

No. 110662

IN THE SUPREME COURT OF ILLINOIS

CYNTHIA SIMPKINS,	)	On Appeal from the
Individually and as Special Administrator	)	Appellate Court of
for the Estate of Annette Simpkins, Deceased,	)	Illinois, Fifth District
)	
<i>Plaintiff-Appellee,</i>	)	There Heard on Appeal
	)	Pursuant to Supreme Court
v.	)	Rule 304(a) from the
	)	Circuit Court of
CSX TRANSPORTATION, INC.	)	Madison County, Illinois
)	
<i>Defendant-Appellant.</i>	)	No. 07-L-62
)	
	)	Hon. Daniel, J. Stack,
	)	<i>Judge Presiding.</i>
)	

**AMICI CURIAE BRIEF OF ILLINOIS CIVIL JUSTICE LEAGUE, ILLINOIS CHAMBER OF COMMERCE, ILLINOIS MANUFACTURERS' ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL
IN SUPPORT OF DEFENDANT-APPELLANT**

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QUESTION PRESENTED

Whether premises owners, such as the defendant railroad, owe a legal duty of care to remote plaintiffs allegedly injured as a result of secondhand exposure to asbestos or other substances emitted in the workplace. The subject action involves the estate of a woman who was allegedly exposed to asbestos carried home on the person and clothing of her former husband, who worked for the defendant's predecessor railroad from 1958 to 1964.

INTEREST OF AMICI CURIAE

Amici are associations collectively representing Illinois premises owners and their insurers. Consequently, *amici* have a significant interest in the subject appeal. *Amici* have dedicated years studying the subject matter of this case and the adverse impacts on our business climate caused by efforts to impose increasingly broad duties on ever-more remote defendants. Consequently, *amici* are well-suited to provide a broad perspective to the Court.

Amici agree with the Circuit Court's dismissal of Plaintiff-Appellee's complaint in this action and with the Second District Appellate Court's conclusion in *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 330 Ill. Dec. 909, 909 N.E.2d 931 (Ill. App. 2d Dist.), *appeal denied*, 233 Ill. 2d 564, 919 N.E.2d 355 (Ill. 2009), that imposing a broad new duty rule on Illinois premises owners to protect against remote, off-site exposure to asbestos or other toxic substances emitted in the workplace would be contrary to Illinois law. If the Court were to affirm the Fifth District Appellate Court's ruling below, reversing the Circuit Court's dismissal decision and imposing a broad new duty rule, Illinois employers would be subject to potentially limitless and indefinite

liability, needlessly prolonging the asbestos litigation and adding to the already huge number of Illinois asbestos filings.

STATEMENT OF FACTS

Amici adopt Defendant-Appellant CSX's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Now in its fourth decade, asbestos litigation has been sustained by the plaintiffs' bar's search for new defendants and new theories of liability. In particular, the connection between plaintiffs and asbestos-containing products has become increasingly remote, and the liability connection more attenuated. This appeal is an example.

Premises owner liability for off-site exposure to asbestos is of relatively recent vintage. In earlier years, asbestos litigation was focused mostly on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those companies have been forced into bankruptcy. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners for alleged harms to independent contractors exposed to asbestos on the owners' premises. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." Like this action, these "peripheral defendant-peripheral plaintiff" claims involve workers' family members who allege exposure to asbestos off-site, typically through contact with a directly exposed worker or that worker's soiled work clothes.

In recent years, a growing number of courts have addressed the issue of whether premises owners owe a duty to "take home" exposure claimants. These claims have been uniformly rejected by courts that employ an Illinois-like duty analysis, including the highest courts of Delaware, Georgia, Iowa, Michigan, and New York. Other courts that

have rejected take home asbestos exposure claims include state appellate courts in Texas and Maryland, a federal appellate court applying Kentucky law, and a federal district court applying Pennsylvania law. Kansas and Ohio have statutorily barred claims against premises owners for off-site asbestos exposures. Only jurisdictions that apply a duty analysis that is inapplicable in Illinois have found a duty to exist in some circumstances, including the New Jersey and Tennessee Supreme Courts, and a few lower courts, often in unpublished and even noncitable decisions.

Claims such as the instant appeal are generally failing across the board because courts and legislatures have appreciated that allowing a new cause of action against landowners by remote plaintiffs injured off-site would be inconsistent with traditional duty rules and worsen the asbestos litigation.

