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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION **SANDRA KIVELL, individually, and as Personal Representative of the Estate of MILTON J. KIVELL, deceased**. Plaintiff Below, Appellant, v. **UNION CARBIDE CORPORATION,** Defendant Below, Appellee.	No. 15, 2020 On Appeal from the Superior Court of the State of Delaware in C.A. No.: N15C-07-093 (ASB)

APPELLANT'S AMENDED OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff-Appellant Sandra Kivell, individually and as personal representative of the estate of her deceased husband Milton J. Kivell, brings this premises liability case against Defendant-Appellee Union Carbide Corporation ("UCC" or "Union Carbide"). Mr. Kivell experienced significant asbestos exposure at Union Carbide's industrial facility in Taft, Louisiana, while employed by independent contractors.

The Superior Court committed error in granting Union Carbide's Motion for Summary Judgment. In so doing, the Superior Court improperly resolved questions of material fact in Union Carbide's favor, and disregarded controlling Louisiana law in favor of distinguishable decisions.

After granting Appellant's Motion for Reargument in light of newly discovered evidence, the Superior Court moved the goal posts, again granting summary judgment although Appellant presented the exact evidence the Superior Court identified as lacking in Appellant's original response.

The Superior Court opted not to hear oral arguments on either Appellee's original motion, or on reargument.

Plaintiff contends in the first instance that Mr. Kivell's testimony, standing alone, is sufficient to survive summary judgment. He describes extensive exposure to asbestos at Appellee's facility, both in new construction but also to existing structures, at times at Appellee's explicit direction. In response Union Carbide

adduced not one single fact about its property or Mr. Kivell's work. There was no basis on the original summary judgment record for the Superior Court to find in Appellee's favor.

Regardless, however, the evidence set forth by Plaintiff in her Motion for Reargument certainly passes the minimal bar for purposes of summary judgment. The evidence demonstrates the specific evidential issues identified as lacking by the Superior Court in its Order granting summary judgment – that significant asbestos was present, that Appellee specified the use of asbestos, and that Appellee was aware of the hazard.

Appellant's position is consistent with the governing substantive law of Louisiana, as supported by testimonial and documentary evidence. Accordingly, Appellant asks this Court to restore her right to a trial on the merits.

SUMMARY OF THE ARGUMENT

1) The Superior Court erred as a matter of law by granting Appellee's motion for summary judgment notwithstanding the existence of numerous questions of material fact.

STATEMENT OF RELEVANT FACTS

A. Mr. Kivell's Testimony of Exposure at Appellee's "Taft Facility"

Mr. Kivell died from asbestos-caused mesothelioma on September 5, 2015, at the age of sixty-eight. Mr. Kivell suffered prolonged exposure during his career as an industrial pipefitter. "[O]ne of the biggest jobs" in his career was at UCC's industrial facility in Taft, Louisiana ("Taft," or the "Taft Facility"), where he worked for periods between 1966 and 1969.[1] While working in the Taft Facility, Mr. Kivell was employed directly by a series of independent contractors: Stearns Roger Corporation (1966-67) ("Stearns-Roger"), Parsons Government Services Inc. (1967-68), and Peter Kiewit Sons Company (1968-69) ("Kiewit").[2]

Much of Mr. Kivell's work at Taft involved the construction of new units. But that new construction involved "tie-ins" to existing systems.[3] Mr. Kivell needed permission from UCC staff before performing a tie in. To perform a tie-in, Mr. Kivell would "hack" at existing insulation, expose the line, and attach the new

[1] A728-729 (Kivell disc. dep. at 143:18-144:2).

[2] *See* A697 (Kivell video dep. at 94:14-20); *see also* A755 (Social Security records for Milton Kivell, at 2). Mr. Kivell worked as a pipefitter from 1966-1987. The nearly four years he spent at the Taft Facility, therefore, represents a substantial portion of Mr. Kivell's work life (and exposure to asbestos).

[3] A699-703 (Kivell video dep. at 96:21-100:21) ("[Y]ou would be covered with [dust from the insulation], and you would inhale it").

equipment.[4] Mr. Kivell performed a fair bit of maintenance at UCC.[5] Such work was at UCC's direct request:

> Maintenance, where the Union Carbide requested. If they had additional work while you were on that new site, if they had something that they wanted done, they would work with the contractor and have men pulled from their site to go work with whatever job they needed completed, whether it's a short line here or short line there, maybe even a tie-in or something else in another unit.[6]

Mr. Kivell worked with asbestos containing gaskets at UCC Taft.[7] The gaskets were manufactured by well-known asbestos-sellers such as Flexitallic, Fel-Pro, and Garlock.[8] His description of the gaskets: "a nice, white, fibery type material" – is entirely consistent with asbestos.[9]

Mr. Kivell testified that the insulation used at Taft was asbestos.[10] He saw packages of insulation from Johns Manville, among the most notorious purveyors of asbestos during the years of Mr. Kivell's exposure.[11]

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[4] *Id*.

[5] A726-728 (Kivell disc. dep. at 141:4-143:17).

[6] *Id.* at 142:21-143:3.

[7] A725 (*id.* at 140:7-20).

[8] A742-745 (*id.* at 157:17-160:4).

[9] *See, e.g., https://www.asbestos.net/asbestos/products/gaskets/* (identifying Flexitallic and Garlock as "major asbestos gasket companies," noting that "Garlock manufactured gaskets that contained white asbestos"), last visited March 13, 2020.

[10] A731 (*id.* at 146:3-12).

