STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: March 5, 2014]

LAVERNE E. HOSTETTER AND ELIZA HOSTETTER	:	
v.	:	**C.A. No. PC 12-0650**
AIR & LIQUID SYSTEMS CORPORATION, et al.	:	

DECISION

GIBNEY, P.J. The late Laverne E. Hostetter (Hostetter) and his wife Eliza Hostetter (Plaintiff) filed this asbestos suit against a number of defendants, including ArvinMeritor, Inc. (Defendant). Defendant moves for summary judgment pursuant to Super. R. Civ. P. 56 (Rule 56), and Plaintiff objects. For the reasons set forth below, Defendant's Motion for Summary Judgment is granted.

I

Facts and Travel

Asserting various theories of liability—including negligence, products liability, strict liability, breach of implied warranty of merchantability, and loss of consortium—Plaintiff brings this action on behalf of herself and her late husband, Hostetter, against Defendant, an automobile brakes manufacturer. Hostetter died of malignant pleural mesothelioma, which Plaintiff claims he developed as a result of exposure to Defendant's products while he was working as a heavy equipment mechanic. The evidence on the record shows that Hostetter performed and worked nearby others who were performing tasks that resulted in asbestos fibers being released into the ambient air. In particular, Hostetter's deposition testimony suggests that he breathed in asbestos from brake dust while replacing brakes and using compressed air to clean out brake drums.

Moreover, Hostetter's testimony indicates that while working as a heavy equipment mechanic, he routinely breathed in asbestos-containing dust created by his coworkers working nearby. Hostetter was unable, however, to state with certainty that he ever came into contact with Defendant's asbestos-containing products, in particular, as opposed to other manufacturers' products.

Given Hostetter's inability to recall whether he ever worked with or around Defendant's asbestos-containing products, Defendant argues that Plaintiff lacks sufficient evidence to meet her burden of proof as to causation and that Defendant is, therefore, entitled to summary judgment. As support for this argument, Defendant asserts that Plaintiff has presented no evidence—witness testimony or otherwise—establishing by a preponderance of the evidence that Hostetter ever came into contact with asbestos from products manufactured, supplied, or sold by Defendant. As a result, if the instant matter were to proceed to trial, Defendant insists that the factfinder would be unable to find for Plaintiff without making unsubstantiated, impermissible inferences. Plaintiff, on the other hand, maintains that she has put forth sufficient evidence to show that it is more likely than not that Hostetter was exposed to asbestos from Defendant's products, thereby creating a material question of fact for jury determination.

II

Standard of Review

Pursuant to Rule 56(c), "summary judgment is appropriate only when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). In deciding if the parties dispute any issues of material fact, the Court must neither

"pass[] on the weight and credibility of the evidence" nor "determine issues of fact." Palazzo v. Big G Supermarkets, Inc., 110 R.I. 242, 245, 292 A.2d 235, 237 (1972). Rather, the Court's role in ruling on a motion for summary judgment is "only [to] determine whether there are any issues of fact to be resolved" and "'whether as a matter of law one party is entitled to a judgment.'" Id. (quoting Warren Ed. Ass'n v. Lapan, 103 R.I. 163, 168, 235 A.2d 866, 870 (1967)).

Once a summary judgment motion is made, "[t]he burden rests with the nonmoving party 'to prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Mut. Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 323 (R.I. 2012) (quoting Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011)). Thus, "by affidavits or otherwise, [opposing parties] have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). "[A] litigant cannot avoid summary judgment by merely posing factual possibilities without submitting admissible evidence thereof." Nichols v. R.R. Beaufort & Associates, Inc., 727 A.2d 174, 177 (R.I. 1999). Accordingly, in order to survive a summary judgment motion as to a particular claim, the plaintiff must "produce evidence that would establish a prima facie case for [that] claim." DiBattista v. State, 808 A.2d 1081, 1089 (R.I. 2002). Conversely, summary judgment is proper if the plaintiff cannot set forth a prima facie case. Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 430 (R.I. 2001).

