

The plaintiff suffers from a latex allergy allegedly caused by occupational exposure to NRL gloves. NRL gloves are medical devices under the Federal Food, Drug & Cosmetic Act (“FDCA”), 21 U.S.C. § 301 et seq. (1994). Latex is known to contain certain allergens.¹ The defendants argue that this is not an occupational exposure case. Even if this is an occupational exposure case, defendants assert it is neither an asbestos nor a toxic tort case and the court should apply the traditional substantial factor causation test. On the other hand, the plaintiffs contend that this is an occupational exposure case and the court should apply the frequency, regularity and proximity test. The court must determine which causation standard to apply before examining the proofs submitted in opposition to summary judgment.

New Jersey courts have followed the substantial factor test derived from The Restatement (Second) of Torts § 431 in failure to warn products liability cases. See Molino v. B.F. Goodrich Co., 261 N.J. Super. 85, 98 (App. Div. 1992), certif. den. 134 N.J. 482 (1993); see also Graves v. Church & Dwight Co., Inc., 267 N.J. Super. 445, 464 (App. Div. 1993), certif. den. 134 N.J. 566 (1993). However, in Sholtis v. American Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989), Judge Dreier utilized a frequent, regular and proximate test to analyze causation in a strict liability asbestos case. More recently, in James v. Bessemer Processing Co., Inc., 155 N.J. 279 (1998), the New Jersey Supreme Court recognized and endorsed the use of the frequent, regular and proximate test for causation in the occupational exposure, toxic tort setting. The Court found that in occupational exposure cases, plaintiffs are confronted with multiple exposures, multiple products, and long latency periods. Id. at 300. Since these factors make it unusually difficult to prove causation, the Court adopted the frequent, regular, and proximate test. Ibid. Furthermore, “[s]ince proof of direct contact is almost always lacking . . . courts must rely upon circumstantial proof of sufficiently intense exposure to warrant liability.” Sholtis, supra at 29.

¹NRL is manufactured from a variety of plants, but mainly from the rubber tree, *Hevea brasiliensis*. The milky fluid from the tree contains variable amounts of proteins which may be absorbed through the skin or inhaled. One or more of the proteins may cause allergic reactions in susceptible workers.

For the reasons set forth below, this court **DENIES** the defendants' motion for summary judgment. Plaintiff, through her expert witnesses, has presented genuine issues of material fact with respect to proximate and medical causation. This court also holds that a plaintiff may satisfy the burden of proof with respect to medical causation by showing that frequent, regular and proximate exposure to allergens contained in a product used in the workplace was a cause of plaintiff's injuries.

II. BACKGROUND

A. NRL Gloves

Consumers have used latex gloves for decades. The most frequent users include food merchants, beauty care personnel, and healthcare professionals. Until the last decade, healthcare workers used latex gloves, but not for the prolonged lengths of time or with the regularity with which the gloves are now used. The advent of HIV and other blood-borne pathogens, such as hepatitis, caused healthcare workers to dramatically increase their use of latex gloves as a barrier to potential infections.

In 1987, The Center for Disease Control ("CDC") recommended employing so-called "Universal Precautions." See Recommendations for Prevention of HIV Transmission in Health Care Settings, CDC August 21, 1987, 36 (SU02), 001. The Universal Precautions provided:

Since medical history and examinations cannot reliably identify all patients infected with HIV or other blood-borne pathogens, blood and body fluid precautions should be consistently used for all patients. This approach, previously recommended by CDC (3, 4), and referred to as 'universal blood and body fluid precautions' or 'universal precautions' should be used in the care of ALL patients especially including those in emergency cases in which the risk of blood exposure is increased and the infection status of patients is usually unknown.

1. All healthcare workers should routinely use appropriate barrier precautions to prevent skin mucous-membrane exposure when contact with blood or other body fluids of any patient is anticipated. Gloves should be worn for touching blood or other body fluids, mucous-membranes or non-intake skin of all patients, for handling items or surfaces soiled with blood or body fluids, and for performing vein puncture and other valve access procedures. Gloves should be changed after contact with each patient. . .
[Ibid.]

In 1992, the Occupational Safety and Health Administration ("OSHA") required employers to take protective measures for employees, including the provision of latex gloves. See 29 C.F.R.

§ 1910.1030 et seq. The increased use of NRL gloves as a barrier by health care workers in close contact with patients was evident in the 1990's. By one estimate, 2.5 billion medical gloves were imported to the United States in 1985. See Caryle Murphy, "Latex Sensitivity: A Growing Reaction Especially Among Health-Care Workers," Philadelphia Inquirer, Sept. 2, 1996. By 1995, the figure was 15.4 billion. Ibid. An estimated 20.8 billion medical gloves were imported into the U.S. in 1996. See U.S. Food and Drug Administration-Center for Devices and Radiologic Health, "Medical Glove Powder Report," September 1997.

Reports of allergic reactions to latex products arose simultaneously with increased use. The FDA, latex glove manufacturers, and trade associations such as the Health Industry Manufacturers Association ("HIMA") were aware of the allergy problems inherent to NRL products. The defendants contend that the FDA developed a labeling policy for latex products which was in the best interest of the public. However, the FDA never promulgated an official regulation. Meanwhile, the manufacturers refrained from voluntarily placing warnings on the gloves or their packaging. Until 1998, the only warning given was a general notice that "this product contains natural latex rubber."

The defendants further contend that the FDA did not want glove manufacturers to provide latex content labeling on their packaging and other educational materials. An "informal directive" was communicated to the industry which resulted in Johnson & Johnson ("J & J") adding latex content labeling to its gloves in 1992. Moreover, J & J began to distribute educational information, videotapes, and study guides on latex allergy to its sales representatives as part of an educational program. As for defendant Smith & Nephew ("SN"), the record remains unclear as to what remedial actions, if any, it took during the same period.

B. Government Regulation

The FDA's authority to regulate medical devices is derived from the FDCA, 21 U.S.C. §§ 321-392. The FDCA was passed in 1938 pursuant to Congress's broad constitutional authority to regulate interstate commerce. Pursuant to FDCA 21 U.S.C. § 321(h), a medical device is:

. . . any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or similar or a related article, including any component, part or accessory, which is (1) recognized in the official National Formulary. . . (2) intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment or prevention of disease. . . or (3) intended to affect the structure or any function of the body. . .

