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Utah Supreme Court

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IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

LARRY BOYNTON, *Appellee/Cross-Appellant,* v. KENNECOTT UTAH COPPER LLC, *Appellant/Cross-Appellee,* PHILLIPS 66 COMPANY, CONOCOPHILLIPS COMPANY, PACIFICORP, *Cross-Appellees.*	Case No. 20190259 (On appeal from the Third District Court Salt Lake County, Civil No. 160902693, Judge Randall N. Skanchy)

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LIST OF 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 0. Peay, Kristen J. Overton and Kristen A. Baughman of Snell & Wilmer, L.L.P.

Defendant PacifiCorp, represented by Bret W. Reich, General Counsel, and Stephen K. Christiansen

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

Barbara Boynton does not fall into a category of individuals to whom ConocoPhillips owed a duty. In fact, Mrs. Boynton had no relationship whatsoever with ConocoPhillips. Mrs. Boynton's husband, the Plaintiff in this action, worked for a contractor hired by ConocoPhillips. During the time that Mr. Boynton was an invitee on ConocoPhillips's land, ConocoPhillips employees worked with asbestos products in his general vicinity. The dust from these products allegedly landed on Mr. Boynton's clothes and he carried it home. His wife then washed his clothes and was exposed to the dust. Years later, she contracted mesothelioma.

This Court's analysis in *Jeffs* explains how Utah courts should determine whether one individual is owed a duty by another. *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5, 275 P.3d 228. If, as in this case, there is no special relationship between the alleged victim and defendant, then the plaintiff must show that the defendant took an affirmative act that created a duty. In other words, defendant must have acted with misfeasance toward the alleged victim. If there is no misfeasance toward the alleged victim, if there is only non-feasance, no duty attaches.

Plaintiff's contention that ConocoPhillips's employees' work with asbestos products while Mr. Boynton was on ConocoPhillips's facility was an affirmative act toward Mrs. Boynton conflicts with the Court's decision in *Graves*. This Court explained that the defendant's actions must be more than "plausibly connected" to the harm to be an affirmative act. *Graves v. N. E. Serv., Inc.*, 2015 UT 28, ¶ 26, 345 P.3d 619. "[A]ffirmative acts are a basis for imposing a duty in the performance of those acts, not for

the broader duty to undertake additional measures aimed at preventing [the harm]." *Id.* ¶ 29 (emphasis in original). ConocoPhillips's employees' work with asbestos products while Mr. Boynton was on the ConocoPhillips facility was only plausibly connected to the harm. Plaintiff's real complaint is that ConocoPhillips's failed to prevent asbestos dust from leaving its premises. ConocoPhillips, therefore, engaged in no affirmative acts as to Mrs. Boynton and owed her no duty.

Finally, even if there were a duty in this case, the three "minus factors" identified in *Jeffs* would eliminate any such duty. First, if, as Plaintiff now claims, the OSHA standards made it foreseeable that Mr. Boynton would be carrying asbestos home to his wife, then it was just as foreseeable that ConocoPhillips could have relied upon his employer to make sure Mr. Boynton did not do so. Second, considering the Court's focus on broad categories, were the Court to say that landowners had a duty to those with whom its invitees came in contact, that would greatly increase the duties of all landowners. Finally, no other general policy considerations necessitate placing this burden on landowners.

STATEMENT OF ISSUES

Issue: Did the district court correctly hold that a premises owner, ConocoPhillips, owed no duty to take additional actions to prevent a person who never entered the premises, Mrs. Boynton, from being exposed to dust generated on its property and carried to her by an invitee to the property?

Standard of Review: Whether a legal duty exists is a pure question of law. *Jeffs*, 2012 UT 11, ¶ 5. A lower court's legal conclusions that result in the entry or denial of summary judgment are reviewed for correctness. *Herland v. Izatt*, 2015 UT 30, ¶ 9, 345 P.3d 661.

Preservation: ConocoPhillips preserved this issue for appeal by filing a motion for summary judgment seeking a ruling that ConocoPhillips does not owe a duty of care to Mrs. Boynton. (R. 2235–2246.)

