STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 27, 2017)

In Re: Asbestos Litigation	:	
	:	
MARY SUPREY, individually and as the Personal Representative of the Estate of PAUL F. McCARTHY	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-13-3511**
	:	
ALFA LAVAL, INC., et al.,	:	
Defendants.	:	
MARY SUPREY, individually and as the Personal Representative of the Estate of PAUL F. McCARTHY	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-13-3512**
	:	
CBS CORPORATION F/K/A VIACOM, INC., et al.	:	
Defendants.	:	

DECISION

GIBNEY, P.J. The Defendants—Warren Pumps, LLC (Warren), Gardner Denver, Inc. (Gardner Denver), and General Electric Company (GE) (collectively, Defendants)[1]—seek summary judgment in the above-entitled asbestos litigation matter. Defendants argue that there are no genuine issues of material fact, and that there is insufficient product identification with respect to each Defendant in order for this matter to survive summary judgment. The Plaintiff

[1] At the time of filing, IMO Industries joined with Defendants to bring this Motion for Summary Judgment. Since that time, however, IMO Industries has left the case, and it no longer moves for summary judgment.

objects, arguing that there are genuine issues of material fact for trial, that prior to his death, Paul F. McCarthy, the Decedent, provided sufficient product identification via his sworn statement, and that the sworn statement meets exceptions to the hearsay rule and should therefore be admissible. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Mr. McCarthy initiated this action via two Complaints dated July 17, 2013, after being diagnosed with malignant mesothelioma on or around May 23, 2013.[2] In his Complaints, Mr. McCarthy alleged that he was exposed to asbestos-containing products manufactured, sold, or distributed by the named Defendants beginning in the 1950s and ending in 1979. Mr. McCarthy further alleged that this exposure occurred during his time working with the U.S. Navy and with the U.S. Postal Services as a warehouse laborer. On July 1, 2013—before the filing of this action and prior to his death on November 13, 2013—Mr. McCarthy provided a sworn statement under oath regarding his work history and alleged exposure to asbestos-containing products. In that sworn statement, Mr. McCarthy stated that he served in the Navy for four years, from June of 1951 until June of 1955, and that following basic training in Newport, Rhode Island, he was assigned to the U.S.S. Glennon, DD-840 (the Glennon).

Initially, Mr. McCarthy was a member of the deck force for approximately two years, during which time his responsibilities included painting, scraping paint, and washing equipment. Following his position on the deck force, Mr. McCarthy was a quartermaster and took care of the

[2] Mr. McCarthy simultaneously filed two complaints: the original Complaint in C.A. No. PC-2013-3511 and the second original Complaint in C.A. No. PC-2013-3512. This resulted in two separate case numbers, with Defendants Warren, and Gardner Denver named in PC-2013-3511 and Defendant GE named in PC-2013-3512. However, the Defendants join for the purpose of this Motion for Summary Judgment, and therefore, their arguments will be addressed collectively.

logbooks, flag duties, and general clean-up on the ship. In his sworn statement, Mr. McCarthy further stated that his final designation aboard the Glennon included an assignment as a metalsmith, a position he held for a year. As a metalsmith, Mr. McCarthy fixed ladders and helped other crewmembers, which in one instance included helping a welder in the boiler room where alleged asbestos-containing equipment was located. Mr. McCarthy stated that he lived aboard the Glennon for at least a month while it was docked in the Boston Naval Shipyard in Charlestown for repairs. During this period, Mr. McCarthy was tasked with working around the ship and cleaning dust out of the vents. Finally, Mr. McCarthy stated in his sworn statement that when the Glennon went on training cruises, the guns were fired and dust would come loose as a result of the vibrations caused by the firing of the guns.

