LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Nov. 8, 2017 Case No. 15CV187950

BRIAN KELLOGG, *et al.*
Plaintiff

Thomas Bevan
Plaintiff's Attorney

VS

GENERAL ELECTRIC CO., *et al.*
Defendant

Perry Doran
Defendant's Attorney

This matter is before the Court on Plaintiff's Objections to the Magistrate's Decision, filed August 11, 2017, and pleadings thereto. Oral hearing had October 26, 2017.

Because of the nature and complexity of this case, the Court has reviewed the Magistrate's Decision and separate Defendant, General Electric Company's ("GE"), Motion For Summary Judgment Based Upon the Statute of Repose *de novo.*

Plaintiff's Objections to the Magistrate's Decision are well-taken and hereby GRANTED in part. The Magistrate's Decision granting GE summary judgment is hereby vacated. Plaintiff's Objections to the Magistrate's Decision finding the GE's steam turbines are improvements to real property, however, is over-ruled. For the reasons that follow, *infra,* the Court hereby adopts the Magistrate's Decision finding that the GE steam turbines are improvements to real property.

Because this matter cannot be resolved as briefed, the case is set for further oral hearing consistent with the Court's ruling on **December 12, 2017 @ 1:45 pm.**

See Judgment Entry.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: Bevan, Esq.
Doran, Esq.
Kristan, Jr., Esq. (Clark Ind. Insulation Co.)
Luxton, Esq. (Gould's Pumps, Inc.)

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INTRODUCTION

This matter is before the Court for *de novo* review on separate Defendant, General Electric Co.'s ("GE") Motion For Summary Judgment Based Upon the Statute of Repose, filed June 16, 2016; Plaintiff's Brief in Opposition and Motion to Strike the Affidavit of David Skinner, filed on October 11, 2016; GE's Reply in Support of its Motion For Summary Judgment, filed November 23, 2016; Plaintiff's Sur-Reply to GE's Reply to Plaintiff's Response to GE's Motion For Summary Judgment, filed February 17, 2017; the Magistrate's Decision Granting GE's Motion for Summary Judgment, filed August 11, 2017; Plaintiff's Objections to the Magistrate's Decision, filed August 24,, 2017; and GE's Response to Plaintiff's Objections to the Magistrate's Decision, filed September 25, 2017.

Oral hearing had October 26, 2017.

PROCEDURAL HISTORY

On November 10, 2015, the complaint at bar was filed against GE and eleven (11) other defendants.[1] The complaint alleges that Neal Kellogg ("Kellogg"), Plaintiff's decedent, was exposed to asbestos through his employment with the Cleveland Electric Illuminating Company ("CEI") in facilities located in Lorain, Cuyahoga, Lake, and Ashtabula counties.

[1] This matter was originally filed in Lorain County Court of Common Pleas, then voluntarily dismissed pursuant to Civ. R 41(A). It was thereafter timely re-filed in Cuyahoga County Court of Common Pleas, which *sua sponte* transferred the case back to Lorain County.

Kellogg was employed by CEI between 1966 through 1993 and passed away, allegedly from mesothelioma occasioned by exposure to asbestos, sometime after this suit was filed. The complaint alleges counts of negligence, breach of warranties, fraud, loss of consortium, and wrongful death. The complaint seeks compensatory damages, punitive damages, and attorney's fees.

Since the complaint was filed, the claims against almost all of the defendants have been resolved except for the claims against GE, the claims against separate Defendant, Clark Industrial Insulation Co. (Summary Judgment denied) and the claims against Goulds Pumps, Inc. (Summary Judgment denied.)

STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review for summary judgment in Ohio is well-settled. In *Slinger v. Phillips,* 9th Dist. Medina No. 13CA0048, 2015-Ohio-357, at ¶9, the Ninth District stated, "This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). 'We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party.' *Garner v. Robart,* 9th Dist. Summit No. 25427, 2011–Ohio–1519, ¶ 8."

Pursuant to Civ.R. 56(C), summary judgment is appropriate when: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, (1977).

To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, (1996). If the movant satisfies this burden, the nonmoving party " 'must set forth specific facts showing that there is a genuine issue for trial.' " *Id.* at 293, quoting Civ.R. 56(E).

Recently, the Ninth District Court of Appeals noted, "Summary judgment proceedings create a burden-shifting framework. To prevail on a motion for summary judgment, the movant has the initial burden to identify the portions of the record demonstrating the lack of a genuine issue of material fact and the movant's entitlement to judgment as a matter of law. *** In satisfying this initial burden, the movant need not offer affirmative evidence, but it must identify those portions of the record that support her argument. ***

Once the movant overcomes the initial burden, the non-moving party is precluded from merely resting upon the allegations contained in the pleadings to establish a genuine issue of material fact. Civ.R. 56(E). Instead, it has the reciprocal burden of responding and setting forth specific facts that demonstrate the existence of a 'genuine triable issue.' *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996)." *McQuown v. Coventry Township,* 9th Dist. Summit No. 28202, 2017-Ohio-7151, at ¶ 10. See also: *Bank of New York Mellon v. Bridge,* 9th Dist. Summit No. 28461, 2017-Ohio-7686, at ¶ 8.

STANDARD OF REVIEW – CIVIL RULE 53: MAGISTRATE'S DECISION

" '[T]he decision to adopt, reject, or modify a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion.' *Barlow v. Barlow*, 9th Dist. Wayne No. 08CA0055, 2009–Ohio–3788, ¶ 5. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993)." *Amstutz v. Amstutz,* 9th Dist. Wayne No. 16AP0027, 2017-Ohio-7909, at ¶ 5.

STATEMENT OF PERTINENT FACTS

As noted, *supra,* Kellogg was an employee of CEI for about 27 years. CEI is an electrical generating public utility with plants located in many counties in Ohio, including Lorain County. Kellogg worked (though not often) at the CEI facility located in Lorain County ("The Facility"). According to Kellogg's estate, he was exposed to asbestos through his employment with CEI and passed away, allegedly from mesothelioma, sometime after this suit was filed.

