**STATE OF RHODE ISLAND**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: July 21, 2021)**

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| **LESTER WALLACE, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERARD WALLACE, DECEASED, AND RUTH WALLACE, HIS WIFE, PLAINTIFFS,** | : | |
| **V.** | : | **C.A. No. PC-2016-5339** |
| **TRANE COMPANY, SUCCESSOR-IN-INTEREST TO AMERICAN STANDARD, ET AL., DEFENDANTS.** | : | |

**DECISION**

**GIBNEY, P.J.** Electrolux Home Products (Defendant or Electrolux), including Williams Oil-O-Matic, seeks summary judgment pursuant to Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure in this personal injury action brought by Lester Wallace, Personal Representative of the Estate of Gerard Wallace (Decedent or Mr. Wallace), and Ruth Wallace, Decedent's wife (collectively, Plaintiffs). Plaintiffs objected to the motion. This Court held a hearing on August 19, 2019 and now issues its Decision. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

**I**

**Facts and Travel**

Mr. Wallace suffered from mesothelioma as a result of his exposure to asbestos-containing products and died on August 19, 2017 during litigation of this suit. (Fifth Am. Compl. ¶ 1.) Mr. Wallace worked as a plumbing-heating installer-repairer for Portland Lehigh Fuel Company (Portland Lehigh) from 1949 to 1951, A.R. Wright from 1951 to 1953, Peterson Oil Company

(Peterson Oil) from 1956 to 1966, and as an instructor at Southern Maine Vocational Technical Institute (later known as Southern Maine Community College) (College) from 1966 to 1985. (Def.'s Mem. Supp. Mot. Summ. J. (Def.'s Mem.) 2, citing Ex. B (Wallace Dep. Day 1) 14:11-15:15.) Plaintiffs allege that Mr. Wallace, while at work, inhaled, absorbed, ingested, and came into contact with asbestos and asbestos-containing products. (Fifth Am. Compl. ¶ 60.)

Plaintiffs claim that Decedent's exposure arose from his employment involving boilers, furnaces, and burners at Portland Lehigh, A.R. Wright, Peterson Oil, and the College. (Def.'s Mem. 2, citing Wallace Dep. Day 1 16:7-19.) Decedent performed three types of boiler, furnace, and burner work: service and repair of existing boilers and furnaces; coal to oil conversions; and new installations of boilers and furnaces. (Pls.' Resp. 1, citing Ex. A (Jan. 24, 2017 Wallace Dep.) 16:20-17:5.) Mr. Wallace testified that on these boilers and furnaces, he encountered asbestos-containing sealant products, such as powder, furnace cement, rope, and gaskets. (Def.'s Mem. 2-3, citing Wallace Dep. Day 1 19:4-20:5.)

Decedent testified, however, that during his time working at Portland Lehigh, A.R. Wright, and Peterson Oil, he did not know or would not have known whether he was working with original or replacement material, or the trade, brand, or manufacturer name of the products prior to his service on the boilers and furnaces. *Id.*, citing Ex. D (Wallace Dep. Day 2) 147:2-148:10. Furthermore, Mr. Wallace testified that when he had to conduct service jobs and install new product, the sealants were purchased at various supply houses in Portland. *Id.* at 3, citing Wallace Dep. Day 1 24:24-26:15. Decedent also attested that he never received sealants from a manufacturer of the boilers, furnaces, or burners. *Id.*, citing Ex. E (Wallace Dep. Day 4) 383:13-22.

Plaintiffs have offered evidence that Williams Oil-O-Matic designed and built oil burners and heating plants to convert coal to oil heat, and that installation of every Williams Oil-O-Matic involved contact with a combustion chamber of refractory material, as well as that the sealant used by Decedent to install and maintain furnaces contained asbestos. *See* Pls.' Resp. 2, citing Ex. E (1939 Williams Oil-O-Matic brochure). Decedent testified that he frequently worked on Williams Oil-O-Matic boilers and burners. (Def's Mem. 3, citing Wallace Dep. Day 1 51:24-52:5.) Decedent specifically recalled contact with Williams Oil-O-Matic brand boilers and burners while at Peterson Oil because they were a dealer for that brand. (Pls.' Resp. 3, citing Ex. D (Jan 25, 2017 Wallace Dep.) 156:11-157:18.) However, he testified that the William Oil-O-Matic burners he worked with were mostly low pressure systems, and that he could not recall ever removing a Williams Oil-O-Matic boiler or burner. *Id.*, citing Wallace Dep. Day 3 289:1-18, 341:7-15. Furthermore, all Williams Oil-O-Matic products that were shipped to Peterson Oil were new equipment according to Decedent, though he did not know if they came directly from Williams Oil-O-Matic or from a third-party. *Id.* at 14, citing Ex. F (Wallace Dep. Day 3) 296:24-297:11.

