



Mark Reynolds

IN THE NEW MEXICO COURT OF APPEALS
Ct. App. No. A-1-CA-36240

PEGGY ANN TORRES, Individually and as
the Personal Representative of the Estate of
LEONARD C. TORRES, Deceased,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY
(as Successor By Merger to the ATCHISON,
TOPEKA & SANTA FE RAILWAY),

Defendant-Appellee.

Appeal from the District Court of the Thirteenth Judicial District Court
Sandoval County
Honorable James L. Sanchez, District Judge

**AMICI CURIAE BRIEF OF NEW MEXICO ASSOCIATION OF COMMERCE
AND INDUSTRY, ALBUQUERQUE HISPANO CHAMBER OF COMMERCE,
NEW MEXICO DEFENSE LAWYERS ASSOCIATION, COALITION FOR
LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS,
AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE
ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318 NMRA and 12-502 NMRA, this is to certify that this Brief was prepared using a proportionally-spaced typeface (Times New Roman, 14 point font), and contains 3,763 words (inclusive of footnotes) according to the word processing system used to prepare the brief (Microsoft Word 2010).

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QUESTION PRESENTED

Whether a premises owner owes a duty of care to a person exposed off-site to asbestos or other toxic substances in the workplace through contact with an occupationally exposed worker or the worker's clothing?

INTEREST OF AMICI CURIAE

Amici are New Mexico business associations and defense lawyers as well as national business and civil justice associations whose members include New Mexico employers and their insurers.¹ *Amici* are interested in this case because imposition of a duty on premises owners to prevent off-site exposures to asbestos or other toxic substances in the workplace would lead to potentially limitless and indefinite liability. Further, such a duty would substantially burden the remaining but increasingly remote defendants in the four decades old asbestos litigation.

Counsel for the parties received timely notice of *amici*'s intent to file this brief in accordance with Rule 12-320(D)(1).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reject Plaintiff's invitation to greatly expand the universe of people to whom a premises owner owes a duty of care. Plaintiff's position is founded on their perspective of foreseeable harm. But New Mexico courts must

¹ No party or counsel for a party authored the proposed brief in whole or in part. No person or entity other than the *amici* made a monetary contribution intended to fund the preparation or submission of the brief.

“articulate specific policy reasons, unrelated to foreseeability considerations,” when determining the existence of a duty. *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2014-NMSC-014, ¶ 19, 326 P.3d 465, 467; *see also Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 612, 894 P.2d 386, 389 (“Policy determines duty.”). The New Mexico Supreme Court has expressly held that “foreseeability is not a factor for courts to consider” in a duty analysis. This is, in part, because the existence of duty is a legal and categorical determination, while foreseeability is fact specific finding that is “not susceptible to a categorical analysis.” *Rodriguez*, 2014-NMSC-014, ¶ 1, 326 P.3d at 467; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2010) (“Determinations of no duty are categorical while foreseeability cannot be determined on a categorical basis.”).²

Courts in many states have articulated strong public policy reasons for rejecting the duty the plaintiff seeks here. In fact, courts in states like New Mexico that do not focus on foreseeability as part of the duty analysis have *uniformly*

² For example, in *Lester ex rel. Mavrogenis v. Hall*, 1998-NMSC-047, ¶ 25, 126 N.M. 404, 412, 970 P.2d 590, 598, “public policy considerations” led the New Mexico Supreme Court to decline to extend a physician’s duty of care to a third party injured by the physician’s alleged negligence in prescribing medication to a patient. *See also Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶ 24, 134 N.M. 789, 796, 82 P.3d 960, 967 (“we decline for policy reasons to impose a duty on [utility company] to maintain streetlights” where pedestrian was struck by car and injured in intersection where streetlight had been removed); *Chavez v. Desert Eagle Distrib. Co. of N.M., LLC*, 2007-NMCA-018, ¶ 32, 141 N.M. 116, 126, 151 P.3d 77, 87, *overruled on other grounds by Rodriguez*, 2014-NMSC-014, ¶¶ 9-10, 326 P.3d at 470 (public policy did not support imposition of duty on casino for motor accident by intoxicated patron).

rejected take-home asbestos exposure claims against premises owners. These courts have been mindful that imposing a duty on premises owners to prevent off-site exposures to asbestos or other hazards in the workplace could result in potentially limitless and indefinite liability.

