STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: October 22, 2018]

ROBERT E. CARSON, as Personal Representative of the Estate of RALPH E. CARSON, and DOROTHY CARSON, individually and as Surviving Spouse,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-2011-1046**
	:	
3M COMPANY, et al.,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Before this Court is a Motion for Summary Judgment, pursuant to Super. R. Civ. P. 56, brought by ExxonMobil Oil Corporation (ExxonMobil or Defendant) against Robert E. Carson, as Personal Representative of the Estate of Ralph E. Carson (Decedent), and Dorothy Carson, individually and as Surviving Spouse of Decedent (collectively Plaintiffs). Defendant submits that it is immune from civil suit by Plaintiffs under the exclusivity provision of Chapter 29 of Title 28, entitled Rhode Island Workers' Compensation Act (WCA). Plaintiffs object, arguing that a genuine issue of material fact exists as to whether workers' compensation benefits are the appropriate remedy. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Decedent was employed by ExxonMobil continuously between 1946 and 1971. Decedent worked as a "boiler maker" who "made, installed, and repaired boilers" at the Mobil Oil Refinery in East Providence, Rhode Island, which is no longer in operation. In 1971,

Decedent voluntarily withdrew from his employment with ExxonMobil, and fully retired from the workforce in 1975. In 2008, Decedent was diagnosed with pleural mesothelioma. He died as a result of the disease in 2009 at the age of eighty-four (84) years old.

Plaintiffs contend that Decedent was exposed to various asbestos-containing products between approximately 1942 and 1971, during most of which time Decedent was employed by ExxonMobil. Specifically, Plaintiffs maintain that Decedent was forced to breathe, inhale, or generally come into contact with asbestos particles or fibers during the course of his employment. Plaintiffs aver that the Decedent's exposure to asbestos caused him great pain and suffering, and proximately caused his death from mesothelioma.

In 2011, Dorothy Carson brought this action against multiple defendants in her capacity as the surviving spouse of the Decedent. ExxonMobil was not included in the original complaint (Complaint), but was subsequently joined as a defendant. The Complaint included counts of failure to warn, negligence, strict product liability, breach of warranty, conspiracy, loss of consortium, and wrongful death. In 2012, Plaintiff amended her Complaint to join Robert Carson as an additional plaintiff, acting in his capacity as Personal Representative of Decedent's estate.

ExxonMobil now moves for summary judgment, asserting it is immune from civil suit under the exclusivity provision of the WCA. Specifically, Defendant submits that mesothelioma is an occupational disease for the purpose of the WCA; Decedent contracted the disease while employed by Defendant; and, Decedent failed to preserve his common law right to sue ExxonMobil under G.L. 1956 §§ 28-29-17 and 28-29-19. As such, Defendant maintains that Plaintiffs' claims are barred by the exclusivity provision of the WCA, and that this Court must

grant summary judgment, because Plaintiffs' sole remedy lies with the Workers' Compensation Commission (WCC).

ExxonMobil additionally moves for summary judgment on Plaintiff Dorothy Carson's claim for loss of consortium. Defendant asserts that the viability of a derivative claim is dependent upon the success of the underlying claims, and must be dismissed when the claims upon which they are based fail as a matter of law. Defendant maintains that if this Court determines Plaintiffs have no right to sue due to the exclusivity provision of the WCA, the derivative claim must also be dismissed. Accordingly, ExxonMobil seeks summary judgment on Dorothy Carson's loss of consortium claim.

In response, Plaintiffs agree that the Rhode Island Supreme Court has recognized mesothelioma as an occupational disease for the purpose of the WCA, and that Decedent was an employee of Defendant employer within the meaning of the statute. However, Plaintiffs assert that workers' compensation benefits are not the appropriate remedy in this action. Plaintiffs state that their suit is not barred because Decedent did not experience a loss of earning as a result of his disease, and applying the exclusivity provision to this case would be contrary to legislative intent. Accordingly, Plaintiffs object to Defendant's motion for summary judgment.

II

Standard of Review

Pursuant to Super. R. Civ. P. 56, "[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt 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 Educ.*, 93 A.3d 949, 951 (R.I. 2014) (internal quotation marks omitted) (alterations in

original). '"The moving party bears the initial burden of establishing the absence of a genuine issue of fact."' *McGovern v. Bank of Am., 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)). 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, 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. Citizens Bank of R.I.*, 799 A.2d 254, 257 (R.I. 2002) (per curiam)).

