STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-10-21

MICHAEL MAHAR, Personal Representative of the ESTATE OF MYRTLE J. MAHAR,

Plaintiff,

v.

SULLIVAN & MERRITT, INC., DEZURIK, INC., F.W. WEBB CO., GENERAL ELECTRIC CO., CBS CORP., THOMAS DICENZO, INC., GOULDS PUMPS, INC., WARREN PUMPS, LLC, JOS. A. BERTRAM, INC., PEARSE-BERTRAM, LLC, and BERTRAM CONTROLS CORP., LLC,

Defendants

DECISION AND ORDER
(CBS Corp. as successor to Westinghouse Electric Corp.)

In this action, Plaintiff seeks to recover damages allegedly resulting from the death of Myrtle J. Mahar (the Decedent) due to her exposure to asbestos during the course of her employment at the Georgia-Pacific mill in Woodland, Maine, (now the Domtar mill, but hereinafter referred to as the "Woodland mill"). Plaintiff alleges that as a result of exposure to asbestos used with products manufactured by or removed by the Defendants, the Decedent contracted mesothelioma, which resulted in her death. Before the Court is the summary judgment motion of Defendant CBS Corp., as successor to Westinghouse Electric Corporation. (CBS).[1]

[1] CBS is a Delaware corporation, formerly known as Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania entity, which was formerly known as Westinghouse Electric Corporation.

I. FACTUAL BACKGROUND

The Decedent worked at the Woodland mill from April 1977 until July 2008 as a laborer, spare, and janitor. (Supp. S.M.F. ¶ 1; Opp. S.M.F. ¶ 1.) As a spare, the Decedent's work included cleaning and painting motors, checking tanks, and cleaning spills. (Supp. S.M.F. ¶ 2; Opp. S.M.F. ¶ 2.) As a janitor, the Decedent swept and scrubbed, stripped and waxed floors, washed walls, and otherwise cleaned office and bathrooms at the Woodland mill. (Supp. S.M.F. ¶ 3; Opp. S.M.F. ¶ 3.)

The Decedent did not work on motors or take apart motors; she painted them but was otherwise not allowed to touch the motors. (Supp. S.M.F. ¶¶ 7-9, 17; Opp. S.M.F. ¶¶ 7-9, 17.) The Decedent recalled seeing Westinghouse on a pallet or on the tag on a motor, but did not testify that she worked with any Westinghouse product. (Supp. S.M.F. ¶¶ 5-6; Opp. S.M.F. ¶¶ 5-6.)

It is undisputed that Westinghouse products, including motors, pumps, turbines, and control systems, were present at the Woodland mill. (Supp. S.M.F. ¶¶ 13-14, 16, 19, 21; Opp. S.M.F. ¶¶ 13-14, 16, 19, 21; A.S.M.F. ¶¶ 2, 6-7; Reply S.M.F. ¶¶ 2, 6-7.) The Woodland mill purchased at least 44 motors of various sizes from Westinghouse between February 1979 and August 1984. (A.S.M.F. ¶ 2; Reply S.M.F. ¶ 2.)[2] Nine of these motors were MAC motors, which were manufactured for mill and chemical plants and utilized Class "F" insulation. (A.S.M.F. ¶¶ 5-6; Reply S.M.F. ¶¶ 5-6.)[3] Asbestos is among the alternative electrical insulations found within Class "F" insulation. (A.S.M.F. ¶ 4; Reply S.M.F. ¶ 4.)[4]

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[2] CBS admits this statement "for the purposes of this motion only." (Reply S.M.F. ¶ 2.)
[3] CBS admits this statement "for the purposes of this motion only." (Reply S.M.F. ¶¶ 5-6.)
[4] CBS denies that all Class F insulation contained asbestos or that Westinghouse required the use of asbestos insulation with its equipment. (Reply S.M.F. ¶ 4.)

Valves and pumps were torn apart and repaired in the machine shop. (A.S.M.F. ¶ 10; Reply S.M.F. ¶ 10.) The Decedent walked through or passed by the machine shop while the motors were being worked on; the Decedent walked through or passed by the machine shop many times each day in order to get to other parts of the mill. (A.S.M.F. ¶ 9; Reply S.M.F. ¶ 9.)[5] Nevertheless, the parties dispute whether the Decedent had personal contact with a Westinghouse product (Supp. S.M.F. ¶¶ 5, 24; Opp. S.M.F. ¶¶ 5, 24), and whether and to what extent that the Westinghouse equipment at the Woodland mill contained asbestos (Supp. S.M.F. ¶ 23; Opp. S.M.F. ¶ 23; A.S.M.F. ¶ 3; Reply S.M.F. ¶ 3).

