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# I. A Review of Selected Jurisdictions

## A. California

### 1. *O'Neil v. Crane Co.*, 53 Cal 4th 335 (Cal. 2012).

*O'Neil v. Crane Co.* addressed the question of whether a product manufacturer can be held liable on the theory of strict liability or negligence for harm caused by the product of another manufacturer. The California Supreme Court answered this question in the negative with one caveat, a defendant may be liable for harm caused by another manufacturer's product if the defendant's product "contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." *O'Neil*, 53 Cal. 4th at 342.

The defendants in this case made valves and pumps that were used in Navy warships. The plaintiff alleged that external insulation and internal gaskets and packing, which were all made by a third party and added to the valves and pumps post-sale, released asbestos and caused the plaintiff's asbestos-related disease. It was undisputed that "the defendants never manufactured or sold any of the asbestos-containing materials to which plaintiffs' decedent was exposed." *Id.* In addition, the Navy specified the materials to be used in the building of its ships and asbestos was such a valuable resource at the time that warships could not have been built without it. *Id.* at 343. As such, the manufacturers of the products had no control over the specifications required of them in

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order to fulfill their contracts with the Navy even if those specifications required asbestos-containing products. *Id.*

The Court declined to expand liability to manufacturers when it is "foreseeable that their products will be used in conjunction with defective products or replacement parts made and sold by someone else." *Id.* at 362. The Court explained, "the foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a non[-]defective product, or one whose arguable defective product does not actually cause harm." *Id.*

In addition, the Court concluded that there is no duty imposed on a manufacturer to warn about dangerous aspects of other manufacturers' products and replacement parts. *Id.* at 365. "There is no reason to think a product manufacturer will be able to exert any control over the safety of replacement parts or companion products made by other companies." *Id.*

*O'Neil* is important because it clearly sets forth the common-sense rule that a manufacturer of a product cannot be held liable for the products of others. Also, it forces the plaintiff to carry his/her burden in order to show that the defendant's product was the injury-causing product. It is no longer sufficient to say that because one product was used with another product and when put together created a defective piece of equipment that will be sufficient to find one or both manufacturers of the component parts liable for the injury.

**2. *Casey v. Perini Corp.*, 206 Cal. App. 4th 1222 (Cal. Dist. Ct. App. 2012).**

*Casey v. Perini Corp.* examined what proof a plaintiff needs to survive a motion for summary judgment by a general contractor in the asbestos context. The Court affirmed the trial court's grant of the motion for summary judgment and held that, at the very least, a plaintiff opposing a motion for summary judgment must provide "circumstantial evidence . . . sufficient to support a reasonable inference" to establish the threshold issue of asbestos exposure. *Casey*, 206 Cal. App. 4th at 1237.

John Casey, a career plumber and pipefitter, and his wife filed a lawsuit against Perini, a general contractor at several of Casey's jobsites and alleged that Perini negligently exposed Casey to asbestos. Casey claimed that he worked alongside Perini subcontractors who swept asbestos-containing materials on these jobsites, which exposed him to asbestos. Perini moved for summary judgment, asserting that Casey's deposition testimony and discovery responses provided no evidence that he was exposed to asbestos.

The Court reviewed Casey's deposition testimony and discovery responses and determined that Casey had merely assumed that he was exposed to asbestos at the Perini job site. The Court found that Casey had no personal knowledge as to whether he was exposed to asbestos-containing materials. He identified the type of work performed but was unable to identify any specific asbestos-containing materials. Thus, the Court declined to find a triable issue premised on nothing more than Casey's assumptions and found that the mere possibility of exposure is insufficient to create a triable issue of fact regarding causation. *Casey*, 206 Cal.App.4th at 1235 (quoting *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1105-06).

Even under the most lenient causation standards, there must be a sufficient factual nexus between the negligent conduct and the injury. *Id.* at 1239. Absent from the *Casey*

case was evidence of any causal connection between Perini's activities and Casey's alleged asbestos exposure, and thus summary judgment was appropriate.

*Casey* is important for several reasons. First, in a contractor liability case, when faced with a motion for summary judgment, it is essential that a plaintiff identify the asbestos-containing products and the source of the product (brand name, manufacturer, or supplier). Second, the Court rejected the declaration of Kenneth Cohen, a ubiquitous plaintiff expert, and made it clear that it will not consider expert testimony that lacks foundation. Finally, *Casey* rejected the proposition that the OSHA regulations create a legal presumption against tort defendants. Judge Elias has noted that this case is good for defendants. We have already begun citing it in our motions for summary judgment, but the ultimate effect outside of the general contractor arena is yet to be determined.

**3. *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (Cal. 2011).**

In *Howell v. Hamilton Meats & Provisions, Inc.*, the Supreme Court of California addressed the issue of whether a plaintiff, who has private health care insurance, may recover the amount of past medical expenses that her health care providers billed versus the amount that was actually paid and accepted for services.

The Court held that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. *Howell*, 52 Cal.4th at 566.

The plaintiff is never permitted to recover more than the amounts paid because the plaintiff did not suffer any economic loss in that amount and has never been personally liable for that amount. *See* Civ. Code § 3281 (damages are awarded to

compensate for detriment suffered); *see also* Civ. Code § 3282 (detriment is a loss or harm to person or property). At the time the charges were incurred, the medical providers had already agreed on a different price schedule. Thus, the amount billed does not represent an economic loss for the plaintiff and it is not recoverable.

This holding is a significant win for the defense and should considerably reduce plaintiffs claim for past medical economic damages.

**4. *Farag v. ArvinMeritor, Inc*. 205 Cal. App. 4th 372 (Cal. Ct. App. 2012).**

In *Farag v. ArvinMeritor, Inc*., the court addressed the issue of whether a *California Code of Civil Procedure* § 998 offer made jointly to Plaintiffs, who are husband and wife, is valid. The court held that a defendant's single offer of judgment requiring both spouses to settle their claims is valid and triggered the cost-shifting statute under *California Code of Civil Procedure* § 998. The statute specifies that "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post[-]offer costs and shall pay the defendant's costs from the time of the offer." Cal. Code of Civ. Proc. § 998(c)(1) (2006).

