IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	:	
	:	
WAYNE R. REED, INDIVIDUALLY AND AS THE EXECUTOR OF ESTATE OF BARBARA REED, DECEASED, AND AMY RHODES AND COURTNEY REED, AS SURVIVING CHILDREN	:	No. 387,2016
	:	Court Below: Superior Court of the State of Delaware in and for New Castle County
	:	C.A. No. N13C-11-188 ASB
Plaintiff Below/Appellant	:	
	:	
v.	:	
	:	
ASBESTOS CORPORATION LIMITED, BAYER CROPSCIENCE, INC., CHARLES A. WAGNER COMPANY, INC., NOSROC CORPORATION, AND COUNTY INSULATION COMPANY	:	
	:	
Defendants Below/Appellees	:	

APPELLEE COUNTY INSULATION COMPANY'S ANSWERING BRIEF

MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C.

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Date: October 17, 2016

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NATURE OF THE PROCEEDINGS

On November 15, 2013, Barbara K. Reed and Wayne R. Reed commenced this litigation in the Superior Court for the State of Delaware against twenty three (23) Defendants, including County Insulation Company ("County Insulation").[1] Subsequently, two amended complaints were filed. The operative pleading, the Third Amended Complaint, was filed on June 27, 2014.[2] The Third Amended Complaint substitutes Wayne R. Reed as the Executor of Mrs. Reed's Estate, and adds Amy Rhodes and Courtney Reed as Mrs. Reed's surviving children to the matter ("Plaintiffs").[3]

The Third Amended Complaint categorizes this lawsuit as "Household Exposure," alleging Mrs. Reed was exposed to asbestos "in the course of living in her childhood home with her father Raymond F. Ryan," and her marital home with her first husband, Gary M. Attix.[4] Plaintiffs allege negligence, strict liability, willful and wanton conduct, and conspiracy.[5] Mrs. Reed, and product identification witnesses, Gary Attix and Randy Meadows, were deposed in this matter.[6]

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[1] Tr. No. 54567331.
[2] *Appellee Asbestos Corporation Limited's Appendix Index to Answering Brief on Appeal*, B30-B54 (hereinafter "Asbestos Corporation's Appendix"). (Tr. No. 59707003.)
[3] *Id*.
[4] Asbestos Corporation's Appendix, B37-B39, ¶¶ 10-15. (Tr. No. 59707003.)
[5] Asbestos Corporation's Appendix, B30-B54. (Tr. No. 59707003.))
[6] Plaintiffs also rely on Mr. Meadows' numerous prior deposition transcripts and

This matter was scheduled for trial in February of 2016. County Insulation filed its Motion for Summary Judgment and Opening Memorandum on July 27, 2015, presenting multiple arguments for dismissal based on the discovery record.[7]

Plaintiffs filed their opposition to County Insulation's Motion for Summary Judgment on August 21, 2015. Plaintiffs dismissed their strict liability claim.[8] They did not discuss Mr. Ryan's work history, or provide any testimony linking Mr. Ryan to County Insulation.[9] County Insulation filed its Reply Memorandum on September 18, 2015.[10] On July 6, 2016, the Superior Court ruled in favor of County Insulation's motion for summary judgment in a joint opinion.[11]

Plaintiffs voluntarily dismissed the remaining Defendants on July 28, 2016.[12] Plaintiffs appealed the Superior Court's ruling as to Asbestos Corporation Limited, Bayer Cropscience, Inc., Charles A. Wagner Company, Inc. and Nosroc Corporation on July 28, 2016.[13] Plaintiffs amended their appeal to add County Insulation on August 8, 2016.[14] This is County Insulation's Appellee Answering Brief.

Raymond Ryan's testimony.

[7] County Insulation's Memorandum of Law to its Motion for Summary Judgment, A939-A944.

[8] Plaintiff's Response to County Insulation Company's Motion for Summary Judgment, A1155 n.2.

[9] *Id*. at A1154-A1157.

[10] County Insulation's Reply Memorandum, A1423-A1436.

[11] Plaintiffs' Appellant Brief, Exhibit B. (Tr. No. 59549120.)

[12] Tr. No. 59340006.

[13] D.I. 1, Tr. No. 59341275.

[14] D.I. 5, Tr. No. 59390189.

SUMMARY OF THE ARGUMENT

1. Denied. County Insulation denies Plaintiffs' argument. The Superior Court did not usurp the jury's role. The trial court recognized the specific instances when Gary Attix recalled County Insulation working at DuPont Seaford. It found, however, that the testimony under the appropriate product nexus standard for larger facilities was, at most, speculative. There was no evidence, other than supposition, that Mr. Attix was exposed to asbestos-containing products that County Insulation used at DuPont Seaford. Therefore, a jury could only speculate that Mrs. Reed was exposed to asbestos from County Insulation when Mr. Attix worked directly with asbestos-containing products on a daily basis as a member of Local 42. Mrs. Reed, who alleges household exposure by "take-home," was not in County Insulation's vicinity while its employees worked. While Plaintiffs may be entitled to a presumption that their version of the facts were true for summary judgment purposes, the presumption cannot be based on "surmise, speculation, conjecture or guess, or on imagination or supposition."[15] The trial court correctly granted County Insulation's motion for summary judgment.

