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Case Number 305,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELIZABETH RAMSEY, Personal Representative of the Estate of DOROTHY RAMSEY, Deceased,	:	No. 305, 2017
Plaintiff Below, Appellant,	:	
v.	:	Court Below: Superior Court of the State of Delaware
GEORGIA SOUTHERN UNIVERSITY ADVANCED DEVELOPMENT CENTER; HOLLINGSWORTH AND VOSE COMPANY,	:	C.A. No. N14C-01-287
Defendants Below, Appellees.	:	

APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

On January 31, 2014, Dorothy Ramsey, Delaware resident, (hereinafter "Appellant") sued, *inter alia*, Hollingsworth & Vose ("H&V") and Georgia Southern University Herty Advanced Development Center's ("Herty") (hereinafter "Appellees"), as a result of her diagnosis of asbestos-related lung cancer and requested that a Delaware jury decide her case as a guaranteed by the Delaware Constitution.[1] The Original Complaint[2] was subsequently amended to take in account her death, substitute her Estate, and clarify the years of exposure. On January 4, 2017, Elizabeth Ramsey, Personal Representative of the Estate of Dorothy Ramsey, Deceased, filed the Third Amended Complaint.[3]

On October 8, 2015, Herty filed a Motion for Summary Judgment, on the basis that it owed no duty of care and a lack of product nexus.[4] After briefing and oral argument, on February 2, 2017 the Superior Court granted summary judgment, holding only that Herty owed no duty of care because its conduct was

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[1] Del. Const. Article 1 § 4.
[2] A28-A40.
[3] A41-A53. Mrs. Ramsey filed suit in 1997 based on her asbestosis and pleural disease, against, *inter alia*, H&V and Herty. C.A. No. 97C-09-105, which settled before trial. Mr. Ramsey filed suit in 1986, based on his asbestosis, against, *inter alia*, Herty. This case also resolved. C.A. 86C-05-053O.
[4] Herty's Motion for Summary Judgment is at A54-A268, Plaintiff's Answering Brief, filed on October 30, 2015, is at A269-A468, and Herty's Reply Brief, filed on November 12, 2015 is at A469-A515. Oral argument was held on December 8, 2016. (A516-A543).

nonfeasance.[5] Plaintiff filed a Motion for Reargument,[6] which, after briefing and oral argument, was denied.[7] On February 24, 2017, H&V filed a Motion for Summary Judgment on the sole issue of no duty owed,[8] which, after briefing and oral argument, was granted on July 7, 2017, based on the law of the case.[9] Exposure and causation were not decided, as the Court's holdings below were limited to the issue of duty. The case became final on July 11, 2017 when a Stipulation of Dismissal Pursuant to Rule 41(a)(1)(ii) was filed.[10] A notice of appeal and amended notice of appeal were filed on August 1, 2017.[11] This is Plaintiff-below, Appellant's Opening Brief.

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[5] Ramsey v. Atlas Turner Ltd. (In re Asbestos Litig.), 2017 Del. Super. LEXIS 53, at *18 (Del. Super. Feb. 2, 2017) (Ex. A).

[6] Plaintiff's Motion for Reargument, filed on February 9, 2017 is at A544-A626, and Herty's Response in Opposition, filed on February 16, 2017, at A627-633. Oral argument was held on May 8, 2017. (A634-A669).

[7] Ramsey v. Atlas Turner Ltd. (In re Asbestos Litig.), 2017 Del. Super. LEXIS 235, at *6 (Del. Super. May 11, 2017) (Ex. B).

[8] A670-A726. Plaintiff's SJAB was filed on March 10, 2017. (A727-A1060). H&V's RB was filed on March 29, 2017. (A1061-1095). Oral argument was held on July 7, 2017. (A1096-1106) The motion was filed pursuant to stipulated briefing schedule, after the time for filing summary judgment motions, after Ramsey v. Atlas Turner Ltd. (In re Asbestos Litig.) was decided, to enable the Court to address the duty issue prior to trial. A728.

[9] Ex. C, Ramsey v. Hollingsworth & Vose, C.A. 14C-01-287, Scott, J., p. 9:17-10:3 (Del. Super. July 7, 2017) (TRANSCRIPT).

[10] Ex. D.

[11] D.I. 1 and 2.

SUMMARY OF ARGUMENT

1. Between 1971 and 1980, H&V and Herty manufactured and supplied a blue crocidolite asbestos product that Mrs. Dorothy Ramsey, Plaintiff-below, Appellant, was exposed to, and which caused her to develop asbestos-related lung cancer. Mrs. Dorothy Ramsey argued that H&V and Herty were negligent in manufacturing and selling a dangerous product without warning, and that this proximately caused her harm. There was evidence below that H&V and Herty knew or should have known of the dangers of their asbestos product, that they did not place an adequate warning on their product or otherwise take steps to provide adequate warnings, and that Dorothy Ramsey was a foreseeable victim of harm as a result of their conduct.

This Court has stated that a manufacturer's duty to warn is only dependent on whether it knew or should have known of the hazards associated with its product. In re Asbestos Litig. (Colgain), 799 A.2d 1151, 1152 (Del. 2002). The Superior Court has also so held.[12] A manufacturer must exercise due care in the manufacture of its products, which would include warning if the manufacturer was aware of the possibility that the product was dangerous.[13] Therefore, under the precedents of this Court and basic tort law, manufacturing and selling a product,

[12] Graham v. Pittsburgh Corning Corp, 593 A.2d 567, 568-569 (Del. Super. 1990); see also Restatement (Second) §§ 388 and 389 (2nd 1979).
[13] Massey-Ferguson, Inc. v. Wells, 383 A.2d 640, 642 (Del. 1978) (citing Restatement §§ 395 and 398); Id. at 644; see Graham, 593 A.2d at 567, 570-71.

which could cause harm, without an adequate warning, is misfeasance. A duty of care is owed to anyone who could be foreseeably harmed.[14] The court below erred in granting summary judgment, when it held that manufacturing and selling a harmful product without adequate warning was nonfeasance, and that no duty of care was owed to anyone except those in a special relationship with the manufacturer/supplier.[15] Riedel v. ICI Ams. Inc., 968 A.2d 17 (Del. 2009) and Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162 (Del. 2011) do not apply in the context of a manufacturer/seller's duty of care, or should be revisited.

[14] Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 718-19 (Del. 1981); Restatement (Second) § 388, cmt d., Restatement (Second) § 395, cmt i.

[15] Ramsey, 2017 Del. Super. LEXIS 53, at *19 (Ex. A); Ramsey, 2017 Del. Super. LEXIS 235, at *6 (Ex. B) (decision on Plaintiff-Below's Motion for Reargument); Ramsey v. Hollingsworth & Vose, C.A. 14C-01-287, Scott, J., p. 9:17-10:3 (Del. Super. July 7, 2017) (TRANSCRIPT) (Ex.C) (decision on H&V's Motion for Summary Judgment, following the decision in Ramsey v. Atlas Turner Ltd. (In re Asbestos Litig.) based on law of the case).

