No. 110662

IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Respondent*, v. CSX TRANSPORTATION, INC., *Defendant-Petitioner*.	)	On Petition for Leave to Appeal from the Illinois Appellate Court Fifth District 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.*

PETITION FOR LEAVE TO APPEAL
OF CSX TRANSPORTATION, INC.

Kurt E. Reitz
Heath H. Hooks
THOMPSON COBURN LLP
525 West Main Street
P.O. Box 750
Belleville, IL 62222
(618) 277-4700

Michele Odorizzi
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Andrew Tauber
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Defendant-Petitioner

August 18, 2010

PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rule 315, petitioner CSX Transportation, Inc. ("CSXT") respectfully prays that this Court grant it leave to appeal from the decision of the Appellate Court of Illinois, Fifth District.[1]

JURISDICTION

The Appellate Court issued its opinion on June 10, 2010. App.1.[2] No petition for rehearing was filed. On July 8, 2010, Justice Karmeier extended the time within which to file this petition to August 19, 2010.

POINTS RELIED UPON FOR REVERSAL

Reflecting a deep disagreement that has sharply divided courts across the country, the Fifth District's decision in this case squarely conflicts with the Second District's recent decision in *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036 (2d Dist. 2009). The Fifth District held that a plaintiff who claims injury from exposure to asbestos fibers allegedly carried home on the work clothes of the plaintiff's spouse is owed a duty of care by the spouse's employer even though the plaintiff never set foot on the employer's premises. In *Nelson*, by contrast, the Second District concluded that no such duty is owed. Because this doctrinal conflict involves an important recurring issue, and because the Fifth District's holding would result in an unprecedented—and potentially unlimited—expansion of tort liability, review by this Court is warranted.

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[1] Although the decision below also identifies CSX Corporation as a defendant in this litigation, the action against CSX Corporation was voluntarily dismissed on March 16, 2007. Stipulation for Dismissal (C612).

[2] Citations to the appendix required by Rule 315(c)(6) are noted as App.__. Citations to the record on appeal are noted as R__ or C__.

The decision below not only conflicts with the Second District's decision in *Nelson*, but also is contrary to the clear weight of authority in other jurisdictions. Appellate courts in fifteen other states have decided whether an employer (or manufacturer who supplied asbestos products to an employer) owes a duty of care to a non-employee allegedly exposed to asbestos fibers carried off the employer's premises on an employee's work clothes. In ten of those fifteen states (Delaware, Georgia, Iowa, Kentucky, Maryland, Michigan, Ohio, Oklahoma, New York, and Texas), the courts have concluded that an employer (or manufacturer) cannot be held liable to a non-employee for such exposure. Explicitly rejecting the majority view, the Fifth District instead aligned itself with the five states (California, Louisiana, New Jersey, Tennessee, and Washington) in which employers can be held liable for off-site exposure.

As several courts have noted, the approach taken by the Fifth District in this case creates an intolerable risk of unlimited liability to the world. If an employer can be held liable because an employee's spouse regularly came into contact with the employee's work clothes, why can't the employer also be held liable by the employee's housekeeper, drinking buddies, and fellow carpoolers? Indeed, the Fifth District did not purport to limit the duty it recognized to immediate family members. On the contrary, it expressly left open the possibility of extending the duty to other potential plaintiffs in future cases.

Review of the Fifth District's decision is necessary to resolve the conflict among Appellate Court districts over an important question of law with profound practical implications.

STATEMENT OF FACTS

This case involves alleged exposure to asbestos. Plaintiff Cynthia Simpkins alleges that Annette Simpkins, Cynthia's mother and the original plaintiff, contracted

mesothelioma as a result of Annette's exposure to asbestos fibers. Compl. 14 ¶ 4 (C17). Cynthia Simpkins was substituted as plaintiff upon Annette's death in 2007.[3]

Annette Simpkins brought this case against 73 defendants, most of whom she alleged had "manufactured, sold, distributed or installed" asbestos-containing products to which she was exposed at work or home. *Id*. at 4 ¶ 4 (C7). Plaintiff's claims against CSXT, however, rest on a different basis.

The complaint asserts three counts against CSXT—Counts VII, VIII, and IX. Count VII alleges strict liability for an ultra-hazardous activity; Count VIII alleges negligence; and Count IX alleges willful and wanton misconduct. *Id.* at 14–19 (C17–C22). 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." *Id.* at 14 ¶ 1 (C17); *see also id.* at 15 ¶ 1 (C18); *id*. at 17 ¶ 1 (C20).

The complaint does not allege that Annette Simpkins worked for CSXT or that she ever entered CSXT's premises. Rather, the complaint alleges that Ronald Simpkins, Annette's former spouse, "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," which fibers Ronald "carried home on his

[3] Annette Simpkins died shortly before the circuit court dismissed her claims against CSXT by order dated May 18, 2007. After Annette's death, and after issuance of the order dismissing her claims against CSXT, Cynthia Simpkins, Annette's daughter and the administrator of her estate, filed an amended complaint reflecting Annette's death and Cynthia's substitution as plaintiff. The amended complaint is not included in the record on appeal but is identical in all relevant parts to the original complaint, which is in the record on appeal. C3–C32. On June 15, 2007, the circuit court issued a *nun pro tunc* order that dismissed the amended complaint as to CSXT effective May 18, 2007, for the reasons stated in the record of that date. C1466.

person and clothing"; and that Annette "was exposed to . . . the asbestos fibers [Ronald] carried home." *Id.* at 14 ¶¶ 1, 3 (C17). Plaintiff alleges that Annette Simpkins contracted mesothelioma as a result of her exposure to the asbestos fibers that Ronald purportedly carried home from the B&O premises. *Id.* at 14 ¶ 4 (C17).[4]

In support of each count, plaintiff asserts, without any supporting factual allegations, that Annette's "exposure to . . . said asbestos fibers was foreseeable" and that CSXT "knew or should have known that exposure to asbestos fibers posed an unreasonable risk of harm to" Annette. *Id.* at 15 ¶¶ 5, 6 (C18); *see also id.* at 15 ¶ 1 (C18); *id*. at 17 ¶ 1 (C20). In support of Count VII, plaintiff asserts—also without any supporting factual allegations—that CSXT's "use of asbestos-containing products and raw asbestos at the above-named facilities . . . constituted an ultra-hazardous activity." *Id.* at 15 ¶ 7 (C18). In support of Count VIII, plaintiff alleges that CSXT "had a duty . . . to use ordinary care for the safety of [Annette] . . . in conducting any operations or activities on [its] premises," and in support of Count IX alleges that CSXT "had a duty . . . to protect [Annette] . . . from harm in conducting any operations or activities on [its] premises." *Id.* at 16 ¶ 3 (C19); *id.* at 17 ¶ 2 (C20).

CSXT moved to dismiss the complaint under 735 ILCS 5/2-615 on the ground that CSXT "did not owe a duty to non-employees who came into contact with its employees' allegedly asbestos-contaminated work clothing at locations away from the work place." Mot. to Dismiss 2 (C307). Plaintiff opposed CSXT's motion, and asked the circuit court "to recognize the existence of a duty to family members in the

[4] Counts VII, VIII, and IX are also asserted against Dow Chemical Company based on the allegation that Ronald was employed from 1964 to 1965 at "premises located in Madison, Illinois" that were "owned, operated and/or controlled" by Dow. Compl. 14 ¶ 2 (C17); *see also id.* at 15 ¶ 1 (C18); *id*. at 17 ¶ 1 (C20). Dow is not a party to this appeal.

employee's household." Opp. 8 (C1119).[5] After hearing oral argument (R22–R48), the circuit court granted CSXT's motion, dismissed the claims against CSXT with prejudice, and certified the matter for immediate appeal pursuant to Supreme Court Rule 304. Order (C1218).

Plaintiff appealed to the Fifth District, framing the issue presented as "[w]hether the defendant railroad owed a legal duty of care to decedent, the wife of its employee, with respect to injury (disease) 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." Plf. 5th Dist. Br. vi. Plaintiff admitted that Annette Simpkins "had no direct relationship" with CSXT. Nevertheless, relying on *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274 (2007), she argued that CSXT should be deemed to have owed Simpkins a duty of care because "Illinois does not require a direct employment relationship to exist between the defendant and the injured party for a duty to arise." Plf. 5th Dist. Br. 17. In response, CSXT argued that the parties' relationship is highly relevant to the duty inquiry, and that Illinois looks to "'whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the plaintiff's benefit.'" CSXT 5th Dist. Br. 19 (quoting *Cunis v. Brennan*, 56 Ill. 2d 372, 374 (1974)).

