

I. ARGUMENT

Appellant Basil F. Weakley, Jr., through counsel, here replies to the brief of each Appellee.

A. OAKFABCO

In its "Statement of Facts" Oakfabco asserts that Mr. Weakley's pleadings do not provide dates or places of asbestos exposure and do not describe the nature of the work that occasioned the exposure.¹ Oakfabco's position is insupportable for various reasons.

First, in moving the trial court to enter summary judgment, Oakfabco did not raise the alleged deficiency in pleading that it raises before this Court. It is self-evident and settled law that an issue not passed upon by the trial court cannot be reviewed in the appellate court. *District of Columbia v. Gray*, 452 A.2d 962, 964 (D.C. 1982) ("matters not raised at the trial court level may not be raised for the first time on appeal").

Second, Super. Ct. Civ. R. 8(a)(2) requires the pleader to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief." Super. Ct. Civ. R. 9(b) provides an exception to the general rule, but only where the plaintiff alleges fraud, which Mr. Weakley does not allege in the instant case. Finally, a cursory review of the Revised

¹ Oakfabco Br. at 4.

Second Amended Complaint² reveals that Mr. Weakley supplies more detail with respect to time and place and manner of his asbestos exposure than is required by Rule 8(a)(2).

Oakfabco complains that Mr. Weakley's discovery responses are devoid of particularity with respect to time, place and manner of Kewanee boiler asbestos exposure.³ As noted, however, the precise means by which Mr. Weakley was exposed to the asbestos products of all party defendants was amply stated in the Complaint. With regard to Mr. Weakley's "passing reference"⁴ to Kewanee boilers in his initial Work History, Oakfabco knows that the Work History was later amended to include significant time and place information when Mr. Weakley received the subpoena *duces tecum* responses of the owners of the properties where he serviced boilers.⁵

Mr. Weakley served the subpoena upon the premises owners on or about September 14, 2002. The documents requested thereunder were not fully proffered to Mr. Weakley until October 23, 2002.⁶ On November 1, 2002, said documents were tendered to Oakfabco

² JA at 75.

³ Oakfabco Br. at 4.

⁴ *Id.*

⁵ JA at 491.

⁶ Courtlink Filing ID Nos. 1022253-55.

and all other defendants⁷ together with a supplemental discovery response which included a Revised Work History summarizing the information.⁸

Mr. Weakley thus abided the stricture of Super Ct. Civ. R. 26(f) that requires the seasonable supplementation of discovery responses upon obtaining new information that should be proffered to the opposing party up to the date of trial. Thus supplemented, Mr. Weakley's answers to interrogatories was not the subject of any motion to compel by this or any other defendant. That Oakfabco and the other Defendants grouse about the timing of the supplementation, given their lack of any effort to challenge the propriety of the new evidence entering the record, is without any legal significance whatsoever.

Thus, Oakfabco's assertion on appeal that the premises owners' documents were proffered untimely is insupportable. The timeliness issue was not raised before the trial court, not decided by it and therefore not properly before this Court.

The premises owners' discovery was served two days after Mr. Weakley's September 12, 2002 deposition.⁹ On that date, Mr. Weakley's recollection had not been refreshed to the extent that the premises owners' responses later enabled. Nevertheless, it

⁷ *Id.*

⁸ JA at 484, Courtlink Filing ID 1024490.

⁹ JA at 182, 491.

is absurd of Oakfabco to note that Mr. Weakley did not mention the name Kewanee in his deposition.¹⁰ In "passing"¹¹ or otherwise, Mr. Weakley's pre-deposition mention of Kewanee burdened Oakfabco to ask Mr. Weakley to describe his Kewanee exposure. The fact is that Oakfabco asked no questions of Mr. Weakley about his exposure.¹² This was an ill-considered defense tactic. In the context of summary judgment law, it was decided by the Supreme Court that a litigant is not required to depose his own witnesses. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986).

Oakfabco contends that Mr. Weakley's submission of "untimely" and "inadmissible" documents does not pose an effective challenge to its motion for summary judgment:

In an unavailing effort to rehabilitate his failure of proof of exposure to an Oakfabco product, plaintiff relied on three types of documents never produced during discovery and which were proffered, for the first time in post-discovery filings. (Pl. Brief at 22). These materials, first produced either after the close of discovery or as an attachment to his Opposition to Oakfabco's Motion for Summary Judgment, are: 1) unsworn and unauthenticated documents from the Fairfax County Public Schools; 2) an Affidavit from plaintiff ostensibly based on these unsworn and unauthenticated documents; and 3) discovery responses of a non-party in connection with unrelated litigation filed in Texas. (Pl. Brief at 4, 6, 9, 21, 22, 25).

