



IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION :
PHILIP LAVELLE and his wife, : No. 307, 2018
LINDA LAVELLE, :
 :
Appellants, Plaintiffs below, : Court Below: Superior Court
 : of the State of Delaware
 :
 :
 : C.A. No. N16C-03-079 ASB
V. :
 :
FEDERAL-MOGUL ASBESTOS :
PERSONAL INJURY TRUST AS :
SUCCESSOR TO FELT-PRODUCTS :
MANUFACTURING COMPANY, :
 :
Appellee, Defendant below. :

APPELLANTS' OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT

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NATURE OF THE PROCEEDINGS

On March 9, 2016, Philip Lavelle and his wife, Linda Lavelle, both Delaware residents, Plaintiffs-below, Appellants, sued, *inter alia*, Federal-Mogul Asbestos Personal Injury Trust as successor to Felt-Products Manufacturing Co., Defendant-below, Appellee (“Fel-Pro”), as a result of Philip Lavelle’s diagnosis of mesothelioma and requested that a Delaware jury decide their case as guaranteed by the Delaware Constitution.¹ On June 5, 2017, Defendant filed a motion for summary judgment.² Plaintiffs filed a timely answering brief³ and Defendant filed a reply brief.⁴ Oral argument was held on August 14, 2017.⁵ On September 19, 2017 the Superior Court granted summary judgment.⁶ Pursuant to Delaware Superior Court Rule of Civil Procedure 54(b), when an order granting Defendants’ Motion to Dismiss and Close was entered on May 18, 2018, closing the case below the Order became final, and Plaintiffs timely filed a Notice of Appeal.⁷

¹ Del. Const. Article I § IV. The complaint was filed on March 9, 2016 (A139-A168) and was subsequently amended twice to add additional Defendants. (A169-A198, First Amended Cmp, A199-A229, Second Amended Cmp.).

² A875.

³ A1012.

⁴ A1097.

⁵ *In Re: Asbestos Litigation (Lavelle, et. al.)* 16C-03-079 (Del. Super. August 14, 2017 (TRANSCRIPT) (Ex. B).

⁶ *Lavelle v. The Ford Motor Co.*, C.A. No. N16C -03-079 ASB (Del. Super. September 19, 2017) (Wharton, J.) (ORDER) (Ex. A).

⁷ *In Re: Asbestos Litigation (Lavelle, et. al.)* 16C -03-079 (Del. Super. May 18, 2018) (ORDER) (Ex. C).

SUMMARY OF ARGUMENT

The Superior Court erred when it usurped the role of the jury and granted summary judgment in this matter, despite there being a material fact in dispute: whether Mr. Lavelle was exposed to Defendant's asbestos-containing cylinder head gaskets. Since Defendant admitted the vast majority of these types of gaskets contained asbestos during the early 1980's, and Mr. Lavelle was regularly exposed to them through his employment during the early 1980's, there was at least a question of fact as to whether he was exposed to asbestos through his use of them. The decision was also contrary *In re Asbestos Litig. 112010jr Trial Grp. To: Henderson, Henderson*, Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82 (Del. Super. Feb. 2, 2011), where the Superior Court found that a similar "majority" asbestos admission was sufficient to establish product nexus. The Superior Court violated this Court's direction that summary judgment is only appropriately entered where there are "no material factual disputes."⁸ In summary, the Superior Court resolved a material disputed fact in favor of the Defendant.

⁸ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

STATEMENT OF FACTS

Philip Lavelle is a 59 year old automotive technician.⁹ He has been diagnosed with mesothelioma caused by asbestos exposure.¹⁰ He learned how to do such work in high school, worked with automobiles before his high school graduation in 1977,¹¹ and received numerous automotive certifications.¹² Following his high school graduation in 1977, Mr. Lavelle worked as an auto mechanic at various service stations and repair shops including his own automotive repair business which he has operated since 2008.¹³ His only known asbestos exposure is through his work in the automotive trade.¹⁴

Gasket removal and replacement was a common service performed in Mr. Lavelle's automotive service career.¹⁵ He discussed it in detail during his trial deposition¹⁶ as well as his eight days of deposition testimony.¹⁷

⁹ A731, Lavelle dep. 12/1/16, 9:18-19, 22-23.

¹⁰ A732, *Id.*, 14:6-8.

¹¹ A736, A737, *Id.*, 30:13-17, 33:7-35:6.

