STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-10-19

GWENDOLYN RICHARDS, Individually and as Personal Representative of the ESTATE OF AUSTIN RICHARDS, JEAN ANN NOONAN, JEFFREY RICHARDS, JERRY RICHARDS, and JOEL RICHARDS,

Plaintiffs,

v.

ARMSTRONG INTERNATIONAL, INC., CRANE CO., DATRON INC. LIQUIDATING TRUST, GOULDS PUMPS, INC., and NASH ENGINEERING CO.,

Defendants

DECISION AND ORDER
(Crane Co.)

In this action, Plaintiffs seek to recover damages allegedly resulting from the death of Austin Richards (the Decedent) due to his exposure to asbestos during the course of his employment at the Great Northern Paper Company (Great Northern). Plaintiffs allege that as a result of exposure to asbestos insulation used with products manufactured by each of the Defendants, the Decedent contracted mesothelioma, which resulted in his death. The matter is before the Court on the summary judgment motion of Defendant Crane Co., individually and as the successor-in-interest to Chapman Valve Co. and Jenkins Valves (collectively, "Crane").

I. BACKGROUND

Except where noted, the following facts in the summary judgment record are not in dispute. *See F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 2, 8 A.3d 646, 647.

The Decedent was employed at Great Northern from 1950 to 1953 and 1956 to 1987. (Supp. S.M.F. ¶ 3; Opp. S.M.F. ¶ 3.)[1] Plaintiffs allege that the Decedent was exposed to asbestos and asbestos-containing products while working at Great Northern. (Supp. S.M.F. ¶ 1; Opp. S.M.F. ¶ 1.) In his capacity as a mason's helper and mason, the Decedent was involved in applying and removing asbestos insulation from pipes and equipment at Great Northern. (Supp. S.M.F. ¶¶ 5-6; Opp. S.M.F. ¶¶ 5-6; A.S.M.F. ¶ 3; Reply S.M.F. ¶ 3.) He did not install, nor do any maintenance on, valves while employed at Great Northern. (Supp. S.M.F. ¶¶ 10-11; Opp. S.M.F. ¶¶ 10-11; A.S.M.F. ¶ 7; Reply S.M.F. ¶ 7.)

The summary judgment record supports the presence of Crane Co. valves, Jenkins valves, and Chapman valves at Great Northern during the period that the Decedent worked there as a mason.[2] (Supp. S.M.F. ¶ 7; Opp. S.M.F. ¶ 7; A.S.M.F. ¶¶ 12-13; Reply S.M.F. ¶¶ 12-13.) It is undisputed that valves arrived at Great Northern as bare steel. (Supp. S.M.F. ¶ 15; Opp. S.M.F. ¶ 15.) The parties vigorously dispute whether there is sufficient, admissible evidence to support the assertion that the Decedent specifically applied and removed asbestos insulation from Crane Co., Jenkins, or Chapman valves. (*See* Supp. S.M.F. ¶¶ 4, 8-9; Opp. S.M.F. ¶¶ 4, 8-9; A.S.M.F. ¶ 6; Reply S.M.F. ¶ 6.) The parties also dispute the extent to which Crane Co. recommended the use of asbestos insulation with its products, and whether these recommendations were made to Great Northern.[3] (*See* A.S.M.F. ¶¶ 19-24; Reply S.M.F. ¶¶ 19-24.)

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[1] Plaintiffs qualified this statement to note that the Decedent worked at Great Northern Paper Mill (Great Northern) until 1987. (Opp. S.M.F. ¶ 3.)

[2] Crane suggests in its reply statement of material facts that the only Crane Co. products that Crane Co. shipped to Great Northern were four ball valves in 1981. (*See* Reply S.M.F. ¶¶ 16-31.)

[3] Several of Plaintiffs' statements of material fact include references to asbestos containing packing materials or gaskets sold by Crane. (*See* A.S.M.F. ¶¶ 16-19, 21-23, 25, 29-30.) Crane objects to these statements as irrelevant to the present motion because Plaintiffs' theory of liability is that the Decedent's exposure to exterior asbestos insulation caused his illness. (*See* Obj. to A.S.M.F. ¶¶ 16-19, 21, 25, 29-30.)

Crane Co. acquired the Jenkins line of valves in an asset purchase in the early 1990s when Jenkins was in bankruptcy, but did not acquire the liabilities of Jenkins.[4] (Supp. S.M.F. ¶¶ 16-17, 20; Opp. S.M.F. ¶¶ 16-17, 20.)

