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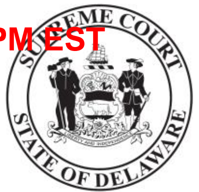

# IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

## APPELLEE GEORGIA SOUTHERN UNIVERSITY ADVANCED DEVELOPMENT CENTER'S ANSWERING BRIEF ON APPEAL

**MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C.**

Megan T. Mantzavinos, Esquire (ID No. 3802)
Eileen M. Ford, Esquire (ID No. 2870)
300 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 658-6538
*Attorneys for Appellee/Defendant Below Georgia Southern University Advanced Development Center*

Date: December 13, 2017

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## NATURE AND STAGE OF THE PROCEEDINGS

On January 31, 2014, Dorothy Ramsey commenced this action in the Superior Court for the State of Delaware against fifteen (15) Defendants, including Georgia Southern University Advanced Development Center ("Herty").[1] Subsequently, two amended complaints were filed. The Second Amended Complaint substituted Elizabeth Ramsey as the Personal Representative of the Estate of Dorothy Ramsey ("Plaintiff"). The Third Amended Complaint was filed on January 4, 2017, one and a half years after Herty filed its motion for summary judgment.[2] It clarifies Dorothy Ramsey as "Plaintiff Decedent."[2]

Plaintiff categorizes this lawsuit as "Household Exposure," alleging Mrs. Ramsey was exposed to "asbestos dust brought home by her husband on his person, and while washing his clothes."[3] Plaintiff alleges negligence, strict liability, willful and wanton conduct, material misrepresentation and conspiracy.[4] Mrs. Ramsey was deposed. Prior witness testimony was also relied upon in this litigation.

This matter was previously scheduled for trial in April of 2016. Herty filed

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[1] A-28−A-40.

[2] (A-41−A-53.) Herty filed its motion for summary judgment on October 8, 2015. (A-54−A-67.) Briefing on Herty's motion for summary judgment closed on November 12, 2015. (A-469−A-478.)

[2] A-41−A-53.

[3] A-28−A-40, ¶¶ 4, 10-14; A-41−A-53, ¶¶ 4, 10-14.

[4] A-41−A-53.

its *Motion for Summary Judgment* ("Motion") on October 8, 2015.[5] Plaintiff filed her opposition to Herty's motion for summary judgment on October 30, 2015.[6] Plaintiff did not oppose Herty's motion for summary judgment on strict liability and conspiracy.[7] Herty filed its Reply Memorandum on November 12, 2015.[8] Oral argument on Herty's motion for summary judgment was held on December 8, 2016.[9] The Superior Court granted Herty's Motion on February 2, 2017.[10]

Plaintiff filed a Rule 59(e) motion for reargument on Herty's Motion on February 9, 2017.[11] Herty filed its opposition on February 16, 2017.[12] Oral argument on Plaintiff's motion for reargument was held on May 8, 2017.[13] The Court denied Plaintiff's motion for reargument on May 11, 2017.[14]

Hollingsworth & Vose filed a separate motion for summary judgment, which

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[5] A-54−A-268.
[6] A-269−A-468.
[7] (A-269−A-283; A-469−A-478.) While Herty recognizes that it mistakenly identified the Count numbers, Plaintiff did not oppose these arguments.
[8] A-469−A-515.
[9] A-516−A-543.
[10] Memorandum Opinion granting *Herty's Motion for Summary Judgment*, Appellant's Opening Br., Exhibit A.
[11] A-516−A-626.
[12] A-627−A-633; Herty's Exhibits to its *Response in Opposition to Plaintiff's Rule 59(e) Motion for Re-Argument and/or Reconsideration of February 2, 2017 Order Granting Herty's Motion for Summary Judgment*, Herty's Appendix, B000001 - B000036. (Tr. 60221645.)
[13] A-634−A-669.
[14] Memorandum Opinion denying *Plaintiff's Rule 59(e) Motion for Reargument and/or Reconsideration of February 2, 2017 Order Granting Defendant Herty's Motion for Summary Judgment*, Appellant Opening Br., Exhibit C.

was granted following oral argument.[15] Plaintiff voluntarily dismissed the remaining Defendant.[16] This appealed followed on August 1, 2017.[17] This is Appellee Herty's *Answering Brief on Appeal*.

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[15] A-670−A-1106.
[16] Pl.'s Appellant Opening Br., Exhibit D.
[17] D.I. 1, Tr. No. 60920485.

## SUMMARY OF THE ARGUMENT

1. Denied. The trial court correctly found that Herty owed no duty to Mrs. Ramsey. It is well settled Delaware law that the initial threshold question of duty in any negligence case is the relationship between the parties.[18] This Court previously addressed the issue of negligence and the duty owed in take-home asbestos exposure matters. This Court held that Delaware does not impose a duty on an employer, to a third-party, non-employee, who was allegedly exposed to asbestos from contact with, and laundering of, an employee's alleged asbestos-laden clothing.[19] This holding was affirmed three years later when this Court reiterated that, based upon the type of injured party, the alleged harm-causing conduct of nonfeasance, and the lack of special relationship, no duty was owed.[20] This Court need look no further than *Riedel II* and *Price* to extend the duty analysis to a manufacturer/supplier. Thereby, following Delaware's longstanding "duty/relationship" negligence requirement, and rejecting a "duty/foreseeability" negligence assessment.

No amount of characterization, overuse of terms, or exaggeration can change the nature of the underlying conduct that allegedly caused Mrs. Ramsey's injuries: (1) Herty failed to prevent asbestos fibers from arriving home on Mr. Ramsey's

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[18] *Riedel v. ICI Americas, Inc.*, 2007 Del. Super. LEXIS 413, *13 (Del. Super. 2007) (citation omitted) (*Riedel I*), *aff'd,* 968 A.2d 17 (Del. 2009).
[19] *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 18-19 (Del. 2009) ("*Riedel II*").
[20] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011).

clothing; and (2) Herty failed to warn Mrs. Ramsey of potential dangers of asbestos.[21] Foreseeability does not alter nonfeasance or the duty owed.[22] There is no relationship between Herty and Mrs. Ramsey. The lower court properly declined to find duty under a logical extension of *Riedel II* and *Price*. Any adoption of Plaintiff's theory would radically expand Delaware's duty requirement, creating a generic duty owed. Essentially, requiring Delaware to adopt the Restatement (Third) of Torts, previously rejected by this Court.[23] Plaintiff's theory skips straight to the duty of care/foreseeability element, *i.e.*, breach and causation. This free-for-all usurps the trial court's role as gatekeeper of the essential element: whether a duty is owed.

2. Herty is also entitled to summary judgment, as addressed in the briefing below, because Plaintiff has not satisfied Delaware's product nexus standard. The only occasion Mr. Ramsey identified significant dust was while he shaped and sanded non-Herty asbestos-containing briquettes. Mr. Ramsey testified to little to no dust from the spiraling of the paper, cutting the pipe, or threading the pipe. Mr. Ramsey worked directly with several manufacturers' asbestos-containing products.

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[21] Plaintiff adds new arguments on appeal, suggesting that the conduct at issue is now the alleged affirmative act of manufacturing a product and the lack of warning label on the product. Nothing in the pleadings asserts a product liability or breach of warranty claim. Rather, Plaintiff's pleadings proffer the same allegations asserted in *Riedel II* and *Price*.
[22] *Price*, 26 A.3d at 168-70.
[23] *Riedel II*, 968 A.2d at 20-21.

While Plaintiffs may be entitled to a presumption that their version of the facts were true for summary judgment purposes, the presumption cannot be based on "surmise, speculation, conjecture or guess, or on imagination or supposition."[24] Mrs. Ramsey's alleged exposure to Herty is speculative.

[24] *In re Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *54 (Del. Super. May 31, 2007) ("*Helm*").

## STATEMENT OF THE FACTS

### I. HAVEG INDUSTRIES, INC. SEEKS OUT A SUPPLIER OF BLUE ASBESTOS PAPER FOR ITS INDUSTRIAL PRODUCTION OF CHEMTITE PIPE.