Both surgical gloves, see 21 C.F.R. § 878.4460, and medical gloves, see 21 C.F.R. § 880.6250, are medical devices covered by the FDCA. In 1976, Congress amended the FDCA when it recognized the need to regulate medical devices before their distribution. See Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended in scattered sections of 21 U.S.C.). The amendments expanded the FDA's regulatory power. The FDA could require pre-market review of certain medical devices, including requiring 510(k) premarket notification to the FDA for significant changes in the labeling or intended use of the device.

Under the 1976 Amendments, the FDA divided medical devices into three categories. See 21 U.S.C. §360(k). All medical devices are categorized as Class I, Class II, or Class III. The classifications are based on the risk of harm to the public. See Roger W. Bivans, "Substantially Equivalent? Federal Preemption of State Common Law Claims Involving Medical Devices," 74 Tex. L. Rev. 1087, 1090 (April, 1996). Latex medical examination gloves and surgical gloves were originally both Class I devices. Class I includes devices to which General Controls "are sufficient to provide reasonable assurance of safety and effectiveness," are not to be used in "supporting or sustaining life, " and present no "unreasonable risk of illness or injury." Ibid. (citing 21 U.S.C. § 360(c)(1)(A) (1994)). Section 510(k) premarket notifications were required for surgical gloves, as well as compliance with the Good Manufacturing Practice ("GMP") regulations, but medical examination gloves were exempt from these two General Controls. Other Class I devices include tongue depressors and crutches.

In 1989, the FDA revoked the exemption for medical examination gloves from submission of pre-market 510(k) notifications and compliance with Good Manufacturing Practices (GMP) regulations. See 54 Fed. Reg. 1602, 1604 (Jan. 13, 1989). In July 1999, the FDA began to reclassify NRL gloves as a Class II device. See DHHS, FDA Administration, 21 C.F.R. Parts 801, 878, 880.

This new classification subjected latex gloves to various controls. The new controls included performance standards, post-marketing surveillance, and other guidelines. The FDA also recommended that protein content, glove powder content, and caution statements be contained on labels. See Natural Rubber-Containing Medical Devices; User Labeling, 62 Fed. Reg. 51021-51030 (1997). From this initiative, it is clear that FDA sought to enhance the labeling requirements for NRL products. Moreover, the court notes that at least ten states have proposed legislation to control or ban the use of NRL gloves in the occupational setting.²

C. Latex Allergies

The plaintiff making a claim based on exposure to latex in the course of a healthcare career, in this case nursing, theorizes that the protein in latex rubber, and perhaps the gloves' powder content causes an allergic reaction. NRL gloves contain natural rubber. The proteins within the rubber are thought to cause reactions in some people. One estimate puts the allergic reactions of the general population between 1% and 6%. Somewhere between 8% and 12% of healthcare workers who are regularly exposed to latex are sensitized to it. See Kelly, Sussman, & Fink, Stop the Sensitization, J. Allergy Clin. Immunology, vol. 98, part 1, no. 5, 857-858 (Nov. 1996); see also NIOSH, Preventing Allergic Reaction to Natural Rubber Latex Workplace, DHHS, June 1997, Pub. No. 97-135. The reaction starts in the body when the exposed person's system binds to rubber proteins and creates antibodies. Sensitization requires exposure. Workplace exposure is the factual premise of many healthcare workers' claims.

Reactions to latex exposure range from dermatitis to anaphylaxis. The rubber proteins sit on the surface of the gloves. The proteins are released when the glove is first placed on the hand. This is called absorption. The proteins may then become airborne which may lead to exposure by inhalation. However, NRL gloves and latex allergy may not be synonymous since the alleged allergen in the gloves comes from the proteins in the natural rubber, and not the latex. Ibid.

² A survey of state bills to ban or control the occupational use of NRL products includes: Rhode Island 2000-H8348; Illinois SR 0220; Pennsylvania S No. 106; New York S04765; Massachusetts Bill No. 942; Hawaii HR 82; Tennessee HJR 730; Wisconsin A593; Minnesota S# 1994; Oregon B1196; and Indiana HB 1085. Similarly, at the federal level, see H.R. 387, Promoting Latex Awareness, Research, and Treatment.

Defendants argue that there is no scientific evidence which establishes that latex allergy is the result of cumulative exposure to latex containing products in the work place. Studies cited by the defense conclude that there is no link between the dose and/or duration of latex glove use and the development of latex allergy in healthcare workers. See Elena H. Page, et al., U.S. Dept. HHS, Health Hazard Evaluation Report 98-0096-2737 EXEMPLA ST. JOSEPH'S HOSPITAL, Denver, Colorado 8 (1998) (finding no association between current or past occupational use of latex gloves and latex sensitization); Kristina Turjanmaa, Incidence of Immediate Allergy to Latex Gloves and Hospital Personnel, 17 CONTACT DERMATITIS 270, 272 (1987) (concluding that there was no "significant difference. . .with regard to daily use" between those who were latex skin prick test positive and those who were negative); Xaver Baur, Can a Threshold Limit Value for Natural Rubber Latex Airborne Allergens Be Defined?, 101 J. ALLERGY CLIN. IMMUNOL. 24, 25 (1998) (finding "[n]o significant association between the duration of exposure and latex-related symptoms and the prevalence of seropositive IgE antibodies to latex"); Francoise Lagier, Prevalence of Latex Allergy in Operating Room Nurses, 90 J. Allergy Clin. Immunol. 319, 320 (1992)("[n]o relationship was observed [in the 197 nurses who underwent skin prick testing] between skin test positively and years of operating room experience or glove-wearing time"). The defendants also point out that in the last 10 to 15 years, latex gloves have become one of the most important medical devices for protecting healthcare workers and patients from life-threatening diseases. Latex gloves, like vaccines, have great social utility. Cf. Shackil v. Lederle Laboratories, 116 N.J. 155-177-82 (1989).

An allergic reaction is a chemical reaction that occurs when antibodies attached to tissue cells combine with an antigen or allergen. See 47 Proof of Facts 2d, 232, citing Holtzman, "Duty of Manufacturer to Warn the Allergic User," 1982 Med Tr T Q 171, 176. It is hypothesized that workers may be suffering adverse effects of airborne natural latex allergens associated with the use of powdered latex medical gloves. Mrs. Zarnosky contends that despite the industry's knowledge of adverse health effects, these manufacturers delayed placing proper warnings on gloves until the FDA compelled them to in 1998. Defendants move for summary judgment claiming that plaintiff

is unable to prove causation based on the depositions, reports, documents and studies relevant to this case.

