

IN THE SUPREME COURT OF OHIO

CHERYL BOLEY, Executrix of the)	Case No: 2009-0542
Estate of MARY ADAMS, and)	
CLAYTON ADAMS)	On Appeal from the Cuyahoga County
	Court of Appeals, Eighth Appellate District
Plaintiffs-Appellants,)	
	Court of Appeals
v.)	Case No. CA-08-091404
GOODYEAR TIRE AND RUBBER)	
COMPANY,)	
Defendant-Appellee.)	

**MERIT BRIEF OF AMICUS CURIAE
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF
APPELLEE GOODYEAR TIRE AND RUBBER COMPANY**

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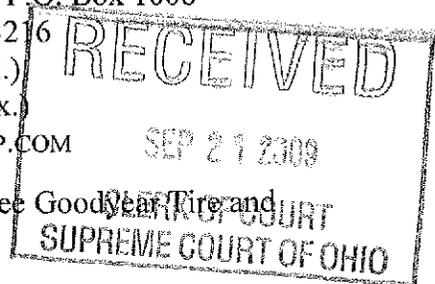
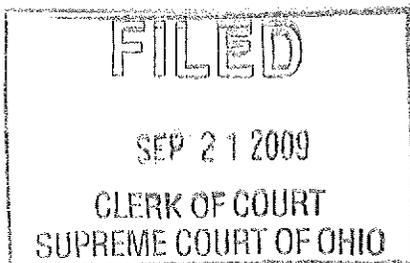


TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT.....	1
I. Common Law Negligence Demands A Relationship Between The Parties And Foreseeability Of Injury As Prerequisites To Imposition Of A Duty Of Care	2
A. A Relationship Between the Parties is a Prerequisite to Imposition of a Duty of Care For Common Law Negligence	3
B. Foreseeability of Injury is a Prerequisite to Imposition of a Duty of Care For Common Law Negligence.....	7
II. Liability For Asbestos Carried From A Defendant’s Premises To A Remote Plaintiff Should Adhere To The Prerequisites Of A Relationship Between The Parties And Foreseeability Of Injury Known To The Common Law	10
A. A Lack of a Relationship Between the Parties has been the Basis for Other Jurisdictions to Preclude Liability	12
B. A Lack of Foreseeability of Injury has been the Basis for Other Jurisdictions to Preclude Liability.....	14
CONCLUSION	15
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

Page

CASES

<i>Adams v. Owens-Illinois, Inc.</i> (Md. Ct. Spec. App. 1998), 119 Md. App. 395, 705 A.2d 58	14
<i>Armstrong v. Best Buy Co.</i> (2003), 99 Ohio St.3d 79, 81, 2003-Ohio-2573, 788 N.E.2d 1088.....	2
<i>Baier v. Cleveland R. Co.</i> (1937), 132 Ohio St. 388, 391, 8 N.E.2d 1	2
<i>Baltimore & O. S. W. R. Co. v. Cox</i> (1902), 66 Ohio St.276, 288, 64 N.E.2d 119.....	3
<i>Chaisson v. Avondale Indus.</i> (La. App. Ct. 2006), 947 So.2d 171	11
<i>Commerce & Indus. Ins. Co. v. Toledo</i> (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188	3
<i>CSX Transp., Inc. v. Williams</i> (Ga. 2005), 278 Ga. 888, 889, 608 S.E.2d 208	13
<i>DiCenzo v. A Best Prods. Co.</i> (2008), 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132. ...	9
<i>Estates of Morgan v. Fairfield Family Counseling Ctr.</i> (1997), 77 Ohio St.3d 284, 293, 1997-Ohio-194, 673 N.E.2d 1311	2
<i>Fossen v. MidAmerican Energy Co.</i> (Iowa Ct. App. Jan. 16, 2008), No. 7-747/06-1691, 2008 Iowa App. LEXIS 12, unreported.....	14
<i>Gladon v. Greater Cleveland Reg'l Transit Auth.</i> (1996), 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287	4
<i>Goldman v. Johns-Manville Sales Corp.</i> (1987), 33 Ohio St.3d 40, 50, 514 N.E.2d 691	6
<i>Grover v. Eli Lilly & Co.</i> (1992), 62 Ohio St. 3d 756, 762, 1992 Ohio 45, 591 N.E.2d 696	6, 9
<i>Hamilton v. Beretta U.S.A. Corp.</i> (N.Y. 2001), 96 N.Y.2d 222, 233, 750 N.E.2d 1055.....	13
<i>Heckert v. Patrick</i> (1984), 15 Ohio St.3d 402, 406, 473 N.E.2d 1204	7
<i>Hill v. Sonitrol of Sw. Ohio, Inc.</i> (1988), 36 Ohio St.3d 36, 40, 521 N.E.2d 780	3
<i>Holdampf v. A.C. & S., Inc. (In re New York City Asbestos Litig.)</i> (N.Y. 2005), 2005 NY Slip Op 7863, 1-2, 5 N.Y.3d 486, 840 N.E.2d 115	13
<i>Huston v. Konieczny</i> (1990), 52 Ohio St.3d 214, 217, 556 N.E.2d 505	2
<i>James Morgan & Co. v. Cincinnati</i> (1884), 9 Ohio Dec. Reprint 280	8
<i>Jeffers v. Olexo</i> (1989), 43 Ohio St3d 140, 143, 539 N.E.2d 614	3, 8
<i>Klever v. Canton Sachsenheim, Inc.</i> (1999), 86 Ohio St.3d 419, 421, 1999-Ohio-117, 715 N.E.2d 536.....	5
<i>Martin v. Cincinnati Gas & Elec. Co.</i> (6th Cir. 2009), 561 F.3d 439, 444	14
<i>McKinney v. Hartz & Restle Realtors, Inc.</i> (1987), 31 Ohio St.3d 244, 510 N.E.2d 386	4
<i>Menifee v. Ohio Welding Prods., Inc.</i> (1984), 15 Ohio St.3d75, 77, 472 N.E. 2d 70.	7
<i>Miller v. Ford Motor Co.</i> (Mich 2007), 479 Mich. 498, 740 N.W. 2d 206.....	10, 11
<i>Mitchell</i> (1987), 30 Ohio St.3d 92, 95, 507 N.E.2d 352.....	4
<i>Nelson v. Aurora Equip. Co.</i> (Ill. App. Ct. 2009), 909 N.E.2d 931.....	12
<i>Oliyo v. Owens-Illinois, Inc.</i> (N.J. 2006), 186 N.J. 394, 895 A.2d 1143.....	11
<i>Railway Co. v. Staley</i> (1884), 41 Ohio St. 118, 122-23 (quoting Cooley on Torts, p. 69).....	7
<i>Riedel v. ICI Ams. Inc.</i> (Del. 2009), 968 A.2d 17.....	12
<i>Rodgers v. Holland Oil Co.</i> , 9th Dist. No. 23718, 2007-Ohio-6049, at ¶14.....	5
<i>Rush v. Lawson Co.</i> (1990), 65 Ohio App.3d 817, 820, 585 N.E.2d 513.....	8
<i>Ruwe v. Bd. of Springfield Twp. Trs.</i> (1987), 29 Ohio St.3d 59, 505 N.E.2d 957.....	4
<i>Satterfield v. Breeding Insulation Co.</i> (2008), 266 S.W.3d 347.....	11
<i>Schell v. Du Bois</i> (1916), 94 Ohio St. 93, 107, 113 N.E. 664.....	2
<i>Simmers v. Bentley Constr. Co.</i> (1992), 64 Ohio St.3d 642, 646, 1992-Ohio-42, 597 N.E.2d 504 2	2