During this analysis, the Court is cognizant 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)). "[O]nly 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).

III

Analysis

The Rhode Island Legislature enacted the WCA to replace the cumbersome tort system with an accelerated, no-fault remedy for injured workers. *See Kaya v. Partington*, 681 A.2d 256, 260 (R.I. 1996). The WCA applies "to any and all employees, as defined in § 28-29-2(4), who are injured or hired in the state of Rhode Island." Sec. 28-29-1.3. Through the WCA, "the Legislature clearly intended that this system of benefits serve 'as the exclusive remedy available to injured workers, completely replacing all other remedies then available.'" *Kulawas v. Rhode Island Hosp.*, 994 A.2d 649, 656 (R.I. 2010) (quoting *Kaya*, 681 A.2d at 260); *see also Nassa v.*

Hook-SupeRx, Inc., 790 A.2d 368, 371 (R.I. 2002) (explaining that the employee "'gives up the right to pursue an action at law'" through the WCA) (quoting *DiQuinzio v. Panciera Lease Co., Inc.*, 612 A.2d 40, 42 (R.I. 1992)).

When asserting the WCA as a defense, the employer bears the burden of proving that workers' compensation benefits are the appropriate and exclusive remedy for the injured employee. 9 *Larson's Workers' Compensation Law* § 100.01(2) at 100-3. An employer must demonstrate "that the plaintiff was an employee entitled to workers' compensation [benefits]" under the appropriate workers' compensation statute by establishing an employer-employee relationship between the parties at the time of injury. *Id.* at 100-3; 100-5–100-6. Furthermore, the employer must demonstrate that the employee has not preserved his or her common law right to sue. *See* § 28-29-17 (explaining that an employee must provide the employer with written notice within ten (10) days of the employee's date of hire—or within ten (10) days of the time the employer becomes subject to the WCA—in order to waive his or rights to recovery under the WCA, thereby preserving the right to sue at common law).

A

Mesothelioma as an Occupational Disease Under the WCA

The WCA defines an "injury" as a "personal injury to an employee arising out of and in the course of his or her employment, connected and referable to the employment." Sec. 28-29-2(7)(i). When an employee is disabled as a result of an "occupational disease," the injury is treated as a personal injury under the meaning of the WCA, making the WCA the appropriate remedy for the employee. Sec. 28-34-2. An occupational disease is defined, in relevant part, as a "disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment." Sec. 28-34-1(3).

Specific occupational diseases to be treated as compensable personal injuries under the WCA are enumerated in § 28-34-2. While this provision includes "[d]isability arising from . . . asbestosis," mesothelioma is notably absent from the statute. Sec. 28-34-2(32). Nevertheless, it is well-settled that mesothelioma qualifies as an occupational disease within the meaning of the WCA. *Gallagher v. Nat'l Grid USA/Narragansett Elec.*, 44 A.3d 743, 744 (R.I. 2012) ("[i]t is not disputed that [plaintiff's] malignant mesothelioma is an occupational disease"). Accordingly, Decedent's mesothelioma constitutes an occupational disease within the meaning of the WCA.

B

WCA Jurisdiction and Loss of Earning Capacity

While Plaintiffs concede that mesothelioma is recognized by Rhode Island courts as an occupational disease for the purposes of the WCA, Plaintiffs contend that the WCA is not Decedent's exclusive remedy. Plaintiffs explain that the exclusivity provision is only applicable when an employee has lost earning capacity as a result of an occupational disease (or personal injury), and submit to this Court that the Decedent did not experience lost earnings as of the date of his injury. In support thereof, Plaintiffs cite to *Mullaney v. Gilbane Bldg. Co.*, 520 A.2d 141, 144 (R.I. 1987).