Regarding his work at the College, Mr. Wallace similarly did not know the repair or maintenance history of the used boilers and furnaces he worked with, and he testified that the boilers and furnaces there were consistently donated to the program. *Id.* at 4, citing Wallace Dep. Day 1 60:1-20, 61:11-18, Wallace Dep. Day 2 173:6-18. While employed at the College, Decedent worked with Craig Carney (Mr. Carney), who also testified. *Id.* at. 4-5, citing Ex. G (Carney Dep.). According to Mr. Carney, "[v]irtually everything in the building was used equipment." *Id.* at Mem. 5, citing Carney Dep. 16:17-18. Mr. Carney testified specifically to the presence of one warm-air Williams Oil-O-Matic residential furnace at the College. *Id.*, citing Carney Dep. 14:10-20, 18:2-7. While he testified that the furnace came to the school when he was a student there, he

did not know when it was removed. *Id.*, citing Carney Dep. 98:4-6. Mr. Carney also testified that this Williams Oil-O-Matic furnace was 100,000 BTU, possibly light green in color, and approximately thirty inches wide, five feet long, and four feet tall. *Id.*, citing Carney Dep. 97:18-98:3.

The operative Fifth Amended Complaint was filed on November 15, 2017. Defendant filed its motion for summary judgment on July 18, 2019. Plaintiffs filed their objection on August 16, 2019. Hearing on this matter was held on August 19, 2019. Plaintiffs subsequently filed a motion to dismiss all loss of consortium claims on October 1, 2019.

## II

## Parties' Arguments

Defendant claims that Plaintiffs have failed to produce evidence showing that Mr. Wallace worked with or around an Electrolux or Williams Oil-O-Matic product utilizing original asbestos-containing components manufactured, sold, or supplied by Electrolux or Williams Oil-O-Matic. (Def.'s Mem. 7-10.) Defendant further contends that Plaintiffs have not offered evidence showing that Mr. Wallace had contact with asbestos through sealant materials original to Electrolux or Williams Oil-O-Matic products. *Id.* at 11-15. Defendant states that if Plaintiffs cannot prove that asbestos-related injuries occurred due to Mr. Wallace's exposure to asbestos-containing products original to an Electrolux or Williams Oil-O-Matic product (i.e., not replacement parts or sealant manufactured or sold by third parties), then Plaintiffs have not made out a prima facie case under Maine law, and Defendant is entitled to summary judgment. *Id.* at 15. Assuming Defendant is entitled to summary judgment on the personal injury claim, Defendant argues that Plaintiff Ruth Wallace's loss of consortium claim (which is dependent upon the underlying tort liability asserted through her late husband's claim) is similarly barred. *Id.* at 15-16.

Plaintiffs do not dispute Defendant's statement of facts. (Pls.' Resp. 1.) However, Plaintiffs oppose the application of Maine law, arguing that the Court should be guided by Rhode Island's public policy of allowing recovery against manufacturers of defective products. (Pls.' Resp. 3-4.) Plaintiffs also oppose summary judgment, whether under Maine or Rhode Island law, arguing that inferences reasonably drawn from the evidence in the record create a dispute of material fact as to whether Mr. Wallace's asbestos-related disease was caused by exposure to asbestos while working with Electrolux's products. *Id.* at 5-7. Plaintiffs contend that, under a strict liability theory, the foreseeable use of asbestos products with its oil burner boilers creates liability for Electrolux. *Id.* at 6-7. Plaintiffs also argue that Electrolux was negligent, as it had a duty to warn of asbestos used in conjunction with its products. *Id.* at 7-8.

## III

## Standard of Review

Initially, the Rhode Island Supreme Court has said that "[it] appl[ies] [its] own procedural law, . . . 'even if a foreign state's substantive law is applicable.'" *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1067 (R.I. 2009) (quoting *McBurney v. The GM Card*, 869 A.2d 586, 589 (R.I. 2005)).

