



## I

### Facts and Travel

The Plaintiffs filed the underlying personal injury action on June 26, 2013, asserting claims for negligence and breach of warranty. The Plaintiffs named numerous defendants, including NEI, and alleged that Mr. Blouin was exposed to asbestos-containing products during his career as a laborer at various job sites. Mr. Blouin worked at paper mills, hospitals, universities, and Bath Iron Works from approximately 1969 to 1983, and he was a member of Local 327 Laborer's Union from 1969 to 1990.

Mr. Blouin was deposed for three days in September of 2013. In that deposition, Mr. Blouin stated that he worked as a laborer for general contractors, such as Walsh Construction, at jobsites located in southern and central Maine. Mr. Blouin further testified that he worked at International Paper Mill on at least five "shutdowns" for multiple contractors from the late 1960s to the early 1970s; shutdowns occurred when the mill was closed for maintenance or repair work and lasted anywhere from a few weeks to a couple of months. While working at the mill for Walsh Construction, Mr. Blouin worked with pipe covering.

From 1973 to 1976, the Decedent worked at International Paper Mill in the powerhouse and on paper machines. While employed at International Paper Mill, Mr. Blouin cleaned up after all trades throughout different areas of the mill. Mr. Blouin's co-worker and brother, Larry Blouin, testified that he and the Decedent worked together at the mill from 1973 to 1976. Mr. Larry Blouin stated that he and the Decedent worked around other trades, including pipefitters, and that there were insulation subcontractors present at the mill. Mr. Larry Blouin testified that his work with the Decedent involved removing pipe covering and working around insulators who were installing pipe covering.

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 that NEI was 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 at the mill and that this process created dust.

## II

### **Parties' Arguments**

The Defendant contends that the substantive law of Maine should not apply to the instant action because 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 further maintains that under Rhode Island substantive law, 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.

The Plaintiffs contend that Maine substantive law should apply to the instant action and they raise a choice-of-law argument in their brief in opposition to the Defendant’s Motion for Summary Judgment. In that choice-of-law argument, the Plaintiffs contend that there is a true conflict between Rhode Island and Maine substantive law. They maintain that the State of Maine has a superior interest in the matter because factually, the work, the injury, and

relationship between the parties all occurred in Maine. The Plaintiffs additionally claim that they have provided sufficient notice of their intent to apply foreign law in their opposing brief, since the Rhode Island Rules of Civil Procedure allow for notice in the pleadings or otherwise.

Under Maine law, the Plaintiffs maintain that they have offered sufficient evidence of product identification in relation to NEI. They contend that under a recent Supreme Judicial Court of Maine holding, they have provided evidence to show proper product nexus and causation sufficient 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**

##### **A**

#### **Notice**

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 via their objection brief under the Rhode Island Rules of Civil Procedure. The Plaintiffs assert that Maine law is most appropriate and that the Court should 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, the Plaintiffs gave notice to apply foreign law to the opposing party on November 18, 2016 via their objection to the Defendant’s Motion for Summary Judgment. The Defendant then replied to that brief on December 19, 2016, but did not provide any choice-of-law argument and merely argued that notice in that form was not proper under the Rules of Civil Procedure. Under § 9-19-6, however, the Plaintiffs have provided sufficient notice to the opposing party of their intent to apply the foreign law of Maine to the present suit. See § 9-19-6. The choice-of-law argument raised by the Plaintiffs is a sufficient means of providing notice, and therefore, this Court will now engage in a choice-of-law analysis. See id.; see also Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 525 n.17 (R.I. 2011) (citing Rocchio v. Moretti, 694 A.2d 704, 706 n.2 (R.I. 1997) (holding that notice is required in any case involving law of a foreign country or state before a conflict-of-law analysis can commence)).

## **B**

### **Conflict of Law**

In response to Plaintiffs’ choice-of-law argument, this Court must determine if the laws of a foreign state are to be applied. In order to do so, this Court must conduct a choice-of-law analysis. The Court must first determine whether the laws of the two states in question are in conflict; i.e., if a “true conflict” exists. See Nat’l Refrigeration, Inc. v. Standen Contracting Co., 942 A.2d 968, 973-74 (R.I. 2008) (noting that it is well established that “[a] motion justice need

not engage in a choice-of-law analysis when no conflict-of-law issue is presented to the court”). A “true conflict” exists when each state retains an interest in the application of its contradictory laws. Peavey Co. v. M/V ANPA, 971 F.2d 1168, 1172 (5th Cir. 1992). If the laws are found to be in true conflict, then this Court shall apply Rhode Island’s interest-weighting approach. See Turcotte v. Ford Motor Co., 494 F.2d 173, 176-77 (1st Cir. 1974).