On May 29, 2009, while this case was still pending before the Fifth District, the Second District ruled in *Nelson* that a premises owner does not owe a duty to "a person

[5] Plaintiff did not rely on the sufficiency of the complaint when opposing CSXT's motion. Instead, plaintiff submitted an affidavit and numerous other documents to bolster her assertion that CSXT "should have foreseen the potential hazards associated with toxins being carried home." Opp., at 13 (C1124); *see id.* at 2–7 (C1113–C1118) (relying on C1133–C1217); *see also, e.g.*, R31, R35, R46–R47 (plaintiff's counsel relying on affidavit and various documents at oral argument on motion to dismiss).

who did not have contact with the premises but who was allegedly injured by asbestos fibers and dust that escaped from the premises." 391 Ill. App. 3d at 1037. Soon after the opinion was released, CSXT brought *Nelson* to the Fifth District's attention via a motion to cite supplemental authority, which was granted. Mot. to Cite Second Supp. Authority 1–3 (App.10–App.14); Order (App.15).

A little more than a year later, on June 10, 2010, the Fifth District issued its decision 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 does have a "duty to protect the family of its employee from the dangers of asbestos brought home on the work clothes of the employee." App.3. According to the Fifth District, the lack of a "particular special relationship" between the parties is irrelevant 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." App.5. Rather than considering the parties' relationship as such, the Fifth District looked only to "(1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm." App.6.

Of these four factors, the court placed greatest emphasis on the supposed foreseeability of the harm. Relying on plaintiff's bare allegation that CSXT "knew or should have known during the relevant times that the asbestos fibers carried home from work on Ronald Simpkins' clothing and body posed a risk of harm to Annette Simpkins," the Fifth District concluded that plaintiff had sufficiently alleged that "the risk of harm to

Annette Simpkins was foreseeable at the time Ronald Simpkins worked for [CSXT]." App.7.[6]

In concluding that CSXT owed a duty to its employee's spouse, the Fifth District considered "the out-of-state cases that have found a duty in similar circumstances to be more persuasive than those that have not." App.6. Although the court dismissed the suggestion that its holding could result in defendants being held liable to the entire world, the Fifth District specifically declined to limit the duty it recognized as being owed only to employees' immediate family members. App.9.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE FIFTH DISTRICT'S DECISION CONFLICTS WITH THE SECOND DISTRICT'S DECISION IN *NELSON*.

This Court's intervention is necessary because the decision below squarely conflicts with the Second District's 2009 decision in *Nelson.*

As described by the Second District, *Nelson* was "a case of first impression in Illinois" in which plaintiffs asked the court "to extend a duty in a premises liability case to a person who did not have contact with the premises but who was allegedly injured by asbestos fibers and dust that escaped from the premises." 391 Ill. App. 3d at 1037. The underlying facts alleged in *Nelson* were virtually identical to those alleged here. The plaintiffs alleged that the 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*

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[6] The only other basis for the court's determination that plaintiff had sufficiently alleged foreseeability, and thus, on the court's view, adequately pleaded a cognizable duty, was the Fifth District's "belie[f] that 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." App.7.

id. The plaintiffs sued on a premises liability theory, and the defendant sought summary judgment on the ground that it did not owe a duty to the decedent. *See id.*

While acknowledging that the decedent in *Nelson* had not entered the defendant employer's premises, the plaintiffs—relying on this Court's decisions in *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274 (2007), and *Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (2006)—argued that the defendant nevertheless owed her a duty on the theory that the employer "had a duty to persons off the land who would foreseeably be harmed by conditions on the land." *Nelson*, 391 Ill. App. 3d at 1040. After carefully analyzing *Forsythe* and *Marshall*, the Second District rejected the plaintiffs' position, which emphasized the foreseeability of injury rather than the decedent's relationship to the defendant.

In holding that the defendant employer owed the decedent no duty, the Second District began with this Court's reminder "that the 'touchstone' of a duty analysis is 'to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.'" *Nelson*, 391 Ill. App. 3d at 1040 (quoting *Forsythe*, 224 Ill. 2d at 280–81). The court recognized that inquiry into the existence of such a relationship is informed by (1) the reasonable foreseeability of injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden upon the defendant. But, expressly relying on this Court's decision in *Marshall*, the Second District firmly rejected the plaintiffs' contention "that Illinois looks only to the four factors and not to whether the plaintiff and defendant stood in such a relationship to each other that the law imposed a duty." *Id*. Having considered "the relationship

between the parties, which *Marshall* says is the touchstone of a duty analysis," the Second District "determined that no duty exists because no relationship exists." *Nelson*, 391 Ill. App. 3d at 1044 (citing *Marshall*, 222 Ill. 2d at 436).

Contrary to the Second District's conclusion in *Nelson*, the Fifth District held in this case that "employers owe the immediate families of their employees a duty to protect against take-home asbestos exposure." App.9. That holding cannot be reconciled with *Nelson*. Here, as in *Nelson*, the plaintiff alleges that the decedent contracted mesothelioma as a result of having been exposed to asbestos fibers carried home from the defendant's premises on the work clothes of the decedent's husband, who had been employed by the defendant. Compl. 14 ¶¶ 1, 3, 4 (C17). And here, as in *Nelson*, plaintiff seeks to impose premises-based liability, resting her claims 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." *Id.* at 14 ¶ 1 (C17); *see also id.* at 15 ¶ 1 (C18); *id.* at 17 ¶ 1 (C20). Inasmuch as *Nelson* and this case involve indistinguishable claims based on indistinguishable allegations, it is impossible to harmonize their diametrically opposite results.[7]

Remarkably, the Fifth District's decision in this case does not even discuss, let alone attempt to distinguish, *Nelson*.[8] Like the Second District in *Nelson*, the Fifth

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[7] That *Nelson* was decided at the summary judgment stage while this case was decided on a motion to dismiss is immaterial. The Second District's conclusion that the defendant owed the decedent no duty was a legal conclusion that did not depend on any evidence submitted by the parties.

[8] Although CSXT brought *Nelson* to its attention (App.10–App.15), the Fifth District inexplicably stated that "CSX implicitly acknowledged that no Illinois court has previously held that employers do not owe a duty to protect families from take-home asbestos exposure." App.4; *see also* App.5 ("As both parties note, no Illinois case is directly on point.").

District took this Court's decisions in *Forsythe* and *Marshall* as its starting point. But it interpreted and applied them quite differently. Contrary to the Second District, which explicitly rejected exclusive reliance on the four policy factors that inform the duty analysis (*see Nelson*, 391 Ill. App. 3d at 1040), the Fifth District looked ***only*** to those factors and did not otherwise consider whether Annette Simpkins and CSXT "stood in such a relationship to one another that the law imposed upon [CSXT] an obligation of reasonable conduct for the benefit of [Simpkins]." *Forsythe*, 224 Ill. 2d at 280–81. Indeed, in sharp contrast to the Second District's analysis in *Nelson*, the Fifth District did not even purport to consider the parties' relationship as such, stating in conclusion that "***[a]fter a consideration of the policy factors used to determine duty***, we believe that Annette Simpkins was entitled to the exercise of care from her husband's employer." App.9 (emphasis added).

It is well established that "[t]he existence of a duty is a question of law for the court to decide." *Chandler v. Ill. Cent. R.R.*, 207 Ill. 2d 331, 340 (2003). But two Appellate Court districts have now reached opposite conclusions as to whether a plaintiff who claims injury from exposure to asbestos allegedly carried home on the work clothes of the plaintiff's spouse is owed a duty by the spouse's employer even though the plaintiff never entered the employer's premises. This Court should grant review in this case and exercise its supervisory authority to resolve that conflict over an important question of law.

