar Rapids plant in 1968."[28] The court noted that "[n]o additional evidence has been produced concerning where Mr. Gordon worked while at Square D or any instances—if there are any—in which he may have been exposed to any asbestos-containing product attributable to either Defendant."[29]

2. The lower court correctly determined that there was no legally sufficient evidentiary basis for a reasonable jury to find Reichhold liable for these injuries.

Concerning Jamesson's exposure, the lower court stated: "During Mr. Jamesson's time at Square D, by his own account, his exposure to any asbestos-containing material was sporadic and minimal…. He recalled exposure to only a

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[26] *Id.*

[27] *Id.*

[28] Opinion and order, p 7.

[29] *Id.*

single brand of molding compound, Plenco, and cannot recall any exposure to a Reichhold product."[30] The court added that "[t]his is unsurprising; the uncontroverted evidence is that Reichhold was a minor supplier to the Square D plant as a whole."[31] The court then continued its discussion of exposure: "Mr. Jamesson's alleged exposure to any molding compound was admittedly neither frequent nor regular. He did not work in an area of the plant that commonly experienced respirable dust from such, and the layout of the plant insulated him from any regular exposure."[32] Finally, the court concluded that "Mr. Jamesson fails to demonstrate, even under the flexible Iowa standard, exposure to any Reichhold product, much less that such a product was a substantial factor in causing his illness."[33]

As for Gordon, the lower court explained that plaintiff did not "introduce any evidence that could support a reasonable inference that he was exposed to a Reichhold asbestos-containing compound," adding that "[n]o evidence has been provided to detail Mr. Gordon's work history, his duties at the Square D plant, or to what degree he could have been exposed to any asbestos-containing material."[34] The court then explained: "Plaintiff asks the Court to rely on surmise to divine Mr.

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[30] Opinion and order, p 17.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Opinion and order, p 18.

Gordon's alleged damaging exposure from the simple statement that he supervised Mr. Jamesson … for a six-month period in 1968. This falls far short of meeting Plaintiff's burden and therefore [summary judgment is appropriate]."[35]

G. The statement of facts in the opening brief.

Although this appeal concerns whether plaintiffs introduced sufficient evidence for a reasonable jury to find that Reichhold's asbestos-containing products caused their injuries, they devote only three sentences of their 26-page opening brief on appeal to Jamesson:

> 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." 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."
>
> 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 [sic] 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. [Opening brief, pp 4-5 (footnotes containing citations omitted).][36]

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[35] *Id.*, pp 18-19.

[36] Gordon gets one sentence:

> Roger Gordon, decedent, was Michael Jamesson's supervisor for six months when Mr. Jamesson began working at the Square D Cedar Rapids plant in 1968, and Mr. Jamesson's work as a laborer at the

Even worse, in these sentences they use insertions and omissions to alter or add to the quotations in a way that inaccurately and unfairly represents the original text. They alter the quoted material in the first sentence by including the word "and" and an ellipsis before that word. This alteration makes it appear that Jamesson has testified that he cleaned and swept residue off the floor in the "molding department" area discussed above, where the molding compounds were dumped in press hoppers producing a haze of airborne dust.[37] But Jamesson said no such thing. He was asked to list where he worked as a laborer and answered:

> A. Sure. The front offices, we cleaned those. We were what I call across the wall in assembly. We did the cleanup over there. In the molding – the Bakelite molding department, we swept all the residue off the floor. We worked around the dock area, which was right next to molding.

[Jamesson Dep, p 37:3–8 (courtesy copy A195).]

The Bakelite molding "department" is not just the one molding/manufacturing room/facility described above. It includes everything "across the wall," offices for the molding facility supervisors, storage rooms for molding compounds and the molded components, an assembly facility, and a loading dock next to the molding

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> plant during the course of those six months is described above. [Opening brief, p 5.]

[37] Moreover, even if he had cleaned this area, there is no evidence that this occurred while the machines were operating, or while there was a haze in the room, or when a Reichhold product was recently used, and there was no testimony that any sweeping produced airborne dust.

room. Jamesson is clarifying that he worked in the dock area of the molding department, next to the room where they made component parts for circuits from molding compounds.

The third sentence states that Jamesson delivered "phenolic molding materials specifically the Bakelite molding" (Opening brief, p 5). While this may literally be true, the only molding compounds he could recall delivering were from "Plenco" and came in a 35-gallon cardboard drum.[38] He provided no testimony from which one can properly infer that he delivered Reichhold molding compounds.

