2019

Larry Boynton, Individually and On Behalf of the Heirs of Barbara Boynton, Appellee/Cross-Appellant, v. Kennecott Utah Copper, LLC, Appellant/Cross-Appellee, Phillips 66 Company, Conocophillips Company, Pacificorp, Cross-Appellees : Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

LARRY BOYNTON, individually and on behalf of the heirs of BARBARA BOYNTON, Appellee/Cross-Appellant, vs. KENNECOTT UTAH COPPER, LLC, Appellant/Cross-Appellee, PHILLIPS 66 COMPANY, CONOCOPHILLIPS COMPANY, PACIFICORP, Cross-Appellees.	Case No. 20190259-CA (On appeal from the Third Judicial District Court, Salt Lake County, Civil No. 160902693, Honorable Randall N. Skanchy) ORAL ARGUMENT REQUESTED

CROSS-APPELLEE PACIFICORP'S RESPONSE BRIEF

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Current and Former Parties

Appellant/Cross-Appellee

Defendant Kennecott Utah Copper LLC, represented by Rick L. Rose, Kristine M. Larsen, and Blake M. Biddulph of Ray Quinney & Nebeker.

Appellee/Cross-Appellant

Plaintiff Larry Boynton, individually and on behalf of the heirs of Barbara Boynton, represented by Troy L. Booher, Beth E. Kennedy, and Dick J. Baldwin of Zimmerman Booher and Richard I. Nemeroff and Barrett B. Naman of Nemeroff Law Firm.

Cross-Appellees

Defendants Phillips 66 Company and ConocoPhillips Company, represented by Tracy H. Fowler, Stewart O. Peay, Kristen J. Overton and Kristen A. Baughman of Snell & Wilmer, L.L.P.

Defendant PacifiCorp, represented by Stephen K. Christiansen of Christiansen Law, PLLC, and Bret W. Reich of PacifiCorp.

Parties Below Not Parties to the Appeal

The following defendants named in the Amended Complaint have been dismissed:

Industrial Supply Company, Inc.; Bechtel Corporation; CBS Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation; Crane Co., Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; John Crane, Inc.; Riley Power, Inc., individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, individually and as successor-in-interest to D.B. Riley; The Goodyear Tire & Rubber Company; United States Welding, Inc.

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Introduction

This Court should affirm summary judgment for PacifiCorp. Boynton's "retained control" and direct negligence arguments fail as a matter of law based on the undisputed fact record and the briefing on appeal.

First, PacifiCorp's predecessor UP&L did not retain control over the injury-causing work of any subcontractor sufficient to meet the threshold standards for "active participation" outlined in this Court's case law. The retained control doctrine does not impose a duty on this record.

Second, Boynton has failed to adequately brief any direct negligence argument against PacifiCorp in this appeal. No duty applies in these circumstances.

For these reasons, as explained more fully in this brief, the Court should affirm the district court's grant of summary judgment in favor of PacifiCorp.

Statement of Issues

1. The district court correctly concluded that UP&L did not actively participate in work assigned to independent contractors to a degree that UP&L retained control over the injury-causing aspects of those contractors' work.

2. Boynton has not adequately briefed a direct negligence claim nor shown that UP&L owed a duty of care directly to Mrs. Boynton.

Standards of Review

The issues raised by Boynton's cross-appeal are questions of law, reviewed by this Court for correctness. *See Magana v. Dave Roth Const.*, 2009 UT 45, ¶ 19, 215 P.3d 143 (application of retained control doctrine reviewed for correctness on summary judgment); *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 25, 275 P.3d 228 (noting "duty is a question of law").

This Court reviews a grant of summary judgment for correctness, examining the same record that was before the trial court. *Nixon v. Clay*, 2019 UT 32, ¶ 34, 449 P.3d 11. "A grant of summary judgment is proper when 'there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Utah R. Civ. P. 56(a)). The facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *Id.*

In a principal brief, an appellant "must explain, with reasoned analysis supported by citation to legal authority and the record, why the party should prevail on appeal." Utah R. App. P. 24(a)(8). An appellant who fails to do so will "almost certainly fail to carry its burden of persuasion on appeal." *Rodriguez v. Kroger Co.*, 2018 UT 25, ¶ 31 n.10, 422 P.3d 815 (citation and quotations omitted).

Preservation Below

PacifiCorp preserved its arguments in its pleadings, motion for summary judgment, reply and supplemental filing in support thereof, and oral argument. (R.1296-1315, 2349-2609, 4139-57, 5169-77, 5338-5437.)

Statement of the Case

Relevant facts

PacifiCorp is successor-in-interest to Utah Power & Light ("UP&L"). (R.2440.) By the 1970s, UP&L had been in business in Utah and the intermountain region for approximately 80 years as a power producer and provider. (R.2440.)

In 1970, UP&L determined it needed a new power plant to supply energy to its customers. (R.2445-47.)[1] On July 30, 1970, UP&L entered into a contract with engineering firm Stearns-Roger Corporation to design a power plant at the mouth of Huntington Canyon in Emery County, Utah (the "Plant"). (R.2449-60.) Stearns-Roger designed the Plant and provided its specifications. (R.2449-80.)[2]

The Stearns-Roger contract provided, among other things, that "Stearns-Roger shall perform for [UP&L] the work of engineering the project described

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[1] *See generally* R.2378 (containing an index of PacifiCorp's exhibits submitted in support of summary judgment below).

[2] *Cf. Stearns-Roger Corp., Inc. v. United States*, 577 F. Supp. 833, 834 (D. Colo. 1984) ("Stearns-Roger is in the business, world-wide, of designing and manufacturing large mining, petroleum, and power generation plants.").

below including, but not limited to, preparation of engineering drawings; equipment specifications and other specifications"; that its work would include "[p]reparation of designs, plans, drawings, specifications, and bills of materials, all as required to properly describe in detail work to be constructed"; that it would "[p]rovide competent engineering personnel for . . . inspection during construction to insure compliance with the scope and intent of design, quality requirements and workmanship"; and that it would "provide liaison between [UP&L] and contractor(s)." (R.2449, 2451, 2452.)

On February 22, 1972, UP&L entered into a contract with general contractor Jelco-Jacobsen ("Jelco") to construct the new Plant based on Stearns-Roger's specifications. (R.2461-2575.) Jelco's scope of work included "[o]rganizing, planning, managing, directing, and scheduling the construction work." (R.2558.) As an independent contractor, Jelco was tasked with "maintaining complete control over and responsibility for its own men and operations." (R.2494.) Jelco was in charge of hiring all subcontractors, technical workers, and laborers it needed to fulfill the contract. (R.2494-95.) Jelco scheduled and assigned the work of its own forces and those of its subcontractors. (R.2494-95.)

Jelco employed, supervised, or hired 950 workers onsite during peak construction (R.2575) and used at least 25 subcontractors (R.2572-74.) Among other subcontractors, Jelco contracted with Mountain States Insulation

("Mountain States") to install the insulation used at the Plant under the specifications provided by Stearns-Roger. (R.2357, 2413-14, 2573, 3296.)

Jelco was contractually responsible to oversee safety at the Plant and to comply with governing safety laws, including all OSHA regulations:

> The Contractor shall comply with all Federal, State, local and Owner's rules and regulations governing safety and the safe performance of the work, including, but not limited to, all applicable provisions of the Williams-Steiger Occupational Safety and Health Act of 1972.

(R.3436; *see* Cross-Aplt. Addend. Ex. E.) Jelco developed and began its safety program by February 1972, before starting any construction at the Plant. (R.2563-65, 2567.) The safety program was based on a number of safety protocols, including federal safety standards:

> The Safety Program evolved and developed from several influential sources including, federal safety regulations, Utah State Safety Regulations, previous company safety experience, customer preference, and outstanding project conditions. The total success from the safety program was due to the combined cooperation from both management and labor with emphasis on the way the Project Superintendent conducted enforcement of the safety policies.
>
> The Huntington Project Safety Program was established and maintained in such a manner to keep Jelco-Jacobsen and its subcontractors in compliance with state and federal safety standards, and to prevent accidents and injuries to all employees.

(R.2566.) During construction, Jelco employed a full-time Safety Engineer:

> The Safety Engineer conducted the safety program and was responsible for the following functions.
>
> a. Assisting the supervisors and engineers in planning safety into each phase of the construction.

b. Helping resolve problems pertaining to safety on the job.
c. Making daily tours of the jobsite, paying particular attention to unsafe working conditions, practices and safety hazards, then seeing to the correction of such problems.
d. Administering a safety orientation to each newly hired employee in order to educate him in the recognition and avoidance of hazards pertaining to his work.
e. Conduct a weekly union stewards safety meeting and see to the resolution of any problems brought up in these meetings.
f. Administer first-aid to injured employees and investigate each accident as to the cause and prevention of reoccurrences.
g. Train and educate employees in accident prevention, safety awareness, OSHA standards and first-aid techniques.

(R.2566-67.)

