IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	:	
	:	
HUNT TRIAL GROUP	:	
Limited to:	:	
Arthur Fleetwood	:	C.A. No. 99C-02-278
	:	
CASH TRIAL GROUP	:	
John Cash	:	C.A. No. 00C-04-162
John Rigby	:	C.A. No. 00C-05-045
Dennis Carr	:	C.A. No. 01C-02-003
William Miller	:	C.A. No. 00C-05-024
	:	
NAI TRIAL GROUP	:	
Limited to:	:	
James Desmond	:	C.A. No. 00C-08-209
James Wilson	:	C.A. No. 00C-12-224
William Cooper	:	C.A. No. 86C-08-070
Billie Chaney	:	C.A. No. 97C-08-087
Virginia Mason (Charles)	:	C.A. No. 84C-05-145J
George Hill	:	C.A. No. 97C-08-064
Ella Morris (Samuel)	:	C.A. No. 84C-05-145N
Jackie Donovan	:	C.A. No. 99C-09-074
Clifford Scruggs	:	C.A. No. 99C-11-106
Raymond Nack	:	C.A. No. 98C-05-047
	:	
COLLINS TRIAL GROUP	:	
Limited to:	:	
James Williams	:	C.A. No. 00C-06-047
	:	
PYLE TRIAL GROUP	:	
Conrad Fassel	:	C.A. No. 00C-11-159
Larry Hollis	:	C.A. No. 97C-08-128
Charles Fleetwood	:	C.A. No. 96C-05-266
Leroy Messick	:	C.A. No. 96C-10-150
Joseph Messick	:	C.A. No. 95C-03-123
Albert Griffith	:	C.A. No. 97C-02-220
Paul Hitchens	:	C.A. No. 97C-10-153
Robert Truitt	:	C.A. No. 97C-12-019
George Willey	:	C.A. No. 97C-03-056
Kenneth Miller	:	C.A. No. 98C-04-123
Freddie Pusey	:	C.A. No. 94C-01-038

Raymond Peters	:	C.A. No. 98C-09-007
Lois Lyons	:	C.A. No. 97C-09-135
Harold Porter	:	C.A. No. 97C-11-228
Calvin Musser	:	C.A. No. 88C-09-199
Larry Surricchio	:	C.A. No. 89C-10-130
Jerome Wells	:	C.A. No. 89C-10-128
Jack Brasure	:	C.A. No. 89C-10-129
Edgar Wilson	:	C.A. No. 90C-05-038
Richard McCabe	:	C.A. No. 90C-05-037
Roland Wingate	:	C.A. No. 90C-07-101
Clark Spicer	:	C.A. No. 90C-07-102
William Lane	:	C.A. No. 90C-07-103
John Garris	:	C.A. No. 90C-12-040
Ronald Davidson	:	C.A. No. 90C-11-222
Parker Turner	:	C.A. No. 90C-12-039
Robert Steele	:	C.A. No. 90C-11-221
William West	:	C.A. No. 91C-04-124
Robert Harding	:	C.A. No. 91C-04-153
James Reed	:	C.A. No. 91C-04-125
Claude Marvel	:	C.A. No. 90C-09-067
Orville Somers	:	C.A. No. 90C-09-068
Sidney Taylor	:	C.A. No. 90C-12-139
Alton Scott	:	C.A. No. 90C-12-108
Kenneth Marvel	:	C.A. No. 90C-12-106
Richard Bowdle	:	C.A. No. 90C-12-107
Leroy Hill	:	C.A. No. 90C-12-109
Eugene Hastings	:	C.A. No. 91C-07-251
Donald Hill	:	C.A. No. 91C-07-259
Ben Peterson	:	C.A. No. 91C-07-127
Shelley Ewell	:	C.A. No. 91C-04-046
Woodrow Butler	:	C.A. No. 91C-07-252
Herman English	:	C.A. No. 91C-01-153
Thomas Marine	:	C.A. No. 88C-07-146A
Albert McDowell	:	C.A. No. 89C-05-197
Doris Fernandes	:	C.A. No. 87C-07-037
Edward Kowalewski	:	C.A. No. 88C-11-109
Lester Trice	:	C.A. No. 86C-02-100A
Erman James Bradley	:	C.A. No. 84C-05-145A
Edward Barto	:	C.A. No. 84C-05-145B
Calvin Collins	:	C.A. No. 84C-05-145C
Griffin Conley	:	C.A. No. 84C-05-145D
G. Robert Dickerson	:	C.A. No. 84C-05-145E
Calvin Foskey	:	C.A. No. 84C-05-145F
Allen Hickman, Sr.	:	C.A. No. 84C-05-145G
Lloyd Hopkins	:	C.A. No. 84C-05-145H

