

R.I. in re : Asbestos Litig. Evelyn Burdick

Superior Court of Rhode Island, Providence

March 16, 2021, Filed

C.A. NO. PC-2011-3431

Reporter

2021 R.I. Super. LEXIS 27 *

STATE OF RHODE ISLAND IN RE: **ASBESTOS**
LITIGATION EVELYN BURDICK and RONALD
BURDICK as Co- Administrators of the Estate of
WALTER BURDICK and EVELYN BURDICK,
Individually Recognized as Surviving Spouse, Plaintiffs,
v. ALCO VALVES, ET AL. Defendants.

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Core Terms

valves, **asbestos**, exposed, summary judgment, **asbestos**-containing, genuine, Steam, issue of material fact, gaskets, packing, nonmoving party, products

Opinion

[*1] DECISION

GIBNEY, P.J. Defendant NIBCO, Inc. (NIBCO) moves for summary judgment in this action brought by Ronald Burdick and Evelyn Burdick as Co-Administrators of the Estate of Walter Burdick and Evelyn Burdick, individually as surviving spouse (Plaintiffs). NIBCO argues that there are no genuine issues of material fact remaining for trial as Plaintiffs cannot demonstrate that

the decedent, Walter Burdick (Decedent), was exposed to an **asbestos**-containing NIBCO product. Plaintiffs object to the within motion. This Court exercises jurisdiction pursuant to [Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure](#).

I

Facts and Travel

On June 17, 2011, Plaintiffs filed a Complaint, alleging that Decedent died as a result of exposure to **asbestos** or **asbestos**-containing products sold, manufactured, or distributed by the

named defendants, including NIBCO, while he worked at multiple worksites in Pennsylvania and New Jersey. (Seventh Am. Compl. ¶ 5.) Decedent worked at various steam plants and construction sites beginning in the mid-1940s as a laborer, mechanic, maintenance man, boiler operator, pipefitter, machinist, and welder. *Id.* Plaintiffs allege in their Complaint that NIBCO knew that its **asbestos**-containing products were inherently dangerous to those [*2] who used, handled, or came in contact with these products but nevertheless failed to provide adequate warnings and information about these dangers. *Id.* ¶¶ 10-11. Thus, Plaintiffs claim that NIBCO breached its duty of reasonable care and warranties of merchantability and implied fitness to Decedent. *Id.*

¶¶ 13-14. Evelyn Burdick also claims loss of consortium as surviving spouse. *Id.* ¶ 20.

During discovery, NIBCO deposed Decedent, who testified to having worked at Scranton Steam Heat Company from around 1956 to 1972. (Def.'s Mem. Supp. Mot. Summ. J. (Def.'s

Mem.) 2, citing Ex. 2, Burdick Dep. 99-100, 113-115.) Decedent testified that during his time with Scranton Steam Heat Company, he installed new valves, some which were manufactured by NIBCO and NIBCO-Scott. *Id.*, citing Ex. 2, Burdick Dep. 130-132, 145, 283-84.

Plaintiffs contend that these valves contained **asbestos** and proximately caused Decedent's mesothelioma.

On May 7, 2013, NIBCO moved for summary judgment, contending that Plaintiffs had failed to produce evidence that Decedent was exposed to any **asbestos**-containing product manufactured, sold, or distributed by NIBCO. In response, Plaintiffs argued that genuine issues of fact existed [*3] regarding Decedent's exposure to NIBCO **asbestos**-containing valves, and that, accordingly, summary judgment was precluded. This Court heard oral arguments on February 19, 2020 and now issues a decision.

2

II

Standard of Review

It is well settled that "[s]ummary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously." [*Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390-91 \(R.I. 2008\)](#) (quoting [*Ardente v. Horan*, 117 R.I. 254, 256-57, 366 A.2d 162, 164 \(1976\)](#)).

"Summary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving 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." [*Quest Diagnostics, LLC. v. Pinnacle Consortium of Higher Education*, 93 A.3d 949, 951 \(R.I. 2014\)](#) (internal quotation marks omitted). "Where the facts suggest only one reasonable inference, the motion justice may properly treat the question as a matter of law." [*Deutsche BankNational Trust Company, for Registered Holders of Ameritrust Mortgage Securities, Inc. v. McDonough*, 160 A.3d 306, 311 \(R.I. 2017\)](#) (internal quotation omitted).

