IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION	)	
	)	
LIMITED TO:	)	**C.A. NO. 04C-07-099-ASB**
	)	
Lillian Riedel	)	

Date Submitted: June 26, 2007
Date Decided: December 21, 2007

MEMORANDUM OPINION

Upon Consideration of
Defendant ICI Americas, Inc.'s Motion for Summary Judgment.
GRANTED.

Thomas C. Crumplar, Esquire, JACOBS & CRUMPLAR, P.A., Wilmington, Delaware. Attorney for the Plaintiff.

Mark L. Reardon, Esquire and Krista R. Samis, Esquire, ELZUFON, AUSTIN, REARDON, TARLOV & MONDELL, P.A., Wilmington, Delaware. Attorneys for the Defendant, ICI Americas, Inc.

SLIGHTS, J.

I.

The plaintiff, Lillian Riedel, alleges she was exposed to asbestos while laundering her husband's work clothes.[1] According to Mrs. Riedel, her husband worked for the defendant, ICI Americas, Inc. ("ICI"),[2] for almost thirty years and, during the course of his employment, was exposed to asbestos on various ICI work sites. She alleges that asbestos would accumulate on her husband's work clothes throughout a typical work day. Her husband would wear these same clothes home at the end of the work day and thereby unknowingly expose members of his household to a dangerous carcinogen. She alleges that ICI's negligence in failing to take reasonable measures to prevent its employees from leaving the workplace with asbestos covered clothing, or to warn her or her husband of the hazards of "take home" asbestos exposure, was the proximate cause of her asbestosis, a pulmonary disease related to asbestos exposure.

ICI has moved for summary judgment on the ground that it owed no duty to Mrs. Riedel. After carefully considering the parties' arguments, the Court concludes

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[1] The Court may refer to the situation whereby a family member is exposed to asbestos brought home from work on the clothing of another family member as "take home" asbestos exposure. This term, along with others such as "household exposure" and "spousal exposure," have become fixtures in the asbestos litigation nomenclature.

[2] ICI was previously known as Atlas Powder Company and is now known as AstraZenaca, L.P. The parties have referred to the defendant as "ICI" throughout their motion papers and the Court will adopt that reference here.

that ICI owed no duty to Mrs. Riedel to prevent her from being exposed to asbestos within her own home. The relationship between Mrs. Riedel and ICI is too tenuous to support a legal duty of care running from ICI to Mrs. Riedel or other members of her household. Accordingly, ICI's motion for summary judgment must be **GRANTED.**

II.

Plaintiff's husband, John Riedel, Sr., worked for ICI from approximately 1962 to 1990 at the Atlas Point facility. At the time Mr. Riedel began working for ICI, the company's principle business was to manufacture explosives. Over the subsequent years of his employment, ICI moved into other businesses, including research, development and manufacture of chemicals, pharmaceuticals, and various forms of insulation. It also provided environmental control and remediation services. The record suggests that ICI incorporated asbestos into some of its research, development and/or manufacturing projects relating to, among other products, industrial filters, adhesives, coatings, and molding compositions. ICI also may have utilized asbestos-containing products in connection with the operation of its various facilities.[3] As a result of these projects and operations, it is likely that ICI developed an appreciation

[3] *See* Tr. ID 14413199 at A-94-99, 175-182.

for the hazards of asbestos exposure during the time Mr. Riedel worked there.[4]

According to Mr. Riedel, ICI never warned him of the dangers associated with asbestos. Of particular relevance here, ICI never advised him of the need to wear special clothing when working around asbestos, or of the need to remove his clothing and leave it at the job site before going home. Mr. Riedel worked at ICI in the clothes he wore from home and returned home in those same clothes. ICI did not provide uniforms to its employees. ICI also never warned either Mr. or Mrs. Riedel of the dangers associated with laundering clothing that was covered with asbestos dust.[5]

Mrs. Riedel regularly laundered her husband's work clothes along with her family's other clothes.[6] She recalls that the clothing was frequently covered in dust, although she did not appreciate that the dust was asbestos. By all accounts, Mrs. Riedel was not exposed to asbestos on ICI's premises. Indeed, there is no indication in the record that Mrs. Riedel ever entered any of ICI's properties. To the extent she was exposed to asbestos from ICI's work sites, therefore, it would have been asbestos

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[4] *Id.* at A-197, 205-210, 217-221, 224, 233-234. As it must, the Court has viewed the facts in a light most favorable to the plaintiff as the non-moving party. *See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997). The Court recognizes that if this matter were to proceed to trial, ICI would vigorously defend the plaintiff's contention that it knew of the dangers of asbestos at the time Mr. Riedel worked for ICI.

[5] *Id.* at A-23-26, 37-40, 62-70.

[6] *Id.* at A-37-40.

that was brought from ICI into her home by her husband.

The record suggests that during the time Mr. Riedel worked for ICI, the company would, on occasion, endeavor to warn its employees of dangers they might encounter outside of the work environment. For instance, ICI published and distributed to employees a magazine entitled the *The Atlas Family,* in which it would provide information regarding safe driving practices, safe vacation planning, and "avoiding hazards around the home."[7] The plaintiff points out that none of these publications offered warnings regarding safe practices for removing asbestos-covered clothing before leaving the work site, or the dangers of being exposed to such clothing at home.

By the late 1980's and/or early 1990's, ICI began to require its employees to take steps to minimize the risk of asbestos exposure, such as "wetting down" asbestos materials before working with or around them.[8] ICI also required its employees to wear "appropriate dress (e.g., throw away coveralls, hats, gloves) and use respirators" when working with or around asbestos.[9] It is not clear from the record when these safety precautions were first implemented.

