

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: October 10, 2014)

MAUREEN GALLAGHER, Executor for the :
ESTATE of DENNIS GALLAGHER, by her :
agent, THE FEDERAL-MOGUL ASBESTOS :
PERSONAL INJURY TRUST, :
Plaintiff, :

VS. :

AMERICAN INSULATED WIRE CORP., et al :
Defendants. :

C.A. No. PC 11-5269

and

CONSTANCE PODEDWORN, Executrix for :
the ESTATE of Joseph PODEDWORN, :
by her agent, THE FEDERAL-MOGUL :
ASBESTOS PERSONAL INJURY TRUST, :
Plaintiff, :

VS. :

AMERICAN INSULATED WIRE CORP., et al :
Defendants. :

C.A. No. PC 11-5268

DECISION

GIBNEY, P.J. The Plaintiffs, Maureen Gallagher, Executor for the Estate of Dennis Gallagher, by her agent, The Federal-Mogul Asbestos Personal Injury Trust (C.A. No. PC 11-5269) and Constance Podedworn, Executrix for the Estate of Joseph Podedworn, by her agent, The Federal-Mogul Asbestos Personal Injury Trust (C.A. No. PC 11-5268), by and through their attorneys of record, filed the above-entitled, asbestos-related negligence claims against a number of defendants, including Turner & Knewell (Defendants). The Plaintiffs move to consolidate the two cases pursuant to Super. R. Civ. P. 42 (Rule 42). Jurisdiction is pursuant to G.L. 1956 § 8-2-14. For the reasons set forth below, Plaintiffs’ Motion to Consolidate Cases for Trial is granted.

I

Facts and Travel

Joseph Podedworny was employed by Narragansett Electric from 1952 to November 1, 1984 in a variety of positions, including janitor, helper, assistant boiler operator, boiler operator, turbine operator, and engineer. Mr. Podedworny was diagnosed with malignant mesothelioma on September 17, 2002. On June 29, 2003, Mr. Podedworny died at the age of eighty-three.

Similarly, Dennis Gallagher was employed as a welder in the maintenance department at Narragansett Electric from October 29, 1984 to April 7, 2004. On April 8, 2004, Mr. Gallagher was diagnosed with malignant mesothelioma. On July 13, 2005, he died at the age of fifty-eight. Unlike Mr. Podedworny, Mr. Gallagher testified that he was exposed to asbestos-containing products prior to his work at Narragansett Electric. More specifically, he testified that he was exposed to asbestos-containing products as a welder at Electric Boat in Groton, Connecticut from 1965 to 1971 and as a supervisor, welder, and planner at Electric Boat in Quonset, Rhode Island from April 1974 to October 1984.

Mr. Podedworny received treatment in Rhode Island from Drs. Frank Fallon and John Przygoda. Mr. Gallagher received treatment for his medical condition in Rhode Island and Massachusetts from Drs. Frank Fraioli, John Pella, R. Eric Lilly, and David J. Sugarbaker. During the course of Mr. Gallagher's treatment, Dr. Sugarbaker performed an extrapleural pneumonectomy.

Plaintiffs both allege that they were exposed to Defendants' asbestos-containing product, Limpet, which Plaintiffs contend was sprayed on the turbines at Narragansett Electric. Both Plaintiffs worked in the same Narragansett Electric facility and were allegedly exposed to asbestos in the same manner.

II

Discussion

Rule 42(a) allows the consolidation of actions that involve “common questions of law and fact.” Rule 42(a). However, it is important to remember “that consolidation is allowed to avoid unnecessary costs or delay and does not result in a merger of the cases.” Martin v. Lilly, 505 A.2d 1156, 1159 (R.I. 1986). In Giguere v. Yellow Cab Co., the Supreme Court of Rhode Island observed:

“the trial court has inherent power to order that several cases pending before it be tried together where they are of the same nature, arise from the same act or transaction, involve the same or like issues, depend substantially upon the same evidence, even though it may vary in its details in fixing responsibility, and where such a trial will not prejudice the substantial rights of any party.” Giguere v. Yellow Cab Co., 59 R.I. 248, 251, 195 A. 214, 216 (1937); see also Rich v. Rich, 94 R.I. 220, 222, 179 A.2d 498, 500 (1962); Sch. Comm. of Cranston v. Bergin-Andrews, 984 A.2d 629, 647 (R.I. 2009).