STATEMENT OF FACTS

A. H&V and Herty Manufactured an Asbestos Product and Sold it to Haveg for Chemtite Operation.

Haveg was a manufacturing plant in Marshallton, Delaware which made two asbestos products – Haveg and Chemtite.[16] The Chemtite operation at Haveg started after the process was purchased from Johns Manville in 1969-1970.[17] Asbestos paper composed of blue crocidolite asbestos[18] had to be used to make Chemtite.[19]

1. H&V – Manufactured and Supplied Asbestos Product for Chemtite Operation at Haveg from 1971 to 1973. H&V was the exclusive supplier of blue crocidolite asbestos paper for Chemtite at the time of Haveg's purchase of the Chemtite operation.[20] From November 16, 1971 through December 18, 1972, H&V manufactured and delivered 88,531 pounds of H&V asbestos paper to Haveg.[21] H&V's asbestos paper was used exclusively in the Chemtite process at

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[16] A748:22-A749:3, A749:20-750:1.
[17] A752, ¶ 4.
[18] A763:6-8. It is well recognized crocidolite asbestos is the most harmful. OSHA, Standard for Exposure to Asbestos Dust, 37 Fed.Reg. 11318, 11320-21 (June 7, 1972) (OSHA Standard).
[19] A763:15-18; A759:8-A760:3.
[20] A761:7-8, A764:8-12; A771:11-14; A896-A897; A774:3-17, A775:4-20, A776:16-A777:8, A778:20-A779:11. Unlike many asbestos products, this was 80% asbestos-containing and consisted of crocidolite, not chrysotile asbestos.
[21] A798-A816; A780:4-A781:24, A782:8-A786:5.

Haveg from the beginning of the Chemtite operation until about January 1973.[22] Haveg continued to use H&V's asbestos paper up to October 1973.[23]

2. Herty – Manufactured and Supplied Asbestos Product for Chemtite Operation at Haveg from 1976 to 1980. Herty started supplying Haveg with large quantities of the asbestos paper in 1976.[24] Herty was the last supplier of asbestos paper to Haveg for the Chemtite operation.[25] Herty sold over 118 tons of asbestos paper to Haveg, as enumerated on the purchase orders.[26] The fact that Herty's asbestos dominated the scene from 1976 to 1980 is also demonstrated by the Haveg's requisition logs which indicate only a limited purchase of 500 lbs. from Mead in April 1976, and only 5000 lbs. from Special Electric in November 1977; whereas, from 1976 to 1978, hundreds of thousands of pounds were purchased from Herty. Herty was the exclusive supplier of asbestos for Chemtite from 1978-1980. The last time that asbestos paper was used in the Chemtite process was in the late summer of 1980.[27] At the time Chemtite was discontinued,

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[22] A818-A894; A771:11-14; A765:17-20.
[23] A818-A894.
[24] A388-A401; A403-A404; A406-A418.
[25] A430:1-3; A364:21-22.
[26] A388-A401; A403-A404; A423:17-25, A1108:1-21. Below, Plaintiff mistakenly did not attach the deposition page at A1108, and mistakenly asserted that it was 125 pounds instead of 118 tons, but Herty did not contest these facts for purposes of summary judgment.
[27] A361:4-362:1; A380:19-22.

almost no asbestos paper remained.[28] Thus, a large amount of asbestos paper was used during this time.

B. H&V and Herty's Asbestos Product Exposed Chemtite Operation Worker Robert Ramsey and His Wife, Dorothy Ramsey to Asbestos.

1. The Use of H&V and Herty's Asbestos Product in the Chemtite Operation Caused Asbestos Dust to be Released. The Chemtite process was a continual process in that it operated 24 hours a day.[29] The Chemtite process began in the resin plant where asbestos paper was unrolled and fed into a saturator machine.[30] The feeding and handling of the paper, as well as the flex caused by the roller action, caused fibers to flake off of the asbestos paper. Additionally, when the paper was torn off or if breakage occurred, as it frequently did, dust was created.[31] After the resin bath, the paper went through an oven/drier and was then rewound into a roll. After approximately 50 lbs. of paper had been rewound, the roll was cut with a knife.[32] The rolls were then transported from the resin plant to the Chemtite pipe machine where it was spiraled to form the pipe. The Chemtite pipe was machined and the ends were then threaded to act as a connector in the main Haveg machining facility adjacent to the large molding area and the main

[28] A362:2-19.
[29] A450:20-451:7.
[30] A373:6-18, A375:9-16.
[31] A363:5-21; A429:9-12; A761:9-17.
[32] A369:2-A370:9, A374:13-16.

entrance to the manufacturing building.[33] Machining and threading the Chemtite pipe was dusty.[34] In addition, sanding of the Chemtite pipe was necessary before the fittings could be put on. Sanding of the Chemtite pipe also created dust.[35]

2. Robert Ramsey Worked With and Was Exposed to H&V and Herty's Asbestos.

Dorothy Ramsey's husband's job at Haveg was working in the Chemtite department. Mr. Ramsey worked on making pipe from asbestos paper in the Chemtite department at Haveg from approximately 1971 until approximately 1979.[36] Robert Ramsey handled the rolls of asbestos paper and put them on mandrels and wound the paper and made pipe.[37] It took 6 or 7 rolls to make a pipe.[38] After the pipe came off the pipe machine it was baked and then put on another machine where the ends would be sawed off by a wet saw.[39] Mr. Ramsey stated that the wet saw eliminated a lot (but not all) of the dust.[40] In addition to making Chemtite pipe, Mr. Ramsey also threaded the pipe when no one was available to thread the pipe or if they did not need to make pipe.[41] The threading

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[33] A374:13-16, A377:9-13.
[34] A382:10-A383:9; A385 ¶5.
[35] A383:10-20.
[36] A917:17-22, A918:21-A919:4, A920:24-A921:3.
[37] A440:9-13.
[38] Id. at 440:14-17.
[39] Id. at 441:16-A443:5.
[40] Id. at A443:2-5.
[41] Id. at A443:9-10, A445:2-5.

machine was in the same room where Mr. Ramsey made the pipe.[42] Mr. Ramsey recalled that the threading of the Chemtite pipe created dust.[43] When asbestos is released into the air it is not necessarily visible to the human eye.[44]

3. Dorothy Ramsey was Exposed to H&V and Herty's Asbestos.

Mrs. Dorothy Ramsey, who married Mr. Ramsey on August 16, 1947,[45] laundered Mr. Ramsey's dust laden work clothes at least once a week.[46] Haveg provided her husband with uniforms, but they did not launder them.[47] Mr. Ramsey's uniforms were covered with dust every day when he came home.[48] The dusty condition of Mr. Ramsey's work clothes was consistent from 1967 until 1980.[49] He would shake the dust off of his uniform, and hang it in a closet. Mrs. Ramsey would clean up the dust and put the uniform in the family's hamper.[50] Mrs. Ramsey shook the dusty uniforms to remove the excess dust before she put them in the washing machine.[51] She then swept the dust from the floor.[52] The laundry room where Mrs. Ramsey washed Mr. Ramsey's work uniforms was

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[42] Id. at A444:11-15.
[43] Id. at A444:20-22.
[44] A467, ¶6.
[45] A110:1-9.
[46] A454:11-16.
[47] Id. at A452:11-15, A453:19-A454:10.
[48] Id. at A452:14-15.
[49] Id. at A457:25-A458:8.
[50] Id. at A454:17-455:1.
[51] Id. at A457:5-13.
[52] Id. at A457:14-15.