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[7] *Id.* at A-147-165.

[8] *Id.* at A-68, 87-88.

[9] *Id.* at A-101.

Based on the foregoing, for purposes of the motion *sub judice*, the Court assumes that Mr. Riedel was exposed to asbestos while working at ICI, that some of the asbestos would collect on his work clothes during the course of the day, that he wore those same asbestos-covered clothes home after work, and that Mrs. Riedel was exposed to friable asbestos while laundering these work clothes. The Court also will assume that ICI did not warn either Mr. or Mrs. Riedel of the dangers of take home asbestos exposure, nor did it institute practices to prevent employees from leaving its work sites with asbestos dust on their clothing until some time after Mr. Riedel began working there. Finally, the Court will assume that Mrs. Riedel has contracted asbestosis and asbestos related pleural disease as a result of her exposure to asbestos on her husband's work clothes.

III.

ICI's singular contention is that it owed no duty to Mrs. Riedel. It points to the undisputed fact that Mrs. Riedel never stepped foot on any of its properties, and argues that it cannot, as a matter of law, be held liable for an injury that occurred in Mrs. Riedel's own home. According to ICI, a legal duty does not arise merely because one's actions or inactions may foreseeably cause injury to another. Rather, a duty may be imposed only when the relationship between the plaintiff and the defendant is such that the law should impose a duty upon the defendant to "protect

the plaintiff from the harm that caused [her] injuries."[10] ICI also contends that the Court must consider the public policy implications of a ruling that would allow a plaintiff who has never entered a property to sue a property owner for injuries sustained off property.

Mrs. Riedel argues that ICI has misconstrued the nature of her claim. She is not, as ICI suggests, seeking to hold ICI liable as a premises owner. Rather, she is making a claim of negligence against her husband's employer for unsafe work practices that allowed her husband to bring home friable asbestos on his work clothing. According to Mrs. Riedel, ICI's duty to her arises not from its status as a premises owner, but rather its status as the employer of someone (her husband) with whom she cohabited. Mrs. Riedel argues that, given ICI's extensive knowledge of the hazards of asbestos, a jury could conclude that ICI knew or should have known that, in the absence of appropriate safety measures or warnings, workers exposed to asbestos on its work sites could carry that asbestos home on their clothing and thereby expose members of the household to a dangerous carcinogen.

IV.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material

[10] *See* Tr. ID 13950352, at 4.

fact remain for trial.[11] Summary judgment will be granted only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[12] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment must be denied.[13]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[14] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder and/or that the movant's legal arguments are unfounded.[15] When reviewing the record, the Court must view the evidence in the light most favorable to the non-moving party.[16]

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[11] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[12] *Id.*

[13] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[14] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)(citing *Ebersole*, 180 A.2d at 470).

[15] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[16] *See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Brzoska*, 668 A.2d at 1364.

V.

The plaintiff's showcase claim against ICI sounds in negligence. "To state a claim for negligence one must allege that defendant owed plaintiff a duty of care; defendant breached that duty; and defendant's breach was the proximate cause of plaintiff's injury."[17] ICI's motion for summary judgment takes aim at the heart of the negligence cause of action. ICI wisely has chosen not to challenge the legal sufficiency of the more fact-intensive elements of the claim - breach of duty or proximate cause. Instead, ICI has called the threshold legal question of whether it owed a duty of care to Mrs. Riedel. "The ultimate question of whether 'such a relationship exists between the parties that the community will impose a legal obligation upon one for the benefit of the other' is an issue for the court."[18]

As will be discussed in more detail below, Delaware is not the first jurisdiction to confront the question of whether a defendant/employer owes a duty to the spouse of an employee (or other household member) who has been injured as a result of take home exposure to asbestos. Indeed, the question has received thorough treatment from courts throughout the country. Suffice it to say, there is a split of authority -

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[17] *New Haverford P'ship v. Stroot,* 772 A.2d 792, 798 (Del. 2001).

[18] *Naidu v. Laird,* 539 A.2d 1064, 1070 (Del. 1988)(citation omitted). *See also Kuczynski v. McLaughlin*, 835 A.2d 150, 153 (Del. Super. Ct. 2003)("Whether a duty exists is [ultimately] a question of law to be determined by the court.")(citations omitted).

some courts have found a duty and others have not.[19] From these competing lines of authority a pattern has emerged: the courts that recognize a duty focus on the foreseeability of harm resulting from the defendants' alleged failure to warn of or take safety precautions to prevent take home exposure; those that find no duty focus on the relationship (or lack thereof) between the defendant and the injured spouse (or other injured members of the household).[20] The question presented here is one of first impression in Delaware. To answer it, the Court must first review the most fundamental aspect of the negligence cause of action - under what circumstances will the common law "impose a legal obligation upon one for the benefit of the other."[21]