STATEMENT OF THE CASE

I. RELEVANT FACTS

Mr. Boynton married Mrs. Boynton in September 1962. (R. 01236.) After their marriage, Mr. Boynton worked as a laborer at Kennecott Utah Copper, LLC's ("Kennecott") smelter and continued in that position for about a year (from 1962 to late 1963 or early 1964). (R. 04165.) Mr. Boynton claims he was exposed to asbestos dust as a laborer by working in the vicinity of workers who removed and installed pipe insulation and for approximately a five-month period while cleaning up pipe insulation. (R. 04165–

66.) He then worked as an apprentice and journeyman electrician for Wasatch Electric at Kennecott's smelter from 1964 to 1966. (R. 04165, 04242, 05959.) In that capacity, he was responsible for "[r]unning pipe, conduit, pulling wire, terminating, [and] heat trace" on "newer construction and remodel, upgrades…plant-wide, around the converter aisle and places like that." (R. 04197, 04242, 05241.) He believes he was exposed to asbestos from the installation of the insulation on pipes and dry asbestos mix that was used by pipe fitters who worked within 20 feet of him. (R. 04166.)

Mr. Boynton was employed as an electrician for L.E. Myers Electric and worked at the ConocoPhillips refinery off and on from 1976–78. (R. 02237.) Before that, he also worked as an electrician for Jelco Electric and worked at PacificCorp's Huntington Plant for 5 to 6 months in 1973. His duties at L.E. Myers Electric and Jelco Electric involved "running conduit, pulling wire, cable tray, [and] heat tracing pipes." (R. 02685–86, 02393.) Mr. Boynton alleges that he was exposed to asbestos dust on both of these premises while working within 20 feet of insulators who were sawing and installing pipe, boilers, and turbine insulation. (R. 02686.) He also alleges that the insulators removed the old insulation and let it fall to the ground close to where he was working. (R. 02256–57.)

Mrs. Boynton did not visit ConocoPhillips's premises and had no relationship with ConocoPhillips. (R. 02238, 04090.)

Mr. Boynton alleges that Mrs. Boynton died from mesothelioma that she contracted from laundering his work clothing. (R. 01235–37, 02366.) Mr. Boynton brought strict premises liability and negligence claims against the Premises Defendants. The allegations

against the Premises Defendants are identical and include a list of things that Plaintiff claims Premises Defendants *failed* to do. (R. 01238–57.)

After Premises Defendants moved for summary judgment arguing that there was no duty in this case of omissions, Mr. Boynton pointed to paragraph 13 of the Amended Complaint.

> Mrs. Boynton was exposed to asbestos through her husband's work with and around asbestos-containing products while working at locations including, but not limited to the following: [listing Kennecott, PacifiCorp, and ConocoPhillips locations]. The activities of cutting, chipping, mixing, sanding, sawing, scraping and sweeping that occurred in association with the work performed by Mr. Boynton and other workers working around Mr. Boynton with asbestos-containing products exposed him to great quantities of asbestos. These asbestos exposures continued as asbestos-containing dust accumulated on his work clothes and was transported to his cars and home exposing his wife, Barbara Boynton, to great quantities of asbestos as she too came in contact with the asbestos-containing products carried home on those clothes and deposited into her home and cars.

(R. 04419.) But Mr. Boynton does not allege that Mrs. Boynton was harmed by "cutting, chipping, mixing, sanding, sawing, scraping and sweeping." That would be impossible as she never entered the premises.

II. PROCEDURAL HISTORY AND DISPOSITION IN THE TRIAL COURT

Mr. Boynton filed his Amended Complaint on March 23, 2018. (R. 01258.) ConocoPhillips moved for summary judgment on October 22, 2018; PacifiCorp moved for summary judgment on October 26, 2018; and Kennecott moved for summary judgment on November 21, 2018. (R. 02246, 03380, 04180.) On January 25, 2019, the district court held a hearing on all the motions. (R. 05162). On March 13, 2019, the district court issued

an order denying Kennecott's motion for summary judgment and granting ConocoPhillips and PacifiCorp's motions for summary judgment. (R. 05447.) In granting ConocoPhillips's and PacifiCorp's motions for summary judgment, the district court determined that neither defendant had engaged in any affirmative acts as to Mrs. Boynton that would give rise to a duty. The court also held that, even if ConocoPhillips and PacifiCorp had engaged in affirmative acts, each of the *Jeffs* "minus" factors weighed in favor of finding no duty. (R. 05443–47.)