After careful consideration of the differences between Maine and Rhode Island substantive law, this Court finds that a “true conflict” of law does, in fact, exist. See Harodite Indus., 24 A.3d at 525 n.17; Nat’l Refrigeration, 942 A.2d at 973-74. Most notable is the significant difference between Maine’s Statute of Repose and Rhode Island’s Statute of Repose. Maine’s Statute of Repose states:

“All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered under Title 32 shall be commenced within 4 years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than 10 years after the substantial completion of the construction contract or the substantial completion of the services provided . . . ” 14 M.R.S.A. § 752-A.

Maine’s Statute of Repose does not protect mere contractors, and Maine’s courts have held that the statute applies only to architects and engineers. See Bangor Water Dist. v. Malcolm Pirnie Eng’rs, 534 A.2d 1326, 1328 n.6 (Me. 1988).

In contrast, Rhode Island’s Statute of Repose is much broader and provides, in relevant part, that:

“No action . . . in tort to recover damages shall be brought against any architect or professional engineer who designed, planned, or supervised to any extent the construction of improvements to real property, or against any contractor or subcontractor who constructed the improvement to real property, or material suppliers who furnished materials for the construction of the improvements, on account of any deficiency in the design, planning, supervision, or observation of construction or construction of any such

improvements or in the materials furnished for the improvements . . .” Sec. 9-1-29.

Rhode Island’s Statute of Repose bars suits for damages brought more than ten years after substantial completion of an improvement and bars recovery against architects, engineers, contractors, subcontractors, and material suppliers who meet the requirements of the statute. See id.

Therefore, there is a true conflict between the substantive laws of Maine and Rhode Island—namely, in their respective Statutes of Repose and in the applicability of those two provisions. See 14 M.R.S.A. § 752-A; § 9-1-29; see also Nat’l Refrigeration, 942 A.2d at 973-74. Thus, this Court moves on to an interest-weighting analysis to determine which state’s substantive law is most appropriate. See Harodite Indus., 24 A.3d at 525 n.17.

## C

### **Interest-Weighting Approach**

In Harodite Indus., the Rhode Island Supreme Court adopted the interest-weighting approach with respect to choice-of-law questions. 24 A.3d at 525 n.17. In doing so, the majority reaffirmed its holding in Cribb v. Augustyn, 696 A.2d 285, 288 (R.I. 1997) that the lex loci delicti conflict-of-law doctrine had been abandoned in Woodward v. Stewart, 104 R.I. 290, 299, 243 A.2d 917, 923 (1968). In applying the “interest-weighting approach,” this Court “look[s] at the particular . . . facts and determine[s] therefrom the rights and liabilities of the parties in accordance with the law of the state that bears the most significant relationship to the events and the parties.” Harodite Indus., Inc., 24 A.3d at 534 (quoting Cribb, 696 A.2d at 288) (emphasis in original).

Under the interest-weighting approach, the following five factors shall be considered: 1) predictability of result; 2) maintenance of interstate and international order; 3) simplification of

the judicial task; 4) advancement of the forum's governmental interests; and 5) application of the better rule of law. Najarian v. Nat'l Amusements, Inc., 768 A.2d 1253, 1255 (R.I. 2001). Additionally, for conflict-of-law questions involving tort actions, the Court must evaluate the following four specific factors: 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and 4) the place where the relationship between the parties, if any, is centered. Id.

In the present case, Mr. Blouin was allegedly exposed to the Defendant's asbestos-containing products while working in southern and central Maine. Def.'s Ex. 3 at 78-79. NEI's conduct at jobsites in Maine is the focal point of the Plaintiffs' claims for personal injury Pls.' Ex. E at 117. Additionally, Maine is the state where the relationship between Mr. Blouin and the Defendant is centered. See Pls.' Ex. E at 117; Pls.' Ex. F. Considering the general interest-weighting factors discussed above, Maine substantive law is most appropriate because it supports predictability of result, as the crux of the relationship and alleged conduct between the parties occurred in Maine. See Najarian, 768 A.2d at 1255.