A. The Duty of Care In Negligence Actions

The notion that a defendant must owe a duty of care to the plaintiff before he

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[19] *Compare Olivo v. Owens-Illinois, Inc.,* 895 A.2d 1143 (N.J. 2006)(finding a duty exists); *Satterfield v. Breeding Insulation Co., Inc.,* 2007 Tenn. App. LEXIS 230 (Tenn. App. 2007)(same); *Chaisson v. Avondale Indus., Inc.,* 947 So.2d 171 (La. App. 2006)(same) *cert. denied,* 945 So. 2d 145 (La. 2997); *Condon v. Union Oil Co. of Cal.,* 2004 Cal. App. LEXIS 7975 (Cal. App. 2004)(same); *Adams v. Owens-Illinois, Inc.,* 705 A.2d 58 (Md. App. 1998)(same); **with** *In re Certified Question from the 14th Dist. Ct. of App. Of Texas*, 2007 Mich. LEXIS 1625 (Mich. 2007)("*In re Cert. Question")*(finding no duty); *Exxon Mobile Corp. v. Altimore,* 2007 Tex. App. LEXIS 2971 (Tex. App. 2007)(same); *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. App. 2007)(same); *CSX Trans., Inc. v. Williams,* 608 S.E.2d 208 (Ga. 2006)(same); *In re New York City Asbestos Litig.*, 840 N.E.2d 115 (N.Y. Ct. App. 2005)(same). *See also Rochon v. Saberhagen Holdings, Inc.,* 2007 Wash. App. LEXIS 2392 (Wash. App. 2007)(finding a duty under general negligence claim but no duty in connection with employer or premises liability claims).

[20] This pattern held true with one exception - in Texas, the Court of Appeals found no duty because the risk of injury was not, as a matter of law, foreseeable. *See Alcoa, Inc.*, 235 S.W.3d at 462.

[21] *Naidu,* 539 A.2d at 1070 (citation omitted).

can be found liable for his harmful actions is of "relatively recent vintage" in the common law.[22] "At early English common law, the existence of a duty of care was not considered an element of an actionable tort."[23] A defendant's liability arose from his "wrongful acts;" strict liability was the prevailing theory of recovery in the British common law courts.[24] "[W]hen negligence began to take form as a separate basis of tort liability, the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability."[25] Duty was installed as a predicate to negligence liability "as a means by which the defendant's responsibility may be limited."[26] In the absence of this limitation, the common law could be manipulated to impose upon a defendant "an obligation to behave properly" that was "owed to all the world."[27] As one court explained, "the concept of a limited duty disciplined the concept of negligence, requiring the plaintiff to establish a definite legal obligation."[28]

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[22] *James v. Meow Media, Inc.,* 300 F.3d 683, 689 (6th Cir. 2002).

[23] *Id.*

[24] *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 356 (5th Ed. 1984)(hereinafter PROSSER & KEETON).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *James,* 300 F.3d at 690.

1. Duty As A Function Of The Relationship Between The Parties

In Delaware, the law is settled that when determining whether a defendant owed a duty of care to the plaintiff, the court must determine whether "such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other."[29] The focus on the relationship between plaintiff and defendant as the basis upon which a court will impose upon the defendant a legal duty to act with reasonable care towards the plaintiff is not novel or unique to Delaware. Indeed, the recognition that duty springs from the relationship between the parties is basic hornbook law:

> Inherent in the concept of duty is the concept of a relationship between the parties out of which the duty arises. The existence of a duty turns on the basic nature of the relationship between the parties to the cause of action. Thus, in determining whether a duty exists, the court should examine the relationship between the parties.
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> Unless and until some relationship exists between the person injured and the defendant, by which the latter owes a duty to the former, there can be no liability for negligence.... The relationship which gives rise to a duty may be created by contract, statute, municipal ordinance, administrative regulation, common law, or the interdependent nature of human society.[30]

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[29] *Naidu,* 539 A.2d at 1070. *See also Furek v. University of Delaware,* 594 A.2d 506, 516 (Del. 1991)("The scope of the duty of care often turns on the relationship between the party claiming harm and the party charged with negligence."); *Kuczynski*, 835 A.2d at 153 ("tort notions of duty arise from the relationship between plaintiff and defendant.")(citations omitted).

[30] 57A AM. JUR. 2D *Negligence* §§81, 82 (2004).

At first glance, the "relationship requirement" in the duty analysis appears simple enough. Find a relationship; find a duty. Yet it is in this apparent simplicity where the challenge in practically applying the standard is revealed. Dean Prosser examined the analytical shortcoming of considering the threshold duty issue strictly in terms of the "relationship" between the parties:

> This concept of a relative duty [derived from relationships] ... has been assailed as serving no useful purpose, and producing only confusion in our [law]. Its artificial character is readily apparent; in the ordinary case, if the court should desire to find liability, it would be quite easy to find the necessary 'relation' in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff. The statement that there is not a duty begs the essential question-whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated.[31]

Even Am. Jur.2d, in its general description of the "manner and creation of relationship," suggests that a legally cognizable relationship can arise from the "interdependent nature of human society."[32] In an abstract sense, does this suggest that each person owes a duty of care to every other person by virtue of our membership in the human society? Or, is one's "relationship" with the human race too attenuated to trigger a legal duty? Needless to say, how the court defines

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[31] PROSSER & KEETON, *supra* note 23, §53, at 357.

[32] 57A AM. JUR. 2d *Negligence,* §82 (2004).

"relationship" in a given case will dictate the result. In this regard, courts must be mindful of Dean Prosser's admonition not to allow outcome-oriented jurisprudence to control the duty analysis. The analytical approach must be thoughtful and intellectually honest.

Courts have long struggled to bring some structure to the determination of whether the relationship between parties should trigger a legal duty. Lord Esher, in *Heaven v. Pender*,[33] offered a standard by which courts could gauge the legal significance of human interaction in the negligence context:

> Whenever one person is by circumstance placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[34]

This Court found Lord Esher's standard to be helpful when determining whether one boat operator owed a duty to another boat operator on the same waterway to warn of an impending collision with a third vessel.[35] Commentators have criticized Lord

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[33] 11 Q.B.D. 503 (1883).

