IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CARL WILKERSON and CONNIE WILKERSON, his wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 04C-08-268 ASB
AMERICAN HONDA MOTOR CO., INC., *et al.*,	)	
Defendants.	)	

Submitted: January 15, 2008
Decided: January 17, 2008

Upon Defendants' Motion for Summary Judgment.
DENIED

MEMORANDUM OPINION

David A. Arndt, Esquire, Jacobs & Crumplar, P.A. Wilmington, Delaware, Attorney for Plaintiffs

Robert K. Beste, Esquire, Smith, Katzenstein & Furlow LLP, Wilmington, Delaware, Attorney for Defendant

JOHNSTON, J.

STATEMENT OF FACTS

Carl and Connie Wilkerson filed this action with the Court on August 30, 2004. Carl Wilkerson claims he developed asbestosis due to work with asbestos-containing products. Wilkerson served in the U.S. Navy, the U.S. Air Force and worked as an automotive mechanic from 1954-1982. Wilkerson routinely removed and installed gaskets from vehicles during his career. Wilkerson claims asbestos-containing gaskets manufactured and sold by defendant McCord Corporation caused him to develop asbestosis.

MOTION FOR SUMMARY JUDGEMENT

McCord Corporation filed a Rule 56 Motion for Summary Judgment on October 12, 2007. This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a

[1] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[2] *Id.* at 681.

genuine issue of material fact for trial.[3] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.[4]

A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.[5] The Court must evaluate the facts in the light most favorable to the non-moving party.[6] Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[7]

The parties do not dispute that McCord manufactured and sold asbestos-containing gaskets. Additionally, the parties agree that installing the McCord gasket did not expose Wilkerson to asbestos. The asbestos exposure could only occur in the removal and replacement of an existing asbestos-containing gasket. Thus, the issue before the Court is whether

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[3] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. 322-23.

[5] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[6] *Id.*

[7] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

McCord had a duty to warn Wilkerson that removing and replacing a gasket, manufactured by McCord or another company, may lead to asbestos exposure.

DUTY TO WARN

In *Dawson v. Weil-McLain*, this Court allowed testimony regarding a boiler manufacturer's duty to warn of possible asbestos exposure when replacing existing boilers.[8] Specifically, the Court considered whether the jury should be permitted to consider whether the defendant had a duty to warn about to products installed or manufactured by others. The Court relied on Restatement Second of Torts § 388, "Chattel Known to be Dangerous for Intended Use," which provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

[8] *Dawson v. Weil-McLain*, C.A. No. 00C-32-117, at 136-38 (Del. Super. July 20, 2005) (Slights, J.) (TRANSCRIPT).

The Court ruled:

> [The] Restatement provisions trigger the duty to warn based on the foreseeable harm that might be caused by the use or probable use of the product.
>
> If it can be established in the facts that the defendant knew or should have known that in the installation of its boilers, there was a need to be exposed to a toxic dangerous substance, and that falls within the foreseeable harm contemplated by these two Restatement provisions,[9] and therefore, on a negligence theory, if supported by the facts, that duty will lie.

"Among the essential elements that a plaintiff must prove in a negligence-based products liability case is that the defendant had a duty to warn of dangers associates with its product."[10] At issue in this case is whether, after considering all facts and reasonable inferences in the light most favorable to plaintiff, there is sufficient evidence to establish that defendant had a duty to warn of the potential dangers of exposure to an asbestos product. "The manufacturer's duty to warn is dependent on whether it had knowledge of the hazards associated with its product. [Plaintiff], however, does not need to present evidence that [defendant] had actual knowledge of those dangers. It is enough that [plaintiff] merely establish that the manufacturer should have known of them. In turn, what knowledge a defendant should have had is a function of what a reasonably

[9] Restatement Second of Torts §§ 388, 389.

[10] *In re Asbestos Litig.*, 799 A.2d 1151, 1152 (Del. 2002).

prudent individual would have known under the pertinent circumstances at the time in question."[11]

Nevertheless, "to require each manufacturer to ascertain the risks of products manufactured by others within an industry and to warn of the highest risks a consumer might encounter…would place on each manufacturer an untoward duty and would penalize" the manufacturer.[12] The duty to warn does not "require a manufacturer to study and analyze the products of others and to warn users of risks of products."[13] Any duty is "restricted to warnings based on the characteristics of the manufacturer's own product."[14] Any necessary warning must be tailored to the risks associated with the reasonably-anticipated use of the manufacturer's own product.

McCord used asbestos in manufacturing its automotive gaskets. Plaintiff has made a *prima facie* case, raising genuine issues of material fact: whether the probable use of the McCord gasket involved the removal and replacement of an asbestos-containing gasket; whether McCord knew or should have known, based on the understanding of its own product, that the

[11] *Id.* at 1152-53.

[12] *Powell v. Standard Brands Paint Co.*,166 Cal.App.3d 357, 364 (1985).

[13] *Id.*

[14] *Id.*

installation of McCord gaskets placed plaintiff at risk of exposure to asbestos; and whether it was reasonably foreseeable that the use of a McCord gasket would lead to asbestos-related disease.

CONCLUSION

Viewing the facts in the light most favorable to Wilkerson, the Court finds that a genuine issue of material fact exists as to whether McCord had a duty to warn. **THEREFORE, McCord's Motion for Summary Judgment is hereby DENIED.**

IT IS SO ORDERED.

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The Honorable Mary M. Johnston