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Case Number 211,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHELLEY DROZ, Individually, and as Executor for the Estate of ERIC C. DROZ, deceased,	:	No: 211,2021
Plaintiff Below, Appellant.	:	In the Superior Court of the State of Delaware Below C.A. No.: N19C-06-024 ASB
v.	:	
HENNESSY INDUSTRIES, LLC,	:	
Defendant Below, Appellee.	:	

APPELLEE'S ANSWERING BRIEF

REILLY, MCDEVITT & HENRICH, P.C.

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NATURE OF THE PROCEEDINGS

Appellee, Hennessy Industries, LLC (hereinafter "Appellee" or "Hennessy") respectfully requests this Honorable Court affirm the Superior Court's grant of summary judgment to Hennessy under the sound reasoning of *Stigliano v. Westinghouse*, 2006 Del. LEXIS 433 (Del. Super. Ct. Oct. 18, 2006). Appellant exagerates *Stigliano's* status in asbestos litigation as similar to foundational holdings like the "bare metal defense" or the "frequency, regularity, and proximity" standard of *Lohrmann. See generally* MAJORIE A. SHIELDS, AM. LAW REPORTS, APPLICATION OF "BARE METAL" DEFENSE IN ASBESTOS PRODUCTS LIABILITY CASES, 9 A.L.R. (7th ed.)*; Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (3rd Cir. 1986). The truth is far more mundane.

Appellant and Plaintiff below filed her initial complaint individually and on behalf of her late husband (together hereinafter, "Appellant"), arguing Appellant developed mesothelioma after exposure to asbestos containing products produced by a scatter-shot list of twenty-two defendant manufacturers, including Appellee. B054-060. Appellee moved for summary judgment on the grounds that Appellant failed to show exposure to an asbestos containing product made by Appellee, application of Washington's "bare metal" defense, and *Stigliano*. B223. After Appellant did not oppose the motions for summary judgment of eight codefendants who also moved on lack of identification of an asbestos containing product, oral

arguments on the remaining motions were held before the Honorable Judge Sheldon Rennie. B039-047.

The majority of oral arguments focused on the application of Washington's "bare metal" defense, with a lesser portion devoted to *Stigliano*. Exhibit A (hereinafter "Ex. A"), at 79-83, 86-94, 98-99. Judge Rennie insightfully inquired as to the applicability of *Stigliano* to this case, to which Appellee's counsel pointed to the Superior Court's decision in *In re Asbestos Litigation (Petit)*, where in the Honorable Judge Adams held *Stigliano* was applicable to Hennessy. Ex. A, at 83:6-13; see *also In re Asbestos Litig. (Petit)*, 2020 Del. LEXIS 2760, *6 (Del. Super. Ct. Aug. 31, 2020). Counsel also argued *Stigliano* was even more applicable given Hennessy had no control over the asbestos content in brake shoes made by other manufacturers. Ex. A, at 83:14-84:2 at B. Appellant's counsel, incorrectly argued that *Stigliano* was not triggered because Hennessy had the burden to show evidence that Appellant worked with asbestos-free brakes, and Hennessy had not met that burden. Ex. A, at 99:11-14, 101:6-9. Additionally, Appellant incorrectly argued that since they have presented evidence that the identified brake manufacturers predominately made asbestos-containing brakes *Stigliano* was not triggered. Ex. A, at 98:9-14, 102:18-21. Appellant further argued that even if *Stigliano* was triggered they had satisfied their burden based upon the affidavit of their expert, Dr. Barry Castleman, interrogatory responses submitted by three brake manufacturers, and

prior testimony from Bendix and Hennessy's corporate representatives. Ex. A, at 98:9-14, 100:1-16, 102:1-9.

Judge Rennie ultimately ruled that *Stigliano* was triggered because, while Appellant's expert report claimed asbestos could be found in most brake shoes manufactured during the relevant time period and that asbestos use in brake shoes was "near universal", the words "near universal" and "most" do not mean all, and Hennessy had put forth sufficient evidence to trigger *Stigliano*.[1] Exhibit B (hereinafter "Ex. B"), at ¶12. The Superior Court found the burden then shifted to Appellant to present some evidence from which one could infer Appellant was exposed to asbestos-containing products while working with the Hennessy product. Ex. B, at ¶13. Judge Rennie found that while Appellant "generally identified the manufacturers of brake shoes Mr. Droz encountered (including Bendix, Wagner, and Raybestos), the record is devoid of any testimony linking his work to a particular manufacturer's brake or even an asbestos containing brake. Ex. B, at ¶13. This is fatal to Plaintiff's ability to satisfy her burden under *Stigliano*." Ex. B, at ¶13. The

[1] Appellant mischaracterizes Judge Rennie's use of the phrase "near universal" in his decision. Judge Rennie was quoting the language used by Appellant's expert, he was not making a finding that asbestos use in brake shoes during the relevant time period was "near universal", rather he was considering the expert's affidavit in determining whether *Stigliano* was triggered. The full context of his use of the phrase is as follows: "[Plaintiff] also states that her expert, Berry Castleman, explains that the use of asbestos in brake linings in the 1970s was near universal. The use of the phrase 'near universal' demonstrates that not all brake linings were asbestos containing." Ex. B, at ¶13.

Superior Court granted summary judgment in favor of Appellee under *Stigliano*. Ex. B, at ¶13.

Stigliano is not an unsecured doctrine adrift in a sea of asbestos claims, employed without reason or merit. It is a simple application of the summary judgment standard, as articulated by Superior Court Civil Rule 56(c). It is well established and well understood by this Honorable Court and all Superior Court judges. *Stigliano* is a Delaware specific rule of procedure, not adopted in any other jurisdiction, that applies to a very specific but recurring fact pattern. It does not improperly shift the burden. Its application tracks the standard of summary judgment. While Appellant's may perceive *Stigliano* as burdensome, the truth is that, regardless of how many defendant's raise it, the Superior Court only invokes *Stigliano* in limited fashion.

In fact, a fair reading of *Stigliano's* progeny shows its application has been firmly anchored in the sound reasoning of the Honorable Joseph R. Slights III. Appellee asks this Honorable Court to affirm the Superior Court's well-reasoned and proper application of *Stigliano* in granting Appellee's motion for summary judgment.

SUMMARY OF ARGUMENT

1. Appellee herein denies Appellant's argument on the following grounds. *Stigliano* is simply the specific application of the summary judgment standard to a recurring evidentiary issue involving product nexus, an essential component of every asbestos claim. *See Cain v. Green Tweed & Co.,* 832 A.2d 737, 741 (Del. 2003) (*citing In re Asbestos Litigation (Nutt)*, 509 A.2d 1116, 1117 (Del. Super. Ct. 1986) (*citing Clark v. A.C. & S.,* 1985 Del. LEXIS 1249, *6-8 (Del. Super. Ct. Sep. 3, 1985))). Far from uprooting Rule 56(c), *Stigliano's* burden shifting process tracks the summary judgment standard and is firmly planted in the burden shifting framework therein. It does not require a plaintiff to show exclusive use of the asbestos-containing version of a product, nor does it favor direct evidence over circumstantial. Instead, it guides the court in handling a very specific and recurring evidentiary issue involving a defendant who manufacturers both asbestos-containing and asbestos-free versions of their product during the period of alleged exposure.

