EFiled: Dec 28 2017 09:36PM EST
Filing ID 61510203
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 REPLY BRIEF ON APPEAL

JACOBS & CRUMPLAR, P.A.

/s/ Raeann Warner
Raeann Warner, Esq. (DE ID. #4931)
750 Shipyard Drive, Suite 200
Wilmington, DE 19801
(302) 656 5445
Raeann@jcdelaw.com

Attorneys for Appellant/Plaintiff Below

Date: December 28, 2017

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REPLY TO APPELLEES' STATEMENT OF FACTS

Herty quotes In re Asbestos Litig. (Mergenthaler), 542 A.2d 1205, 1207 (Del. Super. 1986) at length in its Statement of Facts. Mrs. Ramsey does not dispute that evidence it discussed exists, but the record below was not exactly the same as that in Mergenthaler. Herty states that caution labels had been applied by Haveg to Herty's asbestos paper upon receipt. (Herty Answering Brief ("AB"), p. 8, n. 37). The details regarding exactly how and when this was done are not clear from the Opinion, and are not in the record below. Further,"[i]t should be noted that some of the plaintiff employees of Haveg deny being aware of such warning labels." In re Asbestos Litig. (Mergenthaler), 542 A.2d at 1207. There is no evidence Robert Ramsey saw them, and the only expert evidence in the record is that they were inadequate to convey a warning. (A214). Herty also states that Haveg requested Herty apply these labels prior to shipment. (Herty AB, p. 8, n.38). Subsequent to Mergenthaler Herty's corporate representative, Mr. Belvin, was deposed. He testified that Herty placed labels on its paper, beginning in the fall of 1978, in order to protect people, and could not explain why it did not do so earlier. (A426,70:9-71:1,71:18-72:3). Elizabeth Tull, Head of Personnel at Haveg during the relevant time period also testified subsequent to Mergenthaler that Haveg's understanding of asbestos was not sophisticated. (A923-A926).

Herty claims Mr. Ramsey only used Johns Manville asbestos paper during his work in Chemtite. (Herty AB, p. 11,45). Mr. Ramsey did not know the manufacturer or supplier of asbestos products used in Chemtite. He did not know if it was Manville paper that he used. (A76:2-24, A85:12-16).

H&V states that Mr. Ramsey was exposed to a small amount of asbestos when H&V supplied to Haveg, but in the portion of his deposition cited he was discussing his work prior to being assigned to the Chemtite department. (H&V AB, p.7, fn.33, A73:3-A74:12). The deposer acknowledges the dates were approximate. (A73:21-23). Mr. Ramsey estimated he worked in Chemtite for seven or eight years prior to 1979, making his start date either 1971 or 1972. (A72:7-20). Plaintiff submits it was more likely 1971 as Mr. Ramsey was among the first to work in the Chemtite department. (A72:7-11). The Chemtite operation at Haveg started after the process was purchased from Johns Manville in 1969-1970. (A752, ¶ 4). Even if he started in 1972, he was still exposed to a significant amount of H&V asbestos because H&V's asbestos paper was used **exclusively** in the Chemtite process at Haveg from the beginning of the Chemtite operation until about January 1973. (A818-A894; A771:11-14; A765:17-20).

ARGUMENT

I. THIS COURT HAS EXPLAINED THAT IN CASES OF MISFEASANCE DUTY IS DEFINED BY FORESEEABILITY OF HARM TO OTHERS.

In Riedel v. ICI Ams. Inc., 968 A.2d 17 (Del. 2009) ("Riedel") and Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162 (Del. 2011) ("Price") this Court confirmed that Delaware follows the Restatement (Second) of Torts (hereafter ("Restatement")) and in particular follows Restatement §§ 4(b), 282, 284 and 302(a) in determining whether there is a duty of care. Riedel, 968 A.2d at 20-22, Price, 26 A.3d at 166-167. Restatement § 302(a) explains that "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 the act." Riedel, 968 A.2d at 22 (emphasis added); accord Price, 26 A.3d at 167 ("Therefore, in a case involving misfeasance, the defendant's duty is automatic…[]"). Clearly, then, "relationship" is not required for a duty to lie in cases of misfeasance, but foreseeability that the Defendant's conduct could cause harm is.