The general contract with Jelco contained Stearns-Roger's specifications. (R.3385-3410; *see* Cross-Aplt. Addend. Ex. D.) Jelco was responsible for "providing complete and in place all insulation and accessories necessary for insulating piping and equipment in accordance with the contract documents"; "[p]rocuring, delivering and installing all materials, jacketing, and incidentals for thermally insulating all piping and tubing systems or portions thereof shown or specified to be insulated"; "[p]rocuring, delivering and installing all materials, lagging, jacketing and incidentals for thermally insulating equipment"; and "procuring, delivering and installing all other materials required to complete the thermal insulation of this equipment." (R.3386.) Jelco was further responsible for "[p]rocuring, delivering and installing all materials for weathertight flashing of

piping, both insulated and uninsulated, where the piping passes through an exterior wall or weather enclosure" and "[p]rocuring, delivering and applying sprayed on insulating materials as specified hereinafter." (R.3386.)

Insulation materials specified were "only for the purpose of establishing the type and standard of quality required," and "not intended to preclude the use of approved similar products of proven equal or superior thermal or physical qualities." (R. 3389.) UP&L had authority to approve materials and require substitutes. (R.3388-89.) The general contract also provided that Jelco would institute and maintain, as directed by UP&L and/or Stearns-Roger, adequate dust control measures. (R.3446; *see* Cross-Aplt. Addend. Ex. E.)

Larry Boynton worked as a union electrician with the International Brotherhood of Electrical Workers ("IBEW"). Jelco hired him to work at the Huntington Plant in the third and fourth quarters of 1973. (R.2359, 2378, 2392-93, 2395, 2416, 2579, 3296-98.)

Boynton participated in a safety orientation run by Jelco employees when he hired on. (R.2409-10.) His foreman conducted safety meetings for his crew about once a month. (R.2397-98, 2407-08.) According to Boynton, safety during construction was "paramount" and everywhere he looked at the plant there were signs of workers trying to be as safe as possible. (R.2412.) Boynton testified "the job at the Huntington power plant was a safe job." (R.2411.) He also testified he looked to his Jelco foreman for safety instruction. (R.2398.)

A union steward was present at the construction site. (R.2400.) Boynton could talk to this steward if there was something at the site that he thought was dangerous or a possible safety issue. (R.2359, 2400, 3298.) Boynton never made a formal complaint to the IBEW steward at the Plant or to IBEW in general about safety issues at the Plant from asbestos dust. (R.2409.) Boynton's duties as a union electrician during the construction of the Plant included running conduit, pulling wire, and working on cable trays and heat tracing pipes. (R.2393.) A Jelco foreman controlled Boynton's work and told him what to do and where to work each day. (R.2395-96, 2405-06.)

> Q: And was it your foreman who told you what type of work you'd be doing at the plant?
> A: Yes.
> . . .
> Q: And your foreman, who was a Jelco employee, would also tell you where in the plant you'd be working on any given day; is that correct?
> A: Yes.

(R.2405.)

The Jelco foreman who supervised Boynton answered to a Jelco general foreman. (R.2397, 2403-04.) Boynton testified that UP&L never told any subcontractor how to do its job or where or how to work on the construction site:

> Q: Did you ever see a UP&L employee interfere with a Jelco work crew?
> A: I didn't
> Q: Did you ever see a UP&L employee interfere with a subcontractor crew?
> A: Not that I recall.

Q: And as a union electrician during your work at the Huntington plant, there wasn't any time where a UP&L employee told you how to do your job; correct?
A: I knew what my job was.
Q: You knew your job—what your job was.
A: Nobody told me what to do. My - my direction come from my foreman.

(R.2415.) He testified further that any work he did near insulation installers during construction was as a result of Jelco's instructions. (R.2395-96, 2405.)

Mrs. Boynton lived in the Salt Lake valley during construction and was not present at the construction site. (R.2402.) Boynton testified he stayed at a trailer onsite at the Plant during the week and made the 150-mile trip home to the Salt Lake valley on weekends. (R.2394.) While he was home, his wife would launder his clothes. (R.2394.)

UP&L began operating the Plant in 1974, after Boynton's work on the Plant was completed. (R.2361, 2378, 2556-75, 3298.)

Relevant procedural history and disposition below

On April 27, 2016, Boynton filed suit in the district court on behalf of himself and the heirs of his deceased wife, based on his wife's death. (R.1-32.) He amended his complaint on March 23, 2018. (R.1234-62.)

The named defendants included companies that had allegedly "sold, distributed, and/or installed . . . asbestos-containing products in Utah or . . . placed the same into the stream of commerce for use in Utah, and . . . committed tortious acts against the Plaintiff in this state." (R.1235.) The amended complaint

alleged the defendants had a "a duty to design, manufacture and sell products that were not unreasonably dangerous or defective" and four separate duties to warn. (R.1236 ¶ 23, 1244 ¶ 36, 1246 ¶ 39, R.1247 ¶ 42.) The amended complaint alleged UP&L breached these duties in a number of ways, including "cutting, chipping, mixing, sanding, sawing, scraping and sweeping" insulation. (R.1237, 1252-53, 1237-54.)

Following discovery, PacifiCorp moved for summary judgment. (R.2349-2609.) In opposition, Boynton argued, among other things, that UP&L engaged in "affirmative acts of specifying, controlling, regulating and negligently installing asbestos pipe insulation in Boynton's proximity" and "specified and directed the use of asbestos pipe insulation in close proximity to Boynton without warning and implementing controls." (R.3302, 3312.) Boynton also argued that UP&L should not have specified and required the use of asbestos insulation after OSHA promulgated regulations in 1972 governing the handling of asbestos. (R.3302, 3303, 3309.)

The district court granted PacifiCorp's motion. (R.5438-48.) Applying this Court's controlling law to the undisputed material facts, the district court determined UP&L did not retain control over the alleged injury-causing aspects of the relevant work at the Huntington Plant, was therefore not subject to vicarious liability, and did not independently owe a duty of care to Mrs. Boynton. (R.5440-47.)

This Court granted Rule 5 cross-petitions for permission to appeal filed by Kennecott Utah Copper, LLC, and Larry Boynton. (R.7322-23.) PacifiCorp is before the Court as a cross-appellee to Boynton's cross-appeal. (R.7323.)

Summary of the Argument

This Court should affirm the district court's decision granting summary judgment to PacifiCorp on both the retained control and direct negligence claims.

First, the Court should affirm the retained control determination. The retained control doctrine is a narrow exception to an owner's general non-liability for the acts and omissions of independent contractors. The exception is outlined in a trilogy of cases from this Court. Those cases hold that an owner must engage in active participation – a term of art – by controlling the means and methods by which a contractor undertakes an injury-causing activity before a duty arises. Mere supervisory oversight is not enough.

Here, UP&L did not take control of the injury-causing activities, which Boynton himself has described as insulation installation undertaken in dangerously close proximity to him. UP&L did not control the placement of Boynton, interfere with the installation, or otherwise direct the contractors in a manner that meets the standards defined by this Court. Responsibility for the specifications rested with the engineering contractor and responsibility for safety remained with the general contractor. Boynton's arguments to the contrary do

not square with controlling case law from this Court. The district court got it right and should be affirmed.

Second, Boynton has failed to brief a direct negligence claim on appeal. An appellant must do more than mention a claim; he must provide reasoned authority and analysis for the Court. Here, Boynton analyzes his claims against PacifiCorp separately from those against the other defendants, but he does not discuss or apply the duty factors from controlling law. He therefore fails to carry his burden of persuasion on appeal to show a duty.

If the Court were to reach the issue anyway, the Court should conclude UP&L owed no duty to Mrs. Boynton. The two "plus" factors under *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228, do not favor a duty because Boynton alleges nonfeasance with no special relationship. The affirmative acts Boynton invokes – entering into independent contracts with third parties – are not enough by themselves to impose a duty, nor do they give rise to the harm alleged. The three "minus" factors all counsel against imposing a duty. The general rule of non-liability for owners entering independent contracts weighs against a duty, and the requested extension of a duty here threatens to burden the courts, businesses, and society, with no reasoned limitation circumscribed by governing relationships.

For these reasons, the Court should affirm summary judgment.

Argument

The district court granted summary judgment on both the plaintiff's retained control and direct negligence theories. This Court should affirm.

I. This Court Should Affirm Summary Judgment Under the Retained Control Doctrine Because UP&L Did Not Actively Participate in the Independent Contractors' Work.

Boynton alleges that PacifiCorp has potential vicarious liability based on duties owed by UP&L's subcontractors. This claim fails as a matter of law on this record.

"Utah adheres to the general common law rule that 'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'" *Thompson v. Jess*, 1999 UT 22, ¶ 13, 979 P.2d 322 (quoting Restatement (Second) of Torts § 409 (1965), and citing *Gleason v. Salt Lake City*, 74 P.2d 1225, 1232 (Utah 1937)). "This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented." *Id.* (citing W. Prosser & W. Keaton, *The Law of Torts* 509 (5th ed. 1984)). "The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing the contracted work, the contractor 'is the proper party to be charged with the

responsibility for preventing the risk [arising out of the work], and administering and distributing it.'" *Id.* (citing Prosser & Keaton at 509).[3]

The general rule is subject to an exception known as the "retained control doctrine." *See id.* ¶ 15. This is "a narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, but not enough to become an employer or a master of those over whom the control is asserted." *Id.* "The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted." *Id.* The Second Restatement of Torts defines the doctrine this way:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965); *see Thompson*, 1999 UT 22, ¶ 16.