III

Analysis

In support of its summary judgment motion, Defendant argues that Plaintiff cannot meet her burden of proof to show that Defendant was the cause-in-fact of her claimed injuries. Defendant correctly points out that for each of her theories of liability, Rhode Island law requires

Plaintiff to establish that Defendant's asbestos-containing products caused the injuries for which she seeks to recover. See Clift v. Vose Hardware, Inc., 848 A.2d 1130, 1132 (R.I. 2004) (noting that "'a plaintiff in a products liability case bears the burden of proving by a preponderance of evidence that the defendant caused the harm that is the subject of the litigation'") (quoting 1 Louis R. Frumer & Melvin I. Friedman, Products Liability § 3.04[1] at 3-46 to 3-48 (2002)); Soares v. Ann & Hope of Rhode Island, Inc., 637 A.2d 339, 353 (R.I. 1994) (noting that "a cause of action for loss of consortium . . . depends on the success of the underlying tort claim"); Jenard v. Halpin, 567 A.2d 368, 370 (R.I. 1989) (noting that "in order to gain recovery in a negligence action, a plaintiff must establish [inter alia] causation between the [defendant's] conduct and the resulting injury"); Thomas v. Amway Corp., 488 A.2d 716, 719, 722 (R.I. 1985) (holding that the plaintiff has the burden on claims in strict liability and breach of implied warranty of merchantability to show a "causal nexus" between the allegedly defective product and the claimed injury). Defendant contends that Plaintiff cannot satisfy this causation standard because she has not put forth any evidence that establishes by a preponderance of the evidence that Hostetter was at any time exposed to Defendant's asbestos-containing products. In particular, Defendant contends that neither Hostetter's deposition testimony nor his responses to discovery requests contain any direct assertions that Hostetter was exposed to asbestos from Defendant's products. Defendant further claims that Plaintiff's other product identification evidence falls far short of the preponderance of the evidence standard, as it shows only that Hostetter might have been exposed to Defendant's asbestos-containing products.

1

Plaintiff's Evidentiary Showing

Plaintiff does not dispute that Hostetter failed to specifically identify Defendant's products when testifying as to his asbestos exposure. Nonetheless, Plaintiff maintains that she can satisfy her evidentiary burden with Hostetter's deposition testimony and documents produced during discovery. According to Plaintiff, said testimony and documents show that for nearly the entire decade of the 1970s, Hostetter worked as a mechanic on trucks manufactured by Mack Trucks, Inc. (Mack) and Ford Motor Company (Ford). Hostetter Dep. at 98-99, 371, 690-91, Mar. 29, 2012; Hostetter SSA Statement at 6-7. Moreover, while working as a mechanic, Hostetter was routinely exposed to dust kicked up when he and his coworkers inspected the trucks' brakes, sanded down brake linings, and blew out dust from the trucks' brake drums and assemblies. Hostetter Dep. at 691, 694, 724-25, 768-69, 912-13, May 8, 2012. In keeping with his employers' policies, Hostetter and his coworkers repaired truck brakes with replacement parts supplied by the truck manufacturer, meaning that they regularly repaired the brakes on Mack trucks with replacement parts supplied by Mack and the brakes on Ford trucks with replacement parts supplied by Ford. Id. at 916. Additionally, Defendant was one of four suppliers of front and rear air brakes for Ford's medium and heavy trucks during the 1970s, and Defendant was one of at least two suppliers of brake parts for Mack during the same timeframe.[1]

[1] In addition, Plaintiff submits a former Mack employee's deposition testimony from a different lawsuit, filed by a different plaintiff against Defendant and others. Therein, the deponent testified that Mack "used to make [its] own brake [sic], brake shoes, brake assemblies," but that Mack "phased that out probably around '71 or so in favor of Rockwell, now ArvinMeritor, brakes, which were made standard." Victor Krondstadt Deposition, Crowley v. Borg-Warner Morse Tec, et al., No: L-2524-08 (N.J. Super. Ct.) at 80. Assuming, arguendo, that this testimony tends to prove that Defendant supplied all or nearly all brakes and brake replacement parts for the trucks on which Hostetter worked, the Court, nevertheless, cannot consider this testimony in ruling on the instant summary judgment motion because it is inadmissible hearsay. See Rotelli v. Catanzaro, 686 A.2d 91, 93 (R.I. 1996) (explaining that summary judgment is

Ford Suppliers List at 2; Mack's Resp. to Pl.'s Req. for Prod. Plaintiff also submits evidence demonstrating that Defendant manufactured its brake replacement parts with asbestos during the time period relevant to this suit. Rockwell Letter to U.S. E.P.A., Mar. 18, 1985.