Next, immediately after the three sentences about Jamesson and the one sentence about Gordon, plaintiffs start discussing testimony from a deposition of "Roy Duncan" *that is not part of the Jamesson or Gordon trial court records* (Opening brief, p 6). Plaintiffs included selected portions of this deposition in the appendix they submitted with their opening brief (A1860-63), a clear violation of the rule against expanding the record on appeal.[39]

Two pages later, plaintiffs do the same thing with the deposition of "William Hodina" (A1864–1877), which is also not in the Jamesson or Gordon trial court

[38] Jamesson Dep, pp 38:4–39:6 [courtesy copy A431–32].

[39] Plaintiffs have included this document in their appendix without even attempting to make a colorable argument as to why they should be permitted to expand the record in this appeal. They simply state that the deposition was "inadvertently not attached to the Jamesson/Gordon briefing" (Opening brief, p 6 fn 15). However, there is no "inadvertently not attached" exception to the rule against enlarging the record on appeal.

records (Opening brief, p 8).[40] They assert that Jamesson "worked in the vicinity of" Hodina and then use the Hodina deposition as their reference for the next four pages in their statement of facts (*Id*., pp 8–11). They cite the deposition 29 times in a row and treat Hodina's workplace-activity testimony (again, not part of the record) as if it were Jamesson's (*Id*., pp 8–11 fns 24–52). As for their assertion that Jamesson "worked in the vicinity" of Hodina, Hodina worked in the plastic molding department from 1967 to 1974. Jamesson worked as a laborer for one year beginning in 1968 and then worked in the shipping department until 1980.

H. Relevant procedural history.

On August 21, 2014, the lower court issued its opinion and order granting Reichhold summary judgment in both *Gordon* and in *Jamesson*.

1. Gordon

On September 22, 2014, Gordon filed a notice of appeal with this Court (Gordon's notice of appeal, 9/22/14). His notice stated that he is appealing from "the ruling on Defendant Reichhold Inc.'s Motion for Summary Judgment dated August 21, 2014," and that he "believes this decision became final, pursuant to Superior Court Rule 68, when this order was entered…" (*Id*., p 1).

[40] Plaintiffs acknowledge that "the deposition excerpts were not attached to the answering briefs below" (Opening brief, p 8 fn 24).

2. Jamesson

Jamesson did not file a notice of appeal with this Court within 30 days of the August 21, 2014 opinion and order. According to Jamesson, "there was still a defendant remaining in the case, Rogers Corporation," and "[t]herefore, pursuant to Superior Court Rule 54(b), the [August 21, 2014] Order dismissing Reichhold, Inc. was not the final order in the case" (Jamesson's response to notice to show cause, 5/3/16). On October 6, 2014, Reichhold notified the lower court that it filed a petition for Chapter 11 bankruptcy protection on September 30, 2014, and that in accordance with the automatic stay provision in 11 U.S.C. §362(a) all lawsuits filed against it before the petition date must immediately halt (Notice of bankruptcy, 10/6/14, Exhibit B to Jamesson's response to notice to show cause).

On November 30, 2015, the lower court signed an order dismissing the *Jamesson* case "under Rule 41(e) of the Superior Court Rules of Civil Procedure because the action has been pending in the Court for more than six (6) months without any proceeding having taken place over the past six (6) months" and "no information having been provided as to why a dismissal order should not be entered" (Order of dismissal, 11/30/15, Exhibit C to Jamesson's response to notice to show cause).

On January 13, 2016, Reichhold's bankruptcy plan was confirmed and became effective on March 1, 2016 (Delaware Bankruptcy Court notice, 3/1/16, p 1, Exhibit E to Jamesson's response to notice to show cause). Under the bankruptcy plan,

the automatic stay that had been imposed on asbestos claims was lifted sixty days after the March 1, 2016 effective date. (Bankruptcy plan, p 51, Exhibit D to Jamesson's response to notice to show cause).

On May 2, 2016, Jamesson filed a notice of appeal with this Court (Jamesson's notice of appeal, 9/22/14). The notice stated that he was appealing from "the ruling on Defendant Reichhold, Inc.'s Motion for Summary Judgment dated August 21, 2014," and that he "believes this decision became final, pursuant to Superior Court Rule 68, when the Superior Court Ordered the case dismissed pursuant to Rule 41(e) on November 30, 2015." (*Id*., p 1).

