No. 110662

IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee*, v. CSX TRANSPORTATION, INC., *Defendant-Appellant*.	)	Appeal from the Appellate Court of Illinois, Fifth District *Simpkins v. CSX Corporation*, No. 5–07–0346 There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07–L–62 Hon. Daniel J. Stack, *Judge Presiding.*

BRIEF OF DEFENDANT-APPELLANT CSX TRANSPORTATION, INC.

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NATURE OF THE ACTION

This is a personal injury action. It was brought to recover damages that decedent Annette Simpkins ("Simpkins") allegedly suffered as the result of secondhand exposure to asbestos fibers carried home by her former spouse when he was employed by Defendant-Appellant CSX Transportation Inc. ("CSXT"). The Circuit Court granted CSXT's motion to dismiss, finding that Plaintiff Cynthia Simpkins had failed to establish a duty of care running from CSXT to the decedent. The Appellate Court reversed, holding that although the decedent was not an employee of CSXT and had no contact with CSXT's premises, CSXT owed her a duty of care with regard to indirect off-site asbestos exposure. The case was not tried to a jury. It raises a question on the pleadings, namely, whether the complaint states a claim for which relief may be granted.

ISSUE PRESENTED

Whether an employer owes a duty of care to protect an individual who was not its employee and did not have contact with its premises from indirect exposure to asbestos fibers allegedly carried off-site on an employee's person or work clothes.

JURISDICTION

The Appellate Court had jurisdiction over CSXT's appeal under Supreme Court Rule 304(a). A5, A122.[1] The Appellate Court issued its decision on June 10, 2010. A1. CSXT filed a timely Petition for Leave to Appeal under Rule 315, which this Court granted on November 24, 2010.

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[1] The opinion of the Appellate Court is reported at 401 Ill. App. 3d 1109 (5th Dist. 2010) and is reprinted in the Separate Appendix. Citations to the Separate Appendix are noted as A__. Citations to the record on appeal are noted as C__.

STATEMENT OF FACTS

A. Background

This case involves alleged exposure to asbestos. Prior to the 1970s, asbestos was used in a "wide variety of manufactured products, from wire insulation to building materials." J. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51, 53 (2003). These products were used throughout American industry. As the health dangers of asbestos became more widely known, a "flood of lawsuits" followed. *Amchem Prods. v. Windsor*, 521 U.S. 591, 598 (1997) (internal quotation marks omitted).

Over time, the structure of asbestos litigation has changed. Initially, plaintiffs typically sought recovery from the manufacturers of asbestos or asbestos-containing products. Growing asbestos liabilities forced many of these companies into bankruptcy, starting with the 1982 bankruptcy of Johns-Manville, the largest asbestos producer. S. Carroll et al., Rand Institute for Civil Justice, Asbestos Litigation 48, 110 (2005). The litigation then shifted to "peripheral" defendants (*id.* at 48), often companies that were not manufacturers but rather consumers of asbestos-containing products. The early 2000s saw "rapid growth" in the number of claims brought by plaintiffs who had worked outside the traditional defendant industries and had not personally handled asbestos but who alleged that asbestos had been present in their workplaces. *Id*. at 76–77. As this second wave of asbestos litigation grew, an "increasing number of major defendants" filed for bankruptcy, adding to the financial pressure on those "defendants who remain in the litigation." *Id*. at 97; *see also In re Combustion Eng'g*, 391 F.3d 190, 201 (3d Cir. 2004).

More recently, courts have seen a third wave of asbestos litigation, in which plaintiffs—such as Plaintiff here—allege injury from secondhand exposure to asbestos. Secondhand-exposure claims are brought against defendants who did not employ the plaintiffs, invite them onto company premises, or otherwise directly expose them to asbestos. The plaintiffs claim that they were exposed to fibers from the defendants' premises through some intermediary, typically a family member who had been employed by a defendant.

Reports of disease allegedly attributable to secondhand exposures were regarded as "medical curiosities" as late as 1979. C1198 (reprinting H. Anderson et al., *Asbestosis Among Household Contacts of Asbestos Factory Workers*, 1979 Annals N.Y. Acad. Sci. 387, 387). Until recently, claims based on alleged secondhand exposure represented only a small fraction of asbestos claims. P. Hanlon & E. Geise, *Asbestos Reform—Past and Future*, Mealey's Litig. Rep.: Asbestos, Apr. 4, 2007, at 31, 40. Within the past decade, however, secondhand-exposure claims have become more common. Their sudden appearance has forced courts across the country to consider whether such claims are legally cognizable. The majority of courts to have reached the issue have concluded that they are not. *See infra* at 27–29.

B. The Complaint

Decedent Annette Simpkins died of lung cancer.[2] Cynthia Simpkins, Annette's daughter and the special administrator of her estate, was substituted as Plaintiff after Annette's death in 2007. A87, A90. Although Simpkins was a lifelong smoker, having

[2] The complaint had originally alleged that Simpkins suffered from mesothelioma. It was later determined that she suffered from lung cancer instead. A17, A57; C1113 n.2.

smoked a pack-and-a-half of cigarettes per day for 41 years (A69), Plaintiff alleges that Simpkins' lung cancer was "asbestos-related." A17; C1113 n.2.[3]

The complaint names 73 defendants, alleging that each was somehow responsible for Simpkins' asbestos-related disease. A13–14. Most of the 73 defendants were manufacturers, distributors, or installers of asbestos-containing products. A16–17.

According to the complaint, Simpkins was directly exposed to asbestos fibers "[d]uring the course of [Simpkins'] employment" and "during non-occupational work projects (including, but not limited to, home and automotive repairs, maintenance and remodeling)." A15–16. At work, Simpkins was exposed to "asbestos fiber emanating from asbestos-containing materials present and being used . . . by [Simpkins] and others." A32.[4] Plaintiff claims that "[a]s a direct and proximate result" of these exposures Simpkins "developed . . . asbestos-related disease." A34; *see also* A19, A36, A38.

In addition to asserting claims against 69 manufacturers, distributors, and installers (A15–23) and two of Simpkins' former employers (A31–40), the complaint also asserts claims against CSXT and Dow Chemical Company ("Dow"), former employers of Simpkins' former husband Ronald.[5] Ronald had been employed by the B & O Railroad, CSXT's predecessor-in-interest, from 1958 to 1964. The complaint asserts three counts against CSXT. Count VII alleges strict liability for an ultra-hazardous activity; Count

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[3] Because this case arises on a motion to dismiss, the complaint's allegations are assumed to be true for purposes of this appeal. *Iseberg v. Gross*, 227 Ill. 2d 78, 86 (2007).

[4] According to Simpkins' sworn statement, complaints were made to her work supervisors about asbestos-containing dust. A53.

[5] The decision below erroneously identifies CSX Corporation, the parent of CSXT, as a defendant in this litigation. Plaintiff had named CSX Corporation as a defendant, but voluntarily dismissed her claims against that company on March 16, 2007. A86.

VIII alleges negligence; and Count IX alleges willful and wanton misconduct. A26–31. Each count rests on the allegation that CSXT "owned, operated and/or controlled the B & O Railroad premises located in Granite City, Illinois, at all times relevant hereto." A26; *see also* A27, A29.[6]

The complaint does not allege that Simpkins ever worked for CSXT, or that she ever entered CSXT's premises. Rather, the complaint alleges that Ronald "was employed by Defendant and worked at said premises from 1958 to 1964"; that "[w]hile present upon the above-named premises," Ronald "was exposed to asbestos fiber emanating from asbestos-containing materials and raw asbestos present and being used at said premises"; that Ronald "carried [the fiber] home on his person and clothing"; and that Annette "was exposed to . . . the asbestos fibers [Ronald] carried home." A26. The complaint further asserts, without any supporting factual allegations, that Simpkins's "exposure to . . . said asbestos fibers was foreseeable," that CSXT "knew or should have known" that this exposure "posed an unreasonable risk of harm to [her]," and that Simpkins's lung cancer was "a direct and proximate result" of this secondhand exposure. A26–27, A29, A31.[7]

In addition to the secondhand exposure claim against CSXT, Plaintiff also appears to assert a secondhand exposure claim against each of the 69 manufacturers, distributors, and installers that she has named as a defendant. A15, A18. However, the question of what duty Simpkins may have been owed by a manufacturer, distributor, or installer is

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[6] Counts VII, VIII, and IX are also asserted against Dow, based on the allegation that Dow employed Ronald from 1964 to 1965 at "premises located in Madison, Illinois" that it "owned, operated and/or controlled." A26; *see also* A27, A29. Dow is not a party to this appeal.

[7] In addition to allegations of secondhand exposure attributable to CSXT and Dow, Plaintiff also alleges that Simpkins was exposed as a child to asbestos fibers that were carried home on the work clothes of her father, who was a steelworker at Commonwealth Steel for 23 years. A15. Commonwealth Steel was not named as a defendant.

not before this Court; the only issue in this appeal concerns the duty, if any, of an employer and premises owner. *See infra* at 13 n.12, 38.

C. Proceedings in the Circuit Court

CSXT moved to dismiss the complaint under 735 ILCS 5/2–615, on the ground that "[e]mployers do not owe any duty to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." A43. Plaintiff opposed CSXT's motion.[8] Emphasizing that she was "not suggesting that employers . . . should have a duty to everyone in the world that had contact with an asbestos-covered worker or his clothes" (C1118–19), Plaintiff argued that CSXT owed a "duty to family members in the employee's household" (C1119) because of those family members' "special relationship" to employees (C1122). In support of that argument, Plaintiff relied upon a transferred-negligence theory, citing *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348 (1977), which she described as "dispositive here." C1122.

At oral argument before the Circuit Court, Plaintiff conceded that "there is admittedly no Illinois case that applies this particular duty in this particular context." A100. Nevertheless, Plaintiff continued to rely on the transferred-negligence theory adopted in *Renslow*, asking that the court extend the employer's duty to an employee to include the employee's "family members," "particularly the spouse," based on "the close

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[8] Plaintiff did not rely on the sufficiency of the complaint in opposing dismissal. Instead, Plaintiff submitted an affidavit and numerous other documents to bolster her assertions of foreseeability. *See* C1113–18 (relying on C1133–1217); *see also, e.g.*, A100, A104, A115–16 (plaintiff's counsel relying on affidavit and various documents at oral argument on motion to dismiss); Pl.'s 5th Dist. Reply Br. 12 (arguing that "[P]laintiff's evidence is uncontested for purposes of this appeal" and "more than sufficient to establish . . . the existence of a duty").

family relationship." A102–03. The Circuit Court granted CSXT's motion, dismissed the claims against CSXT with prejudice, severed CSXT from the proceedings, and certified the cause for immediate appeal. A119.[9]

D. Proceedings on Appeal

Plaintiff appealed to the Fifth District. She framed the issue as whether CSXT "owed a legal duty of care to decedent, the wife of its employee, with respect to injury . . . caused by her exposure to asbestos that was carried home on the person and clothing of her husband from his work at defendant's premises." Pl.'s 5th Dist. Br. vi. Plaintiff conceded that Simpkins "had no direct relationship" with CSXT, and that the two were merely "linked through an intermediary," namely her former husband. *Id.* at 17. But she contended that a direct relationship was not necessary, both because CSXT owed her a derivative duty under the transferred-negligence theory she had raised below (*id*. at 11–14), and because CSXT owed a general duty to protect "'all others'" from any harm that might foreseeably result from its conduct (*id.* at 15 (quoting *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 291 (2007)). Although Plaintiff relied on a supposed duty to protect "all others," Plaintiff insisted that the only duty she sought to impose was one owed "to the *family members* of workers" (*id.* at 9), a duty that Plaintiff suggested was justified by the "sufficient link between [CSXT] and the families (wives in particular) of its . . . workers" (*id*. at 15).