2. A second basis for which County Insulation is entitled to summary judgment, as addressed in the briefing below, is that County Insulation owed no duty

[15] *In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *54 (Del. Super. May 31, 2007).

to Mrs. Reed. Mrs. Reed was a family member of a separate, independent contractor's employee. No amount of characterization, overuse of terms, or exaggeration can change the nature of the underlying conduct that allegedly caused Mrs. Reed's injuries: (1) County Insulation failed to prevent asbestos fibers from arriving home on Mr. Attix's clothing; or (2) County Insulation failed to warn Mrs. Reed of potential dangers of asbestos. Foreseeability does not alter nonfeasance or the duty owed.[16] There is no relationship between County Insulation and Mrs. Reed. County Insulation owed no duty to Mrs. Reed. Plaintiffs' claims fail as a matter of law. County Insulation was entitled to summary judgment.

[16] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, at *168-70 (Del. 2011).

STATEMENT OF FACTS

Barbara Reed was born on September 29, 1957.[17] She lived in the family home until 1976.[18] Raymond Ryan, Mrs. Reed's father, was as a member of Local 42, the insulators union, during her lifetime. Mrs. Reed observed her mother doing the laundry until the age of thirteen.[19] She would play in the "pixie dust" and cleaned the dust as a child.[20] Mrs. Reed had no knowledge of the material composition of the dust,[21] or the products her father was exposed to while she lived in the family home.[22] She had no knowledge of any of the products Mr. Attix worked with, whether he worked with asbestos-containing products, or if he would have been exposed to asbestos.[23] She never visited her father or her ex-husband at any jobsite.[24] Mrs. Reed did not know if she was exposed to asbestos.[25]

Gary Attix, Mrs. Reed's first husband, began working for Local 42 as a helper in 1975.[26] He married Mrs. Reed in April of 1976, and the two separated in 1981.[27]

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[17] A967, at 13:23-25; A953, at 14:18-19.
[18] A975, at 33:10-13.
[19] A968, at 21:22-23; A969, at 22:9-12; A970-A971, at 23:21-24:1; A954, at 26:10-13; A955, at 27:1-5.
[20] A971, at 24:2-9; A972, at 27:13-25; A956, at 29:7-17.
[21] A976, at 36:10-12.
[22] A977, at 40:8-15.
[23] A980, at 45:3-13; A961-A962, at 73:19-74:1.
[24] A957, at 42:1-8; A959, at 50:14-18; A960, at 71:8-10; A1010, 176:1-4.
[25] A963-A964, at 76:13-77:2.
[26] A983, at 14:19-24; A985, at 16:5-7.
[27] A958, at 45:15-21; A973, at 31:7-22; A977, at 40:16-17; A986-A987, 22:21-23:2; A988, at 37:20-23.

Mr. Attix worked as apprentice for Local 42 in 1976, and became a journeyman in 1980.[28] He worked as an apprentice at DuPont Seaford for approximately one and a half years, sometime between 1976 and 1978.[29] He worked all over the plant.[30] While he worked directly with insulation on a daily basis,[31] his duties consisted mostly of supplying Local 42 insulators with supplies.[32]

Mr. Attix provided limited testimony as to County Insulation at DuPont Seaford.[33] His knowledge as to County Insulation's presence was largely dependent upon what his co-workers told him.[34] He did not recall County Insulation's presence for the entire eighteen month period.[35] He did not know how often or how long County Insulation performed work at DuPont Seaford.[36] His distance to County Insulation employees depended upon his assignments with Local 42.[37] He recalled one instance where County Insulation worked above him inside at DuPont Seaford.[38] He did not see what County Insulation was doing.[39] He had no knowledge as to the

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[28] A983-A984, at 14:25-15:7.
[29] A989, at 41:7-25; A1204,at 60:9-12; A1418, at 197:14-21.
[30] A990, at 42:1-10; A998-A999, at 125:15-126:7.
[31] A991, at 44:3-5; A992, at 45:2-4, 45:13-24.
[32] A990, at 42:15-25; A998, at 125:15-25.
[33] A994, at 60:13-15.
[34] A997, at 116:12-15.
[35] A1003, at 147:9-14.
[36] A997, at 116:16-21.
[37] *See* A995, at 63:6-17.
[38] (A1001, at 145:3-6.) He believed County Insulation was performing this work because a co-worker told him. (A1012, at 180:19-22.)
[39] A1006, at 150:8-10.

material that was falling down.[40]

Mr. Attix again limited his time period near County Insulation when he observed its employees working outside on pipe racks.[41] He was assigned to deliver materials to Local 42 members working on the pipe racks outside.[42] While he generally believed that County Insulation was ***installing*** insulation,[43] he did not know what County Insulation employees were doing.[44] He did not watch County Insulation work.[45] The other remaining dozen or so times he saw County Insulation occurred while he simply delivered materials to Local 42 members.[46]

While Mr. Attix acknowledged that he worked with Randy Meadows, his foreman, he admitted that this typically meant he ran supplies.[47] Mr. Meadows confirmed that Mr. Attix's main duty as an apprentice was to run materials.[48] Mr. Meadows recalled the same instance where County Insulation worked above Mr. Attix inside a building at DuPont Seaford.[49] He was not in the exact area with Mr. Attix and was not around when a shop steward appeared.[50] He did not know the