The Decedent was diagnosed with malignant mesothelioma at age 71 and passed away on August 19, 2007. (A.S.M.F. ¶ 1; Reply S.M.F. ¶ 1.)

II. DISCUSSION

A. Standard of Review

Pursuant to M.R. Civ. P. 56(c), a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . show that there is no genuine issue as to any material fact set forth in those statements and that [the] party is entitled to a judgment as a matter of law." A party wishing to avoid summary judgment must present a prima facie case for each element of a claim or defense that is asserted. *See Reliance Nat'l Indem. v. Knowles Indus. Svcs.*, 2005 ME 29, ¶ 9, 868 A.2d 220. At this stage, the facts in the summary judgment record are reviewed "in the light most favorable to the nonmoving party." *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63. A material fact is a fact that has "the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573. "If material facts are disputed, the dispute must be resolved through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18.

A factual issue is genuine when there is sufficient supporting evidence for the claimed fact that would require a fact-finder to choose between competing versions of the facts at trial. *See Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745. "Neither party may rely on conclusory

[4] Plaintiffs assert there is a genuine issue of material fact regarding whether Crane Co. acquired the liabilities of Jenkins, but they have not asserted in their statement of material facts or otherwise established by record evidence to support their contrary viewpoint. *See Kenny v. Dep't of Human Svcs.*, 1999 ME 158, ¶ 3, 740 A.2d 560. Crane has assumed for purposes of the motion that Crane Co. is responsible for both the Crane and Chapman lines of valves. (Crane MSJ 2 n.2, 11-14.)

allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact." *Kenny v. Dep't of Human Svcs.*, 1999 ME 158, ¶ 3, 740 A.2d 560 (quoting *Vinick v. Comm'r*, 110 F.3d 168, 171 (1st Cir. 1997)).

B. Applicable Law

Plaintiffs' primary causes of action against Crane are negligence and strict liability.[5] Plaintiffs allege that the use of asbestos insulation on Crane's valves and the valves of its predecessors-in-interest was reasonably foreseeable, and that Crane was negligent in the manufacture and sale of its products in part because Crane failed to warn of the reasonable foreseeable dangers associated with the use of its products with asbestos-containing insulation made by third parties. As a result, the Decedent allegedly was exposed to harmful asbestos insulation, which caused Decedent to develop mesothelioma and ultimately resulted in his death.

"The essential elements of a claim for negligence are duty, breach, proximate causation, and harm." *Baker v. Farrand*, 2011 ME 91, ¶ 11, 26 A.3d 806. A plaintiff must demonstrate that "a violation of the duty to use the appropriate level of care towards another, is the legal cause of harm to" the plaintiff and that the defendant's "conduct [was] a substantial factor in bringing about the harm." *Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1993) (internal citations omitted); *see also Bonin v. Crepeau*, 2005 ME 59, ¶ 10, 873 A.2d 346 (outlining negligence cause of action for supplying a product without adequate warnings to the user); RESTATEMENT (SECOND) OF TORTS § 388 (1965). "Maine's strict liability statute, [14 M.R.S. § 221 (2011)],

[5] In Count I of the complaint, Plaintiffs allege that the negligence of each manufacturer Defendant, including Crane, caused the Decedent's exposure to asbestos, development of mesothelioma, and ultimate death. Plaintiffs also assert strict liability for defective design and condition based on asbestos within the products and the failure to warn of the dangers of asbestos (Count I), civil conspiracy among all the defendants (Count III), gross negligence (Count IV), "aiding and abetting" among the Defendants' negligent and intentional acts (Count V), negligence per se against all defendants based on alleged violations of state and federal law (Count VI), and loss of consortium (Count VII).

imposes liability on manufacturers and suppliers who market defective, unreasonably dangerous products," including liability for defects based on the failure to warn of the product's dangers.[6] *See Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 537 (Me. 1986).

As the asbestos litigation has evolved both nationally and within Maine, the level of proof necessary to establish the requisite relationship between a plaintiff's injuries and a defendant's product has been subject of much debate.[7] A majority of jurisdictions have adopted the standard articulated by the court in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), where the court construed the "substantial factor" test of the RESTATEMENT (SECOND) OF TORTS.[8] In *Lohrmann*, the court announced and applied the frequency, regularity, and proximity test, which requires a plaintiff to "prove more than a casual or minimum contact with the product" that contains asbestos. 782 F.2d at 1162. Rather, under *Lohrmann*, a plaintiff must present "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-63. *Lohrmann* suggests that the Court engage a quantitative analysis of a party's exposure to asbestos in order to determine whether, as a matter of law, the party can prevail. *See id.* at 1163-64.

