STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 16, 2018)

CAROLYN MARIE NICHOLS, as Executrix of the Estate of IVA PEARL JONES and OSCAR ANDREW JONES, as Surviving Spouse of IVA PEARL JONES,	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-2008-1134**
ALLIS CHALMERS PRODUCT LIABILITY TRUST, ET AL.,	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is Defendant Crane Co.'s (Defendant or Crane) motion for summary judgment on all counts of the Plaintiffs' Second Amended Complaint (Complaint) pursuant to Super. R. Civ. P. 56. In this motion, the Court is asked to decide whether Rhode Island law imposes a duty of care on Crane, an employer, to protect third party non-employees who came into contact with its employee's asbestos-tainted work clothes at the employee's home. The Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

In this case, the Plaintiffs allege multiple causes of action including claims of failure to warn, negligence, strict product liability, breach of warranty, conspiracy, loss of consortium, and wrongful death. The Plaintiffs claim that Iva Pearl Jones (Ms. Jones) was repeatedly and regularly exposed to asbestos fibers and dust on the clothing of Stanley Nichols (Mr. Nichols),

her brother-in-law, while he was employed by Crane and while they resided in the same home. Plaintiffs contend this secondary exposure from Mr. Nichols' clothes was a substantial contributing cause of Ms. Jones' disease and death from mesothelioma.

During discovery, Mr. Nichols was deposed and testified that he worked for Crane in the state of Arkansas from 1979 to 1980. (Dep. of Stanley Nichols at 22:9-19.) During his employment, Mr. Nichols worked as a metal pourer and furnace operator. *Id.* at 22:12-17, 39:18-44:16. In these capacities, he was exposed to asbestos-containing products. *Id.* at 25:21-23; 39:18-44:16. Crane did not provide uniforms to its employees. *Id.* at 429:23-430:4. Crane provided employees with an asbestos apron, and employees wore street clothes under the asbestos apron. *Id.* at 40:15-41:4, 63:17-64:5, 429:18-430:17. Despite the asbestos apron, the dust adhered to the clothes. *Id.* at 44:14-19, 54:19-24, 62:8-14.

While employed by Crane, Mr. Nichols lived with his wife, Carolyn Marie Nichols (Ms. Nichols); his sister-in-law, Ms. Jones, and her husband, Oscar Andrew Jones (Mr. Jones); and his mother-in-law, Wanda. *Id.* at 19:11-13. According to Mr. Nichols' testimony, Ms. Jones "always" did his laundry, including his work clothes. *Id.* at 44:20-24. Mr. Nichols further testified that when Ms. Jones shook out his work clothes, dust was visible and that she breathed in the dust. *Id.* at 45:1-23, 55:1-24, 62:15-63:15, 65:15-66:15.

Ms. Jones was diagnosed with mesothelioma on May 13, 2005 and died from her illness on May 14, 2007[1] at fifty-nine years old. (Report of Dr. James A. Strauchen at 2.) The Plaintiffs[2]

[1] The report in fact states that Ms. Jones died on "May 144th, 2007," which is certainly a mistake. (Report of Dr. James A. Strauchen at 2.) This Court interprets that date to mean "May 14th, 2007."

[2] Probate was pending on Ms. Jones' estate at the time the Complaint was filed originally, and her husband Oscar Andrew Jones as Surviving Spouse was listed as the Plaintiff. The Complaint was later amended twice to add defendants in the matter and to reflect that Ms. Jones' sister, Carolyn Marie Nichols, became the executrix of the estate.

filed this suit in Rhode Island Superior Court on February 27, 2008. Crane filed the instant motion for summary judgment and the memorandum in support thereof on September 19, 2017. The Plaintiffs filed a response and memorandum in opposition on October 6, 2017, and Crane filed a reply memorandum on October 20, 2017. Oral arguments on the motion for summary judgment were scheduled and heard on November 15, 2017.

Crane contends that summary judgment should be granted on all counts.[3] Crane asserts that there is no duty of care owed to Ms. Jones. Crane also posits that the Plaintiffs have not produced sufficient evidence to show that the materials Mr. Nichols and Ms. Jones handled contained asbestos or that there is a causal connection between that material and Ms. Jones' mesothelioma. Accordingly, Crane argues that the derivative claims as well as the primary claims should be dismissed. Crane further claims that it is entitled to summary judgment on the breach of warranty claim.

Alternatively, Plaintiffs argue that Crane failed to take adequate precautions to ensure that asbestos fibers and dust did not leave the worksite on employees, and also failed to warn employees of the known risks of transmission. Plaintiffs aver that Crane's actions created a foreseeable risk of harm to Ms. Jones, thereby establishing a duty of care. The Plaintiffs further assert that they have produced sufficient evidence to show causation. The Plaintiffs finally assert that the breach of warranty claim is applicable only to the Defendant manufacturers and not to Crane.

[3] While the instant motion for summary judgment grants Crane summary judgment on all counts, Crane does not discuss other grounds or claims not addressed herein, and such issues are deemed waived. *See Wilkinson v. State Crime Lab. Comm'n*, 788 A.2d 1129, 1131 n.1 (R.I. 2002) ("Simply stating an issue . . . without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.").

II

Standard of Review

"Summary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously." *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390-91 (R.I. 2008) (quoting *Ardente v. Horan*, 177 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)). Pursuant to Rule 56(c) of the Superior Court Rules of Civil Procedure, "[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Quest Diagnostics, LLC. v. Pinnacle Consortium of Higher Educ.*, 93 A.3d 949, 951 (R.I. 2014) (internal quotation marks omitted) (alterations in original). Summary judgment is properly granted when the plaintiff is unable to establish a *prima facie* case as a matter of law. *Kelley v. Cowesett Hills Assocs.*, 768 A.2d 425, 430 (R.I. 2001).