[11] A736 (*id.* at 151:8-24).

Mr. Kivell was also exposed to significant asbestos as a bystander to other workers, including insulators and boilermen, working in his direct vicinity.[12] This too exposed him to respirable dust.[13] Mr. Kivell never saw any warning signs at the Taft Facility, and was never warned of the dangers of asbestos.[14]

UCC admits that by 1964, "the potential association between long-term exposure to some types of asbestos and certain diseases had been known for many years."[15]

B. Procedural History Through Motions for Summary Judgment

This litigation commenced through the filing of Plaintiff's Complaint on July 10, 2015.[16] Mr. Kivell was deposed for three days from August 12-14, 2015, a few short weeks before his death in early September. On September 30, 2016, Appellant filed her second amended complaint, substituting herself as party plaintiff and adding a wrongful death claim.[17]

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[12] A704-710 (Kivell video dep. at 101:6-107:1); A735-737 (Kivell disc. dep. at 150:19-152:24).

[13] A708-709 (Kivell video dep. at 105:23-106:11).

[14] A712-713 (*Id.* at 109:7-110:1).

[15] *See, e.g.,* A588 (UCC's Responses to Plaintiff's Supplemental Interrogatories, at 3, Apr. 10, 2017).

[16] A182-212.

[17] A 275-308. Plaintiff's first amended complaint simply added a defendant. A228-259.

On December 6, 2016, current counsel substituted their appearance for Plaintiff, replacing previous counsel. On February 6, 2017, Appellant served Appellee with case-specific discovery requests.[18]

On March 10, 2017, the Superior Court granted Defendants' unopposed motion to establish the substantive law of Louisiana as controlling.[19]

On April 10, 2017, Union Carbide served its Objections and Responses to Plaintiff's Supplemental Interrogatories and Requests for Production.[20] UCC did not produce a single document in conjunction with its responses, instead offering access to its "document repository," without confirming or denying that responsive documents existed.[21] This was approximately twenty-five (25) days before the deadline for fact discovery – too late to litigate more complete disclosure in advance of summary judgment briefing.

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[18] A325-362.

[19] A363-368. In asbestos litigation in Delaware, the substantive law of the jurisdiction where the majority of the exposure occurred applies, and there was no dispute that Louisiana law should apply here.

[20] A369.

[21] Louisiana case law makes clear that UCC has been sued with respect to its Taft Facility regarding alleged asbestos exposure during the same time frame. *See Smith v. Union Carbide Corp.*, 2014 WL 4930457 (E.D. La. Oct. 1, 2014); *Legendre v. Anco Insulations, Inc.*, 2013 WL 3107471 (M.D. La. June 18, 2013). It is therefore surprising that UCC has not identified and produced responsive documents regarding Taft in the past.

A quick aside as to discovery – under the then-active General Scheduling Order governing asbestos litigation, discovery does not close until well after summary judgment, shortly in advance of trial.[22] This illustrates the fact that asbestos summary judgment practice is intended to weed out clearly non-meritorious claims, and not require the Parties to present fully developed cases. Appellant knew that she could finalize the details of her case after summary judgment, through, *inter alia*, deposition of Union Carbide's corporate representative.

On June 6, 2017, Appellee filed its motion for summary judgment.[23] Union Carbide moved for summary judgment on two grounds, arguing that:

- Union Carbide owed Mr. Kivell no duty (and therefore was not negligent); and
- Union Carbide is not strictly liable, because "there is no evidence Mr. Kivell was exposed to asbestos in [UCC's] custody or control."[24]

On July 10, 2017, Plaintiff filed her opposition to UCC's motion for summary judgment.[25] There, Appellant presented Mr. Kivell's testimony as set forth above. Believing that testimony sufficient to demonstrate unresolved questions of material fact (and because Union Carbide failed to produce any documents), Appellant relied principally on Mr. Kivell's testimony.

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[22] Transaction ID 58312536, at ¶18, No. 77C-ASB-2 (Del. Super. Dec. 17, 2015).

[23] A370-397.

[24] A373, A374.

[25] A398-472.

Plaintiff also relied heavily on two decisions – a Louisiana appellate decision affirming a jury verdict in favor of an independent contractor-carpenter over a premises owner,[26] and a similar decision by the Eastern District of Louisiana in the summary judgment context.[27] The second case, *Smith v. Union Carbide Corp*., was distinguishable from the first in that in *Smith* the plaintiff was an asbestos insulator (as opposed to a carpenter), and the court nonetheless found the premises owner potentially liable for his exposure to asbestos.

On July 25, 2017, UCC filed its reply.[28] Union Carbide put *no* facts about its facility on the record, either in its motion for summary judgment, or in its reply in support of same. Mr. Kivell's testimony, therefore, was uncontroverted for purposes of summary judgment and should have been accepted as true by the Superior Court.

[26] *Thomas v. A.P. Green Industries, Inc.*, 933 So.2d 843, 852 (La. Ct. App. 2003).

[27] *Smith v. Union Carbide Corp.*, 2014 WL 4930457 (E.D. La. Oct. 1, 2014).

[28] A473-484

C. The Superior Court Grants UCC's Motion for Summary Judgment

On August 30, 2017, *the day before oral arguments were scheduled*, the Superior Court filed its Order granting summary judgment in favor of Union Carbide.[29] The Superior Court declined to hear oral arguments on the matter.