GE, the defendant at issue herein, designed, engineered, supervised, and participated in the construction of steam turbines ("The Turbines") located at the power stations at which Kellogg worked, including the plant in Lorain County ("The Facility"). GE was contracted by CEI to engineer, design, and construct The Turbines that were ultimately installed at The Facility. According to GE, The Turbines installed at The Facility were completed and in operation by 1973.

The Turbines were shipped to The Facility and "integrated" with the building and "other major components of the power plant that were involved in producing steam for driving

the turbine generator, including a boiler and piping system . . . to produce electrical power . . ." (Affidavit of David Skinner.)[2]

GE designed, manufactured, shipped, and provided technical direction "in the installation of The Turbines." *Id.* Each of The Turbines was custom designed, engineered, and manufactured by GE and is a multi-million dollar unit. *Id.*

During his employment at CEI, one of Kellogg's duties involved maintenance and repair of The Turbines. According to Kellogg's deposition testimony, during maintenance and repair work on The Turbines, he was exposed to asbestos from "asbestos-containing blanket insulation that was removed when the outer shell of [The Turbines] was removed." According to Kellogg, he was also exposed to asbestos when removing "block insulation around valves and other parts of [The Turbines]." In addition, Kellogg alleges to have been exposed to asbestos when he removed block insulation "on the crossover pipe on [The Turbines] when the asbestos-containing block insulation would have to be removed to get to the joints on the crossover pipe." *Id.*

Kellogg's estate maintains that Kellogg ultimately died from mesothelioma occasioned by his exposure to asbestos contained within The Turbines designed, shipped, constructed, and installed by GE.

ANALYSIS

KELLOGG'S MOTION TO STRIKE THE AFFIDAVIT OF DAVID SKINNER

"Civ.R. 56(E) requires that affidavits supporting motions for summary judgment be made on personal knowledge. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223, (1994). For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. *Id.*; Evid.R. 602. 'Personal knowledge' is '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ('The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.')." *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶ 320.

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[2] The Affidavit of David Skinner is unopposed. Plaintiff did not file or attach in opposition an Affidavit or other Civ. R 56(E) evidentiary material contra the Skinner Affidavit. Acknowledging that Plaintiff has no duty to do so, the Court nevertheless accepts as true the unopposed factual statements averred in the Skinner Affidavit. *Dresher v. Burt,* 75 Ohio St.3d 280, (1996).

Kellogg urges this Court to strike the Affidavit attached to GE's Motion on the basis that, "Mr. Skinner has no personal knowledge regarding the facts of this case. He simply testifies regarding what he ***thinks*** would have happened."

The Affidavit at issue by David Skinner ("Skinner") is clearly made "on personal knowledge." Skinner is a mechanical engineer with a Master of Science degree in Mechanical Engineering; he was employed by GE for thirty eight years from 1967-2005; and, was a consultant for GE for nine years. He has intimate knowledge and experience regarding the contracting process, design, manufacture, installation, operation, and maintenance of steam turbines. (Skinner Affidavit.)

Moreover, Skinner testified that he was intimately aware of the normal protocol for the purchase, manufacture, and installation of GE's steam turbines and testified as to the "milestones" for their assembly and integration with a plant's many other components and systems. *Id.* There is no doubt that Skinner is an expert with personal knowledge of GE's steam turbines.

The fact that Skinner may not have worked on the exact turbines at issue is of no accord. Experts are routinely called upon to opine on issues within their expertise even though they may not have had direct or actual knowledge of the specific subject of their testimony. Clearly, Skinner is qualified to opine as an expert by way of Affidavit on matters involving steam turbines, even if he is not intimately familiar with the exact turbines in this case.[3]

Kellogg also contends that Skinner's Affidavit contains certain legal terms that he does not fully understand. This Court disagrees. Skinner adequately explained most of the terms at issue. Moreover, the disputed legal terms are not germane to the main thrust of the Affidavit. In any event, if courts are tasked with striking affidavits because they contain some legal jargon that the Affiant is not completely familiar with or would not use in his or her every day lexicon, most, if not all affidavits (particularly those drafted by lawyers) could be stricken.

For the forgoing reasons, the Motion to Strike the Affidavit of David Skinner is not well-taken and is DENIED.

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[3] The Court would also recall, as previously noted, that Plaintiff did not posit an Affidavit in opposition or contra to Skinner's Affidavit nor does Plaintiff actually challenge Skinner's qualification in general.

THE STATUTE OF REPOSE

The gravamen of GE's dispositive motion is that it is immune from liability due to operation of RC 2305.131, Ohio's Statute of Repose for Real Property.[4] GE argues that The Turbines are "improvements to real property" and, as Kellogg's claims accrued "later than ten years from the date of substantial completion of such improvements[,]" his claims are barred.

Kellogg's estate counters, in essence, that his claims do not sound in premise liability but *products* liability such that RC 2305.10, Ohio's statute of repose for bodily injury applies, and, in any event, that The Turbines are not improvements to real property but products such that the Statute of Repose for real property is inapplicable.

A BRIEF HISTORY

A brief history of Ohio's Statute of Repose is in order. At the outset, it should be noted that the jurisprudential history of the Statute of Repose is somewhat "murky" if not outright convoluted. In *Sedar v. Knowlton Const. Co.*, 49 Ohio St.3d 193 (1990), the Ohio Supreme Court upheld the constitutionality of the Statute of Repose. The Court identified the differences between general statutes of limitations and statutes of repose for medical malpractice claims where a valid claim is subsequently time-barred from RC 2305.131 which treats injuries occurring more than ten years after the negligent act from ever forming a basis for recovery. "The injured party literally has *no* cause of action." *Id.* at 202. "Unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statue of repose . . . potentially bars a plaintiff's suit *before* the cause of action arises." *Id.* at 195.

