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
(Warren Pumps, LLC)

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 or removed the Defendants, the Decedent contracted mesothelioma, which resulted in her death. The matter is before the Court on the summary judgment motion of Defendant Warren Pumps, LLC (Warren).

I. FACTUAL BACKGROUND

The Decedent worked at the Woodland mill from 1977 until 2008. (Supp. S.M.F. ¶¶ 1-2; Opp. S.M.F. ¶¶ 1-2.) From 1977 until 1981, the Decedent worked as a "spare" and in the yard

crew; her duties included cleaning and painting motors, checking tanks, and cleaning spills. (Supp. S.M.F. ¶ 3; Opp. S.M.F. ¶ 3.)[1] As a spare, the Decedent worked where she was needed, including alleyways, the wood room, the craft mill, the bleach plant, and the steam plant. (A.S.M.F. ¶ 5; Reply S.M.F. ¶ 5.) The Decedent cleaned in places where mill workers tore apart and rebuilt pumps and valves, including those with asbestos packing. (A.S.M.F. ¶¶ 6-7; Reply S.M.F. ¶¶ 6-7.)

The Decedent became a permanent janitor in 1981. (Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 4.) As a janitor at the mill, she scrubbed, swept, and waxed floors and washed walls; she also cleaned bathrooms and office spaces all over the mill. (Supp. S.M.F. ¶¶ 4-5; Opp. S.M.F. ¶¶ 4-5.) While working at the mill, the Decedent may have swept up scattered material containing asbestos, especially pipe covering that would fall off in chunks or that was hanging off boilers. (Supp. S.M.F. ¶ 7; Opp. S.M.F. ¶ 7.) The Decedent also may have been exposed to asbestos fibers in the air from loose pipe insulation and from loose discarded material she encountered while cleaning up the alleyways. (Supp. S.M.F. ¶ 8.)[2]

It is undisputed that Warren pumps were present at the mill.[3] (Supp. S.M.F. ¶¶ 21-22, 25, 27, 29-30; Opp. S.M.F. ¶¶ 21-22, 25, 27, 29-30; A.S.M.F. ¶¶ 1, 8[4]; Reply S.M.F. ¶¶ 1, 8.) Until at least 1986, some pumps produced by Warren contained asbestos, but there is no evidence that these asbestos containing pumps were present at the Woodland mill. (A.S.M.F. ¶ 3; Reply

---

[1] Plaintiff denies this statement of material fact, but the denial is really more of a qualification that the Decedent worked as a spare from 1977 (not 1979) until 1981, and that she was also worked in the yard crew during that period. (Opp. S.M.F. ¶ 3.)

[2] Plaintiff attempts to qualify this statement, but includes no record citation for the qualification. The statement is supported by record evidence and is thus deemed admitted. *See* M.R. Civ. P. 56(h).

[3] Warren asserts, and Plaintiff admits, that: "The Warren pumps were bare metal; there was no insulation on them." (Supp. S.M.F. ¶ 22; Opp. S.M.F. ¶ 22.) The statement would seem to indicate that all Warren pumps at the Woodland mill were bare, but the testimony cited indicates that the deponent remembered seeing Warren stamped on an uninsulated pump. The testimony does not support that all Warren pumps in use at the plant were bare.

[4] Plaintiff's additional statement of material facts contains two paragraphs numbered "7." The order proceeds by renumbering the second "7" as "8," and the "8" as "9" as in the reply statement of material facts.

S.M.F. ¶ 3.) The Decedent worked near or passed by mill workers that were working on pumps and valves. (Supp. S.M.F. ¶ 13; Opp. S.M.F. ¶ 13.) The Decedent herself did not work on pumps, other than occasionally painting them, and she did not repack a pump. (Supp. S.M.F. ¶¶ 15-16, 23; Opp. S.M.F. ¶¶ 15-16, 23.)

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, Plaintiff relies upon 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.

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 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. "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 Warren are negligence and strict liability. Plaintiff alleges that Warren manufactured asbestos containing products, that the Decedent was exposed to asbestos from those products in her work at the Woodland mill, and that the exposure to asbestos from Warren's products was a substantial factor in bringing about the Decedent's 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.[5] 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[6] rejected the *Lohrmann* standard "because it is entirely the jury's function to determine if the

[5] 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).

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

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).[7] 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

[7] 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).

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

Warren argues that Plaintiff cannot establish a connection between the Decedent and Warren pumps. In other words, Warren maintains that Plaintiff has failed to prove product nexus. Although Plaintiff has established that Warren pumps were present at the Woodland mill when the Decedent was employed at the mill, the summary judgment record contains no evidence that the Decedent was in proximity to Warren pumps or that the Warren pumps either contained or were wrapped in asbestos. (A.S.M.F. ¶ 3; Reply S.M.F. ¶ 3.) That is, contrary to

Plaintiff's argument, there is not direct or circumstantial evidence from which a fact finder could reasonably conclude that the Decedent was exposed to a Warren product that 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, Warren is entitled to summary judgment.

III. CONCLUSION

Based on the foregoing analysis, the Court grants Warren Pumps, LLC's motion for summary judgment and enters judgment in favor of Warren Pumps, LLC 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 ✓