D. Procedural History

Plaintiff filed a complaint in 1995 against various latex manufacturers, including SN and J & J. All of New Jersey's latex cases were centralized in this court pursuant to an order from Chief Justice Deborah Poritz on March 16, 1998. Similarly, the Multi-District Panel for Multi-District Litigation (MDL) in the United States Federal District Courts centralized all latex glove cases pending in federal court in the Eastern District of Pennsylvania before the Honorable Edward Ludwig, MDL 1148.

Mrs. Zarnosky's case was one of three bellwether cases selected by consent of the New Jersey counsel with the aid of Standing Master Joyce Usiskin. See CMO No. 4, June 8, 1999. The bellwether cases were intended for the court's total handling. The New Jersey Supreme Court recognized and endorsed the administrative technique of bellwether case selection in Perez v. Wyeth, 161 N.J. 1, 8 (1999).

Presently, the plaintiff's sole theory of relief is failure to warn. On June 9, 2000, this court heard various motions related to the latex glove litigation, including defendants' motion for summary judgment. Initially, defendant's motion for summary judgment was based exclusively on the theory of product identification. The plaintiff opposed the motion on sufficiency of identification after the conclusion of extensive discovery overseen by the standing master. In the closing pages of plaintiff's opposition brief, counsel parenthetically suggested that the court should apply the causation standard adopted by the New Jersey Supreme Court in James v. Bessemer, 155 N.J. 279 (1998). Upon receiving defendant SN's reply brief, the court learned for the first time that the parties never addressed causation in any pretrial conferences. In fact, both the SN and J & J defendants made causation the focus of their reply briefs and urged the court to adopt the traditional substantial factor test for causation.

SN's pro hac vice defense counsel informed the court for the first time at the June 9, 2000 oral argument that in the McGinnis case, a latex trial ongoing in California, Judge Pate ruled on

June 1, 2000 that the substantial factor test should apply to the causation analysis. The Zarnosky trial was initially set for Monday, June 12, 2000. This court denied the defendants' motions for summary judgment on product identification. In light of the unaddressed causation issue, the court directed all counsel to brief the causation issue in accord with the court rules. Judicial construction of the New Jersey Court Rules indicates that raising a contested issue for the first time in a reply brief is improper. Warren Twp. V. Suffness, 225 N.J. Super 399, 412, certif. den., 113 N.J. 64 (1998); Interchange State Bank v. Veglia, 286 N.J. Super 164, 188 (1995), certif. den. 144 N.J. 377 (1996); City of Elizabeth v. Shaw, 174 N.J. Super. 32, 39 (App. Div. 1980); State v. Smith, 55 N.J. 476, 488 (1970). The designated trial judge, the Honorable Rosemary K. Reavey, adjourned the trial. Finally, the causation issue was argued on July 28, 2000.

E. Facts

Mrs. Zarnosky obtained her nursing degree in 1990. She worked from 1990-1995 at Our Lady of Lourdes Medical Center in Camden, New Jersey. She was a staff nurse in the neonatal intensive care unit. However, her occupational exposure to latex gloves and accompanying reactions allegedly caused her to leave the medical center in 1995. Mrs. Zarnosky claims that she developed a latex allergy from her occupational exposure to latex gloves.

Mrs. Zarnosky began experiencing severe itching on the back of her hands while wearing latex gloves in approximately March 1994. Her symptoms subsided when she went on vacation but returned and increased when she returned to her work environment. She believed the problems with her hands were possibly due to a combination of factors. For instance, frequent scrubbing and the use of soap at work, or, perhaps from her latex gloves. She tried using vinyl gloves and hypoallergenic latex gloves at different times, but her problems persisted.

In May 1994, she suffered a severe allergic episode when she used household rubber gloves while gardening at home. She experienced a burning sensation in her hands and her face began to swell. She became light headed. She went to the ER where she was treated with Benadryl, Epinephrine and Prednisone. She had to call out of work because she felt incapacitated. Mrs. Zarnosky consulted an allergist, Dr. Stephen Litz, in June 1994. Dr. Litz performed a RAST test

dated July 9, 1994 which confirmed a diagnosis of latex allergy. The test indicated a “moderate antibody level.” Dr. Litz advised Mrs. Zarnosky to use non-latex gloves.

By August 1994, Mrs. Zarnosky was experiencing hay fever type symptoms. These symptoms included runny nose, itchy eyes, hoarse throat, coughing and a choking feeling. Mrs. Zarnosky continued to work, hoping that the hospital would implement a policy it was considering to switch to non-latex gloves. Because she was not improving, Mrs. Zarnosky saw another allergist, Dr. Sandra Gawchik. Dr. Gawchick is the treating physician and one of two named experts for the plaintiff. Dr. Gawchik repeated a RAST test on May 18, 1995. This test showed a high level of latex antibodies present. In Dr. Gawchik’s opinion, Mrs. Zarnosky has latex allergy types I and IV. The type IV reaction was contact dermatitis. Mrs. Zarnosky’s symptoms progressed. Although she resolved to avoid latex, her airway hypersensitivity persisted through 1999.

As plaintiff’s treating physician, Dr. Gawchik opines within a reasonable degree of medical certainty that had Mrs. Zarnosky avoided occupational latex exposure, she would not have developed a latex allergy. Workplace induced asthma, as demonstrated by the plaintiff, has persisted in other healthcare workers despite removal of the worker from the work environment. Since there is currently no treatment for a latex allergy, the patient must modify her professional, social, and personal life. According to her doctor, Mrs. Zarnosky is at risk for an anaphylactic reaction upon exposure to latex. Dr. Gawchik concluded her report by characterizing plaintiff’s condition as one of permanent disability.

Plaintiff’s second expert witness is Dr. Dennis Charpin. Dr. Charpin is an epidemiologist. He is also a medical doctor, board certified in public health and pulmonology. Plaintiff proffers Dr. Charpin as a “generic” expert. Dr. Charpin’s deposition testimony indicates that all “healthcare workers have an increased risk of becoming allergic to latex as a result of their occupational exposure to latex gloves.” Dr. Charpin, according to plaintiff, expressed an opinion in depositions through the use of a hypothetical question regarding facts similar to Mrs. Zarnosky’s case that will assist in proving medical causation.

III. ANALYSIS

A. Standard of Review for a Motion for Summary Judgment

A court should grant summary judgment 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 challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Insurance Co., 142 N.J. 520, 528-529 (1995). The plain language of R. 4:46-2 provides that a court should deny a summary judgment motion where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged."

In Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-74 (1954), the New Jersey Supreme Court described the rationale behind R. 4:46-2:

It is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial. . In conjunction with the pretrial discovery and pretrial conference procedures, the summary judgment procedure aims at the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial.

Although genuine issues of material fact preclude the granting of summary judgment, those "of an insubstantial nature" do not. Brill, supra. at 529 (quoting Judson, supra at 75.)

In considering all of the material evidence and whether there is any genuine issue of material fact which precludes summary judgment, the court must determine if there is a sufficient factual disagreement to require submission to a jury. This is accomplished by the court, within the bounds of reason, viewing most favorably those items presented to it by the party opposing the motion. Brill, supra. at 540.

The defendants move for summary judgment based on two arguments. First, defendants argue that the plaintiff is unable to show proximate causation because there is no nexus between the lack of warnings and the plaintiff's alleged injuries. Secondly, defendants argue that plaintiff is unable to prove medical causation. Viewing the evidential submissions in the light most favorable to the non-moving party, the court finds that the plaintiff has raised genuine issues of material fact.

The moving parties, defendants SN and J & J, are not entitled to judgment as a matter of law. For reasons more fully explained below, defendants' motion for summary judgment is hereby **DENIED**.

B. Proximate Causation

In Coffman v. Keene Corp., 133 N.J. 581 (1993), the New Jersey Supreme Court held that a plaintiff in a strict liability-failure to warn asbestos case which stemmed from occupational exposure was entitled to a rebuttable presumption that had a warning been provided by the manufacturer, the plaintiff would have heeded it. In other words, a heeding presumption operates to shift the burden on the issue of proximate causation to the defendant to produce rebuttable evidence. The heeding presumption has been held to apply to all failure to warn cases. See Sharpe v. Bestop, Inc., 314 N.J. Super. 54, 68 (App. Div.), *aff'd* 158 N.J. 329 (1999). However, this court views application of the heeding presumption as a separate issue. It is not the focus of this decision, whereas causation is. The Coffman Court reasoned that:

Causation is a fundamental requisite for establishing any product-liability action. The plaintiff must demonstrate so-called product-defect causation—that the defect in the product was a proximate cause of the injury. Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394 (1982); Vallillo v. Muskin Corp., 212 N.J. Super. 155, 159 (App. Div. 1986). When the alleged defect is the failure to provide warnings, a plaintiff is required to prove that the absence of a warning was a proximate cause of his harm. See Campos v. Firestone Tire & Rubber Co., 98 N.J. (1984). [Coffman, 133 N.J. 581 at 592.]

The 1987 PLA created a single product liability cause of action for harm caused by a product. The PLA provided three bases for a products liability action: design defect, warnings defect, or manufacturing defect. See N.J.S.A. 2A:58C-2. Pursuant to N.J.S.A. 2A:58C-1(3) and (4), express warranties and environmental claims are excluded from the PLA. The PLA defines a warning defect by defining an adequate warning. See Dreier, et al., N.J. Product Liability and Toxic Torts Law at 58 (1999). Under N.J.S.A. 2A:58C-4, an “adequate warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger that communicates adequate information on the dangers and safe use of the product, taking into

account the characteristics of and the ordinary knowledge common to the persons by whom the product is intended to be used. . . ”

Manufacturers have a duty to warn when a product is defective absent an adequate warning because it is not reasonably fit, suitable or safe for its intended purpose. See Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 205 (1984). The duty to warn, therefore, is consonant with a manufacturer’s broader duty to place only products that are reasonably safe in the stream of commerce. See id. at 207-209; see also Coffman, 131 N.J. at 598. In Feldman v. Lederle Laboratories, 125 N.J.117, 144 (1991), the New Jersey Supreme Court held that “Under New Jersey law, a manufacturer is strictly liable for damages resulting from use of its product when a manufacturer fails to produce and distribute a product that is fit, suitable and safe for its intended and foreseeable purpose.” Thus, if a product contains an inadequate warning or fails to warn altogether, it may be unsafe. See Feldman, 125 N.J.117, 144; see also Molino, 261 N.J. Super. 85, certif. den., 134 N.J. 482 (1993).

New Jersey courts have increasingly relied on portions of the Restatement (Third) of Torts in products liability cases. Lynch v. Scheninger, 162 N.J. 209 (2000); Polizeno v. General Motors Corp., 328 N.J. Super 41 (App.Div. 2000); Perez v. Wyeth, 161 N.J. 1 (1999). With respect to product warnings and allergens, examination of the Restatement (Third) of Torts § 2 and § 6 (1998) is instructive. Restatement (Third) of Torts § 2 (1998) cmt k. indicates how the American Law Institute would view this case:

Cases of adverse allergic or idiosyncratic reactions involve a special subject of products that may be defective because of inadequate warnings. Many of those cases involve nonprescription drugs and cosmetics. . . Prescription drugs and medical devices are also capable of causing allergic reactions, but they are governed by § 6.

Restatement (Third) of Torts § 2 (1998) cmt k., illus. 13 states:

XYZ produces an over-the counter non-prescription medicine containing aspirin, a well-known allergen to which a substantial minority of persons are sensitive. XYZ may reasonably assume that those who are allergic to aspirin are aware of their allergy or that if they are not aware, warnings of possible allergic reactions would not be needed. Thus, it is necessary to warn only of the fact that the medicine contains aspirin.

Furthermore, Restatement (Third) of Torts § 6(b)(3) (1998) is instructive regarding medical devices:

For purposes of liability under subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device: (3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

Subsection (d) provides:

A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risk of harm are not provided to: (1) prescribing and other healthcare providers who are in a position to reduce the risk of harm in accordance with the instructions or warnings. . .

In this case, plaintiff's sole theory is strict liability-failure to warn. Plaintiff asserts that she was never warned about the dangers of latex allergies inherent to the use of NRL gloves. The defendants argue that plaintiff cannot prove that the failure to warn was a proximate cause of her injury or that the plaintiff's injuries were caused by the defendants' products. In support of their argument, defendants rely on excerpts from the deposition testimony of plaintiff's experts, Drs. Gawchik and Charpin.³

The defense objects to plaintiff's use of Dr. Gawchik as an expert witness. The defense alleges that although the witness is an allergist, she has no specialized courses or training in warnings. Further, defendants assert that Dr. Gawchik knows nothing about the protein content or specific powder levels in SN gloves which might have effected Mrs. Zarnosky's allergies. Similarly, defendants assert that Dr. Gawchik does not know the difference between any particular manufacturer's gloves. Finally, defendants assert that Dr. Gawchik's deposition testimony reveals that she does not know what exposure the plaintiff had to any manufacturer's gloves throughout her lifetime.