Moreover the *Sedar* court addressed public policy concerns occasioned by the admittedly harsh result that the Statute of Repose can often inflict on injured parties.[5] The Ohio Supreme Court noted, "[W]e also recognize that R.C. 2305.131 bars *all* claims after ten years, whether meritorious or frivolous. However, we do not sit in judgment of the wisdom of legislative enactments. ' * * * [A] court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power.' *State, ex rel. Bishop, v. Bd. of Edn.* (Citation omitted.) We agree that '[t]he Legislature could reasonably conclude that the statistical improbability of meritorious

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[4] Ohio's Statute of Repose For Real Property is actually identified in the Revised Code as "Ten-year statute of repose for certain premises liability actions." Hereinafter, unless otherwise identified, it will be referred to as the "Statute of Repose."

[5] While not central to the issue at hand, both parties touched-on the public policy implications of Ohio's Statute of Repose in their briefs and at oral argument.

claims after a certain length of time, * * * and the inability of the courts to adjudicate stale claims weigh more heavily than allowing the adjudication of a few meritorious claims. * * *' *Klein.* (Citation omitted.) Thus, we hold that R.C. 2305.131 does not violate the due course of law provision of Section 16, Article I of the Ohio Constitution." *Id.* at 201.

Shortly thereafter, in *Brennaman v. R.M.I.*, 70 Ohio St.3d 460 (1994), the Ohio Supreme Court again addressed the Statute of Repose. In an unconventional decision, the *Brennaman* Court both established a standard of review consisting of four (4) elements prerequisite to determining whether an item is an "improvement to real property," *and then* declared RC 2305.313 unconstitutional!

I say "unconventional" because there is a dearth of precedent in Ohio where the Supreme Court has established a novel standard of review or created new elements essential to a claim for relief *then* finds the underlying statute upon which the standard was created unconstitutional. In fact, such a metric is logically counterintuitive. If the *Brennaman* Court determined that Ohio's Statute of Repose was unconstitutional, why was it necessary to develop a standard of review for its application?

Even more odd, the *Brennaman* Court went so far as to actually find, based upon its new criteria, that the implement at issue, "Sodium Handling Area 1100," is an improvement to real property and, ". . . hence, RC 2305.131 applies." *Id.* at 466. Nonetheless, the Court then went on to find the statute unconstitutional and in doing so, contra the mandates enunciated in *Sedar* regarding public policy, ". . . reopen[ed] the courthouse doors by declaring that RC 2305.131, a statute of repose, violates the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution, and is, thus, unconstitutional. We overrule *Sedar* . . ." *Id.* at 467.

Two years later, in 1996, the Ohio General Assembly passed Am. HB No. 350, commonly referred to as "Tort Reform." Included in this bill was a new iteration of RC 2305.131, with some modifications. In response, in a stunningly bold decision, the Ohio Supreme Court blasted the Legislative Branch and issued a lengthy opinion critical of the legislature for usurping the power of the courts with the legislature's own pronouncement that the new act was constitutional. *State ex rel. Ohio Acad. Of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451 (1999). In *Sheward,* the Supreme Court again found RC 2305.131 unconstitutional.

The next significant case regarding the Statute of Repose was *Groch v. General Motors Corp.,* 117 Ohio St.3d 192 (2008). It should be noted that the statute of repose at issue in *Groch* was RC 2305.10, Ohio's Statute of Repose for Products Liability actions. Nevertheless, the *Groch* Court engaged in a fascinating analysis of RC 2305.131, the

Statute of Repose for Real Property, and without quite saying so, found the current iteration of that statute constitutional.[6] (*Id.* at ¶ 122-148.)

The *Groch* decision is also unique in its blistering criticism of *Brennaman.* The *Groch* Court stated, "[I]n an abbreviated discussion devoid of any in-depth analysis, a majority of this court simply set forth the text of Section 16, Article I; cited one case * * * for the proposition that the General Assembly is constitutionally precluded from depriving a claimant of a right to a remedy before the claimant knew or should have known of the injury; and summarily declared that the statute, because it was a statute of repose, deprived the plaintiffs of the right to sue those who had negligently designed or constructed improvements to real property once ten years had elapsed after the negligent service, and was thus unconstitutional. *Brennaman,* at 70 Ohio St.3 at 466." *Id.* at ¶ 126.

The *Groch* Court went on, "The preceding summary of *Brennaman* is essentially the court's full opinion regarding the unconstitutionality of former R.C. 2305.131. *Brennaman*'s entire discussion of this issue, which culminated in the holding that the statute violated Section 16, Article I and which overruled *Sedar,* spans one page of the Ohio Official Reports. The analytical portion of the court's opinion is a mere four paragraphs long." *Id.* at ¶130.

Concluding its criticism, the *Groch* Court noted, "[A]lthough *Sedar* was a thorough and concise opinion that fully sustained each of its specific conclusions with extensive reasoning, *Brennaman* is the classic example of the 'arbitrary administration of justice' that *Galatis* (citations omitted) cautions against." *Id.* at ¶ 136. "*Brennaman* cavalierly overruled *Sedar* with virtually no analysis. In the process, *Brennaman* failed to accord proper respect to the principle of stare decisis." *Id.* at ¶ 137. "We confine *Brennaman* to its particular holding that former RC 2305.131, the prior statute of repose for improvements to real property, was unconstitutional. It is entitled to nothing more." *Id.* at ¶ 146.

Finally, the Ohio Supreme Court again, and most recently, considered the Real Property Construction Statute of Repose in the matter of *Oaktree v. Hallmark,* 139 Ohio St.3d 264 (2014). In this case, Oaktree's board was informed of construction problems associated with footers for the property's foundations on October 31, 2003; thus, its cause of action against Hallmark Building Company accrued on that date. "Because its

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[6] In the interim between the *Sheward* and *Groch* decisions, the Ohio General Assembly repealed and amended RC 2305.131, first in 2001 as part of SB 108, and again in April, 2005 as part of SB 80. As such, when the Ohio Supreme Court took-up RC 2305.131 in *Groch*, it was in a different iteration than the versions declared unconstitutional by *Brennaman* and *Sheward.*

cause of action accrued and vested before the April 7, 2005 effective date of R.C. 2305.131, the retroactive application of the statute of repose would take away Oaktree's substantive right and conflict with Article II, Section 28 of the Ohio Constitution. Therefore, R.C. 2305.131 is unconstitutional as applied to Oaktree." *Id.* at ¶ 12.

