IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KAY HEDDINGER, Individually and as Surviving Spouse of HAROLD HEDDINGER, deceased,	)	
Plaintiff,	)	
v.	)	C.A. No. 06C-05-295 BEN
ASHLAND OIL, Inc., *et al.*,	)	
Defendants.	)	

Submitted: November 28, 2011
Decided: January 13, 2012

Upon The Sherwin-Williams Company's Motion for Summary Judgment Based on Lack of Product Identification and Product Nexus: **DENIED IN PART**, and **GRANTED IN PART**

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Jurden, J.

I. INTRODUCTION

Kay Heddinger, on behalf of her deceased husband, Harold Heddinger, and as his surviving spouse ("Plaintiff"), brings this wrongful death suit against The Sherwin-Williams Company ("Sherwin-Williams"). Plaintiff alleges that Mr. Heddinger's exposure to Sherwin-Williams' paint and paint-related products (hereinafter "paint products") in his occupational and non-occupational capacities caused his Acute Myelogenous Lukemia ("AML"), a type of cancer, which ultimately led to his death. Sherwin-Williams moves for summary judgment based upon Plaintiff's witnesses' failure to specifically identify Mr. Heddinger's use of Sherwin-Williams paint products. For the following reasons, Sherwin-Williams Motion is **DENIED IN PART**, and **GRANTED IN PART**.

II. FACTS

Mr. Heddinger worked at Rockwell Goss/Goss Graphic ("Goss") in Cedar Rapids, Iowa from 1967 to 1996 assembling and repairing printing presses.[1] Plaintiff alleges that Mr. Heddinger, in his occupational capacity at Goss and his non-occupational capacity at home, was "exposed to, inhaled, ingested and/or otherwise absorbed benzene fumes emanating from benzene and benzene-containing products" that were sold, supplied and/or manufactured by Sherwin-

[1] Plaintiffs' Second Amended Complaint ("Pl.'s Am. Compl.") at ¶ 4.

Williams.[2] Plaintiff claims that, as a result of his exposure, Mr. Heddinger developed AML and died on November 16, 2004.[3]

Plaintiff has produced three witnesses to establish Mr. Heddinger's exposure to Sherwin-Williams' products. Robert Leuenberger and Jacob Bulicek testified about Mr. Heddinger's occupational exposure at Goss, and Kay Heddinger testified about his non-occupational exposure in their home.[4]

A. Mr. Heddinger's Alleged Occupational Exposure

1. Mr. Heddinger's Work Experience

Mr. Leuenberger, who worked at Goss from 1966 to 1996, testified about Mr. Heddinger's daily routine and the physical locations where he generally worked while at Goss.[5] He testified that he worked with Mr. Heddinger for many years in "Heavy Frames."[6] Mr. Leuenberger started in Heavy Frames in 1969, and Mr. Heddinger joined him in 1970.[7] Working in Heavy Frames required Mr. Heddinger to clean, smooth, and apply sealer,[8] and paint the inside of a pair of printing press frames that came from the machine shop.[9] Mr. Heddinger used an unnamed lacquer thinner to clean the metal.[10] Goss employees, including Mr.

[2] *Id*. at ¶ 4.
[3] *Id*. at ¶ 5, 9
[4] Defendant Sherwin-Williams' Motion for Summary Judgment ("Def. Mot. for Sum. J.") at p. 1.
[5] Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Br.") at Exhibit A, p. 8.
[6] *Id*. at p. 10.
[7] *Id*. at pp. 8, 10.
[8] *Id*. at p. 22.
[9] *Id*. at 9.
[10] *Id*. at 19-21.