In *Mullaney*, three plaintiffs could not recover weekly workers' compensation benefits because they were retired at the time of their incapacitation. *Id.* at 142-43. Our Supreme Court found that the WCC "had no statutory authority . . . to award the compensation the employees sought," which were lost wages. *Id.* at 144. The plaintiffs were unable to show earning capacity at the time of the incapacitation because they were retired, and therefore, the Court affirmed the denial of their petitions for lost wages. *Id.* at 143 (noting that "weekly workers' compensation

benefits are not paid to a worker because of a physical disability but rather because one has, as a result of a work-related condition or injury, suffered a loss of one's earning capacity"); *see also Lambert v. Stanley Bostitch, Inc.*, 723 A.2d 777, 781 (R.I. 1999) (limiting *Mullaney* to voluntary retirement, rather than involuntary unemployment, to calculate lost wages).

The Plaintiffs' reliance on *Mullaney* is misplaced. The exclusivity provision of the WCA currently at issue before this Court was not a factor in the *Mullaney* decision. Mullaney, 520 A.2d at 141. Instead, *Mullaney* involved the review of three decisions already rendered by the WCC. *Id.* Plaintiffs' reading of *Mullaney* would foreclose the possibility of workers' compensation benefits for the majority of mesothelioma cases, as the disease has a long latency period and individuals are often retired when their diseases manifest. *See Gallagher*, 44 A.3d 743, at 747 (explaining that mesothelioma "has an average latency period of thirty to thirty-five years"). Furthermore, Plaintiffs specifically indicated in their complaint that the Decedent suffered a loss of earning capacity as a result of his disease. Compl. ¶ 16 ("[a]s a further result of said illness, the Decedent's earning capacity was impaired"). As such, Plaintiffs are estopped from now taking a contrary position. *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001) r*eh'g denied* (Aug. 6, 2001) (explaining that judicial estoppel prevents parties from advancing inconsistent positions in order to obtain an unfair advantage in court).

C

Exclusivity and Waiver of Common Law Rights Provisions of the WCA

Having determined that mesothelioma is an occupational disease within the meaning of the WCA, and that loss of earning capacity need not be proven as a threshold issue in the analysis of the exclusivity provision, this Court now turns to the question of whether Decedent

waived his common law right to sue. Specifically, the Court addresses the exclusivity and waiver provisions of the WCA and their applicability to the Decedent.

The WCA provides injured employees a remedy that replaces all other remedies available against the employer. *Kaya*, 681 A.2d at 260. The absolute nature of § 28-29-20, known as the exclusivity provision, provides that

> "[t]he right to compensation for an injury under chapters 29–38 of this title, and the remedy for an injury granted by those chapters, shall be in lieu of all rights and remedies as to that injury now existing, either at common law or otherwise against an employer, or its directors, officers, agents, or employees . . . ." Sec. 28-29-20.

The provision has the potential to lead to harsh results, but its constitutionality is well-settled. *Sayles v. Foley*, 38 R.I. 484, 96 A. 340, 349 (1916) (holding, shortly after the WCA's enactment in 1912, that the exclusivity provision is constitutional on both the state and federal levels).

Nevertheless, the WCA contains a narrow exception that allows employees to retain their common law right to sue. The provision states that an employee

> "shall be held to have waived his or her right of action at common law to recover damages for personal injuries if he or she has not given his or her employer at the time of the contract of hire or appointment notice in writing that he or she claims that right and within ten (10) days after that has filed a copy of the notice with the director [of the department of labor and training]." Sec. 28-29-17.

An employee who has not retained his or her common law right in the aforementioned manner is barred from pursuing a civil action "in which workers' compensation benefits are appropriate." *Kulawas*, 994 A.2d at 656 (citing *Lopes v. G.T.E. Products Corp.*, 560 A.2d 949, 950 (R.I. 1989)); *see* § 28-29-20.

Here, no genuine issue of fact exists with respect to whether Decedent preserved his common law right to sue. *Estate of Giuliano*, 949 A.2d at 391 ("movant must seek to establish

that there exists no genuine dispute with respect to the material facts of the case" at summary judgment). Plaintiffs contend that Defendant has not demonstrated Decedent was subject to the WCA, but Plaintiffs fail to produce evidence supporting their claim. *Id.* ("nonmovant must, by competent evidence, prove the existence of a disputed issue of material fact" and "may not rely upon 'mere allegations or denials in the pleadings'") (quoting *Tanner v. Town Council of Town of E. Greenwich*, 880 A.2d 784, 791 (R.I. 2005)). The WCA was well-established law at the time Decedent began his term of employment with ExxonMobil. Sec. 28-29-6 (1938) ("[e]very . . . private corporation, including any public service corporation, including the state, that regularly employs employees in the same business . . . shall constitute an employer subject to the provisions of chapters 29-38 of this title"). Absent a waiver by Decedent in accordance with § 28-29-17, he was subject to the WCA during his employment with ExxonMobil. *Id.* As Plaintiffs have failed to produce evidence of such a waiver, no issue of material fact exists with respect to whether Decedent was subject to the WCA.