The gravamen of the *Oaktree* decision is that the Statute of Repose is facially constitutional though it is unconstitutional if applied retroactively to a vested claim.[7]

THE CASES CITED BY THE PARTIES AS PRECEDENT - BY PLAINTIFF

Kellogg points this Court to a number of cases decided by the Cuyahoga County Court of Common Pleas that have addressed similar issues and the applicability, or lack thereof, of the Statute of Repose.[8]

In the matter of *Bowling v. Allen Bradley Co.,* Cuyahoga County Court of Common Pleas, Case No. 673790, in deciding a summary judgment motion in favor of the plaintiff, the court rejected application of RC 2305.131, the Statute of Repose for improvements to real property and instead applied RC 2305.10, the statute of repose for bodily injury. In reaching this conclusion, and considering RC 1.51, the court determined that RC 2305.131 is a "general statute of repose" where RC 2305.10 is a "specific statute of repose." Applying RC 1.51 and harmonizing the statutes, the *Bowling* court concluded that in fact both statutes ". . . can be read together so that a 10-year period is given effect with an exception to this limitation for an injury caused by exposure to asbestos. This case may proceed because the claims are based on an injury caused by exposure to asbestos." *Id.*

In the wake of *Bowling,* Judge Hanna decided three (3) additional cases all following the rationale developed in *Bowling.* In *Huron v. American Standard, Inc.,* Cuyahoga County Court of Common Pleas, Case No. 755988, *Meier v. ABB DE, Inc.,* Cuyahoga County Court of Common Pleas, Case No. 811282, and in *Herion v. Donley's, Inc.,* Cuyahoga County Court of Common Pleas, Case No. 848879, the court denied the defendants motions for summary judgment on the basis that RC 1.51 mandates that RC 2305.10, not RC 2305.131, was applicable to plaintiffs claims and that because of the exception for asbestos claims carved-out by RC 2305.10, the defendants could not avail themselves of the Statute of Repose for improvements to real property.

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[7] In the case at bar, there is no constitutional challenge to the Statute of Repose nor is its application to the facts at hand retroactive.

[8] These cases were all decided by Judge Harry A. Hanna, a highly respected jurist who oversees the Cuyahoga County Court of Common Pleas Asbestos Docket.

Similarly, Kellogg points this Court to a very recent decision from the Lorain County Court of Common Pleas, *Haefele v. Honeywell,* Case No. 15CV187218, where in a one-sentence opinion, citing *Bowling, supra,* the court ". . . rejects [defendant's] argument that Plaintiffs' claims are barred by the 10-year statute of repose."

With great respect to Judge Hanna and his rulings in these cases,[9] this Court is not persuaded that application of RC 1.51, "Special or local provision prevails as exception to general provision," is necessary to decide which statute of repose to apply. Further, this Court finds that it is legally inapposite to coble the asbestos exception "carve-out" contained in RC 2305.10 onto RC 2305.131[10]; and, that the actual analysis necessary to resolve these matters lies in the determination of the true nature, character, and type of asbestos-containing product that the plaintiff was allegedly exposed to.

A "PRODUCT"

If Kellogg was exposed to a "product" as defined by RC 2307.71(A)(12)(a), and that product retains its character as a product throughout its useful life, then RC 2305.10, the products liability, bodily injury statute of repose applies. Items such as asbestos-containing gloves or aprons, asbestos-laden tape, brakes, and asbestos-containing cloth and welding rods, asbestos-containing block, cloth, and paper, are examples of items that started-off as products and retained at all times during their utility their character as products. They are usually smaller, tangible, fungible, easily obtained, moved, used, and discarded items. And, they are usually inexpensive.

AN IMPROVEMENT TO REAL PROPERTY

Conversely, if the asbestos containing materials, even if *initially* "products" are used, implemented, attached, affixed, or so integrated into an apparatus or mechanism such that what was once a product becomes so assimilated or incorporated into the apparatus or mechanism that it loses its character as a product and instead becomes materially concatenate with the apparatus or mechanism or an essential, wholly integrated component thereto, then RC 2305.131, the Statute of Repose for improvements to real property is applicable. In other words, if an item that was at one time a product is so assimilated or incorporated into an apparatus or mechanism that it loses its character as a "product," (assuming, of course, that the apparatus or mechanism itself is determined to be an improvement to real property),[11] then so is the former, incorporated or assimilated product an improvement to real property.

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[9] And to my colleague in Lorain County Court of Common Pleas.

[10] If the Legislature wanted to include an asbestos "carve-out" exception for RC 2305.131, it surely could have done so.

[11] Pursuant to the *Brennaman* test.

Examples of this situation might include permanently blown-in asbestos-containing insulation, permanently affixed asbestos-containing pumps, compressors, valves, heat-deflectors, asbestos-containing thermal insulation on pipes or other items, asbestos contained in or on forced-draft fans, and asbestos-containing concrete. Unlike asbestos-containing gloves, aprons, tape, or rods, for example, the items *supra* are often larger, non-fungible, not easily obtained or removed, are permanently affixed and not discarded after wear but serviced and repaired then returned to operation. And, such items are usually more costly and often specifically designed and manufactured for a particular purpose in a larger or more complex mechanism or apparatus. Accordingly, when such a product or item is a permanent component wholly incorporated into a larger, more complex apparatus or mechanism, assuming such apparatus or mechanism is an improvement to real estate, then so are all of its constituent, assimilated parts, including asbestos-containing products.

THE CASES CITED BY THE PARTIES AS PRECEDENT - BY GE

Like Kellogg, GE cites this Court to four cases that support its contention that the mechanical apparatus that it designed and installed at The Facility is an improvement to real property such that Ohio's Statute of Repose for real property serves as a bar to Plaintiff's claims.