located in the basement of their home.[53] In approximately 1972, the corner of the basement where the washing machine was located was made into an enclosed room.[54] From 1972 onward, Mrs. Ramsey laundered Mr. Ramsey's dusty uniforms in that confined space.[55] Haveg did not have an on-site or off-site laundry service.[56] In addition, Haveg did not instruct its employees to shower or change their clothing before the left the facility, except for workers in the asbestos treatment area where "Haveg", not Chemtite, was made, who the Haveg Company believed were at risk during the late 70's.[57] However, it did have facilities available for worker to use for showering and changing beginning in the 1960's.[58]

Mrs. Ramsey contracted asbestos –related lung disease as a result of her exposure to asbestos.[59]

C. H&V and Herty's Asbestos Product was Manufactured and Supplied Without a Warning. It is undisputed that H&V did not place a warning on its asbestos paper that it manufactured and supplied.[60] Herty did not place even a

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[53] Id. at A455:2-5.
[54] A457:20-24, A1110:18-21. Page 53 of Mrs. Ramsey's deposition was cited in Plaintiff's SJAB in response to Herty's MSJ but inadvertently not attached to the SJAB below. See A271, citing Ramsey Dep., page 53. Appellees did not contest these facts for purposes of summary judgment below.
[55] A457:20-24.
[56] A461:17-19.
[57] A461:8-24, A488:20-A489:2; A924 ¶¶ 5,6, A925-926 ¶ 10.
[58] A488:5-15.
[59] A31, ¶ 5.
[60] A900; A765:12-17.

caution label on the paper until 1978, which Plaintiff's expert has opined was inadequate to convey a warning.[61] Dr. Cunitz, human factors expert, will testify that a reasonable manufacturer or supplier should warn when it knows of the possibility that its product will do harm and it would have been effective as to the spouse of a worker.[62] Robert Ramsey was a man who heeded warnings, and would not have taken asbestos home on his clothes if he had known it was dangerous to his wife.[63] There is a presumption that one will heed a warning if given.[64] H&V never discussed with Haveg specifically the dangers of asbestos,[65] H&V's representative admitted that Haveg never indicated they considered it to be dangerous,[66] and H&V never thought about whether it was hazardous to the Haveg workers.[67] Haveg was not aware of the dangers of asbestos, particularly to those in the Chemtite area except for long periods of excessive exposure.[68] No asbestos supplier or manufacturer even warned Haveg.[69] Haveg's understanding of the dangers of asbestos, and which workers were at risk, was limited based in part on a

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[61] In re Asbestos Litig. (Mergenthaler), 542 A.2d 1205, 1213 (Del. Super. 1986); A214.
[62] A221:12-23; A910-A913.
[63] A966 ¶¶ 5-6.
[64] In re Asbestos Litig. (Norris Trial Group), 1995 Del. Super. LEXIS 693, at *5 (Del. Super. Mar. 30, 1995).
[65] A943:6-11, A944:23-A945:3, A946:15-23.
[66] Id. at A946:6-10.
[67] A978:14-A980:9; A976:4-A977:8; A947:10-17.
[68] A923-A926, ¶¶ 3-6,10.
[69] A924, ¶ 5. However, another asbestos supplier for the Haveg material, Partek, was warning its Finland customers at this time, but not Haveg. A930:9-A931:19.

lack of warnings from suppliers to the facility.[70] Specifically, due to this lack of warning, Haveg did not believe Chemtite operators were at risk.[71] Had they fully known of the dangers of asbestos exposure, Haveg would not have put its employees and their families at risk.[72]

D. H&V and Herty Knew or Should Have Known Household Members of Those Who Worked With Their Asbestos Could Be Harmed If Adequate Warnings Were Not Provided. H&V knew asbestos was dangerous by mid-1960.[73] Based on the record below, Herty should have known. Neither Defendant below disputed that they knew or should have known in their Motions for Summary Judgment.

Beginning in the 1930s the National Safety Council published information and had discussions regarding the hazards of asbestosis in the 1930s.[74] The Journal of the American Medical Association contained an editorial regarding asbestosis and cancer in 1949. In the late 1940's and early 1950s, there were references to asbestos causing cancer in The New York Times, the Washington

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[70] A924, ¶ 5.
[71] A924, ¶¶ 5-6.
[72] A925-926, ¶ 10.
[73] A941:1-4, A942:5-17; A787:20-A788:2, A788:20-A790:25, A791:4-A797:5.
[74] A349, A956. This Court has referred to Dr. Castleman's book, Asbestos Medical and Legal Aspects, as a "learned treatise." Nicolet, Inc. v. Nutt, 525 A.2d 146, 148 (Del. 1987). This Court has also stated that "Dr. Ba[rr]y I. Castleman [is] a well-recognized expert in the field of asbestos research." In re Asbestos Litigation (Colgain), 799 A.2d 1151, 1153 (Del. 2002)

Post, Newsweek, and the Encyclopedia Britannica.[75] "By 1950, there were more than 80 articles and abstracts referring to the lung cancer hazard from asbestos…." and by 1960 it was widely accepted that environmental and occupational asbestos caused mesothelioma."[76] The earliest writing specifically commenting on the ill health among families of asbestos workers was 1897[77] and "[t]he hazards of asbestos exposure to families of the workers, in particular cancer, was scientifically knowable long before it was studied directly. . . ."[78]

In 1913, the text Safety, "emphasized the importance of having workers remove work clothes before leaving a factory where toxic materials are handled, so the poisons would not be carried 'into the homes of the workers.'"[79] The U.S Public Health Service, in its Manual of Industrial Hygiene, 1943, suggested two compartment lockers or ideally separate lockers for employees whose clothes were contaminated by poisonous material.[80] The same year, Chemical Engineering, a

[75] A350, A957.
[76] A348, A955; A209-210 (Appellant's expert below, Dr. Castleman Disclosure, stating hazards of asbestos, including cancer, were published in scientific and other publicly available literature in the 1940's through the 1960's, and that by then, there was ample basis to conclude that the hazards of asbestos exposure extended to workers' households).
[77] A351, A958.
[78] Id. at A353, A960.
[79] A351, A958.
[80] A352, A959.

trade magazine, "advised separate lockers for street clothes and work clothes, separated by showers, in plants handling aluminum power."[81]

In 1946, Dr. Hueper wrote in the Journal of American Medical Association "that workers handling carcinogenic materials such as asbestos be provided with showers and special rooms for storing clothes."[82]

In the late 1940s, some corporations were providing their employees who worked with toxic materials with work clothing and laundry services.[83]

In 1952, a United State Department of Labor document entitled Safety and Health Standards for Contractors performing Federal Supply Contracts under the Walsh-Healey Public Contracts Act "required that [government] contractors provide facilities to prevent the communication of harmful substances from work clothes by contact to street clothes."[84]

Walsh-Healy regulations, published in the Federal Register in 1960, provided that "'Where employees' work clothes are exposed to contamination by poisonous, infectious, or irritating material, facilities shall be provided in change rooms so that street and work clothes will not be stored in contact with each other.'"[85]

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[81] A352, A959.
[82] A352, A959.
[83] A352, A959.
[84] Id. at A352, A959.
[85] Id. at A352, A959.