'"The moving party bears the initial burden of establishing the absence of a genuine issue of fact."' *McGovern v. Bank of Am., N.A.*, 91 A.3d 853, 858 (R.I. 2014) (quoting Robert B. Kent et al., *Rhode Island Civil Procedure* § 56:5, VII–28 (West 2006)). Once the moving party meets this burden, "'[t]he burden then shifts and the nonmoving party has an affirmative duty to demonstrate a genuine issue of fact.'" *Id.* (alteration in original) (internal ellipses omitted) (quoting Kent, *supra* § 56:5, VII–28). The nonmoving party then must prove by "'competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.'" *D'Allesandro v. Tarro*, 842 A.2d 1063, 1065 (R.I. 2004) (quoting *Santucci v. Citizens Bank of R.I.*, 799 A.2d 254, 257 (R.I. 2002) (per curiam)).

When considering a motion for summary judgment, a judge "must refrain from weighing the evidence or passing upon issues of credibility." *DeMaio v. Ciccone,* 59 A.3d 125, 130 (R.I. 2013) (internal quotation marks and citation omitted). The function of the judge "is not to cull out the weak cases from the herd of lawsuits waiting to be tried. Rather, only if the case is legally dead on arrival should the court take the drastic step of administering last rites by granting summary judgment." *Mitchell v. Mitchell*, 756 A.2d 179, 185 (R.I. 2000). This Court is mindful that the "purpose of the summary judgment procedure is issue finding, not issue determination." *Estate of Giuliano,* 949 A.2d at 391 (internal quotation marks and citation omitted).

III

Analysis

A

Duty

Secondary exposure to asbestos occurs when a person comes into contact with the toxin and subsequently carries the asbestos fibers and dust home on his or her person or clothes, exposing the individuals with whom he or she lives to the asbestos. Rhode Island has not addressed the question of duty in a secondary exposure case. The issue in this case is one of first impression.

Various jurisdictions have addressed the issue of duty in this regard. There is a division of authority among the courts. In some jurisdictions, the outcome turns on the lack of a special relationship between the parties. *See, e.g.*, *In re New York City Asbestos Litig.*, 840 N.E.2d 115 (N.Y. App. Div. 2005); *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005); *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58 (Md. Ct. Spec. App. 1998). Other jurisdictions focus on whether the risk of injury was

foreseeable. *See, e.g.*, *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008); *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010), *affirmed and remanded* 965 N.E.2d 1092 (Ill. 2012);[4] *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006); *Schwartz v. Accuratus Corp.*, 139 A.3d 84 (N.J. 2016); *Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016); *CertainTeed Corp. v. Fletcher*, 794 S.E.2d 641 (Ga. 2016), *reconsideration denied* (Dec. 8, 2016); *Palmer v. 999 Quebec, Inc.*, 874 N.W.2d 303 (N.D. 2016).[5] Mindful of these approaches, this Court turns to the question of duty within the confines of these facts under Rhode Island law.

1

Rhode Island Law

"It is well settled that '[a] defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff.'" *Santucci*, 799 A.2d at 256 (alteration in original) (quoting *Ferreira v. Strack*, 636 A.2d 682, 685 (R.I. 1994)). "[I]n the absence of a duty, 'the trier of fact has nothing to consider and a motion for summary judgment must be granted.'" *Holley v. Argonaut Holdings, Inc.*, 968 A.2d 271, 274 (R.I. 2009) (quoting *Banks v. Bowen's Landing Corp.*, 522 A.2d 1222, 1225 (R.I. 1987)). Whether a duty exists is a question of law for the Court to determine. *Santucci*, 799 A.2d at 256; *Volpe v. Gallagher*, 821 A.2d 699, 705 (R.I. 2003).

Rhode Island has no "set formula for finding a legal duty." *Wells v. Smith*, 102 A.3d 650, 653 (R.I. 2014); *Flynn v. Nickerson Cmty. Ctr.*, 177 A.3d 468, 477 (R.I. 2018); *Banks*, 522 A.2d at 1225 ("No clear-cut rule exists to determine whether a duty is in fact present in a particular case[.]"). The courts are to employ a case-by-case determination in deciding whether there is a

[4] The court remanded the case for plaintiff to amend the complaint to add facts relating to defendant's knowledge of the dangers of asbestos in order to determine duty.

[5] *See also* Yelena Kotlarsky, *The "Peripheral Plaintiff": Duty Determinations in Take-Home Asbestos Cases*, 81 Fordham L. Rev. 451, 453 (2013); Nicole Ward, *When Laundry Becomes Deadly: Why the Extension of Duty Past Spouses in Schwartz v. Accuratus Corp. Holds the Right People Responsible for Take-Home Toxic Torts*, 62 Vill. L. Rev. 457, 463 (2017).

legal duty. *Flynn*, 177 A.3d at 477. Thus, an *ad hoc* approach is utilized. The approach "turns on the particular facts and circumstances of a given case." *Id.*; *Gushlaw v. Milner*, 42 A.3d 1245, 1256 (R.I. 2012). In this analysis, the Court should consider

> "'(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.'" *Flynn*, 177 A.3d at 477 (quoting *Banks*, 522 A.2d at 1225).