[34] *Id.* at 509.

[35] *See Kuczynski*, 835 A.2d at 154 (concluding that the defendant was "by circumstances placed in such a position with regard to [the plaintiff - a fellow boater]" that he knew or should have known that if "he did not use ordinary care ... in his own conduct ... he could cause injury" to the plaintiff).

Esher's approach to duty, however, particularly in cases involving nonfeasance (a failure to act), as being too broad and relying too heavily on the notion of foreseeable consequences.[36]

Lord Atkin spoke of the requisite relationship as that which exists between neighbors:

> The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's question, Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[37]

Once again, Dean Prosser is critical of this approach: "As a formula this dictum is so vague as to have little meaning, and as a guide to decision it has had no value at all."[38]

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[36] *See* PROSSER & KEETON, *supra* note 23, §53, at 358.

[37] *Donoghue v. Stevenson*, A.C. 562, 580-81 (1932)(H.L. (Sc.)).

[38] PROSSER & KEETON, *supra* note 23, §53, at 359.

2. The Role of Foreseeability In The Analysis

The jurisprudence of this country is not without its attempts to provide some meaningful focus to the duty analysis. In the case perhaps most readily identified by American law students as symbolic of the complex subtleties of negligence law, *Palsgraf v. Long Island Railroad Co.,*[39] then Chief Judge Cardozo confronted an extraordinarily difficult fact pattern and, in this context, chose to examine carefully the fundamental issue of duty. As we all remember, the plaintiff in *Palsgraf* was waiting on a railway platform for her train to arrive. At this same time, two men were rushing to board another train some distance away. As the conductor pulled one of the men on board the departing train, the man dropped a package filled with fire works which then exploded. The explosion, in turn, caused a large set of scales on the adjoining platform to fall over and strike the plaintiff. The court determined that the conductor may have owed a duty to the two men who were boarding the train, but owed no duty to Palsgraf because "nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed [like plaintiff]."[40] Judge Cardozo held that the defendant's duty of care in a tort case is to avoid "risks

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[39] 162 N.E. 99 (N.Y. Ct. App. 1928).

[40] *Id.* at 99-100.

reasonably to be perceived."[41]

As one commentator has distilled it, *Palsgraf* defines the duty based on whether the "consequences of the challenged conduct should have been reasonably foreseen by the actor who engaged in it."[42] Having said this, it cannot be said that *Palsgraf* abandoned the notion that duty must be based first and foremost upon relationships. To the contrary, Chief Judge Cardozo was keenly aware of the relationship requirement in the duty analysis. In his view, the relationship between the two passengers who were attempting to board the train and the conductor was such that the conductor would have owed a duty to the boarding passengers. On the other hand, he determined that no relationship existed between Palsgraf and the conductor because the conductor's conduct was not a wrong toward her, she was not a foreseeable victim of his actions and, as such, she could not be "the vicarious beneficiary of a breach of duty to another."[43]

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[41] *Id.*

[42] Harper, James & Gray, *The Law of Torts,* §18.2 (2nd Ed. 1986). *See also* PROSSER & KEETON, *supra* note 23, §43, at 284("In 1928 something of a bombshell burst upon this field, when the New York Court of Appeals [in *Palsgraf*], forsaking "proximate cause," stated the issue of foreseeability in terms of duty.").

[43] *See* PROSSER & KEETON, *supra* note 23, §43, at 285("Negligence, [Judge Cardozo] said, was a matter of relation between the parties, which must be founded upon upon the foreseeability of harm to the person in fact injured.").

The idea that a defendant owes a duty to everyone that his conduct may foreseeably harm, in the abstract, has been rejected in Delaware. In a thorough discussion of the issue, Judge Longobardi, applying Delaware law, rejected the plaintiff's argument that foreseeability alone drives the duty analysis:

> What Freedman fails to address, however, is the question of whether the law imposes upon the relationship between a franchisor [the defendant] and an unspecified potential investor in an as yet nonexistent franchise [the plaintiff], a duty to protect the investor from harm from the potential franchisee. There can be no such obligation in the absence of some relationship between [the plaintiff and defendant]. In the absence of some relationship, actual or constructively construed, [the plaintiff and defendant] are legal strangers.
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> Thus, it is clear that the Court [may] not evaluate the imposition of primary negligence liability solely on grounds of the foreseeable risk of harm, but instead [must] determine[] whether a duty existed in the first instance.[44]

Clearly, our law recognizes several instances where a defendant's conduct might foreseeably harm another and yet the defendant is held to owe no duty to that person. For instance, as a general matter, an employer of a general contractor is not liable for harm caused by the general contractor even though the employer might

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[44] *Freedman v. Tenn. Dev. Corp., et al.,* 1993 U.S. Dist. LEXIS 11021, at **40-41, 43 (citing *Furek*, 594 A.2d at 520).

foresee that certain conduct of the general contractor could cause harm to others.[45] Likewise, Delaware courts recognize the general rule that "there is no duty to control the conduct of a third person to prevent him from causing harm to another [even if such harm may be foreseeable]."[46]

This is not to say that foreseeability is divorced from the duty analysis. Foreseeability is a factor, among others, that our courts will consider when assessing the significance of the relationship between the parties.[47] Foreseeability of risk plays a more pivotal role in the establishment of the duty when the determination of foreseeability (or lack thereof) can be made on an undisputed record such that it can be made as a matter of law and/or policy.[48] Our courts will also look at the foreseeability of harm to define the duty once the court determines that a duty exists.[49] More often than not the foreseeability analysis implicates a highly fact intensive

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[45] *Urena v. Capano Homes, Inc.,* 933 A.2d 877, 879 (Del. 2007)(also recognizing exceptions to the general rule).