"The moving party bears the initial burden of establishing the absence of a genuine issue of fact." [*McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 \(R.I. 2014\)](#) (quotation omitted). Once this burden is met, the burden shifts to the nonmoving party to prove by competent evidence the existence of a genuine issue of fact. *Id.* The nonmoving party may not rely on "mere allegations or denials in the pleadings, [*4] mere conclusions or mere legal opinions" to satisfy its burden. [*D'Allesandro v. Tarro*, 842 A.2d 1063, 1065 \(R.I. 2004\)](#) (quoting [*Santucci v. CitizensBank of R.I.*, 799 A.2d 254, 257 \(R.I. 2002\)](#)). "Rather, the nonmoving party must affirmatively assert facts that raise a genuine

issue to be resolved." [*Avco Corp. v. Aetna Casualty & SuretyCompany*, 679 A.2d 323, 327 \(R.I. 1996\)](#) (quoting [*Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 954 \(R.I. 1994\)](#)). However, "[t]he purpose of the summary-judgment

3

procedure is to identify disputed issues of fact necessitating trial, not to resolve such issues."

[*Rotelli v. Catanzaro*, 686 A.2d 91, 93 \(R.I. 1996\)](#); see also [*Palazzo v. Big G Supermarkets, Inc.*, 110 R.I. 242, 245, 292 A.2d 235, 237 \(1972\)](#) (The Court held that when ruling on a motion for summary judgment, the court determines whether there are any issues of fact to be resolved but cannot pass on the weight and credibility of the evidence or determine issues of fact.).

III

Analysis

NIBCO argues that Plaintiffs have failed to identify either a NIBCO product that exposed Decedent to **asbestos** or the manner in which such product exposed him to the **asbestos**. (Def.'s

Mem. 5.) More specifically, NIBCO argues that Decedent's testimony is wholly insufficient to establish that his work with or on NIBCO valves exposed him to **asbestos**, and for that reason, Plaintiffs cannot prove a causal connection between NIBCO's valves and Decedent's injury. *Id.*

In contrast, Plaintiffs argue that genuine issues of material fact exist with respect to their claims against NIBCO. Plaintiffs assert that there [*5] are facts and evidence showing that there were NIBCO valves in areas frequented by Decedent during his time working at Scranton Steam Heat Company and that these valves contained **asbestos**. (Pls.' Mem. Obj. Mot. Summ. J. (Pls.' Mem.))

5-7.) Therefore, given the complexity of the case and the facts and viewing the evidence in a light most favorable to Plaintiffs, summary judgment would be inappropriate. *Id.* at 15.

In order to establish liability in an **asbestos** action, a plaintiff must provide both

"identification of the specific defendant responsible for the injury" and evidence of the plaintiff's exposure. See [*Gorman v. Abbott Laboratories*, 599 A.2d 1364, 1364](#)

(*R.I. 1991*); see also *Thomas v. Amway Corp.*, 488 A.2d 716, 719 (*R.I. 1985*) ("[t]he plaintiff is not bound to exclude every other possible cause of her condition but she is required to show that the probable cause was the

4

[product]"). At summary judgment, the nonmoving party "must assert 'sufficient facts to satisfy the necessary elements of his [or her] negligence claim' and if a 'plaintiff fails to present evidence identifying defendants' negligence as the proximate cause of his [or her] injury or from which a reasonable inference of proximate cause may be drawn,' then summary judgment becomes proper." *Splendorio v. Bilray Demolition Co., Inc.*, 682 A.2d 461, 467 (*R.I. 1996*) (granting summary judgment based on an insufficiency [*6] of factual allegations in an **asbestos** action) (quoting

Russian v. Life-Cap Tire Services, Inc., 608 A.2d 1145, 1147 (*R.I. 1992*)).

NIBCO concedes that Plaintiffs have produced evidence that Decedent used NIBCO and NIBCO-Scott valves. NIBCO also admits that some of the NIBCO valves used at Scranton Steam Heat Company during the time Decedent worked there may have contained **asbestos**; however, it challenges the element of causation based on Decedent's testimony, which NIBCO argues shows that Decedent did not come into contact with **asbestos**-containing NIBCO valves during his tenure at Scranton Steam Heat Company. Because the only issue before this Court is the question of causation, it will proceed with an analysis solely under this element.

First, NIBCO contends that Decedent's description of the NIBCO and NIBCO-Scott valves establishes that the valves he described did not expose him to respirable **asbestos** fibers. The two distinctions in the NIBCO and NIBCO-Scott **asbestos**-containing valves from non-**asbestos** ones during the time Decedent worked at Scranton Steam Heat Company were that the valves containing **asbestos** included gaskets and packing. According to NIBCO, Decedent was never exposed to either of these because he never mentioned that the valves he worked [*7] with involved either gaskets or packing. (Def.'s Mem. 6.)