For its part, CSXT observed that the existence of a particular duty under Illinois law does not depend on "foreseeability alone" (CSXT 5th Dist. Br. 20 (internal quotation

[9] On June 15, 2007, Plaintiff filed a substantively identical amended complaint to reflect the substitution of Cynthia as Plaintiff. A120; C1430–61. The Circuit Court issued a *nunc pro tunc* order effective May 18, 2007, dismissing the amended complaint as to CSXT and recertifying the matter for immediate appeal. A122.

marks omitted)), but instead involves "a question of 'whether the defendant and the plaintiff stood in such a relationship to one another'" as to justify that duty (*id*. at 17 (emphasis omitted; citing *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 525 (1987))). Noting that no Illinois court had ever recognized the duty that Plaintiff sought to impose, CSXT urged the Fifth District to conclude, as had the majority of courts around the country to have considered the issue before it, that such a duty should not be recognized and that the contrary result would risk creating an unmanageable and unlimited source of liability. *Id*. at 6–16.

After briefing had concluded, the Second District decided *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036 (2d Dist. 2009), which presented a similar claim based on secondhand asbestos exposure. The plaintiffs alleged that their decedent had contracted mesothelioma as a result of having been exposed to asbestos fibers carried home from the defendant's premises on the work clothes of her husband and son, both of whom had been employed by the defendant. *See id* at 1037. The plaintiffs sued, contending that the employer, as a premises owner, had been under a duty to protect all who might foreseeably be injured by conditions on its property. Noting that premises liability is traditionally based on "'the duty owed to persons *present on the land*'" rather than a free-ranging duty to all (*id*. at 1039 (quoting *Lee v. Chi. Transit Auth.*, 152 Ill. 2d 432, 445–46 (1992)), and recognizing that the relationship between the plaintiff and the defendant is "the touchstone of a duty analysis," the Second District refused to extend the premises owner's duty to a person who "never encountered any condition on [the defendant's] premises" and "had no relationship with [the defendant]." *Id*. at 1044

(citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006)). CSXT brought the decision to the Fifth District's attention soon after *Nelson* was decided. Pet. App. 10–15.

A little more than a year later, the Fifth District issued its decision in this case, reversing the dismissal of Plaintiff's claims against CSXT. Without mentioning the Second District's contrary holding in *Nelson*, the Fifth District concluded that an employer has a "duty to protect the family of its employee from the dangers of asbestos brought home on the work clothes of the employee." A3. The court did not distinguish among the three counts against CSXT because all "involved allegations that the risk of harm to Annette Simpkins was foreseeable." A5.

Given this Court's decision in *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155 (2009), the Fifth District "d[id] not believe that a transferred-negligence theory provide[d] viable support" for the duty asserted by Plaintiff. A6. But the lack of a "particular special relationship" between Simpkins and CSXT was irrelevant, the Fifth District held, because "every person owes every other person the duty to use ordinary care to prevent any injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions." A6 (citing *Forsythe*, 224 Ill. 2d at 291).

Indeed, although it paid passing attention to the likelihood of injury, the level of burden involved in guarding against it, and the consequences of placing that burden on the defendant (A9), the Fifth District forthrightly acknowledged that the "focus" of its duty analysis was "on foreseeability." A10. According to the Fifth District, the injury alleged by Plaintiff was foreseeable because "it takes little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well." A8.

Brushing aside the risk that imposing a duty to protect non-employees from secondhand exposure would "expose employers to limitless liability to 'the entire world,'" the Fifth District insisted that its "focus on foreseeability provides an acceptable limitation on an employer's potential liability." A9–10. The court acknowledged, however, that foreseeability provided "no principled reason to limit liability to the immediate families of workers who handle asbestos." A10. Thus, although the Fifth District "decide[d] . . . only that employers owe the immediate families of their employees a duty to protect against take-home asbestos exposure," the court specifically refused to "expressly limit the duty to immediate family members." A10.

SUMMARY OF ARGUMENT

Under well-established principles of Illinois tort law, the parties' relationship is "the touchstone of the duty analysis." *Krywin v. Chi. Transit Auth.*, 238 Ill. 2d 215, 938 N.E.2d 440, 447 (2010). Plaintiff claims that CSXT had a duty to protect Simpkins from secondhand exposure to asbestos fibers carried on her husband's person or clothing. CSXT undoubtedly had a duty of care to her husband, who was its employee. But, as Plaintiff has conceded, Simpkins had no direct relationship with CSXT. She was not its employee and never visited its premises. Nor was Simpkins the vicarious beneficiary of any duty CSXT owed her husband. Accordingly, CSXT owed no duty to Simpkins.

The Fifth District's contrary holding was based on what it perceived to be a generalized duty owed to all members of the public. But that holding, which focuses on foreseeability rather than the parties' relationship, is clearly contrary to this Court's precedent. Moreover, it creates the specter of massive liability to an unlimited universe of potential plaintiffs. Indeed, it is largely for this reason that the majority of other courts to have considered the issue have concluded that employers do not owe a duty to protect

non-employees against secondhand asbestos exposure. The few courts that have come to the contrary conclusion have done so based on principles of law that are incompatible with this Court's jurisprudence.

Whether a particular duty should be recognized is, in part, a matter of public policy. Yet none of the four factors that traditionally inform this Court's policy decisions favors recognizing a duty to protect non-employees against secondhand asbestos exposure. Injury from secondhand asbestos exposure was not foreseeable at the time of the alleged exposure. Imposing that duty today will not reduce the likelihood of future injury, because most employers have stopped using asbestos and those that continue to use it are subject to strict regulations and other legal duties that protect employees and non-employees alike. Although it would do little to promote future safety, recognizing such a duty would impose a substantial burden on employers, because it would require them to police their employees' off-duty conduct. Finally, allowing non-employees to assert claims based on secondhand exposure would exacerbate an already serious asbestos-litigation crisis and undermine the tort system by unfairly shifting a disproportionate share of massive liabilities onto defendants that bear little or no responsibility for plaintiffs' injuries.

This Court should adhere to its well-established principles and reject the unprecedented and potentially unlimited liability that Plaintiff seeks to impose.

ARGUMENT

I. UNDER TRADITIONAL TORT PRINCIPLES, EMPLOYERS OWE NO DUTY TO PROTECT NON-EMPLOYEES AGAINST SECONDHAND EXPOSURE TO ASBESTOS.

The Circuit Court correctly dismissed Plaintiff's action on the ground that CSXT owed Simpkins no duty of care. To state a claim for negligence, a complaint "must

allege facts establishing the existence of a duty of care owed by the defendant[] to the plaintiff[], a breach of that duty, and an injury proximately caused by that breach." *Iseberg v. Gross*, 227 Ill. 2d 78, 86–87 (2007) (citing *Bajwa v. Metro. Life Ins. Co.*, 208 Ill. 2d 414, 421 (2004)). Because negligence ordinarily may not be "founded upon the breach of a duty owed only to some person other than the plaintiff" (*Renslow*, 67 Ill. 2d at 355), the "first essential element" of a negligence claim is "a recognized duty of care owed by the defendant to the *particular* plaintiff." *Kirk*, 117 Ill. 2d at 528 (emphasis added); *see also, e.g.*, *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 265 (1990) ("negligence . . . require[s] proof that defendant breached a duty owed to a particular plaintiff").[10] Whether that duty exists in a particular case is a question of law, which this Court reviews *de novo*. *Vancura v. Katris*, 238 Ill. 2d 352, 939 N.E.2d 328, 342 (2010).

Plaintiff asks that this Court impose a previously unrecognized duty requiring employers to protect non-employees who never entered their premises from secondhand asbestos exposure.[11] Plaintiff's argument fails, however, because a duty of care will be imposed only when there is a relationship between the parties—a precondition that Plaintiff concedes is not satisfied here.

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[10] As the Fifth District recognized, the same duty is critical to Plaintiff's other theories of recovery—strict liability and "willful and wanton conduct." A4–5. The latter, for example, is merely "an aggravated form of negligence," and thus requires the same showing of duty. *Krywin*, 938 N.E.2d at 452. And, like negligence, "strict liability require[s] proof that defendant breached a duty owed to a particular plaintiff." *Smith*, 137 Ill. 2d at 265.

[11] Although secondhand-exposure claims have arisen in previous cases, none has addressed whether there is a duty to protect against such exposure. *See, e.g.*, *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102 (1999) (finding the evidence insufficient to establish the asserted civil conspiracy); *Healy v. Owens-Illinois, Inc.*, 359 Ill. App. 3d 186 (1st Dist. 2005) (affirming summary judgment on statute-of-limitations grounds).

In the courts below, Plaintiff advanced two theories for why a duty to protect non-employees against secondhand, off-site exposure should nevertheless be imposed on employers.[12] First, she argued that an employer owes an employee's family members a duty under the "'transferred duty' rule." Pl.'s 5th Dist. Br. 9. But, as the Fifth District suggested (A6), that argument is squarely foreclosed by this Court's decision in *Tedrick*. Plaintiff's second theory, which the Fifth District accepted, was that every person owes a duty of care to all other persons regardless of their relationship. Pl.'s 5th Dist. Br. 15. That theory, however, is not only inconsistent with this Court's precedent, but would open the door to unlimited and unmanageable liability. It is therefore no surprise that the majority of States to have addressed the issue have rejected the duty that Plaintiff seeks here.

A. A Duty of Care Requires a Relationship Between the Parties.

Although this Court has described the concept of duty as "'very involved, complex and indeed nebulous,'" *Marshall*, 222 Ill. 2d at 435 (quoting *Mieher v. Brown*, 54 Ill. 2d 539, 545 (1973)), some aspects of the doctrine are clear. This Court has recently and repeatedly affirmed that "[t]he touchstone of the duty analysis is to ask whether the plaintiff and defendant stood in such a *relationship to one another* that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Vancura*, 939 N.E.2d at 347 (internal quotation marks omitted); *see also, e.g.*, *Krywin*, 938 N.E.2d at 447; *Forsythe*, 224 Ill. 2d at 280–81; *Marshall*, 222 Ill. 2d at 436.