[46] *Naidu,* 539 A.2d at 1072 (also recognizing exceptions to the general rule).

[47] *Kuczynski,* 835 A.2d at 154.

[48] *See generally* PROSSER & KEETON, *supra* note 23, § 43, at 287.

[49] *See Sirmans v. Penn,* 588 A.2d 1103 (Del. 1991)(noting that when a duty of care is imposed in the negligence context, the duty is to "protect against events reasonably foreseeable"); *Delmarva Power & Light Co. v. Burrows,* 435 A.2d 716, 718 (Del. 1981)("One breaches [a] duty by not protecting against an event that a reasonably prudent man would protect against. Stated differently, one's duty encompasses protecting against reasonably foreseeable events.").

inquiry that is typically left for the jury along with other more fact-based issues that are inherent in the negligence analysis.[50] The determination of whether a duty exists, however, is a matter of law for the court to decide before the matter ever reaches a jury. The suggestion that the foreseeability of risk alone will dictate whether or not a duty exists ignores the fact-intensive nature of the foreseeability inquiry, the role of the jury in resolving factual issues, and the mandated role of the court in making the predicate determination of whether a defendant owes a duty to the plaintiff as a matter of law.

3. Learned Hand's Risk/Benefit Duty Analysis

Yet another formulation of the duty of care in negligence cases was offered by Judge Learned Hand in the seminal decision *United States v. Carroll Towing Co.*[51] There, the court reduced the duty analysis to "algebraic terms:"

> If the probability [of injury] be called P; the injury, L; and the burden [upon the defendant to take precautions to avoid injury], B; liability depends upon whether B is less than L multiplied by P; i.e., whether B is less than PL.[52]

Learned Hand's so-called "risk-benefit method" has taken hold among jurists who

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[50] *See Hercules Powder Co. v. DiSabatino*, 188 A.2d 529, 535 (Del. 1963)(noting that questions of "foreseeability of risk [and] the reasonableness of a defendant's conduct" implicate factual inquiries best "submitted to the decision of the jury.").

[51] 159 F.2d 169 (2nd Cir. 1947).

[52] *Id.* at 173.

subscribe to a "law and economics" approach to tort law.[53] And while not specifically adopted in Delaware,[54] our courts have recognized that it is appropriate when engaged in the duty analysis for the court to measure the risk to the plaintiff caused by the defendant's conduct, and the cost or burden to the defendant in minimizing the risk.[55]

4. The Relationship Between The Parties Is Paramount

Each of the analytical approaches discussed above, from Lord Esher's "ordinary sensibility" test to Learned Hand's "risk benefit method," attempt to provide some framework within which the court can consider the question of whether the relationship between the parties is such that the court justifiably can impose a legal duty upon the defendant owing to the plaintiff. None of these approaches has been adopted in Delaware to the exclusion of others. At the end of the day, as Resident Judge Terry observed, the court must consider the relationship of the parties

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[53] *See e.g.* Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972).

[54] Surprisingly, the Court could not find a single reference to *Carroll Towing* in Delaware case law.

[55] *See e.g. Delmarva Power Co.,* 435 A.2d at 719 ("the social utility of the activity [and cost to the defendant of changing behavior] must be balanced against the risk [of harm to the plaintiff]."); *Graham v. Pittsburgh Corning Corp.,* 593 A.2d 567, 568 (Del. Super. Ct. 1990)(same); *Craig v. A.A.R. Realty Corp.,* 576 A.2d 688, 692 (Del. Super. Ct. 1989)("Various factors undoubtedly have been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others.").

"in each particular case in light of its peculiar facts."[56] Ultimately, "[i]t is for the court to decide whether a plaintiff's interest in a negligence action is entitled to legal protection as a matter of public policy."[57] And, while this case-by-case inquiry may give rise to the sort of outcome oriented jurisprudence Dean Prosser warned against -- i.e., that judges would find a "relationship" when they wanted to a find a duty -- our common law has developed certain boundaries within which the inquiry must be confined. The checks and balances inherent in appellate review, and the ability of our General Assembly to serve as the ultimate voice of public policy, also will ensure that the duty of care is imposed thoughtfully and consistently.

B. The Take Home Exposure Decisions From Other Jurisdictions

As mentioned, the Court is not left to consider this issue in a vacuum. Several other courts have thoroughly addressed the duty issue in take home exposure cases, albeit with conflicting results.[58] In jurisdictions, like Delaware, where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not

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[56] *Jeffries v. State of Del. Dept. of Health & Social Serv.,* 1998 Del. Super. LEXIS 177, at *3.