2. Appellee herein denies Appellant's argument on the following grounds. The Superior Court's application of *Stigliano* below in granting Hennessy summary judgment was proper because, Hennessy could avail itself of *Stigliano*, Hennessy properly triggered it, and Appellant failed to put forth sufficient direct or circumstantial evidence from which one could infer the Appellant worked with asbestos-containing brake shoes as opposed to asbestos-free brake shoes. *Stigliano*

is especially applicable to Appellee in this case because it prevents the unjust shifting of liability from a manufacturer to a third party.

3. Further, based upon the evidence of record at summary judgment Appellee demonstrated that during the period of Appellant's alleged exposure brake manufacturers made both asbestos-containing and asbestos-free brake shoes, thereby triggering *Stigliano*. Appellant's claim that brakes in the market largely contained asbestos is akin to a market-share liability theory and was wholly insufficient evidence from which one could reasonably infer that Appellant worked with any asbestos-containing brake shoe in conjunction with Appellee's product.

4. Accordingly, because *Stigliano* is nothing more than the specific application of the summary judgment standard to a specific and frequently occurring evidentiary issue the grant of summary judgment by the Superior Court in favor of Hennessy was proper. This Honorable Court should affirm the Superior Court's decision, and affirm *Stigliano*'s use as a guide at summary judgment.

STATEMENT OF FACTS

Hennessy's product at issue did not contain asbestos. B323. Therefore, Appellant's legal theory is based solely on a failure to warn when Hennessy's asbestos-free product is used with an asbestos-containing product. B345. Appellant worked part-time after school and during the summer at Larry's Auto Repair Shop in Washington State, where he claimed to have performed brake jobs. B305 (245:9-11). If the contour on a brake shoe did not properly fit the contour of its drum brake he would use Appellee's asbestos-free arcing machine's grinding wheel to remove minuscule amounts of the brake shoe's friction material, thereby adjusting the contour of the shoe. B318 (28:16-29:8). It is not disputed that the Appellee's arching machine itself did not contain any asbestos. Ex. A, at 89:21-22. Instead, Appellant alleged that the asbestos-free arcing machine was used with asbestos-containing brake shoes, releasing friable asbestos. Ex. A, at 94:1-8; B344-46. Appellant claims Appellee's failure to warn Appellant of the dangers of using their non-asbestos product with asbestos-containing brake shoes caused Appellant's mesothelioma. Ex. A, at 94:1-8; B344-4].

Appellant stated he encountered several manufacturers of brake shoes during his two years of part-time work, but could only recall the names of three manufacturers, Bendix, Wagner, and Raybestos. B314 (359:2-360:14), B375 (37:21-38:2). Other than recalling their names he could not provide any specific testimony

about whether the brakes contained asbestos, how they came packaged, specific instances where he worked with them, or any other details beyond manufacturer names. B314 (360:20-25), B375 (37:24-38:6). Appellant supplemented this vague testimony with an affidavit from industrial hygienist, Dr. Barry Castleman, interrogatory responses from two of the manufacturers, and corporate representative deposition testimony from the representatives of Bendix and Hennessy taken in unrelated matters. B401, B403 (9:19-23), B419, B442, B450, B455.

Dr. Castleman's report was no more specific as to whether any of the brakes Appellant actually encountered contained asbestos. B419-20. Instead, Dr. Castleman presented market-share evidence, contending that in the 1950s, 60s, and 70s the majority of brake and clutch friction material contained asbestos. B419. He then concludes that, given the "near universal" use of asbestos, any auto mechanic working before the 1990s would most certainly have encountered asbestos containing friction materials during their career. B420. Dr. Castleman made no specific mention of any particular brake manufacturer or Appellant's work itself. B419-20.

The interrogatory responses submitted by Appellant came from Wagner and Raybestos, and like all of Appellant's evidence speak in generalities. B451-53, B456-57. The responses indicate that each of the manufacturers made some asbestos-containing brake and clutch friction material during the period of alleged

exposure. B451-53, B456-57. There is nothing to link the products to Appellant's work. B451-53, B456-57.

Lastly, Appellant submitted prior deposition testimony from the corporate representatives of Bendix and Hennessy. B403 (9:19-23), B442. The Bendix representative indicated that the first non-asbestos brake lining became available in the U.S. market in 1969, and was for heavy-duty use applications such as police cars and taxis. B445 (154:8-10, 154:14-16), B446 (155:1-3). While he testified the first Bendix after-market non-asbestos brake shoe came to market in 1987, he could not recall when Bendix first began manufacturing asbestos-free brake shoes for use in passenger vehicles. B447 (156:1-7). The testimony of Hennessy's representative was similarly short on specifics. Hennessy's representative agreed, that it was probable that a mechanic in the 1950s, 60s, and 70s would have encountered asbestos brake linings. B406 (62:2-9). This aligns with the affidavit from Hennessy's corporate representative, which Appellee submitted in this matter, wherein he stated that Hennessy's non-asbestos arcing machine was designed to arc brake shoes, regardless of their composition, including asbestos-free brake shoes, which were available beginning in the 1960s. B324.

This generalized evidence was all that was presented to sustain Appellant's claim at summary judgment. No amount metaphors can tie Appellant to an asbestos-containing brake shoe, let alone one he used with an AMMCO asbestos-free arcing

machine. Without such a link Appellant could not survive summary judgment, and no appeal can remedy Appellant's failure to establish that link.

ARGUMENT

I. Stigliano is nothing more than a specific application of the summary judgment standard to a recurring evidentiary issue involving product nexus.

A. Question Presented

Was it proper for the Superior Court to apply *Stigliano* to Hennessy's asbestos-free arcing machine where it was used to grind brake shoes at a time when any particular brake shoe may or may not have contained asbestos? Ex. A, at ¶¶11-13.

B. Standard of Review

On appeal the standard of review is *de novo* for

> "a trial court's grant of a motion for summary judgment, both as to the facts and the law. Thus, this Court must undertake an independent review of the record and applicable legal principles 'to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law.'" *Dabaldo v. URS Energy & Constr.*, 85 A.3d 73, 77 (Del. 2014) (citing *See e.g. State Farm Mut. Auto. Ins., Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013)); *see also Collins v. Pittsburgh Corning Corp. (In re Asbestos Litig.)*, 673 A.2d 159, 161 (Del. 1996) (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (1992)).

C. Merits of the Argument

The Superior Court's continued invocation and application of *Stigliano* to the case below and others like it is a proper application of the summary judgment burden shifting framework in cases involving a specific evidentiary issue that is recurrent and unique to asbestos litigation. This Court should not jettison the Honorable Judge

Slights' decision in *Stigliano* for three reasons. First, *Stigliano* tracks the traditional burden shifting framework of summary judgment. Second, *Stigliano* does not supplant the summary judgment standard or substantive state law of any case by imposing any requirement of exclusivity or direct evidence use. Third, *Stigliano* addresses a very specific and narrow evidentiary issue that frequently occurs in asbestos litigation.[2]

i. *Stigliano* directly tracks the well-established summary judgment burden shifting framework.

Judge Slights' reasoning in *Stigliano*, stands not on a "mountain of sand" but on the well-established, well known, and well defined summary judgment standard. *Stigliano* tracks and matches Delaware Superior Court Rule of Civil Procedure 56(c) in both structure and application. A comparison of cases applying *Stigliano* and the summary judgment standard reveals near identical burden shifting and application. Further, a defendant is not automatically granted summary judgment by simply meeting its burden under *Stigliano*.