Charles Isenberg	:	C.A. No. 84C-05-145I
Jack Messick	:	C.A. No. 84C-05-145K
Ulysses Mills	:	C.A. No. 84C-05-145L
Joseph Moore	:	C.A. No. 84C-05-145M
Donald Powell	:	C.A. No. 84C-05-145O
Lewis Powell	:	C.A. No. 84C-05-145P
Harry Schiff	:	C.A. No. 84C-05-145R
Joseph Spicer	:	C.A. No. 84C-05-145S
Andrew H. Bjornson,	:	C.A. No. 85C-05-013
Urias Graham,	:	C.A. No. 85C-11-119A
Granville W. Brittingham	:	C.A. No. 85C-11-119B
Ernest M. Derrickson	:	C.A. No. 85C-11-119C
Roy D. James	:	C.A. No. 85C-11-119D
Hayward Roe	:	C.A. No. 85C-11-119E
Dale V. Shaffer	:	C.A. No. 85C-11-119F
Harley G. Watkins, Jr.	:	C.A. No. 85C-11-119G
Dathiette M. Hearn,	:	C.A. No. 86C-06-160
Donald Lowe,	:	C.A. No. 86C-08-070A
	:	
v.	:	
	:	
Charles A. Wagner Co., Inc.	:	
	:	
Defendant.	:	

OPINION

Submitted: November 21, 2002
Decided: November 27, 2002

Upon Defendant's Motion for Summary Judgment.

Motion Granted.

Appearances:

Thomas J. Crumplar, Esquire, Jacobs & Crumplar, P.A., Wilmington, Delaware. Attorney for Plaintiffs.

John Kent, Esquire, and David Malatesta, Jr., Esquire, Kent & McBride, P.C., Wilmington, Delaware. Attorneys for Charles A. Wagner Co., Inc.

Judge John E. Babiarz, Jr.

This is the Court's decision on a motion for summary judgment filed by Defendant Charles A. Wagner Company, Inc. ("Wagner" or "Defendant"). Wagner argues that is entitled to judgment as a matter of law against a consolidated group of Plaintiffs who allege they were harmed by asbestos supplied by Wagner to the Du Pont Company. For the reasons explained below, Defendant's motion is Granted.

FACTS

The record shows the following facts. Since 1910, Wagner has been a distributor of non-metallic minerals such as clay, talc, pumice stone, carbon black, silica, lead, pigments and asbestos. The company's principal place of business is Philadelphia, and its distribution area is primarily the greater Delaware Valley. In 1965, Wagner was bought by Edward Rabon, who was the president of the company during the times pertinent to this case. Wayne Rabon is the current president. Generally, Wagner has always marked the products it distributes with a customer order number and a destination, but it does not repackage, rebrand or otherwise alter the products it supplies.

In January 1958, Wagner began purchasing short-fiber asbestos from Asbestos Corporation Limited ("ACL"), located near Quebec, Canada. ACL mined the asbestos, then processed it by crushing, drying and grinding it to different sizes

and lengths for distribution.[1] ACL sold the short-fiber asbestos to suppliers such as Wagner, and sold the more valuable long fibers directly to the end-users. Based on Du Pont purchasing orders, Wagner delivered the asbestos to the Du Pont Seaford nylon plant located in Seaford, Delaware. Between January 1958 and January 1973, Wagner made 47 deliveries to Seaford, totaling less than 38 tons of asbestos, but constituting no more than five percent of Wagner's overall sales, and probably less. As the distributor, Wagner added destination labels to the bags and rebagged the product only when necessary. Wagner stopped distributing asbestos in 1973.

Since 1985, former employees and part-time tradesmen who worked at the Du Pont Seaford plant at various times between 1958 and 1973 have filed lawsuits against Wagner, alleging that they were exposed to a sweeping compound which contained asbestos supplied by Wagner and that this exposure caused them various injuries. Wagner filed several successful summary judgment motions, which were granted on the grounds that a sufficient nexus could not be established between Du Pont's sweeping compound and the asbestos supplied by Wagner.[2] In August 2002,

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[1]Plaintiff's Appendix at A-51. Subsequent references to this document appear as "Pl. App. at Page No."

[2]*See Nicolet, Inc. v. Nutt,* 525 A.2d 146, 147 (Del.1987) (holding that the existence of a sufficient nexus between the defendant and the injury-causing asbestos is one of the elements a plaintiff must prove in an asbestos-related products liability action).

after this Court granted interlocutory appeal on several of these decisions and entered final judgments, the Supreme Court found that a reasonable juror could find a sufficient nexus and remanded these cases to the Superior Court for further proceedings.[3] In November 2002, Wagner filed for summary judgment to consolidate the numerous Du Pont Seaford cases. The first trial is scheduled to begin on December 4, 2002.

