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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS

NORTHEAST CENTRAL JUDICIAL DISTRICT

Grand Forks County Asbestos Litigation - Set-7A

Robert Boyer
Gary Duggan
Dennis Inglis
Allen Leshovsky
Duane Quaschnick
Anton Wachala

Civil Nos.: 96-C-1027
96-C-1027
96-C-1027
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96-C-1027

**MEMORANDUM OF PLAINTIFFS IN OPPOSITION TO MOTION BY DEFENDANT
~~HERCULES CHEMICAL COMPANY, INC.~~ FOR SUMMARY JUDGMENT ON
ALLEGED NON-EXPOSURE GROUNDS**

I. FACTS AND PROCEDURAL HISTORY

Defendant Hercules Chemical Company, Inc. has moved for summary judgment in the above-captioned cases, asserting that these plaintiffs have not made a sufficient showing that they were exposed to asbestos-containing products manufactured and/or sold by defendant Hercules.¹ For the reasons set forth herein, it is respectfully submitted that Hercules motion should be denied.

However, prior to discussing the specific factual circumstances of the above-captioned plaintiffs in the context of the current motions by Hercules Chemical for summary judgment on alleged non-exposure grounds, it is respectfully submitted that Hercules Chemical has failed to comply with applicable summary judgment doctrine relating to the matters of burden of proof substantively, and the burden of going forward procedurally. It is clear that the moving party in a summary judgment setting has **both** the burden of going forward **and** the burden of proof. Black v. Abex Corporation, 603 N.W.2d 182, 187-188 (N.D. 1999) (reaffirming that a party moving for summary judgment, if not supporting that motion with affidavits, must "support that motion" with "pleadings depositions, answers to interrogatories and admissions on file" the non-moving

¹The plaintiffs have agreed with defense counsel to a stipulated dismissal of plaintiff Anton Wachala's claims against defendant Hercules Chemical Company, and Hercules has not moved for summary judgment in the Robert Boyer case.

1 party will be required to go beyond the pleadings with a factual showing in
2 opposition to the summary judgment motion), Delzer v. United Bank of Bismarck, 482
3 N.W.2d 502, 508 (N.D. 1992), and Soentgen v. Q & R Clinic, 467 N.W.2d 73, 77 (N.D.
4 1991).

5 It is respectfully submitted that in the words of the North Dakota Supreme Court in
6 Black v. Abex Corporation, *supra*, Hercules Chemical has failed to "support" its summary
7 judgment motion, and thus Hercules Chemical has carried neither its burden of going
8 forward nor its burden of proof, with this defendant's motion in many instances amounting
9 to little more than unsupported requests that summary judgment be granted. See, Black
10 v. Abex Corporation, *supra*, 603 N.W.2d at 187-188. Also, see Rule 56(e) N.D.R.Civ.P. and
11 1963 comments to Rule 56(e) F.R.Civ.P. ("**Where the evidentiary matter in support of**
12 **the motion does not establish the absence of a genuine issue, summary judgment**
13 **must be denied even if no opposing evidentiary matter is presented**"). See, also
14 Adams v. Canterra Petroleum, Inc., 439 N.W.2d 540, 543 (N.D. 1989); Northwestern
15 Equipment, Inc. v. Badinger, 403 N.W.2d 8, 9 (N.D. 1987); and Rice v. General Motors
16 Corp., 198 N.W.2d 247, 252 (N.D. 1972).

17 Indeed, "**(t)he moving party seeking summary judgment has the burden to**
18 **clearly demonstrate that there is no genuine issue of material fact**". (emphasis
19 added). Kukowski v. Simonson Farm Inc., 507 N.W.2d 68, 70-71 (N.D. 1993); Delzer v.
20 Union Bank of Bismarck, 484 N.W.2d 502, 508 (N.D. 1992); and In Re: Tire Worker
21 Asbestos Litigation, 1991 Westlaw 195557 (E.D.Pa).

22 As the New York appellate court explained in its very recent decision in Reid v.
23 Georgia Pacific Corp.², 1995 Westlaw 75801, 622 N.Y.S.2d 946, 946-947 (A.D.1Dept.