¹² A1022-A1024, Ex. A to Summary Judgment Answering Brief (SJAB); A764-A766, Exhibits 2 and 3 to Lavelle 12/1/16 Vid. Dep.

¹³ A1025-A1030, Ex. B to SJAB (work history); A1041-A1052, Ex. D to SJAB (Lavelle Affidavit); A778-A788, Ex. 11 to Lavelle 12/1/16 Vid. Dep. (Lavelle Affidavit).

¹⁴ A732, Lavelle 12/1/16, 14:9-13.

¹⁵ A743, Lavelle 12/1/16, 57:12-58:4.

¹⁶ A735-736, Lavelle 12/1/16, 25:17-30:12, A743-744, *Id.*, 57:9-64:8, A747-A748, *Id.*, 73:15-77:8, A753, *Id.*, 97:23 - 98:13, A754, *Id.*, 101:16-102:7.

¹⁷ A298-299, 72:3-73:8; A304, 95:21-96:14; A324, 173:5-174:14; A326-A327, 184:17-187:8; A328-A330, 191:8-199:20; A333, 211:4-6; A397, 255:16; A400, 265:2-13; A410-A411, 308:15-309:11; A415, 328:2-22; A426-A427, 372:5-

Mr. Lavelle explained the methodology in removing and replacing of gaskets during his work:

Well, you would use whatever tools, power or hand tools are necessary to disassemble the components. And then as far as gasket removal, some gaskets may come right off and intact, basically, and leave no residue. Other gaskets may run the other end of the spectrum for difficulty of or complexity of removal and preparation. Other gaskets may leave considerable material bonded to the surfaces, mounting surfaces, which would require scraping and abrasion methods to remove the residual material. The abrasion methods, it wasn't unusual to have high-speed rotary abrasive tools used to accomplish that.¹⁸

At times, the process could be quite dusty.¹⁹

Mr. Lavelle explained that installation of a gasket necessarily required removal of a gasket:

373:12; A432-A433, 396:18-397:4; A451-A452, 465:24-469:6; A455-A456, 484:14-485:23; A456-A459, 487:8-498:4; A461, 506:20-507:10; A469, 537:14-540:9; A472-A474, 550:3-559:10; A476, 565:9-567:15; A478-A479, 575:19-580:25; A512-A513, 705:21-709:21; A518-A520, 730:4-739:14; A523, 749:6-9; A524, 752:20-753:24; A526-A528, 760:4-771:17; A540-A541, 814:22-815:4; A541-A542, 816:21-820:5; A544-A546, 827:12-835:3; A546-A547, 838:13-840:19; A549, 848:21-850:13; A551, 855:1-2; A555, 872:18-21; A556, 876:3-23; A556, 877:18-878:3; A564, 907:8-908:11; A564, 910:10-12; A566-A567, 916:19-920:11, A572-586, 940:5-997:3; A588-A593, 1005:15-1024:1; A597-A602, 1034:12-1056:1; A603-A604, 1060:15-1063:14; A610, 1087:1-15; A612-A614, 1094:11-1104:25; A617-A633, 1114:5-1181:14; A630,1203:1-1205:19; A644, 1223:11-1224:5; A657-A662,1272:12-1291:3; A666-A677, 1307:16-1353:24; A686-A687, 1389:18-1390:6; A689, 1401:8-15; A705-A706, 1455:24-1456:2.

¹⁸ A743, Lavelle 12/1/16 dep, 59:11 to 59:24.

¹⁹ A743, Lavelle 12/1/16 dep., 59:8-60:-4. This was a description of gasket removal and replacement at Quillen Getty, but he explained that the methodology was the same throughout his work. A747-A748, 76:20-77:8.

23 Q. In general, as to gaskets, would you
24 agree that the installation of new gaskets
25 required removal of the previous gasket?

□

2 THE WITNESS: Absolutely.

3 BY MS. WARNER:

4 Q. Is that the same for brake replacement
5 and removal?

□

7 THE WITNESS: Yes, absolutely.

8 BY MS. WARNER:

9 Q. And why is that?

10 A. Well, to replace a component, a gasket
11 would, out of necessity, require removing the
12 gasket that would be replaced.²⁰

Even Fel-Pro's corporate representative, Robert Pearlstein, explained the importance of fully removing the prior gasket prior to installation of the new gasket; thus it is a part of installation.²¹ Defendant Fel-Pro instructed installers of its gaskets to completely remove the prior gasket.²²

Mr. Lavelle worked at Joe Shilling by his recollection from November 1980 until 1984 and by Social Security records from 1980 to 1983.²³ Four other mechanics worked with him, who did similar jobs, and worked in close proximity

²⁰ A736, 29:23 to 30:12.