The Superior Court granted summary judgment because "Plaintiff has not presented evidence that [UCC] knew of the risks of asbestos, specified the use of asbestos in the construction, or that Mr. Kivell used asbestos products in the construction of the building."[30] The Superior Court was simply incorrect about each of these evidential points – Mr. Kivell testified that he was exposed to asbestos at Taft, and that Union Carbide controlled at least some aspects of his work. There was evidence on the record that UCC knew the dangers of asbestos. Moreover, certainly Union Carbide put forth no evidence that it *did not* specify the use of asbestos at Taft. It was, after all, Union Carbide's burden to prove the *nonexistence* of questions of fact for resolution at trial.

The Superior Court relied heavily on a decision by the Western District of Louisiana granting summary judgment against a silica blaster who sought

[29] Order Granting Union Carbide Corporation's Motion for Summary Judgment, Aug. 30, 2017 (attached hereto as **Exhibit A**).

[30] Ex. A, at 7.

compensation for damages caused by exposure to silica.[31] The Superior Court noted the "distinction between hazards that are inherent in a defendant's premises (for which a premises owner owes a duty) and hazards inherent in an independent contractor's job (for which a premises owner does not owe a duty)."[32]

Of course, Mr. Kivell was a pipefitter, and not an insulator. There was no reason to think that asbestos was "inherent" in Mr. Kivell's work as a pipefitter.[33] This fact made it especially strange for the Superior Court to rely on the decision it did, as opposed to the multiple decisions cited by Plaintiff in support of her case.

Finally, the Superior Court also granted summary judgment as to Appellant's claim sounding in strict liability.[34] This conclusion hinged on an analysis of "custody," and the Superior Court concluded "there is nothing in the record indicating that [Union Carbide] had any type of direction, control, or ownership of an asbestos product used by Plaintiff." This too was an improper shifting of burden by the Superior Court, moving the burden away from Union Carbide to prove the *absence* of disputed material facts.

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[31] Ex. A, at 6 (citing *Roach v. Air Liquid America*, 2016 WL 1453074 (W.D. La. Apr. 11, 2016).

[32] Ex. A, at (quoting *Roach*, 2016 WL 1453074 at *4).

[33] *See, e.g., Legendre v. Anco Insulations, Inc.*, 2013 WL 3107471 (M.D. La. June 18, 2013) (where plaintiff was a pipefitter and not an insulator, "asbestos risk was not a risk inherent in his duties.").

[34] Ex. A, at 7-8.

D. Appellant Discovers New Facts; Motion for Reargument

In the meantime, Appellant continued efforts toward discovery. Counsel for Appellant and Appellee exchanged numerous emails.[35] Appellee finally produced some documents, although only those that supported its side of the case. But in the days immediately before scheduled oral arguments on Union Carbide's motion for summary judgment, Appellant received a significant production from one of Appellee's codefendants – Kiewit Corporation, one of the contractors who directly employed Mr. Kivell at UCC Taft. Those documents provided ample evidence about, *inter alia*, Union Carbide's specification of asbestos at Taft, and the extent to which Union Carbide exercised control over the construction on site.

Accordingly, On September 7, 2017, Appellant timely filed her motion for reargument.[36] Appellant appended evidence satisfying each of the deficiencies identified by the Superior Court – evidence that UCC used asbestos extensively at Taft, as specified by UCC, and that UCC knew the dangers of asbestos.

Appellee responded on September 11, 2017, arguing that reargument was unwarranted.[37] Union Carbide was not well positioned for this argument, given that

[35] A487, ¶6; A551-555.

[36] A485-592.

[37] A593-594.

Plaintiff was forced to find documents relevant to the Taft facility not from UCC, but from one of its settling co-defendants.

On January 29, 2018, the Superior Court granted Plaintiff's motion for reargument on the basis of newly discovered evidence.[38] The Superior Court instructed Appellee to file an opposition to the position laid out by Appellant in her motion for reargument, which UCC did on February 5, 2018.[39] Also as instructed by the Superior Court, Appellant filed a "Reply" in further support of her motion for reargument, on February 28, 2018.

Appellant's "Reply" was the most fulsome presentation of Appellant's case.[40] In addition to reiterating and expanding on Mr. Kivell's testimony, Appellant presented significant new information about UCC and the Taft Facility.

E. A More Complete Record Regarding UCC and Taft

a. The Taft Facility Contained Asbestos

Documentary evidence makes clear that there was extensive asbestos present at the Taft Facility, in insulation, gaskets, and otherwise. UCC began measuring air quantities of asbestos at Taft at least as early as 1972.[41] At that time, Taft Plant

[38] A595-597.

[39] A598-680.

[40] A681-836.

[41] A766 (Letter from J. Schonberg to W.J. Dugan, et al., Aug. 17, 1972).

Industrial Hygienist J. Schonberg detailed the work of "contract personnel" making asbestos insulation matts. "The insulators frequently beat the matt in order to shape it." Mr. Schoenberg understood the sample's results to indicate that "the proper wearing of mechanical respirators virtually eliminates the possibility of breathing in asbestos fibers." The document does not indicate whether UCC required the insulator "contract personnel" to wear respirators, or whether it warned and/or equipped nearby workers. UCC submits no evidence to establish such facts.

UCC performed significant asbestos remediation at the Taft Facility. Purely by way of example, in 1989 UCC requested bids for the removal of thousands of feet of asbestos insulation.[42] One estimate set forth a price of $445,076.20, "based on a five year period."[43] Third-party air sampling conducted in 1990 still found the presence of asbestos in 10 out of 14 surveyed areas.[44]

As to gaskets, UCC piping specifications issued in 1964 – the same year as Kiewit's initial contract with UCC – required the use of "compressed asbestos" gaskets.[45] In 1986, Mr. C.C. Neely of UCC's "Special Work Group on Phase-Out

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[42] A768-769 (UCC Internal Correspondence, March 16, 1989).

