STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 15, 2022)

LAURA M. MELLOR and LINDA M. MELLOR, INDIVIDUALLY AND AS CO-PERSONAL REPRESENTATIVES FOR THE ESTATE OF ESTHER D. MELLOR,	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-2017-5107**
ARNOLD LUMBER CO., et al.,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Esther D. Mellor (Mrs. Mellor) was diagnosed with mesothelioma on October 12, 2016 and filed this asbestos suit against Defendant Union Carbide Corporation (Union Carbide) and several other defendants on October 25, 2017. (Pls.' Mem. Resp. and Opp'n Def. Union Carbide Corporation's Mot. Summ. J. (Pls.' Summ. J. Mem.) 5.) Mrs. Mellor died on April 4, 2018. *Id.* Currently, the named Plaintiffs in this case are two of Mrs. Mellor's children, Laura M. Mellor (Laura)[1] and Linda M. Mellor (Linda), proceeding individually and as co-personal representatives of Mrs. Mellor's estate (collectively, Plaintiffs). (Second Am. Compl. Wrongful Death Jury Demand (Second Am. Compl.) ¶ 3.) Before the Court for decision are Union Carbide's Motion for Summary Judgment and Plaintiffs' Motion for Leave to File a Third Amended Complaint. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

[1] As Mrs. Mellor's children all share the same—or a remarkably similar—surname, to avoid confusion, the Court will use first names when referring to Mrs. Mellor's children as individuals. No disrespect is intended.

I

Facts and Travel

Plaintiffs advance multiple theories of liability against Union Carbide, including the claim that Union Carbide breached its duty to warn users of the dangers of its asbestos. *See* Second Am. Compl. ¶ 19. Each cause of action rests on the assertion that Mrs. Mellor was exposed to the Union Carbide Calidria asbestos (Calidria) present in the Georgia-Pacific Ready Mix joint compound (Ready Mix) used in the remodeling of Mrs. Mellor's house in Narragansett, Rhode Island during the 1960s and 1970s. (Pls.' Summ. J. Mem. 1-4.) Specifically, Plaintiffs allege that the process of applying and sanding the Ready Mix released large quantities of dust which Mrs. Mellor then inhaled, especially when she cleaned the dust from her house and her family's clothes. *Id.* at 4. To establish that the Ready Mix Mrs. Mellor encountered in her house contained Calidria, Plaintiffs advance evidence indicating when Mrs. Mellor's house was under construction and highlight the deposition testimony of Charles William Lehnert (Lehnert), formerly employed by Georgia-Pacific as a chemist, that the Ready Mix manufactured for sale in the northeastern United States during the relevant timeframe used Calidria as an ingredient. *Id.* at 3. Plaintiffs also submit the expert medical opinions of Drs. Richard Kradin (Dr. Kradin) and Arthur Frank (Dr. Frank) that Mrs. Mellor's exposure to the asbestos in the Ready Mix caused her mesothelioma. *Id.* at 5.

Through their Motion to File a Third Amended Complaint, Plaintiffs seek to join Mrs. Mellor's children Terry M. Mohler (Terry) and Michael P. Mellor (Michael) as individual Plaintiffs and add a separate claim on behalf of all four children for the loss of parental society and companionship under G.L. 1956 § 10-7-1.2. (Mot. Leave File Third Am. Compl. 1; Third Am. Compl. Wrongful Death Jury Demand (Third Am. Compl.) ¶ 3.) Currently, all claims against Union Carbide in the Second Amended Complaint incorporate the allegation that Laura, Linda,

Terry, and Michael have each suffered the loss of parental society and companionship as a result of Mrs. Mellor's illness and death; as a result, Plaintiffs characterize the Third Amended Complaint as a procedural formality filed out of an abundance of caution. (Hr'g Tr. 2:13-17, 3:7-4:20, 5:2-7, Mar. 22, 2022; Second Am. Compl. ¶¶ 21, 27, 32.) Plaintiffs also argue that because the Second Amended Complaint put Union Carbide on notice of all four children's claims, Union Carbide will not be prejudiced by the Third Amended Complaint. (Hr'g Tr. 5:8-17, 5:22-6:8, Mar. 22, 2022.)

In its Motion for Summary Judgment, Union Carbide challenges Plaintiffs' theory of causation by arguing that Plaintiffs cannot prove that Mrs. Mellor was exposed to Calidria. (Def. Union Carbide's Mem. Law Supp. Mot. Summ. J. (Def.'s Summ. J. Mem.) 6-8.) To attack Plaintiffs' assertion that Calidria was present in the Ready Mix used in Mrs. Mellor's home, Union Carbide points to evidence showing temporal and geographic limitations on Georgia-Pacific's use of Calidria as an ingredient in its joint compounds. *Id.* at 9; Def. Union Carbide's Reply Pls.' Opp'n Mot. Summ. J. (Def.'s Reply) 5-9. Comparing those limitations with Plaintiffs' uncertainty as to when the renovations on Mrs. Mellor's house took place, Union Carbide contends that any inference that Mrs. Mellor was exposed to Ready Mix dust containing Calidria—and thus any further inference that Union Carbide products caused Mrs. Mellor's mesothelioma—would rest on impermissible speculation. (Def.'s Summ. J. Mem. 8-9; Def.'s Reply 9.) Union Carbide also argues that it had no duty to warn end users of the dangers of asbestos because it only sold asbestos directly to sophisticated users such as Georgia-Pacific. (Def.'s Summ. J. Mem. 12-15.) Alternatively, Union Carbide argues that it satisfied any duty to warn by providing Georgia-Pacific with information on the dangers of asbestos. *Id.* at 15-17; Def.'s Reply 15-23.

Union Carbide also objects to Plaintiffs' Motion for Leave to File a Third Amended Complaint on the grounds that the amendment will unduly prejudice Union Carbide and delay the resolution of this case. (Mem. Law Supp. Def. Union Carbide's Obj. Pls.' Mot. Leave to File Third Am. Compl. (Def.'s Obj. Third Am. Compl.) 1.) Union Carbide asserts that Plaintiffs could have pleaded their new claims for loss of parental society and companionship at an earlier date and contends that Plaintiffs' proposed amendments are now barred by the applicable statute of limitations because they do not relate back to the original Complaint. *Id.* at 2-7.

II

Standard of Review

A

Summary Judgment

Under Rule 56 of the Superior Court Rules of Civil Procedure, "[s]ummary judgment is appropriate only when 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 judgment as [a] matter of law.'" *Sola v. Leighton*, 45 A.3d 502, 506 (R.I. 2012) (quoting *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005)). In conducting this inquiry, the Court "'view[s] the facts and all reasonable inferences therefrom in the light most favorable to'" the nonmoving party. *DeMaio v. Ciccone*, 59 A.3d 125, 130 (R.I. 2013) (quoting *Delta Airlines, Inc. v. Neary*, 785 A.2d 1123, 1126 (R.I. 2001)). Additionally, the Court "'must refrain from weighing the evidence or passing upon issues of credibility[,]'" as the "'purpose of the summary judgment procedure is issue finding, not issue determination.'" *Id.* (first quoting *Doe v. Gelineau*, 732 A.2d 43, 48 (R.I. 1999); then quoting *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 391 (R.I. 2008)).

However, "a litigant cannot avoid summary judgment by merely posing factual possibilities without submitting admissible evidence thereof." *Nichols v. R.R. Beaufort & Associates, Inc.*, 727 A.2d 174, 177 (R.I. 1999). "'Although summary judgment is recognized as an extreme remedy, to avoid summary judgment the burden is on the nonmoving party to produce competent evidence that proves the existence of a disputed issue of material fact.'" *Lowney v. Canteen Realty, LLC*, 252 A.3d 259, 261-62 (R.I. 2021) (quoting *Ballard v. SVF Foundation*, 181 A.3d 27, 34 (R.I. 2018)). When the evidence before the Court would "'support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage.'" *DeMaio*, 59 A.3d at 132 (quoting *Coyne v. Taber Partners I*, 53 F.3d 454, 460 (1st Cir. 1995)).

B

Amended Pleadings

Rule 15 of the Superior Court Rules of Civil Procedure "allows a party to move the court for leave to amend its pleading." *Gannon v. City of Pawtucket*, 200 A.3d 1074, 1079 (R.I. 2019). "The rule makes it clear that 'leave shall be freely given when justice so requires.'" *Id.* at 1079-80 (quoting Super. R. Civ. P. 15(a)). The Rhode Island Supreme Court has taken the "view that [Rule 15] allows for amendment 'absent a showing of extreme prejudice[,]'" and has "appl[ied] such a liberal interpretation 'in order to facilitate the resolution of disputes on their merits rather than on blind adherence to procedural technicalities.'" *CACH, LLC v. Potter*, 154 A.3d 939, 942 (R.I. 2017) (quoting *Wachsberger v. Pepper*, 583 A.2d 77, 78 (R.I. 1990)).