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[3] "For purposes of the general non-liability rule, the terms 'employer' and 'independent contractor' are used generally." *Magana v. Dave Roth Const.*, 2009 UT 45, ¶ 21 n.4, 215 P.3d 143. "For example, the term 'employer' could mean an owner who hires a contractor to oversee the construction of a building, in which case the contractor would be considered the 'independent contractor.'" *Id.* "The term 'employer' could also mean a contractor who hires a subcontractor to complete a specific part of the construction, in which case the subcontractor would be the 'independent contractor.'" *Id.*

A. This Court has defined the retained control doctrine and its related active participation standard.

This Court adopted and then implemented the retained control doctrine in three principal cases: *Thompson v. Jess* (1999); *Begaye v. Big D Construction Corp.* (2008); and *Magana v. Dave Roth Construction* (2009). PacifiCorp will briefly analyze each of these decisions before discussing the instant case.

Thompson v. Jess

This Court formally adopted the Restatement's retained control doctrine in *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322. The Court noted it had previously used similar principles in its own jurisprudence. *See id.* ¶¶ 16-17. In adopting the doctrine, the Court outlined the contours of an "active participation" standard used to determine whether the retained control doctrine applies, concluding that "a principal employer is not subject to liability for injuries arising out of its contractor's work unless the employer 'actively participates' in the performance of the work." *Id.* ¶ 18 (collecting cases).

"Under the 'active participation' standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work." *Id.* ¶ 19. "Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means

and methods by which the work is to be accomplished." *Id.* (citing *Lewis v. N.J. Riebe Enterprises, Inc.*, 825 P.2d 5, 7-8 (Ariz. 1992) (imposing liability where subcontractor's employee was injured as a result of new, less safe method of work required by general contractor); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (imposing liability where subcontractor was ordered to operate backhoe dangerously close to plaintiff)).

The Restatement comments provide further guidance on the "active participation" requirement:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail."

Id. ¶ 20 (quoting Restatement § 414 cmt. c (emphasis omitted)).

"The degree of control necessary for the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury." *Id.* (citation, quotations, and alternation omitted). Notably, the control the employer exerts must be over the means used to carry out the "injury-causing aspect of the work." *Id.* ¶ 21 (citing Restatement § 414 cmt. c).

The *Thompson* court applied these standards to conclude that the defendant landowner did not retain control over the work of independent contractors when one of them was injured. The landowner directed the contractors to install a large pipe, with specifications she provided, over an existing smaller pipe stub used to support a sign. *See id.* ¶¶ 2-3. The injury occurred during the process. *See id.* ¶¶ 5, 24. The Court noted that the landowner exerted control "in directing that the pipe be installed over the pipe stub." *Id.* ¶ 24. However, "[t]his amounted merely to control over the desired result, which is insufficient to come within the retained control doctrine." *Id.* Because the landowner "did not actively participate in or otherwise exercise affirmative control over the manner or method of performance utilized," the landowner owed "no duty of care under the retained control doctrine." *Id.* ¶ 26.

Begaye v. Big D Construction Corp.

This Court subsequently applied the retained control doctrine in *Begaye v. Big D Construction Corp.*, 2008 UT 4, 178 P.3d 343. Big D was a general contractor on a large construction project. Big D managed the sequencing and work flow of the project and contracted to be responsible for initiating, maintaining, and supervising all safety precautions and programs. Big D subsequently hired Preferred Steel, Inc., as the concrete and masonry subcontractor. Under the terms of the subcontract, Preferred was responsible for its own employees, including

providing the tools and equipment for the job. The subcontract required Preferred to provide a safe workplace for its employees. *See id.* ¶ 2.

During the project, Big D directed Preferred to begin building the inside face of a rebar wall. Preferred chose the method for constructing and bracing the wall. During construction, the bracing broke loose, causing the wall to collapse and kill a Preferred employee, Begaye. *See id.* ¶ 3.

Begaye's wife sued Big D alleging retained control. Begaye contended that Big D was liable because it controlled the workflow, timing, and sequencing of the wall's construction. Begaye also argued that because Big D directed Preferred to work on the wall when there were other walls it could have built that did not require bracing, Big D controlled the method and manner in which the wall was constructed. *See id.* ¶¶ 4-6.

Applying *Thompson*, this Court affirmed the district court's grant of summary judgment for Big D. *See id.* ¶¶ 4-14. The Court concluded that "Big D simply did not exercise sufficient control over the method and manner of the construction of [the wall] to bring it within the purview of the retained control doctrine." *Id.* ¶ 11. "In this case, Big D controlled the sequencing of the task, as well as the workflow generally, but it had no discretion or control regarding the specifics of how [the wall] was built or which bracing method was to be used." *Id.* "[A]lthough Big D had a general supervisory role over when and where Preferred worked, it did not exercise control such that Preferred could not 'carry

out the injury-causing aspect of the work' in its own way, nor was Preferred's discretion subordinate to Big D's." *Id.* (quoting *Thompson,* 1999 UT 22, ¶ 21) (footnote omitted).

"[A]lthough Big D 'ordered' Preferred to build [the wall] when it could have sent the employees home for the day or sent them to work on another wall, such direction is insufficient to bring it within the scope of the 'active participation' standard articulated by this court." *Id.* ¶ 12. "'"It is not enough that [Big D] ha[d] merely a general right to order the work stopped or resumed. . . . Such a general right is usually reserved to employers, *but it does not mean that [Preferred was] controlled as to [its] methods of work, or as to operative detail.*"'" *Id.* (quoting *Thompson,* 1999 UT 22, ¶ 20 (quoting Restatement § 414 cmt. c)). "As such, Big D [did] not fall within the narrow contours of the retained control doctrine." *Id.* ¶ 13.

Magana v. Dave Roth Construction

This Court's most recent pronouncement on the retained control doctrine is *Magana v. Dave Roth Construction,* 2009 UT 45, 215 P.3d 143. *Magana* applied and amplified the *Thompson/Begaye* analysis.

Dave Roth Construction ("DRC") was general contractor on a construction project. DRC was responsible for overseeing construction, purchasing materials, and securing subcontractors. DRC subcontracted with Circle T to provide framing labor and crane work. *See id.* ¶¶ 6-7.

DRC's manager superintended and managed the project. His duties included inspecting and ensuring quality control of the subcontractors' work. *See id.* ¶ 6. DRC's manager worked with Circle T to determine where to place walls, and he snapped the lines marking their location. DRC also supplied the lumber, arranged for shipping of the framing materials, and determined where on the construction site the lumber should be placed. *See id.* ¶ 7.

DRC's manager scheduled a crane company to off-load truss joists. *See id.* ¶ 8. He worked with Circle T and the truss transporter to determine where to unload the trusses, and he helped begin off-loading the trusses. *See id.* ¶ 9. The second bundle of trusses became unbalanced and fell on plaintiff Magana, injuring him. *See id.* ¶ 11. DRC's manager was on the truck bed at the time. *See id.* ¶¶ 10-11.

Magana filed suit against DRC based on its manager's conduct, arguing that DRC was liable for his injuries under the retained control doctrine. The district court granted summary judgment for DRC and the court of appeals affirmed, holding that DRC did not actively participate in the contracted work to bring it within the retained control doctrine. *See id.* ¶ 17. This Court affirmed. *See id.* ¶¶ 18, 35.

In its decision, the Court noted that under "the retained control doctrine and the accompanying active participation standard[,] . . . [t]he first step is to determine whether the employer actively participated in the contractor's work

and, therefore, had a limited duty of care to ensure that the work was conducted safely." *Id.* ¶ 25. The Court considered the injured party's contentions that DRC was liable for his injuries because its supervisor had actively participated by: (1) snapping the lines for the walls and determining where to place them; (2) deciding with Circle T where to off-load the lumber shipped to the site; (3) hiring the crane company that assisted in the off-loading; (4) bearing responsibility for on-site safety; and (5) directly participating in rigging the load of truss joists that fell on Magana. *See id.* ¶ 26. The Court rejected each of these arguments:

> The first three facts that Magana relies upon fail to meet the active participation standard because they exceed the scope of the injury-causing activity. The fourth fact fails to meet the standard because a duty over general on-site safety cannot establish active participation. Finally, the fifth fact fails to meet the standard because it does not demonstrate that [DRC] retained control over the means and methods of rigging the trusses.

Id. The Court analyzed each of these points in turn. *See id.* ¶¶ 27-35.

First, "[u]nder the retained control doctrine, an employer is liable for the actions of an independent contractor when the employer exerts sufficient control over the independent contractor 'such that [the contractor cannot] "carry out *the injury-causing aspect of the work*" in its own way.'" *Id.* ¶ 27 (footnote and quotations omitted). "An aspect of the work constitutes an injury-causing aspect when the aspect is a legal cause of the plaintiff's injuries." *Id.* "An event is the legal or proximate cause of the plaintiff's injury when the event in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the

injury and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury." *Id.* (footnote and quotations omitted).