The plaintiff counters that Dr. Gawchik is an allergy specialist. Dr. Gawchik treated the plaintiff and testified based upon her medical training, experience, treatment of plaintiff, review of relevant literature, and proof of objective scientific tests. Based upon all of this information, Dr.

³At oral argument both parties recognized the difficulty of a contextual reading from segments of the experts' testimony and agreed that the court should review the expert depositions in their entirety.

Gawchik testified that plaintiff suffers from serious injuries as a result of occupational exposure to latex gloves. Dr. Gawchik's testimony is consistent with plaintiff's other expert, Dr. Dennis Charpin, a medical doctor and epidemiologist. Dr. Charpin testified that repeated occupational exposure to latex gloves increases a worker's chances of developing a latex allergy.

The potential for latex allergy was not known to the general population. Various documents and deposition testimony reveal that both latex manufacturers and the FDA knew about adverse reactions from health-care workers exposed to latex gloves as late as the 1980's and into early 1990. (See Expert Report of Dr. Thomas Arrowsmith-Lowe, D.D.S., M.P.H., F.A.C.D at 5.) Despite this knowledge, no warnings were placed on NRL gloves to provide notice to consumers of the potential for allergic reactions. This court finds that the question of latex allergy awareness, necessity of a warning, and adequacy of a warning are all fact questions for the jury.

In Molino v. B.F. Goodrich Co., plaintiff sued under a strict liability-failure to warn theory after he was injured by a tire rim assembly unit that had no warning. 261 N.J. Super. 85. Although the unit was not made by defendant, plaintiff's expert testified that the industry "knew they were having problems with the multi-piece rims." Id. at 93. The trial judge held that the warnings issue should not be sent to the jury absent "competent evidence" as to what the warnings should have been, what the results would have been if there had been a warning, and how a warning would have prevented the incident from occurring, and granted summary judgment for the defendant. The appellate division reversed. The appellate court stressed the underlying policy justification of the PLA, the promotion of safety, and further reasoned that the jury should have been given the opportunity to consider whether it would accept the expert's testimony as plausible. Id. at 94.

The defendants would have this court make the same mistake as the trial court in Molino by arguing that the judge, not the jury, should decide the issues of necessity and adequacy of warnings as well as how the warnings would have prevented the harm. Similarly, the defendants would have the court determine the adequacy of plaintiff's expert testimony with regard to causation. Defendants argue that Dr. Gawchik is unqualified to express an opinion on warnings. Although this

issue may be the subject of a N.J.R.E. 104(a) hearing at the trial judge's discretion, it is not the basis of a motion for summary judgment.

Additionally, the court notes Molino's reliance on Shatz v. TEC Technical Adhesives, 174 N.J. Super. 135 (App. Div. 1980). In Shatz, the trial court's refusal to permit expert testimony on the alleged inadequacy of a product's labeling constituted reversible error. The Shatz court stated:

While it is true that the judge could find that he [the witness] had no special expertise in the actual writing of labels, certainly his knowledge of the product was sufficient to permit him to state a conclusion as to the adequacy of the warnings. In fact, the language of both labels was not at all complicated. To know the sufficiency of warnings it is not necessary to be a writer. Reider had sufficient expertise to testify as to the adequacy of the labeling. See Heningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 411 (1960); Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 141-42 (1950). **The ruling was highly prejudicial since plaintiffs were deprived of testimony going to the heart of their case** (emphasis added). Ibid. [See Molino, 261 N.J. Super. at 95.]

Here, Dr. Gawchik is both an allergist and the plaintiff's treating physician. Dr. Gawchik physically examined Mrs. Zarnosky, made a full patient history, administered medical tests, and read the literature in the field. Moreover, Dr. Gawchik was trained in medical school on basic warning label construction. Her deposition testimony confirms this.

- Q. I think that you suggested to Mr. Dames that a warning label on a product would alert --a latex product, would alert a non-allergic, non-latex allergic person to ask questions. Is my understanding of what you were saying to Mr. Dames, correct?
- A. It would alert both the people who are allergic and those who are not allergic and it would clear up, you know, if it says warnings, this is latex, people will recognize what they were taking and putting on themselves. (Gawchik Dep., May 25, 2000, P 362, L 10-21.)

- Q. What courses did you take?
- A. The basic allergy training program talks about writing warning labels. The basic medical school training talks about writing warning labels. If a patient is allergic to Penicillin, you put the warning on the chart, Penicillin allergic, and you clarify it. (Gawchik Dep., May 25, 2000, P 361, L 4-10.)

Defendants provided no warnings here. The experts' testimony about the presence of warnings versus the adequacy of any existing warnings must be viewed most favorably toward the non-moving party on summary judgment.

New Jersey case law, statutory authority, and The Restatement (Third) of Torts are similar in their approach to allergy cases. Judge Dreier described allergy cases as a “unique category.” See William A. Dreier, “The Restatement (Third) of Torts: Products Liability and New Jersey Law—Not Quite Perfect Together,” 50 Rutgers L. Rev. 2059, 2093 (Su. 1998). The Restatement (Third) provides that “warnings are required when maladaptive ingredients cause harm to a substantial number of users.” *Ibid.* (citing Restatement (Third) of Torts § 2 cmt. k). The plaintiff is generally required to demonstrate that “the allergic predisposition is not unique to the plaintiff.” *Ibid.* The authorities differ, however, on the issue of duty. A minority of courts, including New Jersey, “impose a duty to warn even when the group at risk of allergic reaction is small.” *Zirpola v. Adam Hat Stores, Inc.*, 122 N.J.L. 21, 23 (1939). Moreover, “[t]he mere fact that only a small proportion of those who use a certain article would suffer injuries by reason of such use does not absolve the vendor from liability.” *Ibid.*

C. Medical Causation

Defendants next argue that plaintiff’s proof of medical causation is deficient. Specifically, defendants argue that plaintiff’s expert witnesses failed to render an adequate medical opinion. In sum, defendants assert that all the proofs are insufficient to satisfy medical causation under the traditional substantial factor test.

Plaintiff opposes these contentions and urges the court to recognize that this is an occupational exposure case.⁴ Plaintiff was required to wear latex gloves in her work place to conform with the CDC’s Universal Precautions. The repeated use of the NRL gloves may have resulted in latex sensitization. According to plaintiff, sensitization ultimately transformed into an allergy. The allergy resulted in asthma and its attending sequellae. In sum, NRL gloves exhibited harmful characteristics. The products were used by an employee in a work place environment. The product was provided by multiple defendants to the plaintiff’s employer without sufficient warnings of the potential health risks.

