

FILE NAME: Wagner (WAG)

DATE: 2002

DOC#: WAG002

DOCUMENT DESCRIPTION: Legal - Plaintiffs' Amended Opening Brief on Appeal

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION : No. 704, 2002
: Court Below: Superior Court
: Of the State of Delaware in
: and for New Castle County
:
Arthur Fleetwood : C.A. No. 99C-02-278
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
James Desmond : C.A. No. 00C-08-209
James Wilson : C.A. No. 00C-12-224
William Cooper : C.A. NO. 86C-08-070E
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
James Williams : C.A. No. 00C-06-047
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
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Larry Surricchio : C.A. No. 89C-10-130
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John Garris	:	C.A. No. 90C-12-040
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Richard Bowdle	:	C.A. No. 90C-12-107
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Donald Lowe,	:	C.A. No. 86C-08-070A
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CHARLES A. WAGNER CO.,	:	
INC.,	:	
Defendants.	:	

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

PLAINTIFFS' /APPELLANTS' AMENDED OPENING BRIEF ON APPEAL

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NATURE AND STAGE OF PROCEEDINGS

This appeal involves the cases of 90 DuPont employees who worked at the Seaford Nylon plant and who are all alleged to have developed a number of asbestos-related diseases including terminal cancer as a result of exposure from 1958 through 1973 to a raw asbestos fiber mined in Canada and sold by the mining company's Philadelphia-based agent, Charles A. Wagner Company, Inc. ("Wagner") for use as a sweeping compound to absorb spills. In the various plaintiffs' complaints, the first of which was filed in 1984, it is alleged, that Wagner among other things:

- failed to substitute, suggest, promote or require the substitution of materials other than asbestos, (A-265)¹
- failed to adequately warn all the potential victims of asbestos, including the plaintiff...of the risks of asbestos, (A-266)
- directly and indirectly materially misrepresented that asbestos was not hazardous and/or could be used safely when it (a) had no basis for such representation; (b) knew that a significant health hazard to human life existed from asbestos. (A-269)

In 1989, shortly before the first Wagner case was scheduled to go to trial, Wagner filed a Motion for Summary Judgment on the

¹ Because the court below in its decision frequently referred to plaintiffs' appendix by specific appendix number, the appellants in order to assist the Court have wherever possible used the same appendix number. This means documents such as the Fleetwood complaint which was not in plaintiffs' appendix below, may not appear in the same order in the appendix filed with this brief, as they appear in the brief itself.

sole ground that there was no proof that its raw asbestos fiber was ever actually used at the Seaford plant. On June 16, 1989, Judge Taylor accepted Wagner's argument and granted summary judgment in Bradley et al. v. A.C. & S., Inc., Del. Supr. Ct. C.A. No. 84C-MY-145.² This decision was subsequently adopted by Judge Babiarz in July 2001,³ who shortly thereafter entered final order in all the prior cases thereby allowing plaintiffs to file an appeal with this Court.

On June 28, 2002, this Court reversed all the prior summary judgment decisions and held that Judge Babiarz and his predecessors had "erred by failing to give the same consideration to the inferences favorable to the Plaintiffs arising from the material facts." (Nack Order at 5). In response to this Court's decision, Wagner filed a Motion for Reargument. On August 14, 2002, this Court denied that motion stating:

[I]t appears that appellee has adopted an alternative position for summary judgment and now argues that other suppliers were the proximate cause of appellants' injuries. Proximate cause issues can rarely be resolved at the summary judgment stage, therefore we must conclude that this motion is without merit

(Nack Re-argument Order at 1)

On August 30, 2002, after all the cases had been remanded to the Superior Court for further action consistent with this

² This decision along with all other unreported decisions cited is contained in the compendium cases filed with this brief.

³ Nack and Peters, Del. Super. Ct., C.A. No. 98C-05-047, 98C-09-007 (Babiarz J. (July 2001))

Court's Orders, plaintiffs filed a motion to set all of these cases, including those which had been filed over 18 years ago, down for an immediate trial. Despite Wagner's opposition on November 4th, the Superior Court ordered the case of Arthur Fleetwood, a plaintiff who had died from malignant mesothelioma to be set for trial commencing on December 4, 2002.

Wagner's response was to file on November 11, 2002 yet another Motion for Summary Judgment. In that motion, it now argued that it was entitled as a matter of law to summary judgment on the grounds that because it was a "mere supplier" of manufactured products under both the Restatement (Second) of Torts §402 and the 1987 Sealed Container Defense 18 Del.C. §7001 and because plaintiffs had no evidence to establish it had any knowledge or reason to know of the dangers of asbestos.⁴ Although, at the summary judgment stage, Wagner had the burden of proof, it did not point to anything in the record to establish that it was undisputed that Wagner had no knowledge or reason to know of the dangers of asbestos. Instead, it simply stated in its brief below that plaintiffs had produced no such evidence. (Wagner Brief below at 7)

On November 27, 2002, Judge Babiarcz issued an opinion granting Wagner's Motion in all 90 cases. In that opinion the

⁴ Although this supplier defense had not been raised by Wagner in the summary judgment motions filed in earlier cases such as Bradley, Wagner did devote 2 pages to the 402 Restatement issue in its Motion for Summary Judgment filed in June 2000.

court found that the Restatement (Second) of Torts §402 is valid Delaware law, and that Wagner was a seller of a manufactured product. The lower court, did not, however, hold that Wagner did not have knowledge of the dangers of asbestos noting that

Rabon was clear that he understood his products posed the danger that any dusty or powdery substance would pose under continuous breathing (Emphasis added) (Opinion at 15).

