

Lowe v. 3M Co.

Superior Court of Rhode Island, Providence

December 13, 2024, Filed

C.A. No. PC-2019-4605

Reporter

2024 R.I. Super. LEXIS 115 *

ELAINE LOWE, as Surviving Spouse, and PETER A. LOWE, Jr., as Executor of the ESTATE OF PETER A. LOWE, Sr., Plaintiffs, v. 3M COMPANY et al., Defendants.

Core Terms

pipes, cement, asbestos, exposure, asbestos-containing, exposed, products, supplied, mesothelioma, regularity, causation, proximity, suppliers, summary judgment, frequency, receipts, argues, brand, Excavating, SEWER

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Judges: GIBNEY, P.J.

Opinion by: GIBNEY

Opinion

DECISION

GIBNEY, [*2] P.J. Before this Court for decision is Defendant Kamco Supply Corporation of New England's (Kamco) Motion for Summary Judgment.¹ (Def.'s Mot. for Summ. J. (Def.'s Mot.) 1.) Kamco argues that Plaintiffs Elaine Lowe, as surviving spouse, and Peter A. Lowe, Jr., as Executor of the Estate of Peter A. Lowe, Sr., (collectively Plaintiffs) fail to present evidence to show that Peter A. Lowe, Sr. (Lowe) was exposed to its asbestos-containing products. See *generally id.* Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

¹ Kamco is sued both individually and as the successor-in-interest to Colony Lumber. See Compl.

I

Facts and Travel

Plaintiffs assert several theories of liability against some seventy defendants, including failure to warn, negligence, strict liability, breach of express and implied warranty, punitive damages, wrongful death, loss of consortium, and conspiracy.² See generally Compl. Central to Plaintiffs' claims is that Lowe suffered from and died of malignant mesothelioma caused by exposure to asbestos dust from his installation of cement sewer pipes that contained asbestos from about 1965 until the late 1970s. *Id.* ¶ 50; see Lowe's Dep. Tr. at 22:19-23:6, May 7, 2019, Vol. 1 (hereinafter, Lowe's Dep. Vol. 1). Prior to his death, Lowe was deposed in this matter—the relevant aspects of his testimony [*3] are summarized below.

Lowe's father owned a company called Lowe Excavating and Construction (Lowe Excavating). See *id.* at 19:9-11. Lowe Excavating performed "all types of excavation, [and] water/sewer connections" on roads, dams, ponds, commercial buildings, and residential homes. *Id.* at 22:2-6, 24:1-4. Its services included demolition and septic work. *Id.* at 22:7-10. Lowe started working for his father's company sometime around 1959 before he eventually took over the business in 1978. *Id.* at 19:12-14, 21:1-2. He then continued to work full-time for Lowe Excavating until he developed mesothelioma in the fall of 2018. *Id.* at 21:12-16, 49:6-8. Relevant to the instant motion, Lowe's work included sizing and cutting concrete pipes—which are alleged to have contained asbestos—between about 1965 until the late 1970s. *Id.* at 22:19-21, 23:1-6. He would use a grinding wheel to cut the cement pipe, which created dust that he would subsequently breathe in. *Id.* at 25:13-26:18, 29:4-11.

Lowe testified that the three brands of cement pipe that he would regularly install were "Italit, Johns-Manville, and CertainTeed." *Id.* at 29:23-30:2. He knew this because the name of each brand was stamped on [*4] the side of each pipe. *Id.* at 30:9-22. Regularly supplying those brands of concrete pipes to his company were Helm Construction, Colony Lumber, and Superior Products Distributors, Incorporated (SPDI). *Id.* at 31:4-10, 31:25-32:2. Lowe testified that Colony Lumber may have supplied CertainTeed cement pipes, (Lowe's Dep. Tr. at 226:9-13, May 8, 2019, Vol. 2 (hereinafter, Lowe's Dep. Vol. 2)), however, he also said that Colony Lumber and SPDI both sold Johns-Manville cement pipes. *Id.* at 226:25-227:2. Lowe further stated that none of those suppliers ever provided a warning that breathing in asbestos dust could cause mesothelioma or indicated that asbestos was dangerous. Lowe's Dep. Vol. 1 at 32:3-33:7.