<i>Simpson v. Big Bear Stores Co.</i> (1995), 73 OhioSt.3d 130, 134, 1995-Ohio-203, 652 N.E.2d 702	4
<i>State Farm Fire & Cas. Co. v. Chrysler Corp.</i> (1988), 37 Ohio St.3d 1, 8, 523 N.E.2d 489, 496	6
<i>Sutowski v. Eli Lilly & Co.</i> (1998), 82 Ohio St.3d 347, 352, 1998-Ohio-388, 696 N.E.2d 187.....	6
<i>Temple v. Wean United, Inc.</i> (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.....	9
<i>Widera v. Eltco Wire & Cable Corp.</i> (N.Y. App. Div. 1994), 204 A.D.2d 306, 307, 611 N.Y.S.2d 569.....	13

OTHER AUTHORITIES

RESTAT. 2D OF TORTS § 290(a)	14
RESTAT. 2D OF TORTS § 281	8
RESTAT. 2D OF TORTS § 314.....	3
Revised Code 2307.941	7, 10
Revised Code 2307.941(A).....	1, 15
Revised Code 4399.18	5

INTRODUCTION

This amicus curiae represents the interests of the Ohio Association of Civil Trial Attorneys (“OACTA”), an organization of attorneys, corporate executives, and managers devoted to the defense of civil lawsuits and claims against individuals, corporations, and governmental entities in Ohio.

OACTA is appearing in this appeal on behalf of Appellee Goodyear Tire and Rubber Company (“Goodyear”), to ensure that the law of Ohio, as expressed in Revised Code 2307.941(A), is applied in this case and to future premises owners with the same consistency as the common law has been applied for centuries.

STATEMENT OF THE CASE AND FACTS

OACTA adopts by reference the Statement of the Case and Facts set forth in the Appellee’s Merit Brief.

ARGUMENT

Revised Code 2307.941(A) is clear on its face that a premises owner cannot be held liable for asbestos exposure to a plaintiff who never entered the premises. Rather than rehashing the unassailable substance of Goodyear’s Merit Brief, it is the intent of OACTA to provide context for where the statute fits within the long evolution of Ohio law toward the issue at hand. To wit, the General Assembly did not simply pluck the limitation of a premises owner’s duty from the ether, but instead the keystone was placed atop a broad-based foundation of precedent that stands for the proposition that, for a duty of care to be imposed upon a defendant, the plaintiff must have had a relationship with the defendant and the injury must have been foreseeable.