Rule 56(c), which outlines the basic standard for determining a motion for summary judgment, "mandates the granting of summary judgment where the moving party demonstrates that 'there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Crawford v.*

[2] To-date, no products liability or tort case outside of the asbestos docket has cited *Stigliano*.

A.O. Smith Corp., 2019 Del. LEXIS 189, *4 (Del. Super. Ct. Apr. 10, 2019) (citing Del. Super. Ct. Civ. Pro. R. 56); *see also Motorola, Inc. v. Amkor, Inc.*, 849 A.2d 931, 935 (Del. 2004); *see also Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979). "If the movant makes such a showing, the burden then shifts to the nonmoving party to submit sufficient evidence to show that a genuine factual issue, material to the outcome of the case, precludes summary judgment." *Ridgeway v. Acme Mkts., Inc.*, 2018 Del. LEXIS 410, *4-5 (Del. Sep. 5, 2018); *see also Crawford*, 2019 Del. LEXIS 189, *4; *see also Moore*, 405 A.2d at 680-81. A careful reading of *Stigliano* and its progeny makes apparent that it has the same burden shifting impact in an asbestos case as the summary judgment standard outlined above – and no more.

Stigliano held that when a defendant made "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." *Stigliano,* 2006 Del. LEXIS 433, *1-2.

Comparing the summary judgment standard to *Stigliano*, the initial burden is always on the moving party to show the lack of a dispute on material issues of fact entitling them to a judgment as a matter of law. *Stigliano* outlines one way a defendant may meet their initial burden, by showing that during the time period of

alleged exposure the defendant manufactured both asbestos-containing and asbestos-free versions of its product. Under Rule 56(c), the burden then always shifted to the non-moving party to put forth some evidence showing the existence of one or more genuine issues of fact. *Stigliano* articulates that when a defendant has shown that during the period of alleged exposure it manufactured asbestos-containing and asbestos-free versions of its product the proper way to show the existence of a genuine issue of fact is for the plaintiff to put forth some evidence, direct or circumstantial, from which one could reasonably infer the plaintiff was exposed to the asbestos-containing version. That relationship can be further illuminated by comparing decisions applying the summary judgment standard to factually similar cases applying *Stigliano*. Two such comparisons follow.

One can see how *Stigliano* tracks the summary judgment standard by comparing *Hoofman v. Air & Liquid Corp.* to *Stigliano*. In *Hoofman*, the plaintiff maintained and serviced pumps, valves, engines, and turbines on board U.S. Navy ships, and as a result he was exposed to asbestos from pumps manufactured by two different defendants. *Hoofman v. Air & Liquid Corp.*, 2014 Del. LEXIS 61, *3 (Del. Super. Ct. Feb. 14, 2014). The parties argued over applicable law and causation, but the court ultimately found those issues to be secondary to the product nexus issue. *See id* at *5, *8-9, *11. The Superior Court found the defendant pump manufacturers had established the lack of a material issue on product nexus because the evidence

presented showed plaintiff generally recalled encountering the defendant's pumps while serving in the Navy; but plaintiff "could not identify any instance when, or location where, he worked on either…" *Id.* at *3, 5. The burden was then on plaintiff to "demonstrate that any material issue of fact remains to be determined by a jury as to whether any asbestos-containing products manufactured by Defendants caused [plaintiff's] lung cancer." *Id.* at *5.

Plaintiff attempted to meet that burden by arguing that the general recollection of the names of the manufacturers, the length of plaintiff's service, and expert medical testimony was sufficient to create a material issue of fact for the jury. The court reasoned that "[w]hile such evidence might present a material issue of fact as to whether asbestos caused [plaintiff's] lung cancer, [plaintiff's] limited recollection coupled with Plaintiff's experts' generalized testimony is insufficient to support the inference that the source of that exposure was either Defendants' products." *Id.* at *8-9. The court further stated that "[w]ithout evidence of the time and place of his alleged work on and exposure to pumps manufactured by [defendants]" the plaintiff could not prove that any of "[defendants'] pumps he may have worked on even contained asbestos." *Id.* at 9. Therefore, summary judgment was entered for both defendants due to the lack of a product nexus. *Id.* at *11.

In *Stigliano*, the Superior Court granted summary judgment in favor of defendant Westinghouse, finding that plaintiff failed to establish the necessary

product nexus. *Stigliano,* 2006 Del. LEXIS 433, *1-2. The court found, despite plaintiff's assertion that he worked solely with a particular series of defendant's welding rods, the record revealed that the defendant manufactured asbestos-containing and asbestos-free welding rods during the time period of plaintiff's alleged exposure and plaintiff failed to put forth sufficient direct or circumstantial evidence from which inferences linking plaintiff to the asbestos-containing version could be made. *Id.* The Honorable Judge Slights reasoned that where a defendant establishes they manufactured asbestos-containing and asbestos-free versions of a product they have shown there is no genuine issue as to a material fact. *See id.* Thus, the court concluded the burden shifts to the plaintiff to show that a material issue of fact exists by presenting direct or circumstantial evidence from which one could infer plaintiff was exposed to the asbestos-containing version of the defendant's product. *See id.*

As another example, compare *In re Asbestos Litigation (Gordon)* to *In re Asbestos Litigation (Ruggeri)*. *In Gordon*, the plaintiff alleged exposure to asbestos from brakes, clutches, gaskets, and engine components that occurred while he performed vehicle maintenance. *In re Asbestos Litig. (Gordon)*, 2011 Del. LEXIS 503, *2 (Del. Super. Ct. Nov. 16, 2011). Plaintiff testified to having performed fifty to seventy-five gasket replacements, some of which he believed did or likely

contained asbestos and some of which were asbestos-free.[3] *Id.* Defendant manufactured various types of automotive gaskets, some of which contained asbestos and some did not. *See id.* *3-4. Plaintiff described defendant's gaskets as "'the main one'" he used and clearly recalled defendant's name on the packaging and gasket itself. *Id* at *3-4. However, he could only recall one occasion where he removed defendant's gasket from a vehicle. Plaintiff also used gaskets made by other manufacturers, and he could not testify to what percentage of time he used defendant's gaskets. *Id.* at *3

Defendant moved for summary judgment, arguing that plaintiff had not produced sufficient evidence to show plaintiff was exposed to asbestos-containing gaskets made by defendant such that those gaskets were a substantial factor in causing his injury. *Id.* at *4. According to defendant, plaintiff's evidence showed, at best, he worked with one type of gasket that was asbestos, but that it could have been manufactured by defendant or by another manufacturer. *See id.* As such, defendant argued plaintiff may never have come into contact with an asbestos containing gasket made by defendant. *Id.* The Superior Court found this was sufficient evidence for defendant to carry "its initial burden of establishing the non-

[3] Plaintiff testified to replacing exhaust manifold gaskets, which plaintiff alleged were all asbestos in the early years; intake manifold gaskets, which plaintiff stated "'wouldn't necessarily…have any asbestos in them,' though he also said he 'feeling' was that 'they probably did'"; and side panel and tappet gaskets, which plaintiff described as cork and then later paper gaskets. *Gordon*, 2011 Del. LEXIS 503, at *2.

existence of material issues of fact by highlighting the absence" of evidence that plaintiff was significantly exposed to asbestos from defendants product. *See id.* at *7. This shifted the burden to plaintiff to "identify any evidence from which a jury could reasonably infer that [plaintiff] was exposed to asbestos from [defendant's] gaskets…." *See id.* at *7-8.