²¹ A1035, Ex. C to SJAB, Robert Pearlstein Dep 1/10/12, 56:15-24.

²² A1036-A1037, *Id.* at 57:7-58:1.

²³ A745, Lavelle 12/1/16 dep, 65:16-20, A1057, Ex. E to SJAB, SSPO.

to him with no ventilation during colder months.²⁴ He did much more gasket work at this shop.²⁵

Mr. Lavelle primarily installed Fel-Pro gaskets at Joe Shilling.²⁶ He did so dozens, maybe over a hundred times.²⁷ These included engine gaskets.²⁸ He removed Fel-Pro gaskets at Joe Shilling.²⁹ Mr. Lavelle preferred Fel-Pro gaskets.³⁰

He explained the applications for which he removed and replaced gaskets at Joe Shilling: “They would involve all engine gaskets, all exhaust system gaskets, all transmission gaskets, all final-drive gaskets -- being differentials, transfer cases.”³¹ This included cylinder head gaskets, a type of engine gasket.³² Fel-Pro was among the type of these cylinder head gaskets he removed from automobiles at Joe Shilling.³³ He also used it as a replacement gasket.³⁴ He also used Teflon Blue, another engine gasket.³⁵ Mr. Lavelle recalled using Permatorque, a Fel-Pro cylinder head gasket, on automobiles at Joe Shilling in the early 1980’s. It was a

²⁴ A745, Lavelle 12/1/16 dep., 66:7-15, A749, *Id.*, 81:14-82:23.

²⁵ A747, *Id.* at 73:15- 74:9.

²⁶ A582, 981:8-10.

²⁷ A582, 982:6-7.

²⁸ A583, 983:8-9.

²⁹ A584, 988:13-22.

³⁰ A575, Lavelle 6/29/16 dep., 951:20-24, A644, Lavelle 7/14/16 1223:22-1224:5.

³¹ A747, Lavelle 12/1/16 dep., 74:6 to 74:9.

³² *Id.*, 74:12-13.

³³ *Id.* at 74:14-25.

³⁴ *Id.* at 75:13-76:18.

³⁵ A747-A748, *Id.*, 76:7-18.

common gasket he used.³⁶ Fel-Pro cylinder head gaskets were clearly identifiable by their blue color.³⁷

He explained the methodology for removing and replacing gaskets was similar to what he had described at Quillen Getty, *supra*.³⁸ He explained it was “Very similar. Very similar. And once again, depending on the gasket, the application the, the location on the vehicle. Some gaskets come off quite easily. Some gasket materials don't require anything other than pulling them off and light cleaning of surfaces for replacement. Other gaskets could be extremely stubbornly bonded to the component surfaces and require a extensive amount of abrasive action to remove the material.”³⁹

He also used Fel-Pro as replacement engine head gaskets on his own four or five vehicles on which he did engine work prior to 1985.⁴⁰ He performed entire engine gasket replacement on his Pontiac GTO in 1980.⁴¹ This included installation of Fel-Pro cylinder head gaskets.⁴² Subsequently, he removed Fel-Pro cylinder head gaskets approximately three or four times from the GTO between

³⁶ A743-A744, Lavelle 12/1/16 dep., 60:22- 62:3, A747, *Id.*, 75:23-76:6.

³⁷ A575, Lavelle 6/29/16, 953:24-954:9.

³⁸ A747-748, 76:20-77:8, *see* A743 at 57:8-60:4.

³⁹ A747-A748 at 76:20 to 77:8.

⁴⁰ A754 at 101:16-102:7.

⁴¹ A572-A576, Lavelle 6/29/16, 940:1-958:21.

⁴² A574, Lavelle 6/29/16, 950:7-13.