In enacting the statute, the General Assembly decided an emerging and heretofore unanswered issue of law. The legislature so acted as part of its overall tort reform to address the

explosion of increased potential liability for all types of defendants who had any connection with asbestos, a crisis raised in a brief of multiple other amicus curiae. The legislature, in addressing the asbestos liability crisis, determined that there was no duty of care placed upon Goodyear in light of the facts of the case. The thrust of this brief is to demonstrate for the Court that such a determination was in accordance with the long-established common law of the state and the vast majority of recent decisions from other jurisdictions.

I. Common Law Negligence Demands A Relationship Between The Parties And Foreseeability Of Injury As Prerequisites To Imposition Of A Duty Of Care

It is axiomatic that to prevail on a negligence claim, the plaintiff must show “(1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom.” *Armstrong v. Best Buy Co.* (2003), 99 Ohio St.3d 79, 81, 2003-Ohio-2573, 788 N.E.2d 1088. Negligence cannot exist without a cognizable duty: “Negligence is the failure to comply with some duty imposed by law.” *Schell v. Du Bois* (1916), 94 Ohio St. 93, 107, 113 N.E. 664. *See also Baier v. Cleveland R. Co.* (1937), 132 Ohio St. 388, 391, 8 N.E.2d 1 (“To establish actionable negligence it is fundamental that the one seeking recovery must show the existence of a duty on the part of the one sued not to subject the former to the injury complained of[.]”); *Estates of Morgan v. Fairfield Family Counseling Ctr.* (1997), 77 Ohio St.3d 284, 293, 1997-Ohio-194, 673 N.E.2d 1311 (“It is by now an axiom that duty is an essential element of a cause of action for negligence.”).

A duty, in turn, “depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff’s position.” *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 646, 1992-Ohio-42, 597 N.E.2d 504. Thus, a duty does not arise unless **both** prerequisites exist. *See Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217, 556 N.E.2d 505 (stating separately that a duty depends upon both “the relationship between” the parties and “the

foreseeability of injury”). The nexus between the relationship and foreseeability was best expressed by the Court in *Jeffers v. Olexo*: “Only when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care.” (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614. Each prerequisite to imposition of a duty of care has elements that must be satisfied, and each is discussed in turn.

A. A Relationship Between the Parties is a Prerequisite to Imposition of a Duty of Care For Common Law Negligence

This Court has defined ‘duty’ by its very nature to be “the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.” *Commerce & Indus. Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188. The prerequisite has been a part of Ohio law for over a century. *See Baltimore & O. S. W. R. Co. v. Cox* (1902), 66 Ohio St.276, 288, 64 N.E.2d 119 (In negligence, “there can be no recovery unless there existed between the decedent and the company a relation which imposed upon it the duty of exercising care toward him.”). The relationship prerequisite is of equal importance to foreseeability in that a party is under no duty to protect someone with whom it has no relationship even if harm is foreseeable. *See Hill v. Sonitrol of Sw. Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (“Even if Sonitrol had realized or should have realized that action was necessary to protect Mrs. Hill, . . . it had no duty to do so.”); RESTAT. 2D OF TORTS § 314 (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

Though Ohio law does not compartmentalize negligence causes of action based upon the nature of the alleged injury – a duty must be present for *every* type of claim pled in negligence – the law has been equally consistent with regard to premises owners. Like every negligence

claim, a plaintiff must have had a relationship with the premises owner for a duty to be imposed. *See Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 134, 1995-Ohio-203, 652 N.E.2d 702 (holding that “unless a special relationship existed [between the premises owner and plaintiff that was] imposed by statute or common law, no duty existed” because “[i]f [courts] were to rely on foreseeability alone there could conceivably be no limit to any [] business owner’s liability”).

The courts of Ohio traditionally have “adhere[d] to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability” to determine the nature of the relationship, if any. *Gladon v. Greater Cleveland Reg’l Transit Auth.* (1996), 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287. The common feature of the three categories of plaintiffs is that they entered the premises, and courts have been reluctant to extend liability to persons beyond the premises. *See, e.g., Mitchell* (1987), 30 Ohio St.3d 92, 95, 507 N.E.2d 352 (rejecting alleged duty of a “municipality to protect individuals from or warn them of dangers existing on property which is beyond its corporate limits or control”).

In *McKinney v. Hartz & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 510 N.E.2d 386, the plaintiff was injured offsite by a train after he had entered and passed through the defendant’s property. The plaintiff alleged that the premises owner had owed him a duty of care to fence off access to its property, and hence access to the offsite railroad tracks. The Court noted that it has “generally refused to extend the requisite duty of care to protect against conditions existing beyond the territorial limits of the defendant’s property[.]” *Id.* at 248. Past refusals to extend a duty beyond the premises had occurred in cases against municipalities. *Id.* (citing *Mitchell*, 30 Ohio St.3d 92; *Ruwe v. Bd. of Springfield Twp. Trs.* (1987), 29 Ohio St.3d 59, 505 N.E.2d 957).

