2019

Larry Boynton, Individual and On Behalf of the Heirs of Barbara Boynton, Plaintiff/Appellee, v. Kennecott Utah Copper, LLC, Defendant/Appellant : Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

LARRY BOYNTON, individual and on behalf of the heirs of BARBARA BOYNTON, Plaintiff/Appellee, v. KENNECOTT UTAH COPPER, LLC, Defendant/Appellant.	Case No. 20190259 (Appeal from the Third District Court Salt Lake County, Civil No. 160902693, Judge Randall N. Skanchy)

BRIEF OF THE APPELLANT

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LIST OF PARTIES

The parties to this appeal include:

- Appellant/Cross-Appellee Kennecott Utah Copper, LLC; represented by Rick L. Rose, Kristine M. Larsen, and Blake M. Biddulph of the firm Ray Quinney & Nebeker P.C.

- Appellee/Cross-Appellant Larry Boynton, individually and on behalf of the heirs of Barbara Boynton, is represented by Richard I. Nemeroff and Barrett Naman of The Nemeroff Law Firm and Troy L. Booher, Beth E. Kennedy, and Dick J. Baldwin of the firm Zimmerman Booher.

- Cross-Appellee Phillips 66 Company and ConocoPhillips is represented by Tracy H. Fowler, Stewart O. Peay, Kristin Overton, and Kristin Ann Baughman of the firm Snell & Wilmer LLP.

- Cross-Appellee PacifiCorp is represented by Sam Meziani of the firm Wrona Dubois; Jason L. Kennedy and Jill M. Felkins of the firm Segal McCambridge Singer & Mahoney, Ltd.; and Timothy Clark, Emily Wegener, and Bret Reich of PacifiCorp.

The following are parties to the underlying proceeding but not the appeal: FMC Corporation, General Electric Company, Honeywell Inc., and Ingersoll Rand Company.

The following parties have been dismissed from the underlying proceeding: Fluor Enterprises Inc., Flowserve US Inc., Pacific States Cast Iron Pipe, Bechtel Corporation, CBS Corporation, Crane Co., Foster Wheeler Energy Corporation, IMO Industries Inc., Industrial Supply Company Inc., John Crane Inc., Riley Power Inc., The Goodyear Tire & Rubber Co., United States Welding Inc., and Warren Pumps LLC.

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INTRODUCTION

Nearly 60 years ago, Larry Boynton worked at the Kennecott Utah Copper, LLC ("KUC") smelter where he was allegedly exposed to asbestos-containing products and, as a result, carried asbestos fibers home on his work clothing. His wife, Barbara Boynton, was then allegedly exposed to those fibers while laundering that clothing.[1] This type of exposure is known as "take-home exposure" or "non-occupational exposure." Mrs. Boynton was diagnosed with malignant mesothelioma on February 4, 2016 and died on February 27, 2016. This appeal considers whether a premises owner, like KUC, owes a duty in a take-home asbestos exposure case to a family member who never set foot on its premises.

Mr. Boynton filed suit against KUC, PacifiCorp, and Phillips 66/ConocoPhillips ("Conoco") (collectively the "Premises Defendants") alleging claims of strict premises liability and negligence. The allegations against the Premises Defendants are identical and consist of failures to act, or nonfeasance. Mr. Boynton alleges that Mrs. Boynton was exposed to asbestos because the Premises Defendants failed to prevent Mr. Boynton from carrying asbestos fibers home on his clothing and failed to warn him of the potential hazards of asbestos exposure. The Premises Defendants moved for summary judgment arguing that they did not owe a duty to Mrs. Boynton. Judge Randall Skanchy denied KUC's motion, finding a disputed issue of material fact (without identifying the disputed fact), and granted the very similar motions of PacifiCorp and Conoco.

[1] For purposes of this appeal only, KUC assumes Mr. and Mrs. Boynton were exposed to asbestos because whether or not they were actually exposed is irrelevant to whether KUC owed Mrs. Boynton a duty.

The district court's denial of KUC's motion for summary judgment should be reversed because KUC did not owe a duty to Mrs. Boynton. Whether a duty exists is a question of law, not a question of fact. In *B.R. ex rel. Jeffs v. West*, this Court listed five factors relevant to determining whether a defendant owes a duty to a plaintiff:

> (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general policy considerations.

2012 UT 11, ¶ 5, 275 P.3d 228 (quotation marks and citations omitted). The first two factors are "plus" factors because they create a duty while the last three factors are "minus" factors because they eliminate a duty that would otherwise exist. *Id.*

KUC's alleged tortious conduct consists only of nonfeasance. When a claim is based on a defendant's nonfeasance, as is the case here, a duty does not exist without a special relationship. KUC therefore does not owe a duty to Mrs. Boynton because it is undisputed there is no legal relationship between KUC and Mrs. Boynton.

Even if KUC engaged in misfeasance, the three "minus" factors would eliminate any duty created by that misfeasance. First, harm from take-home asbestos exposure was not reasonably foreseeable to KUC when Mr. Boynton worked at the smelter (1961–66). Although the danger of very high direct occupational asbestos exposure, such as in asbestos mining and asbestos textile milling and manufacturing, may have been generally foreseeable during this time period, the potential harm of take-home exposure was not. Indeed, there was no real consensus about the risk of exposure to family members until 1972 at the very earliest, when the Occupational Safety and Health Administration

("OSHA") first addressed take-home asbestos exposure.[2] As a result, multiple courts have held that harm from take-home exposure was not reasonably foreseeable prior to the enactment of those OSHA regulations.[3]

Second, KUC was not best situated to prevent harm from take-home exposure because Mr. Boynton was the one who actually carried the fibers home on his clothing.

Third, public policy disfavors imposing a duty in take-home exposure cases. If the Court finds that KUC owed a duty to Mrs. Boynton, KUC would arguably owe a duty to any other person with whom Mr. Boynton's clothes came into contact because there is no principled basis for distinguishing such claims. Take-home exposure liability creates limitless liability for premises owners and virtually an infinite number of potential plaintiffs.

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[2] *Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1037 (Md. 2013) ("In addition to setting a maximum level of airborne asbestos fibers to which workers could be exposed during an 8-hour period, the [1972] regulations require, among other things, that employers (1) provide and require the use of special protective clothing, including head covering, gloves, and foot coverings for employees exposed to airborne concentrations of asbestos fibers that exceed the maximum allowed level; (2) provide change rooms and lockers for employees, so they may change from their work clothes into street clothes; and (3) provide for the laundering of asbestos-contaminated clothing in a safe manner.") (citation omitted).

