

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

IN RE: ASBESTOS LITIGATION        :  
   :  
Limited to:                               :  
JAMES, ROBERT                         :  
   :                         C.A. No. 08C-11-215 ASB

UPON DEFENDANT ALBANY INTERNATIONAL CORPORATION'S  
MOTION FOR SUMMARY JUDGMENT  
**GRANTED**

This 16th day of February, 2011, it appears to the Court that:

1. Plaintiff Charlene James alleges that her husband Robert James (“James”) died of mesothelioma caused by occupational and non-occupational exposure to asbestos-containing products. Plaintiff’s claims against Defendant Albany International Inc. (“Albany”) relate to James’s work with dryer felts at the ITT Rayonier Pulp and Paper Mills (“Gray’s Harbor Mill”) in Washington state, where he was employed from 1946 to 1988.

2. Plaintiff’s product identification witness, Merle Boettcher, worked at the mill with James beginning in the early 1970s.<sup>1</sup> Boettcher testified that he and James both worked with dryer felts that were wrapped around dryer drums on two paper machines in the mill. He described the dryer felts as “kind of like a wool

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<sup>1</sup> Boettcher was deposed prior to Plaintiff’s naming Albany as a defendant. Although Albany has raised a question regarding the admissibility of Boettcher’s testimony against it on this basis, Albany also points to Boettcher’s description of dryer felts used at the mill to argue that Plaintiff has not identified an asbestos-containing product.

blanket.”<sup>2</sup> Boettcher recounted that James worked on the machines on a daily basis for approximately one year “close to 1976,”<sup>3</sup> when James served as a troubleshooter in the paper machine department. Boettcher associated a “small amount of dust” with the used dryer felts.<sup>4</sup> In addition, Boettcher explained that a salvage program at the mill distributed dryer felts to workers free of charge. Boettcher recollected that James used the salvaged dryer felts as a windbreak or rainbreak “on the front of his carport” to protect his car and firewood.<sup>5</sup> Boettcher did not identify the manufacturer of the dryer felts he described or suggest that they contained asbestos.

3. Albany has moved for summary judgment on the basis that Plaintiff has offered no evidence establishing that James was exposed to an asbestos-containing Albany product. In response, Plaintiff presents responses to discovery in which Albany states that it sold asbestos-containing dryer felts from approximately 1967 to 1976, and that it supplied a particular style of asbestos-containing dryer felt to the Gray’s Harbor Mill on April 13, 1973, and January 1,

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<sup>2</sup> Merle Boettcher Dep., July 16, 2009, at 64:21-65:1.

<sup>3</sup> *Id.* at 66:15.

<sup>4</sup> *Id.* at 66:24.

<sup>5</sup> *Id.* at 66:7-15.

1976. Plaintiff contends that this evidence supports an inference that James was exposed to asbestos fibers by working with Albany dryer felts.

4. 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>6</sup> Initially, the burden is placed upon the moving party to demonstrate that his legal claims are supported by the undisputed facts.<sup>7</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>8</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>9</sup>

5. Upon reviewing the record and Washington law, the Court finds that Albany is entitled to summary judgment. Washington’s Supreme Court has taken a flexible approach to evaluating the sufficiency of a plaintiff’s evidence of exposure to asbestos-containing products, but that flexibility is of little assistance

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<sup>6</sup> Super. Ct. Civ. R. 56(c).

<sup>7</sup> *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

<sup>8</sup> *Id.* at 880.

<sup>9</sup> *Id.* at 879-80.

to Plaintiff in this case. Plaintiff relies upon the fact-sensitive analysis set forth in *Lockwood v. AC & S, Inc.*, which held that “instead of personally identifying the manufacturers of asbestos products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of asbestos products which were then present at his workplace.”<sup>10</sup> For present purposes, the key phrase in this quoted language is “asbestos products”; as this wording suggests, *Lockwood* involved a defendant’s challenge to the sufficiency of the plaintiff’s evidence of exposure to a product that was undisputedly asbestos-containing. *Berry v. Crown Cork & Seal Co.*, another Washington Supreme Court case cited by Plaintiff, addressed whether a plaintiff had provided adequate evidence identifying the defendant as a distributor of asbestos-containing products used at the decedent’s worksite to survive summary judgment. In addition to challenging the sufficiency of Plaintiff’s product identification and exposure evidence, Albany’s motion raises the separate issue of whether Plaintiff has offered sufficient evidence that the dryer felts to which Robert James was exposed contained any asbestos.