Plaintiff-Appellee tries to downplay the novelty of the remedy being sought here by pointing to (1) a few older cases touching on take home exposure claims against former asbestos product *manufacturers and sellers*,¹ (2) payment eligibility criteria for various trusts, specifically including the Manville Trust, set up in bankruptcy to pay asbestos-related claims against former asbestos product *manufacturers*,² and (3) the

¹ For example, Plaintiff-Appellee refers to *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906, 908-909 (J.P.M.D.L. 1977), where the “majority of the defendants [were] manufacturers or distributors of various asbestos products” along with some “insurance companies, doctors, suppliers of raw asbestos fibers, trade associations, trade unions, and the United States of America,” and two failed proposed global settlements of claims against manufacturers of asbestos-containing products, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor* 521 U.S. 591 (1997).

² For a discussion of asbestos-related trusts, see Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Inst. for Civil Justice 2010), available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf; William P. Shelley et al.,

aborted federal “FAIR Act” legislation that would have comprehensively replaced the civil asbestos tort system with a federally managed, privately funded, administrative scheme.³ These references essentially amount to a legal sleight of hand trick.

In the past, a few courts in other states, but not all, have permitted *product liability* claims involving bystander asbestos exposure.⁴ As this Court knows, however, product liability law rests on an entirely different foundation than the law of premises owner liability and cannot support the duty rule sought here by Plaintiff-Appellee. The application of strict product liability to commercial sellers and distributors “reflects the origins of liability without fault in the law of warranty, which has traditionally focused on sales transactions.” Restatement Third, Torts: Products Liability § 20 cmt. *a* (1997). A justification for strict products liability has been that “the seller, by undertaking to market his product for use and consumption, has undertaken and assumed a special responsibility

The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 17 Norton J. Bankr. L. & Prac. 257 (2008); Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. Ann. Surv. Am. L. 163 (2006).

³ For a discussion of the FAIR Act, see Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 Conn. Ins. L.J. 527 (2006).

⁴ See *Fuller-Austin Insulation Co., Inc. v. Bilder*, 960 S.W.2d 914, 918 (Tex. App.—Beaumont 1998); *AC&S, Inc. v. Abate*, 710 A.2d 944, 961 (Md. Ct. Spec. App.), *cert. denied sub nom. Crane v. Abate*, 713 A.2d 979 (Md. 1998), *cert. denied*, 525 U.S. 1171 (1999); *Anchor Packing Co. v. Grimshaw*, 692 A.2d 5, 34 (Md. Ct. Spec. App. 1997), *rev'd on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 713 A.2d 962 (Md. 1998); *Lunsford v. Saberhagen Holdings, Inc.*, 208 P.3d 1092 (Wash. 2009). *But see Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844, 847 (10th Cir. 1992) (asbestos manufacturer was not liable under Oklahoma law for the death of an insulator’s wife, who was exposed to asbestos dust carried home on the insulator’s work clothes).

toward any member of the consuming public who may be injured by it. . . .” Restatement (Second) of Torts § 402A cmt. c (1965).

Here, Plaintiff-Appellee allegedly was exposed to asbestos dust carried home from work by a family member. She did not buy asbestos from the Defendant-Appellant railroad. No sales transaction was involved. Unlike asbestos product manufacturers, the Defendant-Appellant had no meaningful way to incorporate the costs of any risk posed by those products into the pricing of its wholly unrelated activities. Therefore, the Defendant-Appellant cannot be said to have “undertaken and assumed” a duty to the plaintiff. *Id.*

It is also telling that the issue of premises owner liability for take home exposures is just now before this Court, because Illinois is certainly no stranger to asbestos litigation. Illinois has experienced asbestos litigation for decades and consistently has been among the top states in the nation for asbestos filings, often serving as a magnet for claimants from around the country.

This Court should reject Plaintiff-Appellee’s invitation to create a broad new duty rule in Illinois. A new duty requirement for premises owners would allow plaintiffs’ lawyers to name scores of employers and other premises owners directly in asbestos and other toxic tort suits. The impact would be to augment these litigations and subject premises owners to limitless and indefinite liability.