The "relationship between the parties" should also be considered. *Id.* (quoting *Gushlaw*, 42 A.3d at 1257); *see also Selwyn v. Ward*, 879 A.2d 882, 887 (R.I. 2005); *Volpe*, 821 A.2d at 705.

2

Duty Analysis

In the instant matter, the Plaintiffs do not argue that a third party committed the underlying actions and Crane owes a duty on the basis of a special relationship.[6] Rather, the

[6] For purposes of discussion, this Court notes that as a general rule, no legal duty exists in Rhode Island to control a third party's conduct. *Santana v. Rainbow Cleaners*, 969 A.2d 653, 658 (R.I. 2009); *Flynn*, 177 A.3d at 477. The exception to this rule is when "a defendant has a special relationship with either the person whose conduct needs to be controlled or with the intended victim of the conduct." *Santana*, 969 A.2d at 658 (citing Restatement (Second) of *Torts* § 315 at 122 (1965)). For example, in *Volpe*, the Rhode Island Supreme Court found a special relationship existed and imposed a duty on the defendant, who was the landowner and mother of the third party who had shot and killed a neighbor, because she "knew or had reason to know that she had the ability to control her son's conduct on her property merely by—as she herself admitted—telling him to remove the guns and ammunition from her house, and, if he failed to do so, by removing them herself." 821 A.2d at 709. Later, in *Martin v. Marciano*, 871 A.2d 911, 915 (R.I. 2005) our Supreme Court imposed a duty on a defendant who hosted a party at which a guest was attacked by a third party attendee because alcohol was provided to underage party-goers at the party. *Id.* at 915.

However, "to impose a duty to control, there must be an opportunity to exercise such control." *Santana*, 969 A.2d at 665. Accordingly, Rhode Island courts have infrequently found a legal duty to control a third party's conduct exists on the basis of the special relationship exception. See *Ouch v. Khea*, 963 A.2d 630, 633-34 (R.I. 2009) (finding that no special

Plaintiffs allege that Crane operated its facility in a manner that permitted hazardous asbestos fibers and dust to be transmitted from the Arkansas worksite to Mr. Nichols and Ms. Jones' home and failed to warn Mr. Nichols of the known risks of transmission and asbestos exposure. Accordingly, this Court need not find a special relationship to impose a duty as Crane urges. *See, e.g.*, *Selwyn*, 879 A.2d at 886 (analyzing the duty factors, and not whether a special relationship existed, where plaintiff's complaint alleged that defendant should not have sold alcohol to the minor, who later ignited it); *Ferreira*, 636 A.2d at 685-88 (not discussing a potential special relationship and focusing on the *ad hoc* duty factors in a case in which plaintiffs, injured by an intoxicated third party's vehicle, claimed that defendant church owed parishioners a duty to control traffic or to warn); *Satterfield*, 266 S.W.3d at 364 (emphasizing that the special relationship exception was inapplicable because "the outcome of this case does not turn on a failure to act or on the act of a third party, but instead, it turns on the employer's own misfeasance—its injurious affirmative act of operating its facility in such an unsafe manner that

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relationship existed to impose a duty on a driver whose fellow gang-member passengers were injured in a drive-by shooting by a rival gang because the shooting was unforeseeable and the injury "was in no way connected to the vehicle or the driver's conduct"; noting "we are not prepared to elevate [street gangs] into a special relationship sufficient to give rise to a duty of care"); *see also Santana*, 969 A.2d at 665 (finding that a mental health center did not have a special relationship with a patient triggering a duty to control when plaintiff was attacked by a voluntary outpatient because there was no evidence that the center could have involuntarily committed the patient and therefore the center "possessed neither the legal authority nor the opportunity to exercise such control"); *Gushlaw*, 42 A.3d at 1258 (finding no special duty was owed where a driver transported to his car an intoxicated friend who subsequently drove, injuring plaintiff's husband, as a special relationship did not exist between the driver and friend because the driver did not furnish the friend with alcohol, the friend did not drink on a premise controlled by the driver, and the driver did not have the ability to control the friend's drinking or later decision to drive). Recently, the Rhode Island Supreme Court addressed this issue again in *Flynn*, 177 A.3d 468, and found no special relationship existed between the defendant community center and either the injured plaintiff or the third party juvenile because the defendant did not give the juvenile permission to enter the property and take the van with which the juvenile later injured the plaintiff. *Id.* at 479 (We decline to recognize a duty because it would amount to imposing a duty of care on victims of illegal entries to unknown plaintiffs.").

dangerous asbestos fibers were transmitted outside the facility to others who came in regular and extended close contact with the asbestos-contaminated work clothes of its employees").[7] Instead, the Court employs an *ad hoc* approach to determine duty, focusing on the duty factors of *Flynn*,

a

Foreseeability

This Court begins with the "linchpin" of the duty analysis: foreseeability of harm to Ms. Jones. *See Selwyn*, 879 A.2d at 887. Foreseeability alone does not create a duty. *Ferreira*, 636 A.2d at 688 n.4. The Court must "evaluate whether the type of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced by the victims of such conduct. . ." *Volpe*, 821 A.2d at 705. "'The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others *within the range of apprehension*.'" *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 467 (R.I. 1996) (quoting *Builders Specialty Co. v. Goulet*, 639 A.2d 59, 60 (R.I. 1994) and *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)). "[W]hether a duty of care can be owed to one who is injured from a dangerous condition on the premises, to which the victim is exposed off-premises, devolves to a question of foreseeability of the risk of harm to that individual or identifiable class of individuals." *Olivo*, 895 A.2d at 1148. "'[I]n order to temper foreseeability . . . an adequate nexus must exist between the foreseeability of [plaintiff's] harm and the actions of the defendant.'" *Selwyn*, 879 A.2d at