#### A. The Material for Chemtite Pipe.

Herty is a non-profit, federally tax-exempt trusteeship of the State of Georgia.[25] Herty was created as an opportunity to promote Georgia's pulp and paper industry, and worked directly with companies who desired to market product with the paper.[26]

"Haveg Industries, Inc. (hereinafter 'Haveg') is a manufacturer of industrial products."[27] It produced several asbestos-containing products, including asbestos cement, plastics imbedded with raw asbestos and phenol formaldehyde, and chemical tanks and pipes.[28] Haveg purchased the manufacturing process of Chemtite pipe around 1971, which "required the use of raw blue crocidolite fibers and blue asbestos paper."[29] "In the mid-1970s, Haveg began to search for a reliable supplier of blue asbestos paper . . . . It is clear that Herty did not initiate contact."[30]

Haveg eventually contacted Herty to inquire into the capability of producing

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[25] *In re Asbestos Litig.: Mergenthaler*, 542 A.2d 1205, 1206 (Del. Super. 1986) ("*Mergenthaler I*").
[26] *Id*. at 1206.
[27] *Id*.
[28] *Id*.
[29] *Mergenthaler I*, 542 A.2d at 1206.
[30] *Id*. at 1207.

blue asbestos paper to Haveg-requested specifications.[31] "Haveg sent a sample of the required asbestos paper to Herty to duplicate."[32] Herty provided a sample to Haveg in January of 1976.[33] Thereafter, a contract was formed and Herty supplied Haveg its specified paper from April of 1976 to January of 1979.[34] Haveg initially supplied the raw asbestos to Herty.[35] "Following *Haveg's* directions, Herty shipped the blue asbestos paper in rolls wrapped in brown paper or polyethylene."[36] Haveg applied warnings to the paper upon receipt,[37] and eventually requested Herty apply the warnings prior to shipment.[38] Herty last shipped Haveg's specified chemical concentration paper to Haveg in January of 1979.[39]

Plaintiff can hardly claim that Haveg was unaware of the alleged hazards of asbestos: "The evidence is clear that Haveg management was well aware of asbestos dangers, as demonstrated by the existence of a booklet."[40] "[I]t is uncontroverted that management levels of Haveg were aware of the dangers."[41]

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[31] *Mergenthaler I*, 542 A.2d at 1207.
[32] *Id*. at 1207.
[33] *Id*.
[34] *Id*.
[35] *Mergenthaler I*, 542 A.2d at 1212.
[36] *Id*. at 1207 (emphasis added).
[37] This directly conflicts with Plaintiff's assertion. (Pl.'s Appellant Opening Br., pp. 10-12.) Regardless, the issue of knowledge is irrelevant for this appeal.
[38] *Mergenthaler I*, 542 A.2d at 1207.
[39] *Id*. at 1207.
[40] *Id*. at 1214.
[41] *Id*.

### B. <u>The Chemtite Pipe Manufacturing Process at Haveg.</u>

The only relevant time period for Herty is 1976 (first shipment to Haveg) to August of 1979 (Herty's last shipment to Haveg).[42] Several asbestos-containing products were manufactured at Haveg prior to and during this period. From 1974 to 1978, approximately fifty (50) to seventy-five (75) Johns Manville pure asbestos bags were poured into the brick-making machine on a daily basis in the tin shack.[43] Dust was created while pouring these bags and using the brick-making machine.[44] These asbestos briquettes were used to create fittings and couplings for the Chemtite pipe.[45]

Leon DeBrabander, Haveg's manager, identified numerous manufacturers' asbestos-containing products at Haveg during Mrs. Ramsey's alleged years of exposure.[46] Huxley continued to supply Haveg with asbestos for a short period of time after 1976.[47] Eugene O'Neill, Haveg's supervisor, identified a litany of other asbestos suppliers to Haveg.[48]

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[42] A-127:1−A-129:11, A-130:15−A-132:25; A-136:19-23.
[43] A-103:18-23, A-104:18-23, A-105:15-19; A-175-19:24−A-176-122:7.
[44] A-104:18-23, A-106:5−A-107:3.
[45] A-78:6-19−A-81:4-23.
[46] A-182:21−A185:21, A-186:19−A-188:10 (identifying both anthophyllite and crocidolite asbestos products).
[47] A-193:4-9.
[48] A-137:16−A-172:15.

"Chemtite pipe consists of blue asbestos paper matrix in a phenolic resin."[49] Haveg's Chemtite pipe process transferred the blue asbestos paper from the storage area to the tin shack and fed it into a saturator.[50] The saturator would cover the paper with a phenolic resin bath.[51] While the asbestos paper may release some fibers if it was cut prior to inserting it in the saturator, the "resin-impregnated paper is not capable of releasing fibers due to the binding effect of the partially cured resin."[52]

The resin-impregnated paper is then transported from the tin shack to the pipe mandrel machine area in main building where it is spirally wound.[53] Only when the resin was fully cured would the pipe be removed from the mandrel.[54] The pipe would then be cut to length and *may* be machined with a wet saw.[55]

## II. MR. RAMSEY'S ROLE AT HAVEG INDUSTRIES, INC.

Robert Ramsey worked at Haveg from 1968 to 1992.[56] He first worked in the shipping department in 1968,[57] until moving to the Minicell department in 1970, where he worked until 1973.[58] Mr. Ramsey was then assigned to the Chemtite

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[49] *Mergenthaler, et al. v. Asbestos Corp. of Am., Inc.*, 1988 Del. Super. LEXIS 392, at *4 (Del. Super. Oct. 25, 1988) ("*Mergenthaler II*").
[50] *Id*. at *4.
[51] *Id*. at *4.
[52] *Id*. at *4-5.
[53] *Mergenthaler II*, 1988 Del. Super. LEXIS 392, at *5.
[54] *Id*. at *5.
[55] *Id*. at *5.
[56] A-70:19-23; A-92:7-20.
[57] A-71:19-24.
[58] A-72:1-6.

department, working in that area from approximately 1973 to 1979.[59] There, he made pipes and pipe fittings.[60] Using *Manville* resin-soaked asbestos paper,[61] Mr. Ramsey placed the rolls of paper on the mandrels, which wound the paper into a pipe.[62] The resin-soaked paper was not dusty.[63] Mr. Ramsey then removed the pipe from the machine to place it into the oven for hardening.[64] While the pipe may have been dusty after it was formed, but prior to baking in the oven, Mr. Ramsey did not spend much time handling it.[65] In fact, he later explained that the environment was not dusty, but rather, "steamy."[66] After the baked pipe cooled, he may have cut the pipe to size, yet the cutting did not create much dust because he used a wet saw.[67] While threading the finished pipe created a little dust, Mr. Ramsey's spent very little time threading the pipe.[68] Thus, there was little dust working on the pipe.[69]

Rather, most of Mr. Ramsey's alleged asbestos dust exposure occurred while making and sanding pipe fittings from the asbestos briquettes.[70] Herty did not supply

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[59] A-72:7-19. Mr. Ramsey's work up and through the Chemtite process did not place him in the tin shack.
[60] A-73:21−A-74:4, A-77:16-22.
[61] A-73:24−A-74:18.
[62] A-95:6-17.
[63] A-95:18−A-96:2.
[64] A-96:21−A-97:15.
[65] *Id*.
[66] A-96:9-11.
[67] A-97:22−A-98:5.
[68] A-98:11−A-99:3; A-99:20-22.
[69] A-82:7-8.
[70] A-78:6-19, A-81:4-23.

the materials for the briquettes.[71] For this portion of his job in the Chemtite department, he would take the asbestos bricks, which were created in the tin shack building,[72] preheated them, placed them in a press to form the fittings, and then sanded and buffed them to remove the rough edges.[73] Sanding the fittings created plenty of dust.[74]

Haveg provided showers and locker rooms, but Mr. Ramsey never used them.[75] In 1979, Mr. Ramsey moved to the maintenance department until his retirement in 1992.[76] He never identified working with a Herty product.[77]