II. PROCEDURAL BACKGROUND

Myrtle J. Mahar filed suit in Washington County Superior Court. The amended complaint asserts eight causes of action. The principal counts relevant to the present motion are: negligent failure to warn (Count I); strict liability failure to warn, *see* 14 M.R.S. § 221 (2011), (Count II); and punitive damages (Count IV), which were asserted against all named Defendants.

In Counts I and II, Plaintiffs rely on the Defendants' sale of asbestos containing equipment to the Woodland mill without adequate warning of the dangers of asbestos. In Count IV, Plaintiff seeks punitive damages for the Defendants' willful and malicious actions that were "in total disregard of the health and safety of the users and consumers of their products." (Compl. ¶ 40.) The Decedent passed away on October 1, 2009. (*See* Sugg. of Death, filed Mar. 29, 2010.) The present Plaintiff was substituted for the Decedent on July 11, 2011.

[5] In support of this statement of material fact, Plaintiff cites the testimony of Mary Austin, a co-worker of the Decedent. CBS objects that the cited testimony does not identify the Decedent as the person with whom Ms. Austin would pass by the machine shop. (Reply S.M.F. ¶ 9.) Taking the evidence in the light most favorable to the Plaintiff, *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63, the reasonable inference from Ms. Austin's testimony of "we" in a deposition related to a suit brought by Ms. Mahar is that Ms. Austin is referring to Ms. Mahar.

III. 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." *See also Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶ 11, 989 A.2d 733. A party wishing to avoid summary judgment must present a prima facie case for each element of the claim or defense that is asserted against it. *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. "If material facts are disputed, the dispute must be resolved through fact-finding." *Arrow Fastener Co. v. Wrabacon, Inc.*, 2007 ME 34, ¶ 18, 917 A.2d 123 (quotation marks omitted).

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 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 Substantive Law

Plaintiff's primary causes of action against CBS are negligence and strict liability. Plaintiff alleges that CBS manufactured asbestos containing products, that the Decedent was

exposed to asbestos from those products in her work at the Woodland mill, and that the Decedent's exposure to asbestos from CBS's products was a substantial factor in bringing about her death from mesothelioma.

"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)], 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. *See Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 537 (Me. 1986); *see also Pottle v. Up-Right, Inc.*, 628 A.2d 672, 674-75 (Me. 1993).

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. 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.[6] 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

[6] 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).

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[7] 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).[8] 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

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

[8] 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).

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 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 fact finder.

Thus, to survive the motion for summary judgment given the record presented by CBS, the Plaintiffs must first demonstrate that: (1) CBS's product was at the Woodland mill, (2) CBS's product at the Woodland mill contained asbestos, and (3) the Decedent had personal contact with asbestos from CBS'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. Analysis

CBS argues that Plaintiff cannot establish a connection between the Decedent and asbestos from Westinghouse equipment, or has failed to prove product nexus.[9] Plaintiff attempts to connect the Decedent with Westinghouse products through a series of material facts: there were numerous Westinghouse products and motors throughout the mill; motors and pumps were repaired in the machine shop; and the Decedent passed through the machine shop on a daily basis. Viewed this evidence in the light most favorable to the Plaintiff, the Plaintiff has raised an issue of material fact as to the Decedent's contact with Westinghouse products. *See Lightfoot*, 2003 ME 24, ¶ 6, 816 A.2d 63.

Significantly, however, Plaintiff has established that the Decedent had any contact *with asbestos* from Westinghouse products. Specifically, Plaintiff has not established that any of the Westinghouse products with which the Decedent might have had contact at the Woodland mill contained asbestos. Although the "F" insulation included asbestos as an alternative among other insulations within that class, there is no evidence that MAC motors at the Woodland Mill contained asbestos. Plaintiff thus has not made out a prime facie case to establish negligence or strict liability. *See Reliance Nat'l Indem.*, 2005 ME 29, ¶ 9, 868 A.2d 220. Accordingly, CBS is entitled to summary judgment.

[9] In its reply, CBS also asserts that Plaintiff has failed to establish medical causation in his opposition to the motion and thus CBS is entitled to summary judgment. Because, however, CBS did not move for summary judgment on the issue of medical causation, that issue is not squarely before the Court. Plaintiff was not required to address that issue in its opposition.

III. CONCLUSION

Based on the foregoing analysis, the Court grants CBS Corp.'s motion for summary judgment and enters judgment in favor of CBS Corp. on all counts of Plaintiff's complaint.

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

Date: 7/26/12

John C. Nivison
Justice, Maine Business & Consumer Court

Entered on the Docket: 7-31-12
Copies sent via Mail ___ Electronically ✓