Herty repeatedly cites to Riedel v. ICI Ams, Inc., 2007 Del. Super Lexis 413 (Del. Super. 2007), which was affirmed in Riedel, 968 A.2d 17, for the proposition that relationship is the initial question in a duty determination. (Herty AB, p. 4,17,19). However, as made clear by this Court in Riedel, 968 A.2d at 22, and Price, 26 A.3d at 167, the initial question is what type of conduct did the

Defendant engage in. There, this Court noted that the trial judge had not explicitly discussed whether the plaintiff alleged misfeasance or nonfeasance and that the "trial judge's analysis strayed from the guidance of the (Second) Restatement…[]" Riedel, 968 A.2d at 23. The initial step in determining duty is determining whether Defendant's conduct was misfeasance or nonfeasance.

The cases cited by H&V for the proposition that relationship is required to impose a duty (AB, p. 11, 27)[1] confirm that relationship is only required for a duty to exist in cases of nonfeasance: where the Defendant did not create the harm.

In Furek v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991), this Court held that a University could be liable under Restatement §§ 314A, 323 and 343 for failure to protect a student from dangerous acts by third parties. This was clearly a nonfeasance case - the University was merely charged with failing to protect a student from the actions of others. That is why this Court looked to the special relationship sections of the Restatement.

The Superior Court in Higgins v. Walls, 901 A.2d 122 (Del. Super. 2005) held that there was no duty on the part of landowners, under the sub-set landowner duty of care analysis, to warn or protect the plaintiff from dangerous conditions on its property that it was not aware of and could not control. Id. at 139, 140-141, 143. The plaintiff's claims in Higgins were that the landowner defendants had a

[1] H&V also acknowledges that misfeasance comes with a duty to act reasonably to prevent foreseeable harm. (AB, p. 11, 12).

duty to protect plaintiff from the harm other people caused on its land, and as such, applying the rule that nonfeasance requires a traditional "relationship," the court found no duty to exist. Id.

Shepard v. Reinoehl, 830 A.2d 1235, 1239 (Del. Super. 2002) involved "…the question [of] whether a shopping center which, through its agent, causes a false alarm, known to be false, owes a duty of care to motorists driving near the shopping center which requires it to notify the alarm company, 911 or the police directly, that the alarm is false." This case is significant to this appeal, as it holds that a defendant can have a duty to someone with whom he has no relationship, based on omissions or failures, where the defendant created the harm. This was a case of misfeasance where the shopping center's agent caused a false alarm, knew it was false, and then *failed* to "notify the alarm company, 911 or the police directly." Id. at 1237, 1239. Summary judgment on "no duty of care" was denied. Id. at 1239, 1241. The Superior Court discussed that the actions and *omissions* of creating a false alarm and then failing to notify emergency responders could *foreseeably* harm motorists or emergency responders as a result of emergency responders' having to respond to the false alarm. Id. Because these actions and omissions could foreseeably lead to harm to motorists and emergency responders,

a duty was owed to the injured motorist plaintiff.[2] There was no "special relationship" between the motorist and the shopping center. Further, although the defendant was a shopping center or a landowner, the Court analyzed the case in light of the defendant's conduct through his agent.

Therefore, it is only where the law imposes a duty to act on one who did not act to create the harm (nonfeasance) that relationship becomes important.

[2] This is consistent with W. Page Keeton, Prosser And Keeton on the Law of Torts § 53, 358 (5th ed. 1984) (explaining that once a defendant takes some affirmative action, whenever he should, as a reasonable person, "foresee that his conduct will involve an unreasonable risk of harm to [others], he is then under a duty to exercise the care of a reasonable person as to what he does *or does not do*.") (emphasis added)).

II. MANUFACTURE AND SALE OF A DEFECTIVE, DANGEROUS PRODUCT BELOW THE STANDARD OF CARE IS MISFEASANCE AND A DUTY IS OWED TO ANYONE WHO COULD BE FORESEEABLY ENDANGERED.

Defendants attempt to justify why the general law that has been applied in Delaware in cases and the Restatement (cited at Appellant's OB, I.C.4 and 5, and recognized at Ramsey v. Atlas Turner Ltd. (In re Asbestos Litig.), 2017 Del. Super. LEXIS 53, * 8 (Del. Super. Feb. 2, 2017), that manufacturers and sellers do owe duty of care to foreseeable plaintiffs, should not apply here. These justifications do not withstand scrutiny. The principle of law espoused in all of that case law fits here because the Defendants are manufacturer/suppliers and the plaintiff is a foreseeable person who will be harmed by Defendant's failure to exercise reasonable care. While none of those cases involved spouses exposed at home to asbestos, there is no rational justification for not including them.

