

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

VIVIAN L. MEDINILLA
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0626

October 8, 2019

Nicholas D. Picoelli Jr.
Jason A. Cincilla
Amaryah K. Bocchino
Ryan W. Browning
Manning Gross + Massenburg LLP
1007 N. Orange Street, 10th Floor
Wilmington, Delaware 19801

Andrew C. Dalton, Esquire
Bartholomew J. Dalton, Esquire
Ipek Kurul, Esquire
Dalton & Associates, P.A.
Cool Spring Meeting House
1106 West Tenth Street
Wilmington, Delaware 19806

Adam Balick, Esquire
Patrick J. Smith, Esquire
Balick & Balick, LLC
711 King Street
Wilmington, Delaware 19801

**Re: *In Re Asbestos Litigation: Larry Deckert and Shirlee Deckert*
C.A. No.: N17C-02-072**

Dear Counsel:

Although I received notice that this case may have settled, since I do not have anything entered on the docket, this is the Court's decision on Defendant's Motion for Summary Judgment. The sole issue before the Court is with respect to product identification. After consideration of all pleadings, the oral arguments on August 29, 2019, and the last supplemental submissions on September 4, 2019, for the reasons stated below, Defendant's Motion for Summary Judgment is **DENIED**.

Factual Background¹

Plaintiff alleges that he developed lung cancer as a result of his exposure to asbestos-containing parts, including Johns-Manville asbestos-cement pipe (“A/C”) while working at R&L Sewer, Inc. Plaintiff testified to installing A/C pipes many times from 1969 to 1990s in California. At the time of Johns-Manville’s bankruptcy in December 1982, J-MM purchased pipe assets from Johns-Manville. Per stipulation by the parties, Plaintiff does not contest that J-M Manufacturing (“J-MM”) is not liable for Johns-Manville pipe prior to 1983. In addition J-M A/C Pipe Corp. (“JMAC”) also purchased A/C pipe assets in a separate transaction from Johns-Manville. J-MM supplied A/C pipe manufactured by JMAC from 1983-1988.

As to work after 1983, Plaintiff identified three jobs in Bellflower, Huntington Beach, and San Clemente, California. The length of these projects ranged from two weeks to one month. The process of installing the A/C pipe included using a saw to cut it, which produced dust that Plaintiff inhaled. Plaintiff explained that the A/C pipe was labeled with “Johns-Manville” or “J.M.”²

Standard of Review

Delaware Superior Court Civil Rule 56 mandates the granting of summary judgment where the moving party demonstrates that “there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.”³ “Once the movant meets its burden, then the burden shifts to the non-movant to demonstrate sufficiently an existence of one or more genuine issues of material

¹ The Court’s recitation is based on Defendant’s Motion for Summary Judgment filed on May 7, 2019, Plaintiff’s Response filed on May 30, 2019, Defendant’s Reply filed on July 22, 2019, Defendant’s Letter to the Court Enclosing Exhibit in Support of Motion for Summary Judgment filed on August 21, 2019, Oral Argument heard on August 29, 2019, Plaintiff’s Letter to the Court Regarding the Deposition of Louis Armstong in the Jones Case filed on September 4, 2019, and Defendant’s Letter to the Court in Response to Plaintiff’s Letter filed on September 4, 2019.

² Defendant submitted the video deposition of Larry Deckert to clarify the record and made sure to note that although the written transcript identified the product as “J-M,” the video indicates that there should be no dash or hyphen. Rather, it should be J.M.

³ Del Super. Ct. Civ. R. 56(c).

fact.”⁴ In considering the motion, “[a]ll facts and reasonable inferences must be considered in a light most favorable to the non-moving party.”⁵

Discussion

California substantive law applies in this case. *Rutherford v. Owens-Illinois, Inc.*⁶ establishes a two-part test “for determining whether exposure to asbestos from a particular product was a legal cause of a plaintiff’s injury in an asbestos-induced personal injury case.”⁷ First, the plaintiff must establish “some threshold exposure to the defendant’s defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a ‘legal cause’ of his injury, i.e., a substantial factor in bringing about the injury.”⁸ In asbestos-cases, “a particular asbestos-containing product is deemed to be a substantial factor in bringing about the injury if its contribution to the plaintiff or decedent’s risk or probability of developing cancer was substantial.”⁹

Product Identification

Defendant argues for summary judgment because there is no evidence that Plaintiff encountered an asbestos-containing product for which J-MM is responsible. Defendant claims that where the Johns-Manville, J-MM, and JMAC names are orbiting in this case, “Plaintiff testified that the only punctuation he recalled between the J and M was a dot or period.”¹⁰ It suggests the only potential liability is limited to the Johns-Manville pipe that J-MM sold in the first three months of 1983. While this may be true, the facts also support that in addition to J-MM continuing to sell Johns-Manville A/C pipe for the first three months of 1983, J-MM also sold new A/C pipe from 1983-1988. After J-MM and JMAC purchased inventory from Johns-Manville, JMAC manufactured—and J-MM sold—the asbestos pipe formerly manufactured and sold by Johns-Manville.