Plaintiffs (husband and wife) brought causes of action for personal injury and loss of consortium as a result of husband's alleged exposure to asbestos. *Id.* at 375. Defendant made a statutory offer for compromise, pursuant to *California Code of Civil Procedure* § 998, to both spouses jointly without specifying that the offer could be accepted by either spouse. *Id.* After judgment was returned in favor of Defendant at trial, Plaintiffs claimed that Defendant's § 998 offer was invalid. The trial court disagreed, and Plaintiffs appealed. *Id.* at 321.

The court of appeal agreed with the trial court. The Court analyzed *Vick v. DaCorsi,* 110 Cal. App. 4th 206 (Cal. Ct. App. 2003) and *Barnett v. First National Ins. Co. of America*, 184 Cal. App. 4th 1454 (Cal. Ct. App. 2010) and determined that Plaintiffs' claims arose after they were legally married in California. *Farag*, 205 Cal. App. 4th at 326. In turn, their claims constituted community property under the law of California. *Id.* at 327. As a result, defendant's offer was valid because either spouse could have accepted the § 998 offer on behalf of the community. *Id.* at 326-27.

**B. Road Map to Causation Rationality**

**1. The Texas Two-Step**

There are three recent cases in the State of Texas dealing with the causation standard in asbestos-injury cases. Two of the three deal with specific causation and the third deals with the use of epidemiological and clinical trial evidence in proving general causation.

**i. The Standard—*Borg-Warner Corp. v. Flores,* 232 S.W.3d 765 (Tex. 2007).**

The *Flores* court rejected an outright adoption of the *Lohrmann* test (frequency, regularity, and proximity) to judge whether Flores presented enough evidence to support a judgment against Borg-Warner. The court recognized that "[o]ne of toxicology's central tenets is that 'the dose makes the poison.'" *Id.* at 770. Thus, proof of the particular defendant's exposure was an important component of proving causation: "epidemiological studies are without evidentiary significance if the injured person cannot show that 'the exposure or dose levels were comparable to or greater than those in the studies.'" *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953, S.W.2d 706, 720–21

(Tex. 1997)). "Thus, a literal application of *Lohrmann* leaves questions unanswered … proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law." *Id.* at 772.

The court concluded by adopting a new, stricter standard that built on *Lohrmann*'s foundation; in addition to frequency, regularity, and proximity, the plaintiff must show "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease." *Id.* at 773.

**ii. Substantial factor/specific causation as related to specific asbestos fiber testimony—*Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829 (Tex. Ct. App. Ft. Worth 2010).**

No-evidence summary judgment can be proper where there is a genuine issue of material fact as to the *Lohrmann* factors (frequency, regularity, and proximity), but no genuine issue of material fact regarding the minimum dose requirement if not raised by the plaintiff. *Id.* at 836-37. "A plaintiff in a mesothelioma suit that he or she claims is caused by an asbestos-containing product must prove the elements set forth in *Borg-Warner's* 'substantial factor causation test': specifically, an aggregate does of exposure from the defendant's product and a minimum threshold dose above which an increased risk of developing mesothelioma occurs." *Id.* at 833.

"It is generally accepted that a person can develop mesothelioma from only low levels of asbestos exposure." *Id.* at 834. "[W]e cannot read *Borg-Warner*, and the test announced therein, so narrowly as to apply only to asbestosis or asbestos-exposure cases other than mesothelioma." *Id.*

In order to show specific causation, a plaintiff must allege more than the fact that a particular asbestos fiber (chrysotile in this case) is capable of causing mesothelioma. *See id.* at 839. Rather, the plaintiff must indicate in the literature or through testimony of expert witnesses the approximate minimum exposure level (dose) of that particular fiber at a level leading to an increased risk of developing mesothelioma and that the plaintiff was in fact exposed at that level to that particular fiber. *See id.* at 837. Studies relied on by experts must do more than demonstrate a reasonable inference that exposure to a particular asbestos fiber can increase a worker's risk of developing mesothelioma. *Id.* at 832. They must also link minimum exposure level (or dosage) of that particular fiber with a statistically significant increased risk of developing the disease. *Id.*

**iii. Sufficiency of exposure (dose) evidence and particular exposure of plaintiff to defendant's products—*Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. Ct. App. Dallas 2010).**

**a. Causation**

"In a toxic tort case, the plaintiff must show both general and specific causation." *Id.* at 595. "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* Alleging that a plaintiff has been exposed to a particular company's asbestos-containing products "many times" is not sufficient evidence of a plaintiff's frequent and regular exposure during a relevant time. This assertion must be very specific. *Id.* at 599.

**b. Quantitative Evidence that Exposure Increased Risk of Developing Mesothelioma**

*Borg-Warner* requires that a showing of substantial factor causation include quantitative evidence that the plaintiff's exposure to asbestos increased his risk of developing an asbestos-related injury. *Id.* at 600. Evidence must show that plaintiff's exposure to company-specific asbestos-containing product was on a frequent and regular basis, but also that the exposure was in sufficient amounts to increase his risk of developing mesothelioma. *Id.* An expert must be able to establish an exposure level or dose for the plaintiff particularly. *Id.*

**iv. The standard for appropriate use of epidemiological and clinical trial evidence to show general causation—*Merck & Co., Inc. v. Garza*, 2011 WL 379634 (Tex. 2011).**

*Havner's* requirements for epidemiological evidence apply to clinical trials, "when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrates a statistically significant doubling of the risk." *Id.* at *6.

