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.*

REPLY BRIEF OF DEFENDANT-APPELLANT CSX TRANSPORTATION, INC.

Kurt E. Reitz
Heath H. Hooks
THOMPSON COBURN LLP
525 W. Main St., P.O. Box 750
Belleville, IL 62222-0750
(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-Appellant

June 16, 2011

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Page(s)

POINTS AND AUTHORITIES—continued

Page(s)

POINTS AND AUTHORITIES—continued

Page(s)

POINTS AND AUTHORITIES—continued

Page(s)

POINTS AND AUTHORITIES—continued

Page(s)

POINTS AND AUTHORITIES—continued

Page(s)

I. IMPOSING A DUTY TO NON-EMPLOYEES WOULD BE CONTRARY TO TRADITIONAL TORT PRINCIPLES.

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

1. The parties' relationship is the touchstone of duty analysis.

Under Illinois law, the parties' relationship is "the touchstone of the duty analysis." *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 226 (2010). Plaintiff tries to evade this well-established rule by redefining "touchstone" as nothing more than a "benchmark or guidepost." Plf. Br. 18. But a touchstone is a "test or criterion," a "fundamental or quintessential part or feature." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1247 (10th ed. 1996). And this Court has consistently held that "[t]he existence of a duty ***depends*** upon whether the plaintiff and the defendant stood in such a relationship to each other that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Bajwa v. Metro. Life Ins. Co.*, 208 Ill. 2d 414, 421–22 (2004) (emphasis added).

Contrary to this longstanding precedent, Plaintiff's proposed rule—under which anyone who creates a risk of foreseeable harm owes a duty to anyone actually harmed—ignores the parties' relationship entirely. Plaintiff's proposed rule, like the Fifth District's erroneous "focus on foreseeability" (A10), is inconsistent with the numerous cases in which this Court has refused to recognize a duty despite the defendant having created a risk of foreseeable harm.

For example, Plaintiff's proposed rule is contrary to *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507 (1987), in which this Court held that doctors who negligently failed to warn a patient of a drug's sleep-inducing side effects owed no duty to a third party injured in a subsequent car accident. This Court did not doubt that

the doctors' failure to warn created a "reasonably foreseeable" risk of injury to others (*id.* at 529), but nevertheless refused to recognize a duty to all "those in the general public who may reasonably be expected to come in contact with the patient" (*id.*), because the doctor's "relationship with the patient" was insufficient to support "a duty to protect unidentifiable, unknown third parties" (*id.* at 531).

Plaintiff's proposed rule is also contrary to *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155 (2009), in which this Court held that defendants who negligently treated a paranoid man who had threatened to kill his wife owed no duty to the man's wife. Given his paranoid delusions and violent threats, it was "reasonably foreseeable to defendants that [the man] would injure and/or kill his wife." *Id.* at 160. But, despite the foreseeability of harm, this Court, citing *Kirk*, rejected the plaintiffs' assertion that the defendants owed the wife a duty of care because there was no cognizable relationship between the defendants and the wife.

Plaintiff's proposed rule is likewise contrary to *Widlowski v. Durkee Foods*, 138 Ill. 2d 369 (1990), where an employer who negligently exposed its employee to dangerous gasses was held not liable to a nurse injured in the employee's resulting delirium. There is no question that, by rendering its employee delirious, the defendant had created a risk to all who might subsequently encounter him. Nevertheless, this Court held that the defendant owed the injured plaintiff no duty. According to Plaintiff, this Court so held because it found "the specific events involved were too unforeseeable," a finding that Plaintiff says "had nothing to do with relationship." Plf. Br. 23. But *Widlowski* expressly held that, even if one "accept[ed] plaintiff's [foreseeability] argument at face value," imposing a duty on the defendant would be inappropriate

because the existence of a duty "depends, in part, ***on the relationship*** between the parties." *Widlowski*, 138 Ill. 2d at 375 (emphasis added). The Court recognized that imposing a duty on the defendant, who had no direct relationship with the plaintiff, would extend liability "to the world at large," because the defendant's employee "could have harmed anyone with whom he came into contact." *Id.*

If this Court were to accept Plaintiff's contention that a duty of care always "attaches to conduct that creates the risk of harm" regardless of the parties' relationship (Plf. Br. 9), then it would have to overrule not only *Kirk*, *Tedrick*, and *Widlowski*, but also many other precedents. In *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982)—a case relied upon in *Widlowski* (*see* 138 Ill. 2d at 376)—this Court held that an attorney who negligently creates a risk of harm is not liable to non-client third parties, rejecting a test that considered "the foreseeability of harm" (92 Ill. 2d at 22) because of "the concern . . . that liability for negligence not extend to an unlimited and unknown number of potential plaintiffs" (*id.* at 20). Illinois courts have endorsed the same rule for accountants, explaining that recognizing a duty to unrelated third parties who might foreseeably rely on their reports would create "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Brumley v. Touche, Ross & Co.*, 123 Ill. App. 3d 636, 639 (2d Dist. 1984) (internal quotation marks omitted). And in *Holtz v. Amax Zinc Co.*, 165 Ill. App. 3d 578 (5th Dist. 1988), and *Wienke v. Champaign County Grain Ass'n*, 113 Ill. App. 3d 1005 (4th Dist. 1983)—decisions cited with approval in *Simmons v. Homatas*, 236 Ill. 2d 459, 472–74 (2010)—the courts held that employers who had created foreseeable risks by supplying alcohol to their employees were not liable to third parties injured in ensuing car accidents.