The Court accordingly applied the same rationale toward a private premises owner to “decline to extend such a duty in these circumstances.” *Id.*¹

Similarly, even if a relationship existed by virtue of entrance onto the premises, it does not extend indefinitely in time or location. The law has limited the duty to the time during which the plaintiff is present on the premises. See *Simpson*, 73 Ohio St.3d at 134 (“Big Bear owed a duty of care to Falkenberg while she was on Big Bear’s premises. However, once she finished her business and left the supermarket that relationship no longer existed.”); *Rodgers v. Holland Oil Co.*, 9th Dist. No. 23718, 2007-Ohio-6049, at ¶14 (“Rodgers argues that Holland Oil owed Khayree a duty based on the special relationship found in premises liability. While we agree that Holland Oil owed Khayree a duty while he was on its premises, we cannot and will not extend this liability to acts of third parties that occur several days later, off the property.”).

The common law of Ohio as to premises owners clearly requires that a relationship between the parties existed. The relationship’s genesis is when the plaintiff enters the defendant’s premises and the relationship ends when the plaintiff exits the premises. Any harm that occurred offsite, even for a plaintiff who once had a relationship with the defendant by virtue of his presence on the premises, is outside the scope of the defendant’s duty toward the plaintiff. It stands to reason that a plaintiff who never set foot on the premises and whose injury occurred offsite is much less in a position to establish a relationship between the parties.

Finally, the fact that an injury is alleged to have been caused by a microscopic toxic substance, *e.g.*, asbestos, would not alter the paradigm that a relationship must have existed between the parties. In other words, this Court has disallowed toxic exposure claims by

¹ A notable, albeit irrelevant, exception to the rule is the Dramshop Act. See R.C. 4399.18. The statute “creates a narrow exception” to the common law rule that a plaintiff “may not maintain a cause of action against a liquor permit holder for injury resulting from the acts of an intoxicated person.” *Klever v. Canton Sachsenheim, Inc.* (1999), 86 Ohio St.3d 419, 421, 1999-Ohio-117, 715 N.E.2d 536.

plaintiffs who could not establish a relationship with the defendant. The rejection of market share liability in toxic tort cases, for example, offers proof that a duty cannot be imposed on a defendant without some known relationship with the plaintiff. In rejecting market share liability in DES cases, the Court acknowledged that “[m]anufacturers are not insurers of their products.” *Sutowski v. Eli Lilly & Co.* (1998), 82 Ohio St.3d 347, 352, 1998-Ohio-388, 696 N.E.2d 187 (quoting *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 8, 523 N.E.2d 489, 496). Thus, while a “plaintiff who, without fault, is unable to identify the manufacturer responsible for her injury engenders sympathy,” it is “the role of the court to interpret the law,” which long has required a known relationship between the parties. *Id.* at 355. In asbestos cases, market share liability also is inappropriate, “especially where it cannot be shown that all the products to which the injured party was exposed are completely fungible.” *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 50, 514 N.E.2d 691.

Identification of the tortfeasor, however, is merely the starting point to connect a thread from the plaintiff to the defendant, but that thread cannot be stretched so far that it snaps. In *Grover v. Eli Lilly & Co.*, another DES case, the plaintiff, whose grandmother had ingested the drug, sued for birth defects allegedly caused by the drug. (1992), 63 Ohio St.3d 756, 762, 1992-Ohio-45, 591 N.E.2d 696. The case was characterized as being one in which a plaintiff was harmed by the “rippling effects” of the original drug use. *Id.* at 759. The court assumed that DES was the proximate cause of the plaintiff’s injuries but held that “an actor is not liable for every harm that may result from his actions.” *Id.* at 761. A duty of care in that case did not extend to the remote plaintiff. *Id.* at 762.

The cumulative effect of Ohio law is that a defendant never could have been held liable in negligence for injury to a plaintiff with whom it had no relationship. The specific facts of a

case cannot sidestep this prerequisite – it was true for premises owners; it was true for toxic tort claimants. Beyond question, the settled common law of the state is to require a plaintiff to establish a legally cognizable relationship with the defendant. The General Assembly, in enacting Revised Code 2307.941, adhered to the common law rule by requiring that a plaintiff must have been on the defendant’s premises in order to bring claims for injuries caused by asbestos exposure; a relationship could not have formed otherwise. Such a legislative act simply was the natural progression of the law as expressed by the courts before it.

B. Foreseeability of Injury is a Prerequisite to Imposition of a Duty of Care For Common Law Negligence

Once there was a relationship between the parties, “[t]he existence of a duty depends on the foreseeability of the injury.” *Meniffee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.. The need for the injury to be foreseeable in order to impose a duty already had been developed in Ohio by the Nineteenth Century:

If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action.

Railway Co. v. Staley (1884), 41 Ohio St. 118, 122-23 (quoting Cooley on Torts, p. 69).

This Court has expressed the test for foreseeability as being “whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act.” *Meniffee*, 15 Ohio St.3d at 77. In other words, “where negligence revolves around the question of the existence of a hazard or defect, the legal principle prevails that notice, either actual or constructive, of such hazard or defect is a prerequisite to the duty of reasonable care.” *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 406, 473 N.E.2d 1204. A test of foreseeability for premises owners has been to ask: “[D]id previous experience on the premises

create a duty to provide additional protection for business invitees?” *Rush v. Lawson Co.* (1990), 65 Ohio App.3d 817, 820, 585 N.E.2d 513.