In addition, *Havner* requires that a plaintiff show "that he or she is similar to [the subjects] in the studies' and that 'other plausible causes of the injury or condition that could be negated [are excluded] with reasonable certainty." *Id.* *Havner* also requires that even if studies meet the threshold requirements of reliability, sound methodology still necessitates that courts examine the design and execution of epidemiological studies using factors like the Bradford Hill criteria to reveal any biases that might have skewed the results of a study, and to ensure that the standards of reliability are met in at least two properly designed studies. *Id.*

Thus, a plaintiff must first pass the primary reliability inquiry by meeting *Havner's* threshold requirements of general causation. Then, courts must conduct the

secondary reliability inquiry that examines the soundness of a study's findings using the "totality of the evidence test." *Id.* at *8.

**2. Ain't That Special**

In the past two years, several courts around the country have excluded the opinions of "experts" that "every fiber" contributes towards a plaintiff's development of mesothelioma.

**i. *Robertson v. Doug Ashby Building Materials, Inc.* (Louisiana)**

On August 21, 2012, a Baton Rouge trial court granted HPTY's Daubert motion precluding Dr. Eugene Mark from testifying that that "each 'special exposure' to asbestos constitutes a significant contributing factor" and further prohibited Dr. Mark "from giving his definition of special exposure." The win came after nearly five years of litigation and appeals following the initial grant of summary judgment to HPTY's client based on the exclusion of Dr. Mark's opinions.

**ii. *Dixon v. Ford Motor Co.* (Maryland)**

In September 2011, the Maryland Court of Appeals held that the testimony of Dr. Laura Welch that "every exposure to asbestos is a substantial contributing cause" was unhelpful to the jury and should have been excluded under Maryland Rule 5-702. *Dixon v. Ford Motor Co.*, 47 A.3d 1038, pp. 5-7, 15, 25-26. The Court further held that Dr. Welch's opinions were inadequate because they were not supported by any epidemiology. *Id.* at pp. 39-40. Good sound bites from Court's opinion:

- "And while we have no doubt that Dr. Welch is well-qualified to render some opinion as to the *likely* intensity of Mrs. Dixon's exposure and the *likely* effect it

had on her risk of mesothelioma, Dr. Welch's testimony implied only that both were 'more than nothing.' For obvious reasons an infinitesimal change in risk cannot suffice to maintain a cause of action in tort." *Id.* at p. 29.

- "Dr. Welch's conclusion that the exposure and risk in this case were 'substantial' simply was not a scientific conclusion, and without it her testimony did not provide information for the jury to use in reaching its conclusion as to substantial factor causation. For these reasons and in these circumstances (*i.e.*, where probabilistic causation is the generally accepted scientific theory of causation and scientific expert testimony is required), we join with several other courts in requiring quantitative epidemiological evidence." *Id.* at p. 30.
- "Practical and statistical limitations may have prevented Dr. Welch from providing any particular estimates of Mrs. Dixon's exposure or relative risk, or from opining with any reasonable certainty that the probability of causation was enough that a reasonable person would consider it substantial. But lack of epidemiological data does not give an expert license to state his or her *belief* that exposure and risk – however low they may be – are 'substantial.'" *Id.* at pp. 39-40.

**iii. *Betz v. Pneumo Abex, LLC* (Pennsylvania)**

The *Betz* case was taken up by the Pennsylvania Supreme Court as a "test case" to determine the "admissibility of expert opinion evidence to the effect that each and every fiber of inhaled asbestos is a substantial contributing factor to any asbestos-related disease." *Betz v. Pneumo Abex, LLC, et al.*, 44 A.3d 27, 30 (Pa. 2012). At the trial court level, defendants challenged Dr. Maddox's causation opinions that "each inhalation"

contributes to the development of asbestos-related diseases and that "each exposure is therefore a substantial contributing factor." *Id.* at 31. Specifically, they argued that his opinions lacked any scientific methodology and were thus unhelpful to the trier of fact under *Frye*. *Id*. at 33-34. The trial court sustained defendants' *Frye* challenge and excluded Dr. Maddox's opinions, but the Superior Court reversed.

The Pennsylvania Supreme Court, however, agreed that the trial court was "right to be circumspect about the scientific methodology underlying the any-exposure opinion," noting that Dr. Maddox "acknowledged that he 'picked and chose' among studies in support of his opinion." *Id.* at 16, 74-75. The Supreme Court offered the following characterizations of Maddox's opinions:

- "Dr. Maddox offered a broad-scale opinion on causation applicable to anyone inhaling a single asbestos fiber above background exposure levels. In doing so, he took it upon himself to address (and discount) the range of the scientific literature, including pertinent epidemiological studies. Dr. Maddox's any exposure opinion simply was not couched in terms of a methodology or standard peculiar to the field of pathology." *Id.* at 78.
- "Dr. Maddox's any-exposure opinion is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantively causative, while also conceding that a disease is dose responsive." *Id.* at 82.
- "[T]he analogies offered by Dr. Maddox in support of his position convey that it is fundamentally inconsistent with both science and the governing standard for legal causation. The force of his marbles-in-a-glass illustration changes

materially upon the recognition that, to visualize this scenario in terms of even a rough analogy, one must accept that the marbles must be non-uniform in size (as asbestos fibers are in size and potency), microscopic, and million-fold. From this frame of reference, it is very difficult to say that a single one of the smallest of microscopic marbles is a substantial factor in causing a glass of water to overflow." *Id.* at 85-86.

## II. Bringing Home More Than "The Bacon"—Duty in Household Exposure Cases

Generally, take-home exposure cases revolve around one question: whether a duty to protect non-employees from take-home asbestos exposure exists. This question is primarily answered by determining whether the jurisdiction hearing the case values, above all else (1) the relationship between the defendant and the plaintiff or (2) the foreseeability of harm to the plaintiff as a result of the defendants acts or omissions when conducting its duty analysis. Courts also consider public policy issues, but the outcome can usually be predicted with a fair degree of accuracy based on which of the above considerations the jurisdiction's duty analysis focuses on. In some cases, however, there may be certain exceptions and variables that will be considered by the sitting court depending on the specific facts of the case (i.e. the relevant time frame of the exposure, the employers' willingness to provide showers and/or laundry service, claims of nonfeasance vs. misfeasance, employment law statutes, etc.).