Kennecott appealed the district court's denial of its motion for summary judgment. Plaintiff responded and cross-appealed the lower court's entry of summary judgment in favor of ConocoPhillips and PacifiCorp. ConocoPhillips asks this Court to affirm the lower court's entry of summary judgment in its favor on the basis that ConocoPhillips owed no duty to Mrs. Boynton.

SUMMARY OF ARGUMENT

The lower court correctly concluded that ConocoPhillips owed no duty of care to Mrs. Boynton. First, ConocoPhillips did not engage any affirmative acts as to Mrs. Boynton. Rather, Plaintiff's complaint is that ConocoPhillips failed to prevent Mr. Boynton—an employee of an independent contractor working on its premises, i.e. an invitee—from carrying dust home and exposing Mrs. Boynton. Mrs. Boynton never entered ConocoPhillips's premises and was never employed by ConocoPhillips. Because ConocoPhillips engaged in no affirmative acts as to Mrs. Boynton, no duty can attach. Second, and as Plaintiff concedes, there is no special relationship between Mrs. Boynton and ConocoPhillips that would give rise to a duty. Finally, though the Court need not

consider the remaining "minus" factors, those factors would eliminate a duty even if one existed. Harm resulting from a substance taken off the premises by an invitee is not foreseeable because premises owners do not control their invitees'—including independent contractors and their employees—independent conduct. For the same reason, ConocoPhillips was not in the best position to take precautions to prevent the harm. Furthermore, imposing a duty on premises owners to prevent invitees from taking substances off their property and harming others would impose nearly limitless liability.

All the *Jeffs* duty factors weigh against finding that ConocoPhillips owed a duty to Mrs. Boynton. The Court should, therefore, affirm the lower court's entry of summary judgment in ConocoPhillips's favor.

ARGUMENT

Duty, one of the four essential elements of negligence, is the legal obligation to conform to a particular standard of conduct toward another. *See, e.g.*, *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5, 275 P.3d 228. Duty is a question of law that must be determined on a "categorical basis for a given class of tort claims" and "should be articulated in relatively clear, categorical, bright-line rules of law applicable to a general class of cases." *Id.* ¶ 23 (citations and quotation marks omitted). Therefore, the legal question for this Court to resolve is this:

> Does a premises owner have a duty to take actions to prevent a person who never entered the premises from being exposed to dust generated on its property?

This Court has identified several factors relevant to determining whether a defendant owes a duty to a plaintiff. But not every factor is created equal. The first factor,

"whether the defendant's alleged tortious conduct consists of an affirmative act or merely an omission," is the most critical. *Id.* ¶ 6. With the former (an affirmative act) a duty generally exists, and with the latter (omission) no duty exists. *Id.* ¶ 7. The second factor, "the legal relationship of the parties," is a "plus" factor—used to impose a duty even when the act complained of is merely an omission. *Id.* ¶ 9. The final three factors, which consider foreseeability and policy, are "minus" factors—used to eliminate a duty that would otherwise exist. *Id.* ¶ 21.

ConocoPhillips owed no duty to Mrs. Boynton because it neither engaged in an affirmative act nor has a relationship with her. Even if ConocoPhillips had engaged in affirmative acts as to Mrs. Boynton, the remaining policy and foreseeability considerations would negate any duty. The Court should therefore hold that the premises owner, ConocoPhillips, owed no duty to take actions to prevent a person who never entered the premises, Mrs. Boynton, from being exposed to dust in her home.