[3] *See, e.g., Martin v. Gen. Elec. Co.*, 2007 WL 2682064, *5 (E.D. Ky. Sept. 5, 2007) ("Simply put, the literature at the time did not place [the defendant] on notice that bystanders/nonworkers such as Plaintiff's Decedent were subject to health maladies due to second-hand exposure to asbestos-containing materials."), *aff'd*, *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 445 (6th Cir. 2009) ("We agree with the district court that [the plaintiff] has failed to show the risk was foreseeable at the relevant times."); *Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 218 (Mich. 2007) ("Therefore, the risk of "take home" asbestos exposure was, in all likelihood, not foreseeable by defendant while [the worker] was working at defendant's premises from 1954 to 1965.").

The existence of a duty in take-home asbestos exposure cases is a matter of first impression for Utah appellate courts, but courts across the country have held there is no duty in such cases.[4] This Court should follow those jurisdictions, hold that KUC did not owe Mrs. Boynton a duty, and reverse the district court.

[4] *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 462 (Tex. App. 2007) ("[T]he danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to [the defendant] in the 1950s."); *Bootenhoff v. Hormel Foods Corp.*, 2014 WL 3744011, *14 (W.D. Okla. July 30, 2014) ("[L]ack of foreseeability and additional policy considerations dictate that [the defendant] did not owe a duty of care to Norma Bootenhoff."); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) ("[W]e decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."); *Farrar*, 69 A.3d at 1039 ("[W]e conclude that the Court of Special Appeals erred in finding a duty on the part of [the defendant] to warn Ms. Farrar, back in 1968–69, of the danger of exposure to the dust on her grandfather's clothes."); *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014) ("[T]he Court concludes that [the defendant] owed no duty to Mrs. Gillen regarding her claim for 'take-home exposure' to asbestos."); *Fourteenth Dist.*, 740 N.W.2d at 222 ("[W]e hold that, under Michigan law, defendant, as owner of the property on which asbestos-containing products were located, did not owe to the deceased, who was never on or near that property, a legal duty to protect her from exposure to any asbestos fibers carried home on the clothing of a member of her household who was working on that property as the employee of independent contractors, where there was no further relationship between defendant and the deceased."); *In re Asbestos Litig.*, 2007 WL 4571196, *1 (Del. Super. Ct. Dec. 21, 2007) ("[T]he Court concludes that [the defendant] owed no duty to Mrs. Riedel to prevent her from being exposed to asbestos within her own home."), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009); *In re Asbestos Litig.*, 2012 WL 1413887, *2 (Del. Super. Ct. Feb. 21, 2012) ("[T]he court finds under Pennsylvania law an employer/premises owner does not owe a duty to the spouse of an employee in the take home asbestos exposure context."); *In re New York City Asbestos Litig.*, 840 N.E.2d 115, 116 (N.Y. 2005) (concluding there is "no duty of care" in take-home exposure cases); *Martin*, 2007 WL 2682064 at *5 ("[B]ecause it was not generally foreseeable to either [defendant] during the relevant time period herein that intermittent, non-occupational exposure to asbestos could put those person[s] at risk of contracting serious illness, no duty existed."), *aff'd*, *Martin*, 561 F.3d at 445; *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 699 (Iowa 2009) ("[T]he district court correctly concluded [defendants] owed no duty to Ann, a household member of an independent contractor's employee.").

STATEMENT OF THE ISSUE

Issue: Inasmuch as the issue of duty is a legal question, did the district court err in denying KUC's motion for summary judgment and concluding there was a disputed issue of material fact as to whether KUC owed a duty of care to Mrs. Boynton?

Standard of Review: A district court's grant or denial of summary judgment is reviewed for correctness, with no deference to the district court. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 ("An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness . . . .") (quotation marks and citation omitted); *Raab v. Utah Ry. Co.*, 2009 UT 61, ¶ 10, 221 P.3d 219 ("We review a district court's decision to grant summary judgment for correctness, giving no deference to the district court.").

Preservation: KUC preserved this issue for appeal by filing a motion for summary judgment seeking a ruling that KUC does not owe a duty to Mrs. Boynton. (R. 04162–80.)

STATEMENT OF THE CASE

I. RELEVANT FACTS

A. Mr. Boynton's work at KUC's premises

Mr. Boynton married Mrs. Boynton in September 1962. (R. 04165, 05008.) After their marriage, Mr. Boynton worked as a laborer at KUC's smelter and continued in that position for "[p]robably 12 to 15 months" (from 1962 to late 1963 or early 1964). (R. 04165.) Mr. Boynton claims he was exposed to asbestos 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 KUC's smelter from 1964 to 1966. (R. 04165, 04242.) 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 2 to 20 feet away from him. (R. 04166.) Mrs. Boynton never visited KUC's premises. (R. 04166, 05008.)

There is no evidence whatsoever that KUC had knowledge of any potential danger from take-home asbestos exposure.

B. Mr. Boynton's work at PacifiCorp and Conoco's premises

Mr. Boynton was employed as an electrician for (1) Jelco Electric and worked at PacifiCorp's Huntington Plant for 5 to 6 months in 1973; and (2) L.E. Myers Electric and worked at the Conoco refinery off and on from 1976–78. (R. 02237, 02393, 02359.) Similar to his work for Wasatch Electric at KUC's smelter, his duties at PacifiCorp and Conoco involved "[r]unning conduit, pulling wire, cable tray, [and] heat tracing pipes." (R. 02685–86, 02393.) At PacifiCorp, he was allegedly exposed to asbestos while working within 5 to 20 feet of insulators who were sawing and installing pipe insulation as well as insulation on boilers and turbines. (R. 02256–57.) He made the same allegations about his time at Conoco and added that the insulators removed the old asbestos pipe insulation and let it fall to the ground close to where he was working. (*Id.*)

C. Mr. Boynton's allegations against KUC, PacifiCorp, and Conoco

Mr. Boynton alleges that Mrs. Boynton died from mesothelioma that she contracted from laundering his work clothing. (R. 04165.) Mr. Boynton brought strict premises liability and negligence claims against the Premises Defendants. The allegations of wrongdoing against the Premises Defendants are identical and include the following:

> Premises Defendants negligently, recklessly, willfully and/or because of gross and wanton negligence, fault, or strict liability, ***failed*** to properly discharge its duties to Plaintiff in the following particulars: (a) ***failure*** to provide Plaintiff's husband with a safe place to work; (b) ***failure*** to provide Plaintiff's husband with adequate engineering or industrial hygiene measures to control the level of exposure to asbestos, including but not limited to local exhaust, general ventilation, respiratory protection, segregation of work involving asbestos, use of wet methods to reduce the release of asbestos into the ambient air, medical monitoring, air monitoring, and procedures to prevent the transportation of asbestos fibers home on Petitioner's father's clothing; and (c) ***failure*** to inform or warn Plaintiff's husband of the hazards of asbestos exposure. . . .
>
> Premises Defendants negligently, recklessly, willfully and/or because of gross and wanton negligence or fault, ***failed*** to properly discharge their duties to the Plaintiff in the following: (a) ***failed*** to provide the Decedent's husband with a safe work environment; (b) ***failed*** to provide the Decedent's husband with safety equipment; (c) ***failed*** to provide the Decedent's husband with correct, adequate, or proper safety equipment; (d) recklessly and negligently ***failed*** to disclose, warn or reveal critical medical and safety information regarding asbestos hazards in general and with regard to those specific hazards at the work site; (e) recklessly ***concealed*** and negligently ***omitted*** to reveal critically medical and safety information regarding the safety and health risks associated with the asbestos and asbestos-containing products at the worksites; (f) ***failed*** to timely remove asbestos hazards from the work place; (g) ***failed*** to properly supervise or monitor the work areas for compliance with safety regulations; (h) ***failed*** to provide a safe and suitable means of eliminating the amount of asbestos dust in the air; and (i) ***failed*** to provide the necessary facilities, practices and procedures that would lessen or eliminate the transfer of asbestos from the workplace to the home on the clothing and/or person of Larry Boynton.