A duty of care owed is to all those who could foreseeably be harmed, not just to users or those in the vicinity of the product when being used. See e.g. Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 718 (Del. 1981) ("Stated differently, one's duty encompasses protecting against reasonably foreseeable events."); In re: Asbestos Litig. (Colgain), 799 A.2d 1151, 1152 (Del. 2002) ("The manufacturer's duty to warn is dependant on whether it had knowledge of the hazards associated with its product."); Graham v. Pittsburgh Corning Corp., 593 A.2d 567, 571 (Del. Super. 1990) ("Hence, the standard for determining the duty

of a manufacturer to warn is that which a reasonable (or reasonably prudent) person engaged in that activity would have done, taking into consideration the pertinent circumstances at that time.").

The Restatement sections by their plain terms refer to a duty being owed to third parties not connected with the use of the product. (Appellant's OB, p. 25, p. 25 n.115, p. 28 n.127). Because Defendants' products could foreseeably hurt household members of users, the duty runs to them. Defendants' products, through their normal use, created asbestos dust which Mrs. Ramsey came in to contact with. Thus, Mrs. Ramsey was in proximity to the products that Defendants manufactured and sold – that is how she developed her fatal cancer.

III. RIEDEL AND PRICE DO NOT MANDATE A FINDING OF NO DUTY HERE.

Mrs. Ramsey's allegations below are not the same as those made in Price, 26 A.3d 169. Mrs. Price never contended that DuPont made or sold an asbestos product. Plaintiff here has contended, both in her Complaint and summary judgment briefing, that Defendants are manufacturers and sellers of asbestos products.[3]

H&V claims that Riedel and Price "undisputedly established that an employer, who has made the choice to use an asbestos –containing material in the fabrication of its product… has only engaged in nonfeasance" in failing to protect or warn employee's family members (H&V AB, p. 20). Plaintiff disagrees these

[3] See Appellant's OB, p.18, fn.104 (citing to Third Amended Complaint); A278-281, A731-742. Herty claims that Plaintiff states a "new argument" on appeal that manufacturing is the conduct at issue. (Herty AB, p. 5, n.21, p.27, n.150). The record shows it is not. Plaintiff has always alleged that the conduct at issue is the manufacturing (and selling) of the product without a warning. Further, Plaintiff did not merely "cursorily" cite to a comment of the Restatement. (Herty AB, p. 31-32, n. 170). Plaintiff's entire argument below is based on the principle of law espoused in the Restatement – that manufacturers and supplies owe a duty of care to warn. While the Restatement is persuasive and followed in Delaware, it is not a statute under which liability arises. It is a compilation of common law principles. In re Asbestos Litig., 2007 Del. Super. LEXIS 154, at *30-31 n.79 (Del. Super. May 31, 2007). Plaintiff cited to Delaware common law below, as well as the Restatement. Plaintiff attempted to explain this in her Motion for Reargument. (A544-550).

cases go that far.[4] While Mrs. Price did allege that DuPont released asbestos into her home and directed its use, Price, 26 A.3d at 164-165, this Court did not acknowledge these claims when it discussed Mrs. Price's allegations "stripped of all reformatory recharacterization." Id. at 169. Further, Mrs. Price never alleged that DuPont manufactured asbestos products.

In Riedel, however, this Court stated "At some point, ICI incorporated asbestos into its research and product development." Riedel, 968 A.2d at 19. Mrs. Ramsey's interpretation is that this Court determined that ICI a was a landowner/employer who used asbestos in its research and product development, but not that ICI was an asbestos product manufacturing operation. Mrs. Ramsey believes that under Price and Riedel, she could state a valid claim against a Defendant who was an asbestos product manufacturer.

Defendants clearly believe that under Price and Riedel, Mrs. Ramsey could not state a negligence claim against a Defendant whose business was asbestos product manufacturing. If Defendants are correct, and unless this Court reverses the decisions below, then no one is liable for causing Mrs. Ramsey's illness – not the manufacturers who made and sold the asbestos products, not her husband's employer who used and manufactured asbestos products. She was not eligible for

[4] Mrs. Ramsey did sue Haveg's successors but they were dismissed as she had released them in prior litigation. A5-6, A28.

worker's compensation. If Defendants' positions are correct, then there is no one responsible under Delaware law to compensate her for the harm she suffered.

