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

IN RE ASBESTOS LITIGATION:	)	
	)	
DARLENE K. MERRITT and	)	
JAMES KILBY STORY, et al.	)	C.A. No. N10C-11-200 ASB
	)	
Limited to: The William Powell Co.	)	

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, JR., JUDGE

Plaintiff, James K. Story, worked at Allied Chemical in Chesterfield, Virginia 1956-1995. The plant used valves manufactured by Defendant, The William Powell Co. ("William Powell"). Defendant moves for summary judgment on product nexus grounds and asserts the "component parts defense" as grounds for not owing a duty to Plaintiff for asbestos-containing parts added to their products after sale. Therefore, this motion comes down to two issues. Whether product nexus is met for the original asbestos-containing parts of Defendant's valves and whether Defendant owes a duty for asbestos-containing parts added to its valves after sale. Based on the reasoning below, the court finds Plaintiff has not made a *prima facie* case for product nexus with original asbestos-containing parts manufactured by Defendant and under Virginia law a manufacturer owes a duty to warn for asbestos-containing replacement parts when their use is reasonably foreseeable. Therefore, summary judgment is **GRANTED IN PART** as to product nexus with asbestos-containing parts manufactured by Defendant and **DENIED IN PART** as to the component parts argument.

FACTS

Plaintiff, James K. Story, worked at Allied Chemical's nylon facility in Chesterfield, Virginia 1956-1995. He worked as an operator at Allied Chemical and mostly worked in Building 25. In the 1980s he became an oiler and worked in the Tool Room which was adjacent to the valve room. Plaintiff was not deposed in this matter, instead Plaintiffs offer a co-worker, Clay Jarvis, as

a product identification witness. Mr. Jarvis worked overtime shifts in Building 25 at the same that Plaintiff worked there. He was a millwright or field machinist.

Mr. Jarvis identified William Powell valves as being present in Building 25. He believed the packing contained asbestos because of the high heat application and testified that it was manufactured by John Crane and Garlock. He did not testify that Warren Pumps manufactured any of the packing. The process of removing packing and repacking valves generated dust. Generally this process took place in the Valve Room, but some more minor repacking and repairs occurred in Building 25. Plaintiffs allege Mr. Story was exposed to asbestos containing dust in Building 25 while people were doing packing work and when he worked in the Tool Room in the 1980s because it was adjacent to the Valve Room.

Defendant objects to the use of Mr. Jarvis' deposition on the grounds of hearsay and lack of personal knowledge because it was not present for the deposition and did not cross examine him. Defendant was added to the case after Mr. Jarvis' deposition and subsequently has been given an opportunity to depose him. That opportunity is ongoing and it appears Defendant has not yet availed itself of it. The court views the deposition transcript in the same light as an affidavit from Mr. Jarvis.[1] His Jarvis' sworn deposition will therefore be considered to the extent it is based on personal knowledge; the court will not consider any speculative testimony contained therein. Accordingly,

[1] *See* Superior Court Rule of Civil Procedure 56 (permitting the use of affidavits which are out of court statements offered for the truth of the matter asserted).

Defendant's objections are overruled for the purposes of this motion, but Defendant has leave to renew them for trial.

STANDARD OF REVIEW

In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant summary judgment when "the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[2] The question of whether a legal duty exists "is a question of law for the Court to determine."[3]

PRODUCT NEXUS ANALYSIS

Virginia courts have not laid out a precise product nexus standard for summary judgment. "[F]ederal courts applying Virginia law have made the reasonable assumption that Virginia would accept the Fourth Circuit's widely-adopted test, set forth in *Lohrmann v. Pittsburgh-Corning Corp.*"[4] Therefore, Plaintiff "must establish that he was exposed to a specific product of the defendant over an extended period of time in proximity to where he actually

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[2] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).

[3] *Riedel v. ICI Americas Inc.*, 968 A.2d, 17, 20 (Del. 2009) (citing *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001)); *see Simonetta v. Viad Corp.*, 197 P.3d 127, 131 (Wash. 2008) (en banc).

[4] *In re Asbestos Litigation: Hovermale*, C.A. No. 09C-12-275 ASB, at 2 (Del. Super. Jan. 20, 2011) (Ableman, J.) (ORDER) (applying Virginia law) (citing *Lohrmann*, 782 F.2d 1156 (4th Cir. 1986); *Wood v. Celotex Corp.*, 1991 U.S. Dist. LEXIS 15819 (W.D. Va. May 9, 1991)).

worked."[5] This is also referred to as the frequency, regularity, and proximity test.