[57] *Id.*

[58] Plaintiffs have cited to several Delaware decisions which they claim have addressed the viability of the take home exposure claim in Delaware. *See* Tr. I.D. 14413199, at 17-21. The Court has reviewed each of these decisions and has determined that none of them address the issue *sub judice* -- whether a defendant in a take home exposure case owes a duty to the plaintiff. The cases either don't involve take home exposure claims, or they simply reveal that the claim was submitted to a jury without any apparent consideration of the duty issue. Consequently, the Court views this as a case of first impression in Delaware.

simply the foreseeability of injury, the courts uniformly hold that an employer/premises owner owes no duty to a member of a household injured by take home exposure to asbestos.[59] For instance, in *In Re Certified Question From the 14th Dist. Ct. of Appeals of Texas,*[60] the Supreme Court of Michigan, sitting *en banc* to answer a certified question from a Texas appellate court, held that the defendant landowner, an employer of the independent contracting firm for whom the plaintiff's stepfather worked, did not owe a duty of care to a plaintiff who had contracted mesothelioma after laundering her stepfather's work clothes. In doing so, the court offered a sequential approach to the duty analysis that incorporates all of the elements that have been recognized in Delaware:

> To summarize, in determining whether a defendant owes a duty to a plaintiff, competing policy factors must be considered. Such considerations include: the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented. Where there is no relationship between the parties, no duty can be imposed, but where there is a relationship, the other factors must be considered to determine whether a duty should be imposed. Likewise, where the harm is not foreseeable, no duty can be imposed, but where the harm is foreseeable, other factors must be considered to determine whether a duty should be imposed. Before a duty can be imposed, there must be a relationship between the parties

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[59] The court notes that in Texas the courts have focused on the foreseeability of injury in the duty analysis and have determined on the record presented that the defendant owed no duty to the plaintiff because the risk of injury from take home exposure was not foreseeable. *See Exxon Mobil Corp. v. Altimore*, 2007 Tex. App. LEXIS 2971.

[60] 2007 Mich. LEXIS 1625 (en banc).

> and the harm must have been foreseeable. Once it is determined that there is a relationship and that the harm was foreseeable, the burden that would be imposed on the defendant and the nature of the risk presented must be assessed to determine whether a duty should be imposed.[61]

Ultimately, the court concluded that the relationship between the plaintiff and the defendant was "highly tenuous" and that "'the relationship between the parties' prong of the duty test, which is the most important prong in this state, strongly suggests that no duty should be imposed."[62] In this regard, the court noted that the plaintiff "had never been on or near defendant's property and had no further relationship with defendant."[63] The court went on to hold that the "burden on the defendant prong" and the "foreseeability" prong also supported a finding of no duty. As to the burden on the defendant, the court found that the defendants would face "an extraordinarily onerous and unworkable burden" if they were found to owe a duty to "every person with whom [its] employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact."[64] As to foreseeability, the court noted that evidence in the record suggested the risk of

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[61] *Id.* at **14-15. (Citations omitted)

[62] *Id.* at *26.

[63] *Id.* The court made a point to emphasize that it was considering the plaintiff's claims as straight forward negligence claims, not premises liability claims. *Id.* at *7, n.5.

[64] *Id. See also Id.* at 29 (court noting that it could find "no principled basis" upon which to distinguish household plaintiffs from other potential plaintiffs outside of the home who might come into frequent contact with the employees' asbestsos-covered clothing).

take home exposure was not foreseeable to the employer during the time frame at issue there.[65] Importantly, however, under the court's sequential duty analysis, it noted that it need not look beyond the relationship of the parties (or lack thereof) to decide the issue. Having found that the relationship between the parties, if any, would not sustain a duty of care running from one to the other, the court found that the duty analysis could, as a matter of law, end there.[66]

The New York Court of Appeals reached an identical result employing similar reasoning. In *In Re New York City Asbestos Litig.*,[67] New York's highest court declined to impose a duty upon an employer in a take home exposure case after concluding that the relationship between the employer and the spouse of an employee could not support the duty that the plaintiffs asked the court to impose. Apparently recognizing that they must demonstrate a relationship between the spouse and the employer, the plaintiffs proffered several potential relationships upon which a duty could be based. First, the plaintiffs argued that the employer owed her a duty because she was the spouse of an employee. The court rejected this argument and noted that

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[65] *Id.* at **30-31.

[66] *Id.* at **44-45.

[67] 840 N. E.2d 115 (N.Y. Ct. App. 2005).

the imposition of such a duty was unprecedented in New York law.[68]

Next, the court determined that the defendant owed no duty to the spouse as a landowner. The court acknowledged that it has, in certain instances, imposed a duty upon landowners to individuals or entities that have never entered upon the property, such as when a landowner allows toxins to be released from his property into the ambient air and the neighboring community. Nevertheless, the court held that the take home exposure case involves an entirely different set of facts in that the relationship between the plaintiff and the defendant was far more tenuous than the relationship between property owner and neighbor.[69]

The plaintiffs then urged the court to extend the "safe workplace" doctrine to take home exposure cases. The court declined to do so, noting that in New York the doctrine has been codified and the take home exposure facts did not match the statutory elements. The court also declined to find that the employer maintained a special relationship with its employee such that it owed the employee's spouse a duty to control the employee outside of the workplace.[70]

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[68] *Id.* at 120.

[69] *Id.* at 121-22.

[70] *See Naidu,* 539 A.2d at 1072 (imposing a duty upon a psychiatrist to control behavior of patient who injured plaintiff in automobile accident based on the "special relationship" between doctor and patient).

