

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

George Herring, Individually )  
and as Surviving Spouse of Regina )  
Herring, Deceased, )

Plaintiffs, )

v. )

C.A. No. 06C-05-297-BEN

Ashland, Inc., )  
BP Amoco Chemicals, )  
Shell Oil Company A/K/A Shell )  
Chemical, Sunoco Inc. A/K/A/ Sunoco )  
Chemicals )

Defendants. )

Date Submitted: July 7, 2008

Date Decided: September 19, 2008

Date Amended: November 5, 2008

*Upon Defendant Shell Oil Company's Motion for Summary Judgment:*  
**GRANTED**

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A/K/A Sunoco Chemicals.

Jurden, J.

## I. Introduction

Before the Court is Defendant Shell Oil Company's ("Shell") Motion for Summary Judgment on Product Identification. The lawsuit giving rise to this motion was filed on May 26, 2006 by George Herring ("Plaintiff"), the surviving spouse of Regina Herring.<sup>1</sup> Plaintiff claims that Mrs. Herring developed Acute Myelogenous Leukemia ("AML") as a result of exposure to Xylene, Naphtha, mineral spirits and Toluene manufactured by Shell during her employment with the Warner Graham Company.<sup>2</sup> Regrettably, Mrs. Herring passed away on September 9, 2005.<sup>3</sup> She was never deposed regarding her alleged exposure to solvents while working for Warner Graham. By its motion, Shell argues that there are no facts upon which Plaintiff can rely to establish that a product manufactured by Shell caused Mrs. Herring's injuries.<sup>4</sup>

## II. Background

Warner Graham blends, packages and distributes alcohol and solvent products.<sup>5</sup> It purchases many different solvents and other chemicals (primarily alcohols) which it repackages and/or blends for resale.<sup>6</sup> Although Warner Graham sometimes purchases solvents directly from manufacturers, it typically purchases

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<sup>1</sup> Compl., Docket Item ("D.I.") 1.

<sup>2</sup> Sec. Am. Compl. at ¶5(d), D.I. 28.

<sup>3</sup> *Id.* at ¶5.

<sup>4</sup> Shell's Mot. for Summ. J. at 1, D.I. 143.

<sup>5</sup> *Id.*

<sup>6</sup> Pl. Mem. in Opp'n to Shell's Mot. for Summ. J. ("Pl. Answ. Br.") at 2, D.I. 148.

from distributors.<sup>7</sup> Warner Graham does not select which manufacturers' solvents it purchases from its distributors, nor does it necessarily know the manufacturers unless it receives paperwork identifying which entity made the product.<sup>8</sup>

Warner Graham's alcohol and solvent operations are conducted in separate warehouses located on opposite ends of the facility.<sup>9</sup> The solvents are delivered by a tanker truck and are pumped into three 30,000 gallon elevated storage tanks located outside of the solvent warehouse.<sup>10</sup> The solvents are delivered through a piping system to a filling system found in the solvent warehouse.<sup>11</sup> The warehouse employees dispense the solvents from the filling system into blending tanks or directly into various sized containers which are then shipped to customers. The warehouse employees typically do not know the manufacturer of the solvents they are dispensing.<sup>12</sup> Nor does Warner Graham keep track of which manufacturer's solvent is being dispensed at any given time.<sup>13</sup> Solvents are not typically used in the alcohol warehouse except when used to manufacture denatured alcohols.<sup>14</sup>

Warner Graham's purchasing records do not show that it purchased any solvents directly from Shell from 1983-1998. Warner Graham did, however,

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<sup>7</sup> Dominick Dep. 20:10 – 21:21; Farrell Dep. 23:7 - 13, 56:11 – 60:21.

<sup>8</sup> Reipe Dep. 33:13 – 37:1.

<sup>9</sup> The alcohol warehouse is building 7 and the solvent warehouse is building 3 on the map attached to Ex. B to the Pino Aff.; Knox Dep. 13:14 - 14:4.

<sup>10</sup> Dominick Dep. 20:10 – 21:21 131:21 – 133:10; Farrell Dep. 18:15 – 20:3.