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[12] Although Plaintiff has generally defined the duty that she seeks to impose as one that would be owed by employers, she sued CSXT not only "as an employer" but also "as a premises owner." Pl.'s 5th Dist. Reply Br. 8; *cf.* A26. The distinction is, however, immaterial as the duty of a premises owner vis-à-vis non-entrants would be identical to that of an employer vis-à-vis non-employees.

This is not only a fundamental principle of Illinois law but reflects one of the traditional rules of the common law, which, rather than imposing an "obligation to behave properly" that is "owed to all the world," requires that there be "some specific relation between the plaintiff and the defendant." W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 53, at 357 (5th ed. 1984) (hereinafter "Prosser & Keeton"). Accordingly, because "'[p]roof of negligence in the air, so to speak, will not do,'" this Court "has thus far been unwilling to 'say there is a duty' unless the parties stood in such a relationship where one party is obliged to conform to a certain standard of conduct for the benefit of the other." *Widlowski v. Durkee Foods, Div. of SCM Corp.*, 138 Ill. 2d 369, 376 (1990) (quoting *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (quoting F. Pollock, Law of Torts 455 (11th ed. 1920))).

This well-established rule is fatal to Plaintiff's claim. As Plaintiff conceded below, Simpkins "had no direct relationship" with CSXT. Pl.'s 5th Dist. Br. 17. While every employer is under a "general obligation to provide a safe workplace for his *employees*" (*Iseberg*, 227 Ill. 2d at 90 (emphasis added)), Simpkins was never an employee of CSXT. And while "Illinois law imposes a duty upon premises owners" based on "the plaintiff's status *on the premises*" (*Rhodes v. Ill. Cent. Gulf R.R.*, 172 Ill. 2d 213, 227–28 (1996) (emphasis added)), Simpkins never set foot on CSXT's premises—or even ventured "in the vicinity" of those premises (Prosser & Keeton, *supra*, § 71, at 514). *Cf. Ziemba v. Mierzwa*, 142 Ill. 2d 42, 48 (1991) (noting, with regard to "the relationship between the parties," that "plaintiff never entered defendant's property, nor did he come into contact with any condition on defendant's land"). There was, quite simply, no direct relationship between Simpkins and CSXT.

The mere fact that Simpkins' husband had been employed by CSXT does not create a duty to Simpkins. It has long been understood, in Illinois and elsewhere, that a plaintiff must sue "in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." *Palsgraf*, 162 N.E. at 100 (cited with approval in *Widlowski*, 138 Ill. 2d at 376, and *Cunis v. Brennan*, 56 Ill. 2d 372, 374 (1974)). Thus, as the Second District concluded when presented with the question in *Nelson*, "no duty exists because no relationship exists." 391 Ill. App. 3d at 1044.

B. An Employer's Duty of Care to Its Employees Cannot Be Transferred to Their Family Members.

Recognizing that Simpkins "had no direct relationship" with CSXT (Pl.'s 5th Dist. Br. 17), Plaintiff argued in both the Circuit Court and the Fifth District that Simpkins was, by virtue of her marriage, owed a derivative duty under the transferred-negligence doctrine recognized in *Renslow*. *See id. at* 11; C1122. In *Renslow*, the Court extended a physician's duty of care to a patient to include a duty to her yet-to-be-conceived child—recognizing "a limited area of transferred negligence" in light of "the nature of the relationship between the parties harmed." 67 Ill. 2d at 357; *cf.* Prosser & Keeton, *supra*, § 53, at 357 (at common law "no [negligence] action could be founded upon the breach of a duty owed only to some person other than the plaintiff"). As the Fifth District properly recognized, however, the transferred-negligence theory is inapplicable here. *See* A6.

In *Tedrick*, this Court made clear just how narrow the transferred-negligence doctrine is, holding that a duty owed to a married individual is not transferred to the individual's spouse by virtue of their marriage. In *Tedrick*, the question was whether medical providers treating a mentally ill patient owed a duty of care to the patient's wife,

who was killed by her husband, who suffered paranoid delusions and had threatened to kill her. *See* 235 Ill. 2d at 157–60. Although the plaintiffs alleged "that it was reasonably foreseeable to defendants that [the husband] would injure and/or kill his wife" (*id*. at 160), the Court held that the transferred-negligence doctrine did not apply and that the duty owed to the patient did not transfer to his wife, because "'[t]he relationship between a mother and a fetus'" at issue in *Renslow* has "'singular and unique'" characteristics that the marital relationship does not share. *Id*. at 174 (quoting *Doe v. McKay*, 183 Ill. 2d 272, 280–81 (1998)); *see also id.* at 177. Under the reasoning in *Tedrick*, it is clear that Plaintiff here cannot bring her action on the theory that Simpkins was a vicarious beneficiary of the duties CSXT owed to her husband.

C. An Employer Does Not Owe a General Duty of Care to Non-Employees.

The Fifth District held for Plaintiff on a different theory. Relying on "general principles of duty," it stated that "all parties owe to all others the duty to take reasonable precautions to prevent their actions from harming all others." A6–7. Thus, according to the Fifth District, employers such as CSXT have a general duty to prevent any "reasonably foreseeable" injuries. A6. Avowedly "focus[ed] on foreseeability," the Fifth District believed that mere foreseeability "provides an acceptable limitation on an employer's potential liability." A10.

But this free-floating duty to protect, severed from any relationship between the plaintiff and the defendant, cannot support Plaintiff's claim here. As this Court has made clear, generalized statements of duty do not relieve the Plaintiff of her obligation to demonstrate a particular relationship that justifies the imposition of the asserted duty. The Court has repeatedly recognized that the existence of a relationship, not

foreseeability, is the touchstone of liability in Illinois. Moreover, the Fifth District's reasoning does not logically support the purportedly limited duty that Plaintiff sought below—namely, a duty that extends to an employee's family members but not to the world at large. As numerous other courts have recognized, there is no principled basis on which to distinguish between family members and the unlimited range of other persons who might foreseeably encounter the clothing of a defendant's employee or invitee on a regular basis. That is why courts in ten of fifteen States—and six of eight high courts in those States—have refused to impose a generalized duty on employers or premises owners to protect unrelated third parties from secondhand exposure.

1. A duty of care rests on the parties' relationship, not foreseeability.

The Fifth District's derived its untethered foreseeability standard from this Court's statement in *Forsythe* "'that every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act.'" 224 Ill. 2d at 291 (quoting *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32 (1992)). Similarly broad statements are occasionally found in other cases. In addition to *Frye*, which in turn quotes *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86 (1964), *Forsythe* cites *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 124 (1995); *Widlowski*, 138 Ill. 2d at 373; and *Feldscher v. E & B, Inc.*, 95 Ill. 2d 360, 368–69 (1983).

Significantly, however, in neither *Forsythe* nor any of the cases it cites for the proposition that "every person owes" a duty "to all others" did this Court find that a duty was in fact owed to a third party who had no direct relationship with the defendant. Indeed, only one of the cases even presented the question of whether a duty was owed to

a third party who had no relationship with the defendant.[13] And in that case, *Widlowski*, this Court squarely held that there was no such duty.

In *Widlowski*, the defendant employer negligently exposed an employee to fumes that caused him to become delirious. In that state, the employee was taken to a hospital, where he bit off a portion of a nurse's finger. 138 Ill. 2d at 372. Although the Court noted that, in general, "every person owes a duty of ordinary care to all others" to guard against foreseeable injury (*id*. at 373), it found that the employer owed no duty to the nurse. Not only was the injury unforeseeable, but even if it had been foreseeable a duty would not necessarily have existed because "whether a legal duty exists is contingent upon a variety of factors." *Id*. at 374–75. The Court noted that were foreseeability alone sufficient grounds for imposing a duty, "liability would extend to the world at large, because it was conceivable . . . that [the employee] could have harmed *anyone with whom he came into contact*." *Id*. at 375 (emphasis added). Thus, notwithstanding its broad statement regarding a duty "to all others," this Court reiterated that "whether a duty exists depends, in part, on the *relationship* between the parties." *Id*. at 373, 375 (emphasis added). "After all," the Court wrote, "[p]roof of negligence in the air, so to speak, will not do." *Id*. at 376 (alteration in original; internal quotation marks omitted).

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[13] In *Forsythe*, the question was "whether a parent company can be held liable under a theory of direct participant liability for controlling its subsidiary's budget in a way that led to a workplace accident." 224 Ill. 2d at 277–78. In both *Frye* and *Nelson*, the question was whether the defendant had voluntarily assumed a duty to the plaintiff, who was in each case directly injured by the defendant's conduct. *See Frye*, 153 Ill. 2d at 32; *Nelson*, 31 Ill. 2d at 83 (applying Florida law). In both *Mt. Zion* and *Feldscher*, the question was whether the duty owed by an owner or occupier of land to a trespasser injured on the land varied depending on the age of the trespasser. *See Mt. Zion*, 169 Ill. 2d at 116–18; *Feldscher*, 95 Ill. 2d at 366–67.

The Court reached a similar result in *Kirk*, where the defendant physicians had failed to warn their patient against driving while on certain medications. The plaintiff, a passenger in the patient's car who was injured in the ensuing wreck, argued that that the crash was "reasonably foreseeable," and that the doctors therefore owed "a common law duty to warn, running . . . to those in the general public who may reasonably be expected to come in contact with the patient." *Kirk*, 117 Ill. 2d at 529. The Court did not dispute that the plaintiff's injury was reasonably foreseeable to the defendant doctors, but nevertheless refused to "extend[] the duties of the doctors . . . beyond the patient to the general public," and thus "to an indeterminate class of potential plaintiffs." *Id*. at 532. Despite the injury's foreseeability, the Court held that the physicians' "relationship with the patient" was insufficient to support "a duty to protect unidentifiable, unknown third parties" who might be endangered by that patient. *Id*. at 531.