[43] A771 (Letter from Cajun Insulation to UCC, Aug. 7, 1989).

[44] A773 (West-Paine Laboratories Asbestos Count, Jan. 31, 1990).

[45] A775-783 (*Valve and Piping Specification Nos. 1, 2, 2A*, Union Carbide Corp., Sept. 1, 1964). These specifications are representative of many similar pipe specifications.

of Asbestos-Containing Materials" wrote to a group of his colleagues, stating that "[a] total of approximately one man year of work relating to the selection of non-asbestos gasket/packing materials" would be necessary.[46] UCC's work in this regard was "conducted primarily in the Materials and Valve and Piping Skill areas." UCC would also need to budget for "[p]rinting and distribution of the revised standards."

b. UCC Specified the Use of Asbestos-Containing Parts and Insulation

Documents relating to Mr. Kivell's work with both Stearns-Roger and Kiewit demonstrate that UCC specified the use of asbestos-containing materials and insulation. In 1967, Stearns-Roger sought UCC's approval to retain an insulation subcontractor.[47] Stearns-Roger forwarded the insulator's proposal, which specifies the use of "CareyTemp" insulation as its primary material.[48] A separate enclosure from the insulator shows that the materials are required pursuant to "UCC Spec. 22-H and 22-HHS …."[49] UCC Specification 22-H is for "expanded silica … reinforced with asbestos and glass fibers in suitable proportion."[50] Another UCC specification

[46] A782-783 (Letter from C.C. Neely to L.E. Calvert, et al., Sept. 29, 1986).

[47] A785-786 (Letter from Stearns-Roger to UCC, May 17, 1967) ("we need Union Carbide's approval for this additional work …").

[48] A788-791 (Letter from B&B Engineering & Supply Co. to Stearns-Roger, Nov. 25, 1966).

[49] *Id*., at Schedule "A".

[50] A793-794 (UCC Thermal Insulation Specification 22-H).

setting forth required insulation thicknesses refers to 22-H as "CareyTemp."[51] Thus, the insulation subcontractor hired by Stearns-Roger used the precise brand of asbestos-containing insulation specified by UCC.

This Stearns-Roger project took place in 1967 in the "B," or Benzene Unit. Mr. Kivell testified that he worked in the Benzene unit while working for Stearns-Roger, and explained how closely he was forced to work with insulation subcontractors at that time.[52] Other documents related to Stearns-Roger show that it used asbestos-containing gaskets at the Taft Facility.[53]

As to Kiewit, Plaintiff's Motion for Reargument centered on the contract whereby Kiewit agreed to serve as general contractor for the construction of the "Peracetic Acid Complex" at the Taft Facility. The contract also required Kiewit to perform "[w]hen requested by the Owner from time to time by means of job instructions" various side-jobs, "in accordance with such instructions" and "standby construction labor."[54] The related "Construction Specifications for Peracetic Acid

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[51] A796 ("Economic Insulation Thickness for Plants Taft," Feb. 5, 1965).

[52] A730 (Kivell disc. dep. at 145:15-23); A707-710 (Kivell video dep. at 104:15-107:1).

[53] A798-801 (Stearns-Roger Piping Specification for Taft "B" Plant, revised July 14, 1966.

[54] *See* A809-825 (Contract No. 511-776-18 between UCC and Kiewit, at 4-5, June 6, 1967). These side-jobs are consistent with Mr. Kivell's testimony that he performed maintenance on existing equipment at UCC's instruction.

Complex" include a section titled "Thermal Insulation," and separate "Thermal Insulation Specifications."[55] Of the seven types of insulation specified, at least three contain asbestos. While Kiewit may have subcontracted some of the insulation work, evidence demonstrates that it followed UCC's explicit instructions both with respect to the insulation used, and as to which subcontractors to hire.[56]

c. UCC's Knowledge of the Risk as an Asbestos Miner and Seller

That UCC used asbestos extensively in its facilities is unsurprising insofar as UCC itself sold raw asbestos fibers to a variety of industries from 1963 until 1985.[57] Beginning in 1964, UCC prepared an "Asbestos Toxicology Report," which states in part that "the potential association between long-term exposure to some types of asbestos and certain diseases had been known for many years prior to 1963 …."[58] This Toxicology Report, which UCC revised and updated periodically, speaks persuasively to UCC's negligence in failing to warn Mr. Kivell of the dangers.[59] UCC acknowledges the differences between asbestos types in causing disease (UCC contended and continues to argue that the asbestos it sold cannot cause

[55] A827-831 (excerpts from construction specifications). *See also* A793-794.

[56] A833 (Letter from Kiewit to UCC, dated Dec. 1, 1967.

[57] A758 (UCC's Responses to Standing Order Interrogatories, at 2 (General Objection No. 4), Apr. 24, 2014).

[58] A760-761 (*id.* at 28 (Response to Interrogatory No. 14)).

[59] UCC Toxicology Reports from 1966 and 1969 (attached hereto as **Exhibit C**).

mesothelioma, and sought to distinguish itself from other sellers on that ground). UCC recognizes that greater exposure causes greater risk. UCC sets forth proper methods of protection from asbestos dust.