<sup>11</sup> *Id.*

<sup>12</sup> Dominick Depo. at 23:16 - 25:2, 111:1 - 112:5; Farrell Dep. 23:4 – 25:9.

<sup>13</sup> Reipe Dep. 34:9 – 37:1.

<sup>14</sup> Dominick Dep. 17:16 – 19:16, 152:3 – 153:21; Farrell Dep. 58:2 – 10.

produce a Material Safety Data Sheet (“MSDS”) dated October 1985 for a Shell solvent containing Toluene and Naphtha.<sup>15</sup> According to Plaintiff, Toluene and Naphtha are solvents typically contaminated with Benzene.<sup>16</sup> There is no evidence, however, to show that this Shell product was actually used in the Warner Graham facility.<sup>17</sup> Purchasing records indicate that Warner Graham purchased Shell solvents once in 2000 and four times in 2003.<sup>18</sup>

Two of Mrs. Herring’s co-workers, Tom Dominick (“Dominick”) and Brian Farrell (“Farrell”), identified by Plaintiff as product identification witnesses, recall seeing Shell products at the facility during the relevant time period. Dominick and Farrell testified at their depositions that they recalled seeing Shell solvents on site at Warner Graham and Dominick recalls seeing Shell’s name on an MSDS.<sup>19</sup> Neither of the co-workers, however, can recall the specific Shell solvents actually used at the facility and/or the dates when Shell solvents were used.<sup>20</sup>

Mrs. Herring worked briefly in the solvents warehouse from 1978-1979.<sup>21</sup> She left her employment at Warner Graham in 1979 and returned in 1983 to work

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<sup>15</sup> Pino Aff. Ex. H (Material Safety Date Sheet for Tolu-Sol(R)).

<sup>16</sup> Pl. Answ. Br. at 2.

<sup>17</sup> Shell’s Mot. for Summ. J. at 3.

<sup>18</sup> *Id.* at Exs. K-N.

<sup>19</sup> Dominick Dep. 20:7 – 21:7, 22:4 – 24:11, 150:2 – 151:20; Farrell Dep. 57:15 – 58:10, 64:2 – 66:6.

<sup>20</sup> Shell’s Mot. for Summ. J. at 3.

<sup>21</sup> Reipe Dep. 26:5 – 27:2.

as a supervisor in the alcohol warehouse.<sup>22</sup> In October 1998, Mrs. Herring was promoted to inventory/purchasing manager<sup>23</sup> and began working in the business office of the facility which is separated from the solvent warehouse by a storage and shipping area and several doors.<sup>24</sup> She worked in the business office until 2004 when she was diagnosed with AML.<sup>25</sup> There is no dispute that during her employment at Warner Graham, Mrs. Herring would have entered the solvent warehouse.<sup>26</sup> There is no evidence, however, relating to specific dates that she was in the solvent warehouse, the frequency or length of her visits to the solvent warehouse, or whether any Shell solvents were being utilized while she was in the solvent warehouse.

### **III. DISCUSSION**

In order to establish “product nexus” the plaintiff must establish that the defendant’s product was present at the job site and that the plaintiff was in proximity to defendant’s product *at the time it was being used*.<sup>27</sup> All reasonable inferences go in favor of the non-moving party at the summary judgment stage of the proceedings; however there must still be “substantial support” for such

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<sup>22</sup> Supp. Disc. Resp. to Master Disc. (“Pl. Supp. Resp.”), work history forms (Pino Aff., Ex. G).

<sup>23</sup> Reipe Dep. 29:11 – 30:16.

<sup>24</sup> Shell’s Mot. for Summ. J. at 3.

<sup>25</sup> *Id.* at 28:21 – 29:3; Pl. Supp. Resp., work history forms (Pino Aff., Ex. G).

<sup>26</sup> *Id.*; Pl. Answ. Br. at 2.