D

Applicability of the 1979 WCA Amendment to Decedent

Plaintiffs further argue that the intent behind the WCA—evidenced by the timing of OSHA's 1972 Federal Register publication regarding asbestos safety precautions, coupled with the 1979 Reenactment of the General Laws of Rhode Island (1956)—precludes the exclusive application of the WCA to the Decedent. The 1972 OSHA publication, as well as the 1979 Reenactment of the WCA, took place after Decedent voluntarily left the workforce, and Plaintiffs suggest that the Legislature did not intend for the WCA to apply to an individual in Decedent's position.

Due to the latent nature of many occupational diseases, courts have been faced with the question of what law to apply in the context of workers' compensation benefits. *See, e.g., Johnson v. Ringuette,* 99 R.I. 419, 208 A.2d 393 (1965). The WCA indicates that its statute of limitations begins to run when "the person claiming benefits knew . . . or should have known[] of the existence of the impairment and its causal relationship to his or her employment." Sec. 28-35-57(b)(1). In the case of latent diseases, '"the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct."' *Hanson v. Singsen,* 898 A.2d 1244, 1248-49 (R.I. 2006) (quoting *Anthony v. Abbott Laboratories,* 490 A.2d 43 (R.I. 1985)). More specifically, courts outside Rhode Island have held that the proper law to apply in mesothelioma cases is the law in place at the time an employee's disease is diagnosed. *See, e.g., Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.,* 219 Cal. App. 3d. 1265, 1268 (1990) (applying the workers' compensation law in place at the time of the employee's mesothelioma diagnosis, rather than his asbestos exposure).

Accordingly, the applicable law is the 1979 Reenactment of the General Laws of 1956, which controlled at the time of Decedent's mesothelioma diagnosis. Sec. 28-35-57(b)(1). However, due to the lack of substantive changes to the relevant provisions of the WCA during Decedent's employ with ExxonMobil, Plaintiffs' argument that the Legislature did not intend the WCA to apply to Decedent is moot. The WCA was enacted in 1912, and included the exclusivity and waiver provisions that remain in force today (subject only to minor, non-substantive modifications). P.L. 1912, ch. 831, art. I, §§ 6-7. Furthermore, "asbestosis" was added to the occupational diseases recognized under the WCA in 1949, while Decedent was employed with Defendant. P.L. 1949, ch. 2253, § 1. As such, the Court finds that Plaintiffs' common law claim is governed by the WCA and is, therefore, barred by its exclusivity provision.

E

Loss of Consortium Claim

Defendant additionally moves for summary judgment on Plaintiff Dorothy Carson's derivative claim for loss of consortium. ExxonMobil maintains that if Plaintiffs' underlying common law claim fails—due to the fact that the sole remedy lies with the WCC—then Dorothy Carson's derivative claim must also fail as a matter of law. A loss of consortium claim is derivative and dependent upon the injured spouse's right to recovery. *Mariani v. Nanni*, 95 R.I. 153, 154, 185 A.2d 119, 120 (1962); *see also Normandin v. Levine*, 621 A.2d 713 (R.I. 1993) (loss of consortium claims are "inextricably linked" to the underlying claims because their success depends on the success of those underlying claims). Specifically, our Supreme Court has held that the exclusivity provision of the WCA bars a spouse's claim for loss of consortium if the original common law claim is likewise barred. *Sama v. Cardi Corp.*, 569 A.2d 432, 433 (R.I. 1990).