Leuenberger and Mr. Heddinger, applied the paint and sealer with small paint brushes. No one wore gloves, masks, or eye protection during this process.[11] Mr. Leuenberger and Mr. Heddinger worked together in Heavy Frames until Mr. Heddinger left that department in 1991 to work in Final Assembly.[12] After Heavy Frames finished its process, the frames moved to Final Assembly.[13]

In Final Assembly, the frames were cleaned again by spraying them down with the aforementioned lacquer thinner.[14] Mr. Leuenberger stated that it took approximately an hour to an hour and a half to "spray out" a frame.[15] Mr. Leuenberger also testified that when he walked through Final Assembly he could detect fumes in the air.[16]

Once Final Assembly completed its preparations, the frames were moved to the Painting Area. Here, the frames underwent high pressure cleaning and were painted.[17] Because the fumes would "extend a ways out into the plant," anyone working in the Paint Area or Final Assembly in the old Goss building[18] could

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[11] *Id*. at pp. 44-45, 47.
[12] *Id*. at pp. 8, 10.
[13] *Id*. at pp. 19-21.
[14] *Id*. at pp. 23-24.
[15] *Id*. at p. 24.
[16] *Id*.
[17] *Id*. at pp. 25-26. Mr. Leuenberger could not identity the paint that was used for this process.
[18] Mr. Heddinger worked in two different buildings while he was employed at Goss. A more thorough description of the two buildings is provided below.

smell the fumes.[19] According to Mr. Leuenberger, however, the fumes were not detectable in Heavy Frames.[20]

Jacob Bulicek's career at Goss started in 1988 in the Purchasing Department, where he remained until Goss closed in August 2001.[21] Mr. Bulicek worked as a buyer for maintenance, repair, and operating supplies ("MRO").[22] As a buyer, he purchased operating supplies for the Goss plant such as "tooling, lumber, janitorial, paint . . . and related accessories and supplies."[23] Goss employees used the paint that Mr. Bulicek ordered for painting the printing presses.[24]

Mr. Bulicek testified that Goss' main paint supplier was Sherwin-Williams.[25] He also testified that although other paint suppliers may have been used by Goss,[26] he does not recall ordering any other paint besides Sherwin-Williams during his time as a purchaser in MRO.

2. The Two Goss Facilities

During Mr. Heddinger's time at Goss, he worked in two buildings. When he started, Goss employees worked in a smaller, older building (the "old building").

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[19] Pl.'s Br. at pp. 26-27.
[20] *Id*. at p. 26.
[21] Pl.'s Br. at Exhibit B, pp. 6-7.
[22] *Id*. at pp. 7-8. Mr. Bulicek worked in this position for approximately 4 and a half years, but not continuously. He worked as an MRO for two years, then moved to raw materials purchasing for one year. After that, he moved back to work as an MRO for a year and a half. *Id*. at p. 20.
[23] *Id*. at pp. 8-9.
[24] *Id*. at p. 9.
[25] *Id*. at pp. 9-10. Mr. Bulicek also purchased paint related products from Sherwin-Williams on behalf of Goss, but could not recall if he had ever purchased lacquer thinner.
[26] *See id.* at p. 10.

In the late 1980's, Goss obtained a newer, bigger building (the "new building").[27] In both the old and new buildings, Final Assembly was located directly next to Heavy Frames,[28] and the Paint Area was located at the end of Final Assembly.[29] The old building had no barriers between each area and the plant was described as "wide open."[30] The old building was windowless, and "big corn dryer fans" were used at one point to circulate air within the old building.[31] The fans did not circulate fresh air into the old building.[32] Goss used a large exhaust fan to ventilate the Paint Area.[33] Despite the large exhaust fan and the use of paint booths, employees could smell paint fumes in Final Assembly every time a frame was painted in the old building.[34]

In the new building, the Paint Area was "one bay over from the final assembly area," but unlike the old building, there was a wall between the Paint Area and Final Assembly, with a large door connecting the two.[35] Testimony suggests that the door may have acted as a barrier that could potentially seal off the two areas from one another, but not definitively.[36] Frames were painted in paint

[27] Pl.'s Br. at Exhibit A, pp. 11-12.
[28] *Id*. at p. 13.
[29] *Id*. at p. 14.
[30] *Id*. at pp. 14; 35.
[31] *Id*. at p. 37.
[32] *Id*.
[33] *Id*. at p. 39.
[34] *Id*. at p. 53. Mr. Leuenberger testified that he did not know the name of the paint used in the paint area.
[35] *Id*. at p. 14.
[36] *See id*. at p. 15.