II. THE FIFTH DISTRICT'S DECISION IS CONTRARY TO THE WEIGHT OF AUTHORITY NATIONWIDE.

The conflict between the Second and Fifth Districts reflects a conflict playing out across the country. Courts applying the laws of fifteen other states have addressed the

issue presented here. Like the Second and Fifth Districts, they "have reached inconsistent conclusions" as to "whether an employer owes a duty to persons who develop asbestos-related illnesses after exposure to asbestos fibers on its employees' clothing." *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 361 (Tenn. 2008). But the Fifth District's decision is contrary to the clear weight of authority.

A majority of the states that have addressed the issue have—like the Second District in *Nelson*—rejected liability for take-home exposure. Ten of the fifteen states to have addressed the issue (Delaware, Georgia, Iowa, Kentucky, Maryland, Michigan, Ohio, Oklahoma, New York, and Texas) have held that no duty is owed to an individual claiming injury from off-site exposure: seven have concluded that "an employer does not owe a duty of care to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace" (*CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005)), two have reached an analogous conclusion with respect to the duties owed by an employer of independent contractors, and a tenth has reached an analogous conclusion with respect to the duties owed by an asbestos manufacturer. *See, e.g., Riedel v. ICI Americas, Inc.*, 968 A.2d 17 (Del. 2009); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2004); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009) (addressing issue in the context of a claim brought on behalf of the spouse of an independent contractor who had been retained by the defendant); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009) (applying Kentucky law); *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58 (Md. Ct. Spec. App. 1998); *In re Certified Question from the Fourteenth Dist. Ct. of App. of Tex.*, 740 N.W.2d 206 (Mich. 2007) (claim brought on behalf of the spouse of an independent

contractor who had been hired by the defendant); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005); *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010); *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992) (applying Oklahoma law in case involving claims against an asbestos manufacturer); *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. Ct. App. 2007). Thus, as the Iowa Supreme Court recently observed, "[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 conclude that no such duty exists." *Van Fossen*, 777 N.W.2d at 697.

Rather than join the Second District and the majority of states in rejecting such a duty, the Fifth District instead expressly aligned itself with the minority of states to hold that an employer does owe a duty to protect non-employees from off-site exposure. App.6. Five states—California, Louisiana, New Jersey, Tennessee, and Washington—have imposed such a duty, at least in cases where (unlike here) the alleged exposure occurred after 1972, when OSHA issued regulations addressing take-home exposure. *See, e.g.*, *Honer v. Ford Motor Co.*, 2007 WL 2985271 (Cal. Ct. App. 2007); *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. Ct. App. 2007); *Olivo v. Exxon Mobil Corp.*, 872 A.2d 814 (N.J. Super. Ct. App. Div. 2005); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008); *Rochon v. Saberhagen Holdings, Inc.*, 2007 WL 2325214 (Wash. Ct. App. 2007).

Consistent with the Fifth District's acknowledged "focus on foreseeability" (App.8) and plaintiff's admission that Annette Simpkins "had no direct relationship" with CSXT (Plf. 5th Dist. Br. 17), one court has observed that "[i]n nearly every instance where courts *have* recognized a duty of care in a take home exposure case, the decision

turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis" and the court's corresponding "little regard for the relationship (or lack thereof) between the plaintiff and the defendant." *In re Asbestos Litig.*, 2007 WL 4571196, at *11 (Del. Super. Ct. 2007), *aff'd*, 968 A.2d 17 (Del. 2009).

Because the relationship between the parties is the "touchstone" of duty analysis under Illinois law (*Marshall*, 222 Ill. 2d at 436), this Court should review, and ultimately reverse, the Fifth District's decision, which imposes an unprecedented duty in erroneous reliance on decisions from other jurisdictions that not only are in the distinct minority nationwide but also, contrary to Illinois law, disregard the parties' relationship when determining whether a duty exists.

III. THE FIFTH DISTRICT'S DECISION IS CONTRARY TO GOOD PUBLIC POLICY.

Although the parties' relationship is the "touchstone" of duty analysis, it is also true that "determining whether a duty should be imposed involves considerations of public policy." *Marshall*, 222 Ill. 2d at 436. The Fifth District's decision is contrary to good public policy because it would entail an unprecedented—and potentially unlimited—expansion of tort liability.

Indeed, the specter of unbounded liability is one reason the majority of states that have considered the issue have refused to recognize a duty to protect third parties from off-site exposure. As the Supreme Court of Georgia observed, "[t]he recognition of a common-law cause of action under the circumstances of this case would, in our opinion, expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." *CSX Transp.*, 608 S.E.2d at 209 (quoting *Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569, 571 (N.Y. App. Div. 1994)); *see also, e.g.*,

In re Certified Question, 740 N.W.2d at 220 (observing that imposition of a duty to protect against take-home exposure "would create a potentially limitless pool of plaintiffs"). The Maryland Court of Special Appeals has explained why this is so: "If liability for exposure to asbestos could be premised on [the spouse's] handling of [the employee's] clothing, presumably [the defendant] would owe a duty to others who came in close contact with [the employee], including other family members, automobile passengers, and co-workers." *Adams*, 705 A.2d at 66; *see also, e.g., In re N.Y.C. Asbestos Litig.*, 840 N.E.2d at 122. Accordingly, imposition of the duty recognized by the Fifth District means that "'[p]laintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes." *In re Certified Question*, 740 N.W.2d at 219 (quoting Behrens & Cruz-Alvarez, *A Potential New Frontier In Asbestos Litigation: Premises Owner Liability For "Take Home" Exposure Claims*, 21 MEALEY'S LITIG REP. ABS. 1, 5 (2006)).

In *Satterfield*, which the Fifth District repeatedly cited with approval, the Tennessee Supreme Court 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" once a duty to non-employees is recognized (App.9):

> 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. It is foreseeable that the adverse effects of repeated, regular, and extended exposure to asbestos on an employee's work clothes could injure these persons. Public policy does not warrant finding that there is no duty owed

> to such persons. ***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 Supreme Court recognized that other courts have cautioned against the imposition of such an unbounded duty because it "could result in 'mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes.'" *Id*. (quoting *In re Certified Question*, 740 N.W.2d at 219). But the Tennessee Supreme Court nevertheless embraced the notion that *all* persons, even "remotely exposed persons," should be entitled to sue, regardless of their relationship to the defendant, stating that

> in light of the magnitude of the potential harm from exposure to asbestos and the means available to prevent or reduce this harm, ***we see no reason to prevent carpool members, babysitters, or the domestic help from pursuing negligence claims against an employer*** should they develop mesothelioma after being repeatedly and regularly in close contact with an employee's asbestos-contaminated work clothes over an extended period of time.

Id. (emphasis added). Following the lead of the *Satterfield* court, the Fifth District specifically declined to limit the universe of potential plaintiffs to whom the newly imposed duty is owed by employers, emphasizing that its decision "do[es] not expressly limit the duty to immediate family members." App.9.

It is not fanciful to expect that the new-found duty, unlimited by a plaintiff's relationship to the defendant employer, will soon be invoked by carpool members, babysitters, and other individuals outside the employee's immediate family. In fact, one court has already held that an employer owed the duty to a niece of two employees who

had, during her childhood, spent time with her uncles in the evenings and on weekends. *See Catania v. Anco Insulations, Inc.*, 2009 WL 3855468, at *3 (M.D. La. 2009). As New York's highest court has cautioned, although "logic might suggest . . . that the incidence of asbestos-related disease allegedly caused by the kind of secondhand exposure at issue in this case is rather low, experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d at 122.

As this case well illustrates, plaintiffs claiming injury from asbestos typically file complaints naming scores of defendants based on purported exposures that are, as here, often alleged to have occurred more than half a century ago. Given the passage of time, even cases that allege a direct exposure to asbestos-containing products present serious evidentiary problems. Those problems are exponentially greater when, as in this case, the alleged exposure is to someone who claims indirect exposure via a third party. Even if such speculative claims regarding events that occurred decades ago must ultimately fail for lack of proof, simply allowing them to proceed imposes enormous costs on the employers frequently named in such suits.

"There can be little doubt that there is an asbestos products liability litigation crisis in the United States." *Satterfield*, 266 S.W.3d at 369 (citing Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 Rev. Litig. 583, 584–95 (2007)). The Fifth District's "imposition of an expansive new duty on premises owners for off-site exposures" serves only to "exacerbate the current 'asbestos-litigation crisis.'" *In re Certified Question*, 740 N.W.2d at 219 (quoting *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 166 (2003); Behrens & Cruz-Alvarez, *A Potential New Frontier In*

Asbestos Litigation, 21 MEALEY'S LITIG REP. ABS. at 5). For this reason, too, this Court should exercise its supervisory authority and review the decision below.