(R. 04432–35 (emphasis added).)

In his district court briefing, Mr. Boynton pointed to paragraph 13 from the Amended Complaint in arguing that the Premises Defendants engaged in affirmative acts of negligence (misfeasance):

> 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 KUC, PacifiCorp, and Conoco 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 the Premises Defendants were negligent in doing these acts. In other words, he does not allege the Premises Defendants were negligent in cutting, chipping, mixing, sanding, sawing, scraping, and sweeping asbestos-containing products.

II. PROCEDURAL HISTORY AND DISPOSITION IN THE TRIAL COURT

Mr. Boynton filed his Amended Complaint on March 23, 2018. (R. 01258.) Conoco moved for summary judgment on October 22, 2018; PacifiCorp moved for summary judgment on October 26, 2018; and KUC moved for summary judgment on November 21, 2018. (R. 02246, 03380, 04180.) The district court held a hearing on all of the motions on January 25, 2019. (R. 05162.) Then on March 13, 2019, the district court issued an order denying KUC's motion for summary judgment and granting

Conoco and PacifiCorp's motions for summary judgment. (R. 05447.) In denying KUC's motion, the district court determined there was "a disputed issue of material fact as to whether a legal duty extends to Mrs. Boynton." (*Id.*) In granting the very similar motions of Conoco and PacifiCorp, the district court determined Conoco and PacifiCorp did not engage in any misfeasance that would create a duty to Mrs. Boynton, and that even if they did, each of the *Jeffs* "minus" factors weighed in favor of no duty. (R. 05443–47.) The district court did not address any of the "minus" factors with respect to KUC's motion and did not identify the supposed dispute of material fact that precluded summary judgment. (R. 05447.) KUC appeals that order.

SUMMARY OF THE ARGUMENT

Whether a duty exists is a question of law and should be articulated in relatively clear, categorical, bright-line rules of law applicable to a general class of cases. *Jeffs*, 2012 UT 11, ¶ 23. As a matter of law, KUC did not owe a duty to Mrs. Boynton who was never at or near KUC's premises. KUC's allegedly tortious conduct consists only of nonfeasance, and no duty exists in cases of nonfeasance absent a special relationship, which here there undisputedly is not. But even if KUC engaged in misfeasance, KUC did not owe a duty to Mrs. Boynton because harm from take-home asbestos exposure was not reasonably foreseeable before 1972, KUC was not best positioned to prevent harm from take-home exposure, and public policy weighs heavily against take-home exposure liability. The Court should therefore reverse the district court's decision and hold that KUC did not owe Mrs. Boynton a duty.

ARGUMENT

I. DUTY IS A QUESTION OF LAW AND SHOULD BE ARTICULATED IN RELATIVELY CLEAR, CATEGORICAL, BRIGHT-LINE RULES OF LAW APPLICABLE TO A GENERAL CLASS OF CASES.

"[D]uty is one of four essential elements of a cause of action in tort" and is "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Jeffs*, 2012 UT 11, ¶ 5 (citations omitted). "Duty must be determined as a matter of law and 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.* at ¶ 23 (citations and quotation marks omitted). The "general class of cases" here is take-home asbestos exposure claims against premises owners, which are end users of asbestos-containing products.

II. KUC DID NOT OWE A DUTY TO MRS. BOYNTON BECAUSE KUC'S ALLEGED TORTIOUS CONDUCT CONSISTS ONLY OF NONFEASANCE AND THERE IS NO SPECIAL RELATIONSHIP BETWEEN KUC AND MRS. BOYNTON.

The five *Jeffs* factors relevant to determining whether a defendant owes a duty to a plaintiff are:

> (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general policy considerations.

Id. at ¶ 5 (quotation marks and citations omitted). Absent a special relationship, misfeasance is required for a duty to exist; conversely, a special relationship is typically required if the case involves only nonfeasance. *Id.* at ¶ 7. It is undisputed that KUC and

Mrs. Boynton are "legal strangers" for negligence purposes, so, without misfeasance, KUC owed no duty to Mrs. Boynton.

A. KUC's alleged tortious conduct consists only of nonfeasance.

"The long-recognized distinction between acts and omissions—or misfeasance and nonfeasance—makes a critical difference and is perhaps the most fundamental factor courts consider when evaluating duty." *Id.* "Acts of misfeasance, or active misconduct working positive injury to others, typically carry a duty of care." *Id*. (quotation marks and citation omitted). "Nonfeasance—passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant—by contrast, generally implicates a duty only in cases of special legal relationships." *Id.* (quotation marks and citation omitted). The following two cases illustrate that KUC's alleged tortious conduct consists only of nonfeasance, not misfeasance.

In *Graves v. North Eastern Services, Inc.*, a child's parents sued a provider of services to individuals with mental and physical disabilities after the provider's employee sexually assaulted the child in a residential facility. 2015 UT 28, ¶¶ 3–9, 345 P.3d 619. Arguing that the facility owed a duty to the child because of the facility's misfeasance, the plaintiffs pointed to the following allegations—"enticing children like [the victim] into [the residence] by keeping the door open, maintaining a portable swimming pool outside, and offering candy and television inside." *Id.* at ¶ 26. But this was not misfeasance for purposes of duty analysis because the "crux" of the plaintiffs' cases was not that the facility "was uncareful in the way it placed the portable swimming pool, or in

the manner in which it offered candy or television programming." *Id.* at ¶ 27. The plaintiffs' "core complaint" was instead that the facility's nonfeasance—"in *not* performing an employment background check on [the assaulting employee], and in *not* providing training and supervision for [the employees]"—caused the child's harm. *Id.* (emphasis in original). The facility's "affirmative acts [were] a basis for imposing a duty *in the performance of those acts*, not for a broader duty to undertake additional measures aimed at preventing the sexual assault by a third party." *Id.* at ¶ 29 (emphasis in original). Even though the facility had undertaken affirmative acts and even though the acts were "plausibly connected to the assault," there was no duty based on the affirmative acts because plaintiffs' claims were "aimed at [the facility's] failures (as regards training, supervision, and employment background checks), and not its affirmative acts." *Id.* at ¶¶ 26–29.[5]

