STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: February 22, 2013)

NANCY SANTOS, as Executrix of the Estate of JOHN JOSEPH SOUZA	:	
	:	**C.A. No. PC 2009-5475**
v.	:	
A.C. McLOON OIL CO., et al.	:	

DECISION

GIBNEY, P.J. In this asbestos action filed by Nancy Santos ("Plaintiff"), Executrix of the Estate of John Joseph Souza ("Souza"), six of the named defendants[1] ("Defendants") have brought identical Motions to Dismiss pursuant to Super. R. Civ. P. 12(b)(2) and 12(b)(6) (the "Motions"). Defendants argue that this Court may not exercise personal jurisdiction over them because they are non-resident parties who have not established sufficient "minimum contacts" with the State of Rhode Island. Defendants further contend that Plaintiff has not stated a claim for relief in her Amended Complaint because they have never produced or sold asbestos or asbestos-containing products. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Souza, a Massachusetts resident, worked for Blount Marine Corporation ("Blount"), a Rhode Island corporation with its principal place of business in Warren,

[1] The six Defendants are Casco Bay Lines a/k/a Casco Bay Island Transit District, Champion's Auto Ferry, Inc., Lake Champlain Transportation Co., Fire Island Ferries, Inc., Fishers Island Ferry District, and Soo Locks Boat Tours. Because their Motions to Dismiss are nearly identical in structure and language, this Court shall address Defendants' claims together.

Rhode Island, from 1952 until 1993 as a welder, carpenter, finisher, crane operator, and yard foreman. Throughout its existence, Blount has specialized in the construction, maintenance, and repair of a variety of water-going vessels. Defendants are all non-resident businesses providing ferry, shuttle, and other water-based transportation services to local residents. All six Defendants purchased at least one passenger boat from Blount during Souza's term of employment there.

Plaintiff alleges that when ordering boats from Blount, Defendants specified the use of asbestos and asbestos-containing products in the boats. Plaintiff alleges that Defendants made such specifications, despite knowing of the dangers that the asbestos products presented to Blount's workforce as foreseeable users of those products. As such, Plaintiff claims that Defendants owed duties of care to Blount's employees, including Souza, to warn them of the dangers of working with asbestos and to avoid exposing them to those dangers. Plaintiff claims that Defendants breached these duties by failing to label the asbestos products with proper warnings and handling instructions, failing to inform Souza of the dangers of working with asbestos, and negligently exposing Souza to asbestos in the first instance. Such misconduct, Plaintiff alleges, also subjects Defendants to strict products liability pursuant to the Restatement (Second) of Torts § 402A (1965).

Plaintiff alleges that Defendants expressly and impliedly warranted that the asbestos products were safe and of merchantable quality by specifying their use in the boats. Plaintiff claims that Defendants made these warranties knowing that the products were defective and dangerous to humans. Accordingly, Plaintiff alleges that Defendants

breached the warranties because the asbestos products were, in fact, "inherently dangerous" and unsuitable for use by humans.

As the result of Defendants' alleged misconduct, Plaintiff claims that Souza was exposed to, and breathed in, asbestos fibers, thereby contracting malignant mesothelioma and other asbestos-related diseases. Plaintiff maintains that Souza suffered physical and financial injuries and eventually died from his sickness. Plaintiff seeks compensatory and punitive damages from Defendants as redress for their alleged misconduct and Souza's wrongful death.

Plaintiff filed this action on September 17, 2009, and Defendants responded with the instant Motions. Defendants argue that this Court should dismiss Plaintiff's claims against them on two grounds. Defendants contend that they are all out-of-state parties with insufficient "minimum contacts" with Rhode Island. Defendants also assert that Plaintiff has failed to state any claim against them upon which relief may be granted. Specifically, Defendants argue that they owed Souza no duty to warn or duty of care as a matter of law because they did not produce any asbestos or asbestos-containing products. Defendants contend that they cannot be liable in strict products liability or for breach of any warranties because they are not asbestos "sellers" or "manufacturers" within the meaning of the applicable statutes. As such, Defendants assert that they cannot be liable for Souza's wrongful death because they did not engage in any negligent actions or other misconduct directed at Souza.

II

Motion to Dismiss for Lack of Personal Jurisdiction

A

Standard of Review

When ruling on a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), a Rhode Island court must "examine the pleadings, accept the facts alleged by the plaintiff as true, and view disputed facts in the light most favorable to the plaintiff." Cassidy v. Lonquist Management Co., LLC, 920 A.2d 228, 232 (R.I. 2007) (citing Cerberus Partners, L.P. v. Gadsby & Hannah, LLP, 836 A.2d 1113, 1117 (R.I. 2003)). The reviewing court may also examine "affidavits and discovery to establish the jurisdictional facts." Ben's Marine Sales v. Sleek Craft Boats, 502 A.2d 808, 810 (R.I. 1985). In ruling on Defendants' Motions, this Court examines Plaintiff's Amended Complaint and Answers to Interrogatories along with the parties' affidavits.

B

Personal Jurisdiction in Rhode Island

Our Supreme Court has held that "to withstand a defendant's Rule 12(b)(2) motion to dismiss a complaint for lack of in personam jurisdiction, a plaintiff must make out a prima facie case of jurisdiction." Cerberus Partners, L.P, 836 A.2d at 1118 (citing Ben's Marine Sales, 502 A.2d at 809). A plaintiff establishes a prima facie case of personal jurisdiction only when two requirements are met: "the complainant [must] allege facts sufficient to satisfy the requirements of Rhode Island's 'long-arm' statute, and [must demonstrate] that the court's exercise of personal jurisdiction comports with the requirements of constitutional due process." Rose v. Firstar Bank, 819 A.2d 1247, 1250

(R.I. 2003); Casey v. Treasure Island at the Mirage, 745 A.2d 743, 744 (R.I. 2000); Ultra Scientific, Inc. v. Yanusas, 687 A.2d 1247, 1248-49 (R.I. 1997). (Emphasis added.)

1

Rhode Island's "Long-arm" Statute

Rhode Island's "long-arm" statute is codified in G.L. 1956 § 9-5-33(a).[2] "'[Section] 9-5-33(a) permits the exercise of jurisdiction over nonresident defendants to the fullest extent allowed by the United States Constitution.'" Cerberus Partners, L.P, 836 A.2d at 1118 (quoting Rose, 819 A.2d at 1250); see also Conn v. ITT Aetna Finance Co., 105 R.I. 397, 402, 252 A.2d 184, 186 (1969). Therefore, the existence of personal jurisdiction in a given case often turns on whether the requirements of constitutional due process have been met. E.F. Hutton & Co., Inc. v. Tourism & Development Corp., 455 F. Supp. 981, 983 (D.R.I. 1978); Porter v. Porter, 684 A.2d 259, 262 (R.I. 1996) (citing Nicholson v. Buehler, 612 A.2d 693, 696 (R.I.1992)).

[2] Section 9-5-33(a) provides:

> "Every foreign corporation, every individual not a resident of this state or his or her executor or administrator, and every partnership or association, composed of any person or persons not such residents, that shall have the necessary minimum contacts with the State of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitutions or laws of the United States."