booths where a filtering system filtered the air.[37] Mr. Bulicek testified that he did not know if the filters vented the paint particles outside or inside of the building.[38] Further, he did not know whether the large doors separating Final Assembly and the Paint Area in the new building were closed or open while the presses were being painted.[39]

B. Mr. Heddinger's Alleged Non-occupational Exposure

Plaintiff testified that she and Mr. Heddinger used Krylon spray paint, a Sherwin-Williams' product, approximately six times per year from the 1970's until approximately 1996.[40] Mr. Heddinger allegedly used Krylon paint more often in 1995 when he and Plaintiff spray painted pieces of furniture in preparation for opening a gift shop.[41] Plaintiff testified that Mr. Heddinger did most of the painting, and that it took approximately four weeks to complete.[42] She also testified that, while painting, Mr. Heddinger experienced dizziness and nausea, which were symptoms similar to those he experienced while working at Goss.[43]

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[37] Pl.'s Br. at Exhibit B, p. 23.
[38] *Id*.
[39] *Id*. at p. 36.
[40] Def. Mot. for Sum. J. at Exhibit C, pp. 88-89, 92-93. Krylon spray paint is a Sherwin-Williams product. *See* http://www.krylon.com/terms/
[41] *Id*. at pp. 84-85, 88-89.
[42] *Id*. at pp. 89-90.
[43] *Id*. at pp. 91, 94-95.

III. PARTIES' CONTENTIONS

Sherwin-Williams moves for summary judgment under Iowa law with respect to Mr. Heddinger's occupational and non-occupational exposure.[44] Sherwin-Williams argues that because "Leuenberger and . . . Bulicek failed to identify any actual occasion, time and/or job where they specifically observed Mr. Heddinger using a Sherwin-Williams['] product," there is no genuine issue of material fact and Sherwin-Williams is entitled to judgment as a matter of law.[45]

Regarding Mr. Heddinger's non-occupational exposure, Sherwin-Williams moves for summary judgment because Plaintiff "failed to identify with the specificity required a particular occasion, time and/or job where she specifically observed Mr. Heddinger using a Sherwin-Williams product."[46] In support of its motion, Sherwin-Williams argues that Plaintiff "must produce some evidence establishing exposure by Harold Heddinger to a specific Sherwin-Williams product in order for her [(Plaintiff's)] claims to survive a summary judgment motion based on lack of product identification."[47] Moreover, Sherwin-Williams argues that because Sherwin-Williams did not own Krylon until June 25, 1990, Sherwin-

[44] Both parties agree that the substantive law of Iowa controls. *See* Transcript of Oral Argument at 5-6; Pl.'s Br. at p. 1; Def. Br. in Support of Mot. for Sum. J. at p. 2.

[45] Def. Mot. for Sum. J. at ¶ 6.

[46] *Id*.

[47] Sherwin-Williams Brief in Support of Motion for Summary Judgment ("Def.'s Br. in Support of Mot. for Sum. J.") at p. 2.

Williams is not responsible for any liability related to Krylon paint before that date, and thus summary judgment is appropriate.[48]

On this point, Plaintiff argues that summary judgment is premature and inappropriate because expert discovery has not yet occurred.[49] Plaintiff also argues that, notwithstanding a lack of expert discovery, she has produced sufficient evidence of exposure to survive Sherwin-Williams' Motion for Summary Judgment.[50]

IV. STANDARD OF REVIEW

The Court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[51] The moving party bears the initial burden of establishing that material facts are not in dispute.[52] Summary judgment is appropriate if, after viewing the facts in the light most favorable to the non-moving party, there are no material facts in dispute, or the moving party is entitled to judgment as a matter of law.[53] "If, however, the record reveals that material facts are in dispute, or if the

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[48] Def. Mot. for Sum. J. at Exhibit D.
[49] Pl.'s Br. at p. 1.
[50] *Id*.
[51] Super. Ct. Civ. R. 56(c).
[52] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[53] *Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 879–80 (Del. Super. 2005).

factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted."[54]

V. DISCUSSION

Plaintiff and Sherwin-Williams agree that Iowa law applies to the substantive issues in this case.[55] However, the parties disagree as to the application of Iowa law with respect to the proper level of product identification necessary to withstand a motion for summary judgment.