CONCLUSION

For the foregoing reasons, the Petition for Leave to Appeal should be granted.

Respectfully submitted,

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Michele Odorizzi
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Andrew Tauber
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Kurt E. Reitz
Heath H. Hooks
THOMPSON COBURN LLP
525 West Main Street
P.O. Box 750
Belleville, IL 62222
(618) 277-4700

Counsel for Defendant-Petitioner

August 18, 2010

APPENDIX

Appellate Court decision.....App.1

CSXT's Motion to Cite Second Supplemental Authority.....App.10

Order granting CSXT's Motion to Cite Second Supplemental Authority.....App.15

Appellate Court of Illinois,
Fifth District.
Cynthia SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, Plaintiff-Appellant,
v.
CSX CORPORATION and CSX Transportation, Inc., Defendants-Appellees.
No. 5-07-0346.

June 10, 2010.

Background: Railroad worker's wife, and subsequently wife's estate, brought action against worker's former employer after wife contracted mesothelioma, alleging in part that employer negligently failed to take precautions to protect worker's family from take-home asbestos exposure. The Circuit Court, Madison County, Daniel J. Stack, J., dismissed estate's complaint. Estate appealed.

Holding: As a matter of first impression, the Appellate Court, Chapman, J., held that employer had duty to protect wife from take-home asbestos exposure.

Reversed and cause remanded.

West Headnotes

[1] Courts 106 87

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k87 k. Nature of judicial determination. Most Cited Cases
The trial judge has both the authority and the duty to decide disputes before it, even if the dispute is one of first impression.

[2] Courts 106 1

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k1 k. Nature and source of judicial authority. Most Cited Cases
Absence of statutory or regulatory law to govern a particular dispute does not constrain the trial court's power to decide disputes before it.

[3] Negligence 272 214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship between parties. Most Cited Cases
Existence of a duty, as would support negligence claim, depends on whether the parties stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff.

[4] Negligence 272 214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship between parties. Most Cited Cases
The term “relationship,” for purposes of finding existence of a duty so as to support negligence claim, does not necessarily mean a contractual, familial, or other particular special relationship.

[5] Negligence 272 210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases

Negligence 272 213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases

Negligence 272 232

272 Negligence
272III Standard of Care
272k232 k. Ordinary care. Most Cited Cases

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.

[6] Negligence 272 210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases

Negligence 272 213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases

Negligence 272 214

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship between parties. Most Cited Cases
Whether a relationship exists between the parties that will justify the imposition of a duty for negligence purposes depends upon four factors: (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm.

[7] Negligence 272 211

272 Negligence
272II Necessity and Existence of Duty
272k211 k. Public policy concerns. Most Cited Cases
Court's determination of duty for negligence purposes is informed by public policy considerations.

[8] Negligence 272 210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases
As a matter of public policy, it is best for courts to place the duty to protect against a harm on the party best able to prevent it.

[9] Negligence 272 220

272 Negligence
272II Necessity and Existence of Duty
272k220 k. Protection against acts of third persons. Most Cited Cases

Negligence 272 306

272 Negligence
272VIII Dangerous Situations and Strict Liability
272k306 k. Dangerous substances. Most Cited Cases
Employer had duty to protect wife of railroad employee from take-home asbestos exposure, even in the absence of any special relationship, in case in which wife developed mesothelioma after exposure to asbestos on husband's clothes; public policy supported imposition of duty, since employer was party best able to prevent harm, risk to wife was reasonably foreseeable, likelihood of serious or fatal injury was substantial, burden of guarding against take-home asbestos exposure was not unduly burdensome when compared to nature of risk to be protected against, and scope of liability would be inherently limited by foreseeability of harm.

[10] Negligence 272 210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases
All people have a duty to others to refrain from actions which involve an unreasonable risk of harm to others.

[11] Negligence 272 210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases

Negligence 272 220

272 Negligence
272II Necessity and Existence of Duty
272k220 k. Protection against acts of third persons. Most Cited Cases
Generally people have no duty to protect others from dangers or risks except for those that they themselves

have created.

[12] Negligence 272 213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases
What is required to be foreseeable, so as to support existence of a duty in negligence claim, is the general character of the event or harm, not its precise nature or manner of occurrence.

[13] Pretrial Procedure 307A 681

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak681 k. Matters considered in general. Most Cited Cases
Under a motion to dismiss based on the pleadings, courts may not consider affidavits or other supportive documentation. S.H.A. 735 ILCS 5/2-615.

[14] Negligence 272 210

272 Negligence
272II Necessity and Existence of Duty
272k210 k. In general. Most Cited Cases

Negligence 272 213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases
Foreseeability is an important factor in determining whether a duty, as would support a negligence claim, exists, but it is not the only factor; court must also consider the likelihood of the injury, the level of the burden involved in protecting against injury, and the consequences of placing that burden on a party.
***1258** John A. Barnerd, Amy Garrett, SimmonsCooper LLC, East Alton, IL, Charles W. Chapman, Wood River, IL, for Appellant.

Kurt E. Reitz, Heath H. Hooks, Thompson Coburn LLP, Belleville, IL, for Appellees.

Justice CHAPMAN delivered the opinion of the court:

****1** According to the plaintiff's complaint, Annette Simpkins was exposed to asbestos fibers brought home on the work clothes of her husband, Ronald Simpkins. Ronald Simpkins was exposed to asbestos while working for various employers, including the defendants' predecessor, the B & O Railroad. Annette Simpkins died of mesothelioma cancer in April 2007 while the instant action was pending in the trial court. Her daughter, Cynthia Simpkins, was appointed as the special administrator of Annette's estate and was substituted as the plaintiff. She now appeals an order dismissing three counts of the complaint against the defendants, CSX Corp. and CSX Transportation, Inc. (collectively referred to as CSX). The counts were dismissed pursuant to a motion under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)), on the grounds that an employer has no duty to protect the family of its employee from the dangers of asbestos brought home on the ***1259** work clothes of the employee. We find that such a duty does exist. Accordingly, we reverse and remand for further proceedings.

The fact that this case comes to us on a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure limits our consideration to the matters asserted in the pleadings. The supreme court has explained as follows:

> "A section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2002)) challenges the legal sufficiency of a complaint based on defects apparent on its face. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 364 [, 290 Ill.Dec. 525, 821 N.E.2d 1099, 1110] (2004). Therefore, we review *de novo* an order granting or denying a section 2-615 motion. *Wakulich v. Mraz*, 203 Ill.2d 223, 228[, 271 Ill.Dec. 649, 785 N.E.2d 843, 846] (2003). In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Ferguson v. City of Chicago*, 213 Ill.2d 94, 96-97[, 289 Ill.Dec. 679, 820 N.E.2d 455, 457] (2004). We also construe the allegations in the complaint in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, 11-12[, 293 Ill.Dec. 657, 828 N.E.2d 1155, 1161] (2005). Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that

> would entitle the plaintiff to recovery. *Canel v. Topinka*, 212 Ill.2d 311, 318 [, 288 Ill.Dec. 623, 818 N.E.2d 311, 317] (2004)." *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 429, 305 Ill.Dec. 897, 856 N.E.2d 1048, 1053 (2006).

For purposes of a motion to dismiss pursuant to section 2-615, the court may not consider affidavits or other supporting materials. *Kirchner v. Greene*, 294 Ill.App.3d 672, 677, 229 Ill.Dec. 171, 691 N.E.2d 107, 112 (1998); *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill.App.3d 1065, 1068, 177 Ill.Dec. 841, 603 N.E.2d 1215, 1218-19 (1992). Unlike a section 2-619 motion or a section 2-1005 summary judgment motion (735 ILCS 5/2-619, 2-1005 (West 2006)), a section 2-615 motion relies solely on the pleadings rather than on the underlying facts. It is for that reason that the plaintiff must prevail if sufficient facts are pled which, if proved, would entitle her to relief.