## III. MRS. RAMSEY'S ALLEGED EXPOSURE.

Dorothy Ramsey married Mr. Ramsey on August 16, 1947.[78] In 1955, they moved to 408 Centreville Road, which was approximately a mile from Haveg.[79] Mr. Ramsey wore his Haveg uniforms home,[80] never leaving them at Haveg at the laundry facility.[81] While Mrs. Ramsey recalled white dust on Mr. Ramsey's

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[71] A-103:18-23; A-104:18-23; A-105:15-19; *supra* n.44.
[72] A-84:19−A-85:1.
[73] A-78:6-19; *see also* A-94:23−A-95:3.
[74] A-100:3-16.
[75] A-90:19-23.
[76] A-72:14; A-92:7-20.
[77] A-74:13-18; A-75:11−A-76:7; A-82:16-23; A-83:10-20; A-93:2-5.
[78] A-110:7-9.
[79] A-111:16−112:12; A-120:13-16.
[80] A-113:4-15.
[81] A-113:16-18.

clothes,[82] Mr. Ramsey would shake out his clothes prior to placing them in the laundry.[83] Mrs. Ramsey separated the laundry, and would shake Mr. Ramsey's uniform prior to placing it in the automatic washing machine.[84] She did the laundry approximately twice a week in the basement.[85]

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[82] A-116:16-24.
[83] A-114:11-13; A-91:20-24; A-121:17-20, A-122:17-20.
[84] A-115:3-5, A-116:6-9; A-124:5-9.
[85] A-114:20-22, A-117:11-16; A-123:13-16.

## ARGUMENT

### I. THE SUPERIOR COURT PROPERLY RULED THAT GEORGIA SOUTHERN UNIVERSITY ADVANCED DEVELOPMENT CENTER DID NOT OWE DOROTHY RAMSEY A DUTY.

#### A. Question Presented

Whether Herty, who supplied asbestos paper to Haveg's specification and requirements, which was utilized in Haveg's industrial processing center for Chemtite pipe, owed a duty to a Haveg employee's family member, a non-user of the paper, after the paper was manipulated and altered from its original state?

#### B. Scope of Review

The Delaware Supreme Court reviews a trial court's ruling on a motion for summary judgment *de novo* on both facts and law.[86]

#### C. Merits of the Argument

"When confronted with a Motion for Summary Judgment, the party bearing the burden of proof at trial must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question."[87] An essential element of a negligence-based claim is whether the defendant owed the plaintiff a duty.[88] Plaintiff cites to *Delmarva Power & Light Co. v. Burrows* for the proposition that Herty automatically had a duty to act reasonably, and "do everything that gives

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[86] *Dabaldo v. URS Energy & Construction*, 85 A.3d 73, 77 (Del. 2014).
[87] *In re Asbestos Litig.: Colgain*, 799 A.2d at 1152.
[88] *Id*.

reasonable promise of preserving" ***Mrs. Ramsey's*** life.[89] Plaintiff's reliance on *Burrows* to hold Herty potentially liable in a household exposure matter is mistaken because in *Burrows*, the plaintiff was allegedly injured through direct contact with the product, making the distinction between misfeasance and nonfeasance irrelevant.[90] Where the injury-causing conduct is nonfeasance, no amount of semantics will hold a defendant liable for the plaintiff's injuries in a household exposure matter ***unless*** there is a special relationship.[91] There is no relationship between Herty, a supplier of the asbestos paper manufactured to Haveg specifications, and Mrs. Ramsey, a spouse of an employee of an employer-manufacturer. Consistent with this Court's rulings, Herty was entitled to summary judgment.

**1. The motion for summary judgment standard.**

The standard detailing the facts necessary to withstand summary judgment was provided in Herty's briefing below.[92] When evaluating a motion for summary judgment, a court must determine "whether there is evidence upon which a jury can ***properly*** proceed to find a verdict for the party producing it, upon whom the *onus* of

[89] *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981); Pl's. Appellant Opening Br., pp. 4, 23, 28.
[90] *Burrows*, 437 A.2d at 717, 719-20.
[91] *Price*, 26 A.3d at 168.
[92] A-58.

proof is imposed."[93] While the court must take "plausible inferences" in favor of the plaintiff, "[t]he presumption afforded the non-moving party in the summary judgment analysis is not absolute."[94] "[Plaintiffs] must present sufficient evidence from which a rational trier of fact could find in [their] favor."[95] "This Court will not draw unreasonable inferences in favor of the non-moving party."[96] A rational juror must find that the evidentiary burden was satisfied.[97] The judge is the gate-keeper.[98] "[I]f an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find in that party's favor, then summary judgment is appropriate."[99] "Where there is no precedent fact, there can be no inference . . . . Nor can an inference be based on surmise, speculation, conjecture or guess, or on imagination or supposition."[100]

**2. Plaintiff proffers premature issues in an attempt to circumvent the trial court and the trier-of-fact's roles.**

Plaintiff proffers irrelevant issues on appeal as a mechanism to try her case in front of this Court, usurping the role of the trial court and trier-of-fact. Specifically,

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[93] *Helm*, 2007 Del. Super. LEXIS 155, at *52 (quotation omitted) (citation omitted) (emphasis added).
[94] *Id*. at *53.
[95] *Smith v. Delaware State University*, 47 A.3d 472, 477 (Del. 2012).
[96] *Id*. at 477.
[97] *Cerberus Int'l, Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141, 1150 (Del 2002).
[98] *Id*. at 1151.
[99] *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192, at *5 (Del. 2012) (TABLE).
[100] *Helm*, 2007 Del. Super. LEXIS 155, at *54 (quotations omitted) (citation omitted).

whether Mrs. Ramsey was a foreseeable third party, the state of the art at the time of the incident, and Herty's knowledge of health hazards, have no bearing on the only issue on appeal: whether Herty owed Mrs. Ramsey a duty.[101] Contrary to Plaintiff's contentions, foreseeability is not the touchstone for determining whether a duty is owed. "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."[102] "[T]he foreseeability of an injury or risk is more properly considered an element of the breach of duty or proximate cause."[103] The foreseeability of harm may assist in defining the duty "once the court determines that a duty exists."[104]

The issue on appeal before this Court is whether a manufacturer/supplier of a raw material, specified and designed by an employer-manufacturer for an industrial process, has a duty to the employer-manufacturer's employee's family member after the raw material was altered from its original state. The only issue before the Court

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[101] *Sierra Club v. DNREC*, 919 A.2d 547, 555 n.11 (Del. Ch. 2006) (chastising the parties for failing to provide "the Court with helpful briefing on the legal issues raised in th[e] matter . . . [and providing] countless pages of briefing devoted to [an] irrelevant debate . . .").

[102] *Riedel I*, 2007 Del. Super. LEXIS 413, at *13.

[103] *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 376 (Tenn. 2008); *In re New York City Asbestos Litig.*, 840 N.E.2d 115, 119 (N.Y. Ct. App. 2005) ("Foreseeability should not be confused with duty.").

[104] *Riedel I*, 2007 Del. Super. LEXIS 413, at *24.

is whether a duty is owed. The trial court did not address the allegations of whether Mrs. Ramsey was a foreseeable third party, the state of the art at the time of the exposure, or Herty's alleged knowledge of health hazards of asbestos because it found no duty existed. Sections C and D to Plaintiff's "Statement of Facts" and Sections I.C.3 (State of the Art - Knowledge) and I.C.6 (Foreseeability) to Plaintiff's "Argument" in the Appellant Opening Brief are moot, and at the very least, are not ripe on appeal.[105] Plaintiff's assertions are premature.