In 1972, asbestos composed one-fifth of the make up of Johns-Manville cement pipes used for sewerage, including 7 percent crocidolite and 13 percent chrysotile. (Pls.' Mem. in Opp'n to Summ. J. (Pls.' Mem.) Ex. D, Manville Spec Sheet, 1.) Colony Lumber sold Johns-Manville products, (Pls.' Mem. Ex. G, Kamco's Answers to Interrogatories, Answer No. 4), and marketed "J.M. SEWER PIPE" on receipts it issued to its customers. (Pls.' Mem. Ex. F, Lowe's Colony Lumber Receipts.) In 1979, Colony Lumber's [*5] offices experienced a fire which destroyed virtually all of its records. (Lee Slomkowski Dep. Tr. at 19:23-20:1, Jan. 12, 2024, (hereinafter, Slomkowski's Dep.)). By the end of 1998, Colony Lumber had merged with Kamco. *Id.* at 12:16-22. In 1976, Colony Lumber had ceased selling Johns-Manville's asbestos-containing cement pipes. *Id.* at 45:5-8.

Lowe was diagnosed with malignant mesothelioma in 2018. (Pls.' Mem. Ex. H, Lowe's Pathology Report.) On April 5, 2019, he brought the current action seeking to recover damages associated with that disease. See generally Original Compl. He succumbed to his mesothelioma on August 14, 2019. (Pls.' Mem. Ex. I, Lowe's Death Certificate.) Lowe was then substituted as a party to this matter by his estate. See Compl. Kamco filed the instant motion for summary judgment on August 21, 2024, (Kamco's Mot. for Summ J), and Plaintiffs objected on September 25, 2024. (Pls.' Mem.) Kamco filed its reply on October 1, 2024. See Kamco's Reply Mem. in Supp. (Kamco's Reply Mem.). Oral arguments were heard on October 10, 2024, and this matter is ready for adjudication.

²The Operative Complaint is Plaintiffs' Seventh Amended Complaint, which was filed on May 31, 2023. See Docket. Hereinafter, the Court refers to the Seventh Amended Complaint as the Complaint.

II

Standard of Review

"Summary judgment is a drastic remedy, and a motion for summary judgment should [*6] be dealt with cautiously." *Cruz v. DaimlerChrysler Motors Corporation*, 66 A.3d 446, 451 (R.I. 2013) (quoting *DeMaio v. Ciccone*, 59 A.3d 125, 129 (R.I. 2013)). "[S]ummary 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 omitted); see also Super. R. Civ. P. 56. "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) (quoting Robert B. Kent et al., *Rhode Island Civil Procedure* § 56:5, VII-28 (West 2006)). Then, the burden shifts—

"[t]he party opposing summary judgment bears the burden of proving, by competent evidence, the existence of facts in dispute. The opposing party will not be allowed to rely upon mere allegations or denials in the pleadings but rather, by affidavits or otherwise the opposing party has an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." *Henry v. Media General Operations, Inc.*, 254 A.3d 822, 834 (R.I. 2021) (cleaned up) (internal citations omitted).

"In deciding a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party." *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 532 (R.I. 2013). In doing so, the Court "does not pass upon the [*7] weight or the credibility of the evidence[.]" *Palmisciano v. Burrillville Racing Association*, 603 A.2d 317, 320 (R.I. 1992).

III

Analysis

A

Causation in the Asbestos Context

"All cognizable negligence claims in Rhode Island must set forth four essential elements: duty, breach, causation, and damages." *Sweredoski v. Alfa Laval, Inc.*, No. PC-2011-1544, 2013 R.I. Super. LEXIS 111, 2013 WL 3010419, at *2 (R.I. Super. June 13, 2013) (citing *Santana v. Rainbow Cleaners*, 969 A.2d 653, 658 (R.I. 2009)). "In the asbestos context, plaintiffs must present both product identification and exposure evidence to satisfy the causation element." *Id.*

"Historically, however, asbestos plaintiffs have struggled to 'fairly meet the burden of production with regard to causation,' owing to such factors as the prevalence of second-hand exposure to airborne asbestos dust, the indistinguishable nature of asbestos fibers from different manufacturers' products, the long latency of asbestos-related diseases, and the difficulty of obtaining witnesses and other probative evidence of exposure years after the fact." *Id.* (quoting *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 603 N.E.2d 449, 455-56, 177 Ill. Dec. 379 (Ill. 1992)).

As a result of those challenges, Rhode Island has adopted the "frequency, regularity, proximity" test as the standard for proving causation in the asbestos context, because it "strikes the appropriate balance between 'the rights and

interests of the manufacturer [and] those of the claimants . . ." 2013 R.I. Super. LEXIS 111, [WL] at *5 (quoting *Holcomb v. Georgia Pacific, LLC*, 128 Nev. 614, 289 P.3d 188, 196 (Nev. 2012)).

