IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	:	
	:	
Limited to:	:	
Robert J. Truitt	:	C.A. No. N10C-06-072 ASB

UPON DEFENDANT ASBESTOS CORPORATION, LTD.'S
MOTION FOR SUMMARY JUDGMENT
GRANTED

This 3rd day of October, 2011, it appears to the Court that:

Factual and Procedural Background

Plaintiffs Robert J. Truitt ("Truitt") and his wife Carolyn A. Truitt filed suit against numerous defendants, including Asbestos Corporation, Ltd. ("ACL"), alleging that Truitt developed an asbestos-related illness as a consequence of exposure to various asbestos-containing products manufactured by or otherwise associated with the defendants. In particular, Truitt alleges that he was exposed to asbestos contained in a sweeping compound that was used at the DuPont plant in Seaford, Delaware, where he was employed from 1960 until he retired in 1992. Truitt was deposed in this litigation on January 14, 2011. No other witnesses were deposed in this case. Truitt's deposition was also taken on July 20, 2010 in

connection with *In re: Asbestos Litigation, William Neal v. Asbestos Corporation, Ltd.*[1]

In his depositions, Truitt described using an "asbestos-sweeping compound" to sweep the floor at the DuPont Seaford plant and to clean up water spills.[2] Truitt explained, "When I first went there in the '60s, it [the sweeping compound] was black. Now, this is – could be a guess too. I think it was green."[3] Truitt then testified that many years later, DuPont began using a "red," "oily" substance to sweep the floors.[4] Truitt described the substance of the compound as "heavy" and granular, with an oily base.[5] In response to questions about how the substance was packaged, Truitt seemed uncertain:

> Came in cardboard – well, wait a minute. It come in them drums that were really heavy. I really don't know that. It could come in barrels, or it could come in bags. But I never remember dumping a bag, so it probably come in drums.[6]

When asked about the packaging of the red cleaning substance, Truitt responded that it was "[n]ever in a metal drum. It was in heavy-duty cardboard."[7] Truitt testified that he used the substance(s) to clean the floors every day.[8]

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[1] C.A. No.: 08C-12-264 ASB (Del. Super. Aug. 2, 2011). Notably, the *Neal* litigation was dismissed with prejudice for the plaintiffs' failure to oppose summary judgment.
[2] Robert Truitt Dep. Tr., Jan. 14, 2011, at 64:14-16.
[3] *Id.* at 65:16-18.
[4] *Id.* at 65:20-21.
[5] *Id.* at 66:8; 67: 2-11.
[6] *Id.* at 66: 18-22.
[7] *Id.* at 68:2-3.
[8] *Id.* at 68:6-17.

Truitt gave similar answers in his 2010 deposition taken in connection with the *Neal* litigation. In that deposition, Truitt testified that he thought the green sweeping compound had asbestos in it, then admitted that he had no personal knowledge of the compound's composition.[9] Furthermore, in the 2010 deposition, Truitt testified that the green substance "came in a bag, and we'd rip it open and just dump it into a 35-gallon drum."[10] In response to further questioning, Truitt conceded that the substance "could have come in a drum […] I never remember dumping it in there, to tell you the truth, so it must have come in a drum."[11] Truitt testified that the cardboard exterior of the drum "probably" had some writing identifying "where it come from," but he could not recall what it might have said, nor did he recall the brand-name or the manufacturer of the sweeping compound.[12]

The Master Trial Scheduling Order ("MTSO") applicable to this litigation, as amended July 1, 2011, required the submission of summary judgment motions by July 8, 2011, with responses due July 25, 2011 and replies due on August 5, 2011. By agreement of the parties, and with the approval of the Court, the MTSO was amended to require the submission of summary judgment opposition briefs on August 1, 2011 and the submission of reply briefs by August 12, 2011.[13]

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[9] Robert Truitt, Dep. Tr., Jul. 20, 2010, at 45: 2-9.
[10] *Id.* at 45:21-22.
[11] *Id.* at 46:3-4.
[12] *Id.* at 46:12-19.
[13] Master Trial Scheduling Order, C.A. No. 77C-ASB-2 (Del. Super. Aug. 4, 2011).