<sup>27</sup> Def. Reply Br. in Supp. of its Mot. For Summ. J. (“Def. Rep. Br.”) at 1. (emphasis added).

inferences in the record.<sup>28</sup> There is no evidence that Shell solvents were actually used at Warner Graham during the time Ms. Herring worked in the solvent warehouse between 1978-79, or in the alcohol warehouse in 1983-98. Plaintiff's co-workers' testimony establishes only that there may have been Shell products at the facility during the relevant time period. Their testimony does not identify a specific Shell solvent or a time period during which a Shell solvent was used. The solvents were not stored in containers identifying the manufacturer. Warner Graham purchased solvents manufactured by different manufacturers and there is no record of which manufacturers' solvents were in the filling system at any given time.<sup>29</sup> There is a single MSDS for a Shell product dated 1985. Even if one could reasonably infer from the existence of this sole MSDS that Warner Graham actually purchased that Shell product, there is no evidence that the product was used, or that it was used during the time Ms. Herring was in the alcohol warehouse.<sup>30</sup> It is not disputed that Ms. Herring occasionally went to the solvent warehouse when she worked elsewhere. But it is too great a leap, not a reasonable inference, and sheer speculation to conclude that a Shell solvent was in the solvent warehouse when she was there, and that a Shell solvent was in use when she was

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<sup>28</sup> *Cain v. Green Tweed & Co.*, 832 A.2d 737, 738 (Del. 2003).

<sup>29</sup> *C.F. Mergenthaler v. Asbestos Corp. of America, Inc.*, 1988 WL 116805, at \*3 (Del. Super. Oct. 25, 1988).

<sup>30</sup> *See Farrall v. A.C. & S. Co., Inc.*, 1988 WL 167320, at \*2 (Del. Super. May 11, 1988); *See Kee v. Allied Chem. Corp.*, 1986 WL 2267 (Del. Super. Feb. 6, 1986).

there. The solvent warehouse is not in close proximity to the alcohol warehouse.<sup>31</sup> Even if it could be inferred that a Shell solvent was in the solvent warehouse, and it was being used, it cannot be reasonably inferred that Ms. Herring was exposed to it while she was working in the alcohol warehouse.

Simply establishing that a defendant's product was present at plaintiff's work-site is not sufficient to establish product nexus.<sup>32</sup> There is evidence in the record that Warner Graham purchased Xylene and Toluene in May 2000 and Heptane in January, March and July of 2003. From this, one could reasonably infer that these solvents were used at some time. But from this, one cannot reasonably infer that these products were used at a time when Ms. Herring was in the solvent warehouse.<sup>33</sup> Based on this record, it would be speculation, not reasonable inference, to say that Ms. Herring was in an area where Shell solvents were used at the time they were being used.<sup>34</sup>

#### **IV. CONCLUSION**

Plaintiff cannot meet his burden of establishing that Shell solvents were used at Warner Graham and, at the same time they were in use, Ms. Herring was in the

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<sup>31</sup> See Exh. B to Aff. of Tanya E. Pino in Supp. of Def. Mot. for Summ. J. (D.I. 18).

<sup>32</sup> Def. Rep. Br. At 1; *Lee v. A.C. & S., Inc.* 1986 WL 154221, at \*1 (Del. Super. Dec. 15, 1986)

<sup>33</sup> To meet the product nexus standard, the record must reflect that the solvents used in the warehouse were in fact Shell products that are at issue. See *Morgenthaler.*, 1988 WL 116405, at \*6; *See Kee*, 1986 WL 2267; *Farrall*, 1988 WL 167320, at\*2.

<sup>34</sup> See *In re Asbestos Litig.*, 509 A.2d 1116, 1117 (Del. Super. Ct. 1986), *aff'd*.by *Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *Farrall.*, 1988 WL 167320, at \*2.



area where they were used, or in proximity to the area such that fumes from the solvents would be carried into the area where she was working.<sup>35</sup> Consequently, Shell's Motion for Summary Judgment is **GRANTED**.

**IT IS SO ORDERED.**

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Jan R. Jurden, Judge

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<sup>35</sup> See *Kee*, 1986 WL 2267.