STANDARD OF REVIEW

When considering a motion for summary judgment under Superior Court Civil Rule 56, the Court's function is to examine the record to determine whether genuine issues of material fact exist.[4] If, after viewing the record in a light most favorable to the non-moving party, the Court finds there are no genuine issues of material fact, summary judgment is appropriate.[5] The Court's decision must be based on only on the record presented, including all pleadings, affidavits, admissions, and answers to interrogatories, not on what evidence is potentially

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[3] *Nack v. Charles A. Wagner, Co., Inc.*, No. 361, 483, 474, 2001, Steele, J. (June 28, 2002) (ORDER).

[4] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super.Ct. 1973).

[5] *Id.*

possible.[6] All reasonable inferences must be drawn in favor of the non-moving party.[7] Summary judgment will not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the facts.[8]

DISCUSSION

Wagner argues first that it was a mere supplier of asbestos and therefore had a duty to act or warn its customers only if it had reason to know of the potential hazards of asbestos, pursuant to the Restatement (Second) of Torts § 402. Plaintiffs argue that Wagner was not a mere supplier, and, even if it was, the mere supplier defense set forth in § 402 is not available in Delaware. Plaintiffs further argue that if the mere supplier defense is available, Wagner had sufficient reason to know about asbestos dangers to trigger its duty to warn its customers.

This Court has previously acknowledged that a seller or supplier has no duty to inspect or investigate for latent defects in products as they arrive from the manufacturer unless the supplier has reason to suspect that such defects exist.[9] In

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[6] *Rochester v. Katalan*, 320 A.2d 704, 708 (Del.1974).

[7] *Sweetman v. Strescon Indus.*, 389 A.2d 1319, 1324 (Del.Super.Ct.1978).

[8] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del.1962).

[9] *In re Asbestos Litigation Spong Trial*, 1993 WL 603386 (Del.Super.1993) (citing *Behringer v. William Gretz Brewing Co.*, 169 A.2d 249 (Del.Super.Ct.1959); *Simmons v.*

so stating, the Court explicitly cited to the Restatement (Second) of Torts § 402, upon which Wagner relies. That is, a mere supplier is held to a less rigorous standard of care with respect to the issue of failure to investigate and warn.[10] Section 402 provides as follows:

> A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

The Court finds that the supplier defense as set forth in § 402 is a viable defense in Delaware and is available if Wagner can show that it was only a supplier.

Wagner argues that it has always been a supplier or distributor and has never altered the products it sells. As Mr. Ed Rabon, who was president of the company at the pertinent times, made clear in his several depositions, Wagner affixed destination tags and order numbers on bagged products as they were received, and rebagged them only when necessary because of breakage.

Richardson Variety Stores, 137 A.2d 747 (Del.Super.Ct.1957); *Restatement (Second) of Torts* § 402).

[10]*Ruth v. Delaware Plumbing Supply Co.,* 1994 WL 553277 (Del.Super.1994). Plaintiffs assert that under *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968 (Del.1980), section 402 of the Restatement of Torts is not valid Delaware law. However, *Cline* held that the Delaware UCC preempted the Restatement's provisions for strict liability. Nothing in the UCC or in *Cline* suggests preemption of the section 402's mere supplier defense.

The record is clear that Wagner played no role in any manufacturing or beneficiating process. ACL crushed, dried and ground the mined asbestos,[11] and Wagner sold it to Du Pont in the same condition that it bought it from ACL. Plaintiffs concede that the Wagner facility consisted of an office building and a warehouse, as opposed to a plant or operational facility.[12]

Plaintiffs further contend that § 402 is inapplicable because the asbestos supplied to Wagner by ACL was not "manufactured." It is not disputed, however, that ACL processed the ore extracted from its mine to separate the more valuable long fiber asbestos from the short. The short fiber asbestos is therefore the product of a manufacturing process and § 402 is applicable. Viewing the facts in the light most favorable to Plaintiffs, the Court finds that for the purposes of this products liability action, Wagner was a supplier of goods. Thus, Wagner's duty to warn or investigate is triggered if it had reason to know of the dangers of asbestos.

The Restatement (Second) of Torts § 12(1) defines the reason to know standard as follows:

> The words "reason to know" are used throughout the Restatement of this Subject to denote the fact that the actor has information from

[11]Pl. App. at A-51.

[12]Pl. Answer at 7.

> which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.