In *Magana*, DRC's snapping the wall lines, determining where to place them, deciding with Circle T where to off-load the lumber, and hiring the crane company were not the legal cause of Magana's injuries. Each of the activities occurred prior to the rigging of the load of trusses, which rigging constituted an efficient intervening cause of Magana's injuries. Each thus fell outside the scope of the injury-causing aspect of Circle T's work and therefore failed to show that DRC "actively participated." *See id.* ¶ 28.

Second, "[a] general obligation to oversee safety on a project 'does not equate to exerting control over the method and manner of the injury-causing aspect of [the sub-contractor's] work.'" *Id.* ¶ 29 (footnote omitted). "The same is true even where the general contractor has closely monitored on-site safety." *Id.* (footnote omitted). In support of this rule, this Court has noted that "[p]enalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety." *Id.* (footnote omitted). Therefore, Campbell's general responsibility for on-site safety did not amount to actively participating in an injury-causing aspect of the work. *See id.*

Lastly, it was not enough that DRC's manager personally assisted in rigging the load of truss joists that fell on Magana. *See id.* ¶ 30. "Under the retained control doctrine, the employer must direct that the contracted work be done by use of a certain mode or otherwise interfere with the means and methods by which the work is to be accomplished." *Id.* (footnote, quotations, and alterations omitted). "In other words, this standard requires that an employer exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way." *Id.* (footnote and quotations omitted). "Thus, the question of whether an employer actively participated is not simply whether an employer participated in an injury-causing activity, but whether the employer controlled the means and methods by which the injury-causing activity was performed." *Id.* ¶ 32.

Based on this analysis, the Court concluded that DRC did not owe Magana a duty to ensure that Circle T conducted the off-loading process safely and therefore was not exposed to liability under the retained control doctrine. *See id.*

B. UP&L did not actively participate in the alleged injury-causing activities of its contractors and thus did not retain control of that work.

This Court should affirm the grant of summary judgment on the question of retained control. UP&L did not actively participate in the injury-causing activities to a degree that it is exposed to liability for its subcontractors' actions or inactions.

Mountain States was the subcontractor that installed the insulation. (R.2413-14, 2573.) UP&L did not hire Mountain States; Jelco did. (R.2359, 2378, 2392-93, 2395, 2416, 2579, 3296-98.) Consequently, UP&L was not Mountain States' employer and therefore could not be vicariously liable for Mountain States' alleged negligent acts, omissions, or failure to comply with OSHA regulations during construction.

Boynton does not engage in a retained control analysis with respect to Mountain States. Nor does he identify or discuss the underlying duty of Mountain States or any other contractor or subcontractor for which he alleges UP&L can be held vicariously liable, including Jelco and Stearns-Roger. There can be no vicarious liability without underlying liability. *See* 57B Am. Jur. 2d *Negligence* § 1104 (2011) ("It is fundamental that in order to establish imputed liability for harm, injury or damage caused by the wrongful act of another, the injury victim must establish that the actor did commit a tort," as "the duty of care at issue is that of the servant . . . ."); *Black's Law Dictionary* 934 (8th ed. 2004) (defining "vicarious liability" as liability borne by a supervisory party "for the actionable conduct of a subordinate or associate . . . based on the relationship between the two parties").

Moving past these initial hurdles, it is undisputed that UP&L did not interfere with or actively participate in the actual work onsite of Jelco or Mountain States that is alleged to have harmed Mrs. Boynton. Jelco was an

independent contractor, tasked with "maintaining complete control over and responsibility for its own men and operations." (R.2494.) UP&L did not control implementation of the general contract, nor did it exercise control of any such implementation on the ground over Jelco, over any Jelco work crew, over Mountain States, or over Boynton. (R.2395-98, 2403-06, 2415.)

UP&L likewise did not oversee the alleged injury-causing activities in this case. Those were Mountain States' "cutting, chipping, mixing, sanding, sawing, scraping and sweeping" insulation and UP&L's alleged "specifying, controlling, regulating and negligently installing asbestos pipe insulation in Boynton's proximity," which Boynton argued below was undertaken after promulgation of the 1972 OSHA regulations and "without warning and implementing controls." (R.1237, 1252-53, 3302, 3303, 3309, 3312, emphasis added.) UP&L did not supervise Boynton or instruct him or the insulators to work in proximity to each other. Those decisions were made exclusively by Jelco. Boynton points to no evidence that UP&L was onsite or supervised or oversaw the construction. Rather, UP&L was the ultimate intended operator who contracted with specialty contractors - an engineering firm and a construction contractor - to design and build the Plant for UP&L to later operate. And the general contractor hired a subcontractor insulation specialist to help do this. UP&L thus had zero involvement in the actual activities that allegedly harmed Mrs. Boynton.

The contract provisions themselves do not constitute active participation in the injury-causing activities. Those provisions lay out specifications to be complied with during installation. There is no dispute they were drafted by another specialty contractor, Stearns-Roger, which designed the Plant, and included in the general contract for implementation by Jelco. (R.2449-80.) UP&L did not specify the means or methods of accomplishing the work, it requested the outcome. Its contractors were free to accomplish the result as they saw fit, using the means and methods they deemed best.

As in *Begaye* and *Magana*, there is no evidence of UP&L taking over the contractually assigned duties of these independent contractors and overriding their will as to how to accomplish the requested results. Nor do the specifications themselves do that. They tell Jelco what the end result must do, not how it must be done. (R.3392-99.) This is akin to the facts in *Thompson*, where the employer specified the pipe to use and instructed that it be fitted over another pipe but then left it to the independent contractors to get the job done.

The only items in the contract provisions that directly related to UP&L's involvement were its authority to ensure compliance with the design and approve or reject any requests by the general contractor to substitute materials. (R.3386, 3388-89.) This is not active participation under controlling law. As the Restatement comments themselves point out, "It is not enough that [an employer] has merely a general right to order the work stopped or resumed, to

inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." Restatement § 414 cmt. c. "Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail." *Id.*; *see Magana*, 2009 UT 45, ¶ 24 (invoking this comment from prior Utah cases). Boynton has, moreover, adduced no evidence that UP&L ever exercised any such right, let alone that it did so specifically with respect to any injury-causing activity.

To the contrary, Boynton's own testimony confirmed that Jelco and Mountain States directed how, when, and where their employees undertook the activities they did. (R.2395-97, 2403-06, 2415.) As in *Begaye* and *Magana*, there is no evidence of UP&L taking over the contractually assigned duties to these independent contractors and overriding their will as to how to accomplish the requested results. The connection is even more tenuous here, where Jelco, not UP&L, was the party with general safety oversight. (R.2563-67, 3436.)

UP&L did not ignore OSHA's asbestos regulations when entering into the subject contracts. They had not yet been promulgated. UP&L contracted with Stearns-Roger in July 1970 and with Jelco in February 1972. (R.2378, 2449-60, 2461-2575.) OSHA promulgated its asbestos regulations in June 1972. *See* 37 Fed. Reg. 110 (June 7, 1972), *codified at* 29 CFR § 1910.1001 (cited in Cross-Aplt. Br. at 17); *cf. Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1037 (Md. 2013) (noting June 1972 date of

promulgation). By that time, the obligation to comply with OSHA requirements was squarely Jelco's. (R.3436.)

Jelco was also responsible for "providing complete and in place all insulation and accessories necessary for insulating piping and equipment in accordance with the contract documents"; "[p]rocuring, delivering and installing all materials, jacketing, and incidentals for thermally insulating all piping and tubing systems or portions thereof shown or specified to be insulated"; "[p]rocuring, delivering and installing all materials, lagging, jacketing and incidentals for thermally insulating equipment"; and "procuring, delivering and installing all other materials required to complete the thermal insulation of this equipment." (R.3386.) Jelco was further responsible for "[p]rocuring, delivering and installing all materials for weathertight flashing of piping, both insulated and uninsulated, where the piping passes through an exterior wall or weather enclosure" and "[p]rocuring, delivering and applying sprayed on insulating materials as specified hereinafter." (R.3386.)

By contract, Jelco was responsible to oversee safety at the Plant and to comply with governing safety laws. (R.3436; *see* Cross-Aplt. Addend. Ex. E.) Jelco developed the safety program based on a number of safety protocols, including federal safety standards. (R.2563-65, 2567.) Jelco employed a full-time Safety Engineer with day-to-day responsibilities for the Plant who oriented Boynton. (R.2409-10, 2566-67.) His foreman conducted safety meetings and instructed him

on safety, and Boynton felt safety was paramount and everywhere visible. (R.2397-98, 2407-08, 2411-12.) Boynton also had access to a union steward to address any safety concerns. (R.2359, 2400, 2409, 3298.)

A Jelco foreman controlled Boynton's work and told him what to do and where to work each day. (R.2395-96, 2405-06.) That Jelco foreman was supervised by a Jelco general foreman – not by UP&L. (R.2397, 2403-04.) Boynton testified that UP&L never told any subcontractor how to do its job or where or how to work on the construction site; that UP&L never interfered with a Jelco work crew or a subcontractor crew; and never hold him how to do his job. (R.2415.) He testified that any work he did near insulation installers during construction was as a result of Jelco's instructions. (R.2395-96, 2405.) UP&L did not operate the Plant until 1974, after Boynton's work on the Plant was completed. (R.2361, 2378, 2556-75, 3298.)