In this case, Mr. Boynton points to KUC's supposed misfeasance of selecting asbestos-containing materials and chipping, sawing, and cutting asbestos-containing materials in arguing that KUC owed a duty to Mrs. Boynton. But similar to *Graves*, the "crux" of this case is not that KUC "was uncareful in the way it [selected asbestos-containing materials] or in the manner in which it [chipped, sawed, or cut asbestos-containing materials]." *Id.* at ¶ 27. Instead, Mr. Boynton's "core complaint" is that Mrs. Boynton developed mesothelioma because KUC *failed* to prevent Mr. Boynton from carrying asbestos fibers home on his clothing and to warn him of the potential hazards of

[5] This Court ultimately found that there was a special relationship justifying the creation of a duty. *Graves*, 2015 UT 28, ¶ 36.

asbestos exposure. KUC's alleged affirmative acts of selecting asbestos-containing materials and chipping, sawing, and cutting those materials "are a basis for imposing a duty *in the performance of those acts*, not for a broader duty to undertake additional measures aimed at preventing [take-home asbestos exposure]." *Id.* at ¶ 29. Like *Graves*, Mr. Boynton's claims are "aimed at [KUC's] failures . . . and not its affirmative acts." *Id.*

This Court's opinion in *Hill v. Superior Prop. Mgmt. Servs., Inc.* further illustrates that KUC's alleged tortious conduct consists only of misfeasance. 2013 UT 60, ¶¶ 38–41, 321 P.3d 1054. In *Hill*, the issue was whether a lawn mowing company owed a duty to apartment residents to prevent hazards associated with tree roots growing hidden in the grass. *Id.* at ¶ 1. Plaintiff argued there was a duty because the defendant had voluntarily undertaken the affirmative act of mowing the lawn. *Id.* at ¶ 38. But the plaintiff "fail[ed] to connect up any activity that [the lawn mowing company] voluntarily undertook with an allegation of negligence *in the performance of that activity*." *Id.* at ¶ 39 (emphasis in original). The plaintiff's real claim was "that her injury could have been *prevented* if [defendant] had chosen to undertake *additional activities*" related to the tree roots growing hidden in the grass. *Id.* at ¶ 41 (emphasis in original). Therefore, the defendant's duty "was limited to the extent of its undertaking—a duty that is narrowly construed, and not a basis for a general obligation to undertake affirmative acts in aid of third parties." *Id.*

Like *Hill*, Mr. Boynton has "fail[ed] to connect up any activity that [KUC] voluntarily undertook with an allegation of negligence *in the performance of that*

activity." *Id.* at ¶ 39 (emphasis in original). There are no allegations of negligence related to the selection of asbestos-containing materials or the chipping, sawing, or cutting of those materials. Instead, Mr. Boynton's alleged actions of negligence against KUC concern failures only, not active misconduct. Mr. Boynton claims KUC ***failed*** to provide the necessary facilities, practices, and procedures that would lessen or eliminate the transfer of asbestos from the workplace to the home on the clothing and/or person of Mr. Boynton. Indeed, Mr. Boynton's real claim is that Mrs. Boynton's harm from asbestos exposure "could have been *prevented* if [KUC] had chosen to undertake *additional activities*" to prevent Mr. Boynton from carrying asbestos fibers home on his clothing. *Id.* at ¶ 41 (emphasis in original).

This is clearly a case of alleged omissions. The premise of Mr. Boynton's case against KUC is for its *failures*, not any acts of affirmative misconduct or misfeasance. Accordingly, KUC only owed Mrs. Boynton a duty if there was a special relationship between them.

B. There is no special relationship between KUC and Mrs. Boynton.

Nonfeasance "generally implicates a duty only in cases of special relationships." *Jeffs*, 2012 UT 11, ¶ 7. "The essence of a 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) (citation omitted). Traditional examples include "common carrier to its passenger, innkeeper and guest, landowner and invitees to his land, and one who takes custody of another." *Jeffs*, 2012 UT 11, ¶ 8 (citation omitted). Mrs. Boynton was not employed by KUC, and she never even stepped foot on its premises. As a result,

there is no dispute that KUC and Mrs. Boynton are "legal strangers" for negligence purposes. *See Gillen*, 40 F. Supp. 3d at 538 ("Mrs. Gillen's relationship with [the defendant] as it relates to her take-home exposure claim is essentially that of 'legal strangers' under the law of negligence."). Since there are no allegations of misfeasance and since there is no special relationship between KUC and Mrs. Boynton, KUC did not owe a duty to Mrs. Boynton as a matter of law.

III. THE THREE MINUS FACTORS, PARTICULARLY FORESEEABILITY, WOULD ELIMINATE ANY DUTY CREATED BY MISFEASANCE.

The final three *Jeffs* factors are "minus" factors because they "eliminate a duty that would otherwise exist." 2012 UT 11, ¶ 5. This means that even if KUC's alleged tortious conduct includes misfeasance, the following factors eliminate any duty arising from that misfeasance.

A. Harm from take-home asbestos exposure was not reasonably foreseeable before the 1972 OSHA Regulations.

Foreseeability analysis for duty "is distinct from that for breach or proximate cause." *Mower v. Baird*, 2018 UT 29, ¶ 24, 422 P.3d 837. It "does not question the specifics of the alleged tortious conduct such as the specific mechanism of the harm;" instead, it "relates to the general relationship between the alleged tortfeasor and the victim and the general foreseeability of harm." *Jeffs*, 2012 UT 11, ¶ 25 (quotation marks and citations 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.* at ¶ 27. For this appeal, the relevant foreseeability question is

whether harm from take-home asbestos exposure was foreseeable to a premises owner, which was an end user of asbestos-containing products, where the exposure occurred prior to the 1972 OSHA regulations.

When considering foreseeability, it is important not to be swayed by hindsight bias because "[i]t can be said, with the benefit of hindsight, that everything is foreseeable." *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1098 (Ill. 2012). To make the determination what the defendant should have known in a take-home exposure case, a court should consider "what information about the nature of asbestos was known at the time of plaintiff's alleged exposure" and "what information defendant could reasonable be held accountable for knowing." *Id.* at 1099. Indeed, "the Court must look to whether the harm to [plaintiff] was foreseeable in the first instance" because "with the benefit of hindsight, an argument can be made that it was foreseeable that those exposed to asbestos on Defendant's premises would later expose those they came in contact with at home." *Gillen*, 40 F. Supp. 3d at 539. The relevant timeframe for this appeal is 1961–66 (when Mr. Boynton undisputedly worked at KUC's smelter), several years before the promulgation of the 1972 OSHA regulations. Although the potential danger to workers from direct, and very high, occupational exposure settings— such as asbestos mining and asbestos textile milling and manufacturing —was generally foreseeable in the 1960s, harm from non-occupational asbestos exposure was not reasonably foreseeable until 1972, at the very earliest.