Overall, Maine's contacts with both Mr. Blouin and the Defendant render it the better rule of law, and Maine's Statute of Repose does not outright prevent recovery in this case. See Victoria v. Smythe, 703 A.2d 619, 621 (R.I. 1997) (applying Florida law, where Rhode Island law would not assign any liability whatsoever under the circumstances of that particular case); see also Brown v. Church of Holy Name of Jesus, 105 R.I. 322, 325, 252 A.2d 176, 178 (1969) (applying the general five factors of the interest-weighting approach to determine the best rule of law). After careful consideration of all the factors provided in Rhode Island's interest-weighting



analysis, this Court finds that Maine’s substantive law is the most appropriate for this particular case. See Najarian, 768 A.2d at 1255; Victoria, 703 A.2d at 621.

#### 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) (citations 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 stated 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—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 (citations omitted). 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.<sup>1</sup> *Id.*

In the present case, the Plaintiffs allege in their Complaint that Mr. Blouin’s exposure arose from his employment as a laborer with general contractors, such as Walsh Construction, and from his employment at International Paper Mill. *See* Def.’s Exs. 1, 2, 3. The Plaintiffs allege that as a laborer, the Decedent worked around outside subcontractors who were installing

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<sup>1</sup> Additionally, the Superior Court of Maine cited with approval extra-jurisdictional cases holding 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 *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 498-99 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008)).

asbestos-containing pipe covering. See Pls.’ Ex. D at 13. The Plaintiffs allege that these outside subcontractors 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 Pls.’ Ex. E at 117, 139-40, 151. The Plaintiffs also allege that the Decedent routinely worked “shutdowns” at the International Paper Mill, in which the mill ceased operation for repair work—including the installation and removal of pipe covering by outside contractors. See Pls.’ Ex. A at 79.

The Plaintiffs provide the deposition testimony of Maurice Morin—a worker at the International Paper Mill 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. E at 117, 139-40, 151, 152, 165. 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 its name 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. F.

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 Grant stated 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 outlined in Grant by providing evidence of an original NEI product installed at the International Paper Mill where Mr. Blouin worked as both a laborer and at the paper machines, placing the Decedent in proximity to that product. 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. E. Therefore, after review of the evidence, this Court finds that the Plaintiffs have submitted sufficient evidence of product nexus to overcome 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, on 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 as 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 often 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.<sup>2</sup> Therefore, since the Plaintiffs have provided sufficient evidence of product nexus with respect to Mr. Blouin and an NEI product, the remaining question of causation will not be addressed by this Court and is left to the ultimate fact-finder. See id.

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<sup>2</sup> See also Kumiszczka 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 defendant’s product was a substantial factor in causing plaintiff’s damages is best left for the jury).

## C

### **Statute of Repose**

Finally, the Plaintiffs contend that their claims are not barred by Maine's Statute of Repose because that statute does not apply to subcontractors but merely to architects or engineers. Although the Defendant argued for summary judgment under Rhode Island's Statute of Repose, it has not provided any arguments under Maine's Statute of Repose should Maine substantive law apply. This Court finds that under Maine's Statute of Repose, the Plaintiffs' claims are not barred, since the Defendant is neither an architect nor an engineer under the protection of the statute's clear and unambiguous language. 14 M.R.S.A. § 752-A; see also Bangor Water Dist., 534 A.2d at 1328 n.6.

## VI

### **Conclusion**

This Court finds that under Rhode Island's interest-weighting approach, the substantive law of Maine most appropriately applies to this action. This Court also finds that the Plaintiffs have met their burden to produce sufficient evidence of product nexus and causation in order to survive summary judgment. Further, this Court finds that the Plaintiffs' claims are not barred by Maine's Statute of Repose. 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*

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**TITLE OF CASE:** Henry R. Blouin, et al. v. Albany International Corp., et al.

**CASE NO:** PC-13-3116

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** March 13, 2017

**JUSTICE/MAGISTRATE:** Gibney, P.J.

**ATTORNEYS:**

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