There can be no question that UCC was aware of the dangerous nature of asbestos during the time Mr. Kivell worked at the Taft Facility. Under the circumstances, UCC was uniquely positioned both to recognize the risk faced by workers such as Mr. Kivell, and to step in with warnings.

F. The Superior Court Agrees with Itself; Again Grants Summary Judgment

On May 1, 2018, again without hearing oral argument, the Superior Court affirmed its decision to grant summary judgment in favor of Union Carbide (the Superior Court's "Second Order").[60]

Although the opinion was prompted by newly discovered evidence, the court cited to significant case law not present in its initial decision. That caselaw, according to the Superior Court, established that a property holder could only be liable for the work of an independent contractor under two circumstances:

1) Where the independent Contractor is involved in "ultrahazardous" work;

   or

[60] Order Granting Union Carbide Corporation's Motion for Summary Judgment after reviewing additional evidence, May 1, 2018 (attached hereto as **Exhibit B**).

2) The principal is in direct control over the manner in which the independent contractor completes the work.[61]

The case the Superior Court cited for this proposition did not appear in its original grant for summary judgment. In fact, the factual circumstances set forth by the Superior Court apply only to a premises owner's *vicarious* liability for the acts of an independent contractor, and not *direct* liability for dangerous conditions on the property. Even as to vicarious liability, the Superior Court ignored the caveat that a principal is also responsible where it "expressly or impliedly approved [the] unsafe work practice that led to an injury."[62]

As to direct liability, the Superior Court reiterated its reliance on the Western District of Louisiana's decision in *Roach*, distinguishing between hazards "inherent" in a defendant's property, as opposed to inherent in a contractor's work. But now the Superior Court held that the mere presence of asbestos "is [not] inherently dangerous or harmful." Rather, "Louisiana case law on asbestos exposure is derived from cases involving asbestos fibers released into the air and subsequently inhaled." It is unclear why the Superior Court ignored Mr. Kivell's testimony of frequent inhalation of asbestos dust at the Taft Facility.

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[61] Ex. B, at 3 (citing *Touchstone v. G.B.Q. Corp.*, 596 F. Supp. 805, 813-814 (E.D. La. 1984)).

[62] *Thomas*, 933 So.2d at 852 (citing *Davenport v. Amax Nickel, Inc.*, 569 So.2d 23, 27-28 (La. Ct. App. 1990)).

Finally, the Superior Court cited another case for the first time in determining that UCC did not exercise the requisite control over the asbestos at Taft to be held strictly liable.[63] Appellant disagrees with the Superior Court's interpretation here as well, as discussed *infra*.

[63] Ex. B, at 9 (discussing *Rando v. Anco Insulations Inc.*, 16 So.3d 1065 (La. 2009)).

ARGUMENT

I. Plaintiff presented sufficient evidence to demonstrate the continued existence of questions of material fact for resolution at trial.

A. Question Presented

1) Whether the evidence, when viewed through the spectrum of Louisiana premises liability law, creates unresolved questions of material fact?

B. Scope of Review

A trial court's grant of summary judgment is subject to *de novo* review.[64] "[I]f from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate."[65]

At trial Appellant will be required to prove her case by a preponderance of the evidence. That is *not* the standard here, although it provides the "prism" through which a summary judgment motion should be viewed.[66] At this stage the "question is whether any rational finder of fact *could* find . . . that the substantive evidentiary

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[64] *See, e.g., Texlon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002).

[65] *AeroGlobal Capital Mgmt., LLC v. Cirrus Industries, Inc.*, 871 A.2d 428, 444 (Del. 2005) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962), *modified*, 208 A.2d 495 (Del. 1965)).

[66] *See e.g., United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.3d 1076, 1080 (Del. 1997) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-55 (1986)).

burden had been satisfied," with all inferences made in favor of plaintiff.[67] In the context of summary judgment the burden is on movant to demonstrate the absence of a disputed material fact.[68]

"The test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail."[69] Rather, "[i]f a trial court must weigh the evidence to a greater degree than to determine that it is hopelessly inadequate ultimately to sustain the substantive burden," summary judgment should not be granted.[70] "[T]he judge as gate-keeper merely considers whether the finder of fact could come to a rational conclusion either way, not whether that conclusion would be objectively reasonable."[71]

C. Merits of Argument

Appellant pursues three theories of liability. The core of Appellant's case is Union Carbide's direct negligence for failing to warn Mr. Kivell. Appellant also renews her claims for Appellee's vicarious liability for the negligence of Mr. Kivell's employers; and strict liability for the dangerous conditions at Taft.

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[67] *Cerberus Intern., Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (emphasis added, and removed from the word "rational").

[68] *See, e.g., Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[69] *Cerberus Intern.*, 794 A.2d at 1150.

[70] *Id.*

[71] *Id.* at 1151.

a. Louisiana Premises Liability Law

We are guided by a substantial body of Louisiana law on the subject of premises liability. Careful examination of that case law shows that summary judgment in favor of Union Carbide was inappropriate. The numerous cases cited by the Superior Court are universally distinguishable and/or inapplicable in the first instance.

The appellate decision in *Thomas v. A.P. Green Industries* provides a starting point.[72] There, the court affirmed a jury verdict in favor of a carpenter-subcontractor against the premises owner. The Court delineated between vicarious and direct liability. As to direct liability:

> In general, a premises owner has a duty of exercising reasonable care for the safety of persons on its premises and a duty of not exposing such persons to unreasonable risks of injury or harm. This duty extends to employees of independent contractors for whose benefit the owner must take reasonable steps to ensure a safe working environment.[73]

In contrast "a premises owner is not *vicariously* liable for the negligence of an independent contractor unless the owner retained control over the contractor's work or expressly or impliedly approved its unsafe work practice that led to an injury."[74]

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[72] 933 So. 2d 843 (La. Ct. App. 2006).