In addition, the science regarding the prevalence of serious injury, such as mesothelioma, from take-home asbestos exposure raises questions as to whether many claimants have sufficient exposure to cause their disease. Studies suggest that many of today's take-home exposure cases involve spontaneous cancers.

Finally, the availability of asbestos trust recoveries outside the tort system further weighs against stretching New Mexico law to impose liability on premises owners in cases such as this one.

For these reasons, the Court should affirm the decision below.

ARGUMENT

I. CREATING A DUTY OF CARE FOR TAKE-HOME ASBESTOS EXPOSURE WOULD BE UNSOUND POLICY

Courts in states like New Mexico that do not base their recognition of a duty on foreseeability have *uniformly* held that premises owners owe no duty of care in take-home asbestos exposure cases. For this Court to find such a duty, it would need to become the first court in the country to impose a duty on a premises owner for take-home asbestos exposure based on policy considerations unrelated to foreseeability. *See Quiroz v. ALCOA, Inc.*, 382 P.3d 75, 82 (Ariz. Ct. App. 2016)

(“Those courts that do not focus on foreseeability have declined to find a duty of care in take-home exposure cases.”), *review granted* (Feb. 14, 2017).³

Courts have recognized the practically limitless liability that would result if premises owners owe a duty of care to anyone in contact with (or even close to) an occupationally exposed worker or that person’s clothing. Potential plaintiffs might include household members, extended family,⁴ dating partners, renters, houseguests, babysitters, house cleaners, carpool members, bus drivers, friends and co-workers of the exposed worker, people in various commercial enterprises visited by the exposed worker,⁵ and local laundry workers, among others.

For example, New York’s highest court in *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115 (N.Y. 2005), recognized the potential for such “limitless liability” when it held that a premises owner did not owe a duty of care to a former employee’s wife allegedly injured from asbestos exposure introduced into the home from her husband’s clothes. *Id.* at 122. The

³ See also *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009) (“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.”); *In re Asbestos Litig.*, 2007 WL 4571196, at *8 (Del. Super. Ct. Dec. 21, 2007), *aff’d sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) (“In jurisdictions . . . 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.”); Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The “Endless Search for a Solvent Bystander,”* 23 *Widener L.J.* 59 (2013).

⁴ See, e.g., *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028 (Md. 2013) (grandchild).

⁵ See, e.g., *Frieder v. Long Island R.R.*, 40 Misc. 3d 685 (N.Y. Sup. Ct. N.Y. County 2013) (cashier at diner).

court appreciated that potential plaintiffs in secondhand asbestos exposure cases might include a “babysitter (or maybe an employee of a neighborhood laundry) [who] launders the family members’ clothes” in addition to the employee’s household members. *Id.* The court also dismissed plaintiff’s contention that the incidence of disease from secondhand asbestos exposure is rather low. The court said, “experience counsels that the number of new plaintiffs’ claims would not necessarily reflect that reality.” *Id.*⁶

The Michigan Supreme Court in *Miller v. Ford Motor Co. (In re Certified Question from the 14th District Court of Appeals)*, 740 N.W.2d 206 (Mich. 2007), held that Ford Motor Company did not owe a duty to protect a plaintiff from asbestos fibers carried home on the clothing of a family member who worked at a Ford plant. The court said that imposing such a duty “would create a potentially limitless pool of plaintiffs.” *Id.* at 220. The court held that “expand[ing] traditional tort concepts beyond manageable bounds and creat[ing] an almost infinite universe of potential plaintiffs” imposed a social cost that did not outweigh any alleged social benefit. *Id.* at 213 (quoting *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005)).

Policy reasons also led the Iowa Supreme Court to reject a duty of care requiring a premises owner to warn the wife of an independent contractor’s

⁶ See also *In re Eighth Jud. Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.)*, 815 N.Y.S.2d 815, 820-21 (N.Y. Sup. Ct. 2006).

employee of the hazards of asbestos. In *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), the court said such a duty arguably would extend “to a large universe of other potential plaintiffs who never visited the employers’ premises but came into contact with a contractor’s employee’s asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat.” *Id.* at 699. The court “conclude[d] such a dramatic expansion of liability would be incompatible with public policy.” *Id.*⁷

The Georgia Supreme Court in *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005), also “decline[d] 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.” *Id.* at 210. The court realized that such a duty would “create an almost infinite universe of potential plaintiffs.” *Id.* at 209 (quoting *Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569, 571 (N.Y. App. Div. 1994)).

