SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET
Suite 10400
WILMINGTON, DE 19801
PHONE: (302) 255-0656
FASCIMILE: (302) 255-2274

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Robert Jacobs, Esquire
Jacobs & Crumplar, P.A.
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899

Jonathan L. Parshall, Esquire
Murphy, Spadaro & Landon
1011 Centre Road, Suite 210
Wilmington, DE 19805

Re: ***Carmen Stigliano v. Anchor Packing Company, et al.***
C.A. No. 05C-06-263-ASB

Dear Counsel:

The Court has reviewed the parties' supplemental submissions in connection with the defendant, Avalon System's Inc.'s, motion for summary judgment. As you know, Avalon System's, Inc., f/k/a McCardle-Desco Corporation ("McCardle-Desco") has moved for summary judgment on the ground that there is no genuine issue of material fact with respect to whether the plaintiff was exposed to an asbestos-containing product manufactured, sold or distributed by McCardle-Desco. At the conclusion of oral argument on the motion, the Court ruled that McCardle-Desco had carried its burden to establish the lack of any genuine issue of material fact regarding

product nexus. The Court further ruled that plaintiff had failed to meet his responsive burden to establish that an issue of material fact on product nexus existed, except for a post-deposition affidavit of the now-deceased plaintiff that arguably created an issue of fact on exposure. McCardle-Desco argued that the affidavit should not be considered on summary judgment because the affidavit was hearsay and would not be admissible at trial.[1] The Court allowed supplemental briefing on the question of whether the Stigliano affidavit would be admissible at trial.

Plaintiff argues that the affidavit is admissible as a "dying declaration" under D.R.E. 804(b)(2). This rule is inapplicable, however, because the party proffering the hearsay statement must establish that death was "imminent" at the time the statement was made, and that the statement concerned the cause or circumstances of the declarant's death.[2] The Stigliano affidavit was executed seventy-three days before his death. Death was not, therefore, imminent at the time the affidavit was made. Nor does the affidavit specifically address "the cause or circumstances of . . . the declarant's pending death." Accordingly, the "statement under belief of impending death" exception to the hearsay rule does not apply.[3]

Plaintiff also seeks to have the Stigliano affidavit admitted pursuant to the "residual exception" to the hearsay rule.[4] This rule must be "construed narrowly so

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[1] *See Continential Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A2d 743 (Del. 1965)(holding that the court should not consider inadmissible hearsay when deciding a motion for summary judgment).

[2] D.R.E. 804(b)(2).

[3] *See Sternhagen v. Dow Co.*, 108 F. Supp. 2d 1113, 1115 (D. Mont. 1999)(holding that sworn statement prepared by the declarant suffering from non-Hodgkin's lymphoma three months prior to his death was not made when death was "imminent.").

[4] *See* D.R.E. 807.

that the exception does not swallow the hearsay rule."[5] The Court must be satisfied that there is a guaranty of trustworthiness associated with the proffered hearsay statement that is equivalent to the guaranties of trustworthiness recognized and implicit in the other hearsay exceptions.[6]

Several factors cause the Court to conclude that the Stigliano affidavit is not sufficiently trustworthy to allow its admission under the "residual exception" to the hearsay rule. First and foremost, Mr. Stigliano is dead and cannot be cross-examined on his affidavit. Given that Mr. Stigliano was deposed in this case on four occasions and did not once in those depositions recount exposure to McCardle-Desco products, his post-deposition sworn statements to the contrary would, at the least, need to be tested by cross-examination before the Court would allow them to be presented to a jury. Fundamental fairness dictates this result.[7] Moreover, given the substantial deposition record on the product nexus issue, including Mr. Stigliano's *de bene esse* deposition on August 5, 2005, the Court cannot conclude that the post-deposition

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[5] *Cabrera v. State*, 840 A.2d 1256, 1268 (Del. 2004).

[6] *See Odaho v. Wright*, 110 S. Ct. 3139, 3147 (1990).

[7] Although this is not a criminal case, confrontation clause analysis is instructive here. In this regard, the Court notes that the "residual exception" is not "firmly rooted" in the common law such that confrontation clause concerns would be alleviated by introducing a hearsay statement under this exception. *See Wright,* 110 S. Ct. at 3147 (noting that the "residual exception" is not "firmly rooted" in the common law);*Johnson v. State*, 878 A.2d 422, 428 (Del. 2005)(recognizing that confrontation clause is not violated when introducing a hearsay statement only if the statement would be admissible under a "firmly rooted" exception to the hearsay rule and is not of a "testimonial" nature). In this instance, Mr. Stigliano's statements in his affidavit not only fail to implicate a "firmly rooted" exception to the hearsay rule, they also are clearly testimonial in nature in that they attempt to create a product nexus issue against McCardle-Desco when his four previous sworn statements on the issue failed to do so. Again, the Court recognizes that a confrontation clause analysis is not implicated in this civil case. Nevertheless, the Court has considered the confrontation analysis by analogy when determining the trustworthiness of the Stigliano affidavit.

Stigliano affidavit is "more probative on the [product nexus] point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."[8] Consequently, the Stigliano affidavit is not admissible under the "residual exception."

Based on the foregoing, McCardle-Desco's motion for summary judgment is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

Joseph R. Slights, III

JRS, III/sb

[8] *See* D.R.E. 807(b).