Parties' Contentions

ACL timely filed its Motion for Summary Judgment on July 8, 2011. In it, ACL argues principally that it was entitled to summary judgment based upon the Plaintiffs' failure to produce evidence that Truitt had been exposed to asbestos-containing products manufactured or distributed by ACL. ACL also contends that it is entitled to summary judgment on Plaintiffs' strict liability claims, noting that Delaware law does not permit strict liability in asbestos claims.[14] Similarly, ACL argues that the record presents no evidence of willful or wanton conduct, or that ACL engaged in a conspiracy to conceal the dangers of asbestos exposure. Finally, ACL submits that it is entitled to summary judgment on Plaintiffs' loss of consortium claim because such a claim is derivative in nature and can only be sustained where there is a valid underlying claim against the defendant.

Plaintiffs filed their response on August 2, 2011, one day after the deadline established in the amended Master Trial Scheduling Order. Plaintiffs' submission, as ACL observes in its reply brief, can only be described as "incomprehensible."[15] Plaintiffs' brief is a rambling nine-page statement filled with misspellings, confusing statements, and unsupported assertions.[16]

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[14] *See Bell v. Celotex Corp.*, 1988 WL 7623, at *3 (Del. Super. Ct.); *see also Bradley v. Pittsburgh Corning Corp.*, 505 A.2d 451 (Del. 1985).
[15] Def.'s Reply Br. at 1.
[16] For example, the first heading under the Argument section of the brief states, bewilderingly, "Collateral Estoppel Contests This Issue Under *Nack v. Charles A. Wagner, Inc.*" More

Plaintiff appears to proceed on the theory that the present summary judgment motion is governed by *Nack v. Charles A. Wagner, Inc.*,[17] in which the Supreme Court reversed this Court's decision granting summary judgment to Charles A. Wagner, Inc. ("Wagner"). In *Nack*, employees of the DuPont Seaford plant brought suit against Wagner, alleging that it had harmed them by supplying an asbestos-containing sweeping compound to the plant from 1958 to 1973.[18] Wagner sought summary judgment on the grounds that the exposed workers had failed to establish sufficient nexus between Wagner and the sweeping compound actually used in the DuPont plant.[19] The Supreme Court rejected Wagner's argument, finding that Wagner was not entitled to summary judgment because Plaintiffs had presented evidence that

> a) Wagner shipped almost 38 tons of asbestos fiber to the DuPont plant; b) an asbestos compound consistent with that supplied by Wagner was used by or near the Plaintiffs as a sweeping compound; c) there was deposition testimony associating Wagner's name with paper bags in which asbestos arrived at the plant; d) there was no evidence of any other asbestos sweeping compound delivered after 1958; and e) DuPont purchasing officers and Wagner's president corresponded in 1969 about the use of Wagner's asbestos fiber as a sweeping compound at the DuPont plant.[20]

In *Nack*, the Supreme Court held that the evidence presented to this Court, viewed in the light most favorable to the plaintiff, supported an inference that the

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troubling to the Court, the Statement of Facts contains no citations to the record and the included citations to the exhibits do not match the facts asserted.

[17] 803 A.2d 428, 2002 WL 1472268 (Del. Jun. 28, 2002) (TABLE).

[18] *Id.* at *1.

[19] *Id.*

[20] *Id.*

employees of the DuPont Seaford plant had been exposed to an asbestos-containing sweeping compound supplied by Wagner from 1958 to 1973 and that summary judgment was therefore improper. In the present litigation, Plaintiffs have asserted, without support, that Wagner was an agent of ACL and that the doctrine of collateral estoppel prevents this Court from revisiting the question of whether the plaintiff has established a sufficient nexus between the alleged exposure and ACL's product.

