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

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| IN RE: ASBESTOS LITIGATION | : | |
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| 112011 P&S TRIAL GROUP | : | |
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| BRIAN C. MONTGOMERY, as Personal Representative of the Estate of JUNE MONTGOMERY, deceased, | : | |
| | : | |
| Plaintiff, | : | C.A. No. 09C-11-217-ASB |
| | : | |
| v. | : | |
| | : | |
| A.W. CHESTERTON COMPANY, et al., | : | |
| | : | |
| Defendant. | : | |

UPON DEFENDANT GENERAL ELECTRIC COMPANY'S
MOTION FOR SUMMARY JUDGMENT
**DENIED**

This 28th day of September, 2011, it appears to the Court that:

Plaintiff, Brian C. Montgomery, as representative of the Estate of June Montgomery has filed this wrongful personal injury death action against various manufacturers and suppliers of allegedly asbestos-containing products, claiming that the defendant's products caused June Montgomery ("Ms. Montgomery") to contract and ultimately die from mesothelioma. Defendant General Electric Company ("GE") has moved for summary judgment. By its motion, GE contends that Plaintiff cannot establish any

causal nexus between any of its products and Ms. Montgomery's mesothelioma.[1]

## Facts

Defendant June Montgomery was married to Arthur Montgomery on February 29, 1964. During the entire time of their marriage until Ms. Montgomery's retirement in 1994, he worked as an electrician in and around Broward County Florida. Mr. Montgomery met June Montgomery in 1963, and dated her for three or four months before they married.

At the time of the marriage Arthur Montgomery was employed at the Port Everglades Power Plant in Broward County, Florida. During the construction of two turbines or generators -- units 2 and 3 -- and he continued working at that facility until both units were completely constructed and functional. One of those units, the Unit 3 boiler, was manufactured and supplied by defendant Foster Wheeler, which is the

[1]Counsel have apparently taken it upon themselves to file additional pleadings that were not permitted by the Rules nor have then been authorized by the Court. Unfortunately, the Court did not become aware of this fact until it had already pored through the mountain of papers that included the unauthorized submissions. Had the Court not already undertaken the additional burden of reading everything submitted it would have stricken both sets of briefs, required the submission of new ones and moved this case to a later trial. Since the Court has already expended time and energy on these issues it has elected to decide the motions as presented. Counsel are advised that henceforth this practice will not be countenanced and any future similar attempts to "bend the rules" without Court approval will result in sanctions.

subject of a second summary judgment motion that has been denied by separate decision dated _____.

While Mr. Montgomery could not identify the manufacturer of the main turbine/generator set at Port Everglades, documents produced in discovery establish that the main turbine installed in Unit 3 was a General Electric turbine. Mr. Montgomery testified that this generator/turbine was wired, installed, and insulated while he was present and working at the plant and he described the insulation process as dusty. The dust adhered to his body and clothing. He then wore these same clothes home in the evenings and they were laundered daily by June Montgomery.

Documents produced by GE during discovery reflect that the turbine insulation contained asbestos and that the literature and specifications provided to those installing and constructing these turbines required asbestos insulation to function properly. Thus, not only did GE include asbestos thermal insulation in its product but it also specifically recommended to its installers that its turbines be insulated with asbestos insulation.

Although Mr. Montgomery testified at his deposition that he was working for Bechtel while employed at the Port Everglades Power Plant his social security records, and documents obtained from GE independently confirm that ESI Corp, Inc., a/k/a Ebasco Services Industries was the

contractor for whom Montgomery was then working and was the contractor for the construction of Unit 3 at Port Everglades.

Mr. Montgomery's exposure to GE products was not limited to his work around the turbine at the Port Everglades Power Plant. He testified that he used GE panels, switches, and breakers throughout his occupational life. As an electrician, Mr. Montgomery installed and maintained these panels, switches, and breakers and, in the process of drilling, bolting, and otherwise manipulating the GE electrical products, dust was created and transferred to his clothing.

In addition, Mr. Montgomery testified that throughout his career he worked with several types of wire, including wire that was insulated with asbestos. He specifically identified GE as one of the approximately five manufacturers of wire with which he worked and he was frequently required to strip insulation from these wires, within several inches of his body and his clothes. In fact, he testified that he stripped wires every day while working at the Port Everglades Power Plant.

## Standard of Review

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a

matter of law.[2] Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.[3] If the proponent properly supports its claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[4] Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.[5]

In an asbestos case, under Florida law, a plaintiff is required to establish that she was exposed to the asbestos products of the specific defendant and that this exposure contributed substantially to producing the plaintiff's injury.[6]

## Decision

Upon review of the record the Court concludes that Plaintiff has raised a genuine dispute of material fact as to the extent and frequency of Mr. Montgomery's exposure to GE asbestos-containing products and, accordingly, as to the extent and frequency of June Montgomery's exposure

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[2] Super. Ct. Civ. R. 56(c).

[3] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).
[4] *Id.* at 880.
[5] *Id.* at 879-80.
[6] *Reeves v. Armstrong World Indus., Inc.*, 569 So.2d 1307, 1309 (Fla. Dist. Ct. App. 1990).

when she washed her husband's clothing on a daily basis during the thirty years she was married and living with Mr. Montgomery before his retirement in 1994.