To the contrary, even if Defendants are correct that Mrs. Ramsey could not state a claim against Haveg, manufacturers and sellers of defective products who injure people should not be immune from liability simply because other, potentially co-responsible actors are found to owe no duty of care. A person who manufactures and sells the product takes the affirmative action and causes the product to be in the stream of commerce. If it were not for the manufacturer and seller Defendants here, Haveg could not have bought and used their asbestos product. The manufacturer and seller have ultimate control over warnings – they can choose whether and how to warn.

H&V notes that Mrs. Ramsey did not buy H&V's asbestos product, which is true, but to require her to do so reintroduces privity and would be a step backward. H&V claims that its asbestos product was not intended for use as an end product and therefore this is not traditional product liability claim, but cites no legal support for this premise. It is a product which was put into the stream of commerce by Defendants. Raw asbestos and coal are products also.

H&V discusses cases where failures were described as nonfeasance. (H&V AB, p.13). These cases alleged the Defendants failed to protect or warn plaintiffs from a harm someone else created. Doe v. Bradley, 58 A.3d 429, 448 (Del. Super.

2012) (doctors received reports about another doctor sexually abusing patients, and failed to act); Brandt v. Rokeby Realty Co., 2004 Del. Super. LEXIS 297, at *27 (Del. Super. Sep. 8, 2004) (mere knowledge by Landlord of the problem of his tenant's mold, without taking an affirmative act or personal participation in any tort, was nonfeasance).

In Heronemus v. Ulrick, 1997 Del. Super. LEXIS 266, at *10-11 (Del. Super. July 9, 1997), the Superior Court did characterize Defendant Directors' failure to warn and failure to test as nonfeasance. However, this was in the context of determining their individual liability through the personal participation doctrine as Directors of a corporation which leased the allegedly dangerous game. Id. at * 1, *3-9. It was the corporation, not the Directors, who leased the game. Id. at *1, see Id. at * 2 (referencing the corporation's duty of care in leasing the game). In this case the liability is based on a failure to protect the plaintiff from a harm someone else has created. It even refers to the plaintiff alleging that the individual Directors should be responsible for discharging the corporation's duty of care in leasing the velcro wall. Id. at * 2.

IV. FORESEEABILITY IS RELEVANT TO THE MISFEASANCE DUTY ANALYSIS.

H&V contends that foreseeability is not relevant to this Court's duty analysis. Yet this Court has stated that "The manufacturer's duty to warn is dependant on whether it had knowledge of the hazards associated with its product." In re Asbestos Litig. (Colgain), 799 A.2d at 1152. In Colgain, this Court found Partek did not have the requisite knowledge of the dangers of asbestos in 1938-1941, thus it had no duty to warn. Since Mrs. Ramsey is arguing that Defendants have a duty to warn, she properly discussed the issue of what they knew or should have known about the risks associated with its product both below and in this Court. As Mrs. Ramsey made more than "a *prima facie* case establishing that knowledge," Id., the court below should have determined there was such a duty. This case is particularly relevant since it involves the same plant, Haveg, and another asbestos supplier, Partek.

V. IT IS NOT SPECULATIVE THAT MRS. RAMSEY WAS EXPOSED TO HERTY'S ASBESTOS PRODUCT.

H&V did not move on product nexus below and thus appropriately does not argue that Mr. and Mrs. Ramsey were not exposed to its product. Supreme Court Rule 8.

As to Herty, Mr. Ramsey worked in Chemtite with Herty's products for three years when it was the major supplier and for one year when it was the exclusive supplier of asbestos paper for Chemtite. (Appellant's OB, Statement of Facts, A.2). Mrs. Ramsey was exposed to his person and clothes daily, washing his clothes at least weekly, and contracted an asbestos-related disease. (Id.,B.3). It is not speculative that she was exposed to asbestos dust from Herty's products. That he was exposed to other asbestos does not negate the product nexus. Plaintiff will have to prove specific medical causation for this exposure which she is prepared to do.[5]