The Clerk issued a notice pursuant to Supreme Court Rule 29(b) directing Jamesson to show cause why the appeal should not be dismissed as untimely filed. (Notice to show cause, 5/2/16). Jamesson responded to the notice to show cause and also filed a motion to consolidate his appeal with *Gordon.* (Order consolidating cases, 7/18/16). Reichhold did not oppose the motion to consolidate, and on July 18, 2016, this Court entered an order consolidating the cases. (*Id*.). This Court's order also stated that "The notice to show cause issued on May 2, 2016 is discharged without prejudice. The appellee may raise the issue advanced in the notice in the answering brief on appeal." (*Id*., p 2).

Argument

I. The August 21, 2014 order was not a final judgment appealable as of right, and the Court is without jurisdiction because Gordon did not satisfy the interlocutory appeal requirements.

A. Question presented.

Whether this Court has jurisdiction in the *Gordon* matter?[41]

B. Standard and scope of review.

Whether this Court has jurisdiction in this matter presents a question of law. See *Tyson Foods, Inc. v. Aetos Corp*., 809 A.2d 575, 579-580 (Del. 2002).

C. Merits of argument.

It is a well-established principle that "[a]n aggrieved party can appeal to this Court, as a matter of right, only after a final judgment is entered by the trial court." *Emerald Partners v. Berlin*, 811 A.2d 788, 790 (Del. 2001); *Tyson*, 809 A2d at 579 ("An aggrieved party can appeal to this Court only after a final judgment is entered by the trial court.").

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[41] In regard to this Court's preservation requirements, Reichhold could not have "preserved" this issue by raising it in the trial court. That is, whether this Court has jurisdiction in this appeal is a matter for this Court to decide in the first instance. It is not a question for the trial court to decide and for this Court to review. The trial court has no authority to decide whether this Court has jurisdiction in this matter. Moreover, "and perhaps most importantly, parties cannot waive issues regarding appellate jurisdiction and cannot confer jurisdiction on this Court by agreement." *Branch Banking & Trust Co. v. Eid*, 114 A.3d 955, 959 (Del. 2015) (discussing "Eids argue[ment] that BB & T failed to preserve this [jurisdictional] issue for appeal"). Here, if this Court did not consider this jurisdictional issue, it would erroneously allow the parties to confer jurisdiction on this Court. For these reasons, the "interest of justice" requires this Court to consider this question that has not been presented to the trial court. Supreme Court Rule 8.

The test for whether an order is final and therefore ripe for appeal is not whether the trial court used "final judgment" or "final order" or other "magic words." *Lipson v. Lipson*, 799 A.2d 345, 346 (Del. 2001). Rather, the test "is whether the trial court has clearly declared its intention that the order be the court's 'final act' in a case." *Tyson*, 809 A2d at 579. In other words, "an order is deemed final and appealable if the decision is the trial court's last act in disposing of all justiciable matters within its jurisdiction." *Emerald*, 811 A.2d at 790. Such a decision "leaves nothing for future determination or consideration." *Tyson*, 809 A.2d at 579 ("[A] final judgment is one that determines all the claims as to all the parties.")

Here, a simple review of the Superior Court docket sheet in *Gordon* reveals that the August 21, 2014 order was not a final judgment appealable as of right to this Court. (A42-87). Other parties remain and, in fact, on January 12, 2016, the court offered a proposed order of dismissal, which Gordon objected to. (Entry # 319-320). There has been no judgment or dismissal issued and it appears that the order appealed remains subject to revision at any time by the court below. This August 21, 2014 order was far from the "final act" in the case. Nor did it "leave[] nothing for future determination or consideration."

Moreover, the proper perfection of an appeal to this Court from a final judgment generally divests the Superior Court from its jurisdiction over the cause of action in the absence of a remand. See *Eller v. State*, 531 A.2d 951, 952 (Del.

