STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 13, 2017)

BRENDA HINKLEY, Personal Representative of the Estate of RUDOLPH ALLEN, Deceased and DOROTHY ALLEN, His Wife, in her own right,	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-15-1722**
A.O. SMITH CORPORATION, et al.,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. The Defendant New England Insulation Company (Defendant or NEI) seeks summary judgment in the above-entitled personal injury matter brought by Plaintiffs Brenda Hinkley, Personal Representative of the Estate of Rudolph Allen, and Dorothy Allen, the Decedent's wife (Plaintiffs). The present Defendant objects to the application of Maine law that was previously requested by co-defendants on October 15, 2015 and agreed to by the Plaintiffs on November 16, 2016. Additionally, the Defendant argues that under either Maine or Rhode Island law, the Plaintiffs have failed to provide sufficient product identification to overcome summary judgment. The Plaintiffs contend that the application of Maine law is proper and that sufficient product identification has been presented to survive summary judgment. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The Decedent, Rudolph Allen (Mr. Allen or the Decedent), and his wife, Dorothy Allen, filed this instant action on April 27, 2015 after the Decedent was diagnosed with mesothelioma on March 11, 2015. The Plaintiffs allege that Mr. Allen worked as a plumbing-heating tradesman from 1949 to 1959 and subsequently worked as a plumber-pipefitter from 1960 to the late 1970s. The Plaintiffs allege that Mr. Allen, while at work, inhaled, absorbed, and came into contact with asbestos and asbestos-containing products.

Mr. Allen was born in Maine, where he lived the majority of his life, with the exception of the two and one-half years that he served in the Navy beginning in 1943 and the nine years that he lived on Long Island, New York. Following his time in the Navy, Mr. Allen worked in New York and Maine on various jobs which included plumbing, boiler and heating equipment installation, and finally as a union pipefitter from 1963 through retirement. Mr. Allen's exposure allegations in the present motion involve his employment in the fields of plumbing, heating, and pipefitting at multiple paper mills, the majority of which were located in Maine. In his deposition testimony, Mr. Allen specifically testified to his time working at International Paper Mill in Jay, Maine where he worked around outside contractors who installed asbestos-containing pipe covering.

Mr. Allen died in Auburn, Maine on October 10, 2015. Subsequently, Mr. Richard R. Ouellette (Mr. Ouellette), a co-worker of the Decedent, was deposed on July 6, 2016. Mr. Ouellette worked with Mr. Allen at International Paper Mill in Jay, Maine, and he testified that the Decedent was his foreman. During this time, Mr. Ouellette worked with Mr. Allen assisting in the construction of a new power house. After this construction project was complete, Mr.

Ouellette continued to work alongside the Decedent for approximately two months at the International Paper Mill on the digester and pulp mill areas. Mr. Ouellette stated that outside contractors installed and cut asbestos-containing pipe covering in the power house, the pulp mill, and the digester and that such cutting created dust which both he and the Decedent inhaled.

Maurice Morin, a worker at International Paper Mill, testified in another suit that he worked on the paper machines at the mill from 1956 until 1972. Mr. Morin recalled NEI as the insulation contractor that performed the insulation work at International Paper Mill, since he remembers seeing its name on the trucks. He testified that NEI installed pipe covering and that this process created dust.

On July 15, 2015, co-defendants Crane Co. and Kimberly-Clark Corporation filed a Notice to Apply the Foreign Law of Maine to the instant action. On July 21, 2015, the Plaintiffs opposed that Notice to Apply Foreign Law. On November 13, 2015, co-defendant S.D. Warren motioned to join Kimberly-Clark Corporation's notice. The Plaintiffs initially objected to the defendants' motions to apply foreign law on April 19, 2016. However, on or about November 16, 2016, the Plaintiffs filed a Notice of No Opposition and agreed to apply the substantive Maine law to the case. The Defendant on this present motion—NEI, which is a co-defendant of the corporations noted above—filed its objection to the Application of Foreign Law on January 18, 2017 and noted its objection during oral arguments on summary judgment.