There was very little, if any, information available about the danger of take-home asbestos exposure when Mr. Boynton worked at KUC's smelter, and there is no evidence

KUC had any knowledge of such danger. Speculation that asbestos-related diseases might result from take-home exposure was first raised in asbestos scientific literature in 1965 (the "Newhouse Study").[6] But the Newhouse Study was conducted in London and was not capable of focusing solely on take-home exposure because the studied population had significant community environmental exposure from a crocidolite asbestos factory in the neighborhood. Other courts have recognized the Newhouse Study and still determined that no duty existed for take-home exposure.[7] This one study, with questionable relevance to take-home exposure and published at the very end of Mr. Boynton's time at KUC's smelter, simply does not make take-home exposure reasonably foreseeable to an end user of asbestos products on the other side of the globe, like KUC.

Instead, the very earliest that harm from take-home exposure could be reasonably foreseeable is 1972, when the OSHA regulations were released, which approach has been followed by multiple courts across the country: *Martin*, 2007 WL 2682064 at *5, *aff'd*, *Martin*, 561 F.3d at 445; *Fourteenth District*, 740 N.W.2d at 218; *Farrar*, 69 A.3d at 1036–39.

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[6] The Newhouse Study was cited in Dr. Richard Lemen's affidavit, filed by Plaintiff in opposition to the Premises Defendants' motions for summary judgment. (R. 02966–67.)

[7] *See, e.g.*, *Farrar*, 69 A.3d at 1036–37 ("The study that experts from both sides regarded as more significant was one by Muriel Newhouse and Hilda Thompson in 1965. The study concerned 76 persons who lived in the vicinity of an asbestos factory in the London area and who contracted lung disease. Although most (67) of those persons had neither an occupational nor a household exposure to asbestos but . . . may have been exposed because they lived in the vicinity of the factory, nine of the subjects were exposed to dust brought home by a family member and later were diagnosed with mesothelioma or asbestosis."); *Martin*, 561 F.3d at 445 (finding no duty while recognizing "Plaintiff's expert report concedes that the first studies of bystander exposure were not published until 1965.").

In *Martin*, Vernon Martin was allegedly exposed to asbestos from 1951 to 1963 while working for the defendant. His son, Dennis Martin, contracted mesothelioma after being exposed to the asbestos brought home on the "clothing, hair, and person of his father." 2007 WL 2682064 at *1. The court granted the defendant's motion for summary judgment because the defendant did not "owe[] a legal duty to [Dennis Martin] because the potential harm of non-occupational asbestos exposure was not foreseeable to [the defendant] during the relevant time period." *Id.* at *5. "Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930s, *the extension of that harm to others was not widely known until at least 1972*, when OSHA regulations recognized a causal connection." *Id.* (emphasis added). "Simply put, *the literature at the time* did not place [the defendants] on notice that bystanders/nonworkers such as [the decedent] were subject to health maladies due to second-hand exposure to asbestos-containing materials." *Id.* (granting the defendants' motions for summary judgment based on no legal duty); *see also Martin*, 561 F.3d at 444–45 ("We agree with the district court that Martin has failed to show the risk was foreseeable at the relevant times. . . . Without any published studies or any evidence of industry knowledge of bystander exposure, there is nothing that would justify charging [the defendants] with such knowledge during the time that Mr. Martin's father was working with asbestos.").

In *Farrar*, Jocelyn Farrar was diagnosed with mesothelioma caused by take-home asbestos exposure from shaking out and laundering her grandfather's clothes from 1968–69. 69 A.3d at 1030. The Maryland Court of Appeals determined the harm was not

foreseeable during the pre-OSHA timeframe of 1968–69, which is even later than the timeframe here of 1961–66:

> Although the danger of exposure to asbestos in the workplace was well-recognized at least by the 1930s, the danger from exposure in the household to asbestos dust brought home by workers, though in hindsight perhaps fairly inferable, *was not made publicly clear until much later*. . . . The *clear and most widely broadcast breakthrough came in June 1972*, when OSHA adopted regulations dealing specifically with the problem of tracking asbestos dust on clothing into a home. . . . On the record before us, we conclude that the Court of Special Appeals erred in finding a duty on the part of [the defendant] to warn Ms. Farrar, back in 1968–69, of the danger of exposure to the dust on her grandfather's clothes.

Id. at 1036–39 (emphasis added).

The relevant time period for the take-home exposure in *Fourteenth District* was 1954 to 1965. 740 N.W.2d at 218. In finding no duty, the court explained that "we did not know what we know today about the hazards of asbestos" and the plaintiff's expert conceded that "the first published literature suggesting a 'specific attribution to washing of clothes' was not published until 1965." *Id.* As such, "the risk of 'take home' asbestos exposure was, in all likelihood, not foreseeable by defendant while [the employee] was working at defendant's premises from 1954 to 1965." *Id.* The court cited a separate Texas appellate decision, which opinion was replaced on other grounds, stating that "the risk of 'take home' asbestos exposure was not foreseeable to Exxon Mobil before 1972" because OSHA "did not promulgate regulations prohibiting employers from allowing workers who had been exposed to asbestos to wear their work clothes home until" then. *Id.*

Just like *Martin*, "there is nothing that would justify charging [KUC] with" knowledge of harms resulting from take-home asbestos exposure "during the time that [Mr. Boynton] was working with asbestos." 561 F.3d at 444–45. Indeed, "*the literature at the time* did not place [KUC] on notice that bystanders/nonworkers such as [Mrs. Boynton] were subject to health maladies due to second-hand exposure to asbestos-containing materials." *Martin*, 2007 WL 2682064 at *5.

B. KUC was not in the best position to prevent harm from take-home asbestos exposure to Mrs. Boynton.

The second "minus" factor does not consider which party has the deepest pockets but "considers whether the defendant is best situated to take reasonable precautions to avoid injury." 2012 UT 11, ¶ 30. This factor "typically" cuts against creating 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." *Id.* The Court of Appeals of New York analyzed this same factor in a take-home asbestos exposure case and found that it weighed in favor of no duty. *NYC Asbestos Litig.*, 840 N.E.2d at 120. In that case, and similar to here, the plaintiffs argued that the employer was "in the best position to protect against the risk of harm" to the employee's spouse because "it might have compelled [the employee] to wear clean clothes home from work or to warn [his spouse] about the dangers of washing his soiled uniforms." *Id.* The court disagreed that the employer was in the best position, reasoning that the employer "was, in fact, entirely dependent upon [the employee]'s willingness to comply with and carry out such risk-reduction measures." *Id.*