To now hold that the creation of a foreseeable risk automatically imposes a duty, regardless of the parties' relationship, would require abandoning this Court's long-standing recognition that "'[p]roof of negligence in the air . . . will not do,'" and its corresponding "unwilling[ness] 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 (quoting *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928)).[1]

2. There must be a direct relationship between the parties.

Much of Plaintiff's brief is devoted to attacking a straw-man. Contrary to Plaintiff's unsupported insinuation, CSXT does not contend that a duty of care requires a "formal, pre-existing special relationship" like contractual privity or parental bond. Plf. Br. 9; *see also id.* at 3, 19. Rather, CSXT argues merely that under this Court's clearly established precedent a duty exists only where there is *some* direct relationship between the plaintiff and the defendant. Here, there is no duty because—as Plaintiff concedes—Simpkins and CSXT "had no direct relationship" but were instead linked only "through an intermediary." Plf. Br. 20; *see also* Plf. 5th Dist. Br. 17.

The cases Plaintiff relies upon do not support the proposition that a duty of care always "attaches to conduct that creates a risk of harm" regardless of the parties' relationship. Plf. Br. 4; *see also id.* at 9–11, 18, 20. In none of the cases that Plaintiff cites did the mere creation of a risk give rise to a duty of care absent a direct relationship

[1] Citing *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 266 (1990), Plaintiff suggests that *Palsgraf* is "about causation, not duty." Plf. Br. 21 n.5. But, as *Widlowski* recognized, the *Palsgraf* rule is about duty and how it is affected by the parties' relationship. Thus, the *Palsgraf* court enunciated the rule immediately after having observed that "[t]he conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong ***in its relation to the plaintiff***." 162 N.E. at 99 (emphasis added).

between the parties. *Iseberg v. Gross*, 227 Ill. 2d 78 (2007) is inapposite: Not only was no duty found, but there was no allegation that the defendants' affirmative conduct had created the risk of harm. *See id* at 97. In each of the cases in which a duty was found, there was a direct relationship between the parties. In *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274 (2007), for example, this Court held that a parent corporation owed a duty of care to its subsidiary's employees but only when the parent "specifically directs an activity" such that the "parent's ***direct*** participation" surpasses "the control exercised as a normal incident of ownership" thereby "superseding the discretion and interest of the subsidiary." *Id.* at 290, 297 (emphasis added). Thus, far from recognizing a duty when the parties are linked only through an intermediary, *Forsythe* underscores the fundamental requirement that there be a ***direct*** relationship between the parties. That requirement is plainly satisfied in each of the other cases upon which Plaintiff relies: In *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32 (2004), a wrongful death action arising from a natural gas explosion, the defendant gas company had supplied the gas to the decedent (*see* 211 Ill. 2d at 36–37); in *Bajwa*, a wrongful death action arising from the murder of an individual, the defendant insurer had issued a life-insurance policy in the name of the decedent (*see* 208 Ill. 2d at 416–19); and in *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955), a personal injury case, the defendant lumber company had built the lumber pile on which the plaintiff was injured (*see* 5 Ill. 2d at 618–19). Thus, no case that Plaintiff cites supports the proposition that the mere creation of a foreseeable risk will give rise to a duty of care in the absence of a direct relationship between the parties.[2]

[2] Citing *Ziemba v. Mierzwa*, 142 Ill. 2d 42 (1991), Plaintiff contends (at 47) that for purposes of duty analysis a "relationship" is merely "whatever circumstances" might connect a plaintiff to the defendant. *Ziemba* offers no support for that erroneous

This Court's decisions make clear that, absent special circumstances, the creation of a foreseeable risk does not give rise to a duty where, as here, the parties "had no direct relationship" but were instead linked only "through an intermediary." Plf. Br. 20. Implicitly recognizing this rule, Plaintiff tries to elide Ronald's intermediary position. According to Plaintiff, Ronald "was merely a conduit for the railroad's asbestos" and Simpkins' alleged secondhand exposure is "no different than" if the asbestos "had been dispersed by the wind or put into a consumer product." Plf. Br. 22. In support of this assertion, Plaintiff cites *Donaldson* v. *Central Illinois Public Service Co.*, 199 Ill. 2d 63 (2002), and *Court v. Grzelinski*, 72 Ill. 2d 141 (1978). But neither case is on point.

As a product liability case, *Grzelinski* is plainly inapposite. Manufacturers' unusually broad liability is based on a "special responsibility" that employers like CSXT do not bear. Restatement (Second) of Torts § 402A cmt. *c*; *cf. Kirk*, 117 Ill. 2d at 520. Thus, contrary to Plaintiff's assertion below, "[r]ecognition of a duty here" would be "fundamentally different than that now applied in product liability cases." C1120.