II

Parties' Arguments

The Defendant contends that the substantive law of Maine should not apply to the instant action, despite co-defendants' previous motions to apply foreign law and Plaintiffs' assent thereto. The Defendant argues that the Plaintiffs failed to comply with Super. R. Civ. P. 44.1,

which states that "[a] party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice." The Defendant argues that since the Plaintiffs failed to provide notice, this Court should not entertain arguments on the application of Maine law and should not apply Maine law to the present Motion for Summary Judgment.

The Defendant maintains that if Rhode Island substantive law applies, summary judgment should be granted because Plaintiffs have failed to provide product identification or evidence of a causal connection. Further, the Defendant contends that the Plaintiffs' claims are barred under Rhode Island's Statute of Repose because the Defendant, as an insulation contractor, clearly qualifies for protection under the statute's language. Alternatively, the Defendant argues that if this Court should determine that Maine substantive law applies, the Plaintiffs' claims similarly cannot survive summary judgment. The Defendant argues that the Plaintiffs have failed to provide evidence regarding product identification as required by Maine law in the recent Grant v. Foster Wheeler, LLC decision from the Supreme Judicial Court of Maine. 140 A.3d 1242 (Me. 2016).

Alternatively, the Plaintiffs contend that Maine substantive law applies to the instant action because the Notice to Apply Foreign Law brought by co-defendants applies to the entire action, not just the motion between a particular co-defendant and a plaintiff. Plaintiffs additionally claim that their filed Objection to Apply Foreign Law constitutes Notice under Super. R. Civ. P. 44.1 and that their filed Objection to the Motion for Summary Judgment similarly provided sufficient notice of the application of Maine law. Under Maine law, the Plaintiffs maintain that they have offered sufficient evidence of product identification in relation to NEI. They contend that under Grant, they have provided evidence to show proper product

nexus in order to survive summary judgment. Additionally, the Plaintiffs aver that their claims are not barred by either the Maine or Rhode Island Statute of Repose because the Defendant does not meet the statutory definitions under either statute.

III

Choice-of-Law

The Defendant contends that the substantive law of Maine should not apply to the present action because the Defendant was not provided proper notice as required by Super. R. Civ. P. 44.1. The Plaintiffs contend that proper notice was provided to all co-defendants, that the application of Maine law was previously agreed to by both the Plaintiffs and co-defendants (albeit not NEI), and that NEI has not provided sufficient argument to now raise a choice-of-law issue. The Plaintiffs assert that Maine law is most appropriate and that the Court should not now engage in a choice-of-law analysis.

Rhode Island's Uniform Judicial Notice of Foreign Law Act (G.L. 1956 §§ 9-19-3 to 9-19-8), together with Super. R. Civ. P. 44.1, provides the proper procedure for raising issues of choice-of-law with respect to other states and foreign countries. See Super. R. Civ. P. 44.1 1995 Committee Notes. The statutes deal with the law of other states, while the rule of civil procedure applies to the law of foreign countries. See id. Sec. 9-19-6 provides that:

> "Any party may also present to the trial court any admissible evidence of foreign laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise." Sec. 9-19-6.

Therefore, under Rhode Island procedural rules, a party wishing to apply the law of a foreign state need only provide reasonable notice to the adverse parties; such notice can be stated in the pleadings or "otherwise." Id.

In the present matter, co-defendants Crane Co. and Kimberly-Clark Corporation gave Notice to Apply Foreign Law to the opposing party on July 15, 2015. Pls.' Ex. 5. In response, Plaintiffs originally objected to that Notice on July 21. 2015. Pls.' Ex. 6. Fellow co-defendant ECR International, Inc. brought its Motion to Apply Foreign Law on October 15, 2015. Pls.' Ex. 7. Fellow co-defendant S.D. Warren joined the motion to Apply Foreign Law on November 13, 2015. The present Defendant, NEI, did not provide an objection to that Notice until January 18, 2017—well after the co-defendants gave notice in 2015 and after the Plaintiffs acquiesced in November of 2016 by providing their written Notice of No Objection.