Judge Babiarz then concluded by holding that

Wagner was doing what other suppliers were doing with asbestos during this same time period and that it had no reason to do otherwise.⁵ (Opinion at 15)

On December 20, 2002 plaintiffs filed an appeal of this November 27, 2002 decision. This is appellants' "Opening Brief."

⁵ The lower court did not reach Wagner's argument regarding the statutory sealed container defense.

SUMMARY OF ARGUMENT

- I. The Court below erred as a matter of law in holding that the supplier defense was applicable to appellee because (1) Restatement (Second) of the Law of Torts, Section 402 must be read in conjunction with Section 402A (Strict Liability) which is not valid Delaware law. As such, Section 402 must also be invalid under the same rationale; (2) Restatement Section 402 only applies to manufactured products and does not apply to the asbestos at issue in this litigation because that asbestos was merely a mined raw material; and (3) Section 402 does not apply to appellee because of its role as an exclusive agent as opposed to a mere supplier.
- II. Even if Restatement Section 402 applies, the court below erred when it found, as a matter of law, that there is no possible evidence to infer that appellee did know or had reason to know of the dangers of the asbestos sweeping compound that appellants were exposed to. At a minimum, sufficient evidence exists to create a valid issue to be resolved by the trier of fact. The court also erred when it required the additional elements of knowledge of "specific" and "Particular" danger in a Section 402 analysis. Finally, the court erred when it determined that appellee was doing what other companies were doing during that time period without any evidence in the record of other distributors' practices or behavior.

STATEMENT OF FACTS

A. Scope and Nature of Wagner's Business

The undisputed facts show that Wagner was not a small, local retailer which sold unaltered, manufactured products in sealed containers to the general public but was rather an agent of various mining companies and that it sold no manufactured products. (A-104). As these mining companies' agent, Wagner promoted their interest to various Delaware Valley manufacturers. It handled a large number of different raw materials ranging from silica, talc, lead, carbon black and asbestos, all of which were used in a large variety of industries including the chemical industry. (A-16 - A-17, A-67, A-105 - A-111).

During the period 1958 to 1973, Wagner sold almost 38 tons of raw asbestos fiber to DuPont's Seaford Delaware plant for use as sweeping compound to absorb spills on the plant floor. Wagner's sales to the Seaford plant, however, represented a fraction of its total asbestos sales. Most of the asbestos which Wagner sold went to various asbestos manufacturers, who combined it with other materials to manufacture products such as roofing material and floor tile. (A-65 - A-66).⁶

By the early 1950's, Wagner had acquired enough skill and expertise in the area of asbestos that it was selected as the

⁶ The record reveals that in addition to asbestos sold to DuPont Seaford, for janitorial use, Wagner on at least one other occasion sold a non asbestos material to a Dupont New Jersey plant for the same purpose. (A-156 - 159, A-273 - A-277)

exclusive agent for one of the largest asbestos mining operations in the world, Asbestos Corporation, Ltd. ("ACL"). (A-116 - A-117). At least two of Wagner's officials, Edward Rabon, and Ward Stackhouse, made special trips to ACL's operations in Canada. (A-61 - A-63). As ACL's representative in this area, Wagner developed business for ACL and dealt with various customer's needs, including requests that ACL perform special testing of asbestos quality. (A-151). When ACL wished to give information to its customers, it did so through Wagner. (A-182). When any individual tried to purchase directly a type of product that Wagner handled, ACL would direct them to go through Wagner. (A-184).

In addition to acting as the exclusive agent of ACL, Wagner was also the area representative for Johns-Manville asbestos-containing talc sales. (A-161, A-188). It shipped Desertalc to Delaware Amoco plant, a material which contained up to 30 percent asbestos.⁷(A-185 - A-186).

Consistent with the fact that Wagner did not operate a retail store is the fact that Wagner operations basically consisted of an office and a warehouse. (A-112 - A-113).

⁷ As a result of its supply of asbestos containing talc to Amoco, Wagner has also been sued in a number of Amoco asbestos cases. Those cases, however, are not involved in this appeal. Because of the 40 plus years latency period between exposure and asbestos disease new cases coming from Wagner's sale of asbestos to DuPont Seaford and Amoco New Castle continue to be filed although at a slower pace.

Reflecting the industrial nature of their operation, their employees were all equipped with respirators which they were instructed to use when handling the raw materials. (A-77 - A-78). Furthermore, it is clear that Wagner did not only act as a mere transit point in the shipment of the raw material, as they had a re-bagging machine to take care of the bags, which frequently broke. (A-74, A-112, A-122). Finally, it would add its own label to the bags, including the bags of raw asbestos fiber it sent to DuPont Seaford. (A-139 - A-140).

The Wagner official most closely connected to the DuPont Seaford sales was Edward Rabon. He had started with the company in 1929 and sometime prior to 1958 when Wagner started to ship raw asbestos to Seaford, he had risen to position of Vice President. (A-49 - 50, 52). In 1965 he became President and principal owner of the company, a position he maintained until 1987 when his son succeeded him. (A-48, A-169). As a Wagner officer he traveled throughout the United States and the world to promote Wagner's business (A-114).