"To satisfy the 'frequency, regularity, proximity' [*8] test, plaintiffs must present evidence showing '(1) exposure to a particular product; (2) on a regular basis; (3) over an extended period of time; and (4) in proximity to where the plaintiff actually worked.'" *Id.* (quoting *Chavers v. General Motors Corp.*, 349 Ark. 550, 79 S.W.3d 361, 368 (Ark. 2002)). Both direct and circumstantial evidence are sufficient to meet the elements of that test. *Id.* It is not a rigid test, and its factors "should be tailored to the facts and circumstances of the [particular] case at hand." 2013 R.I. Super. LEXIS 111, [WL] at *6 (quoting *Holcomb*, 289 P.3d at 196) (internal quotation marks omitted). Further, "in cases alleging that the plaintiff developed mesothelioma as a result of exposure to a particular defendant's product" the "frequency, regularity, proximity" test is slightly relaxed "because medical evidence has established that mesothelioma can develop from less intense exposures to asbestos than other asbestos-related diseases, such as asbestosis." *Id.* "When applying the 'frequency, regularity, proximity' test . . . courts must 'make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decendent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection [*9] between the defendant's product and the asserted injury.'" *Id.* (quoting *Gregg v. V-J Auto Parts, Co.*, 596 Pa. 274, 943 A.2d 216, 227 (Pa. 2007)).

B

CertainTeed Cement Pipes

Kamco argues that there is no proof that Kamco ever sold CertainTeed asbestos-containing cement pipes. See Kamco's Mem. in Supp. of Mot. for Summ. J. (Kamco's Mem.) 13-17. Kamco points to evidence—in the form of interrogatory answers and deposition testimony from its former vice president—to show that it never supplied such pipes. See Kamco's Answers to Interrogatories, No. 4 (providing that the only asbestos-containing product Colony Lumber sold was Johns-Manville cement pipe); see also Slomkowski's Dep. 34:24-35:7 (providing that Colony Lumber never sold CertainTeed cement pipe). In their objection to the current motion, Plaintiffs fail to present any evidence in the record to contradict Kamco's assertion that it did not sell CertainTeed cement pipes. See generally, Pls.' Mem. Thus, even when viewing the evidence in the light most favorable to them, Plaintiffs have not met their burden in showing they will be able to offer evidence identifying the CertainTeed pipe as a product offered by Colony Lumber. See *Mruk*, 82 A.3d at 532.

C

Johns-Manville Cement Pipes

Kamco also argues that Plaintiffs have failed to [*10] present evidence showing that Lowe was exposed to Johns-Manville cement pipes supplied by it, therefore, Plaintiffs are unable to prove Kamco's products were a cause of his malignant mesothelioma. (Kamco's Mem. 5-10.) The evidence here shows that Lowe stated that he worked with three specific brands of cement pipes that contained asbestos, including Johns-Manville's. Lowe's Dep. Vol. 1 at 29:23-30:2. He knew which brand of pipe he was working with because the brand name was stamped on the side of each pipe. *Id.* at 30:9-22. Lowe further stated that he regularly worked with asbestos-containing cement pipes from "[a]bout 1965" until "about the late '70s." *Id.* at 23:3, 23:6. He further identified three companies which regularly supplied those pipes, including Colony Lumber being a supplier of Johns-Manville cement pipes. Lowe's Dep. Vol. 2 at 226:25-227:2.

Kamco argues that Lowe's testimony, based solely upon his memory, is insufficient to present a genuine issue of material fact as to the identification of Kamco's products. See Kamco's Mem. 7, 9-10. It further argues that Lowe's failure to state a specific date for when he was exposed to asbestos is fatal to Plaintiffs' claims. *Id.* at [*11] 8-9. In

making those arguments, Kamco relies on *Sherman v. A C & S, Inc. (In re Asbestos Litig.)*, No. CIV.A. 01-0696, 2002 R.I. Super. LEXIS 89, 2002 WL 1378959 (R.I. Super. June 20, 2002). In *Sherman*, the date of the plaintiff's exposure was significant because the defendant ceased asbestos business in April of 1958; the plaintiff had failed to state that he was exposed to the defendant's product prior to that date beyond a vague reference to "the late 50's." 2002 R.I. Super. LEXIS 89, [WL] at *3. Additionally, that vague reference was contradicted by an earlier affidavit submitted to the court in which the plaintiff stated: "I worked as an insulator and was exposed to asbestos-containing materials from 1961 until 1982." *Id.* That earlier affidavit placed the plaintiff's alleged exposure outside of the time the defendant was selling asbestos products. *Id.*