Mr. Boynton, not KUC, was in a "superior position of control" to prevent harm to Mrs. Boynton from take-home asbestos exposure because he ultimately carried asbestos fibers home on his clothing and thereby exposed Mrs. Boynton. Even if KUC had policies requiring the changing or laundering of clothes at the worksite, like *NYC Asbestos*, those policies would have been "entirely dependent upon [Mr. Boynton's] willingness to comply with and carry out such risk-reduction measures." *Id.* Admittedly, neither KUC nor Mr. Boynton were in great positions to prevent this harm from occurring—due to not knowing about the potential harm from take-home exposure—but the question under this factor is whether KUC is *best* situated to take reasonable precautions to prevent injury, which it was not.[8]

C. Finding a duty in take-home asbestos exposure cases creates an almost infinite universe of potential plaintiffs.

"Asbestos claims have given rise to one of the most costly products-liability crises ever within our nation's legal system." *Fourteenth Dist. Ct.*, 740 N.W.2d at 220. The pool of traditional asbestos plaintiffs is shrinking, so plaintiff attorneys are trying to expand the pools of potential plaintiffs and defendants by asserting take-home asbestos cases against premises owners. However, finding a duty in take-home asbestos exposure cases would open the flood gates to asbestos litigation in Utah. "[L]iability 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

[8] KUC is not arguing that Mr. Boynton was in a "superior position of knowledge" because neither KUC nor Mr. Boynton knew about the risk of take-home asbestos exposure, but Mr. Boynton was in a "superior position of control."

potentially came in contact with [the employee's] clothes." *Gillen*, 40 F. Supp. 3d at 540.[9] But "there is no principled basis in the law upon which to distinguish the claim of a spouse" with the claim of any other person potentially exposed to an employee's asbestos-covered clothing. *Riedel*, 2007 WL 4571196 at *12.

The burden on a premises owner "to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great." *Id.* Such a burden—"protecting every person with whom a business's employees and the employees of its independent contractors come into contact, or even with who their clothes come into contact"—is an "extraordinarily onerous and unworkable burden." *Fourteenth Dist. Court*, 740 N.W.2d at 217. For these reasons, the third "minus" factor weighs heavily against creating a duty in take-home asbestos exposure cases.

IV. THERE IS NO DISPUTE OF FACT THAT PRECLUDES SUMMARY JUDGMENT.

In denying KUC's motion for summary judgment, the district court stated there is a disputed issue of material fact precluding summary judgment:

> With respect to [KUC], viewing the facts in the light most favorable to Mrs. Boynton and drawing all reasonable inferences therefrom in her favor, affirmative act of specifying and using asbestos pipe insulation and its employee-insulators' affirmative acts of exposing Mr. Boynton, a direct employee of [KUC], *raises a disputed issue of material fact as to whether a legal duty extends to Mrs. Boynton.*

[9] *Williams*, 608 S.E.2d at 209 (declining to extend employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace, reasoning that to impose a duty would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs"); *NYC Asbestos Litig.*, 840 N.E.2d at 122 (explaining that the duty line is "not so easy to draw" in take-home asbestos cases); *see also In re Asbestos Litig.*, 2012 WL 1413887 at *3 (same).

(R. 05447 (emphasis added).) Notably, the district court did not address whether any of the "minus" factors would eliminate a duty that otherwise exists, but instead merely pointed to a supposed dispute of fact involving whether KUC engaged in misfeasance.

The Court should reverse the district court because there are not any disputed issues of fact that prevent the Court from finding that KUC did not owe a duty to Mrs. Boynton. The parties agree that Mr. Boynton worked at KUC's premises from 1961 to 1966. Further, for purposes of summary judgment and this appeal only, it is undisputed that KUC used asbestos-containing insulation and its workers removed and/or installed insulation in the vicinity where Mr. Boynton worked. The issue is not whether these facts are in dispute, but rather, the issue is whether Mr. Boynton contends that KUC was negligent in performing these acts such that it caused his wife's harm. As set forth in detail above, the crux of Mr. Boynton's claims against KUC concern omissions—failing to prevent Mr. Boynton from carrying asbestos fibers home on his clothing and failing to warn him of the potential dangers posed by asbestos exposure—and not active misfeasance. Finally, whether Mr. Boynton's allegations constitute affirmative acts or mere omissions is the threshold issue in the duty analysis and is therefore entirely a question of law to be determined by a court, not a jury.

The Court should apply the *Jeffs* factors and hold that KUC did not owe a duty to Mrs. Boynton.

CONCLUSION

The district court incorrectly denied KUC's motion for summary judgment, and KUC should prevail on appeal because it did not owe a duty to Mrs. Boynton.

DATED this 16th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2019, a true and correct copy of the foregoing **BRIEF OF APPELLANT KENNECOTT UTAH COPPER, LLC** was email filed with the Utah Supreme Court (supremecourt@utcourts.gov) and served on the interested parties by email on September 16, 2019 and on September 17, 2019 via U.S. mail postage, prepaid on the following:

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CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

1. This brief complies with Utah R. App. P. 24(a)(11)(A), and contains 8,421 words and/or is less than 30 pages, excluding the parts of the brief which are exempt.

2. This brief complies with Utah R. App. P. 24(a)(11)(B), governing public and private records.

DATED this 16th day of September, 2019.

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ADDENDUM

1. Memorandum Decision and Order on Defendants' Motion for Summary Judgement Statement Discovery Issues – Dated 3-13-2019 (R. 05438-47)

ADDENDUM NO. 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LARRY BOYNTON, Individually and on behalf of the Heirs of BARBARA BOYNTON,	:	MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND
Plaintiff,	:	STATEMENT OF DISCOVERY ISSUES
vs.	:	Civil No. 160902693
INDUSTRIAL SUPPLY COMPANY, INC., et. al.,	:	
Defendants.	:	Judge Randall N. Skanchy

The above-entitled matter came before the Court on January 25, 2019, for argument on Motions for Summary Judgment and Discovery Issues filed by Defendants Phillips 66 Company and ConocoPhillips Company (hereinafter ConocoPhillips), Utah Power and Light/PacifiCorp ("PacifiCorp") and Kennecott Utah Copper, LLC ("Kennecott") ("collectively Defendants"). At the hearing, the Court requested additional material from the parties, which was provided to the Court on January 29, 2019. The matter is now fully briefed and argued, and is ready for decision.

BACKGROUND

Plaintiff Larry Boynton ("Mr. Boynton") individually and on behalf of the heirs of Barbara Boynton ("Mrs. Boynton") (collectively "Boyntons") sued Defendants alleging that Mrs. Boynton developed mesothelioma from second-hand exposure to asbestos as a result of laundering Mr. Boynton's work clothes. At some period over Mr. Boynton's work life, he worked at each of the Defendants' work sites.