24
25 ²Indeed, this court has itself recognized the applicability of Reid v. Georgia Pacific Corporation to
26 exposure-based motions such as that made by defendant Hercules Chemical in the instant cases.
27 See, e.g., the Pretrial Order entered by the above-captioned court in Hansel T. Rye, et. al., v. ACandS, Inc.,
28 et. al., Grand Forks County Civil Nos. 93-C-903, et. seq., August 29, 1995. ("**(T)he defendants have failed**
to bear their burden of proof that there is no material issue of fact on the issue of exposure to
asbestos products.") See, also, Takacs v. Asbestospray Corporation, et. al., 1998 Westlaw 787541, _____
N.Y.S.2d _____ (N.Y.App.Div. 4 Dept. 1998) ["**Defendant failed in the first instance to establish that its**

1 1995):

2 Plaintiff instituted this action to recover for injury allegedly
3 sustained as a result of exposure to products and machines
4 containing asbestos. **While defendant's own failure, in the**
5 **first instance, to unequivocally establish that its product**
6 **could not have contributed to the causation of plaintiff's**
7 **injury would have required denial of its motion for**
8 **summary judgment.** (Winegrad v. New York Univ. Med. Ctr.,
9 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 942), here
10 plaintiff's papers identified specific brands of the subject
11 asbestos products, including those of defendant, in use at the
12 relevant work site during the relevant time, showed that
13 various asbestos products were interchangeable in the work
14 site at the time, and showed that he was heavily exposed to
15 asbestos dust at that site during that time. The **plaintiff is not**
16 **required to show the precise causes of his damages, but**
17 **only to show facts and conditions from which defendant's**
18 **liability may be reasonably inferred** (Matter of New York City
19 **Asbestos Litig. [Brooklyn Nav. Shipyard Cases]**, 188 A.D.2d
20 214, 225, 593 N.Y.S.2d 43, *aff'd* 82 N.Y.2d 821, 605 N.Y.S.2d
21 3, 625 N.E.2d 588). This is particularly true on defendant's
22 motion for summary judgment, where plaintiff is required
23 only to show the evidence of triable questions of fact, and
24 where any doubt must be resolved against summary
25 resolution (Henderson v. City of New York, 178 A.D.2d 129,
26 130, 576 N.Y.S.2d 562). (*emphasis added*).

27 622 N.Y.S.2d at 946-947.

28 While only making the bare assertion that these plaintiffs did not identify the name
Hercules Chemical Company, in connection with its position that such plaintiffs have
allegedly failed to present evidence of exposure to Hercules Chemical Company's
asbestos products, at the same time, **this defendant fails to acknowledge work by**
these plaintiffs at jobsites, and particularly for employers, with respect to which this
defendant knows that its asbestos products were used³.

(asbestos) product could not have contributed to the causation of the injury and death of plaintiff's
decedent."}]

³ Indeed, it has long been recognized in reported decisional law in asbestos litigation that so-called
"tearout" exposures are as dangerous to the person exposed, and as compelling as causation evidence, as
are exposures sustained by workers to asbestos-containing materials as such products were originally
installed. See, e.g., Thrapp v. Keene Corporation, 1993 Westlaw 147176, __ S.W.2d __ (Tex.App.-Dallas
1993), slip opinion, attached to the Joint Memorandum on Behalf of All Plaintiffs Concerning the Appropriate
Legal Standards to be Applied to the Motions by the Defendants for Summary Judgment on Alleged Non-

1 **A. The asbestos-containing product, Hercules Furnace Cement.**

2 Sometime prior to June of 1946, defendant Hercules Chemical Company began
3 marketing an asbestos-containing product known as Hercules Furnace Cement. This
4 product was designed for application by plumbing and heating contractors in the sealing
5 of firebrick and "use in combustion chamber repairs and boilers and heating systems
6 generally." See deposition of Jay W. Fidler, President of defendant Hercules Chemical
7 Company, Inc., reported November 9, 1990, at pages 15 and 26. (Excerpt attached as
8 **Appendix "A".**) This product was sold under the name "Hercules Furnace Cement" in
9 one-pound cans, five-pound cans, and under the trade name "For Heat's Sake", in half-
10 gallon, one-gallon, and two-gallon quantities. *Id.* at page 33.