II

Parties' Arguments

Defendants contend that there are no genuine issues of material fact for a jury's consideration, and that, therefore, summary judgment is appropriate. They maintain that the Plaintiff has failed to allege sufficient product identification and exposure evidence with respect to each of the named Defendants. They argue that such product identification must be established as a prima facie element of any asbestos litigation. In order to establish causation in asbestos exposure cases, the Defendants contend that the Plaintiff must present sufficient, competent evidence regarding the frequency, regularity, and proximity of the alleged exposure, which the Plaintiff, they contend, has not successfully established.

Alternatively, the Plaintiff contends that she has alleged sufficient product identification with respect to Defendants—through exhibits establishing the existence of asbestos-containing products sold, manufactured, or distributed by each of the Defendants and located on Mr.

McCarthy's ship, the Glennon. The Plaintiff argues that there are sufficient issues of material fact regarding product identification, exposure evidence, and causal connection to survive summary judgment. Further, the Plaintiff argues that Mr. McCarthy's sworn statement provides evidence of such factual issues and that the statement is admissible through exceptions to the hearsay rule—or in the alternative, that the sworn statement is non-hearsay and therefore admissible.

III

Standard of Review

"[S]ummary judgment is an extreme remedy that warrants cautious application." Gardner v. Baird, 871 A.2d 949, 952 (R.I. 2005). Pursuant to Super. R. Civ. P. 56(c), "[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." Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). In a motion for summary judgment, the moving party bears the initial burden of establishing the absence of a genuine issue of fact; the burden then shifts, and the nonmoving party has an affirmative duty to demonstrate a genuine issue of fact. McGovern v. Bank of Am., N.A., 91 A.3d 853, 858 (R.I. 2014); Robert B. Kent et al., Rhode Island Civil Procedure § 56:5, VII-28 (West 2006). The party who opposes the motion for summary judgment cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions. Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996). 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).

Accordingly, in order for a plaintiff to survive a defendant's motion for summary judgment 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 where the plaintiff is unable to establish a prima facie case. Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 430 (R.I. 2001). A judge's function when "considering a proposed summary-judgment motion is not to cull out the weak cases from the herd of lawsuits waiting to be tried. Rather, only if the case is legally dead on arrival should the court take the drastic step of administering last rites by granting summary judgment." Mitchell v. Mitchell, 756 A.2d. 179, 185 (R.I. 2000).

IV

Analysis

A

Admissibility of Sworn Statement

The parties dispute whether Mr. McCarthy's sworn statement is admissible as a hearsay exception under Rhode Island Rules of Evidence 804(b) or 804(c). The Defendants note that the sworn statement was made before the commencement of this legal action, and that none of the named Defendants were therefore present for that statement or able to cross-examine Mr. McCarthy. The Plaintiff argues that the sworn statement meets the hearsay exception under R.I. R. Evid. 804(b) as a "Statement Under Belief of Impending Death" because Mr. McCarthy made the statement while believing that his death was imminent and in relation to the circumstances of his death. Additionally, the Plaintiff argues that Mr. McCarthy's sworn statement is admissible as an exception to the hearsay rule, namely under R.I. R. Evid. 804(c) as a "Declaration of Decedent Made in Good Faith" because Mr. McCarthy spoke under oath, in good faith, before

the commencement of the legal action, and he spoke from his own personal knowledge. Finally, the Plaintiff argues that if Mr. McCarthy's sworn statement fails to meet the requirements of R.I. R. Evid. 804(b) or 804(c), it should be admissible as a hearsay exception under R.I. R. Evid. 804(b)(5).

Federal case law provides that for affidavits to be utilized relative to summary judgment motions, the first requisite is that the information they contain (as opposed to the affidavits themselves) would be admissible at trial. U.S. v. Hangar One, Inc., 563 F.2d 1155 (5th Cir. 1977) (finding that the threshold issue of admissibility must be resolved before determining whether unresolved questions of fact exist). Rhode Island Superior Court Rules of Civil Procedure 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Super. R. Civ. P. 56(e). Although otherwise admissible evidence may be submitted in inadmissible form at the summary judgment stage, inadmissible hearsay alone may not be used to defeat summary judgment. See Nichola v. Fiat Motor Co., 463 A.2d 511, 513-14 (R.I. 1983) (finding that affidavits that fail to comply with an element of Super. R. Civ. P. 56(e) are useless in establishing if a genuine issue of material fact exists). Therefore, before considering whether any genuine issues of material fact exist, this Court must first analyze the admissibility of Mr. McCarthy's sworn statement under the hearsay rule and its exceptions. Id.