The issue as set forth in each of the parties' Motions for Summary Judgment involves whether the respective Defendant(s) owed a legal duty to Mrs. Boynton. Each of the Defendants' Motions is factually independent of the others, but the legal issues are the same, and involve the legal relationship of Mrs. Boynton to the respective Defendants. In summary, each Defendant argues that the analysis of the element of duty as enumerated in the case of *B.R. ex rel Jeffs v. West*, 275 P.3d 228 (Utah 2012) controls the decision in their respective cases and that no duty existed between them and Mrs. Boynton. The Boyntons counter that their claims for negligence are based not only on the Defendants' failure to warn of the danger of exposure to asbestos and failure to undertake safety precautions, as plead in the Information, but the active handling, cutting, chopping and sawing of materials with asbestos at the job site, and in some instances, the specification of parts that included asbestos. This decision will address each Defendant individually.

1. **ConocoPhillips**. ConocoPhillips alleges that Mr. Boynton worked as an electrician for L.E. Myers Electric, an independent contractor, at various times for ConocoPhillips. He was never a direct ConocoPhillips employee. From 1976 to 1978, Mr. Boynton spent two periods of time – one for four months and one for six months – working for L.E. Myers Electric at the Phillips Oil Refinery in Davis County, Utah. (Boynton Depo. pps/line 28:22 – 29:6) Mr. Boynton alleges that during this time, he was exposed to asbestos, which fibers were transported home on his clothing, allegedly resulting in Mrs. Boynton's exposure to the fibers when she did his laundry.

The operative paragraphs alleging liability against ConocoPhillips (as well as the other two defendants) arise from the Amended Complaint as follows:

(i) Paragraph 13: ". . . exposure to asbestos through her husband's work with and around asbestos containing products while working at. . . Phillips 66 Company" in Davis County between 1975 and 1978, and ". . . [t]he activities of cutting, chopping, mixing, sanding, sawing, scraping and sweeping that occurred in association with the work performed. . ."

(ii) Paragraph 55 details 3 subparagraphs of omissions and failures on the part of the Defendants to warn or take appropriate safety precautions to insure a safe work place.

Under these allegations, the Boyntons allege ConocoPhillips was negligent in exposing Mr. Boynton to the asbestos which was the alleged cause of Mrs. Boynton's mesothelioma.

ConocoPhillips contends that under the duty analysis set forth by the Utah Supreme Court in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 10, 275 P.3d 228, ConocoPhillips owed no duty of care to Mrs. Boynton because

- The claims are based on alleged omissions, which do not carry an inherent duty to a third-party;
- Mrs. Boynton did not have a legally significant "special relationship" that would otherwise impose a duty on ConocoPhillips;
- The Boyntons were in the best position to guard against any harm to them; and
- Public policy weighs heavily against imposing a duty for take home exposure to third parties because it would create a limitless number of potential plaintiffs and would overburden the Courts, society, and businesses.

2. **PacifiCorp.** In 1970 and 1972, PacifiCorp's predecessor in interest, Utah Power & Light Company ("UP&L"), hired independent contractors to design and build a new power

plant in Huntington, Utah. Mr. Boynton was a union electrician hired by the general contractor, Jelco-Jacobsen, to provide electrical work at the power plant. He likewise was never a direct employee of UP&L. The same operative allegations of paragraphs 13 and 55 detail the identical allegations of negligence against PacifiCorp. Paragraph 13 of the Amended Complaint alleges Mr. Boynton worked at UP&L's Huntington plant, as an employee of an independent contractor in 1973. (Boynton Depo. pps/line 21:11 – 23:1) PacifiCorp argues that the Utah Supreme Court has consistently held an employer of an independent contractor does not owe a duty of care to others for harm arising out of the contractor's work. The only exception to this rule is the "retained control" doctrine; if the principal employer interferes with the work to such a degree that the contractor is not free to perform the work in its own way, the party hiring the independent contractor may be found to have a duty of care to prevent harms arising from such interference.

PacifiCorp contends the undisputed material facts in this case demonstrate that UP&L did not provide any input, instruction, or supervision over Larry Boynton's work. Mr. Boynton testified that he was a trained union electrician who knew how to do his job and received direction from his general contractor, Jelco-Jacobsen. PacifiCorp alleges no UP&L representative told him what to do or where to work and never interfered with a Jelco-Jacobsen crew, or the crew of any subcontractor. Therefore, it is PacifiCorp's position the "retained control" exception does not apply and PacifiCorp alleges it is likewise entitled to summary judgment under this argument and the lack of duty argument as set forth above. *See Jeffs*, 2012 UT at ¶ 9. As Mr. Boynton's employer, PacifiCorp argues that it was the duty of Jelco-Jacobsen to comply with OSHA regulations, including OSHA regulations relating to asbestos. (Larry

Boynton Deposition ("Boynton Dep."), at 93:9-17) Mr. Boynton alleges Mrs. Boynton was harmed when she laundered his work clothes.

3. Kennecott. Kennecott argues it is entitled to summary judgment because it likewise owed no duty to Mrs. Boynton under the same duty argument made by ConocoPhillips and PacifiCorp. Paragraph 13 of the Amended Complaint indicated that Mr. Boynton worked, both as a direct employee at Kennecott from 1961 to 1964 and again from 1964 to 1966, on and off as an electrician working with Wasatch Electric (Boynton Depo. pps/line 14:09 – 14:11, 16:6 – 19). Mrs. Boynton was allegedly exposed to asbestos by laundering Mr. Boynton's work clothes. Specifically, Kennecott asserts that Mrs. Boynton was never present on Kennecott's premises, and her only alleged asbestos exposure was via contact with Mr. Boynton's work clothes.

The Boyntons argue that the negligence arises both from exposing Mr. Boynton to asbestos and the duties enumerated in the Amended Complaint, but also alleges that duty arose from affirmative acts of negligently specifying and using asbestos pipe insulation as materials in their facility and negligently exposing Mr. Boynton to it during his time at each facility when it was removed from their piping and swept during cleanup, along with the failures to warn and prevent contact with asbestos through reasonable and necessary safety protocols such as showers, change rooms, and/or laundry services.

RULING

In *Warren v. Asbestos Corp., Ltd.*, Judge Iwasaki denied premises liability Defendant United States Steel's ("USX") Motion for Summary Judgment on the issue of whether USX owed a duty of care to a mesothelioma victim who never entered its premises, but was exposed

to asbestos as a result of washing her father's work clothes. While the Boyntons ask the Court to apply the same reasoning to this case, *Warren* was a non-binding ruling, and since that decision, the case of B.*R. ex rel. Jeffs v. West,* 275 P.3d 228 (Utah 2012) was issued which sets forth a duty analysis not applied in *Warren.* Specifically, the Court in *Jeffs* listed 5 factors for determining whether a Defendant owes a duty to one that is injured:

1. Whether the Defendant's allegedly tortious conduct consists of an affirmative act or merely an omission, *e.g., Webb v. Univ. of Utah*, 2005 UT 80, ¶ 10, 125 P.3d 906;

2. The legal relationship of the parties, *Id.*;

3. The foreseeability or likelihood of injury, *e.g., AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 321 (Utah 1997);

4. "Public policy as to which party can best bear the loss occasioned by the injury," *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶ 19, 215 P.3d 152; and

5. "Other general policy considerations" *Jeffs*, 2012 UT ¶ 5.