In response, plaintiff relied upon plaintiff's "hazy recollection" regarding the work he performed with defendant's gaskets over forty-seven years and an article asserting that defendant manufactured asbestos containing products until 1988. *See id.* at *8-9. The court found this evidence was not sufficient to meet said burden. *See id.* at *8. At best, the court found, without citing or mentioning *Stigliano*, that this evidence permitted "only a weak inference that [plaintiff] may have been exposed to asbestos from a [defendant] product." *Id.* Such an inference is not sufficient to satisfy the plaintiff's burden under summary judgment, thus summary judgment was granted for defendant. *See id.* at *8-9.

Compare to *Ruggeri*, where defendant moved for summary judgment after showing that it ceased manufacturing "Ready Mix" asbestos-containing joint compound roughly five months before the plaintiff alleged to have used said compound. *In re Asbestos Litig. (Ruggeri)*. 2012 Del. LEXIS 10, *2-3 (Del. Super. Ct. Jan. 10, 2012). The extent of plaintiff's identification testimony was that he used "Ready Mix" joint compound made by defendant, and that he purchased it in "five

gallon white plastic buckets with a pine tree logo." *Id.* at *2. He did not testify to its asbestos content, but plaintiff presented formulary evidence that defendant's V-975 "Ready Mix" joint compound contained asbestos and production of that formula ceased five months before plaintiff's alleged exposure, and the non-asbestos version of V-975 did not begin production until several months after plaintiff's alleged exposure. *Id.* *3-4. Plaintiff argued that this was sufficient to show the plaintiff must have purchased the asbestos-containing joint compound that was still in stock. *Id.*

The Superior Court found *Stigliano* was applicable because defendant had shown it manufactured an asbestos-containing version of its joint compound, V-975, and an asbestos-free version of its joint compound, V-978. *See id.* at *4. This demonstrated there was no material issue as to product nexus, and the burden shifted to the plaintiff to present some evidence, direct or circumstantial, from which one could infer exposure to the asbestos-containing version, V-975. *See id.* The court found, even when taking the evidence in the light most favorable to the plaintiff, he had "shown at most that he could have used joint compound containing asbestos or used joint compound which was asbestos free." *Id.* With no evidence showing he was exposed to the asbestos containing V-975 joint compound the jury would be left to speculate as to product nexus, therefore summary judgment for defendant was warranted. *See id* at *4-5.

From the aforementioned decisions, and others like it, it's plain to see that *Stigliano* simply supports the traditional summary judgment standard in form and application. It in no way shifts the burden at summary judgment any more than a defendant who shows a lack of product identification shifts the burden to plaintiff to show disputed product identification. *See Cain,* 832 A.2d at 741; (*citing Nutt*, 509 A.2d at 1117 (*citing Clark*, 1985 Del. LEXIS at *6-8)).

ii. Stigliano does not propose automatic summary judgment for a defendant who meets their initial burden.

Stigliano does not automatically prescribe granting summary judgment upon a defendant meeting its initial burden. Rather, it seeks to determine whether there is any triable issue of fact, regarding product nexus, and seeks to ensure any triable issue of fact is preserved for the jury. *See id.*

While hearing transcripts and single page opinions applying *Stigliano* can appear conclusory, the Superior Court has consistently affirmed that a defendant will not automatically be granted summary judgment by meeting their initial burden under *Stigliano*. *See In re Asbestos Litig. (Henderson),* 2011 Del. LEXIS 82, * 21-22 (Del. Super. Ct. Feb 2, 2011). In *In re Asbestos Litigation (Henderson)*, the Superior Court affirmed this principle by denying a defendant gasket manufacturer's motion for judgment, having found that merely presenting evidence that the defendant made both asbestos-containing and asbestos-free gaskets does not warrant summary judgment under *Stigliano*. *See id.* In that case defendant presented

evidence that they manufactured asbestos-containing gaskets and asbestos-free gaskets under a brand name plaintiff allegedly identified as handling. *Id.* at *2-3. The Superior Court disagreed with the defendant's contention that this alone warranted summary judgment because under *Stigliano* the burden shift to the plaintiff to present some direct or circumstantial evidence from which an inference of exposure to their asbestos containing gaskets could be found. *See id.* at *19-22. Plaintiff presented evidence that defendant's special purpose gaskets which the Hendersons installed contained asbestos during that time period. That evidence was considered after the burden shifted demonstrating that *Stigliano* does not automatically entitle a defendant to summary judgment once they have met their initial burden.

iii. *Stigliano* does not require a plaintiff to show exposure exclusively to defendant's product in order for plaintiff to meet their burden.

Stigliano does not stand for the proposition, as Appellant implies, that a plaintiff can only meet their burden under *Stigliano* by showing the plaintiff exclusively used defendant's product or defendant's asbestos containing product. *See In re Asbestos Litig (Pelzel)*, 2011 Del. LEXIS 523, *10-11 (Del. Super. Ct. Aug. 17, 2011). In *In re: Asbestos Litigation (Pelzel)*, the defendant gasket manufacturer moved for summary judgment under *Stigliano* and lack of causation, arguing that

the vast majority of the gaskets it manufactured during the period of exposure did not contain asbestos. *Id.* at *4-5.

The burden shifted to the plaintiff to present any evidence showing plaintiff worked with or around any asbestos-containing gasket made by defendant from which one could reasonably infer exposure to asbestos. *See id.* at *10-11. Plaintiff attempted to meet their burden through testimony that plaintiff used defendant's gaskets ninety-nine percent of the time he did automotive work, and that defendant admitted in interrogatories that some of the gaskets it manufactured during the time period contained asbestos. *Id.* at *3, *11. Plaintiff then summarily argued that they had provided substantial product identification evidence against defendant. *Id.* at *5-6. The Superior Court rejected plaintiff's arguments, finding the plaintiff failed to meet its burden to show plaintiff was exposed to any asbestos-containing gasket made by defendant, therefore summary judgment was granted for defendant. *Id.* Demonstrating that plaintiff used a lot of gaskets did not warrant an inference, but also did not preclude a finding of liability had plaintiff been able to point to evidence that he used an asbestos containing gasket.

Appellant's cites three other cases for its exclusivity proposition, but misinterprets them all. In addition to the fact that they are against the great weight of cases applying *Stigliano*, they make no mention or application of an exclusivity

requirement. Appellant first cites the case of *In re Asbestos Litigation (Timmons)*, also properly cited as *Timmons v. Bondex International, Inc.*

Appellee does not disagree with Appellant on the basic facts of *Timmons*, but disagrees with Appellant's stated proposition for three reasons. First, once the burden was properly shifted to plaintiff under *Stigliano* and the traditional summary judgment standard, the plaintiff chose to argue exclusivity in attempting to meet its burden. *See Timmons v. Bondex Int'l, Inc*, 2008 Del. LEXIS 494, *2, 4-5 (Del. Super. Ct. May 15, 2008). Plaintiff was successful in arguing that defendant Union Carbide sent bulk asbestos to Georgia-Pacific and unsuccessful in arguing they sent bulk asbestos to Kaiser Gypsum, the Superior Court did not require the plaintiff to prove exclusivity. *See id.* at *4-5. The issue of exclusivity was made material by the plaintiff's argument, not the rule in *Stigliano*. *See id.* at *5-6. Summary judgment was granted to Union Carbide as to asbestos sent to Kaiser Gypsum because the plaintiff, having argued exclusivity, failed to produce sufficient evidence to support its argument. *See id.* In contrast to the deposition testimony plaintiff presented on Georgia-Pacific, the formula data from Kaiser Gypsum plaintiff presented was not sufficient to create the reasonable inference of exposure. *See id.* at *2-3, 5-6.