Although foreseeability necessarily is judged in hindsight, it nonetheless is judged through the prism of the contemporary actors. *See Meniffee, Inc.*, 15 Ohio St.3d at 77 (“In determining whether appellees should have recognized the risks involved, only those circumstances which they perceived, or should have perceived, at the time of their respective actions should be considered.”). That injury resulted, however, does not render its outcome as foreseeable. *See Mitchell*, 30 Ohio St.3d at 94 (“While we have empathy for appellee and the decedents’ family, an untimely death alone is not enough to create liability.”). The experience that leads to foreseeable harm only applies to the class of plaintiff, not to all potential persons:

If the actor’s conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

Jeffers, 43 Ohio St.3d at 143 (quoting RESTAT. 2D OF TORTS § 281, comment c).

Thus, foreseeability is measured both by the type of plaintiff – a remote plaintiff certainly is different than an invitee or a trespasser – and the nature of the injury – harm from asbestos certainly is different than falling objects or malfunctioning equipment. As to the nature of the injury, Ohio courts as early as the Nineteenth Century recognized that the foreseeability of harm from toxic substances is limited to the scientific knowledge then available: “It would be impossible to foresee what may become pestilential or noxious in the progress of scientific improvement.” *James Morgan & Co. v. Cincinnati* (1884), 9 Ohio Dec. Reprint 280. Over a century later, this Court in a toxic tort case upheld that principle by holding that “[m]odern studies may provide us with twenty-twenty hindsight, but the only medical studies relevant to

this issue are those that occurred before DES was banned in 1971.” *Grover*, 63 Ohio St.3d at 761 n.2.

Specifically in the context of asbestos, this Court has seen fit to limit a defendant’s liability based upon knowledge available to it at the time of its actions, not decades after the fact. *See DiCenzo v. A Best Prods. Co.* (2008), 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132. In *DiCenzo*, the Court addressed liability for suppliers of asbestos. In 1977, supplier liability first was imposed as a “new rule” by the decision in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267. *Id.* at 160. Before that time, asbestos suppliers “could not have foreseen that these products, distributed from the 1950s to the 1970s, could decades later result in [the supplier] being liable for injuries caused by that product.” *Id.* at 160-61. The Court, therefore, concluded that “[i]mposing such a potential financial burden on these nonmanufacturing suppliers years after the fact for an obligation that was not foreseeable at the time would result in a great inequity.” *Id.* at 161. As a result, foreseeability of injury was measured by the knowledge that a defendant’s actions could lead to tort liability.

It is apparent that the parameters of common law negligence in Ohio long have been settled. No matter the nature of the injury, a plaintiff suing in negligence must prove that the defendant owed him a duty of care, which was dependent upon a relationship between the parties and foreseeability of injury. The precedent in Ohio is such that it is a natural extension of the common law to limit the duty of care of a premises owner to a party with whom it had a relationship by virtue of the party’s presence on the premises and only if the nature of the asbestos harm was known and established by law.

II. Liability For Asbestos Carried From A Defendant's Premises To A Remote Plaintiff Should Adhere To The Prerequisites Of A Relationship Between The Parties And Foreseeability Of Injury Known To The Common Law

The sum total of the foregoing section is to demonstrate that Ohio law on negligence for over a century has held that a plaintiff must prove that he had a relationship with the defendant and that his injury was foreseeable at the time. The principle has been applied to all common law negligence claims, from premises owners to toxic tort defendants. Thus, though the issue of premises liability for offsite asbestos exposure is one of first impression in Ohio, it is an issue with a solid foundation. In enacting Revised Code 2307.941, the General Assembly was the first branch of government to define the duty of care for premises owners in such a situation, but it did so with the wind of a hundred years of precedent at its back.²

Other jurisdictions in which the legislature already had not spoken have analyzed the issue through the same means by which Ohio courts have determined if a duty should be imposed – they determine if the plaintiff had a relationship with the premises owner and if it was foreseeable that the asbestos exposure would occur offsite in such a manner as to cause injury. The Supreme Court of Michigan has offered a prime example of the interplay between the two prerequisites that are needed to impose a duty of care.

In *Miller v. Ford Motor Co.*, the decedent contracted mesothelioma from laundering the work cloths of her stepfather, who was exposed to asbestos when he relined blast furnaces at the defendant's premises. (Mich. 2007), 479 Mich. 498, 740 N.W.2d 206. In determining if the defendant owed a duty to the decedent, the court stated that "there must be a relationship between the parties and the harm must have been foreseeable." *Id.* at 509. As to the relationship, the court found that any supposed relationship was "highly tenuous" because the

² The constitutionality of the statute was not raised by the Appellants and is not an issue before the Court.

decedent “had never been on or near defendant’s property and had no further relationship with defendant.” *Id.* at 515. As a result, “the ‘relationship between the parties’ prong of the duty test, which is the most important prong in this state, strongly suggest[ed] that no duty should be imposed.” *Id.*

As to foreseeability, the *Miller* Court focused on the years of the decedent’s stepfather’s employment, 1954 to 1965, and admitted that “we did not know what we know today about the hazards of asbestos.” *Id.* at 518. While the dissent lamented that more of the record would show foreseeability, the majority held that it had to answer the “question of law on the basis of the information that has been presented to us.” *Id.* at 518 n.18. As a result, “the ‘foreseeability of the harm’ prong suggest[ed] that no duty should be imposed.” *Id.* at 518. The court concluded 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[.]” *Id.* at 526.