[7] *See also Olivo*, 895 A.2d at 1146 (discussing foreseeability and other duty factors in a case where the complaint asserted that the premises owners "breached their duty to maintain a safe working environment by failing to take appropriate measures to protect [employee], and derivatively [employee's wife], from exposure to asbestos, asbestos fibers, and asbestos dust"); *Simpkins*, 965 N.E.2d at 1096 (analyzing the duty factors rather than whether a special relationship existed because plaintiff alleged that the defendant "actively created the relevant risk of harm by using materials containing a known toxic substance in a way that caused that substance to escape and directly expose decedent to harm from inhaling the railroad's asbestos").

887 (second alteration in original) (quoting *Marchetti v. Parsons*, 638 A.2d 1047, 1051 (R.I. 1994)).

Scientific and government literature begin discussing the dangers of asbestos exposure from as far back as the early 1900s. (Pls.' Mem. at 8-11.) Of particular importance is the regulation from the Occupational Safety and Health Administration (OSHA), published in the Federal Register in 1972, that emphasized the importance of preventing asbestos from leaving the worksite on employees' clothes. *See* Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 110, 11318 (June 7, 1972), amending 29 C.F.R. § 1910 *et seq.* The regulation required employers to take precautions to ensure asbestos was not transmitted from the worksite, including providing employees with special protective clothing—including whole body clothing, head coverings, and foot coverings—changing rooms and lockers for employees to change from asbestos-contaminated work clothes to street clothes, and laundering services. *Id.* The Plaintiffs further put forth evidence that Crane admitted that executives were aware that asbestos dust presented a health hazard in the early 1970s. *See In re New York City Asbestos Litig.*, 59 N.E.3d 458, 464 (N.Y. 2016) ("By Crane's admission in this litigation, its executives became aware of the dangers of exposure to breathable asbestos dust in the early 1970s.").

The record includes Mr. Nichols' deposition testimony demonstrating that Mr. Nichols worked with asbestos while employed by Crane between 1979 and 1980. (Dep. of Stanley Nichols at 22:9-19; 39:3-44:16; 51:6-17; 52:11-54:18; 57:2-4.) While Mr. Nichols stated that he wore protective equipment such as an apron, the apron came down to his mid-calf and left parts of his work clothes exposed. *Id.* at 65:4-14. Mr. Nichols testified that asbestos fibers and dust attached to his clothes, which he later wore to his home and were laundered by Ms. Jones. *Id.* at 44:14-24; 54:19-24; 61:11-62:17; 65:9-18. He further stated that the dust was visible while she

laundered the clothes and she breathed in the dust. *Id.* at 45:1-23; 55:1-24, 62:18-63:15, 65:19-66:15.

Viewing all facts and evidence in the light most favorable to the Plaintiffs, it is clear that at the time of Ms. Jones' exposure, it was foreseeable to Crane that dangerous asbestos fibers and dust could be transmitted on an employee's clothing and could pose a risk to individuals living with the employee. The latest that Crane plausibly could claim it was unaware that asbestos fibers and dust could be transmitted on clothing, and that such transmission was dangerous, was before the publication of OSHA's regulations in 1972. At the time that Ms. Jones was exposed to asbestos from Crane's worksite in 1979—seven years after OSHA's regulations were published—Crane was on notice that asbestos fibers and dust could be transmitted and there was a risk of harm to exposed individuals.[8] Because Crane did not provide uniforms for employees to wear at work, it reasonably knew that employees wore their street clothes as work clothes, and later wore those asbestos-exposed clothes home at the end of the day. *See Kesner*, 384 P.3d at 296 (finding foreseeability because "[a]n employee's return home at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior"). It is certainly presumable that the asbestos-exposed employee or someone who lived with the employee would handle and launder the asbestos-contaminated work clothes at home. *See Olivo*, 895 A.2d at 1149 (declaring that "[i]t requires no leap of imagination to presume that [while the employee worked] either he or his spouse would be handling his clothes in the normal

[8] Moreover, as the California Supreme Court aptly declared, "[i]t is a matter of common experience and knowledge that dust or other substances may be carried from place to place on one's clothing or person, as anyone who has cleaned an attic or spent time in a smoky room can attest." *Kesner*, 384 P.3d at 293; *id.* at 292 (finding that take-home exposure was foreseeable because "[a] reasonably thoughtful person making industrial use of asbestos during the time periods at issue in this case (i.e., the mid-1970s) would take into account the possibility that asbestos fibers could become attached to an employee's clothing or person, travel to that employee's home, and thereby reach other persons who lived in the home").

and expected process of laundering them so that the garments could be worn to work again . . . [and defendant] . . . should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing").