"'Summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.'" *DeMaio v. Ciccone*, 59 A.3d 125, 129-30 (R.I. 2013) (quoting *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390 (R.I. 2008)). This Court will grant summary judgment "when no genuine issue of material fact is evident from 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' and the motion justice finds that the moving party is entitled to prevail as a matter of law." *Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283, 288 (R.I. 2012) (quoting *Beacon Mutual Insurance Co. v. Spino Brothers, Inc.*, 11 A.3d 645, 648 (R.I. 2011) (internal quotation omitted)).

The moving party "bears the initial burden of establishing the absence of a genuine issue of fact." *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (citation omitted). The Court "views the evidence in the light most favorable to the nonmoving party[,]" *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 532 (R.I. 2013), and "does not pass upon the weight or the credibility of the evidence[.]" *Palmisciano v. Burrillville Racing Association*, 603 A.2d 317, 320 (R.I. 1992). Thereafter, "'the nonmoving party bears the burden of proving 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.'" *Mruk*, 82 A.3d at 532 (quoting *Daniels v. Fluette*, 64 A.3d 302, 304 (R.I. 2013)).

In this context, "'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant." *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995). Consequently, only when the facts reliably and indisputably point to a single permissible inference can this process be treated as a matter of law. *Steinberg v. State*, 427 A.2d 338, 340 (R.I. 1981). Furthermore, "'summary judgment should enter against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .'" *Newstone Development, LLC v. East Pacific, LLC*, 140 A.3d 100, 103 (R.I. 2016) (quoting *Lavoie v. North East Knitting, Inc.*, 918 A.2d 225, 228 (R.I. 2007) (further internal quotation omitted)).

## IV

## Choice of Law

Our Supreme Court has stated that, "[g]enerally, 'parties are permitted to agree that the law of a particular jurisdiction will govern their transaction.'" *DeFontes*, 984 A.2d at 1066 (quoting *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350, 353 (R.I. 2000)). Here, a separate

defendant has submitted, as an exhibit to its reply, a letter dated March 28, 2019. (Carrier's Reply, Ex. A (Letter).) This Letter is addressed to "All Counsel of Record" in this matter, signed by Plaintiffs' attorney, and states as follows: "The instant correspondence is to advise and confirm that Plaintiff is not contesting that Maine law applies regarding the above-captioned matter[.]" *Id.*

Moreover, under Rhode Island's "interest-weighing" approach to choice of law issues, Maine is the state that "'bears the *most significant relationship* to the event and the parties.'" *Harodite Industries, Inc. v. Warren Electric Corp.*, 24 A.3d 514, 534 (R.I. 2011) (quoting *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997)) (emphasis added by *Harodite* Court). Our Supreme Court has confirmed that Rhode Island courts must consider the following factors when evaluating choice of law in tort matters: "'(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil [*sic*], residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.'" *Harodite Industries*, 24 A.3d at 534 (quoting *Brown v. Church of the Holy Name of Jesus*, 105 R.I. 322, 326-27, 252 A.2d 176, 179 (1969)).

Mr. Wallace's contacts with Maine give that state a strong interest in and relationship with this matter. It is undisputed that it was in Maine that Mr. Wallace lived most of his life and worked with the products at issue here. *See* Fifth Am. Compl ¶ 1; *Wallace v. Trane Co.*, No. PC-2016-5339, 2021 WL 194321, at *1, *4 (R.I. Super. Jan. 13, 2021). It was also in Maine that Mr. Wallace was treated for mesothelioma and later died. *Wallace*, 2021 WL 194321, at *4. This Court has applied Maine law under similar circumstances in the past, including in a recent decision granting summary judgment in this same matter to another defendant. *See generally Wallace v. Trane Co.*, No. PC-2016-5339, 2021 WL 194321, at *1 (R.I. Super. Jan. 13, 2021); *Hinkley v. A.O. Smith*

*Corp.*, No. PC-15-1722, 2017 WL 1046587, at *3 (R.I. Super. Mar. 13, 2017). Therefore, this Court will apply Maine law.

## V

## Analysis

In order for a plaintiff to survive a defendant's motion for summary judgment as to a particular claim, the plaintiff must "produce evidence that would establish a prima facie case for [that] claim . . . ." *DiBattista v. State*, 808 A.2d 1081, 1089 (R.I. 2002).

