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
(General Electric Co.)

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 (now the Domtar mill) in Woodland, Maine (hereinafter, 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. The matter is before the Court on the summary judgment motion of General Electric, Co. (GE).

I. FACTUAL BACKGROUND

The Decedent began working at the Woodland mill in April 1977, initially working as a spare in the yard crew at various locations throughout the Woodland mill. (Supp. S.M.F. ¶¶ 3-4;

Opp. S.M.F. ¶¶ 3-4.) As a spare, the Decedent cleaned up debris from alleyways, cleaned spills, and checked tank levels. (Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 4.) The Decedent became a spare janitor in 1979 and began performing janitorial duties such as sweeping, scrubbing, stripping, and waxing floors, and cleaning offices and bathrooms; she became a permanent janitor in 1981. (Supp. S.M.F. ¶ 5; Opp. S.M.F. ¶ 5.)

GE manufactured the No. 10 turbine at the Woodland mill. (Supp. S.M.F. ¶¶ 17, 47; Opp. S.M.F. ¶¶ 17, 47; A.S.M.F. ¶ 6; Reply S.M.F. ¶ 6.) The Decedent did not directly work on the steam turbines located at the mill, other to wipe them off and sweep around them; she never assisted others who worked on the steam turbines. (Supp. S.M.F. ¶¶ 7, 23; Opp. S.M.F. ¶¶ 7, 23; Def.'s Exh. B 82:1-2.) The Decedent cleaned after work had been done on the turbine. (A.S.M.F. ¶ 10.) As a janitor, the Decedent passed by steam turbines on her way to offices and bathrooms for which she was responsible to clean. (Supp. S.M.F. ¶¶ 10, 13-14, 23, 49; Opp. S.M.F. ¶¶ 10, 13-14, 23, 49). Most of the time, a bare metal cover protected the turbines when she passed by them. (Supp. S.M.F. ¶¶ 14, 18, 33, 47; Def.'s Exh. E 136:21-22; Opp. S.M.F. ¶¶ 18, 33, 47.) When the turbines were undergoing maintenance, the cover was off and the Decedent walked past them. (Opp. S.M.F. ¶ 14; A.S.M.F. ¶¶ 10-12; Reply S.M.F. ¶¶ 10-12.)

The Decedent and Mary Austin, a co-worker, passed by the No. 9 and No. 10 turbines when they were torn apart and when there were asbestos gaskets and blankets around; the Decedent and Austin cleaned up this debris. (A.S.M.F. ¶¶ 12, 14.)[1] In 1991, asbestos was removed from the steam line, caustic soda line, and a fuel oil supply line of the No. 10 turbine pursuant to an asbestos removal work plan. (A.S.M.F. ¶ 8.)[2] GE generally disputes whether

[1] GE qualifies these statements to note that there is no indication that the asbestos materials came from the GE turbine. (Reply S.M.F. ¶¶ 12, 14.)

[2] GE qualifies this statement: "The work outlined in Exhibit 10 involved piping connected to the GE steam turbine—known as the No. 10 turbine—and not work on the turbine itself." (Reply S.M.F. ¶ 8.) From the face of

there is sufficient, relevant evidence to show that the GE turbine, as opposed to the piping connected to the turbine, was insulated with asbestos and whether those asbestos materials originated with GE. (Reply S.M.F. ¶¶ 1-5, 8-9.)

II. PROCEDURAL BACKGROUND

Myrtle J. Mahar filed suit in Washington County Superior Court. The amended complaint asserts eight causes of action. The only 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 Plaintiff asserted against all named Defendants.

In Counts I and II, Plaintiff relies on the Defendants' sale of asbestos containing equipment to the Woodland mill without adequate warning of the dangers of asbestos. Count IV 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.

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." A party wishing to avoid summary judgment must present a prima facie case for each element of a claim or defense

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the exhibit, the Court cannot determine whether the piping is part of the turbine, and GE has cited to no other record material for that assertion.

that is asserted. *See Reliance Nat'l Indem. v. Knowles Indus. Svcs.*, 2005 ME 29, ¶ 9, 868 A.2d 220. "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 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 GE are negligence and strict liability. Plaintiff alleges that GE 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 GE'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.[3] 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[4] 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

[3] 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).

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

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).[5] 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 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

[5] 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).

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 Plaintiff must demonstrate that: (1) GE's product was at the Woodland mill, (2) GE's product at the Woodland mill contained asbestos, and (3) the Decedent had personal contact with asbestos from GE'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

GE argues that Plaintiff cannot establish a connection between the Decedent and asbestos-containing GE products. In other words, GE argues that Plaintiff has failed to prove product nexus. Product nexus requires proof "that the defendant's asbestos-containing product was at the site where the plaintiff worked or was present, and that the plaintiff was in proximity to that product at the time it was being used . . . ." *Boyden*, 2007 Me. Super. LEXIS 47, at *11 (quotation marks omitted).

GE first argues that there is no evidence that the GE turbine was insulated with asbestos-containing insulation when the Decedent began working at the Woodland Mill. GE relies on the testimony of Al Goodwin, but he does not establish that the mill was asbestos-free despite the

fact that the insulation mill employees used after 1969 did not contain asbestos.[6] Given that he also testified that from 1969 until 1980 contractors removed asbestos at the mill (supp. S.M.F. ¶ 43; Opp. S.M.F. ¶ 43.), his testimony does not prove that the mill was free from asbestos when the Decedent began working at the mill. Indeed, the disposal and removal of a storeroom full of asbestos does not establish that the mill itself was asbestos free. (Supp S.M.F. ¶ 44; Opp. S.M.F. ¶ 44.) The suggestion that the mill contained no asbestos after 1969 is also contradicted by the testimony of Mary Austin and the Decedent.

Next, GE argues that the Decedent's exposure, if any, to asbestos by was not related to the GE turbine. Plaintiff points to the Decedent's testimony, the testimony of Mary Austin, materials prepared by GE in 1958,[7] and an asbestos removal project on the No. 10 turbine to show that GE's turbine contained asbestos to support this contention. (Opp. S.M.F. ¶¶ 13-14; A.S.M.F. ¶¶ 1-3, 8, 10-14.) Simply stated, review of the record evidence upon which Plaintiff relies reveals a disputed issue of material fact for trial as to whether the Decedent was exposed to asbestos from the GE turbine. Accordingly, summary judgment is not warranted.

III. CONCLUSION

Based on the foregoing analysis, the Court denies General Electric Co.'s motion for summary judgment.

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

[6] Greg Reardon, however, testifies that new asbestos material was not banned until 1973. (Supp. S.M.F. ¶ 30; Opp. S.M.F. ¶ 30.)

[7] As GE points out, however, the 1958 materials were published 20 years in advance of the Decedent's employment at the Woodland mill and Plaintiff has not shown that the turbines referred to in those materials were present at the Woodland mill.