[73] *Id*. at 853.

[74] *Id*. at 852 (emphasis added).

"Although the independent contractor defense is a bar to a vicarious liability claim, it is not a bar to direct liability claim arising out of a premises-owner's own negligence."

To establish strict liability against a premises owner, a plaintiff must show that: "(1) the thing which caused the damage was in the care, custody and control of the defendant; (2) the thing had a vice or defect which created an unreasonable risk of harm; and (3) the injuries were caused by this defect."[75]

b. Union Carbide Breached a Duty by Failing to Warn Mr. Kivell of the Dangers of Asbestos

To be clear, the core of Appellant's case is Union Carbide's **direct liability** for its negligent failure to warn Mr. Kivell of the dangers of asbestos. There can be no question that UCC had "a duty to exercise reasonable care for the safety of persons on its premises …."[76]

The facts demonstrate that UCC was uniquely situated to warn workers such as Mr. Kivell of the dangers of asbestos. As an asbestos miner and miller, UCC benefited from an extensive knowledge base about asbestos. Its own Toxicology

[75] *Migliori v. Willows Apartments*, 727 So. 2d 1258, 1260 (La. Ct. App. 1999).

[76] *Legendre v. Arco Insulations, Inc.*, 2013 WL 3107471. *3 (M.D. La. June 18, 2013) (quoting *Jefferson v. Cooper/T. Smith Corp.*, 858 So.2d 691, 695-96 (La. Ct. App. 2003)).

Report distinguishes between asbestos types, and acknowledges that greater exposures cause greater risk. Under these circumstances, UCC was clearly negligent in turning a blind eye while employees of independent contractors endured large-scale poisoning on its property.

This is exactly the type of situation contemplated by the Louisiana court in *Thomas*, *supra*, as supported by significant additional case law. Directly on-point is the Louisiana Court of Appeal's decision reversing the trial court's grant of summary judgment in *Jefferson v. Cooper/T.Smith Corporation*.[77] There, a longshoreman sought to hold the "Dock Board" – owner of one of the docks where plaintiff worked – liable for asbestos exposure suffered while loading and unloading boats. The Dock Board did not employ the plaintiff, and had no control over his work: "[a]t all times, the case, custody, and control of all cargo, including any asbestos and asbestos containing products, stored on or in the Dock Board's premises remained with the various stevedore companies."[78]

Nevertheless, the appellate court concluded "genuine issues of material fact exist as to whether the Dock Board knew or should have known of the dangers posed by asbestos at the time …, whether it knew or should have known that its facilities

[77] *Jefferson v. Cooper/T.Smith Corporation*, 858 So.2d 691 (La. Ct. App. 2003).
[78] *Id*. at 695.

were inadequate …, and whether it could have refused such hazardous cargo."[79] Other than deposition testimony establishing exposure, the only evidence cited by the court served to establish constructive knowledge of the hazards of asbestos by the Dock Board.[80] In the court's view, the evidence created unresolved questions of fact as to plaintiff's claims in *both* negligence *and* strict liability.

On request for rehearing, the court distinguished a previous case "which involved identical legal issues and identical facts," where the court "affirmed the trial court's dismissal of [plaintiff's] suit against the Dock Board *after a full trial on the merits* …."[81] Unlike in that case, "the trial court in this case dismissed the plaintiffs' suit on a motion for summary judgment."[82] The court reiterated the unresolved issues of fact it set forth in its original opinion.

Multiple cases literally involve the Taft Facility during the same time period. In *Legendre v. Anco Insulations, Inc*., on reconsideration the court denied UCC's motion for summary judgment.[83] UCC advanced many of the same arguments it does here – that "asbestos dust was a temporary condition resulting from construction," that "it was not in control of the insulators," and "that [UCC] cannot

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[79] *Id*. at 695-96.

[80] *Id*. at 695.

[81] *Id*. at 697 (emphasis added).

[82] *Id*.

[83] *Legendre v. Anco Insulations, Inc*., 2013 WL 3107471 (M.D. La. June 18, 2013).

owe a duty to protect [plaintiff], an employee of a contractor, from risks inherent in his job."[84]

"However, it is clear Union Carbide owed [the independent contractor pipefitter] a duty."[85] Insulation was not inherent in the job of a pipefitter. The temporary nature of the asbestos was irrelevant to plaintiff's causes of action for negligence and strict liability.[86] It is hard to imagine a more on-point decision. And if anything, the facts here are stronger, where it is clear that Appellee specified the use of asbestos, and at times directly controlled Mr. Kivell's work.

Also directly on point is the Eastern District of Louisiana's decision denying summary judgment in *Smith v. Union Carbide Corp*.[87] In *Smith* as well, the plaintiff worked at UCC's Taft facility during the same time period as Mr. Kivell, although with two key differences. First, the plaintiff in *Smith* worked at Taft for only one or two weeks (as compared to Mr. Kivell's multiple years at Taft). Second, in *Smith* the plaintiff was literally an asbestos insulator. Nonetheless, the court found questions of fact making summary judgment inappropriate for the property owners.

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[84] 2013 WL 3107471, *3 (M.D. La. June 18, 2013).