Rhode Island Rules of Evidence Rule 804(c) provides that a declarant's statements shall not be inadmissible in evidence as hearsay "if the court finds that [the declaration] was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." R.I. R. Evid. 804(c). The Rhode Island Supreme Court has acknowledged that

admission of an out-of-court statement under a hearsay rule exception is left to the sound discretion of the trial justice. State v. Lynch, 854 A.2d 1022, 1031 (R.I. 2004). The Court further states that this exception to the hearsay rule "should be liberally applied." Waldman v. Shipyard Marina, Inc., 102 R.I. 366, 369, 230 A.2d 841, 843 (1967).[3] Since this statement is presented in the civil context, this Court must consider whether Mr. McCarthy's statement was made in good faith, before commencement of this action, and was grounded in the decedent's personal knowledge. See R.I. R. Evid. 804(c); State v. Feliciano, 901 A.2d 631, 640 (R.I. 2006) (discussing application of R.I. R. Evid. 804(c) in the criminal versus civil context and applying the additional two-step "testimonial" analysis required in a criminal case).

In the present matter, Mr. McCarthy was diagnosed with malignant mesothelioma in May of 2013. He provided the sworn statement to his attorney, with a court reporter present, on July 1, 2013, prior to the commencement of this action. The first original Complaint in this matter was filed on July 17, 2013; therefore, Mr. McCarthy provided the statement before the commencement of this legal action. See Waldman, 102 R.I. at 369, 230 A.2d at 843. Mr. McCarthy later died on November 13, 2013.

After a review of all the evidence and circumstances before it, this Court is satisfied that Mr. McCarthy's statements were made from his personal knowledge because they concern his personal work experience and his own memories of his time in the U.S. Navy. See R.I. R. Evid. 804(c); Waldman, 102 R.I. at 369, 230 A.2d at 843. In his sworn statement, Mr. McCarthy

[3] While statements of a decedent are admissible under this hearsay rule exception in both civil and criminal trials, a trial justice must go one step further in a criminal context to consider whether admission of the statement would violate the Confrontation Clause as outlined in Crawford v. Washington; namely, whether said statement is "testimonial" in nature and therefore would violate a criminal defendant's right to confront the witness against him or her. Crawford v. Washington, 541 U.S. 36, 53-55 (2004); State v. Ramirez, 936 A.2d 1254, 1266 (R.I. 2007) (noting the two-step analysis required in the criminal context, versus the one-step analysis applied in the civil context).

outlined his various work placements during his time on the Glennon and the responsibilities and duties associated with each position. He recounted, under oath, the dates that he lived on the ship while it was undergoing repairs and the types of machinery that he came into contact with while working onboard. This Court finds that such statements were made from personal knowledge, and further, that they were made in good faith, since there is nothing in the record to indicate that Mr. McCarthy was less than truthful regarding his employment and service history. See Norton v. Courtemanche, 798 A.2d 925, 931 (R.I. 2002) (noting that the trial justice's determination that declarant lacked good faith based on facts of the particular case should receive discretion and not be disturbed on appeal unless clear error). Therefore, Mr. McCarthy's sworn statement is admissible as an exception to the hearsay rule as a statement of a decedent made in good faith and may be considered by this Court in the Motion for Summary Judgment. See R.I. R. Evid. 804(c); Nichola, 463 A.2d at 513-14; Hangar One, 563 F.2d at 1155.[4]