Applying this Court's case law leads to the conclusion that UP&L did not retain control of the injury-causing activities at issue in this case. By Boynton's own argument below, the allegations that UP&L engaged in "affirmative acts of specifying, controlling, regulating and negligently installing asbestos pipe insulation in Boynton's proximity" and "specified and directed the use of asbestos pipe insulation in close proximity to Boynton without warning and implementing controls" fail as a matter of law. (R.3302, 3312.) These were the injury-causing activities, and these were indisputably not within UP&L's control.

UP&L never directed Jelco, Mountain States, or Boynton, via contract or otherwise, to work in close proximity to each other; to have individuals nearby while undertaking the work; how to implement their safety protocols; or where, when, or how to complete the specified work vis-à-vis other contractors onsite. UP&L did not intervene in the work and require it be done in a way that resulted in asbestos fibers being transmitted to Boynton. Nor did UP&L specify that any particular safety precautions be ignored with respect to Boynton's clothing. General contractor Jelco and its subcontractor Mountain States had these responsibilities.

In short, the evidence of record demonstrates that UP&L did not retain control of the injury-causing aspects of the Plant's construction. The general non-liability rule for employers therefore prevails in this case and calls for affirmance of the district court's correct determination based on the undisputed material facts.

C. Boynton's retained control argument fails on this record.

In his brief, Boynton cites case law from other jurisdictions and then advances a number of arguments in support of his retained control theory. (Cross-Aplt. Br. at 50-54.) His case law is unhelpful and his arguments fail on this record.

1. *Boynton's cited case law is unhelpful.*

Boynton shies away from any meaningful discussion of this Court's precedents in his briefing. Instead, he cites case law from other jurisdictions on the retained control doctrine. His cites do not help him.

The decision in *Avalos v. Pulte Home Corp.*, 474 F. Supp. 2d 961 (N.D. Ill. 2007), for example, did not turn on contract language as Boynton suggests. Rather, the court looked first to the contract language but then also to "the parties' actual practice and whether the [employer] in fact exerted control sufficient to trigger section 414" as a necessary part of its analysis. *Avalos*, 474 F. Supp. 2d 961, 966 (N.D. Ill. 2007). The court pointed to evidence that the employer held a preconstruction meeting actually directing the location where materials should be delivered, which allegedly led to the injury. *See id.* at 966-67. No similar evidence of actual control exerted by UP&L exists in this case, even if this were sufficient under Utah law. *Cf. Magana*, 2009 UT 45, ¶ 28 (holding employer's actual direction about where materials should be delivered was insufficient to establish active participation).

In *Kirby Forest Industries, Inc. v. Kirkland*, 772 S.W.2d 226 (Tex. Ct. App. 1989), a Texas intermediate appellate court held that landowner Kirby retained control over how trees were cut despite this contract language:

> Kirby will have no right to direct the means or methods of performance by Contractor; Contractor is to have responsibility for accomplishing the agreed results, himself employing, controlling and directing the details of

> performance of the work and selecting, directing and controlling his own employees.

Kirby Forest Indus., Inc. v. Kirkland, 772 S.W.2d 226, 229 (Tex. App. 1989), *writ denied* (Nov. 29, 1989). The court concluded the landowner retained control based on the outcome prescribed – a smooth cut – coupled with evidence that Kirby actually came onsite and instructed the contractor how to proceed. *See id.* at 229-31. There is no evidence in the instant case of any such actual onsite direction by UP&L. To the extent *Kirby* would have held the landowner liable simply for directing the prescribed outcome, such a conclusion is at odds with this Court's case law. *See Thompson*, 1999 UT 22, ¶¶ 2, 24 (holding landowner who prescribed specifications for pipe and directed how it should be placed did no more than describe desired outcome, not actively participate).

Boynton points also to *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *Gaytan v. Wal-Mart*, 853 N.W.2d 181 (Neb. 2014); and *Lewis v. N.J. Riebe Enterprises, Inc.*, 825 P.2d 5 (Ariz. 1992), to suggest control over workplace safety or authority to stop unsafe work conditions equals retained control. Such an argument cannot withstand scrutiny under Utah law. *Begaye* and *Magana* both held that control over workplace safety was not enough and that authority to stop did not meet the threshold. *See Begaye*, 2008 UT 4, ¶¶ 2, 11-12; *Magana*, 2009 UT 45, ¶¶ 24, 29. Moreover, it was Jelco, not UP&L, that was responsible for worksite safety. As for Arizona's *Lewis* decision, this Court cited to it in *Thompson*

as a good example of what *did* constitute retained control because the general contractor actually made the subcontractor change its roofing removal process onsite, causing the subject injury. *See Thompson*, 1999 UT 22, ¶¶ 22-23. No such facts exist here.

Lastly, *West v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991 (D.N.H. 1983), dealt with a franchisor specifying what equipment to use. There is no allegation in the instant case that the injury-causing activity arose out of UP&L allegedly specifying what equipment to use.

Boynton's conclusion that these cases collectively reveal that "nearly any control will satisfy section 414" (Cross-Aplt. Br. at 52) is belied by the cases themselves as well as by the Restatement, its comments, and this Court's implementing case law. To the contrary, the *Avalos* court Boynton cites described the necessary level of control as "significant," *Avalos*, 474 F. Supp. 2d at 966, and Utah's standards have led this Court to reject retained control arguments in the face of active employer involvement. *See supra* Part I.A. The cases collectively reveal a concerted effort to determine whether control alleged to be asserted is *significant enough.* Mere participation in the means and methods is not enough. It must be "active participation," which is "a term of art that describes the level of control necessary to find an employer liable for its contractor's actions." *Magana*, 2009 UT 45, ¶ 21. This Court's cases demonstrate that the retained control doctrine is a decidedly narrow exception to an otherwise general rule that

applies no duty. The Court should decline to read the cases Boynton cites as supportive of his overly generous characterization, which is at odds with this Court's own case law.

More instructive is *Stanley v. Ameren Illinois Co.*, 982 F. Supp. 2d 844 (N.D. Ill. 2013). There, the court concluded that the owners of two power plants did not owe a duty to an employee of independent contractors who died of mesothelioma because any supervision by the power plant owners was outside the scope of the injury-causing activities. The plaintiff worked for a boiler manufacturer onsite during the power plants' construction. He alleged that the owners of power plants in Illinois and Iowa "retained control" and were "in charge of" the construction site, despite the fact that each owner hired general contractors to construct the plants, who in turn hired subcontractors. *See id.* at 847-55. The plant owners maintained supervisory safety oversight and were regularly involved on the ground with the project. *See id.*

The court granted summary judgment for each defendant, as well as for a general contractor, holding they owed the plaintiff no duty of care. *See id.* at 852-55, 857-60. The court rejected the plaintiff's arguments that the plant owners were in control of the insulation work that caused asbestos exposure. With respect to the Illinois plant, "there [was] no evidence that [the owner] exercised safety oversight in a way that affected the means and methods by which [subcontractors] sought to insure the safety of their own employees." *Id.*

at 854 (citation and quotations omitted). Indeed, "the plaintiff has not submitted *any* evidence as to [the owner's] control over the insulation contractor." *Id.* at 854.

Likewise, with respect to the Iowa power plant, the court concluded there was no active control because "[t]here is simply no evidence with respect to [the owners'] control over the 'operative' details and work methods of the insulation contractors or the safety protocol used by other subcontractors who encountered asbestos dust that is required for the retained control exception to apply." *Id.* at 858. This was true "particularly where it is undisputed that [the owners] hired a general contractor to manage the entire construction." *Id.*

As in *Stanley*, the Court should reject the retained control argument advanced here. Jelco, not UP&L, was responsible for onsite safety measures and oversight of the activities in question here.

2. *Boynton does not demonstrate retained control.*

Boynton advances four groups of facts he alleges show retained control. (Cross-Aplt. Br. at 52-54.) As in *Thompson*, *Begaye*, and *Magana*, these are insufficient as a matter of law to demonstrate active participation and retained control.

First, Boynton argues that UP&L's contract mandated asbestos insulation, prohibited substitutions without its agreement, and allowed only UP&L to change or substitute materials. (Cross-Aplt. Br. at 52.) This does not equal

retained control under Utah case law. The mere specification of asbestos is not the alleged injury-causing activity; the installers' handling of it in close proximity to Boynton at the Plant is. Boynton himself argued as much below. (R.3302, 3312.) Meanwhile, UP&L's mere ability to require substitution of materials prescribed by a specialty contractor does not reach the level of active participation where there is no evidence any such right was ever invoked. *See Magana*, 2009 UT 45, ¶ 24 (mere right to prescribe alterations and deviations in activity insufficient to conclude employer retained control).

Furthermore, as Boynton pointed out below, the OSHA regulations in place in 1973 did not prohibit the use of asbestos. (R.5401.) Rather, OSHA required that asbestos work be handled according to regulations that Jelco had responsibility to follow. *See* 37 Fed. Reg. 110 (June 7, 1972), *codified at* 29 CFR § 1910.1001. Boynton has abandoned on appeal the claim he alleged below that the mere use of asbestos was the use of a defective or dangerous product giving rise to liability under Restatement (Second) of Torts §§ 413, 416, and 427. (R.3305-06.)