Timmons demonstrates that The Superior Court understood how to properly apply *Stigliano,* and that it did not contain an exclusivity requirement, as evidenced by its grant of summary judgment to another defendant in the case, after hearing oral

arguments on the same day it heard arguments from Union Carbide. *See Timmons*, 2008 Del. LEXIS 491, *1-2 (Del. Super. Ct. May 15, 2008). In this second *Timmons* decision, defendant Conwed, a manufacturer of asbestos-containing and asbestos-free ceiling tiles, moved for summary judgment under *Stigliano*. *Id.* The plaintiff testified to using Conwed ceiling tiles that had a reddish colored backing. *Id.* Defendant presented testimonial evidence from its representatives that the presence of a red backing was not an indication of asbestos content because both asbestos-containing and asbestos-free tiles used a red backing. *Id.* Defendant also presented expert testimony that one could not determine the asbestos content of a Conwed tiles by simply looking at the backing. *Id.*

The Honorable Judge Johnson, who decided Union Carbide's motion, found Conwed had met its initial burden under *Stigliano* by showing that it manufactured asbestos-containing and asbestos-free tiles during the period of alleged exposure, and the burden shifted to plaintiff to produce "evidence directly or circumstantially linking exposure to an asbestos-containing Conwed product." *Id.* Judge Johnson found plaintiff's evidence regarding the reddish title backing was not sufficient to create a reasonable inference of exposure to Conwed's asbestos-containing tiles, therefore summary judgment for Conwed was granted.[4]

[4] Both *Timmons* decisions are examples of decisions that are short and appear conclusory.

Appellant next cites *In re Asbestos Litigation (Sturgill)*, as standing for its exclusivity proposition, but this association is flawed for two reasons. Appellant's Opening Br., 23, Aug. 20, 2021 Filing ID: 66868324. First, *Stigliano* is never mentioned or cited in *Sturgill*. *In re Asbestos Litig. (Sturgill)*, 2017 WL 6343519 (Del. Super. Ct. Dec. 11, 2017). Second, *Sturgill*, as noted by Appellant, cited to *Nutt v. A.C. & S. Co., Inc.*, for the notion that if defendant "Union Carbide was one of several suppliers of asbestos to joint compound manufacturers, it cannot reasonably be inferred that the asbestos to which [plaintiff] was exposed to was supplied by Union Carbide." *See Sturgill*, 2017 WL 6343519 at *3. The problem for Appellant, and what Appellant fails to make clear, is that *Nutt* was not analyzing *Stigliano,* but whether Delaware law recognizes some form of alternative liability or market-share liability, which would place the burden on defendants to show their asbestos containing product was not present at a plaintiff's worksite. *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 694 (Del. Super. Ct. 1986).

The Superior Court in *Nutt* rejected plaintiff's argument for market share liability, and the Superior Court in *Sturgill* was simply applying *Nutt's* denunciation of market share liability in rejecting the plaintiff's claim that because Union Carbide's asbestos fibers accounted for half of all asbestos used in joint compounds during the relevant time period plaintiff most likely used a joint compound containing Union Carbide asbestos. *See Sturgill* 2017 WL 6343519 at *2-3; *see also*

Nutt, 517 A.2d at 694. Accordingly, *Sturgill* does not propose an exclusivity requirement under *Stigliano*, rather *Sturgill* stands for Delaware's continued rejection of the market share liability doctrine as a means for overcoming summary judgment.

Lastly, Appellant cites to *In re Asbestos Litigation (Aveni)*, to support their exclusivity proposition, but Appellant's proposition is betrayed by *Aveni* for two reasons. First, as in *Sturgill* the Superior Court's opinion does not mention or cite *Stigliano*. *In re Asbestos Litig. (Aveni)*, 2017 WL 5594055, *1-2 (Del. Super. Ct. Nov. 8, 2017). Second, the issue in *Aveni* was not whether the plaintiff worked with an asbestos-containing versus asbestos-free version of the joint compound, but whether the links necessary for plaintiff to reach Union Carbide were too speculative. *Id.* at *2.

In that case, plaintiff could not identify what type of Georgia-Pacific product plaintiff used, only that it came in a plastic-bucket that said "Georgia-Pacific" on it. *Id.* at *1. Likewise, plaintiff could not identify whether the joint compound contained asbestos because Georgia-Pacific stopped manufacturing asbestos-containing joint compound in May of 1977 and plaintiff used the product sometime between 1977 and 1981. *Id.* at *1-2. Even if the joint compound did contain asbestos plaintiff did not present evidence showing that the asbestos would have come from Union Carbide. *Id.* The Superior Court reasoned that to link plaintiff's exposure to

Union Carbide would require speculative strands of rope that were too long and knotted to be permissible. *See id.* Summary judgment was granted in favor of Union Carbide because plaintiff simply lacked the necessary evidence for product identification. *See id.* at *2.

A fair reading of the above cases does not lead to the conclusion that exclusivity is a requirement placed upon plaintiff to meet their burden under *Stigliano*, rather it is one method of satisfying its evidentiary requirements. *See* Crawford, 2019 Del. LEXIS 189, *9-10. The basic requirement of *Stigliano* and its progeny is that at summary judgment, once a defendant meets its initial burden the plaintiff must present some evidence from which one could reasonably infer exposure to defendant's asbestos containing product. *See e.g. Stigliano,* 2006 Del. LEXIS 433 at *2; *Pelzel*, 2011 Del. LEXIS 523 at *11; *Ruggeri*, 2012 Del. LEXIS 10 at *4; *Crawford*, 2019 Del. LEXIS 189 at *10-11; *Peti)*, 2020 Del. LEXIS 2760, *7.

iv. Stigliano has not thrown out circumstantial evidence in favor of direct evidence only.

Neither has *Stigliano* thrown out circumstantial evidence as relevant valuable evidence, nor does it have any preference for direct evidence over circumstantial evidence as Appellant has implied. Appellant's Opening Br., 24-25. As recently as August of last year, the Superior Court reiterated the acceptance of both direct and circumstantial evidence under *Stigliano*.

In *In re Asbestos Litigation (Petit)*, the Honorable Judge Adams quoted *Stigliano* when she found plaintiff failed to meet their burden. *See Petit*, 2020 Del. LEXIS 2760 at *7-8. The plaintiff alleged to have used Appellee's arcing machine and lathe while performing brake jobs between 1981 and 1986. *Petit,* 2020 Del. LEXIS 2760 at *1. He testified that grinding the brake shoes would create asbestos dust that he would breath-in; however, plaintiff did not know if the brakes he worked on contained asbestos, he just assumed they did. *Id.* at *2, 7.