In the 1950's and 1960's, companies had adopted protective measure for employees to prevent asbestos from traveling from the employees' clothes to their homes.[86]

That members of households of workers exposed to asbestos were getting sick was directly reported in the 1960's when work by Newhouse and Thompson (1965) and Lieben and Pistawka (1967) established that mesothelioma was causing deaths among persons with only household exposure to asbestos.[87] OSHA was enacted in June 1972 which provided regulations to prevent asbestos from traveling on workers' clothing to nonemployees, such as providing exposed employees with special clothing, changing rooms, and separate lockers for work clothes and street clothes.[88]

That asbestos could be transported by exposed workers to their households was foreseeable.[89]

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[86] Id. at A352, A959.
[87] Id. at A354, A961.
[88] OSHA, Standard for Exposure to Asbestos Dust, 37 Fed.Reg. 11318, 11320-21 (June 7, 1972) (OSHA Standard); Kesner v. Superior Court, 384 P.3d 283, 292 (Cal. 2016); A353, A960.
[89] Id. at A353, A960; Id. at A354, A961.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE MANUFACTURERS AND SELLERS HAVE A DUTY TO WARN OF DANGERS ASSOCIATED WITH THEIR PRODUCT.

A. Question Presented. Did the court below err in holding that a manufacturer/seller does not have a duty to warn of dangers associated with their product? This issue was preserved in Plaintiff's SJAB's to the Motions for Summary Judgment filed by Herty[90] and H&V,[91] at oral argument on Herty's Motion for Summary Judgment[92] and H&V's Motion for Summary Judgment,[93] in the Motion for Reargument of the Court's decision granting summary judgment to Herty,[94] and at oral argument.[95]

B. Scope of Review. The court below made an error of law in ruling that H&V and Herty owed Dorothy Ramsey no duty of care. As such, the standard of review is *de novo* and plenary.[96]

C. Merits of Argument.

1. Standard of Review on Motion for Summary Judgment.

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[90] A276-A284.
[91] A730-742.
[92] A516-A543.
[93] A1102-1104.
[94] A544-A550.
[95] A634-A669.
[96] Pierce v. Int'l. Ins. Co., 671 A.2d 1361, 1363 (Del. 1996).

"Following the grant of a motion for summary judgment, the applicable standard of appellate review requires this Court to examine the record to determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[97] Issues of negligence are not generally appropriate for resolution by summary judgment.[98]

The Court should accept all undisputed facts and the non-moving party's version of disputed facts.[99] "[I]f the parties are in disagreement concerning the factual predicate for the legal principles they advance," summary judgment must be denied.[100] "[I]f it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate."[101]

2. H&V and Herty Committed Misfeasance.

H&V and Herty committed misfeasance: manufacturing and selling a dangerous product without adequate warning, or in other words, manufacturing and selling a dangerous product below the standard of care for what a reasonable prudent manufacturer or seller should do.

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[97] Sostre v. Swift, 603 A.2d 809, 811-12 (Del 1992).
[98] Ebersole v. Lowengrub, 180 A.2d 467, 469 (Del. 1962).
[99] Merrill v. Crothall – Am., Inc., 606 A.2d 96, 99-100 (Del. 1992).
[100] Id. at 99.
[101] Doe, 884 A.2d at 463.

The court below's opinions were primarily based on this Court's decisions in Riedel v. ICI Ams. Inc., 968 A.2d 17 (Del. 2009) and Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162 (Del. 2011), cases which held that an Employer/Landowner, who has a duty to provide its employees a safe workplace,[102] and duties to those come on to the land,[103] owes no duty to the wife of an employee (who never came to the workplace) for household exposure to the asbestos.

Unlike the defendant in Price, however, Appellees were not Employers/Landowners who were just asbestos customers, but were manufacturers and sellers of asbestos products. There were no allegations that the defendant in Price made or sold an asbestos product, as there were as to Defendants below.[104]

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[102] Bryant v. Delmarva Power & Light Co., 1995 Del. Super. LEXIS 438, at *21 (Del. Super. Oct. 2, 1995).

[103] See Restatement (Second) of Torts, §§ 343,344.

[104] A44, Third Amended Complaint, ¶ 4 ("[Plaintiff] was exposed to asbestos and/or asbestos-containing products which were…manufactured, distributed, sold…by the defendants."); A45-46, ¶ 11 ("…[H&V and Herty]… [were]…engaged in the [] manufacturing, distribution, sales, …of asbestos and asbestos-containing products."); A48, ¶ 17 ("The defendants were negligent in conducting the above activities in that despite the fact [they] knew or should have known that asbestos exposure could result in... [injury]... they: (a) Chose to use asbestos materials…. (b) Chose not to adequately warn all the potential victims of asbestos including the Plaintiff's decedent as well as other users, bystanders, household members and members of the general public of the risks of asbestos…(d) Chose not to adequately package, distribute and use asbestos in a manner which would minimize the escape of asbestos fibers therefore adding to the exposure of the Plaintiff's decedent Dorothy Ramsey and others similarly situated…").

Appellant's allegations are not that H&V and Herty failed to warn Mr. or Mrs. Ramsey about a danger someone else created, but that H&V and Herty made and sold a defective product. It was defective, in part, because it had no warning.

As discussed in Price, Restatement (Second) of Torts § 284 (hereafter, "Restatement"), defining negligent conduct, distinguishes an act from a failure to do an act.

Delaware follows the Restatement (Second) of Torts and recognizes the distinction between misfeasance and nonfeasance in imposition of duties:

> In the case of misfeasance, the party who "does an affirmative act" owes a general duty to others "to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the [affirmative] act." But, in the case of nonfeasance, the party who "merely omits to act" owes no general duty to others unless "there is a special relation between the actor and the other which gives rise to the duty." Therefore, in a case involving misfeasance, the defendant's duty is automatic, whereas in a case involving nonfeasance, the defendant's duty arises only if there is a legally significant "special relationship" between the parties.[105]
>
> In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of act. The duties of one who ***merely omits to act*** are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.

Restatement § 302, cmt. a (emphasis added).

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[105] Price, 26 A.3d at 167 (internal citations omitted); see Robelen Piano Co. v. Di Fonzo, 169 A.2d 240, 244-45 (Del. 1961)(in close case what a reasonable person should have done under the circumstances must be decided by the jury).

Misfeasance, or active negligence, is the failure of a defendant to prevent harm to a plaintiff arising from a risk the defendant created. H&V and Herty did not merely omit to act, or fail to warn about a danger they had no hand in creating, which would constitute nonfeasance. They acted –made and sold asbestos – without warning those who could foreseeably be harmed. This is misfeasance as contemplated by the Restatement, not nonfeasance. See Restatement § 314, cmt. d ("The rule stated in this Section applies only where the peril in which the actor knows that the other is placed is *not due to any active force which is under the actor's control*.") (emphasis added) and cmt. e ("Since the actor is under no duty to aid or protect another who has fallen into peril *through no conduct of the actor*, it is immaterial that his failure to do so is due to a desire that the other shall be harmed.") (emphasis added); Restatement § 321(1) ("If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.").

