Droz v. Air & Liquid Sys. Corp. (In re Asbestos Litig.)

Superior Court of Delaware, New Castle

April 15, 2021, Decided

C.A. No.: N19C-06-024 ASB

Reporter
2021 Del. Super. LEXIS 458 *

IN RE ***ASBESTOS*** LITIGATION; SHELLEY DROZ, individually and as Executor for the Estate of ERIC C. DROZ, Deceased, Plaintiff, v. AIR & LIQUID SYSTEMS CORPORATION, et al., Defendants.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Core Terms

asbestos, manufactured, brake, ***asbestos***-containing, summary judgment, products, exposure, arc, linings, grinder, argues, brake shoe

Case Summary

Overview
HOLDINGS: [1]-The widow had not identified an ***asbestos***-containing product attributable to the manufacturer because any ***asbestos***-containing products alleged to have caused her deceased husband's ***asbestos*** exposure were separate and distinct products from the manufacturer's products identified in the case; [2]-The widow failed to satisfy her burden under Stigliano because, although the widow generally identified the manufacturers of brake shoes her husband encountered, the record was devoid of any testimony linking his work to a particular manufacturer's brake or even an ***asbestos*** containing brake.

Outcome
Motion for summary judgment granted.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN1[] **Summary Judgment, Burdens of Proof**

Del. Super. Ct. R. Civ. P. 56 provides that summary judgment should be granted where the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Del. Super. Ct. R. Civ. P. 56(c)*. Once the movant meets its burden, then the burden shifts to the non-movant to demonstrate sufficiently an existence of one or more genuine issues of material fact. Summary judgment will not be granted if there is a material fact in dispute or if it seems desirable to inquire thoroughly into the facts in order to clarify the application of the law to the circumstances. In considering the motion, all facts and reasonable inferences must be considered in a light most favorable to the non-moving party. However, the court shall not indulge in speculation and conjecture; a motion for summary judgment is decided on the record presented and not on evidence potentially possible.

Torts > Products Liability > Theories of

Liability > Strict Liability

HN2[] **Theories of Liability, Strict Liability**

Pursuant to Washington law, to succeed on an ***asbestos*** related products liability claim, a plaintiff must establish that he worked with a defendant's ***asbestos***-containing product and that a particular manufacturer's product caused him injury. In assessing a plaintiff's claim on this issue, Washington courts consider a number of factors to determine whether there exists sufficient evidence to support a finding of causation. Washington case law does not require a plaintiff to personally identify the defendant, but the plaintiff must provide some evidence that identifies a defendant's product that was present at the plaintiff's workplace.

Business & Corporate Compliance > ... > Hazardous Wastes & Toxic Substances > ***Asbestos*** > Work Practice Standards

Torts > Products Liability > Types of Defects > Marketing & Warning Defects

HN3[] **Asbestos, Work Practice Standards**

Under Washington law, a manufacturer generally does not owe a duty to warn an end user of the dangers associated with ***asbestos*** products, as long as it did not manufacture the ***asbestos*** product and was not a party within the chain of distribution. The Supreme Court of Washington has held that as a matter of law a party retains no duty to warn when it does not manufacture, sell, or supply the ***asbestos***-containing part at issue and had no control over the type of insulation the secondary party would choose to complete the product. The Supreme Court also specified that a party is not responsible for the ***asbestos*** contained in another manufacturer's product. However, Washington courts have noted exceptions to this rule when: (1) a manufacturer incorporates a defective component into its finished product; (2) a combination of two sound products creates a dangerous condition, resulting in both manufacturers having a duty to warn; and (3) the product inherently and invariably posed the danger of exposure to ***asbestos***, regardless of whether the manufacturing party was in the chain of distribution of products containing ***asbestos*** when manufactured.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Torts > Products Liability > Theories of Liability > Strict Liability

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN4[] **Summary Judgment, Burdens of Proof**

Under Stigliano, summary judgment must be granted on the issue of product nexus in ***asbestos*** based product liability actions, when the record reveals that a defendant manufactured both ***asbestos***-containing and non ***asbestos***-containing versions of a product during the time period of alleged exposure, in the absence of evidence directly or circumstantially linking the plaintiff to the ***asbestos***-containing product. The burden shifting process under Stigliano, requires that a defendant place into the record evidence that it manufactured both ***asbestos***-containing and non ***asbestos***-containing versions of its product. The plaintiff then carries the burden to proffer evidence sufficient to show that she was exposed to the ***asbestos***-containing product for her claims to survive summary judgment under Delaware law.