In the instant case, Lowe has described his time of exposure from "[a]bout 1965" until the "late '70s." (Lowe's Dep. Vol. 1 at 23:3-6.) That testimony places his alleged exposure in the timeframe of when Colony Lumber sold Johns-Manville's cement pipe. See Slomkowski's Dep. at 45:4-8 (providing that Colony Lumber ceased selling Johns-Manville cement pipes in 1976). Further, *Sherman* does not stand for the proposition that a plaintiff's, or a decedent's, deposition testimony based upon his or her memory is [*12] always insufficient to establish product identification; rather, it held that the *Sherman* plaintiff's failure to establish a date of exposure without any other relevant material to establish a date, in light of inconsistent testimony, was fatal to his claim. See *Sherman*, 2002 R.I. Super. LEXIS 89, 2002 WL 1378959, at *4 ("Plaintiff Sherman has not come forward with any deposition testimony or other relevant materials of a substantial nature to suggest, beyond conjecture, a similar unity of time, place, and product."). Here, not only did Lowe's deposition provide a timeframe for his exposure that fits into the time Colony Lumber sold Johns-Manville's asbestos-containing cement pipes, but Plaintiffs further provide receipts issued to Lowe between 1976 and 1982 by Colony Lumber. See *generally* Pls.' Mem. Ex. F. Those receipts feature "J.M. SEWER PIPE," marketing it as a product available for sale, along with general categories such as "TOOLS" and "HARDWARE." See *id.* Colony Lumber's former vice president explained that "J.M. SEWER PIPE" refers specifically to Johns-Manville cement pipes. (Slomkowski's Dep. at 46:22-47:1.) While those receipts do not reflect Lowe's actual purchases of the Johns-Manville pipes, they serve as circumstantial evidence [*13] that Colony Lumber was selling them, and they are of particular importance considering that Colony Lumber's records were destroyed in a fire in 1979. See *Sweredoski*, 2013 R.I. Super. LEXIS 111, 2013 WL 3010419, at *5 (providing the "frequency, regularity, proximity" test should be tailored to the facts of each case).

Viewing the receipts and Lowe's direct testimony, in the light most favorable to the Plaintiffs, the Court concludes that there is sufficient evidence in the record for a trier of fact to find that Lowe was exposed to an asbestos-containing product sold by Colony Lumber. See *Mruk*, 82 A.3d at 532.

Kamco further argues that the evidence described above merely provides impermissible inferences to establish the identification of its products while relying on *Hostetter v. Air & Liquid Sys. Corp.*, No. PC-2012-0650, 2014 R.I. Super. LEXIS 30, 2014 WL 906112 (R.I. Super. Mar. 5, 2014). (Kamco's Mem. 10-13.) In *Hostetter*, the court held a plaintiff may establish causation by stacking inferences drawn from circumstantial evidence, "when the second inference is based on a primary inference that 'is the only reasonable one to be drawn from the underlying facts.'" *Hostetter*, 2014 R.I. Super. LEXIS 30, 2014 WL 906112, at *3 (quoting *In re Derek*, 448 A.2d 765, 768 (R.I. 1982)). In that case, the decedent had failed to identify the defendant as a supplier of an asbestos-containing product that he was exposed to. 2014 R.I. Super. LEXIS 30, [WL] at *2. However, the plaintiff attempted to prove that the decedent was exposed to [*14] the defendant's products because it had supplied asbestos-containing brakes where he worked throughout the 1970s. *Id.* Yet, the evidence that established the defendant supplied such brakes also indicated that it was one of four suppliers. *Id.* Thus, there was a reasonable inference that the decedent was exposed only to brakes supplied by the other three suppliers and the plaintiff's evidence was insufficient to show causation against the defendant particularly. 2014 R.I. Super. LEXIS 30, [WL] at *3.

Here, although Lowe stated that there were three suppliers of asbestos-containing cement pipe he was exposed to, he identified Colony Lumber as a supplier of the Johns-Manville pipe and CertainTeed pipes he was exposed to. (Lowe's Dep. Vol. 2 at 226:9-13, 226:25-227:2.) However, as discussed above, Kamco denies that it ever sold CertainTeed cement pipes and points to evidence showing that the only asbestos-containing products it ever sold was from Johns-Manville. See Kamco's Mem. 13-17; see also Kamco's Answers to Interrogatories, Answer No. 4. As there is no evidence that Kamco sold CertainTeed cement pipes, the only reasonable inference based on

Lowe's direct testimony is that Lowe purchased Johns-Manville cement pipes from [*15] Colony Lumber. What weight to assign Lowe's testimony, if any, is a determination for the trier of fact to make. See *Palmisciano*, 603 A.2d at 320.

IV

Conclusion

For the foregoing reasons, Kamco's motion is **GRANTED IN PART** and **DENIED IN PART**. Plaintiffs have failed to show there is a genuine issue of material fact that Kamco sold the CertainTeed cement pipes Lowe is alleged to have been exposed to; however, Plaintiffs have shown that there is evidence in the record for a trier of fact to conclude Kamco supplied the Johns-Manville cement pipes.

Counsel shall submit the appropriate order for entry.

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