2

Constitutional Due Process Requirements

A Rhode Island court's exercise of personal jurisdiction comports with the requirements of constitutional due process when the plaintiff demonstrates that the defendant has "'certain minimum contacts with the forum such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Rose, 819 A.2d at 1250 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)); see also Kalooski v. Albert-Frankenthal AG, 770 A.2d 831, 832-33 (R.I. 2001); Casey, 745 A.2d at 744; Ben's Marine Sales, 502 A.2d at 809. Moreover, "there are no 'readily discernable guidelines for determining what are 'minimum contacts' for the purposes of the long-arm statute.'" Cassidy, 920 A.2d at 232 (quoting ITT Aetna Finance Co., 105 R.I. at 402, 252 A.2d at 187); see also Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995) (quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994) and acknowledging that "'divining personal jurisdiction is 'more an art than a science'"). Rather, the reviewing court must consider the particular facts of the case at hand to determine "the 'quality and quantity of the potential defendant's contacts with the forum.'" Rose, 819 A.2d at 1250 (quoting Philips Exeter Academy v. Howard Phillips Fund, Inc., 916 F.3d 284, 288 (1st Cir. 1999)); see also Cassidy, 920 A.2d at 232.

i

"Minimum Contacts"

A plaintiff satisfies the "minimum contacts" requirement by "alleg[ing] and prov[ing] the existence of either general or specific jurisdiction." Cassidy, 920 A.2d at 232 (citing Cerberus Partners, L.P, 836 A.2d at 1118). General jurisdiction exists when

the plaintiff establishes that the defendant's "contacts with the forum state are continuous, purposeful, and systematic." Cassidy, 920 A.2d at 232; Rose, 819 A.2d at 1250. When the plaintiff demonstrates that such contacts exist, "'a nonresident defendant will subject itself to the general jurisdiction of that forum's courts with respect to all claims, regardless of whether they relate to or arise out of the nonresident's contacts with the forum.'" Cerberus Partners, 836 A.2d at 1118 (quoting Rose, 819 A.2d at 1250); see Cassidy, 920 A.2d at 232.

Specific jurisdiction exists when the plaintiff demonstrates that "'the claim sufficiently relates to or arises from any of a defendant's purposeful contacts with the forum." Cassidy, 920 A.2d at 232 (quoting Rose, 819 A.2d at 1251). The reviewing court must consider two prongs to determine whether the plaintiff has demonstrated the existence of specific personal jurisdiction in a given case: the plaintiff's claims must "relate" to the defendant's specific contacts with the forum, and the defendant must have "purposefully" created those specific contacts between itself and the forum. See Sawtelle, 70 F.3d at 1389; Am. Jur. Products Liability § 1537 at 1 ("in order to determine whether a nonresident defendant . . . has sufficient minimum contacts with the forum state . . . , the cause of action must arise out of an act done in the forum . . . by which the defendant purposefully availed itself of the privilege of conducting activities in the forum state").

"The relatedness [prong] is not met merely because a plaintiff's cause of action [arises] out of the general relationship between the parties; rather, the action must directly arise out of the specific contacts between the defendant and the forum state." Sawtelle, 70 F.3d at 1389. (Emphasis added.) The reviewing court should therefore focus "on 'the relationship among the defendant, the forum, and the litigation.'" Cerberus Partners, L.P,

836 A.2d at 1118 (quoting State of Maryland Central Collection Unit v. The Board of Regents for Education of the University of Rhode Island, 529 A.2d 144, 151 (R.I. 1987)).

Furthermore, the "purposeful" contacts prong requires that "the defendant performed 'some act by which it purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'"[3] Cassidy, 920 A.2d at 232 (quoting Rose, 819 A.2d at 1251); see also Cerberus Partners, L.P, 836 A.2d at 1119; Casey, 745 A.2d at 744. Our Supreme Court noted that the "cornerstones upon which the concept of purposeful availment rest are voluntariness and foreseeability." Cerberus Partners, L.P, 836 A.2d at 1121 (R.I. 2003) (citing Sawtelle v. Farrell, 70 F.3d 1381, 1391 (1st Cir. 1995)). "Voluntariness" in the personal jurisdiction context requires that "[t]he defendant's contacts with the forum state must . . . not [be] based on the unilateral actions of another party or a third person." Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 716 (1st Cir. 1996) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). "'The foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.'" Cerberus Partners, L.P, 836 A.2d at 1121 (quoting World-Wide Volkswagen Corp., 444 U.S. at 297).

[3] Our Supreme Court has held that even "'a single act having impact in and connection with the forum state can satisfy the minimum-contact test of International Shoe Co.,'" Rose, 819 A.2d at 1252 (quoting Ben's Marine Sales, 502 A.2d at 812); McKeeney v. Kenyon Piece Dye Works, Inc., 582 A.2d 107, 108-09 (R.I. 1990), so long as the act "does not represent a random or fortuitous event, and as long as it creates a connection with the forum substantial enough to give rise to the reasonable foreseeability of litigation within the forum." State of Maryland Central Collection Unit, 529 A.2d at 151.

ii

"Fair Play and Substantial Justice"

Finally, "once a court determines that a nonresident defendant purposefully established minimum contacts with [Rhode Island,] the court must consider whether the exercise of jurisdiction would offend fair play and substantial justice." State of Maryland Central Collection Unit, 529 A.2d at 151. With respect to the reasonableness of exercising personal jurisdiction, a reviewing court should employ the so-called "gestalt factors."[4] Id.; see also Cerberus Partners, L.P, 836 A.2d at 1121. A court should employ the "gestalt factors," however, only "when the question of personal jurisdiction is close, and then the balance may be tipped toward exercising personal jurisdiction if the balance of the factors shows that exercise to be reasonable."[5] Cerberus Partners, L.P, 836 A.2d 1122 (citing Sawtelle, 70 F.3d at 1394). Alternatively, when "the plaintiff does not establish the requisite minimum contacts . . . the gestalt factors should not be employed." Cerberus Partners, L.P, 836 A.2d at 1122.

C

Discussion

The parties agree that this Court lacks general personal jurisdiction over Defendants. Plaintiff argues, however, that this Court may properly assert specific

[4] The "gestalt factors" include "the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining the most effective resolution of the controversy, and the shared interest of the several states in furthering fundamental substantive social policies." Cerberus Partners, L.P, 836 A.2d at 1121.

[5] The Court has also recognized that the "gestalt factors" may "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Cerberus Partners, L.P, 836 A.2d at 1121 (quoting Burger King Corp., 471 U.S. at 477).

personal jurisdiction over Defendants. Plaintiff contends that Defendants established specific contacts with Rhode Island by purchasing passenger boats from Blount during Souza's term of employment there. Plaintiff further asserts that her five tort-based claims against Defendants arise directly from these contacts because she alleges that Souza contracted mesothelioma from exposure to asbestos while working on the boats that Defendants ordered. Therefore, Plaintiff maintains that there is a clear relationship among Souza, Defendants, and this litigation. Plaintiff further posits that Defendants' contacts with Blount are regular and robust enough to satisfy our state's "minimum contacts" requirement because such conduct demonstrates that Defendants "purposefully availed" themselves of the "privilege" of conducting business in Rhode Island. Plaintiff contends that this evidence supports the existence of specific personal jurisdiction over Defendants.

Defendants argue that this Court lacks specific personal jurisdiction over them. They maintain that they lack the requisite "minimum contacts" with this forum because their infrequent purchases of passenger boats from Blount over a forty-year span were sporadic and isolated events. Defendants aver that they have inculcated no other, more definite contacts with this state.[6] Defendants further assert that the boat purchases were so casual, in fact, that they could not have foreseen or anticipated any tort-based litigation

[6] For example, Casco Bay Lines emphasizes in its affidavit its lack of contacts with Rhode Island by averring that it has never operated ferry services, conducted any other business, been affiliated with any local business, sold any products, paid any taxes, or advertised or promoted its business in Rhode Island. (Mavodones Aff. at 1 ¶ 7; 2 ¶¶ 8, 12-14, 16.) Casco Bay Lines further avers that it maintains no offices in Rhode Island, does not own any property in Rhode Island, employs no employees in Rhode Island, or holds any bank accounts in this state. Id. at 2 ¶¶ 9-11, 15. The other five Defendants assert almost identical facts in their affidavits. See Sorrell Aff.; Anderson Aff.; Doherty Aff.; Bryson Aff.; Welch Aff.

arising out of them. Therefore, Defendants contend that as they have neither "conducted business" in Rhode Island nor "purposefully availed" themselves of Rhode Island's laws, this Court may not properly exercise specific personal jurisdiction over them.