Under Rule 15(c),

> "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment

> changing or adding a plaintiff or defendant or the naming of a party relates back if the foregoing provision is satisfied and within the period provided by Rule 4(1) for service of the summons, complaint, Language Assistance Notice, and all other required documents, the party against whom the amendment adds a plaintiff, or the added defendant:
> "(1) Has received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits; and
> "(2) Knew or should have known that but for a mistake the action would have been brought by or against the plaintiff or defendant to be added." Super. R. Civ. P. 15(c).

When the necessary conditions are satisfied, "it is perfectly appropriate for a trial justice to find that plaintiffs who were joined in an amended complaint relate back to the original complaint[.]" *Carrozza v. Voccola*, 90 A.3d 142, 172 (R.I. 2014) (citations omitted).

III

Analysis

A

Union Carbide's Motion for Summary Judgment: Asbestos Exposure

Union Carbide contends that summary judgment in its favor is warranted because Plaintiffs are unable to show that Mrs. Mellor was exposed to Union Carbide's Calidria asbestos. (Def.'s Summ. J. Mem. 6.) Citing this Court's prior decisions in *Hostetter v. Air & Liquid Systems Corp.*, No. PC-12-0650, 2014 WL 906112, (R.I. Super. Mar. 05, 2014) and *Reera v. A.O. Smith Corp.*, No. PC-12-0379, 2014 WL 2441482 (R.I. Super. May 23, 2014), Union Carbide argues that Plaintiffs must establish to the exclusion of other reasonable inferences that the Ready Mix in Mrs. Mellor's home contained Calidria. *Id.* at 6-8. To attack that inference, Union Carbide points to evidence that it only supplied asbestos to Georgia-Pacific from approximately 1970 to 1977; that Union Carbide was never Georgia-Pacific's sole source of asbestos; and that in 1970, Georgia-Pacific began a program aimed at removing asbestos from its joint compound products. *Id.* at 9.

In its Reply, Union Carbide also attacks Plaintiffs' reliance on Lehnert's deposition testimony and argues that no generally available Georgia-Pacific joint compounds with Calidria were sold in Rhode Island before April 1974. (Def.'s Reply 6-7, 9.) Contrasting these limitations on Georgia-Pacific's use of Calidria with Mrs. Mellor's testimony that the home renovations in question took place from the late 1960s to the mid-1970s, Union Carbide argues that Plaintiffs can establish only the mere possibility that the Ready Mix used in the renovations contained Calidria and that any finding that Union Carbide products caused Mrs. Mellor's mesothelioma and death would rest on speculation or conjecture. (Def.'s Summ. J. Mem. 8-10.)

This Court has adopted the "'frequency, regularity, proximity' test as the proper causation standard for asbestos cases in Rhode Island." *Sweredoski v. Alfa Laval, Inc.*, No. PC-2011-1544, 2013 WL 3010419, at *5 (R.I. Super. June 13, 2013) (citation omitted). This test requires plaintiffs to set out competent evidence showing "(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." *Chavers v. General Motors Corp.*, 79 S.W.3d 361, 368 (Ark. 2002). The purpose of the test is to assess "whether the injured party's exposure to defendant['s] asbestos products was a substantial factor in causing the alleged injury." *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992). The injured party "'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[.]'" *Sweredoski*, 2013 WL 3010419, at *5 (quoting *Gianquitti v. Atwood Medical Associates, Ltd.*, 973 A.2d 580, 593 (R.I. 2009)).

As such, the 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.* at *6 (quoting *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007)); *see Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986) (citing *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 241 (4th Cir. 1982)) (explaining that the "frequency, regularity and proximity test" is "an application of [the] principle" that "permissible inferences" of causation from circumstantial evidence "must be within the range of reasonable probability"). "[A]pplication of the test should be tailored to the facts and circumstances of the case[.]" *Gregg*, 943 A.2d at 225 (citing *Tragarz*, 980 F.2d at 421).

In *Hostetter*, cited *supra*, this Court addressed the circumstances under which the ultimate inference of causation may justifiably rest on a subsidiary inference that the injured party was exposed to a specific defendant's product. *See Hostetter*, 2014 WL 906112, at *3. The decedent in *Hostetter* worked as a mechanic on "trucks manufactured by Mack Trucks, Inc. (Mack) and Ford Motor Company (Ford)[,]" in which capacity he was "routinely exposed to dust kicked up when he and his coworkers inspected the trucks' brakes, sanded down brake linings, and blew out dust from the trucks' brake drums and assemblies." *Id.* at *2 (citations omitted). Plaintiff's theory of the case was that decedent's mesothelioma had been caused by exposure to the defendant's asbestos-containing brake pads; however, the evidence "establishe[d] only that Defendant was one of four brake suppliers for the Ford trucks on which [decedent] worked and one of at least two suppliers for the Mack trucks." *Id.* at *3.

As a result, "to find that Defendant was the cause-in-fact of Plaintiff's claimed injuries, the factfinder would [have had] to first infer that Defendant's asbestos-containing products were present in [decedent]'s workplaces." *Id.* "Then, the factfinder would [have had] to infer, based on this first inference, that Defendant's asbestos-containing products caused [decedent]'s mesothelioma." *Id.* Our Supreme Court has held that "such 'pyramiding of inferences' may

support a jury verdict when the second inference is based on a primary inference that 'is the only reasonable one to be drawn from the underlying facts.'" *Id.* (quoting *In re Derek*, 448 A.2d 765, 768 (R.I. 1982)); *see Waldman v. Shipyard Marina, Inc.*, 102 R.I. 366, 373, 230 A.2d 841, 845 (1967) (stating that this rule protects "the integrity of the fact-finding process" because "when an inference is such as to exclude any other reasonable inference being drawn from the basic fact[s], such an inference partakes of the nature of a fact to which probative force must be attributed").

In *Hostetter*, this Court found that the facts in evidence were "'susceptible of another reasonable inference' besides the inference that [decedent] was exposed to Defendant's asbestos-containing brake products[:] namely, that [decedent] was never exposed to the Defendant's products but was instead exposed only to the products of the other Mack and Ford suppliers." *Hostetter*, 2014 WL 906112, at *3 (quoting *Waldman*, 102 R.I. at 374, 230 A.2d at 845). Plaintiff's evidence thus failed to "'establish that it [was] reasonably probable, not merely possible, that the [D]efendant was the source of the offending product.'" *Id.* (quoting *Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004)). The defendant was entitled to summary judgment because "'the ultimate conclusion' the Plaintiff hope[d] the factfinder [would] reach—that Defendant's products caused [decedent]'s mesothelioma—'would rest on no more than conjecture and surmise.'" *Id.* at *4 (quoting *Carnevale v. Smith*, 122 R.I. 218, 225, 404 A.2d 836, 841 (1979)).

Similarly, in *Reera*, cited *supra*, the plaintiff's claims rested in part on the assertion that the decedent was exposed to asbestos at defendant's electric plant while working alongside "[i]nsulation workers cutting up pieces of insulation in [decedent]'s work area." *Reera*, 2014 WL 2441482, at *4. "In particular, [decedent]'s testimony demonstrate[d] that he was exposed to a white, chalky dust created by these workers cutting an insulation product called 'cal sil[,]'" which decedent believed contained asbestos. *Id.* However, the plaintiff was unable to substantiate that

belief with any "evidence showing that all or most white, chalky insulation materials produced during the relevant time contained asbestos[.]" *Id.* at *5. This Court granted summary judgment to the defendant because "Plaintiff's evidence would give the fact finder no basis on which to find that it [was] 'more probably true than false' that the insulation to which [decedent] was exposed contained asbestos[,]" and "any such finding would necessarily be based on impermissible 'speculation or conjecture.'" *Id.* (first quoting *Parker v. Parker*, 103 R.I. 435, 442, 238 A.2d 57, 61 (1968); then quoting *Hill v. State*, 121 R.I. 353, 355, 398 A.2d 1130, 1131 (1979)).

Here, Mrs. Mellor stated in her deposition that she and her husband David Mellor (Mr. Mellor) extensively renovated their Narragansett home from the late 1960s through the 1970s; among other projects, the Mellors built a twenty-four by thirty-two-foot addition containing a family room, library, and master bedroom with bathroom. (Pls.' Summ. J. Mem. Ex. A (Esther Mellor Dep.), 11:4-8, 12:12-17.) Plaintiffs have also submitted documentary evidence showing that a building permit for the construction of a "24x32" addition to be used as a "famoly [*sic*] room" was issued to Mr. Mellor by the Town of Narragansett in March 1971 and was later renewed in February 1976 "[t]o finished [*sic*] interior of addition[.]" (Pls.' Notice Filing Add'l Evid. Supp. Pls.' Resp. Opp'n Def. Union Carbide's Mot. Summ. J. (Pls.' Notice) Ex. A, 1-2, 4.) The two permits are consistent with the deposition testimony offered by Terry, who was a child when the addition was built; although Terry could not recall any exact dates, she testified that the addition was initially one "big family room" and that the bedroom and bathroom were built at a later time. Def.'s Reply Ex. 7, 44:5-45:4, 45:10-20; *see id.* at 50:21-51:24 (stating that the family spent a lot of time in the addition although it was "never really finished").