Below is a brief overview of the current cornerstone cases from several jurisdictions across the United States which has been broken down by holding and duty analysis. These cases essentially make up the entire current body of take-home exposure

case law and precedence that are frequently referenced by courts to give guidance when a jurisdiction is faced with a "take-home exposure to a non-employee" question as a matter of first impression.

Reader should note that although this memo is organized by "No Duty Jurisdictions" and "Duty Jurisdictions" this is primarily for readability. In negligence actions, there is no such thing as a "No Duty" jurisdiction. The cases below in the "No Duty" section are, as all asbestos exposure cases are, fact specific. A finding of no duty is most often supported by a finding that there is no relationship between the parties in the matter, or because of the time frame for alleged exposure, an employer would not have been able to foresee the harmful effects of take-home exposure. There are, however, jurisdictions that can be fairly classified as "No Duty" jurisdictions in reference to actions for premises liability and employer/employee duty cases.

All internal and pinpoint citations are omitted in the interest of brevity for the purpose of this presentation.

### A. No Duty Jurisdictions

All of the courts and respective jurisdictions outlined below have held that there is no duty owed to a non-employee who is exposed to asbestos as a result of take-home exposure from a spouse or family member who works directly with asbestos-containing products.

#### 1. Relationship with Plaintiff

The following cases are from jurisdictions which emphasize the relationship of the plaintiff to the defendant when determining if a duty exists between the defendant and the plaintiff.

**i. *Reidel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).**

**Court:** Supreme Court of Delaware:

**Claim:** Negligence

**Exposure Dates:** Plaintiff's husband worked at ICI's Atlas Point facility in New Castle, Delaware from 1962-1990. Plaintiff's husband was around asbestos used and sprayed in the facility. Plaintiff Riedel regularly washed her husband's dusty clothes. Plaintiff was later diagnosed with asbestosis.

**Employer Knowledge:** There was some evidence that ICI was aware of the hazards of asbestos during the time he was employed there, and they did not provide showers, laundry rooms, uniforms, or locker rooms to their employees. Mr. Riedel was not warned of the potential danger of taking asbestos home on his clothing.

**Rationale:** The court followed the Restatement (Second) of Torts. Under the Restatement (Second) liability for nonfeasance is largely confined to situations in which there is a special relationship between the parties, on the basis of which the defendant is found to have a duty to take such action for the aid or protection of the plaintiff.

The Court relied on *In re N.Y. City Asbestos Litigation* for the proposition that "[t]here is no authority suggesting that the [defendant employer] owed a duty to protect [take home plaintiff] against its allegedly negligent acts because she was a beneficiary of her husband's work-related benefits." The Court also refused to find a relationship was created by ICI publishing a newsletter to ICI employees and families that provided tips on how to stay safe at home.

**Holding:** The Supreme Court of Delaware found Mrs. Riedel and ICI to be "legal strangers in the context of negligence" and found ICI owed Mrs. Riedel no duty. The trial court's summary judgment in favor of ICI was affirmed.

**ii. *In re Certified Question from the Fourteenth Dist. Court of Appeals of Texas,* 740 N.W.2d 206 (Mich. 2007) (original case name *Miller v. Ford Motor Co.*).**

**Court:** Supreme Court of Michigan

**Claim:** Negligence

**Exposure Dates:** Plaintiffs filed suit in Texas against defendant, alleging that the decedent contracted mesothelioma from washing the work clothes of her stepfather who worked for independent contractors who were hired by Ford to reline the interiors of blast furnaces from 1954-1965 at their Rouge plant in Deerborn, Michigan with materials that contained asbestos.

**Employer Knowledge:** The first published literature suggesting a "specific attribution to washing of clothes" was not published until 1965, so defendant would have not been able to foresee the risks of take home asbestos exposure during the stepfather's tenure at the plant.

**Rationale:** In Michigan, "the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. The inquiry involves considering, among any other relevant considerations, 'the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.'" (quoting *Dyer v. Trachtman*, 679 N.W.2d 311 (2004)). The most important factor to be considered is the relationship of the parties. "The determination of whether a legal duty exists is a question of whether the

relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." (quoting *Buczkowski v. McKay*, 490 N.W.2d 330 (1992)). Before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable. Once it is determined that there is a relationship and that the harm was foreseeable, the burden that would be imposed on the defendant and the nature of the risk presented must be assessed to determine whether a duty should be imposed.

**Holding:** Michigan negligence law values the relationship amongst the parties as the primary factor in determining whether a duty is owed, there was no duty owed to the decedent in the instant case. The Court explained the policy reasons why imposing a duty in this instance would bring about a "pervasive result" stating:

> Plaintiffs have asked us to recognize a cause of action that departs drastically from our traditional notions of a valid negligence claim. Beyond this enormous shift in our tort jurisprudence, judicial recognition of plaintiffs' claim may also have undesirable effects that neither we nor the parties can satisfactorily predict. For example, recognizing a cause of action based solely on exposure--one without a requirement of a present injury--would create a potentially limitless pool of plaintiffs.

**iii. *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 931 (Ill. App. Ct. 2009).**

**Court:** Appellate Court of Illinois, Second District

**Claim:** Negligence—Premises Liability

**Exposure Dates:** The deceased washed the clothing of her husband and son who worked for Aurora from 1968-1987 and 1977-1993, respectively. Plaintiffs alleged that, as a direct and proximate result of her exposure to asbestos from defendant's facility, Eva was stricken with mesothelioma and colon cancer, which caused her death.