⁴Plaintiff’s experts’ deposition testimony is arguably couched in both the substantial factor and the frequent, regular and proximate language.

There is a latency period for manifestation of a latex allergy. Under these circumstances, plaintiff urges this court to recognize the occupational exposure nature of this case and adopt the non-traditional test from Sholtis and Bessemer of ‘frequent, regular and proximate’ exposure. Even while maintaining that plaintiff’s experts’ testimony may qualify under the substantial factor test, plaintiff seeks application of the causation analysis announced in Sholtis and later adopted in Bessemer.

New Jersey courts have already addressed medical causation. Medical causation is an essential element of proof in both products liability and toxic tort cases. As the Supreme Court reasoned in James v. Bessemer Processing, Co., Inc.:

In a toxic-tort action, in addition to product defect causation a plaintiff must prove what is known as medical causation, that the plaintiff’s injuries were proximately caused by exposure to the defendant’s product. See Becker v. Barone Brothers, 138 N.J.145, 152 (1994). Coffman v. Keene, 413 N.J. at 594; Sholtis, *supra*, 238 N.J. Super at 30-31, 568. As recognized by the Appellate Division below, 301 N.J. Super at 528 n. 3, the requirement set forth in Coffman **that a plaintiff prove both product defect and medical causation applies not only to asbestos cases, but also to other cases involving occupational exposure to toxic materials.** See William A. Drier, *et al.*, New Jersey Product Liability & Toxic Tort Law § 33.3, at 568 (1996). To prove medical causation, a plaintiff must show “that the exposure to each defendant’s product was a substantial factor in causing or exacerbating the disease.” Sholtis, *supra*, 238 N.J. Super. at 30-31. . .This Court has emphasized for over a decade the “extraordinary and unique burdens facing plaintiffs who seek to prove causation in toxic tort litigation.” Rubanick v. Witco Chem. Corp., 125 N.J. 421, 433 (1991); see also Landrigan v. Celetex Corp., 127 N.J. 404, 413 (1992) (noting that in toxic-tort context “proof that the defendant’s conduct caused decedents injuries is more subtle and sophisticated than proofs in cases concerned with more traditional torts”). [Bessemer, 155 N.J. at 299.]

In light of the difficulties of proving medical causation in multiple product exposure, latent manifestation cases by the traditional substantial factor test, the Court adopted the frequent, regular and proximate test in the interest of fairness. The Court held:

. . . agreeing with the reasoning in Borel v. Fiberboard Paper Products Corp., 493 F. 2d 1076, 1094 (5th Circuit 1973), certif. den. 419 U.S. 869, and borrowing language from Lohrman v. Pittsburgh Corning Corp., 782 F.2d, 1156, 1162-63 (4th Cir. 1986), and Sholtis, *supra*, 238, N.J. Super at 28-29, [adopted] a ‘frequency, regularity and proximity test’ to establish liability in a multiple defendant [asbestos] exposure context. Under that test, “to prove that exposure to a specific defendant’s product was a substantial factor in causing or exacerbating the plaintiff’s disease, the plaintiff is required to prove ‘an exposure of sufficient frequency, with

regularity of contact, and with close proximity to the plaintiff. [Bessemer, 155 N.J. at 302 (citing Sholtis, 238 N.J. Super. at 29).]

The decision to apply the substantial factor test or the frequency, regularity and proximity test can only be made after examining the relevant legal authorities and the proofs presented.

Pursuant to N.J.S.A. 34:15-31:

. . . [T]he phrase ‘Compensable occupational disease’ shall include all diseases arising out of and in the course of employment, which are due to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or employment, or which diseases are due to the exposure of any employee to a cause thereof arising out of and in the course of his employment.

This is not the first case involving allergens in the workplace. The New Jersey Supreme Court examined occupational exposure for purposes of worker’s compensation in Bober v. Independent Plating Corporation, 28 N.J. 160 (1958). The Bober Court held:

The suggestion is that his claim cannot be considered compensable unless the chrome dust constituted an allergen, i.e., a substance to which Bober was allergic. In other words, unless the allergic bronchial asthma was directly produced by a dust possessing the inherent and recognized capacity to create an asthma of that type the exposure was not a cause thereof arising out of and in the course of the employment. But the legislative language, which demands liberal construction to the end that its beneficial purpose be served, does not justify such a constricted interpretation. Under the proof here, the chrome dust was an irritant which so sensitized the latent allergic bronchial asthma as to cause it to move from the dormant to an active state. **If it were not for the employment exposure, the predisposition would have remained quiescent** (emphasis added). So the dust must be treated as a cause in the legal sense and thus satisfy the mandate of the statute. [Bober, 28 N.J. at 173.]

New Jersey courts recognized allergic reactions caused by consumer products in Newmark v. Gimbel’s Incorporated, 54 N.J. 585 (1969) (permanent waive solution); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. (1939) (paraphenylenediamine dye in men’s hat); and Reynolds v. Sun Ray Drug Co., 135 N.J.L. 475 (1947) (lipstick). Furthermore, recognizing the implied use for a particular purpose under the U.C.C., both Zirpola and Reynolds were cited with approval in Feldman v. Lederle Laboratories I, 97 N.J. 429, 448 n.6 (1984) (tetracycline). See Dreier, et al., N.J. Product Liability and Toxic Torts Law at 104 (1999).

The development of allergy cases progressed as consumers received personal injuries from manufactured goods purchased for personal use. In D’Arienzo v. Clairol, Inc., 125 N.J. Super 224

(Law Div. 1973), the court examined the personal choice of a consumer who bought hair dye on repeated occasions without ill effects. After suffering a severe reaction, the consumer sought damages against the manufacturer and seller on warranty theories. At summary judgment, the court considered “whether the directions were adequate in light of all of the surrounding circumstances.” Id. at 229. The court concluded that the negligence of the plaintiff, if any, in following the defendant’s directions was a jury question. The court adopted an analysis of the allergy process which is analogous to that alleged by the plaintiff in the instant case. The court summarized:

The potential for allergy is acquired by a previous exposure, or exposures which sensitize the person so that upon a later exposure he will react adversely to the presence of the substance.