H&V and Herty committed affirmative acts of making and releasing into the stream of commerce asbestos-containing products that a reasonable person should have recognized involved an unreasonable risk of causing the invasion of the interest of Dorothy Ramsey. They manufactured and supplied defective products because they contained no warning. They conducted their manufacturing and

supplying below the reasonable standard of care because they did not warn. They should have recognized that these asbestos-containing products, when used as reasonably foreseen, would release dangerous asbestos fibers that would settle on the clothes of workers using the products or around the products when used, and be breathed by those handling the clothes or around the clothes when handled in the workers' home. These acts were active, not passive; misfeasance, not nonfeasance. Since these acts were misfeasance, Defendant's duty to others is automatic.[106]

The distinction between misfeasance and nonfeasance has been thus explained:

> If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward…[]. So the surgeon who operates without pay, is liable though his negligence is in the omission to sterilize his instruments…[]; the engineer, though his fault is in the failure to shut off steam….[]; the maker of automobiles, at the suit of some one other than the buyer, though his negligence is merely in inadequate inspection…[]. The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good…[].
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> H. R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898

(N.Y. 1928) (citations omitted).

[106] See Price, 26 A.3d at 167; see Pamela L. v. Farmer, 112 Cal. App. 3d 206, 209-10 (Cal. Ct. App. 1980) (where Defendant through her own actions made Plaintiff's position worse or created risk of harm from third person this is not nonfeasance but misfeasance judged by the standard of ordinary care).

Professor Keeton notes that the difference between misfeasance and nonfeasance is not merely an issue of action versus inaction, and he lists examples of *omissions* that have always been understood to constitute *misfeasance*:

> It is clear that it is not always a matter of action or inaction as to the particular act or omission which has caused the plaintiff's damage. *Failure* to blow a whistle [i.e., a failure to warn] or to shut off steam, although in itself inaction, is readily treated as negligent operation of a train, *which is affirmative misconduct*; an *omission* to repair a gas pipe is regarded as negligent distribution of gas; and *failure* to supply heat for a building can easily become mismanagement of a boiler.

W. Page Keeton, Prosser And Keeton on the Law of Torts § 56, at 374 (5th ed. 1984) (emphasis added) (Ex. E). Thus, the true difference is not action versus omission. Rather the difference is that in "'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse . . . ." Id. at 373. This understanding that misfeasance encompasses omissions and "failures" that nevertheless "created a new risk of harm to the plaintiff," id., is a matter of basic hornbook law.

The Court must consider the character of the conduct at issue and whether the Defendant created the dangerous condition. Where the Defendant creates the dangerous condition, "the law imposes a duty upon the person creating the hazard to protect against reasonably foreseeable danger and events which may reasonably be expected to occur. Id. 'One breaches that duty by not protecting against an

event that a reasonably prudent [person] would protect against.' Id."[107] In Delmarva Power & Light Co. v. Burrows[108], this Court approved the trial court's instructions that the Defendant power company was negligent for failing to insulate its wires and failing to warn about the dangers associated with them.[109] In Pipher v. Parsell, this Court found that the driver of a car had a duty to passengers and members of the public for failure to prevent foreseeable interference from his passenger.[110] In Figgs v. Bellevue Holding Co., the Superior Court found that a contractor could be negligent for failing to construct a temporary handrail on a staircase it had performed construction work on.[111] Under the court below's standard, these "failures" would be nonfeasance and so no duty would be imposed unless the injured party was in a special relationship with the defendant. This Court should not look at a "failure to warn" in a vacuum but recognize that when one acts one must do so without creating a dangerous condition, and this means providing a warning in circumstances where it is necessary to prevent harm by one's actions.

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[107] Bryant, 1995 Del. Super. LEXIS 438, at *39 (citing Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 718 (Del. 1981)).
[108] 435 A.2d 716, 720 (Del. 1981).
[109] Id. at 719, 720.
[110] 930 A.2d 890, 893 (Del. 2007).
[111] 652 A.2d 1084, 1092-93 (Del. Super. 1994).

3. H&V and Herty Knew or Should Have Known Asbestos was Dangerous to Household Members of Those Who Worked With It. The starting point for the analysis of duty in cases of misfeasance is whether Defendants knew or should have known that if they made and sold asbestos products, but did not warn those who worked with their product, family members of those workers could be harmed. As set forth in Statement of Facts, D.**,** Defendants knew or should have known that spouses and family members of those who worked with Defendant's products were those that could foreseeably be harmed by their failure to warn workers of the dangers of asbestos dust.

Appellees/Defendants below did not argue that Mrs. Ramsey was an unforeseeable victim, either by her status as a household member of a person who worked with their products, nor as to the type of disease she contracted from being exposed to their products. Defendants did not argue, or set forth evidence, that they did not know or should not have known of the dangers of asbestos, or the fact that families of workers exposed to asbestos could be harmed by asbestos transported to them on the workers' clothing.[112] The Court below did not find that Mrs. Ramsey was not a foreseeable victim, or that the Defendants did not know or

[112] Appellant did set forth evidence of foreseeability below, at A209-210, A341-357, A948-964; A941:1-4, A942:5-17; A787:20-A788:2, A788:20-A790:25, A791:4-A797:5.

should not know of the dangers their products posed to her, only that the Appellees' conduct was nonfeasance.

4. Restatement 388/389 – Manufacturer/Supplier's Duty to Warn.

H&V and Herty, as manufacturers/suppliers of asbestos-containing products owed a duty to warn as set forth in Restatement §§ 388 and 389.[113] A "duty to warn arises when a manufacturer and distributor of a product knows, or as a reasonably prudent manufacturer and distributor should know, (when) it involves dangers to users, places that product on the market."[114] Restate. § 388, cmt. d[115] discusses both the basis for liability of a manufacturer/supplier like H&V and Herty, the rule as stated in Restate. 388 or supplying a dangerous product without warning, as well as those persons to whom a manufacturer/supplier is subject to liability to, third persons whom it should expect to be endangered by its use, like Dorothy Ramsey. In In re Asbestos Litig. (Colgain)[116] this Court held that a manufacturer's duty to warn is dependent on whether it had or should have had knowledge of the hazards

[113] Although Restatement §§ 388 and 389 refer to "suppliers" these liabilities apply to manufacturers as well. Restatement § 394.

[114] Graham v. Pittsburgh Corning Corp, 593 A.2d 567, 568 (Del. Super. 1990).

[115] "One supplying a chattel to be used or dealt with by others is subject to liability under the rule stated in this Section, *not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use*." (emphasis added).

[116] 799 A.2d 1151, 1152 (Del. 2002). This case also involved exposure at Haveg.

associated with its product, citing Graham v. Pittsburgh Corning[117] and In re Asbestos Litig.(Mergenthaler).[118]

> Even if a product is not defective, it still may be found defective if a manufacturer fails to fulfill its duty to warn. In Re Asbestos Litigation (Mergenthaler), Del. Super., 542 A.2d 1205, 1208 (1986); Wilhelm v. Globe Solvent Co., Del. Super., 373 A.2d 218, 223 (1977), aff'd in part, rev'd in part, Del. Supr., 411 A.2d 611 (1979) ("Wilhelm"). The duty to warn arises when a manufacturer places into the stream of commerce a product which, to his knowledge, involves dangers to users. Wilhelm, supra.[119]

In Mergenthaler, the Superior Court found there was an issue of fact as to whether Appellee Herty owed a duty to warn to those exposed to the asbestos products it supplied.[120]

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[117] In re Asbestos Litig. (Colgain), 799 A.2d at 1152 n.3 (citing Graham, 593 A.2d at 568).