In *Harder v. Acands,* 179 F.3d 609 (8th Cir. 1999), the U.S. Court of Appeals for the Eight Circuit dealt with an asbestos case involving steam turbines manufactured by GE. Like the case at bar, GE argued that the steam turbines in *Harder* and their asbestos-containing component - insulation blankets ". . . are improvements to real property under Iowa's statute, and because the turbines and blankets were installed more than fifteen years before commencement of this action, Harder's claims are barred." *Id.*

The Circuit Court of Appeals, agreeing with the District Court, found that the turbines ". . . are improvements to real property." *Id.* The District Court also found, based on the undisputed evidence, ". . . that the blankets were essential components of the turbines and the turbines were not meant to function without the blankets. Nevertheless, the district court concluded the blankets lost their status as improvements while they were temporarily detached from the turbines for routine maintenance. **We disagree with this conclusion**." *Id.*

The Circuit Court of Appeals concluded, ". . . that once the blankets were attached to the turbines, they became improvements to real property * * * As part of a properly working steam turbine, the blankets were permanent additions to or betterment of real property that enhanced the property's capital value * * * The asbestos blankets involved the expenditure of money and increased the power plant's usefulness or value by

making it operate efficiently * * * To revive liability long after it has expired based on the improvement's temporary detachment is contrary to Iowa's 'legislative policy decision to close the door after fifteen years on certain claims arising from improvements to real property.' " *Id.*

In *In re Asbestos Litigation: Thomas Stephenson,* The Superior Court of Delaware, Case No. N10C-07-134, the Delaware Superior Court interpreted and applied Ohio's Statute of Repose where a manufacturer of a boiler located at a plant in Lancaster, Ohio, moved for summary judgment in an asbestos case. Like The Turbines at bar manufactured by GE, the boiler in *Stephenson* was manufactured specifically for that facility, was four-feet in diameter, difficult to remove and was ". . . custom designed and engineered to meet the unique requirements of each customer and the particular site." *Id.*

As a threshold question, the Delaware Superior Court had to determine whether the boilers in question ". . . are improvements to real property." *Id.* Applying the *Brennaman* test, the court held, "As a matter of law the boilers in question are improvements to real property. Their sheer size and the fact that part of the building would need to be deconstructed if the boilers were to be removed is proof enough of their status as improvements to real estate. Moreover, they were an integral part of the plant's purpose . . . the boilers in question were not purchased off a shelf; rather they were specifically designed and installed . . . to conform to Anchor Hocking's needs." *Id.*

In addition, and significantly, the Delaware Court refused to follow the Cuyahoga County Court of Common Pleas decision in *Bowling.* "This court respectfully disagrees with the *Bowling* court's analysis and conclusion . . . The Court will not read an exception into the statute that the legislature did not include . . ." *Id.*

The Delaware Court thereafter granted the defendant's motion for summary judgment.

In the next case, *Barile v. 3M Company, Inc.,* Superior Court of New Jersey, Appellate Division, Case No. A-0092-11T2, 2013 WL 4727128, the court found New Jersey's statute of repose was applicable to a mesothelioma case where the plaintiff was exposed to asbestos from a large, customized boiler that was manufactured especially for Exxon's refinery.

The court noted, "Whether a statute of repose applies in these circumstances is a matter of statutory interpretation and therefore a legal question subject to our plenary review * * * We conclude that the claims against Foster Wheeler should have been dismissed because Foster Wheeler designed and constructed an improvement to real property, and the statute of repose bars any claim that was not filed within ten years of completion of its work in 1963 * * * The use of a defective product among the materials

used to design and construct an improvement to real property does not circumvent application of the statute of repose to a designer or builder of the improvement . . ." *Id.* at II.

The court concluded, "There is no question in this case, however, that the forty-foot customized boiler built to Exxon's specifications for the Bayway refinery was not a standardized product that Foster Wheeler sold to Exxon but an improvement to Exxon's real property." *Id.* The court cited a number of other cases that found all sorts of mechanisms and apparatuses to be improvements to real property including, underground natural gas lines, a permanently attached ladder providing access to a roof, a free-standing electrical transfer switch, an industrial oven in a plant, and, a water treatment system installed in a plant were all deemed improvements to real property. *Id.* (Internal citations omitted.)

Finally, GE cites this Court to the matter of *McSweeney v. AC&S, Inc., United States District Court, C.D., Illinois,* 2014 WL 4628030. This case is almost directly on point to the case at bar. The plaintiff was a millwright who worked on GE turbines at a nuclear plant. He died of respiratory failure and lung cancer and sued GE (and other defendants) for causing his illness. GE argued that plaintiff's claims were untimely under Illinois Construction Statute of Repose ("CSOR").

Like the case at bar, GE custom-designed and specifically built the turbines, was onsite during their construction, and "called the shots" regarding their assembly. *Id.* The court noted that "Although grounded in fact, the question of whether something constitutes an 'improvement to real property' is one of law." *Id.* (Internal citations omitted.)

In *McSweeney,* GE argued that *if* the decedent was exposed to asbestos during the overhauls, the claim arises out of an act or omission (the specified use of certain component parts) rooted in the design, planning, and construction of the original turbine. "Therefore, the CSOR applies." *Id.* The *McSweeney* court relied on two opinions, one from the State of Iowa, *Harder, supra,* (citations omitted), and one from Pennsylvania, *Rabatin v. Allied Glove Corp.* (citations omitted). Citing *Rabatin,* the *McSweeney* court observed, "GE is entitled to the protections of section 5536 based upon its design and construction of the finished product—the turbine itself." *Id.* (Internal citations omitted.)

In granting GE's motion for summary judgment, the *McSweeney* court held,

> "*Harder* and *Rabatin* are persuasive. Both cases involved injuries resulting from exposure to asbestos during overhauls to GE turbines. And in both cases, recovery was barred pursuant to state statutes of repose substantially similar to Illinois' CSOR. The court agrees with the reasoning in *Harder* and *Rabatin.*

Essential **components of the turbine are improvements to real property even if components are later removed and replaced**, and statutory protection arising from the design and initial construction of the turbine extends to injury sustained during overhauls and outages." *Id.* (Emphasis added.)