[85] *Id*. (citing *Jefferson v. Cooper/T.Smith Corporation*, 858 So.2d 691 (La. Ct. App. 2003)).

[86] *Id*.

[87] 2014 WL 4930457 (E.D. La. Oct. 1, 2014).

But instead of following *Smith*, the Superior Court instead opted to rely on the easily distinguishable decision by the Western District of Louisiana in *Roach v. Air Liquide America*.[88]

In *Roach*, the plaintiff testified that no employee of the property owner ever directed his work.[89] In contrast, Mr. Kivell testified that employees of UCC sometimes instructed him to perform tasks that caused exposure to asbestos.[90] In *Roach*, defendant's knowledge of the dangers of silica was based on constructive knowledge through scientific publications.[91] Here, UCC admits to knowledge of the dangers since before Mr. Kivell ever stepped foot on its property.

While the court in *Roach* did question its sister court's decision in *Smith v. Union Carbide Corp.*,[92] the *Roach* court rejected only a narrow portion of the *Smith* court's holding.[93] Rather, the District Court in *Roach* disagreed with *Smith* only to the extent that a premises owner should not be held liable for "hazards inherent in an independent contractor's job."[94] According to the court in *Roach*, then, "it is the

[88] 2016 WL 1453074 (W.D. La. Apr. 11, 2016).

[89] *Id*. at *3.

[90] A726-728.

[91] *Id*. at *3.

[92] 2014 WL 4930457 (E.D. La. Oct. 1, 2014).

[93] 2016 WL 1453974, at *4.

[94] 2016 WL 1453974, at *4.

employer's duty to ensure plaintiff's safety with respect to specific hazards created by the performance of his work."[95] Mr. Kivell was a pipefitter – a job which does not inherently entail asbestos.[96] This situation is much more akin to *Thomas*, where a carpenter was exposed to asbestos at an industrial site, than to *Roach*, where a silica-blasting company's employee complained of silica poisoning.

To the extent *Roach* is read to require not only that a risk *not* be inherent in an independent contractor's job, but *also* that a risk be inherent in a premises owner's property, that standard is still satisfied here. "Inherent" in a premises owner's property, in this context, means arising "due to plaintiff's mere presence at the job site."[97] Such is precisely the theory advanced by Plaintiff and supported by documentary evidence. At least three facts demonstrate that an independent contractor would necessarily be exposed to asbestos at the Taft facility during the relevant time: UCC's specification of asbestos-containing parts and insulation; the requirement that pipefitters such as Mr. Kivell perform "tie-ins" to existing asbestos-containing equipment; and UCC's ability to require Mr. Kivell to perform maintenance of existing equipment.

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[95] *Id*.

[96] Would a pipefitter today necessarily work with asbestos as part of his job? If not, asbestos is not "inherent" in the work of a pipefitter. *See also Legendre v. Anco Insulations, Inc*., 2013 WL 3107471 (M.D. La. June 18, 2013) (insulation exposure not inherent in the work of a pipefitter).

[97] *Id*. at *4 (discussing *Thomas*).

Why, when faced with two decisions from equally situated courts, would the Superior Court follow *Roach* instead of *Smith*? To the extent it found those decisions to be in conflict, why would it not turn to the Louisiana appellate decision in *Jefferson v. Cooper/T.Smith Corporation*?[98] These choices by the Superior Court constitute reversible legal error.

c. A Jury Could Find UCC Vicariously Liable for the Negligence of Mr. Kivell's Direct Employers[99]

One of the exceptions to the independent contractor doctrine under Louisiana law is where the premises owner "expressly or impliedly approved [the] unsafe work practice that led to an injury."[100] Here, evidence shows that at least as of 1972, UCC employed an industrial hygienist at the Taft Facility, who monitored, *inter alia*, the

[98] In its Second Order, the Superior Court cited for the first time to *Jordan v. Thatcher Street, LLC*, 167 So. 3d 1114 (La. Ct. App. 2015). Ex. B, at 7, n. 15. That case too is easily distinguishable because in *Jordan* there was no "factual support to show that [defendant] knew that asbestos was being used, specified its use, or knew the dangers it posed." *Id*. at 1119.

[99] In its initial opposition to UCC's motion for summary judgment, Appellant conceded the issue of vicarious liability. A403. Subsequently discovered evidence, however, altered the analysis, and Appellant renewed her claim for vicarious liability on reargument. A490.

[100] *Thomas*, 933 So.2d at 852 (citing *Davenport v. Amax Nickel, Inc.*, 569 So.2d 23, 27-28 (La. Ct. App. 1990)).

work of independent insulation contractors.[101] UCC's monitoring included opinions as to the efficacy of safety devices used by such independent contractors. Given Mr. Kivell's testimony that he was exposed to asbestos as a bystander to the work of third-party insulation contractors, a question of material fact exists as to whether UCC "expressly or impliedly approved [the] unsafe work practice that led" to Mr. Kivell's mesothelioma. Summary judgment should be denied as to Appellee's vicarious liability for the negligence of Mr. Kivell's employers.

Again, the Superior Court cited to new and easily distinguishable case law in support of its Second Order granting summary judgment. The Superior Court cited *Hawkins v. Evans Cooperage Co., Inc.*, for the proposition that "[a] principal who exercises no operational control has no duty to discover and remedy hazards created by acts of its independent contractors."[102] The plaintiff in *Hawkins* "ran over a drum which had bounced out of another vehicle …."[103] He sought to hold the owner of the drum liable, although it had hired a contractor to transport its goods. The case bears no significance to this premises liability matter.