The decision is particularly apt because Michigan law, like the law of Ohio, requires a relationship between the parties and foreseeability of injury before a duty of care can be imposed. The court explicitly analyzed both prerequisites to find a duty lacking. The vast majority of other jurisdictions that have addressed the issue likewise have refused to impose a duty of care on the premises owner,³ but they have tended to do so by favoring one of the two prerequisites. Their analysis nonetheless is important to demonstrate the evolution of the law to prevent a duty of care from extending to remote plaintiffs who never set foot on the premises.

³ The small minority of jurisdictions that have imposed liability upon the premises owner are distinguishable from the law of Ohio. In *Satterfield v. Breeding Insulation Co.* (2008), 266 S.W.3d 347, for example, the Tennessee Supreme Court held that the lack of a relationship between the parties was immaterial, an outcome that Ohio courts have not countenanced. In New Jersey and Louisiana, the determination of a duty falls to an amorphous “fairness” test. *See Olivo v. Owens-Illinois, Inc.* (N.J. 2006), 186 N.J. 394, 895 A.2d 1143; *Chaisson v. Avondale Indus.* (La. App. Ct. 2006), 947 So.2d 171. Such a test is at odds with Ohio law’s unequivocal requirements of a relationship between the parties and foreseeability of injury.

A. A Lack of a Relationship Between the Parties has been the Basis for Other Jurisdictions to Preclude Liability

Most courts, perhaps in recognizing the initial importance of the relationship between the plaintiff and premises owner, have focused on the lack of a relationship between the parties. Just this year, an Illinois court had occasion to address the issue in this light. *See Nelson v. Aurora Equip. Co.* (Ill. App. Ct. 2009), 909 N.E.2d 931. Like Ohio law, the court noted that its supreme court had instilled the requirement that the plaintiff must have had a “special relationship” with the premises owner in order for liability to attach. *Id.* at 935. The plaintiff in that case had no such relationship with the premises owner because “[s]he never encountered any condition on [the defendant’s] premises, nor was she in a position to have to enter the premises for any reason.” *Id.* at 939. The court consequently upheld summary judgment on the basis that “no duty exists because no relationship exists.” *Id.*

Also this year, the Delaware Supreme Court rejected liability because of the absence of a relationship between the parties. *See Riedel v. ICI Ams. Inc.* (Del. 2009), 968 A.2d 17. The state high court agreed with the trial judge that there was “no legally significant special relationship” between the offsite plaintiff and the premises owner. *Id.* at 23. Nor had the premises owner undertaken to form such a relationship through its “occasional publication of a newsletter providing tips for its employees and their families to stay safe at home” because there was no evidence that it “undertook to warn its employees’ families of all dangers.” *Id.* at 27. The court also found that sections 314A-324A of the Restatement (Second) of Torts did not recognize the establishment of a relationship between such parties. *Id.* at 26.

Earlier, the New York high court was asked to decide whether a premises owner “owes a duty of care to plaintiff wife, who was allegedly injured from exposure to asbestos dust that plaintiff husband, a Port Authority employee, introduced into the family home on soiled work

clothes that plaintiff wife laundered.” *Holdampf v. A.C. & S., Inc. (In re New York City Asbestos Litig.)* (N.Y. 2005), 2005 NY Slip Op 7863, 1-2, 5 N.Y.3d 486, 840 N.E.2d 115. The court recognized that to find the defendant liable would “upset [] long-settled common-law notions of an employer’s and landowner’s duties.” *Id.* at 9. That was true because “[t]he ‘key’ consideration critical to the existence of a duty in these circumstances is ‘that the defendant’s relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.’” *Id.* at 6 (quoting *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001), 96 N.Y.2d 222, 233, 750 N.E.2d 1055). In that case, there was “no relationship between the Port Authority [the premises owner] and Elizabeth Holdampf [the remote plaintiff] – much less that of master and servant (employer and employee), parent and child or common carrier and passenger[.]” *Id.* at 7. Concerned with “limitless liability,” the court held that the “‘specter of limitless liability’ is banished only when ‘the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.’” *Id.* at 9 (quoting *Hamilton*, 96 N.Y.2d at 233).