Mrs. Mellor testified that construction of the addition involved the use of Ready Mix joint compound, which Mrs. Mellor identified by name and by reference to the product's appearance as

a mud-like substance in a five-gallon metal bucket bearing a green "Christmas tree" logo. (Esther Mellor Dep. 16:15-24, 17:5-7, 24:9-25:18.) After the Ready Mix was applied to the walls of the addition and allowed to dry, it was then sanded, a process that generated large quantities of dust. *Id.* at 16:15-24, 19:11-20:9, 125:24-126:11; *see* Pls.' Summ. J. Mem. Ex. B (2001 Lehnert Dep.), 12:23-13:5 (explaining the multiple uses of joint compound in "gypsum wallboard construction"). Although Mrs. Mellor did not apply or sand the Ready Mix herself, she remembered watching as Mr. Mellor or hired workers would sand the dried Ready Mix, and she breathed in the dust that the sanding process released into the air. (Esther Mellor Dep. 16:6-24, 20:10-22, 126:12-14.) Further airborne exposures occurred when Mrs. Mellor swept up any dust left in the work area at the end of the day or shook off the dust that had accumulated on the clothes worn by Mr. and Mrs. Mellor and their children—both routine practices for Mrs. Mellor. *Id.* at 21:4-22:13, 23:11-24:7. Mrs. Mellor did not recall the Ready Mix bucket containing any warnings about the dangers of asbestos and was generally unaware of any such dangers; as a result, she did not wear a mask or take any other precautions to avoid breathing in the dust. *Id.* at 20:10-21:3, 26:1-27:14.

Plaintiffs have thus put forth evidence that Mrs. Mellor frequently and repeatedly came into close contact with the dust released into her home when the Ready Mix was applied and sanded, as well as evidence indicating that these exposures likely took place following the issuance of the building permit in March 1971 as the Mellors constructed the walls of their family room; any construction that followed on the heels of the building permit's renewal in February 1976 would have provided additional opportunities for exposure. To connect Mrs. Mellor's mesothelioma diagnosis with her claimed asbestos exposure, Plaintiffs submit the expert medical reports of Drs. Kradin and Frank, who both opine to a reasonable degree of medical certainty that Mrs. Mellor's mesothelioma and subsequent death were caused by her exposure to airborne

asbestos fibers through the mechanism of the joint compound used in her home. *See* Pls.' Summ. J. Mem. Ex. F (Dr. Frank Report), 1-2; *id.* Ex. G (Dr. Kradin Report), 17-18.

To support the inference that the Ready Mix used in Mrs. Mellor's home contained Union Carbide's Calidria asbestos—the final, crucial link in the chain of causation—Plaintiffs point to evidence that Calidria was a ubiquitous ingredient in the Ready Mix sold in Rhode Island when the Mellors' renovations took place. *See* Pls.' Summ. J. Mem. 3. The question for the Court is whether this subsidiary inference, "on which a factfinder must base the ultimate inference of causation[,]" is "sufficiently certain to support Plaintiff[s'] causation argument by a preponderance of the evidence." *Hostetter*, 2014 WL 906112, at *3 (citing *Hill*, 121 R.I. at 355, 398 A.2d at 1131); *see Reera*, 2014 WL 2441482, at *5 (quoting *Parker*, 103 R.I. at 442, 238 A.2d at 61) (explaining that preponderance of the evidence standard "'means that a jury must believe that the facts asserted by the proponent are more probably true than false'"). After reviewing the record under the appropriate standard, the Court concludes that Plaintiffs' inference is sturdy enough to weather Union Carbide's Motion for Summary Judgment. *See Waldman*, 102 R.I. at 374, 230 A.2d at 846 (discussing which "evidentiary facts" could support the "degree of probability necessary to exclude other reasonable or contrary inferences"); *Hostetter*, 2014 WL 906112, at *3 (quoting *Hill*, 121 R.I. at 355, 398 A.2d at 1131) (noting that "the summary judgment standard tilts in favor of the nonmoving party and that '[t]he issue of causation is almost always a question for the jury'").

Plaintiffs primarily rely on the 2001 deposition of Lehnert, previously the Manager of Research and Manager of Product Development and Technical Services of Georgia-Pacific's Gypsum Division.[2] (2001 Lehnert Dep. 15:21-16:3, 16:18-17:1.) In that capacity, Lehnert oversaw

[2] Both Plaintiffs and Union Carbide present the deposition testimony of former Georgia-Pacific employees taken in connection with asbestos litigation in other jurisdictions.

the creation and modification of the chemical formulas Georgia-Pacific used to manufacture its joint compound products during the 1970s. *Id.* at 17:5-9, 17:19-23; *see* Def.'s Summ. J. Mem. Ex. 3 (2006 Burch Dep.) 225:5-12 (identifying Lehnert as the person best positioned "to say which type of asbestos" was used in a Georgia-Pacific product). To prepare for his 2001 deposition, which addressed Georgia-Pacific's use of Calidria in its joint compounds, Lehnert reviewed copies of the "entire joint system formula set of Georgia-Pacific[.]" (2001 Lehnert Dep. 7:1-2, 20:18-21:10.)

On the basis of that extensive review, Lehnert testified that "all" of the Ready Mix formulas used by Georgia-Pacific's Akron, New York plant from approximately September 1970 to May 1977—with the exception of asbestos-free Ready Mix formulas—contained Union Carbide's Calidria asbestos, also known as "SG-210[.]"[3] *Id.* at 35:1-18, 36:24-37:1. To quote one exchange:

> "Q. But that up until . . . September of 1970, most of the Ready Mix products from Akron, New York used exclusively the Phillip Carey 7RF09?
> "A. Yes.
> "Q. And then starting in September of 1970, all available formulas used some Union Carbide SG-210?
> "A. Except for asbestos-free." *Id.* at 95:17-23.

Lehnert's specific identification of Georgia-Pacific's Akron, New York plant is significant because that plant supplied the northeastern region of the United States, including Rhode Island. *See id.* at 29:14-18. To minimize shipping costs—particularly for Ready Mix, which contained

[3] Initially, Lehnert testified that Union Carbide asbestos was present in all asbestos-containing Ready Mix made in Akron, New York between December 29, 1969 and May 4, 1977; in response to a follow-up question regarding Akron's use of Phillip Carey asbestos until September 1970, he then stated that Akron Ready Mix "could have contained some mix of asbestos" during the period between December 29, 1969 and September 1970, "[b]ut from September forward all available formulas used some SG-210, some SG-210, except for asbestos-free." *Id.* at 35:5-37:1. Lehnert later clarified that while some Akron formulas contained SG-210 as of December 29, 1969, most of them did not contain SG-210 until September 1970, at which point all asbestos-containing formulas used some Union Carbide SG-210. *Id.* at 95:12-23; 97:9-17.

water—Georgia-Pacific's joint compound products were typically manufactured at the regional plant closest to where the products were ultimately sold. *See* Def.'s Summ. J. Mem. Ex. 4 (2010 Schutte Dep.) 88:13-22; *see also* 2001 Lehnert Dep. 98:12-99:9 ("I don't know of any instance where Ready Mix would have been shipped to a different region."). Customers could ask Georgia-Pacific for special formulations of Ready Mix; in the absence of such requests, Georgia-Pacific would adhere to its general formulas. (2001 Lehnert Dep. 38:3-12.)

In a deposition taken in 2006 and 2007, Lehnert stated that Georgia-Pacific developed asbestos-free Ready Mix formulas as part of an ongoing effort to remove asbestos from its joint compound products. (Pls.' Notice Ex. 6 (2006-07 Lehnert Dep.) 57:9-19.) This initiative began in 1970 and initially focused on sprayed textures and dry products due to the likelihood of airborne asbestos exposure inherent in the use of those products; because Ready Mix only generated airborne dust when it was sanded, it was afforded the lowest priority. *Id.* at 56:12-57:25. Removing asbestos from Ready Mix formulas also proved difficult: Lehnert testified that when Georgia-Pacific stopped selling asbestos-containing joint compounds in May 1977, he was still trying to develop an asbestos-free Ready Mix that was "as acceptable" as the asbestos product. *Id.* at 80:23-81:7, 82:8-12, 93:12-18; *see* Def.'s Summ. J. Mem. Ex. 5 (2011 Schutte Dep.) 95:8-10 ("And the Ready Mix was the challenge. . . . [T]hat was the big challenge.").