This is not like Reed, where this Court held that plaintiff "did not produce evidence from which a jury could reasonably infer, without speculation, that Barbara Reed's father and former husband were in specific proximity to the products at issue at the time they were being used." Reed v. Asbestos Corp. (In re Asbestos Litig.), 155 A.3d 1284 (Del. 2017). Here, Mrs. Ramsey has produced

[5] Neither defendant moved for summary judgment on medical causation.

sufficient evidence from which a jury could reasonably infer that Mr. Ramsey was in specific proximity to Herty's friable asbestos[6] at the time it was used, thus meeting the product nexus standard. It is not speculative that fibers from Herty's product got onto Mr. Ramsey and then Mrs. Ramsey. That asbestos travels in such a manner is supported by medical and Industrial Hygiene literature and expert opinion. (Appellant's OB, Statement of Facts, D.; A468,¶ 9).

If this Court is concerned about product nexus it can reverse and remand to the Superior Court to decide this issue.

[6] See Appellant's OB, Statement of Facts, B.1 and 2.

VI. HERTY COULD HAVE PLACED WARNINGS ON ITS PRODUCT.

Herty argues that Mrs. Ramsey has asserted a new claim on appeal regarding a manufacturer's duty to put warning labels on a product, and further, that it was not feasible for Herty to do so. (Herty's AB, p. 39-41). Herty however acknowledges that Plaintiff pled the negligent manufacturing. (A28, n.156). To be clear, plaintiff alleged in her complaint and throughout the summary judgment process contended that Herty's negligence included negligent manufacturing, including manufacturing an asbestos product without an adequate warning, and cited to Restatement §§ 388 and 395 and case law discussing them. (A33, ¶ 11, A35 ¶ 16, A278-84, A544-550, A523:21-23, A526:21-A529:6, A534:19-537:10, A538:7-539:5). If this Court approves the "risk-utility" standard or "risk-benefit" method, the burden of warning was small compared to the risk of harm. If Herty had placed an adequate warning label on its paper, it would have reached Mr. Ramsey, who would have prevented exposure to Mrs. Ramsey. Herty was not prevented from placing warning labels on its products and was able to do so. It placed labels on its paper, beginning in the fall of 1978, in order to protect people, and could explain why it did not do so earlier. (A426,70:9-71:1,71:18-72:3); see also In re Asbestos Litig., 542 A.2d at 1207. Whether, after 1978, these were adequate is for the jury to determine. But it certainly could have been done.

VII. NON-DELAWARE CASES THAT HAVE ADDRESSED THIS ISSUE.

Only a few non-Delaware cases cited by Defendants have dealt with whether a manufacturer or seller had a duty to warn in the context of household asbestos exposure. However, none have found "no duty" on the basis that manufacturing and selling an asbestos product without warning is nonfeasance. Further the threat of "limitless" duty rings hollow when one recognizes that finding a duty does not mean a finding of liability.

Because the majority of exposure and negligent conduct in this case was after OSHA was enacted in 1972, "whether or not there was solid scientific evidence at the time to support the 1972 regulations, no manufacturer, supplier, or employer could ignore the fact that the Federal agency specifically created by Congress to assure and supervise safety in the workplace had concluded that exposure to asbestos dust on clothing was a significant health hazard and had adopted fairly extensive and intrusive regulations to deal with that hazard." Ga. Pac., LLC v. Farrar, 69 A.3d 1028, 1038 (Md. 2013). And, because the majority of events were post OSHA's enactment in 1972, there were practical ways for the employee, Mr. Ramsey, and his employer, Haveg, to respond to such warnings. This distinguishes the circumstances from this case from those in Ga. Pac., LLC v. Farrar, where the Court found there was no duty to warn by a manufacturer in the context of household exposure which occurred from 1968-1969, because prior to