The conduct of Jelco, Mountain States, and Boynton also constitutes an intervening legal cause. *See Magana*, 2009 UT 45, ¶ 27. As in *Magana*, the conduct with which Boynton charges UP&L – entering into contracts with specifications – all happened *prior to* the injury-causing events. Boynton alleges he picked up asbestos fibers working close by the insulation installers and then carried them

on his clothes 150 miles to his home in Salt Lake City. (R.1237, 2394.) As with the rigging of trusses in *Magana*, these intervening acts are the legal cause of the harm. UP&L was not in control of these activities and did not take control of the Plant until after its completion in 1974. (R.2361, 2378, 2556-75, 3298.)

Second, Boynton argues that UP&L's contract set out where Jelco was to cut and install the insulation, where formed sections and staggered joints were required, and the amount and thickness of the insulation applied. He argues that this included detail about cuts being made at flanges, the method of insulating pipe pieces, the necessity of staggering joints, the spacing measurement of wires, how asbestos insulating cement was to be applied, and to what thickness. (Cross-Aplt. Br. at 53.)

It is undisputed that independent contractor Stearns-Roger, not UP&L, drafted the insulation specifications and identified the insulation products to be used. Boynton does not analyze in this appeal whether UP&L retained control of such specifications in its contract with Stearns-Roger. Furthermore, Stearns-Roger's specifications detail the end result, not the methods for getting there. Setting aside the conclusory argument that the general contract specified the "method" of insulating and "how" cement was to be applied, the specifications necessarily detail what is required in the end, but they leave it to the contractor to get the job done. (R.3392-99.) They do not specify the means and methods for accomplishing the injury-causing activities on the job, the cutting, sawing,

chipping, etc., that Boynton alleges happened in close proximity to him. Stating that cuts need to be made at flanges does not tell the contractors the means or methods to make those cuts – nor who can or should be present or in close proximity. Identifying the required thickness of insulation or cement does not tell the contractors the means or methods of obtaining the required thickness – nor prohibit in any way the taking of safety precautions that are already prescribed in the contract.

Third, Boynton argues that UP&L took responsibility for and controlled testing and inspecting to determine the suitability of materials and methods of the work, maintaining the right to order changes, inspect and reject materials and workmanship, and demand the contractor stop unsafe work practices. (Cross-Aplt. Br. at 53.) If this were entirely true, the Restatement's comments invoked in *Begaye* and *Magana* answer this contention. The mere supervisory right fails as a matter of law to lead to a retained control conclusion.

Here, however, the factual assertion is not entirely true to begin with. The record cite states that testing, inspection, and quality control "will be performed by others under separate contracts with the Owner" – not by UP&L. (R.7300.) This includes those third parties identifying "what may be necessary or required to determine suitability and quality control of various types of work, methods of work, materials and related functions." (R.7300.) Boynton has not identified

those independent contractors or analyzed any control UP&L retained over their work.

"A general obligation to oversee safety on a project 'does not equate to exerting control over the method and manner of the injury-causing aspect of [the contractor's] work.'" *Magana*, 2009 UT 45, ¶ 29 (footnote omitted). "The same is true even where the [employer] has closely monitored on-site safety." *Id.* (footnote omitted). In support of this rule, this Court has noted that "[p]enalizing [an employer's] efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety." *Id.* (footnote omitted). This was true in *Begaye* and *Magana* with a general contractor, and it is even more true here with an owner who has hired a general contractor.

Lastly, Boynton argues that UP&L was responsible for "certain aspects of safety at the jobsite," which in fact boils down to "directing the contractor to implement adequate dust control measures." (Cross-Aplt. Br. at 53.) The provision in question provides:

> The Contractor shall institute and maintain, as directed by the Owner and/or Engineer, adequate dust control measures such as sprinkling, for all his work areas, haul routes, and parking areas. For the purposes of this contract, adequate dust control shall be considered as controlling generating of dust such that dust does not cause discomfort to personnel or impaired visibility.

(R.3446.) This provision specified the end result desired, not the means or methods to achieve that result. The contract left to Jelco the mechanism for implementing adequate dust control measures. Like the landowner in *Thompson*, the fact that UP&L described what it wanted did not give retained control. There is no evidence of record that UP&L interfered with or overrode Jelco's decision-making on the dust control issue and prescribed the means or methods for accomplishing the task or even that it gave directions as opposed to Stearns-Roger doing so. The contract provision itself certainly does not provide operative details.

In sum, Boynton's active participation argument and proposed retained control conclusion fail as a matter of law. On this record, the district court properly granted summary judgment to PacifiCorp under this theory.

II. This Court Should Affirm Summary Judgment on the Direct Negligence Claim Because Boynton Has Not Demonstrated that UP&L Owes a Duty of Care to Mrs. Boynton.

The retained control doctrine just discussed "is separate and distinct from a direct negligence theory." *Magana*, 2009 UT 45, ¶ 37. "Specifically, the retained control doctrine does not apply when a plaintiff alleges that an employer's own actions were negligent." *Id.* "Rather, the doctrine is limited to circumstances where the plaintiff alleges that the employer of a contractor is liable for the *contractor's negligence* because the employer retained sufficient control over the contractor's actions to owe the plaintiff a duty of care regarding the

contractor's actions." *Id.* (footnote omitted). "Likewise, the common law general non-liability rule only recognizes that employers are not liable for the actions of their contractors." *Id.* (footnote omitted). "The rule does not speak to an employer's liability for its own actions." *Id.* (footnote omitted).

"Once an employer goes beyond mere direction or control of the contractor's work and directly acts in such a way that causes an injury, the employer may be liable for its own direct negligence." *Id.* ¶ 38. "It is not a defense that the employer was conducting the work of the independent contractor when the employer caused the injury." *Id.* "Simply because an employer submits to the means and methods chosen by the contractor does not change the fact that the employer remains the contractor's employer." *Id.* "If while assisting the contractor the employer were to decide to change the means and methods of the work, the employer would be at liberty to do so." *Id.* (footnote omitted). "Accordingly, we conclude that an employer remains liable for its own direct actions, even if the employer is assisting its contractor and acting according to the means and methods that the contractor has prescribed." *Id.*

In *Magana*, after affirming the grant of summary judgment based on the retained control doctrine, the Court reversed the grant of summary judgment based on fact disputes about employer DRC's own direct negligence. *See id.* ¶ 39. Magana testified that he had observed DRC's manager help rig the load of

trusses that subsequently slipped and fell on him. *See id.* Whether the manager in fact assisted rigging the trusses was a material fact question bearing on DRC's alleged direct negligence. *See id.*

In the instant case, Boynton says he is alleging direct negligence against UP&L in addition to vicarious liability under the retained control doctrine. (Cross-Aplt. Br. at 3.) Yet he utterly fails to undertake a duty analysis with respect to a direct negligence claim against PacifiCorp, which was the basis for the district court's decision on this point. (*See* R.5440-47.) This Court should therefore reject any argument on appeal that the district court's summary judgment ruling on direct negligence should be disturbed.

A. Boynton fails to adequately brief a direct negligence claim.

Boynton's brief on this point fails in two main respects.

First, Boynton collapses into one issue the separate doctrines of retained control and direct negligence. He does not separately frame a direct negligence issue, which in the proceedings below focused on UP&L's duty to Mrs. Boynton.

Boynton begins by identifying his issue presented as "[w]hether the district court erred in ruling that PacifiCorp was neither directly nor vicariously liable for the acts of its independent contractor – and thus could not owe a duty to Barbara." (Cross-Aplt. Br. at 3-4.) This is the wrong analysis to begin with. The Court does not look at whether a defendant is "directly . . . liable for the acts of its independent contractor" under a direct negligence analysis. Rather, as per

Magana, it looks at the employer's own conduct vis-à-vis the injured party. The conduct must be shown to exceed the scope of any retained control. *See Magana*, 2009 UT 45, ¶ 40 (noting for direct negligence purposes that the plaintiff's claim "exceeds the scope of the retained control doctrine because the assertion relates to [the employer's] acts, and not the acts of [the independent contractor]"). Boynton's statement of the issue is one of vicarious liability based on the retained control doctrine and does not properly frame a direct negligence issue.

Second, Boynton does not adequately brief a direct negligence argument against PacifiCorp. PacifiCorp's direct negligence argument below focused on whether UP&L had a duty under the *Jeffs* factors, as did the district court's decision. (R.2364-72, 5443-47.) In this appeal, Boynton does not direct any argument to that question for its claims against PacifiCorp.

The cross-appeal brief breaks out Boynton's argument section and analyzes what he deems to be relevant law with respect to each defendant separately. (Cross-Aplt. Br. at 22-45, 45-49, 49-54.) With respect to Kennecott and ConocoPhillips, Boynton argues the *Jeffs* factors and duties. (Cross-Aplt. Br. at 22-49.) But he does not do so with respect to PacifiCorp. (Cross-Aplt. Br. at 49-54.) Nor does he incorporate by reference the arguments made against other defendants or otherwise indicate in his argument against PacifiCorp that he is relying on those or any similar analyses. (Cross-Aplt. Br. at 49-54.)

