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 THE NASH ENGINEERING CO.,

Defendants

DECISION AND ORDER
(Datron Inc. Liquidating Trust)

In this action, Plaintiffs seek to recover damages allegedly resulting from the death of Austin Richards 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. This matter is before the Court on the motion for summary judgment of Defendant Datron Inc. Liquidating Trust (Datron), individually and as the successor in interest to Nicholson Steam Trap. Datron was substituted for Spence Engineering Company on May 5, 2011.

I. BACKGROUND

The following facts are undisputed, except where noted. The Decedent, Austin Richards, worked as a mason at the East Millinocket paper mill owned by Great Northern between 1950 and 1953 and between 1956 to 1987. (Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 4.) As a mason's helper and mason at the mill,[1] Decedent's responsibilities included the removal insulation from pipes and various pieces of equipment (including pumps, turbines, valves, boilers, and steam traps) to allow other tradesmen to do their respective jobs (such as performing internal repairs of the pump), and then to reinsulate the pipes and equipment. (Supp. S.M.F. ¶ 6; Opp. S.M.F. ¶ 6; A.S.M.F. ¶ 5; Reply S.M.F. ¶ 5.) Until the 1970s, the insulation used at the mill contained asbestos. (A.S.M.F. ¶ 10; Reply S.M.F. ¶ 10.) Removal of the insulation created a significant amount of dust. (A.S.M.F. ¶ 4; Reply S.M.F. ¶ 4.) The mixing of asbestos-containing cement used for insulation and sweeping debris from the floor also created dust. (A.S.M.F. ¶ 4; Reply S.M.F. ¶ 4.)

Datron's predecessor manufactures steam traps. Although Decedent testified at his deposition that there were Nicholson steam traps at the mill, Datron disputes whether the testimony is based on his personal knowledge, or whether the testimony is based on a summary of information received from other former Great Northern employees. (*See* A.S.M.F. ¶ 6; Reply S.M.F. ¶ 6.)

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

[1] The Decedent performed "brick work" on a less regular basis. (A.S.M.F. ¶ 3; Reply S.M.F. ¶ 3.)

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 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 Datron are negligence and strict liability.[2] Plaintiffs allege that the use of asbestos insulation on Nicholson pumps was reasonably

[2] Count I of the complaint alleges that each manufacturer Defendant's negligence, including Datron, caused the Decedent's exposure to asbestos, development of mesothelioma, and ultimate death. Count I also asserts strict liability for defective design and condition based on asbestos within the products and the failure to warn of the dangers of asbestos. Count III asserts civil conspiracy among all the defendants; Count IV alleges gross negligence.

foreseeable and that Datron 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 of Datron's failure to warn the Decedent of those dangers or recommend safety precautions,. the Decedent was exposed to harmful asbestos insulation, which caused the 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)], 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.[3] *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.[4] A majority of jurisdictions have adopted

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Count V alleges "aiding and abetting" among the defendants' negligent and intentional acts. Count VI alleges negligence per se against all defendants based on alleged violations of state and federal law, and in Count VII, the Plaintiffs allege loss of consortium. The predicate of each cause of action is exposure to asbestos from one of Defendant's products.

[3] 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.

[4] In their opposition to Datron'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

the standard articulated by the court in *Lohrmann v. Pittsburg 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-proximity test", which requires a plaintiff to "prove more than a casual or minimum contact with the product" that contains asbestos. *Lohrmann*, 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.

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 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. CV-04-57 at 7 (Me. Super. Ct., April 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 –

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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*.

[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 ..."

[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.

[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).

> 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.

Campbell at 5-6. (citing, 63 Am. Jur. 2d Products Liability § 70 (2001).

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 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) Datron's product was at Great Northern, (2) Datron's product at Great Northern contained asbestos, and (3) the Decedent had personal contact with asbestos from Datron'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 support of its motion for summary judgment, Datron asserts that there is no admissible evidence through which Plaintiffs can prove the Decedent worked on any asbestos-containing component of a Nicholson steam trap, for which Datron is alleged to be liable as the successor in interest. Datron thus challenges the product nexus between the Decedent and its products. Datron also asserts that because any asbestos exposure by the Decedent is the result of insulation applied after manufacture of the steam trap, it cannot be liable for any exposure to asbestos from third party products.

The record reveals that the parties dispute whether there is sufficient admissible evidence to establish the presence of Datron's products at Great Northern. The Decedent testified at his deposition that Nicholson steam traps were present at the mill, but Datron disputes whether the testimony is based on Decedent's personal knowledge, or based on a summary of information received from other former Great Northern employees. (*See* A.S.M.F. ¶ 6; Reply S.M.F. ¶ 6.) Datron also objects to paragraph 10 of Plaintiffs' additional statement of material facts as unsupported by record material. (Reply S.M.F. ¶ 10.) The Court does not have to resolve the

parties' dispute regarding the record evidence at this stage of the proceedings. Viewing the evidence in the light most favorable to Plaintiffs as the non-moving party, *see Lightfoot*, 2003 ME 24, ¶ 6, 816 A.2d at 65, the Plaintiffs have established the presence of Nicholson steam traps (for which Datron is responsible) at Great Northern.

Plaintiffs, however, have not established that the Decedent was exposed to asbestos from Datron's products or that the Decedent insulated them with asbestos. *See Boyden*, 2007 Me. Super. LEXIS 47, at *11. Even when viewed in the light most favorable to the Plaintiffs, *see Lightfoot*, 2003 ME 24, ¶ 6, 816 A.2d at 65, the Decedent's testimony at his deposition that he remembered Nicholson steam traps at the plant does not establish that he in fact insulated those steam traps with asbestos, or was otherwise exposed to asbestos that was associated with Datron's products. The record is devoid of evidence from which a fact finder could reasonably conclude that the Decedent worked on, or otherwise had contact with Nicholson steam traps. Because Datron's duty to warn would only arise after sufficient proof of Decedent's exposure to asbestos from Datron's products, Plaintiffs have not made out a prima facie case to establish negligence or any duty to warn under the law of strict liability. Accordingly, Datron is entitled to summary judgment.

III. CONCLUSION

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

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