1

Plaintiff Has Established a Prima Facie Case of Specific Personal Jurisdiction

At the outset, this Court finds that Plaintiff has alleged sufficient facts to satisfy § 9-5-33(a). In particular, Plaintiff alleges that all six Defendants are foreign corporations which have conducted business in Rhode Island. See Pl.'s Am. Compl. at 8 ¶ 2; see also Sorrell Aff. at 1 ¶ 2; Mavodones Aff. at 1 ¶ 2; Anderson Aff. at 1 ¶ 2; Doherty Aff. at 1 ¶ 2; Bryson Aff. at 1 ¶ 2; Welch Aff. at 1 ¶ 2. Thus, the success of Plaintiff's prima facie case rests on whether she can demonstrate that this Court's exercise of specific personal jurisdiction over Defendants meets the requirements of constitutional due process. See E.F. Hutton & Co., Inc., 455 F. Supp. at 983; Porter, 684 A.2d at 262 (citing Nicholson, 612 A.2d at 696); Cassidy, 920 A.2d at 232.

Plaintiff has shown that Defendants have the requisite "minimum contacts" with this state such that the exercise of specific personal jurisdiction is proper. Cassidy, 920 A.2d at 232. A plaintiff demonstrates that specific personal jurisdiction exists when the plaintiff shows that her claims "sufficiently arise from or relate to" the defendant's "purposeful contacts" with the forum state. Id.; Sawtelle, 70 F.3d at 1389. The reviewing court must therefore consider both whether the plaintiff's claims arise directly from the defendant's specific contacts with the forum, and whether the defendant "purposefully" created those specific contacts with the forum state. Sawtelle, 70 F.3d at 1389.

i

Relatedness

This Court finds that Plaintiff has demonstrated that her claims against Defendants "sufficiently relate" to Defendants' specific contacts with Rhode Island for this Court to exercise specific personal jurisdiction. See Cassidy, 920 A.2d at 232. The record reflects that Defendants' relevant contacts with Rhode Island are their collective purchase of various passenger boats from Blount during the time that Souza worked there.[7] The record further shows that Plaintiff's five tort-based claims arise directly from Defendants' purchase of boats from Blount. See Sawtelle, 70 F.3d at 1389. Plaintiff alleges that Defendants "contracted for" the use of asbestos and asbestos-containing products in the boats that they ordered from Blount and failed to warn Souza of the known dangers of working with and breathing dust from such products. See Pl.'s Am. Compl. at 9 ¶¶ 7-11. Plaintiff continues that Defendants owed duties of reasonable care to Souza to avoid exposing him to asbestos and asbestos-containing products, thereby breaching these duties when they "contracted for" the use of such products in the boats. Id. at 14 ¶¶ 29-31. Plaintiff alleges that Defendants' negligent acts also expose them to

[7] Souza was employed by Blount in various capacities from 1952 to 1993. (Pl.'s Obj. to Defs.' Mot. to Dismiss, Ex. A at 3.) Lake Champlain Transportation Company purchased seven boats from Blount during the relevant time period, in 1966, 1967, 1968, 1969, 1972, and 1981, respectively. (Sorrell Aff. at 2 ¶ 15.) Casco Bay Lines purchased one boat from Blount during the relevant time period, in 1987. (Mavodones Aff. at 2 ¶ 17.) Fire Island Ferries, Inc. purchased six boats from Blount during the relevant time period, in 1972, 1976, 1977, 1979, 1981, and 1984, respectively. (Anderson Aff. at 2 ¶ 14.) Fishers Island Ferry District purchased two boats from Blount during the relevant time period, in 1967 and 1977, respectively. (Doherty Aff. at 2 ¶ 14.) Champion's Auto Ferry, Inc. purchased two boats from Blount during the relevant time period, in 1967 and 1973, respectively. (Bryson Aff. at 2 ¶ 14.) Finally, Soo Locks Boat Tours purchased three boats from Blount during the relevant time period, in 1955, 1957, and 1959, respectfully. (Welch Aff. at 2 ¶ 13.)

strict products liability pursuant to the Restatement (Second) Torts § 402A. Id. at 15 ¶¶ 33-34. Plaintiff alleges that by affirmatively "contracting for" the use of asbestos and asbestos-containing products in the boats, Defendants expressly and impliedly warranted that such products were of merchantable quality and fit for their particular purposes, but Defendants breached these warranties because the asbestos and asbestos-containing products were "inherently dangerous" and unfit for any purpose. Id. at 15 ¶¶ 36-37; 16 ¶¶ 37-39. Finally, Plaintiff contends that this wrongful and negligent conduct subjects Defendants to liability for Souza's wrongful death. Id. at 29 ¶¶ 47-48.

These facts, taken together, demonstrate a distinct "'relationship among the defendant[s], the forum, and the litigation'" in this case. Ben's Marine Sales, 502 A.2d at 816 (finding that there was a clear "relationship among the defendant, the forum, and the litigation" in a breach-of-contract action between a Rhode Island plaintiff and an out-of-state defendant, where the contract required performance and payment in Rhode Island); cf. Rushmore Investment Advisors, Inc. v. Frey, 231 S.W.2d 524, 530 (Tex. App. 2007) (determining that there was no "relationship among the defendant, the forum, and the litigation," in part, because the contract underlying the plaintiff's claims "did not require performance in Texas"). Plaintiff therefore has shown that her claims against Defendants are "sufficiently related" to Defendants' specific contacts with this state to support the exercise of specific personal jurisdiction over Defendants. See McKeeney, 582 A.2d at 108-09; cf. Kalooski, 770 A.2d at 833-34.

ii

Purposeful Availment

This Court finds that Plaintiff has demonstrated that Defendants "purposefully availed" themselves of the privileges and benefits of Rhode Island's laws. See Cassidy, 920 A.2d at 232. Our Supreme Court has emphasized that a court should consider the "voluntariness" and "foreseeability" of a defendant's contacts with Rhode Island when determining whether the defendant "purposefully availed" itself of our state's laws. See Cerberus Partners, L.P, 836 A.2d at 1121 (citing Sawtelle, 70 F.3d at 1391). The "voluntariness" prong considers whether the defendant's contacts with the forum state are the product of the defendant's affirmative choices or were unilaterally induced or influenced by another party's actions. See Tak How Investments, Ltd., 94 F.3d at 716. The "foreseeability" prong focuses on whether the defendant's contacts with the forum "'are such that [the defendant] should reasonably anticipate being haled into court'" there. Cerberus Partners, L.P, 836 A.2d at 1121 (quoting World-Wide Volkswagen Corp., 444 U.S. at 297).

a

Voluntariness

This Court finds that Plaintiff has shown that Defendants "voluntarily" formed contacts with Rhode Island. The record evinces that all six Defendants purchased at least one boat from Blount over a span of approximately forty years. See Sorrell Aff. at 2 ¶ 15; Mavodones Aff. at 2 ¶ 17; Anderson Aff. at 2 ¶ 14; Doherty Aff. at 2 ¶ 14; Bryson Aff. at 2 ¶ 14; Welch Aff. at 2 ¶ 13. There is no evidence in the record, nor do Defendants argue, that these purchases from Blount amounted to anything other than affirmative

business arrangements. There is also no evidence in the record showing that Souza, Blount, or a third party unilaterally induced Defendants to purchase the boats. See Rose, 819 A.2d at 1255 (quoting Bendick v. Picillo, 525 A.2d 1310, 1312 (R.I. 1987) and recognizing that "'the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy" the voluntariness requirement). Therefore, this Court finds that Defendants' contacts with Rhode Island are "voluntary" because they reached out to Blount of their own free will. See Tak How Investments, Ltd., 94 F.3d at 716-717 (determining that the defendant's contacts with Massachusetts were voluntary because they constituted affirmative actions "unprompted" by any third party); M-R Logistics, LLC v. Riverside Rail, LLC, 537 F. Supp. 2d 269, 277-78 (D. Ma. 2008) (finding that the defendant's contacts with Massachusetts were voluntary because his regular communications with the plaintiff, a Massachusetts corporation, demonstrated "no element of surprise or involuntariness").