Donaldson does not help Plaintiff either. In *Donaldson*, there was no intermediary. On the contrary, the defendant released toxins into the air that ***directly***

---

assertion. In *Ziemba*, the plaintiff was injured on a public road "when the bike he was riding collided with a dump truck exiting a driveway" that was owned by the defendant and "not visible . . . due to foliage growing on defendant's property." *Ziemba*, 142 Ill. 2d at 45. As Plaintiff notes, the cyclist had no formal or pre-existing relationship with the owner of the driveway. But, contrary to Plaintiff's suggestion, that does not mean that a "relationship" is merely "whatever circumstances" might connect a plaintiff to the defendant. Indeed, in *Ziemba*, the Court reiterated that "whether a duty exists will depend in large part upon the relationship between the parties"and then ***rejected*** the plaintiff's contention that the purported relationship was sufficient to create a duty of care, concluding instead that no duty was owed because "plaintiff never entered defendant's property, nor did he come into contact with any condition on defendant's land." 142 Ill. 2d at 48.

impacted the plaintiffs or their decedents.[3] Thus, *Donaldson* presented a very different situation than that alleged here, where Plaintiff does not claim that CSXT "discharge[d] toxins into the atmosphere" (*In re N.Y. City Asbestos Litig.* (*Holdampf v. A.C. & S., Inc.*), 840 N.E.2d 115, 121 (N.Y. 2005)), or that it "spread[] asbestos dust among the general population" (*CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005)), but instead concedes that Simpkins and CSXT were "linked through an intermediary" and alleges that Simpkins' injury resulted from CSXT's conduct with respect to Ronald. The respective complaints reflect that critical difference. In *Donaldson*, the complaint alleged that the defendant had breached its duty by failing to warn the plaintiffs. *See* 199 Ill. 2d at 98. Here, by contrast, "Plaintiff does not allege that [CSXT] should have warned [Simpkins] directly, but that it should have warned Ronald, its employee." Plf. Br. 8.

This Court's decisions in *Widlowski* and *Kirk* make clear that the creation of a foreseeable risk does not give rise to a duty where, as here, the parties are linked only through an intermediary. In *Widlowski*, the defendant owed a duty not to expose its employee to dangerous gasses, and presumably would have been liable to nearby residents had it released delirium-inducing gasses into the surrounding neighborhood. In *Kirk*, the defendants owed a duty to inform their patient about the side-effects of sleep-inducing medication, and presumably would have been liable for injuries had they poured such medication into the water supply. Nevertheless, because the parties were connected only through an intermediary, this Court held that the defendants owed the third-party plaintiffs no duty of care, even if the defendants' conduct had created a foreseeable risk

[3] Moreover, the *Donaldson* defendant was "[a]ware of the risk," obtained insurance "to cover 'potential claims,'" and—despite actual knowledge of emissions exceeding the applicable health standards and of injury to a nearby resident—disregarded its own expert's advice that residents living in the area be "relocated." 199 Ill. 2d at 68, 72.

of injury. *See Widlowski*, 138 Ill. 2d at 375; *Kirk*, 117 Ill. 2d at 529, 531.

Plaintiff cites *Simmons* for the proposition that a defendant owes a duty if it "creat[es] a risk that caused injuries away from defendant's business premises." Plf. Br. 12. There is no doubt that, as in *Donaldson*, a defendant might owe a duty to persons directly injured by the defendant's on-site conduct. But *Simmons* does not support the imposition of a duty where, as here, the parties' only relationship is through a non-culpable intermediary.[4] *Simmons* analyzed *Holtz* and *Weinke*, Appellate Court decisions in which defendant employers were held to owe no duty to third-party plaintiffs despite having provided alcohol to employees who then caused car accidents when driving while intoxicated. Inasmuch as it expressly approved *Holtz* and distinguished *Weinke* on the ground that it did not involve the voluntary assumption of a duty (*see* 236 Ill. 2d at 473–74), *Simmons* leaves no doubt that simply creating a foreseeable risk of injury does not by itself give rise to a duty absent a direct relationship between the parties.

Plaintiff tries to distinguish *Widlowski*, *Kirk*, and *Weinke* on the ground they involved intermediaries who "***behave[d]*** in a dangerous manner." Plf. Br. 22; *see also id.* at 30–31. But that purported distinction contradicts Plaintiff's theory that "a duty of care attaches to conduct that creates the risk of harm" regardless of the parties' relationship. *Id.* at 9. If a duty arises whenever one creates a risk of harm, then what matters is the creation of the risk, not the mechanism by which the harm might occur. Thus, if

[4] The recognition of a duty in *Simmons* rests on two facts that are not present here. First, the *Simmons* defendant voluntarily "acquired a duty" when it "took on the burden of determining whether [its customer] was dangerously intoxicated." 236 Ill. 2d at 475. Second, by "affirmatively assisting [its customer] in driving while intoxicated," the *Simmons* defendant had "giv[en] substantial assistance . . . to another's tortious conduct," and thus fell within the scope of Restatement (Second) of Torts § 876 (1979). *Simmons*, 236 Ill. 2d at 476–77. Here, there is no allegation that CSXT voluntarily assumed a duty to Simpkins, nor any allegation that CSXT assisted Ronald in tortious conduct.