Other courts have rejected the duty sought here for similar policy reasons. *See Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (“If liability for exposure to asbestos could be premised on Mary Wild’s handling of

⁷ In a separate opinion cited in *Van Fossen*, the Iowa Supreme Court adopted Section 7 of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM. *See Thompson v. Kaczinski*, 774 N.W.2d 829, 834-35 (Iowa 2009); *Van Fossen*, 777 N.W.2d at 696; *cf. Rodriguez*, 2014-NMSC-014, ¶ 1, 326 P.3d at 467; *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶¶ 15, 18, 148 N.M. 646, 241 P.3d 1086. As is the case in New Mexico, Iowa law was modified such that foreseeability no longer enters into the duty calculus. *See McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012).

her husband's clothing, presumably Bethlehem would owe a duty to others who came in close contact with Edwin Wild, including other family members, automobile passengers, passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees.”⁸ Two states have made a legislative policy decision to bar take-home asbestos exposures claims against premises owners. *See* Ohio Rev. Code Ann. § 2307.941(a)(1); Kan. Stat. Ann. § 60-4905(a).

Further, trying to cabin in the scope of liability, such as limiting any duty to household family members of an occupationally exposed work, may be unworkable and would require the type of line-drawing that is typically the role of legislators. *See* Meghan E. Flinn, Note, *Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707, 746 (2014) (“the problem of take-home asbestos exposure is best suited for the legislature”). As one court explained:

[T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member who has been exposed to asbestos while laundering a family member's clothing, from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of

⁸ *Cf. Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011); *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009); *Palmer v. 999 Quebec, Inc.*, 874 N.W.2d 303 (N.D. 2016); *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 931 (Ill. App.), *appeal denied*, 919 N.E.2d 355 (Ill. 2009).

his work clothing at the end of the day. All have been exposed to asbestos from the employee's clothing; all arguably have intersected with the asbestos-covered employee in a foreseeable manner; and all would have viable claims of negligence . . . if the take home exposure cause of action is permitted. . . . The burden upon the defendant to undertake to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great; the exposure to potential liability would be practically limitless.

In re Asbestos Litig. (Lillian Riedel), 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

Moreover, the “specter of limitless liability,” *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014),⁹ would stretch decades into the future because the volume of asbestos claims shows no signs of abating. A 2016 review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that “[f]ilings remained flat at the levels observed since 2007....” Mary Elizabeth Stern & Lucy P. Allen, *Resolution Values Dropped 35% While Filings and Indemnity Payments Continued at Historical Levels*, at 1 (NERA Econ. Consulting June 2016); *see also* Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have

⁹ As it is in New Mexico, under Pennsylvania law, the concept of duty in a negligence case is “rooted in public policy.” *Gillen*, 40 F. Supp. 3d at 538 (quoting *R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2005)). Even where Pennsylvania law considers foreseeability as part of the duty analysis, “foreseeability ‘is not alone determinative of the duty question,’ and ‘is not necessarily a dominant factor’ in the duty assessment.” *Id.* at 540 (quoting *Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1249 & n.26 (Pa. 2012)).

“remained near peak levels since 2000.”). “Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.” Biggs et al., *supra*, at 5; see also *Best’s Special Report: Asbestos Losses Continue to Rise; Environmental Losses Remain Stable* (Nov. 2017) (asbestos losses show no sign of subsiding).

This Court recently rejected the establishment of a duty based upon its pragmatic consideration that “liability for indirect (but foreseeable) consequences to third parties resulting from negligent harm could be limitless given society’s proliferation of commercial relationships” *National Roofing, Inc. v. Allstate Steel, Inc.* 2016-NMCA-020, ¶6, 366 P.3d 276, 279, *cert. denied*, 370 P.3d 473 (2016). The Court should similarly reject the duty the plaintiff seeks here because of the substantial burden it would impose on the remaining solvent – but increasingly remote – defendants in asbestos cases today.