b

Foreseeability

Plaintiff has also demonstrated that Defendants' "'conduct and connection with [Rhode Island]'" is such that Defendants should have "reasonably anticipated" being haled into our courts. Cerberus Partners, L.P, 836 A.2d at 1121 (quoting World-Wide Volkswagen Corp., 444 U.S. at 297). The Defendants collectively purchased twenty-one boats from Blount during Souza's term of employment there. See Sorrell Aff. at 2 ¶ 15; Mavodones Aff. at 2 ¶ 17; Anderson Aff. at 2 ¶ 14; Doherty Aff. at 2 ¶ 14; Bryson Aff. at 2 ¶ 14; Welch Aff. at 2 ¶ 13. The record shows that five of the Defendants engaged in regular telephone and mail contact with Blount each time they contracted for and

purchased a boat. See Sorrell Aff. at 2 ¶ 18; Anderson Aff. at 2 ¶ 16; Doherty Aff. at 2 ¶ 16; Bryson Aff. at 2 ¶ 16; Welch Aff. at 2 ¶ 14. The sixth Defendant, who does not aver that it engaged in any mail or phone contact with Blount despite purchasing a boat from Blount in 1987, currently has an open contract with Blount for the construction of a new vessel. See Mavodones Aff. at 2 ¶¶ 17-18. Such conduct demonstrates that Defendants, individually and collectively, have "purposefully" engaged in a distinct pattern of conduct directed at Rhode Island's economy. See J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (U.S. 2011) (finding that the "foreseeability" analysis centers on "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct"); cf. Cassidy, 920 A.2d at 234 (holding that a nonresident defendant's contacts with Rhode Island were insufficient to support the exercise of specific personal jurisdiction because there was "no evidence that defendant engaged in any conduct suggesting that he reached out" to this state). This Court finds that such conduct was sufficiently regular and robust for Defendants to "reasonably anticipate" being haled into our state's courts for litigation arising from those contacts. See Adelson v. Hananel, 652 F.3d 75, 82-83 (1st Cir. 2011) (finding that the defendant, an out-of-state businessman who regularly communicated with a Massachusetts corporation during business dealings, should have "reasonably anticipated" litigation in Massachusetts because he engaged in a distinct "course of conduct" directed at Massachusetts); cf. Anderson v. Metropolitan Life Ins. Co., 694 A.2d 701, 703 (R.I. 1997) (finding that the defendant, a large corporate entity that shipped raw asbestos into the United States for general sale, did not direct any regular or

specific conduct toward Rhode Island and, thus, could not "reasonably anticipate" litigation here).

By affirmatively contracting with Blount, a Rhode Island corporation doing business in Rhode Island, for the construction and purchase of passenger boats, Defendants "conducted business" within this state. See McKeeney, 582 A.2d at 108-09 (recognizing that an out-of-state defendant who sold a piece of machinery to a Rhode Island company "conducted business" within Rhode Island); cf. Coia v. Stephano, 511 A.2d 980, 983 (R.I. 1986) (determining that out-of-state defendants, who merely presented show dogs at organized exhibitions and circulated their names in trade publications in this state, did not "conduct business" within Rhode Island for personal jurisdiction purposes). Defendants "invoke[ed] the benefits and protections" of Rhode Island's laws because Defendants could have sued Blount for non-performance or breach of the various contracts in which they entered. See Vencedor Manufacturing Co., Inc. v. Gougler Industries, Inc., 557 F.2d 886, 892 (1st Cir. 1977) (finding that "[t]he primary benefit any nonresident corporation seeks from the law of a foreign state is enforcement of the contracts it has made with that state's residents"). The evidence demonstrates that Defendants "'purposefully availed [themselves]" of our state's laws such that this Court's exercise of specific personal jurisdiction over them is proper. Cassidy, 920 A.2d at 233 (quoting Rose, 819 A.2d at 1251); Cerberus Partners, L.P, 836 A.2d at 1121.

Defendants argue that their contacts with Blount were insufficient for them to "reasonably anticipate" the possibility of facing tort litigation arising from those contacts. Defendants maintain that, at most, they could "reasonably anticipate" the potential for litigation based upon breach of contract or failure to tender payment. Defendants contend

that they did not "purposefully avail" themselves of Rhode Island's laws for the purposes of the instant action.

The United States Supreme Court has consistently emphasized that "[a]lthough it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require . . . this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." Burger King Corp., 471 U.S. at 474-76. Instead, the Court has focused its analysis on whether the defendant could "reasonably anticipate" litigation in any form, so long as such litigation "relates to" the defendant's contacts with the forum state. Id. at 472-73; see also Dall v. Kaylor, 163 Vt. 274, 276 (1995). It is enough, therefore, that Defendants could "reasonably anticipate" being sued in Rhode Island for some claim arising from their specific contacts with Blount. See Burger King Corp., 471 U.S. at 472-73; Dall, 163 Vt. at 276-77; Henry v. Sheffield, 749 F. Supp. 2d 3, 14-15 (D.R.I. 2010); Ben's Marine Sales, 520 A.2d at 816-17.

Defendants further argue that their contacts with Blount are too casual and few in number to amount to "purposeful availment" of the protections and benefits of Rhode Island's laws. Such contacts, they argue, constitute the type of "random, fortuitous" events that cannot stand as the basis for personal jurisdiction in this state.

It is true that Defendants' contacts with Blount number relatively few in the aggregate when spread over forty years. However, our Supreme Court has consistently found that even "'a single act having impact in and connection with the forum state can satisfy the minimum-contact test of International Shoe Co.'" so long as the other requirements for personal jurisdiction are met. Rose, 819 A.2d at 1252 (quoting Ben's

Marine Sales, 502 A.2d at 812); McKeeney, 582 A.2d at 108-09; State of Maryland Central Collection Unit, 529 A.2d at 151. (Emphasis added.) It is undisputed that all six Defendants purchased at least one boat from Blount during the relevant time period, see Sorrell Aff. at 2 ¶ 15; Mavodones Aff. at 2 ¶ 17; Anderson Aff. at 2 ¶ 14; Doherty Aff. at 2 ¶ 14; Bryson Aff. at 2 ¶ 14; Welch Aff. at 2 ¶ 13, and such purchases indisputably had economic impact in this state. Moreover, this Court has already determined that Plaintiff has fulfilled the "voluntariness" and "foreseeability" prongs of our state's "minimum contacts" requirement. See Cerberus Partners, L.P, 836 A.2d at 1121. As such, this Court finds that the evidence presented favors exercising specific personal jurisdiction over Defendants in this case. See McKeeney, 582 A.2d at 108-09 (finding personal jurisdiction when the defendant sold a single piece of machinery to a Rhode Island corporation twenty years before the litigation arose, because by that single act the defendant "purposefully availed" itself of Rhode Island's laws, and the plaintiff's injury arose from that sale).

2

This Court's Exercise of Specific Personal Jurisdiction Over Defendants Is Reasonable

Because Plaintiff has demonstrated that Defendants established the requisite "minimum contacts" with this state, this Court considers the reasonableness of exercising specific personal jurisdiction over Defendants. See Sawtelle, 70 F.3d at 1394; Sheffield, 749 F. Supp. 2d at 15. In so considering, this Court shall apply the "gestalt factors" to this case. See Cerberus Partners, L.P, 836 A.2d 1122 (citing Sawtelle, 70 F.3d at 1394, and holding that the "gestalt factors" should not be employed unless the plaintiff has first "established the requisite minimum contacts").