B

Product Identification

The Defendants contend that there are no genuine issues of material fact and that the Plaintiff has provided no product identification with respect to each of the Defendants. They further maintain that the Plaintiff, in order to survive summary judgment, must provide some evidence linking the Defendants' products to Mr. McCarthy's alleged exposure to asbestos as a prima facie element of the Plaintiff's case. They argue that the Plaintiff has not provided sufficient evidence of Warren, Gardner Denver, or GE asbestos-containing products on the Glennon, where Mr. McCarthy served during his time in the Navy. Finally, the Defendants

[4] This Court declines to analyze the admissibility of Mr. McCarthy's statement under alternative exceptions to the hearsay rule since admissibility has already been determined and the Court need not resort to R.I. R. Evid. 804(b)(5), which allows for the admission of statements not explicitly covered by other hearsay exceptions. See R.I. R. Evid. 804(b)(5).

contend that Mr. McCarthy's jobs and duties onboard the ship would not have exposed him to any of the Defendants' products, and that there is insufficient evidence to even suggest that the Defendants placed any asbestos-containing products on the Glennon.

The Plaintiff contends that Mr. McCarthy, as part of his required duties onboard the Glennon, spent a significant amount of time in contact with and around the Defendants' asbestos-containing products. They maintain that each Defendant did, in fact, supply asbestos-containing products to the U.S. Navy and its ships, including the Glennon. The Plaintiff alleges that Mr. McCarthy's duties and time living on the ship would have exposed him to asbestos dust, and that any small amount of exposure over time can result in an asbestos-related illness. Finally, the Plaintiff maintains that she has provided the required preliminary showing of evidence necessary to establish product identification and to overcome the summary judgment stage. The Plaintiff notes that proof of product identification is a low threshold at the summary judgment stage, and that product identification issues are typically reserved for the jury as an issue of fact determination.

This Court has, in the past, looked to both Massachusetts and Federal case law on product identification to determine the various ways that a plaintiff might meet his or her burden at the summary judgment stage. In re Asbestos Litigation, No. Civ.A 01-0696, 2002 WL 1378959 (R.I. Super. June 20, 2002) (turning to Massachusetts and Federal cases where the law and its design are substantially similar to Rhode Island law). Specifically, Welch v. Keene Corp. addresses the ways in which a plaintiff might sufficiently allege contact with a defendant's asbestos-containing product—including, but not limited to, affidavits and other exhibits with a particular or specific date or range of contact, the proximity and frequency of any contact, and any witnesses who could support contact with the product. 575 N.E.2d 766, 769 (Mass. App. Ct.

1991). Ultimately, any question of product identification will be evaluated on a case-by-case basis. Id.

In the present matter, the Plaintiff has provided evidence via Mr. McCarthy's sworn statement of his duties onboard the Glennon and the areas of the ship that he had access to or in which he worked. Mr. McCarthy's own statement outlined the various jobs he held and the duties they required—such as helping a welder in the boiler room—in addition to general tasks such as cleaning dust from vents and living on the ship for extended periods of time. See Pl.'s Obj. to Gardner Denver Mot. for Summ. J. Ex. 1 at 10, 15, 18. Mr. McCarthy recounted that the Glennon would shake dust loose as the guns were fired on training cruises. See id. at 8-9. Further, Plaintiff has provided historical documents as evidence that Gardner Denver promised a shipment of alleged asbestos-containing pumps to the Glennon during the time period in question. See Pl.'s Obj. to Gardner Denver Mot. for Summ. J. Ex. 2. The Plaintiff provided historical documents to show that Warren supplied equipment to the Glennon, including emergency feed pumps, and that Warren has admitted that its pumps contained a variety of asbestos-containing products. See Pl.'s Obj. to Warren Mot. for Summ. J. Ex. 3. In sworn answers to interrogatories, Warren admitted that some of its pumps contain asbestos gaskets, packing, and insulation. See id.