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[40] A1012, at 180:5-11.
[41] A1004, at 148:9-15.
[42] A999, at 126:8-15.
[43] A1005, at 149:1-6.
[44] *See* A1005, at 149:13.
[45] A1004, at 148:9-15; A1005, at 149:13.
[46] A1003, at 147:16-24; A1012, at 180:23-181:20.
[47] A993, at 57:4-7, 57:18-23.
[48] A1027, at 23:12-16.
[49] A1031-A1032, at 97:19-98:3.
[50] A1031, at 97:6-14; A1034, at 100:2-3.

material composition of the products that were falling.[51] Mr. Meadows admitted that there were several outside contractors working around Mr. Attix during this time.[52] He also recalled an instance when County Insulation worked on pipe racks outside.[53] He believes County Insulation removed asbestos insulation from the pipe racks.[54] Local 42 was reinsulating the pipe racks with asbestos-free insulation.[55] Mr. Meadows believed the outside pipe rack project occurred on December 31, 1979.[56] He did not place Mr. Attix in the area during this work.[57]

Mr. Meadows made no attempt to place Mr. Ryan in the general area of County Insulation. Mr. Ryan's work history at the time County Insulation existed limits his potential exposure to Getty Refinery, McKee Run Powerhouse, and DuPont Seaford.[58] While Mr. Ryan's work at DuPont Seaford occurred in January of 1974,[59] there is no testimony linking him to County Insulation.

Mr. Attix agreed that Local 42, the insulators union, used the same techniques

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[51] A1045, at 252:3-6.
[52] A1032, at 98:4-13.
[53] A1035-A1036, at 103:25-104:6.
[54] A1037, at 105:2-14.
[55] A1036, at 104:7-9.
[56] A1038, at 107:11-13.
[57] A1035, at 103:13-20; A1039, at 200:17-24.
[58] (A1053, at 71:9-72:20; A1055-A1056, at 125:22-126:4; A1057, at 129:12-16; A1058, at 131:10-19; A1059, at 132:21-23; A1060, at 136:9-19; A1061-A1062, at 147:24-148:14; A1065, at 294:1-8; A1066, at 295:14-19; A1067, at 301:5-7.) County Insulation was founded in November of 1970 and incorporated in July of 1971. (A1049-A1050, at 25:23-26:11; A1051, at 31:4-6.)
[59] A1053-A1054, at 71:9-72:2; A1067, at 301:5-7.

to insulate as County Insulation.[60] Mr. Meadows agreed that Local 42 was often sloppy in its insulating process and "screwed up" at DuPont Seaford at the same time County Insulation was there.[61] Local 42 did not use containment structures for removing old insulation during the applicable time.[62] Mr. Attix admitted that he used an air hose to clean himself prior to returning home to Mrs. Reed.[63] He removed most of the dust off his clothes prior to getting in his car and driving home.[64] Mrs. Reed acknowledged that Mr. Attix's clothing had less dust compared to her father.[65]

Mr. Attix was not trained on how to work with asbestos-containing materials or how to identify asbestos-containing materials at the time he observed County Insulation at DuPont Seaford.[66] Mr. Attix could not identify any materials that were removed at DuPont.[67] He admitted that he would have no idea what was worked on by someone else.[68] He had no knowledge of asbestos at the time he worked at DuPont Seaford.[69] Mr. Attix did not know any of the manufacturers of the products County Insulation used.[70] He admitted that he could ***only speculate*** as to the material

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[60] A1010, at 176:11-22.
[61] A1043, at 249:12-21.
[62] A1044, at 251:12-21.
[63] A1008, at 161:14-19.
[64] A1008, at 161:14-19.
[65] A978, at 42:7-12.
[66] A985, at 16:8-15.
[67] A1010-A1011, at 176:23-177:5; A1204, at 60:20-24.
[68] A1011, at 177:6-13.
[69] A1011, at 177:13-22.
[70] A994, at 60:20-24.

content of the products.[71] He was unable to provide any permissible testimony regarding the chemical component of the materials County Insulation used at DuPont Seaford.[72] He had no personal knowledge of any materials County Insulation used at DuPont Seaford.[73]

[71] A995-A996, at 63:24-64:4 ("I just speculate they're using the same stuff we were using. I don't know.")
[72] A996, at 64:5-16.
[73] A1000, at 130:2-7.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY RULED THAT COUNTY INSULATION WAS ENTITLED TO SUMMARY JUDGMENT UNDER DELAWARE'S SUMMARY JUDGMENT AND PRODUCT NEXUS STANDARDS.

A. Question Presented

Whether the trial court correctly granted County Insulation's motion for summary judgment on the issue of product nexus?[74]

B. Scope of Review

The Delaware Supreme Court reviews a trial court's ruling on a motion for summary judgment *de novo* on both facts and law.[75]

C. Merits of the Argument

1. The motion for summary judgment standard.

The standard detailing the facts necessary to withstand summary judgment was provided in County Insulation's briefing below.[76] When evaluating a motion for summary judgment, a court must determine "whether there is evidence upon which a jury can ***properly*** proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."[77] While the court must take "plausible

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[74] The product nexus standard was addressed in County Insulation's briefing below. (A944-A947; A1423-A1424; A1433-A1435.)