1980 and 1988.⁴³ To do so he used a combination of scraping tools and high speed rotary abrasive tools.⁴⁴

Fel Pro admits it sold asbestos-containing engine gaskets including those marketed as Perma-Torque and Teflon Blue, which Mr. Lavelle used: “In general, an asbestos-containing engine gasket contained chrysotile asbestos encapsulated in one of the materials listed above. Some of the gaskets which on occasion contained asbestos were marketed under the trade names Fel-coply, Teflon Blue, Perma-Torque, Print-o-seal, Alupak, Felbestos, Shimbestos, Perma-Torque Gold, Perma-Torque Blue, and others.”⁴⁵

Fel Pro’s corporate representative admitted that the vast majority of automotive cylinder head gaskets in the early 80’s contained asbestos:

A. In the early '80s, the vast majority of
11 automotive cylinder head gaskets contained asbestos -
-
12 Q. And --
13 A. -- from anybody.⁴⁶

He stated that the majority of gaskets in the mid-1980’s “didn’t have asbestos-
because they weren’t cylinder head gaskets.”⁴⁷ This clearly indicates that

⁴³ A578-579, *Id.* 966:6-969:1.

⁴⁴ A579, *Id.*, 968:1-19.

⁴⁵ A1065-A1066, Pltf’s Ex. F, Federal Mogul Response to Interrogatories, Response to Interrogatory No. 1, p. 5 and 6.

⁴⁶ A1040, Ex. C to SJAB, Pearlstein dep. 1/10/12, 74:10-13, 74:6-13; A1034, *Id.*, 47:21-24.

⁴⁷ A1039, *Id.*, 73:20-21 (emphasis added).

cylinder head gaskets had asbestos in the mid-1980's, as opposed to other types of gaskets. He confirmed the transition period from asbestos to non-asbestos was in the mid 1980's for asbestos-category gaskets such as head gaskets.⁴⁸ In 1986, Mr. Lehman, the President and Chief Sales and Marketing Officer for Fel-Pro, stated before the EPA that three to seven years was needed before asbestos could be phased out in certain high heat applications, specifically including engine gaskets within that category and referencing cylinder head gaskets as an example he had brought with him of historically asbestos-containing gaskets.⁴⁹ He specifically said that Fel-Pro, among other manufacturers, was a major manufacturer of gaskets used in, *inter alia*, cylinder head gaskets.⁵⁰ He stated that he brought samples of these products for the panel's review and that the qualities necessary for a satisfactory product have been best achieved by the use of asbestos.⁵¹ In 1986, he requested from the EPA at least three years to allow for asbestos to be eliminated specifically from engine gaskets.⁵² This testimony would give rise to an inference that asbestos was most likely present in Fel-Pro's cylinder head gaskets in the early 1980's when Mr. Lavelle was exposed to them.

⁴⁸ A1040, *Id.* 74:1-4.

⁴⁹ A1069-1070, Ex. G to SJAB, Testimony of Ken Lehman before EPA on 7/22/86, p. 7-8.

⁵⁰ A1069.

⁵¹ A1069.

⁵² A1070.

ARGUMENT

I. THE TRIAL COURT ERRED BY DECIDING A FACT WHICH WAS THE EXCLUSIVE PROVINCE OF THE JURY.

A. Question Presented. Did the Superior Court err in granting the Defendant's motion for summary judgment when a dispute of material fact remained? This issue was preserved in Plaintiffs' summary judgment answering brief to the motion for summary judgment filed by Fel-Pro⁵³ and at oral argument on the motion for summary judgment.⁵⁴

B. Scope of Review. The Court below made an error of law in granting Defendant's motion for summary judgment. Therefore, the standard of review on appeal is *de novo*.⁵⁵

C. Merits of Argument.

1. Standard of Review on Motion for Summary Judgment.

"Following the grant of a motion for summary judgment, the applicable standard of appellate review requires this Court to examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the

⁵³ A1012-A1021.

⁵⁴ Exhibit B, Hearing Transcript 8-14-17 at 33:8-36:13, 41:22 - A44:18, 99:22-107:16.

⁵⁵ *Dabaldo v. USR Energy & Const.*, 85 A.3d 73, 77 (Del. 2014).

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.”⁵⁶

Delaware Superior Court Rule of Civil Procedure 56(c) governs motions for summary judgment and provides “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Summary judgment should only be entered where there are “no material factual disputes.”⁵⁷

The court may not “weigh qualitatively or quantitatively the evidence adduced on the summary judgment record. The test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail.”⁵⁸ “Plaintiffs are, of course, entitled to have that record read in the way most favorable to them, and they get the benefit of any inferences therefrom.”⁵⁹ It has long been established that issues of negligence are generally not appropriate for resolution by summary judgment.⁶⁰

⁵⁶ *Sostre v. Swift*, 603 A.2d 809, 811-12 (Del 1992).