Under § 9-19-6, co-defendants Crane Co. and Kimberly-Clark Corporation provided sufficient notice to opposing parties of their intent to apply the foreign law of Maine to the present suit. See § 9-19-6. The numerous filings by NEI's co-defendants and the Plaintiffs were sufficient means of providing notice to apply the substantive laws of Maine to the instant action. Id.; see also Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 525 n.17 (R.I. 2011) (requiring notice to opposing party in any case involving foreign laws of another state); Rocchio v. Moretti, 694 A.2d 704, 706 (R.I. 1997) (requiring notice in pleading or otherwise). Additionally, the Defendant has not provided sufficient argument to this Court as to what distinguishes it from fellow co-defendants, such that the substantive law of Rhode Island should apply to NEI, while the substantive law of Maine properly applies to all other co-defendants.

This Court is satisfied that the Defendant was provided sufficient notice of the application of Maine substantive law as required by § 9-19-6 when co-defendants and the Plaintiffs presented arguments for, and objections to, the application of Maine law. See § 9-19-6; Nat'l Refrigeration, Inc. v. Standen Contracting Co., 942 A.2d 968, 973-74 (R.I. 2008); see also Rocchio, 694 A.2d at 706. Therefore, this Court will apply the substantive law of Maine to

any summary judgment arguments—as agreed to by the parties in November of 2016—since the Court has not received any compelling argument as to why this Defendant should be held apart from co-defendants who originally presented their Notice to Apply Foreign Law in July of 2015.

IV

Standard of Review

Maine Rule of Civil Procedure 56(c) provides that summary judgment is warranted 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 . . . and that [the moving] party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." Burdzel v. Sobus, 750 A.2d 573, 575 (Me. 2000). "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." Lever v. Acadia Hosp. Corp., 845 A.2d 1178, 1179 (Me. 2004). If ambiguities in the facts exist, they must be resolved in favor of the nonmoving party. Beaulieu v. Aube Corp., 796 A.2d 683, 685 (Me. 2002).

In Arrow Fastener Co. v. Wrabacon, Inc., the court observed that, "although summary judgment is no longer an extreme remedy, it is not a substitute for trial. It is, at base, 'simply a procedural device for obtaining judicial resolution of those matters that may be decided without fact-finding.'" 917 A.2d 123, 127 (Me. 2007) (internal citation omitted). If facts material to the resolution of the matter have been properly placed in dispute, summary judgment based on those facts is not available except in those instances where the facts properly proffered would be flatly insufficient to support a judgment in favor of the nonmoving party as a matter of law. Id. (citations omitted) (quoting Curtis v. Porter, 784 A.2d 18, 21-22 (Me. 2001)).

The party opposing a summary judgment motion is given the benefit of any inferences which might be reasonably drawn from the evidence. See Curtis, 784 A.2d at 22. However, neither party can rely on 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 Servs., 740 A.2d 560, 562 (Me. 1999) (quoting Vinick v. Comm'r of Internal Revenue, 110 F.3d 168, 171 (1st Cir. 1997)). Additionally, the plaintiff must establish a prima facie case for each element of the cause of action at issue in order to survive a defendant's motion for summary judgment. See Champagne v. Mid-Maine Med. Ctr., 711 A.2d 842, 845 (Me. 1998); Barnes v. Zappia, 658 A.2d 1086, 1089 (Me. 1995).

V

Analysis

A

Product Identification

When a defendant moves for summary judgment, the burden first rests on the moving party to show that evidence fails to establish a prima facie case for each element of the plaintiff's cause of action. Budge v. Town of Millinocket, 55 A.3d 484, 488 (Me. 2012). Under Maine law, a claim for negligence requires proof of causation as a main element; namely, that the injury to the plaintiff is proximately caused by a breach of duty owed to the plaintiff by the defendant. See Mastriano v. Blyer, 779 A.2d 951, 954 (Me. 2001). In Grant, the Supreme Judicial Court of Maine states that:

> "Evidence is sufficient to support a finding of proximate cause if the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing the injury or damage and that

> the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence." 140 A.3d at 1246.