11 From 1946 until 1973, defendant Hercules acquired this asbestos furnace cement
12 product in bulk form in drums from Johns-Manville Corporation. Hercules' personnel in turn
13 transferred the material from "the drums into our extruding equipment and put the furnace
14 cement into our own cans at our own plant." See Fidler deposition at page 93. In the year
15 1973, Hercules ceased purchasing the product from Johns-Manville in drums and instead
16 began manufacturing the product from scratch at its own plant facility. The product
17 contained 6.6 percent chrysotile asbestos fiber from 1973 until late in the year 1983, when
18

19 _____
20 Exposure Grounds, ["(E)xposure would occur both when workers were installing asbestos-containing
21 products and when the pipes on which the products had been installed were disturbed." (emphasis
22 added).]

23 **Serious asbestos exposure can occur a great many years after an asbestos product was**
24 **installed in the first place.** See, e.g., *Martin v. American Petrofina, Inc.*, 779 F.2d 250, 251-242 (5th Cir.
25 1985). In *Martin*, the plaintiff worked as a pipefitter at an oil refinery on occasion. The plaintiff's work in his
26 trade "entailed the removal, through tearing, burning, or grinding" of 'mastics' - a weather protective
27 coating, similar to roofing tar, containing asbestos - which had been applied to insulation on steel pipes,
28 most of which were out-of-doors. *Id.* at 252. The plaintiff did not recall ever having worked with or
around the defendant mastic manufacturer's products, but other witnesses testified that beginning
in the "mid-50's", the defendant's mastics containing asbestos were used in the plant along with the
mastics of other manufacturers. *Id.* See, also with respect to "tearout" asbestos exposure, and the matter
of the sufficiency of evidence thereof, *Kreppein v. Celotex Corp.*, 969 F.2d 1424, 1425-1426 (2nd Cir. 1992).

 Based on this admittedly circumstantial evidence, the court in *Martin v. American Petrofina, Inc.*,
supra, found that there was sufficient evidence for the trier of fact to conclude that, more probably than not,
Martin had been exposed to the defendant's mastics. *Martin, supra*, 779 F.2d at 252. See, also, *Kreppein*
v. Celotex Corp., *supra*, 969 F.2d at 1426.

1 the formula for Hercules Furnace Cement was changed to call for a non-asbestos
2 composition. Id. at pages 24-26. The exclusive supplier of the asbestos fiber constituent
3 in the Hercules Furnace Cement from 1973 to 1983 was Johns-Manville Corporation. Id.
4 at page 27.

5 After Hercules Furnace Cement was changed to have a non-asbestos formulation
6 late in the year 1983, existing warehouse stocks of the product in its old asbestos-
7 containing formulation were retained, being sold as demand dictated and being gradually
8 replaced thereafter with the non-asbestos product in the marketing process. Id. at page
9 28.

10 Hercules President and Chief Executive Officer, Jay W. Fidler, who has been with
11 the company since June of 1946, testified that he first had knowledge that asbestos was
12 a potentially dangerous substance "sometime in the early 1970's," acquiring this
13 information by reading "magazines. . . (and) business publications." Id. at pages 37 and
14 69. Beginning in the year 1973, when Hercules began manufacturing its asbestos furnace
15 cement product from scratch, a dust collection device was built into the cover of the mixing
16 vessel at the Hercules plant in which the furnace cement product was prepared. Id. at
17 pages 35-37.

18 Despite this fact, defendant Hercules at no time acted to place any warnings on the
19 packaging or containers of Hercules Furnace Cement or For Heat's Sake from 1946
20 through late 1983 at which latter point the product no longer contained asbestos fiber as
21 part of its formulation. Id. at pages 40-41.

22 On August 3, 1983, in response to a request by N. George Tucker, then Vice-
23 President for Manufacturing of defendant Hercules, a consulting laboratory performed
24 testing upon Hercules Asbestos Furnace Cement "under various conditions to determine
25 if there could be a release of asbestos fibers." See report of Case Consulting Laboratories,
26 Inc., dated August 3, 1983, Fidler deposition Exhibit "12", attached hereto as **Appendix**
27 **"B"**.

28 This report from Case Consulting Laboratories contained the conclusion that certain

1 anticipated applications and uses of Hercules Furnace Cement would cause violation of
2 OSHA standards with respect to levels of asbestos fiber release. The engineering report
3 stated in pertinent part as follows:

4 The most probable possibility (of a hazard) could arise from sanding the
5 cured cement or vigorous scraping of cement deposits on tools. As a
6 precaution, it may be useful to advise that tools be cleaned before the
residue dries and that no sanding of the dried or cured material be done
without proper particulate mask protection.