Judges: [*1] Sheldon K. Rennie, Judge.

Opinion by: Sheldon K. Rennie

Opinion

JURY TRIAL OF TWELVE DEMANDED

ORDER

On this 15th day of April, 2021, upon consideration of Defendant, Hennessy Industries, LLC's ("Hennessy") Motion for Summary Judgment ("Motion"),[1] Plaintiff, Shelley Droz's ("Plaintiff") Response,[2] Defendant's

[1] Trans. ID 66244204.

[2] Trans. ID 66329288. Mrs. Droz brought this action individually and as the executor for the Estate of Eric C. Droz. However, for ease of reading, the Court will refer to Plaintiff in the singular throughout this Order.

Reply thereto,[3] and oral argument, it appears to the Court that:

1. Plaintiff asserts claims against multiple defendants, including Hennessy, asserting that her husband, Eric Droz ("Mr. Droz"), suffered from mesothelioma as a result of alleged exposure to ***asbestos*** and ***asbestos***-containing products manufactured by defendants. As to Hennessy, Plaintiff argues that Mr. Droz was exposed to ***asbestos*** through use of an AMMCO brake arcing machine and an AMMCO grinder.

2. In this Motion, Hennessy seeks summary judgment dismissing Plaintiffs claims. Plaintiff argues that Defendant's Motion fails because she has satisfied her burden under Washington law to establish exposure to ***asbestos***-containing products attributable to Hennessy, sufficient to overcome summary judgment.

3. *Delaware Superior Court Civil Rule 56* ***HN1***[⬆] provides that summary judgment should be granted where the moving party demonstrates that "there is no genuine issue as to any material fact and that **[*2]** the moving party is entitled to judgment as a matter of law."[4] "Once the movant meets its burden, then the burden shifts to the non-movant to demonstrate sufficiently an existence of one or more genuine issues of material fact."[5] Summary judgment will not be granted if there is a material fact in dispute or if it "seems desirable to inquire thoroughly into [the facts] in order to clarify the application of the law to the circumstances."[6] In considering the motion, "[a]ll facts and reasonable inferences must be considered in a light most favorable to the non-moving party."[7] However, the Court shall not "indulge in speculation and conjecture; a motion for summary judgment is decided on the record presented and not on evidence potentially possible."[8]

4. The Court applies Washington law to the substantive issues of this case. ***HN2***[⬆] Pursuant to Washington law, to succeed on an ***asbestos*** related products liability claim, a plaintiff must establish that he worked with a defendant's ***asbestos***-containing product and that a particular manufacturer's product caused him injury.[9] In assessing a plaintiff's claim on this issue, Washington courts consider a number of factors to determine **[*3]** whether there exists sufficient evidence to support a finding of causation.[10] Washington case law does not require a plaintiff to personally identify the defendant, but the plaintiff must provide some evidence that identifies a defendant's product that was present at the plaintiff's workplace.[11]

5. The Court will first consider product identification and nexus. From 1971 to 1973, Mr. Droz worked as a mechanic at Larry's Repair Shop on weeknights and Saturday mornings.[12] He testified that he ground brake drums and linings manufactured by Bendix, Wagner, and Raybestos.[13] In his testimony, Mr. Droz identified

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[3] Trans. ID 66400862.

[4] *Super. Ct. Civ. R. 56(c)*.

[5] ***Quality Elec. Co., Inc. v. E. States Const. Serv., Inc., 663 A.2d 488 (Del. 1995)***. *See also* *Super. Ct. Civ. R. 56(e)*; *Moore v. Sizemore, 405 A.2d 679, 681 (Del. 1979)*.

[6] *Ebersole v. Lowengrub, 54 Del. 463, 180 A.2d 467, 470, 4 Storey 463 (Del. 1962)*.

[7] *Nutt v. A.C. & S. Co., 517 A.2d 690, 692 (Del. Super. 1986)*.

[8] *In re.* ***Asbestos*** *Litig., 509 A.2d 1116 (Del. Super. 1986)*, *aff'd sub. nom.* *Nicolet, Inc. v. Nutt, 525 A.2d 146 (Del. 1987)*.