Plaintiff's theory were correct, it would not matter whether a defendant creates a risk of explosion, a risk of contamination, or a risk of dangerous behavior.[5] Moreover, Plaintiff's distinction between dangerous behavior and other dangerous conditions cannot be reconciled with cases such as *Heigert v. Riedel*, 206 Ill. App. 3d 556 (5th Dist. 1990), and *Britton v. Soltes*, 205 Ill. App. 3d 943 (1st Dist. 1990), both of which apply the same rule as in *Widlowski* and *Kirk* to situations that did not involve the risk of dangerous behavior, but the risk of infection. *Cf. Tedrick*, 235 Ill. 2d at 167–68, 175.

Plaintiff also tries to limit the force of *Kirk* to medical malpractice cases. Plf. Br. 23. But *Widlowski* was not a malpractice case, and neither were other cases that have applied the same rule. For example, in *Brewster v. Rush-Presbyterian-St. Luke's Medical Center*, 361 Ill. App. 3d 32 (1st Dist. 2005), the defendant's employee fell asleep behind the wheel and crashed into another car. The plaintiff argued that the defendant had created the risk by making its employee work long hours, and that it was reasonably foreseeable that sleep-deprived employees would cause accidents. *Id.* at 35–36. Relying on *Kirk* and finding an insufficient relationship between the parties, the Appellate Court held that the defendant did not owe a duty to the third-party plaintiff. *Id.* at 36–37.

B. Plaintiff's Foreseeability Test Would Create Unlimited Liability.

Plaintiff contends that "the 'creator' of a hazardous situation owes a legal duty of care to those who could foreseeably encounter such hazard." Plf. Br. 9–10. But this theory of duty, which makes foreseeability paramount and the parties' relationship irrelevant, would violate the principle that liability ought not "extend to the world at large" (*Widlowski*, 138 Ill. 2d at 375) or "to an indeterminate class of potential plaintiffs"

[5] Indeed, in the Circuit Court, Plaintiff specifically denied the distinction she now urges, expressly arguing that "there is no logical distinction between sending a minor driver off full of liquor and sending an employee off covered with asbestos." C1124.

(*Kirk*, 117 Ill. 2d at 532).[6]

Echoing the decision below (A10), Plaintiff asserts that "foreseeability provides an adequate and traditional limit on the scope of any duty." Plf. Br. 35. But this Court has repeatedly recognized that foreseeability is an "'altogether inadequate'" basis for "'determining the duty issue and its scope.'" *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 354 (1977) (quoting *Cunis v. Brennan*, 56 Ill. 2d 372, 375 (1974)); *see also* CSXT Br. 20–21 (citing additional cases). Indeed, as explained in our opening brief (CSXT Br. 21–23), Plaintiff's foreseeability test does not meaningfully limit the scope of the duty she asks this Court to recognize. Plaintiff offers no explanation why injury to an employee's spouse from secondhand exposure to asbestos is any more foreseeable than injury to a food server who regularly served lunch to plant employees or injury to a bus driver who regularly transported employees leaving work at the end of their shift. Plaintiff's only response is that such individuals "would experience difficulties of proof that family members would not." Plf. Br. 34. The truth of that assertion is dubious. A server who worked in a restaurant across from a factory gate, or a bus driver who drove a route that stopped at a factory gate, would likely have little difficulty proving frequent, sustained contact with plant employees. Regardless, evidentiary impediments have nothing to do with foreseeability, and thus—even on Plaintiff's own theory—impose no limit on the

[6] Dismissing concerns about liability to an indeterminate class of plaintiffs, Plaintiff argues that "[p]laintiffs have been bringing household exposure claims for decades" and that "[i]f there was going to be a flood of claims" by non-family members "it should have manifested itself by now." Plf. Br. 37. But the first reported case recognizing a duty to protect non-employees against secondhand asbestos exposure, *Zimko v. Am. Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005), was not decided until 2005. Moreover, once a jurisdiction has recognized the duty, subsequent secondhand exposure cases are likely to be invisible, both because the legal question has already been resolved and because of the tremendous pressure to settle such cases. *See* CSXT Br. 42–46.

scope of the duty that Plaintiff asks this Court to recognize.

Rather than articulate a principled distinction between family members and all others that might allay this Court's oft-stated concern "that liability for negligence not extend to an unlimited and unknown number of potential plaintiffs" (*Pelham*, 92 Ill. 2d at 20), Plaintiff instead assures this Court that it "need not address" whether employers owe the alleged duty to anyone "beyond family members." Plf. Br. 34. But Plaintiff's assurance is patently insufficient. This Court cannot avoid delineating the scope of the duty that Plaintiff seeks to establish because, as noted in our opening brief (CSXT Br. 26), this Court will not recognize an *ad hoc* duty founded on "irrelevant" or "illogical" distinctions. *Lamkin v. Towner*, 138 Ill. 2d 510, 525 (1990).