Oakfabco Br. at 14.

¹⁰ Oakfabco Br. at 4, 10 n.8.

¹¹ *Id.* at 4.

¹² JA at 526-46.

Oakfabco's argument is insupportable for several reasons. First, these arguments were not raised in the trial court and cannot be countenanced for the first time on appeal. *Gray*, 452 A.2d at 964, *See also DeCintio v. Westchester County Med. Ctr.*, 821 F.2d 111, 114 (2d Cir. 1987), *cert. denied*, 484 U.S. 965 (1987) (failure to object to consideration of inadmissible evidence on summary judgment motion waives the point).

Second, it is well established that documents competent to overcome a motion for summary judgment are not necessarily proffered in trial-ready form. Chief Justice Rehnquist spoke to this issue in *Celotex*:

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses.

* * *

Such a motion, whether or not accompanied by affidavits, will be made and supported as provided in this rule, and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. (internal quotations omitted)

Celotex, 477 U.S. at 324.

Third, Oakfabco's argument overlooks the ruled-based propriety of two of the three items with which it finds fault: Mr. Weakley's affidavit and American Standard's discovery responses are among the species of materials that a trial court

rightly considers under Super. Ct. Civ. R. 56(c). Finally, the Fairfax County Public Schools records, as a matter of evidence, are admissible for being business records and therefore exceed the nature and quality of what the *Celotex* court deemed acceptable in these circumstances. *Celotex*, 477 U.S. at 320, *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987).

Oakfabco likens this case to *Claytor v. Owens-Corning Fiberglas Corp.*, 662 A.2d 1374 (D.C. 1995), where one of the defendants sued unsuccessfully by plaintiff Claytor was the manufacturer of pipe that left the factory without containing or including any asbestos but as installed was later clad with asbestos insulation made by unknown entities not connected in any way to the pipe manufacturer.¹³ Under those circumstances this Court affirmed the grant of summary judgment in favor of the pipe manufacturer. *Claytor*, 662 A.2d at 1385.

Claytor, however, is not this case. Here, Kewanee boilers left the factory containing asbestos components. Moreover, it was necessary and therefore foreseeable that during the useful life of each boiler that asbestos would continue to be a component even if the routine and likewise foreseeable maintenance of these boilers entailed the replacement of worn asbestos components with new asbestos components. Finally,

¹³ Oakfabco Br. at 9.

there is no evidence of record to gainsay that the original asbestos in and around the Kewanee boiler at issue was still in place on the premises where Mr. Weakley serviced it. This is a reasonable inference that must be construed in Mr. Weakley's favor under settled summary judgment law.

Oakfabco's use of *Claytor* reveals a sly refusal to see the basic gravamen of Mr. Weakley's claim. This is a failure to warn case. Mr. Weakley avers in his affidavit that none of Defendants' asbestos-containing boilers bore warning labels of any kind.¹⁴ As further elucidated in his affidavit, Mr. Weakley notes that, likewise, none of Defendants' service manuals pertaining to the subject boilers contained asbestos warnings of any kind -- despite the fact that those manuals pertained to the performance of tasks necessarily exposing the serviceman to the inhalation of asbestos.¹⁵ Having not received any such warning, Mr. Weakley carried out his duties without wearing respiratory protection.¹⁶

Furthermore, Mr. Weakley plainly states that had he been warned about the asbestos hazards of boiler servicing, he would not have performed this type of work.¹⁷ Thus, Mr. Weakley

¹⁴ JA at 424.

¹⁵ JA at 424-25.

¹⁶ *Id.*

¹⁷ JA at 425.

suffered exposure that resulted, as declared by the only medical expert of record, in his development of asbestosis.¹⁸ Against this background, it follows *a fortiori*, that Oakfabco's conduct was "a substantial factor in bringing about [Mr. Weakley's] harm." *Claytor*, 662 A.2d at 1381-82. Therefore, Oakfabco's citation of *Claytor* could not possibly be less germane to this issue.