Testimony provided by Mr. Montgomery included extensive discussion of his exposure to dust from insulation of the main turbine/generator for Unit 3 at Port Everglades, a turbine which the record reveals was manufactured by GE, with insulation-containing asbestos and instructions for additional asbestos applications during its construction and installation. Mr. Montgomery testified about the dust circulating in the plant during this process, his exposure to it while he performed electrical services there, and the dusty and dirty condition of his clothing as a result. The record further reveals that he wore his clothing home after work and the dust was carried with it, requiring Ms. Montgomery to wash his work clothes every day. The project of installing Unit 3 occurred during the time that the Montgomerys were dating and engaged and was not completed until after they had been married and living together for 9 or 10 months.

Moreover, plaintiff's evidence of exposure to GE products, including some insulated with asbestos, was not limited to the time Mr. Montgomery worked at the Port Everglades Power Plant. Mr. Montgomery testified that he worked with other asbestos-containing equipment manufactured by GE,

including electrical panels, switches, breakers and wires throughout his career as an electrician and June Montgomery's exposure, in turn, continued throughout the thirty years she was married to him while he was employed as she laundered his clothing on a daily basis.

Mr. Montgomery's testimony that he worked for Bechtel while Unit 3 was being installed rather than ESI, as is documented in his Social Security records, does not lead the Court to conclude that Mr. Montgomery's work at the Port Everglades Plant could not have exposed him to asbestos from GE products. The Court considers Mr. Montgomery's recollection is likely mistaken for several reasons.

First, the Social Security records are inconsistent with his testimony, as they reflect that he worked for ESI, or Abasco Services Industries during the time he was employed at the Port Everglades Plant and he stated that he was employed there when he met June Montgomery in 1963. He also testified that he worked at the plant until Unit 3's installation was complete, which did not occur until late 1964 or 1965. The Court is also mindful of the fact that Mr. Montgomery, a man undoubtedly in his late seventies or eighties is being asked to recall events and employers' names for whom he worked almost fifty years ago. The confusion could well result from the fact that Bechtel did in fact construct Unit 2 at the plant. Then too, ESI Corp, the

outfit that constructed Unit 3, may have been referred to by a different trade name as it is noted in the government records as "a/k/a Ebasco." In the final analysis, it is likely that Mr. Montgomery was mistaken about the identity of the contractor and, if so, such a factual discrepancy should be resolved by the jury after trial, not as a matter of law.

When viewed in the light most favorable to plaintiff, as the non-moving party, there is sufficient evidence from which a jury could reasonably conclude that June Montgomery was exposed to an asbestos containing GE product or products that substantially contributed to her death from mesothelioma. Mr. Montgomery's exposure to GE products spanned his occupational life and his exposure to dust from these products, most extensively during his work at the Everglades Power Plant caused him to transmit this dust home on his clothing every working day. His wife in turn was equally exposed as she laundered these same dust-laden articles of clothing each time that her husband came home from work. When viewed in the light most favorable to Plaintiff, these facts demonstrate a product nexus to GE products that clearly precludes summary judgment.

GE also seeks dismissal of Plaintiff's claims of negligence, willful, wanton and intentional behavior and conspiracy, but does so without support except a citation to the Florida Asbestos and Silica Fairness Compensation

Act which argument it later repudiates in an unauthorized supplemental reply brief. To the extent that these arguments by GE, made in two separate reply briefs, one of which purports to repudiate the other, GE's motion for summary judgment on this basis is denied, as unclear, unauthorized and entirely unsupported.

Finally, the Court turns to GE's belated "last ditch" effort to invoke the Delaware Builders' Statute as support for its contention that this action is barred by the statute of repose, an argument that was presented and supported for the first time not even in GE's Reply Brief, but in its gratuitous submission of a supplemental reply brief that was never authorized by the Court. Defendant's failure to raise this issue in its Opening Brief results in its waiver of the right to assert this argument as a basis for summary judgment. Aside from the fact that Florida, not Delaware, law is applicable to this case (and a statute of repose that would bar a cause of action is clearly substantial, not procedural), GE has apparently reinstituted a practice that has been expressly prohibited by this Court.

**In Re Asbestos**

Since 2007 Judge Slights of this Court that criticized this "sandbagging" strategy and warned future moving parties in asbestos

litigation that they would adopt this practice at their peril.[7] Unfortunately, in this case, GE has failed to heed this admonition and its assertion of the statute of repose argument for the first time in its "second" unauthorized reply brief leads the Court to conclude that the argument has been waived and will not be considered.

As Judge Slights stated in the *Lagrone* decision, "the failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim" in connection with the matter under submission to the Court.[8] This is so because it is unfair both to the Court and the non-moving party to have to wait until the reply brief to understand the basis for dispositive relief since this practice leaves no opportunity for the non-moving party to respond to it and it deprives the Court of the benefits of the opposing party's argument.

Moreover, GE's perfunctory mention of Delaware's statute of repose in its opening brief and its purported effort to preserve its right to assert it later, does not satisfy the requirement that a moving party establish and support by record evidence any basis for its right to dispositive relief in its initial summary judgment pleading. The conclusory statement to the effect

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[7] *See In re Asbestos Litig. (Lagrone)*, 2007 WL 2410879 (Del. Super. Aug. 27, 2007).
[8] *Id.* at *4 (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958); *Murphy v. State*., 632 A.2d 1150, 1152 (Del. 1993)).

that "General Electric expressly preserves its builders's statute/statute of repose defenses" represents an inadequate attempt to rely upon this defense and it will not be considered by the Court as it has been waived.

Accordingly, Defendant General Electric Company's Motion for Summary Judgment is hereby **DENIED**.

**IT IS SO ORDERED**.

/s/
**Peggy L. Ableman, Judge**

cc: All counsel via Lexis Nexis File & Serve