Crane argues that it was not foreseeable that Ms. Jones would be exposed to asbestos because she was the sister-in-law of Crane's employee and not the employee's immediate family. Crane's argument, however, mischaracterizes the foreseeability analysis. Foreseeability does not require Crane to foresee harm to that specific victim, but rather that Crane foresee "*the kind of harm* experienced by the victims." *See Volpe*, 821 A.2d at 705 (emphasis added). Here, the Plaintiffs have provided sufficient evidence to show that Crane knew of the dangers of asbestos transmission and exposure, and that individuals in the same household would likely come in contact with asbestos fibers or dust on an employee's work clothes. Accordingly, the risk of harm Ms. Jones suffered was within Crane's range of apprehension. *See id.* at 711-12 (explaining that neighbor's injury from plaintiff's son shooting him was within the range of apprehension because plaintiff knew her son suffered from delusionary and paranoid mental illness yet allowed him to store and maintain firearms and ammunition on her property); *cf. Splendorio*, 682 A.2d at 467 (determining that the alleged decrease in the plaintiff's property value was "clearly outside the zone of any foreseeable danger" where the defendant did not have prior knowledge and could not have foreseen that a third party would violate the terms of their demolition contract and the applicable waste disposal law); *Selwyn*, 879 A.2d at 887-88 (holding that plaintiff's burn injuries were not a foreseeable consequence of the sale of alcohol to a minor, because plaintiff was not injured due to the minor's consumption thereof and there was no evidence the liquor store sold the alcohol to the minor for the purpose of igniting it).

Crane urges this Court to concur with the Georgia and North Dakota court's analyses and conclude that no duty is owed to Ms. Jones. *See CertainTeed*, 794 S.E.2d 641; *Palmer*, 874 N.W.2d 303. The facts of *CertainTeed* and *Palmer* are distinguishable. In *CertainTeed*, there was no evidence that the defendant manufacturer knew of the dangers of asbestos. *CertainTeed*, 794 S.E.2d 641. In *Palmer*, the court expressly found that the evidence submitted by the plaintiff did not establish that the defendant knew about the dangers of asbestos at the relevant time. *Palmer*, 874 N.W.2d at 310.

The facts, in the instant matter, however, are more analogous to those of the cases from New Jersey and Tennessee, *Olivo* and *Satterfield*, respectively. In *Olivo*, the New Jersey Supreme Court addressed whether the defendant, Exxon Mobil, owed a duty to a worker's wife who was exposed to asbestos dust while laundering her husband's work clothes and died of mesothelioma. 895 A.2d at 1146. The court found that the evidence showed the defendant was aware that exposure to asbestos dust constituted a health hazard at the time of the take-home exposure and that the "[worker's] soiled work clothing had to be laundered and Exxon Mobil, as one of the sites at which he worked, should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks." *Id.* at 1149.

Similarly, in *Satterfield*, the court analyzed whether an employer had a duty to an employee's daughter who contracted and ultimately died from mesothelioma as a result of close contact with her father's asbestos-contaminated work clothes for at least five years beginning the day she was born. 266 S.W.3d at 351-54. The court ultimately found that a duty existed to the daughter because the defendants knew or should have known about the asbestos fibers and dust

that were being transmitted on employee's clothing, operated the worksite in a manner that failed to prevent it, and failed to warn employees of such dangers. *Id.* at 363, 367.

Like the defendants in *Olivo* and *Satterfield*, Crane knew or should have known that asbestos could be transmitted on an employee's clothing and that asbestos fibers and dust presented a health hazard, yet operated its facility in a way that did not prevent foreseeable harm. Nor did Crane warn employees about the harm of asbestos transmission. As an individual living in the same household as Mr. Nichols, Ms. Jones was inside the zone of foreseeable danger created by Crane's actions of operating the worksite in a manner in which hazardous asbestos fibers and dust could leave the premises, and failing to warn Mr. Nichols about the risks of asbestos exposure to members of his household. This factor strongly weighs in favor of finding Crane owed a duty to Ms. Jones.

b

Degree of Certainty that Plaintiff Was Injured

The next *Banks* factor is "'the degree of certainty that the plaintiff suffered an injury.'" *Flynn*, 177 A.3d at 477 (quoting *Banks*, 522 A.2d at 1225). Although the parties disagree on the other duty factors, it is uncontested that Ms. Jones contracted and died of malignant mesothelioma.

c

Closeness of Connection

This Court next looks to the closeness of the connection between Crane's conduct at issue and Ms. Jones' injury. The cause of Ms. Jones' mesothelioma was "cumulative exposure to asbestos and asbestos containing products." (Report of Dr. James A. Strauchen at 2.) The report specifically mentions exposure on her brother-in-law's (Mr. Nichols) clothing and person. *Id.*

The manner in which Crane operated its facility and its failure to warn created a situation where Mr. Nichols could transmit asbestos home. Protective clothing could have been provided that would have covered Mr. Nichols' entire body. In addition, it could have required him to change clothes prior to leaving the worksite, provided him with laundering and showering facilities, or warned Mr. Nichols about the risk of transmitting asbestos home. Any of these actions—some of which were required by federal regulations—would have prevented Mr. Nichols from unwittingly transmitting asbestos fibers and dust home to where he lived with Ms. Jones. Crane acted in a manner which it knew risked endangering the health of individuals who lived with its employees, and now that very risk was realized.

While Ms. Jones was diagnosed with mesothelioma approximately twenty-five years after the alleged exposure to asbestos dust attributable to Crane, this Court recognizes that asbestos-related diseases have a long latency period. *See Sweredoski v. Alfa Laval, Inc.*, No. PC 2011-1544, 2013 WL 3010419, *2 (R.I. Super. June 13, 2013) (Gibney, P.J.). Moreover, this is not a case where intervening factors dampen the closeness of the connection between the conduct and injury. *See, e.g., Banks*, 522 A.2d at 1225 (upholding the trial justice's ruling that the connection between defendant's failure to place warning signs or a barrier to prevent diving and minor plaintiff's injury was not close enough because plaintiff was intoxicated, climbed a railing, and voluntarily dove into the harbor despite knowing the risks of diving into shallow water); *Gushlaw*, 42 A.3d at 1261-62 (finding that there was not a close connection because the intoxicated third party decided to drive after being dropped off at his car by the defendant and there was a significant amount of time between the drop-off and the third party's car accident). This factor also weighs in favor of finding a duty.