**Employer Knowledge:** None Addressed

**Rationale:** "This is a case of first impression in Illinois in which plaintiffs ask us to extend a duty in a premises liability case to a person who did not have contact with the premises but who was allegedly injured by asbestos fibers and dust that escaped from the premises." The court then went on to define general duty and duty in premises liability cases. In defining general duty the Court stated:

> The essential elements of a cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Ward v. K mart Corp.*, 136 Ill.2d 132, 554 N.E.2d 223 (1990). The determination of whether a duty exists rests on whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Kirk v. Michael Reese Hospital & Medical Center*, 513 N.E.2d 387 (1987). The reasonable foreseeability of injury is one important concern, but our Supreme Court has recognized that foreseeability alone 'provides an inadequate foundation upon which to base the existence of a legal duty.' (quoting *Ward*, 136 Ill. 2d at 140). Other factors include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon the defendant. (quoting *Ward*, 136 Ill. 2d at 140-41). The nature of the relationship between the parties is a threshold question in the duty analysis.

The Court then outlined relevant premises liability law. "[P]remises-liability action is a negligence claim." See *Salazar v. Crown Enterprises, Inc.*, 328 Ill. App. 3d 735, 740, 767 N.E.2d 366 (2001). " Traditionally, the liability of a landowner in Illinois has been delineated in terms of the duty owed to persons *present on the land*." (emphasis added) (internal quotations omitted) (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 445-46, 605 N.E.2d 493 (1992)). The Court then concluded by saying:

> In our case, Eva had no relationship with Aurora. She never encountered any condition on Aurora's premises, nor was she in a position to have to enter the premises for any reason. Plaintiffs ask us to ignore the

> requirements of the cause of action they pleaded--premises liability--and to hold that a premises owner is liable to persons off the premises when it is foreseeable that a danger on the premises will cause injury to those persons. Plaintiffs concede that Eva had no relationship with Aurora's premises, and we cannot rewrite the law of premises liability as it has been established by our Supreme Court.

**Holding:** The Court affirmed the decision of the lower court and found that "no duty exists because no relationship exists."

**iv. *In re Asbestos Litig.*, 2012 Del. Super. LEXIS 67, February 21, 2012. (applying Pennsylvania law).**

**Court:** Superior Court of Delaware, New Castle

**Claim:** Negligence—Premises Liability

**Exposure Dates:** Plaintiff worked at PolyVision from 1968-2009. From 1974-1983 Plaintiff cut asbestos cement board. Dust collected on Mr. McCoy's work clothes and he wore them home. Janine McCoy, his wife, washed his clothes two to three times a week and was diagnosed with mesothelioma in 2010.

**Employer Knowledge:** Not Addressed

**Rationale:** Pennsylvania duty law is outlined by several factors "includ[ing]: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." The court looked to guidance from pervious decisions in similar cases to help guide its analysis.

On the issue of relationship between the parties the court found that "Mrs. McCoy and PolyVision are legal strangers in the context of negligence," and therefore, found that

this factor weighed in favor of no duty. Regarding social utility, the court found that businesses provide value to society, yet at the same time, people also have an interest in being protected from disease causing toxins, thus the court found this factor to be even. When analyzing foreseeability the court again found precedent to support both sides of the argument, which made this issue a wash. The consequence of imposing a duty factor weighed in favor of not imposing a duty because, "[t]he burden upon the defendant to undertake to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great; the exposure to potential liability would be practically limitless." Finally, when looking at overall public interest the court looked to the policy reasoning from courts in Pennsylvania's region in similar cases for guidance and found a majority "make the stronger argument [for not imposing a duty] and limitless liability is [a] serious public policy concern of finding that a duty exists. Therefore, this factor weighs against a duty in this case."

**Holding:** After weighing all of the factors of Pennsylvania duty law it was concluded that:

> Relationship analysis, consequence of imposing a duty, and overall public policy favor a finding of no duty. Social utility analysis and foreseeability analysis do not tip the scale in either direction. The court finds the relationship analysis the most persuasive factor. In weighing the factors as a whole the scale tips in favor of no duty existing. Therefore, the court finds under Pennsylvania law an employer/premises owner does not owe a duty to the spouse of an employee in the take homes asbestos exposure context.

**v. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009) (addressing liability of plant owners for asbestos-disease related death of spouse of independent contractor).**

**Court:** Supreme Court of Iowa

**Claim:** Negligence (independent contractor filing suit against premises owner for spouse take-home exposure).

**Exposure Dates:** Plaintiff was employed by Ebasco as an iron-rigger on the construction projects from 1973 to 1981. His wife laundered his work clothes regularly. She was diagnosed with malignant peritoneal mesothelioma and passed away.

**Employer Knowledge:** Defendant retained no control over the work or employees of the contractors or general contractors that it hired.

**Rationale:** Plaintiff brought claims under the theories that "MidAmerican and IPL are liable as the employer of an independent contractor," and that "MidAmerican and IPL owed [plaintiff] a general common-law duty to warn of the risks associated with exposure to asbestos."

Under the first theory, the Court analyzed Restatement (Second) of Torts Sections 413 and 416 as exceptions to the rule that the employer of an independent contractor is not liable for acts of the contractor. The Court found that "the risk that asbestos fibers would be carried home by Van Fossen and cause injury to Ann was not a risk that inhered in the construction and maintenance work performed by Van Fossen as an iron worker at the Port Neal facility. It was instead a risk that was occasioned by the failure of Ebasco and Klinger to employ routine precautionary measures against ordinary and customary dangers." The Court then concluded "the risk which led to the injury claimed by the plaintiff was not a peculiar risk under sections 413 and 416."

Under plaintiff's second theory, that defendants owed a duty under Restatement (Second) Section 427, the Court again found no duty. Under section 427, one who

employs an independent contractor to do work which the employer knows or has reason to know involves an "abnormally dangerous activity" owes a non-delegable duty to those exposed to the hazard. Restatement (Second) § 427 , at 418. To be an inherently dangerous activity, "the danger must inhere in the activity itself at *all times,* whether or not carefully performed." (quoting *Clausen v. R.W. Gilbert Constr. Co.,* 309 N.W.2d 462, 467 (Iowa 1981)). The court reasoned that had the work been done the proper way, there would not have been any inherent risk in the work that plaintiff performed.