Because the duty that Plaintiff asks this Court to impose would extend to the world at large, encompassing any member of the general public who might reasonably be expected to come into contact with an employer's employee, Plaintiff's request should be rejected for much the same reasons that the Court refused to impose duties in *Widlowski* and *Kirk*. Like the defendants in *Widlowski* and *Kirk*, CSXT is not accused of having directly injured the plaintiff, but instead of having released into the world an individual in a dangerous state who, in turn, allegedly injured the plaintiff as a result of that state—chemical-induced delirium in *Widlowski*, medication-induced intoxication in *Kirk*, and asbestos contamination here. A duty to protect those in the world who might be reasonably expected to encounter an employee's work clothes, like a duty to protect those in the world who might be reasonably expected to encounter a delirious or intoxicated

individual, would create "an indeterminate class of potential plaintiffs" (*Kirk*, 117 Ill. 2d at 532) and should be rejected. The notion that "[d]ue care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone," was the view of the losing side in *Palsgraf*, and it has not been adopted by this Court. *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting). On the contrary, this Court has reiterated "the concern . . . that liability for negligence not extend to an unlimited and unknown number of potential plaintiffs." *Pelham v. Griesheimer*, 92 Ill. 2d 13, 20 (1982).

Consequently, the Court has steadfastly refused "to 'say there is a duty' unless the parties stood in such a relationship where one party is obliged to conform to a certain standard of conduct for the benefit of the other" (*Widlowski*, 138 Ill. 2d at 376), and the parties' relationship remains "the 'touchstone of this court's duty analysis.'" *Forsythe*, 224 Ill. 2d at 280 (quoting *Marshall*, 222 Ill. 2d at 436). Accordingly, and contrary to the Fifth District's avowed "focus on foreseeability" (A10), "'the existence of a legal duty is not to be bottomed on the factor of foreseeability alone.'" *Renslow*, 67 Ill. 2d at 354 (quoting *Cunis*, 56 Ill. 2d at 375); *see also Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990) ("foreseeability alone provides an inadequate foundation upon which to base the existence of a legal duty"); *Kirk*, 117 Ill. 2d. at 520 ("'A foreseeability test . . . is not intended to bring within the scope of the defendant's liability every injury that might possibly occur.'" (quoting *Winnett v. Winnett*, 57 Ill. 2d 7, 12 (1974)).

Recognizing a duty based on foreseeability alone is improper, among other reasons, because "hindsight makes virtually every occurrence foreseeable." *O'Hara v. Holy Cross Hosp.*, 137 Ill. 2d 332, 339 (1990). Indeed, this Court has repeatedly

recognized that "'[h]owever valuable the foreseeability formula may be in aiding a jury or judge to reach a decision on the negligence issue, it is altogether inadequate for use by the judge as a basis of determining the duty issue and its scope.'" *Renslow*, 67 Ill. 2d at 354 (quoting *Cunis*, 56 Ill. 2d at 375, in turn quoting L. Green, *Foreseeability in Negligence Law*, 61 Colum. L. Rev. 1401, 1417–18 (1961)); *see also, e.g.*, *Stallman v. Youngquist*, 125 Ill. 2d 267, 277 (1988).

2. A general duty of care cannot be limited to family members.

Plaintiff has repeatedly disclaimed any intent to establish a duty that would run from employers to all the world. *See, e.g.*, C1118–19, C1125; A102; Pl.'s 5th Dist. Br. 9, 16. Instead, she claims, she seeks the imposition of a duty that runs only to employees' "families (wives in particular)." Pl.'s 5th Dist. Br. 15. But to recognize a duty that is limited to employees' family members, or spouses in particular, would in effect be nothing more than a misapplication of the transferred-negligence doctrine based on those individuals' special relationship with the employee. As explained above (*see supra*, at 15–16), and as recognized by the Fifth District, the transferred-negligence doctrine does not "provide[] viable support for the plaintiff's argument regarding duty." A6. Because the duty that Plaintiff seeks to establish cannot rest on the special relationship between an employee and the employees' family members, that duty, if it exists at all, is owed not only to an employees' family members but to "every other person" who might be reasonably expected to encounter the employee away from the employee's worksite. *Id.* And, although the decision below purportedly applies only to "the immediate families" of employees, the Fifth District emphasized that its decision "do[es] not expressly limit the duty to immediate family members." A10.

Indeed, the few courts in other States that have recognized a duty to protect non-employees against secondhand asbestos exposure have not identified any principled basis on which to limit such claims to immediate family members. On the contrary, they have freely acknowledged that there is no logical basis upon which to exclude claims brought by persons outside an employee's immediate family. Nor, absent arbitrary distinctions, could this Court hope to cabin the duty that Plaintiff wishes to impose. If this Court were to recognize a duty to protect non-employees against secondhand asbestos exposure, that duty would quickly encompass "an indeterminate class of potential plaintiffs." *Kirk*, 117 Ill. 2d at 532.

The essence of Plaintiff's claim is that CSXT should have foreseen that asbestos fibers on its employee's person and clothing might be brought into Simpkins's presence. If, however, the foreseeability of regular contact with an employee's person and clothing is sufficient to create a duty of care, then it would be wholly arbitrary to limit that duty to the employee's immediate family members. As New York's highest court has explained, a spouse who lives with the defendant's employee may not have any more exposure to residual asbestos fibers than a "babysitter who takes care of children in the employee's home five days a week," or the "employee of a neighborhood laundry" who "launders the family members' clothes." *In re N.Y. City Asbestos Litig.* (*Holdampf v. A.C. & S., Inc.*), 840 N.E.2d 115, 122 (N.Y. 2005). Likewise, the Michigan Supreme Court predicted suits brought on behalf of "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." *In re Certified Question from the Fourteenth Dist. Ct. App. of Tex.* (*Miller v. Ford Motor Co.*), 740 N.W.2d 206, 219 (Mich. 2007)

(internal quotation marks omitted); *see also CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 698–99 (Iowa 2009).

The list of potential plaintiffs is endless. People who might be reasonably expected to encounter employees away from their worksite could include, for example, the servers at a restaurant where workers regularly buy lunch; the bartenders and patrons of a bar where workers regularly drink after work; and the commuters who ride the bus every weekday with workers coming home in dirty work clothes. There is no *a priori* reason to believe that such individuals necessarily had less exposure to an employee's person and clothing than members of the employee's immediate family. If the duty to protect non-employees against secondhand asbestos exposure is based on the foreseeability of the non-employees' contact with a defendant's employees, there is no reason why the predicate contact must be limited to routine encounters with the *same* employee. A server or bartender who served thirty different employees daily may well have had greater aggregate contact than the immediate family of any one employee. And if it were predictable that servers and bartenders would be exposed to asbestos fibers, then the same would presumably be true of *their* spouses and children; and so the cycle of ever-expanding liability rolls on.

Thus, far from "provid[ing] an acceptable limitation on an employer's potential liability" (A10), mere foreseeability provides no limitation at all. On the contrary, recognizing a duty to protect non-employees against foreseeable secondhand asbestos exposure would "create a potentially limitless pool of plaintiffs." *Miller*, 740 N.W.2d at 220; *see also Williams*, 608 S.E.2d at 208. Because a "focus on foreseeability" (A10)

does not suffice, "the specter of limitless liability is banished only when the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." *Holdampf*, 840 N.E.2d at 122 (internal quotation marks omitted).

Of the few courts to have recognized a duty to protect non-employees against secondhand asbestos exposure, several have candidly admitted that the duty cannot be restricted only to family members. For example, the Tennessee Supreme Court in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008), frankly acknowledged that there is, in the Fifth District's words, "*no principled reason* to limit liability to the immediate families of workers who handle asbestos." A10 (emphasis added). As the Tennessee court stated:

> There is no magic talisman that protects persons from the harmful effects of exposure to asbestos simply because they do not live under the same roof or are not a member of the employee's family by blood or marriage. . . . *Accordingly, the duty we recognize today extends to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time, regardless of whether they live in the employee's home or are a family member*.

Satterfield, 266 S.W.3d at 374 (emphasis added). The Tennessee court embraced the notion that *all* persons, even "remotely exposed persons," should be entitled to sue, finding "no reason to prevent carpool members, babysitters, or the domestic help from pursuing negligence claims against an employer." *Id*.

And when one court did try to limit the duty to an employee's immediate family members, the futility of that effort soon became apparent. When the Louisiana Court of Appeal recognized an employer's duty to an employee's spouse, it dismissed concerns of limitless liability, assuring that "limitless liability would not be created" because its ruling applied only to "these particular facts and circumstances." *Chaisson v. Avondale Indus.*, 947 So. 2d 171, 182 (La. Ct. App. 2006). But within three years of that decision,

the duty was expanded to include a niece who spent evenings and weekends with her employee uncles, with the court noting that "obvious dilemmas would arise" if judges attempted "to define what constitutes a household member" with any greater precision. *Catania v. Anco Insulations, Inc.*, 2009 WL 3855468, at *2 & n.6 (M.D. La. 2009). Indeed, it is not only impossible to limit the duty Plaintiff seeks to impose through a definition of who constitutes a household member, but also impossible "to offer any principled way of distinguishing the claims of household members from other potential claimants—for instance, a person who sat next to [a defendant's employee] on the bus every day after work." *Miller*, 740 N.W.2d at 217 n.17. It is for this reason, presumably, that the Fifth District "d[id] not expressly limit the duty to immediate family members." A10.

Recognizing the "possibility of broad liability" but unable to articulate a principled basis upon which to distinguish family members from other non-employees, Plaintiff urged the Fifth District to limit the duty on an arbitrary basis, suggesting simply that "[t]he line can be drawn at family members, should the courts choose to do so." Pl.'s 5th Dist. Reply Br. 15–16. Consistent with her unprincipled approach below, Plaintiff has asked that this Court turn a blind eye to "speculative future implications"—which is to say, *any* future implications—of its decision. Pl.'s Answer to Pet. 12. Indeed, some courts have adopted that approach. *See, e.g.*, *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1150 (N.J. 2006) (recognizing a duty "in these circumstances" only, to avoid "public policy concerns about [its] fairness and proportionality").

But a decision of this Court is not like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J.,

dissenting). This Court's decision in any individual case will "establish the law of the jurisdiction for future cases." *In re Commitment of Simons*, 213 Ill. 2d 523, 531 (2004) (internal quotation marks omitted). Accordingly, this Court will not recognize a new duty if it must at the same time "limit application of th[at] duty" based on "irrelevant" or "illogical" distinctions. *Lamkin v. Towner*, 138 Ill. 2d 510, 525 (1990). Attempting to distinguish between the individuals who would be allowed to assert claims for secondhand asbestos exposure and those who would not when there is no principled basis upon which to do so would embroil Illinois judges in endless line-drawing exercises—and (as this Court has stated in another context) "imprudently bog down the judiciary in an almost futile endeavor." *Smith*, 137 Ill. 2d at 253. There is no rational distinction to be drawn between family members and others who routinely encounter an employee's person or work clothing. *All* such persons fall equally within the Court's longstanding policy of avoiding unlimited and indeterminate liability, and all their claims must rise and fall together.