7 Case Consulting Laboratories report dated August 3, 1983, at page 4 and its
8 Exhibit I entitled "Fiber Concentration Comparisons", attached hereto as a
portion of **Appendix "B"**.

9
10 As stated above however, defendant Hercules Chemical Company never did include
11 any such warning on the packaging of its asbestos furnace cement, choosing instead to
12 alter the formulation of the product shortly thereafter in 1983 to a non-asbestos
13 composition.

14 **B. Hercules Furnace Cement was regularly stocked, sold and**
15 **utilized by Robert Gibb and Sons, of Fargo, North Dakota,**
16 **the employer of plaintiffs Dennis Inglis, Allen Leshovsky**
17 **and Duane Quaschnick.**

18 As stated above, Hercules Furnace Cement was "a product which (was) intended
19 for use in (sealing) firebrick, and use in combustion chamber repairs and boilers and
20 heating systems generally." See Fidler deposition, *supra*, at page 26.

21 **Marvin Dahlberg worked as a plumber/pipefitter from 1946 until 1992, working**
22 **for Robert Gibb and Sons from 1948 to 1992, where he worked with Hercules**
23 **Furnace Cement during his 44-year employment for Gibb and Sons. See Dahlberg**
24 **deposition excerpt attached hereto as Appendix "C" at pages 129 and 296. See also**
25 **deposition excerpts of Walter Larson and John Staska, wherein they describe their**
26 **use of Hercules furnace cement while working for Robert Gibb and Sons, attached**
27 **hereto as Appendix "D" and Appendix "E" respectively.**

28 **Hercules Furnace Cement was widely used by plumbing and heating contractors**
throughout North Dakota, including **Mechanical Contractor Robert Gibb and Sons of**

1 **Quaschnick. See, work histories of plaintiffs Allen Leshovsky and Duane**
2 **Quaschnick attached herewith as Appendices B-1 and B-2.** Plumbers/pipefitters Walter
3 Larson and John Staska both identified using Hercules Furnace Cement while working for
4 Robert Gibb and Sons during the same period from 1962 to 1965. See, deposition excerpts
5 of Walter Larson and John Staska, attached hereto as **Appendix "D"** and **Appendix "E"**
6 respectively.

7 **C. Hercules Furnace Cement was regularly stocked, sold and**
8 **utilized by Whitcomb & Sons, of Fargo, North Dakota, the**
9 **employer of plaintiff Dennis L. Inglis.**

10 Mechanical Contractor, Whitcomb & Sons, also used Hercules asbestos-containing
11 furnace cement on an as-needed basis for many years and at many jobsites. See
12 Benjamin Hoaby deposition excerpt, at pages 118-119, wherein Mr. Hoaby explains his
13 use of furnace cement while employed by this contractor, attached hereto as **Appendix**
14 **"F."** See also testimony from Kent Peach explaining that Whitcomb purchased their
15 supplies from Crane Company, excerpt at pages 60-61, attached hereto as **Appendix "G"**.
16 Finally, plumber/pipefitter Richard England, testified that he used Hercules furnace cement
17 on numerous occasions. He described the product as pre-mixed, black, trowleable
18 material, used for furnace applications and to set firebrick around boilers and furnaces.
19 See England deposition excerpt, attached hereto as **Appendix "H"**, at page 53-55. Mr.
20 England also testified that while working at Whitcomb, he used furnace cement on
21 numerous occasions or saw others using this product. Id., page 100.

22 **D. Each of these plaintiffs was exposed to significant**
23 **quantities of asbestos-containing furnace cement**
24 **manufactured, sold and/or supplied by defendant**
25 **Hercules.**

26 Each of the plaintiffs worked for substantial periods of time as a sheet metal worker
27 at industrial, commercial, and residential jobsites, where he was exposed to the asbestos-
28 containing products manufactured sold and/or supplied by Hercules, either as he worked
directly with Hercules Furnace Cement or as others worked with Hercules Furnace Cement

1 causing asbestos dust to be emitted into his work environment.