In earlier years, the asbestos litigation typically pitted a “dusty trade” worker “against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant’s work site or other exposure location.” James S. Kakalik et al., *Costs of Asbestos Litigation* 3 (Rand Corp. 1983). Much of this work involved insulation

containing long, rigid amphibole fibers, rather than the more common, and less toxic, chrysotile form of fiber.¹⁰

By the late 1990s, the asbestos litigation had reached such proportions that the Supreme Court of the United States described the “elephantine mass” (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)), as a “crisis.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Mass filings led virtually all of the primary historical defendants to file bankruptcy.

After the most culpable asbestos defendants exited the tort system through bankruptcy, the litigation “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 A14.¹¹ The focus of plaintiff attorneys shifted “away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution

¹⁰ See, e.g., *In re Asbestos Litig.*, 911 A.2d 1176, 1181 (Del. Super. May 9, 2006) (“[I]t is generally accepted in the scientific community and among government regulators that amphibole fibers are more carcinogenic than serpentine (chrysotile) fibers.”), *cert. denied*, 2006 WL 1579782 (Del. Super. June 7, 2006), *appeal refused*, 906 A.2d 806 (Del. Super. June 13, 2006); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) (“While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma.”), *aff’d sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

¹¹ See also Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) (“The surge of bankruptcies in 2000-2002...triggered higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability.”).

of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products.” Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27 Mealey’s Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012). The Towers Watson consulting firm has identified “more than 10,000 companies, including subsidiaries, named in asbestos litigation.” Biggs et al., *supra*, at 1.

Companies that used to be peripheral defendants are “now bearing the majority of the costs of awards relating to decades of asbestos use.” American Academy of Actuaries’ Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007). One plaintiffs’ attorney described the asbestos litigation as an “endless search for a solvent bystander.” ‘*Medical Monitoring and Asbestos Litigation*’—A Discussion with Richard Scruggs and Victor Schwartz, 17 Mealey’s Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

Recently, even some attenuated asbestos defendants have filed bankruptcy. See S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013) (“Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.”).

Courts should be particularly wary of creating a novel and limitless duty between employers and those they do not employ given that asbestos litigation is increasingly focused on companies with an attenuated connection to asbestos and has already rendered over one hundred corporations bankrupt.

Lastly, any duty finding here presumably would not be limited to mesothelioma cases,¹² but could spark lawsuits by plaintiffs with numerous other asbestos-related diseases,¹³ including non-malignant conditions, and open the door to lawsuits against premises owners over any number of hazards that workers carry off-site. *See Stanton v. Battelle Energy Alliance, Inc.*, 89 F. Supp. 3d 937, 946 (D. Idaho 2015) (policy factors weighed against duty on nuclear operator for wife of employee exposed to radioactive chemical elements); *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1096-97 (Md. 2005) (employer owed no duty to wife of employee who became infected with HIV through unprotected sex with her spouse,

¹² Plaintiff inaccurately estimates the potential number of mesothelioma take-home cases in New Mexico. The referenced 2002 NIOSH report, Table 7-6, <http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf>, does *not* report all homemaker mesotheliomas “in the United States in 1999,” but only for a selected number of states – 26 to be exact. *See* Appendix E, at E-1. More critically, the report only documented the “occupation” of the deceased, so the “housewife/homemaker” designation represents only those persons who had no other occupation. Many take-home cases would be filed by spouses and others who worked outside the home. The housewife/homemaker designation also would not account for exposures to persons as children. Thus, many other occupations and people would have to be included in plaintiff’s estimate to reflect accurately the source of potential take-home cases.