⁴ *Quality Elec. Co., Inc. v. E. States Const. Serv., Inc.*, 663 A.2d 488 (Del. 1995). *See also* Del. Super. Ct. Civ. R. 56(e); *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

⁵ *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 692 (Del. Super. 1986).

⁶ 941 P.2d 1203 (Cal. 1997).

⁷ *Miranda v. Bomel Construction Co., Inc.*, 187 Cal. App. 4th 1326, 1338 (Cal. Ct. App. 2010).

⁸ *Rutherford*, 941 P.2d at 1223 (citations omitted).

⁹ *Id.* at 1219.

¹⁰ Def.’s Mot. at 5.

Both J-MM and JMAC purchased Johns-Manville inventory from the Johns-Manville Bankruptcy Trust. Both J-MM and JMAC operated under the same roof, and JMAC manufactured, and J-MM sold, the A/C pipe formerly manufactured and sold by Johns-Manville. Therefore, it is unclear as to the true length of the period of liability for which J-MM may be responsible for Johns-Manville inventory. Furthermore, the record is unclear of the extent to which J-MM might be liable for the production of new A/C pipe, sold from 1983-1988, where J-MM sold newly produced pipe, manufactured by JMAC Johns-Manville inventory. Based on this lack of clarity regarding the relationship between the three companies, and the inventory sold and manufactured between them, the Court finds that there are genuine issues of material fact regarding J-MM's exposure in this case.

More basic is that there is ambiguity between Johns-Manville and J-MM. Plaintiffs presented evidence through the deposition of J-MM's corporate representative that J-MM and JMAC worked and operated under the same roof and that J-MM held itself out as a continuation of Johns-Manville. It is not surprising that customers would refer to J-MM products as Johns-Manville products. The ambiguity appears to be intentional such that J-MM received a benefit of claiming some connection to the well-established Johns-Manville name.

Defendant relies on *In re Asbestos Litig. (Hunter)* to argue for summary judgment.¹¹ This Court distinguishes the *Hunter* case from the record here. In *Hunter*, the Plaintiff said he had not worked in the 1980's with any Johns-Manville pipe, and then changed his testimony "that he had used Johns-Manville pipe in the 80's."¹² Also, the *Hunter* plaintiff was very clear about the two different pipes to include CertainTeed and Johns-Manville.¹³ The *Hunter* plaintiff never mentions or suggests he was confused about the difference between J-MM or Johns-Manville.

Here, Plaintiff indicated that he considered Johns-Manville, J-M, and J-MM to be one in the same, meaning that when he identified Johns-Manville pipe, he meant J-MM pipe. He also identified three jobs that he worked in the mid-1980's using Johns-Manville A/C pipes. Unlike in *Hunter*, Plaintiff is not alleging that he encountered the Johns-Manville A/C pipe supplied by J-MM in the first three months of 1983. Rather, he testified to installing and cutting solely new "transite" A/C pipe

¹¹ *In re Asbestos Litig. (Hunter)*, C.A. N13C-08-267 ASB (Del. Super. Feb. 9, 2017) (TRANSCRIPT) (Def.'s Mot. For Summary Judgment, Exhibit L).

¹² *Id.* at 115:14-18.

¹³ *Id.* at 114:17-22.

over the three jobs at issue in this case.¹⁴ Although Defendant tries to distance itself from the term “transite” as a generic term used to refer to all A/C pipe,¹⁵ Plaintiff submits that a 1983 advertisement that directly tied J-MM; using the trademarked term “transite” as its proprietary term for asbestos-cement pipe.¹⁶ He also submits through his handwritten exhibit at his deposition that he identified “J.M.” in relation to A/C pipe from the three projects described.¹⁷

The Court cannot grant summary judgment over the use of a period or a hyphen. The ambiguity favors the Plaintiff, and in drawing all reasonable inferences in his favor, this Court finds that he raises genuine issues of material fact that precludes summary judgment. Defendant’s Motion for Summary Judgment is therefore **DENIED**.

/s/Vivian L. Medinilla
Vivian L. Medinilla
Judge

¹⁴ Pl.’s Resp. at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ Pl.’s Exhibit C.