Therefore, to establish a case in personal injury asbestos litigation, a plaintiff must demonstrate product nexus—which means that the decedent was exposed to the defendant's asbestos-containing product—and also medical causation, i.e. that such exposure was a substantial factor in causing the plaintiff's injury. Id. The court has stated that "[t]he mere possibility of . . . causation" is not enough and that when the matter remains one of "pure speculation or conjecture, or even if the probabilities are evenly balanced," a defendant is entitled to summary judgment. Id.

The Supreme Judicial Court of Maine recently stated that in asbestos personal injury matters, Maine law requires evidence demonstrating that the asbestos containing product originated with the defendant as a prerequisite to product identification and liability. Id. at 1248-49. The court stated that "[p]ursuant to 14 M.R.S. § 221, the seller of a product is liable for injury if the product 'is expected to and does reach the user or consumer without significant change in the condition in which it is sold.'" Id. at 1248. The court goes on to state that based on this rationale, the court will only review a plaintiff's exposure evidence to a defendant's original product.[1] Id.

In the present case, the Plaintiffs allege in their Complaint that the Decedent's exposure arose from his employment at International Paper Mill. See Def.'s Ex 2 at 55, 64, 71, 83. The Plaintiffs allege that during the construction of a paper mill located in Jay, Maine, the Decedent worked around outside contractors who were installing asbestos-containing pipe covering. See

[1] Additionally, the Superior Court of Maine cited extra-jurisdictional cases to hold that a defendant is not liable for injury-causing materials supplied by a third party that is used in conjunction with a defendant's product. See Rumery v. Garlock Sealing Techs., Inc., 2009 WL 1747857 (Me. Super.) (citing to Braaten v. Saberhagen Holdings, 198 P.3d 493, 498-99 (Wash. 2008); Simonetta v. Viad Corp., 197 P.3d 127, 138 (Wash. 2008)).

Pls.' Ex. B at 24. The Plaintiffs allege that these outside contractors installed hundreds of feet of pipe covering which had to be cut as part of the installation process, creating dust which the Decedent inhaled. See id. The Plaintiffs also allege that the Decedent routinely worked "shutdowns" at the International Paper Mill in Jay, Maine, in which the mill ceased operation for repair work—including the installation and removal of pipe covering by outside contractors. See id. at 25-26.

The Plaintiffs provide the deposition testimony of Maurice Morin—a worker at the International Paper Mill in Jay, Maine from 1956 to 1972—to allege that NEI was the insulation contractor that performed the insulation work at the mill during its construction. See Pls.' Ex. D at 7. Mr. Morin stated in his testimony that he was employed at the International Paper Mill on the paper machines, and that he recalled NEI as the insulation contractor that installed insulation at the mill because he remembered seeing their names on trucks. See id. at 117, 165. Further, Mr. Morin testified that the installation of pipe covering created dust. See id. Finally, the Plaintiffs submit historical documents to allege that NEI sold 58,143 linear feet (approximately 11.01 miles) of various diameters of Kaylo section pipe covering to the International Paper Mill from June 29, 1965 to April 23, 1970. See Pls.' Ex. E.

After careful review of the facts and testimony presented, this Court finds that the Plaintiffs have met their burden to overcome summary judgment by demonstrating—through witness testimony and other historical documents—that genuine issues of material fact regarding product identification remain for a jury. See Grant, 140 A.3d at 1248-49; Def.'s Exs. A, B; Pls.' Ex. A. The Supreme Judicial Court of Maine, in the Grant case, instructed that a plaintiff must provide sufficient evidence of product nexus in order to survive summary judgment; the Court defined product nexus as 1) a defendant's asbestos-containing product, 2) at the site where the

plaintiff worked or was present, and 3) where the plaintiff was in proximity to that product at the time it was being used. 140 A.3d at 1248-49.