B. BURNHAM

Burnham claims that in the discovery phase of this litigation its name was mentioned but once -- in an answer to interrogatories identifying Burnham and other defendants as the manufacturers of pipe insulation that was a component of the subject boilers.¹⁹ Burnham ignores that its product was fully described as implicated in this case in Mr. Weakley's Complaint:

Plaintiff's development of asbestosis was a direct and proximate result of the negligence of the defendants herein in their design, manufacture, production, testing, distribution, specification, supply and/or installation and labeling of asbestos-containing materials and products

Revised Second Amended Complaint at ¶ 6, JA 77.

¹⁸ JA at 432.

¹⁹ Burnham Br. at 2.

The Complaint apprised Burnham and all other defendants, consistent with the content standard provided in Rule 8(a)(2), that they were burdened by a duty, breached that duty and thereby caused injury to Mr. Weakley.

Burnham avers that Mr. Weakley did not mention it by name during his deposition.²⁰ This is literally true, but Burnham coyly refrains from admitting that it asked no questions of Mr. Weakley about Burnham boilers and his exposure to the asbestos components therein.²¹ It is well settled that a party is not required to depose his own witnesses. *Celotex*, 477 U.S. at 324. Moreover, Burnham's deeds giving rise to this case were fleshed out with specificity in Mr. Weakley's Revised Work History and ultimately in an affidavit appended to his opposition to the motion for summary judgment.²²

Failing to discern the evidentiary impact of this material on its motion for summary judgment, Burnham is left to complain that the premises owners' documents inculcating Burnham and

²⁰ *Id.*

²¹ JA at 526-46.

²² JA at 423, 495. Burnham makes the disingenuous argument that Mr. Weakley's affidavit opposing summary judgment "makes no reference to any contact with a Burnham boiler." Burnham Br. at 8. In his affidavit Mr. Weakley states: "Among the asbestos-containing boilers that I frequently serviced and which caused me to be exposed regularly to significant amounts of asbestos dust in the manner described above were those manufactured by Burnham Corporation. . . ." JA at 425.

procured by subpoena *duces tecum* were introduced by "an unsworn, uncertified and unattested letter" with an unsigned attachment.

. . ."23

All of Burnham's arguments respecting the sufficiency of Mr. Weakley's proof opposing its motion for summary judgment -- to wit: (1) whether Defendants were timely advised of the particulars of Mr. Weakley's injurious exposure to their product; (2) whether Mr. Weakley had a duty to, in effect, depose himself and (3) whether Mr. Weakley adduced evidence whose form and substance was sufficient to defeat Defendants' motions for summary judgment -- are matters addressed *supra* at 2-6 and in Mr. Weakley's opening brief.

Burnham offers *Ford Motor Co. v. Wood*, 119 Md.App. 1, 703 A.2d 1315 (1998) for the principle that Defendants face a species of limited liability for injury arising from asbestos components contained in their boilers manufactured or installed by them. In *Wood*, many years after the subject Ford vehicles left the factory and were placed into the stream of commerce, a garageman working in close proximity to personnel servicing asbestos-containing brakes and clutches thereby developed mesothelioma, an incurable asbestos-induced cancer.

²³ Burnham Br. at 3.

Ford had installed the original asbestos brakes and clutches. Twenty years later, however, in the garage where plaintiff breathed asbestos when the brakes and clutches in the Ford vehicles were being serviced, those brakes and clutches were replacement parts which though made of asbestos, were neither the original-factory installed equipment nor otherwise supplied by Ford.

Plaintiff apparently prosecuted her case as a matter of whether the decedent was exposed to Ford's asbestos-containing products. That theory comported with the jury verdict sheet. Having presented its case espousing that theory, however, plaintiff's counsel asked the trial court to revise the verdict sheet and allow the jury to decide whether "Ford had a duty to warn of the dangers of replacing brakes and clutches regardless of the origin of the brakes and clutches." *Id.* 119 Md.App. at 33, 703 A.2d at 1330. The trial court declined. *Id.*

The problems with Burnham's reliance on *Wood* are many. First, *Wood* has no precedential authority in this jurisdiction. Second, the principles from *Wood* whose application Burnham urges are matters of *dicta* and therefore not entitled to precedential weight even in the jurisdiction in which the opinion was written.