B. The undisputed record reveals that Wagner's Asbestos was mined and not a manufactured material.

Asbestos is a naturally occurring mineral, which, like coal, is dug out of the ground. The type of asbestos sold by Wagner was chrysotile which came from Thetford Mines, Quebec. (A-257, A-178). As Wagner's principal and chief asbestos supplier, ACL states in its interrogatories, this asbestos was not a product that was manufactured but rather a material which was mined. (A-

257). The deposition testimony of Wagner's president, Edward Rabon, is also consistent with ACL's position wherein he states that Wagner never sold any manufactured product, but that it only carried raw materials which in turn it sold to manufacturers. (A-104 - A-105)⁸ The fact that some of the various different raw materials that Wagner carried had to be processed at the mine does not alter the fact the raw material remained the same substance, although in a different size. (A-151). Moreover the only evidence in the record here of any so-called processing involving the asbestos sold by Wagner to DuPont was Rabon's statement that the less valuable short fibers that it sold were merely separated from the more valuable longer fibers. (A-53-54). According to Rabon, the asbestos Wagner sold came from, "almost the bottom of the pile." (A-54). Moreover, the grade of asbestos sold by Wagner to DuPont Seaford was the lowest of this low grade material. In fact its official ACL designation was "asbestos waste." (A-18). This designation alone should establish that it was not a manufactured product for which value was added but was rather a leftover, the least valuable material taken from the mine.

⁸ Wagner's company brochures proclaim its business as one of supplying "Raw Material For" - and then lists various industries as the recipients of its raw materials. (A-116).

C. Undisputed Facts regarding Wagner's knowledge of the dangers of asbestos.

Edward Rabon who was the President of Wagner during most of the time it shipped ACL's asbestos waste to DuPont a was not an uneducated store keeper. In addition to his business degree from Drexel he spent two additional years studying chemistry at the University of Pennsylvania (A-83) which was one of the leading institutions in the development of asbestos-related disease research. (A-191) Rabon kept up with industry publications such as Chemical Week, (A-135) which in 1966 ran an article dealing with the hazards of asbestos (A-46), attended national industry conferences (A-56 - A-58), was aware of both Pennsylvania's Worker's Compensation Laws (A-127) and OSHA (A-84), and dealt with a number of asbestos manufacturers (A-65) as well as two major asbestos mining interests - Asbestos Corporation Limited and Johns-Manville.⁹

Given these facts, it is not surprising that Rabon repeatedly admits in deposition that during the relevant time period, he was aware that exposure to asbestos could be hazardous. The only dispute is whether Rabon was aware that asbestos was more dangerous than the other materials Wagner carried. In his June 13, 1989 deposition, Edward Rabon was

⁹ Rabon claims his dealing with Johns-Manville was for a non-asbestos - talc - but the record shows that this talc product contained up to 30% asbestos. (A-72, A-185)

questioned with regard to his knowledge of the dangers of the various industrial powders Wagner was carrying in the 1950's and 1960's:

Q. Mr. Rabon, let me just make sure I understand this. You knew in the '60s or '50s that you were selling a product that in your belief that may have caused dust whether it be silica or anything else; Is that correct?

A. All the products we sell were powders mostly under certain circumstances that caused dust.

Q. Okay. And you knew that. And then because of that reason you gave respirators to your employees at Charles Wagner; Is that correct?

A. Yes.¹⁰

Q. And that was because, you've already said, that there may have been a potential hazard associated with inhaling created by these products?

A. Yes. (A-137 - A-138)

A few months later on November 13, 1989 Rabon's testimony was similar.

Q. Is it your testimony that the powders Charles Wagner sold could not hurt anyone?

A. No, it is not my testimony. (A-88).

A. The basis was as I gave it to you, that all of our powders are in terms of, to the best of my knowledge, were -- they were potentially harmful as a result of a dust hazard. And the principal precaution we would ask anyone to take would be to protect themselves from dust. (A-99).

Finally, in his 1985 deposition when asked about his knowledge of asbestos during the time period 1958 to 1972 he again admitted that because of its dangers, asbestos was one of

¹⁰ Rabon also noted that Wagner required respirators even though its warehouse was relatively clean and dust-free. (A-138).

the materials for which Wagner required its employees to use a respirator.

Q. So that, you considered asbestos no different than the other materials that you were handling? Something that if handled, a respirator should be used, but there was nothing particular or special about asbestos?

A. No. Back in the time frame you are talking about. (A-81).

Wagner's knowledge that the various industrial grade raw materials could pose an inhalation hazard is consistent with the medical literature. Dr. Susan Daum, one of plaintiffs' experts has published that many of raw materials carried by Wagner including carbon black, silica, talc, as well as asbestos, pose a dust disease hazard. (A-235 - A-250).

Wagner's response to the knowledge that many of its industrial raw materials which came in powdered form were hazardous was to require all of its employees who handled the bags of raw fiber, including asbestos, to wear respirators. Any employee caught not wearing a respirator would summarily be fired.

Q. Did you have any sort of requirement of the warehouse people, the people who handled the materials, and this is not just the asbestos, that they had to wear a respirator or any sort of mask?

A. We make respirators available. That's about all I can tell you.

Q. When do you recall first making respirators available?

A. Many years ago.

Q. That goes back more than 15 years ago?

A. Yes. Definitely. (A-77)

Q. In the '60's they were available?

A. That's right. But bear in mind, we have a warehouse, and the only dust we get is if something breaks. And when they re-bag, they better have their respirator on, or they might get canned. But, for the normal course of events, it's a fairly clean place.

Q. And the purpose of that is to protect them from the dust of the materials they are handling?

A. Any dust. That's correct. (A-78).

In another deposition, Rabon stated:

Q. So is that you were conscious of the silicosis, or should it be pneumoconiosis? Any kind of illness to the lungs caused by inhalation of dust?

A. Generally speaking since we were handling dusty products that's what precipitated it, but there was a lot of dust. To be protected.