[75] *Dabaldo v. URS Energy & Construction*, 85 A.3d 73, 77 (Del. 2014).

[76] (A938.) A copy of *Defendants' General Submission on the Summary Judgment Standard Applicable to Asbestos Litigation Cases* is attached hereto, for ease of reference. (County Insulation's Compendium, Tab 1.)

[77] *In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *52 (quotation

inferences" in favor of the plaintiff, "[t]he presumption afforded the non-moving party in the summary judgment analysis is not absolute."[78] "[Plaintiffs] must present sufficient evidence from which a rational trier of fact could find in [their] favor."[79] "This Court will not draw unreasonable inferences in favor of the non-moving party."[80] A rational juror must find that the evidentiary burden was satisfied.[81] The judge is the gate-keeper.[82] "[I]f an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find in that party's favor, then summary judgment is appropriate."[83] "Where there is no precedent fact, there can be no inference . . . . Nor can an inference be based on surmise, speculation, conjecture or guess, or on imagination or supposition."[84]

2. The trial court correctly addressed the current Delaware product nexus standard for larger facilities.

Plaintiffs incorrectly rely on outdated asbestos decisions to support their theory of the applicable product nexus standard in Delaware. Plaintiffs rely on *Clark*

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omitted) (citation omitted) (emphasis added).
[78] *Id*. at *53.
[79] *Smith v. Delaware State University*, 47 A.3d 472, 477 (Del. 2012).
[80] *Id*. at 477.
[81] *Cerberus Int'l, Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141, 1150 (Del 2002).
[82] *Id*. at 1151.
[83] *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192, at *5 (Del. 2012) (TABLE).
[84] *In Re Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *54 (quotations omitted) (citation omitted).

v. A.C.&S,[85] a 1985 decision, to set the minimal evidence necessary to establish exposure regardless of the size of the facility at issue.[86] Plaintiffs' proposition for the trial court's error is largely dependent upon their refusal to recognize the *Helm* decision and its progeny. In so doing, they continue to rely on *Opalcyznski v. County Insulation*, an October 2006 decision.[87] *Helm*, which explains how the product nexus standard is applied in larger facilities, was decided in May of 2007.

County Insulation recognizes that *Helm* incorporates the *Merganthaler v. Asbestos Corp. of Am.* product nexus standard:

> that at the time the defendant's asbestos product was present on the site he was in the area where the product was used, near that area, walked past that area, or was in a building adjacent to where the product was used if open windows or doors would allow asbestos fibers to be carried to the area where the plaintiff was working.[88]

Helm, however, also requires both time and space proximity for larger facilities, including DuPont Seaford, a 618 acre facility.[89] "[T]here must be some meaningful intersection between the plaintiff and the co-worker on the property, both in place

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[85] *Clark v. A.C.&S.*, C.A. No. N82C-DE-26, Poppiti, J. (Sept. 3, 1985). (Pls.' Appellant Br., p. 25.)
[86] Pls.' Appellant Br., pp. 25-26.
[87] *In re: Asbestos Litig.: Opalcyznski*, C.A. No. N04C-03-264, Johnston, J. (Feb. 5, 2008). (Pls.' Appellant Br., pp. 33-34.)
[88] *In Re Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *65 (quotations omitted) (quoting *Merganthaler v. Asbestos Cor. of Am.*, 1988 WL 116405, at *1-2 (Del. Super. Ct. Oct. 25, 1988)).
[89] *In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *67-69.

and time."[90] "In larger facilities, it is incumbent upon the plaintiff to describe the location of his own work within the facility with sufficient detail to allow the Court to compare that description to the description of the location of the asbestos offered by the co-worker."[91] To succeed, there must be evidence that the plaintiff was in close enough proximity to the specific location such that the co-worker's testimony addressing friable asbestos can create an inference that the plaintiff was in the area and could have been exposed.[92]

Plaintiff Helm worked as a painter for Local 100 at several DuPont facilities in the 1970s.[93] Although he believed he was exposed to asbestos from other tradesmen, he could not testify whether those trades used asbestos products.[94] Plaintiff Helm relied on product identification witnesses to identify the asbestos-containing products at issue.[95] Only one witness was able to identify where in the facilities he worked with asbestos-containing products.[96] None of the witnesses placed Plaintiff Helm in the vicinity of the asbestos work.[97] The court found that none of the product identification witnesses could place Plaintiff Helm in the vicinity

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[90] *Id*. at *68.
[91] *Id*.
[92] *Id*. at *69-70.
[93] *In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *7-12.
[94] *Id*.
[95] *Id*.
[96] *Id*. at *7-9.
[97] *In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *7-12.

when asbestos-containing products were used.[98] There must be "a factual connection in space and time between a particular plaintiff and a particular defendant's product."[99] The court did not need to consider Dr. Orn Eliasson and Dr. Steve Hayes' opinions.[100]