In addition, Rule 42(a) is almost identical to Rule 42(a) of the Federal Rules of Civil Procedure. The Rhode Island Supreme Court has “repeatedly held that in situations where our procedural rule is identical to the federal counterpart and our own case law is sparse in that area, we will look for guidance in the precedents of the federal courts.” Kirios v. Arsenault, 632 A.2d 15, 16-17 (R.I. 1993); see also Kelvey v. Coughlin, 625 A.2d 775, 776 (R.I. 1993) (citing Cabral v. Arruda, 556 A.2d 47, 49 (R.I. 1989)); Smith v. Johns–Manville Corp., 489 A.2d 336, 339 (R.I. 1985). Here, it is even more appropriate to look to the federal courts for guidance on consolidating asbestos-related litigation because “the consolidation of mass toxic tort cases has created its own body of law.” In re Asbestos Litig., 1998 WL 230950, at *4 (S.D.N.Y. May 8, 1998).

In Johnson v. Celotex Corp., the Second Circuit directly addressed the consolidation of asbestos-related personal injury cases. Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990). In its analysis, the court adopted a set of eight factors which the Southern and Eastern Districts of New York had created as a guideline “in determining whether to consolidate asbestos exposure cases.” Id.; see also In re Asbestos Litig., 1998 WL 230950 (analyzing the eight factors). The eight criteria include:

“(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged” Johnson, 899 F.2d at 1285. See also In re Joint E. and S. Dists. Asbestos Litig., 125 F.R.D. 60, 64 (E.D.N.Y./S.D.N.Y.1989).

In addition to these specific factors, courts must also consider that, although judicial economy favors consolidation, “the discretion to consolidate is not unfettered. Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.” Johnson, 899 F.2d at 1285.

In their motion, Defendants assert that the cases should not be consolidated because they do not involve common issues of fact or law. Defendants stress that Mr. Gallagher and Mr. Podedworny have different exposure histories and did not work at Narragansett Electric at the same time. Furthermore, Defendants contend that consolidation would confuse the jury because Defendants would have to call additional witnesses unique to each case. Finally, Defendants claim that a consolidated trial—where two plaintiffs are suing the same defendant—is prejudicial because the jury may be led to believe that there is ‘truth in numbers.’

In support of their Motion, Plaintiffs assert that Mr. Gallagher and Mr. Podedworny worked at the same facility, were exposed in the same manner, and the exposure occurred as a

result of Limpet being sprayed on the same turbines. Plaintiffs allege the same injury—contracting malignant mesothelioma as a result of exposure to asbestos—as well as the same legal claims. Lastly, Plaintiffs intend to call expert witnesses common to both cases.

III

The Relevant Factors Applied

Applying the eight-factor test, as set forth above, reveals that consolidation for trial of the instant cases is warranted.

A

Common Worksite

Both Gallagher and Podedworny worked at the same Narragansett Electric facility. Prior to joining Narragansett Electric, Gallagher did spend a number of years working at Electric Boat in Groton and Quonset; however, there is no indication that a jury would be incapable of assessing his previous exposure. In In re Asbestos Litig., the federal district court addressed a similar issue where five plaintiffs alleging asbestos-related injuries made a motion to consolidate. The various plaintiffs all worked in different shipyards and construction sites within New York City, and the court acknowledged that “to some degree the divergence in worksites between the five [p]laintiffs weigh[ed] against consolidation.” In re Asbestos Litig., 1998 WL 230950, at *4. However, the court distinguished the facts from the Malcolm v. Nat’l Gypsum Co. case where the record contained evidence of over 250 worksites for forty-eight plaintiffs. Malcolm v. Nat’l Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993). The court reasoned,

“the fact that individualized evidence will need to be presented fails to establish that a properly instructed jury would be unable to evaluate the working conditions and the exposure at the jobsites of different plaintiffs less fairly than it would were it required only to judge the multiple worksites of a single plaintiff at a single trial.” In re Asbestos Litig., 1998 WL 230950, at *4.

Ultimately, the court found a jury to be capable of fairly assessing the case, even in light of the five plaintiffs having worked at similar, but not identical worksites.

In Malcolm, the trial judge “consolidated over 600 cases in which each plaintiff had been exposed to asbestos in one or more of over 40 power-generating stations . . . in New York State.” In re Asbestos Litig., 1998 WL 230950, at *2 (citing Malcolm, 995 F.2d at 348). The Court of Appeals remanded the case based upon improper consolidation because, “under the unique circumstances of this case, there [was] an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence.” Malcolm, 995 F.2d at 352. However, the Second Circuit was explicit that its ruling did not change the governing standards of consolidation, but rather was confined to the unique facts of the case. See Malcolm, 995 F.2d at 354 (“Our holding is narrow and amounts to little more than a caution that it is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process.”).