Q. Now when I say the respirators were supplied, that is Charles Wagner supplied them for the workers?

A. Yes. (A-124).

Although Rabon admits that during the period in question (1958 to 1973), he knew asbestos along with the other industrial powders Wagner handled were potentially harmful, he does not give a specific date when he first learned of the dust hazard created by the raw materials Wagner handled. He does, however, admit the reason Wagner started requiring the respirators was his knowledge of the "silicosis controversy". He then added that the hazards of silicosis were known before asbestos (A-139).

Rabon's observations that the dangers of silica exposure, were recognized before asbestos is confirmed by plaintiffs' state-of-the-art expert, Dr. Castleman, who described silicosis as asbestosis' "better-known cousin." (A-196). Dr. Castleman also notes that the silicosis "controversy" which Rabon speaks of occurred in the 1930's when there were a tremendous number of silicosis suits. (A-206 - A-209). By 1949, however, it was being reported in the American Medical Association Journal that asbestos was associated with lung cancer far more than silica and

asbestos soon began to dwarf silica as a health risk. (A-202, A-204 - A-206)

It is reasonable to conclude that just as Wagner learned of silicosis from his silica suppliers that it learned of asbestos and other diseases in the early 1950's when it began dealing with Asbestos Corporation Ltd.. As Dr. Castleman notes in his book, as early as 1943 ACL was faced with numerous cases of asbestosis. (A-²²⁹~~226~~). In 1946, a death claim had been filed in a case where the asbestosis was accompanied by lung cancer. (A-²²⁹~~226~~). Three years later in 1949, the treasurer of ACL whose exposure consisted only of office work, died from mesothelioma. (A-²³⁰~~226~~ - A-227). Rabon admits, in his deposition that when he visited ACL operations, he saw people using respirators when handling asbestos. (A-63 - A-64). This must be carefully considered given the fact that Rabon later instituted the same requirements for his employees.

The knowledge of Wagner's other asbestos principal Johns-Manville was even more intensive and, in fact, Rabon admits he learned about the dangers of asbestos as a result of public disclosure of problems Johns-Manville was having. It should be noted that the first lawsuit against J.M. occurred in the 1950's directly across the river in New Jersey. (A-214 - A-215).

D. Wagner's Statutory Obligations

During the entire time Wagner was storing tons of raw asbestos at its warehouse, it was required by Pennsylvania law to take special precautions. Unlike Delaware which did not single

out asbestos among other dust producing materials for special consideration until the 1980's,¹¹ Pennsylvania has a long history of dealing with the hazards of asbestos.¹² In 1945 the Pennsylvania legislature passed an occupational disease act which singled out two specific dust-related occupational diseases, silicosis and asbestosis. (A-22). The statute stated that a Pennsylvania employer was responsible for providing compensation to any of its workers who developed "asbestosis in any occupation involving direct contact with, handling of, or exposure to the dust of asbestos." (A-22). The law further required that the employer post the law in a prominent place for all of its employees (A-27).

In September 1971, the Pennsylvania promulgated special regulations which required each employer to take steps, including respiratory protection, to limit dust exposure. Again, asbestos was singled out for special treatment (A-30). Although the regulations set limits on the various raw materials carried by Wagner, such as silica, mica, and talc, the asbestos regulations were by far the most stringent. (A-32 - A-33).

¹¹ The Delaware workers' compensation statute, unlike many other states, did not specifically list asbestos as a specific cause of occupational disease. The first Delaware statute to specifically single out asbestos was 16 Del. C. §7801.

¹² By 1935, even before any U.S. Government or industry had done any large scale studies, the State of Pennsylvania had already published a study of disease and dust level at four of its asbestos plants. (A-215A-D).

OSHA Regulations. Both Edward and Wayne Rabon admitted that they were aware of the OSHA regulations. (A-84, A-172 - A-173). As with the Pennsylvania requirements, anyone looking at the OSHA regulations, would see that asbestos was singled-out as a dangerous material. Asbestos was in fact considered so dangerous that it was the first substance regulated after OSHA came into existence. (A-41 - 45). In December 1971, OSHA issued an emergency standard for asbestos dust and specifically mandated that the lesser standards for general industrial dust would not apply to asbestos in view of its unique dangers. (A-34 - A-35). In 1972 these emergency standards were replaced with another set of regulations which placed elaborate obligations on any employer whose employees handled asbestos. These regulations make it quite clear that they were issued "in view of the undisputed grave consequences from exposure to asbestos fibers" which could cause diseases "such as asbestosis, lung cancer and mesothelioma". The regulations further noted that no safe level of exposure to asbestos had been established and even though further studies were necessary, it was essential to set minimum standards as "lives of employees are at stake" (A-36).

E. Wagner's response to its knowledge that asbestos exposure may be harmful

Upon learning that exposure to asbestos might be harmful Wagner took steps to require its employees to wear respirators when handling the asbestos. It, however, took no steps whatsoever to inform officials at the DuPont Seaford plant that their employees were at risk when they handled asbestos. At no

time did Wagner ever place a warning on any of the asbestos materials sold nor did it even inform DuPont that there was any danger associated with it. It never suggested to the Seaford personnel where asbestos was being thrown on the floor to absorb spills that there were less dangerous substitutes available.

Most significantly in 1969 when asked specifically by DuPont purchasing personnel as to whether or not there was any hazard that could be associated from inhalation of its raw asbestos, Wagner promptly responded that its asbestos was "non-toxic" and that "no special handling precautions are required" (A-2). In his deposition testimony Edward Rabon admitted that he could point to no basis for this statement it and admitted that he made no investigation before making such a guarantee to DuPont. (A-89 - A-91).