Boynton gives some conclusory lip service to a direct negligence claim. For example, he says PacifiCorp "engaged in an affirmative act when it required [Jelco] to cut and install asbestos." (Cross-Aplt. Br. at 49.) And he refers offhandedly to "PacifiCorp's negligence." (Cross-Aplt. Br. at 52.) He even states in his Introduction to the brief that "[u]nder this court's test for duty in *Jeffs*, the companies [defined to include UP&L] owed a duty to Barbara." (Cross-Aplt. Br. at 1.) Yet despite this, the body of the brief does not advance or analyze a direct negligence claim against PacifiCorp and does not cite to relevant legal authority to demonstrate why a duty should be imposed under a direct negligence theory. Instead, his argument against PacifiCorp is a retained-control argument through and through. (Cross-Aplt. Br. at 49-54.)

"Utah Rule of Appellate Procedure 24(a)(8) requires an appellant's brief to 'explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal'" on a given issue. *Rodriguez v. Kroger Co.*, 2018 UT 25, ¶ 31 n.10, 422 P.3d 815. "An appellant who fails to adequately brief an issue will almost certainly fail to carry its burden of persuasion on appeal." *Id.* (citations, quotations, and alterations omitted). To the extent Boynton is in fact trying to advance a direct negligence claim on appeal,

he has failed to meet this Court's briefing standards to do so and therefore has failed to carry his burden of persuasion on appeal.[4]

It is not enough that the briefing discusses direct negligence claims and duties against other defendants. PacifiCorp is in a different position than any other defendant in this appeal because the parties doing the work that allegedly led to the injury were independent contractors of UP&L's, not employees. Absent retained control, their actions or inactions are not attributable to UP&L under the general rule of non-liability. *See Thompson*, 1999 UT 22, ¶ 13 (citing Restatement § 409 general rule).

Boynton cannot place on this Court or this cross-appellee the burden of presenting his argument for him.

> This court is not a depository in which the appealing party may dump the burden of argument and research. An adequately briefed argument must provide meaningful legal analysis. A brief must go beyond providing conclusory statements and fully identify, analyze, and cite its legal arguments. This analysis requires not just bald citation to authority but

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[4] Boynton's fact statement also leaves much to be desired, as he cites principally to briefing in the court below. (Cross-Aplt. Br. at 7-10.) This leads to assertions that are unsupported by the record. For example, he refers to himself as an "independent contractor" of Jelco's, but his briefing below does not say that. (*See* Cross-Aplt. Br. at 7, citing R.3300). He testified under oath at his deposition that Jelco was his employer. (R.2395.) His fact statement also contains conclusory legal assertions, which implicate as well the retained control analysis. His statement of "facts" suggests conclusorily, for example, that "PacifiCorp directed and retained control" over subcontractors - citing to his own briefing below. (*See* Cross-Aplt. Br. at 8, citing R.3298-3301. *But cf.* Utah R. App. P. 24(a)(6)(A) (requiring "citations to the record" to support facts asserted).

development of that authority and reasoned analysis based on that authority.

West Jordan City v. Goodman, 2006 UT 27, ¶ 29, 135 P.3d 874 (footnotes and quotations omitted).

To the extent Boynton suggests at all that UP&L owed him a direct duty of care, he has failed to adequately brief this issue. The Court should therefore affirm the district court's summary judgment decision against him and in favor of PacifiCorp on the direct negligence claim he asserted below.

B. If the Court reaches the issue anyway, UP&L owed no duty.

If the Court reaches the issue despite Boynton's inadequate briefing, the Court should conclude any direct negligence claim against PacifiCorp fails as a matter of law. PacifiCorp incorporates by reference and joins in the arguments advanced by all other defendants in this appeal regarding the lack of duty, to the extent they are applicable. PacifiCorp also points the Court to the district court's reasoned analysis on the *Jeffs* duties. (R.5438-47.) PacifiCorp further advances the following in support of the conclusion the Court should reach.

1. The first two "plus" factors favor not creating a duty.

The amended complaint alleged against UP&L only a duty to warn. (R.1236 ¶ 23, 1244 ¶ 36, 1246 ¶ 39, 1247 ¶ 42.) Of the five instances in the complaint where Boynton alleged the defendants owed duties to his wife, four of those were a "duty to warn." (R.1236 ¶ 23, 1244 ¶ 36, 1246 ¶ 39, 1247 ¶ 42.) The

alleged failure to meet this duty formed the basis for Boynton's allegations. (R.1237-54.) The fifth, alleged generally against all defendants, was a "duty to design, manufacture and sell products that were not unreasonably dangerous or defective." (R.1236 ¶ 23.) There is no evidence of record that suggests UP&L itself ever designed, manufactured, or sold asbestos or any other relevant products. Moreover, Boynton has abandoned his claim on appeal that asbestos was itself unreasonably dangerous or defective. No other duties were alleged.

Alleged failure to warn is nonfeasance, which does not give rise to a duty unless a special relationship exists between the parties. *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 7, 275 P.3d 228. Boynton does not allege a special relationship between UP&L and Mrs. Boynton. She was a family member of an independent contractor's employee living 150 miles away. Under this Court's jurisprudence, UP&L owed no duty to warn Mrs. Boynton about take-home asbestos.[5]

Furthermore, no affirmative act gave rise to a duty by UP&L to warn Mrs. Boynton. Boynton suggests two such sets of affirmative acts: (1) the "cutting, chipping, mixing, sanding, sawing, scraping and sweeping that occurred in association with the work performed by Boynton and other workers working around Boynton with asbestos-containing products exposed him to great

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[5] Boynton alleges that the duty he asserted below was to warn *him*. (Cross-Aplt. Br. at 11.) He cites no authority for such an assertion, as Mrs. Boynton was the injured party to whom any alleged duty would have to run to maintain an action.

quantities of asbestos," which then exposed his wife when he carried it home (R.1237; *see* Cross-Aplt. Br. at 11); and (2) UP&L's alleged "decision to require the use of asbestos insulation in its facility," also characterized here generally on appeal as its "negligent use of asbestos" (Cross-Aplt. Br. at 10, 11). Each of these arguments should be rejected.

First, there is no record evidence that UP&L, as opposed to any independent contractor, was itself involved in the alleged cutting, chipping, mixing, sanding, sawing, scraping, or sweeping of insulation. UP&L indisputably contracted to have the Plant designed and built by independent contractors and did not take control of the facility until after Boynton finished his construction work there. (R. 2361, 2378, 2449-80, 2556-75, 3298.) Boynton himself testified that UP&L was never involved in the construction work of which he complains. (R.2395-97, 2403-06, 2415.) No other evidence suggests UP&L was. This allegation fails as a matter of law for direct negligence purposes.

Second, Boynton cites no authority for the suggestion that merely entering into independent contracts with specialty contractors for highly technical specialized work is an affirmative act leading to direct tort liability. While such contracts may bear on the question of retained control, a direct negligence claim against an owner in UP&L's position requires acts going beyond the scope of retained control. *See Magana*, 2009 UT 45, ¶ 40. In *Magana*, for example, the

plaintiff adduced evidence that DRC's supervisor personally helped rig the truss joists that fell on the plaintiff. *See id.* ¶ 39.

No such facts exist in this case. The undisputed material facts demonstrate rather that UP&L contracted with Jelco to implement specifications provided by its independent engineering contractor, Rogers-Stearn. UP&L did not create the specifications. Just as UP&L did not interfere with the work of the general contractor, UP&L did not perform any affirmative act that exposed Mrs. Boynton to asbestos fibers. UP&L hired an engineer, which designed the Plant using engineering specifications, and a general contractor, which hired a subcontractor to install the insulation and then directed an employee (Boynton) to work in the vicinity. (R.2357, 2361, 2378, 2395-97, 2403-06, 2413-15, 2449-80, 2556-75, 3296-98.)

This Court holds that an act may give rise to a duty if the conduct "created a situation where harm will commonly or foreseeably result, such that his inaction would permit the already advancing foreseeable harm to work its course." *Herland v. Izaatt*, 2015 UT 30, ¶ 35, 345 P.3d 661. In this case, the fact the construction contract contained specifications for insulation products with asbestos is far removed from Jelco's supervision of the worksite and from the insulation subcontractor's installation activities. UP&L required Jelco to maintain the construction site in compliance with federal, state, and local standards, and specifically to comply with OSHA. (R.3436.) Jelco's alleged failure to comply with its contractual duties to UP&L and with OSHA regulations was the first step

leading to Boynton's alleged exposure to and retention of asbestos fibers in excess of the federal standard, who then carried the fibers home.