Before May 1977, Georgia-Pacific did make asbestos-free Ready Mix available for sale; Lehnert's testimony indicates that this occurred at some point in 1975 or 1976. *See* 2006-07 Lehnert Dep. 129:12-130:5 (stating that the "first time that there was an asbestos-free formulation of Ready-Mix was about 1976"); *id.* at 399:21-24, 400:25-401:3 (discussing October 29, 1975 Georgia-Pacific memo stating that all one-gallon Ready Mix at Akron is asbestos-free). However, Lehnert testified that asbestos-free Ready Mix was sold in one-gallon buckets, with the expectation

that the average "home user or do-it-yourselfer" who lacked the masks and safety equipment needed to protect against asbestos exposure would be more likely to buy the smaller container. *Id.* at 92:7-93:2 ("[I]t was decided all of the one-gallon Ready-Mix would become asbestos-free. . . . I don't . . . remember exactly when it was, but it was probably '76 or maybe even '75."); *see id.* at 892:2-20 (stating that, "starting in 1975," one-gallon cans of Ready Mix were asbestos free); *cf.* Esther Mellor Dep. 25:7-8 ("Probably I would say like maybe a 5-gallon bucket.").

Through Lehnert's testimony, Plaintiffs have submitted evidence that all Georgia-Pacific Ready Mix manufactured in Akron, New York from September 1970 to May 1977—if sold in five-gallon buckets of the type that Mrs. Mellor recalled—contained Calidria asbestos as an ingredient. Together with the building permits issued to Mr. Mellor by the Town of Narragansett in March 1971 and February 1976 and the evidence that Georgia-Pacific's Akron plant supplied Ready Mix to Rhode Island, Lehnert's testimony could provide a jury with a "basis on which to find that it is 'more probably true than false'" that the Ready Mix used in the Mellors' family room contained Union Carbide asbestos. *Reera*, 2014 WL 2441482, at *5 (internal quotation omitted); *see Hostetter*, 2014 WL 906112, at *3 (quoting *Clift*, 848 A.2d at 1132) ("[T]o survive Defendant's summary judgment motion, Plaintiff[s'] circumstantial evidence 'must establish that it is reasonably probable, not merely possible, that the [D]efendant was the source of the offending product.'"). If a jury credits that evidence, the inference that Mrs. Mellor was exposed to Ready Mix containing Calidria would thus "partake[] of the nature of a fact to which probative force must be attributed." *Waldman*, 102 R.I. at 373, 230 A.2d at 845. Given Mrs. Mellor's testimony regarding the frequency, regularity, and proximity of her exposures to airborne Ready Mix dust, "'a jury would [then] be entitled to make the necessary inference of a sufficient causal connection

between [Union Carbide]'s product and the asserted injury.'" *Sweredoski*, 2013 WL 3010419, at *6 (quoting *Gregg*, 943 A.2d at 227).

Against the above, Union Carbide responds by characterizing Lehnert's 2001 testimony that all of the asbestos-containing Ready Mix formulas made in Akron, New York during the relevant time frame contained Union Carbide asbestos as "incorrect and misleading" because Lehnert was "only being asked about products that contained Calidria." Hr'g Tr. 20:5-21:13, Mar. 22, 2022; *see* Def.'s Reply 5-7. To support this interpretation, Union Carbide asserts that during his 2006-07 deposition, "Lehnert explained that the notes on which he relied in 2001 were based solely on formulas that contained Union Carbide's asbestos, but not on those that contained Johns Manville or Philip Carey asbestos[,]" with the result that Lehnert's "2001 notes and his October 2001 testimony relying on those notes present an incomplete and inaccurate picture of what was actually being manufactured[.]" Def.'s Reply 7; *see id.* Ex. 11 (presenting excerpt of Lehnert's 2006-07 deposition). Union Carbide also champions deposition testimony from Georgia-Pacific corporate representative Howard A. Schutte (Schutte) that Ready Mix containing Calidria was not generally available in Rhode Island until April 1974 and emphasizes Plaintiffs' uncertainty over when the renovations took place. Def.'s Reply 4-5, 9; *see id.* Ex. 13 (Schutte 2013 Dep.) at 75:6-21. Lastly, Union Carbide argues that Plaintiffs' medical experts cannot reliably opine that Mrs. Mellor's mesothelioma was caused by Calidria because neither expert, when deposed, could substantiate the connection between Georgia-Pacific and Union Carbide. *See* Def.'s Reply 10.

Ultimately, however, none of these arguments alter the Court's conclusion that Plaintiffs have produced "enough competent evidence to allow the fact finder to find in [Plaintiffs'] favor, which, in this case, must be by a preponderance of the evidence." *Reera*, 2014 WL 2441482, at *3 (citations omitted). To begin with, to the extent that Union Carbide attempts to provide weightier

or more credible alternatives to Lehnert's 2001 testimony that all asbestos-containing Ready Mix made in Akron, New York from 1970 to 1977 contained Calidria, that calculus is not the Court's to undertake. *See Reniere v. Gerlach*, 752 A.2d 480, 482 (R.I. 2000) (quoting *Industrial National Bank of Rhode Island v. Peloso*, 121 R.I. 305, 307-08, 397 A.2d 1312, 1313 (1979)) ("'[T]he only task of a trial justice in passing on a motion for summary judgment is to determine whether there is a genuine issue concerning any material fact[,]' . . . without passing upon the weight or credibility of the evidence."). And to the extent that Union Carbide argues that Lehnert's statement cannot be taken at face value, and therefore cannot serve as competent evidence at the summary judgment stage, the Court disagrees. *Cf. Weaver v. American Power Conversion Corp.*, 863 A.2d 193, 201 (R.I. 2004) (holding that plaintiff's affidavit, which contradicted earlier deposition that was "replete with evasions and inconsistencies," was "both ineffectual and insufficient to establish the existence of a genuine issue of fact").

It is true that the specific purposes of Lehnert's 2001 deposition were to address Georgia-Pacific's use of Union Carbide asbestos and to authenticate copies of Georgia-Pacific joint compound formulas containing Union Carbide asbestos. (2001 Lehnert Dep. 7:1-5; 9:11-15.) This set of joint compound formulas, labeled as Exhibit A at the deposition, all contained Union Carbide's "SG-210" asbestos; although Lehnert reviewed Exhibit A to prepare for his 2001 deposition, Exhibit A did not represent all of Georgia-Pacific's joint compound formulas. *Id.* at 18:16-19:7, 59:5-16. But the full scope of Lehnert's preparatory review extended much further:

> "Q. In addition to reviewing the formulas contained in Exhibit A, did you review anything else in preparation for this deposition?
> "A. Yes.
> "Q. What did you review?
> "A. Several hundred other formulas of Georgia-Pacific's joint compounds, as well as some other lab documents.
> "Q. Did you review only selected formulas?
> "A. No.

> "Q. Did you have access to and review the entire joint system formula set of Georgia-Pacific?
> "A. Yes.
> "Q. Why did you make that review, Mr. Lehnert?
> "A. So that we could put a history together of the development of joint compounds, and in this case the history concerning SG . . . the use of SG-210 in joint compounds." *Id.* at 20:18-21:10.

From that research, Lehnert created a set of handwritten notes, labeled as Exhibit B, which he described as "a history of those joint compounds and texture formulas that contained SG-210 Union Carbide asbestos." *Id.* at 24:16-25:7. Exhibit B was thus focused on Georgia-Pacific's use of Union Carbide asbestos; however, Lehnert noted on Exhibit B that up until September 1970, "virtually all" Ready Mix formulas at Akron, New York used "7RF-9 asbestos" supplied by Philip Carey, indicating that Lehnert had considered formulas that used asbestos from other suppliers. *Id.* at 35:5-37:1. At his 2001 deposition, Lehnert used Exhibit B as a memory aid to "identify the products manufactured by Georgia-Pacific which contained Union Carbide asbestos[,]" as he "went through several hundred documents and it just wouldn't be possible to remember all of [that] without making some kind of a history[.]" *Id.* at 25:2-10; *see id.* at 92:5-11 (stating that Lehnert "believe[d]" that he had "cop[ies] of all of the formulas for Georgia-Pacific joint compound products" in his possession). Lehnert then testified that all the generally available Ready Mix made by Georgia-Pacific's Akron, New York plant between September 1970 and May 4, 1977, with the sole exception of asbestos-free formulations, contained Union Carbide asbestos. *Id.* at 95:9-23; *see id.* at 95:17-23 (confirming that "all available" asbestos-containing Ready Mix formulas from Akron, New York "used some Union Carbide SG-210" from September 1970 on).

The bottom line is that Lehnert's 2001 testimony as to the extent of Georgia-Pacific's use of Union Carbide asbestos is competent evidence that a reasonable jury could choose to take at face value. Union Carbide's attempts to counter Lehnert's 2001 testimony with portions of his 2006-07 deposition—or contradictory testimony from Schutte—therefore cannot serve as the basis

for summary judgment in Union Carbide's favor, as they implicate questions of weight and credibility that are reserved for the factfinder. *See Joplin v. Cassin*, 252 A.3d 271, 281-82 (R.I. 2021) (quoting *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944)) ("'It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts.'"). The same is true for the question of when the Mellors' renovations occurred: because Plaintiffs have submitted competent evidence supporting the reasonable inference that the renovations followed the March 1971 building permit, the Court's inquiry is at an end. *Cf. Totman v. A.C. & S., Inc.*, No. PC-2000-5296, 2002 WL 393697, at *4 (R.I. Super. Feb. 11, 2002) (denying summary judgment where the question of "whether the [defendant's] product was a substantial factor in causing [plaintiff's] illness" rested on the resolution of "factual issues").