KELLOGG'S ARGUMENT THAT BECAUSE GE DID MORE THAN "FURNISH THE DESIGN PLAN AND/OR SUPERVISE THE CONSTRUCTION" OF THE TURBINES BUT IN ADDITION, "SHIPPED" AND "MANUFACTERED" THEM, GE IS EXCLUDED FROM THE PROTECTIONS OF RC 2305.131 - IS WAIVED

For the first time, at oral argument, Kellogg urged that the Statute of Repose for real property is limited in its application only to persons who "furnished the design, planning, supervision of construction, or construction of the improvement." The relevant portion of the statute reads, ". . . no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property . . . shall accrue against person[s] who performed services for the improvement to real property or a person who **furnished the design, planning, supervision of construction, or construction of the improvement** to real property later than ten years from the date of substantial completion of such improvement." RC 2305.131(A)(1). (Emphasis added.)

By its own admission, GE did more than furnish the design, furnish the plans, supervise and construct The Turbines. GE also engineered, manufactured, and shipped them to The Facility. According to Kellogg, these multiple rolls or dual "hats" except GE from protection of the statute. Put another way, even if GE can avail itself of the Statute of Repose for its activities in furnishing, designing, and constructing The Turbines,[12] since it also engineered, manufactured, and shipped them, it is not protected for that activity.

GE responds to this argument by first stating that as Kellogg did not brief this issue, he has waived it and cannot raise it for the first time at oral argument. GE urges that had it known that this argument was going to be raised, it would have briefed the issue and been better prepared to address it. Second, GE cites this Court to a number of decisions that stand for the proposition that a person who can avail himself of the Statute of Repose does not lose that protection simply because he engaged in activity broader than that enumerated in the statute.

This Court agrees with both propositions.

[12] A position that Kellogg does not concede as he argues that The Turbines are not "improvements to real property" *ab initio*.

" 'It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal.* * *' *Branden v. Branden,* 8th Dist. Cuyahoga No. 91453, 2009-Ohio-866, ¶ 30. '[A]n issue raised during oral argument for the first time and not assigned as error in the appellate brief is, generally, untimely.* * *' *State v. Chambers,* 10th Dist Franklin No. 99AP–1308, 2000 WL 963890 (July 13, 2000), *7. 'Further, under App.R. 12(A), an appellate court is not required to consider issues not argued in the briefs.' *Id." Autumn Health Care of Cambridge, Inc. v. Todd,* 5th Dist. Guernsey No. 14 CA 16, 2015-Ohio-264, at ¶ 11.

With respect to the moving party raising a new argument in a reply brief, this has been characterized as "summary judgment by ambush." *Intl. Fid. Ins. Co. v. TC Architects, Inc.,* 9th Dist. Summit No. 23112, 2006–Ohio–4869, ¶ 11. Hence, when a new argument is presented in a reply brief, the non-moving party should move to strike the reply or be allowed to file a surreply. *Baker v. Coast to Coast Manpower, L.L. C.,* 3rd Dist. Hancock No. 5–11–36, 2012–Ohio–2840, ¶ 35.

It goes without saying that if a party cannot raise a new issue for the first time in a reply brief, they surely cannot do so for the first time at oral argument. As such, the multiple "hat" argument raised by Kellogg for the first time at oral argument is waived.

That said, even if the Court were to consider this issue on the merits, the argument is not well-taken. This Court agrees with the rationale enunciated by the court in the *Barile v. 3M, supra,* matter. The *Barile* court, relying on *Dziewiecki* (citations omitted), noted that ". . . when a defendant wears 'two hats,' — namely, as both the manufacturer of a standardized product and its installer according to a specific design for the real property — and the injury is attributable to both functions, the responsibility should be allocated between the two 'roles.' " In the *Barile* case, the court rejected this conclusion because the defendant in that case designed and constructed a ". . . forty-foot customized boiler built to Exxon's specifications . . . not a standardized product . . ." *Id.* (Emphasis added.)

Similarly, in the case at bar, GE designed, constructed, and installed custom-made steam turbines for The Facility. Under no stretch of the imagination could one conclude that The Turbines are "standardized products." As such, the fact that GE wore "two hats" or did more than design, plan, and/or supervise the construction of The Turbines is of no accord.

In its submission of post-hearing cases, Kellogg refers this Court to the matter *Jones v. A-Best Products,* 8th Dist. No. 81792, 2003-Ohio-6612. A review of *Jones* sheds no light on this issue. In *Jones,* the defendant ("Tasco") argued that it was not a supplier and thus, could not be strictly liable for "supplying" asbestos-containing products.

Instead, Tasco argued that it was simply providing "professional services" and as such, was not subject to strict liability (or negligence) for its conduct.

But *Jones* did not touch on the implications of RC 2305.131, the Statute of Repose, nor did it address the question of applicability, or inapplicability, of the Statute of Repose where the statute's protections cover some, but arguably not all, of the defendants conduct. Accordingly, *Jones* is inapposite to the facts at bar.

DECISION

The threshold issue before the Court for resolution of Kellogg's Objections to the Magistrate's Decision and GE's Motion For Summary Judgment is this: "Are The Turbines 'improvements to real property' such that Ohio's Statute of Repose for real property applies?" The only rational conclusion that this Court can reach is in the affirmative.

Consistent with decisions reached in other, multiple jurisdictions, including Iowa (*Harder*) and Illinois (*McSweeney*), involving GE steam turbines, The Turbines at issue are clearly improvements to real property.