6. In *Hautala v. Cutler Hammer, Inc.*, the Washington Court of Appeals held that *Lockwood* and *Berry* would not apply to salvage a claim where the plaintiff provided no evidence that the product to which he was exposed contained

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<sup>10</sup> 744 P.2d 605, 612 (Wash. 1987).

asbestos.<sup>11</sup> The plaintiff in *Hautala* provided testimony clearly establishing that he worked with electrical starters and other products manufactured by defendant Cutler, but offered no proof that the products contained asbestos. Cutler starters contained asbestos for a portion of the period during which the plaintiff recalled using Cutler products, but he could not name specific products or attribute them to particular time-frames.<sup>12</sup> The *Hautala* court found that plaintiff failed to “provide a basis for an inference that he was exposed to asbestos in products manufactured by Cutler, because he does not show that such products were ever present at his worksite,” and the available circumstantial evidence would “not point to Cutler.”<sup>13</sup> Thus, “[a] fact finder could only arrive at such a conclusion through speculation.”<sup>14</sup>

7. Although *Hautala* was a non-precedential opinion, this Court finds it on-point and persuasive. In essence, the *Lockwood* analysis—which weighs the sufficiency of a plaintiff’s exposure evidence in view of factors such as the plaintiff’s “proximity to the asbestos product” during exposures, the length of the exposure, and “types of asbestos products to which the plaintiff was exposed”<sup>15</sup>—

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<sup>11</sup> 2006 WL 2590020 (Wash. Ct. App. 2006).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*2.

<sup>14</sup> *Id.*

<sup>15</sup> *Lockwood*, 744 P.2d at 613.

presupposes that the product at issue contained asbestos. *Hautala* provides guidance where it is not clear that a product in fact contained asbestos.

8. The Court recognizes that Plaintiff has presented slightly more evidence here than did the plaintiff in *Hautala*: the discovery responses provided by Plaintiff reflect two shipments of Albany asbestos-containing dryer felts to the mill where James worked. However, without any evidence even circumstantially linking those particular asbestos-containing Albany dryer felts to James, the record is simply insufficient to survive summary judgment. One of the shipments occurred three years prior to the approximate time period during which James worked with the dryer felts as a machine troubleshooter. The second shipment, in January 1976, took place near or during the time James worked with the machine dryer felts—but that shipment also took place near or during the time that Albany discontinued production of asbestos-containing dryer felts.<sup>16</sup> According to its discovery responses, asbestos-containing products constituted “only a small portion of the dryer fabrics that [were] being made by Albany International during the relevant period.”<sup>17</sup>

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<sup>16</sup> Albany’s Answers and Objections to Pls.’ Standard Interrogatories, C.A. No. 77C-ASB-2, at 3 (Del. Super. Oct. 22, 2010) (“Upon information and belief, Albany International discontinued making asbestos containing dryer felts around 1976.”).

<sup>17</sup> *Id.*

9. Boettcher did not identify the dryer fabrics he discussed during his deposition as Albany products *or* asbestos-containing products. Albany has presented an affidavit from William Luciano, an Albany employee since the late 1970s, who asserts that Boettcher's descriptions did not match the qualities of Albany asbestos-containing dryer felts, which were "a course, open mesh fabric, . . . like a screen door" and would not be suitable for use as a windbreak or rainbreak.<sup>18</sup> Luciano further states that "Albany did manufacture papermachine clothing that resembled woolen blankets," consistent with Boettcher's testimony about the dryer felts to which James was exposed, but those items did not contain asbestos.

10. While *Lockwood* supports that the presence of an asbestos-containing product at a worksite may, under certain circumstances, present a reasonable inference of workers' exposure to asbestos from that product, the *Lockwood* opinion followed a trial during which the plaintiff provided evidence that the defendant's product would have generated friable asbestos dust to which the plaintiff could have been exposed by drifting.<sup>19</sup> Here, Plaintiff offers no evidence relating to the use of the *asbestos-containing* dryer felts shipped to James's worksite. Boettcher associated some dust with the dryer felts, but the only

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<sup>18</sup> William Luciano Aff. ¶¶ 10-11.

<sup>19</sup> *Lockwood*, 744 P.2d at 612-13.