2

Sufficiency of Plaintiff's Evidence Under the Summary Judgment Standard

Based on the evidence above, Plaintiff argues that summary judgment should be denied because a factfinder could reasonably infer that it is more likely than not that Hostetter worked with and around Defendant's asbestos-containing products during his years as a mechanic. Defendant, however, counters that no reasonable factfinder could permissibly make such an inference. Specifically, Defendant contends that Plaintiff is attempting to base her case for causation on a flawed "pyramid of inferences," i.e., that Plaintiff's evidence requires the factfinder to draw a primary inference that Hostetter was exposed to Defendant's products, then base an inference of causation on that primary inference. Mead v. Papa Razzi, 899 A.2d 437, 441, n.3 (R.I. 2006).

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appropriate when, "after reviewing the admissible evidence in the light most favorable to the nonmoving party, [the Court] conclude[s] that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law") (emphasis added). The Rhode Island Rules of Evidence do not exclude from evidence an out-of-court statement made by a declarant who is unavailable to testify at trial when such statement was "testimony . . . in a deposition . . . if the party against whom the testimony is now offered . . . had an opportunity to develop the testimony by direct, cross, or redirect examination." R.I. R. Evid. 804(b)(1). "The burden of proof on the issue of the unavailability of witnesses rests with the proponent of the evidence," which, in this case, is Plaintiff. State v. Hannagan, 473 A.2d 291, 293 (R.I. 1984). Yet, Plaintiff has made no such showing of declarant unavailability, and, as a result, the deposition testimony is inadmissible and therefore not "competent evidence" on which this Court may base a finding of "a disputed issue of material fact." Hill, 11 A.3d at 113; see also Schindler v. Seiler, 474 F.3d 1008, 1012 (7th Cir. 2007) (finding that the plaintiff was unable to meet his burden of proof on summary judgment with testimonial evidence that was hearsay not subject to any exception); Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1004 (9th Cir. 2002) (holding that out-of-court statements that would be admissible if the declarant were unavailable could not be considered in opposition to a motion for summary judgment where the party opposing summary judgment made no showing as to why the declarant was unavailable to testify).

Indeed, to find that Defendant was the cause-in-fact of Plaintiff's claimed injuries, the factfinder would be required to first infer that Defendant's asbestos-containing products were present in Hostetter's workplaces. Then, the factfinder would be required to infer, based on this first inference, that Defendant's asbestos-containing products caused Hostetter's mesothelioma. Our Supreme Court has ruled that such "pyramiding of inferences" may support a jury verdict when the second inference is based on a primary inference that "is the only reasonable one to be drawn from the underlying facts." In re Derek, 448 A.2d 765, 768 (R.I. 1982); see also Mead, 899 A.2d at 441 (holding "that a pyramid of inferences must be rejected when 'the facts from which [the primary inference] is drawn are susceptible of another reasonable inference'") (quoting Waldman v. Shipyard Marina, Inc., 102 R.I. 366, 374, 230 A.2d 841, 845 (1967)); Carnevale v. Smith, 122 R.I. 218, 225, 404 A.2d 836, 841 (1979) (explaining that "if a plaintiff intends to meet its burden of proof by [inference] pyramiding, the second or ultimate inference drawn by the factfinder is permissible only if the first or prior inference has been established to the exclusion of other reasonable inferences").

Accordingly, in ruling on the instant summary judgment motion, the question for this Court is whether a reasonable jury could make the inferences required in order to find by a preponderance of the evidence that Defendant's products caused Hostetter's injuries. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (holding that, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden"); see also Riley v. Stone, 900 A.2d 1087, 1095 (R.I. 2006) (noting that the plaintiff's evidentiary burden in negligence actions is a preponderance of the evidence). In carrying out this analysis, evidence put forward by Plaintiff, as the nonmoving party, "is to be believed, and all justifiable inferences are to be drawn in [her] favor." Anderson,

477 U.S. at 255; see also Sharkey v. Prescott, 19 A.3d 62, 68 (R.I. 2011) (accepting the assertions in the nonmoving party's affidavit as true when ruling on a motion for summary judgment). Bearing in mind, therefore, that the summary judgment standard tilts in favor of the nonmoving party and that "[t]he issue of causation is almost always a question for the jury," this Court nonetheless finds that the primary inference on which a factfinder must base the ultimate inference of causation is not sufficiently certain to support Plaintiff's causation argument by a preponderance of the evidence. Hill v. State, 121 R.I. 353, 355, 398 A.2d 1130, 1131 (1979).