⁵⁷ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

⁵⁸ *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

⁵⁹ *Mechell v. Palmer*, 343 A.2d 620, 621 (Del. 1975).

⁶⁰ *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).

As this Court has recognized, Judges are only empowered to decide whether there are issues of fact on a motion for summary judgment, not to decide them:

Summary judgment is a harsh remedy that affects a party's substantive rights. It must be cautiously invoked, and is not a mechanism for resolving contested issues of fact. Rather, summary judgment may only be granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. As Wright, Miller & Kane explain in their influential treatise: "[S]ummary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried."⁶¹

2. Standard for Product Nexus in Asbestos Cases.

Product nexus relates to proximate causes and is a term used to describe a factual connection in space and time between a particular plaintiff and a particular defendant's product...[] Implicit within this product nexus standard is the requirement that the particular defendant's product to which the plaintiff alleges exposure must be friable, that is, the product must be susceptible to releasing fibers which are capable of ingestion or respiration into the plaintiff's body.⁶²

3. Product Nexus was Proved Below. As shown above by the facts, Mr. Lavelle removed and replaced a number of Fel-Pro cylinder head gaskets during the early 80's time frame when Fel-Pro admits the vast majority of such gaskets contained asbestos. That should have been enough to overcome the

⁶¹ In *GMG Capital Invs., Ltd. Liab. Co. v. Athenian Venture Partners I, Ltd. P'ship*, 36 A.3d 776, 783 (Del. 2012) (internal citations omitted).

⁶² *Mergenthaler v. Asbestos Corp. of America, Inc.*, 1988 Del. Super. LEXIS 392, *2-3 (Del. Super. Sept. 12, 1988); see *In re Asbestos Litig.(Helm)*, 2007 Del. Super. LEXIS 155, *67-68 (Del. Super. May 31, 2007).

product-nexus based summary judgment motion. This “majority” admission by a Defendant was sufficient to overcome summary judgment and a motion for judgment notwithstanding the verdict in *In re Asbestos Litig. 112010jr Trial Grp. To: Henderson, Henderson*, Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82, at *18 (Del. Super. Feb. 2, 2011) where the Superior Court held:

While it is true that Dana manufactured both asbestos-containing and asbestos-free gaskets, Plaintiffs presented evidence from which the jury could reasonably conclude that Elizabeth and Bruce were exposed to the asbestos- containing varieties. In particular, Plaintiffs offered a 1980 article by John E. Zeitz, then employed as the Victor Products Division chief engineer at Dana, which indicated that the applications for which gaskets were used in cylinder heads, intake manifolds, and exhaust manifolds "require[d]" the use of materials with certain qualities then only available in asbestos, which was therefore used in the "**majority**" of gaskets manufactured for those applications. Zeitz further indicated that heavily-loaded flanges "require the crush and extrusion resistance of asbestos," which was used in "a large number of extremely heavily loaded flanges." Zeitz suggested that it was or soon would be "possible to replace asbestos in different ways for different applications" and "present design engineers and the marketplace with an improved product with greater appeal." As the Court noted in denying Dana's motion for summary judgment, the 1980 Zeitz article could support a reasonable inference that all of the gaskets Dana manufactured for the particular applications identified up to that time contained asbestos. Indeed, because Zeitz discusses the "possible" replacement of asbestos for the applications described in the future, it is difficult to arrive at a contrary reading.⁶³

The Superior Court there explained why, because of the Zeitz article

⁶³ *In re Asbestos Litig. 112010jr Trial Grp. To: Henderson, Henderson*, Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82, at *18-19 (Del. Super. Feb. 2, 2011) (emphasis added).

summary judgment had been denied:

The Zeitz article and usage testimony were crucial in defeating Dana's argument that *Stigliano v. Westinghouse* entitled it to summary judgment, and, together with additional evidence adduced at trial, fully support the jury's verdict against Dana. *Stigliano* holds that no reasonable inference of exposure to asbestos is supported "[w]hen the record reveals that a defendant manufactured both asbestos-containing and non asbestos-containing versions of a product during the time period of alleged exposure, *in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product.*" **Thus, *Stigliano* addresses a particular, albeit oft-recurring, evidentiary deficiency in product exposure cases; it does not stand for the proposition that a manufacturer is *always* entitled to judgment in its favor merely because it manufactured asbestos- containing and asbestos-free varieties of a product during the time period of the alleged exposure. Here, in contrast to *Stigliano*, Plaintiffs provided evidence linking Bruce and Elizabeth Henderson to asbestos-containing Victor gaskets, thereby creating a triable issue as to causation.** The jury was free to credit that evidence, which it did.⁶⁴