Moreover, this Court cannot accept Plaintiff's arbitrary distinction between family members and all others who might "regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time" (*Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 374 (Tenn. 2008)) without resurrecting the transferred-negligence theory that it unanimously rejected in *Tedrick*.[7] Plaintiff dismisses this observation as a "false dilemma." Plf. Br. 35. But there is nothing false about the dilemma. Either the duty would be limited to employees' family members, in which case

[7] Below, Plaintiff expressly relied on the transferred-negligence theory. She told the Circuit Court that "[t]he legal principle set forth in *Renslow* . . . is dispositive here" (C1122), and told the Appellate Court that "[t]he narrow and specific issue presented here is whether or not Illinois places a duty upon an employer/premises owner with respect to the ***family members*** of workers whom it occupationally exposes to asbestos (Plf. 5th Dist. Br. 9 (emphasis in original)). In this Court, Plaintiff's reliance on the transferred-negligence theory is implicit rather than overt, but no less essential to her argument. Plaintiff concedes that "[t]he specific negligent acts . . . alleged in the Complaint relate to precautions that [CSXT] could have taken where Ronald worked to avoid contaminating ***him***," and admits that "Plaintiff does not allege that the railroad should have warned Annette directly, but that it should have warned ***Ronald***." Plf. Br. 8 (emphasis added).

the duty would necessarily rest on the transferred-negligence theory, or the duty would extend to all who regularly encounter an employees' soiled work clothes, in which case the duty would be owed "to an indeterminate class of potential plaintiffs." *Kirk*, 117 Ill. 2d at 532. Since neither alternative is viable, the duty should not be recognized.

Plaintiff argues that failure to recognize a duty to employees' family members "violates this Court's admonitions in *Marshall*" regarding no-duty rules "by mingling family members in the same category with a morass of unrelated and" purportedly "less foreseeable potential victims of exposure to asbestos from contaminated workers." Plf. Br. 33 (citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 441–42 (2006)). But *Marshall* does not preclude no-duty rules. What *Marshall* says is that "'no-duty rules should be invoked only when all cases they cover fall substantially within the policy that frees the defendant of liability.'" 222 Ill. 2d at 442 (quoting 1 D. Dobbs, Torts § 227, at 579 (2001)). As prior cases (*e.g.*, *Widlowski*, *Kirk*, and *Pelham*) and subsequent cases (*e.g.*, *Tedrick*) make clear, this Court will not hesitate to deny the existence of a duty where there is no direct relationship between the parties. With respect to secondhand asbestos exposure, ***all*** non-employees are similarly situated; none has a direct relationship to the employer. Thus, all non-employees—family members and others—"fall substantially within the policy that frees the defendant of liability."

II. A DUTY TO PROTECT THIRD-PARTIES AGAINST SECONDHAND ASBESTOS EXPOSURE WOULD BE CONTRARY TO PUBLIC POLICY.

In our opening brief (CSXT Br. 31–50), we explained why public policy does not support the novel duty Plaintiff has proposed. Plaintiff's responses are unpersuasive.

A. Injury from Secondhand Exposure Was Not Foreseeable in 1964.

The reasonable foreseeability of the alleged injury is one of the considerations

that informs this Court's public policy analysis. In our opening brief (at 33–34), we observed that Plaintiff's conclusory allegation of foreseeability did not satisfy the basic requirement that a "plaintiff[] must allege facts, not mere conclusions" to survive a motion to dismiss. *Iseberg*, 227 Ill. 2d at 86. Plaintiff does not defend her pleading as sufficient, except in a footnote no less conclusory than the complaint itself. *Cf.* Plf. Br. 24 n.6. Instead, Plaintiff argues that she may proceed on an insufficient pleading because CSXT did not raise the issue below. But this Court ultimately reviews the judgment of the Circuit Court dismissing Plaintiff's claim, and may affirm that judgment (and reverse the Fifth District) on any basis supported by the record, "even if the issues were not raised before the appellate court." *People v. Artis*, 232 Ill. 2d 156, 164 (2009).

Plaintiff does not deny that she submitted evidence to the trial court in an effort to bolster her conclusory allegations, admitting that she "offered evidence below as to what was known" about the risk of injury from secondhand asbestos exposure at the time of Simpkins' alleged exposure. Plf. Br. 13. What Plaintiff fails to acknowledge is that this "uncontested evidence" (*id.*) shows that injuries from secondhand asbestos exposure were first documented in 1964, the year Ronald left CSXT, and that as of 1979 scientists continued to see such injuries as "medical curiosities." *Cf.* CSXT Br. 34 (citing C1137–38, C1198). Thus, Plaintiff has neither alleged nor shown facts to support the suggestion that CSXT could have reasonably foreseen the risk of injury from secondhand exposure.[8]

[8] Mere knowledge that occupational exposure to asbestos in sufficient quantities could cause disease does not mean that CSXT (or anyone else in 1964) could have reasonably foreseen the risk of injury from secondhand exposure. Not every exposure is sufficient to cause disease. *Cf. Nolan v. Weil-McLain*, 233 Ill. 2d 416, 439 (2009) ("our decision in *Thacker* establishes that it is possible to exclude particular exposures as substantial contributing causes of a plaintiff's injury in asbestos cases").