There is also no explanation for Wagner's failure to promptly move to rectify this statement when just one year later it learned that its principle ACL was planning to put a caution label on all of its bags of asbestos stating that exposure to asbestos may be "harmful". (A-3). Despite this statement which took added importance inasmuch as Rabon has admitted that it was a very rare for any of his suppliers to inform him that they might be placing a warning on their bags (A-150), Rabon can point to no evidence that he ever brought this to the attention of DuPont. (A-148 - A-149). The consequences of Wagner's false statement and later failure to act is readily apparent. In 1970 the amount of asbestos ordered by DuPont Seaford increased by 25

percent (A-13 - A-14). DuPont continued to regularly order and use Wagner's asbestos sweeping compound until sometime after January 1973 (when there is some evidence a warning finally appeared) thereby exposing countless individuals including those involved in this appeal.

ARGUMENT

I. THE COURT BELOW ERRED AS A MATTER OF LAW IN HOLDING THAT THE SUPPLIER DEFENSE WAS APPLICABLE TO APPELLEE

A. Standard and Scope of Review

This issue on this appeal is whether Wagner is entitled to summary judgment. "In an appeal from the entry of summary judgment by the Superior Court, the standard of appellate review is not deferential; it is *de novo*." Hoeschst Celanese Corporation v. Certain Underwriters at Lloyd's, London, 656 A.2d 1094, 1098 (Del. Supr. 1994).

The Supreme Court is free to determine, *de novo*, whether the record reflects the existence of material, factual disputes. Merrill v. Crothall-American, Inc., 606 A.2d 96,100 (Del. Supr. 1992). This Court must examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute such that the moving party is entitled to summary judgment as a matter of law. Burkhart v. Davies, 602 A.2d 56, 59 (Del. Supr. 1991).

B. Argument

1. Delaware has not adopted Restatement §402

Wagner argued that Delaware has adopted Restatement (Second) of Torts §402 and, as a seller of chattel manufactured by a third person, it is not liable in an action for negligence [as opposed

to an action for strict liability] of a seller of products unless plaintiff can show at trial it knows or has reason to know "that it is or is likely to be dangerous." In support of this position, Wagner below cited cases which describe the duties of a retailer who simply sells products manufactured by another company. Behringer v. William Gretz Brewing Co. 169 A.2d 249 (Del. Super. Ct. 1959); Simmons v. Richardson Variety Stores, 137 A.2d 747 (Del. Super. Ct. 1957). There is, however, a real question of whether §402 has been adopted in Delaware. The cases Wagner cited all are Superior Court cases from the 1950s and all pre-date the Delaware Supreme Court's decision in Cline v. Prowler Industries of Maryland, Inc., 418 A.2d 968 (Del. 1980) which held that Restatement §402 A was not valid Delaware law.

Restatement Section 402 A, which is not valid Delaware law, along with Section 402 make up the Restatement sections dealing with the legal duty of suppliers of chattel. Restatement §402 states in Comment a that "[t]his Section should be read together with ... §402 A, as to the **special strict liability** of sellers of products for consumption." (emphasis added) It is not just appellant's position that Restatement Sections 402 and 402A go hand in hand, but it is clearly the intent of the Restatement that the two sections work in tandem with regard to the strict liability of manufacturers and sellers. Since Delaware, through Cline v. Prowler Industries of Maryland, Inc., supra, has declined to adopt §402A, then §402A's counterpart also should be

preempted by the UCC and other legislative enactments under the same reasoning.

Additionally, in 1987 the Delaware legislature passed the Sealed Container Act, 18 Del. C. §7001, governing the legal duty of suppliers. In its briefs below Wagner claims, without any citation, that this law "merely codifies" pre-existing common law. The legislative history, which is found in the compendium filed with this brief, however, states otherwise when it notes: "This Bill creates a sealed container defense in product liability." (Emphasis added). If §402 was already valid Delaware law, there would have been little need to pass legislation to "create" the defense.

Since Restatement §402A is not valid Delaware law and Restatement §402 deals with strict liability and must be read in conjunction with §402A, then §402 strict liability defenses cannot be valid under Delaware law. Additionally, 18 Del. C. §7001 creates and governs the duty of suppliers in Delaware and, as such, §402 cannot be applicable to these cases.

2. Restatement §402 applies only to manufactured products and does not apply to asbestos which is a naturally occurring mineral.

Restatement §402, by its own definitions, does not apply to the asbestos Wagner shipped to duPont. The Restatement involves a seller of a chattel manufactured by a third person. There is no evidence whatsoever, that the 100% waste asbestos fiber mined by Wagner's principal, ACL, was a manufactured product. Wagner cites no facts or authority that the asbestos waste it sent to

duPont was a manufactured product. ACL was a mining company, not a manufacturing company. ACL, in fact, in its interrogatories states that it made no products. (A-257). Rabon admits he visited ACL's mine, not any manufacturing operation (A-58 - A-59). More significantly, Rabon states Wagner never sold any manufactured product from any source, it only carried raw material. (A-104 - A-105). The asbestos shipped to Seaford by Wagner was not improved in any manner. As pointed out in the Facts Section, this asbestos consisted of the tailings, or the waste, from the asbestos mining operation. At a minimum, the factual dispute as to whether it was material mined or a product manufactured should be a question for the jury.