Although the Maine Law Court has not addressed the issue, at least one Justice of the Maine Superior Court has expressly rejected the *Lohrmann* standard. Justice Ellen Gorman[9]

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[6] In addition, strict liability can attach for a design defect or a defect in the manufacturing process. *See Pottle v. Up-Right, Inc.*, 628 A.2d 672, 674-75 (Me. 1993). Those theories of liability are not at issue in this case.

[7] In their opposition to Crane's motion for summary judgment, Plaintiffs write that strict liability in Maine requires medical causation and a product nexus in order to prove the necessary link between the alleged defective product and the claimed damages. (Pls.' Opp'n MSJ 6.) Plaintiffs also assert that this "rubric . . . is a departure from the so-called 'frequency, regularity, and proximity test' of *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1157 (4th Cir. 1986)." (Pls.' Opp'n MSJ 6.) Because the Maine Law Court has not addressed the issue in the context of asbestos litigation (Plaintiffs cite other Superior Court decisions as authority for the standard in Maine), the Court will discuss its reasoning for applying a standard other than as articulated in *Lohrmann*.

[8] The RESTATEMENT (SECOND) OF TORTS is consistent with the causation standard in Maine. Section 431 provides in pertinent part that "[t]he actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm . . ." RESTATEMENT (SECOND) OF TORTS § 431(a).

[9] At the time, Justice Gorman was a member of the Maine Superior Court. Justice Gorman was subsequently appointed to the Maine Supreme Judicial Court.

rejected the *Lohrmann* standard "because it is entirely the jury's function to determine if the conduct of the defendant was a substantial factor in causing the plaintiff's injury and because it is not appropriate for the court to determine whether a plaintiff has proven that a defendant's product proximately caused the harm." *Campbell v. The H.B. Smith Co., Inc.*, Docket No. LINSC-CV-2004-57, at 7 (Me. Super. Ct., Lin. Cty., Apr. 2, 2007) (Gorman, J).[10] In rejecting the *Lohrmann* standard, Justice Gorman wrote that to establish a *prima facie* case, a plaintiff must demonstrate:

> (1) medical causation – that the plaintiff's exposure to the defendant's product was a substantial factor in causing the plaintiff's injury and (2) product nexus – that the defendant's asbestos-containing product was *at the site where plaintiff worked or was present, and that the plaintiff was in proximity to that product at the time it was being used* ... a plaintiff must prove not only that the asbestos products were used at the worksite, but that the employee inhaled the asbestos from the defendant's product.

Id. (quoting 63 AM. JUR. 2D *Products Liability* § 70 (2001) (emphasis added)).

Insofar as under *Lohrmann* a plaintiff must prove exposure to asbestos over a sustained period of time while under the standard applied by Justice Gorman a plaintiff must only demonstrate that plaintiff was in proximity to the product at the time that it was being used, the *Lohrmann* standard imposes a higher threshold for claimants. The Court's decision as to the applicable standard cannot, however, be controlled by the standard's degree of difficulty. Instead, the standard must be consistent with basic principles of causation. In this regard, the Court agrees with the essence of Justice Gorman's conclusion – to require a quantitative assessment of a plaintiff's exposure to asbestos, as contemplated by *Lohrmann*, would usurp the fact finder's province. Whether a defendant's conduct caused a particular injury is at its core a question of fact. The Court perceives of no basis in law to deviate from this longstanding legal

[10] Justice Gorman also rejected the *Lohrmann* standard for similar reasons in *Boyden v. Tri-State Packing Supply, et al.*, Docket No. CV-04-452 (Me. Super. Ct., Feb. 28, 2007).

principle. The Court, therefore, concludes that in order to avoid summary judgment, in addition to producing evidence of medical causation, a plaintiff must establish the product nexus through competent evidence. In particular, a plaintiff must demonstrate (1) that the defendant's product was at the defendant's work place, (2) that the defendant's product contained asbestos, (3) and that the plaintiff had personal contact with the asbestos from the defendant's product. If a plaintiff produces such evidence, which can be either direct or circumstantial, the question of whether the defendant's product was a "substantial factor" in causing the plaintiff's damages is for the jury.