During these “sensitization” exposures a particle of the substance called an ‘antigen’ is introduced into the blood stream and is met by antibodies produced by the host in response to a foreign particle. In the normal situation, the antibodies would repel the antigen, since it is a harmless particle, and there would be no further consequences. In the case of an allergy, however, the antigen is able to sensitize the antibody to the properties of the antigen.

Upon re-exposure, the antibodies will resist the antigens to which they are sensitive and combine with them, liberating histamine and other noxious chemicals that produce the symptoms of allergic disease. Schattman, “A Cause of Action for the Allergic Consumer,” 8 Houston L. Rev. 827, 860 (1971). [D’Arienzo, 125 N.J. Super. at 235.]

Thus, New Jersey recognizes occupational exposure and personal injury cases involving allergens. The question becomes, what effect does this recognition have in a strict liability-failure to warn case against the manufacturer of a medical device which contains an allergen and is pervasively used in the workplace? The causation analysis has been modified for policy reasons, like those set forth in Bessemer, in the areas of both asbestos and toxic substances. The court must consider whether allergens in the workplace should be treated as environmental torts. The court must decide whether products containing allergens are covered under the statutory definition of an “environmental tort.” An environmental tort is:

. . . a civil action seeking damages for harm where the cause of the harm is exposure to toxic chemicals or substances, but does not mean actions involving drugs or products intended for personal consumption or use. [See N.J.S.A. 2A: 58C-1b(4).]

Whether an “environmental tort” covers allergens, and is therefore, excluded from the PLA, is an unanswered question. The court interprets statutory language with the traditional tools of statutory construction. In Stevenson v. Keene Corp., 254 N.J. Super. 310 (App. Div. 1992) aff’d 131 N.J. 393 (1993), Judge Conley said:

Interpretation of a statute requires analysis of the statute’s plain language. State v. Churchdale Leasing, Inc., 115 N.J. 83, 101 (1989); Dempsey v. Mastropasqua, 242 N.J. Super. 234, 238 (App. Div. 1990). Particular words and phrases must be construed within their context and unless inconsistent with the Legislature’s manifest intent or unless another meaning is expressly indicated, they must be given their generally accepted meaning. State v. Davis, 175 N.J. Super. 130 (App. Div.), cert denied 85 N.J. 136 (1980). When the Legislature has specifically defined a term, that definition governs. Eagle Truck Transport, Inc. v. Board of Review Division of Employment, 29 N.J. 280 (1959). [Stevenson, 254 N.J. Super. at 317.]

In Stevenson, a primary asbestos distributor appealed an interlocutory ruling that the 1987 Amendments to the Comparative Fault Act were not applicable to asbestos litigation. 254 N.J. Super. 310. Defendant made numerous arguments in favor of the Act. One of defendant’s arguments was that asbestos does not involve a tort against the environment. Rather, asbestos claims should be framed as product liability actions for wrongful death based on strict liability. Id. at 320. Judge Conley replied that although asbestos litigation may be labeled products liability, there is no question that the asbestos and the risks it presents when introduced into the environment are both toxic and hazardous. Id. at 320-321. Judge Conley further reasoned, “. . . **exposure to asbestos caused by negligent manufacture, use, disposal, handling, storage and treatment with resulting injury is a “tort against the environment** (emphasis added).” Id. at 321.

In typical products liability cases, like those involving a design defect in a particular machine, see Grier v. Cochran Western Corp., 308 N.J. Super. 308, 317 (App. Div. 1998), or post-production changes, see Dixon v. Jacobson Mfg. Co., 270 N.J. Super. 569 (1994), the injury is usually traumatic. Where the injury is traumatic, there is a linear connection between the defect and the injury. On the other hand, in the toxic tort type case, see Ayers v. Jackson Twp., 106 N.J. 557 (1987), the injury is more subtle. In these cases, the injury manifests as a disease or an increased risk of disease. Toxic tort and product exposure cases are characterized by periods of repeated exposures, multiple

products, uncertain etiology, and long latency periods. See Ayers, supra; see also Bessemer, supra. Both toxins and allergens share these characteristics. See Joseph C. Kearfott, et al., “Case Management and Health Claims in Toxic Tort Litigation,” SE 73 ALI-ABA 111 (Jan. 27, 2000). These factors cast a dark cloud over the plaintiff’s ability to show a causal nexus between his injury and the defendant’s defect. Furthermore, exposure cases may result in injurious conditions other than cancer. Jean Macchiavoli Eggen, “Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Worker’s Compensation Systems,” 60 Fordham L. Rev. 843, 850-51 (April 1992). For a detailed discussion of the liability of manufacturers in allergy cases, see James A. Henderson, Jr., “Process Norms in Producing Liability: Liability for Allergic Reactions,” 51 U. of Pittsburgh Law Rev. 761 (Su. 1990).

The instant case is not controlled by those cases which involve personal choice of a consumer product which results in injury. The extent to which a person can exercise meaningful personal choice is greatly reduced in the occupational setting. For instance, occupational exposure stands in stark contrast to those cases in which consumer plaintiffs sue on account of their reactions to peanuts. See Jonathan Bridges, “Suing for Peanuts,” 75 Notre Dame L. Rev. 1269 (March 2000). In the instant case, plaintiff wore latex gloves during the course of her employment. With continuous use and re-exposure, plaintiff may have experienced repeated sensitization. However, plaintiff does not complain that the repeated exposures resulted in an increased risk of sensitization. Plaintiff instead alleges that re-exposure resulted in an increased risk of developing the actual allergy. In fact, she developed the allergy and it manifested as asthma and attending sequallae. The legislative comment to the environmental tort provision of the PLA is instructive.

. . . [A] statement accompanying an earlier version of the statute suggests that a more limited meaning of ‘environmental tort’ had been considered by the Legislature. That statement indicates the environmental tort exception was at one time only ‘intended to encompass actions involving polluting of ambient air and of streams and other bodies of water, ‘dumping’ of toxic wastes, and similar activities ordinarily belonging to environmental torts.’” Apparently this legislative understanding was rejected in favor of the one in the Assembly Insurance Committee Statement which explicitly includes ‘occupational exposure’ within the definition of an environmental tort. [Dreier, et al., N.J. Products Liability and Toxic Torts Law at 543 (1999).]