Alternatively, Plaintiffs contend in their brief that there is a factual question regarding whether Truitt was exposed to an asbestos-containing sweeping compound manufactured or supplied by ACL as an employee of the DuPont Seaford plant. Plaintiffs note, again without support, that "[t]ons of ACL's asbestos were sold by Wagner to the DuPont Company in Seaford as sweeping compound when Mr. Truitt was an employee."[21] Plaintiffs further argue that Truitt testified that he used asbestos-sweeping compound as an employee of the Seaford plant from 1960 to 1992, and that his co-workers' testimony clearly shows that the off-white/gray asbestos sweeping compound was extensively used in areas where Truitt worked from 1960 to 1966.[22] Accordingly, Plaintiffs conclude that they

[21] Pl.'s Resp. at 7.
[22] *Id.* at 8. These citations are not supported by the record, as discussed below.

have "clearly" shown that Truitt was exposed to ACL's asbestos as required by Delaware law because "only Wagner sweeping compound was present."[23]

With respect to Plaintiffs' other claims, Plaintiffs contend that their loss of consortium claim must survive summary judgment along with their products liability claim. Moreover, Plaintiffs allege, again conclusorily and without support, that there is evidence that ACL engaged in willful and wanton conduct and conspiracy by participating in trade organizations and failing to warn others of the hazards of asbestos until after 1970.[24] Plaintiffs did not oppose entry of summary judgment on their strict liability claims.

Defendant ACL timely filed its reply brief on August 12, 2011. ACL first notes that Plaintiffs failed to timely file a response to its motion for summary judgment and argues that it was unfairly prejudiced and hampered in its attempts to answer by the Plaintiffs' response. In particular, ACL noted that many of the citations included in Plaintiffs' brief "referenced only cover pages of depositions or cited to exhibit page numbers that were not included."[25] ACL moved to strike the Plaintiffs' late-filed Response and asked the Court to enter an order granting its motion for summary judgment.

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[23] *Id.*
[24] *See* Pl.'s Resp. at 9.
[25] Def.'s Reply Br. at 1.

Defendants, in their reply brief, also addressed the merits of Plaintiffs' claims. For purposes of this summary judgment motion, ACL concedes that it sold its raw asbestos fibers to Wagner, whose sweeping compound may have been used at the DuPont Seaford plant from 1958 to 1972. However, ACL argues, Truitt's deposition testimony supplied in the present litigation does not support Plaintiffs' claims of exposure to a product manufactured or distributed by ACL. In particular, ACL notes that its product was grayish-white in color and that Truitt described using only a green or red sweeping material during the period in question.[26]

Standard of Review

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[27] Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.[28] If the proponent properly supports its claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[29] Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the

[26] Dep. Tr. of Robert J. Truitt; 1/14/11 68: 18-24 ("Q: Okay. Other than the green and the red, do you ever recall seeing anyone else using any type of substances on the floor? A: Never. Now, like a bad spill like you were talking about, they'd use like a sawdust material. But it didn't have any – it was just – I forget what color it was.")
[27] Super. Ct. Civ. R. 56(c).
[28] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).
[29] *Id.* at 880.

non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.[30] Furthermore, when a motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."[31]

Decision

Upon review of the record and the briefs of the parties, the Court will grant ACL's request to strike Plaintiffs' late-filed response to its summary judgment motion and will grant summary judgment in favor of ACL based upon Plaintiffs' failure to respond to timely to the motion. Filing deadlines exist not merely for the convenience of the parties but to ensure the orderly progress of cases.[32] A late-filed response to a summary judgment motion, particularly one such as that filed by the Plaintiffs in this case, increases the burden on the Court by, among other things, increasing the risk of a late-filed reply. The Court also notes that the Plaintiffs' strategy of making conclusory and unsupported allegations in their response brief deprives the moving defendant of the opportunity to make reasonable arguments in reply.

[30] *Id.* at 879-80.
[31] Super. Ct. Civ. R. 56(e).
[32] *In re Asbestos Litig. (Dempsey)*, 1991 WL 35687, *2 (Del. Super. Mar. 11, 1991).

Out of an abundance of caution, the Court notes that summary judgment in favor of ACL would have been appropriate on all claims, even if the Plaintiffs' response had been timely filed. The *Nack* decision does not, as Plaintiffs suggest, bar this Court from considering whether Truitt has shown an appropriate nexus between his alleged exposure and ACL's products. Collateral estoppel, also known as issue preclusion, bars re-litigation of issues of fact previously adjudicated.[33] To determine whether collateral estoppel bars consideration of an issue, a court must determine whether:

> (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[34]

This case is not an appropriate one for the application of collateral estoppel because ACL was not a party to the *Nack* litigation, the issues presented by the present litigation are not, in the Court's view, identical to those decided in Nack, and ACL did not have a "full and fair opportunity" to litigate the product nexus question in the *Nack* litigation.

