

**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: :  
FREEMAN, WILBURN : C.A. No. 09C-12-232 ASB

**UPON DEFENDANT GEORGIA-PACIFIC LLC'S  
MOTION FOR SUMMARY JUDGMENT  
DENIED**

This 13th day of January, 2011, it appears to the Court that:

1. Wilburn Freeman died of mesothelioma in September 2009. Plaintiffs, Freeman's wife and the representative of his estate, brought the instant action alleging, *inter alia*, that Freeman's occupational and non-occupational exposures to asbestos-containing products manufactured or supplied by certain of the defendants caused his mesothelioma. Although Freeman passed away prior to being deposed, his son Jackie testified regarding renovation and construction projects his father undertook in the 1960s and 1970s, when the family lived in North Carolina.

2. According to Jackie, he was recruited by his father to assist with construction work from 1961, when he was six years old. During his deposition, Jackie recalled assisting Wilburn on more than a dozen specific projects. The particular jobs described in Jackie's deposition spanned a time period from approximately 1963, when Jackie would have been eight years old, to 1975. Jackie

recounted that for each of the projects, his father used a Georgia-Pacific pre-mixed joint compound. He further recalled that the joint compound was always packaged in a white tub- or bucket-type plastic container bearing a green triangle logo with a “GP” label.

3. Defendant Georgia-Pacific LLC (“Georgia-Pacific”) moves for summary judgment on the basis that Plaintiffs cannot establish that their decedent was exposed to an asbestos-containing Georgia-Pacific product. Georgia-Pacific has supplied an affidavit from Howard A. Schutte, a former Georgia-Pacific employee, stating that “Georgia-Pacific did not place Ready Mix joint compound on the market for national distribution in plastic pails or buckets until 1978, after asbestos was removed from Ready Mix.”<sup>1</sup> Furthermore, Georgia-Pacific contends that the joint compound Jackie Freeman described cannot be its product, because it did not begin distributing a pre-mixed joint compound until 1965, and Jackie recounted working on projects with Wilburn as early as 1961.

4. In response, Plaintiffs point to interrogatory responses drafted or filed by Georgia-Pacific in other jurisdictions, in which Georgia-Pacific states that its Ready Mix joint compound was sold from 1963 to 1977 and packaged in buckets or pails. Furthermore, Plaintiffs emphasize that although Jackie testified generally about assisting his father with construction work as early as 1961, he described his

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<sup>1</sup> Schutte Aff. ¶ 7.

father's use of Georgia-Pacific joint compound in the context of specific projects that began in 1965, when Georgia-Pacific Ready Mix was on the market.

5. 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.<sup>2</sup> Initially, the burden is placed upon the moving party to demonstrate that his legal claims are supported by the undisputed facts.<sup>3</sup> If the proponent properly supports his 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."<sup>4</sup> Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are no material facts in dispute and judgment as a matter of law is appropriate.<sup>5</sup>

6. Under North Carolina law, the plaintiff in an asbestos suit must be able to demonstrate actual exposure to an asbestos-containing product manufactured, sold, or distributed by the defendant.<sup>6</sup> Upon review of the record, the Court concludes that Plaintiffs have raised a genuine dispute of material fact as

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<sup>2</sup> Super. Ct. Civ. R. 56(c).

<sup>3</sup> *E.g., Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

<sup>4</sup> *Id.* at 880.

<sup>5</sup> *Id.* at 879-80.

<sup>6</sup> *Wilder v. Amatex Corp.*, 336 S.E.2d 66, 67-68 (N.C. 1985).

to the identification of the joint compound to which Wilburn Freeman was exposed during the projects described by his son, such that summary judgment would be inappropriate. The specific projects Jackie Freeman associated with his father's exposure to Georgia-Pacific joint compound were not all assigned precise dates, but Jackie described the earliest as occurring in or around 1965, when Ready Mix was marketed as a Georgia-Pacific product. Jackie clearly and repeatedly identified the joint compound his father used as a Georgia-Pacific product, and Georgia-Pacific has not disputed for the purposes of this motion that its Ready Mix joint compound contained asbestos until at least 1973. Georgia-Pacific nonetheless contends that either Jackie "was correct about the years during which he and Decedent worked with joint compound packaged in plastic buckets but has misidentified Georgia-Pacific, or [he] was correct that he and Decedent used Georgia-Pacific joint compound, but was mistaken about the years during which they used it" and has therefore described containers of asbestos-free Georgia-Pacific product.<sup>7</sup> This characterization of the record is a false dichotomy which ignores several alternative possibilities. Even if the Court accepts *arguendo* Georgia-Pacific's position that the Shutte affidavit is "uncontroverted," it does not establish Georgia-Pacific's entitlement to summary judgment. Georgia-Pacific asserts that it did not sell pails or buckets of Ready Mix on the *East Coast* until 1978, but the

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<sup>7</sup> Georgia-Pacific's Mot. for Summ. J. 7.

containers the Freemans used may not have traveled through the normal distribution channels. Furthermore, although the Court will not deny summary judgment on the basis that a witness might provide testimony at trial that completely contradicts his discovery deposition testimony, and does not do so in this case, it is cognizant of the unusually lengthy gaps in time between exposure and disease that arise in mesothelioma cases. It does not appear from his deposition that Jackie Freeman's identification of the joint compound as a Georgia-Pacific product stemmed wholly from the packaging. Under the circumstances, a jury could reasonably conclude that Jackie, who was revisiting events which occurred in his childhood and early adolescence more than thirty-five years ago, correctly recalled the time period, the Georgia-Pacific product, and the logo, but inaccurately described or misremembered the packaging in use during the relevant timeframe.

7. Plaintiffs have presented evidence from which a jury could reasonably conclude that Wilburn Freeman experienced significant exposures to an asbestos-containing Georgia-Pacific product; by its motion, Georgia-Pacific has presented evidence from which a jury could reach the opposite conclusion. The issues raised by Georgia-Pacific amount to a product-identification dispute that hinges upon the credibility of Plaintiffs' witness. Such credibility determinations are within the province of the jury, not the Court.

8. For the foregoing reasons, Defendant Georgia-Pacific LLC's Motion for Summary Judgment is hereby **DENIED**.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary  
cc: All counsel via File & Serve