Third, even if the musings of the Maryland Court of Special Appeals are deemed persuasive by this Court, Burnham does not advance its position in the instant case. It appears clear that if *Wood* were followed, a manufacturer who incorporates in its product the dangerously defective component of another manufacturer and places the resulting product into the stream of commerce, a fair analogue to Burnham and every other defendant in this case, liability would obtain where one such as Mr. Weakley was exposed injuriously to the given boiler manufacturer's dangerous component. *Id.* 119 Md.App. at 34, 703 A.2d at 1331.

On a theoretical basis only, the Maryland Court of Special Appeals opined:

As a general matter, however, those courts that have considered the issue have held that a vehicle manufacturer may be held liable in damages for defective component parts manufactured by another only if the vehicle manufacturer incorporated the defective component into its finished product. Such liability, often referred to as "assembler's liability," is justified because the assembler derives an economic benefit from the sale of a product that incorporates the component; the assembler has the ability to test and inspect the component when it is within its possession; and, by including the component in its finished product, the assembler represents to the consumer and ultimate user that the component is safe. (internal citations omitted).

Id.

In the instant case, defendant boiler manufacturers incorporated various asbestos-containing components apparently manufactured by others. Moreover, facts in evidence warrant the inference that those asbestos components were still in place when Mr. Weakley serviced the boiler in ways that generated the release and inhalation of asbestos fiber.²⁴

Fourth, Burnham ignores the Wood court's embrace of another theory upon which the instant case relies:

During the proceedings below, Mrs. Wood's counsel asked the trial court not to submit a strict liability count to the jury, but instead, to submit the case only on a negligence theory. Counsel indicated that they may not have met the burden required by strict liability in that they may not have demonstrated that Ford supplied the brakes to which Mr. Wood was exposed. On appeal, Mrs. Wood apparently has abandoned the idea that there is a distinction between negligence and strict liability in this regard. Nevertheless, we note that, regardless of whether Ford's duty to warn sounds in negligence or strict liability, it has a duty to warn only by virtue of its manufacture or sale of unreasonably dangerous products. **This is not, for example, a case based on negligent instruction as there is no evidence that anyone relied on instructions supplied by Ford.** (emphasis supplied)

Id. 119 Md.App. at 35, 703 A.2d at 1331 n.7.

²⁴ The Burnham boiler at issue was installed at L'Enfant Plaza in 1967; Mr. Weakley serviced that boiler in the early 1970's including removing asbestos materials from it. JA at 426, 495, 502. Given the modest age of the boiler, it is reasonable to infer that asbestos components removed relatively a few years later were original factory items. Burnham offers no proof to the contrary. The same is true for Oakfabco's Kewanee boiler that was installed at Langley High School in or about 1965 and serviced by Mr. Weakley in the same year. JA at 450-51, 491.

Mr. Weakley, however, claims Defendants' manuals failed to instruct him as to the steps necessary to avoid asbestos hazards inexorably and invariably encountered whenever the boiler was serviced.²⁵ Mr. Weakley was utterly unaware of the hazard posed by servicing Defendants' boilers.²⁶ Given the foregoing points, Burnham's citation to *Wood* undermines its entitlement to summary judgment.

C. CLEAVER BROOKS

Cleaver Brooks implies that Mr. Weakley serviced asbestos-containing boilers at only six Fairfax County Public Schools: Centreville Elementary School, Falls Church High School, Langley High School, Marshall Road Elementary School, Marshall High School and J.E.B. Stuart High School.²⁷ In fact, the named schools were mentioned without limitation as examples of sites that came readily to Mr. Weakley's mind.²⁸ It is important to note the greater context of what Mr. Weakley averred in his deposition:²⁹

²⁵ JA at 424-25.

²⁶ *Id.*

²⁷ Cleaver Brooks Br. at 2.

²⁸ JA at 535 (Tr. 53).