Nack presented the question of whether there was a sufficient record that a reasonable factfinder could conclude that the plaintiff-employees had been exposed

[33] *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).
[34] *Id.* at 535 (citations omitted).

to Wagner asbestos at the DuPont Seaford plant between 1958 and 1973. ACL was not a party to that litigation. It is true that Delaware does not require mutuality of parties to assert the doctrine of collateral estoppel.[35] However, there is no reason to believe, based on the record before the Court, that ACL and Wagner would have had identical interests in the prior litigation. The *Nack* Court considered only the question of whether the record would permit a reasonable factfinder to conclude that the plaintiffs, employees of the DuPont Seaford plant, had been exposed to asbestos-containing products associated with Wagner.

Although ACL has conceded for purposes of this summary judgment motion that it supplied raw asbestos fiber to Wagner, which may have been used at the DuPont Seaford plant from approximately 1958 to 1972, this fact does not require the application of the doctrine of collateral estoppel. ACL and Wagner are not the same entity. It is likely that ACL and Wagner do not share identical interests with respect to this litigation – indeed, ACL appears to be arguing that the sweeping compound used at the Seaford plant is inconsistent with its product. The issue of whether there is sufficient evidence in the record to permit a reasonable factfinder to conclude that the plaintiffs were exposed to ACL's product is separate and distinct from the issue of whether there was sufficient evidence in the record to permit a reasonable factfinder to conclude that the plaintiffs in *Nack* were exposed

[35] *Columbia Casualty Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991).

to Wagner's product. Furthermore, the record presented in this litigation is not identical to that presented in the *Nack* litigation.

The Court has considered only the record presented in this case in determining whether Plaintiffs have established a sufficient factual record of exposure to asbestos-containing ACL products to survive summary judgment. Delaware law requires plaintiffs to demonstrate that "a particular defendant's asbestos-containing product was used at the job site and that the plaintiff was in proximity to that product at the time it was being used."[36] The Court should not "sustain a claim which rests upon speculation or conjecture or on testimony which could not meet the 'time and place' standard."[37]

Upon review of the record in this case, the Court is satisfied that the Plaintiffs have failed to meet the "time and place" standard. Truitt's testimony regarding the sweeping compound used at the DuPont Seaford plant is vague and uncertain and does not establish anything more than that Truitt used, at various times, a red, green, or black sweeping compound to complete his housekeeping duties at the DuPont Seaford plant. Truitt does not positively identify the product as having been supplied by Wagner or ACL in either of the depositions taken since the *Nack* case was decided. None of the citations to the record in Plaintiffs' response supports the assertion in their brief that Truitt worked with a "grayish-

[36] *In re Asbestos Litig.*, 509 A.2d 1116, 1117 (Del. Super. 1986) (citation omitted).
[37] *Id.* at 1117-18.

white," "fibrous" material that was consistent with "waste[-]grade Canadian chrysotile asbestos."[38] Nowhere in the record is there support for Plaintiffs' allegations that Truitt was exposed to a sweeping compound containing asbestos mined or supplied by ACL. Essentially, Plaintiffs are asking the Court to create a presumption of exposure based on the fact that Truitt worked at the DuPont Seaford Plant during the years that an asbestos-containing sweeping compound distributed by Wagner was in use and that he used a sweeping compound as part of his duties at the plant. The claim cannot be sustained on the basis of such speculative evidence, and ACL is therefore entitled to summary judgment on Plaintiffs' negligence claim.

The Court also grants summary judgment to ACL on all of Plaintiffs' other claims. Strict tort liability in products liability claims does not exist in Delaware, and these claims must therefore be dismissed.[39] Plaintiffs have also failed to provide any specific assertions of fact to support their claims of willful and wanton conduct, conspiracy, or loss of consortium. Accordingly, summary judgment will be granted on these claims pursuant to Superior Court Civil Rule 56(e).

ACL's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/

[38] Pl.'s Resp. at 2.
[39] *See, e.g.*, *Bell v. Celotex Corp.*, 1988 WL 7623, *3 (Del. Super. Jan. 19, 1988).

Peggy L. Ableman, Judge