

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

IN RE: ASBESTOS LITIGATION :
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 :
 Limited to: :
 Gordon, Melvin Carl : C.A. No. N10C-08-307-ASB

UPON DEFENDANT UOP, LLC'S MOTION FOR SUMMARY
JUDGMENT
GRANTED

This 15th day of November, 2011, it appears to the Court that:

Plaintiff Melvin Gordon ("Gordon") worked for nearly forty years in various capacities at the Coffeyville Oil Refinery in Coffeyville, Kansas, from 1965 until his retirement in 2005. Gordon was diagnosed with mesothelioma which led to his death in June 2011.

Gordon and his wife, Carol Ann Gordon, filed this lawsuit on August 30, 2010, shortly after Mr. Gordon was diagnosed. Plaintiffs alleged in the Complaint that the defendants in this case each either manufactured, distributed, sold, supplied, or installed products that caused Gordon's mesothelioma. Plaintiffs' claims against the UOP, LLC ("UOP") relate to Gordon's exposures to heaters that they allege were manufactured by UOP and which were present at the refinery where plaintiff was employed throughout his occupational life.

Gordon, who was deposed prior to his death, testified extensively concerning his employment at the refinery. During the first year of his employment, Gordon worked as a laborer digging ditches and cleaning up. Thereafter, from 1966 until 1971, he continued as a laborer but served as a relief or vacation person, filling in for others in the Furfural Vacuum Unit. During this time, Gordon worked with insulators and was often present when insulation was removed or installed.

In 1971, Gordon was promoted to the position of Operations Foreman of the Coker Unit where he remained until 1981. He then became supervisor of the boilermakers for four or five years, maintenance supervisor for approximately five years, and maintenance superintendent for the following five years. He served as a contractor and construction supervisor for the last ten years of his employment before he retired.

Gordon was present and worked around heaters that bore the nameplate or placard of “UOP”¹ which he perceived to be the manufacturer or trade name of the heaters. The heaters were situated in the Coker unit of the refinery, and were approximately 40 feet long, 15 or 16 feet wide, and 20 feet high. While Gordon had no recollection of doing any work on the heater unit itself, he testified that he supervised 18 boilermakers and “was in

¹Universal Oil Product.

and around every heater they worked on.”² Gordon testified that the heaters would have had gaskets on the inlet and outlet valves, but could not identify the brand or manufacturer of the insulation.

Defendant UOP has moved for summary judgment on the ground that there is no evidence to support plaintiffs’ claims that Gordon was exposed to asbestos from any UOP heater, any gaskets associated with UOP heater technology, or through any products or materials supplied by UOP. In fact UOP submits that it is in the business of developing and licensing technology primarily in the petrochemical industry.³ It licenses the intellectual property to refiners and performs the initial sizing and process requirements for refiners to produce certain chemical reactions to convert the refiners’ feedstock into petrochemical product. UOP submits that it did not do the detailed design of the heaters, or construct the heater, or select the materials to be used in its construction. Nor did it design or require any heater to be insulated with asbestos. UOP does not typically supply its customers or licensees with any products or materials, much less any containing asbestos, except for products such as catalysts. As a licensor of technology, UOP argues that it cannot be held liable for Gordon’s exposure to asbestos.

²Melvin C. Gordon Disc. Dep. Tr., Vol. I, Jan. 13, 2011, at 125: 23-24.

³Clary Affidavit.

In its brief in opposition to summary judgment, Plaintiff argues that Gordon “always went inside the UOP heater when it was down” to check for weak spots with the tubing or burners. Since “the work would have involved gaskets if the inlet and outlet valves were removed,” Plaintiff submits that Gordon was necessarily exposed to asbestos by UOP.

Since plaintiff cannot dispute the fact that UOP did not utilize any asbestos products in its heaters, but insulated them with non-asbestos refractory materials such as lumite, haydite, or vermiculite (“LHV”) plaintiffs make a rather tortuous argument that the LHV used in the 1950s, 60s, and 70s was also toxic because some of the vermiculite from the mine in Libby, Montana was contaminated with asbestos. Plaintiffs provide no evidence that any vermiculite was used in the UOP Coffeyville heater or that it was derived from Libby, Montana.

When considering a motion for summary judgment, the Court examines the record to determine whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law. Initially, the burden is placed on the moving party to demonstrate that its legal claims are supported by the undisputed facts. If the proponent properly supports its claims, the burden then shifts to the non-moving party to demonstrate that there are material issues of fact for

resolution by the jury. Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute, or if judgment as a matter of law is not appropriate.

Under Kansas substantive law, which the parties agree applies to this case, the plaintiff in an asbestos case must establish that the defendant's product was a substantial factor in causing his disease:

- (a) In any civil action under this act ... alleging an asbestos claim, the party with the burden of establishing this claim ... must show that the alleged exposure attributable to a given ... party was a substantial factor in causing the injury, loss, or damages.

In assessing whether the factor causation test has been met, the Kansas statute requires the Court to consider, without limitation all of the following factors:

- (1) The manner in which the plaintiff was exposed;
- (2) The proximity to the plaintiff when the exposure occurred;
- (3) The frequency and length of the plaintiff's exposure;
- (4) Any factors that mitigated or enhanced the plaintiff's exposure.

The Kansas statute has thus essentially codified what is generally known as the *Lohrmann* "frequency, regularity and proximity" standard.⁴

⁴ See, e.g., *In re Asbestos Litig. (Haas)*, No. 10C-05-245 ASB at 42(Del. Super. 9, 2011) (TRANSCRIPT) (finding that the Kansas statute tracks the *Lohrmann* standard); see also *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).

Upon reviewing the record and the Kansas statute, the Court is satisfied that UOP is entitled to summary judgment as there is no evidence supporting plaintiffs' claims against it. UOP did not perform the detailed design, engineering, or construction of any of the heaters at the Coffeyville Refinery. Rather, the refinery separately hired independent third parties to engineer and construct the heaters. Nor were the heaters designed to be insulated with asbestos but instead were to be used in conjunction with a non-asbestos, concrete composite refractory material.

Plaintiffs' somewhat farfetched effort to attribute an asbestos product to UOP, by arguing the contamination of the vermiculite from the Libby, Montana mines, is not sufficient to salvage the claim or to present a triable issue of fact, without asking a jury to engage in pure speculation. Without any evidence even circumstantially linking the portion of vermiculite that may have been contaminated to the LHV non-asbestos refractory insulation material recommended by UOP for its heaters, the record is simply insufficient to survive summary judgment.

The Court will not consider Defendant's argument that plaintiffs' claims against UOP are barred by either the Kansas or Delaware statutes of repose as they were presented for the first time in UOP's reply brief and the

Court's disposition on other grounds renders consideration of this argument unnecessary.⁵

Even viewed in the light most favorable to plaintiff, the record does not support a non-speculative inference that Gordon was exposed to asbestos from a UOP, LLC product. UOP's Motion for Summary Judgment is therefore granted.

IT IS SO ORDERED.

/s/ Peggy L. Ableman
Peggy L. Ableman, Judge

cc: All counsel via File and Serve

⁵ See, e.g., *In re Asbestos Litig. (Lagrone)*, 2007 WL 2410879, *4 (Del. Super. Aug. 27, 2007) (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958); *Murphy v. State.*, 632 A.2d 1150, 1152 (Del. 1993)).