¹³ There is a new wave of asbestos lung cancer cases appearing on some asbestos dockets, reflecting an attempt to expand the litigation well beyond mesotheliomas. *See* Bethany Krajelis, *Lung Cancer Suits are New Trend in Asbestos Litigation; Filings Discussed at Recent California Asbestos Conference*, Madison-St. Clair Record (Mar. 28, 2013).

a lab technician at employer's viral production facility, because imposition of a duty of care "would create an indeterminate class of potential plaintiffs."); *Widera v. Ettco Wire and Cable Corp.*, 611 N.Y.S.2d 569, 571 (N.Y. App. Div. 1994), *leave denied*, 650 N.E.2d 414 (N.Y. 1995) (employer not liable to infant exposed in utero to toxic chemicals emitted at work because recognition of a duty would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.").¹⁴ As an Arizona appellate court recently explained:

[Plaintiffs] offer no way to limit the duty they seek either to employees' family members or to asbestos exposure. Absent these constraints, any company that made or used a potentially hazardous substance could be liable to anyone who ever came into contact with an employee who arguably could have carried said hazardous substance offsite. Such a dramatic expansion of liability would not be compatible with public policy.

Quiroz, 382 P.3d at 81.

II. CREATING A TAKE-HOME DUTY WOULD ENCOURAGE THE FILING OF GROUNDLESS ASBESTOS LITIGATION

Duty rules by their very nature may exclude claims by potential plaintiffs who, while injured, lack a sufficient connection to the defendant. The rules are imposed to create reasonable boundaries around liability and reserve recovery for the most direct injuries and tortious actions. Here, the Court should not be overly

¹⁴ See also *Ruffing v. Union Carbide Corp.*, 766 N.Y.S.2d 439, 441 (N.Y. App. Div. 2003) (worker whose pregnant wife was exposed to toxic substances carried home by worker, resulting in daughter's birth defects, failed to state cause of action against employer).

concerned that by rejecting a duty of care it would be cutting off a large class of meritorious mesothelioma claims. The science behind mesothelioma suggests that today's "take home" litigants are frequently suing over spontaneously generated cancers that have nothing to do with asbestos exposures. Preserving New Mexico's sensible limitations on who receives a duty of care will not deprive deserving plaintiffs, because it would only impact those with the most attenuated and questionable claims. See William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take Home" Cases*, 39 Am. J. of Trial Advoc. 107, 121 (2015) (providing examples involving plaintiffs with tenuous connections to asbestos).

**A. True Instances of Take-Home
Mesotheliomas Are Rare and Difficult to Produce**

Historically, take-home cases have arisen out of heavy workplace and home exposure situations – "asbestos miners, asbestos factory workers, shipyard/dock workers, textile workers, furnace/engine boiler room workers, railway carriage workers, pipefitters, and insulators." Ellen Donovan, *Evaluation of Take Home (Para-Occupational Exposure to Asbestos and Disease: A Review of the Literature*, 42 Crit. Reviews in Toxic. 703, 716 n.11 (2012).¹⁵ Even in those settings, it was difficult to encounter a case of take-home mesothelioma. For instance, a 1965 study that has been referenced as the first take-home exposure

¹⁵ See also Emily Goswami et al., *Domestic Asbestos Exposure: A Review of Epidemiologic and Exposure Data*, 10 Int. J. Env'tl. Research & Pub. Health 5629 (2013) (citing studies).

study found only nine spouse cases across the entire population served by the London Hospital, at a time when asbestos factories with uncontrolled exposures were common. See Muriel Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 Brit. J. Indus. Med. 261, 261 n.5 (1965). A later study of all mesotheliomas in New York found only ten spouses with apparent take-home disease in a decade. See Nicholas Vianna & Adele Polan, *Non-Occupational Exposure to Asbestos and Malignant Mesothelioma in Females*, 1 Lancet 1061, 1062 (1978).

B. Today's Take-Home Cases Involve Spontaneous Cancers

So where are today's take-home cases coming from? Mesotheliomas, like all cancers, are increasingly a function of age – the older the population becomes, the more cancers we have. See Stanley Venitt, *Mechanisms of Spontaneous Human Cancers*, 104 Env'tl. Health Persp. 633, 633, 635 (1996).¹⁶

Most cancers are produced by our own bodies generating errors in our genes during the billions of replications of our DNA that occur in our cells on a daily basis. See *id.* at 637; Robert A. Weinberg, *One Renegade Cell: How Cancer Begins* at 89-90 (1998). These types of cancers are called “spontaneous” cancers because they are self-generating, the result of a series of two or more spontaneous