[9] ***Lockwood v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 (Wash. 1987)***; *see also* ***Van Hout v. Celotex, 121 Wn.2d 697, 853 P.2d 908 (Wash. 2008)*** (A plaintiff must establish through sufficient evidence that there is a causal connection between a particular product and that plaintiff's injurious exposure to ***asbestos***).

[10] *See generally* ***Lockwood, 744 P.2d 605*** (These factors include: (1) the plaintiff's proximity to the ***asbestos*** product when exposure occurred; (2) the expanse of the work site where ***asbestos*** fibers were released; (3) the extent of time the plaintiff was exposed to the product; (4) what types of ***asbestos*** products the plaintiff was exposed to; (5) how the plaintiff handled and used those products; (6) expert testimony on the effects of inhalation of ***asbestos*** on human health in general and the plaintiff in particular; and (7) evidence of any other substances that could have contributed to the plaintiff's disease, including expert testimony as to the combined effect of exposure to all possible sources of the disease.).

[11] ***Id. at 612*** ("Hence, instead of personally identifying the manufacturers of ***asbestos*** products to which he was exposed, a plaintiff may rely on the testimony of witnesses who identify manufacturers of ***asbestos*** products which were then present at his workplace.").

[12] Mr. Droz's Video Deposition Transcript at 15:23-16:21, 47:1-10, 75:6-12 [hereinafter "Pl.'s Video Dep. Tr."]; *see also* Mr. Droz's Discovery Deposition Transcript at 141:7-142:13 [hereinafter Pl.'s Discovery Dep. Tr"].

[13] Pl.'s Video Dep. Tr. at 37:21-38:2. Mr. Droz testified to arcing brakes at least once a week. *See id.* at 46:20-25; *see*

AMMCO as the manufacturer of the arc grinder.[14] He testified that the process of grinding brake drums and linings was dusty, to such an extent that the AMMCO grinder had a dust bag attached.[15] Plaintiff contends that this dust exposure resulting from the grinding process, placed Mr. Droz in danger because a majority of brakes used in the early 1980s contained ***asbestos***.[16]

6. Although Plaintiff has identified that Mr. Droz worked with an arc grinder that was manufactured by AMMCO, the AMMCO arc grinders were not ***asbestos***-containing. According to AMMCO's **[*4]** corporate representative, Kevin Belack ("Mr. Belack"), AMMCO designed, manufactured, and sold brake service equipment, including brake shoe arcing machines and brake lathes.[17] Notably, his Affidavit specifies that such products "did not contain ***asbestos***."[18] In addition, the record is clear that neither AMMCO nor Hennessy has ever "manufactured, marketed, designed, or sold brake shoes, brake linings, brake pads, brake drums or brake rotors[.]"[19] Plaintiffs allegations are based on exposure to ***asbestos***-containing brakes, as opposed to an ***asbestos***-containing AMMCO product. Thus, any ***asbestos***-containing products alleged to have caused Mr. Droz's ***asbestos*** exposure are "separate and distinct products" from the AMMCO products identified in this case.[20] Plaintiff does not dispute this fact. For this reason, the Court finds that Plaintiff has not identified an ***asbestos***-containing product attributable to Hennessy. However, the Court's analysis does not end here, because Plaintiff argues an exception under Washington law.

7. ***HN3***[↑] Under Washington law,[21] a manufacturer generally does not owe a duty to warn an end user of the dangers associated with ***asbestos*** products, as long as it did not manufacture the **[*5]** ***asbestos*** product and was not a party within the chain of distribution.[22] The Supreme Court of Washington has held that "as a matter of law" a party retains no duty to warn when it does not "manufacture, sell, or supply" the ***asbestos***-containing part at issue and had "no control over the type of insulation the [secondary party] would choose" to complete the product.[23] The Supreme Court also specified that under the *Restatement (Second) of Torts § 402A*, a party is not "responsible for the ***asbestos*** contained in another manufacturer's product."[24]

8. However, Washington courts have noted exceptions to this rule when: (1) "a manufacturer . . . incorporates a defective component into its finished product[;]"[25] (2) a combination of "two sound products creates a dangerous condition," resulting in both manufacturers

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also Pl.'s Discovery Dep. Tr. at 243:18-244:4. He testified that grinding brake linings took "anywhere from a few minutes to 15, 20 minutes." Pl.'s Video Dep. Tr. at 30:1-6.

[14] Pl.'s Video Dep. Tr. at 38:9-11.

[15] *Id.* at 30:23-31:4, 30:7-22.