I. CONOCOPHILLIPS HAS NO DUTY TO MRS. BOYNTON BECAUSE IT NEITHER ENGAGED IN ANY AFFIRMATIVE ACTS NOR HAS ANY RELATIONSHIP WITH HER

a. Plaintiff's Complaint is that ConocoPhillips Failed to Prevent Dust from Leaving the Premises

Nearly every act taken by a person "carries with it a potential duty and resulting legal accountability for that act." *Jeffs*, 2012 UT 11, ¶ 9 (quoting *Webb v. Univ. of Utah*, 2005 UT 80, ¶ 10, 125 P.3d 906, *overruled on other grounds by Cope v. Utah Valley State Coll.*, 2014 UT 53, 342 P.3d 243). Thus, in determining whether a duty exists, the question is not whether a plaintiff can identify some affirmative acts that are "plausibly connected"

to the harm. *Graves v. N. E. Serv., Inc.*, 2015 UT 28, ¶ 26, 345 P.3d 619. If that were the case, a duty would exist in almost every case. *See Jeffs*, 2012 UT 11, ¶ 9 (noting that "in almost every instance" affirmative acts carry some kind of duty). Instead, the "threshold question" is what allegedly caused the harm: "(a) an affirmative act of the defendant or (b) an act of a third party that the defendant failed to prevent." *Graves*, 2015 UT 28, ¶ 20. This "long-recognized distinction between acts and omissions—or misfeasance and nonfeasance—makes a critical difference and is perhaps the most fundamental factor considered when evaluating a duty." *Jeffs*, 2012 UT 11, ¶ 7. Where the harm is allegedly caused by a defendant's affirmative act, a duty of care typically attaches. *Id.* But, where the harm allegedly results from a defendant's failure to protect someone from harm, no duty attaches absent a special relationship. *Id.*

In this case, Plaintiff's wife's harm was, as Plaintiff puts it, caused when "Larry [Plaintiff] wore his dusty clothes home where Barbara [Plaintiff's wife] washed them every week. Before washing Larry's clothes, Barbara would shake them out – exposing her to the asbestos dust that had settled onto them. She breathed more asbestos dust when she swept the laundry room to clean up the asbestos dust." Br. of Appellee and Cross-Appellant (Plaintiff), at 5 (internal citations to the record omitted); *see also* (R. 2684–7, 2845, 3294–301, 4238, 4241–4, 5438–42.) Thus, the harm here resulted from Mrs. Boynton laundering her husband's clothes. Plaintiff does not allege that ConocoPhillips or its employees engaged in any affirmative acts related to laundering Plaintiff's clothes.

Plaintiff's complaint is, instead, that ConocoPhillips failed to prevent asbestos dust from leaving the premises: "ConocoPhillips never warned Larry of the hazards of asbestos,

never monitored asbestos levels, never implemented any engineering controls to reduce his exposure, and never provide him with showers or laundry services ***to prevent the asbestos from leaving the oil refinery***." Br. of Appellee and Cross-Appellant (Plaintiff), at 7 (internal citations to the record omitted) (emphasis added). Because Plaintiff's complaint is with what ConocoPhillips allegedly failed to do to protect Mrs. Boynton—rather than what it did to harm her—no duty attaches.

To be sure, Plaintiff points to several "affirmative acts" allegedly done by ConocoPhillips's employees, but none of these alleged acts caused the harm. "[A]ffirmative acts are a basis for imposing a duty *in the performance of those acts*, not for the broader duty to undertake additional measures aimed at preventing [the harm]." *Graves*, 2015 UT 28, ¶ 29 (emphasis in original). Plaintiff claims that ConocoPhillips's employees: (1) removed insulation and let it fall to the ground; and (2) swept up the debris. Br. of Appellee and Cross-Appellant (Plaintiff), at 1, 3, 6, 7. *See also* (R. 02256–57.) These are affirmative acts. But the crux of Plaintiff's complaint is not that ConocoPhillips could have been more careful in removing insulation or sweeping up debris. Nor is his complaint that Mrs. Boynton was injured by the removal or sweeping—that would be impossible because she never entered the premises. Plaintiff's complaint is that ConocoPhillips did not undertake additional measures aimed at preventing dust from leaving the premises and exposing Mrs. Boynton in her home.