d

Policy of Preventing Future Harm and Extent of the Burden

The Court now turns to the next two interrelated factors: public policy considerations and the extent of the duty. *See Flynn*, 177 A.3d at 480-81 (analyzing the factors together); *Ferreira*, 636 A.2d at 685 (noting that "[w]e recognize that the factors utilized in a particular case should reflect considerations of public policy, as well as notions of fairness"). In this analysis, this Court is mindful that courts in Rhode Island are instructed to approach the question of duty on the "particular facts and circumstances of a given case" and that "foreseeability limits the scope of duty." *Benaski v. Weinberg*, 899 A.2d 499, 502 (R.I. 2006) (first quotation); *Selwyn*, 879 A.2d at 888 (second quotation).

Asbestos is a danger to public health, and historically Rhode Island has allowed plaintiffs suffering from asbestos-related diseases to recover from asbestos exposure. *See, e.g.*, *Splendorio*, 682 A.2d at 466 (declaring that "asbestos is understandably an ultrahazardous or abnormally dangerous material"); G.L.1956 § 23-24.5-3 (declaring that the purpose of the Asbestos Abatement Act "is to protect the public health and public interest" and that the use of asbestos is "a danger to the public health"); G.L.1956 §§ 28-34-2(32), 28-34-8 (noting that employees suffering from an occupational disease, such as disability caused by asbestos exposure, are entitled to compensation); *Gallagher v. Nat'l Grid USA/Narragansett Elec.*, 44 A.3d 743, 744-45 (R.I. 2012) (listing mesothelioma as an "occupational disease"). Cumulative exposures to asbestos can cause mesothelioma, which is a serious and fatal disease. *Sweredoski*, 2013 WL 3010419, at *1 n.2 ("[m]esothelioma 'is a rare tumor arising from the mesothelial cells lining the pleural, pericardial and peritoneal cavities [of a person's lungs]'" (alterations in original) (internal citation omitted)); *id.* (explaining that treatments "rarely produce a cure" and that it is

"almost always fatal within the year following diagnosis"); *id.* at 7. The overwhelming number of deaths caused by asbestos exposure[9] and Crane's knowledge about the dangers of such exposure evidence a strong public policy argument in favor of allowing Ms. Jones to recover.

Crane, in its memoranda, asserts that finding a duty in this take-home exposure case "is simply bad public policy" and creates a "classic" unreasonable burden. In support thereof, Crane argues that finding a duty would open the floodgates to claims from "a seemingly immeasurable amount of people." Crane's concerns, however, are overstated. While recognizing a duty in the instant matter certainly permits the courts to hear the Plaintiffs' claims, this Court rejects Crane's assertion that it would impose an unreasonable burden or subject it to limitless liability. Duty is determined on a case by case basis, and the duty recognized herein is limited to the facts of this case. Moreover, claimants will still bear the onus of proving that a duty was owed, a breach of that duty, causation, and injury. *See Ouch*, 963 A.2d at 633.

This Court notes that the instant matter is not a case where finding a duty would place an "uncertain duty" on employers. *See Gushlaw*, 42 A.3d at 1262 (finding the potential burden to a designated driver to prevent his intoxicated passenger from later operating a vehicle would be too great because "[d]efining the scope of such a duty escapes practicality, particularly in light of the innumerable factual nuances pervading this species of circumstance"). The measures advanced by the Plaintiffs—preventing employees from taking home asbestos-laden clothing and

[9] The U.S. Supreme Court has noted:

> "'On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 n.1 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997)).

warning employees about the dangers of transmission and second-hand exposure—are clearly defined, feasible, and not cost prohibitive. *See Satterfield*, 266 S.W.3d at 368-69; *Olivo*, 895 A.2d at 1149-50. Crane does not contend otherwise, and in fact was required to take preventative measures pursuant to OSHA regulations at the time of Ms. Jones' exposure. *See* Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 110, 11318 (June 7, 1972), amending 29 C.F.R. § 1910 *et seq.* Under these circumstances, the burden on Crane to run a safe worksite where hazardous asbestos fibers and dust do not leave the premises and to warn exposed employees is not too onerous.

In determining that these public policy considerations weigh in favor of finding a duty, this Court joins other jurisdictions that have addressed and rejected the argument that public policy concerns require the finding that no duty was owed in take-home exposure cases. *See Satterfield*, 266 S.W.3d at 374 (rejecting the idea that allowing liability in take-home exposure cases would result in "mass tort actions brought by remotely exposed persons" because "in light of the magnitude of the potential harm from exposure to asbestos and the means available to prevent or reduce this harm," there is no reason to prevent recovery if the person repeatedly and regularly was in close contact with asbestos); *id.* at 371 ("We see no particular public policy reason to favor imposing these costs upon the persons who have been harmed by exposure to asbestos rather than upon the manufacturers who used asbestos in their manufacturing processes."); *Olivo*, 895 A.2d at 1150 (noting that public policy concerns should "dissipate" because the duty was based on foreseeability of harm); *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1305 (11th Cir. 2017) (rejecting defendant's public policy arguments because the defendant knew about the danger of take-home exposure and the existence of the relevant OSHA regulations and was in the best position to protect people like the plaintiff); *see also Simpkins*,