**3. The evolution of take-home exposure.**

Herty proposes an inherent extension of take-home exposure by further limiting the scope of duty to manufacturers, especially those in Herty's position. While the underlying case law addresses landlord/employer duty to an employer's family member, it is evident that the type of defendant at issue played a limited role, if any, in determining the circumstances surrounding the "injury-causing conduct." Rather, these cases addressed the common law duty by evaluating the legal relationship between a plaintiff and a defendant. Jurisdictions that focus on the relationship between the parties extend the employer-employee duty analysis to manufacturers where the injured party is the family member of the buyer's employee

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[105] *Hall, et al. v. John S. Isaacs & Sons Farms, Inc.*, 163 A.2d 288, 293-94 (Del. 1960) (declining to rule on issues where the lower court reserved decision because it was premature). Depending upon this Court's ruling, these issues would be addressed before the trial court, should a trial ensue.

or user.[106] Plaintiff's duty/foreseeability contention relies on jurisdictions adopting foreseeability as the threshold duty requirement.[107] Plaintiff is misinformed: "The focus on the relationship first between plaintiff and defendant as the basis upon which a court will impose upon a defendant a legal duty to act with reasonable care towards plaintiff is not novel or unique in Delaware."[108]

Delaware decisions have clearly stated that an employer owes no duty to its employee's spouse.[109] In *In re Asbestos Litig.: Wooleyhan*, the Delaware Supreme Court was tasked with determining the extent of a landowner's liability for two types of independent contractors' employees' injuries: (1) asbestos exposure from working alongside another independent contractor's employee's asbestos work; and (2) those who worked directly with asbestos products.[110] The level of duty owed "depend[ed] upon the nature of the work performed by an employee of a contractor while on the landowner's premises."[111] The plaintiffs who worked directly with asbestos on the landowner's premises could not pursue litigation against the

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[106] *See, e.g.*, *CertainTeed Corp. v. Fletcher,* 794 S.E.2d 641 (GA 2016); *Palmer v. 999 Que, Inc.*, 874 N.W.2d 303 (N.D. 2016).
[107] *See, e.g.*, *Rochon v. Saberhagen Holdings, Inc.,* 2007 Wash. App. LEXIS 2392 (Wash. Ct. App. Aug. 13, 2007); *Satterfield,* 266 S.W.3d at 347; *Kesner v. Superior Court*, 384 P.3d 283 (Ca. 2016).
[108] *Riedel I*, 2007 Del. Super. LEXIS 413, at *13-14.
[109] *In re Asbestos Litig.: Wenke*, 2007 Del. Super. LEXIS 154, at *21 (Del. Super. May 31, 2007).
[110] *In re Asbestos Litig.: Wooleyhan*, 897 A.2d 767, at *1-2 (Del. 2006) (TABLE).
[111] *In re Asbestos Litig.: Wenke*, 2007 Del. Super. LEXIS 154, at *1-2.

landowner regardless of whether the plaintiff alleged active control or assumption of the duty by the landowners.[112] These decisions examined the relationship between the defendant and the plaintiff to determine the duty owed.

In evaluating the impact of *Wooleyhan* and *Wenke*, *Helm* explored the history of the common law duty, explaining that earlier cases focused on the "affirmative acts and misconduct of a party, otherwise known as misfeasance."[113] *Helm* acknowledged that it was "a far more difficult task to determine whether the requisite legal relationship exists to trigger a duty when the defendant simply fails to act."[114] Nonfeasance occurs where there is "a failure to take steps to protect others from harm."[115] In determining the duty owed, courts addressed the relationship between the parties.[116] Some courts require a "definite relation[ship] between the parties," often arising when the defendant gains economic "or other benefit from the plaintiff," for a duty to exist.[117]

In *Riedel II*, this Court addressed the duty required in a household asbestos exposure cases.[118] Mrs. Riedel alleged that the trial court erred because it "focus[ed]

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[112] *In re Asbestos Litig.: Wenke*, 2007 Del. Super LEXIS 154, at *17.
[113] *Helm*, 2007 Del. Super. LEXIS 155, at *78.
[114] *Id*.
[115] *Id*. (quotation omitted) (citation omitted).
[116] *Id*. at *78-79.
[117] *Helm*, 2007 Del. Super. LEXIS 155, at *78-79.
[118] *Riedel II*, 968 A.2d at 18-19.

on her relationship with ICI, rather than on the foreseeability of the harm."[119] Her appeal argued that ICI was negligent because it affirmatively "releas[ed] asbestos into the environment," *i.e.*, misfeasance.[120] While *Riedel II* barred Mrs. Riedel from arguing misfeasance, it nonetheless, refused to find that Mrs. Riedel, and ICI, her husband's employer, shared a legally significant relationship.[121] In determining what duty was owed, the Court declined to adopt the Restatement (Third) of Torts, indicating that to do so would "creat[e] a common law duty that directly contravenes the primacy of the legislative branch in resolving this question."[122] Under the Restatement (Second) of Torts, §§ 314A, 316-324A, there was no legally significant special relationship between Mrs. Riedel and her husband's employer.[123] To the extent any duty was owed, it would fall under Restatement (Second) of Torts, § 323, Negligent Performance of Undertaking to Render Services.[124] However, there was no evidence that ICI undertook to warn its employees' spouses of all dangers, and therefore, any claim under Section 323 failed.[125] No duty was owed because the parties were legal strangers.[126]

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[119] *Riedel II*, 968 A.2d at 18.
[120] *Id*.
[121] *Id*. at *19.
[122] *Riedel II*, 968 A.2d at 20-21.
[123] *Id*. at 22-23, 25-27.
[124] *Id*. at 26. This is not a landowner/premises Restatement section.
[125] *Id*. at 26-27.
[126] *Riedel II*, 968 A.2d at 26-27.

The household exposure liability issue was presented again to this Court in *Price*. In *Price*, the plaintiff alleged that her employee-husband worked with and around asbestos products, such that the fibers permeated his clothing and exposed her to asbestos.[127] The plaintiff (injured spouse) attempted to amend the complaint to assert misfeasance, arguing an affirmative act on the employer's part to release asbestos fibers in the air.[128] This Court affirmed the trial court's granting of summary judgment, finding that mere wording of the alleged acts does not change the nature of the underlying alleged conduct.[129] Where a defendant negligently failed to prevent asbestos fibers from arriving in the home or failed to warn the plaintiff (injured spouse) of potential dangers of asbestos, rephrasing the allegation would not create misfeasance.[130] Thus, a special relationship was required to hold the defendant-employer responsible for the plaintiff-spouse's injuries under nonfeasance.[131] No duty existed, and summary judgment was proper.[132]

**4. Herty did not owe Mrs. Ramsey a duty.**

"[P]laintiff's showcase claim against [Herty] sounds in negligence."[133] Plaintiff attempts to have this Court reject its previous holdings and adopt an

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[127] *Price*, 26 A.3d at 163-64.
[128] *Id*. at 164-66.
[129] *Id*. at 169.
[130] *Id*.
[131] *Price*, 26 A.3d at 169-70.
[132] *Id*. at 169-70.
[133] *Riedel I*, 2007 Del. Super. LEXIS 413, at *9.

automatic foreseeability requirement for legal duty in take-home exposure matters. Delaware's threshold duty analysis is the relationship between the parties. Plaintiff's reliance on cases that adopt foreseeability are inapplicable. This Court has found that, in similar instances of exposure, the first step required is to examine the type of plaintiff involved. "In the common law, duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person."[134] Negligence is defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[135] While Delaware courts find guidance in Section 284 of the Restatement (Second) of Torts, Section 302 provides further instruction between the distinction of negligent acts and negligent omissions.[136] *Riedel II* and *Price* define the type of conduct (act or omitting to act) based upon the relationship with the injured party (direct or indirect exposure).