Finally, Union Carbide attacks Plaintiffs' expert medical opinions by arguing that neither Dr. Kradin nor Dr. Frank have any factual basis on which to opine that Mrs. Mellor was exposed to Calidria. *See* Def.'s Summ. J. Mem. 11; Def.'s Reply 10-15. In his deposition, Dr. Frank stated that his opinion that Mrs. Mellor's mesothelioma was caused by Union Carbide asbestos was based in part on information, shared with Dr. Frank by Plaintiffs' attorney, that Union Carbide asbestos would have been present in the Georgia-Pacific Ready Mix used in Mrs. Mellor's home. (Pls.' Notice Ex. 4 (Dr. Frank Dep.), 7:9-8:8, 11:18-12:5.) However, Dr. Frank also stressed that it was "not [his] role" to speak to whether Union Carbide asbestos was in that Ready Mix; instead, his "role will be that whatever asbestos was in the joint compound, and asbestos was in Georgia-Pacific joint compound until at least 1976, that that was a cause of her mesothelioma[.]" *Id.* at 11:7-11.

Similarly, in speaking to his opinion that Mrs. Mellor's mesothelioma was caused by "cumulative exposures" to asbestos-containing joint compound, Dr. Kradin stated in his deposition that he could only opine as to Union Carbide's role in those events "to the extent that Union Carbide is related to Georgia-Pacific" and the joint compounds that Mrs. Mellor identified as Georgia-Pacific products. (Pls.' Notice Ex. 5 (Dr. Kradin Dep.), 8:8-9:7.) Dr. Kradin also indicated that it was his "understanding from other cases" that Union Carbide supplied Georgia-Pacific with asbestos during the relevant time frame and confirmed that his opinion as to Union Carbide's role in this case would change if that understanding were disproven. *Id.* at 9:8-14, 11:4-14.

"'[A]n expert's opinion must be predicated upon facts legally sufficient to form a basis for his [or her] conclusion.'" *Kurczy v. St. Joseph Veterans Association, Inc.*, 820 A.2d 929, 940 (R.I. 2003) (quoting *Raimbeault v. Takeuchi Manufacturing (U.S.), Ltd.*, 772 A.2d 1056, 1062 (R.I. 2001)); *see Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990) (quoting *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 745 F.2d 248, 262 (3d Cir. 1984)) ("To the extent that [the experts'] opinions were predicated upon factual assumptions[,] . . . those assumptions 'must find some support in the record.'"). However, "Rule 703 of the Rhode Island Rules of Evidence clearly permits an expert to base an opinion on 'a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence[.]'" *Gallucci v. Humbyrd*, 709 A.2d 1059, 1064 (R.I. 1998) (quoting R.I. R. Evid. 703). For the purposes of the present inquiry, the Court has already identified the record evidence that would allow a jury to reasonably infer that Mrs. Mellor was exposed to Calidria. *Cf. Paolino v. Ferreira*, 153 A.3d 505, 524-25 (R.I. 2017) (finding that trial justice abused her discretion in

excluding expert's opinion on causation when the record disclosed "supporting evidence" from which "a jury could very well have found causation").

A fair reading of the doctors' medical opinions in the larger context of this case also makes clear that Plaintiffs are not submitting those opinions to establish that Union Carbide asbestos was present in the Ready Mix. Instead, Plaintiffs offer the opinions to show the connection between asbestos exposure and mesothelioma, a separate element of Plaintiffs' overarching theory of causation. *See Mills v. State Sales, Inc.*, 824 A.2d 461, 468 (R.I. 2003) (citing *Boccasile v. Cajun Music Limited*, 694 A.2d 686, 690 (R.I. 1997)) ("[E]xpert testimony is required to establish any matter that is not obvious to a lay person and thus lies beyond common knowledge."). The fact that the doctors' ultimate conclusions as to Union Carbide's role in this case rely on Mrs. Mellor's testimony regarding her asbestos exposure, and the contested assumption that Union Carbide supplied the asbestos in question, does not negate the validity and importance of their medical expertise. *See Beaton v. Malouin*, 845 A.2d 298, 301-02 (R.I. 2004).

Our Supreme Court has stated that expert testimony, as an "'aid in the search for the truth[,] . . . need not be conclusive and has no special status in the evidentiary framework of a trial.'" *Owens v. Silvia*, 838 A.2d 881, 890 (R.I. 2003) (quoting *Morra v. Harrop*, 791 A.2d 472, 477 (R.I. 2002)). This same principle holds true in the context of summary judgment; Rule 56 of the Superior Court Rules of Civil Procedure mandates a sweeping consideration of "the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions on file, together with the affidavits, if any[.]" Super. R. Civ. P. 56(c). During this survey, the Court "'view[s] the facts and all reasonable inferences therefrom in the light most favorable to'" the non-moving party. *DeMaio*, 59 A.3d at 130 (quoting *Delta Airlines, Inc.*, 785 A.2d at 1126). It follows that Plaintiffs cannot be penalized at the summary judgment stage simply

because their medical experts have not independently verified every element of Plaintiffs' prima facie case.

B

Union Carbide's Motion for Summary Judgment: Duty to Warn

In its Motion for Summary Judgment, Union Carbide also argues that as the supplier of a component of a larger product, it had no duty to warn end users of the dangers of Calidria, particularly because it only sold raw asbestos directly to sophisticated users like Georgia-Pacific who knew or should have known of those dangers. (Def.'s Summ. J. Mem. 12-15.) Union Carbide contends that Georgia-Pacific's history of manufacturing asbestos-containing products indicates that Georgia-Pacific had extensive knowledge of the dangers of asbestos, and that any warnings from Union Carbide would have had little to no effect on Georgia-Pacific's actions. *Id.* at 13-15. Alternatively, Union Carbide argues that if a duty to warn did exist, it satisfied that duty by providing Georgia-Pacific with adequate warnings and reasonably relying on Georgia-Pacific to pass those warnings along to end users. *Id.* at 15-17; Def.'s Reply 15-23.

Citing this Court's decision in *Lindquist v. Buffalo Pumps, Inc.*, No. PC-06-2416, 2006 WL 3456346 (R.I. Super. Nov. 28, 2006), Plaintiffs argue that Union Carbide owed a duty to warn end users of the reasonably foreseeable dangers created when products containing Calidria—such as Georgia-Pacific Ready Mix—were sanded, thereby releasing asbestos fibers into the air. (Pls.' Summ. J. Mem. 35.) Plaintiffs also note that Rhode Island has not explicitly adopted the sophisticated user defense; assuming that the defense is available, Plaintiffs point out that Union Carbide's arguments that Georgia-Pacific was a sophisticated user and that Union Carbide provided adequate warnings implicate factual disputes that cannot be decided on summary judgment, such as the extent of Union Carbide's knowledge of the dangers posed by Calidria; the

extent of Georgia-Pacific's knowledge of those dangers; the sufficiency of any warnings that Union Carbide provided; and whether it was reasonable for Union Carbide to rely on Georgia-Pacific to pass those warnings on to the end users of Calidria-containing products. *Id.* at 31-38.

"A duty to warn arises when a defendant has notice of the dangerous propensities of a product." *Dent v. PRRC, Inc.*, 184 A.3d 649, 656 (R.I. 2018) (citations omitted). Although the existence of a duty typically presents a question of law, the existence of a duty to warn often involves disputed questions of fact as to what a defendant knew or should have known about its products. *See Ritter v. Narragansett Electric Co.*, 109 R.I. 176, 183, 283 A.2d 255, 259 (1971) (finding "a jury question as to whether defendant . . . had reason to know that the [product] would be dangerous to a user"). In *Lindquist*, after noting that the plaintiff had submitted evidence showing that the defendant "knew that the pumps it shipped included asbestos pumps and gaskets, and that it knew these components would have to be replaced over the course of the lifetime of the pump, releasing asbestos fibers[,]" this Court found "a triable issue of fact as to whether [the defendant] knew or should have known of the dangers posed by its pumps when serviced in the manner intended, and whether it breached a duty when it did not warn of those dangers." *Lindquist*, 2006 WL 3456346, at *2. The Court also rejected defendant's argument that it was "being asked to '[anticipate] every conceivable design' in which its pump [could] be used[,]" as the evidence showed that the defendant had actual knowledge of the use in question. *Id.* at *3 (quoting *Buonanno v. Colmar Belting Co., Inc.*, 733 A.2d 712, 719 (R.I. 1999)).