2 **i. Dennis Inglis**

3 Plaintiff **Dennis Inglis** has worked as a sheet metal worker from 1969 to the
4 present. Mr. Inglis has been employed as a sheet metal worker by Robert Gibb & Sons
5 during the years 1976-1981, and Whitcomb & Sons from 1969-1972, at numerous
6 locations in the Minnesota - North Dakota region during this period. See, Work History of
7 Dennis Inglis, attached hereto as a part of **Appendix "I"**. Mr. Inglis, in deposition
8 testimony, recalled using furnace cement during the course of his work. See Dennis Inglis
9 deposition testimony excerpt, at pages 79-83, 127-138, and Inglis work history, attached
10 hereto collectively as **Appendix "I"**.

11 **ii. Allen Leshovsky**

12 Plaintiff **Allen Leshovsky** has worked as a sheet metal worker from 1960 to the
13 present. Mr. Leshovsky has been employed as a sheet metal worker for Robert Gibb &
14 Sons from 1963-1980. See Work History of Allen Leshovsky attached hereto collectively
15 as a part of **Appendix "B-1"**.

16 During his employment with Robert Gibb & Sons, Mr. Leshovsky both installed and
17 removed furnaces, and recalled removing firebrick and old furnace cement from
18 combustion chambers. Mr. Leshovsky also worked at ANG - Coal Gasification Plant,
19 Beulah, North Dakota, in 1982. Mr. Leshovsky was exposed to asbestos-containing
20 furnace cements at these sites as he and/or other tradesmen working in his vicinity
21 installed, removed, scraped, and/or otherwise disturbed furnace cements in the course of
22 their work. See Allen Leshovsky deposition testimony excerpt at pages 89-90, 263-264,
23 and Leshovsky work history, attached hereto collectively as **Appendix "B-1"**.

24 **iii. Duane Quaschnick**

25 Plaintiff **Duane Quaschnick** has worked as a sheet metal worker from 1960 to the
26 present. Mr. Quaschnick has been employed as a sheet metal worker for Robert Gibb &
27 Sons during the years 1961-1962 and 1970-1971. Mr. Quaschnick's job responsibilities
28 at this site included installing ductwork and ventilation systems. Mr. Quaschnick was

1 exposed to asbestos-containing furnace cements as he and/or other tradesmen working
2 in his vicinity installed, removed, scraped, and/or otherwise disturbed furnace cements in
3 the course of their work. See Duane Quaschnick deposition testimony excerpt, at pages
4 47-51, 77-78, and Quaschnick work history, attached hereto collectively as **Appendix "B-
5 2"**.

6 **iv. Gary Duggan**

7 Plaintiff **Gary Duggan** has worked as a sheet metal worker from 1965 to the
8 present. Mr. Duggan has been employed as a sheet metal worker for Climate Control in
9 1960, where he installed insulation on duct work, did furnace changeouts and tear-out
10 work, and worked for Robert Gibb and Sons in 1970. Mr. Duggan was exposed to
11 asbestos-containing furnace cements at these sites as he and/or other tradesmen working
12 in his vicinity installed, removed, scraped, and/or otherwise disturbed furnace cements in
13 the course of their work. See Gary Duggan deposition testimony excerpt, at pages 64-66,
14 113-115, and Duggan work history, attached hereto collectively as **Appendix "J"**.

15 **II. ARGUMENT AND AUTHORITY**

16 Argument and authority relating to Hercules Chemical Company, Inc. claims that the
17 plaintiffs can make no legally/factually sufficient showing that they were exposed to any
18 asbestos products manufactured, distributed and/or sold by this defendant, are addressed
19 in the Joint Memorandum on Behalf of All Plaintiffs Concerning the Appropriate Legal
20 Standards to be Applied to the Motions by the Defendants for Summary Judgment on
21 Alleged Non-Exposure Grounds. The plaintiffs' arguments and authority set forth therein
22 are additionally and entirely adopted and by reference incorporated herein, as to defendant
23 Hercules Chemical Company, Inc.