1987); *Radulski v. Delaware State Hosp*., 541 A.2d 562, 567 (Del. 1988). Again, a simple review of the Superior Court docket sheet reveals that the lower court still has jurisdiction over this action.[42]

Gordon's notice of appeal also leaves one baffled as to the basis for this Court's jurisdiction. The order identifies the August 21, 2014 order and then states that Gordon "believes this decision became final, pursuant to Superior Court Rule 68, when this order was entered…." (Gordon Notice of appeal, 9/22/14). Superior Court Rule 68 concerns offers of judgment and the circumstances when one party must pay costs for rejecting an offer.[43]

Finally, plaintiffs take the completely-opposite approach with regard to Jamesson. See Jamesson notice of appeal, 5/2/16 ("Plaintiff believes this decision became final, pursuant to Superior Court Rule 68, when the Superior Court Ordered the case dismissed pursuant to Rule 41(e) on November 30, 2015."); Response to notice to show cause, 5/3/16 ("Therefore, pursuant to Superior Court Rule 54(b), the Order dismissing Reichhold, Inc. was not the final order in the case.")

Given that the August 21, 2014 order was not a final judgment appealable as of right to this Court, Gordon's appeal must therefore satisfy the requirements for tak-

[42] Compare this with the docket sheet in *Jamesson*, which shows that the "final act" has occurred in that case. (A1) ["CLOSED"].

[43] Gordon may have possibly meant Superior Court Rule 58, which is titled "entry of judgment," however one must guess as to how "this decision" can somehow "become final" pursuant to that rule.

ing an interlocutory appeal under Supreme Court Rule 42. Gordon has not attempted to comply with that rule and therefore his appeal must be dismissed. *See Hecksher v. Fairwinds Baptist Church, Inc*., 93 A.3d 654 (Del. 2014) ("Absent compliance with Rule 42, the jurisdiction of this Court is limited to the review of final judgments of trial courts."); *Carr v. State*, 554 A.2d 778, 779 (Del. 1989) (internal quotation marks omitted) ("When a party fails to perfect timely its appeal a jurisdictional defect is created which may not be excused in the absence of unusual circumstances which are not attributable to the appellant or the appellant's attorney.")

II. The Superior Court did not err in granting Reichhold summary judgment because there is no legally sufficient basis for a reasonable jury to find Reichhold liable for these injuries.

A. Question presented.

Whether the trial court erred when it held that there was no legally sufficient evidentiary basis, viewing the existing record in each case in the light most favorable to each plaintiff, for a reasonable jury to find Reichhold liable, and granted Reichhold summary judgment on that basis? This issue is preserved for appeal because it was raised before and decided by the trial court.[44]

B. Standard and scope of review.

This Court "review[s] the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the non-moving 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 as a matter of law." *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1173 (Del. 2012) (internal quotation marks omitted).

"[I]f an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find in that party's favor, then summary judgment is appropriate." *Edisten v Greyhound Lines, Inc*., No. 144, 2012, Jacobs, J (August 13, 2012), citing *Burkhart v. Da*vies, 602 A.2d 56, 58–59 (Del. 1991); *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (emphasis in original) ("The question is whether *any rational* finder of fact could find,

[44] A89-A400, A571-A1307, A1447-A1859

on the record presented to the Court of Chancery on summary judgment viewed in the light most favorable to the non-moving party, that the substantive evidentiary burden had been satisfied.")

Under this standard, a court "will not indulge in speculation and conjecture; a motion for summary judgment is decided on the record presented and not on evidence potentially possible." *In re Asbestos Litig*., 509 A.2d 1116, 1118 (Del. Super. Ct. 1986), *aff'd sub nom. Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987). And of course, this Court "may affirm a grant of summary judgment on grounds other than those on which the trial judge relied." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of argument.

This Court should affirm the Superior Court's decision. First, all off Gordon and Jamesson's claims require proof of causation, but they are unable to establish it under applicable Iowa law.[45] Second, their failure to warn claims fail under these facts as Reichhold could not have provided any warnings that could have reduced the likelihood of harm to Gordon or Jamesson. Third, their punitive damages claims fail as there is no evidence that Reichhold ever engaged in willful and wanton conduct.

[45] As noted, the parties agree that Iowa substantive law controls in this dispute (See Opening brief, p 16).

1. Gordon and Jamesson cannot meet the causation standard.

All of the claims require proof of causation. *Mulcahy v. Eli Lilly & Co*., 386 N.W.2d 67, 76 (Iowa 1986). That means Gordon and Jamesson must meet the standard found in the Restatement (Third) of Torts: Liability for Physical Harm. *Thompson v. Kaczinski*, 774 N.W. 2d 829, 839 (Iowa 2009). This framework has two parts: factual causation and scope of liability.