Black's Law defines "manufacturer" as "[t]he production of articles for use from raw or prepared materials..." (citing Cain's Coffee Co. v. City of Muskogee, 44 P.2d 50,52 (Okla. 1935)). Mining, by definition, generally does include the "breaking, crushing, sizing, cleaning, washing, drying, storing and loading" of raw material once removed from the earth. 30 U.S.C. §802(h)(2)(i). Pennsylvania courts have also been confronted with this determination and have held:

"Whether or not an article is a manufactured product depends upon whether or not it has gone through a substantial transformation in form, qualities and adaptability in use from the original material, so that a new article or creation has emerged... If there is merely a superficial change in the original materials, without any substantial and well signaled transformation in form, qualities and adaptability in use, it is not a new article or new production..."

Heisey v. Elizabethtown Area School Dist. 445A.2d 1344, 1345 (Pa. Cmwlth. 1982) (citing Commonwealth v. Deitch Co., 295A.2d 834, 837 (Pa. 1972)). The court below, without any cite to authority, reasoned that raw asbestos and its waste is a manufactured product because it is separated into different sizes. Under the lower court's reasoning, any common mining operation constitutes manufacturing which is contrary to common usage and practice.

3. Restatement 402 does not apply as Wagner functioned as more than as a mere supplier.

In the case before the Court, Wagner was a sophisticated agent actively involved with exclusive promotion and distribution of ACL's asbestos to a wide variety of area manufacturers. As ACL's exclusive agent, Wagner was responsible for promoting ACL's interests in this region and making sure that its various manufacturing customers, including DuPont, were taken care of. When someone would contact ACL about its asbestos, ACL would direct them to Wagner as its representative rather than deal with them directly. As the exclusive agent of ACL who was responsible for all its asbestos sales in this area, Wagner provided special services to the numerous asbestos manufacturing concerns in the Delaware Valley including explaining to the manufacturers' "technical men" how to test the asbestos. (A-182 - A-183). When a manufacturing customer such as DuPont inquired on behalf of its local "Process Hazard Committee" as to the technical aspect about some of its raw material, Wagner felt it had sufficient expertise to promptly respond without checking first with its principal, ACL. (A-1, 2).

Almost all of the Delaware cases dealing with Restatement §402 involve retailers of manufactured goods, including the asbestos cases.¹³ The only Delaware case involving a company that carried raw material was Derr v. Special Materials, C.A. No. 96C-07-276. In Derr, Special Materials who, like Wagner, sold various minerals besides asbestos, was an exclusive agent of an asbestos mining company did not qualify for Section 402 protection. In fact, it was a much smaller operation than Wagner as it only had three employees besides its owner, it handled only one material, and was only in existence for ten years. In Derr, Judge Babiarz found that §402 did not apply. In the case presently before the Court, the lower court made no attempt to distinguish its previous holding in Derr. Appellant has found no cases in any jurisdiction where §402 was applied to an exclusive agent and seller of raw materials. As such, the Court below erred when it found that under these facts, as a matter of law, that Wagner is afforded the protections of Restatement §402.

¹³ In IN RE: Asbestos Litigation (Spong Trial Group) 1993 WL 603386 (Del. Super. Ct.), the defendant was a local supplier to the general public of a variety of manufactured asbestos material. Even there, the trial court refused to apply §402 as it found the defendant retailer did more than merely sell the general public, i.e. it installed the product.

II. EVEN IF RESTATEMENT §402 APPLIES, THE COURT BELOW ERRED WHEN IT FOUND, AS A MATTER OF LAW, THAT ALL INFERENCES AND ALL THE UNDISPUTED EVIDENCE ESTABLISHED THAT WAGNER DID NOT KNOW OR HAVE REASON TO KNOW OF THE DANGERS OF ASBESTOS

A. Standard and Scope of Review

"In an appeal from the entry of summary judgment by the Superior Court, the standard of appellate review is not deferential; it is *de novo*." Hoeschst Celanese Corporation v. Certain Underwriters at Lloyd's, London, 656 A.2d 1094, 1098 (Del. Supr. 1994). This Court must examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute such that the moving party is entitled to summary judgment as a matter of law. Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

B. Argument

Although the Court below correctly cited the standard of review for summary judgment, it failed to properly follow the standard and gave all inferences to the moving party¹⁴. Assuming *arguendo*, that the Restatement §402 manufactured goods retailer standard applies, Wagner is still liable. The standard is not

¹⁴ The lower court's decision begins by incorrectly referring to an exhibit which was cited by plaintiffs as evidence to show Wagner's relationship with its principal rather than as evidence of Wagner's knowledge. (Opinion at 10-11).

actual knowledge¹⁵, but rather the objective standard of a reason to know. Section 12(1) of the Restatement (Second) of the Law of Torts distinguishes the should-have-known standard which requires a party to make a thorough investigation of the safety of a product even if it appears to be safe with the reason to know standard which requires special circumstance before a duty to investigate applies. Here, there are special circumstances which would give a person of reasonable intelligence suspicion that there might be a problem. During the period in question, Wagner admitted that it knew that respirators were used at its principal's mines when people were around asbestos. (A-63 - A-64). After seeing this practice at its principal's mines, Wagner required respirators for its employees who were handling the bags of asbestos. (A-77 - A-78). During the time Wagner was selling to DuPont, it was subject to and aware of OSHA and Pennsylvania Occupational Health and Safety regulations, which both specifically identified and regulated asbestos as a hazardous material. All of this evidence, especially when taken together, gave Wagner reason to know of the dangers of asbestos.