Plaintiff must establish that: Herty owed Mrs. Ramsey a duty; that Herty breached that duty; and that breach by Herty proximately caused Mrs. Ramsey's injuries.[137] Whether a duty exists is a separate legal determination from whether the

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[134] *Doe v. Bradley*, 2011 Del. Super. LEXIS 21, at *14 (Del. Super. Jan. 21, 2011) (internal quotations omitted) (citation omitted).
[135] RESTAT. 2D OF TORTS, § 282.
[136] *Bradley*, 2011 Del. Super. LEXIS 21, at *16-17.
[137] *Riedel II*, 968 A.2d at 20; *In re Asbestos Litig.: Colgain*, 799 A.2d at 1152.

required duty was met.[138] The duty owed depends upon whether the party "acted" or "omitted to act." "[O]ne who merely omits to act generally has no duty to act, unless there is a special relation[ship] between the actor and the other which gives rise to the duty."[139] "The Court must first determine whether the plaintiff[ ] ha[s] pled 'malfeasance' or 'nonfeasance' against [Herty]. In Delaware, the distinction dictates the direction in which the Court's common law duty analysis must proceed" following determination of the type of injured party.[140] Section 314 of the Restatement (Second) of Torts negates Plaintiff's misfeasance theory of liability: "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not itself impose upon him a duty to take such action."[141] Comment c to Section 314 goes even further, suggesting that the "Section is applicable ***irrespective*** of the gravity of danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection."[142]

Herty recognizes the jurisdictional split between foreseeability of the harm resulting from the alleged failure to warn (Plaintiff's theory), and the relationship between the defendant and family member. The *Palmer* Court was tasked with

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[138] *See Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. 2005).
[139] *Riedel II*, 968 A.2d at 22 (quotations omitted) (citation omitted).
[140] *Bradley*, 2011 Del. Super. LEXIS 21, at *16.
[141] RESTAT. 2D OF TORTS, § 314.
[142] *Id*. at § 314 cmt. c (emphasis added).

determining whether the lower court erred when it focused on the relationship, not the foreseeability of the injury, to determine whether a duty was owed.[143] While it recognized the dueling jurisdictions for duty, *i.e.*, foreseeability vs. relationship, it nevertheless concluded that "duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part of the benefit of the injured person."[144] The majority of cases in Plaintiff's Appellant Opening Brief were already addressed and rejected.[145]

Before liability can be imposed under a negligence nonfeasance theory, some "definite relationship" must exist between the parties, and it must be of such character that social policy justifies imposing a duty.[146] While Plaintiff suggests social policy as rationale for adopting a foreseeability standard, this Court has held that such a determination is for the Legislature.[147]

This Court already held that an injury-causing conduct to a third-party

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[143] *Palmer*, 874 N.W.2d at 307-09.

[144] *Id*. at 309-10; *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas,* 740 N.W.2d 206, 222 (Mich. 2007); *In re New York City Asbestos Litig.,* 840 N.E.2d at 122; *CSX Transp., Inc. v. Williams,* 608 S.E.2d 208, 210 (Ga. 2005).

[145] *Riedel I*, 2007 Del. Super. LEXIS 413, at *10 n.19.

[146] *Murphy v. Godwin*, 303 A.2d 668 (Del. Super. 1973); RESTAT. 2D OF TORTS, § 284.

[147] *Riedel II*, 968 A.2d at 21 (internal quotations omitted) (citation omitted). Arizona Courts have expressed that a duty may arise from either a relationship between the parties or a public policy consideration. *Quiroz v. Alcoa Inc., et al*., 382 P.3d 75, 77-78 (Ariz. Ct. App. Sept. 20, 2016).

plaintiff in a take-home exposure matter was the alleged negligent failure to prevent asbestos fibers from arriving in the home or failure to warn the plaintiff (injured spouse) of potential dangers of asbestos. Plaintiff's attempts to rephrase the allegation does not create misfeasance.[148] Delaware Courts declined to adopt the Restatement (Third) of Torts, finding that doing so would require redefining the common law concept of duty.[149] The lower court properly relied on *Riedel II* and *Price* in finding no duty owed to Mrs. Ramsey.

**(a) Plaintiff's claims arise to nothing more than nonfeasance.**

Plaintiff attempts to cloud the legal theory of the case with gross exaggerations and misgivings about Herty's participation in the manufacturing process of Chemtite pipe at Haveg, and Mr. Ramsey's alleged dust exposure. Plaintiff uses this concept to support a doctrinal distinction between product manufacturers from premises owners and employers. This distinction is not required when determining the threshold question of duty. While the defendants in *Riedel II* and *Price* were employer/landowners, nothing in this Court's duty analysis was based on "landowner/premises liability" law, or limited to those types of defendants. While *Riedel II* and *Price* are equally applicable to all manufacturers, the case *sub judice*, does not involve a manufacturer of goods provided to the general public. Regardless

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[148] *Riedel II,* 968 A.2d at 26-27.
[149] *Id*. at 21-22.

of Plaintiff's new theory of conduct,[150] the allegations in the pleadings, and underlying theory of actions against Mrs. Ramsey, epitomize nonfeasance.[151]

The issue before this Court is fairly simple: what was Herty's actual "injury-causing conduct" that allegedly resulted in Mrs. Ramsey's injuries? No amount of characterization can replace nonfeasance with misfeasance. In *Price*, the plaintiff (spouse) requested a right to amend the complaint to assert the affirmative action of wrongfully releasing asbestos fibers.[152] This Court declined to permit the amendment, finding it would be futile because despite the allegation of affirmatively allowing asbestos fibers to be released, the injury-causing conduct to the plaintiff (employee's family member) was either: (1) the failure to prevent asbestos fibers from arriving home; or (2) the failure to warn the plaintiff (employee's family member) of potential dangers.[153] Thus, in *Price* despite using terms that suggest misfeasance, it was the failure to act (warn) that caused the plaintiff's (employee's family member's) injuries. Nonfeasance is never misfeasance.[154] The failure to prevent an employee from taking home asbestos fibers or to warn of the dangers of asbestos "do not rise to the level of affirmative misconduct required to allege a claim

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[150] The affirmative action of manufacturing an asbestos product and the alleged failure to add a warning label to the product.

[151] *See, e.g.*, A-48−A49, ¶ 17.

[152] *Price*, 26 A.3d at 164-66.

[153] *Id*. at 168-70.

[154] *Id*. at 168.

of misfeasance."[155]

As the facts suggest in the prior and present briefing, Herty's alleged conduct arises from the release of asbestos fibers into the air at Haveg following the manipulation of resin-soaked Herty paper by Haveg employees, such that they permeated Mr. Ramsey's clothing, which he allegedly brought home to Mrs. Ramsey. Specifically, that Herty did nothing to warn Mr. Ramsey of the dangers of take-home asbestos exposure, and that, because Mrs. Ramsey resided with Mr. Ramsey and did his laundry, she developed lung cancer from her exposure to the asbestos he brought home from work.[156] These allegations mirror *Price*.[157] Overuse of "affirmative" or "misfeasance" would not re-characterize the alleged injury causing conduct to Mrs. Ramsey.[158]

Rather, Plaintiff incorrectly attempts to convert the claim into misfeasance by changing the allegations against Herty on appeal, asserting not only the negligent conduct of failure to warn by omitting a warning label, but also the mere manufacture of the product. This Court already determined that the actual conduct at issue with regard to the injured employee's family member is nonfeasance. Issues of foreseeability do not alter this theory. Plaintiff made the following attempts to

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[155] *Id*. at 169.
[156] (*See* A-30−A-31, A-35−A-36.) The failure to affix warnings to its product is encompassed within this conduct.
[157] A-30−A-33; A-35−A-36.
[158] *Price*, 26 A.3d at 168-69.

amend the complaint in *Price* to assert foreseeability:

- "These releases were the direct result of positive actions and *knowing* actions of the [Defendant]";[159]
- "Defendant [ ] *knew or should have known* that the times that said asbestos containing products were being utilized . . . that they were friable and prone to release asbestos fibers within the air and contaminate the facility";[160]
- "[Defendant] *knew or should have known* that the asbestos fibers would be transported by any vehicle or by the air beyond the facility and, thus, causing a pollution of the Plaintiff's home resulting in the disease complained of";[161] and
- "It was *foreseeable* that its employees' families including the employee's wife and children would handle the clothing . . . which would have been contaminated with asbestos."[162]

These modifications were not sufficient to plead misfeasance. Plaintiff's attempts to rely on the issue of foreseeability is equally unavailing.