Further, Plaintiff alleged to have worked with a whole range of brake manufacturers, but he could not recall all of the brands he worked with. *Id.* *3. He did recall working with Bendix brakes, but plaintiff could not testify to whether the Bendix brakes he actually encountered contained asbestos. *Id.* at *2-3.

In granting summary judgment, Judge Adams stated "*Stigliano* simply requires 'evidence directly or circumstantially linking the plaintiff to the asbestos-containing product' in cases where the plaintiff worked with both asbestos-containing and non-asbestos-containing versions of a product." *Id.* at *7. The court found, despite competing Bendix interrogatories regarding the asbestos-content of Bendix brakes, that plaintiff's assumption that the brakes contained asbestos was insufficient to meet their burden. *Id.* at *7-8.

Appellant has specifically cited to two cases in support of its proposition that *Stigliano* prefers direct evidence to circumstantial, however, these cases are

inapposite. Appellant first cites a hearing transcript from *In re Asbestos Litigation (Kales)*. Appellant's Opening Br., 24.

Appellants reliance on *Kales* is of little value for four reasons. First, this is an unpublished hearing transcript that does not contain any ruling on the issue. *See* Trans. Mot. Hr'g at 84, *In re Asbestos Litig. (Kales)*, C.A. No. N17C-05-589 ASB (Del. Super. Ct. Feb. 28, 2019). Second, the language Appellant quotes is a question the Superior Court was posing to counsel, not a criticism of *Stigliano*. *See id.* at 73:21-23. Third, the Honorable Judge Clark and counsel appear to earnestly grapple with whether evidence that a defendant is a majority or minority supplier of asbestos to a manufacturer constitutes circumstantial evidence or an application of market share liability. *See id.* at 40:12-41:1, 80:15-82:9. Judge Clark also makes references to the need for direct evidence to satisfy the market share liability doctrine. *See id.* at 40:12-41:1. Finally, the Honorable Judge Clark's summary of *Stigliano* is at odds with the stated proposition of the case. *Id.* at 52:4, 81:9-12. *Stigliano* clearly states the plaintiff must present evidence "*directly or circumstantially* linking the plaintiff to the asbestos-containing product." *Stigliano*, 2006 Del. LEXIS 433 at *2 (emphasis added). Judge Clark's statement that "you've got *Stigliano* providing essentially direct evidence is necessary…" is clearly at odds with that holding and is simply an example of a short hand summary of what evidence was lacking in the case rather than a pronouncement of the law upon which *Stigliano* is founded.

Appellant then cites *Robinson v. Union Carbide Corp.* as further support of their perceived assault on circumstantial evidence by *Stigliano*, but that case does not support Appellant's proposition. The Superior Court never discusses, cites, or references *Stigliano*, nor does it even address any issues of an asbestos-containing versus asbestos-free product in *Robinson*. *See Robinson v. Union Carbide Corp.*, 2019 WL 3822531 (Del. Super. Ct. Aug. 15, 2019). Further, and most importantly, the Superior Court was criticizing the prior decision in *Nutt*, wherein the same court rejected the application of market-share liability. *Id.* at *10. The Superior Court rejected defendant Union Carbide's argument under *Nutt*, saying:

> These written decisions and a significant number of Superior Court oral summary judgment decisions echo a principle set forth in *Nutt v. A.C. & S. Co., Inc.*, which causes some of the confusion. No Delaware Supreme Court decision, to this Court's knowledge, has approved applying Nutt's reasoning rejecting market share liability in the way [Union Carbide] requests and in the manner that many Superior Court decisions have applied it. In this Court's view, Nutt's holding rejecting market-share liability has improperly bled into what should be a traditional proximate cause analysis. *Id.*

Frankly, *Robinson* is criticizing *Nutt* and the decisions that followed it. *See id.* In fact, the court discusses the previously analyzed cases of *Sturgill* and *Aveni* as progeny of *Nutt*, but that discussion is wholly unconnected to any *Stigliano* type discussion. *See id.* Appellant would undoubtedly welcome the adoption of market share liability under Delaware law, but that is not the issue on appeal in this case.

Appellant's cannot end run the continued rejection of market share liability by disposing of *Stigliano.*

Appellee appreciates the difficulty Appellant and other plaintiffs sometimes face in meeting their evidentiary burden, but their contention regarding the preference for direct evidence is based on their perception of *Stigliano's* application, not the actual judicial application.

v. Stigliano addresses a very specific evidentiary issue that frequently occurs in asbestos litigation.

Stigliano is a procedural rule that deals with a very specific evidentiary issue, the lack of evidence from which a reasonable jury could infer, without speculating, exposure to a defendant's asbestos-containing product as opposed to an asbestos-free version, involving a narrow band of factual scenarios that frequently appear in asbestos litigation. *See Henderson*, 2011 Del. LEXIS 82 at *21-22. That band of factual scenarios is best illustrated by three exemplar cases.

The first case, *Crawford v. A. O. Smith, Corp.*, represents the classic *Stigliano* scenario where a manufacturer made asbestos-containing and asbestos-free versions of their product. In *Crawford,* defendant Tenneco, successor in interest to Walker Mufflers, moved for summary judgment. *See Crawford,* 2019 Del. LEXIS 189 at *1,3. Plaintiff performed automotive exhaust work for two years between 1963 and 1965. *Id.* at *2. At his deposition he testified he recalled working with Walker brand mufflers because Walker was one of the main brands of mufflers. *Id.* He testified to

the composition of the muffler, including the mesh like lining of the mufflers that created dust when he removed and replaced them. *Id.* His belief that the liner contained asbestos was based on the high heat application of the liner and that someone told him it was asbestos. *Id.* Tenneco put forth evidence showing that between 1941 and 1978 some of Walker's muffler contained asbestos. *Id.* at *6. The Superior Court found that "Tenneco had established it produced both asbestos-containing and non-asbestos-containing Walker mufflers that requires this Court to consider whether there is evidence linking [plaintiff] to the asbestos containing version of the Walker mufflers." *Id.* at *8. That analysis illustrates the typical evidentiary issues addressed by *Stigliano*.

The second instructive case is *In re Asbestos Litigation (Ruggeri)*, which sets forth the second factual scenario where *Stigliano* applies, namely, where a defendant makes an asbestos-containing product that is not readily distinguishable from a non-asbestos containing product, during the period of exposure. *See Ruggeri*, 2012 Del. LEXIS 10 at *3-5.

In *Ruggeri*, defendant manufactured an asbestos-containing joint compound under the formula name V-975, and a non-asbestos containing joint compound under the formula name V-978 during the period of alleged exposure. *Id.* at *3-4. It was undisputed that defendant produced asbestos-containing joint compound, and that plaintiff worked with defendant's joint-compound. *Id.* at *2-3. The issue for plaintiff

was that he could not present evidence that he worked with V-975 as opposed to V-978 because they were indistinguishable by mere appearance. *See id.* at *3-4. Plaintiff testified that he purchased defendants product "in five gallon white plastic buckets with a pine tree logo", but plaintiff could not demonstrate by appearance or otherwise that he purchased the V-975 formula. *Id.* at *2-4. The Superior Court found *Stigliano* applied and that plaintiff had failed to meet their burden, stating "[t]aking the evidence in the light most favorable to the Plaintiff, he has shown at most that he could have used joint compound containing asbestos or used joint compound which was asbestos free…[p]laintiff has adduced no evidence that he was exposed to the asbestos-containing version." *Id.* at *4.