Recognizing a duty based solely on foreseeability without regard to the parties' relationship would unleash a torrent of claims. That is reason enough to reject Plaintiff's theory, for "in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree." *Holdampf*, 840 N.E.2d at 119 (internal quotation marks omitted). Notwithstanding Plaintiff's suggestion that this Court can simply ignore this case's "future implications" (Pl.'s Answer to Pet. 12), a finding of duty here "will apply not only in the instant case but in the next 500 cases as well." *Miller*, 740 N.W.2d at 217 n.17. And, if any lesson can be drawn from nearly forty years

of the "asbestos-litigation crisis" (*Amchem*, 521 U.S. at 597), it is that once a duty is recognized, it will quickly become a magnet for new attempts to expand its scope. Thus, even if the actual "incidence of asbestos-related disease" due to secondhand exposure is "rather low, experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *Holdampf*, 840 N.E.2d at 122. Without a logical basis to limit the class of potential claimants, it would be "unwise, to say the least, to alter the common law in the manner requested by plaintiffs when it is unclear what the consequences of such a decision may be and when we have strong suspicions . . . that they may well be disastrous." *Miller*, 740 N.W.2d at 220 (omission in original; internal quotation marks omitted).

3. A general duty of care for secondhand exposure would be contrary to the weight of nationwide authority.

The duty requested by Plaintiff would not only be limitless in scope; it would also be contrary to the weight of nationwide authority. Recognizing the novelty and breathtaking scope of the duty asserted here, "[m]ost of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos [have] conclude[d] that no such duty exists." *Van Fossen*, 777 N.W.2d at 697. In particular, the States whose law is most similar to that of Illinois—*i.e.*, the States that consider not only foreseeability, but also the parties' relationship—have consistently rejected the duty that Plaintiff seeks here. This Court should do the same.

a. The majority of state courts have rejected a duty of care for secondhand exposure.

The question before this Court has already been considered by the highest courts of eight States. Of those, six have refused to recognize a duty of care with respect to the family members of an entrant onto the defendant's premises. *See Riedel v. ICI Americas*

Inc., 968 A.2d 17 (Del. 2009); *Williams*, 608 S.E.2d 208 (Georgia); *Van Fossen*, 777 N.W.2d 689 (Iowa); *Miller*, 740 N.W.2d 206 (Michigan); *Holdampf*, 840 N.E.2d 115 (New York); *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010).[14] In four of these cases—*Riedel*, *Williams*, *Holdampf*, and *Boley*—the entrant was the defendant's employee; in the two others—*Van Fossen* and *Miller*—the entrant was the employee of an independent contractor. Under either fact pattern, however, recognition of a duty to protect an entrant's family members against secondhand exposure would have entailed the same risk of "'limitless liability to an indeterminate class of persons.'" *Miller*, 740 N.W.2d at 214 (*quoting Holdampf*, 840 N.E.2d at 119); *cf. supra* at 13 n.12.

Secondhand-exposure claims have also been rejected by intermediate appellate courts in Maryland (*see Adams v. Owens-Illinois, Inc.*, 705 A.2d 58 (Md. Ct. Spec. App. 1998))[15] and Texas (*see Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415 (Tex. Ct. App. 2008); *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. Ct. App. 2007)), and by federal courts applying the laws of Kentucky (*Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009)), and Pennsylvania (*see Jesensky v. A-Best Prods. Co.*, 287 F. App'x 968, 971 (3d Cir. 2008), *aff'g on other grounds* 2004 WL 5267498 (W.D. Pa. 2004)). In

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[14] *Boley* relied on a state statute codifying the traditional tort rule that a premises owner is not liable for asbestos exposure that did not occur "'at the premises owner's property.'" 929 N.E.2d at 451 (quoting Ohio Rev. Code § 2307.941(A)(1)). Kansas has adopted a similar statute. *See* Kan. Stat. Ann. § 60–4905(a).

[15] *Adams*'s reasoning was implicitly ratified by the Maryland Supreme Court in *Doe v. Pharmacia & Upjohn Co.*, 879 A.2d 1088 (Md. 2005), a case involving secondhand exposure to HIV. Citing *Adams*, the *Doe* court held—notwithstanding the plaintiff's assurance that her proposed duty would be "limited to spouses"—that recognizing an employer's duty "to anyone who had close contact with [an] employee" would create an "indeterminate class" of plaintiffs and "make tort law unmanageable." *Id.* at 1096.

all, courts applying the laws of ten States have rejected claims analogous to those presented here.[16]

These decisions represent the clear majority rule. By contrast, the high courts of only two States, New Jersey and Tennessee, and the intermediate appellate courts of another, Louisiana, have recognized a duty arguably analogous to that which Plaintiff asserts here. *See Olivo*, 895 A.2d 1143; *Satterfield*, 266 S.W.3d 347; *see also Chaisson*, 947 So. 2d 171; *Zimko v. Am. Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005).[17] Not only do these cases represent the minority view, but, as explained more fully below (*see infra* at 29–31), they rest on legal principles that are foreign to Illinois law.

b. The States whose law is similar to that of Illinois have rejected a general duty of care.

Notably, the majority of the courts that have rejected the duty that Plaintiff asserts here have done so by applying law similar to that of Illinois, while the minority of courts to have accepted that duty have done so on legal principles that are either foreign to Illinois law or otherwise inapplicable to this case. As the judge responsible for Delaware's asbestos docket recognized, "[i]n jurisdictions . . . where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the

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[16] The decisions in Texas (*Altimore* and *Behringer*) and Kentucky (*Martin*) found as a matter of law that the plaintiff's asserted injuries were not foreseeable. As a result, they did not need to reach the question whether a duty would be imposed if the injuries could have been foreseen. The exposures in each of the cases—like the exposure alleged here—occurred prior to 1972, when the federal government began regulating asbestos in the workplace. *See infra* at 33–35.

[17] Below, Plaintiff also invoked the unpublished decisions of lower courts in California and Washington. *See* Pl.'s 5th Dist. Br. 25–27 (citing *Honer v. Ford Motor Co.*, 2007 WL 2985271 (Cal. Ct. App. 2007); *Condon v. Union Oil Co.*, 2004 WL 1932847 (Cal. Ct. App. 2004); *Rochon v. Saberhagen Holdings, Inc.*, 2007 WL 2325214 (Wash. Ct. App. 2007)). But those decisions lack precedential value even within their own jurisdictions (*see* Cal. R. Ct. 8.1115; Wash. Rev. Code § 2.06.040), and are entitled to no weight here.

foreseeability of injury, the courts uniformly hold that an employer/premises owner owes no duty." *In re Asbestos Litig.*, 2007 WL 4571196, at *3 (Del. Super. Ct. 2007), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

Indeed, courts have distinguished contrary holdings on this very basis. *See Satterfield*, 266 S.W.3d at 361 (courts finding a duty "have focused on . . . foreseeability," while courts "finding that no duty exists have focused on the relationship—or lack of a relationship—between the employer and the injured party"). Thus, Michigan's high court distinguished its law from that of Louisiana and New Jersey by noting that the latter courts "rel[y] heavily upon foreseeability in [their] duty analysis," while Michigan's own law and that of New York "rel[y] more on the relationship between the parties." *Miller*, 740 N.W.2d at 215–16 (internal quotation marks omitted). The courts of Louisiana, New Jersey, and Tennessee openly acknowledge the primary reliance they place on foreseeability. *See, e.g.*, *Satterfield*, 266 S.W.3d at 366 ("foreseeability . . . has taken on paramount importance in Tennessee"); *Olivo*, 895 A.2d at 1148 (describing "foreseeability of harm" as "a crucial element" under New Jersey law); *Chaisson*, 947 So. 2d at 182 ("Louisiana relies more heavily upon foreseeability in its duty/risk analysis than Georgia does").

The contrast between Illinois law, in which the parties' relationship is the "touchstone" of duty analysis, and the law of the States that have recognized the sort of duty that Plaintiff wishes to establish here, has effects in other contexts far removed from asbestos litigation. For example, following their general commitment to foreseeability, courts in Louisiana, Tennessee, and New Jersey have subjected physicians or psychiatrists to a duty to third parties foreseeably injured by their negligence in treating

patients. *See Davis v. Puryear*, 673 So. 2d 1298 (La. Ct. App. 1996); *Marshall v. Klebanov*, 902 A.2d 873 (N.J. 2006); *C.W. v. Cooper Health Sys.*, 906 A.2d 440, 452 (N.J. Super. Ct. App. Div. 2006); *Burroughs v. Magee*, 118 S.W.3d 323, 329 (Tenn. 2003). The Tennessee Supreme Court repeatedly relied on this case law when it found the employer liable for secondhand exposure in *Satterfield*. *See* 266 S.W.3d at 355, 357, 363, 365 (citing *Burroughs*). And, in *Olivo*, the New Jersey Supreme Court made clear that the duty it recognized did *not* run directly from the employer to the spouse, but was instead "a *derivative* duty" based on the duty the employer owed to the husband. 895 A.2d at 1149 (emphasis added); *see also id.* at 1151 (remanding the case to determine whether the husband was owed a duty in the first place, because if "no duty is owed to [the husband]," then "no derivative duty can be imposed . . . for [the wife]"). By contrast, as this Court has made clear in *Tedrick* and *Kirk*, Illinois law emphasizes the relationship of the parties and—with the "singular and unique" exception of transferred duties owed to an unborn fetus—does not recognize derivative duties. *See Tedrick*, 235 Ill. 2d at 169–70, 174–77; *Kirk*, 117 Ill. 2d at 527. Thus, the fact that courts in Tennessee, New Jersey, and Louisiana have recognized the duty that Plaintiff seeks to impose here is a reason to reject, not accept, Plaintiff's argument.

II. IMPOSING A DUTY ON EMPLOYERS TO PROTECT NON-EMPLOYEES AGAINST SECONDHAND EXPOSURE TO ASBESTOS FIBERS WOULD BE CONTRARY TO PUBLIC POLICY.

Plaintiff's claim fails because she alleges no legally significant relationship between Simpkins and CSXT. Moreover, even if she had alleged such a relationship, Plaintiff's claim would still fail on public policy grounds. Under Illinois law, whether a given relationship between the parties justifies the imposition of a duty "involves considerations of public policy." *Marshall*, 222 Ill. 2d at 436. The Court will decline to

impose a duty where, as here, "the public policy and social requirements of our era do not support [its] imposition." *O'Hara*, 137 Ill. 2d at 341.

The public policy decision is traditionally "informed" by the consideration of four factors: (1) the reasonable foreseeability of the injury, (2) its likelihood, (3) the burden involved in guarding against it, and (4) the consequences of placing that burden on the defendant. *See City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 391 (2004).