929 N.E.2d at 1263 (explaining that "liability will be limited by foreseeability"); *Kesner*, 384 P.3d at 294-98. As the Eleventh Circuit aptly noted, "In any event we do not think that the prospect of greater liability is necessarily negative. After all, imposing liability to deter acting, or failing to act, in a way that causes foreseeable harm is one of the functions of tort law." *Bobo*, 855 F.3d at 1306. In Rhode Island, as in these other jurisdictions, foreseeability will serve to appropriately limit liability.

e

Relationship Between the Parties

Finally, this Court contemplates the relationship between the parties in its duty analysis. Crane, in its memoranda, contends that the relationship between Crane and Ms. Jones "is extremely attenuated" because Ms. Jones was Mr. Nichols' sister-in-law. Given the dynamics among Mr. Nichols, Ms. Jones, and the rest of the familial household, this Court finds Crane's argument unpersuasive. The relationship between Crane and Ms. Jones is best described as between the employer and the member of the employee's family who performed the household chores. Plaintiffs provided evidence of long-standing cohabitation between Ms. Jones and Mr. Nichols and that they acted as a single household unit during the relevant times. Mr. Nichols testified in his deposition that he lived with Ms. Jones, their respective spouses, and Ms. Jones' mother for decades, including the time he worked for Crane. (Dep. of Stanley Nichols at 19:11-20:15.) Further, Mr. Nichols' testimony shows that the Nichols-Jones household acted as a unit, with Ms. Jones "always" doing the laundry for the household and Mrs. Nichols doing other chores such as the dishes. *Id.* at 44:20-24. With these facts in mind, this Court finds that the relationship between Crane and Ms. Jones is not too attenuated to prevent this Court from finding Crane had a duty. *See, e.g., Olivo,* 895 A.2d at 1149 (considering the relationship

between the parties where plaintiff's wife washed the contaminated work clothes, and holding that "we do not hesitate to impose a derivative duty on Exxon Mobil for injury to plaintiff's spouse" because "the risk of injury to someone like [plaintiff's wife] is one that should have been foreseeable").

Based on the duty analysis and the facts of this particular case, this Court finds that Crane owed a duty to Ms. Jones. Crane's motion for summary judgment is denied as to this ground.[10]

IV

Causation

Crane next asserts that the Plaintiffs have not provided enough evidence of causation and cannot meet the "frequency, regularity, proximity" test. *See Sweredoski*, 2013 WL 3010419, at *8. The Plaintiffs must show that the defendant was the cause-in-fact and proximate cause of the injury to satisfy the causation element. *See Almonte v. Kurl*, 46 A.3d 1, 18 (R.I. 2012). There must be "a causal relation between the act or omission of the defendant and the injury" to prove cause-in-fact. *Id.* The defendant is the proximate cause of the injury if "'the harm would not have occurred but for the [act] and that the harm [was a] natural and probable consequence of the [act].'" *Id.* (alterations in original) (quoting *Pierce v. Providence Ret. Bd.*, 15 A.3d 957, 964 (R.I. 2011). "In other words, '[proximate] cause' is that [the defendant's conduct] shall have been a *substantial* factor in bringing about the harm." *Sweredoski*, 2013 WL 3010419, at *2 (alterations in original) (quoting *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994)). "'[T]he issue of proximate causation is usually a question for the trier of fact that cannot be

[10] The Plaintiffs also argue that if this Court does not find a duty under Rhode Island law, Arkansas law applies to the instant matter under the conflict of law doctrine. The Plaintiffs attempt to invoke this doctrine for the first time in their Response and Memorandum in Opposition to Defendant Crane Co.'s Motion for Summary Judgment, filed over nine years after the Plaintiffs first commenced this lawsuit. Because this Court finds that Crane owed a duty under Rhode Island law, this Court declines to address this issue.

determined on summary judgment.'" *Benoit, III v. A.W. Smith Corp.*, No. 07-3755, 2009 WL 3328525, *4 (R.I. Super. May 14, 2009) (Gibney, P.J.) (quoting Robert Kent et al., *Rhode Island Civil and Appellate Procedure*, § 56:2).

To establish causation in an asbestos case, plaintiffs must proffer product identification and exposure evidence. *Sweredoski*, 2013 WL 3010419, at *2 (citing *Thomas v. Amway Corp.*, 488 A.2d 716, 718-22 (R.I. 1985) and *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 693 (R.I. 1999)). This Court has recognized that

> "[h]istorically, however, asbestos plaintiffs have struggled to 'fairly meet the burden of production with regard to causation,' owing to such factors as the prevalence of second-hand exposure to airborne asbestos dust, the indistinguishable nature of asbestos fibers from different manufacturers' products, the long latency of asbestos-related diseases, and the difficulty of obtaining witnesses and other probative evidence of exposure years after the fact." *Id.* (quoting *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455-56 (Ill. 1992)).

To remedy this obstacle, this Court has adopted the "frequency, regularity, proximity" test to establish proximate cause. *Id.* at *5. The "frequency, regularity, proximity" test "strikes the appropriate balance between 'the rights and interests of the manufacturer [and] those of the claimants.'" *Id.* (alteration in original) (quoting *Holcomb v. Georgia Pacific, LLC*, 289 P.3d 188, 196 (Nev. 2012)). The purpose of the test is to "distinguish between a 'substantial factor,' tending along with other factors to produce the plaintiff's disease and death, and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to have contributed to the result." *Id.* at *7 (quoting *O'Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 513 (Mass. 1998)).