Both parties suggest that Iowa asbestos cases are instructive. In the context of asbestos litigation, to recover under Iowa law, a plaintiff must establish that "[t]he conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct."[56] Although the Iowa courts have adopted this "substantial factor" test to analyze proximate cause, it is important to note that proximate cause issues are "ordinarily a question for the jury."[57] And, under Iowa law, when making a proximate cause determination, Iowa courts consider circumstantial evidence equally as probative as direct evidence.[58]

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[54] *In re Asbestos Litigation*, 2007 WL 2410879, at *2 (Del. Super) (citing *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962)); *see also Cook v. City of Harrington,* 1990 WL 35244, at *3 (Del. Super.) (citing *Ebersole,* 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates ... that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").

[55] Pl.'s Br. at p. 1; Def.. Br. in Support of Mot. for Sum. J. at p. 2; Transcript of Oral Argument at p. 5-6.

[56] *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). The Court notes that Iowa's "substantial factor" analysis essentially operates as a straight forward "but-for" analysis.

[57] *Id*.

[58] *Id*. (citing Iowa R.App.P. 14(f)(16).

Interestingly, Plaintiff and Sherwin-Williams both rely on the same cases in support of their positions: *Spaur v. Owens-Corning Fiberglas Corp.*[59] and *Beeman v. Manville Corp. Asbestos Disease Compesnsation Fund*.[60]

Spaur is an Iowa Supreme Court case that fully addresses the substantial factor test and its application in asbestos cases.[61] In that case, doctors diagnosed the plaintiff with mesothelioma five years after he retired from his job working at an Iowa power plant.[62] The plaintiff worked in the plant for twenty-five years.[63] The parties did not dispute the plaintiff's asbestos exposure; they disputed whose asbestos caused the plaintiff's injury.[64] In *Spaur*, the Iowa Supreme Court applied the substantial factor test, and also discussed three different tests that have been used in various other jurisdictions.[65] The court noted that plaintiffs in some jurisdictions are required to prove exposure to the defendant's product and "that it is more likely than not this exposure was a substantial factor in his injury."[66] Other jurisdictions have a "less rigid approach" in that they do not require that "each of several concurring contributing causes be sufficient, standing alone, to

[59] *Spaur*, 510 N.W.2d at 857.
[60] 496 N.W.2d 247 (Iowa 1993).
[61] *Spaur*, 510 N.W.2d at 857. *Spaur* does not specifically address the substantial factor test in the context of summary judgment. Rather, *Spaur* discusses proximate cause determinations on appellate review when parties have made post-trial motions.
[62] *Spaur*, 510 N.W.2d at 857.
[63] *Id*.
[64] *Id*.
[65] *See id.* at 858-59.
[66] *Id*. (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285-86 (2d Cir. 1990)).

bring about the plaintiff's harm."[67] Finally, the *Spaur* court discussed the Fourth Circuit's far more stringent and particularized rule adopted in *Lohrmann v. Pittsburgh Corning Corp.*[68] There, the Fourth Circuit held that "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."[69] The *Spaur* court interpreted what has been referred to as the "frequency, regularity and proximity test" as a test that "requires more than a mere showing that the plaintiff and an asbestos product were present at the same time."[70] Rather, the test mandates a showing "of reasonable and rational nature upon which a jury can make the necessary inference that there is a causal connection between a defendant's action and a plaintiff's injury."[71]

The defendant in *Spaur* urged the Iowa Supreme Court to implement the *Lohrmann* test, arguing that the plaintiff's burden should be to prove exposure to a specific product, and that the exposure was the proximate cause of the plaintiff's