[118] In re Asbestos Litig. (Colgain), 799 A.2d. at 1152 n. 2 (citing, inter alia, In re Asbestos Litig. (Mergenthaler), 542 A.2d 1205,1208 (Del. Super. 1986)).

[119] Betts v. Robertshaw Controls Co.,1992 Del. Super. LEXIS 528, at *6-7 (Del. Super. Dec. 28, 1992).

[120] In re Asbestos Litig. (Mergenthaler), 542 A.2d at 1213. In Mergenthaler, Herty raised the "sophisticated purchaser" defense to its duty to warn. Id. at 1208-1213. The Superior Court found that Herty received warnings from Haveg which may have put them on notice that Haveg's employees were not being adequately warned. Id. at 1213. Since this decision, the Superior Court has clarified that it is not appropriate to introduce evidence regarding a purchaser's knowledge of the dangers of asbestos where there is no evidence the supplier relied on this knowledge and was aware of it, for the purpose of either sophisticated purchaser or superseding cause defenses. Nutt v. GAF Corp.,C.A.80C-FE-8, Taylor J. (Del. Super. April 22, 1987) (ORDER) (Ex. F). The Superior Court has consistently so held. Nutt v. A.C.& S., Inc., 1986 Del. Super. LEXIS 1461, at *1 (Del. Super. Dec. 9, 1986); Lee v. A. C. & S. Co., 1987 Del. Super. LEXIS 1056, at *3-4 (Del. Super. Mar. 6, 1987). H&V and Herty did not raise the sophisticated purchaser

Under Dawson v. Weil-McLain,[121] and Wilkerson v. Am. Honda Motor Co.,[122] when a supplier of an asbestos-containing product has a reason to know that the intended use of that product is or is likely to be dangerous, it has a duty to warn of said danger.

5. Restatement 395- Manufacturer's Duty to Exercise Due Care. A manufacturer must exercise due care in the manufacture of its products, which would include warning if the manufacturer was aware of the possibility that the product was dangerous.[123] In Massey-Ferguson, Inc. v. Wells, this Court found that there was sufficient evidence of a manufacturer's negligence for failing to provide adequate warnings: "the jury could have found that Massey failed to provide adequate warnings that use of the safety stand device alone was not sufficient support to maintain the header in an up-raised position." Massey-Ferguson, Inc., 383 A.2d at 644.

6. A Duty was Owed Because Dorothy Ramsey's Harm was a Foreseeable Result of Appellees' Conduct. Appellees, as affirmative actors, had

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defense below, or submit any evidence that they relied on Haveg's alleged knowledge regarding the dangers of asbestos.

[121] A983-A985, C.A. No. 00C-12-177 (Del. Super. July 20, 2005) (TRANSCRIPT), pages 129:1-138:8.

[122] 2008 Del. Super. LEXIS 26, *3-7 (Del. Super. Jan. 17, 2008).

[123] Massey-Ferguson, Inc. v. Wells, 383 A.2d 640, 642 (Del. 1978) (citing Restatement §§ 395 and 398); Id. at 644; see Graham, 593 A.2d at 567, 570-71; A904-A906, Disclosure of Robert Cunitz; A907-A913, Affidavit of Robert J. Cunitz 3/12/17.

a duty under Delaware law to protect others from reasonably foreseeable harmful events.[124] A tortfeasor breaches its duty to others "by not protecting against an event that a reasonably prudent man would protect against."[125] Thus, "[i]n negligence actions the question is whether the risk of particular consequences is 'sufficiently great to lead a reasonable man...to anticipate them, and to guard against them'."[126]

For acts of misfeasance, like those of H&V and Herty, foreseeability is key. The range of persons whom the negligent actor should reasonably expect to be endangered by its negligent acts, and the range of risk created from its negligent acts that should be reasonably anticipated, is broad.[127] This broad duty is demonstrated by compelling Delaware cases such as the seminal case of Delmarva Power & Light Co. v. Burrows, in which this Court upheld a jury charge requiring a company to do "everything that gives reasonable promise of preserving life ...

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[124] Sirmans v. Penn, 588 A.2d 1103, 1107 (Del. 1991).
[125] Id.
[126] Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 719 (Del. 1981).
[127] See, e.g., Restatement § 395, comments i. ("The words 'those whom [a manufacturer] should expect to be endangered by its probable use' may likewise include a large group of persons who have no connection with the ownership or use of the chattel itself…") and k. ("The manufacturer may, however, reasonably anticipate other uses than the one for which the chattel is primarily intended. The maker of a chair, for example, may reasonably expect that someone will stand on it…"), and Restatement § 388, comment d. ("One supplying a chattel to be used or dealt with by others is subject to liability under the rule stated in this Section, not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use.").

regardless of difficulty or expense."[128] This did not create a "limitless duty" because the duty is limited by reasonableness.[129]

In the words of this Court, "[a]n event is foreseeable if a defendant should have recognized the risk of injury under the circumstances. It is irrelevant whether the particular circumstances were foreseeable." Duphily v. Del. Elec. Coop., Inc., 662 A.2d 821, 830 (Del. 1995) (emphasis added). As the Superior Court has explained, reasonable foreseeability "does not mean that the negligent party ought reasonably to have foreseen a particular consequence or a precise form of injury, or a particular manner of occurrence, or that it would occur to a particular person." Pitts v. Del. Elec. Coop., 1993 Del. Super. LEXIS 50, at *4 (Del. Super.Jan. 29, 1993). The broad range of foreseeability is also seen in cases such as Robbins v. William H. Porter, Inc.[130]

Dorothy Ramsey was well within the zone of danger that should reasonably have been anticipated by this affirmatively acting Defendant. The record is that the risk to household members exposed to asbestos by individuals such as worker in asbestos manufacturing plants is very clear. H&V and Herty knew, or should

[128] 435 A.2d 716, 718-19 (Del. 1981).
[129] Id. at 719-720.
[130] 2006 Del. Super. LEXIS 201, *3-4 (Del. Super. April 19, 2006) (duty of vehicle owner to protect against theft predicated on foreseeability that stolen cars will be involved in accidents).

have known, asbestos was dangerous.[131] Dr. Castleman will testify that the earliest writing specifically commenting on the ill health among families of asbestos workers was 1897[132] and "[t]he hazards of asbestos exposure to families of the workers, in particular cancer, was scientifically knowable long before it was studied directly. . . ."[133] That members of households of workers exposed to asbestos were getting sick was directly reported in the mid 1960's.[134] OSHA was enacted in June 1972 which provided regulations to prevent asbestos from traveling on workers' clothing to nonemployees.[135] By then, and for many years prior to then, it was foreseeable that household members could become injured from asbestos. See Shewbrooks v. A. C. & S. Co., 1987 Del. Super. LEXIS 1397, at *7-8 (Del. Super. Dec. 4, 1987) (rejecting Defendant's contention that it was not foreseeable in the 1940's that the spouse of an asbestos worker could be harmed, based on Dr. Castleman's book); Kesner, 384 P.3d at 292-93 (citing same sources as Dr. Castleman does in his affidavit).[136] This is well before December 1972 when H&V manufactured and shipped three separate shipments of asbestos paper

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[131] Statement of Facts, D.
[132] A958, Affidavit of Barry I. Castleman, Sc.D. 8/18/15.
[133] Id. at A960.
[134] Id. at A961.
[135] OSHA, Standard for Exposure to Asbestos Dust, 37 Fed.Reg. 11318, 11320-21 (June 7, 1972) (OSHA Standard), A960, Kesner v. Superior Court, 384 P.3d 283, 292 (Cal. 2016).
[136] See Stegemoller v. ACandS, Inc., 767 N.E.2d 974, 976 (Ind. 2002) ("Here, the reasonably expected use of asbestos products encompasses the cleansing of asbestos residue from one's person and clothing at the end of the workday.").

without any warning, and long before Herty's sale of asbestos paper from 1976-1980.