Accepting the facts presented in Plaintiff's evidence as true, this Court is unable to infer "to the exclusion of other reasonable inferences" that Hostetter came into contact with Defendant's asbestos-containing products. Carnevale, 122 R.I. at 225, 404 A.2d at 841. That Plaintiff provides only circumstantial, rather than direct, evidence of causation is not fatal to her case. See Clift, 848 A.2d at 1132 (holding that "circumstantial evidence may be used to establish the identity of the manufacturer or the seller of a defective product"). Yet, in order to survive Defendant's summary judgment motion, Plaintiff's circumstantial evidence "'must establish that it is reasonably probable, not merely possible, that the [D]efendant was the source of the offending product.'" Id. (quoting Frumer & Friedman at 3-50 to 3-50.1). Plaintiff's evidence, however, establishes only that Defendant was one of four brake suppliers for the Ford trucks on which Hostetter worked and one of at least two suppliers for the Mack trucks. See Ford Suppliers List at 2; Mack's Resp. to Pl.'s Req. for Prod. The facts in evidence, therefore, establish only that it is "merely possible that [D]efendant was the source" of the product that caused Hostetter's mesothelioma. Id. In fact, Plaintiff's evidence is "susceptible of another reasonable inference" besides the inference that Hostetter was exposed to Defendant's asbestos-containing brake products, namely, that Hostetter was never exposed to the Defendant's products

but was instead exposed only to the products of the other Mack and Ford suppliers. Waldman, 102 R.I. at 374, 230 A.2d at 845. Consequently, the inference that Defendant's products caused Hostetter's mesothelioma "must be rejected as being without probative force." Id.; see also In re Derek, 448 A.2d at 768 (holding that when the primary inference is not the only inference to be reasonably drawn from the evidence, "[n]o further inferences . . . are, therefore, permissible").

"The trial court should not take [the question of causation] from the jury unless its findings would be based on speculation or conjecture." Hill, 121 R.I. at 355-56, 398 A.2d at 1131. In the case at bar, the evidence supporting the first inference the Plaintiff invites the factfinder to make—that Hostetter was exposed to asbestos from Defendant's products—does not "necessarily exclude[] the drawing of any other reasonable inference." Waldman, 102 R.I. at 374, 230 A.2d at 846. As a result, "the ultimate conclusion" the Plaintiff hopes the factfinder will reach—that Defendant's products caused Hostetter's mesothelioma—"would rest on no more than conjecture and surmise." Carnevale, 122 R.I. at 225, 404 A.2d at 841. Yet, "'[m]ere speculation, guess, or conjecture is insufficient to establish identification'" in a negligence or products liability case. Clift, 848 A.2d at 1132 (quoting Frumer & Friedman at 3-50 to 3-50.1). Consequently, Plaintiff's evidence provides an insufficient basis on which a reasonable factfinder could conclude that Defendant's products caused the injuries for which Plaintiff seeks to recover. Because Plaintiff is unable to "establish a prima facie case . . . as a matter of law, . . . summary judgment [is] proper." Kelley, 768 A.2d at 430.

IV

Conclusion

After reviewing the materials submitted by both parties in the light most favorable to the Plaintiff, this Court grants Defendant's Motion for Summary Judgment on the ground that there

are no issues of material fact because, as a matter of law, Plaintiff is unable to establish the causation element of her prima facie case against Defendant. As a result, Defendant is entitled to judgment as a matter of law. Counsel shall prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Laverne E. Hostetter and Eliza Hostetter v. Air & Liquid Systems Corporation, et al.
CASE NO:	C.A. No. PC 12-0650
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 5, 2014
JUSTICE/MAGISTRATE:	Gibney, P.J.
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