24 As the Fifth Circuit explained in Halphen v. Johns-Manville Sales Corporation, 737
25 F.2d. 462, 466 (5th Cir. 1984), evidence that the plaintiff was employed by a company
26 during a time period when that company was using a particular defendant's asbestos
27 products was sufficient evidence to support a jury's finding that the defendant's asbestos
28 products played a substantial part in causing the plaintiff's illness. Id. at 466. See, also,

1 Lloyd v. W.R. Grace & Co.-Conn, 626 N.Y.S. 2d 147, 148 (App. Div. 1995) ("Plaintiff's
2 evidence . . . which tended to show that defendant's asbestos products were used by the
3 decedent's employer . . . was sufficient to permit an inference that decedent was exposed
4 to asbestos products manufactured by defendant . . ."); Lilley v. Johns-Manville Corp., 596
5 A.2d 203, 208 (Pa. Super. App. Div. 1991) [**Evidence showed that defendant's asbestos
6 products "were used by Sun Ship Company (plaintiffs' employer) during the
7 pertinent time frame" hereby making j.n.o.v. inappropriate.**]; and Hamilton v. Asbestos
8 Corporation Ltd., 998 P.2d 403, 406 n. 2 (Cal. 2000) [**Plaintiff's appropriate and
9 successful "trial theory was that Asbestos Corporation supplied asbestos fibers to
10 a company that made an insulating cement used by one of (plaintiff's) former
11 employers."**].

12
13 Indeed, the Honorable William F. Hodny also in Burleigh County asbestos litigation
14 as follows:

15 It is reasonable to infer that these plaintiffs were exposed to asbestos-containing
16 products of the defendant. The record shows plaintiffs worked at sites to which the
17 defendant furnished such products. **Although defendant was not the sole
supplier, a reasonable inference can be drawn that these plaintiffs worked
with this defendant's products.** (*emphasis added*).

18 See, Memorandum Decision on Motions for Summary Judgment (Non-exposure),
19 in Betty A. Elvin, et. ux., North Dakota District Court, Burleigh County, South Central
District, Civil No. 92-C1729, et. seq., slip opinion at pages 19-20.

20 Additionally, defendant Hercules Chemical Companies, Inc. incorrectly suggests
21 that it is entitled to summary judgment, supposedly because the plaintiffs have not
22 presented expert testimony to quantify, in minute detail, the precise amount of asbestos
23 fiber release which occurred in conjunction with the installation and/or removal of Hercules-
24 manufactured furnace cements. This argument by Hercules is completely without merit.

25 These plaintiffs, having worked on jobsites and directly with these asbestos-
26 containing furnace cements, are capable and competent to testify to the fact that these
27 products emitted dust. See, e.g. John Crane, Inc. v. Wommack, 489 S.E.2d 527, 530-531
28 (Ga. App. 1997). See, also, Derus v. Garlock, Inc., 1995 Westlaw 408880, 539 N.W.2d

1 134 (Wis.App. 1995) (jury was free to reject defendant's expert witness testimony
2 regarding alleged non-release of asbestos from defendant's product in favor of
3 plaintiff's contradictory lay testimony of asbestos dust created by use and handling
4 of said product.)

5 Neither are these plaintiffs required to present an industrial hygienist who can
6 measure the amounts of asbestos fibers emitted by these specific asbestos-containing
7 products, before the plaintiffs' claims may reach the jury. See, Derus v. Garlock, Inc.,
8 *supra*. For example, in Junge v. Garlock, Inc., 629 A.2d 1027 (Pa.Super.1993), defendant
9 Garlock, Inc., admitting as defendant Hercules has in the instant case, that its products
10 contained asbestos, had argued that because its products were allegedly encased or
11 encapsulated, that the plaintiff could not show that his exposure to the defendant's
12 allegedly encapsulated products was a substantial factor in causing his disease. *Id.*, at
13 page 1029. The Pennsylvania appellate court, in reversing a trial court's dismissal of the
14 defendant on alleged non-exposure grounds, held that testimony of plaintiff's medical
15 expert to the effect that every breath of dust contributed to the plaintiff's disease⁴, together
16 with the plaintiff's own testimony of the dust produced by the product, created a question
17 of fact. *Id.* In doing so the Junge, Court held:

18 The trial court's holding that plaintiffs in asbestos actions must
19 present an industrial hygienist who can measure the amount
20 of asbestos fibers emitted by a specific asbestos containing
21 product before they may reach the jury is erroneous. **No such
requirement exists and we decline to create it here.**
(emphasis added).
Id., at page 1030.