Finally, the Plaintiff has presented historical documents alleging that the Glennon was a GE turbine destroyer and that GE supplied two ship service generators; the documents also note that the turbine "was reported to have excessive vibrations." See Pl.'s Obj. to GE Mot. for Summ. J. Ex. 2. The Plaintiff further presented the testimony of a GE corporate representative, which was offered in another case, to allege that from a "functional standpoint" GE turbines would need to be insulated to function properly. See id. at Ex. 3. Representatives stated that

there were occasions where GE provided the insulation for turbines, and that the vendor of the main turbine is responsible for the insulation of the equipment. See id. at Exs. 6, 7. The Plaintiff provided evidence of a GE technical information letter that is generally applicable to steam turbine-generators and that lists the asbestos-containing materials in those turbines. See id. at Ex. 8. That same technical information letter states that asbestos-containing gaskets were used in casings, main steam piping, main steam valve assemblies, and generators, among other places. See id.

Applying the factors outlined in Welch to the present matter, this Court finds that the Plaintiff has alleged sufficient product identification in relation to each of the Defendants. See 575 N.E.2d at 769 (finding product identification when decedent could point to specific date and time period of alleged exposure). Through the use of sworn statements, historical documents, and medical experts, the Plaintiff has sufficiently alleged a particular or specific date or range of contact and the proximity and frequency of any contact to surpass the summary judgment stage. See id. For example, the Plaintiff offers historical documents to show a range of years during which the Defendants supplied equipment to the Glennon and Mr. McCarthy's sworn statement described his contact and proximity to those products and area of the ship that allegedly contained asbestos. See Pl.'s Obj. to Gardner Denver Mot. for Summ. J. Exs. 1, 2; Pl.'s Obj. to Warren Mot. for Summ. J. Ex. 3; Pl.'s Obj. to GE Mot. for Summ. J. Exs. 2-8. Accordingly, this Court finds that genuine issues of material fact regarding product identification, Mr. McCarthy's exposure, and causal nexus remain for a jury's consideration. See Delta Airlines, 785 A.2d at 1126.

This Court has previously stated that once sufficient proximate cause has been shown in order to pass the summary judgment stage, it is for the jury to determine whether a defendant's

product was a substantial factor in causing a plaintiff's injury. See Splendorio v. Bilray Demolition Co., 682 A.2d 461, 467 (R.I. 1996) (finding that summary judgment is proper when plaintiff fails to present evidence of which a reasonable inference of proximate cause may be drawn); see also Totman v. A.C. & S., Inc., 2002 WL 393697 (R.I. Super. Feb. 11, 2002) (Gibney, P.J.) (holding that it is a jury's role to determine whether product was a substantial factor in causing plaintiff's illness). Such issues are questions of fact most appropriate for a jury's consideration, rather than a trial justice's determination at the summary judgment stage, since summary judgment is a drastic remedy that should be dealt with cautiously. See Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008). Therefore, this Court is satisfied that sufficient product identification, exposure evidence, and causal connection have been established with respect to each individual Defendant in order for Plaintiff's claims to survive the summary judgment stage. See Welch, 575 N.E.2d at 769.

V

Conclusion

This Court finds that Mr. McCarthy's sworn statement is admissible evidence under R.I. R. Evid. 804(c) as an exception to the hearsay rule. Further, this Court finds that the Plaintiff has provided sufficient evidence of product identification, exposure evidence, and causal connection for each moving Defendant in order to survive summary judgment. Therefore, the Defendants' Motions for Summary Judgment are denied in full. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASES:	**Mary Suprey, Individually and as the Personal Representative of the Estate of Paul F. McCarthy v. Alfa Laval, Inc., et al.** **and** **Mary Suprey, Individually and as the Personal Representative of the Estate of Paul F. McCarthy v. CBS Corporation f/k/a Viacom, Inc., et al.**
CASE NOS:	**PC-13-3511 and PC-13-3512**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 27, 2017**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**Robert J. Sweeney, Esq.**
For Defendant:	**Jeffrey M. Thomen, Esq.; Zachary Weisberg, Esq.; Shannon Marie O'Neil, Esq.; Andrew R. McConville, Esq.**