It must be emphasized that the period that Wagner was supplying DuPont regularly with tons of raw asbestos was a period when the hazards of asbestos were an ongoing and constant concern of members of the asbestos industry. The Delaware Valley was one

¹⁵ plaintiffs, however, assert that significant evidence exists for a jury to find that Wagner had actual knowledge.

of the centers of the asbestos industry and the major portion of Wagner's asbestos business was not supplying DuPont, but was rather supplying various Delaware Valley asbestos companies who used ACL's raw asbestos to manufacture a variety of products ranging from caulking, floor tiling to roofing paper. In the 1960's the concerns regarding asbestos had become so great that an article appeared in *Chemical Week* (one of the magazines Ed Rabon admitted to receiving) entitled "Asbestos Awaiting Trial," which discussed the various health hazards of asbestos, including a six-fold increase in asbestos-related cancer. (A-46). During this time period, the president of Wagner, Edward Rabon, admitted that he was knowledgeable with regard to health hazards of industrial dust. He further admitted there was a health risk from "inhalation" of all the powders Wagner sold which, of course, included asbestos (A-86).

As outlined in the Facts, Pennsylvania law identified silica and asbestos in 1945 as specific dusts requiring special precautions and handling procedures. By 1971, Pennsylvania required respirators for all of the dust from products that Wagner carried. By 1971, asbestos dust restrictions were the strictest of all regulated dusts by the state of Pennsylvania, and by the U.S. government. This evidence clearly establishes enough inference that Wagner was on constructive statutory notice and had reason to know of the dangers of asbestos to, at a minimum, become an issue to be resolved by the jury.

Additionally, Rabon admitted that he did learn about the hazard of asbestos after "it started hitting the headlines with Johns-Manville." (A-141). Although he does not know the precise date, it must be emphasized that nowhere in the record does, Wagner claims that its first knowledge of the danger from asbestos occurred after it stopped selling asbestos to DuPont. Nowhere in any testimony does Rabon claim that any of the raw materials, i.e. the "powders," that Wagner sold would not hurt anyone. In fact, he stated in response to a direct question:

Q. "Is it your testimony that the powders Charles Wagner sold could not hurt anyone.

A. No, it is not my testimony." (A-88).

It is also undisputed that during this time period, Wagner on at least one occasion, was questioned by one of his customers relative to the health risks of asbestos. In 1969, DuPont Seaford employees who were involved in purchasing wrote Wagner and asked whether the asbestos sweeping compound it had been regularly supplying to the Seaford plant posed any hazard from inhalation. Once these DuPont purchasing employees questioned Wagner regarding the safety of the raw asbestos it was selling to them, Wagner had two valid options: (1) to inform DuPont that Wagner did not know the answer; or (2) to give DuPont a valid, honest and well researched response. Wagner's president, Edward Rabon, promptly wrote back on the same day he received the letter, stating, "[I]t is non-toxic" and that "[n]o special handling precautions are required." (A-2). Rabon, in his

deposition, stated that in making this statement, he made no investigation whatsoever whether by contacting ACL or looking up references dealing with asbestos. This questioning by DuPont, and Wagner's voluntary, but uninformed response, triggered Wagner's duty to investigate. Wagner could have referred DuPont to ACL or asked ACL itself. Wagner chose neither option and, instead, voluntarily assumed the duty of portraying asbestos as safe to use (A- 89 - A-93), and performed that duty negligently. Clearly, this gave rise to a reason to know.

It is understandable why Rabon felt compelled in his deposition to state that he made no investigation, because looking up any references, including: the Pennsylvania Workers' Compensation law, which he was subject to; research available at his alma mater at the University of Pennsylvania; going to Philadelphia libraries; or talking to its principals, such as ACL and Johns-Manville, would have easily revealed that this was a false statement. It is plaintiffs' position that Wagner, in fact, knew of the asbestos problem and was making a false statement. This is especially true inasmuch as at that time period, Wagner was mandating its own employees wear respirators when working around the material, including asbestos, and knew that silica, very similar to asbestos, caused a serious disease, and it was subject to very stringent Pennsylvania law regarding asbestos.

Assuming that somehow Rabon's 1969 representation to DuPont that his 100 percent raw asbestos was non-toxic and required no

special precautions was totally innocent, one then is faced with explaining Rabon's total lack of action after being told one year later by ACL that asbestos was so hazardous that it was taking the unusual step of putting warnings on the bags (there is no reference to there being a warning on bags of silica Wagner sold). One year after he represented to DuPont asbestos was safe, he received a letter from his principal, ACL, in January of 1970, that stated, contrary to what he had just told DuPont a year before, that asbestos could, in fact, be harmful and precautions such as protective devices were advisable. (A-3). Although Rabon admitted receiving this letter (A-146 - A-150), Wagner now wishes this Court to rule as a matter of law that this knowledge does not create a jury issue as to whether or not Wagner knew or had reason to know of the dangers of asbestos. Moreover, Wagner's response, having received this letter, further calls into question the accuracy of the spin it has attempted to place on its 1969 response to DuPont.

ACL made it very clear in the bottom of the letter wherein it advised Wagner that it would soon be putting warning notices on its bags, that ACL would be advising those customers that it made direct shipments to. Rabon admitted in deposition that DuPont, whose shipments came directly from Wagner's warehouse rather than from ACL, would not be one of the customers that ACL would be giving this direct advice to. (A-120 - A-121). One would then assume that Wagner would have the responsibility to do as ACL was doing with its other customers, i.e. of pointing

this danger out to DuPont. This is especially true when this letter conveyed information directly contrary to what Wagner had told DuPont in a letter almost to the day one year before. There is, however, no proof that Wagner did anything. Rabon admits he did not call or speak with anyone at DuPont about it. (A-149). Although he states the common practice would be to forward such information to the customer, there is no evidence this was ever done. (A-148 - A-149).¹⁶

It should be noted that the warning did not take effect immediately and bags would continue to be shipped to DuPont without the warning. In fact, there is some indication in the record that these warnings did not become widespread for ACL's products until 1973. (A-4 - A-8). This may explain why DuPont's local Seaford personnel finally stopped ordering it in 1973. (A-15).