Applying the *Brennaman* test, this Court finds, consistent with the Magistrate's Decision, and as a matter of law, the following:

1) The Turbines enhance the value of The Facility's real property because they are huge, complex, specially designed and manufactured multi-million dollar mechanical systems that are essential to The Facility's ultimate goal of producing electricity. When The Turbines are operational, The Facility can produce, transmit, and market electricity. Without proper functioning steam turbines, The Facility has no utility;[13]
2) The level of integration of The Turbines into The Facility is manifest. They are inter-connected to The Facility's generators, boilers, condensers, and pollution control equipment through miles of steam piping; they are affixed to huge concrete platforms or foundations, often referred to as "pedestals," they are constructed on-site; and, they remain in place for decades until the plant is decommissioned;
3) As noted, *supra,* The Turbines are clearly essential components to the operation of The Facility. They are part of The Facility's overall operational system that generates electricity, without which, would be impossible. Without the ability of The Turbines to convert steam produced from boilers into mechanical energy, the generators would not spin – if the generators do not spin, they do not

[13] No pun intended.

produce electricity – and, if The Facility cannot produce electricity, it has no purpose; and,

4) The Turbines are most certainly permanent. They have been in place at The Facility for over 50 years; they are enormous, complex, expensive, mechanical units affixed to huge, concrete foundations or pedestals; they are assembled on-site; they are firmly attached to other systems such as generators, boilers, condensers, pollution control equipment, and miles of piping; and, the removal or decommissioning of them would be a massive undertaking.

It cannot be logically or rationally argued that the Steam Turbines are anything other than improvements to real property – but, <u>that does not end the inquiry</u>.

WHERE IS THE ASBESTOS IN THIS CASE? ASSUMING THE TURBINES CONTAIN ASBESTOS IN SOME FORM, IS IT IN THE NATURE OF A PRODUCT SUCH THAT RC 2305.10 APPLIES OR HAVE THE ASBESTOS-CONTAINING PRODUCT(S) BEEN SO INTEGRATED OR ASSIMILATED AS COMPENENTS INTO THE TURBINES THAT THE ASBESTOS-CONTAINING MATERIALS HAVE LOST THEIR CHARACTER AS PRODUCTS AND ARE, IN ESSENCE, IMPROVEMENTS TO REAL PROPERTY THEMSELVES?

THE PRESENCE OF ASBESTOS

It appear to this Court a bit . . . odd, that neither party spent much time establishing the actual presence, of lack thereof, of asbestos in The Turbines. Perhaps this Court is revealing its lack of sophistication in asbestos litigation; perhaps it is telling that GE did not even raise as a defense that The Turbines do not contain any form of asbestos; perhaps it is universally accepted that GE manufactured steam turbines contain asbestos in some form. Regardless, it seems counter-intuitive that in an asbestos case, neither side conclusively demonstrates the presence, or lack thereof, of asbestos-containing products.

Regarding asbestos litigation, the Ninth District Court of Appeals has recently noted in an asbestos liability case, ". . . the plaintiff has the burden of proving exposure to asbestos that was manufactured, supplied, installed, or used by the defendant and that the product was a substantial factor in causing the plaintiff's injury. *Horton v. Harwick*, 73 Ohio St.3d 679 (1995), syllabus; R.C. 2307.96(B)." *Williams v. Goodyear Tire & Rubber Co.,* 9th Dist. Summit No. 28253, 2017-Ohio-4052, at ¶ 7.

That said, the Court is mindful that Kellogg testified, somewhat in passing, that he "believes" he was exposed to asbestos when he was a helper in the coal yard and had to attach "heat deflector[s]." He also alleges that he was exposed to asbestos from

"asbestos-containing blanket insulation," and "asbestos-containing block insulation." Amazingly, there is little collaboration or Civ. R 56(E) evidence to support these allegations, nor, as noted, does GE challenge them.

The Court notes that at page 19 of Kellogg's opposition brief, he references a portion of Skinner's deposition testimony that touches on the presence of asbestos in The Turbines:

> 21 Q Okay. Now, ***if*** there was asbestos on Unit 18 at some point, it would have had to – or it would have had to have been removed during a normal lifespan in repairs of the turbines; is that correct? (Emphasis added.)
>
> 4 A I don't know that. That would be a decision that would be made by the utility.
>
> 6 Q Well, I'm not saying General Electric did, but in the normal lifespan and repairs of a turbine, ***for instance***, some of the gaskets that were in the flanges were asbestos, and every time you open the flange, it's recommended you put a new gasket in there to avoid leaks, right? (Emphasis added.)
>
> 13 A Right.
>
> 14 Q So do you consider the asbestos components to a turbine to constitute a betterment to real property?
>
> 17 A Again –
>
> 18 Q It's okay. You can say you don't know.
>
> 19 A I'm not capable of answering that question.

In this exchange, the "questioner" is implying there *might* be asbestos in The Turbines, but this fact is never confirmed by Skinner. And, the final exchange is equally inconclusive.

At oral argument, the Court raised this issue (with no small amount of incredulity) and, in response, Kellogg provided the Court (post-hearing) with a number of cases that stand for the proposition that expert testimony is not necessary to establish the presence of asbestos in a product *if* the lay witness can testify as to the presence of asbestos at the work place on personal knowledge.

The seminal case on this issue is an Ohio Supreme Court decision, *Goldman v. Johns-Manville,* 33 Ohio St.3d 40 (1987). In *Goldman,* plaintiff's decedent worked in a bakery

for many years and was allegedly exposed to asbestos in a number of different products, including pipe insulation, ceiling board, oven lining, oven covering, wallboard, sheeting, gloves, and tape. The Supreme Court reviewed the sufficiency of the Affidavits and deposition testimony introduced by plaintiff in opposing the motions for summary judgment filed by multiple defendants.

In all situations, except one, the court rejected the witnesses' statements about the presence of asbestos because they were not made on personal knowledge. "Our review of the record convinces us that the evidence presented to the trial court was not sufficient, as a matter of law, to create an issue of material fact as to any product allegedly present at Sherlock, save one—asbestos tape." *Id.* The one witness who testified on personal knowledge of the presence of asbestos-containing tape was a lay witness – a maintenance man. "As to the tape, however, Rollman was able to identify the asbestos tape as coming from a Toledo distributor, Sussman Asbestos Co." *Id.* In addition, further evidence in the case established that defendant, Johns-Manville, did produce tape and that Sussman was a Manville distributor.