Helm modifies the decision in *Opalcyznski*, giving meaning to adjacent in a large facility. In the 2006 *Opalcyznski* decision, the plaintiff worked for Amoco in the film plant.[101] There was evidence that County Insulation performed some unknown work at the propylene plant across the public street from the film plant, itself a campus-like facility with multiple structures and facilities. There was no evidence where that work was performed inside the propylene plant.[102] The plaintiff did not work in the same Amoco plant where County Insulation allegedly worked.[103] There was no testimony placing County Insulation in any area that would allow asbestos fibers to travel from the propylene plant, across the street, to the film plant in the area where the plaintiff worked.[104] There was no evidence that the plaintiff was working on the exact days and times County Insulation was inside the propylene

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[98] *Id*. at *67-68, 70-71.
[99] *Id*. at *65.
[100] *See id*. at *15-16, 70-71.
[101] Pls.' Appellant Br., Exhibit E, E21-E22, at 107:4-109:1.
[102] Pls.' Appellant Br., Exhibit E, E21, at 107:5-21.
[103] Pls.' Appellant Br., Exhibit E, E21, at 107:22-108:8; Pls.' Appellant Br., Exhibit E, E23, at 114:11-12.
[104] Pls.' Appellant Br., Exhibit E, E23, 115:8-116:4.

plant. Under *Helm*, Mr. Opalcynski's lawsuit fails because there is no meaningful intersection of the work in both time and space. Plaintiffs' continuous reliance on *Opalcyznski*, a 2006 decision, as evidence of success against County Insulation, is misguided.[105] It is plaintiff's burden to show "that a particular defendant's asbestos-containing product was used at the job site and that the plaintiff was in ***proximity to that product at the time it was being used***."[106]

3. Plaintiffs waived their right to rely on allegations that Mrs. Reed was exposed to asbestos from County Insulation via her father.

Plaintiffs' Appellant Brief against all Defendants discusses facts which they cannot assert against County Insulation. Plaintiffs discuss Raymond Ryan, Mrs. Reed's father, in their "Statement of Facts," and suggest, hidden in a footnote, that they may still move forward with alleging exposure via Mr. Ryan if necessary, regardless of the record below.[107] County Insulation argued below that, because there was no time and space proximity between Raymond Ryan and County Insulation, there was no evidence of product nexus as it pertained to Mr. Ryan.[108] Plaintiffs made no effort in briefing below to address a potential connection between County Insulation and Mr. Ryan.[109] Plaintiffs made no effort to discuss Mr. Ryan's

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[105] Transcript Oral Argument at 7:8-10:13, *In Re: Asbestos Litig.: Wells* (2013) (N11C-02-184). (County Insulation's Compendium, Tab 2.)
[106] *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192, at *5 (emphasis added).
[107] Pls.' Appellant Br., p. 27.
[108] A936-A938; A1433-A1434.
[109] A1156-A1157, A1158-A1160.

work history with regard to their appeal against County Insulation.[110] Plaintiffs waived their right to assert Mrs. Reed was exposed to asbestos-containing products from County Insulation's work via her father.[111]

4. The trial court correctly granted summary judgment in favor of County Insulation when it found only speculative evidence for which no rational juror could hold County Insulation responsible.

Plaintiffs misread the Superior Court's ruling in favor of County Insulation. A significant portion of Plaintiffs' appeal focuses on the Superior Court's use of the term "friable" under *Helm*. Plaintiffs facts and arguments suggest County Insulation's process regarding insulation removal was "messy," "dirty," and "dusty," such that there was more than sufficient evidence to suggest that Mr. Attix was exposed to friable insulation. They ignore, however, Mr. Attix and Mr. Meadows' testimony that Local 42 used the same techniques as County Insulation to remove and install insulation, and Mr. Meadows admitted Local 42 "screwed up" in the insulation process at DuPont Seaford at the same time County Insulation was around.[112] Thus, presenting viable alternative sources of dust undercutting any possible inferences that dust had to come from County Insulation's employees' work.

The appeal ignores the Superior Court's finding that, to the extent Mr. Attix

[110] Pls.' Appellant Brief, pp. 14-17.
[111] DEL. SUP. CT. RULE 8.
[112] A1010, 176:11-22; A1043, 249:12-21.

was exposed to insulation from County Insulation, the content of the insulation, *i.e.*, whether it contained any asbestos, was based on pure speculation and conjecture, insufficient to withstand summary judgment:

> Plaintiffs have not presented evidence from which a jury could reasonably infer, without undue speculation, that Plaintiff was exposed to friable asbestos for which Defendants are responsible . . . because none of the evidence presented by Plaintiffs establish that the old insulation [w]as asbestos-containing . . . . [T]hey have failed to present any evidence of the asbestos content of the insulation.[113]

Although Plaintiffs are entitled to "plausible inferences," "[t]he presumption afforded the non-moving party in the summary judgment analysis is not absolute."[114] "[A]n inference [cannot] be based on surmise, speculation, conjecture or guess, or on imagination or supposition."[115] "Delaware courts do not allow a plaintiff to proceed against a defendant based on speculative exposure."[116]

While Mr. Attix recalled County Insulation working on a floor above him in a building, he admitted that he did not see what County Insulation was actually doing and had no knowledge of the material composition of the products that were falling.[117] Mr. Meadows also admitted that he had no knowledge of the composition