Conduct qualifies as a factual cause "when the harm would not have occurred absent the conduct." Restatement (Third) of Torts: Liability for Physical Harm § 26. In toxic substance cases, a plaintiff must show evidence of exposure. *Id*. at § 27, comment g. There is often no direct exposure evidence in asbestos cases. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). So, circumstantial evidence may be used to raise an inference of exposure. *See Perrin v. AC&S*, 68 F.3d 1122, 1123 (8th Cir. 1995) (applying Iowa law). However, proof of a possibility of contact will not satisfy a plaintiff's summary judgment burden. *Id.*

As for scope of liability, Section 29 of the Restatement provides that an "actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." A trivial contribution to a plaintiff's injury is outside a defendant's scope of liability. Restatement (Third) of Torts: Liability for Physical Harm § 36, comment c. Thus, Iowa courts make comparisons in asbestos cases by

considering "'the nature of the product, the frequency of its use, the proximity, in distance and time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product.'" *Spaur*, 510 N.W.2d at 859, (quoting *Eagle-Picher v. Balbos*, 604 A.2d 445, 459 (Md. 1992)).

a) **Gordon and Jamesson cannot raise an inference of exposure to Reichhold.**

Gordon and Jamesson have no direct exposure evidence, and their circumstantial evidence is not enough to avoid summary judgment. They need evidence raising an inference that they were close enough to a Reichhold product that contained asbestos for fibers from that product drifted into their breathing zone. *Spaur*, 510 N.W.2d at 859. But Reichhold was used infrequently, and, to the extent that Jamesson worked in the molding area, it was used on an unknown number of occasions. Jamesson cannot show what part of the molding area he was in or that he was present when any specific molding compound was used. As the court below noted, although all reasonable inferences favor the non-moving party at the summary judgment stage of the proceedings, there must still be adequate support for such inferences in the record. This evidence only creates a possibility of contact and does not satisfy the threshold requirements for summary judgment. *Perrin*, 68 F.3d at 1123 (8th Cir. 1995).[46]

[46] Indeed, this Court discussed this very principle in a recent asbestos case in which it affirmed the trial court's grant of summary judgment:

b) **Any exposure to Reichhold was trivial.**

Reichhold made a tiny contribution, if any, to Gordon or Jamesson's dose, so their injuries are outside Reichhold's scope of liability. Jamesson chose to smoke cigarettes for almost 50 years, which he admits was a cause of his lung cancer.[47] Jamesson was also surrounded by smokers nearly his whole life including his mother, father, and two wives.[48] Asbestos-containing steam piping was removed overhead throughout the Cedar Rapids facility, which dusted the workers below

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> "The presumption afforded the non-moving party in the summary judgment analysis is not absolute. The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based. Where there is no precedent fact, there can be no inference; an inference cannot flow from the nonexistence of a fact, or from a complete absence of evidence as to the particular fact. **Nor can an inference be based on surmise, speculation, conjecture, or guess, or on imagination or supposition**." *In re Asbestos Litig*., 2012 WL 1408982, at *2 (Del. Super. Apr. 2, 2012) (quoting *In re Asbestos Litig*., 2007 WL 1651968, at *17 (Del. Super. May 31, 2007)); see also *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1188 (Del. 2000) ("While the plaintiff is entitled to the benefit of reasonable inferences from established facts, the jury cannot supply any omission by speculation or conjecture."); *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021, 1026 (Del. 1994) ("While a jury may draw inferences from the facts of a case, those inferences may not be based upon speculation.").

Reed v Asbestos Co., _ A2d _ No. 387, 2016, Strine, J. (February 6, 2017) (ORDER), p 2 fn 2 (emphasis added).

[47] Expert Report from Dr. Abraham, 5/1/13, attached as Exhibit V to Jamesson filing [courtesy copy A332].

[48] Jamesson Dep, pp 17:7-20; 23:8-16; 24:13-20; 33:3-34:5 [courtesy copy A192-94].

with asbestos.[49] And any exposure from molding compounds would have primarily been from other companies that supplied far more product than Reichhold, were dustier than Reichhold, and in some cases, contained a far more dangerous type of asbestos.[50] Dozens of other molding compounds were also used. And Gordon or Jamesson inhaled millions of asbestos fibers from ambient air.[51] If Reichhold made any contribution to Gordon or Jamesson's injuries, it is fractional compared to their overall asbestos dose or smoking history.

c) Plaintiffs' "attack" on the lower court in regard to this issue is absurd.