OSHA's enactment, there was no evidence in that record of a practical way to implement such a duty. Id. Unlike the record in that case, here there is evidence that Haveg had showers and locker rooms available during the time Mr. Ramsey was exposed, (A488:5-15, E. Tull depo. 3/9/09), and that both Mr. Ramsey and his employer, Haveg, would have acted in response to any warning from H&V or Herty regarding the dangers of using their asbestos to prevent asbestos exposure to Mr. Ramsey in the first place, and to his wife. A924-A926, Tull Aff'd 2/19/03 (Haveg did not know asbestos exposure in Chemtite area was dangerous because of a lack of warning from suppliers such as H&V and Herty, and would not have put workers at risk had they known; they did implement procedures for workers they believed were at risk); A965-A966, Elizabeth Ramsey Aff'd 2/24/17 (Robert Ramsey heeded warnings and would not have exposed his wife to asbestos through his clothes had he known of the dangers to her); A910-A913, Robert J. Cunitz Aff'd 3/2/17 (proper warnings from H&V and Herty on the asbestos paper would have been effective as to Mrs. Ramsey); In re Asbestos Litig. (Norris Trial Group), 1995 Del. Super. LEXIS 693, at *5 (Del. Super. Mar. 30, 1995) (presumption warnings will be heeded if given). Dixon v. Ford Motor Co., 70 A.3d 328, 330 (Md. 2013) recognized that duty in a household exposure case against a manufacturer is determined by evidence of knowledge, suggested a duty may be

appropriate, but did not decide existence of a duty following implementation of OSHA in 1972. Id. at 330 n. 1.

In CertainTeed Corp. v. Fletcher, 794 S.E.2d 641, 643 (Ga. 2016), the Georgia Supreme Court concluded that defendant manufacturer owed no duty to warn the plaintiff of the possible hazards of asbestos dust from its products, but held the Court of Appeals had correctly reversed the trial court's judgment with respect to Fletcher's defective design claim. The Court decided that recognizing a duty to the household-exposed plaintiff would not be effective in all cases, so it did not to impose one. Id. at 645. This Court should not take the approach of Georgia, which is unfair to plaintiffs where following the general duty to warn would have been effective. This approach discourages adequate product warnings. Cases can and should be viewed on their individual facts.

Neumann v. Borg-Warner Morse Tec LLC, 168 F. Supp. 3d 1116, 1125 (N.D. Ill. 2016) highlights the lack of logic in defendants' arguments for not recognizing a duty. In a case involving a defendant product manufacturer, the District Court did not know how the Illinois Supreme Court would decide the issue, and chose the path creating least liability. That Court noted that Illinois looked at this issue of duty based on "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the

defendant." Id. at 1120. The Court concluded the injury was foreseeable, yet too burdensome to impose because the defendant could not control the user or the employer, thus ensuring any warnings it provided were followed. Id at 1122-23, 1125. This decision should not be followed. Once a defendant discharges its obligation to reasonably sell and manufacture – including giving a reasonable warning under the circumstances, it is absolved of responsibility for the injury. If the user or employer chose to ignore the manufacturer's warnings, then proximate cause would not exist. If there is no reasonable way to communicate the warning directly to the member of the household, then to do so is not the appropriate scope of duty. The scope of duty is only to do what a reasonable manufacturer could do. The existence of a "duty" does not equate to automatic liability. A plaintiff in Delaware still has to provide evidence of breach of duty and proximate cause in order to just get to the jury. A finding of no duty immunizes those who don't try. A finding of duty does not equate to automatic liability and will not result in liability for a defendant who acts reasonably in the manufacture and sale of its products.

Other courts have recognized liability can be imposed in household asbestos cases involving asbestos product manufacturers.[7]

[7] Stegemoller v. ACandS, Inc., 767 N.E.2d 974, 976 (Ind. 2002) (under Indiana Products Liability Act, rejecting arguments that wife of worker who used the product was not in vicinity of it); Lunsford v. Saberhagen Holdings, Inc., 106 P.3d

The other cases cited by Defendants were against employer or landowner Defendants. Often non-Delaware cases which found there was no liability of a landowner or employer defendant in cases of household exposure, focused on relationship, as Riedel and Price did.[8] The same analysis should not apply to a defendant who manufactures and sells asbestos products. The type of defendant (manufacturer/seller versus employer/landowner), while not dispositive of the conduct at issue, is relevant to the conduct at issue. Conduct determines duty.

Palmer v. 999 Que., Inc., 874 N.W.2d 303, 310-11 (N.D. 2016), cited by Herty for the proposition that relationship determines duty, actually acknowledged that its case law discussed both foreseeability and relationship in determining duty, and determined that regardless of which was the determinant of whether a duty

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808, 812 (Wash. Ct. App. 2005) (under strict liability theory, finding household member of worker exposed to insulation stated a claim).