B. Imposing a Duty Will Not Reduce the Likelihood of Future Injury.

In our opening brief (at 35–38), we explained that imposing a new duty to protect non-employees from secondhand exposure to asbestos would not reduce the likelihood of future injury because today asbestos is rarely used and highly regulated. Plaintiff's failure to identify ***anyone*** who would likely be protected from future asbestos exposure by the duty she proposes confirms our analysis and this Court's understanding that it is "unlikely that an overall safety incentive could result" by imposing liability "40 years after the undesirable occurred" and long after the offending "product [was] removed from the market." *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 263–64 (1990).[9]

Unable to identify anyone who would be protected from future asbestos exposure by the duty she proposes, Plaintiff offers two alternative justifications for its imposition. First, she argues (Plf. Br. 27) that the duty would help compensate injured plaintiffs, a goal she derives from *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 406 (1997). But *Best* addressed the proper measure of damages after liability for breach of a ***recognized*** duty is established, not whether to recognize a duty in the first place. However laudable, the desire to compensate individuals is not sufficient justification for the retroactive imposition of a duty absent a direct relationship between the parties. If it were, then *Kirk*, *Widlowski*, *Tedrick*, and scores of other cases would have been decided differently.[10]

---

[9] The issue in *Smith* was whether to impose market-share liability (*Cf.* Plf. Br. 27), but its reasoning is equally valid here. No tort regime that imposes liability decades after the relevant conduct has ceased can have a prospective, deterrent effect on such conduct.

[10] Plaintiff will not be "deprived of compensation" (Plf. Br. 27) even if this Court refuses to recognize the novel duty she asserts. The Circuit Court's records reveal that Plaintiff has already dismissed with prejudice at least thirteen of the defendants she sued, presumably after reaching monetary settlements with each. They include Maremont Corp., which made asbestos-containing brake pads, Bondex International, Inc., which made asbestos-containing joint compounds, and Owens-Illinois, Inc., which made

Finally, because her proposed duty will not protect anyone from future asbestos exposure, Plaintiff argues (Plf. Br. 28) that this case is not about asbestos, but about secondhand exposure to hazardous substances in general. Notably, however, Plaintiff fails to identify any secondhand-exposure case from any jurisdiction involving any substance other than asbestos.[11] In fact, secondhand-exposure claims are peculiar to asbestos litigation, both for the historic reasons we identified in our opening brief (at 41–43) and because of "the unique problems posed by asbestos injury." *Thacker v. UNR Indus., Inc.*, 151 Ill. 2d 343, 357 (1992); *see also infra* at 17–18. That is not to say that asbestos litigation is governed by special rules. It is not. *Cf. Nolan*, 233 Ill. 2d at 429–44. Indeed, it is the generally applicable principles of tort law that preclude recognition of the duty Plaintiff asserts here. *See* CSXT Br. 11–27, 31–49. But, given the asbestos-specific nature of secondhand-exposure claims, concern about other hazardous substances cannot justify recognizing the novel duty that Plaintiff asserts here.

C. The Proposed Duty Would Impose a Substantial Burden.

In light of the strict regulations that have governed the use of asbestos since 1972, we acknowledged in our opening brief (at 39) that a duty to protect non-employees from secondhand asbestos exposure would not be burdensome to the extent it "required nothing more than workplace protections." Plaintiff overstates the significance of this

---

asbestos-containing insulation. Plaintiff's apparent settlements with these defendants are presumably based on her allegation that Simpkins was directly exposed to asbestos fibers "during non-occupational work projects (including, but not limited to, home and automotive repairs, maintenance and remodeling)." A15–16. Whatever the outcome of this appeal, Plaintiff might also obtain additional compensation from the fourteen other defendants who remain in the case, including Simpkins' own employer, General Electric.

[11] The only secondhand exposure case not involving asbestos that either party has identified is *Doe v. Pharmacia & Upjohn Co.*, 879 A.2d 1088 (Md. 2005), which involved secondhand exposure to HIV and refused to recognize a duty to non-employees.

concession. *Cf.* Plf. Br. 28–29. Although the imposition of a prospective duty would not be burdensome inasmuch as it would overlap with existing regulatory duties, recognizing a duty that is retroactively applicable to pre-1972 conduct would be impossibly burdensome because no employer could ever alter its past conduct to conform to the newly recognized duty.

Moreover, as this Court has recognized before, the fact that the physical precautions required to comply with a new duty to non-employees might overlap with those necessitated by existing duties to employees does not mean that extending a duty to non-employees would not be unduly burdensome from a litigation perspective. In *Widlowski*, the employer had an existing duty not to expose its employees to dangerous gasses. But when a third party tried to recover for off-site injuries caused by an employee's exposure, the Court recognized that "the burden sought to be imposed" under the proposed duty was "a heavy one." 138 Ill. 2d at 375. Likewise, in *Kirk*, this Court found that extending a duty to third parties would impose an "unreasonable burden" notwithstanding the defendants' existing duty to their patient. 117 Ill. 2d at 526. Although the dissent claimed that there would be "no extra burden" because the same acts would have satisfied both duties (*id.* at 537 (Simon, J., dissenting)), the Court rejected that argument as "overlook[ing]" the burden imposed by extending a duty "to the general public" and to "an indeterminate class of potential plaintiffs." *Id.* at 532.

D. The Proposed Duty Would Have Deleterious Consequences.

In our opening brief (at 40–49), we explained why recognizing a duty to protect non-employees from secondhand asbestos exposure would have serious adverse consequences, not only for employers but for the Illinois tort system. Rather than address these consequences, Plaintiff dismisses them as not having "anything to do with duty."