Plaintiff's reliance on case law to enforce implied or actual foreseeability have already been addressed and denied by Delaware courts.[163] In *Price*, the employee argued that he was unaware that the asbestos fibers were on his vehicle or clothing, and was unaware that those fibers would cause the plaintiff's exposure.[164] The Court declined to find any alteration of the nonfeasance standard. While, here, Plaintiff

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[159] *Price*, 26 A.3d at 164 (emphasis added).
[160] *Id*. at 165 (emphasis added).
[161] *Id*. (emphasis added).
[162] *Price*, 26 A.3d at 165 (emphasis added).
[163] *Id*. at 26 A.3d at 168-70; *Riedel I*, 2007 Del. Super. LEXIS 413, at *10 n.19.
[164] *Price*, 26 A.3d at 165.

suggests that Mr. Ramsey was unaware that he brought asbestos fibers home, such that his family would have been exposed, this Court already held that these statements do not alter nonfeasance claims: "No amount of semantics can turn nonfeasance into misfeasance."[165]

Plaintiff would improperly hold Herty liable for Mrs. Ramsey's injuries when her own family members' employer, who specifically sought out Herty to produce a specified material in a Haveg-purchased manufacturing process, owed no duty to her. To allow this alternative would create a separate class of non-employee family members, with greater rights than those owed of a manufacturing-employer to its employees. Plaintiff's theory of liability against Herty fails, and the allegations against it arise to nothing more than nonfeasance.

**(b) Herty has no special relationship with Mrs. Ramsey.**

Herty had no relationship with Mrs. Ramsey. This Court has refused to adopt the Restatement (Third) of Torts, finding that it would create by judicial fiat duties that the Legislature has not embraced. Pursuant to Restatement (Second) of Torts, § 315,

> [t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless[:] (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relationship exists between the actor and the other which

[165] *Price*, 26 A.3d at 169.

gives to the other a right to protection.[166]

While a duty can potentially be owed to a family member in nonfeasance allegations, there must be evidence of a special relationship. Courts may find a "definite relation[ship] between the parties" when the defendant gains economic or other benefit from the plaintiff.[167] A special relationship giving rise to a duty to aid or protect occurs under one of four theories: (1) common carrier; (2) innkeeper; (3) possessor of land; and (4) one who takes the custody of another.[168]

Plaintiff does not argue that there was any special or categorical relationship between Mrs. Ramsey and Herty. Rather, she requested the trial court, as she does here, to base its ruling on Herty's production of the Haveg-specified material in a Haveg manufacturing process. Undoubtedly, Herty has no relationship with Mrs. Ramsey. Herty never received any benefit from Mr. Ramsey or Mrs. Ramsey. Even if the trial court strayed from the applicable standard of liability, review of the record, in conjunction with the applicable law, would result in the same conclusion: no liability.[169] Herty was entitled to summary judgment.

**5. Mrs. Ramsey was not a user or bystander to use.**

Plaintiff only cursorily cited to a comment in section 388 of the Restatement

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[166] RESTAT. 2D OF TORTS, § 315.
[167] *Helm*, 2007 Del. Super. LEXIS 155, at *78-79.
[168] RESTAT. 2D OF TORTS, § 314A.
[169] *See Riedel II*, 968 A.2d at 23.

(Second) of Torts below.[170] This comment, as the lower court explained, was distinguishable to the case at hand.[171] On her motion for reargument, Plaintiff reiterated the allegation that a duty of care was owed because Mrs. Ramsey was a foreseeable plaintiff, and pointed the lower court to Sections 388, 389, and 395 of the Restatement (Second) of Torts ("Sections 388, 389, 395").[172] While Plaintiff attempts to use this appeal in an effort to correct her own errors and omissions below, these sections limit the class of plaintiffs to whom a duty is owed.

A clear reading of sections 388, 389, and 395 limit the duty to those identified as users and those who fall within the class "whom the supplier should expect to use it or occupy it or share in its use with the consent of such person."[173] The contended Sections do not establish a duty on Herty to Mrs. Ramsey. Section 388 provides: "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to *use* the chattel with the consent of the other or to be endangered by its probable *use* . . . ."[174] Comment d to Section 388 reiterates the limitations, indicating that, in addition to a user, a duty may extend "to third persons in whose *vicinity* the supplier intends or should expect

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[170] Pl.'s Appellant Opening Br., Exhibit A, at *10.
[171] Pl.'s Appellant Opening Br., Exhibit A, at *10.
[172] Pl.'s Appellant Opening Br., Exhibit B, at *3.
[173] RESTAT. 2D OF TORTS, § 388 cmt. a.
[174] *Id*. at § 388 (emphasis added).

it to be *used*."[175] Section 389 continues the limitation, identifying the thread of liability to those who may be injured "by such *use* to those whom the supplier should expect to *use* the chattel or to be in the *vicinity of its probable use* . . . ."[176] Section 395 likewise relies on "use" and "vicinity of its probable use."[177] In sum, only purchasers, users, and bystanders to the actual use of the product may be owed a duty - no one else.[178]

Mrs. Ramsey is not an expected individual in the vicinity of Herty's product at the time it was used. Plaintiff's cited cases are inapposite. *Mergenthaler I* involved parties that were allegedly injured due to their proximity to the Chemtite process at Haveg while Herty's paper was in use.[179] The duty of care addressed in *In re Asbestos Litig.: Colgain*, which predated *Riedel II* by seven (7) years, was to the company's employees that the defendant supplied the asbestos-containing product.[180] *Graham v. Pittsburgh Corning Corp*. predates *Riedel II* by seventeen (17) years, and does not examine the duty owed in a take-home exposure matter.[181]

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[175] RESTAT. 2D OF TORTS, § 388 cmt. d (emphasis added).
[176] *Id*. at § 389 (emphasis added).
[177] *Id*. at § 395.
[178] Plaintiff's assertion would hold that Herty owed a duty to an individual several degrees separated from these three types of individuals.
[179] This theory is directly in line with the Court's recent ruling in *Reed v. Asbestos Corp.* This Court affirmed Delaware's product nexus standard, requiring some form of proximity. *Reed v. Asbestos Corp.*, 2017 Del. LEXIS 47, at *1 n.3 (Del. Jan. 25, 2017).
[180] *In re Asbestos Litig.: Colgain*, 799 A.2d 1151 (Del. 2002).
[181] *Graham v. Pittsburgh Corning Corp*., 593 A.2d 567 (Del. Super. 1990).

Nonetheless, *Graham* supports Herty's interpretation of Section 388: finding that a manufacturer's duty to warn would arise when it knew or should have known of dangers to the *users* of the product.[182]

"Whether reasonable assurance will be given depends on the circumstances involved and on who the third person is."[183] Sections 388, 389, and 395 further emphasize this Court's initial duty assessment in take-home exposure: examination of the type of injured party. It is undisputed that Mrs. Ramsey was not a purchaser, user, or bystander to the actual use of Herty's paper. It is clear that Mrs. Ramsey never came into direct contact with or even was in presence of Herty paper at any point in her life. Plaintiff can only speculate that Mrs. Ramsey was indirectly exposed to Herty. Adopting the identical applicable duty analysis here does not restrict the notions of privity for manufacturers in similar asbestos litigation. The lower court correctly held that adopting the misfeasance/nonfeasance approach "recognizes the paradoxical result were the Court to decide the general theories of tort liability apply to such claims."[184]

**6. Plaintiff's theory inevitably creates a generic standard of duty, requiring the Court to adopt the Restatement (Third) of Torts.**

Herty's primary argument on summary judgment, and brought forth on

[182] *Graham,* 593 A.2d at 569.
[183] *Mergenthaler I*, 542 A.2d at 1211.
[184] Plaintiff's Appellant Opening Br., Exhibit A, at *16.