[16] Deposition Transcript of Craig Mountz, Lay v. Abbott Labs., Case No. 1122-CC-09203 (Mo. Cir. Ct. Nov. 13, 2012) at 61:18-2, 62:2-9 [hereinafter "Mountz Tr"].

[17] Kevin Belack's Affidavit at ¶ 2 [hereinafter "Belack's Aff."].

[18] Belack's Aff. ¶ 3.

[19] *Id.* ¶ 7.

[20] *Id.* ¶ 7.

[21] The *Washington Product Liability Act* is inapplicable in the present case because "substantially all" the alleged exposure to AMMCO's product occurred before the Act's effective date: July 26, 1981. *See* ***Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 282 P.3d 1069, 1073-74 (Wash. 2012)*** (discussing applicability of Act).

[22] *See* ***Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493, 498 (Wash. 2008)*** (citing ***Simonetta v. Viad Corp. ,165 Wn.2d 341, 197 P.3d 127 (Wash. 2008)***) (finding that the defendant manufacturers did not owe a duty to warn of the dangers of exposure to ***asbestos***-containing insulation that was manufactured and supplied by third parties; and no duty to warn of the danger of exposure to ***asbestos*** in replacement products); *see also* *Woo v. Gen. Elec. Co., 198 Wn. App. 496, 393 P.3d 869, 875 (Wash. App. 2017)* (citing ***Simonetta v. Viad Corp.,165 Wn.2d 341, 197 P.3d 127 (Wash. 2008)***).

[23] ***Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127, 134 (Wash. 2008)*** (finding that the defendant manufacturer did not owe a duty to warn because it was not in the chain of distribution of the product, and did not manufacture, sell, or supply the ***asbestos*** containing part of the product).

[24] *Woo, 393 P.3d at 875* (quoting ***Simonetta, 197 P.3d 127*** (citing *Restatement (Second) of Torts § 402A, cmt. f*))) ("Under *Restatement (Second) of Torts § 402A*, a product, 'though faultlessly manufactured and designed, may not be reasonably safe when placed in the hands of the ultimate user without first giving an adequate warning concerning the manner in which to safely use the product.").

[25] *Id. at 876* (citing 3D JOHN D. HODSON & RICHARD E. KAY, AMERICAN LAW OF PRODUCTS LIABILITY § 32:9 (2004)).

having a duty to warn;[26] and (3) the product "inherently and invariably posed the danger of exposure to ***asbestos***[,]" regardless of whether the manufacturing party was "in the chain of distribution of products containing ***asbestos*** when manufactured."[27] Plaintiff argues that the third exception applies here and cites to *Macias v. Saberhagen Holdings, Inc. ("Macias")*,[28] in support of her contention.

9. In *Macias*, the Washington Supreme Court found that because the defendants' product "necessarily and purposefully accumulated ***asbestos*** in them when they functioned exactly as they were planned to function[,]" the defendants were considered to exist "in the chain of distribution[,]" and thus, were unable to utilize Washington's "bare metal" defense.[29]

10. Here, Plaintiff argues that AMMCO's arc grinders inherently and invariably posed the danger of ***asbestos*** exposure, because "AMMCO knew that a majority of brakes in use in the early 1980s contained ***asbestos***[,]"[30] to such an extent that the product's dust collection system was referred to as an "***asbestos*** dust collector[.]"[31] Thus, Plaintiff contends that the third exception to the "bare metal" defense applies, and that this Court should find that AMMCO owed a duty to warn Plaintiff under Washington law. However, the Court need not decide the substantive issue addressed in *Macias*, of whether the exception to the "bare metal" defense applies. Even if the *Macias* exception did apply, and Plaintiff was able to then satisfy the *Lockwood* factors following such application,[32] the Court would still be required to grant Hennessy's Motion under **[*7]** *Stigliano v. Westhouse*.[33]

11. ***HN4***[] Under *Stigliano*, summary judgment must be granted on the issue of product nexus in ***asbestos*** based product liability actions, "[w]hen the record reveals that a defendant manufactured both ***asbestos***-containing and non ***asbestos***-containing versions of a product during the time period of alleged exposure, in the absence of evidence directly or circumstantially linking the plaintiff to the ***asbestos***-containing product . . . ."[34] The burden shifting process under *Stigliano*, requires that a defendant place into the record evidence that it manufactured both ***asbestos***-containing and non ***asbestos***-containing versions of its product. The plaintiff then carries the burden to proffer evidence sufficient to show that she was exposed to the ***asbestos***-containing product for her claims to survive summary judgment under Delaware law.