In Georgia, a plaintiff similarly claimed “that he was exposed at home as a child to airborne asbestos emitting from the clothing his father wore while working for CSXT, and that this ‘clothing exposure’ contributed to the plaintiff’s asbestos-related disease.” *CSX Transp., Inc. v. Williams* (Ga. 2005), 278 Ga. 888, 889, 608 S.E.2d 208. Relying upon the common law, the court held that the “duty to provide employees with a safe workplace ‘has not been extended to encompass individuals, such as the infant plaintiff, who are neither “employees” nor “employed” at the worksite.’” *Id.* at 891 (quoting *Widera v. Ettco Wire & Cable Corp.* (N.Y. App. Div. 1994), 204 A.D.2d 306, 307, 611 N.Y.S.2d 569). The natural result toward the specific issue was to hold that “Georgia negligence law does not impose any duty on an

employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." *Id.* at 892.

Finally, Maryland was at the forefront of the emerging issue over a decade ago. *See Adams v. Owens-Illinois, Inc.* (Md. Ct. Spec. App. 1998), 119 Md. App. 395, 705 A.2d 58. The plaintiff, who had been exposed to asbestos offsite, cited error in the trial court's failure to instruct the jury on the duty of the premises owner to provide a safe workplace. The court disagreed and found that "[i]f liability for exposure to asbestos could be premised on [the plaintiff's] handling of her husband's clothing, presumably [the premises owner] would owe a duty to others who came in close contact with [the plaintiff's husband], including other family members, automobile passengers, and co-workers." *Id.* at 411. As such, the premises owner "owed no duty to strangers based upon providing a safe workplace for employees." *Id.*

B. A Lack of Foreseeability of Injury has been the Basis for Other Jurisdictions to Preclude Liability

In interpreting Kentucky law, the Sixth Circuit was faced with a plaintiff who alleged asbestos exposure from his father's work clothes. *See Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009), 561 F.3d 439, 444. The court recognized that Kentucky law, like Ohio law, requires foreseeability in order to impose a duty of care. Foreseeability is determined by actual knowledge and the "capacities of things and forces in so far as they are matters of common knowledge at the time and in the community." *Id.* at 444 (quoting RESTAT. 2D OF TORTS § 290(a)). Based upon that standard of foreseeability, the court held that there was "no showing of any general knowledge of bystander exposure in the industry." *Id.* at 446.

An Iowa appellate court likewise focused on foreseeability to preclude imposition of a duty of care. *See Fossen v. MidAmerican Energy Co.* (Iowa Ct. App. Jan. 16, 2008), No. 7-747/06-1691, 2008 Iowa App. LEXIS 12, unreported [Exhibit "A"]. The decedent had developed

an asbestos disease that allegedly resulted from laundering her husband's work clothes from his employment at the defendants' premises, which spanned from 1973 to 1997. The trial court granted summary judgment because there was no evidence to create "a fact issue as to whether a company in the position of [the premises owners] knew or should have known that such exposure to the microscopic fibers created a risk of harm to persons in the position of [the decedent]." *Id.* at *6. The court of appeals consequently upheld the lower court's decision, "agree[ing] with the district court's findings of fact, conclusions of law, and decision[.]" *Id.*

III. Conclusion

Revised Code 2307.941(A) speaks for itself, but the history of the common law in Ohio demonstrates that the statute rests on a solid foundation. The common law that developed in the state over a century ago laid out the prerequisites of a relationship between the parties and foreseeability of injury before a duty of care could be imposed. Throughout the ensuing decades, Ohio courts applied these prerequisites to premises owners and toxic tort claimants, both of whom fell under the umbrella of common law negligence. It is a natural extension of the law of Ohio for the General Assembly, through the statute, to have determined that a premises owner does not owe a duty of care for onsite asbestos if the plaintiff always remained offsite – there is no relationship or foreseeability in such a situation. That has been the determination of the vast majority of other jurisdictions that have faced the issue without the benefit of a statute and that have done so based upon their corresponding common law. OACTA respectfully posits that,

with the common law and statute being in harmony in Ohio, the Court should hold that liability should not extend to the Appellants or any other similarly situated plaintiffs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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LEXSEE 2008 IOWA APP. LEXIS 12

ROGER VAN FOSSEN, Individually, and as Personal Representative of the Estate of Ann Van Fossen, Deceased, Plaintiff-Appellant, vs. MIDAMERICAN ENERGY COMPANY and INTERSTATE POWER AND LIGHT COMPANY, Defendants-Appellees.

No. 7-747 / 06-1691

COURT OF APPEALS OF IOWA

2008 Iowa App. LEXIS 12

January 16, 2008, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at *Van Fossen v. MidAmerican Energy Co.*, 746 N.W.2d 278, 2008 Iowa App. LEXIS 1733 (Iowa Ct. App., 2008)

PRIOR HISTORY: [*1]

Appeal from the Iowa District Court for Woodbury County, John Ackerman, Judge. Plaintiff appeals from a district court summary judgment ruling that found two premises owners did not owe a duty of care to the spouse of an independent contractor's employee.

DISPOSITION: AFFIRMED.

COUNSEL: Michael Jacobs of Rawlings, Nieland, Probasco, Killinger, Elwanger, Jacobs & Mohrhauser, Sioux City, and John Herrick and Benjamin Cunningham of Motley Rice, Mt. Pleasant, South Carolina, for appellant.

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Singer & Mahoney, Chicago, Illinois, for appellee Mid-American Energy Company.