²⁹ *Id.*

- Q. Do you recall what schools you actually serviced boilers in?
- A. Oh, they had, at that time, probably over a hundred schools. We worked at Fairfax High, Sydney Lanier.
- Q. I'm sorry. What was that one?
- A. Sydney Lanier, that's like an intermediate. Falls Church High, JEB Stuart, Marshall, Centreville Elementary, Langley, **and the list goes on and on, but I cannot recall every one of them.** (emphasis supplied)

In his affidavit, Mr. Weakley says that his boiler servicing "invariably caused a great deal of asbestos-containing dust to be released into the air" and further stated that all of the boilers involved in this litigation contained asbestos components.³⁰ Moreover, in his affidavit Mr. Weakley lists every defendant (including Cleaver Brooks) whose asbestos-containing boilers he "frequently serviced" and thereby was "exposed regularly to significant amounts of asbestos dust."³¹ Mr. Weakley also avers that he was exposed to airborne asbestos when servicing many Fairfax County Public Schools boilers.³²

³⁰ JA at 424-25.

³¹ JA at 425.

³² JA at 426-27. Cleaver Brooks cites Mr. Weakley's testimony to the effect the former's boilers "were covered on the outside with block insulation." Cleaver Brooks Br. at 3 n.3. Cleaver Brooks categorically denies Mr. Weakley's assertion. *Id.* However, its denial is not supported, nor is it supportable, by any reference to the record in this case. For this reason the Court may attach no importance whatsoever to this assertion.

Finally, as noted herein with respect to other defendants, the relative lack of deposition testimony specifically inculcating Cleaver Brooks evinces a lack of pointed questions as noted *supra*. Mr. Weakley is not obliged to depose himself. *Celotex*, 477 U.S. at 324. Defendant's paucity of pointed questions was a wrongheaded tactic.

Mr. Weakley's affidavit should not be seen as one contradicting prior sworn testimony, an issue before this Court in *Hinch v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries Conducting Sibley Mem'l Hosp.*, 814 A.2d. 926 (2003).³³ Mr. Weakley was not contradicting himself; he was providing information that for tactical reasons Cleaver Brooks and its fellow defendants did not seek to elicit. If Cleaver Brooks truly believed Mr. Weakley's affidavit violated the rule announced in *Hinch* it should have moved the court to strike the affidavit on those grounds. This issue has therefore been waived.

Cleaver Brooks asserts that "Mr. Weakley cannot demonstrate, at a minimum, that he and any of Cleaver Brooks' products were in the same place at the same time."³⁴ To the contrary, in his deposition and affidavit, Mr. Weakley stated that from 1964-1965 he was employed by Fairfax County Public

³³ Cleaver Brooks Br. at 15-16.

³⁴ Cleaver Brooks Br. at 8 n.7.

Schools servicing asbestos-containing boilers.³⁵ In that context, Mr. Weakley further asserted that the most prevalent boiler brand serviced there was that of Cleaver Brooks.³⁶

Indeed, the prevalence of Cleaver Brooks boilers in the Fairfax County Public School buildings is a fact Mr. Weakley remembered before this suit was filed -- and one he expressed in discovery as an answer to Defendants' Interrogatory No. 75.³⁷ Cleaver Brooks' implication that Mr. Weakley has violated Super. Ct. Civ. R. 11(b) is a desperate and utterly unfounded assertion.³⁸

Cleaver Brooks appears to seek a host of remedies not sought in the trial court. First, it attacks the Complaint for its lack of specificity (an unfounded argument, discussed *supra*). But Cleaver Brooks lodged no motion for a more definite statement. Second, it attacks the lack of job site information in discovery responses, but likewise never filed a motion to compel.³⁹ In fact, all of these Defendants sat back, assuming that Rule 8 does not mean what it says and that the man they

³⁵ JA at 426-27, 535-37 (Tr. 51-63).

³⁶ JA at 535 (Tr. 53).

³⁷ JA at 439, 440.

³⁸ Cleaver Brooks Br. at 9-10.

³⁹ *Id.* at 10.

injured decades earlier was burdened to come forward with total recall of every fact needed to try his case.

Mr. Weakley contends that these arguments have been waived, were never passed upon by the trial court and cannot be considered in this court. It follows a *fortiori* that having not availed itself of any remedy to correct deficiencies in pleadings or discovery, Cleaver Brooks may not now be heard to complain that it was precluded from investigating this case before Mr. Weakley's deposition.⁴⁰ Indeed, any such difficulties are unsupported by any evidence of record. Cleaver Brooks never sought to vindicate its position with an appropriate motion, but even if it had, the trial court would have been obliged to consider sanctions lesser than entry of summary judgment. See *Lofton v. Kator & Scott*, 802 A.2d 955 (D.C. 2002).