The first "gestalt factor" considered is the burden on the defendant of litigating in the chosen forum. See Sheffield, 749 F. Supp. 2d at 15-16. Here, the "burden" on Defendants of litigating in Rhode Island "falls far short of reaching constitutional significance" because Defendants have failed to proffer any evidence that pursuing this case in our state's courts is an undue burden. See Sawtelle, 70 F.3d at 1395 (recognizing that "defending in a foreign jurisdiction almost always presents some measure of inconvenience, and hence this factor becomes meaningful only where a party can demonstrate a 'special or unusual burden'"); Sheffield, 749 F. Supp. 2d at 15 (acknowledging same).

Whether Rhode Island has a strong interest in this litigation is the next factor for consideration. A state's "interest" in litigation is measured by "determin[ing] the extent to which the forum has an interest," not by "compar[ing] [its] interest to that of some other jurisdiction." Sawtelle, 70 F.3d at 1395. Our federal courts have recognized that states have a strong interest in "obtaining jurisdiction over a defendant who [allegedly] causes tortuous injury within its borders." Ticketmaster, 26 F.3d at 211. Here, Plaintiff alleges that Souza was exposed to asbestos and asbestos-containing products while working at Blount's Rhode Island facility as a result of Defendants' misconduct. (Pl.'s Am. Compl. at 9 ¶ 8). Plaintiff further claims that Souza developed malignant mesothelioma, suffered severe physical and financial injuries, and eventually died from this exposure. Id. at 10 ¶ 12; 11 ¶¶ 12-16; 29 ¶ 48. Clearly, Rhode Island has a strong interest in this case. See Sheffield, 749 F. Supp. 2d at 15-16.

Another "gestalt factor" is whether the plaintiff has a substantial "interest in obtaining relief" from a Rhode Island court. This factor is meant to "ensure that Plaintiff

is able to obtain 'convenient and effective relief.'" Id. at 16 (quoting Pritzker v. Yari, 42 F.3d 60, 64 (1st Cir. 1994)). Ordinarily, a court must "accord [a plaintiff's choice of forum] a degree of deference with respect to the issue of its own convenience." Sawtelle, 70 F.3d at 1395. Souza's injuries allegedly occurred in Rhode Island, see Pl.'s Am. Compl. at 8 ¶¶ 2, 6, so it is logical for Plaintiff to pursue litigation here. See Sheffield, 749 F. Supp. 2d at 16. Therefore, Rhode Island's courts provide Plaintiff with the most convenient and effective forum to obtain relief. See Sawtelle, 70 F.3d at 1395.

"[T]he shared interest of the several states in furthering fundamental substantive social policies," the final "gestalt factor" considered, also favors the reasonableness of exercising personal jurisdiction over Defendants in the instant matter. Cerberus Partners, L.P, 836 A.2d at 1121. In cases involving personal injury, courts have consistently held that "the most prominent [interstate] policy implicated is the ability of a state to provide a convenient forum for its residents to redress injuries inflicted by out-of-forum actors." Sawtelle, 70 F.3d at 1395 (citing Burger King Corp., 471 U.S. at 473); see also Sheffield, 749 F. Supp. 2d at 16 (acknowledging that "the court which is most concerned with a controversy should adjudicate the dispute"). Here, it is undisputed that Rhode Island has the strongest such interest because Souza was allegedly injured by non-resident defendants while working in Rhode Island for a Rhode Island corporation. See Sheffield, 749 F. Supp. 2d at 16.

In sum, an analysis of the "gestalt factors" demonstrates that both Plaintiff and the State of Rhode Island have a strong interest in adjudicating the instant dispute in this state's courts. Defendants have not proffered any evidence demonstrating that litigating in Rhode Island is a "special or unusual burden" for them. Thus, this Court finds that

exercising specific personal jurisdiction over Defendants is reasonable. See Sheffield, 749 F. Supp. 2d at 16; cf. Sawtelle, 70 F.3d at 1395-96.

III

Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted

A

Standard of Review

In Rhode Island, Super. R. Civ. P. 12(b)(6) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted."

Super. R. Civ. P. 12(b)(6). This rule "does not deal with the likelihood of success on the merits, but rather with the viability of a plaintiff's bare-bones allegations and claims as they are set forth in the complaint." Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 823 (R.I. 2005). Accordingly, "the sole function of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint." McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)) (internal quotations omitted). A Superior Court justice considering such a motion "must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor." Watson v. Fox, 44 A.3d 130, 134-35 (R.I. 2012) (quoting McKenna, 874 A.2d at 225). A Superior Court justice will grant a motion to dismiss, however, "[i]f it appears

beyond a reasonable doubt that the plaintiff would not be entitled to relief, under any facts that could be established." Id. at 135 (quoting McKenna, 874 A.2d at 225).

Moreover, when "matters outside the pleadings are presented to and not excluded by the court, [a motion to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56." Multi-State Restoration, Inc. v. DSW Properties, LLC, No. 2011-350-A., slip op. at 4 (R.I., filed January 10, 2013). In fact, "when the motion justice receives evidentiary matters outside the complaint and does not expressly exclude them in passing on the motion, then Rule 12(b)(6) specifically requires the motion to be considered as one for summary judgment." Id. (quoting Martin v. Howard, 784 A.2d 291, 298 (R.I. 2001)). (Emphasis added.) Our Supreme Court has therefore noted that "the better practice when ruling on [a 12(b)(6) motion] is for the trial court to state expressly on the motion whether it has excluded any extraneous matters from its consideration." St. James Condominium Assoc. v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996).

B

Discussion

Defendants move to dismiss this action because Plaintiff has failed to state any claim against them upon which relief may be granted. Specifically, Defendants contend that Plaintiff's failure-to-warn and negligence claims should be dismissed because Defendants are not asbestos producers or sellers who owed Souza a duty of care as a matter of law. Similarly, Defendants assert that they cannot be found liable under Rhode Island's strict products liability doctrine or for breach of any warranties because they are not product "sellers" or "manufacturers" within the meaning of § 402A and the

applicable warranty statutes. Defendants further contend that because they did not breach any duties of care owed to Souza or engage in any wrongful misconduct, they cannot be liable for Souza's wrongful death.

In response, Plaintiff posits that Rhode Island's procedural rules encourage a liberal form of notice pleading aimed at informing a defendant of a plaintiff's claims and affording the defendant enough information to prepare a defense. Plaintiff states that the content of her Amended Complaint comports with these rules and gives Defendants adequate notice of the substance of her claims against them.

All six Defendants have filed documents titled in pertinent part "Motion to Dismiss Pursuant to Rule 12(b)(6) . . . ." See Lake Champlain Transportation Co.'s Mot. to Dismiss; Casco Bay Lines' Mot. to Dismiss; Fire Island Ferries, Inc.'s Mot. to Dismiss; Fishers Island Ferry District's Mot. to Dismiss; Champion's Auto Ferry, Inc.'s Mot. to Dismiss; Soo Locks Boat Tours' Mot. to Dismiss. However, all six Defendants have also attached various affidavits to their memoranda of law in support of their motions to dismiss. See Lake Champlain Transportation Co.'s Mot. to Dismiss, Ex. A; Casco Bay Lines' Mot. to Dismiss, Ex. A; Fire Island Ferries, Inc.'s Mot. to Dismiss, Ex. A; Fishers Island Ferry District's Mot. to Dismiss, Ex. A; Champion's Auto Ferry, Inc.'s Mot. to Dismiss, Ex. A; Soo Locks Boat Tours' Mot. to Dismiss, Ex. A. Plaintiff did not attach these affidavits to her Amended Complaint, nor did she incorporate the affidavits into the Amended Complaint by reference. See Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) (finding that, while "[i]t is certainly true that documents attached to a complaint will be deemed incorporated therein by reference" and, as such, "a motion justice may properly consider and refer to such documents in

deciding a Rule 12(b)(6) motion," a motion justice may properly exclude such evidence in considering a Rule 12(b)(6) motion when the documents come from outside the complaint).