Recognizing the problem, Plaintiff goes against the undisputed facts and claims that Defendants "exposed Barbara to asbestos dust." Br. of Appellee and Cross-Appellant

(Plaintiff), at 27.[1] To be clear, it is undisputed that Mrs. Boynton never entered ConocoPhillips's premises. It also undisputed that Mr. Boynton alone took home his dirty work clothes for his wife to wash. At most, ConocoPhillips allegedly exposed ***Plaintiff*** to dust. *Id.* at 7 ("ConocoPhillips' employees generated asbestos dust that reached ***Larry***…") (emphasis added); *Id.* ("employees negligently removed and swept asbestos insulation debris while ***Larry*** worked less than twenty feet away.") (emphasis added); *Id.* at 21 ("And they swept the residual insulation from the floor, generating asbestos dust that reached ***Larry***, who worked within twenty feet of the insulation workers…") (emphasis added). But Plaintiff has not alleged any fact supporting the conclusion that ConocoPhillips exposed ***Mrs. Boynton*** to dust.

On this point, the Court's decision in *Graves* is instructive. In *Graves*, a child's parent sued an employer after its employee sexually assaulted the child in the employer's residential facility. 2015 UT 28, ¶¶ 3–9. The plaintiff there pointed to several affirmative acts by the employer that were "plausibly connected to the assault." *Id.* ¶ 26. These included leaving the door open for children, maintaining a portable swimming pool outside, offering candy and television to children, and hiring the culpable employee. *Id.*, at ¶¶ 26–29. This Court concluded, however, that the "core complaint" was not with what the employer did, but what it failed to do. Plaintiffs' claims were "aimed at [the employer's] failures (as regarding training, supervision, and employment background checks), and not its affirmative acts." *Id.* ¶ 29. In other words, the Court looked past plaintiffs'

[1] Though Plaintiff makes this argument as to Kennecott, he claims that "ConocoPhillips engaged in the same affirmative conduct that forms the basis for Kennecott's duty." Br. of Appellee and Cross-Appellant (Plaintiff), at 47.

characterizations of the allegedly wrongful conduct and, instead, focused on the real complaint: that the employer had failed to protect the child when it hired the employee. Even though the employer engaged in the affirmative act of hiring the culpable employee, the complaint was, in reality, based on the employer's omissions.

The same is true here. Plaintiff's complaint is not that ConocoPhillips's employees should have exercised reasonable care when removing insulation or sweeping up debris. Plaintiff's complaint is that ConocoPhillips failed to take additional measures to prevent dust from leaving its premises on Plaintiff's clothes. *See Hill v. Superior Prop. Mgmt. Servs., Inc.*, 2013 UT 60, ¶ 41, 321 P.3d 1054 (finding no duty because plaintiff's "claim is that her injury could have been *prevented* if [defendant] had chosen to undertake *additional activities*."). In other words, the type of harm suffered—inhalation of dust at home by someone that never entered the premises—"does not come within the range of harms that [ConocoPhillips, the premises owner] had a duty to avoid." *Jeffs*, 2012 UT 11, ¶ 17 (discussing *Joseph v. McCann*, 2006 UT App 459, 147 P.3d 547). Plaintiff, without citing any authority, urges the Court to find his act of taking dust to his home as entirely irrelevant. This Court's jurisprudence supports no such finding. *Graves*, 2015 UT 28, ¶ 20 ("A person generally has 'no duty to control the conduct of third persons.'") (quoting *Higgins v. Salt Lake Cnty.*, 855 P.2d 231, 236 (Utah 1993) (citing Restatement (Second) of Torts § 315 (1965))).

Because Plaintiff's complaint is based on ConocoPhillips's alleged omissions, no duty should attach.