In comparison to In re Asbestos Litig., the facts at bar are even better suited for consolidation. See In re Asbestos Litig., 1998 WL 230950, at *4. Here, the two Plaintiffs both spent significant portions of their working lives in the same Narragansett Electric facility. Unlike Malcolm, this Court is consolidating only two cases and, as a result, the threat of confusion is significantly reduced. Finally, although Gallagher’s case will involve testimony about previous exposure at other shipyards, there is even less potential for jury confusion than in In re Asbestos Litig. In In re Asbestos Litig., the jury heard testimony regarding five different worksites. Here, the jury need only consider the previous exposure of Mr. Gallagher at two jobsites. See In re Asbestos Litig., 1998 WL 230950, at *4. Like the court in In re Asbestos

Litig., this Court concludes “the worksites in the instant case pose nowhere near the potential for jury confusion that those in Malcolm did.” In re Asbestos Litig., 1998 WL 230950, at *4.

B

Similar Occupation

In Johnson, the Second Circuit found that, although the plaintiffs did not work in identical occupations, they had similar occupations “to the extent that both workers were exposed to asbestos in a bystander capacity (they worked in trades that did not involve direct handling of asbestos products).” Johnson, 899 F.2d at 1285. Like the plaintiffs in Johnson, Gallagher and Podedworny did not work identical jobs; however, both were exposed to asbestos in a bystander capacity when they worked at the Narragansett Electric facility. Id.

In In re Asbestos Litig., the court went one step further and consolidated cases which involved both bystander and direct exposure to asbestos. See In re Asbestos Litig., 1998 WL 230950, at *4. The plaintiffs included a fireman, cable-splicer, boiler-tender, welder, and gas station attendant. Id. While some plaintiffs alleged only bystander exposure, others asserted claims based upon direct exposure. Nevertheless, the court found, “although there are differences in the occupations of the five [p]laintiffs, all, but [one], were tradesmen, who worked with or around products containing asbestos.” Id. While the court did acknowledge the differences among the plaintiffs’ occupations, it concluded that the “shared testimony as to the airborne fibers from the asbestos-containing products to which the [p]laintiffs were exposed should not alter significantly from case to case.” Id.

Gallagher and Podedworny did not work in the same profession; however, both were allegedly exposed to asbestos fibers while working at Narragansett Electric. The fact that they performed different tasks is immaterial with respect to the nature of their exposure. Both men

worked in the same building and allegedly inhaled the asbestos that had been sprayed on the turbines.

C

Similar Time of Exposure

In In re Asbestos Litig., “the period which the various [plaintiffs] were exposed to asbestos products span[ned] from the 1940’s through the 1980’s, with substantial overlap.” In re Asbestos Litig., 1998 WL 230950, at *4. Similarly, in Johnson, “Johnson’s period of exposure was from 1942 to 1945 while Higgins’ exposure was from approximately 1946 to 1966.” Johnson, 899 F.2d at 1285; see also In re Joint E. & S. Dists. Asbestos Litig., 125 F.R.D. at 65 (allowing consolidation of five plaintiffs whose exposure spanned from 1929 to 1987 with substantial overlap). Historically, defendants have raised concerns that juries will be confused by different work histories and varying exposure periods. In re Joint E. & S. Dists. Asbestos Litig., 125 F.R.D. at 64. (holding that juries are capable of hearing complex testimony). Nevertheless, courts have routinely acknowledged such concerns, “but found that juries often consider complex cases competently and that the trial judge could take precautionary measures to reduce confusion and prejudice.” Id.

This Court notes that Podedworny worked at Narragansett Electric from 1952 to 1984, while Gallagher worked from 1984 to 2004. Indeed, Plaintiffs may have been employed simultaneously by Narragansett Electric for a matter of days in 1984. However, in light of case precedent, this Court does not see how consideration of a span of fifty years would cause undue confusion.

D

Type of Disease

Both Plaintiffs were diagnosed with and died as a result of malignant mesothelioma. Although their courses of treatment were different—Mr. Gallagher underwent an extrapleural pneumonectomy—there is no evidence that a jury could not fairly assess or comprehend such testimony.

E

Whether Plaintiffs are Living or Deceased

Both Plaintiffs are deceased.

F

Status of Discovery

There may be further need for limited discovery. Otherwise, the cases are essentially trial ready.

G

Commonality of Plaintiff's Counsel

Both Plaintiffs are represented by The Federal-Mogul Asbestos Personal Injury Trust.

IV

Conclusion

This Court finds that efficiency, judicial economy, and preservation of resources will be achieved by consolidating these cases. Furthermore, this Court finds that consolidation is warranted because common issues of fact and law, as described by applying the factors above, are present in the instant cases. Some factors—such as type of occupation and time of exposure—will require appropriate instructions to prevent confusion and prejudice. Thus, the

Court concludes consolidation is appropriate for the reasons set forth above and Plaintiffs' Motion is granted.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Gallagher v. American Insulated Wire Corp., et al.**
and
Podedworny v. American Insulated Wire Corp., et al.

CASE NOS: **PC 11-5269 and PC 11-5268**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **October 10, 2014**

JUSTICE/MAGISTRATE: **Gibney, P.J.**

ATTORNEYS:

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