Thus, to survive the motion for summary judgment, the Plaintiffs must first demonstrate that: (1) Crane's product was at Great Northern, (2) Crane's product at Great Northern contained asbestos, and (3) the Decedent had personal contact with asbestos from Crane's product. "If a plaintiff produces such evidence, which can be either direct or circumstantial, the question of whether the defendant's product was a 'substantial factor' in causing the plaintiff's damages is for the jury." *Rumery v. Garlock Sealing Techs.*, 2009 Me. Super. LEXIS 73, at *8 (Apr. 24, 2009); *see also Addy v. Jenkins, Inc.*, 2009 ME 46, ¶ 19, 969 A.2d 935 ("Proximate cause is generally a question of fact for the jury.").

C. Product Nexus

In the present case, Plaintiffs are seeking damages for the Decedent's exposure to asbestos material used in connection with Crane's products at Great Northern. Plaintiffs assert that the Decedent's deposition establishes that he removed and replaced insulation on Crane Co., Chapman, and Jenkins valves. (Crane Opp. S.M.F. ¶ 9.) The deposition contains conflicting testimony regarding all three types of valves. The deposition includes the following exchange:

> Q And what names do you recall from the valves that you put insulation on and took insulation off of?

You mentioned Yarway, any others?
A Yarnell, Chapman, Ingersoll-Rand. That's all I can recollect right now.

(Def.'s Exh. A (hereinafter, "Richards Depo.") 41:9-13.) The Decedent was subsequently questioned about a list of other valve manufacturers, referred to as Exhibit 2, which he prepared with former Great Northern co-workers who "helped him remember" the manufacturers of valves and pumps at the mill.[11] (Richards Depo. 273:25-274:7.)

> Q Let me ask you this. In looking at that list of product that you had written down there, are there any that you didn't mention earlier?
> Q Does that refresh your recollection regarding the names of any manufacturers that you had not mentioned previously?
> A On the pumps, Goulds, Ingersoll-Rand. On the traps, Yarway, Nicholson. And the valves I believe Hancock, Jenson[12] and Crane and Fairbanks. That refreshes my mind.

(Richards Depo. 51:19-52:6 (objections omitted).)

> Q Okay. I am going to ask you about a few of the valve products that you listed on Exhibit No. 2. Excuse me.
> One of the valves listed there I saw was Crane. Is that a product you personally remember working with?
> A No, sir.
>
> . . . .
>
> Q And was that a name [referring to Jenkins on Exhibit 2] that you – was that a valve you personally remember working with?
> A No, sir.
>
> . . . .
>
> Q All right. And is that -- is that a name that you have -- do you have a personal memory of working with a Fairbanks Chapman valve?
> A No, sir. No.

(Richards Depo. 274:24-25; 275:1-2; 276:16-19.)

Crane maintains that the record citations are insufficient to sustain Plaintiffs' claim on two grounds: personal knowledge and the contradiction analysis set forth in *Zip Lube v. Coastal*

[11] The names of the former co-workers were set forth in Exhibit 1 at the deposition. (Richards Depo. 49:14-17.)
[12] Plaintiffs assert that the Decedent mistakenly referred to Jenkins as Jenson. (Crane Opp. S.M.F. ¶ 9.)

Savings Bank, 1998 ME 81, 709 A.2d 733. Simply stated, the Court finds *Zip Lube* distinguishable given that the contradictory affidavit at issue in *Zip Lube* was created in response to a summary judgment motion; the present situation is an inconsistency within the same deposition. 1998 ME 81, ¶ 10, 709 A.2d 733. The fact that the testimony of a witness includes inconsistent statements is not necessarily unusual and does not automatically invalidate the witness' testimony. The possible inconsistencies in the Decedent's testimony present credibility issues for the fact finder. Additionally, the Decedent's review of a list of valve manufacturers, which list he created with assistance from co-workers, does not render his subsequent testimony as lacking personal knowledge and thus inadmissible. Indeed, M.R. Evid. 612 contemplates that a witness might review a document to refresh the witness's recollection during his testimony. Contrary to Crane's argument, therefore, the record does not establish that the Decedent lacks personal knowledge of the manufacturers of the valves at Great Northern. In short, Plaintiffs have demonstrated the product nexus necessary to avoid summary judgment.

D. Legal Theories of Recovery

Plaintiffs contend that Crane is liable in both strict liability and negligence.