Plaintiffs insist that the lower court "erroneously proceeded to apply a restrictive and exacting standard to dismiss the claims of Plaintiffs Michael Jamesson and Phyllis Gordon on summary judgment—even as the court impermissibly construed the record facts against these non-movants" (Opening brief, p pp 18-19).[52] Plaintiffs not only fail to explain where in the court's statement of facts this "impermissible construal" occurred, but their suggestion that the court applied a "restrictive

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[49] Deposition of Glenn Malmberg 10/4/11, pp 19:25-25:8, Exhibit W to Jamesson filing [courtesy copy A336-37].

[50] Letter to Square D, Exhibit X to Jamesson filing [courtesy copy A340]; Deposition of Jamesson's expert Dr. Ellenbecker, 5/18/12, pp 57:24-58:8, Exhibit Y to Jamesson filing [courtesy copy A342].

[51] Ellenbecker Dep, pp 87:21-89:13; 90:2-12 [courtesy copy A343-44].

[52] See Opening brief, p 24 ("Reduced to the essentials, the Superior Court below erroneously subjected the claims … to exacting and restrictive asbestos exposure causation standard which was inconsistent with the flexible and liberalized exposure standards prescribed by the Iowa Supreme Court….").

and exacting standard" is absurd. Notably, in addition to Gordon and Jamesson, the lower court also addressed in the same order and opinion whether summary judgment was proper for two other plaintiffs, and, unlike Gordon and Jamesson, decided *against* Reichhold in regard to these plaintiffs.

One was Anna Hartgrave, who worked at Square D from 1962-1982 and held jobs as a part-cleaner machine operator, metal-punch press department worker, and molding-department worker (Opinion and order, p 7). The other was Yvonne Weaver, who worked at Square D as a molding machine operator for approximately 40 years, starting in 1957 (*Id*., p 8). The court noted that there was evidence that they "worked extensively with and around asbestos material and respirable dust created from asbestos-containing molding compounds, some of which Reichhold supplied," and "worked long-term in the molding department, specifically working with manual molding presses" (*Id*., pp 14-15).

The court explained that with the manual presses they "were required to open the presses, remove finished products, and manually load the presses with molding compound. At the completion of each cycle, the operators would additionally have to clean the individual finished pieces by blowing off the 'flash' or residual material," which "created respirable dust that each was exposed to," "[i]n addition to their exposure … [to the airborne dust created by the automatic press machines]" (Opinion and order, pp 15).

Finally, the court discussed that "[w]hile the direct evidence of exposure by Ms. Hartgrave and Ms. Weaver to Reichhold's products may be thin, [it] cannot end the inquiry," and must consider "their proximity to the product, the total duration of their exposure, and the layout of the plant" (Opinion and order, pp 15-16). With that in mind, the court held that "[u]pon a careful review of the entirety of the record, including deposition testimony regarding the layout of the plant and co-workers' recollections of the details of Ms. Hartgrave's and Ms. Weaver's employment, there is sufficient evidence of exposure to Reichhold's asbestos-containing product such that the Court [will not grant summary judgment]" (*Id*., p 16). "Put simply, there remain genuine issues of material fact regarding both product identification and product nexus such that Reichhold has failed to demonstrate that it is entitled to judgment as a matter of law" (*Id*.)

Although Reichhold disagrees with the lower court's ruling concerning Hargrave and Weaver, the court's treatment of the summary judgment motion on their claims reveals that the court did not apply a "restrictive and exacting" standard as plaintiffs assert. Rather, it carefully and thoughtfully applied the applicable standard pursuant to Iowa law.

2. Reichhold had no duty to warn because additional warnings would not have reduced the likelihood of harm.

Iowa has abandoned traditional tort labels like strict liability and negligence in product liability cases and now uses the "Manufacturing Defect, Design Defect,

and Failure to Warn" definitions found in Sections One and Two of the Third Restatement of Torts: Product Liability. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 169, 181 (Iowa 2002); *Scott v. Dutton-Lainson Co*., 774 N.W.2d 501, 504-506 (Iowa 2009).[53] There is no evidence that Gordon or Jamesson were injured by a manufacturing or design defect, so these cases rest on failure to warn claims.[54]

Under the Restatement (Third) of Torts, a product is defective when foreseeable harm "could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor...." RESTATEMENT (THIRD) OF TORTS: PRODUCT LIAB. § 2(b). But there is no duty to end users when a seller can reasonably rely on an intermediary to relay warnings. *Nationwide Agribusiness Ins. Co. v. SMA Elevator Constr., Inc*., 816 F. Supp. 2d 631, 651, 654 (N.D.