Similarly, Plaintiffs in this case have submitted evidence indicating Union Carbide's knowledge of the mesothelioma risk posed by Calidria, as well as its knowledge that Calidria fibers would be released in the course of their regular and foreseeable use in Georgia-Pacific joint compounds such as Ready Mix. *See, e.g.*, Pls.' Summ. J. Mem. Ex. N, at 1-2 (June 7, 1967 Letter

from C.U. Dernehl, M.D., Associate Medical Director at Union Carbide, discussing mesothelioma and other health risks of Union Carbide asbestos); *id.* Ex. D, at 1 (Union Carbide brochure of October 1968 addressing the use of Calidria in "Tape Joint Compounds" and stating that Calidria "Enhances Sandability"). Also relevant here is that the danger was inherent in Calidria itself and did not arise from any interaction between Calidria and other components of the Ready Mix. *See Buonanno*, 733 A.2d at 719 (distinguishing inherently dangerous components from components that only become dangerous through their integration into a larger product).

Against Plaintiffs' charge that it breached its duty to warn end users of the dangers of Calidria, Union Carbide raises two distinct, albeit related, defenses: the sophisticated user defense and the bulk supplier defense. Under the "'sophisticated user' defense, there is no duty to warn an 'end user' of a product's latent characteristics or dangers when the user knows or reasonably should know of those dangers." *Taylor v. American Chemistry Council*, 576 F.3d 16, 24-25 (1st Cir. 2009) (quoting *Carrel v. National Cord & Braid Corp.*, 852 N.E.2d 100, 109 (Mass. 2006)). As a "corollary of the 'open and obvious' doctrine," the sophisticated user defense applies "where the user appreciates the danger to the same extent as a warning would provide." *Id.* at 25 (citations omitted); *cf. Maggi v. De Fusco*, 107 R.I. 278, 283, 267 A.2d 424, 427 (1970) (citing Restatement (Second) *Torts* § 388(b), comment k (1965)) (declining to hold defendants "liable for foreseeable harms to third persons caused by negligent construction" where "the defect was obvious").

"The bulk supplier defense says that a supplier may, in some circumstances, discharge its duty to warn foreseeable users of the dangers in the use of its products by reasonably relying on an intermediary." *Taylor*, 576 F.3d at 25 (citing *Hoffman v. Houghton Chemical Corp.*, 751 N.E.2d 848, 854 (Mass. 2001)). In *Taylor*, the First Circuit further expanded on the distinction between the two defenses as follows:

> "The bulk supplier defense allows a supplier defendant to *satisfy* its duty to warn, while the sophisticated user defense *relieves* the supplier from such a duty. The bulk supplier defense *presupposes* the existence of an intermediary between the supplier and the foreseeable user; the sophisticated user defense requires no intermediating relationship, although it permits one. These differences reflect the distinct rationales of the bulk supplier and sophisticated user defenses. . . . [T]he latter is premised on the idea that certain dangers are obvious to a sophisticated user, making a warning superfluous. In contrast, the bulk supplier defense is premised on the special difficulties that bulk suppliers face in directly warning foreseeable end users of the dangers of their products." *Id.* (internal quotation marks and citations omitted).

Despite their differences, both defenses share a highly fact-specific nature, making them typically inappropriate for resolution through summary judgment. *See Genereux v. American Beryllia Corp.*, 577 F.3d 350, 365-66 (1st Cir. 2009) (citing *Hoffman*, 751 N.E.2d at 855) (stating that sophisticated user defense turns on the knowledge of the end user, "which is a factual matter that may be resolved by the jury"); *id.* at 374 (quoting *Hoffman*, 751 N.E.2d at 856) (stating that whether a bulk supplier "has reasonably relied on the intermediary to transmit its warnings" involves a "fact intensive" reasonableness inquiry); *see also Koken v. Black & Veatch Construction, Inc.*, 426 F.3d 39, 45-46 (1st Cir. 2005) (stating that "analysis must focus on the particular risk and whether that risk is open or obvious or known to the sophisticated user").

Here, the current record reveals a key question of disputed fact that prevents Union Carbide from successfully establishing either defense on summary judgment; namely, the extent of Georgia-Pacific's knowledge of the danger that exposure to Calidria asbestos could cause mesothelioma.[4] *See Dent*, 184 A.3d at 654 (citing *Mead v. Papa Razzi Restaurant*, 840 A.2d 1103,

[4] This question is central to the bulk supplier defense because, for that "doctrine to apply, a product must be delivered in bulk to an intermediary vendee[,]" and "[t]he relevant inquiry turns on the intermediary's knowledge of [the] product's hazard and its ability to pass on appropriate warnings to end users." *Hoffman v. Houghton Chemical Corp.*, 751 N.E.2d 848, 854 (Mass. 2001) (citing *Sara Lee Corp. v. Homasote Co.*, 719 F. Supp. 417, 424 (D. Md. 1989)); *see Genereux v. American*

1108 (R.I. 2004)) (stating that "whether defendant knew or should have known about" the dangerous condition that caused plaintiff's injuries was "a question of fact for the jury, not for the trial justice at the summary-judgment stage"). Both sides have submitted numerous exhibits germane to this question[5]—including evidence on subsidiary questions of fact such as Union

Beryllia Corp., 577 F.3d 350, 374 (1st Cir. 2009) (quoting *Hoffman*, 751 N.E.2d at 856) (setting out six "factors that may determine whether" a bulk supplier reasonably relied on an intermediary to warn end users). "In the context of the sophisticated user defense, the 'end user' is the person whose sophistication is relevant to determining the defense." *Taylor v. American Chemistry Council*, 576 F.3d 16, 24-25 n.6 (1st Cir. 2009). Given Plaintiffs' assertion that Mrs. Mellor was exposed to Union Carbide's Calidria asbestos in her own home through the commercially available Ready Mix purchased and used by Mr. Mellor or hired workers, it is at best unclear whether Georgia-Pacific—rather than the Mellors—should be considered the "end user" of that Calidria for purposes of the sophisticated user defense. *See Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1012 (8th Cir. 1989) (holding that supplier of defective component of liquid propane gas could not employ sophisticated user defense because plaintiffs, as consumers who bought the gas from an intermediary, were the "ultimate users"); *cf. Genereux*, 577 F.3d at 365 (analyzing sophistication of plaintiff's employer, a manufacturer that used defendant suppliers' beryllium as a component in its products).

[5] For example, Union Carbide highlights its "Asbestos Toxicology Report" of May 8, 1969, and its "Asbestos Toxicology Status Summary" of October 1972. *See* Def.'s Reply Ex. 37, at 1 (stating that "[a] type of cancer named mesothelioma has been noted to be associated with asbestos exposure in recent years" and that mesothelioma "may occur in individuals with histories of only slight exposure, and that as much as twenty to forty years earlier"); Def.'s Summ. J. Mem. Ex. 6E, at 7-8 (incorporating "Airborne Asbestos" report from the National Academy of Sciences which states that "[e]vidence of a causal association between some but not all exposures to asbestos fibers and diffuse malignant mesotheliomas of the pleura and peritoneum is substantial" and that "no type" of asbestos "can be regarded as free of hazard"). Union Carbide also presents the affidavit of John L. Myers, previously the Marketing Manager for Union Carbide's Calidria business, who states that "Union Carbide thoroughly educated its salesmen and others about the health hazards and any regulatory requirements associated with asbestos and directed its salesmen to share this information with customers" and that "Union Carbide communicated regularly with its customers, including [Georgia-Pacific], regarding its knowledge of hazards associated with asbestos[.]" (Def.'s Summ. J. Mem. Ex. 6, ¶¶ 6, 8.)

Conversely, Plaintiffs challenge the sufficiency of these warnings as measured against the full extent of Union Carbide's knowledge of the mesothelioma risk, and present evidence showing that Union Carbide took steps to minimize the dangers posed by its asbestos when dealing with customers. Pls.' Summ. J. Mem. 35-38; *see id.* Ex. M (Union Carbide Report of Dec. 5, 1967, "Asbestos as a Health Hazard in the United Kingdom"), at 15 ("There is a general inference that Crocidolite is more liable to produce mesothelioma. Exoneration of Chrysotile has not been made, however. . . . It therefore seems that on the basis of present evidence, we are not entitled under any circumstances to state that our material is not a health hazard."); *id.* Ex. O (Union Carbide

Carbide's knowledge of the mesothelioma risk posed by Calidria and the extent to which Union Carbide shared that knowledge with Georgia-Pacific[6]—and resolving the issue will necessarily entail the weighing of evidence and competing inferences therefrom. Accordingly, Union Carbide's Motion for Summary Judgment is denied.

