Judge Mark Davidson
Multi District Litigation Asbestos Judge
201 Caroline
Houston, Texas 77002

713-368-6600

May 21, 2010

Mr. Jeffrey Simon
Mr. Larry Cotten

Re: Cause No. 2009-06961; *Ramsey v. Borg Warner Morse Tec, Inc. et al*

Dear Counsel:

You will recall that on Friday, the 14th of April, this court considered the Motion for Summary Judgment filed by the Defendant DuPont in the above case. This letter is the ruling of the Court on the motion in that case.

The relevant facts of the case are similar, but not identical, to the facts in the *Altimore v. Exxon* and *Behringer v. Alcoa* cases. Mrs. Ramsey, the Plaintiff, was married to an employee of the Defendant. Mr. Ramsey was employed by the Defendant. Mrs. Ramsey was not. Mr. Ramsey, the Plaintiff's husband, was not, during the relevant time period, a worker that always worked with asbestos, but rather supervised people that did. Mr. Ramsey would go home at the end of each day and his wife would wash his clothes. Mrs. Ramsey has now been diagnosed with mesothelioma. The pleadings in this case claim that a substantial contributing cause of the disease is the asbestos that Mr. Ramsey brought home on his clothes. Mr. Ramsey worked at the plant as late as 1974.

Unlike most motions for summary judgment this Court hears, this motion not based on a challenge of causation, but rather on a challenge of whether there is any duty owed the Plaintiff by the Defendant. In the absence of a duty, of course, there cannot be negligence, the basis of the Plaintiff's claim. Whether a duty exists is a "question of law for the court to decide from the facts surrounding the occurrence in question." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). In citing this case, I acknowledge that any appeal from the trial of this case on a ruling relating to a finding of a duty, or the lack of one, is *de novo*, and that reviewing courts are required to examine the correctness of this ruling, if the case is tried, on the facts of the case. An appeal from this ruling, on the other hand, involves a review using the usual

presumptions governing summary judgment evidence. In other words, for purposes of this ruling, I must look at the evidence in a light most favorable to the non-movant.

The review of the facts of this case under a duty analysis shows that:

1) The Defendant knew of the dangers of asbestos in general by the early 1960s. **That, by itself, is not enough to create a duty to Mrs. Ramsey.**
2) The Defendant knew of a link between exposure of small amount of asbestos fiber and cancer no later than June 2, 1966. **That is not enough to create a duty to Mrs. Ramsey**, since she was not an employee.
3) An employee of the Defendant (J. A. Zapp) attended a Conference in November 1964 in which exposure to asbestos to people "who would not in the ordinary way come to mind as being exposed to asbestos" were in danger. **This is not enough to create a duty to Mrs. Ramsey,** since she has not been shown to have been at the plant her husband was employed at during a time in which asbestos was present.
4) The same report, dated November 2, 1964 showed three types of exposure to asbestos as being recognized as leading to an increase in risk to mesothelioma: "Work in factories manufacturing asbestos textiles (not applicable to this case), insulating materials and other products (this is what was done with the asbestos at the DuPont plant, but not by Mrs. Ramsey)… *and exposure to dust brought home by relatives working with asbestos*." (italicization added) **This shows some knowledge of the danger of asbestos brought home on clothes of its workers**.
5) An internal DuPont conference dated May 21, 1968 which goes over the knowledge the Defendant had of asbestos dangers, and remedies they would take to minimize danger to its employees. On page DUP0503995, an attendee wrote "Wives and children of asbestos workers are also being involved because of the dust laden clothes a man wears home at night."

If this isn't enough evidence to comply with *Behringer*, I really can't imagine what is. Mr. Ramsey's exposure continued for six years following the time internal DuPont documents show they were aware of the danger to its employees' families. The *Behringer* case held that the Alcoa had no knowledge of the dangers of household exposure in the 1950s, and that no duty existed in the absence of that knowledge. In this case, there is some evidence that the Defendant knew as early as 1964 and certainly by 1968. Exposure continued until 1974.

Defendant argues that Mr. Ramsey was not a regular hands-on worker that actually worked with asbestos products, but was a supervisor who walked the entire plant. The argue that that degree of separation removes any duty to Mrs. Ramsey, since she is not a person "similarly situated" to anyone whose spouse worked continually with asbestos. The argument must fail for several reasons.

First, DuPont was clearly on notice that asbestos dust was airborne. To the extent to which Mr. Ramsey supervised insulators or other persons working with asbestos, he was known to be in a zone in which his clothes could reasonably be known to be capable of becoming dusty.

Second, counsel has been unable to find any case in which the duty to the spouses of supervisors is any less than it is to the spouses of employee/laborers. If the Defendant knew exposure led to contamination of clothing, and if it knew that that contamination led to dangers to families, the forseeability required in *Behringer* exists in this case on this summary judgment record.

Third, the Defendant seems to be asking me to extend the standard adopted by the Texas Supreme Court in *Borg Warner v. Flores* beyond causation into the area of duty. To my knowledge, no court anywhere in America has varied the concept of duty in asbestos cases based on the quantum of fibers to which a plaintiff, or the spouse of a plaintiff, was exposed. I will continue to strictly follow Borg Warner on questions of causation. The Defendant in this case is asking me to take a step beyond that. No law supports that step.

I should note that I have accepted the Defendant's argument that *El Chico v. Poole* has not been adopted by any court in Texas as modifying the creation of a duty to others outside the area of alcoholic beverages. I realize that forseeability, by itself, does not a duty create. There are other factors – risk, social utility of the Defendant's conduct and the likelihood of injury that were not addressed or challenged in this record. The Plaintiff in this case has met exactly the burden set forth by the Dallas Court of Appeals in *Behringer*.

The Defendant's Motion for Summary Judgment is therefore denied.

Respectfully,

MARK DAVIDSON

MD/ms