Plaintiffs argue, "[Plaintiff] was exposed to asbestos doing packing work with valves in two places" namely Building 25 and the Tool Room.[6] This packing work was done long after sale of the pumps and is part of regular maintenance on the valves. Mr. Jarvis did not know the maintenance history of the valves in question and only spent limited time around them. He did not identify asbestos stemming from Defendant's valves other than from their packing which he and Plaintiff replaced. Accordingly, Plaintiffs focus their argument specifically on exposure to asbestos dust created from the removal of packing and repacking of the valves. The focus on packing distinguishes this case from *In re Asbestos Litigiation: Howton.*[7] Mr. Jarvis was asked who manufactured the packing and identified John Crane and Garlock, not William Powell. Plaintiff was not deposed, therefore, no product identification witness identified Defendant as a manufacturer of the packing at issue.

Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could infer that Plaintiff worked around Defendant's valves and that the valves had asbestos-containing packing in/around them. However, there is no evidence in the record to support a finding that Plaintiff was exposed to an original asbestos-containing part or more specifically to packing

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[5] *Hovermale*, C.A. No. 09C-12-275 ASB, at 3.
[6] Plaintiffs' Memorandum in Opposition to Defendant The William Powell Company's Motion for Summary Judgment, at 3.
[7] *See* 2012 WL __, C.A. No. N11C-03-218 ASB, at 8-9 (noting the plaintiff focused on the original parts of the Crane valves and not the packing).

manufactured by Defendant. A reasonable jury could not find that Plaintiff was exposed to asbestos from any specific product of Defendant, specifically asbestos-containing packing, without that finding being based purely on speculation.[8] Therefore, summary judgment is **GRANTED** on product nexus grounds for Defendant's asbestos-containing packing and original parts.

DUTY ANALYSIS

Plaintiffs also allege liability against Defendant for other manufacturers packing added to the valves after sale. Accordingly, the court will address this issue as well. The Virginia Supreme Court has not examined whether defendants owe a duty for components added to their products after sale in an asbestos context. Counsel direct the court to three Virginia trial court decisions and a decision of this court on the issue.

Virginia trial courts have considered this issue in at least three unpublished decisions. Defendant moved "to preclude evidence of a duty to warn about another asbestos manufacturers' products" in *Little v. Garlock Sealing Technologies, Inc.*[9] The court denied the motion and concluded

> [a] manufacturer is required to anticipate the foreseeable environment in which his product is intended to be used. Accordingly, there is a legal duty to warn when it is reasonably foreseeable that the product, or the replacement of a product, has the potential to cause harm to another because of the foreseeable manner in which it is used with other products.[10]

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[8] *In re Asbestos Litig: Helm*, 2007 WL 1651968 (Del. Super).
[9] No. 3702V-04, at 2 (Va. Cir. Ct. Oct. 13, 2004) (Conway, J.) (ORDER).
[10] *Id.* at 4.

Garlock's same motion was also denied in *Pyatt v. Garlock, Inc.*[11] Garlock again made a similar motion in *Hicks v. Garlock Sealing Technologies, LLC.*[12] The court ruled "the motion . . . is granted as to Plaintiff's Count for strict liability and denied as to Plaintiff's negligence count concerning a duty to warn of repair or removal of a gasket, as an issue of fact regarding the foreseeability of the environment where Garlock's products were intended to be used."[13] It is noteworthy that the Virginia trial courts embrace a foreseeability reasoning. That reasoning has been rejected by many of the courts which have ruled that no duty exists.

This court briefly considered the issue and applied Virginia law in *Hovermale* and ruled "[e]xisting case law does not offer a basis for this Court to conclude that Virginia would impose a duty upon a defendant to warn of hazards associated with asbestos-containing products manufactured, sold, or distributed by another."[14] During oral argument in this case, the court mused whether the Virginia trial court decisions discussed above were contained in the *Hovermale* briefs. This court's examination of the record in *Hovermale* indicates they were not.

The Virginia court decisions cause this court to conclude that under Virginia law a manufacturer owes a duty to warn for asbestos-containing replacement parts when their use is reasonably foreseeable. The question of

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[11] No. 36688H-02 (Va. Cir. Ct. Jan. 19, 2005) (Hubbard, J.) (ORDER) (noting that the court did not explain its reasoning).
[12] No. 38116P-03 (Va. Cir. Ct. Feb. 13, 2006) (Pugh, J.) (ORDER).
[13] *Id.* at 3.
[14] *Id.* at 4.

whether the use of asbestos-containing replacement parts was foreseeable is a genuine issue of material fact to be determined by the jury. Accordingly, summary judgment is **DENIED** on the issue of whether Defendant owes a duty to Plaintiff for non-original, asbestos-containing parts added to its products after sale under Virginia law.

CONCLUSION

The court finds Plaintiff has not produced evidence that Plaintiff was exposed to asbestos from asbestos-containing parts manufactured by Defendant, and under Virginia law Defendant owes a duty to warn for asbestos-containing replacement parts when their use is reasonably foreseeable. Accordingly, Defendant's motion for summary judgment is **DENIED IN PART** and **GRANTED IN PART**.

IT IS SO ORDERED.

Dated: April 5, 2012

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Judge John A. Parkins, Jr.