For these reasons, *amici curiae* urge the Court to reverse the decision of the Appellate Court below and affirm the Circuit Court’s decision to dismiss Plaintiff-Appellee’s complaint.

ARGUMENT

I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THE SUBJECT APPEAL MUST BE CONSIDERED

A. The Asbestos Litigation Environment

Asbestos litigation is the “longest-running mass tort” in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). “For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.” *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005). As far back as 1997, the United States Supreme Court described the litigation as a “crisis.” *Amchem Prods., Inc. v. Windsor* 521 U.S. 591, 597 (1997).⁵ Through 2002, approximately 730,000 asbestos claims had been filed. See Stephen J. Carroll et al., *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.⁶

By 2006, asbestos-related liabilities had forced over eighty-five companies into bankruptcy. See Martha Neil, *Backing Away from the Abyss*, A.B.A. J., Sept. 2006, at 26, 29, available at http://www.abajournal.com/magazine/article/backing_away_from_the_abyss/. As of today, asbestos litigation has forced at least ninety-six companies into bankruptcy, see Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Inst. for Civil Justice 2010), available at http://www.rand.org/pubs/technical_reports/

⁵ See also Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

2010/RAND_TR872.pdf, with devastating impacts on defendants companies' employees, retirees, shareholders, and surrounding communities. See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003). Bankrupt companies and communities are not the only ones affected:

The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003).

As a result of the large number of bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, abstract available at 2001 WLNR 1993314; see also Steven B. Hantler et al., *Is the Crisis in the*

⁶ RAND has estimated that \$70 billion was spent in the litigation through 2002, with future costs greatly exceeding that figure. See Carroll et al., *supra*, at 92, 106.

Civil Justice System Real or Imagined?, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”). One former plaintiffs’ attorney described the litigation as an “endless search for a solvent bystander.” *‘Medical Monitoring and Asbestos Litigation’—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

The dockets reflect that the litigation has moved far beyond the era in which manufacturers, producers, suppliers and distributors of friable asbestos-containing products or raw asbestos were the defendants. The range of defendants has expanded beyond those responsible for asbestos-containing products, producing exponential growth in the dimensions of asbestos litigation and compounding the burden on the courts. *See Susan Warren, Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486; *Susan Warren, Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *abstract available at* 2003 WLNR 3099209; Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (asbestos suits have expanded “from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities.”), *available at* <http://www.cbo.gov/doc.cfm?index=4641>.

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. *See Towers Watson, A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1, *available at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf.

At least one company in nearly every U.S. industry is involved in the litigation. See American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), available at www.actuary.org/pdf/casualty/asbestos_aug07.pdf. Nontraditional defendants like Defendant-Appellant now account for more than half of asbestos expenditures. See Carroll et al., *supra*, at 94.

B. Illinois is a Magnet for Asbestos Claims; Illinois Employers Have Been Hit Hard by the Litigation

Illinois has a long history with asbestos litigation. Beginning in the 1990s, the number of asbestos filings in Madison County skyrocketed. See Editorial, *Lawsuit Heaven*, St. Louis Post-Dispatch, Jan. 13, 2003, at B6, available at 2003 WLNR 1815375; Adele Nicholas, *Judicial Shakeup Signals Reform In Madison County*, Corp. Legal Times, Jan. 2005, at 50 (stating that over 5,000 asbestos lawsuits were filed in Madison County between 1994-2004). Between 1996 and 2002, the number of filings increased 1144%, from 65 cases in 1996, 176 in 1998, 411 in 2000, to 884 in 2001. See Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 Wash. U. J.L. & Pol'y 235, 243-44 (2004). In 2003, 953 asbestos lawsuits were filed in the county. See Mark A. Behrens, *What's New in Asbestos Litigation*, 28 Rev. Litig. 501, 541-42 (2009). It was estimated that Madison County, with a population around only a quarter-million people, was home to an astonishing twenty-five percent of the nation's mesothelioma claims. See Brian Brueggemann, *Chicagoan to Test Asbestos Case*, Belleville News-Democrat, Nov. 16, 2004, at 1A, available at 2004 WLNR 18871876.

Such an explosion of cases, grossly disproportionate to the county's population, resulted in significant criticism of Madison County and Illinois generally with respect to the way asbestos claims were being handled. The high number of filings, many by out of state plaintiffs, led former U.S. Attorney General Griffin Bell to declare that Madison County "ha[d] allowed itself to become a Mecca for asbestos lawsuits." Griffin B. Bell, *Asbestos and The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 7 (2004).

