

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**  
(DeZurik, Inc.)

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 by the Defendants, the Decedent contracted mesothelioma, which resulted in her death. The matter is before the Court on the summary judgment motion of Defendant DeZurik, Inc.

**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.)<sup>1</sup> 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. ¶ 8; Reply S.M.F. ¶ 8.) The Decedent cleaned in places where mill workers tore apart and rebuilt pumps and valves, including those with asbestos packing. (A.S.M.F. ¶¶ 9-10; Reply S.M.F. ¶¶ 9-10.)

The Decedent became a permanent janitor in 1981. (Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 3.) 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.)<sup>2</sup>

Between May 16, 1969, and November 2, 1984, the Woodland mill purchased at least 175 valves from DeZurik. (A.S.M.F. ¶ 1; Reply S.M.F. ¶ 1.) Between the early 1970s until the early 1990s, DeZurik manufactured and sold certain valves that utilized asbestos-containing gaskets or asbestos packing. (A.S.M.F. ¶¶ 3-7)<sup>3</sup> Neither the Decedent nor any of the other deponents in this case recalled seeing any DeZurik valves in the Woodland plant. (Supp. S.M.F. ¶ 18; Opp. S.M.F. ¶ 18.)

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<sup>1</sup> 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 this period. (Opp. S.M.F. ¶ 3.)

<sup>2</sup> 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).

<sup>3</sup> DeZurik qualifies these statements, admitting that the valves were manufactured or sold, but denying that all such valves contained asbestos or that the valves sold to the Woodland mill contained any asbestos. (Reply S.M.F. ¶¶ 3-7.)

## 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 on 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 DeZurik are negligence and strict liability. Plaintiff alleges that DeZurik 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 DeZurik’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.<sup>4</sup> 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<sup>5</sup> 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.

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<sup>4</sup> 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).

<sup>5</sup> At the time, Justice Gorman was a member of the Maine Superior Court. Justice Gorman was subsequently appointed to the Maine Supreme Judicial Court.

LINSC-CV-2004-57, at 7 (Me. Super. Ct., Lin. Cty., Apr. 2, 2007) (Gorman, J).<sup>6</sup> 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 was at the defendant’s work place, (2) that the defendant’s product contained asbestos, (3) and

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<sup>6</sup> 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 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) DeZurik's product was at the Woodland mill, (2) DeZurik's product at the Woodland mill contained asbestos, and (3) the Decedent had personal contact with asbestos from DeZurik'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

DeZurik argues that Plaintiff cannot establish a connection between the Decedent and DeZurik valves. In other words, DeZurik contends that Plaintiff has failed to prove product nexus. Plaintiff has established that the Woodland mill purchased DeZurik valves. A reasonable inference to the Plaintiff as the non-moving party is that DeZurik valves were present at the Woodland mill. *See Lightfoot*, 2003 ME 24, ¶ 6, 816 A.2d 63. Plaintiff asserts that based on the volume of DeZurik valves purchased by Woodland mill, and given that the Decedent passed through areas of the mill while other employees repaired valves, a fact finder could reasonably infer that the Decedent "was exposed to asbestos through the repair and maintenance of DeZurik valves."

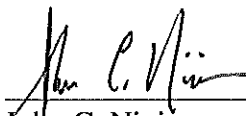
Contrary to Plaintiff's argument, the record does not contain evidence from which a reasonable fact finder could conclude that the Decedent was exposed to an asbestos-containing product manufactured by DeZurik. More specifically, the record contains no direct evidence that the Decedent had contact with a DeZurik product. In addition, Plaintiff has not demonstrated that the volume of DeZurik products was such that a reasonable fact finder could conclude that Decedent had contact with a DeZurik product. 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, DeZurik is entitled to summary judgment.

IV. CONCLUSION

Based on the foregoing analysis, the Court grants DeZurik, Inc.'s motion for summary judgment and enters judgment in favor of DeZurik, Inc. 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

  
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John C. Nivison  
Justice, Maine Business & Consumer Court

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