22 See also, Lilley v. Johns-Manville Corporation, 408 Pa.Super., 83, 596 A.2d 203
23 (1991), *alloc. den.* 530 Pa. 644, 607 A.2d 54 (1992), as cited and relied upon in footnote
24 6, at page 1030, of the Junge case, wherein this same court held:

25
26 ⁴These defendants have not in fact produced any evidence that even low level exposures are not capable of producing
27 plaintiffs' asbestos-caused pulmonary diseases. However, see testimony of Dr. Kaye Kilburn, attached to Plaintiff's
28 Joint Memorandum on exposure standard stating that every exposure is a significant contributing factor in the
development of the plaintiffs' diseases. See, John Crane, Inc. v. Wommack, 489 S.E.2d 527, 531 (Ga.App. 1997)
("Plaintiff's "(e)xpert testimony showed that it is universally agreed that asbestos fibers are intrinsically
dangerous and that the respiration of each fiber is cumulatively harmful . . .").

1 This court held that Fibreboard was not entitled to an
2 instruction specifically defining "substantial contributing factor"
3 or a charge regarding the de minimis effect of certain products
4 to which plaintiff had been "minimally exposed". *Id.* 40 Pa.
5 Super. at 97-99, 596 A.2d at 210

6 ...Further, the court held that **where plaintiff's medical**
7 **expert opined that "every breath" contributed to his**
8 **disease, the jury would not have to know exactly how**
9 **much asbestos from each defendant's product he actually**
10 **had inhaled to find liability.** *Id.*

11 Therefore, based upon plaintiffs' (or co-workers') own lay testimony to the effect
12 that asbestos-containing dust was produced by the handling and use of Hercules Chemical
13 Company's asbestos-containing furnace cements, as well as the testimony of plaintiffs'
14 expert medical/causation witnesses that each exposure is a substantial contributing cause
15 of plaintiffs' diseases, the current Hercules Chemical Company's motion fails to establish
16 the **absence** of genuine issues relating to the causation of plaintiffs' diseases, by their
17 asbestos-containing products.

18 Finally, the plaintiffs do emphasize herein that the reported decisional law cited by
19 the defendant Hercules in support of the so-called "frequency, regularity and proximity"
20 asbestos exposure standard, or other such higher-restrictive asbestos exposure standards
21 is decisional law which has been largely discredited and abandoned in the more recent and
22 better-reasoned appellate decisions from other jurisdictions. See, e.g., Purcell v. Asbestos
23 Corporation, Ltd., 959 P.2d 89, 94-95 (Or. App. 1998); Gates v. Owens-Corning Fiberglas
24 Corp., 1997 Westlaw 610627 (Ohio App. 1 Dist. 1997), *review denied*, 689 N.E.2d 51 (Ohio
25 1998); citing Horton v. Harwick Chemical Corp., 653 N.E.2d 1196, 1200-1202 (Ohio 1995),
26 and holding that the "frequency, regularity and proximity test" "was 'scientifically dubious'
27 and invaded the province of the jury", whereby "the trial judge usurps the traditional role
28 of the medical or scientific expert, establishing a mechanistic test regarding causation
which no contrary expert can overcome... (w)hether the evidence [tying the asbestos
exposure to the disease] is strong enough to prove causation is an issue for the jury."
(emphasis added). See, also, Check v. Owens-Corning Fiberglas Corp., 1994 Westlaw

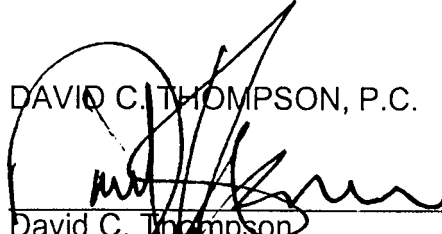
1 (emphasis added). See, also, Check v. Owens-Corning Fiberglas Corp., 1994 Westlaw
2 17469, 513 N.W.2d 708, (Wis. App. 1994); In Re: Brooklyn Navy Yard Asbestos
3 Litigation, 971 F.2d 831, 836-837 (2nd Cir. 1992); Keene v. Gardner, 837 S.W.2d 224, 227-
4 228 (Tex. App. 1992); and Ingram v. ACandS, Inc., 977 F.2d 831, 1343-1344 (9th Cir.
5 1992).

6 **III. CONCLUSION**

7 For these reasons, and on the basis of the argument and authority set forth herein,
8 it is respectfully submitted that the motion by defendant Hercules Chemical Company, Inc.
9 for summary judgment should, in all things, be denied.

10
11 Dated this 20th day of April, 2001.

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