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[113] Pls.' Appellant Br., Exhibit B, pp. 3-4.
[114] *In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *53.
[115] *Id*. at *54 (quotations omitted) (citation omitted).
[116] *In re Asbestos Litig.: Foucha*, 2011 Del. Super. LEXIS 252, at *6 (Del. Super. Ct. June 3, 2011).
[117] A1006, at 150:8-10; A1012, at 180:5-11.

of the products County Insulation removed or installed during this occasion.[118] Mr. Attix recalled another instance where County Insulation worked on pipe racks outside at DuPont Seaford.[119] While Mr. Meadows recalled County Insulation working on the pipe rack, this instance occurred after Mr. Attix left.[120] County Insulation recognizes that Mr. Meadows testified that he believed its employees were ***removing*** asbestos-containing insulation in the pipe racks.[121] However, Mr. Attix testified that County Insulation was ***installing*** insulation at the time he walked by to deliver materials, and Mr. Meadows never placed Mr. Attix with him during this specific occasion.[122] As both witnesses admitted, Mr. Attix's duties required him to run supplies to all Local 42 members.[123] On the other twelve occasions Mr. Attix may have seen County Insulation, he had no knowledge what its employees were doing because he was merely running materials.[124] Mr. Attix admitted that he had no knowledge of any work or materials used by any contractor at DuPont Seaford.[125]

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[118] A1045, at 252:3-6.
[119] A1004, at 148:9-15.
[120] Mr. Attix testified that he worked at DuPont Seaford from 1976 to 1978. (A989, 41:7-25; A1204, at 60:9-12; A1418, at 197:14-21.) Mr. Meadows was adamant that he saw County Insulation working on the pipe racks on December 31, 1979. (A1038, 107:11-13.) Mr. Attix disagreed with Mr. Meadow's discussion of his work history at DuPont Seaford. (A1418, 197:14-21.)
[121] A1037, at 105:2-14.
[122] A999, at 126:8-15; A1005, at 149:1-6; A1035, at 103:1-5, 103:13-20; A1039, at 200:17-24.
[123] A990, at 42:15-25; A1028, at 24:10-18; A1029, at 25:7-11.
[124] A1003, at 147:16-24; A1012, at 180:23-181:20.
[125] A1010-A1011, at 176:23-177:13.

Mr. Attix admitted that he could only speculate as to any of the material content of the products County Insulation used.[126]

In *Edmisten v. Greyhound Lines, Inc.*, the Court affirmed the trial court's granting of summary judgment.[127] There, the plaintiff-decedent testified that he did not know if the defendant's product contained asbestos.[128] While the product identification witness initially testified that he believed that replacement parts used in the shop generally contained asbestos, he later admitted he had no personal knowledge of this fact.[129] The Court affirmed the trial court's ruling granting summary judgment, finding that the testimony regarding possible asbestos exposure was speculative.[130]

As a predicate to any asbestos litigation in Delaware, there must be evidence that the plaintiff was exposed to the defendant's asbestos, such that it caused the plaintiff's injury.[131] Similarly to *Edmisten*, Mr. Attix testified that he had no knowledge of whether the products County Insulation used contained asbestos.[132] While Mr. Meadows testified that insulation products County Insulation removed on December 31, 1979, contained asbestos, he admitted that he had no knowledge as to

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[126] A995-A996, at 63:24-64:4.
[127] *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192 (Del. 2012).
[128] *Id*. at *6.
[129] *Id*. at *6-7.
[130] *Id*.
[131] *See In Re: Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *63.
[132] A995-A996, 63:24-64:16; A1000, at 130:2-7.

the material County Insulation used inside the building on the occasion when he places Mr. Attix in the vicinity.[133] The trial court's use of the term friable does not change the speculative nature of any possible inference that Mr. Attix was exposed to asbestos-containing products used by County Insulation at DuPont Seaford. The trial court correctly noted that a jury would have to unduly speculate to find that Mr. Attix was exposed to asbestos-containing insulation from County Insulation employees.[134] Plaintiffs note that Mrs. Ryan, Barbara Reed's mother, was allegedly diagnosed with her own asbestos injury from Mr. Ryan's direct work with asbestos-containing products as a member of Local 42. Based on the suppositions in the record, a jury would be required to find Mrs. Reed's injury was caused from her father's work as a Local 42 member. As there is no evidence connecting County Insulation and Mr. Ryan, a jury could not rationally conclude that County Insulation caused Mrs. Reed's injuries. The trial court correctly ruled in favor of County Insulation. It did not usurp the jury's role.