C

Plaintiffs' Motion for Leave to File a Third Amended Complaint

Also before the Court is Plaintiffs' Motion for Leave to File a Third Amended Complaint adding a § 10-7-1.2 claim for the loss of parental society and companionship and naming Mrs. Mellor's children Terry and Michael as individual Plaintiffs. (Mot. Leave File Third Am. Compl. 1; Third Am. Compl. ¶ 3.) Pointing out that all claims against Union Carbide in the currently operative Second Amended Complaint allege that Laura, Linda, Terry, and Michael have suffered the loss of parental society and companionship as a result of Mrs. Mellor's illness and death, Plaintiffs represent that the Third Amended Complaint is essentially a procedural formality filed out of an abundance of caution. Hr'g Tr. 2:13-17, 3:7-4:20, 5:2-7, Mar. 22, 2022; *see* Second Am.

Memorandum of May 30, 1975), at 1 (stating that while proposed asbestos use warnings will "undoubtedly maximize protection against possible future product liability suits[,] . . . cancer is a very emotional word" and predicting that "use of the proposed label" will likely have "between serious and fatal" effect on Union Carbide's Calidria business); *id.* Ex. R (Union Carbide Memorandum of June 22, 1972), at 1 ("Point out the vast numbers of customers successfully using asbestos without problem. . . . If the customer is persistent and threatens to eliminate asbestos – a certain amount of aggressiveness may be effective. Words and catch phrases such as 'premature', 'irrational' or 'avoiding the inevitable' will sometimes turn the table.").

[6] *See Genereux*, 577 F.3d at 366 ("Sometimes the analysis will focus on what the intermediary already knows, and sometimes it will depend on what the [supplier] tells the intermediary. . . . Nevertheless, . . . the question is what [the intermediary] knew, or reasonably should have known, as a result of the warnings."); *id.* at 373 ("Moreover, we cannot ignore the evidence of [supplier]'s effort to persuade its customers that occupational exposures to beryllium at the [threshold] level do not cause chronic beryllium disease. . . . While [intermediary] is a sophisticated company, the record reveals that [supplier] is much more sophisticated in its understanding of beryllium, the dangers posed by beryllium, and how best to implement hygienic controls.").

Compl. ¶¶ 21, 27, 32. Plaintiffs also argue that Union Carbide will not be prejudiced by the amendment because the Second Amended Complaint put Union Carbide on notice of all four children's claims for loss of parental society and companionship. (Hr'g Tr. 5:8-17, 5:22-6:8, Mar. 22, 2022.)

Objecting to Plaintiffs' Motion, Union Carbide argues that Plaintiffs are barred from adding Terry and Michael as plaintiffs by the applicable statute of limitations for wrongful death claims, as more than three years have passed since Mrs. Mellor's death in April 2018. (Def.'s Obj. Third Am. Compl. 2-3.) Acknowledging that Rule 15(c) allows certain amendments to relate back to the date of the original pleading, Union Carbide argues that Terry and Michael's claims, while derivative of Mrs. Mellor's underlying claim, are nonetheless separate claims that do not relate back. *Id.* at 4-5. In support, Union Carbide cites *Normandin v. Levine*, 621 A.2d 713 (R.I. 1993), in which our Supreme Court upheld a trial justice's decision to deny an amendment to add a claim for loss of consortium because that claim was brought outside the statute of limitations. *Id.* at 6-7; *see Normandin*, 621 A.2d at 715-16. Union Carbide also relies on Plaintiffs' delay to assert that it will be unduly prejudiced by the amendments; additionally, Union Carbide argues that it has received no notice of the new claims and has not yet had the opportunity to depose Michael. (Def.'s Obj. Third Am. Compl. 6-7.)

"[T]he unquestionable purpose of Rule 15," which governs the amendment of pleadings, "'is to afford a litigant a reasonable opportunity to have his [or her] claim tried on the merits rather than a procedural technicality.'" *Vincent v. Musone*, 572 A.2d 280, 284 (R.I. 1990) (quoting *Kenney v. Providence Gas Co.*, 118 R.I. 134, 140, 372 A.2d 510, 513 (1977)). "That said, 'a number of reasons—such as undue delay, bad faith, undue prejudice to the opposing party, . . . [or] futility of the amendment—may nonetheless warrant the denial of a motion to amend."

Gannon, 200 A.3d at 1080 (quoting *IDC Properties, Inc. v. Goat Island South Condominium Association, Inc.*, 128 A.3d 383, 393 (R.I. 2015)).

Pursuant to § 10-7-2, Plaintiffs' claims for loss of parental society and companionship under § 10-7-1.2 are subject to a three-year statute of limitations that began to run as of Mrs. Mellor's death on April 4, 2018. *See* § 10-7-2 ("Except as otherwise provided, every action brought pursuant to this chapter shall be commenced within three (3) years after the death of the person."). However, Plaintiffs filed their Motion for Leave to File a Third Amended Complaint on February 4, 2022. (Mot. Leave File Third Am. Compl. 1.) "In order to add a claim that falls outside the applicable statute of limitations, the proposed amendment must 'relate back' to the date of the original pleading." *Henderson v. Fitzgerald*, 131 A.3d 172, 174 (R.I. 2016) (quoting *Manocchia v. Narragansett Capital Partners Television Investments*, 658 A.2d 907, 909 (R.I. 1995)).

Under Rule 15(c), "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Super. R. Civ. P. 15(c).

> "An amendment changing or adding a plaintiff or defendant or the naming of a party relates back if the foregoing provision is satisfied and within the period provided by Rule 4(1) for service of the summons, complaint, Language Assistance Notice, and all other required documents, the party against whom the amendment adds a plaintiff, or the added defendant:
> "(1) Has received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits; and
> "(2) Knew or should have known that but for a mistake the action would have been brought by or against the plaintiff or defendant to be added."[7] *Id.*

[7] In *Normandin*, our Supreme Court held that a proposed amendment adding a new plaintiff with a derivative claim was barred by the statute of limitations because the derivative claim did not relate back under Rule 15(c). *Normandin v. Levine*, 621 A.2d 713, 715-16 (R.I. 1993). The Supreme Court's decision in *Normandin* rested on an earlier version of Rule 15(c); as written, that iteration of Rule 15(c)'s relation-back provision only contemplated "amendments adding or

The Court has no hesitation in finding that Plaintiffs' § 10-7-1.2 claims "[arise] out of the conduct, transaction, or occurrence set forth . . . in the original pleading[.]" Super. R. Civ. P. 15(c). Our Supreme Court has "recognize[d] that a claim for loss of society and companionship[,]" while "a separate and distinct cause of action, . . . is not an independent action but a derivative one that is 'inextricably linked to the [impaired party's] underlying claims because [its] success depends on the success of those underlying claims.'" *Malinou v. Miriam Hospital*, 24 A.3d 497, 511 (R.I. 2011) (quoting *Desjarlais v. USAA Insurance Co.*, 824 A.2d 1272, 1277 (R.I. 2003)); *cf. Slaughter v. Southern Talc Co.*, 949 F.2d 167, 169, 174-75 (5th Cir. 1991) (finding that widows' amended claims for wrongful deaths of their spouses in asbestos suit "unquestionably arose out of the same injury as the original pleadings[,]" in which then-living spouses had "allege[d] that defendants' products caused [their] pulmonary disease"). As derivative actions, Plaintiffs' § 10-7-1.2 claims against Union Carbide will stand or fall on the strength of the same evidence and legal theories underlying Mrs. Mellor's original claims. *See, e.g.*, Compl. ¶¶ 3, 19 (alleging that Mrs. Mellor's "terminal malignant mesothelioma" was the "direct and proximate result of the negligence of the Defendants"); Third Am. Compl. ¶ 21 ("As a direct and proximate result of the negligence of the Defendants, Plaintiff's children LINDA M. MELLOR, LAURA M. MELLOR, MICHAEL P. MELLOR, and TERRY M. MOHLER suffered . . . a loss of parental society and companionship[.]"); *cf. Mainella v. Staff Builders Industrial Services, Inc.*, 608 A.2d 1141, 1145

changing the name of a party against whom a claim is asserted." *Balletta v. McHale*, 823 A.2d 292, 294 (R.I. 2003); *see Normandin*, 621 A.2d at 715-16. "Applying that language, [the Supreme] Court had held that Rule 15(c) allowed relation back to the original complaint only when defendants were added in an amended complaint, but not when additional plaintiffs were added." *Carrozza v. Voccola*, 90 A.3d 142, 171 n.32 (R.I. 2014) (citing *Balletta*, 823 A.2d at 294-95). In 2006, "Rule 15(c) was amended to remove that restriction[,]" and Rule 15's "Committee Notes make it clear that Rule 15(c) was intended to allow relation back of a plaintiff added in an amended complaint." *Id.*

(R.I. 1992) ("[Plaintiff]'s original complaint alleged negligence imputed to an employer on the basis of *respondeat superior*; the amended complaint alleges negligence in the hiring and supervision of the employee, a totally different occurrence.").