The record shows that Wagner took reasonable precautions with all of its powdery materials, but that it did not have a reason to know or infer that asbestos was particularly dangerous and or to base its conduct on such an assumption. The first document Plaintiffs point to as evidence that Wagner had reason to know of asbestos dangers is a letter from an ACL technical sales manager to Wagner regarding an updated testing manual.[13] The letter lists ten different testing procedures outlined in the new manual and asks Wagner to "[p]lease try to impress on your customers that the test methods listed in the book are proven procedures which should be used when it becomes necessary to report test results to us."[14] Nothing in the letter suggests any dangers peculiar to asbestos or any special measure for asbestos handling. Plaintiffs point to the fact that the manual was to be distributed to technical personnel as evidence that Wagner was responsible for ACL's asbestos sales and special services in the greater Delaware Valley. Assuming, *arguendo*, that this is true, it does not provide any inference that Wagner

[13]Def. App. at DE-35 and DE-36.

[14]*Id.* at DE-35.

was aware of the dangers of asbestos.

In January 1969, Du Pont Seaford wrote to all of its suppliers stating that Du Pont was establishing handling procedures for all chemicals and commercial products prior to acceptance and asking three open-ended questions about safety issues.[15] As is clear on the face of the letter, Wagner received the letter because it supplied one of the many products shipped to Seaford, not because Seaford had an express concern about asbestos. Wagner replied that the asbestos was non-toxic, and required "only normal precautions against a dusty material."[16] This response is consistent with Rabon's statements that Wagner treated asbestos as a dusty material, uncomfortable to breathe but not toxic.

It cannot be inferred from this letter, which went to all Du Pont Seaford suppliers, that Du Pont had suspicions about asbestos, or that receipt of the letter gave Wagner any increased awareness of the dangers of asbestos. Nor do Wagner's responses manifest a concern other than Wagner's general concern about all of its powdery products. As a letter that can fairly be described as a form letter to all suppliers, the 1969 Du Pont letter did not give Wagner a reason to know that

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[15]Pl. App. at A-1.

[16]Letter from Edward Rabon (Jan. 31, 1969) to G.T. Russell, Du Pont assistant purchasing agent.

asbestos was a toxic material or to trigger a duty to investigate any further.

In January 1970, Wagner received a letter from ACL which stated that future shipments of asbestos would be marked with a cautionary note which would provide as follows:

> This bag contains chrysotile asbestos fibre. Persons exposed to this material should use adequate protective devices as inhalation of this material over long period may be harmful.[17]

According to Edward Rabon's deposition testimony, this letter was consistent with what he already considered to be the general dangers of continuous breathing of the powdery products handled by his company. Rabon testified that "[t]o me, anything that we sold at that time. . . the only possible danger it had to my knowledge at that time was from dust. So if you protect yourself from dust, you're in the clear."[18] As a general precaution, Wagner provided its employees with respirators, which were required to be worn not only when working with asbestos, but also with other dusty materials. Mr. Rabon also testified that he visited many plants that dealt with powdery substances and that the employees generally wore

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[17]Letter from P.E. Leclerc, ACL Regional Sales Manager (Jan. 13, 1970) to Edward Rabon. Pl.App. At A-3.

[18]Pl. App. at 101.

respirators, including the employees at the ACL mine in Canada.[19] In light of the fact that employees in other companies whose products included powdery or dusty substances wore respirators, the fact that Wagner provided respirators to its employees does not indicate that Wagner had a reason to know of the specific dangers of asbestos.

As far as ACL's cautionary letter, it did not convey to Rabon anything other than his previous belief that continuous breathing of powdery substances could be unhealthy, which he stated was an industry-wide view. Rabon testified that his company's general practice was to pass along information such as the Leclerc letter to customers: "I'll tell you the normal procedure in our company has been traditionally on all notices, just like Mr. Leclerc says, we are advising your customers whenever the invoices are done by us. Normally we copy this on a copy machine and send it to each account."[20] Plaintiffs offer no proof that the letter was not forwarded because there is no way to prove a negative, and also no way to rebut Rabon's assertion that "I'm certain that we did that in this case."[21] Because the letter contains a caution which Rabon believed his company was already following

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[19]Pl. App. at A-45, A-46 and A-61.

[20]Def. App. at DE-25.

[21]Def. App. at DE-26.

and because the information would be affixed to future ACL bags, the letter did not trigger a duty to investigate further or to warn Du Pont.

Plaintiffs also point to various general sources of information regarding the dangers of asbestos, including the Pennsylvania Occupational Disease Act, OSHA, and various industry publications. However, Rabon was clear that he understood that his products posed the danger that any dusty or powdery substance would pose under continuous breathing.

The Court concludes that Wagner was doing what other suppliers were doing with asbestos during this same period of time, and that it had no reason to do otherwise. Thus, the Court need not reach Wagner's argument regarding the statutory sealed container defense.

For all these reasons, Defendant Wagner's motion for summary judgment is ***Granted.***

It Is So ORDERED.

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_____Judge John E. Babiarz, Jr.

JEB,jr./bjw/rmp
Original to Prothonotary
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