All of the above would give a person of reasonable intelligence knowledge or, at a minimum, reason to know there was a problem with asbestos. In this case there is evidence, as there was in Hercules Inc. v. LEU Trust & Bank, 611 A.2d 476 (Del. 1992) that the defendant is someone who had superior

¹⁶ In the past 18 years of litigation Wagner and DuPont have both produced all the documents sent to and received from each other. In none of these document productions has there ever appeared any hint that Wagner ever followed up on the 1970 directive from ACL to alert DuPont about its proposed warning. Moreover, Rabon testified in his 1989 deposition that he never wrote nor called anyone at DuPont to tell them about the proposed warning (A-147-149) nor did he receive any indication from DuPont that such a charge had been made. (A-147-A-149).

knowledge and therefore had an even greater duty. Edward Rabon, the president and principle shareholder of Wagner, had studied chemistry at one of the premier educational institutions of the United States, the University of Pennsylvania (A-83), and should not be considered as a mere storekeeper or warehouseman.

Thus, there is evidence that a jury could conclude that Wagner did, in fact, know of the dangers of asbestos. In his depositions, all of which occurred after he had been sued in numerous Delaware cases for substantial sums of money, Edward Rabon, the president and owner of Wagner Corporation, demonstrated a conveniently selective memory. He claimed he had no knowledge whatsoever that the raw asbestos he was sending to DuPont was being used as a sweeping compound despite a letter which he admitted signing a letter which stated as such. (A-2). Although his memory failed him on this and many other points, defense counsel would now have the Court believe that Mr. Rabon is absolutely 100% correct when he implies that up through 1973, while he was shipping raw asbestos fiber to Seaford, he did not know that there was any hazard associated with it. Given the facts discussed herein, appellants submit that there are questions of credibility for the jury, and a reasonable jury could conclude that Wagner did in fact know or have reason to know of the dangers of asbestos during the relevant time period.

Issues of credibility such as this one are for the jury and should not be decided at the summary judgment stage. Blasi v. John P. Dugan & Sons, Inc. 1997 WL 720715 (Del. Super. Ct.),

Vasquez v. State Farm Fire & Cas. Co., 1997 WL 358655 (Del. Super. Ct.) In Blasi the defendants moved for summary judgment on the grounds of the plaintiffs contributory negligence due to his knowledge of the dangers. The Court denied this request stating

The issue of whether your plaintiff had actual knowledge of the dangers of what concrete goes to the plaintiff's contributory negligence and must be proven by the defendant at trial.

Similarly in Vasquez, supra, the Court noted that, notwithstanding that the defendant denied that he had knowledge, a jury could make an opposite finding by making various inferences that he knew. The Court below erred in making the credibility determinations in this case.

Additionally, the Court below found that Wagner did not know of the dangers of asbestos because Wagner did not know asbestos was "particularly dangerous," (Opinion at 10) or had no "reason to know of the specific dangers of asbestos," (Opinion at 13) (emphasis added). The Court below found that Wagner knew its asbestos posed a danger under continued breathing (Opinion at 15), but established the additional requirements that the danger to be "particularly" dangerous and the reason to know is for a "specific" danger. A plain reading of §402 and its comments do not require nor infer any of the additional elements that the Court below required. The Court below cited no authority nor reasoning to add or justify this modification to Section 402. It is clear to the Court below that Wagner did, in fact, know of

the general danger of its asbestos product. (Opinion at 15). As such, the Court below erred when it created these additional requirements to defend against §402.

The Court below also erred in determining that, as a matter of law, the facts establish that Wagner was not negligent in its response to duPont's 1969 letter concerning the hazards associated with the asbestos sweeping compound. The Court below held that, because Wagner told DuPont to use normal precautions for dust, that Wagner was telling DuPont to wear respirators as Wagner's employees were required to do. The Court made this inference for the moving party without any evidence that respirators were commonly used for general dust in 1969. In fact, Wagner did not assert or argue this position to the Court. Additionally, Ed Rabon's testimony was severely challenged with credibility issues and, as such, should remain in the province of the jury. In making this decision, the Court below gave all inferences to the Appellee, the moving party, and no reasonable inference to the Appellant. As such, the Court below erred and must be overruled.

Finally, the Court below concluded that Wagner was not negligent because Wagner was doing "what other suppliers were doing with asbestos during this same period of time..." (p. 15). There is absolutely no evidence in the record to support the Court's conclusion, and, as such, the Court cites no authority for the position. The Court below erred when it wrote and spoke in defense and justification of Wagner's behavior. Even if this

was relevant to a §402 analysis, the fact that other suppliers were negligent does not absolve Wagner of its own negligence. As this Court is well aware, many large asbestos manufacturers are in bankruptcy and hundreds of thousands of innocent people were injured because of the various asbestos defendants' choice to follow the negligent behavior of their mining, manufacturing and distributor peers. As such, the Court erred in resolving issues of Wagner's negligence as part of its Restatement §402 analysis and must be over-turned.

CONCLUSION

The Court below erred by not giving all inferences to appellants as the non-moving parties which represents a significant departure from well established standards governing Summary Judgment. Since material factual disputes remain for the trier of fact, summary judgment must be denied.

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