This Court has determined that the Plaintiffs' common law claim is barred, and their sole remedy lies with the WCC. Accordingly, Dorothy Carson's derivative claim for loss of consortium must also fail as a matter of law. *Id.* It is well-settled that "an action for loss of consortium . . . although a separate cause of action as plaintiff maintains, is not an independent action but a derivative one that is attached to the claim of the injured spouse." *Sami*, 569 A.2d at 433. If the underlying claim fails, "it follows that plaintiff has no such right either." *Id.* (quoting *Mariani*, 95 R.I. at 154, 185 A.2d at 120). Plaintiffs' claim has failed as a matter of law; therefore, Dorothy Carson's derivative claim is likewise barred.

F

Timeliness of the Defendant's Motion

Plaintiffs finally note that Defendant's motion for summary judgment is dilatory. Citing no authority, Plaintiffs submit that Defendant's counsel waited seven years until after the subject case was filed to raise the WCA as a defense again. Defendant maintains it included the WCA as an affirmative defense in its Answer to Plaintiffs' original Complaint in 2011, and avers that no authority exists that the defense of subject matter jurisdiction is waived when a defendant participates in discovery.

The Court finds that Defendant's motion is timely. It is well-established that lack of subject matter jurisdiction may be raised at any time. *See DeMarco v. Travelers Ins. Co.*, 102 A.3d 616 (R.I. 2014) (citing *Long v. Dell, Inc.*, 984 A.2d 1074, 1078 (R.I. 2009)). Subject matter jurisdiction may not be conferred by either party, and may be raised by the court *sua sponte*. *Id.* at 621. However, the exclusivity provision of the WCA is not an issue of subject matter jurisdiction, but rather an affirmative defense that must be raised in the pleadings when used defensively. *Cady v. IMC Mortg. Co.*, 862 A.2d 202, 211 (R.I. 2004) (holding that the defensive use of the exclusivity provision of the WCA is an affirmative defense, not an issue of subject matter jurisdiction). Here, Defendant included the WCA as an affirmative defense in its Answer to Plaintiffs' Complaint. Therefore, ExxonMobil has not forfeited the use of this defense. *Id.*

G

Retaining Jurisdiction if the WCC Denies Plaintiffs a Remedy

Lastly, at oral argument, Plaintiffs ask that the case be remanded to this Court in the event the WCC denies Plaintiffs a remedy. This Court has considered the issue of whether a remedy exists at common law, *supra*, and concluded that such remedy is barred by the exclusivity provision of the WCA. Sec. 28-29-20 ("the remedy for an injury granted by those chapters, shall be in lieu of all rights and remedies as to that injury"). If Plaintiffs are denied relief by the WCC, §§ 28-35-28 and 28-35-29 provide a statutory right of appeal. *See Callaghan v. Rhode Island Occupational Info. Coordinating Comm./Indus. Educ. Council of Labor*, 704 A.2d 740-41, 744 (R.I. 1997).

IV

Conclusion

For the foregoing reasons, this Court finds that Plaintiffs fail to carry their burden of establishing a genuine issue of material fact to preclude summary judgment herein. Decedent was an employee of ExxonMobil during the years 1946 to 1971, and subsequently contracted an occupational disease, mesothelioma. Sec. 28-34-2. Therefore, the WCA, along with its exclusivity and waiver provisions, applies to this case. *Id.* Plaintiffs failed to establish a genuine issue of fact with regard to whether Decedent retained his common law right to sue ExxonMobil. Accordingly, Plaintiffs' suit in this Court is barred, and Plaintiffs' sole remedy against Defendant lies with the WCC. Sec. 28-35-11 ("[a]ll questions arising under chapters 29 – 38 of this title . . . shall, except as otherwise provided, be determined by the workers' compensation court"). Should the WCC determine that Plaintiffs are not entitled to relief under the WCA, Plaintiffs have a statutory right of appeal pursuant to §§ 28-29-17, 28-35-28, and 28-35-29. Likewise,

Dorothy Carson's loss of consortium claim fails as a matter of law as the WCA bars the underlying claim. As no genuine issue of material fact exists with regard to the WCA's applicability to this case, Defendant is entitled to judgment as a matter of law.

Counsel shall submit the appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Robert E. Carson, et al. v. 3M Company, et al.
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COURT:	Providence County Superior Court
DATE DECISION FILED:	October 22, 2018
JUSTICE/MAGISTRATE:	Gibney, P.J.

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