b. ConocoPhillips Has No Relationship—At All—With Mrs. Boynton

Where, as here, plaintiff's complaint centers on a defendant's failures rather than actions, the law will only impose a duty when there is a "special relationship." *Jeffs*, 2012 UT 11, ¶ 5 ("the legal-relationship factor is typically a 'plus' factor—used to impose a duty where one would otherwise not exist, such as where the act complained of is merely an omission."). "The essence of the special relationship is dependence by one party upon the other or mutual dependence between the parties." *Beach v. Univ. of Utah*, 726 P.2d 413, 415–16 (Utah 1986) (citations omitted). Examples include, "common carriers to its passenger, innkeeper and guest, landowner and invitees to his land, and one who take custody of another." *Jeffs*, 2012 UT 11, ¶ 8 (citations omitted). Both in the lower court and on appeal, Plaintiff has conceded that there is no "special relationship" between ConocoPhillips and Mrs. Boynton that would give rise to a duty. She never entered ConocoPhillips's land and is, thus, not an invitee. Because Plaintiff's complaint centers on what ConocoPhillips failed to do to protect a person with which it has no relationship, special or otherwise, no duty attaches.

II. EVEN IF PLAINTIFF'S COMPLAINT WAS WITH CONOCOPHILLIPS'S AFFIRMATIVE ACTS, THE REMAINING DUTY FACTORS WOULD NEGATE ANY DUTY

The remaining duty factors aid the Court in determining whether to negate a duty that would otherwise exist. *Jeffs*, 2012 UT 11, ¶ 21. These "minus" factors include: (1) the foreseeability or likelihood of the injury; (2) public policy as to which party can best bear the loss occasioned by the injury; and (3) other general policy considerations. *Id.*

Because this case is premised on ConocoPhillips's alleged omissions (rather than acts) to a person with which it has no relationship, there is no duty. As such, the Court need not address the remaining "minus" duty factors. ConocoPhillips addresses each of these factors only to show how they would negate a duty if one existed.

a. It is Unforeseeable that a Person Who Never Enters a Premises May be Injured by a Substance Carried Off the Premises by An Invitee

When evaluating whether to negate an otherwise existing duty, the foreseeability factor requires a court to consider "the general relationship between the alleged tortfeasor and the victim" to determine whether the type of harm alleged is foreseeable. *Jeffs*, 2012 UT 11, ¶ 25. The appropriate question 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. The relevant category of cases here, then, consists of premises owners who allegedly fail to prevent invitees from carrying substances off the premises that harm others. *Id.* And the foreseeability question is whether there are circumstances within that category in which premises owners could reasonably foresee injury. *Id.*[2]

The relationship between ConocoPhillips and Mrs. Boynton is this: she is the wife of an employee of an independent contractor that ConocoPhillips hired to do work on its premises. The reason that her harm is unforeseeable is the same reason that no duty exists

[2] Plaintiff's suggestion that ConocoPhillips waived any argument on foreseeability is wrong. ConocoPhillips argued to the lower court that foreseeability must analyze at a broad, categorical level—not by considering the specific mechanism of injury as argued by Plaintiff. (R. 02245–46.) ConocoPhillips also argued that the foreseeability "minus" factor was irrelevant because there is no duty in this case. (R. 02243.) ConocoPhillips expands on that argument on this appeal only to show the Court that it can "affirm a grant of summary judgment upon ***any grounds*** apparent in the record." *Jensen ex re. Jensen v. Cunningham*, 2011 UT 17, ¶ 36, 250 P.3d 465.

in the first place: premises owners do not control their invitees' (including independent contractors and their employees) independent conduct. *Id.* ¶ 15 ("a healthcare provider is not required to control its patients' independent conduct."). Premises owners cannot control whether independent contractors properly train their employees on how to care for dirty work clothes, or whether the contractors provide shower and washing facilities to their employees. *Graves*, 2015 UT 28, ¶ 20 ("A person generally has 'no duty to control the conduct of third persons.'") (quoting *Higgins*, 855 P.2d at 236 (citing Restatement (Second) of Torts § 315 (1965))). And premises owners certainly cannot control whether invitees who work for those contractors ultimately carry substances off the premises and what they do thereafter. *Id.* Thus, any harm caused by an invitee exposing others to substances originating on the premises is not foreseeable to the premises owner. But this is also why foreseeability is a "minus" factor: harm resulting from an omission is rarely foreseeable.