1. *Strict Liability* – 14 M.R.S. § 221

Maine's product liability statute, 14 M.R.S. § 221,[13] lays out the essential elements of the cause of action asserted against a seller:

[13] In full, the statute provides:

> One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(1) the named defendant sold the goods or products;

(2) those goods or products were in a defective condition unreasonably dangerous to the user or consumer or the user or consumer's property;

(3) the plaintiff might reasonably have been expected to use, consume, or be affected by the goods or products;

(4) the defendant was engaged in the business of selling the goods or products;

(5) the goods or products were expected to, and did, reach the user or consumer without significant change in the condition in which they were sold; and

(6) the plaintiff or the plaintiff's property suffered physical harm.

Burns v. Architectural Doors & Windows. 2011 ME 61, ¶ 23 n.7, 19 A.3d 823. Plaintiffs maintain that Crane's products were defective because Crane failed to warn of the products' hazards associated with the asbestos material used in connection with the products. In a defective product case based on a failure to warn, a plaintiff must also show that "(1) the defendant had a duty to warn the plaintiff of the product hazard; (2) any actual warning on the product was inadequate; and (3) the inadequate warning or absence of a warning proximately caused the plaintiff's injury." *See id.* ¶ 23.

Crane asserts that because asbestos insulation was added to its valves after they left Crane's control, Plaintiffs can neither show that the valves were unreasonably dangerous to the Decedent nor show that the valves were without significant change from the condition in which they were sold. Plaintiffs counter that they need not show the valves themselves were defective; Plaintiffs assert that the valves, when put to the foreseeable use of being packed in asbestos insulation, became dangerous and Crane had a duty to warn of those dangers. Plaintiffs cite *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195 (Me. 1990), for this proposition.

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14 M.R.S. § 221 (2011).

In *Lorfano*, the Law Court stated:

> It is now clear that a product, "although faultlessly made, may nevertheless be deemed 'defective' under the [statute] and subject the supplier thereof to strict liability if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied and no warning is given."

569 A.2d at 196 (quoting *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 558 (Cal. Ct. App. 1965)). Plaintiffs interpret *Lorfano* as to require, under Maine law, a supplier or seller to warn about the dangers of a third party's product when the third party's product is used in conjunction with the supplier or seller's product. Thus, Plaintiffs assert that the valves at issue were defective because Crane failed to warn about the dangers of asbestos insulation.

The Law Court, however, only has described a manufacturer's duty to warn of dangers that are inherent in the manufacturer's own products. *See Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993) ("Strict products liability attaches to a manufacturer when by . . . the failure to provide adequate warnings about its hazards, a product is sold in a condition unreasonably dangerous to the user."; *Bernier*, 516 A.2d at 537 (discussing whether "a manufacturer's actual or constructive knowledge of his product's danger" is relevant (emphasis added)); *cf. Bouchard v. Am. Orthodontics*, 661 A.2d 1143, 1145 (Me. 1995) (rejecting plaintiff's argument that "the supplier of a safe product has a duty to warn against another supplier's dangerous product" as unsupported by legal authority or the evidence in the record). The Law Court has never directly held that a manufacturer of a product has a duty to warn of dangers inherent in a third party's product.

The issue is whether given its prior comment on the scope of the duty to warn, the Law Court would impose a duty upon manufacturers to warn of dangers that might be inherent in products that are used in conjunction with the manufacturer's product. Courts in some other jurisdictions have recently concluded that an equipment manufacturer is under no obligation to

warn of the dangers of asbestos insulation that might be used in conjunction with the manufacturer's product. *See O'Neil v. Crane Co.*, 53 Cal. 4th 335 (Cal. 2012); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008). Such a conclusion arguably would be consistent with the Law Court's focus in *Pottle* upon the hazards of the manufacturer's product.

In addition, to hold a manufacturer strictly liable for a defect in another party's product would be contrary to the purpose of strict liability. Strict products liability attaches to a seller (or manufacturer), in part, because of the seller's superior knowledge of the attributes and risks of his own product. *See Bernier*, 516 A.2d at 538 (holding that the manufacturer's knowledge of the dangers of its own product is relevant in establishing a duty to warn).

> [T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).[14] Holding sellers responsible for the dangerous characteristics of their own products places the burden on the appropriate party.