****2** The scope of our inquiry is confined to the issue of whether the plaintiff's complaint should have been dismissed on the basis that Ronald Simpkins' employer did not owe a duty of care to prevent Annette from being exposed to asbestos brought home on her husband's work clothes and body. We make no determination on the questions of whether a breach of that duty occurred or whether such a breach was a proximate cause of Annette's death. For purposes of this opinion, we must assume that the facts contained in the plaintiff's complaint are true.

The plaintiff's complaint states that Annette and Ronald Simpkins were married from 1951 until 1965, after which time they divorced. For much of that time, Ronald was exposed to asbestos in his work as a steelworker, welder, railroad fireman, and laborer. He worked in these capacities for several employers, including the B & O Railroad (the defendants' predecessor), where he worked from 1958 to 1964.

On January 19, 2007, Annette Simpkins filed the original complaint in this matter, alleging that she had contracted mesothelioma cancer due to exposure to asbestos brought home on Ronald's body and work clothes during their marriage. This is what is commonly referred to as "take-home" asbestos exposure. (We note that ***1260** Annette Simpkins also alleged take-home exposure to asbestos through her father and direct exposure through her own employment. Those allegations, however, are not at issue in this appeal.) The complaint named numerous defendants, including asbestos manufacturers and former employers. The three counts of the complaint here at issue named only CSX (as a successor to the B & O Railroad) and the Dow Chemical Company, where Ronald Simpkins worked from 1964 through the end of the parties' marriage in 1965. Count VII of the complaint alleged that both former employers negligently failed to take precautions to protect Ronald Simpkins' family from take-home asbestos exposure, count VIII alleged that both defendants were strictly liable for engaging in an ultrahazardous activity, and count IX alleged willful and wanton conduct on the part of both employers.

On February 28, 2007, CSX filed a section 2-615 motion to dismiss the three counts of the complaint against it. CSX argued that under Illinois law an employer does not owe any duty to the families of its employees. This was the sole basis for dismissal that it asserted. We note that the Dow Chemical Company did not join CSX's motion or file its own motion to dismiss and is not a party to this appeal.

On April 2, 2007, Annette Simpkins died. On May 2, her daughter, Cynthia, was appointed the special administrator of Annette's estate. Cynthia was later substituted as the plaintiff in this litigation.

On May 18, 2007, the court heard arguments on CSX's motion to dismiss. CSX argued that because no Illinois court has previously held that employers owe a duty to the families of employees who are exposed to asbestos, allowing the plaintiff's case to go forward against CSX would be creating a new cause of action. Thus, according to CSX, it is an issue that must be determined by an appellate court or the legislature, not by a trial court. We note that CSX implicitly acknowledged that no Illinois court has previously held that employers do not owe a duty to protect families from take-home asbestos exposure either. CSX's attorney pointed out that the plaintiff could appeal from an order dismissing her case and that "if [s]he can create a new cause of action, [s]he can create a new cause of action."

****3** In response, the plaintiff argued that asking the court to recognize a duty where there are no previous cases on point is not the same as asking the court to create a new cause of action. She further argued that

the Illinois Supreme Court has expressed a broad view of duty, and she emphasized that finding that a duty exists is not the same thing as finding that the duty has been breached or that the defendant is liable. In rebuttal, the defendants argued that holding there is a duty to protect family members from take-home asbestos exposure would expand employers' liability under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2000)) and that the plaintiff's remedy in this case is against the asbestos manufacturers, not against the employer. The court told the plaintiff's counsel: "I have to be candid with you. It sounds like a great argument for the [s]upreme [c]ourt." The court then granted the motion to dismiss and told the parties it would sever the claims against CSX from the remainder of the plaintiff's claims and enter a finding, pursuant to Supreme Court Rule 304 (210 Ill.2d R. 304), making its dismissal a final and appealable order. The court entered a written order to that effect the same day. The plaintiff then timely filed the instant appeal.

[1][2] We are perplexed by CSX's argument that somehow the trial court was unable to decide the issue before it, just as ***1261** we are perplexed by the judge's apparent acquiescence to that argument. Our legal system is one of common law, which by its very definition develops through the case law decisions of the courts. See Black's Law Dictionary 276-77 (6th ed. 1990). The trial judge has both the authority and the duty to decide disputes before it. See *Marbury v. Madison*, 5 U.S.(1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803) (explaining, "It is emphatically the province and duty of the judicial department to say what the law is"). There is no prerequisite that an appellate court decide cases of first impression. Nor does the absence of statutory or regulatory law constrain the court's power to decide disputes before it. See Ill. Const. 1970, art. VI, § 9 (trial courts have jurisdiction over "all justiciable matters").

Before turning to the merits of the parties' contentions, we note that the motion to dismiss was directed at three different counts of the plaintiff's complaint. All three counts, however, involved allegations that the risk of harm to Annette Simpkins was foreseeable. On appeal, the parties do not distinguish the three counts. Thus, we, too, will discuss them together.

As both parties note, no Illinois case is directly on point. Both parties cite decisions of other jurisdictions, which reach opposite results. The plaintiff argues that general principles of duty under Illinois law support finding a duty to protect family members in take-home asbestos cases. CSX urges us to follow those jurisdictions that have not found a duty to protect family members from take-home asbestos exposure, arguing that finding such a duty would lead to unlimited liability. We agree with the plaintiff. Because we find that ordinary principles of Illinois negligence law support this conclusion, we need not consider the plaintiff's alternative argument based on a transferred-negligence theory (see *Renslow v. Mennonite Hospital, Inc.*, 67 Ill.2d 348, 10 Ill.Dec. 484, 367 N.E.2d 1250 (1977)), nor need we consider CSX's related argument that the common law cannot expand FELA liability to a nonemployee spouse. We also take note that in light of the supreme court's recent decision in *Tedrick v. Community Resource Center, Inc.*, 235 Ill.2d 155, 336 Ill.Dec. 210, 920 N.E.2d 220 (2009), we do not believe that a transferred-negligence theory provides viable support for the plaintiff's argument regarding duty.

****4** [3][4][5] Under Illinois law, the existence of a duty depends on whether the parties stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff. *Marshall*, 222 Ill.2d at 436, 305 Ill.Dec. 897, 856 N.E.2d at 1057. The term "relationship" does not necessarily mean a contractual, familial, or other particular special relationship. See *Marshall*, 222 Ill.2d at 441, 305 Ill.Dec. 897, 856 N.E.2d at 1060 (explaining that whether or not the law imposes a duty on a defendant for the benefit of a plaintiff depends on " ' "the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection" ' " (quoting *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill.2d 507, 527, 111 Ill.Dec. 944, 513 N.E.2d 387, 396 (1987)) (quoting W. Keeton, Prosser & Keeton on Torts § 53, at 358 (5th ed. 1984))). As the supreme court has noted, " 'the concept of duty in negligence cases is very involved, complex[,] and indeed nebulous.' " *Marshall*, 222 Ill.2d at 435, 305 Ill.Dec. 897, 856 N.E.2d at 1056-57 (quoting *Mieher v. Brown*, 54 Ill.2d 539, 545, 301 N.E.2d 307, 310 (1973)). Moreover, 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 ***1262** of his or her own actions. See *Forsythe v. Clark USA, Inc.*, 224 Ill.2d 274, 291, 309 Ill.Dec. 361, 864 N.E.2d 227, 238

(2007).

[6][7][8] Whether a relationship exists between the parties that will justify the imposition of a duty depends upon four factors: (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm. *Marshall*, 222 Ill.2d at 436-37, 305 Ill.Dec. 897, 856 N.E.2d at 1057; *Ward v. K mart Corp.*, 136 Ill.2d 132, 140-41, 143 Ill.Dec. 288, 554 N.E.2d 223, 226-27 (1990). Our determination of duty is informed by public policy considerations. *Marshall*, 222 Ill.2d at 436, 305 Ill.Dec. 897, 856 N.E.2d at 1057. As a matter of public policy, it is best to place the duty to protect against a harm on the party best able to prevent it. See *Court v. Grzelinski*, 72 Ill.2d 141, 150-51, 19 Ill.Dec. 617, 379 N.E.2d 281, 285 (1978).