Delaware's version of article 2 of the UCC adopted a broad definition of who could be a plaintiff, i.e., any natural person who could be affected. See 6 Del. C. § 2-318. Therefore the public policy of Delaware is to extend the duty of care broadly, to protect anyone who is injured by a product.

Given the magnitude of the risk and the gravity of the harm to persons in the position of Dorothy Ramsey, H&V and Herty, as manufacturers/sellers of asbestos containing products, had a duty to take all reasonable precautions to protect Dorothy Ramsey and persons like her against an event, serious asbestos-related harm, i.e., asbestos-related lung cancer, that a reasonably prudent man would protect against.[137]

Considerations of foreseeability, if disputed, are for the jury to determine. Pipher, 930 A.2d at 892; Duphily, 662 A.2d at 831; Reynolds v. Blue Hen, 1995 Del. Super. LEXIS 323, at *10 (Del. Super. June 19, 1995); Vadala v. Henkels & McCoy, Inc., 397 A.2d 1381, 1383 (Del. Super. 1979).

[137] See Sirmans v. Penn, 588 A.2d 1103, 1107-1108 (Del. 1991) (explaining that "one's duty encompasses protecting against reasonably foreseeable events" and that the test for foreseeability is not based on scientific or quantitative measures, but depends on what is reasonable, measured by both the degree of risk and seriousness of consequences); Restatement § 388, comment n (the care required to be exercised by a manufacturer/supplier in warning varies with the degree of risk and harm involved).

Appellees below did not argue below, or submit any evidence below, that Mrs. Ramsey was an unforeseeable victim. The court below did not make a determination that she was an unforeseeable victim. On the evidence submitted below, it is undisputed that she was a foreseeable victim of Appellees' manufacturing and selling asbestos products without warning.

7. Because Manufacturers and Suppliers Owe a Duty of Care to Those Who Could Be Foreseeably Harmed By Their Products, Their Conduct is Misfeasance. The case law and Restatement sections discussed above clearly demonstrate that manufacturers and suppliers owe a duty of care to warn persons who could be foreseeably harmed by their products. The court below recognized this: "Delaware courts have consistently held that a manufacturer owes a duty of care to warn reasonably foreseeable plaintiffs of an unreasonable risk of harm associated with its product." Ramsey, 2017 Del. Super. LEXIS 53, at *8. Therefore, if Mrs. Ramsey was a foreseeable victim of harm from H&V and Herty's asbestos paper, she was owed a duty by H&V and Herty, who supplied toxic asbestos products without warning.

Because manufacturers and suppliers owe a duty of care to foreseeable victims of injuries from their products, their conduct of manufacturing and supplying without warning is misfeasance. If this conduct was nonfeasance, then the manufacturers and suppliers in the above-referenced case law and Restatement

sections would not owe a duty to anyone except those with whom they have a special relationship.[138]

Plaintiffs in asbestos cases – or any product liability case - do not have a special relationship with the manufacturer or seller. No one other than the customer who orders the product has any relationship to a product manufacturer/seller. That is why privity and special relationship are not required in product liability law. In Gorman v. Murphy Diesel Co., the Superior Court explained that privity is not required where the manufacturer/supplier sells or delivers a dangerous product without warning: "What is called the third exception to the rule is stated to be that one who sells or delivers an article which he knows to be imminently dangerous to life or limb of another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not." 29 A.2d 145, 147 (Del. Super. 1942). This concept of who is owed a duty in Delaware product liability law – those who could be foreseeably harmed, not those in privity or special relationship with the manufacturer/supplier- has been consistently followed.[139] The reason plaintiffs in asbestos cases, or any other

[138] Price, 26 A.3d at 167; Restatement § 302, comment a.
[139] See e.g. Barni v. Kutner, 76 A.2d 801, 806 (Del. Super. 1950); Shewbrooks v. A. C. & S. Co., 1987 Del. Super. LEXIS 1397, at *6-7 (Del. Super. Dec. 4, 1987); Graham v. Pittsburgh Corning Corp., 593 A.2d 567, 570 (Del. Super. 1990)

product liability case, are owed a duty is because they are foreseeable victims of the Defendant's misfeasance, which is making and supplying an asbestos product without warning and releasing it into the stream of commerce. In other words, the Defendant manufactures and supplies a defective product or manufactures and sells below the standard of care of a reasonable manufacturer/seller.[140] The conduct of the manufacturer/supplier, that of misfeasance, does not change because this is a household asbestos case.

The only difference in this case from the cases the court below cited at Ramsey, 2017 Del. Super. LEXIS 53, at *8-10 is that the victim here was exposed to the asbestos in her household, not while using or working with or around the asbestos product. The person who used and worked with the product, Mr. Ramsey, brought the asbestos dust home on his clothes and exposed her. This is no different than where a bystander is exposed, or a person is environmentally exposed. Thus, in order to find this action by Robert Ramsey mattered in the duty analysis, it would have to be determined that it was unforeseeable, as a matter of law, that a person exposed to asbestos dust through working with the product could transport it to his family members. The court below made no such finding, and as

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(discussing history of rejection of privity in Delaware product liability law and evolution to reasonable manufacturer standard of to determine liability).

[140] In re Asbestos Litig. (Mergenthaler), 542 A.2d at 1208 ("The law is clear that a product, even though 'virtually faultless in design, material, and workmanship, may nevertheless be deemed defective where the manufacturer . . . fails to discharge a duty to warn.'") (citations omitted).

described above in Arg. I.C.6, could and should not make such a determination as a matter of law, on this record.

H&V and Herty did not argue below, nor could it be shown from the evidence in the record, that Robert Ramsey's going home after being exposed to Herty and H&V's asbestos without washing his clothes was a superseding cause that would break the chain between H&V and Herty's negligence and Mrs. Ramsey's exposure. See Duphily v. Del. Elec. Coop., Inc., 662 A.2d 821, 829 (Del. 1995) (citations omitted) (explaining that a superseding cause is an intervening act which is not foreseeable to the tortfeasor); Restatement (Second) of Torts, § 302, comment d.; see Kesner, 384 P.3d at 294.[141] The unrebutted evidence below is that it was foreseeable.[142]

The court below appeared to suggest that in Riedel and Price this Court determined that the Employer/Landowner's conduct in using asbestos in its operations was misfeasance toward the employee on the worksite but nonfeasance

[141] "In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct…[] The relevant intervening conduct here—that workers returned home at the end of the day and, without adequate precautions, would bring asbestos dust home—is entirely foreseeable."