In *Rumery v. Garlock Sealing Technologies, Inc.*, No. 05-CV-599, 2009 WL 1747857 (Me. Super. Apr. 24, 2009) the Maine Superior Court stated that "[s]trict liability pursuant to 14 M.R.S. § 221 may arise under any of three different theories: (1) a defect in the manufacture of a product; (2) a defect in the design of a product; or (3) a failure of the manufacturer to adequately warn with respect to danger in the use of a product." *Rumery*, 2009 WL 1747857 (citing *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534, 537 n.3 (Me. 1986); *Walker v. General Electric Co.*, 968 F.2d 116, 119 (1st Cir. 1992)). As the *Rumery* court noted, the "basis for imposing strict liability on a particular defendant is that 'the product must be in some respect defective.'" *Rumery*, 2009 WL 1747857 (quoting *Bernier*, 516 A.2d at 537). Maine law also calls for evidence that an asbestos-containing product originated with the defendant pursuant to 14 M.R.S § 221. *See Grant v. Foster Wheeler, LLC*, 140 A.3d 1242, 1248 (Me. 2016).

Additionally, a claim for negligence under Maine law requires proof of causation as a main element. *See Mastriano v. Blyer*, 779 A.2d 951, 954 (Me. 2001). Consequently, a plaintiff must prove that their injury was proximately caused by a breach of duty owed to the plaintiff by the defendant. *Id.* The Supreme Judicial Court of Maine stated in *Grant* 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." *Grant*, 140 A.3d at 1246 (internal quotation omitted).

Therefore, to establish a case in personal injury asbestos litigation, a plaintiff must demonstrate (1) product nexus—that the decedent was exposed to the defendant's asbestos-containing product—and (2) medical causation—that such exposure was a substantial factor in causing the plaintiff's injury. *Id.* Furthermore, "[t]he mere possibility of . . . causation" is not enough. *Id.* When the matter remains one of "pure speculation or conjecture, or even if the probabilities are evenly balanced," summary judgment is appropriate. *Id.*

**A**

**Product Nexus**

The Supreme Judicial Court of Maine stated in the *Grant* case that a plaintiff must provide sufficient evidence of product nexus in order to survive summary judgment. *Grant*, 140 A.3d at 1248-49. The *Grant* court held that the necessary showing of product nexus means, at minimum, evidence of (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. *See id.* at 1246 (detailing the "less burdensome standard applied by the trial court" in that case, which the plaintiff did not satisfy) (also citing to *Welch v. Keene Corp.*, 575 N.E.2d 766, 769 (Mass. 1991)). A plaintiff must not only prove that the asbestos product was used at the worksite, but also that the employee inhaled the asbestos from the defendant's product. *See id.*

Furthermore, the Supreme Judicial Court of Maine has 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. *See Grant*,

140 A.3d at 1248-49. The court held 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 determined that based on this rationale, it would only review a plaintiff's exposure evidence to "asbestos contained in the products' original gaskets and packing." *Id.*

Mr. Wallace's testimony regarding his employment as service technician with Portland Lehigh, A.R. Wright, and Peterson Oil was sufficient to draw a reasonable inference that he was ever exposed to any asbestos-containing product of Defendant. First, he testified that he frequently worked with Williams Oil-O-Matic boilers and burners. (Wallace Dep. Day 1 at 51:24-52:5.) Although Decedent testified that the William Oil-O-Matic burners he worked with were mostly low pressure systems and that he could not recall ever removing a Williams Oil-O-Matic boiler or burner (Wallace Dep. Day 3 289:1-18, 341:7-15), he specifically recalled contact with Williams Oil-O-Matic brand boilers and burners while at Peterson Oil because they were a dealer for that brand. (Jan 25, 2017 Wallace Dep. 156:11-157:18.) Furthermore, all Williams Oil-O-Matic products that were shipped to Peterson Oil were new equipment according to Decedent, even though he did not know if they came directly from Williams Oil-O-Matic or from a third-party. (Wallace Dep. Day 3 296:24-297:5.) Regarding his work at the College, according to Mr. Carney, "[v]irtually everything in the building was used equipment." (Carney Dep. 16:17-18.) However, Mr. Carney also testified specifically to the presence of one warm-air Williams Oil-O-Matic residential furnace at the College. *Id.*, citing Carney Dep. 14:10-20, 18:2-7.