This Court declines to examine Defendants' "extraneous" affidavits. In considering Defendants' motions to be Motions to Dismiss pursuant to Rule 12(b)(6), not motions for summary judgment pursuant to Super. R. Civ. P. 56, see Lokey, 676 A.2d at 1346, this Court will review only Plaintiff's Amended Complaint. This Court will "assume that all allegations in the complaint are true, and resolve any doubts in [the] plaintiff's favor." Fox, 44 A.3d at 134-35 (quoting McKenna, 874 A.2d at 225). In her Amended Complaint, Plaintiff claims failure to warn, negligence, strict products liability, breach of express and implied warranties, and wrongful death. See Pl.'s Am. Compl. at 8 ¶¶ 3-27; 14 ¶¶ 28-32; 15 ¶¶ 33-37; 16 ¶¶ 38-39; 29 ¶¶ 47-48.

1

Failure-to-Warn

"[T]he standard for failure to warn is equivalent to the standard for negligence" in Rhode Island. Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 782 (R.I. 1988). This Court must determine whether Plaintiff has properly alleged a claim for failure-to-warn under our state's negligence standard. See id. at 782-83; Raimbeault v. Takeuchi Manufacturing, Ltd., 772 A.2d 1056, 1063 (R.I. 2001).

"'[A] plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage'" to properly set forth a negligence claim. Santana v. Rainbow Cleaners, 969 A.2d 653, 658 (R.I. 2009) (quoting Willis v. Omar, 954 A.2d

126, 129 (R.I. 2008)). "[A] defendant cannot be liable under a negligence theory unless the defendant owes a duty of care to the plaintiff and that duty has been breached." Mallette v. Children's Friend and Service, 661 A.2d 67, 70 (R.I. 1995).

"Whether a defendant is under a legal duty in a given case is a question of law." Santana, 969 A.2d at 658 (citing Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005)); Builders Specialty Co. v. Goulet, 639 A.2d 59, 60 (R.I. 1994). In the failure-to-warn context, "the defendant only has a duty to warn if he had reason to know about the product's dangerous propensities which caused plaintiff's injuries." Thomas v. Amway Corp., 488 A.2d 716, 722 (R.I. 1985). The defendant need only warn of those dangers which are "reasonably foreseeable." Id. Such knowledge may be actual or constructive. Castrignano, 546 A.2d at 782. When the defendant fails to warn of "reasonably foreseeable" and knowable dangers, the defendant has breached the duty of care and "the product is rendered defective." Raimbeault, 772 A.2d at 1063.

After considering the facts in a light favorable to Plaintiff, this Court finds that Plaintiff has properly alleged a claim for failure-to-warn against Defendants. See Gray v. Derderian, 472 F. Supp. 2d 172, 178-79 (D.R.I. 2007). Concerning the duty to warn, Plaintiff alleges that Defendants had actual knowledge of the "inherently dangerous" nature of working with and breathing in the fibers of asbestos and asbestos-containing products. (Pl.'s Am. Compl. at 11 ¶ 17; 12 ¶¶ 21-24.) Plaintiff specifically alleges that Defendants derived such knowledge from medical literature beginning in the late 1920s; according to Plaintiff, this knowledge was comprehensive enough to "conclusively establis[h] that asbestos and asbestos-containing products were hazardous to the health and safety of [Souza] and all humans exposed to the products." Id. at 12 ¶ 22. As such,

Plaintiff claims that Defendants owed Souza and others a duty to warn them of the dangers of working with, and breathing in, the fibers of asbestos and asbestos-containing products because they "contracted for, mined, milled, processed, manufactured, designed, tested, assembled, fashioned, fabricated, packaged, supplied, distributed, delivered, marketed, and sold" such products to Souza and Blount. Id. at 12 ¶ 25; 13 ¶¶ 25-26. These allegations are sufficient to establish the existence of Defendants' duty to warn. See Derderian, 472 F. Supp. 2d at 178-79 (holding that the plaintiff properly alleged the existence of a duty to warn under Rhode Island law because the plaintiff claimed that the defendant knew of the dangerous propensities of its product); cf. Castrignano, 546 A.2d at 782 (dismissing the plaintiff's failure to warn claim on duty grounds because the plaintiff could not show that the defendant had any knowledge of the dangerous propensities of its product).

Plaintiff has also properly set forth the other three necessary elements of a negligence claim—breach of the duty of care, causation, and damages. See Mallette, 661 A.2d at 71-73. Specifically, Plaintiff alleges that Defendants breached the duty to warn when they failed to warn Souza of, among others, the dangerous nature of asbestos and asbestos-containing products and the diseases that Souza could contract from working with, and breathing in, the fibers of such products.[8] Id. at 13 ¶¶ 27(a),(b); 14 ¶ 27(i). Plaintiff claims that as a direct and proximate result of Defendants' breach, Plaintiff was exposed to and inhaled breathable asbestos fibers when working with the asbestos and

[8] Plaintiff also claims that Defendants breached the duty of care to Souza by failing—to inform him about using protective clothing and tools when working with asbestos and asbestos-containing products; package the products in properly sealed containers; label these containers with warnings; and, specify non-asbestos products in their boat orders. (Pl.'s Am. Compl. at 13 ¶¶ 27(c)-(e); 14 ¶¶ 27(e)-(h).)

asbestos-containing products. Id. at 8 ¶¶ 4-6; 9 ¶ 8. Lastly, Plaintiff alleges that Souza contracted mesothelioma and other asbestos-related diseases as a result of this exposure, thereby suffering permanent, painful physical and mental injuries, losing earning potential, incurring substantial medical expenses, and, ultimately, dying. Id. at 10 ¶ 12; 11 at ¶¶ 12-16. Plaintiff seeks compensatory and punitive damages and interest and fees to redress Defendants' alleged failures. Id. at 29. Taken together, these allegations are sufficient to establish the necessary elements of a negligence claim in Rhode Island. See Mallette, 661 A.2d at 71-73 (finding that the plaintiffs properly set forth a negligent misrepresentation claim because they pled the four elements of negligence required in Rhode Island); Castrignano, 546 A.2d 782. Accordingly, this Court finds that Plaintiff's claim for failure to warn survives dismissal. See Hyatt, 880 A.2d at 824; Lokey, 676 A.2d at 1346-47; Thompson v. Thompson, 495 A.2d 678, 680-82 (R.I. 1985).

2

Negligence

A plaintiff must set forth four elements to properly allege a negligence claim in Rhode Island—a legal duty, breach of that duty, causation, and damages. Santana, 969 A.2d at 658. Because it is a "fundamental principle of tort law . . . that 'a defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff,'" id. (quoting Benaski v. Weinberg, 899 A.2d 499, 502 (R.I. 2006)), it "follows that a duty owed by [the defendant] to [the plaintiff] must first be identified in order for [the defendant] to be liable to [the plaintiff]." Gagnon v. State, 570 A.2d 656, 658 (R.I. 1990).