Testimony in the present case demonstrates that the Plaintiffs have met the standard enunciated by Grant by providing evidence of an original NEI product sold to the International Paper Mill where the Decedent worked, placing the Decedent in proximity to that product at the time it was being installed. See 140 A.3d at 1248-49; Arrow Fastener, 917 A.2d at 127; Champagne, 711 A.2d at 845. Additionally, the Decedent testified that at the time of installation, NEI cut the miles of insulation they installed, in the process creating dust that he then allegedly inhaled. See Pls.' Ex. B at 25. This Court finds that the Plaintiffs have submitted sufficient evidence of product nexus to overcome the Defendant's Motion for Summary Judgment on the issue of product identification. See Grant, 140 A.3d at 1248-49; Mastriano, 779 A.2d at 954.

B

Causation

After product nexus is established, Maine courts review medical causation to determine if a plaintiff's exposure to a defendant's original product was a "substantial factor in bringing about the [plaintiff's] harms." See Spickler v. York, 566 A.2d 1385, 1390 (Me. 1989); Wing v. Morse, 300 A.2d 491, 495-96 (Me. 1973). Therefore, relative to summary judgment, the question is whether a material issue of fact remains as to the Plaintiffs' allegation that NEI's conduct or product caused the Plaintiffs' damages. See Spickler, 566 A.2d at 1390.

The Supreme Judicial Court of Maine, in the recent Grant decision, declined to apply the more burdensome standard espoused in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986). Under the Lohrmann standard, plaintiffs would be required to present evidence of the "frequency, regularity, and proximity" of a decedent's contact with an asbestos-containing

product in order to overcome summary judgment. See id. at 1163. In Grant, however, the Supreme Judicial Court of Maine applied a trial judge's analysis and definition of medical causation—essentially, that the plaintiff's exposure to the defendant's product was a "substantial factor" in causing the plaintiff's injury. 140 A.3d at 1246. The Supreme Judicial Court defines "substantial factor" in general negligence actions as:

> "[E]vidence and inferences that may reasonably be drawn from the evidence [to] indicate that the negligence played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence." See Merriam v. Wanger, 757 A.2d 778, 780-81 (Me. 2000).

However, the Supreme Judicial Court of Maine has also stated that issues of causation—such as whether a defendant's conduct caused a particular injury—are questions of fact best left for the jury. See Tolliver v. Dep't of Transp., 948 A.2d 1223, 1236 (Me. 2008).

Following the Supreme Judicial Court of Maine's jurisprudence, this Court therefore finds that—after a plaintiff has sufficiently provided evidence of product nexus to overcome summary judgment—the question of whether a defendant's product was a substantial factor in causing a plaintiff's damages is an issue for the jury.[2] Therefore, since the Plaintiffs have provided sufficient evidence of product nexus with respect to the Decedent and an NEI product, the remaining question of causation will not be addressed by this Court as it is left to the ultimate fact-finder.[3] See id.

[2] See also Kumiszcza v. Tri-State Packing Supply, 2009 WL 1747851 (Me. Super.) (finding that once plaintiff has provided sufficient evidence on product nexus, the remaining question of whether the defendant's product was a substantial factor in causing the plaintiff's damages is a question best left to the jury).

[3] The Defendant has not presented arguments for summary judgment under Maine's Statute of Repose, 14 M.R.S.A. § 752-A. Rather, it presented that argument under Rhode Island's Statute of Repose. Therefore, since Maine substantive law properly applies, Maine's Statute of Repose will not be analyzed.

VI

Conclusion

This Court finds that the Plaintiffs have met their burden and have produced sufficient evidence of product nexus to survive the summary judgment stage. This Court also finds that the material issues of fact regarding causation remain and that such issues are best left to the fact finder. Therefore, the Defendant's Motion for Summary Judgment is denied in full. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Brenda Hinkley, et al. v. A.O. Smith Corporation, et al.**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 13, 2017**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**

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