The court below was not requiring Plaintiffs to show the percentage of asbestos in the insulation, but rather, that the products County Insulation removed and/or installed on the particular instances contained *any* asbestos, such that the jury would not be required to speculate as to Mrs. Reed's alleged exposure.[135] To the

[133] A1045, 252:3-6.
[134] Pls.' Appellant Br., Exhibit B, pp. 3-4.
[135] Pls.' Appellant Br., Exhibit B.

extent the Superior Court may have found that a jury could accept Mr. Attix's testimony, but then erroneously chose to credit Mr. Meadow's conflicting testimony instead, under *Edmisten*, any such error would be harmless.[136] To allow Plaintiff to proceed with the factual scenario as evidenced here would require this Court to "engage in . . . rampant speculation that [is] impermissibl[e]."[137]

Plaintiffs also incorrectly rely on *Messick*. Unlike *Messick*, this is a household exposure case. The issue in *Messick* was whether there was evidence that the plaintiff, a Getty employee, was exposed to asbestos while an independent contractor, Catalytic, worked with asbestos near him.[138] Plaintiffs reliance on *Messick* supports the trial court's reliance on *Helm*. Specifically, that there must be evidence that the ***plaintiff*** was exposed to the defendant's employees use of asbestos-containing products in the area when the ***plaintiff*** was near, walked by, or was in the adjacent building.[139] In the present case, there is ***no*** evidence that Mrs. Reed was ever in the area when County Insulation performed work. *Helm* cannot be met. County Insulation was entitled to summary judgment.

Essentially, the trial court concluded that County Insulation would owe no duty to Mrs. Reed, despite Plaintiffs' contention, because a household exposure

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[136] *Edmisten*, 49 A.3d 1192, at *6.
[137] *In Re: Asbestos Litig.: Colgain*, 799 A.2d 1151, 1154 (Del. 2002).
[138] Pls.' Appellant Br., Exhibit E, E39-E41, at 106:20-108:22.
[139] Pls.' Appellant Br., Exhibit E, at E53, 120:14-20.

plaintiff could never satisfy the proximity standard in *Helm*. To the extent the trial court may have erred in applying this standard to household exposure matters, County Insulation argues that it, nevertheless, owed no duty to Mrs. Reed in the following Argument section.

II. ALTERNATIVELY, EVEN IF *HELM* WAS NOT THE APPLICABLE LAW FOR HOUSEHOLD EXPOSURE, THE TRIAL COURT'S RULING WAS HARMLESS ERROR BECAUSE COUNTY INSULATION OWED NO DUTY TO MRS. REED.

A. Question Presented

Whether County Insulation, an independent contractor, owed a duty to another independent contractor's employee's family member?[140]

B. Scope of Review

This Court may review questions presented to the trial court.[141] While an appellee may not attempt to enlarge his own rights to "correct an error or to supplement the [trial court's] decree with respect to a matter not dealt with below," an appellee may support the underlying decree with "any matter appearing in the record."[142] In so doing, the appellee is merely "assert[ing] additional grounds why the decree should be affirmed."[143]

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[140] County Insulation's briefing below moved for an extension of the duty limitations under *Riedel v. ICI Am. Inc.* and *Price v. E.I. DuPont de Nemours & Co*. (A939-A944, A1424-A1433.

[141] DEL. SUP. CT. RULE 8.

[142] *United States & Interstate Commerce Comm'n v. Am. Railway Express Co., et al.*, 265 U.S. 425, 435 (1924).

[143] *Id*. at 436; *Smith*, 47 A.3d at 480 ("[A]n appellee is entitled to argue any theory in support of the judgment in its favor, even if that theory was not relied upon in the decision on appeal." (quotations omitted) (citation omitted)); *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996) ("An appellee . . . may defend the judgment with any argument that is supported by the record, even if" the trial court disregarded that argument)

C. Merits of the Argument

Plaintiff argues in a footnote that "[n]owhere did the Court conclude that a rational juror could not conclude that . . . Defendants had no duty to Barbara Reed."[144] While County Insulation contends that the trial court's discussion below essentially held that it owed no duty to Mrs. Reed without the use of the term "duty," Plaintiffs' statement is evidence of their understanding that this issue is present in household exposure matters.

"When confronted with a Motion for Summary Judgment, the party bearing the burden of proof at trial must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question."[145] An essential element of a negligence-based claim is whether the defendant owed the plaintiff a duty.[146] Plaintiff cites to *Delmarva Power & Light Co. v. Burrows* for the proposition that County Insulation automatically had a duty "to act reasonably, as a reasonably prudent man (or entity) would" to ***Mrs. Reed***.[147] Plaintiffs' reliance on *Delmarva Power & Light Co.* to hold County Insulation potentially liable in a household exposure matter is mistaken. Where the injury-causing conduct is nonfeasance, no amount of semantics will hold a defendant liable for the plaintiff's injuries in a

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[144] Pls.' Appellant Br., p. 27 n.117.
[145] *In re: Asbestos Litig.: Colgain*, 799 A.2d at 1152.
[146] *Id*.
[147] *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981); Pls.' Appellant Br., p. 32.

household exposure matter ***unless*** there is a special relationship.[148] There is no relationship between County Insulation, an independent contractor, on the one-hand, and Mrs. Reed, a spouse of an employee of a separate independent contractor, on the other. Consistent with this Court's rulings, County Insulation was entitled to summary judgment.