Plaintiff's appeal, goes to the very heart of Plaintiff's negligence claim: whether any duty is owed to Mrs. Ramsey. Plaintiff's foreseeability theory compounds an erroneous duty, requiring foreseeability as an element in every duty analysis. Thus, conflating duty and breach. Incorporating foreseeability into the duty analysis is illogical, unfounded, and would overturn Delaware's longstanding principles. Plaintiff's theory would eliminate the duty requirement in negligence actions because it would presuppose a duty, essentially adopting Restatement (Third) of Torts, and require the trier-of-fact to determine solely whether due care was exercised.[185] In essence, Plaintiff's theory would adopt an overall general duty to act, dissolving all distinction between misfeasance and nonfeasance. "The idea that a defendant owes a duty to everyone that his conduct may foreseeably harm, in the abstract, has been rejected in Delaware."[186] "It is essential for both courts and parties not to conflate the legal determination of a duty and the factual determinations of

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[185] *Quiroz*, 382 P.3d at 78; *Satterfield*, 266 S.W.3d at 375 ("[A]ny discussion of foreseeability in the context of duty encroaches upon the role of the finder of fact."); *see also Riedel I*, 2007 Del. Super. LEXIS 413, at *24. Such an elastic duty eliminates the clarity and certainty of negligence law, providing broad discretion and "free floating" theories. *Satterfield*, 266 S.W.3d at 378. This Court declined to adopt the Restatement (Third) of Torts, indicating that to do so would "creat[e] a common law duty that directly contravenes the primacy of the legislative branch in resolving this question." *Riedel II*, 968 A.2d at 20-21.

[186] *Riedel I*, 2007 Del. Super. LEXIS 413, at *22 (internal quotations omitted) (citation omitted) ("[I]t is clear that the Court [may] not evaluate the imposition of primary negligence liability solely on ground of the foreseeable risk of harm, but instead [must] determine [ ] whether a duty existed in the first instance.").

standard of care, breach, and causation.[187] "[T]he court must consider the relationship of the parties in each particular case in light of its particular facts."[188] This requires a case-by-case analysis.

Plaintiff's theory of duty has a catastrophic result on manufacturers and suppliers of material used in a manufacturing process that allegedly harmed third party plaintiffs.[189] This is especially so where Herty's product was created to Haveg specifications, and the alleged exposure occurred *after* Herty's product was materially altered in the Chemtite industrial process.[190] To hold Herty liable to third party plaintiffs would transform Herty, and other similarly situated manufacturers, into "*de facto* insurers . . . to a virtually unlimited population of individuals."[191] This result is inherently unfair and ultimately arbitrary. This Court rejected the "concept of duty" provided in Restatement (Third) of Torts in *Riedel II* and *Price*. "This rejection was the product of the court's concern that the Restatement (Third) of Torts' approach to common law duty dilutes the importance of the relationship between the tort defendant and others with whom he interacts, and instead focuses

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[187] *Quiroz*, 382 P.3d at 80 (citation omitted).
[188] *Riedel I*, 2007 Del. Super. LEXIS 413, at *26.
[189] Take-home asbestos cases against manufacturers have accelerated. *Riedel II* and *Price* provide clarity and finality.
[190] Herty moved on summary judgment only on certain case dispositive issues. All other defense theories are preserved for trial, contrary to Plaintiff's suggestion.
[191] *Neumann v. Borg-Warner Morse Tec LLC*, 168 F. Supp. 3d 1116, 1123-25 (N.D. Ill. 2016).

almost exclusive of the foreseeability of harm resulting from the defendant's conduct."[192] This Court left it to the Legislature to resolve public policy implications.[193] Plaintiff is not entitled to a creation of a policy-driven duty based upon the generic restrictions of the Restatement (Third) of Torts.

**7. Plaintiff inaccurately claims that finding "nonfeasance" and "no duty" under common law negligence would reinstate the privity requirement.**

Plaintiff's remaining theory on appeal is unsupported. Plaintiff's argument that any ruling affirming the trial court's finding would result in all Delaware residents without a remedy due to a lack of privity is without merit. This last ditch effort to shock-the-conscious completely ignores the continued existence of Delaware's Uniform Commercial Code, Article 2 - Sales, namely section 2-318 of title 6 of the Delaware Code ("§ 2-318"), which confers rights on third parties (not in privity) for breaches of any express or implied warranties related to sales of goods.[194] Much like the common law duty/relationship argument, the applicability of § 2-318 is not without conditions that must be satisfied before it bestows rights to one claiming injury under breach of the warranty product liability theories.[195]

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[192] *Bradley*, 2011 Del. Super. LEXIS 21, at *25.

[193] *Id*.

[194] Nothing in Plaintiff's pleadings proffers a breach of warranty claim. (A-41−A-53.)

[195] There are three essential warranties available: (1) express warranty (§2-313); (2) implied warranty of merchantability (§2-314); and (3) implied warranty of fitness for a particular purpose (§2-315).

Section 2-318 only applies when an express or implied warranty is made. If no warranties are extended, no subsequent party can claim their breach.[196] The lower court already vetted the warranties issue as to the Haveg-Herty relationship. There, it concluded that no warranty claims were available to the employees of Haveg claiming injury from the paper Herty supplied.[197]

In *Mergenthaler I*, the court explained that Haveg supplied Herty with the sample asbestos paper, and Haveg tested Herty's trial run to ensure it satisfied Haveg's specifications.[198] Haveg could not rely on Herty's skill or judgment in the selection or furnishing of a suitable good.[199] "Herty was merely duplicating that which Haveg provided."[200] The lower court concluded that Haveg did not render any implied warranty, and there was no evidence of any express warranties.[201] If there are no warranties available for Haveg's employees who worked directly with the paper, it stands to reason that no warranties extend to take-home plaintiffs (third-parties once removed). This forecloses the breach of warranty litigation against entities who supplied asbestos to Haveg, particularly Herty.[202]

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[196] *Mergenthaler I*, 542 A.2d at *1213-14.
[197] *Id*. at 1213-14.
[198] *Id*. at 1214.
[199] *Id*.
[200] *Mergenthaler I*, 542 A.2d at 1214.
[201] *Id*. at 1213.
[202] A-41-A-53. Plaintiff clearly recognizes that breach of warranty claims are foreclosed upon, and no such claims have been (or could be) made in this case.

Plaintiff's theory that a third party's privity rights should survive without any limitations is equally unavailing. The long standing four year limitations period, set forth in section 2-725, title 6 of the Delaware Code, reinforces the Legislature's intent to clearly define limits on the period of a manufacturer's potential liability.[203] Thus, a buyer's interest in an extended warranty is eventually outweighed by the manufacturer's right. Just as Delaware's Uniform Commercial Code clearly places conditions upon to third parties' claims, so too does Delaware's common law negligence principles, starting with the threshold inquiry duty from a relationship perspective.

**8. Alternatively, the risk-benefit method should be applied to Herty in this case-specific litigation to reject any contended duty owed.**

Delaware recognizes the appropriateness of the risk-benefit analysis when assessing duty.[204] Plaintiff asserts newfound theories of liability, contending allegations of affirmative action because Herty manufactured asbestos-containing paper and allegedly failed to place warnings on the product. *Nacci v. Volkswagen of America, Inc.* addresses the feasibility of the alternative design standard when addressing manufacturer liability.[205] As one article suggests, "[i]f Nacci represents

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[203] *Dalton v. Ford Motor Co.*, 2002 Del. Super. LEXIS 132, at *12-16 (Del. Super. Feb. 28, 2002) (explaining that, even in terms of public policy and defective products, Delaware provides little wiggle room in the application of the four year statute of limitations for Uniform Commercial Code claims).
[204] *Riedel I*, 2007 Del. Super. LEXIS 413, at *25.
[205] *Nacci v. Volkswagen of America, Inc.*, 325 A.2d 617, 619-20 (Del. Super. 1974).

the law of Delaware, the Reporters are clearly correct in classifying Delaware among those states who accept the risk-utility analysis for determining defects."[206] In evaluating duty owed in the employer-employee relationship, *Riedel I* considered the risk-benefit method, concluding that, after applying the method, no duty would be owed because the burden was simply too great.[207] Indeed, *Mergenthaler I* inferred, as applied to Herty's actions, the risk-benefit theory rejected a duty because no alternative design or control was available.[208] To the extent this Court finds that foreseeability should be addressed within the duty analysis, this Court should affirm the lower court and find no duty owed because the burden would be too high.