Plf. Br. 50. But, because recognition of a duty "involves considerations of public policy" (*Marshall*, 222 Ill. 2d at 436), this Court cannot ignore the consequences of its decision.

In the asbestos context, application of generally applicable tort rules can force even innocent defendants to choose between "risking a massive verdict or paying to settle a meritless case," and how this *in terrorem* effect—which would be greatly magnified by recognition of a duty to protect third parties from secondhand exposure—causes serious distortions to the tort system. CSXT Br. 43–48. Plaintiff does not dispute this analysis. Instead, relying on *Nolan*, Plaintiff urges this Court to simply ignore it on the ground that "there is no special law for asbestos cases." Plf. Br. 48. But *Nolan* does not stand for the proposition that this Court must blind itself to the unique attributes of asbestos litigation. To the contrary, this Court recognized in both *Nolan* and *Thacker* that the "unique problems posed by asbestos injury" must be considered when applying traditional tort principles. *Thacker*, 151 Ill. 2d at 357, quoted in *Nolan*, 233 Ill. 2d at 431.

Plaintiff argues that claims of secondhand exposure to asbestos should be treated no differently than cases involving the escape of "anthrax or some virus." Plf. Br. 48. But she ignores a critical distinction. When a person has been injured by exposure to anthrax or a virus such as HIV, one can identify the source of the injury.[12] That is not

[12] Thus, "microbial forensics" enabled investigators "to identify[] the exact flask from which the anthrax spores" used in the 2001 anthrax letter attacks "were taken." *Microbial Forensics: The Science Behind the Amerithrax Investigation*, Geek! (Mar. 15, 2011), http://geekheartsscience.wordpress.com/2011/03/15/microbial-forensics-the-science-behind-the-amerithrax-investigation/ (discussing D.A. Rasko, *et al.*, *Bacillus Anthracis* Comparative Genome Analysis in Support of the Amerithrax Investigation, PROCEEDINGS NAT'L ACAD. SCI. (Mar. 7, 2011)). Similarly, "phylogenetic" analysis allowed researchers to "trac[e] HIV infections back to their source." *Researchers Use Phylogenetics to ID Sources of HIV Infections in Criminal Cases*, GenomeWeb Daily News (Nov. 16, 2010), http://www.genomeweb.com/sequencing/researchers-use-phylogenetics-id-sources-hiv-infections-criminal-cases (discussing A.E. Shearer, *et al.*,

true if someone is injured by exposure to asbestos. The "unique problems posed by asbestos injury"—and the distinctive litigation consequences that result (CSXT Br. 44–45)—arise in part from the fact that "[a]sbestos fibers from different sources are generally indistinguishable from one another." *Thacker*, 151 Ill. 2d at 356. It is this singular fact that allows plaintiffs to name scores of defendants in asbestos cases and puts even innocent defendants to the system-distorting choice of risking a massive verdict or paying to settle a meritless case. As explained in our opening brief (at 45–48), imposing a duty to protect non-employees from secondhand asbestos exposure would needlessly exacerbate the problem by multiplying the number of defendants a plaintiff could sue and the number of plaintiffs a defendant would face. This Court—which is "realistic enough to know that in virtually every instance" in which a plaintiff alleged an asbestos-related injury "a clever plaintiff's attorney would drag into court any and all [defendants] who may qualify" for liability (*Charles v. Seigfried*, 165 Ill. 2d 482, 502 (1995))—need not and should not ignore this reality when deciding whether to depart from well-established precedent and extend a duty to third-party plaintiffs who have no direct relationship with the defendant.

III. THE MAJORITY OF STATES TO HAVE CONSIDERED THE ISSUE HAVE REJECTED THE DUTY PLAINTIFF PROPOSES.

As noted in our opening brief (CSXT Br. 27–31), the clear majority of States to have considered the issue have refused to recognize the duty that Plaintiff asserts. Plaintiff fails to meaningfully distinguish the cases reflecting that majority view.

Plaintiff argues that *Williams*, the Georgia case, addressed a "narrow certified question" (Plf. Br. 42), but that question—whether "negligence law imposes any duty on

---

Source Identification in Two Criminal Cases Using Phylogenetic Analysis of HIV-1 DNA Sequences, PROCEEDINGS NAT'L ACAD. SCI. (Nov. 15, 2010)).

an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace, such as the employee's home" (608 S.E.2d at 208)—is precisely the one at issue here. Moreover, contrary to Plaintiff's assertion (Plf. Br. 42), both *Williams* and *Holdampf*, the New York case, considered the defendants' duties as employers, not merely as premises owners. *See Williams*, 608 S.E.2d at 210; *Holdampf*, 840 N.E.2d at 120.[13]

Plaintiff's other distinctions miss the mark. She argues (Plf. Br. 40–41) that the Iowa and Michigan decisions turned on the distinction between employees and contractors; but both relied heavily on employer-liability precedents and cited, as an independent ground for decision, the consequences of extending a duty to an unlimited class of plaintiffs. *See Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 698–99 (Iowa 2009); *In re Certified Question from the Fourteenth Dist. Ct. App. of Tex.* (*Miller v. Ford Motor Co.*), 740 N.W.2d 206, 218 (Mich. 2007). Plaintiff tries to distinguish *Adams v. Owens-Illinois*, 705 A.2d 58 (Md. App. 1998), on the ground that "in Maryland duty is a fact issue for the jury," but is forced to concede that *Doe* "makes it doubtful that Maryland would now uphold a duty in household exposure cases." Plf. Br. 45, 46 n.10.