[9] Applying these principles, we find the out-of-state cases that have found a duty in similar circumstances to be more persuasive than those that have not. We find two cases particularly helpful. The Tennessee Supreme Court's decision in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn.2008), offers a thoughtful and persuasive discussion of the role the parties' relationship should play in determining the existence of a duty, while the New Jersey case of *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394, 895 A.2d 1143 (2006), cited by the plaintiff (and relied upon in many of the other cases she cites), required the New Jersey Supreme Court to apply general principles of duty similar to Illinois's to circumstances nearly identical to those present in the instant case.

****5** [10][11] *Satterfield* involved a 25-year-old woman who died as a result of mesothelioma cancer, which she contracted after being exposed to asbestos fibers brought home on her father's work clothes during her childhood. *Satterfield*, 266 S.W.3d at 351-52. In rejecting the father's employer's argument that it owed no duty to the daughter because it did not have a special relationship with her, the Tennessee Supreme Court first examined general principles of negligence law. The court explained that all people have a duty to others to refrain from actions " 'which involve[ ] an unreasonable risk of harm' " to others. *Satterfield*, 266 S.W.3d at 355 (quoting Restatement (Second) of Torts § 302 (1965)). Generally, however, people have no duty "to protect others from dangers or risks except for those that they themselves have created." *Satterfield*, 266 S.W.3d at 357. This is what is known as the "no duty to act" rule. *Satterfield*, 266 S.W.3d at 357 (citing Restatement (Second) of Torts § 314 (1965)). These propositions, embodied in the Second Restatement of Torts, are not unique to Tennessee law, and as previously explained, they are the law in Illinois also.

The *Satterfield* court then went on to explain the role that an analysis of the relationship between the parties should play in a duty analysis under these general principles. It explained that exceptions to the no-duty-to-act rule exist where special recognized relationships exist, either between the plaintiff and the defendant or between the defendant and a third party whose actions create the risk to the plaintiff. *Satterfield*, 266 S.W.3d at 359. However, the court found that neither the no-duty-to-act rule nor these exceptions were applicable to the facts before it. This is because the case did not involve a situation where the father's employer simply failed to act to protect the daughter from harm caused by a third party; rather, it involved "the employer's own misfeasance-its injurious affirmative act of operating***1263** its facility in such an unsafe manner that dangerous asbestos fibers were transmitted outside the facility" on its employees' work clothes. *Satterfield*, 266 S.W.3d at 364. The court, therefore, found it unnecessary to consider whether the employer had any additional duties to the daughter flowing from a special relationship. *Satterfield*, 266 S.W.3d at 364.

At least one other court has followed the Tennessee court's approach. See *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, slip op. at 12, 140 Wash.App. 1008, 2007 WL 2325214 (2007) (unpublished opinion) (finding that a duty to prevent harm from take-home asbestos exposure can arise "even in the absence of any special relationship" if the injury is foreseeable). We find this approach persuasive. For one thing, as mentioned, the *Satterfield* court described general principles of negligence law embodied in the Second Restatement of Torts. Also as previously mentioned, in Illinois, as in Tennessee, all parties owe to all others the duty to take reasonable precautions to prevent their actions from harming all others. To find that an employer whose workers are exposed to asbestos owes no duty to protect others from exposure-assuming the exposure is both foreseeable and preventable without undue burden-

merely because the others do not have any particular special relationship with the employer (such as an employee or a business invitee) would defy logic and lead to grossly unfair results. This is not to say the employer has unlimited liability to all the world; as we will discuss later in this opinion, liability will be limited by foreseeability.

****6** With this in mind, we turn our attention to *Olivo*, where the New Jersey Supreme Court found the risk of take-home asbestos exposure foreseeable in a case of a woman who died of mesothelioma cancer after being exposed to asbestos brought home on her husband's work clothes. Under New Jersey law, as under Illinois law, a duty analysis involves both a determination of whether the injury was foreseeable and a consideration of public policy. *Olivo*, 186 N.J. at 403, 895 A.2d at 1148. We find the court's analysis of both factors persuasive. We focus now on its analysis of the foreseeability of the harm.

In *Olivo*, as here, one of the husband's employers argued that it owed no duty to protect its former employee's wife from take-home asbestos exposure. *Olivo*, 186 N.J. at 400, 895 A.2d at 1146-47. When considering the foreseeability of the harm, the *Olivo* court explained as follows: "It requires no leap of imagination to presume that during the decades of the 1940's, 50's, 60's, [70's,] and early 1980's when Anthony [Olivo] worked as a welder and steamfitter[,] either he or his spouse would be handling his clothes in the normal and expected process of laundering them so that the garments could be worn to work again. Anthony's soiled work clothing had to be laundered[,] and [his employer] * * * should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks." *Olivo*, 186 N.J. at 404, 895 A.2d at 1149.

[12] CSX argues that the B & O Railroad did not know of the dangers of take-home asbestos while Ronald Simpkins worked for it. The question, however, is not whether the employer *actually* foresaw the risk to Annette Simpkins; rather, the question is whether, through reasonable care, it *should have* foreseen the risk. " '[W]hat is required to be foreseeable is the general character of the event or harm * * *[,] not its precise nature or manner of occurrence.' " *Marshall*, 222 Ill.2d at 442, 305 Ill.Dec. 897, 856 N.E.2d at 1060 (quoting ***1264***Bigbee v. Pacific Telephone & Telegraph Co.*, 34 Cal.3d 49, 57-58, 665 P.2d 947, 952, 192 Cal.Rptr. 857, 862 (1983)). Like the *Olivo* court, we believe that 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. Thus, the general character of the harm to be prevented was reasonably foreseeable.

[13] As we have previously stated, under a section 2-615 motion to dismiss, courts may not consider affidavits or other supportive documentation. *Kirchner*, 294 Ill.App.3d at 677, 229 Ill.Dec. 171, 691 N.E.2d at 112; *Barber-Colman Co.*, 236 Ill.App.3d at 1068, 177 Ill.Dec. 841, 603 N.E.2d at 1218-19. However, the plaintiff did file a number of documents in support of her allegations and arguments that the hazards of take-home asbestos were known or should have been known to the defendants' predecessor, the B & O Railroad, during the relevant years of Ronald Simpkins' employment from 1958 to 1964. The defendants have also argued that the risk of harm from take-home exposure was not foreseeable until 1972, when the Occupational Safety and Health Administration, or OSHA, introduced regulations to prevent take-home asbestos exposure. We cannot consider those fact-specific arguments derived from affidavits or other supportive documentation. The defendants' choice of a section 2-615 motion, rather than a section 2-619 motion or a section 2-1005 motion for a summary judgment, controls the way both the parties may proceed and our scope of review. Again, for purposes of this motion we must take as true the plaintiff's pleadings, which allege that the B & O Railroad knew or should have known during the relevant times that the asbestos fibers carried home from work on Ronald Simpkins' clothing and body posed a risk of harm to Annette Simpkins. We find that the risk of harm to Annette Simpkins was foreseeable at the time Ronald Simpkins worked for the B & O Railroad.

****7** [14] Finding that the risk of harm was foreseeable does not end our inquiry. Foreseeability is an important factor (see *Corcoran v. Villageville*, 73 Ill.2d 316, 326, 22 Ill.Dec. 701, 383 N.E.2d 177, 180 (1978) (explaining that foreseeability is the cornerstone of our duty analysis)); however, it is not the only factor. As previously outlined, we must also consider the likelihood of the injury, the level of the burden involved in protecting against take-home as-

bestos exposure, and the consequences of placing that burden on an employer whose workers are exposed to asbestos. See *Marshall*, 222 Ill.2d at 436-37, 305 Ill.Dec. 897, 856 N.E.2d at 1057.

We will next consider the likelihood of the injury. A cursory look at the cases that both the parties cite to in support of their various positions illustrates both the pervasiveness and the seriousness of asbestos-related diseases. While apparently the likelihood of contracting mesothelioma or another asbestos-related lung disease through take-home exposure varies depending on the duration of exposure, these cases also demonstrate that the likelihood of developing such a disease from anything more than incidental exposure is not remote. Annette Simpkins' complaint alleges facts that support the conclusion that the magnitude of the harm was great, asserting that asbestos fibers have a "toxic, poisonous, and highly deleterious effect upon the health of persons inhaling, ingesting[,] or otherwise absorbing them." Allegedly, Annette eventually died from her asbestos-related cancer. Thus, the likelihood of serious or fatal injury to anyone foreseeably exposed to asbestos is substantial enough to warrant the imposition of a duty. See ***1265***Forsythe*, 224 Ill.2d at 291, 309 Ill.Dec. 361, 864 N.E.2d at 238 (finding a duty where the "likelihood of injury * * * would not be remote and could be deadly").