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[67] *Id*. at 859. (*See, e.g.*, *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 816-18 (9th Cir. 1992) (plaintiff must prove presence of defendant's product and provide sufficient evidence to support an inference of exposure to that product); *Burton v. Johns-Manville Corp.*, 613 F.Supp. 91, 94-95 (W.D.Pa. 1985) (evidence that asbestos was cause of plaintiff's disease and defendant's product was a substantial factor in cause established causation)).
[68] *See* 782 F.2d 1156, 1162-63 (4th Cir. 1986).
[69] *Spaur*, 510 N.W.2d at 859 (citing *Lohrmann*, 782 F.2d at 1162-63).
[70] *Id*. at 859.
[71] *Id*. (citing *Lohrmann*, 782 F.2d at 1163) (The court in *Lohrmann* ultimately determined that the plaintiff's exposure to the defendant's products for short periods over thirty-nine year did not "raise a permissible inference that such exposure was a substantial factor" in causing the plaintiff's injury) (internal quotation marks omitted).

injury.[72] The *Spaur* Court declined to exclusively adopt the *Lohrmann* court's application, instead stating that, "We do not believe the three-factor test of *Lohrmann* is a rigid test with a minimum threshold level of proof required under each prong."[73] The Iowa Supreme Court's application of *Lohrmann* amounts to a sub-part of the substantial factor test that is used to aid in the court's analysis of the sufficiency of evidence.[74] The *Spaur* court noted:

> Whether evidence of exposure to a particular defendant's product will be legally sufficient to permit a finding of substantial factor causation is *fact-specific* to each case. This determination involves the interrelationship between the use of a defendant's product at the workplace and the *activities* of the plaintiff at the workplace. This requires an understanding of the physical characteristics of the workplace and of the relationship between the activities of the direct users of the product and the bystander plaintiff. Within that context, the factors to be evaluated include the nature of the product, the frequency of its use, the proximity, in distance and time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product.[75]

The evidence in *Spaur* that ultimately satisfied the court consisted of: (1) where the plaintiff *generally* worked; (2) the layout of the plant, which was described as open with no walls; (3) "evidence that the work environment was loud, vibrating, and dusty"; and (4) testimony by two employees who stated that the defendant's product made up eighty to ninety-five percent of the insulating

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[72] *Spaur*, 510 N.W.2d at 859.
[73] *Id*.
[74] *See id*.
[75] *Id*. (citing *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 460 (Md. 1992) (citations omitted) (emphasis added)).

product used in the power plant.[76] General exposure also took place when the plaintiff rewrapped compressors and boilers with the defendant's product.[77] Neither party was able to establish a specific time of exposure. The *Spaur* court relied upon direct and circumstantial evidence, and the "sheer quantity" of the defendant's product used by the plaintiff's employer, to determine that the evidence was sufficient to raise a reasonable inference of plaintiff's exposure to the defendant's product, and that his exposure was a substantial factor in causing his disease.[78] It is important to note that, unlike here, the court in *Spaur* had the benefit of analyzing expert medical testimony when reviewing the trial court's decision.

The plaintiff in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund* was a plumber and pipefitter who worked closely with insulators throughout his career.[79] Consequently, he was exposed to asbestos-laden insulation dust, which allegedly caused his injuries.[80] Although the plaintiff sued multiple manufacturers of asbestos-containing products, by the time of trial only two defendants remained.[81] After trial, the defendants appealed the trial court's denial of the defendants' post-trial motions for new trial and judgment notwithstanding

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[76] *Id*. at 860.
[77] *Id*. at 860-61.
[78] *Id*.
[79] *Beeman*, 496 N.W.2d 247, 249 (Iowa 1993). *Beeman*, like *Spaur*, does not discuss the sufficiency of evidence when reviewing a motion for summary judgment.
[80] *Id*. at 249-50.
[81] *Id*. at 250.

the verdict.[82] The defendants argued that the plaintiff "failed to prove by substantial evidence that . . . [defendants'] products were a proximate cause of . . . [plaintiff's] injuries."[83] Similar to a motion for summary judgment, under Iowa law, where a party makes a post-trial motion, the judge views the evidence in a light most favorable to the non-moving party.[84] The plaintiff and a co-worker testified that the plaintiff's exposure to one defendant's product took place throughout his career.[85] And although the dust contained 2% or less of asbestos, the plaintiff's expert testified that each exposure was a contributing factor to the "disease process."[86]