In *CertainTeed Corp. v. Fletcher*, the plaintiff alleged that her mesothelioma was a result of years of laundering her father's asbestos-laden clothing after he worked with asbestos water pipes.[209] Similar to Plaintiff's new theories of liability, the plaintiff in *Fletcher* argued negligent design and negligent failure to warn.[210] The *Fletcher* Court relied on the risk-utility standard to determine manufacturer liability.[211] "The risk-utility analysis incorporates the concept of 'reasonableness,'

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[206] Perlman, Harvey S., *Delaware and the Restatement (Third) of Torts: Products Liability*, 2 DEL. L. REV. 179, 203 (1999).
[207] *Riedel I*, 2007 Del. Super. LEXIS 413, at *43.
[208] *Mergenthaler I*, 542 A.2d at 1214.
[209] *Fletcher*, 794 S.E.2d at 643-44.
[210] *Id*. at 643. Plaintiff now seems to suggest that the allegations at issue are not those expressly addressed in the pleadings, but rather the alleged failure to place a warning on the product.
[211] *Id*. at 643.

i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take necessary steps to eliminate the risk."[212] Here, Herty created the products to Haveg's specifications.

"[T]he 'heart' of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest feasible one."[213] While the *Fletcher* Court noted that public policy could warrant a duty to third parties, it nonetheless, noted that it would be poor public policy if a reasonable alternative was not feasible.[214] Here, Plaintiff can hardly claim an alternative design existed when Herty manufactured the asbestos paper to Haveg's specifications. To hold Herty liable for Mrs. Ramsey's injuries would be poor public policy.

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[212] *Fletcher*, 794 S.E. 2d at 644.
[213] *Id*.
[214] *Id.* at 645.

## II. ALTERNATIVELY, GEORGIA SOUTHERN UNIVERSITY ADVANCED DEVELOPMENT CENTER WAS ENTITLED TO SUMMARY JUDGMENT UNDER DELAWARE'S PRODUCT NEXUS STANDARD.

### A. Question Presented

Whether Plaintiff can proffer non-speculative and non-conclusory evidence that Mrs. Ramsey was sufficiently exposed to dust emanating from a Herty product such that it could cause her lung cancer.[215]

### B. Scope of Review

This Court may review questions presented to the trial court.[216] While an appellee may not attempt to enlarge his own rights to "correct an error or to supplement the [trial court's] decree with respect to a matter not dealt with below," an appellee may support the underlying decree with "any matter appearing in the record."[217] In so doing, the appellee is merely "assert[ing] additional grounds why the decree should be affirmed."[218]

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[215] Herty moved for summary judgment on a separate, distinct product nexus argument below. A-65−A-66.

[216] DEL. SUP. CT. RULE 8.

[217] *United States & Interstate Commerce Comm'n v. Am. Railway Express Co., et al.*, 265 U.S. 425, 435 (1924).

[218] *Id*. at 436; *Smith*, 47 A.3d at 480 ("[A]n appellee is entitled to argue any theory in support of the judgment in its favor, even if that theory was not relied upon in the decision on appeal." (quotations omitted) (citation omitted)); *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996) ("An appellee . . . may defend the judgment with any argument that is supported by the record, even if" the trial court disregarded that argument)

### C. Merits of the Argument

#### 1. The Delaware Supreme Court solidified the product nexus standard in Delaware.

Herty recognizes that *Helm* incorporates the *Merganthaler II's* product nexus standard:

> that at the time the defendant's asbestos product was present on the site he was in the area where the product was used, near that area, walked past that area, or was in a building adjacent to where the product was used if open windows or doors would allow asbestos fibers to be carried to the area where the plaintiff was working.[219]

*Helm*, however, also requires both time and space proximity for larger facilities.[220] "[T]here must be some meaningful intersection between the plaintiff and the co-worker on the property, both in place and time."[221] "In larger facilities, it is incumbent upon the plaintiff to describe the location of his own work within the facility with sufficient detail to allow the Court to compare that description to the description of the location of the asbestos offered by the co-worker."[222] To succeed, there must be evidence that the plaintiff was in close enough proximity to the specific location such that the co-worker's testimony addressing friable asbestos can create an inference that the plaintiff was in the area and could have been exposed.[223] There

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219 *Helm*, 2007 Del. Super. LEXIS 155, at *65 (quotations omitted) (citation omitted).
220 *Id*. at *67-69.
221 *Id*. at *68.
222 *Id*.
223 *Helm*, 2007 Del. Super. LEXIS 155, at *69-70.

must be "a factual connection in space and time between a particular plaintiff and a particular defendant's product."[224]

This Court, in adopting this standard, relied on *Helm* when it found that, "where the plaintiff himself is unable to establish exposure, a co-worker must be able to place the plaintiff in the vicinity of a specific location on the defendant's property, at a specific time, where friable asbestos is present," even when the defendant is a contractor or manufacturer.[225] Although Plaintiff is entitled to "plausible inferences," "[t]he presumption afforded to the non-moving party in the summary judgment analysis is not absolute."[226] "[A]n inference [cannot] be based on surmise, speculation, conjecture or guess, or on imagination or supposition."[227] "Delaware courts do not allow a plaintiff to proceed against a defendant based on speculative exposure."[228]

**2. Plaintiff only proffered speculative evidence for which no rational juror could hold it responsible.**

The only relevant time period in which Plaintiff can assert any allegation against Herty is from 1976 to August 1979. The evidence does not support that Mr. Ramsey was substantially exposed to a Herty asbestos-containing product. Mr.

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[224] *Helm*, 2007 Del. Super. LEXIS 155, at *65.
[225] *Reed*, 2017 Del. LEXIS 47, at *1 n.3.
[226] *Helm*, 2007 Del. Super. LEXIS 155, at *53.
[227] *Id*. at *54 (quotations omitted) (citation omitted).
[228] *In re Asbestos Litig.: Foucha*, 2011 Del. Super. LEXIS 252, at *6 (Del. Super. Ct. June 3, 2011).

Ramsey testified that there was little to no dust with the actual pipe work. Rather, Mr. Ramsey's alleged "substantial" exposure was caused by his fabricating and sanding of pipe *fittings*.[229] Herty did not manufacture any product that was used in the asbestos bricks at Haveg.[230] There is no evidence, to the extent Plaintiff attempts to suggest environmental exposure based upon Mrs. Ramsey's residency, that any exposure was caused by a Herty product. Plaintiff's alleged environmental exposure requires the trier fact to speculate that fibers from a Herty product, released somewhere in the 32.5 acres, made its way near Plaintiff's home, and subsequently, into her body, causing her alleged injuries. *Helm* does not entertain the possibility of a plaintiff attempting to show exposure to asbestos fiber carried over various distances from the original point of release. Even assuming *arguendo*, that these fibers traveled to the Ramsey home, several other asbestos-containing products were used at Haveg during Plaintiff's alleged years of exposure. Mr. Ramsey only testified to working with *Manville* paper.[231] Delaware's product nexus standard requires more. Summary judgment should be granted.

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[229] A-78:16-19–A-81:4-23.
[230] *See, e.g.*, *supra* n.44.
[231] A-73:24–A-77:16-22.

## CONCLUSION

For the foregoing reasons, Herty respectfully requests this this Honorable Court deny Plaintiff's/Appellant's Appeal and affirm the Superior Court's ruling granting Herty summary judgment on all claims and crossclaims.


**MARKS, O'NEILL, O'BRIEN,**
**DOHERTY & KELLY, P.C.**

*/s/ Eileen M. Ford*_________________
Megan T. Mantzavinos, Esquire (ID No. 3802)
Eileen M. Ford, Esquire (ID No. 2870)
300 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 658-6538
*Attorneys for Appellee/Defendant Below*
*Georgia Southern University Advanced Development Center*


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