The last demonstrative case is *In re Asbestos Litigation (Petit)*, which illustrates the application of *Stigliano* to the manufacturer of a product that is used in conjunction with products manufactured by a third-party, where the third-party makes asbestos-containing and asbestos-free versions of its product. *See Petit*, 2020 Del. LEXIS 2760 at *8. The facts and posture of *Petit* were detailed earlier. The Honorable Judge Adams found *Stigliano* applied because "the plaintiff worked with both asbestos-containing and non-asbestos-containing versions of a product." *Id.* at *7. The court found, despite competing Bendix interrogatories regarding the asbestos-content of Bendix brakes, that plaintiff's assumption that the brakes contained asbestos was insufficient to meet their burden. *Id.* at *7-8. Judge Adams

stated "[p]laintiff failed to submit any evidence showing that the specific Bendix products he worked with in conjunction with the AMMCO machines contained asbestos, or any evidence that any of the brake products he used with the AMMCO machines release friable asbestos." *Id.* at *8.

These cases illustrate several common factual patterns. First, plaintiffs' recollection of the products they encountered are generalized. Second, evidence indicates that during the time period of exposure the product manufacturer made asbestos-containing and asbestos-free versions of their products. Third, the plaintiff is unable to testify to the asbestos content of the product because they lack personal knowledge, or the asbestos content is not readily verifiable based upon the appearance, application, or product type. Because of this inability the plaintiff must rely upon evidence beyond the plaintiff's personal knowledge to establish the asbestos-content of the product and often attempts to establish the asbestos content *via* some form of market share liability theory. Regardless of the facts of anyone particular case, the basic evidentiary issue *Stigliano* is attempting to address is the lack of "evidence from which a jury could reasonably infer, without undue speculation, that [plaintiff] was exposed to asbestos-containing [products] associated with [defendant]." *Crawford*, 2019 Del. LEXIS 189 at *10-11.

All of the above supports the common sense finding that *Stigliano* tracks the application of the summary judgment standard specific to a recurring fact pattern

unique to asbestos litigation. *Stigliano's* principles are reasonable and have in no way been loosed from its summary judgment standard moorings.[5] What is also clear from the preceding cases is that *Stigliano* is not and cannot be applied independently of the summary judgment standard. It does not automatically give summary judgment to a defendant who meets its burden, nor does it require a plaintiff show exclusive use or give preference to direct evidence. Appellee's affinity for ship metaphors likens *Stigliano* to some shanty of a ship adrift on an evidentiary sea or a "Man-of-War" sinking viable claims. It is neither. Rather it is an evidentiary buoy, a guide-post, a navigational aid which has faithfully assisted The Superior Court in navigating a very specific but frequently occurring evidentiary issue.

Leaving all the colorful similes aside, *Stigliano* is nothing more than an asbestos litigation specific outline for the application of the summary judgment standard to one recurring fact pattern.

[5] It is probably a misnomer to even call *Stigliano* a framework given its close connection with the summary judgment standard.

II. The Superior Court's application of *Stigliano* to this case was proper.

A. Question Presented

Whether the Superior Court's application of *Stigliano* at summary judgment below was proper? Ex. A, at ¶¶11-13.

B. Standard of Review

On appeal the standard of review is *de novo* for

> "a trial court's grant of a motion for summary judgment, both as to the facts and the law. Thus, this Court must undertake an independent review of the record and applicable legal principles 'to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law.'" *Dabaldo,* 85 A.3d at 77 (citing *See e.g. State Farm Mut. Auto. Ins., Co.*, 80 A.3d at 632 (Del. 2013)); *see also Collins*, 673 A.2d at 161 (citing *Merrill*, 606 A.2d at 99).

C. Merits of the Argument

The Honorable Judge Rennie's application of *Stigliano* below was proper for three reasons. First, *Stigliano* was applicable to Appellee as a manufacturer of a non-asbestos containing product used in conjunction with asbestos and non-asbestos brake shoes. Second, Appellee set forth sufficient evidence from the record to show that during the relevant period the identified manufacturers and others made asbestos-containing and asbestos-free brake shoes. Third, Appellant failed to satisfy their burden by failing to present direct or circumstantial evidence from which one

could reasonably infer Appellant worked with the asbestos-containing version of brake shoes.

i. Stigliano is applicable to Appellee to prevent the unjust shifting of liability from a manufacturer to a third party.

To permit a third-party manufacturer to utilize *Stigliano* but not the manufacturer of an asbestos-free product used in conjunction with the third-party manufacturer's product has the potential to shift liability from the third-party manufacturer of a potentially defective asbestos-containing product to the innocent manufacturer of a safe asbestos-free product. This goes against the public policy and purpose of product liability law. Therefore, as stated earlier, *Stigliano* applies to a manufacturer whose product is used in conjunction with a third-party manufacturer's product when the third-party manufacturer produces asbestos-containing and asbestos-free versions of said product. *See Petit*, 2020 Del. LEXIS 2760 at *8.

The public policy anchoring products liability law is to protect consumers from injuries caused by defective products by holding manufacturers of defective products liable for the consumer's injuries. *See* Restatement (Second) of Torts, §402A cmt. B (Am. Law Inst. 1979); *see also* Restatement (Third) of Torts: Products Liability §1 cmt. a., §2 cmt. a (Am. Law Inst. 1998). The purpose of products liability law is to compensate consumers for their injuries and encourage manufacturers to create safe products. Victor E. Schwartz et al., *Respirators to the*

Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer, 33 Am. J. Trial Advoc. 49, 49-50 (2009). If a third-party manufacturer like a brake manufacturer can rely on *Stigliano* at summary judgment to show that the product a plaintiff used was not defective, or that plaintiff lacks evidence sufficient to state a claim; but the manufacturer of a sound product, like an arcing machine, whose product cannot cause an asbestos related injury without an asbestos containing brake shoe could be left footing the bill for a defective product it did not manufacture. As a result, a third-party manufacturer, would have no incentive to develop safer products and would not have to pay for injuries caused by its products. *Stigliano* balances the public policy of products liability law with justice's requirement that the wrongful party is held liable for their defective product.

ii. Hennessy properly triggered Stigliano by showing that during the time period of alleged exposure brake shoes were manufactured as both asbestos-containing and asbestos free.

The burden of establishing exposure to an asbestos-containing product in their *prima facie* case is always on a plaintiff, and it was sufficient for Hennessy to trigger *Stigliano* by presenting evidence that during the period of alleged exposure some brakes did not contain asbestos. With regard to any asbestos related injury, the plaintiff has the burden to make a *prima facie* case by showing exposure to an asbestos containing product. *See Cain*, 832 A.2d at 741 (*citing Nutt*, 509 A.2d at

1117 *and Clark,* 1985 Del. LEXIS 1249 at *6-8). In addition, because the burden is always on the plaintiff to show exposure to an asbestos containing product; it is sufficient for Hennessy to trigger *Stigliano* by showing that during the time-period of alleged exposure some brakes manufactured were asbestos-free.