Cleaver Brooks clings stubbornly to its argument that Mr. Weakley has not and cannot demonstrate that he worked with or around an asbestos-containing product of Cleaver Brooks.⁴¹ There is no denying that Mr. Weakley specifically recalls many occasions on which he was exposed to asbestos while servicing Cleaver Brooks boilers and that this servicing occurred between 1964 and 1965 in the Fairfax County Public Schools.⁴² Cleaver

⁴⁰ Cleaver Brooks Br. at 10.

⁴¹ Cleaver Brooks Br. at 14.

⁴² JA at 426-27, 535-37 (Tr. 51-63).

Brooks treats this lucid and categorical assertion as if it fails *ipso facto* to express anything of an inculpatory nature. Mr. Weakley avers that the opposite is true.

Cleaver Brooks says that because Mr. Weakley cannot establish that the asbestos products to which he was exposed while servicing Defendant's boilers was the original asbestos installed in the original boiler or later supplied by Cleaver Brooks as replacement components, Defendant is entitled to summary judgment.⁴³

Cleaver Brooks overlooks that this case, as discussed *supra*, invokes a theory of negligent instruction. That theory is applicable to Cleaver Brooks and all other Defendants. The cases cited by Cleaver Brooks do not gainsay the actionability of this theory in the instant case.

D. FOSTER WHEELER

Foster Wheeler asserts that *Covington v. Abex Corp.*, 1990 U.S. Dist. LEXIS 16197 (D.D.C. 1990) burdens a plaintiff to state specifically when and where he was allegedly exposed to a manufacturer's asbestos products prior to obtaining discovery of the company.⁴⁴ Mr. Weakley remembers that he serviced Foster Wheeler boilers within a specific timeframe and that such

⁴³ Cleaver Brooks Br. at 16-17.

⁴⁴ Foster Wheeler Br. at 8-9.

service entailed exposure to asbestos. What Mr. Weakley does not remember is the specific location where that exposure occurred. The latter point apparently fuels Foster Wheeler's assertion that Mr. Weakley is asking too much, is placing an unfair burden on Foster Wheeler.⁴⁵ Nevertheless, the operative language of *Covington* demonstrates Mr. Weakley has provided enough information to prevent his discovery of Foster Wheeler from being unduly onerous:

Plaintiffs have not specified when and where he was, or even could have been, exposed to Abex's products. Accordingly, before Abex can be expected to respond to plaintiffs' broad discovery requests, plaintiffs must provide Abex with a list of the places where Mr. Covington worked, the companies with whom Mr. Covington was employed, and the duration of his employment with those companies, in the thirty-seven years that he was allegedly exposed to asbestos.

Covington, slip op. at 3.

By the time the notice of deposition was served, Mr. Weakley had already provided Foster Wheeler: (1) "with a list of the places where Mr. [Weakley] had worked;" (2) the names of "the companies with whom Mr. [Weakley] was employed" and (3) "the duration of his employment with those companies." All of this information was set forth in the Work History appended to Mr. Weakley's answers to interrogatories and served upon all defendants. It follows that under the court's ruling in *Covington* the provision of these factual items so lessened the

⁴⁵ Foster Wheeler Br. at 8.

burden upon Foster Wheeler that it should have been expected to comply with Mr. Weakley's discovery requests.⁴⁶

Foster Wheeler implies Mr. Weakley's third-party discovery of premises owners unearthed the universe of documents that could possibly have inculcated Foster Wheeler in this case. This is incorrect. For example, Mr. Weakley's subpoena *duces tecum* reached only six of the 100 buildings in the Fairfax County Public School system. He was unable to obtain records *via* subpoena or otherwise from the following entities listed in his Work History: North Capitol Street Public Housing Project, Cathedral Towers Apartments, C&P Telephone (Covington, Virginia), Clifton Apartments, Georgetown University, Old Canadian Embassy, U.S. Navy Security Station, Walter Reed Hospital and Washington Navy Yard.⁴⁷

It is thus incorrect to infer that all of Mr. Weakley's exposure cards are on the table. Nevertheless, Foster Wheeler would distract this Court's attention from the less than onerous discovery that Mr. Weakley sought. After all, how hard is it for Foster Wheeler to open a file drawer and search for the presence of its boilers in Fairfax County Public Schools?