Plaintiff does not dispute the law and agrees that foreseeability is "evaluated at a broad, categorical level" and that the analysis does not consider the "specific mechanism of injury." Br. of Appellee and Cross-Appellant (Plaintiff), at 29. But Plaintiff then spends nearly seven pages discussing why the specific mechanism of alleged injury—inhalation of asbestos dust from someone's clothes—was foreseeable to Defendants. All of that is irrelevant and "conflates the kind of foreseeability relevant to the duty analysis with the foreseeability inquiries significant to matters of breach and proximate cause." *Jeffs*, 2012 UT 11, ¶ 24. Plaintiff's foreseeability argument, whether in this specific case the particular kind of dust generated on the premises would lead a reasonable premises owner to take

additional precautions, is a question of breach, not duty. Plaintiff's argument misses the mark.

Even so, it was not reasonably foreseeable to ConocoPhillips, a premises owner, that its independent contractor would not exercise reasonable care in instructing its employees how to care for dirty work clothes or how to avoid taking asbestos dust off the premises. *Graves*, 2015 UT 28, ¶ 20. Nor was it foreseeable that dirty work clothes could cause harm to whomever came in contact with Plaintiff's clothes. For example, Plaintiff claims that "[t]he pool of potential plaintiff for take-home asbestos exposure cases is small. Indeed, according the U.S. Centers for Disease Control, the number of deaths from mesothelioma in Utah during 2005, was fourteen. And in 1999, ***homemakers accounted for a mere 6.8% of mesothelioma deaths in the United States***." Br. of Appellee and Cross-Appellant (Plaintiff), at 42 (internal citations to the record omitted). Plaintiff's argument that Mrs. Boynton's harm is the "common result" of sweeping asbestos dust and removing insulation is, thus, unavailing. Br. of Appellee and Cross-Appellant (Plaintiff), at 24.

Regardless of whether the danger of asbestos dust to people who are exposed to dirty clothes was or should have been known, a fact disputed by the parties, it was not reasonably foreseeable to ConocoPhillips that employees of its independent contractors would take home dusty work clothes and cause injury to others.

No duty can exist in this case because ConocoPhillips neither engaged in any affirmative act as to Mrs. Boynton nor had any relationship with her. For that same reason, her injury was unforeseeable.

b. ConocoPhillips Was Not in the Best Position to Prevent Mrs. Boynton from Inhaling Dust in Her Home

The second factor *Jeffs* requires when determining whether to eliminate a duty that would otherwise exist, is whether someone other than defendant was in the best position to prevent the harm. 2012 UT 11, ¶ 30. Where someone other than defendant has more control to avoid the harm, there may be no duty. *Id.* This is particularly true when imposing a duty on the defendant would lead to an extraordinarily onerous and unworkable burden. *See In re Certified Question from Fourteenth Dist. Ct. of Appeals of Tex.*, 740 N.W.2d 206, 217 (2007) (refusing to find that defendant owed a duty to every person with whom the clothes of the business's employees and the employees of its independent contractors come into contact because it would "impose an extraordinarily onerous and unworkable burden.").

Here, Plaintiff and his employer were in a "superior position of control" to prevent Plaintiff's wife from inhaling dust from his dirty work clothes in their home. ConocoPhillips had no control over what Plaintiff did with his work clothes, nor how, where, or who launder them. *Graves*, 2015 UT 28, ¶ 20. This is particularly true, as the district court recognized, because Plaintiff was not employed by ConocoPhillips. (R. 05444.) He worked for L.E. Myers Electric when he came onto the premises. It is undisputed that ConocoPhillips did not supervise, train, or otherwise instruct Mr. Boynton in his work—much less how and where to clean his clothes after work. (R. 05444–46.) ("In short, these Defendants had no involvement whatsoever with the injury causing aspect of the work—the presence of Mr. Boynton near insulation works that allegedly exposed his clothing to asbestos dust."). ConocoPhillips thus "lack[ed] the capacity that [Plaintiff]

ha[d] to avoid injury by taking reasonable precautions." *Jeffs*, 2012 UT 11, ¶ 30. Rather, Plaintiff and his employer were "best situated to take reasonable precautions to avoid the injury." *Id.* In nearly identical cases, courts outside of Utah have agreed with this conclusion. *See, e.g. In re NYC Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005) (finding that an employer "was, in fact, entirely dependent upon [the employee's] willingness to comply with and carry out such risk-reduction measures.").