Here, although the admissions by Fel-Pro's corporate representative and President are not identical to the admissions made by Zeitz, they are similar. Most importantly, Zeitz stated that the majority of certain types of gaskets were asbestos-containing, and made other statements which the Superior Court found sufficient to lead a rational juror to accept that all gaskets for particular applications were asbestos-containing. Here, Plaintiffs have submitted evidence, statements by Fel-Pro's

⁶⁴ *In re Asbestos Litig. 112010jr Trial Grp. To: Henderson, Henderson*, Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82, at *20-22 (Del. Super. Feb. 2, 2011) (emphasis added).

representatives, which show that at the very least the “vast majority” of the Fel-Pro cylinder head gaskets had asbestos, and Mr. Lavelle was regularly occupationally exposed to them. This is sufficient to lead a rational juror to accept that he was exposed to asbestos from his work with them.

Similarly, in *Walls v. Ford*,⁶⁵ the Superior Court denied summary judgment as to original asbestos containing brake exposure. The Superior Court held there was an issue of fact as to whether John Walls had been exposed to Ford original brakes or other asbestos-containing original component parts when the plaintiff testified he worked on new vehicles and denied summary judgment.⁶⁶ The reason this case is significant is because the Court permitted an inference, where there was testimony that plaintiff worked on “new” Fords, that he removed original asbestos-containing parts, even where there was no testimony that he removed the “original” asbestos-containing part. An inference was permitted that when the plaintiff worked on many new Ford cars, removing asbestos-containing parts, at least some of those asbestos-containing parts were original, and therefore, Ford products.⁶⁷

These cases show that an inference should be given where there is evidence from which a rational juror could determine it was more likely than not that a

⁶⁵ Exhibit D, *Walls v. Ford*, C.A. 14C-01-057 ASB, p. 20:22-28:16 (Del. Super. September 10, 2015) (Transcript).

⁶⁶ Exhibit D, *Walls v. Ford*, C.A. 14C-01-057 ASB, p. 20:22-28:16 (Del. Super. September 10, 2015) (Transcript).

⁶⁷ *Id.* at 24:7-16.

plaintiff was exposed to an asbestos containing product, even where the plaintiff cannot himself state that the product he worked with contained asbestos.

Circumstantial evidence is sufficient. Since Mr. Lavelle removed and replaced Fel-Pro's cylinder head gaskets on a regular basis for years in the early 1980's, and the vast majority of these contained asbestos, it is more likely than not that he was exposed to asbestos- containing Fel-Pro cylinder head gaskets.

Mr. Lavelle discussed that removal and replacement of gaskets was sometimes dusty. Plaintiffs proffered evidence of friability in his summary judgment answering briefing, citing both the federal register and affidavits from Industrial Hygiene experts.⁶⁸ Further, Plaintiffs proffered that expert testimony regarding the friability of gasket removal and replacement would be provided at the appropriate time under the scheduling order. Expert disclosures were not due until after the summary judgment decisions on product nexus were determined.⁶⁹

4. The Superior Court's Decision Below. Below, Fel-Pro's primary argument was that Mr. Lavelle could not establish at least a question of material fact as to whether he had been exposed to asbestos from Fel-Pro's gaskets. Fel-Pro relied on *Stigliano v. Westinghouse*, No. 05C-06-263-ASB, 2006 Del. Super. LEXIS 433, at *2 (Del. Super. Oct. 18, 2006), where the Superior Court held that

⁶⁸ A1019, SJAB and A1071-A1078, Exs. H and I to SJAB.

⁶⁹ A1019, SJAB, fn. 33; A265, MTSO April 2018 TG, No. 8. Originally expert disclosures were due on September 8, 2017 but by agreement of the parties the deadline was extended to September 22, 2017.