Granting Plaintiffs, as nonmoving party, the benefit of inferences reasonably drawn from the record, a jury might find that while working for Peterson Oil, which sold new Williams Oil-O-Matic products, and for whom Decedent also worked as a service technician, he was likely to have

been exposed to asbestos from the service of new Williams Oil-O-Matic furnaces or burners. (Wallace Dep. Day 2 157:7-18.) Plaintiffs' evidence, as a whole, has raised a reasonable inference to link his exposure to "asbestos that originated with [Defendant]." *Grant*, 140 A.3d at 1248.

**B**

**Medical 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 "s*ubstantial factor* in bringing about the [plaintiff's] harm." *See Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1989) (emphasis in original); *Wing v. Morse*, 300 A.2d 491, 495-96 (Me. 1973). The question is whether a material issue of fact remains as to Plaintiffs' allegation that Electrolux's conduct or product caused Plaintiffs' damages. *See Spickler*, 566 A.2d at 1390.

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. Department of Transportation*, 948 A.2d 1223, 1236 (Me. 2008). Accordingly, since Plaintiffs have provided sufficient evidence of product nexus here, the remaining question of causation will not be addressed by this Court and is left to the ultimate fact-finder. *See id.*

**C**

**Foreseeability and Duty to Warn**

Foreseeability arguments are not legally sufficient to establish liability for Defendant, either under Maine precedent or this Court's precedent applying Maine law. *Hinkley*, 2017 WL 1046587, at *4 n.3. Additionally, a theory based on the foreseeable ancillary use of a defective or toxic third-party product, which would subject a manufacturer to liability by way of a duty to warn,

is also not applicable here. *See Wallace v. Trane Co.*, No. PC-2016-5339, 2020 WL 6470890, at *6 (R.I. Super. Oct. 27, 2020) (citing *Richards v. Armstrong International, Inc.*, No. BCD-CV-10-19, 2013 WL 1845826, at *25 (Me. B.C.D. Jan. 25, 2013)); *see also Marois v. Paper Converting Machine Co.*, 539 A.2d 621, 624 (Me. 1988). This is because there is no evidence that the actual third-party product, i.e., the Eagle Pitcher and Johns Manville sealant used by Decedent, was supplied or recommended for use with its products by Defendant.

**D**

**Loss of Consortium and Conspiracy**

The Supreme Judicial Court of Maine has stated that both a loss of consortium claim and a personal injury claim are subject to the same defenses since both claims arise from the same set of facts, and the spouse's loss of consortium injury derives from the other spouse's bodily injury. *See Steele v. Botticello*, 21 A.3d 1023, 1027-28 (Me. 2011); *see also Hardy v. St. Clair*, 739 A.2d 368 (Me. 1999); *Brown v. Crown Equipment Corp.*, 960 A.2d 1188 (Me. 2008); *Parent v. Eastern Maine Medical Center*, 884 A.2d 93 (Me. 2005). However, Plaintiffs' loss of consortium claims were collectively dismissed on October 1, 2019.

Under Maine law, civil conspiracy is not an independent tort, and so "absent the actual commission of some independently recognized tort, a claim for civil liability for conspiracy fails." *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998) (citing *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972)). Because civil conspiracy is a derivative action, if the Court denies summary judgment on Plaintiffs' underlying personal injury claim, Plaintiffs' civil conspiracy claim against Electrolux will also survive summary judgment on the underlying personal injury claim.

## VI

## Conclusion

This Court finds that Defendant has not met its summary judgment burden to show that Plaintiffs have failed to produce sufficient evidence of product nexus or medical causation. While Plaintiffs' claims for loss of consortium were previously dismissed, the remaining conspiracy claim survives as derivative of the personal injury claim. Therefore, Defendant's motion for summary judgment is denied. Counsel shall submit the appropriate order for entry.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Lester Wallace v. Trane Company, et al.** |
| **CASE NO:** | **PC-2016-5339** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **July 21, 2021** |
| **JUSTICE/MAGISTRATE:** | **Gibney, P.J.** |

**ATTORNEYS:**

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| **For Defendant:** | **See attached** |

*Lester Wallace, et al. v. Trane Company, et al.*
*C.A. No. PC-2016-5339*

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