Finally, under plaintiff's theory that defendants owed a general duty to exercise reasonable care, the Court again found that defendant's owed no duty to Ann. The Court justified its ruling by stating:

> [A]n actor owes 'a general duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.' (quoting Restatement (Third) § 7(a), at 90). 'However ,[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.' *Id.* § 7(b), at 90. We conclude this case presents an instance in which the general duty to exercise reasonable care is appropriately modified.

**Holding:** The district court granted the defendants' motions for summary judgment, concluding the owners owed no duty to warn the spouse of an independent contractor of the health hazards posed by asbestos.

The Court concluded, "[o]ne who employs an independent contractor owes no general duty of reasonable care to a member of the household of an employee of the independent contractor." To support its decision, the Court discussed applicable policy considerations including: the precedent set out in other jurisdictions that found no duty in

similar circumstances, as well as the threat of unlimited liability stating, "[i]f employers of independent contractors were to bear an unlimited general duty to exercise reasonable care [], when their contractors' work involves asbestos, the universe of potential persons to whom the duty might be owed is unlimited. The general duty of reasonable care urged by [plaintiffs] would extend even to persons like Ann who never visited the property owned by [defendants]." The Court then affirmed the judgment of the district court.

**vi. *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010) (holding that exposure-related injury must occur on premises owner's property).**

**Court:** Supreme Court of Ohio

**Claim:** Negligence—Premises Liability

**Exposure Dates:** Decedent's husband worked as a pipefitter from 1973-1983 for Goodyear at its St. Mary's, Ohio facility. Decedent allegedly breathed in asbestos dust that he brought home on his clothing while she shook them out prior to laundering them. Decedent was diagnosed with mesothelioma and subsequently passed away.

**Employer Knowledge:** Not Addressed

**Rationale:** R.C. 2307.941(A)(1), enacted by the Ohio legislature to reign in and revise the state's asbestos law, provides that premises owners are "not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property."

After looking to the specifics of R.C. 2307.941 and its subparts in the manner in which the Court believed the legislature had intended they found:

> When the provisions of RC. 2307.941are read in their entirety, it is evident that the General Assembly intended the phrase "exposure to asbestos on the premises owner's property," as used in R.C. 2307.941(A) to refer to the

> location of the asbestos to which an individual is exposed, not the location of the exposure. Thus, R.C. 2307.941(A) applies to all tort actions for asbestos claims brought against premises owners relating to exposure originating from *asbestos on the premises owner's property*, and R.C. 2307.941(A)(1) applies to preclude a premises owner's liability for any asbestos exposure that does not occur at the owner's property. Because Mary's exposure did not occur at Goodyear's property, R.C. 2307.941(A)(1) precludes Goodyear's liability as to this claim.

**Holding:** The Court concluded, "[p]ursuant to R.C. 2307.941(A), a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property, unless the exposure occurred at the owner's property."

**2. Foreseeability of Harm**

The following cases also found no duty was owed to the plaintiff by the defendant. The following cases emphasize that foreseeability of harm is the most important factor in determining whether a duty exists between a defendant and plaintiff.

**i. *Alcoa, Inc., v. Behringer,* 235 S.W.3D 456 (Tex. App. 2007).**

**Court:** Court of Appeals of Texas, Fifth District, Dallas

**Claim:** Negligence

**Exposure Dates:** From 1953 until 1955, and from 1957 until 1959, plaintiff's husband worked for Alcoa in the "potrooms." Plaintiff's husband removed his work clothes at Alcoa, showered in the changing room, and took his work clothes home in a bag. Every other day during the four years at issue, plaintiff would take her husband's dusty work clothes outside, shake them off, and then bring them back inside to wash them in the family's washing machine. Plaintiff was diagnosed with mesothelioma.

**Employer Knowledge: "**Non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in the 1950's."

**Rationale:** To establish duty the Court looked to several factors including "the risk, foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Of these factors, the foremost consideration is whether the risk is foreseeable."

Foreseeability is analyzed by the Texas Supreme Court under a two-pronged test: "(i) that the injury be of such a general character as might reasonably have been anticipated; and (ii) that the injured party should be so situated with relation to the wrongful act that injury to him or one similarly situated might reasonably have been foreseen."

**Holding:** After consulting the record for the evidence proffered by plaintiffs, the Court found "the danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s." Since Mrs. Behringer's exposure did not exceed the 1950's time frame the Court found Alcoa did not owe a duty to her under the foreseeability of harm test. As foreseeability is the foremost consideration in negligence analysis, the Court did not go on to analyze the other factors relevant to establishing a duty.

**ii. *In re Estate of Holmes*, 955 N.E.2d 1173, 353 Ill. Dec. 362 (Ill. App. 2011).**

**Court:** Appellate Court of Illinois, Fourth District

**Claim:** Civil Conspiracy and Wrongful Death

**Exposure Dates:** Decedent's husband worked at an asbestos plant operated by Union Asbestos & Rubber Company, later known as Unarco Industries, Inc. from 1962-1963.

Decedent's husband was exposed to asbesto s and brought hom e asbestos fibers on his clothes and person. Decedent was diagnosed with m esothelioma and subsequently passed away.

**Employer Knowledge:** The dangers of take-hom e exposure were not known while decedent's husband worked for the defendants.

**Rationale:** The Court outlined I llinois duty law by stating: "Whether a duty e xists depends on whether the parties stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." The Supreme Court of Illinois had outlined that whether a relationship exists justifying the imposition of a du ty depended on the following four factors: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the m agnitude of the burden of guarding against the injur y, and (4) the consequences of placing that burden on the defendant."

**Holding:** The court held that no duty was owed in th e case at hand stating that "[e]ven if we were to find a relationship existed betw een the parties […], we would find no duty existed because of the lack of foreseeability in this ca se." The court reasoned tha t the first date that the defendants could have re asonably known of the dangers of take-hom e exposure was in Octob er 1964 and that decedent's husban d only worked with asb estos from 1962-1963. Thus, "the evidence indicates the danger of household or take-hom e exposure to asbestos was not reasonably fo reseeable until after d ecedent's husband worked at Unarco."