We must also consider the burden involved in guarding against take-home asbestos exposure. We again find the decisions in *Satterfield* and *Olivo* persuasive. Although the courts in both Tennessee and New Jersey describe differently from Illinois courts the factors they consider in determining the existence of a duty, the courts in both states in fact addressed this issue.

The *Satterfield* court considered whether "the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm." *Satterfield*, 266 S.W.3d at 365. The court discussed measures that could have prevented the daughter's exposure: the employer could have provided warnings to its employees about the dangers of bringing asbestos-laden clothing home, it could have provided coveralls for employees to wear while working around asbestos, and it could have required the employees to change before leaving and provided an on-site laundry facility to clean the coveralls. The court found these measures "to be feasible and efficacious without imposing prohibitive costs or burdens" on the employer. *Satterfield*, 266 S.W.3d at 368. Similarly, the *Olivo* court considered "the nature of the risk and how relatively easy it would have been to provide warnings to workers such as Anthony about the handling of his clothing or to provide protective garments." *Olivo*, 186 N.J. at 405, 895 A.2d at 1149.

****8** Annette's complaint alleges a number of ways the employer here could have reduced the risk of exposure-*i.e.*, by substituting other products, providing warnings of the danger, providing safety instructions, testing the products, and requiring hygienic practices. CSX offers no real argument regarding the burden that implementing any of these practices would have placed on the employer, choosing instead to rely on the lack of any special relationship with Annette Simpkins as dispositive of its duty analysis. We find that the burden of guarding against take-home asbestos exposure is not unduly burdensome when compared to the nature of the risk to be protected against.

Finally, we consider the consequences of placing that burden on employers such as the defendants or their predecessor. The defendants contend that recognizing a duty here would expose employers to limitless liability to "the entire world." The *Olivo* court addressed a similar argument and found that such fears of limitless liability were "overstated." *Olivo*, 186 N.J. at 405, 895 A.2d at 1150. The court explained that the duty it was recognizing "is focused on the particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband." *Olivo*, 186 N.J. at 405, 895 A.2d at 1150. Thus, the scope of liability will be inherently limited by the foreseeability of the harm.

We agree with the *Olivo* court that our focus on foreseeability provides an acceptable limitation on an employer's potential liability. It is certainly foreseeable that the wife of an asbestos-exposed worker would also be exposed to asbestos dust through washing his clothing. It is also foreseeable that other members of the household could be exposed. It is *not* necessarily foreseeable that any person who shares a cab with the asbestos worker would inhale asbestos

dust and develop mesothelioma. See ***1266***Satterfield v. Breeding Insulation Co.*, No. E2006-00903-COA-R3-CV, slip op. at 14, 2007 WL 1159416 (Tenn.App. April 19, 2007) (explaining that while harm to family members "who routinely come into close contact with employees' contaminated clothing" is foreseeable, the risk of harm to people "who might possibly come into contact with the employees' clothing, but whose contacts are sporadic or unpredictable," is "only a remote possibility"), *aff'd*, 266 S.W.3d 347 (Tenn.2008).

We note that the plaintiff argues that the duty to protect against take-home asbestos exposure can be limited to the immediate family of workers who are exposed to asbestos, while the defendants contend that there is no rational reason to draw the line there. As an example, they contend, a housekeeper or babysitter who regularly launders the employee's clothing might be just as likely to be exposed as members of the immediate family, if not more so. The court in *Satterfield* addressed similar arguments. The court agreed that there was no principled reason to limit liability to the immediate families of workers who handle asbestos. *Satterfield*, 266 S.W.3d at 374. The court explained as follows:

> ****9** "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. It is foreseeable that the adverse effects of repeated, regular, and extended exposure to asbestos on an employee's work clothes could injure these persons." *Satterfield*, 266 S.W.3d at 374.

The court therefore held that the duty to protect against exposure to asbestos transported outside the workplace on an employee's clothing extends to any person who is foreseeably exposed through "close contact with an employee's contaminated work clothes over an extended period of time." *Satterfield*, 266 S.W.3d at 374.

We do not believe that the issue of whether anyone other than a member of an employee's immediate family is owed a duty is before us. Whether harm to any such person is foreseeable depends on an assessment of circumstances not presented in this case. While we do not expressly limit the duty to immediate family members, we decide today only that employers owe the immediate families of their employees a duty to protect against take-home asbestos exposure. Should a proper case arise, we can consider whether the duty extends to others who regularly come into contact with employees who are exposed to asbestos-containing products.

After a consideration of the policy factors used to determine duty, we believe that Annette Simpkins was entitled to the exercise of care from her husband's employer. We reiterate, however, that we are not relieving the plaintiff of the burden of proving her case. Duty is not the equivalent of liability; she must still prove a breach and proximate cause. These are factual matters for a jury to decide. We have merely found that, under the facts alleged, the B & O Railroad owed a duty of care to the spouse of one of its employees.

We hold that the plaintiff's complaint sufficiently states a cause of action to establish a duty of care owed by the defendants' predecessor to the decedent. We reverse the circuit court's dismissal of the plaintiff's complaint and remand the cause for further proceedings.

Reversed; cause remanded.

DONOVAN and WEXSTTEN, JJ., concur.
Ill.App. 5 Dist.,2010.
Simpkins v. CSX Corp.
--- N.E.2d ----, 929 N.E.2d 1257, 2010 WL 2337778 (Ill.App. 5 Dist.)

END OF DOCUMENT

No. 5-07-0346

IN THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

IN RE ALL ASBESTOS LITIGATION FILED BY SIMMONS COOPER LLC,

ANNETTE SIMPKINS,

Plaintiff-Appellant,

vs.

CSX CORPORATION and CSX TRANSPORTATION, INC.,

Defendants-Appellees.

No. 07-L-62

MOTION TO CITE SECOND SUPPLEMENTAL AUTHORITY

Now Come Defendants-Appellees, CSX Corporation and CSX Transportation, Inc., and for their Motion To Cite Second Supplemental Authority, state:

1. The Appellate Court of Illinois, Second District, recently issued a new decision addressing whether an employer is liable for secondhand asbestos exposure.

2. In *Nelson v. Aurora Equipment Co.*, No. 2-08-0186, 2009 WL 1537855, (Ill. App. Ct. 2nd Dist. May 29, 2009), a copy of which is submitted herewith, the Plaintiffs alleged that Plaintiffs, Decedent's husband and son, worked for Defendant, Aurora Equipment Company, and that asbestos would accumulate on Plaintiffs' work clothes, which they wore home. *Nelson*, 2009 WL 1537855, at *1. Plaintiffs alleged that Decedent was around Plaintiffs when they were wearing the contaminated clothing and that she washed the clothes and breathed in the asbestos fibers and dust, thus becoming exposed. *Nelson*, 2009 WL 1537855, at *1. Plaintiffs alleged that, as a direct and proximate result of her exposure to asbestos from Defendant's facility, Decedent was

stricken with mesothelioma and colon cancer, which caused her death. *Nelson*, 2009 WL 1537855, at *1. Plaintiffs filed suit against Defendant based on a premises liability theory. *Nelson*, 2009 WL 1537855, at *1.

Aurora filed a motion for summary judgment on the bases that it did not owe a duty to Decedent and that there was no evidence that Decedent was exposed as a result of Aurora's activities. *Nelson*, 2009 WL 1537855, at *1. The trial court granted the motion for summary judgment on the basis that the magnitude of the burden and the consequences of assigning blame to Aurora militated against imposing a duty. *Nelson*, 2009 WL 1537855, at *1. The trial court denied Plaintiffs' motion to reconsider and entered a written finding pursuant to Supreme Court Rule 304(a). *Nelson*, 2009 WL 1537855, at *1. Plaintiffs commenced a timely appeal. *Nelson*, 2009 WL 1537855, at *1.