Pursuant to this test, Plaintiffs must show "'(1) exposure to a particular product; (2) on a regular basis; (3) over an extended period of time; and (4) in proximity to where the plaintiff

actually worked.'" *Id.* at *5 (quoting *Chavers v. Gen. Motors Corp.*, 79 S.W.3d 361, 368 (Ark. 2002)). Of critical importance is this Court's recognition that

> "in cases alleging that the plaintiff developed mesothelioma as a result of exposure to a particular defendant's product, meeting 'the frequency and regularity prongs become[s] somewhat less cumbersome' for plaintiffs because medical evidence has established that mesothelioma can develop from less intense exposures to asbestos than other asbestos-related diseases, such as asbestosis." *Id.* at *6 (quoting *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 225 (Pa. 2007)) (second alteration in original).

At the summary judgment stage, this Court must "'make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.'" *Id.* (quoting *Gregg*, 943 A.2d at 227).

Viewing the facts in the light most favorable to the nonmoving party, this Court finds that the Plaintiffs have provided sufficient evidence of product identification, and regular, frequent, and proximate exposure to asbestos. In Mr. Nichols' deposition, he testified that he worked closely with asbestos-containing insulation, which he described in detail including product names, as a part of his regular job duties over a period of approximately seven months. *See, e.g.*, Dep. of Stanley Nichols at 25:24-26:4, 39:3-44:16, 56:1-57:1. He also stated that asbestos dust and fibers attached to his work clothes which he then wore home, that Ms. Jones "always" laundered his work clothes while he worked for Crane, and that Ms. Jones breathed in visible asbestos dust from his clothes while laundering them. *Id.* at 44:14-19, 44:22-24, 45:16-23, 54:19-24, 55:11-19, 62:2-14, 63:7-10, 65:9-14, 66:9-12, 431:2-8. Further, the Plaintiffs proffered a report from Dr. Strauchen, who stated that in his professional opinion, "Ms. Jones' cumulative exposure to asbestos and asbestos containing products was the cause of her malignant

mesothelioma." Report of Dr. James A. Strauchen. This evidence satisfies the "frequency, regularity, proximity" test and sufficiently shows that Ms. Jones' exposure to asbestos attributable to Crane on Mr. Nichols' work clothes was a substantial factor in causing her mesothelioma. *See Sweredoski*, 2013 WL 3010419, at *7 (noting that the frequency, regularity, proximity test determines whether exposure was a substantial factor in plaintiff's injury and defining a "substantial factor" as one that is "tending along with other factors to produce the plaintiff's disease and death" (internal quotation marks and citation omitted)).

This Court notes that at the summary judgment stage, the Plaintiffs are not required to exclude all other possible causes of Ms. Jones' mesothelioma or show that the insulation Mr. Nichols worked with, in fact, contained asbestos. *See Sweredoski*, 2013 WL 3010419, at *5 (stating that under the "frequency, regularity, proximity" test, "a plaintiff need not exclude every other possible cause of his or her injury and need only present evidence sufficient to base a finding of causation 'on reasonable inferences drawn from the facts'" (internal quotation marks and citation omitted)); *Benoit, III*, 2009 WL 3328525, at *4 (noting that in Rhode Island "the question of whether a product contains asbestos is an issue for a jury to determine" (citing *Totman v. AC&S, Inc.*, 2002 WL 393697, *4 (R.I. Super. Feb. 11, 2002))). The evidence here is adequate such that a jury could reasonably find a causal connection between Crane and Ms. Jones' mesothelioma. That is all that is required at this stage. Crane's motion for summary judgment is denied on this ground.

V

Loss of Consortium

Crane next asserts that this Court should grant its motion for summary judgment as to Mr. Jones' loss of consortium claim on the basis that Crane is entitled to summary judgment on the

Plaintiffs' underlying tort claims, upon which a loss of consortium claim is derivative.[11] Crane is correct that a loss of consortium claim is a derivative claim that "arises from" the claim of the injured spouse and depends on the success of the underlying tort claim. *See Sama v. Cardi Corp.*, 569 A.2d 432, 433 (R.I. 1990); *Holley*, 968 A.2d at 276. However, as discussed herein, Crane is not entitled to summary judgment on the Plaintiffs' underlying tort action. Crane's motion for summary judgment on the loss of consortium claim is similarly denied.

VI

Breach of Warranty

Crane further argues that it is entitled to summary judgment on the Plaintiffs' breach of warranty claim because the Plaintiffs have not provided any evidence that Crane manufactured, sold, or placed in the stream of commerce any products containing asbestos. The Plaintiffs' Response and Memorandum in Opposition to Defendant Crane Co.'s Motion for Summary Judgment clarifies that the breach of warranty claim was not asserted against Crane and expressly waives any such claims against Crane. The Plaintiffs' Complaint asserts the breach of warranty count against "Defendants" and does not unequivocally establish against which defendants the count was asserted. This Court finds that the record should reflect that the Plaintiffs' Complaint does not assert a breach of warranty claim against Crane.

[11] Pursuant to G.L. 1956 § 9-1-41(a), a married person may recover damages in a loss of consortium action for tortious injury to his or her spouse.

VII

Conclusion

For the reasons stated herein, this Court finds that the Plaintiffs have sufficiently evidenced material issues of fact in the instant matter. Crane's motion for summary judgment is denied. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Carolyn Marie Nichols, et al. v. Allis Chalmers Product Liability Trust, et al.**
CASE NO:	**PC-2008-1134**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 16, 2018**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**John Deaton, Esq.**
For Defendant:	**David A. Goldman, Esq.** **Andrew R. McConville, Esq.**