Here, none of these factors favors imposing a duty to protect non-employees against secondhand exposure to asbestos fibers. In 1964, when Simpkins' alleged exposure came to an end, the prospect of serious injury to non-employees from secondhand exposure to asbestos fibers was not reasonably foreseeable. Today, the likelihood of an injury from secondhand exposure is minimal—first, because asbestos is rarely used anymore, and, second, because the employers that do continue to use it are subject to strict regulations and other legal duties that protect both employees and non-employees. Requiring employers to bear an *additional* duty of care to every person whom their employees might regularly encounter would not increase safety. It would, however, impose a significant burden on employers. And, by subjecting employers to massive potential liabilities in connection with past injuries for which they bear little or no responsibility, it would compound the ongoing asbestos–litigation crisis. These consequences would be bad not only for employers but society at large. Accordingly, public policy strongly favors the reaffirmation of existing law and the rejection of the novel duty that Plaintiff seeks to impose.[18]

[18] What is true with respect to employers vis-à-vis non-employees is also true with respect to premises owners vis-à-vis non-entrants. *See supra* at 13 n.12, 28.

A. Plaintiff's Allegations Do Not Establish that Serious Injuries from Secondhand Exposure Were Reasonably Foreseeable 45 Years Ago.

When considering "whether harm was legally foreseeable" this Court "consider[s] what was apparent to the defendant at the time of his now complained of conduct, not what may appear through exercise of hindsight." *Cunis*, 56 Ill. 2d at 376. Here, Plaintiff's allegations fail to establish that the prospect of serious injury from secondhand exposure was reasonably foreseeable to employers when Simpkins' husband Ronald left CSXT's employment in 1964.

Plaintiff's complaint alleges in conclusory fashion that CSXT "knew or should have known" of the dangers of secondhand exposure and that such exposure "was foreseeable." A27. But to survive a motion to dismiss, "a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations." *Pooh-Bah Enters. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Rather, in this fact-pleading jurisdiction, "plaintiffs must allege facts, not mere conclusions, to establish their claim as a viable cause of action." *Iseberg*, 227 Ill. 2d at 86.

Plaintiff here failed to allege any facts to support her assertion that Simpkins' alleged injury was reasonably foreseeable to CSXT. The complaint does not even attempt to describe the nature or degree of Ronald's alleged exposure to asbestos. It merely suggests that he was exposed to some amount greater than zero. *See* A26. Nor does the complaint attempt to quantify how much asbestos fiber Ronald allegedly carried home. *See id*. Thus, even if one were to assume that Ronald carried home every fiber to which he was allegedly exposed, and that Annette was exposed to every fiber Ronald allegedly carried home, the complaint contains no allegations as to the extent of

Annette's secondhand exposure. In the absence of such allegations, there is no basis to conclude that CSXT could reasonably have foreseen any alleged injury to Annette.[19]

In opposing CSXT's motion to dismiss, Plaintiff sought to bolster her complaint by introducing an affidavit and 83 pages of exhibits concerning the state of scientific knowledge in 1964. *See* C1133–1217; *cf. supra* at 6 n.8. Yet, even if these exhibits could properly be considered (which they cannot, *see In re Chi. Flood Litig.*, 176 Ill. 2d 179, 203 (1997)), they do not show that CSXT could reasonably have foreseen that Annette would be injured by secondhand exposure to asbestos fibers. At most, Plaintiff's exhibits demonstrate only that industrial hygenists were aware that workers exposed to substances at work could potentially carry those substances away from the job site on their clothing. *See* C1116–17, C1135–37, C1143–65, C1185–86. The question here, however, is not whether any secondhand exposure at all was reasonably foreseeable, but whether CSXT should have foreseen exposure in amounts then believed likely to cause serious injury. The first study mentioned in Plaintiff's exhibits that documented actual injuries to household members from secondhand asbestos exposure—other than those living on or near asbestos mines—was presented by Finnish researchers at a New York conference in 1964, the last year that Ronald Simpkins worked for CSXT; indeed, the study may well have been presented after Ronald's employment had ended. *See* C1137–38. Moreover, Plaintiff's own exhibits establish that even as late as 1979—*fifteen years* after Ronald Simpkins ceased his employment with CSXT—injuries due to secondhand exposure were still regarded as "medical curiosities" by the scientific community. *See* C1198. Employers are not obliged to monitor first-of-a-kind foreign studies presented at

[19] This is especially true in light of Plaintiff's admission that Ronald has not contracted any asbestos-related disease. *See* Pl.'s 5th Dist. Br. 2 n.2.

distant gatherings and need not treat what scientists consider "medical curiosities" as reasonably foreseeable events. There is, therefore, no basis to conclude that CSXT could, let alone should, have foreseen Annette's alleged injury at the time it employed Ronald.

B. The Likelihood of Future Injury from Secondhand Exposure Is Already Small and Will Not Be Reduced by Imposing a New Duty.

Even if a risk is reasonably foreseeable, this Court also considers the likelihood of injury and the actual "potential for harm" before imposing a duty. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 397 (1998). Here, there is little likelihood of injury. Not only is asbestos use generally a thing of the past, but modern regulations and employers' duties to employees already protect non-employees against secondhand exposure.

1. Workplace asbestos is now rare and heavily regulated.

Plaintiff alleges that Simpkins was injured by conduct that occurred between 1958 and 1964. A26. But the Occupational Safety and Health Administration (OSHA) has regulated workplace asbestos exposures since 1972. *See Altimore*, 256 S.W.3d at 422. Moreover, those regulations have become "increasingly stringent" over time. Stiglitz, *supra*, at 53. While asbestos use "remains technically legal," OSHA and Environmental Protection Agency regulations have "effectively phased out most uses of asbestos." *Id.* at 53–54. Many companies "stopped manufacturing asbestos products around 1975." *Amchem*, 521 U.S. at 600 n.2. Thus, "[b]y the time the courts were involved, the use of asbestos was already in decline and did not need to be discouraged." P. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 Rev. Litig. 583, 605 (2007).

Consequently, there is little chance that the conduct Plaintiff challenges will pose any risk of injury in the future. Because a novel duty to third parties could only have

prospective deterrent effect, no public policy purpose would be served by imposing it, when, as here, the conduct to be deterred no longer occurs. Indeed, this Court has already noted how "unlikely [it is] that an overall safety incentive could result from imposition" of a new form of liability more than "40 years after the undesirable [event] occurred," and nearly as long "after the potential harm was discovered and the product removed from the market." *Smith*, 137 Ill. 2d at 263–64. Absent time machines, there is simply no way that today's defendants can make their past asbestos-handling procedures any safer.

2. Employers already owe employees various duties.

Even in the few workplaces where asbestos is still present, the marginal benefit of any prospective deterrence would be minimal. Under existing law, employers are already under certain duties that make it unlikely that family members will be exposed to work-derived asbestos at home. For example, OSHA regulations not only limit worker exposure to asbestos, but also generally require employers to provide showers, changing rooms, and protective work clothing that is laundered at work. *See* 29 C.F.R. § 1910.1001(c), (h)-(i). Employers who violate these regulations are subject to significant civil and criminal penalties. *See* 29 U.S.C. § 666(a), (e).

Other duties are imposed on employers under common law. Indeed, Plaintiff herself has sued Simpkins' former employers General Electric and Brown Shoe Company for allegedly breaching their duty of care to her as an employee, alleging that they had a duty to warn, to provide special equipment, to contain asbestos fibers at the workplace, and to require hygiene practices to prevent asbestos fibers from being carried home.[20]

[20] Plaintiff thus alleges that Simpkins' employers owed her the same duty as an employee as CSXT owed her as the spouse of one of its employees. *Compare, e.g.*, A28–29 (alleged duties of CSXT) *with* A35–36 (alleged duties of Simpkins' own employers).

Additionally, employers owe employees a duty of care under various statutory schemes. For example, as a railroad, CSXT owes a duty of care to its employees under the Federal Employers' Liability Act (FELA) and is liable for workplace injuries caused by its negligence. *See* 45 U.S.C. §§ 51 *et seq*. The same is true of maritime employers under the Jones Act, 46 U.S.C. § 30104, as well as employers excluded from the coverage of the Workers' Occupational Diseases Act, 820 ILCS 310/1 *et seq.* Even employers subject to the Occupational Diseases Act's no-fault liability regime owe a duty of care to their employees, which can be litigated in court should an employee choose to pursue a negligence claim and should the employer choose to contest it. *See Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 207–08 (1997) (construing analogous provisions of the Workers' Compensation Act, 820 ILCS 305/1 *et seq.*); *Geise v. Phoenix Co. of Chi.*, 159 Ill. 2d 507, 514 (1994) (same). And because these employers must pay for losses whenever a compensable harm occurs, regardless of negligence, they will have incentives to take care both by preventing negligence and by avoiding dangerous activities altogether. *Cf., e.g.*, S. Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1, 3 (1980).[21]

3. Imposing a duty to non-employees would accomplish little.

Given these extensive existing duties, imposing on employers a new duty to non-employees would accomplish little or nothing. By definition, secondhand exposure of

[21] While the Occupational Diseases Act may reduce the amount of liability in any single case—by excluding, for example, damages for pain and suffering (*cf. Page v. Hibbard*, 119 Ill. 2d 41, 47 (1987) (construing the Workers' Compensation Act))—it also subjects employers to liability in a greater number of cases, by allowing claimants to collect without proving negligence and by depriving employers of various defenses (*cf. Forsythe*, 224 Ill. 2d at 296 (same)). This gives employers "strong incentives to manage workplace practices so as to reduce workers' contribution to risk." R. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. Chi. L. Rev. 184, 193 (1987).

non-employees cannot occur absent firsthand exposure of employees. But employers already have strong incentives to protect employees against firsthand exposure—and their efforts to protect employees will necessarily protect non-employees as well.

Imposing on employers a new set of liabilities to non-employees would prevent future injuries to non-employees only in the implausible case where an employer has not only continued to use asbestos in the workplace, but has also—without regard to significant liabilities that might ensue—violated both the federal regulations governing its use and its duties to its own employees. It is hard to imagine that such incorrigible conduct would be deterred by the imposition of an additional duty vis-à-vis non-employees. (Moreover, a non-employee injured by such conduct would not be without a remedy. As this complaint demonstrates, non-employees can pursue the manufacturers and distributors of asbestos-containing products, whose separate and unique duties under product liability law—duties that extend to "persons outside the purchasing chain" (*Kirk*, 117 Ill. 2d at 520)—are not at issue here.)

Thus, in today's world, the likelihood that any injury from secondhand asbestos exposure need be, or could be, deterred by a new form of liability is vanishingly small. This Court should, as it has in other contexts, refuse to expand liability because it is "not clear that the . . . industry needs this even *further* amount of encouragement" to act safely, "above and beyond the incentives" that strict federal regulation and other workplace duties already provide. *Smith*, 137 Ill. 2d at 263.