Having failed in their efforts to show a legally significant relationship between the parties, the plaintiffs argued that the court should impose a duty upon the defendant because the plaintiff's injury was a foreseeable consequence of the employer's failure to warn the spouse or the employee of the danger of take home exposure or implement appropriate safety measures. The court was not persuaded: "foreseeability, alone, does not define duty - - it merely determines the scope of the duty."[71] The court went on to explain that foreseeability becomes a relevant consideration in the negligence equation only after the court determines that a duty exists:

> Foreseeability should not be confused with duty. The principle expressed in *Palsgraf* is applicable to determine the scope of the duty - - only after it has been determined that there is a duty. A specific duty is required because otherwise, a defendant would be subjected to limitless liability to an indeterminate class of persons conceivably injured by its negligent acts. Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweighs its costs.[72]

To illustrate its point regarding the potential "limitless liability" to which a defendant could be exposed if foreseeability of injury was the only element of the negligence formula, the court noted in the take home exposure context that

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[71] *In Re New York City Asbestos Litig.*, 840 N.E. 2d at 119 (citations omitted).

[72] *Id.* (citations and internal quotations omitted).

recognizing a duty owed to spouses or other household members would not end the matter:

> Plaintiffs assure us that this will not lead to "limitless liability" because the new duty may be confined to members of the household of the employer's employee, or to members of the household of those who come onto the landlord's premises. This line is not so easy to draw, however. For example, an employer would certainly owe the new duty to an employee's spouse (assuming the spouse lives with the employee), but probably would not owe the duty to a babysitter who takes care of children in the employee's home five days a week. But the spouse may not have more exposure than the babysitter to whatever hazardous substances the employee may have introduced into the home from the workplace. Perhaps, for example, the babysitter (or maybe an employee from a neighborhood laundry) launders the family members' clothes. In short, ... the 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.' Here, there is no relationship between the [employer] and the [plaintiff/spouse].[73]

In its turn to address the *bona fides* of the take home exposure claim, the Supreme Court of Georgia focused on the safe workplace doctrine and whether the employer's duty to provide a safe workplace to its employees would extend to the employee's home and members of the household.[74] The court followed New York's lead in declining to recognize a duty: "As the New York court did in *Widera,* we decline to extend on the basis of foreseeability the employer's duty beyond the

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[73] *Id.* at 122.

[74] *See CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005).

workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."[75] In reaching this holding, the court emphasized that "mere foreseeability [has been] rejected by this Court as a basis for extending a duty of care...."[76]

In 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. For example, in *Olivo v. Owes-Illinois, Inc.,*[77] the court described the "foreseeability of harm" as "a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate."[78] Similarly, in Tennessee and Louisiana, the courts found a duty in take home exposure cases only after finding that the risk of injury was foreseeable and that "the foreseeability prong [of the duty analysis] is paramount because foreseeability is the test of negligence."[79]

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[75] *Id.* at 210.

[76] *Id.* at 209.

[77] 895 A.2d 1143 (N.J. 2006).

[78] *Id.* at 1148 (citations omitted).

[79] *Satterfield v. Breeding Insul. Co., Inc.,* 2007 Tenn. App. LEXIS 230 *26. *See also Chaisson v. Avondale Indus., Inc.,* 947 So.2d 171, 181-82 (Ct. App. La. 14th Cir. 2006)(noting that premises owner owes duty "to act reasonably in view of the foreseeable risk of danger....").

As best as the Court can tell, the Maryland Court of Appeals affirmed the submission of a take home exposure claim to the jury in *Adams v. Owens-Illinois, Inc.,*[80] upon concluding that the trial court properly afforded the plaintiff an opportunity *at trial* to prove "that [defendant] owed a duty to [plaintiff] and breached that duty."[81] Apparently, the trial courts in Maryland instruct the jury to determine whether the defendant owed a duty to the plaintiff rather than requiring the judge to make the determination as a matter of law.[82]

In Washington, the courts recognize a significant distinction between malfeasance and nonfeasance in determining whether a duty exists - in the case of malfeasance, Washington law appears to provide that if a defendant engages in active conduct, then in all instances he owes "a duty to prevent foreseeable injury from any of its unreasonably safe actions," regardless of his relationship with the putative plaintiff.[83] To the Court's knowledge, Delaware has distinguished between active and

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[80] 705 A.2d 58 (Md. Ct. App. 1998).

[81] *Id.* at 66.

[82] *Id.*

[83] *See Rochon v. Saberhagen Holdings, Inc.*, 2007 Wash. App. LEXIS 2392, ** 8-10. It is also clear that, like Tennessee, New Jersey and Louisiana, Washington emphasizes the foreseeability of injury in determining whether a duty exists. *Id.* at *7 ("A risk is 'unreasonable,' and thus a party has a duty to prevent resulting harm, only if a reasonable person would have foreseen the risk. Conversely, if the risk is not foreseeable, the person who created the risk generally does not have a duty to prevent it.").

passive conduct in the tort context only when determining the sufficiency of negligence pleadings,[84] the viability of implied and contractual indemnification obligations,[85]and the requisite proof in claims of recklessness.[86] The court is not aware of any Delaware authority that would direct a different analytical approach to the duty determination depending upon whether the plaintiff was alleging active or passive negligence (or malfeasance versus nonfeasance) on the part of the defendant.

In each instance where courts have endorsed the take home exposure claim, it is clear that the court either has focused primarily on the foreseeability of risk with little regard for the relationship (or lack thereof) between the plaintiff and the defendant, or the court has applied principles of state negligence law that are not applicable in Delaware. For these reasons, the decisions are distinguishable and of little value here.

C. ICI Owed No Duty To Mrs. Riedel

The Court is satisfied that Delaware law requires the plaintiff to demonstrate

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[84]*See Phillips v. Delmarva Power & Light Co.,* 194 A.2d 690, 697-98 (Del. 1963)(holding that active negligence must be plead with more particularity than passive negligence).