The Court also finds that Union Carbide "[h]as received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits[.]" Super. R. Civ. P. 15(c). Where an amended pleading seeks to add a new plaintiff, "[n]ot only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in." *Williams v. United States*, 405 F.2d 234, 238 (5th Cir. 1968); *see Allied International, Inc. v. International Longshoremen's Association, AFL-CIO*, 814 F.2d 32, 35-36 (1st Cir. 1987) (stating that if a substituted plaintiff's "claim is different and is to relate back[,] . . . there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them"). "The touchstone . . . is whether the defendant knew or should have known of the existence and involvement of the new plaintiff." *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1982) (citing Fed. R. Civ. P. 15(c)).

Union Carbide has been a defendant in this case since Mrs. Mellor filed her original Complaint on October 25, 2017, thereby putting Union Carbide on notice of the "operational facts" at issue. *Williams*, 405 F.2d at 238; *see* Compl. ¶¶ 2-3 (alleging that Mrs. Mellor's "terminal malignant mesothelioma" was caused by her exposure to "Defendant[s'] asbestos-containing products" during the renovation and "subsequent clean-up" of Mrs. Mellor's home). The original pleading also set forth the same causes of action that Plaintiffs continue to advance against Union Carbide as wrongful death claims on Mrs. Mellor's behalf. *See, e.g.*, Compl. ¶¶ 15-19; Third Am.

Compl. ¶¶ 16-21. On January 31, 2018—less than 120 days after this case began—Mrs. Mellor was deposed; during that deposition, at which Union Carbide was represented by counsel, Mrs. Mellor discussed her children and her late husband. Esther Mellor Dep. 8:11-13, 9:1-2, 14:8-17; *see* Super. R. Civ. P. 15(c) (setting period for "notice of the institution of the action" as "the period provided by Rule 4(1) for service of the summons . . . and all other required documents"); Super. R. Civ. P. 4(l) (setting period for service at "one hundred and twenty (120) days after the commencement of the action"). As of Mrs. Mellor's deposition at the latest, Union Carbide, "viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim[s] might be altered" through the addition of Plaintiffs' § 10-7-1.2 claims. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1497 (3d ed. 2022) (analyzing Fed. R. Civ. P. 15(c)); *see Slaughter,* 949 F.2d at 175 ("When plaintiffs filed suit, death loomed large, all knew that plaintiffs could proceed under Texas's Wrongful Death Statute."). "Once that conclusion is reached[,]" Union Carbide "has suffered no prejudice." *Williams*, 405 F.2d at 239.

These facts also indicate that Union Carbide "[k]new or should have known that but for a mistake the action would have been brought by . . . the plaintiff[s] . . . to be added." Super. R. Civ. P. 15(c)(2). From the information it received via the Complaint and Mrs. Mellor's deposition, Union Carbide knew or should have known that Mrs. Mellor's children would file individual claims for loss of parental society and companionship once she died—which they in fact attempted to do. *See* Second Am. Compl. ¶ 21 ("As a direct and proximate result of the negligence of the Defendants, Plaintiff's children LINDA MELLOR, LAURA MELLOR, MICHAEL MELLOR,

and TERRY MOHLER suffered . . . a loss of parental society and companionship[.]").[8] In filing the Second Amended Complaint, Plaintiffs certainly could have avoided the need for a further amendment by adding Terry and Michael to the case caption and setting out a separate count for § 10-7-1.2. But "[v]irtually by definition, every mistake involves an element of negligence, carelessness, or fault[;] . . . [p]roperly construed, the rule encompasses both mistakes that were easily avoidable and those that were serendipitous." *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000) (interpreting Fed. R. Civ. P. 15(c)(3), which requires "a mistake concerning the identity of the proper party"). And while Union Carbide emphasizes the fact that Plaintiffs could have asserted their §10-7-1.2 claims within the statute of limitations, the text of Rule 15(c) focuses the relation-back inquiry on what "the party against whom the amendment adds a plaintiff . . . [k]new or should have known" about Plaintiffs' intentions. Super. R. Civ. P. 15(c)*; cf. Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 541 (2010) ("[R]elation back under Rule 15(c)(1)(C) [of the Federal Rules of Civil Procedure] depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading.").

Having found that Plaintiffs' § 10-7-1.2 claims satisfy the relation-back test of Rule 15(c), the Court's ultimate decision on Plaintiffs' Motion for Leave to File a Third Amended Complaint is governed by Rule 15(a), which "'liberally permits amendment absent a showing of extreme prejudice.'" *Harodite Industries, Inc. v. Warren Electric Corp.*, 24 A.3d 514, 531 (R.I. 2011)

[8] As this quotation indicates, the face of the Second Amended Complaint contains a "short and plain statement" of the derivative claims that Plaintiffs now seek to add as separate causes of action. Super. R. Civ. P. 8(a)(1); *see* Super. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 8:1 (2022) ("Just as Rule 1 contains a mandate for liberal construction of the rules as a whole, so Rule 8(f) calls for the same approach to the pleadings. The importance of this simply cannot be overstated."). An argument could be made that Linda, Laura, Michael, and Terry did plead their § 10-7-1.2 claims within the statute of limitations; however, because the Third Amended Complaint satisfies the relation-back test of Rule 15(c), the Court need not decide that question.

(quoting *Weybosset Hill Investments, LLC v. Rossi*, 857 A.2d 231, 236 (R.I. 2004)). "[T]he burden of demonstrating such prejudice lies on the party opposing the motion to amend." *Lomastro v. Iacovelli*, 56 A.3d 92, 95 (R.I. 2012) (citations omitted). In the Court's view, Union Carbide's arguments that it will be unduly prejudiced by the amendment are not convincing.

As previously discussed, Plaintiffs' § 10-7-1.2 claims are derivative claims that are "dependent upon the success of the underlying" causes of action originally asserted by Mrs. Mellor. *Sama v. Cardi Corp.*, 569 A.2d 432, 433 (R.I. 1990). Plaintiffs also incorporated the substance of their claims for loss of parental society and companionship into their Second Amended Complaint; moreover, Union Carbide responded in its Motion for Summary Judgment by arguing that "Plaintiff Esther Mellor's children's claim is derivative of Esther Mellor's claim so that if her claims against Union Carbide fail, the consortium claim is no longer viable." *See* Second Am. Compl. ¶¶ 21, 27, 32; Def.'s Summ. J. Mem. 18.

In addition to undercutting Union Carbide's assertion that it has been unduly prejudiced by Plaintiffs' delay, these facts confirm that Union Carbide is not being confronted with a "legally distinct theory of liability" that will require a fundamental change in its "trial strategy[.]" *Vincent*, 572 A.2d at 284; *cf. Harodite Industries, Inc.*, 24 A.3d at 532-33 (upholding a trial justice's decision to deny plaintiff's motion to amend the complaint where "[defendant] would have to undertake additional discovery, retain new experts, and reconsider its previously developed trial strategy in order to defend against the new allegations"). Nor will the amendment entail "a considerable amount of new discovery." *Faerber v. Cavanagh*, 568 A.2d 326, 330 (R.I. 1990). Linda, Laura, and Terry have already been deposed, and Plaintiffs' counsel has represented that Michael can readily be made available for deposition. (Hr'g Tr. 8:4-8, Mar. 22, 2022.)

In the absence of any substantial prejudice, "mere delay is an insufficient reason to deny an amendment[,]" as "Rule 15(a) encourages the allowance of amendments in order to facilitate the resolution of disputes on their merits rather than on blind adherence to procedural technicalities." *Wachsberger*, 583 A.2d at 78-79 (citing *Inleasing Corp. v. Jessup*, 475 A.2d 989, 992-93 (R.I. 1984)). Accordingly, Plaintiffs' Motion for Leave to File a Third Amended Complaint is granted.[9]

IV

Conclusion

For the foregoing reasons, Union Carbide's Motion for Summary Judgment is denied, and Plaintiffs' Motion for Leave to File a Third Amended Complaint is granted. Counsel shall prepare the appropriate order for entry.

[9] Union Carbide argues that if Plaintiffs are allowed to amend their complaint, the version of § 10-7-1.2 in effect before that statute's July 2021 amendment should control, meaning that Plaintiffs may recover damages for the loss of parental society and companionship but not for their emotional distress, grief, and loss of enjoyment of life as a result of Mrs. Mellor's death. *See* Def.'s Obj. Third Am. Compl. 8 (citing P.L. 2021, ch. 342 (codified at § 10-7-1.2)). Based on the plain language of the enabling act, the Court agrees. P.L. 2021, ch. 342, § 2 ("This act shall take effect upon passage and shall apply only to all claims resulting from injuries occurring after the effective date.").

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Laura M. Mellor, et al. v. Arnold Lumber Co., et al.**
CASE NO:	**PC-2017-5107**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 15, 2022**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**Vincent L. Greene, IV, Esq.**
For Defendant:	**Lawrence G. Cetrulo, Esq.; Brian D. Gross, Esq.; Mary C. Dunn, Esq.; Jason Caron, Esq.**