In a Fifth District case, *Olinger v. Pretty Products, Inc.,* 5th Dist. Ashland No. 96-CA-29, 1997 Ohio App. LEXIS 5345 (Nov. 7, 1997), citing *Goldman, supra,* the court noted, ". . . the Supreme Court did not reject evidence concerning the presence of asbestos because it was given by a lay witness, but rather rejected the testimony because it was not given as to personal knowledge as to the presence of asbestos." *Id.* In *Olinger,* the court found that a witness did have personal knowledge of asbestos found in the plant, "Jerry Baker had personal knowledge of asbestos in appellant's plant." *Id.*

And, in an Eighth District case, *Shesler v. Conrail,* 151 Ohio App.3d 462, 2003-Ohio-320, the court allowed the testimony of witnesses, both lay and expert, made on personal knowledge, to bolster appellees contention, ". . . that their injuries were caused by exposure to asbestos-containing products during their employment . . ." *Id.* at ¶ 4. Moreover, in discovery, defendant Conrail admitted that asbestos-containing products were used in its locomotives.

In another Eighth District case, *Shepard v. Grand Trunk W. R.R.,* 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853, the court allowed the testimony of plaintiff Shepard and a co-worker, Berger, to testify on personal knowledge about ". . . pipes on the locomotives wrapped in 'raggedy' asbestos insulation and asbestos 'piled-up' in a tool cage in the roundhouse. Berger, Shepard's co-worker, also testified about asbestos being out in the open." *Id.* at ¶ 39.

Finally, Kellogg points this court to a very recent Ninth District case, *Williams v. Goodyear Tire & Rubber Co., supra, reconsideration denied.* In *Williams,* the Ninth District reversed the trial court's grant of summary judgment in favor of defendant,

Akron Gasket & Packing Enterprises, finding that the testimony provided by plaintiff's co-worker was ". . . non-hearsay evidence that sets forth specific facts demonstrating that a genuine issue exists as to whether Akron Gasket supplied . . . [asbestos-containing] tape to Mr. Williams." *Id.* at ¶10. And, there was additional evidence regarding asbestos-containing products in the case where, "The testimony of the company owner from 2001 provided that . . . it did offer supplies of asbestos tape." *Id.* at ¶11.

It is obvious from *Goldman* and its progeny that a lay witness can testify about the presence of asbestos and/or asbestos-containing products in the workplace if the witness has personal knowledge of the asbestos and a proper foundation is laid as to *how* the witness possesses this knowledge.

In the case at bar, Kellogg testified that he "believes" he was exposed to asbestos when he was a helper in the coal yard and had to attach "heat deflector[s]." He also alleges that he was exposed to asbestos from "asbestos-containing blanket insulation," and "asbestos-containing block insulation." But these statements are not supported by Affidavit or other collaborating evidence; there is no foundation to establish *how he knows* that he was exposed to asbestos-containing products; nor is there any indication that these statements are made on Kellogg's "personal knowledge." As such, they are merely unverified assertions – admittedly unchallenged assertions, but unsubstantiated assertions nonetheless.

And, as noted, Skinner's deposition testimony sheds little light on this issue.

IF KELLOGG *WAS* EXPOSED TO ASBESTOS IN THE TURBINES, IN SOME FORM, WHAT WAS THE NATURE OF THAT EXPOSURE

As this Court observed, *supra,* if Kellogg was exposed to a "product" as defined by RC 2307.71(A)(12)(a), and that product retained its character as a product throughout its useful life, then RC 2305.10, the products liability, bodily injury statute of repose applies.

Conversely, if the asbestos containing materials, even if *initially* "products" are used, implemented, attached, affixed, or so integrated into an apparatus or mechanism, like The Turbines, such that what was once a product becomes so incorporated or assimilated into the apparatus or mechanism that it loses its character as a product and instead becomes materially concatenate with the apparatus or mechanism or an essential, wholly integrated component thereto, then RC 2305.131, the Statute of Repose for improvements to real property is applicable. In other words, if items that were at one time products are so assimilated or incorporated into The Turbines that they lose their character as "products," then the products themselves are an improvement to real property.

As there is a paucity of testimony or evidence as to what products, items, implements, components, or materials were actually part of, or attendant to The Turbines, the Court cannot answer this question, properly rule on Kellogg's Objections to the Magistrate's Decision, nor properly rule on GE's dispositive Motion.

CONCLUSION

After review of the pleadings and extensive briefing, the sole Affidavit, the other Civ. R. 56(E) materials, consideration of the oral arguments of counsel and perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties, the Court finds the following:

1. **The Magistrate's Decision granting GE summary judgment is hereby vacated in part and to that extent, Plaintiff's Objections are sustained;**

2. **The Magistrate's Decision finding that GE's steam turbines are improvements to real property is hereby confirmed and adopted and to that extent, Plaintiff's Objections are over-ruled;**

Accordingly, the Court rules *de novo* as follows:

3. **GE's Motion For Summary Judgment is hereby GRANTED in part, and held in abeyance in part. To the extent that GE seeks a determination that that its steam turbines (The Turbines) are improvements to real property, the Court agrees. The Turbines at issue in this case are improvements to real property.**

4. **The following issues remain unresolved and require further briefing and/or argument in order to fully resolve GE's dispositive motion:**

   A. **Was Kellogg actually exposed to any asbestos-containing products contained within The Turbines?**

   B. **If so, what was the nature of those products? Did they at all times during their utility retain their character as products, or, were they at some point so assimilated or incorporated into The Turbines that they lost their character as products and became improvements to real property themselves?**

Accordingly, it is hereby ordered that this matter is set for further oral hearing before Judge Cook to address the two issues posited above. The parties are granted leave to brief these issues, should they so desire, but any briefs are ordered limited to five (5) pages, excluding exhibits. The briefs may include additional Civ. R 56(E) material not already made part of the record. And, it would be most welcome, of course, should the parties wish to enter into any stipulations relative to the above.

IT IS THEREFORE ORDERED, that this matter is set for further Oral Hearing on **Tuesday, December 12, 2017 @ 1:45 pm.** Briefs, if any, to be filed with the Court no later than December 5, 2017, if any. Briefs to be served directly on the Court *via* E-Mail to: jblaszak@loraincounty.us.

IT IS SO ORDERED.

JUDGE D. Chris Cook