### B. Duty Jurisdictions

All of the courts and respective jurisdictions outlined below have held that there is a duty owed to a non-employee who is exposed to asbestos as a result of take-home exposure from a spouse or family member who works directly with asbestos-containing products.

**1. Foreseeability**

**i. *Rochon v. Saberhagen Holdings, Inc.*, 2007 Wash. App. LEXIS 2392 (Wash. Ct. App. Aug. 13, 2007).**

**Court:** Court of Appeals of Washington, Division One

**Claim:** Negligence

**Exposure Dates:** Plaintiff's husband worked for Scott Paper Co., predecessor in interest to Kimberly-Clark Corp. from 1956-1966. Plaintiff's husband was exposed to asbestos and while laundering his clothing was exposed to asbestos fibers. She was diagnosed with mesothelioma.

**Employer Knowledge:** Not Addressed.

**Rationale:** The court specified that foreseeability is a part of any duty inquiry, and that anyone who undertakes an affirmative act is under the duty to protect others from the unreasonable risk of foreseeable harm.

The court determined that it was defendant's affirmative actions of running an unsafe factory that caused plaintiffs injury. Since, defendant acted, it owed a duty to prevent foreseeable harm to plaintiff. The court then used the holding from *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wash. App. 784, 106 P.3d 808 (Wash. Ct. App. 2005), which was a products liability case, to show that, although duty was not at issue in that case, it held the proposition "that an asbestos manufacturer could be liable to a family

member exposed to asbestos on clothing based on principles of foreseeability." The court then concluded that "even in the absence of any special relationship between them, Kimberly-Clark had a duty to prevent plaintiff's injury if its use of asbestos was unreasonably risky, and if her injury was a foreseeable consequence of its risky actions."

**Holding:** Whether a duty is owed is a question that must be answered by the plaintiff proving that his/her injury was foreseeable. The duty owed is a reasonable one that will only relate to the actions of Kimberly-Clark and not the acts of third parties or circumstances it did not create. Legal duty owed to an employee to an employer does not extend to plaintiff in this case. Liability has not been extended to non-employees under an employer/employee theory. No legal duty is owed to the plaintiff in this case under a premise liability theory either. Liability has not been extended under this theory to anyone who is not at least adjacent to the premises. This case was remanded for further findings of fact.

**ii. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).**

**Court:** Supreme Court of Tennessee, at Knoxville

**Claim:** Negligence

**Exposure Dates:** Decedent's father worked for Alcoa from 1973-1995. Decedent was born premature and required hospitalization for three months. Decedent's father would go directly from work in his work clothes, which were allegedly coated in asbestos fibers, to the hospital to visit Decedent. Decedent was eventually diagnosed with mesothelioma and subsequently died at the age of 25.

**Employer Knowledge:** OSHA regulations were promulgated in 1972. Alcoa did not warn its employees about handling asbestos after that time. Alcoa was aware that

asbestos fibers "extended beyond its employees who were in constant direct contact with the materials containing asbestos or the asbestos fibers in the air." Around that same time Alcoa learned that a higher rate of disease was being experienced by members of its employee's families who were being exposed to asbestos in the home. The court also found:

> Despite the fact that Alcoa was aware of the dangers posed by asbestos before Mr. Satterfield became an employee, it failed to apprise him or its other employees of the dangers of asbestos or specifically of the danger associated with wearing home their asbestos-contaminated work clothes. In addition, Alcoa failed to provide protective coveralls for its employees, discouraged the use of its on-site bathhouse facilities, and did not offer to launder its employees' work clothes at its facility.

**Rationale:** The court found that the pivotal factor in determining if a duty is owed in such cases is whether the law of the jurisdiction focuses on foreseeability of harm or the relationship, or lack thereof, between the parties. They then decided Tennessee law favors foreseeability above all else and stated, "a relationship ordinarily is not what defines the line between duty and no-duty; conduct creating risk to another is." Finally, after reviewing the facts of the case and analyzing the arguments presented by both sides they found that "Alcoa engaged in misfeasance that set in motion a risk of harm to Ms. Satterfield. Because Ms. Satterfield's complaint rests on the basic tort claim of misfeasance, it is not necessary to analyze in detail whether Alcoa also had duties arising from special relationships with third parties."

Tennessee law requires a balancing test that essentially boils down to "[t]he greater the risk of harm, the less degree of foreseeability is required [to find a duty]."

The court then reiterated that "[w]hile every balancing factor is significant, the foreseeability factor has taken on paramount importance in Tennessee."

After reviewing all of the factors the court concluded:

> Based on the facts alleged in Ms. Satterfield's complaint, Alcoa was a knowledgeable and sophisticated company that was fully aware (1) that it used materials containing asbestos in its manufacturing operations, (2) high volumes of asbestos fibers were being deposited on its employees' work clothes, and (3) that exposure to asbestos fibers created a substantial health risk. In light of this knowledge, Alcoa had a duty to use reasonable care to prevent exposure to asbestos fibers not only to its employees but also to those who came into close regular contact with its employees' contaminated work clothes over an extended period of time.

The court then went on to address public policy issues presented by Alcoa in support of not finding a duty for take-home exposure cases. The court rejected the arguments that "the current asbestos litigation crisis might have resonance with regard to recognizing a duty to unimpaired claimants where the magnitude of the harm is significantly less," "that [Alcoa] does not manufacture asbestos and that the manufacturers who use materials containing asbestos in their manufacturing process will face enormous financial burdens if they are exposed to liability for illnesses caused by exposure to asbestos fibers in their manufacturing processes," that "the weight of authority [from other jurisdictions] supports Alcoa in this case," and that "recognizing a duty to these family members will eventually result in the recognition of a duty with regard to babysitters, housekeepers, home repair contractors, and next-door neighbors."