Indeed, Boynton all but conceded the point below when he argued under his now-abandoned theories that "Jelco's negligent application of asbestos insulation, Jelco's failure to warn, Jelco's failure to perform air monitoring and Jelco's failure to provide laundry or shower facilities . . . caused Boynton to transport the toxin back home where his wife suffered injury." (R.3307.) No actionable affirmative act by UP&L is at issue. *Cf. Graves v. N.E. Servs., Inc.*, 2015 UT 28, ¶¶ 26-27, 345 P.3d (holding alleged affirmative acts did not give rise to a duty, though plausibly connected to plaintiff's claims, where harm arose from failure to act); *Tatera v. FMC Corp.*, 2010 WI 90, ¶ 38, 786 N.W.2d 810 (holding "the act of supplying asbestos-containing friction disks does not itself constitute an affirmative act of negligence because liability for such an act is necessarily premised in failing to warn, an omission"). Pure nonfeasance without more does not support a duty of care. *See Jeffs*, 2012 UT 11, ¶ 5.

This conclusion comports with the decisions of a majority of courts addressing the issue, which have declined to find a duty of care in take-home asbestos cases when there is no plaintiff-defendant relationship. *See, e.g., Quiroz v. ALCOA Inc.*, 416 P.3d 824 (Ariz. 2018) (employer owed no duty of care to household member where there was no special relationship); *Palmer v. 999*

Quebec, Inc., 2016 ND 17, 874 N.W.2d 303 (same); *In re New York City Asbestos Litig.*, 840 N.E.2d 115 (N.Y. Ct. App. 2005) (same). Notably, these decisions involve defendants one step closer to the plaintiff than in this case, since Jelco, not UP&L, employed Boynton.

Considering the nonfeasance at the heart of any direct negligence case against UP&L, no duty of care attached if this issue is reached.

2. *The last three "minus" factors favor not creating a duty.*

Because no duty exists under the first two "plus" factors, the analysis ends. If the Court determines nevertheless to proceed further with the analysis, for whatever reason, the remaining factors counsel against imposing a duty.

a. Foreseeability weighs against creating a duty.

The foreseeability analysis focuses on "the general relationship between the alleged tortfeasor and the victim and the general foreseeability of harm" rather than "the specifics of the alleged tortious conduct such as the specific mechanism of the harm." *Jeffs*, 2012 UT 11, ¶ 25 (citation and quotations omitted). "The appropriate foreseeability question for duty analysis is whether a category of cases includes individual cases in which the likelihood of some type of harm is sufficiently high that a reasonable person could anticipate a general risk of injury to others." *Id.* ¶ 27. "And the foreseeability question is whether there are circumstances within that category in which [the defendant] could foresee injury." *Id.*

Here, the relevant category of cases consists of companies that contract with independent contractors, requiring them to comply with already applicable safety rules, vis-à-vis family members of those contractors' employees who are injured when the contractors fail to do so. In light of the significant body of Utah law governing the independent contractor relationship, principals cannot reasonably be expected to foresee that their contractors would breach contracts and violate laws in a way that would cause harm to offsite family members of their employees as a result, just because they entered the contract. Such a rule would undermine the substantial body of precedents holding the principal generally immune from harms caused by the contractor's employees. *See Thompson*, 1999 UT 22, ¶ 13 (articulating the general rule of employer non-liability for conduct of independent contractors). At a categorical level, exposure to household members of employees of an independent contractor is not foreseeable.

b. Others are best positioned to bear the loss.

"The parties' relative ability to 'bear the loss' has little or nothing to do with the depth of their pockets." *Jeffs*, 2012 UT 11, ¶ 29. Rather, the determination is based on

> whether the defendant is best situated to take reasonable precautions to avoid injury. Typically, this factor would cut against the imposition of a duty where a victim or some other third party is in a superior position of knowledge or control to avoid the loss in question[] . . . because [the

> defendant] lacks the capacity that others have to avoid injury by taking reasonable precautions.

Id. ¶ 30 (footnotes omitted).

In similar circumstances—cases involving household members of independent contractors—courts have held that owners have no duty because others are better situated to prevent the loss. In *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), for example, the plaintiff alleged his wife developed mesothelioma from laundering his work clothes. The plaintiff was employed by the general contractor during power plant construction, and later worked for a different contractor to do maintenance at the plant. He sued the owners of a power plant for his loss. The court concluded there was no duty: "One who employs an independent contractor owes no general duty of reasonable care to a member of the household of an employee of an independent contractor." *Id.* at 696. The *Van Fossen* court reasoned:

> Employers typically hire contractors to perform services beyond the employers' knowledge, expertise, and ability. The contractors' knowledge and expertise places them in the best position to understand the nature of the work, the risks to which workers will be exposed in the course of performing the work, and the precautions best calculated to manage those risks. These realities dictate that the persons in the best position to take precautions to manage the risks are the contractors.

Id. at 698. The conclusion reached by the Iowa Supreme Court squares with Utah law. *See Jeffs*, 2012 UT 11, ¶ 30 (noting the factor cuts against a duty when a "third party is in a superior position of knowledge or control to avoid the loss in

question"). General contractors – not owners who hire them – are in the best position to protect those they employ. This factor weighs conclusively against imposing a duty upon UP&L here.

"[T]he principal who uses an independent contractor will not be as well placed as the employer would be to monitor the work and make sure it is done safely. This is the [same] reason as we have said for not making the principal vicariously liable for the torts of his independent contractors." *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 939 (7th Cir. 1986) (Posner, J.). As one commentator observed, "a taxi driver is better suited to bear the risk of taxi accidents than the man who hires the cab." Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 545 (1961). With respect to complex projects that require contractor expertise, like power plant construction, "the persons in the best position to take precautions to manage the risks are the contractors." *Van Fossen*, 77 N.W. 2d at 698.

Construction of the Huntington Plant was a gargantuan undertaking. The Jelco workforce averaged 950 employees strong and used at least 25 subcontractors, who together worked 2,467,596 hours (R.2571-75) over a sprawling construction site, building a multi-story building with a complex boiler, piping, electric wiring, a turbine generator, and other equipment. The sheer scale and complexity of the task required supervision and attention by the

general contractor. General contractor Jelco was in the best position to provide a safe workplace to all the workers.

UP&L did its part by requiring its general contractor to make the worksite as safe as possible, which included following OSHA regulations. Boynton himself testified that safety at the worksite was "paramount." (R.2412.) In the case of a massive power plant construction project, just as with the myriad smaller projects that occur regularly in Utah, the general contractor is in the best position to prevent injury emanating from the worksite.

c. General policy considerations weigh against creating a duty here.

Finally, general policy considerations weigh against creating a duty here. The very notion that a party hiring a qualified contractor becomes responsible to ensure the safety of the household of the independent contractor's own hires, or others, is contrary to sound public policy.

Additionally, recognizing a duty would create an indeterminate class of potential plaintiffs. In *In re Eighth Judicial District Asbestos Litigation*, 815 N.Y.S. 2d 815 (N.Y. Super. Ct. 2006), the court noted that "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." *Id.* at 820 (citation and quotations omitted). The social consequences of extending a legal duty in this manner would "'expand

traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.'" *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005) (quoting *Widera v. Ettco Wire and Cable Corp.*, 204 A.D.2d 306, 307–308, 611 N.Y.S.2d 569 (N.Y.A.D. 2 Dept., 1994)); *cf. Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. 1998) (permitting secondary exposure claims would create limitless liability for defendants).

Line-drawing in such circumstances would be problematic, especially if duty is analyzed on a categorical basis. The New York Court of Appeals recognized this problem when it pointed out the difficulty in distinguishing between household members and others with whom an employee may come in contact offsite. *See In re New York City Asbestos Litig.*, 840 N.E.2d 115, 122 (N.Y. Ct. App. 2005) (no meaningful distinction between employee's spouse and employee's regular babysitter for these purposes). The court concluded that the "specter of limitless liability" is banished only when "the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship" between the plaintiff and defendant. *Id.* (citation and quotations omitted). Here, as there, no relationship circumscribes the duty.

Finally, the Court should "consider the likely consequences of adopting the expanded duty urged by plaintiffs." *Id.* "While logic might suggest (and plaintiffs maintain) that the incidence of asbestos-related disease allegedly caused by the kind of secondhand exposure at issue in this case is rather low,

experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *Id.*

Here in Utah, counsel for the cross-appellant has already served another secondhand exposure case on PacifiCorp filed in the Utah courts. *See Payne v. Industrial Supply Co., et al.*, Case No. 190906234, Third Judicial District Court, Salt Lake County. Courts everywhere have warned of the floodgates opening if such an expanded duty is recognized. *See, e.g., supra.* The district court here rightly cautioned against the pressure on the courts, businesses, and society in general that would result from imposing a duty in circumstances like these. (R.5446.) Public policy favors declining such an invitation.

Conclusion

For each of these reasons, the Court should affirm summary judgment in favor of PacifiCorp.

DATED this 31st day of January, 2020.

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Certificate of Compliance

This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because it contains 13,606 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2). This brief complies with Rule 21(g) governing public and private records. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011, Version 14.4.7, in Book Antiqua 13.

DATED this 31st day of January, 2020.

/s/ Stephen K. Christiansen
Stephen K. Christiansen

Certificate of Service

I hereby certify that on the 31st day of January, 2020, I caused a true and correct copy of the within and foregoing document to be sent by email, with two (2) copies to be sent the next business day via U.S. mail, first class postage prepaid, on the following:

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