The existence of a legal duty is a matter of law. Santana, 969 A.2d at 658; Goulet, 639 A.2d at 60. Yet, "[t]here is no clear-cut formula to determine whether a duty exists in a specific case." Santana, 969 A.2d at 658 (quoting Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009)). Instead, our Supreme Court has consistently "employ[ed] an ad hoc approach that 'turns on the particular facts and circumstances of a given case.'" Santana, 969 A.2d at 658 (quoting Benaski, 899 A.2d at 502). This approach considers "'all relevant factors, including the relationship between the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy concerns, and the foreseeability of harm to the plaintiff.'" Santana, 969 A.2d at 658 (quoting Selwyn v. Ward, 879 A.2d 882, 887 (R.I. 2005)).[9]

This Court finds that Plaintiff has properly pled a claim for negligence against Defendants. See Mallette, 661 A.2d at 71-73. Plaintiff alleges that Defendants knew of the dangers of exposure to asbestos and asbestos-containing products beginning decades before they purchased any boats from Blount. (Pl.'s Am. Compl. at 12 ¶¶ 21-24.) Plaintiff further alleges that Souza, a Blount employee who worked on the boats, was a foreseeable user and consumer of these asbestos products. Id. at 14 ¶ 29. Therefore, Plaintiff claims that Defendants were under a duty to avoid exposing Souza to the dangers of such products because Defendants knew that Blount's employees would come into contact with the products when Defendants ordered the boats. Id. at 14 ¶ 30. These allegations, taken in a light favorable to Plaintiff, properly set forth Defendants' duty of care at this stage of the litigation. See Derderian, 472 F. Supp. 2d at 177-78 (finding that

[9] The Court has also "long recognized that a person's actions, whether by word or deed, may create a duty of care to the plaintiff where none previously existed." Mallette, 661 A.2d at 70. (Emphasis in original.)

the plaintiff properly alleged the existence of the defendant's duty of care at the motion-to-dismiss stage because the plaintiff's allegations made "sufficient reference to the danger of [the] product and the foreseeability of its use . . . that [the defendant] is adequately advised of the parameters of the cause of action it faces").

Because Plaintiff has re-alleged and incorporated allegations of breach, causation, and damages from her failure-to-warn count into her negligence count, this Court finds that Plaintiff has properly alleged all four elements of a negligence claim. See id. at 182 (recognizing that a plaintiff may "incorporate" the allegations of one claim into another claim so long as both claims' requirements "overlap significantly"); Mallette, 661 A.2d at 71-73. Therefore, Plaintiff's negligence claim survives dismissal. See Hyatt, 880 A.2d at 824; Lokey, 676 A.2d at 1346-47; Thompson, 495 A.2d at 680-82.

3

Strict Products Liability

The doctrine of strict products liability is set forth in the Restatement (Second) Torts § 402A (1965).[10] To properly plead a claim under this doctrine, a plaintiff must

[10] Our Supreme Court formally adopted § 402A in Ritter v. Narragansett Electric Co., 109 R.I. 176, 192, 283 A.2d 255, 263 (1971). Section 402A provides in pertinent part:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although

allege facts sufficient to show that the defendant "[sold the] product in a 'defective condition unreasonably dangerous,' . . . 'the [defendant] is engaged in the business of selling such a product,' and . . . the product 'is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.'" Olshansky v. Rehrig Int'l, 872 A.2d 282, 287 (R.I. 2005) (quoting Ritter, 109 R.I. at 188, 283 A.2d at 261); see Derderian, 472 F. Supp. 2d at 181-82. Furthermore, "the plaintiff has the burden of proving . . . that the plaintiff's injury was proximately caused by this defect." Olshansky, 872 A.2d at 287 (quoting Thomas, 488 A.2d at 722).

Plaintiff alleges that Defendants were engaged in the business of "contract[ing] for, min[ing], mill[ing], process[ing], manufactur[ing], design[ing], test[ing], assembl[ing], fashion[ing], fabricat[ing], package[ing], suppl[ying], distribut[ing], deliver[ing], market[ing], and [selling]" the asbestos and asbestos-containing products that Souza was exposed to. (Pl.'s Am. Compl. at 9 ¶ 9.) Plaintiff alleges that Defendants expected the products to, and the products did, in fact, reach Souza and Blount "without any substantial change in their condition from the time they were sold." Id. at 8 ¶ 2; 9 ¶ 10. Plaintiff claims that these products were defective because they were "inherently dangerous" and lacked proper warnings and instructions. Id. at 9-10 ¶ 11. As a direct and proximate result of exposure to these "inherently dangerous" products, Plaintiff alleges that Souza developed malignant mesothelioma, suffered physical and financial injuries, and ultimately died as a result. Id. at 8 ¶¶ 4-5; 10-11 ¶ 12; 11 ¶¶ 13-16.) These allegations are sufficient to properly plead a claim under this state's strict products

---

> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

liability doctrine. See Derderian, 472 F. Supp. 2d at 181-82 (holding that the plaintiff properly pled a claim for strict products liability because the plaintiff alleged that the defendant's product was defective, "unsuitab[le] for use," and caused the plaintiff's injuries); Olshansky, 872 A.2d at 287; Ritter, 109 R.I. at 188, 283 A.2d at 261. Plaintiff's strict products liability claim survives dismissal in the instant matter. See Hyatt, 880 A.2d at 824; Lokey, 676 A.2d at 1346-47; Thompson, 495 A.2d at 680-82.

4

Breach of Express Warranties

The elements of a claim for breach of an express warranty in Rhode Island are found in G.L. 1956 § 6A-2-313.[11] With respect to § 6A-2-313, "[t]he plaintiff who

[11] Section 6A-2-313 provides:

> "Express warranties by affirmation, promise, description, sample.
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's

claims breach of express warranty has the burden of [pleading and] proving that the statements or representations made by the seller induced her to purchase that product and that she relied upon such statements or representations." Thomas, 488 A.2d at 720.

Plaintiff alleges that Defendants "expressly . . . warranted that said asbestos materials and products were of merchantable quality, fit and safe . . . as set out in their sales brochures, manuals and written warranties accompanying or preceding sales and distribution of their products . . . ." (Pl.'s Am. Compl. at 15 ¶ 36.) Importantly, however, Plaintiff has not pled that such warranties formed the "basis" of any bargain between Souza and Blount and Defendants, induced Souza or Blount to purchase or use the asbestos products, or that Souza and Blount relied upon the warranties in any way. Nor has Plaintiff pointed to any specific asbestos-product-related advertisements or statements made by Defendants that affected Souza's and Blount's behavior toward the products. Plaintiff cannot properly set forth a breach of express warranty claim without including these allegations. See Smith v. Anheuser-Busch, Inc., 599 A.2d 320, 320-21 (R.I. 1991) (affirming the trial court's dismissal of the plaintiff's breach of express warranty claim because the plaintiff "failed to identify specific advertising he had seen and how it had affected him"); Thomas, 488 A.2d at 720 (finding that the Superior Court justice properly dismissed the plaintiff's claim for breach of express warranty because the plaintiff failed to show that she "made her bargain" based on any express warranty, or that any warranty existed in the first instance). Because Plaintiff would not be "entitled to relief" from her claim for breach of express warranties under "any set of facts that could be established," this Court finds that the claim must be dismissed. Fox, 44 F.3d at

---

> opinion or commendation of the goods does not create a warranty."

135; DeCiantis v. Rhode Island Dept. of Corrections, 840 A.2d 1090, 1092-93 (R.I. 2003).

5

Breach of Implied Warranties

a

Implied Warranty of Merchantability

Claims for breach of the implied warranty of merchantability in Rhode Island are governed by G.L. § 1956 § 6A-2-314.[12] "In order to establish liability for breach of the

[12] Section 6A-2-314 provides:

> "Implied warranty-Merchantability-Usage of trade.-
>
> (1) Unless excluded or modified (§ 6A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and

implied warranty of merchantability [in Rhode Island], a plaintiff must 'prove that the product is defective, that it was in a defective condition at the time it left the hands of the seller, and that said defect was the proximate cause of the injury.'" Marketing Design Source, Inc. v. Pranda North America, Inc., 799 A.2d 267, 272 (R.I. 2002) (quoting Lariviere v. Dayton Safety Ladder Co., 525 A.2d 892, 896 (R.I. 1987)); see Derderian, 472 F. Supp. 2d at 182. Accordingly, the implied warranty of merchantability "is breached when a product of fair average quality does not pass in the trade and is unfit for the ordinary purpose for which it is used . . . ." Thomas, 488 A.2d at 719.