On review, the court in *Beeman* agreed with the trial court, emphasizing that "[q]uestions of proximate cause are for the jury,"[87] and that "[o]nly in exceptional cases is proximate cause decided as a matter of law."[88] The court's analysis also referenced jurisdictions that have accepted co-worker testimony as a means of proving proximate cause in asbestos cases where a co-worker identifies the defendant's product and the plaintiff's proximity to the product.[89] The plaintiff in *Beeman* identified a defendant's product with co-worker testimony, and expert testimony described the cumulative effects of exposure. The court in *Beeman*

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[82] *Id*.
[83] *Id*. at 254.
[84] *Id*; *Crowley v. New Piper Aircraft Corp.*, 2006 WL 3059914, at *9 (Iowa Dist. Ct.).
[85] *Beeman*, 496 N.W.2d at 254.
[86] *Id*.
[87] *Id*. (citing *Bandstra v. Int'l Harvester Co.*, 367 N.W.2d 282, 285 (Iowa App. 1985)).
[88] *Id*. (citing Iowa R.App.P. 14(f)(10); *see also Bandstra*, 367 N.W.2d at 285.
[89] *Id*. (*see In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992)).

determined that after hearing this evidence a reasonable jury could conclude that it was more likely than not that the plaintiff inhaled the identified defendant's product, and that defendant's product proximately caused the plaintiff's injuries.[90]

Here, Sherwin-Williams argues that Mr. Leuenberger and Mr. Bulicek "failed to identify any actual occasion, time and/or job where they specifically observed Mr. Heddinger using a Sherwin-Williams product."[91] According to Sherwin-Williams, because Mr. Leuenberger never specifically stated that "Heddinger used Sherwin-Williams products," and Mr. Bulicek never observed Heddinger using Sherwin-Williams products, there are no genuine issues of material fact and thus it is entitled to judgment as a matter of law.

Sherwin-Williams also argues that summary judgment is appropriate as to Mr. Heddinger's non-occupational exposure claim because Plaintiff did not "identify with the specificity required a particular occasion, time and/or job where she specifically observed Mr. Heddinger using a Sherwin-Williams product."[92]

The Court finds that although *Spaur* and *Beeman* are helpful, they are cases involving *appellate* review of *post-trial motions*. This is a motion for summary judgment. The Court is not reviewing a motion for new trial or judgment notwithstanding the verdict, instances where a jury has already considered the evidence and on review the Court's role is to determine whether the jury's verdict

[90] *Id*. at 254-55.
[91] Def. Mot. for Sum. J. at ¶ 6.
[92] *Id*.

contradicts the great weight of the evidence, or whether the jury disregarded the applicable rules of law.[93] The Court's task here is to determine whether there is a genuine issue of material fact in dispute.

Moreover, on a motion for summary judgment, the facts are construed in the light most favorable to the non-moving party, in this case, the Plaintiff. Thus, the Court must draw all reasonable inferences in favor of the Plaintiff. Sherwin-Williams' burden is to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. It has not met this burden.

Contrary to Sherwin-Williams' argument, *Lohrmann*, as interpreted by the Iowa Supreme Court, is not the "end all-be all" as it relates to this case. As the court in *Spaur* noted, the *Lohrmann* test is not a rigid test with a minimum threshold level of proof for each prong. Rather, it is only one part of the substantial factor test.[94] The Court must also take into consideration the facts specific to the case, the use of the product, the plaintiff's activities in the workplace, and the layout of the workplace.[95]

Mr. Heddinger worked at Goss until 1996. Goss used Sherwin-Williams paint products from 1988 through 2001,[96] and Mr. Heddinger's department was

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[93] *Cofrancesco v. Shop-Rite Supermarkets, Inc.*, 2001 WL 541482, at *4 (Del. Super.).
[94] *See Spaur*, 510 N.W.2d at 859.
[95] *Id*.
[96] Pl.'s Br. at Exhibit B, p. 6-7.