The Court believes that the Law Court's prior decisions as to the scope of a manufacturer's duty, and sound public policy (i.e., a manufacture is appropriately responsible for any dangers inherent in *its* product) militate against the adoption of a general rule that requires a

[14] Maine's strict liability statute is derived from section 402A of the RESTATEMENT (SECOND) OF TORTS. *See Bernier*, 516 A.2d at 537-38 (relying on the comments to section 402A in interpreting Maine's strict liability statute).

manufacture to warn about the hazards of a product that might be used in connection with the manufacturer's product.

Nevertheless, the Court is not prepared to enter summary judgment at this time. The record generates an issue as to whether the Court should recognize an exception to the general rule that a manufacturer of a product is not required to warn of dangers inherent in another's product. More specifically, the issue is whether the same policy considerations that support the general rule justify the imposition of a duty to warn of another's product where a manufacturer's product *must* incorporate another's product in order to have any practical use for the intended user, and the other's product is inherently dangerous, and the manufacturer knew or should have known of the hazards inherent in the other's product. Because the state of the record on this issue is uncertain, and because the parties have not directly addressed the issue, the Court will deny Crane's motion for summary judgment. However, the Court will confer with the parties to determine whether further briefing on or consideration of Crane's request for summary judgment is warranted. The Court, therefore, will schedule a telephonic conference with the parties to discuss the future course of the case.

2. *Negligence*

Plaintiffs' principal negligence claim is based on Defendant's alleged breach of its duty to warn of the dangers of the asbestos containing insulation. In negligence, the duty of a manufacturer to warn of the dangers of its products is similar to the duty to warn in strict products liability actions. *See Bernier*, 516 A.2d at 540 ("A strict liability failure-to-warn case does resemble a negligence action because the reasonableness of the manufacturer's conduct is the critical issue.") The Law Court has applied section 388 of the RESTATEMENT (SECOND) OF

TORTS to negligence actions for the breach of a duty to warn of dangerous propensities of products:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> > (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
> >
> > (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
> >
> > (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Bonin, 2005 ME 59, ¶ 10, 873 A.2d 346 (quoting RESTATEMENT (SECOND) OF TORTS § 388).

In their written submissions, the parties understandably do not distinguish between the duty to warn in strict liability or the duty to warn in negligence.[16] Indeed, the Court perceives no appreciable difference between a manufacturer's duty to warn in strict liability and negligence. As explained above, therefore, the Court determines that summary judgment on the duty issue is not appropriate at this time.[17]

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[16] Many of the recent actions brought in negligence based on the duty to warn involve the failure to warn a minor of dangerous propensities in a product. *Compare Bonin*, 2005 ME 59, ¶ 1 873 A.2d 346 (articulating the issue as "whether [the defendant] may be found negligent for supplying dangerous machinery to a minor"), *and Dickinson v. Clark*, 2001 ME 49, ¶ 9, 767 A.2d 303 (discussing whether the dangers of a wood splitter would be obvious to a teenager in evaluating whether the supplier had a duty to warn), *with Cuthbertson v. Clark Equip. Co.*, 48 A.2d 315 (Me. 1982) (applying section 388 to a supplier of farm equipment after the death of an adult operator).

[17] In their Complaint, Plaintiffs do not limit their negligent theories to the alleged failure to warn. For instance, Plaintiffs allege that the Defendants failed "to properly test said asbestos-containing products or machinery before they were released for consumer use." (Compl. ¶ 31(g).) In addition, in their statement of material facts, Plaintiffs assert that Crane manufactured asbestos-containing products. However, based on the summary judgment filings, the Court understands that the theory of liability against all of the Defendants in this case is based on exposure to asbestos from exterior insulation, and not from internal components or packing materials. (*See, e.g.*, A.S.M.F. ¶¶ 16- 18.) Further, although Plaintiffs assert Crane sold asbestos insulation, there is no evidence in the record to suggest that Great Northern ever purchased asbestos insulation from Crane Co., Chapman, or Jenkins. The Court anticipates discussing the scope of Plaintiffs' negligence claim with the parties during the telephonic conference referenced herein.

III. CONCLUSION

Based on the foregoing analysis, the Court denies Crane's motion for summary judgment. As set forth in this Decision and Order, the Court will schedule a conference with the parties to discuss the future course of the case, including the extent to which further consideration of Crane's request for summary judgment is warranted.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 4/5/12

Justice, Maine Business & Consumer Court

Entered on the Docket: 4-6-12
Copies sent via Mail ___ Electronically ✓