12. Plaintiff argues that she has put forth enough evidence in the record to satisfy her burden under *Stigliano* and withstand summary judgment. Plaintiff notes that the three named manufacturers sold ***asbestos***-containing brake linings during the early 1970s.[35] She also states that her expert, Barry Castleman, explains that the use of ***asbestos*** **[*8]** in brake linings in the 1970s was near universal.[36] The use of the phrase "near universal" demonstrates that not

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[26] *Id.* (citing *Ford Motor Co. v. Wood, 119 Md. App. 1, 703 A.2d 1315 (Md. App. 1998)*, *abrogated on other* ***[*6]*** *grounds by John Crane, Inc. v. Scribner, 369 Md. 369, 800 A.2d 727 (Md. 2002)*; *Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992)*).

[27] *Woo, 393 P.3d at 877* (citing ***Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 282 P.3d 1069 (Wash. 2012)***).

[28] ***175 Wn.2d 402, 282 P.3d 1069 (Wash. 2012)***.

[29] ***Id at 1077***.

[30] Mountz Tr. at 61:18-25, 62:2-9.

[31] *Id.* at 62:17-21.

[32] *See generally* ***Lockwood v. AC & S, Inc., 109 Wash. 2d 235, 744 P.2d 605 (1987)*** (These factors include: (1) the plaintiffs proximity to the ***asbestos*** product when exposure occurred; (2) the expanse of the work site where ***asbestos*** fibers were released; (3) the extent of time the plaintiff was exposed to the product; (4) what types of ***asbestos*** products the plaintiff was exposed to; (5) how the plaintiff handled and used those products; (6) expert testimony on the effects of inhalation of ***asbestos*** on human health in general and the plaintiff in particular; and (7) evidence of any other substances that could have contributed to the plaintiff's disease, including expert testimony as to the combined effect of exposure to all possible sources of the disease.).

[33] *2006 Del. Super. LEXIS 433, 2006 WL 3026171 (Del. Super. Oct. 18, 2000)*.

[34] *2006 Del. Super. LEXIS 433, [WL] at *1*.

[35] Deposition of Honeywell International, Inc. at 154:8-155:21, 156:1-16, *Keefe v. Al-Ko Kober Corp.*, No. 02-4347 (Mass. Super. Ct. May 8, 2003); Defendant Wagner Electric Corp.'s Supplemental Answers to Master Interrogatories at Answers Nos. 4, 6, 52, *In Re:* ***Asbestos*** *Litig.*, (Tex. Dist. Ct. Mar. 19, 1996); Defendant Raymark Indus., Inc.'s Answers to Plaintiffs' Interrogatories at 8-9, *Caswell v. Raymark Indus., Inc.*, Case No. 842-01140 (Mo. Cir. Ct. Aug. 2, 1985).

[36] Affidavit of Barry Castleman, ScD at ¶¶ 2-4 (Feb. 9, 2021).

all brake linings were ***asbestos*** containing. Thus, although the record supports a finding that *most* brakes manufactured during the relevant time frame contained ***asbestos***, it necessarily follows that *some* brake linings did not contain ***asbestos***. The record also supports a finding that AMMCO brake shoe arcing machines "were designed to reshape any brake shoe friction material whether composed of ***asbestos*** or not, including the ***asbestos***-free friction materials which were available and in the marketplace during the 1960s or earlier."[37]

13. Hence, under *Stigliano* the burden shifts to Plaintiff to show that Mr. Droz was exposed to ***asbestos***-containing products while using the AMMCO product. Indeed, it is unrefuted that the AMMCO arcing machines were built to reshape ***asbestos***-containing brakes, as well as non-***asbestos*** containing brakes. Thus, although Plaintiff generally identified the manufacturers of brake shoes Mr. Droz encountered (including those Bendix, Wagner, and Raybestos),[38] the record is devoid of any testimony linking his work to a particular manufacturer's **[*9]** brake or even an ***asbestos*** containing brake. This is fatal to Plaintiffs ability to satisfy her burden under *Stigliano*.

For the foregoing reasons, Hennessy's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ Sheldon K. Rennie

Sheldon K. Rennie, Judge

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[37] Belack's Aff. at .4 5.

[38] Pl.'s Video Dep. Tr. at 37:21-38:2.