⁴⁶ It is noteworthy that Foster Wheeler never provided evidentiary support for the notion that complying with Mr. Weakley's discovery requests posed an onerous burden. Foster Wheeler's assertion rests solely on the *ipse dixit* of its counsel.

⁴⁷ See Courtlink Filing ID Nos. 1022253-55.

E. MARLEY

Marley cites *Claytor* for its rejection of the "decade approach" that found some of the plaintiffs merely averring that they were exposed to asbestos products at a job site "sometime in the 60s and 70s."⁴⁸ The problem with that testimony was that even though there was proof that a particular asbestos manufacturer's product was used at the job site during this period, plaintiffs' temporal evidence was simply too vague to establish that their presence coincided with the manufacturer's product on the premises on a given date. Thus, plaintiffs' circumstantial evidence failed to carry the day on summary judgment. As stated, however, Mr. Weakley's claims rest on direct evidence.

Marley's reliance on this Court's holding in *Alliegro v. ACandS, Inc.*, 691 A.2d 102, 106 (D.C. 1997) is likewise misplaced:

First, Mr. Alliegro recounted his exposure to asbestos-containing products during the 1965 to 1967 remodeling at the Bureau of Engraving and Printing. Second, Mr. Bollo, who worked on the remodeling project with the outside contractor, identified Armstrong asbestos-containing products as used in the remodeling project, described the heating system that was being remodeled as located in "every base of every wing" of the Bureau of Engraving and Printing, and testified that stationary engineers employed by the Bureau of Engraving and Printing were exposed to clouds of suspended dust.

⁴⁸ Marley Br. at 8 citing *Claytor*, 662 A.2d at 1385 n.11.

Marley suggests that the Court's holding requires an asbestos victim to come forward with precise evidence as to a "specific identification of exposure to a specific product, at a specific job site and at a specific time."⁴⁹ In fact, *Alliegro* is another example of circumstantial proof sufficient to prove asbestos product exposure.

Peter T. Enslein 3/9/04 1:38 PM
Comment:

Here, on the other hand, is a plaintiff who remembers directly encountering airborne asbestos dust in the boilers of every defendant, including Marley. Marley produced no evidence to negate this assertion.⁵⁰

II. CONCLUSION

For the foregoing reasons and those set forth in his opening brief, Mr. Weakley seeks an Order from this Court vacating the various entries of summary judgment against him, with directions to afford him the discovery that he was denied.

Respectfully submitted,

Peter T. Enslein [367467]
1738 Wisconsin Avenue, N.W.
Washington, D.C. 20007
(202) 625-2850
Counsel for Appellant
Basil F. Weakley, Jr.

⁴⁹ Marley Br. at 10.

⁵⁰ Marley disingenuously observes that there was "[n]o mention of Weil-McLain boilers in [the] entire deposition transcript" of Mr. Weakley. Marley Br. at 8 n.25. As Defendant knows, Mr. Weakley was never asked a single deposition question about Weil-McLain or the appearance of its name in the Work History. JA at 526-46.

CERTIFICATE OF SERVICE

I certify that on March 16, 2004, a copy of the Brief for Appellant was served via First Class Mail on:

R. Thomas Radcliff, Jr.
Steven J. Parrott
DeHay & Elliston, L.L.P.
Suite 1300
36 South Charles Street
Baltimore, MD 21201
Counsel for Appellee
Burnham Corporation

Thomas P. Bernier
Segal, McCambridge, Singer &
Mahoney, LTD
217 E. Redwood Street
Suite 2150
Baltimore, MD 21202
Counsel for Appellee
The Marley Company

Robin Silver
Miles & Stockbridge, P.C.
10 Light Street
Baltimore, Maryland 21202
Counsel for Appellee
Cleaver-Brooks Boilers

Scott H. Phillips
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, MD 21201
Counsel for Appellee
Foster Wheeler, L.L.C.

David A. Selzer
Laura N. Steel
Wilson, Elser, Moskowitz,
Edelman & Dicker, LLP
Suite 500
1341 G Street, N.W.
Washington, D.C. 20005
Counsel for Appellee
Oakfabco, Inc.

Unless otherwise noted, the original and 3 copies were hand delivered to the Court on the same day.

Peter T. Enslein