“[w]hen the record reveals that a defendant manufactured both asbestos-containing and non asbestos-containing versions of a product during the time period of alleged exposure, in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product, the Court cannot draw the inference of exposure and summary judgment on product nexus must be granted.” The court below agreed that Plaintiff had not produced evidence directly or circumstantially that Mr. Lavelle was exposed to Fel-Pro’s asbestos-containing gaskets.⁷⁰

The court below erred by completely ignoring the admissions by Fel-Pro’s corporate representatives that almost all automotive cylinder head gaskets contained asbestos through the early 1980’s.

Fel Pro’s corporate representative admitted that the vast majority of automotive cylinder head gaskets in the early 80’s contained asbestos:

A. In the early '80s, the vast majority of
11 automotive cylinder head gaskets contained asbestos -
-
12 Q. And --
13 A. -- from anybody.⁷¹

He explained that the vast majority of cylinder head gaskets designed for regular automobiles in the early 1980s had asbestos.⁷²

⁷⁰ *Lavelle v. The Ford Motor Co.*, C.A. No. N16C -03-079 ASB, p. 11 (Del. Super. September 19, 2017) (Wharton, J.) (ORDER) (Ex. A).

⁷¹ A1040, Ex. C to SJAB, Pearlstein 1/10/12, 74:10-13, 74:6-13; A1034, *Id.*, 47:21-24.

⁷² A1038-A1040, *Id.* at 72:20-74:13.

Further, the Superior Court dismissed the fact that a similar “majority” admission by a Defendant was sufficient to overcome summary judgment and a motion for judgment notwithstanding the verdict in *In re Asbestos Litig. 112010jr Trial Grp. To: Henderson, Henderson*, Nos. 09C-07-188 ASB, 09C-04-293 ASB, 2011 Del. Super. LEXIS 82, at *18 (Del. Super. Feb. 2, 2011), where despite the fact that Dana manufactured both non- asbestos and asbestos gaskets during the relevant time period, its employee had testified that the majority of certain gaskets had asbestos and required asbestos, and therefore a question of fact existed.

In 1986, Mr. Lehman, the President and Chief Sales and Marketing Officer for Fel-Pro, stated before the EPA that three to seven years was recommended before asbestos could be phased out in certain high heat applications, specifically including engine gaskets within that category.⁷³ The court below stated that his testimony was given on behalf of the gasket industry generally and not specific to Fel-Pro gaskets.⁷⁴

However, Lehman’s testimony was relevant as to the issue of the asbestos-containing nature of cylinder head gaskets, and the foreseeability by Fel-Pro that those gaskets – both Fel-Pro’s and those across the industry- would contain asbestos.

⁷³ A1069-1070, Ex. G to SJAB, Testimony of Ken Lehman before EPA on 7/22/86, p. 7 and 8.

⁷⁴ *Lavelle v. The Ford Motor Co.*, C.A. No. N16C -03-079 ASB (Del. Super. September 19, 2017) (Wharton, J.) (ORDER) (Ex. A), p. 9.

The speaker, Mr. Lehman, was the President and Chief Sales and Marketing Officer for Fel-Pro at the time he spoke⁷⁵ about the composition of Fel-Pro's high heat gaskets, including cylinder head gaskets, to the Environmental Protection Agency. The testimony is labeled on behalf of "Fel-Pro" among other companies.⁷⁶ He is clearly talking on behalf of and about Fel-Pro, as well as other gasket manufacturers.⁷⁷

Indeed, there was no contention that Mr. Pearlstein, the Fel-Pro corporate representative that made an admission, was not talking about Fel-Pro.

Even by the Court's determination that as a matter of law Mr. Lavelle worked at Joe Shilling from 1980 to 1983 or 1984, those are the early 1980's. He worked with Fel-Pro cylinder head gaskets regularly – he both installed and removed them – in the early 1980's when the "vast majority" of Fel-Pro's cylinder head gaskets contained asbestos. Further it must be remembered that in civil cases the burden of proof is "preponderance of evidence" not "beyond a reasonable doubt."⁷⁸ Certainly, Plaintiffs provided evidence from which a rational jury could determine it was more likely than not that at least some of the Fel-Pro cylinder head gaskets Mr. Lavelle was exposed to in the early 1980's were asbestos-containing.

⁷⁵ A1069.

⁷⁶ A1068.

⁷⁷ A1069.

⁷⁸ DEL. P.J.I. CIV. § 4.1 (2000).

CONCLUSION

Wherefore, Plaintiffs request that this Court reverse the Superior Court's decision on summary judgment.

Respectfully submitted,

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