In this case, Hennessy put forth sufficient evidence showing that between 1971 and 1973, the period of alleged exposure at Larry's Auto Shop, some brakes manufactured contained asbestos and some were asbestos-free. Hennessy's corporate representative submitted a sworn affidavit that Hennessy's asbestos-free arcing machines were designed to grind brake shoes regardless of the content of their friction material, "including the asbestos-free friction materials which were available and in the marketplace during the 1960s or earlier." B324. Appellant's own expert, Dr. Barry Castleman, stated in his sworn affidavit that in "the 1950s, 60s, and 70s, the vast majority of all friction products (brakes and clutches) used in the United States contained asbestos." B419. Testimony from Honeywell's corporate representative indicates that the first asbestos-free brake shoe appeared on the market in 1969 for heavy duty uses, such as police vehicles and taxis. B445 (154:14-16, 23-24), B446 (155:1-3). Testimony from AMMCO's corporate representative reveals that the majority of brakes shoes pre-1980s contained asbestos, necessarily meaning that some minority did not.

Thereafter, the burden is not on Hennessy to show that Appellant worked with asbestos-free brakes. Hennessy must only show that during the time-period of Appellant's alleged exposure, brake manufacturers made asbestos-containing and asbestos-free brake shoes such that there is no material issue as to whether Appellant worked with an asbestos containing product. Plaintiff's generalized testimony that he worked with Bendix, Wagner, and Raybestos brakes is not sufficient to establish he worked with asbestos-containing brake shoes. Accordingly, *Stigliano* was properly triggered to shift the burden to Appellant to present direct or circumstantial evidence from which one could infer exposure to asbestos-containing brake shoes. Appellant failed to meet that burden below.

iii. Appellant's reliance on market-share liability style evidence is insufficient to meet the shifted burden under *Stigliano.*

Appellant's reliance upon market-share liability style evidence is not sufficient to create a reasonable inference that the plaintiff actually worked with the asbestos containing version of the product. Appellant did not present any evidence from which one could reasonably infer that the brake shoes Appellant actually worked with were the asbestos-containing version.

In response to the shifted burden under *Stigliano*, Appellant put forth five pieces of generalized evidence. Appellant pointed to Appellant's own testimony which was notably lacking any personal knowledge or observations regarding the

asbestos-content of any brake shoes he arced.[6] B300 (24:13-17), B318 (27:20-25). Appellant also presented an affidavit from their expert, Dr. Barry Castleman, who stated that the vast majority of brake shoes manufactured in the 1950s, 60s, and 70s contained asbestos, and a mechanic even working in the 1990s would have encountered asbestos-containing brake linings on a regular basis. B419-20. The problem for Appellant is Dr. Castleman does not identify any specific manufacturers, and from his affidavit a jury would be forced to speculate as to the meaning of "vast majority."[7] Appellant then put forth testimonial evidence from Hennessy's corporate representative, in which Hennessy's representative agreed that it was probable that a mechanic in the 1950s, 60s, and 70s would have encountered asbestos brake linings. B406 (62:2-9). Again, the problem for Appellant is that counsel did not identify any specific manufacturers, dates, brake types, or locations when asking about this probability. B406 (62:2-9). A jury would be forced to speculate whether the probability remained constant or fluctuated based on time, location, brake shoe type, application, and brand. That is much the same case for the testimonial evidence from Honeywell International's corporate representative, as successor in interest to Bendix Brakes which Appellant introduced. That

[6] Even if Appellant did testify to the asbestos-content of the brake shoes he likely lacked the requisite knowledge to say with any degree of probability whether the brake shoes actually contained asbestos.

[7] Does a vast majority mean fifty-one percent, ninety-nine percent, or something in between? Further, what part of the country, what time period, and what type of vehicles are included in that claim?

representative testified that the first asbestos free-brake lining came to market in the U.S. in 1969, but the representative could not recall when Bendix began manufacturing asbestos-free brakes for use in passenger vehicle. B447 (156:1-7). He could only state that they had released after-market asbestos-free brake shoe linings in 1987. B447 (156:1-7). The problem for Appellant continues to be the amount of speculation required to link Appellant's work to an asbestos containing brake shoe. The jury would be forced to speculate as to what year between 1969 and 1987 Bendix began selling asbestos-free brake shoes, and whether Appellant would have come into contact with the asbestos containing versions. Lastly, Appellant submitted generalized interrogatory responses from two brake manufacturers, Wagner and Raybestos B450-53, B455-57.

Recalling the name of a product's manufacturer among others that could not be recalled and stating that some were arced while presenting an interrogatory that shows the named manufacturer made some asbestos-containing brake shoes during the period of alleged exposure is not sufficient to overcome summary judgment. It requires impermissible speculation to make the causal link necessary. Using an expert affidavit to argue that most brakes contained asbestos further amounts to an argument for market-share liability, essentially claiming that because most brakes during the period of exposure contained asbestos, without regard to specific details, all of the brake shoes Appellant worked with more likely than not contained

asbestos. This type of logic has been rejected under *Stigliano* time and again as insufficient, and should be rejected again by this Honorable Court, in affirming summary judgment.

CONCLUSION

Any contention that *Stigliano* has supplanted or uprooted the summary judgment framework of Rule 56(c) misses the consistent application of *Stigliano* to a very specific evidentiary issue frequently occurring in asbestos litigation. *Stigliano* is a common sense approach to an evidentiary standard that tracks the proper burden shifting framework of summary judgment. It does not require plaintiff's to prove exclusive use of an asbestos-containing product, nor does it favor direct evidence over circumstantial evidence. It merely requires a plaintiff present some evidence from which a jury could reasonably infer a plaintiff was exposed to the asbestos-containing version of a product.

Appellant seeks to avoid summary judgment by requiring defendants to prove a plaintiff worked with the non-asbestos version of a product in a manner that is akin to market-share liability. However, Appellant's attempt to end-run the lack of market-share liability in this jurisdiction evidences a fundamental misunderstanding of *Stigliano* as a procedural guide to the Superior Court in handling a frequently occurring evidentiary issue.

Appellee is not unsympathetic to the evidentiary plight Appellant, like many plaintiffs, find themselves in when litigating issues that have occurred decades earlier; but the rules and laws of this jurisdiction, like all jurisdictions, are to be applied blindly, without favor to one party or to one class of plaintiffs over another.

The Superior Court's decision below should not be disturbed because the application of *Stigliano* was proper. Hennessy could avail itself of *Stigliano*, as it did in the *Petit* decision, because to hold otherwise would frustrate the public policy of products liability law. Hennessy would be left shouldering the liability of a third-party manufacturer when Hennessy had no control over their product.

Additionally, Hennessy properly triggered *Stigliano* by showing that some brake shoes made during the period of alleged exposure, including those made by the generally identified manufacturers, did not contain asbestos. The burden then shifted to Appellant to show some direct or circumstantial evidence from which one could reasonably infer exposure to asbestos-containing brake shoes. Appellant attempted to use market-share evidence to meet its burden. That generalized evidence is insufficient to create an inference that the actual brake shoes Appellant worked with contained asbestos. Accordingly, summary judgment was properly granted Hennessy.

The inability of plaintiffs to develop an evidentiary record to support their claim is not a reason to throw out *Stigliano* and its proper application of the summary judgment standard. In fact, the very reason for summary judgment is to dispose of claims that lack sufficient evidence for a jury to render a decision. Therefore, Appellee respectfully asks this Honorable Court to affirm the grant to summary judgment in favor of Appellee Hennessy Industries, LLC.