[142] See Castleman Aff. (A958-A961) for proposition that dangers of household asbestos exposure by workers transporting it to members of their were known by well before the time Plaintiff here was exposed; OSHA, Standard for Exposure to Asbestos Dust, 37 Fed.Reg. 11318, 11320-21 (June 7, 1972) (OSHA Standard).

as to the employee's spouse.[143] It appeared that the Court used this distinction to explain why a manufacturer or seller would have a duty to warn foreseeable plaintiffs generally,[144] but not in an asbestos household exposure case, that is, that Defendant's conduct of manufacturing and selling without warning was misfeasance as to the employee, but nonfeasance as to the employee's spouse, Mrs. Ramsey. However, such a distinction cannot be maintained. This Court held that the Employer/Landowner's conduct in Riedel and Price was as to both the employee and the employee's spouse was purely nonfeasance: "…in Riedel…we did explain unequivocally that the facts underlying Mrs. Riedel's claim constituted nonfeasance." and "…because nonfeasance and misfeasance describe substantively different conduct, nonfeasance cannot constitute misfeasance."[145] Thus, conduct of manufacturing and supplying asbestos without warning cannot be misfeasance as to some and nonfeasance as to others.

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[143] See Ramsey, 2017 Del. Super. LEXIS 53, at *11 (discussing Price and Riedel) ("The employer's alleged failure to warn or make safe a dangerous condition on its property constituted alleged misfeasance towards its employees—those who physically entered onto the employer's property. However, that same logic did not extend to the imposition of a duty on the employer to the employee's spouse, who neither entered onto, nor lived next to, the employer's facility. Instead, the employer's alleged "conduct" towards the employee's spouse constituted claims of nonfeasance.").

[144] See Id. at *8 ("Delaware courts have consistently held that a manufacturer owes a duty of care to warn reasonably foreseeable plaintiffs of an unreasonable risk of harm associated with its product.").

[145] Price, 26 A.3d at 168.

During the Motion for Reargument hearing, the court below explained it had ruled below that the conduct of manufacturing and selling without warning was purely nonfeasance.[146] However, such a ruling is in conflict with decades of Delaware law, this Court's prior precedent, the Superior Court's prior holdings, and Restatement §§ 388,389, and 395.[147] The conduct is misfeasance.

8. The Court Below's Holding Leaves Delaware Residents Injured by Products Without a Remedy. If this Court affirms the court below and holds that manufacturing and selling a product without warning is nonfeasance, what is to stop any manufacturer or seller of dangerous products in future cases from pointing to the decision, and arguing that because this conduct is nonfeasance, they have no duty to those who were foreseeably injured by their unsafe defective product. Delaware residents who are injured by unsafe defective products in Delaware are left without a remedy if the injury manifests more than four years after the sale of the products.[148] There is no strict liability for injuries resulting from the sale of products in Delaware.[149] The only remedy Delaware plaintiffs have if they do not receive notice of the injuries until four or more years after sale is the common law negligence claim. Four years may work for some products, but not for products

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[146] A640:9-A641:1.
[147] Argument I.C.4,5, above.
[148] 6 Del. C. § 2-725; Dalton v. Ford Motor Co., 2002 Del. Super. LEXIS 132, *12-16 (Del. Super. Feb. 28, 2002).
[149] Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968, 980 (Del. 1980).

like asbestos, which are time bombs whose harmful effects do not manifest until decades after sale. This decision serves as the basis to eliminate common law products liability in Delaware – for defective home heating units, cars, and any other products. It serves as the basis for complete elimination of asbestos litigation for Delaware residents or those exposed to asbestos in Delaware.[150]

9. Household Cases Tried in Delaware. Household exposure cases have been tried in Superior Court since 1989. In Wilson v. A.C.&S., Inc., Pauline Kline alleged that her asbestos disease was caused by failure to warn by Philip Carey (now known as Celotex) due to the Philip Carey's asbestos brought home on her husband's clothing. A verdict was then entered on behalf of Mrs. Kline on the basis of failure to warn.[151]

In May of 1990, the Kotowski case, involving one insulator's spouse Barbara Cimorosi who developed an asbestos related disease as a result of washing her husband's asbestos laden clothes, went to trial.[152] The jury found the defendant

[150] It should be noted that the vast majority of asbestos cases filed in Delaware are by non-Delaware residents who were not exposed in Delaware and for whom Delaware substantive law does not apply. So the effect would be that Delaware residents have no remedy for their injuries caused by asbestos manufacturers and sellers, but out of state plaintiffs would continue to be permitted to litigate in Delaware courts.

[151] A1000:7-11, A1001:17-A1002:17, A1003:1-2,12-19, A1004:5-6, A1006:11-22, Wilson v. A.C.&S., Inc., C.A. No. 85C-FE-10, Taylor, J. (Del. Super. June 29, 1989) (TRANSCRIPT).

[152] A1008-A1010, Kotowski v. AC&S Co., Inc., C.A. No. 86C-06-050 (Del. Super.).

manufacturer had breached its duty to warn and this breach was a proximate cause of her disease.

In the Pusey Trial Group, C.A. No. 90C-03-10, the case of Mabel MacMurry, a similar household claim against an asbestos manufacturer went to verdict in favor of the Defendant.[153] A great number of household cases have arisen from Haveg.[154]

As is demonstrated by these cases which have gone to trial a jury is capable of being, and should be, the determiner of whether manufacturers and sellers breached their duty to plaintiffs in these cases.

10. In the Alternative, Price was Wrong and Should be Revisited.

Should the Court hold that under Price Appellant here cannot state a claim of misfeasance, then for the reasons explained by Justice Berger in her dissent in Price, 26 A.3d at 170-73, Price was wrongly decided and should be revisited. Riedel never actually decided whether the Plaintiff's complaint could state a claim of misfeasance, only that Plaintiff had not fairly raised it below.[155] Justice Berger's dissent is correct and recognizes that release of asbestos, without warning or taking other precautions to prevent that asbestos from exposing employees and

[153] A1012-A1015; A1017-A1018, In re: Asbestos Litig. (Pusey Trial Group), C.A. No. 90-MR-18, Taylor, J. (Del. Super. September 21, 1993) and (Del. Super. October 27, 1993) (respectively) (TRANSCRIPTS).
[154] A1020-A1022.
[155] Price, 26 A.3d at 170-71 (Berger, J, dissenting); Riedel, 968 A.2d at 18-19.

their spouses, is misfeasance,[156] particularly when OSHA dictated that employers implement procedures to prevent asbestos from traveling from the worksite to nonemployees.[157]

[156] Price, 26 A.3d at 171 (Berger, J., dissenting).
[157] Rochon v. Saberhagen Holdings, Inc., 2007 Wash. App. LEXIS 2392, at *7-8 (Wash. Ct. App. Aug. 13, 2007); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 364 (Tenn. 2008); Kesner v. Superior Court, 384 P.3d 283, 292 (Ca. 2016).

CONCLUSION

Wherefore, Plaintiff requests that this Court reverse the Superior Court's decisions on summary judgment.

Respectfully submitted,

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