With this in mind, this court looks to ascertain the intent of our Legislature. To what extent are workers who become ill from exposure to a substance contained in a product pervasively used in their workplace protected by the PLA? It is unlikely that the Legislature intended for these workers to be entitled to less protection because they were exposed to allergens rather than toxins. It is clear to the court that cases involving allergens are distinguishable from the other products liability cases. Allergen cases are unique. They are not quite like products cases which result in immediate trauma. Rather, they are more like the latent manifestation toxin cases. The allergens present in latex gloves effected plaintiff as a result of occupational exposure. Furthermore, “disease” has been construed broadly under the law. One court called “disease” any departure from the state of health presenting marked symptoms. See Giambattista v. Thomas Edison, Inc., 32 N.J. Super. 103, 113 (App. Div. 1954).

As a matter of law, this court holds that medical causation, as derived from Sholtis and Bessemer, may be satisfied in latex allergy occupational exposure cases when the plaintiff shows (1) factual proof of the plaintiff’s frequent, regular and proximate exposure to the defendant’s products, and (2) that the plaintiff’s injuries were proximately caused by exposure to the defendant’s product. Bessemer, 155 N.J. 279, 304.

As always, the court is cognizant that mass tort litigation does not occur in a vacuum. These same issues arise, often simultaneously, across the country. Similar motions for summary judgment were brought by NRL glove manufacturers in Bishop v. Farhat, et al., 489 S.E. 2d. 323 (Ga. Ct. App.1998). In Bishop, the Georgia Appellate Division held that the plaintiff’s expert testimony was not so speculative that it could provide the basis for summary judgment in defendant Ansell’s favor. The court stated:

We disagree with Ansell’s argument that Dr. Sullivan’s affidavit is too ‘speculative’ to create an issue of fact on the element of causation. Dr. Sullivan testified to his expertise and stated that, based upon Bishop’s descriptions of her use of the gloves and her prior reactions to the gloves, it was his opinion that Ansell’s gloves contributed to her condition. The expert’s lack of knowledge as to the exact latex content of Ansell’s gloves and Bishop’s exposure to the other latex-containing products go to the weight and credibility of his testimony but did not give the court reason to exclude the testimony completely. [Bishop, 489 S.E. 2d. at 328.]

The defense has failed to demonstrate the absence of genuine issues of material fact with respect to medical causation. There appears to be a conflict in the medical community. Plaintiff asserts that her injuries resulted from occupational exposure to NRL gloves manufactured by defendants. Plaintiff's argument is supported by her two experts. Dr. Gawchik is plaintiff's treating physician and an allergist. Dr. Charpin is a medical doctor and epidemiologist who has conducted and published numerous analyses of clinical trials regarding latex allergy. The defense offers the opinion of Dr. Kagen. Dr. Kagen finds that the sensitization levels between the general population and health care workers is not distinguishable. The defense offered numerous articles to support the proposition that information on latex allergies is lacking in the scientific community. According to the defense, it follows that the plaintiff cannot maintain the requisite proofs at trial. However, the court has construed the deposition testimony of the plaintiff's expert witnesses in a light most favorable to the plaintiff. In light of this examination, the plaintiff has presented genuine issues of material fact with respect to causation. Whether the plaintiff has, in fact, satisfied her burden with respect to causation is for the jury to decide.

Lastly, this court is not persuaded by the application of the substantial factor test in McGinnis v. Baxter HealthCare, et al., Alameda County Superior Court, No. 771258-2, JCCP No. 4003-0414, July 6, 2000 Transcript, P. 4 - L. 3117. Like that court, this court recognizes that allergens are different than asbestos. Unlike California, however, in New Jersey a court may apply either the substantial factor test or the frequent, regular and proximate test for causation depending on the facts presented by a case. For instance, New Jersey adopted a frequent, regular and proximate test in asbestos exposure cases. See Sholtis, supra. The New Jersey Supreme Court later expanded the frequent, regular, and proximate test to the toxic tort setting. See Bessemer, supra. This court believes that the frequent, regular and proximate causation analysis applies to this case.

California has determined that the substantial factor test applies to causation in asbestos workplace exposure cases. In Bockrath v. Aldrich Chemical Co., Inc., 980 P.2d 398 (Cal. 1999), the California Supreme Court affirmed its holding in Rutherford v. Owens-Illinois, Inc., 941 P.2d

1203 (Cal. 1997) and held that the substantial factor test “is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, ‘a force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor, but a very minor force that does not cause harm is a substantial factor.’” Bockrath, 980 P.2d at 403-404. Therefore, the McGinnis Court was bound by California precedent to apply the substantial factor test. As such, the McGinnis decision has no precedential value for the New Jersey latex litigation.

Prior to trial in McGinnis, defendant VHA moved for a nonsuit on the grounds that there was no evidence that its gloves were a substantial factor in causing plaintiff’s allergy. Plaintiff responded that it would present expert testimony that no exposure to gloves could be excluded as a contributing factor. The court responded: “That’s not the question. The question is, if the plaintiff wore XYZ gloves one time, at a picnic, served hot dogs, let’s say, natural rubber latex gloves, is it the opinion of your expert that, in and of itself, would be a substantial contribution?” See McGinnis v. Baxter Corporation, et al., June 1, 2000 Transcript P. 80. The court determined that in order to survive the motion for nonsuit, the plaintiff must make “an offer of proof that somebody will come in and say that the level of glove wearing as to VHA was a substantial contribution.” Id. at 82. The court denied VHA’s motion for non-suit on June 1, 2000 because plaintiff’s counsel indicated that plaintiff’s expert would testify that each exposure to VHA gloves was a substantial contributing factor. See ibid.

This court is not persuaded by the preceding pre-trial ruling. The California court’s hypothetical fails to recognize the difference between sensitization and the effect of repeated exposure on the development of a latex allergy. Mrs. Zarnosky was repeatedly exposed to NRL at work. Plaintiff’s expert testimony indicates that this repeated exposure may have caused her allergy. She was exposed to NRL product on many more occasions than the limited exposure posited in the hot dog hypothetical. Incidental exposure to latex while wearing NRL gloves to serve hotdogs at a picnic is in no way similar to the repeated, consistent, mandatory and regular nature of occupational

exposure to NRL gloves in a hospital environment. Under New Jersey law, Mrs. Zarnosky has successfully responded to defendants' motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, this court **DENIES** the defendants' motion for summary judgment based on plaintiff's alleged inability to prove causation. Moreover, the court **HOLDS** that Plaintiff, through her expert witnesses, has presented genuine issues of material fact with respect to proximate and medical causation. Furthermore, a plaintiff may satisfy the burden of proof with respect to medical causation by showing that frequent, regular and proximate exposure to allergens in a product used in the workplace was a cause of plaintiff's injuries. The accompanying order reflects the court's holding.