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[101] *See* A766 (Taft Facility Industrial Hygienist concluding that insulation "contract personnel" could avoid asbestos exposure by wearing respirators; not indicating whether such use was required).

[102] Ex. B, at 4-5 (citing *Hawkins v. Evans Cooperage Co., Inc.*, 766 F.2d 904, 908 (5th Cir. 1985)).

[103] 766 F.2d at 905.

In contrast, the Superior Court did not even cite *Thomas* in its Second Order, although that case postdates *Hawkins* by twenty years, and considers a property owner's liability for asbestos exposure.

As to safety monitoring, the Superior Court relied on *Davenport v. Amax Nickel, Inc.*, for the proposition that "periodic safety inspections and pointing out violations does not constitute sufficient right to control so as to impose liability on the principal."[104] In *Davenport* a contractor's scaffolding collapsed. The property owner's contractual clause that safety regulations must be followed was not sufficient to impose vicarious liability. Again, the facts in *Davenport* are only distantly related to this case, where the evidence is that Union Carbide performed asbestos monitoring on "contract personnel," reaching the conclusion "that significant preventative precautions are being taken in this case."[105]

The extent to which Union Carbide "expressly or impliedly approved" Mr. Kivell's unsafe work practices is a question of fact for resolution by the jury.

[104] Ex. B, at 5 (citing *Davenport v. Amax Nickel, Inc.*, 569 So.2d 23, 28 (La. Ct. App. 1990)).

[105] A766.

d. UCC Held Sufficient Custody of the Premises to be Strictly Liable

Appellant agrees with the Superior Court that the pertinent question as to whether a jury question remains as to UCC's strict liability is whether UCC had sufficient "care, custody or control" of the asbestos. "'Custody,' for purposes of strict liability, does not depend upon ownership, but involves the right of supervision, direction, and control as well as the right to benefit from the thing controlled."[106]

In *Jefferson v. Cooper/T.Smith Corporation*, the Louisiana appellate court found, based on relatively minimal evidence, that unresolved questions of fact mandated that summary judgment be denied as to strict liability.[107] That decision provides the best guidance here. Likewise, in *Legendre v. Arco Insulations, Inc.*, under similar circumstances the District Court found questions of fact as to Plaintiff's claim for strict liability.[108]

In its Second Order, the Superior Court cited for the first time to *Rando v. Anco Insulations Inc.* for the proposition that "[i]n a factually similar case the Louisiana Supreme Court … found that the independent contractor, not the premises

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[106] *Haydel v. Hercules Transp., Inc.*, 654 So. 2d 408, 414 (La. Ct. App. 1995), *writ denied*, 656 So. 2d 1018.

[107] 858 So.2d 691 (La. Ct. App. 2003).

[108] 2013 WL 3107471, *3 (M.D. La. June 18, 2013).

owner, was in possession and control" of the asbestos to which plaintiff was exposed.[109] Again, the Superior Court's analysis was misguided. In *Rando*, the Supreme Court of Louisiana found *no manifest error* in the jury's determination, after full factual development at trial, that the contractor exercised sufficient control to support liability. The decision in *Rando* was *not* a finding that a property owner can *never* be deemed in control of asbestos used in construction on its property. And certainly *Rando* does not control the situation here, where Mr. Kivell was exposed in part to asbestos already at the premises, unassociated with his employer's work.

While the District Court in *Smith* found that the premises owners did not have the requisite custody of the asbestos to support liability, that finding was premised on the fact that the plaintiff there was himself an asbestos worker.[110] *Smith* also does not discuss exposure from existing facilities and equipment on the property.

In its initial Order, the Superior Court cited to *Haydel v. Hercules Transportation* for the proposition that "the 'mere physical presence of the thing on one's premises does not constitute custody.'"[111] While true, the rule is inapplicable here. Taft was fully operational before Mr. Kivell ever arrived, and certain of Mr. Kivell's work involved repair and integration into that existing facility. It is that

[109] Ex. B at 9 (discussing *Rando v. Arco Insulations Inc.*, 16 So.3d 1065 (La. 2009)).
[110] 2014 WL 4930457, *6.
[111] Ex. A at 21 (quoting *Haydel*, 654 So. 2d at 414).

aspect of Taft over which UCC maintained custody and control – not the new construction, but the existing facility, which contributed to Mr. Kivell's exposure. The Superior Court never adequately addressed Appellant's argument in that regard.

Here, Plaintiff does not argue that UCC had control over the day-to-day manner in which Mr. Kivell performed new construction. UCC did, however, retain control over the Taft Facility as a whole, including those existing structures that Mr. Kivell tied his work into, and the equipment on which it requested that Mr. Kivell perform maintenance.

While custody "does not depend on ownership" alone, it does "involve[] the right of supervision, direction, and control as well as the right to benefit from the thing controlled."[112] Here, the factors are split, which is sufficient to create a material question of fact sufficient to survive summary judgment. UCC specified the design of the construction, the materials to be used, and at times exercised control over Mr. Kivell's work. Certainly UCC at all times retained "the right to benefit from the thing controlled." The Superior Court's grant of summary judgment on Plaintiff's claim for strict liability also should be reversed.

[112] *Haydel v. Hercules Transport, Inc.*, 654 So.2d 408, 414 (La. Ct. App. 1995).

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests that the Superior Court's grant of summary judgment for Appellee be reversed, and this case remanded for further proceedings.

Respectfully submitted,

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