Plaintiff alleges that Defendants "impliedly warranted" that the asbestos products were "of merchantable quality," and breached this warranty because Defendants failed to warn Souza and Blount of the products' dangerous propensities. (Pl.'s Am. Compl. at 15 ¶¶ 36-37; 16 ¶ 37.) Plaintiff further alleges that the asbestos products were defective because they were "inherently dangerous" and did not carry warnings describing their dangerous qualities or prescribing proper handling methods. Id. at 9 ¶ 11; 10 ¶ 11. Moreover, Plaintiff claims that the asbestos products bore these defects at the time they left Defendants' hands and "reached [Souza and Blount] without any substantial change in their condition from the time they were sold." Id. at 9 ¶ 10.

Plaintiff alleges that Souza contracted mesothelioma, suffered painful physical injuries and economic losses, and eventually died as a result of exposure to the defective asbestos products. Id. at 8 ¶¶ 4-6; 9 ¶ 8; 10 ¶ 12; 11 ¶¶ 12-16. Plaintiff claims that the

---

> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (§6A-2-316) other implied warranties may arise from course of dealing or usage of trade."

asbestos products "were not of merchantable quality, fit and safe for the purposes for which" Souza and Blount used them. Id. at 15 ¶ 37. Such allegations are sufficient to support a claim for breach of the implied warranty of merchantability in this state. See Derderian, 472 F. Supp. 2d at 182; Lariviere, 525 A.2d at 896-97 (holding that the plaintiff presented evidence sufficient to support a claim for breach of the implied warranty of merchantability when the plaintiff showed that the product contained a defect that proximately caused his injuries); cf. Thomas, 488 A.2d at 718-19 (finding that the plaintiff failed to present sufficient evidence supporting her claim for breach of the implied warranty of merchantability because the plaintiff could not prove that the allegedly defective product was the proximate cause of her injuries). This Court finds that Plaintiff's claim for breach of the implied warranty of merchantability survives dismissal. See Hyatt, 880 A.2d at 824; Lokey, 676 A.2d at 1346-47; Thompson, 495 A.2d at 680-82.

b

Implied Warranty of Fitness for a Particular Purpose

Section 6A-2-315 prescribes the requirements for properly pleading a claim for breach of the implied warranty of fitness for a particular purpose.[13] Our Supreme Court articulated that the "implied warranty of fitness for a particular purpose arises when the seller has reason to know the buyer's particular purpose and that the buyer is relying on

[13] Section 6A-2-315 provides in pertinent part:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

the seller's skill or judgment to furnish appropriate goods and the buyer relies on the seller's skill or judgment." Lariviere, 525 A.2d at 897. A "'dealer who sells articles which ordinarily are used in but one way impliedly warrants fitness for use in that particular way unless there is evidence to the contrary.'" Pranda North America, Inc., 799 A.2d at 272 (quoting Keenan v. Cherry & Webb, 47 R.I. 125, 129, 131 A.2d 309, 311 (1925)).

Plaintiff alleges that Defendants "warranted that said asbestos materials and products were . . . fit and safe for the purposes for which they were contracted for, mined, milled, processed, manufactured, designed, tested, assembled, fashioned, fabricated, packaged, supplied, distributed, delivered, marketed, sold, intended and used . . . ." (Pl.'s Am. Compl. at 15 ¶ 36.) Plaintiff does not allege or otherwise show, however, that Defendants knew or had reason to know of Souza's and Blount's "particular purpose" for the products. Plaintiff also fails to allege that Souza and Blount relied upon Defendants' "skill or judgment" in choosing the asbestos products. Such allegations are necessary elements of any claim for breach of the implied warranty of fitness for a particular purpose. See Smith, 590 A.2d at 320-21; Pranda North America, Inc., 799 A.2d at 272-73 (determining that the plaintiff failed to demonstrate breach of the implied warranty of fitness for a particular purpose because the plaintiff could not show that it intended to use the product for any particular purpose); Lariviere, 525 A.2d at 897 (finding similarly that the plaintiff failed to demonstrate breach of the implied warranty of fitness for a particular purpose because the plaintiff could not show that the defendant had reason to know of any particular use to which the allegedly defective product would be put, or that the plaintiff relied upon the defendant's "skill or judgment" in selecting the product).

Therefore, Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose must be dismissed because Plaintiff "would not be entitled to relief under any facts that could be established." Fox, 44 F.3d at 135; DeCiantis, 840 A.2d at 1092-93.

5

Wrongful Death

Rhode Island plaintiffs are afforded a statutory claim for wrongful death by G.L. 1956 § 10-7-1. This statute provides that:

> "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued shall be liable on an action for damages, notwithstanding the death of the person injured . . . ."

Sec. 10-7-1. The three requirements "for the existence of a right of action in wrongful death," Presley v. Newport Hospital, 117 R.I. 177, 180, 365 A.2d 748, 750 (1976), are

> "[t]here must be a person who has died . . . [t]he person must have died of injuries resulting from a wrongful act, neglect or default that would have conferred a right of action upon the person who died, had that person survived . . . [and] [t]he act, neglect, or default that caused the fatal injury must have been performed by another."

Id. at 180-81, 365 A.2d at 750.

Plaintiff alleges that Souza died as the result of contracting malignant mesothelioma and suffering serious accompanying injuries. (Pl.'s Am. Compl. at 29 ¶ 48.) Plaintiff further alleges that Souza contracted this disease and died because Defendants, among other wrongful acts, failed to warn Souza and Blount about the dangers of exposure to asbestos, id. at 9 ¶ 8; 10 ¶ 12; 11 ¶¶ 12-13, negligently exposed

Souza to asbestos, id. at 14 ¶¶ 28-31, breached Rhode Island's strict products liability doctrine, id. at 15 ¶¶ 33-34, and breached the implied warranty of merchantability.[14] Id. at 15 ¶¶ 36-37, 16 ¶¶ 37-39. Thus, Plaintiff has properly alleged the three necessary elements of a wrongful death claim in Rhode Island. See Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 325-26, 252 A.2d 176, 178-79 (1969). This Court finds that Plaintiff's wrongful death claim survives dismissal. See Hyatt, 880 A.2d at 824; Lokey, 676 A.2d at 1346-47; Thompson, 495 A.2d at 680-82.

IV

Conclusion

This Court finds that its exercise of specific personal jurisdiction over Defendants is proper. Plaintiff has alleged sufficient facts to satisfy our state's "long-arm" statute, and has also demonstrated that exercising specific personal jurisdiction over Defendants comports with constitutional due process. Specifically, Plaintiff has shown that Defendants, non-resident aquatic transportation businesses, established the requisite "minimum contacts" with this state because they voluntarily and affirmatively purchased passenger boats from Blount, a resident ship-building corporation, and therefore "purposefully availed" themselves of the privilege of "conducting business" in Rhode Island. An analysis of the "gestalt factors" demonstrates that exercising specific personal jurisdiction over Defendants is reasonable and appropriate.

[14] It is undisputed that Souza, had he lived, would have a right to bring the same claims against Defendants that Plaintiff properly sets forth in her Amended Complaint. See, e.g., Thomas, 488 A.2d at 722 (failure-to-warn); Santana, 969 A.2d at 658 (negligence); Ritter, 109 R.I. at 192, 283 A.2d at 263 (strict products liability); Lariviere, 525 A.2d at 896-97 (implied warranty of merchantability).

Plaintiff has alleged sufficient facts in her Amended Complaint to properly set forth claims against Defendants for failure-to-warn, negligence, strict products liability, breach of the implied warranty of merchantability, and wrongful death. This Court further finds that Plaintiff has failed to properly set forth the necessary elements of claims for breach of express warranties and breach of the implied warranty of fitness for a particular purpose. Accordingly, this Court grants Defendants' Motions in part and denies them in part.

Counsel shall prepare an appropriate Order for entry.