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[53] Just like Iowa has abandoned traditional tort labels, plaintiffs have abandoned their product liability claims as they do not mention them in their brief much less "present an argument in support of those issues." See, *e.g*., *Roca v. E.I. du Pont de Nemours & Co*., 842 A.2d 1238, 1242 (Del. 2004) (bracketing in original) ("any argument that is not raised in the body of the opening brief [is] deemed waived and will not be considered by the Court on appeal.")

[54] A manufacturing defect claim requires proof that a product deviated from its intended design. Plaintiffs lack that evidence. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(a). A design defect claim requires proof a product was unreasonably safe and proof of an alternative design. *Id*. at § 2(b). There is no evidence that Reichhold products were unreasonably safe or that there was an alternative design for the purpose for which Square D used them. *See id.* Even if they had that proof, plaintiffs cannot sustain a design defect claim because Square D elected not to use asbestos-free products offered by Reichhold, and Reichhold is not liability because its products conformed to the state of the art. *Nationwide Agribusiness Ins. Co. v. SMA Elevator Constr., Inc*., 816 F. Supp. 2d 631, 655-665 (N.D. Iowa 2011); Iowa Code § 668.12.

Iowa 2011). To determine whether a supplier has a duty, courts consider "'the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.'" *Id*. (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIAB. § 2(c), comment i). A supplier has a duty to warn employees of its customers when it has reason to believe warnings will not be relayed to the employee, and it is feasible to warn the employee. *Id*. at 651, 654.

Reichhold could not have feasibly warned Gordon or Jamesson because there is no evidence Gordon or Jamesson ever saw Reichhold packaging. There is no evidence Gordon or Jamesson used a Reichhold product, or ever met anyone from Reichhold. Reichhold had no way to communicate with Gordon or Jamesson, and a warning could not have reduced a likelihood of harm.

There is also no evidence that Reichhold had reason to believe that Square D would not relay warnings to its employees. It was one of the world's biggest companies of its type and used millions of pounds of molding compounds. It had experience using raw asbestos; it had a legal obligation to protect its employees; and it was aware of OSHA's regulations.[55] Any warning to Square D was also superfluous because Square D had as much information as Reichhold. "The duty to warn is based upon superior knowledge of the manufacturer or supplier as to dangers a

[55] Deposition of Louis Barbaglia, 2/13/08, pp 185:14-186:25, Exhibit I to Jamesson filing [courtesy copy A220-21].

certain product poses." *Lamb v. Manitowoc Co*., 570 N.W.2d 65, 68 (Iowa 1997). "There is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product." *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 946 (8th Cir. Iowa 1998) (interpreting Iowa law) (quotation omitted). Square D had as much knowledge as Reichhold about asbestos, and it was the only one in a position to warn Gordon or Jamesson.

3. Plaintiff has no evidence to support punitive damages.

To prevail on punitive damages, Plaintiff must show "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." IOWA CODE § 668A.1(1)(a). This equates to "a heedless disregard for or indifference to the rights of others in the face of apparent danger or be so obvious the operator should be cognizant of it, especially when the consequences of such actions are such that an injury is a probability rather than a possibility." *Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013) (quotations omitted).

Here, there is no evidence that Reichhold disregarded any known dangers associated with its products. Plaintiffs seek to elevate a failure to warn claim based on a "should have known" standard to one justifying punitive damages. Such an imposition of damages is contrary to Iowa law and unconstitutional. *See Schulz v. Sec.*

Nat'l Bank, 583 N.W.2d 886, 888 (Iowa 1998). Here is no evidence that Reichhold had information that its products could release asbestos at levels that could injure anybody. There is no evidence that Reichhold received reports that anybody was injured by its molding compounds during the time it manufactured them. Thus, there is no evidence that supports Gordon or Jamesson's claims for punitive damages.

III. Conclusion.

Reichhold is entitled to summary judgment because Gordon and Jamesson are unable to establish causation under applicable Iowa law, Reichhold could not have provided any warnings that could have reduced the likelihood of harm to them, and there is no evidence that Reichhold ever engaged in willful and wanton conduct. This Court should affirm the Superior Court's decision.

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Respectfully submitted,

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