[85]*See Diamond State Tel. Co. v. The University of Del.,* 269 A.2d 52, 57 (Del. 1970)(recognizing distinction between active and passive negligence in determining the enforceability of an implied indemnification agreement).

[86]*See Jardel v. Hughes*, 523 A.2d 518, 531 (Del. 1987)("Where the claim of recklessness is based on ... passive negligence, the plaintiff's burden is substantial.").

the existence of a legally significant relationship between the plaintiff and the defendant before the common law "will impose a legal obligation upon [the defendant] for the benefit of the [plaintiff]."[87] In determining whether such a relationship exists, Delaware courts frequently will refer to the "definitions and classifications" set forth in the Restatement (Second) of Torts ("the Restatement").[88] In this regard, the Court notes as an initial matter that the plaintiff has not directed the court to any provision of the Restatement that would support her position. The Court's review of the Restatement, likewise, has revealed no provision that would support the imposition of a duty upon an employer or landowner to the spouse of an employee when the spouse has never stepped foot on the employer's property. Neither the employer-based provisions of the Restatement, nor the landowner-based provisions (including the so-called "safe workplace doctrine") apply here.[89] Nor is there a "special relationship" present here, either between Mrs. Riedel and ICI or Mr. Riedel and ICI, that would justify the imposition of a duty upon ICI to control the conduct of its employee while acting outside the scope of his employment and off the

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[87] *Naidu,* 539 A.2d at 1070.

[88] *See generally DiOssi v. Maroney*, 548 A.2d 1361, 1365 (Del. 1988).

[89] *See* RESTATEMENT (SECOND) OF TORTS §328E *et. seq.* (Chapter 13 addressing liability of possessors of land); RESTATEMENT (SECOND) OF TORTS §409 *et. seq.* (Chapter 15 addressing liability of employer of independent contractor).

ICI premises.[90] Finally, the Court is unaware of any basis in Delaware law upon which to impose a duty upon ICI to Mrs. Riedel as the employer of her spouse.[91]

Even when the foreseeability prong is incorporated into the duty analysis, the Court cannot discern a relationship between the plaintiff and the defendant that would support a legal duty. ICI clearly owed a duty to Mr. Riedel just as the conductor in *Palsgraf* owed a duty to the passengers he was helping onto the train.[92] But, just as in *Palsgraf,* the duty owed to Mr. Riedel does not vicariously pass on to Mrs. Riedel in the absence of some independent relationship between ICI and Mrs. Riedel that would justify the imposition of the duty. Her position at the time of the alleged wrong, far removed from ICI's property, is such that she cannot be considered a reasonably foreseeable victim of the alleged breach of the duty ICI owed to her husband (in failing to warn and/or implement safety precautions). There can be no

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[90] *Cf. Naidu,* 539 A.2d 1064 (holding that under Section 15 of the Restatement a special relationship between physician and patient can create duty of physician to protect third parties from the negligent acts of the patient). *See In the Matter of New York City Asbestos Litig.,* 840 N.E.2d at 151 (finding that Section 15 does not apply in the take home exposure context).

[91] The Court notes that if the employment relationship formed the basis of some sort of derivative duty to the employee's spouse, one must question whether Delaware's workmen's compensation statutory exclusivity provisions would apply to bar Mrs. Riedel's claim. *Cf. Nutt v. A.C & S, Inc.*, 466 A.2d 18, 24 (Del. Super. Ct. 1983)("To the extent that workmen's compensation provide's an exclusive remedy for the employee [ ], it presents an equal bar to a spouse's claim which is dependent upon it.").

[92] *See Palsgraf,* 162 N.E. 99 (N.Y. Ct. App. 1928). *See also Anderson v. Atchison, Topeka & Sante Fe Railroad*, 333 U.S. 821 (1948)(recognizing general acceptance of the view that an employer owes a duty of care to its employees in both active and passive negligence contexts).

"transferred negligence" under these facts.[93]

The "risk-benefit method" of considering the duty question also leads to the conclusion that no duty should be imposed here.[94] Simply stated, there is no principled basis in the law upon which to distinguish the claim of a spouse or other household member who has been exposed to asbestos while laundering a family member's clothing, from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day. All have been exposed to asbestos from the employee's clothing; all arguably have intersected with the asbestos-covered employee in a foreseeable manner; and all would have viable claims of negligence against the employer/landowner if the take home exposure cause of action is permitted. Yet none were exposed in the course of employment with the defendant/employer, in the course of the asbestos-covered employee's work, or while on the employer's property. The burden upon the

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[93]*See generally* PROSSER & KEETON, *supra* note 23, §43, at 285 (discussing the notion of "transferred negligence" under *Palsgraf* and its progeny).

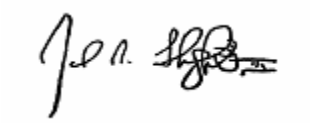
[94]*See Carroll Towing,* 159 F.2d 169 (2nd Cir. 1947)*; Delmarva Power Co.,* 435 A.2d 716 (Del. 1981).

defendant to undertake to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great; the exposure to potential liability would be practically limitless.

VI.

Based on the foregoing, the Court is satisfied that the relationship between Mrs. Riedel and ICI - legal strangers in the context of negligence - is not sufficient to justify the imposition of a duty of care upon ICI to act "for the benefit of" Mrs. Riedel. Accordingly, ICI's motion for summary judgment must be **GRANTED.**

IT IS SO ORDERED.



Joseph R. Slights, III

Original to Prothonotary