Leonard Strand and Kerry Finley of Simmons Perrine, Cedar Rapids, for appellee Interstate Power and Light Company.

JUDGES: ZIMMER, J. Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

OPINION BY: ZIMMER**OPINION****ZIMMER, J.**

Plaintiff Roger Van Fossen appeals from a district court ruling that granted summary judgment to two defendants, MidAmerican Energy Company (Mid-American) and Interstate Power and Light Company (IPL), on the basis that neither premises owner owed a duty of care to his spouse, Ann Van Fossen. Upon our review, we affirm [*2] the district court.

Roger Van Fossen was employed as an ironworker by two independent contractors from 1973 until he retired in 1997. From 1973 through 1981, Van Fossen worked for Ebasco Services (Ebasco), and from 1981 through 1997, he worked for W.A. Klinger Company (Klinger). Iowa Public Services, the predecessor of MidAmerican, hired Ebasco and Klinger to do construction and maintenance work on the electricity generating units at the Port Neal generating station (Port Neal) in Sioux City. Port Neal consists of four power units, designated as Unit 1 through Unit 4. ¹ During his employ-

ment with Ebasco and Klinger, Van Fossen performed work at all four generating units.

1 IPL is a party to this case because two of IPL's corporate predecessors, Iowa Southern Utilities and Interstate Power Company, held passive, minority, ownership interests in Units 3 and 4 at Port Neal.

Van Fossen was never an employee of Mid-American or IPL, and no direct relationship existed between him and either company. Ann Van Fossen was never at Port Neal. There is no evidence in the record that a direct relationship ever existed between either Mid-American or IPL and Ann Van Fossen.

Roger Van Fossen claims that [*3] while working on or near the Port Neal generating units he was exposed to various asbestos-containing products, and that he carried asbestos dust home on his work clothes. He alleges that his wife contracted peritoneal mesothelioma, an incurable and fatal form of lung cancer, as a result of washing his work clothes. Ann Van Fossen died of peritoneal mesothelioma in July 2002.

In 2004 Roger Van Fossen filed suit against a variety of defendants, including Mid-American and IPL, for the wrongful death of his wife and for his own injuries.² He included claims for negligent failure to warn in his suit against Mid-American and IPL. Mid-American and IPL each filed motions for summary judgment. They contended, among other things, that they owed no duty to Ann Van Fossen and therefore could not be held liable for her death. Roger Van Fossen filed a resistance to both of these motions.

2 Plaintiff filed an action asserting nine separate counts against fifty defendants.

The district court heard oral arguments on Mid-American's and IPL's summary judgment motions and other pending motions. On February 17, 2006, the court issued its ruling with respect to all summary judgment motions. The court concluded [*4] that neither defendant owed a duty to Ann Van Fossen and granted Mid-American's and IPL's motions for summary judgment.³

3 In the same ruling, the court denied the motions for summary judgment filed by General Electric and Foster Wheeler.

Roger Van Fossen subsequently filed a motion to enlarge or amend findings of fact and conclusions of law pursuant to *Iowa Rule of Civil Procedure 1.904*. In his motion, Van Fossen requested that the court reconsider its ruling that there can be no liability on behalf of Mid-American and IPL for any alleged asbestos exposures while working at Port Neal. On May 11, 2006, the court

denied Van Fossen's motion. In reaffirming its ruling granting Mid-American's and IPL's motions for summary judgment, the court stated it "does not believe Iowa would recognize a duty on the part of the landowner to persons in the position of Mrs. Van Fossen" under the circumstances of this case.

Van Fossen appeals. He asserts the district court erred in granting summary judgment to Mid-American and IPL on the basis that neither entity owed a duty of care to Ann Van Fossen.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; [*5] *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002).

Upon our review of the district court's detailed summary judgment ruling, we conclude it correctly sets forth the undisputed facts of this case. Moreover, we conclude the court's decision is well-reasoned and its legal conclusions are correct. We find it unnecessary to repeat in detail the factual circumstances and legal analysis set forth by the district court. We note that the court correctly stated that "Iowa courts balance and weigh three factors in determining whether a duty exists--the relationship between the parties, reasonable foreseeability of harm to the injured person, and public policy considerations." See *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999) (citing *Leonard v. State*, 491 N.W.2d 508, 509-12 (Iowa 1992)). After a thorough [*6] analysis of each factor, the court concluded that it should not recognize that Mid-American and IPL, as landowners, owe a duty of care to the spouse of an employee where "the employee who brings the asbestos fibers to the home is not the employee of the landowner but rather [is] the employee of an independent contractor . . . who was in control of the premises when the exposures occurred."

Furthermore, as the district court explained in its ruling on Van Fossen's *rule 1.904* motion, the summary judgment record demonstrates there is no evidence "which creates a fact issue as to whether a company in the position of Mid-American or Interstate Power and Light knew or should have known that such exposure to the microscopic fibers created a risk of harm to persons in the position of Mrs. Van Fossen."

Because we agree with the district court's findings of fact, conclusions of law, and decision, we affirm. See

Iowa Ct. R. 21.29. We leave any extension of the law in this area to the legislature or our supreme court.

AFFIRMED.