Madison County has continued to experience substantial asbestos litigation. *See Litigating in the Field of Dreams: Asbestos Cases in Madison County, Ill.*, U.S. Chamber Institute for Legal Reform, at 5 (Oct. 2010), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/asbestoscasesinmadisoncountyillinois.pdf> (between 2006-2008, the number of asbestos claims in Madison County climbed ninety-seven percent while the county's population rose less than one percent). After a brief decrease in filings, Madison County's asbestos claims jumped back to 814 filings in 2009 from 639 in 2008 (roughly a twenty-seven percent increase). The pace continued in 2010. *See* Amelia Flood, *Asbestos Filings Up in St. Clair, Madison Filings Top 650*, The Record (Madison and St. Clair), Dec. 8, 2010, available at <http://www.madisonrecord.com/news/231862-asbestos-filings-up-in-st.-clair-madison-filings-top-650#>. Annual asbestos filings in Madison County are approaching their all-time high, with a growing percentage of such claims brought by plaintiffs with no connection to the county. The Illinois Civil Justice League reviewed about 400 asbestos cases filed in Madison County "from 2009 and found that just 11 percent of the plaintiffs had a connection to Illinois let alone Madison County." Editorial, *Don't Slide Back Into Hellhole*, Belleville News-Democrat, July 26, 2010, available at 2010 WLNR 14870143.

Claims are also finding their way to alternative Illinois courtrooms. For instance, asbestos filings in Cook County increased forty percent in 2004. *See Trial Lawyers, Inc.: Illinois – A Report on the Lawsuit Industry in Illinois 2006*, Manhattan Institute Center for Legal Policy 12 (2006), available at <http://www.triallawyersinc.com/IL/il01.html>. St. Clair County's asbestos docket “saw a jump in filings last year. That rise has continued.” Amelia Flood, *E-filing and Growing Asbestos Docket are Top Challenges for New St. Clair County Circuit Clerk*, *The Record* (Madison and St. Clair), Feb. 10, 2011, available at <http://www.stclairrecord.com/news/233309-e-filing-and-growing-asbestos-docket-are-top-challenges-for-new-st.-clair-county-circuit-clerk#>; Amelia Flood, *Asbestos Cases Accumulating in St. Clair County's Little Used Docket*, *The Record* (Madison and St. Clair), Mar. 18, 2010, available at <http://www.madisonrecord.com/news/225464-asbestos-cases-accumulating-in-st.-clair-countys-little-used-docket#>.

These developments show that Illinois remains at the forefront of asbestos litigation nationally, continuing to serve as a “magnet” for such lawsuits. In fact, a January 2011 Standing Case Management Order for All Asbestos Personal Injury Cases in Madison County found “that there is a significant volume of asbestos currently on file. . . .” *In re All Asbestos Litig. Filed in Madison County*, Standing Case Management Order for All Asbestos Personal Injury Cases, at I(B)(1)(A) (Cir. Ct. 3d Jud. Dist. Madison County, Ill. Jan. 26, 2011). The new duty rule sought here by Plaintiff-Appellee would usher in a new wave of litigation, prolonging and worsening the already severe challenges the litigation poses for Illinois employers.

Illinois businesses already have borne a direct and substantial economic impact from asbestos litigation. Several major Illinois employers, including Chicago-based USG Corp. and UNR Industries, have been forced into bankruptcy due to the flood of asbestos cases. See Melita Marie Garza, *USG Files for Bankruptcy; Asbestos Claims Lead Firm to Seek Protection*, Chi. Trib., June 26, 2001, at 1, available at 2001 WLNR 10606473; Charles Storch, *UNR Trust Gives Plan for Claims*, Chi. Trib., Apr. 27, 1991, at 3, available at 1991 WLNR 3789305. At the time of USG's bankruptcy, the company was facing approximately 190,000 claims, see *Local Focus*, Chi. Daily Herald, Feb. 25, 2003, at 1, available at 2003 WLNR 16920994, and was forced to shutter multiple plants. See Stephen Rynkiewicz & James P. Miller, *USG Posts \$9 Million Loss*, Chi. Trib., Jan. 30, 2002, at 1, available at 2002 WLNR 12618392.