In his deposition, Decedent described the NIBCO valves he worked with as "cheap," small, threaded, and associated with a low-pressure system. *Id.*, citing Ex. 2, Burdick Dep. 285:9-17.

5

Decedent testified that these valves were used mostly in the boiler room, "not too much on the distribution system." *Id.* 285:6-8. Decedent further testified that these NIBCO and NIBCO-Scott valves were not used in the distribution system. *Id.* 286:24-287:6. In an affidavit of Gordon McCrory-Director of Capital Investments and Special Projects for NIBCO-submitted by NIBCO as an exhibit to its motion-the affiant explained that small, low-pressure, threaded valves, such as those described by Decedent, do not involve the use of gaskets during installation. Def.'s

Mem., Ex. 3, McCrory Aff. ¶ 7. Furthermore, NIBCO contends that the NIBCO and NIBCO-Scott valves described by Decedent did not require repacking. McCrory's affidavit explains that the valves described by Decedent were "throw-aways," because of their small size and cost, and it was industry practice to replace the valves instead of changing the packing. *Id.* ¶¶ 9-10. Because the only NIBCO valves [*8] that contained **asbestos** involved gaskets or packing, and the valves described by Decedent did not seem to involve either of these, Mr. McCrory asserted that Decedent was not exposed to **asbestos** from his work on NIBCO and NIBCO-Scott valves.¹ *Id.* ¶¶ 4, 12.

In response, Plaintiffs argued that Decedent did testify that he used some NIBCO valves in the distribution system, although it was to a lesser extent than in the boiler room. (Tr. 4:9-11, Feb. 19, 2020, citing Burdick Dep. 285, 286:24-287:6.) Even if Decedent later stated in his deposition that employees did not really use valves in the distribution system, this is an issue of credibility and weight of the evidence. See *Palazzo*, 110 R.I. at 245, 242 A.2d at 237. Plaintiffs argue that Decedent repacked NIBCO gate valves and that he had to use a packing puller and a torch to blow

¹ According to NIBCO, Mr. McCrory is familiar with the aspects of NIBCO's current and past manufacturing processes and production methods, and product-related information. (McCrory Aff. ¶ 1.) Plaintiffs claim, however, that Mr. McCrory is not qualified as an expert to testify as to his opinion on whether Decedent was exposed to **asbestos**-containing NIBCO products. During the hearing on February 19, [*9] 2020, Plaintiffs requested that this affidavit be stricken. (Tr. 5:14-18, Feb. 19, 2020.)

6

the dust out of the packing of the stent valves. (Tr. 4:24-5:8; 6:19-21, Feb. 19, 2020, citing Burdick Dep. 266-77.) Decedent also testified that he was exposed to dust

after scraping gasket material during the process of removing the gaskets from the valves during a shutdown. (Pls.' Mem. 5.) Taking these facts into consideration, Plaintiffs have demonstrated at least the possibility that Decedent was exposed to the NIBCO valves containing asbestos.

There is an issue of whether Decedent was or was not in fact exposed to NIBCO valves containing asbestos which remains alive. Both NIBCO and Plaintiffs have presented competent evidence in favor of their respective cases; thus, at this stage, this Court cannot grant NIBCO's motion because more than one reasonable inference can be drawn from the facts and evidence presented here. See McDonough, 160 A.3d at 311. Plaintiffs have met their shifted burden as to the existence of issues of material fact. Therefore, viewing the evidence in the light most favorable to Plaintiffs, this Court holds that genuine issues of material fact remain with respect to whether Decedent was exposed [*10] to NIBCO and/or NIBCO-Scott products containing asbestos.

IV

Conclusion

Because genuine issues of material fact remain regarding Decedent's exposure to the

NIBCO and NIBCO-Scott's asbestos-containing valves, NIBCO's motion for summary judgment is denied. Counsel shall present the appropriate order for entry.

7

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Evelyn Burdick, *et al.* v. Alco Valves, *et al.*

CASE NO: PC-2011-3431

COURT: Providence County Superior Court

DATE DECISION FILED: March 16, 2021

JUSTICE/MAGISTRATE: Gibney, P.J.

ATTORNEYS:

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For Defendant: See attached

8

Burdick v. Alco Valves, *et al.*

C.A. No. PC 11-3431

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9

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10

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11

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