4. **PhillipsConoco and PacifiCorp.** With respect to PhillipsConoco and PacifiCorp, the Boyntons argue that the "affirmative act of specifying and using asbestos pipe insulation" creates a legal duty to Mr. Boynton's wife. However, the claims and injury alleged must be linked to the affirmative act itself, and whether the affirmative act was done negligently. *Graves v. N. E. Servs., Inc.,* 2015 UT 28, ¶ 27, 345 P.3d 619, 625. In *Graves*, the Court found that while there were affirmative acts of enticing children onto the Defendants' property, the affirmative acts did not relate to the Plaintiff's claims and damages. *Id.* at ¶¶26-27. Rather, Plaintiff's claim related to the Defendants Company's failure to properly perform background checks or train and supervise its employee, which were omissions. *Id.* at ¶29. The Court reasoned that "affirmative

acts are a basis for imposing a duty in the performance of those acts, not for a broader duty to undertake additional measures" to protect the plaintiff. *Id.* Even though the Defendant had undertaken affirmative acts, and even though the acts were "plausibly connected to the assault," the Court held that there was no duty based on the affirmative acts because plaintiff's claims were "aimed at" Defendants' omissions, and not affirmative acts. *Id.* at ¶¶26, 29.

In the instant case, the Boyntons claims are omissions related to failure to warn, inform, and protect a third party from injury. The injury and damages complained of – the harm to Mrs. Boynton – are linked only to Defendants' omissions, rather than any alleged affirmative acts. Just as in *Graves*, Mr. Boynton's allegations center on ConocoPhillips and PacifiCorp's failures to take steps to protect others, in other words, the claims are solely "aimed at" Defendants' omissions. Like *Graves*, the Boyntons' claims are "aimed at" Defendants' omissions. The allegations themselves begin with the word "failure" in each of the charging allegations in paragraph 55 of the Amended Complaint. Accordingly, the first prong of *Jeffs* is premised on omissions, rather than acts.

Further, it is undisputed that Mr. Boynton was an independent contractor and not an employee of either PhillipsConoco or PacifiCorp. The injury-causing activity in this case was the exposure of Mr. Boynton to asbestos and the subsequent failure of the employer to insure warn and provide a safe place to work. It is likewise undisputed that ConocoPhillips and PacifiCorp did not supervise Mr. Boynton or instruct him in his work. It is further undisputed that ConocoPhillips and PacifiCorp did not oversee or interfere with the timing and location of Mr. Boynton's work, nor oversee or interfere with the work of the insulation subcontractor. In short, these Defendants had no involvement whatsoever with the injury causing aspect of the

work—the presence of Mr. Boynton near insulation workers that allegedly exposed his clothing to asbestos dust. *See Magana*, 2009 UT ¶ 31. These acts all fell outside of the scope of the injury-causing activity, and as a result, no duty attaches. See *Magana v. Dave Roth Construction,* 2009 UT 45, ¶ 31, 215 P.3d 143 ("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.").

Secondly, there was no special relationship between these two Defendants and Mrs. Boynton. Rather, Mr. Boynton argues that a special relationship is not necessary under the second *Jeffs* factor because duty is established under the first *Jeffs* factor. However, as discussed above, this Court finds that there is no duty under the first *Jeffs* factor because the negligence alleged is based entirely on omissions.

With respect to foreseeability, in *Jeffs*, the Court explained that this factor, in a duty analysis, must look to foreseeability "at a broad, categorical level," and not based on the specific facts of each case. *Jeffs*, 2012 UT at ¶ 25. While the question of whether an employer could foresee harm to the spouse of an employee of an independent contractor has not been decided by Utah Courts, *Jeffs* indicates the correct approach is to look to the general foreseeability of harm based on the relationship between the parties. *Id.* Applied to this case and as discussed above, Mrs. Boynton does not dispute that there was a special relationship between the parties. Indeed, there was no relationship between the parties. As a result, it would be a vast expansion of Utah Tort Law to find that, based on the relationships of the parties; an employer could foresee harm to the spouse of an employee of an independent contractor. Accordingly, under *Jeffs*, the element

of foreseeability does not support a finding of duty in "take-home" exposure against Phillips 66 and PacifiCorp in the instant.

The fourth factor – which party can best bear the loss – "considers whether the defendant is best situated to take reasonable precautions to avoid injury." *Jeffs*, 2012 UT at ¶ 30. This factor also weighs against imposing a duty because "protecting every person with whom a business' employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden." *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 479 Mich. 498, 516, 740 N.W.2d 206, 217 (2007). Here, the Defendants were not in the best position to protect every person with whom an employee of an independent contractor, and that employee's clothes, came in contact.

As for the fifth factor, public policy of imposing a duty in situations of take-home exposure, such weighs against imposing a duty on Defendants. Indeed, as other Courts have acknowledged, "without a limiting principle, liability for take-home exposure would essentially be infinite." *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 540 (E.D. Pa. 2014). The pressure this expansion of the common law would put on the time and resources of courts, society, and businesses in general weighs against finding a company owes a duty to persons with whom the employees of its independent contractors come in contact.

In summary, Defendants ConocoPhillips and PacifiCorp did not interfere with the work of the general contractors and did not perform any affirmative acts which would result in the imposition of a duty on these to Mrs. Boynton. Defendants ConocoPhillips and PacifiCorp's Motion for Summary Judgment is granted.

5. **Kennecott.** With respect to Kennecott, viewing the facts in the light most favorable to Mrs. Boynton and drawing all reasonable inferences therefrom in her favor, affirmative act of specifying and using asbestos pipe insulation and its employee-insulators' affirmative acts of exposing Mr. Boynton, a direct employee of Kennecott, raises a disputed issue of material fact as to whether a legal duty extends to Mrs. Boynton.

In light of this decision, ConocoPhillips and PacifiCorps' Statement of Discovery Issues are moot. Mr. Boynton's Motion to Enlarge Time Period for Discovery is granted, and Kennecott's Statement of Discovery Issues is partially denied, but this Court limits the discovery to work at Kennecott's Garfield Smelter up to 1977. As to Kennecott, the reason for Boynton's delay was excusable as the Boyntons granted Kennecott three extensions of discovery totaling 87 days, and Kennecott ultimately served its final discovery responses on the last day of the discovery period. No trial date has yet been set and as such, no prejudice exists.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED** that Defendants ConocoPhillips' and PacifiCorp's Motions for Summary Judgment are granted and their Statements of Discovery are rendered moot. Defendant Kennecott's Motion for Judgment and Statement of Discovery are, respectfully, denied except as limited above. No further form of order is needed on this motion.

DATED this 13 day of March 2019.

BY THE COURT:

Randall N. Skanchy
District Court Judge