very close to the Paint Department.[97] According to Mr. Bulicek, almost all of the paint products ordered by Goss were Sherwin-Williams products.[98] No one knows how well Goss ventilated the Paint Area.[99] The old building had a wide-open layout, so much so that employees could smell fumes from the Paint Department on a consistent basis.[100] In the new building, no one can definitively say whether the Paint Department was sealed off from the rest of the plant.[101]

The Court must also evaluate the nature of the products (paint and paint-related products that allegedly gave off fumes), the frequency of their use (according to Mr. Bulicek, Sherwin-Williams was the main brand), the proximity to the products in distance and time (Mr. Heddinger worked adjacent to the paint department for years), and the regularity of exposure. In the old building, Mr. Leuenberger's testimony establishes that employees smelled fumes every time a frame was painted. Mr. Leuenberger's testimony and Mr. Bulicek's testimony taken together establishes that Mr. Heddinger worked with, and in close proximity to, paint while employed at Goss, and that Goss used Sherwin-Williams paint. Without expert testimony on the topic of exposure, the Court cannot determine as a matter of law that Mr. Heddinger's alleged exposure was insufficient to cause his AML.

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[97] *Id*. at p. 13-14.
[98] *Id*. at p. 9-10.
[99] *Id*. at p. 23.
[100] Pl.'s Br. at Exhibit A, p. 26-27.
[101] *See id*. at p. 15.

Aside from the evidence of direct exposure in *Spaur*, the facts in *Spaur* are similar to this case. Here, as in *Spaur*, a co-worker's testimony described generally where exposure took place. Also like *Spaur*, testimony established the layout of buildings, and the possibility of exposure to a foreign substance in the air due to working conditions. Mr. Bulicek provided testimony that from 1988 to 2001 almost all of the paint products ordered by Goss were Sherwin-Williams' products. In *Spaur*, the court reasoned that the "sheer quantity" of the defendant's product present in the power plant supported the plaintiff's claim.[102]

Sherwin-Williams maintains that the absence of direct evidence is fatal to the Plaintiff's claim. The Court does not agree. Under Iowa law, the absence of direct evidence in this case is only one factor to consider. The courts in *Spaur* and *Beeman* did not explicitly require direct evidence to establish exposure under the substantial factor test. And, under Iowa law, circumstantial evidence carries the same weight as direct evidence.[103] Indeed, the fact that the Plaintiff has produced circumstantial evidence weighs against Sherwin-Williams' argument.

The Court cannot rule as a matter of law that Mr. Heddinger was *not* exposed to Sherwin-Williams products while employed at Goss, and that Sherwin-Williams products did *not* cause his injuries. The same holds true for Mr. Heddinger's alleged non-occupational injuries. The Court cannot rule as a matter

[102] *See Spaur*, 510 N.W.2d at 860-61.
[103] *Id*. at 858. (citing Iowa R.App.P. 14(f)(16).

of law that Mr. Heddinger's home-use of Krylon spray paint did *not* cause him to develop AML. Plaintiff testified that Mr. Heddinger used the product on numerous occasions, and that he experienced symptoms of dizziness and nausea after using it.

With respect to alleged occupational exposure prior to 1988, the Court will **GRANT** Sherwin-Williams' Motion for Summary Judgment. Mr. Bulicek started ordering paint for Goss in 1988, and Mr. Leuenberger can only testify that paint was used by Goss during Mr. Heddinger's time of employment; he cannot identify the paint manufacturer. Consequently, Plaintiff cannot prove that Sherwin-Williams' paint products were used by Mr. Heddinger before 1988.

With respect to alleged non-occupational exposure prior to June 25, 1990, the Court will **GRANT** Sherwin-Williams' Motion for Summary Judgment. Sherwin-Williams produced documentation proving that it did not own Krylon before June 25, 1990, and Plaintiff has provided no evidence to the contrary. Thus, Plaintiff has failed to meet its burden and show that a Sherwin-Williams product caused Harold's non-occupational injuries before June 25, 1990.

VI. CONCLUSION

For the foregoing reasons, Sherwin-Williams' Motion for Summary Judgment is **DENIED IN PART**, and **GRANTED IN PART.**

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc: Prothonotary