**Holding:** Based on the facts, the court held that the plaintiff (decedent's father) stated a claim upon relief could be granted because as a matter of law, the court could not find that Alcoa did not owe a duty to the decedent. The court affirmed the Court of Appeals

and remanded the case to the trial court for further proceedings consistent with the opinion.

**iii. *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010).**

**Court:** Appellate Court of Illinois, Fifth District

**Claim:** Premises Liability

**Exposure Dates:** The plaintiff/decedent was married from 1951-1965 during which time her husband was exposed to asbestos while he worked as: a steelworker, welder, railroad fireman, and laborer. Plaintiff alleged that she was exposed to fibers brought home on her husband's clothing which caused her to develop mesothelioma. Plaintiff passed away.

**Employer knowledge:** Under the particular type of summary judgment motion that was filed, the court is unable to look at affidavits or other supportive documentation. It must take as true all facts alleged by the plaintiff. Most relevant of which in this case is that the defendants knew the hazards of take-home asbestos exposure at the relevant time when Plaintiff's husband was employed. Whether take-home exposure risk could not have been foreseen prior to OSHA was not considered by the court.

**Rationale:** "Under Illinois law, the existence of a duty depends on whether the parties stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff." "Whether a relationship exists between the parties that will justify the imposition of a duty depends upon four factors: (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm." To

analyze the case facts under Illinois law, the court decided to look to two cases from jurisdictions with similar facts and similar laws.

The court looked to *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) and *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394, 895 A.2d 1143 ( N.J. 2006). The court then discussed the role of relationships between the parties by taking directly from the *Satterfield* case:

> [I]n Illinois, as in Tennessee, all parties owe to all others the duty to take reasonable precautions to prevent their actions from harming all others. To find that an employer whose workers are exposed to asbestos owes no duty to protect others from exposure--assuming the exposure is both foreseeable and preventable without undue burden--merely because the others do not have any particular special relationship with the employer (such as an employee or a business invitee) would defy logic and lead to grossly unfair results.

The analysis did not end there. The court went on to look at other factors contributing to the question of whether a duty is owed. It was then established that 1) "the likelihood of serious or fatal injury to anyone foreseeably exposed to asbestos is substantial enough to warrant the imposition of a duty;" 2) "the burden of guarding against take-home asbestos exposure is not unduly burdensome when compared to the nature of the risk to be protected against;" and 3) the "focus on foreseeability provides an acceptable limitation on an employer's potential liability."

**Holding:** The Illinois court looked to *Olivo* for its analysis of foreseeability as the most important factor in determining duty. The question " is not whether the employer *actually* foresaw the risk to Annette Simpkins; rather, the question is whether, through reasonable care, it *should have* foreseen the risk." (emphasis in original). After reviewing

the record, the court found the risk of harm to Annette Simpkins was foreseeable during the relevant time period.

After a consideration of all of the issues involved in finding that CSX did in fact owe a duty of care to Annette Simpkins to prevent her from being exposed to asbestos brought home on her husband's work clothes and body, the circuit court's dismissal of the plaintiff's complaint was reversed and the case was remanded with the issues of breach and proximate cause still left to be proven by plaintiff.

**C. Policy Issues**

There is a limited field of public policy issues that have been discussed in take-home exposure cases, but the same issues have been argued by both sides and both sides have garnered rulings in their favor.

The most addressed issue is the "burden on the defendant" argument. This burden was best summed up by *Miller v. Ford Motor Co*, when it stated "no duty should be imposed because protecting every person with whom a business's employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden." Obviously, courts that have found no duty in take-home exposure cases have been persuaded by this argument, (*See Miller v. Ford Motor Co.*, *CSX Transp., Inc. v. Williams*, *Van Fossen v. MidAmerican Energy Co.*, and *In re Asbestos Litig.* cited above), while jurisdictions that have found a duty does exist have seen it as nothing more than the cost of doing business with asbestos. *See Satterfield v. Breeding Insulation Co.*, *Simpkins v. CSX Corp.* (cited above). In *Satterfield*, the Supreme court of Tennessee explained "in

light of the magnitude of the potential harm from exposure to asbestos and the means available to prevent or reduce this harm […] the imposition of a duty of reasonable care with regard to safe handling of asbestos fibers on employees' work clothes to prevent transmission to others is not such a burden." The *Simpkins* court even went as far as to outline ways in which the defendant could have prevented exposure to the household plaintiff including warnings, substitution of non-asbestos products, coveralls, locker rooms, and on-site laundry facilities. The court reasoned that the defendant employer could have undertaken these precautions at a much smaller burden when compared to the nature of the risk of the harm.

The question of an unlimited class of plaintiffs has been discussed in the context of inability to limit the class if a duty is found to be owed to non-employees who never entered the premises of the defendant. In *Miller v. Ford Motor Co.* the court cautioned that "[p]laintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes . . . ." *Miller*, 740 N.W.2d at 291. However, courts in jurisdictions where a duty does exist have decided, "the scope of liability will be inherently limited by the foreseeability of the harm, […] [thus] our focus on foreseeability provides an acceptable limitation on an employer's potential liability." *Simpkins*, 929 N.E.2d at 1118.

Another interesting policy issue brought up in *Miller v. Ford Motor Co.* is that of an unfair advantage to non-employee plaintiffs as opposed to employee plaintiffs who were exposed to asbestos at the actual worksite. " [S]econdarily exposed nonemployees

could obtain noneconom ic damages, such as pain and suffering, and possibly even punitive damages; these awards are not gene rally available to injured employees under workers' compensation." *Miller*, 740 N.W.2d at 219. This an interesting point, depending on the workers' com pensation laws of a particular jurisd iction, that was not addressed in other take-hom e exposure cases in any great detail. It would be unfair for plaintiffs who were actual employees and were directly exposed to asbestos on the actual premises of a defendant to have inferior reco very levels and fewer remedies available to them than plaintiffs who we re only secondarily exposed and never set foot on the defendant's premises.