[8]Miller v. Ford Motor Co. (In re Certified Question), 740 N.W.2d 206, 216 (Mich. 2007) ("In the instant case, the relationship between Miller and defendant was highly tenuous-- defendant hired an independent contractor who hired Roland who lived in a house with Miller, his stepdaughter, who sometimes washed his clothes."); Holdampf v. A.C. & S., Inc. (In re N.Y.C. Asbestos Litig.), 840 N.E.2d 115, 119, 122 (N.Y. 2005) (Court focused on defendant's status as employer and landowner to deny existence of duty); Gillen v. Boeing Co., 40 F. Supp. 3d 534, 538-42 (E.D. Pa. 2014) (where defendant was a landowner/employer, id. at 536, 538, and Pennsylvania law required a special relationship to impose a duty to warn about a hazard from a third party); Quiroz v. Alcoa Inc., 382 P.3d 75, 78-79 (Ariz. Ct. App. 2016), review granted (Feb. 14, 2017) (The Court analyzed the case under landowner liability and noted foreseeability was not a factor under Arizona law); CSX Transp., Inc. v. Williams, 278 Ga. 888, 892 (Ga. 2005) (no duty in employer household case because safe workplace doctrine does not extend outside workplace).

existed, that plaintiff had not provided evidence of either. This is not relevant here because Mrs. Ramsey has provided evidence of foreseeability.

In Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 693- 696 (Iowa 2009) the plaintiff claimed that employers/landowners were responsible for household asbestos exposure as the employer of an independent contractor, contending exceptions existed for the general rule that employers are not liable for harm caused by their independent contractors. The Court found these exceptions did not apply. Iowa adopted the Restatement (Third) of Torts' § 7(a)'s general duty of care, but found the public policy exception applied in such a case and chose to retain the limited liability of employers for acts of independent contractors. Id. at 696-697, 697 n.8. This is not relevant to manufacturer/supplier defendants.

Other non-Delaware cases, on the other hand, have found a duty to exist in the context of employer/landowner defendants.[9] It is, however not necessary here that this Court do so. Mrs. Ramsey, in her alternative argument that Price was

[9] Kesner v. Superior Court, 384 P.3d 283, 288 (Ca. 2016) (duty of employer and landowner limited to members of household); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 364, 374-375 (Tenn. 2008) (duty of care owed to daughter of employee by employer, finding employer's acts in using asbestos were misfeasance); Olivo v. Owens-Illinois, Inc., 895 A.2d 1143, 1149-50 (N.J. 2006) (duty owed to wife of independent contractor employee who worked on defendant's premises); Chaisson v. Avondale Indus., 947 So. 2d 171, 184 (La. App. 4 Cir. December 20, 2006) (no error in finding duty owed to wife of employee, primarily because it was foreseeable to employer using asbestos post OSHA that she could be harmed); Rochon v. Saberhagen Holdings, Inc., 2007 Wash. App. LEXIS 2392, at *13 (Wash. Ct. App. Aug. 13, 2007) (duty owed under general negligence principles, not under special relationship).

wrongly decided (OB, Arg. I.C.10), is not suggesting this Court should follow Restatement (Third) of Torts, which it expressly chose not to do in Riedel. Riedel, 968 A.2d at 20-21. Mrs. Ramsey is merely stating that under this Court's decision in Riedel, Price should have been decided differently.

Regardless of how non-Delaware courts view duties in the context of manufacturer or employer liability, none cited by Defendant have declined to recognize a duty of a manufacturer/supplier by identifying their conduct as nonfeasance. To do so in any context threatens to make Delaware products liability law – outside of breach of warranty claims which have a four year state of repose – extinct. It is not consistent with Delaware's law which states there is a duty owed to foreseeable plaintiffs. The threat of limitless liability that Defendants contend will happen if a duty is found here overlooks that finding of a duty is not a finding of liability. There are many hurdles for a plaintiff to overcome in between the two. Absolute immunity for a manufacturer/seller who makes no reasonable effort to warn is inconsistent with Delaware law and serves no valid purpose except denying injured residents of Delaware an opportunity to seek justice, and encouraging manufacturers and sellers not to exercise due care and warn.

CONCLUSION

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

Respectfully submitted,

Jacobs & Crumplar, P.A.
/s/ Raeann Warner
Raeann Warner, Esq. (#4931)
750 Shipyard Drive, Suite 200
Wilmington, DE 19801
Attorneys for Plaintiffs Below/Appellant