The Second District first noted that Plaintiffs pleaded a cause of action for premises liability:

> A premises-liability action is a negligence claim *** The essential elements of a cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach *** The determination of whether a duty exists rests on whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff *** The reasonable foreseeability of injury is one important concern, but our supreme court has recognized that foreseeability alone 'provides an inadequate foundation upon which to base the existence of a legal duty.' *** Other factors include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon the defendant *** The nature of the relationship between the parties is a threshold question in the duty analysis.

Nelson, 2009 WL 1537855, at *2.

The Second District went on to note that Plaintiffs based their action on the common-law duty of a landowner or occupier toward an invitee to use reasonable care to maintain his premises in a reasonably safe condition. *Nelson*, 2009 WL 1537855, at *2. The Second District noted that these precepts did not fit the case before it because Decedent was not an entrant on Aurora's land, and thus she was neither an invitee, a licensee, nor a trespasser. *Nelson*, 2009 WL 1537855, at *3. The Court noted that, while Decedent was alleged to have come into contact with the asbestos fibers and dust on Plaintiffs' work clothes, those fibers and dust were no longer a condition on Aurora's premises. *Nelson*, 2009 WL 1537855, at *3.

Plaintiffs urged the Second District to reject an analysis of the relationship between Decedent and Aurora in favor of a four factor analysis: (1) the reasonable foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden upon the defendant. *Nelson*, 2009 WL 1537855, at *3. However, the Second District found that Plaintiffs misread the Illinois Supreme Court's decision in *Marshall v. Burger King Corp.*, 222 Ill.2d 422 (2006). The Second District noted that the *Marshall* court held that the defendants' duty arose from their relationship with the decedent, and the *Marshall* court addressed the four factors only in considering whether to create an exemption from that duty. Therefore, the Second District found that the relationship between the parties, as part of a duty analysis, has not been eliminated in Illinois. *Nelson*, 2009 WL 1537855, at **3-5.

The Second District therefore held that the theory of premises liability requires that a plaintiff either be an entrant onto the defendant's premises or otherwise have some

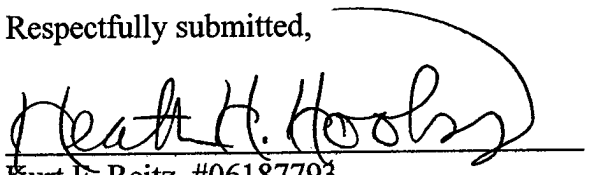
special relationship with the defendant. The Second District noted that Decedent was not an entrant on and had no relationship with Aurora's premises. *Nelson*, 2009 WL 1537855, at *6. Therefore, Aurora had no duty to Decedent. *Nelson*, 2009 WL 1537855, at *6-7.

3. In the present case, as in *Nelson*, Plaintiff's claims are based on a premises liability theory. In the present case, as in *Nelson*, Plaintiff was not an entrant on CSX's premises, and CSX shared no legally significant relationship with Plaintiff, the former spouse of its employee, which would give rise to a duty of care.

4. Consideration of the *Nelson* decision will materially assist this Court in adjudicating this appeal.

WHEREFORE, Defendants-Appellees, CSX Corporation and CSX Transportation, Inc., respectfully request that this Court GRANT them LEAVE to cite the Supplemental Authority submitted herewith.

Respectfully submitted,



Kurt E. Reitz, #06187793
Heath H. Hooks, #06216255
525 West Main Street
P.O. Box 750
Belleville, Illinois 62222-0750
618-277-4700 – FAX 618-236-3434

OF COUNSEL:
THOMPSON COBURN

Attorneys for Defendants-Appellees CSX Corporation and CSX Transportation, Inc.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served upon all attorneys of record by mailing a copy of same, postage prepaid, this 12th day of June, 2009, to:

Mr. John Barnerd
Ms. Amy Garrett
SimmonsCooper,LLC
707 Berkshire Blvd.,
P. O. Box 521
East Alton, IL 62024

Mr. Charles W. Chapman
LakinChapman, LLC
300 Evans Avenue
P. O. Box 229
Wood River, IL 62095-0027

No. 5-07-0346
IN THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

IN RE ALL ASBESTOS LITIGATION FILED BY SIMMONS COOPER LLC,	)	
ANNETTE SIMPKINS,	)	Appeal From the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
Plaintiff-Appellant,	)	
vs.	)	No. 07-L-62
CSX CORPORATION and CSX TRANSPORTATION, INC.,	)	
Defendants-Appellees.	)	

FILED
SEP 25 2008
LOUIS E. COSTA
CLERK APPELLATE COURT, 5th DIST.

ORDER

On Defendants-Appellees, CSX Corporation and CSX Transportation, Inc.'s, Motion to Cite Second Supplemental Authority, motion is hereby ALLOWED/~~DENIED~~ .

ENTER:_____

PER CURIAM

_____
JUDGE

4952246.1

No. 110662

IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Respondent,* v. CSX TRANSPORTATION, INC., *Defendant-Petitioner*.	))))))))))))	On Petition for Leave to Appeal from the Illinois Appellate Court Fifth District 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 hereby certify that this petition conforms to the requirements of Supreme Court Rule 315(d) and, to the extent applicable, Supreme Court Rules 341(a) and (b). The length of the petition, excluding the appendix, is 17 pages.

_____
Michele Odorizzi

No. 110662

IN THE
SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Respondent*, v. CSX TRANSPORTATION, INC., *Defendant-Petitioner*.	))))))))))))	On Petition for Leave to Appeal from the Illinois Appellate Court Fifth District 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 she is one of the attorneys for Defendant-Petitioner CSX Transportation, Inc. and that on August 18, 2010 she caused three copies of the foregoing Petition for Leave to Appeal of CSX Transportation, Inc. to be served on all counsel of record by causing said copies to be sent via overnight delivery to the following:

John A. Barnerd
Amy Garrett
SimmonsCooper LLC
707 Berkshire Blvd.
East Alton, IL 62024

Charles W. Chapman
300 Evans Ave.
Wood River, IL 62095

_____
Michele Odorizzi

No. 110662

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CERTIFICATE OF MAILING

The undersigned, one of the attorneys for Defendant-Petitioner CSX Transportation, Inc., hereby certifies that on August 18, 2010 she caused 20 copies of the foregoing Petition for Leave to Appeal of CSX Transportation, Inc. to be sent via overnight delivery to the following:

Juleann Hornyak
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
200 E. Capitol
Springfield, IL 62701

_____
Michele Odorizzi

No. 110662

IN THE
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CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Respondent*, v. CSX TRANSPORTATION, INC., *Defendant-Petitioner*.	)	On Petition for Leave to Appeal from the Illinois Appellate Court Fifth District 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

To:

John A. Barnerd
Amy Garrett
SimmonsCooper LLC
707 Berkshire Blvd.
East Alton, IL 62024

Charles W. Chapman
300 Evans Ave.
Wood River, IL 62095

PLEASE TAKE NOTICE that on August 18, 2010, we filed the enclosed Petition for Leave to Appeal of CSX Transportation, Inc., three copies of which are hereby served upon you.

Dated: August 18, 2010

CSX TRANSPORTATION, INC.

By:_____
One of Their Attorneys

Michele Odorizzi
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

No. 110662

IN THE
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CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Respondent*, v. CSX TRANSPORTATION, INC., *Defendant-Petitioner*.	)	On Petition for Leave to Appeal from the Illinois Appellate Court Fifth District 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 she is one of the attorneys for Defendant-Petitioner CSX Transportation, Inc. and that on August 18, 2010 she caused three copies of the foregoing Notice of Filing of the Petition for Leave to Appeal of CSX Transportation, Inc. to be served on all counsel of record by causing said copies to be sent via overnight prepaid delivery to the following:

John A. Barnerd
Amy Garrett
SimmonsCooper LLC
707 Berkshire Blvd.
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Charles W. Chapman
300 Evans Ave.
Wood River, IL 62095

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IN THE
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CYNTHIA SIMPKINS, Individually and as Special Administrator for the Estate of Annette Simpkins, Deceased, *Plaintiff-Respondent*, v. CSX TRANSPORTATION, INC., *Defendant-Petitioner*.	)	On Petition for Leave to Appeal from the Illinois Appellate Court Fifth District 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.*

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Michele Odorizzi