Thus, even if ConocoPhillips did some affirmative act (it did not) and owed a duty to Mrs. Boynton, the fact that Plaintiff was better situated to prevent Mrs. Boynton from washing his clothes would weigh against imposing a duty.

c. Imposing a Duty on Premises Owners for Substances Carried Off Their Premises by Invitees Creates Almost Infinite Liability

Courts across the country have refused to impose a duty in take-home asbestos cases because "liability for take-home exposure would essentially be infinite" because the duty would necessarily be extended to "children, babysitters, neighbors, dry cleaners, or any other person who potentially came in contact with [the person's] clothes." *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534 (E.D. Pa. 2014); *see also Quiroz v. ALOCA Inc.*, 243 Ariz. 560, 567–68, 416 P.3d 824, 831–32 (2018) (no duty under Arizona law); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (2005) (no duty under Georgia law); *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 931, 939 (2009) (no duty under Illinois law); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009) (no duty under Iowa law); *Adams v. Ownes-Illinois, Inc.*, 119 Md.App. 395, 705 A.2d 58, 66 (1998) (no duty under Maryland law); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206,

218 (2007) (no duty under Michigan law); *In re New York City Asbestos Litig.*, 840 N.E.2d 115, 116 (2005) (no duty under New York law); *Boley v. Goodyear Tire & Rubber Co.,*929 N.E.2d 448, 451 (2010) (no duty under Ohio law).

Still, Plaintiff argues that the foreseeability requirement would limit how far the duty could extend. Yet in the same breath, he says that harm to the wife of an employee of an independent contractor that was hired to do work on ConocoPhillips's premises was foreseeable. No doubt that if the Court finds a duty in this case, there would be "no principled basis in the law upon which to distinguish the claim of a spouse" with any other person that might have come in contact with someone's clothes. *Riedel v. ICI Am. Inc.*, 968 A.2d 17 (Del. 2009). Such a ruling would open the flood gates in a crisis that is already "one of the most costly…ever within our nation's legal system." *Fourteenth Dist. Ct.*, 740 N.W.2d at 217. And that is just take-home asbestos cases.

Finding a duty in this case would also vastly expand Utah tort law in that it would require premises owners to prevent invitees from carrying potentially-harmful substances off the premises and exposing others—regardless of whether the premises owner had any control over the invitee. Thus, Plaintiff's claim that the "pool of potential plaintiffs for take-home asbestos exposure cases is small" should be given little weight. This Court has, on multiple occasions, held that the question whether a duty exists should be determine with "categorical, bright-line rules of law applicable to a general class of cases." *Jeffs*, 2012 UT 11, ¶ 23. The imposition of a duty here would, therefore, expand the duties of premises owners and impose liability when they merely fail to act. Public policy weighs against imposing a duty in this case.

CONCLUSION

The lower court correctly concluded that ConocoPhillips owed no duty of care to Mrs. Boynton. She never entered ConocoPhillips's premises and was never employed by ConocoPhillips. Nor was her husband. Though Mr. Boynton worked for an independent contractor of ConocoPhillips, he was—at most—an invitee on ConocoPhillips's premises. As such, ConocoPhillips engaged in no affirmative acts as to Mrs. Boynton. Plaintiff's complaint is, instead, that ConocoPhillips failed to prevent him from carrying dust off the property. The tenuous relationship between Mr. Boynton and ConocoPhillips cannot support imposing a duty on ConocoPhillips to protect his wife. Wherefore, this Court should affirm the district court's entry of summary judgment in favor of ConocoPhillips.

DATED this 31stday of January, 2020.

SNELL & WILMER L.L.P.

By: *_/s/ Stewart O. Peay_*
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11)(A) because this brief contains 4949 words, excluding parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the requirements of Utah R. App. P. 21(g).

DATED this 31st day of January, 2020.

SNELL & WILMER L.L.P.

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Tracy H. Fowler
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2020, I caused a true and correct copies of the foregoing **REPLY BRIEF OF THE APPELLEE** to be served via emailed to the following:

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