Even for those major Illinois employers able to eventually exit bankruptcy, the cost of the litigation has been considerable. See, e.g., *USG bankruptcy Exit Plan Approved \$3.95 Billion Would Resolve Claims for Asbestos Liability*, Chi. Trib., June 16, 2006, at 3, available at 2006 WLNR 10412543; *Owens Corning to Pay Asbestos Claims; \$5.2 Billion Settlement to End Bankruptcy Stay*, Chi. Trib., May 11, 2006, at 3, available at 2006 WLNR 8076088.

**II. THIS COURT SHOULD HOLD THAT
LANDOWNERS OWE NO DUTY TO
REMOTE PLAINTIFFS INJURED OFF-SITE
THROUGH SECONDHAND EXPOSURE
TO HAZARDS ON THE PROPERTY**

The general duty analysis in Illinois law was thoroughly articulated in the present context by the Second District in *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 330 Ill. Dec. 909, 909 N.E.2d 931 (Ill. App. 2d Dist.), *appeal denied*, 233 Ill. 2d 564, 919

N.E.2d 355 (Ill. 2009), and is likely to be addressed by Defendant-Appellant, so for the sake of judicial economy those arguments will not be fully discussed here. A brief discussion, however, is important to provide context for Sections III and IV of this brief and demonstrate how Illinois law is more consistent with the law applied by courts in states that have rejected the duty rule sought here than the law applied by the minority of courts that have accepted Plaintiff-Appellee's proposed duty theory.

In Illinois, the law is settled that “[t]he touchstone of the duty analysis is to ask whether the plaintiff and defendant stood in such a relationship to one another that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff.” *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, --, 345 Ill. Dec. 1, 8, 938 N.E.2d 440, 447 (Ill. 2010); *Vancura v. Katris*, 238 Ill. 2d 352, 345 Ill. Dec. 485, 939 N.E.2d 328, 347 (Ill. 2010). As the court explained in *Nelson*, “The reasonable foreseeability of injury is one important concern,” but this Court “has recognized that foreseeability alone ‘provides an inadequate foundation upon which to base the existence of a legal duty.’” *Nelson*, 391 Ill. App. 3d at 1039, 909 N.E.2d at 934 (quoting *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140, 143 Ill. Dec. 288, 291, 554 N.E.2d 223, 226 (Ill. 1990)).⁷ Other factors include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon the defendant.

⁷ See also *Zimmerman v. Netemeyer*, 122 Ill. App. 3d 1042, 1047, 78 Ill. Dec. 383, 387, 462 N.E.2d 502, 506 (5th Dist. 1984) (stating, “it appears from close examination and analysis of the determination of duty in Illinois cases that ‘foreseeability of harm’ in actuality plays little part in the resolution of the duty issue.”). Furthermore, as the California Supreme Court explained in *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989), “there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury.”

Ward, 136 Ill.2d at 140-41, 143 Ill. Dec. at 291-92, 554 N.E.2d at 226-27. The existence of a legal duty also includes “considerations of public policy.” *Marshall v. Burger King Corp.*, 22 Ill. 2d 422, 436, 305 Ill. Dec. 897, 906, 856 N.E.2d 1048, 1057 (Ill. 2006). The nature of the relationship between the parties is the threshold question that must be answered. *See, e.g., Tedrick v. Community Res. Ctr.*, 235 Ill. 2d 155, 336 Ill. Dec. 210, 920 N.E.2d 220 (Ill. 2009) (mental health care providers could not be held liable under a theory of transferred negligence); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 111 Ill. Dec. 944, 513 N.E.2d 387 (Ill. 1987) (hospital owed no duty to nonpatient, nonuser of prescription drug), *cert. denied*, 485 U.S. 905 (1988).

Here, there was no relationship between the parties and, thus, no foundation upon which to support the imposition of liability against Defendant-Appellant. The “touchstone” of the duty analysis is entirely absent.

III. MOST COURTS HAVE REJECTED THE DUTY RULE SOUGHT HERE

“Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists.” *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009). “In jurisdictions, like [Illinois], where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos.” *In re Asbestos Litig.*, 2007 WL 4571196, *8 (Del. Super. Ct. Dec. 21, 2007) (emphasis added), *aff’d sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