C. The Additional Burden on Employers Would Be Substantial.

Recognizing a duty to protect third parties against secondhand asbestos exposure would place a significant burden on any Illinois employer who continues to use asbestos in a legal manner, by requiring the employer to govern its employees' off-duty conduct.

To the extent that a duty to protect against secondhand exposure required nothing more than workplace protections, it would not be burdensome, but would—for the reasons described above (*see supra*, at 35–38)—be entirely redundant of existing legal duties. However, a general duty owed to third parties would not be confined to workplace protections. Even if an employer complied with all OSHA regulations, for example, its employees might still violate company policies in ways that exposed third parties to asbestos. *Cf. Holdampf*, 840 N.E.2d at 120. Risk-averse employers would have no way to prevent future liabilities except by policing their employees' activities outside of work.

Under Illinois law, "the employer lacks control over its employees' actions once outside the scope of the employment relationship," and it is not under a continuing duty to third parties. *Homer v. Pabst Brewing Co.*, 806 F.2d 119, 123 (7th Cir. 1986) (citing cases). Thus, in *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005 (4th Dist. 1983)—in which an employer provided alcohol to an employee who then caused a car accident—the Appellate Court found that the employer's degree of control was insufficient to "impose a duty . . . for injury to third parties inflicted [by the employee] outside the scope of the employment relationship." *Id*. at 1008; *accord Holtz v. Amax Zinc Co.*, 165 Ill. App. 3d 578 (5th Dist. 1988). Although it is obviously foreseeable that a drunken employee may cause a car accident, the court refused to impose a duty on that basis. *Wienke*, 113 Ill. App. at 1007.[22] *Cf. Simmons v. Homatas*, 236 Ill. 2d 459, 474–75 (2010) (recognizing *Wienke* as good law and distinguishing it from the case before the Court, in which the defendant had voluntarily assumed an otherwise non-existent duty).

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[22] An analogous rule was applied to premises owners in *Heldt v. Brei*, 118 Ill. App. 3d 798 (1983), which noted that the owner's duty to a business invitee "would not have extended to plaintiff's decedent who was neither a guest nor a patron, nor would it have extended to [the drunken invitee's] activities after leaving the premises." *Id*. at 802.

As this Court recognized in *Widlowski*, when an employer is "not in a position to control" an employee, holding the employer liable for the employee's conduct "impose[s] . . . a heavy" burden on the employer. 138 Ill. 2d at 375. Imposing a duty here would oblige an employer to prevent its employees from exposing *other* persons to asbestos fibers, wherever its employees might go. Yet an employer can hardly monitor what its employees do after they leave work. To paraphrase this Court's decision in *Beretta*, "judicially imposing [such] a duty" would be "an unprecedented expansion" of existing law, as well as an unwarranted burden on employers. 213 Ill. 2d at 393.

D. Imposing a Duty to Protect Third Parties Against Secondhand Asbestos Exposure Would Have Deleterious Consequences.

This Court has previously found it "inadvisable as a matter of public policy" to impose a novel duty where the consequences are "far-reaching." *Beretta*, 213 Ill. 2d at 414; *accord Evans v. Shannon*, 201 Ill. 2d 424, 438 (2002). As noted above, given the employer's existing duties to its employees, there is little deterrent effect to be gained from imposing an additional duty to third parties. Thus, the main consequence of imposing a duty to prevent secondhand exposure would not be to improve safety, but to vastly increase the amount of *liability* that employers face for conduct that occurred decades ago.

Such an unprecedented expansion of liability would be troubling even in isolation. What makes it especially problematic in this context is that it would exacerbate the "systemic difficulties" that are *already* "posed by the elephantine mass of asbestos cases." *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2142 (2009) (*per curiam*) (internal quotation marks omitted). As the most culpable asbestos defendants have gone bankrupt, two things have occurred: the remaining defendants have borne an increasingly

disproportionate share of asbestos-related liabilities; and plaintiffs seeking deep-pocketed defendants have sued an ever wider array of companies with ever more tenuous connections to the plaintiffs' alleged injuries. This has, in turn, fueled yet more bankruptcies, yet more companies being named as defendants, and yet greater distortions in the tort system. Each asbestos defendant, even one with little or no culpability, is under tremendous pressure to settle lest it be stuck with a disproportionate share of massive liabilities. This is not only unfair to individual defendants, but seriously undermines the tort system. Allowing claims for secondhand exposure would accelerate this dynamic and aggravate its deleterious consequences—by enabling each plaintiff to sue a larger number of at most minimally culpable defendants, and by forcing each such defendant to face a larger number of plaintiffs. This would impose serious economic costs without achieving countervailing social benefits.

1. The asbestos-litigation crisis has overtaken defendants with little or no culpability.

Even without secondhand-exposure claims, American courts have been subjected to an "avalanche" of asbestos litigation. *In re Combustion Eng'g*, 391 F.3d at 200. By 1997, the U.S. Supreme Court recognized the existence of "an asbestos-litigation crisis." *Amchem*, 521 U.S. at 597. During the 1990s, "the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000"; by 2002, approximately 730,000 claims had been filed, and as of August 2005, approximately 322,000 remained pending. D. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos*, 16 J.L. & Pol'y 589, 595 (2008). The number of different defendants rose from 300 in the mid-1980s to nearly 2000 at the beginning of the last decade. *Compare* J. Kakalik et al., Rand Institute for

Civil Justice, Variation in Asbestos Litigation Compensation and Expenses, at vii (1984), *with* D. McLeod, *Asbestos Continues to Bite Industry*, Bus. Ins., Jan 8, 2001, at 1. And by 2005—even before secondhand-exposure claims were recognized in certain states—more than 8400 defendants in "75 out of 83 different industries" had been dragged into litigation. Carroll, *supra*, at xxv.

These "mounting asbestos liabilities" have forced scores of "otherwise viable companies into bankruptcy." *In re Combustion Eng'g*, 391 F.3d at 201. Indeed, as many as 96 companies have filed for bankruptcy in the face of asbestos liabilities. *See* L. Dixon et al., RAND Institute for Civil Justice, Asbestos Bankruptcy Trusts 25 (2010). The first to go bankrupt, of course, were those with the greatest culpability and the most direct involvement with asbestos exposure. Because those firms can no longer be named as defendants, their bankruptcies have "left the remaining defendants with considerably greater liability and sent lawyers searching for new defendants." S. Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 Colum. Bus. L. Rev. 841, 852 (footnote omitted).

These early bankruptcies "had a domino effect" that "shifted liability to the remaining solvent defendants." R. Nagareda, Mass Torts in a World of Settlement 167 (2007). Particularly against the backdrop of joint and several liability, the result is that "[v]ery small, indeed trivial, contributors could be liable for substantial portions of the harm," even though "these defendants of today . . . are likely to be far less culpable than the major asbestos manufacturers." J. Sanders et al., *The Insubstantiality of the "Substantial Factor" Test for Causation*, 73 Mo. L. Rev. 399, 428 (2008). Thus, it was "[w]ith the demise of many key products defendants" that plaintiffs' lawyers, searching

for solvent, deep-pocketed defendants, "took a new interest" in "'take-home' cases" like this one. Hanlon & Geise, *supra*, at 40. If this Court were to permit secondhand-exposure claims, then—as illustrated by Plaintiff's complaint in this case—more companies bearing, at most, only tangential responsibility for the alleged injuries would be named as defendants by more plaintiffs.

2. Even defendants with little or no culpability face tremendous pressure to settle or risk massive liabilities.

A defendant that was not a "substantial factor" in causing a plaintiff's injuries bears no responsibility for those injuries under Illinois law. *See Nolan v. Weil-McLain*, 233 Ill. 2d 416, 432–33 (2009). But once ensnared in the asbestos-litigation crisis, such defendants are frequently forced to bear an undue share of the burden, facing the unfair and costly choice of either risking a massive verdict or paying to settle a meritless case.

Any company found liable in an asbestos case is liable for *all* of the damages assessed by the jury, even if the company's conduct was responsible for only a small fraction of the total exposure. *See* 735 ILCS 5/2–1118. Those damages may be enormous given the injuries involved and the fact that juries often view sick plaintiffs as far more deserving than corporate defendants.

The *in terrorem* effect of this regime would be reduced if employers could be confident that meritless claims would be dismissed before trial. Given the nature of asbestos litigation, however, such confidence is frequently impossible. Although the plaintiff at all times bears the ultimate burden of proving causation, a plaintiff may present sufficient evidence to establish cause in fact—and thereby shift the burden of production to the defendant—by proving "frequen[t], regular[], and proximate[]" exposure at the defendant's hands. *Nolan*, 233 Ill. 2d at 434; *see also Thacker v. UNR*

Indus., 151 Ill. 2d 343, 359 (1992). The defendant can, of course, argue that someone else's conduct was the sole proximate cause of the plaintiff's injury (*Nolan*, 233 Ill. 2d at 442–43 & n.4), and the factfinder can always conclude that the level of exposure attributable to the defendant was too slight to be a substantial factor. But at the pretrial stage, the plaintiff need only create a "genuine issue of material fact" to bring the case before a jury. *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248, 254 (2004).

Once at trial, an innocent defendant faces significant obstacles. The plaintiff's exposure may well have been frequent, regular, and proximate, but still too low for the overall dose to have substantially contributed to the plaintiff's disease. Yet, after the burden of production has been shifted, it can be very difficult for a defendant to prove that someone else's conduct was the sole proximate cause of the plaintiff's injury. This is true, among other reasons, because "[a]sbestos fibers from different sources are generally indistinguishable from one another, even when removed from a plaintiff's body and examined through a microscope." *Thacker*, 151 Ill. 2d at 356. And as this Court correctly noted in *Nolan*, a sophisticated plaintiff's counsel "will likely call an expert to testify that every exposure to asbestos," no matter how slight, "[was] a substantial factor in caus[ing]" the plaintiff's injuries (233 Ill. 2d at 439 (internal quotation marks omitted))—even though that assertion is based on junk science (*cf. Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 226–27 (Pa. 2007) (rejecting the so-called single-fiber theory)). As a result, even an innocent defendant may have difficulty persuading a possibly unsympathetic jury.

An innocent defendant facing the prospect of massive liabilities will be under tremendous pressure to settle before trial. Asbestos plaintiffs typically name "scores,

sometimes hundreds, of defendants in a single exposure case," with the hopes of "settling [with] most of them for a modest amount (often less than $1,000) that collectively generate[s] tens of thousands of dollars." Landin, *supra*, at 602; *see also* Carroll, *supra*, at 3, 129 (noting that plaintiffs "typically name[] several dozen defendants" and that "[m]ost cases are settled"). As noted above, any employer or premises-owner defendant foolhardy enough to go to trial risks being held jointly liable for the entire amount of damages, no matter how minimal its share of the fault. *See* 735 ILCS 5/2–1118. Moreover, if found liable at trial, such a defendant cannot obtain contribution from the defendants that settled with the plaintiff (740 ILCS 100/2(d)), as long as those settlements meet a flexible standard of "good faith" (*id.* § 2(c)) based on "the totality of the circumstances" (*Johnson v. United Airlines*, 203 Ill. 2d 121, 135 (2003)).[23] These rules serve as a cudgel to force settlement by defendants who believe, but cannot be certain, that they would win on the merits. Such defendants have a powerful incentive to settle early at a discounted rate, rather than risk becoming the last defendant standing subject to the full remainder of liability.