¹⁶ See also Suresh Moolgavkar, et al., *Pleural and Peritoneal Mesotheliomas in SEER: Age Effects and Temporal Trends*, 20 Cancer Causes Control 935, 943 (2009); Mathieu Boniol & Mary Heanue, “Chapter 7: Age-Standardisation and Denominators,” in *Cancer Incidence in Five Continents Vol. IX*, IARC Scientific Publication No. 160, at 9 (2015).

cell mutations in a given cell sufficient to turn that cell cancerous. *See* Cristian Tomasetti & Bert Vogelstein, *Variation in Cancer Risk Among Tissues Can Be Explained by the Number of Stem Cell Divisions*, 347 *Science* 78 (Jan. 2015); *see also* Venitt, *supra*, at 633, 635; Weinberg, *supra*, at 89-90.

Spontaneous cancers produce as much as two-thirds of the cancers in today's population, and they are increasingly accounting for mesotheliomas. *See id.*; Mary Jane Teta et al., *US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates*, 17 *Eur. J. Cancer Prevention* 525, 526 (2008) (“[S]cientific evidence suggests that a portion of cases occurred with no apparent history of asbestos exposure. . . . It is generally well accepted, therefore, that there is a background rate of mesothelioma, unrelated to asbestos exposure.”).¹⁷

In short, today's population of persons with mesothelioma are decreasingly individuals who had sufficient asbestos exposure to cause their disease and increasingly made up of people who have incurred spontaneous mesotheliomas instead, sometimes in conjunction with inconsequential asbestos exposures. Yet today, due in part to the acceptance by some courts of speculative asbestos causation theories, virtually every mesothelioma has the potential to become an asbestos lawsuit. Many courts have rejected this causation theory – known as the

¹⁷ *See also* Christine Rake et al., *Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case-Control Study*, 100 *Brit. J. Cancer* 1175, 1175 (2009) (14% of male and 62% of female cases of mesothelioma “not attributable to occupational or domestic asbestos exposure”).

any exposure theory or *cumulative exposure* theory – but it still exists in some jurisdictions.¹⁸

By rejecting a take-home asbestos exposure duty rule in New Mexico, this Court will prevent further unwarranted expansion of an already massive area of litigation.

III. PLAINTIFF COMPENSATION AND ASBESTOS TRUSTS

A duty finding is not required to provide a remedy to take-home exposure plaintiffs because recoveries are available outside the tort system for persons exposed to asbestos from the former major asbestos producers.¹⁹

Today, billions of dollars in assets are available in asbestos trusts to “answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades.” William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 *Widener L.J.* 675 (2014). There are presently over sixty trusts in operation. *See*

¹⁸ *See* Mark Behrens & William Anderson, *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 *Sw. U. L. Rev.* 479 (2008); William Anderson et al., *The “Any Exposure” Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 *Kan. J. L. & Pub. Policy* 1 (2012).

¹⁹ *See, e.g.*, *Manville Trust, 2002 Trust Distribution Process (TDP) § B(C)(11)* (Revised Jan. 2012).

U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011). These trusts operate independent of the civil tort system. See Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010).

“[I]t is much easier to collect against a bankruptcy trust than a solvent defendant.” Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 *The Advoc. (Tex.)* 80, 80 (2007)). “[B]ankruptcy trusts have emerged to give asbestos firms an almost automatic guarantee of settlements for their clients.” *Id.* at 82; see also Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, *Wall St. J.*, Mar. 11, 2013, at A1 (“Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.”). If a claimant meets a trust’s criteria, the claimant will receive a payment. See U.S. GAO, *supra*, at 21. “Thus, it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court.” Brown, 23 *Widener L.J.* at 317.

It is common for a claimant to receive multiple trust payments since each trust operates independently and many workers were exposed to the asbestos-containing products of various former defendants. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014). For instance, in a recent bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff's total recovery was estimated to be \$1-1.5 million, "including an average of \$560,000 in tort recoveries and about \$600,000 from 22 trusts." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014).

CONCLUSION

For these reasons, this Court should affirm the decision below granting summary judgment to Defendant-Appellee based on no duty.

Dated: February 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 12, 2018, the foregoing was filed through the Court of Appeals' Odyssey E-File & Serve System, which will cause service on all counsel of record in this matter listed below:

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