Emphasizing her assertion that CSXT "created the risk of harm," Plaintiff argues (Plf. Br. 41) that *Riedel v. ICI Americas Inc*, 968 A.2d 17 (Del. 2009), is inapposite because the Delaware court construed the plaintiff's complaint as alleging nonfeasance, which requires proof of a "special" relationship, and refused to consider the plaintiff's misfeasance theory, because it had been waived. What Plaintiff fails to acknowledge is

---

[13] Plaintiff notes (Plf. Br. 43) that New York *in utero* exposure law differs from Illinois law. But *in utero* exposure is not at issue here, and, as *Tedrick* makes clear, *Renslow* is a *sui generis* exception to a general rule on which both States otherwise agree.

that the complaint, however characterized, contained allegations very similar to those Plaintiff makes here. *Compare id.* at 19 ("Mrs. Riedel claims that [the defendant] did not provide uniforms, locker rooms, or laundries to its employees, and did not warn either Mr. or Mrs. Riedel of the potential hazards to them created by Mr. Riedel wearing, and Mrs. Riedel laundering, his work clothes at home."), *with* Plf. Br. 15 ("Plaintiff only alleges that Defendant was negligent in its failing to take appropriate workplace precautions to prevent its asbestos from escaping, such as providing showers, uniforms, changing rooms and information to its workers") (citing A28). If anything, the *Riedel* complaint was ***less*** dependent on the existence of a special relationship than is Plaintiff's complaint because the *Riedel* complaint alleged a duty to warn the plaintiff directly, while Plaintiff alleges only that CSXT should have warned Ronald. *See supra* at 11 n.7.

Against this weight of authority, Plaintiff offers only the decisions of two States' high courts and the intermediate courts of Louisiana, together with a few unpublished opinions without precedential value even in their home jurisdictions.[14] The weight of national authority is of course "not binding on this court," but it is "highly instructive" (*JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 472 (2010))—particularly because the States rejecting Plaintiff's proposed duty are those, like Illinois, in which the existence of a duty depends on the parties' relationship rather than mere foreseeability. *Cf. Satterfield*, 266 S.W.3d at 372–73.

CONCLUSION

The judgment of the Appellate Court should be reversed.

---

[14] Plaintiff relies (Plf. Br. 44) on *Lunsford v. Saberhagen Holdings, Inc.*, 106 P.3d 808 (Wash. Ct. App. 2005), but *Lunsford* was a products liability suit against a manufacturer who, as such (and unlike an employer), "'assumed a ***special responsibility*** toward any member of the consuming public who may be injured'" by its products. *Id.* at 812 (emphasis added; quoting Restatement (Second) of Torts § 402A cmt. *c* (1965)).

Respectfully submitted,

_____

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

Andrew Tauber
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20005
(202) 263-3324

Kurt E. Reitz
Heath H. Hooks
THOMPSON COBURN LLP
525 W. Main St., P.O. Box 750
Belleville, IL 62222-0750
(618) 277-4700

June 16, 2011

Counsel for Defendant-Appellant

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, and the certificate of service is 20 pages.

_____
Andrew Tauber

June 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

To: Ted Gianaris, John Barnerd, Amy Garrett
SIMMONS BROWDER GIANARIS ANGELIDES & BARNERD LLC
707 Berkshire Blvd., P. O. Box 521
East Alton, IL 62024

Charles W. Chapman
300 Evans Avenue
Wood River, IL 62095-0027

J. Timothy Eaton
SHEFSKY & FROELICH LTD.
111 East Wacker, Suite 2800
Chicago, IL 60601

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

Dated: June 16, 2011

CSX TRANSPORTATION, INC.

By:_____
One of Their Attorneys

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

Andrew Tauber
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20005
(202) 263-3324

Kurt E. Reitz
Heath H. Hooks
THOMPSON COBURN LLP
525 W. Main St, PO Box 750
Belleville, IL 62222-0750
(618) 277-4700

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 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 June 17, 2011, in Washington, D.C., he caused three copies of the foregoing Reply 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:

Ted Gianaris, John A. Barnerd & Amy Garrett
SIMMONS BROWDER GIANARIS ANGELIDES & BARNERD LLC
707 Berkshire Blvd., P.O. Box 521
East Alton, IL 62024

Charles W. Chapman
300 Evans Ave.
Wood River, IL 62095-0027

J. Timothy Eaton
SHEFSKY & FROELICH LTD.
111 East Wacker, Suite 2800
Chicago, IL 60601

_____
Andrew Tauber

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 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 June 17, 2011, in Washington, D.C., he caused 20 copies of the foregoing Reply Brief of Defendant-Appellant CSX Transportation, Inc. to be sent via prepaid overnight delivery by third-party commercial carrier to the following address:

Carolyn Taft Grosboll
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
200 East Capitol Avenue
Springfield, IL 62701

_____
Andrew Tauber