3. Secondhand-exposure claims would exacerbate the situation.

Allowing secondhand-exposure claims would exacerbate the situation, with deleterious consequences for not only employers, but the tort system and society at large.

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[23] If the settlement payments are discounted—for example, because the "damages are . . . speculative and the probability of liability uncertain" (*Cellini v. Vill. of Gurnee*, 403 Ill. App. 3d 26, 40 (1st Dist. 2010) (internal quotation marks omitted))—then non-settling defendants will be forced to pay far more than their share. *See* R. Michael, *Joint Liability: Should It Be Reformed Or Abolished?—The Illinois Experience*, 27 Loy. U. Chi. L.J. 867, 881 & n.71 (1996).

Were secondhand-exposure claims recognized, the pressure to settle would grow.[24] Recognition of secondhand-exposure claims would—for the reasons described above (*see supra* at 21–27)—subject each defendant to "an almost infinite universe of potential plaintiffs." *Williams*, 608 S.E.2d at 209 (internal quotation marks omitted). Indeed, even if the duty to protect against secondhand exposure were somehow limited to an employees' family members, "the stage [would] be set for a major expansion in premises liability." P. Hanlon, *Developments in Premises Liability Law 2005*, SL041 ALI-ABA 665, 694 (2005) (emphasis omitted). Any employer who had used asbestos in the past would suddenly face many more claims. And, although the defendant's share of culpability will—as suggested by the allegations in this case[25]—often be, at most, relatively small compared to that of other defendants, the threat of potentially massive liabilities would exert enormous pressure on such employers to settle the claims "without liability ever being formally established." Carroll, *supra*, at 127.

That is not only unfair to employers, but undermines the proper functioning of the tort system. "Due to the unique problems posed by asbestos injury," an asbestos plaintiff "often does not know exactly when or where he was injured." *Thacker*, 151 Ill. 2d at 356–57. Asbestos plaintiffs, seeking to maximize their chances of a significant recovery

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[24] As the pressure to settle grew, so too would the opportunity for fraudulent claims—because plaintiffs could reasonably expect to obtain settlements without ever having to prove liability. The risk of fraud in asbestos litigation is real. *See, e.g.*, *CSX Transp., Inc. v. Gilkison*, 2010 WL 5421361, at *8 & n.6 (4th Cir. 2010) (*per curiam*) (finding genuine issues of fact as to whether plaintiffs' attorneys falsified witness questionnaires and medical experts certified false X-ray readings to support asbestos claim against CSXT).

[25] The complaint alleges that Simpkins was *directly* exposed to asbestos fibers "[d]uring the course of [her] employment" and "during non-occupational work projects" at home. A15–16. Simpkins' direct exposure to "asbestos fiber emanating from asbestos-containing materials . . . used . . . by [her]" (A32), including in her own home, presumably posed a far greater risk to her than any secondhand exposure.

from someone, therefore have a strong incentive to name as many potential defendants as possible, including any "solvent bystander." Landin, *supra*, at 599 (internal quotation marks omitted). Allowing secondhand-exposure claims would facilitate this tactic by increasing the number of potential defendants that any given plaintiff could sue—especially if a plaintiff could, as the Fifth District suggests, name the employer of any worker or group of workers with whom the plaintiff had anything "more than incidental" contact. A9. The consequence is that "litigation will be brought," not only against defendants most likely to be at fault, but against others as well "based on the potential for recovery." J. Mosher, *A Pound of Cause for a Penny of Proof: The Failed Economy of an Eroded Causation Standard in Toxic Tort Cases*, 11 NYU Envtl. L.J. 531, 616 (2003). As this Court recognized when it rejected market share liability, a tort regime in which liability does not track actual fault "rewards the plaintiff who, unlike the ordinary plaintiff, no longer has to take the chance that the responsible defendant cannot be reached or is unable to respond financially" and causes liability to "fall unevenly and disproportionately upon those" who remain "amenable to suit." *Smith*, 137 Ill. 2d at 238 (internal quotation marks omitted). This disproportionate liability "not only raises fundamental questions of fairness," but also "undercuts the deterrence objectives of the tort system." Carroll, *supra*, at 129.

Although recognition of secondhand-exposure claims would increase the pressure on defendants to settle, it might simultaneously diminish plaintiffs' incentive to settle, at least with respect to certain defendants. If a plaintiff is confident that most defendants will settle, and therefore confident of obtaining guaranteed compensation without actually having to prove liability, the plaintiff may well refuse to settle with one or two

defendants in the hope of obtaining a huge verdict at trial. By increasing the number of defendants that a plaintiff may sue, the recognition of secondhand-exposure claims increases the chance that a plaintiff will adopt this strategy. The more defendants a plaintiff can name, the more settlements the plaintiff is likely to secure; the more settlements a plaintiff secures, the more compensation the plaintiff is guaranteed to receive; the more compensation a plaintiff is guaranteed to receive, the more likely it is that the plaintiff will refuse to settle with one or two defendants, foregoing the marginal benefit of one or two additional settlements in the hope of winning a large verdict at trial.

Whether they result in a large number of settlements or a number of large verdicts, secondhand-exposure claims will place significant financial strain on defendants, likely producing new asbestos-related bankruptcies. Each such bankruptcy can eliminate thousands of jobs and is estimated to reduce the lifetime wages of each displaced worker by "$25,000 to $50,000." Stiglitz, *supra*, at 52. As a result, a "significant share" of the costs of asbestos suits against an employer are "borne by the firm's workers." *Id.* at 60. Even for firms that do not go bankrupt, the mere threat of enormous liabilities creates severe uncertainty and reduces productive economic activity. The risk associated with asbestos litigation makes "it more difficult for affected companies to raise capital and attract new investment." G. Christian & D. Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003).[26] Capital is diverted "from productive purposes" and jobs are lost. *Id*.

[26] The uncertainty associated with secondhand exposure claims is greater than that associated with direct exposure claims. An employer can determine reliably how many people it employed, and might be able to estimate reliably how many of them were exposed to asbestos. But without knowing how large those employees' families are,

Secondhand-exposure claims would affect many companies. *Any* company that had asbestos-containing products on its property within the last half-century is potentially liable under a secondhand-exposure theory. Given how widely asbestos was used in the past, that includes "owners and operators of virtually any industrial facility constructed prior to the mid-1970s." K. Meyer et al., *Emerging Trends in Asbestos Premises Liability Claims*, 72 Def. Couns. J. 241, 242 (2005).

CONCLUSION

This Court's "judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Beretta*, 213 Ill. 2d at 381 (internal quotation marks omitted). Both of those concerns counsel urgently against recognizing the duty that Plaintiff seeks to establish here.

Imposing a duty on employers to protect non-employees against secondhand asbestos exposure would not only conflict with this Court's long-standing precedent, which considers the parties' relationship to be the "touchstone" of duty analysis (*Vancura*, 939 N.E.2d at 347 (internal quotation marks omitted)), but would also contravene good public policy. Injury from secondhand asbestos exposure was not foreseeable at the time Simpkins was allegedly exposed, and it is unlikely to occur today given modern regulations and employers' duties to their employees. The duty that Plaintiff seeks to establish would achieve little or nothing by way of increased safety, but would impose a heavy price on employers, the tort system, and society at large.

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whom they encountered after work, or how they laundered their clothing, a firm could not even begin to guess at the scope of its potential liability for secondhand exposure.

A "line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." *De Angelis v. Lutheran Med. Ctr.*, 449 N.E.2d 406, 407 (N.Y. 1983) (mem. op.). This Court has refused to impose a novel duty of care when that duty "would have overwhelming economic and social consequences" as well as "staggering" costs. *Lamkin*, 138 Ill. 2d at 524–25. It should refuse Plaintiff's invitation to do so here.

The judgment of the Appellate Court should be reversed.

Respectfully submitted,

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February 16, 2011

No. 110662

IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee*, v. CSX TRANSPORTATION, INC., *Defendant-Appellant*.	)	Appeal from the Appellate Court of Illinois, Fifth District *Simpkins v. CSX Corporation*, No. 5–07–0346 There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07–L–62 Hon. Daniel J. Stack, *Judge Presiding.*

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

_____
Andrew Tauber

February 16, 2011

No. 110662

IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee*, v. CSX TRANSPORTATION, INC., *Defendant-Appellant*.	)	Appeal from the Appellate Court of Illinois, Fifth District *Simpkins v. CSX Corporation*, No. 5–07–0346 There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07–L–62 Hon. Daniel J. Stack, *Judge Presiding.*

NOTICE OF FILING

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PLEASE TAKE NOTICE that on February 16, 2011, we filed the enclosed Brief of Defendant-Appellant CSX Transportation, Inc., three copies of which are served upon you.

Dated: February 16, 2011

CSX TRANSPORTATION, INC.

By:_____
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IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee*, v. CSX TRANSPORTATION, INC., *Defendant-Appellant*.	)	Appeal from the Appellate Court of Illinois, Fifth District *Simpkins v. CSX Corporation*, No. 5–07–0346 There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07–L–62 Hon. Daniel J. Stack, *Judge Presiding.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for Defendant-Appellant CSX Transportation, Inc., and that prior to 8:00 p.m. on February 16, 2011, in Washington, D.C., he caused three copies of the foregoing Brief of Defendant-Appellant CSX Transportation, Inc. to be served on all counsel of record by causing said copies to be sent via prepaid overnight delivery by third-party commercial carrier to the following addresses:

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CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Appellee*, v. CSX TRANSPORTATION, INC., *Defendant-Appellant*.	)	Appeal from the Appellate Court of Illinois, Fifth District *Simpkins v. CSX Corporation*, No. 5–07–0346 There Heard on Appeal Pursuant to Supreme Court Rule 304(a) from the Circuit Court of Madison County, Illinois No. 07–L–62 Hon. Daniel J. Stack, *Judge Presiding.*

CERTIFICATE OF MAILING

The undersigned hereby certifies that he is one of the attorneys for Defendant-Appellant CSX Transportation, Inc., and that prior to 8:00 p.m. on February 16, 2011, in Washington, D.C., he caused 20 copies of the foregoing Brief of Defendant-Appellant CSX Transportation, Inc. to be sent via prepaid overnight delivery by third-party commercial carrier to the following address:

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