1. Evolution of Take-Home Exposure.

Delaware decisions have clearly stated that a business that hires an independent contractor owes no duty to the independent contractor's employees.[149] In *In re: Asbestos Litig.: Wooleyhan*, the Delaware Supreme Court was tasked with determining the extent of a landowner's liability for two types of independent contractors' employees' injuries: (1) asbestos exposure from working alongside another independent contractor's employee's asbestos work; and (2) those who worked directly with asbestos products.[150] The level of duty owed "depend[ed] upon the nature of the work performed by an employee of a contractor while on the landowner's premises, some contractor employees could pursue claims against landowners for exposure to asbestos while others, as a matter of law, could not."[151] Where the plaintiff-employees work directly with asbestos on the landowner's

[148] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 168 (Del. 2011).
[149] *In Re: Asbestos Litig.: Wenke*, 2007 Del. Super. LEXIS 154, at *21 (Del. Super. Ct. May 31, 2007).
[150] *In re: Asbestos Litig.: Wooleyhan*, 897 A.2d 767, at *1-2 (Del. 2006) (TABLE).
[151] *In re Asbestos Litig.: Wenke*, 2007 Del. Super. LEXIS 154, at *1-2.

premises, the plaintiff-employees cannot pursue litigation against the landowner regardless of whether the plaintiff alleges active control by the landowners or assumption of the duty by the landowners.[152]

In evaluating the impact of *Wooleyhan* and *Wenke*, and determining whether the landowners knew asbestos was hazardous and if they concealed the condition, the *Helm* Court explored the history of the common law duty, explaining that earlier cases focused on the "affirmative acts and misconduct of a party, otherwise known as misfeasance."[153] The *Helm* Court acknowledged that it was "a far more difficult task to determine whether the requisite legal relationship exists to trigger a duty when the defendant simply fails to act."[154] Nonfeasance occurs where there is "a failure to take steps to protect others from harm."[155] In determining the duty owed, courts addressed the relationship between the parties.[156] Some courts require a "definite relation[ship] between the parties," often arising when the defendant gains economic "or other benefit from the plaintiff," for a duty to exist.[157]

In *Riedel v. ICI Americas Inc.*, this Court addressed the duty required in a household asbestos exposure liability case.[158] Mrs. Riedel alleged that the trial court

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[152] *Id*. at *17.
[153] *In Re Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *78.
[154] *Id*.
[155] *Id*. (quotation omitted) (citation omitted).
[156] *Id*. at *78-79.
[157] *In Re Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *78-79.
[158] *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 18-19 (Del. 2009).

erred because it "focus[ed] on her relationship with ICI, rather than on the foreseeability of the harm."[159] Her appeal argued that ICI was negligent because it affirmatively "releas[ed] asbestos into the environment," *i.e.*, misfeasance.[160] While the *Riedel* Court barred Mrs. Riedel from arguing misfeasance, it nonetheless, refused to find that Mrs. Riedel, and ICI, her husband's employer, shared a legally significant relationship.[161] In determining what duty was owed, the Court declined to adopt the Restatement (Third) of Torts, indicating that to do so would "creat[e] a common law duty that directly contravenes the primacy of the legislative branch in resolving this question."[162] Under the Restatement (Second) of Torts, §§ 314A, 316-324A, there was no legally significant special relationship between Mrs. Riedel and her husband's employer.[163] To the extent any duty was owed, it would fall under Restatement (Second) of Torts, § 323, Negligent Performance of Undertaking to Render Services.[164] However, there was no evidence that ICI undertook to warn its employees' spouses of all dangers, and therefore, any claim under Section 323 failed.[165] Because Mrs. Riedel and ICI were legal strangers, no duty was owed.[166]

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[159] *Id*. at 18.
[160] *Id*.
[161] *Id*. at *19.
[162] *Riedel*, 968 A.2d at 20-21.
[163] *Id*. at 22-23, 25-27.
[164] *Id*. at 26.
[165] *Id*. at 26-27.
[166] *Riedel*, 968 A.2d at 26-27.

Following the *Riedel* decision, the Superior Court was tasked with applying the ruling for an independent contractor who was present and potentially the source of asbestos that lead to alleged household exposure. In deciding *Persinger* and *Kline*, the Superior Court recognized that the injured parties were spouses of independent contractors working at Amoco.[167] The Superior Court concluded that independent contractors' employees were legally equivalent to Amoco employees for the purpose of any duty owed to their spouses.[168] The Superior Court declined to find liability for household exposure because it resulted from a failure to act, despite the plaintiffs' characterizations of the conduct.[169] In that same ruling, the Superior Court evaluated the duty required of an independent contractor to its own employee's spouse.[170] The court extended *Riedel*, finding that liability did not encompass household exposure where the allegations asserted suggested a failure to prevent the carrying of asbestos fibers home.[171]

Subsequently, the household exposure liability issue was presented again to this Court in *Price*. In *Price*, the plaintiff alleged that her employee-husband worked with and around asbestos products such that the fibers permeated his clothing and

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[167] *In re Asbestos Litig: Persinger*, C.A. No. N04C-11-241, Johnston, J (June 11, 2009) (A940); *In re Asbestos Litig.: Kline*, C.A. No. N06C-04-217 ASB, Johnston, J (June 11, 2009). (A940.)
[168] A940; A1126, at 87:21-88:5.
[169] A940-A941.
[170] A941.
[171] A941; A1432.

exposed her to asbestos.[172] The plaintiff (injured spouse) attempted to amend the complaint to assert misfeasance, arguing an affirmative act on the employer's part to release asbestos fibers in the air.[173] This Court affirmed the trial court's granting of summary judgment, finding that mere wording of the alleged acts does not change the nature of the underlying alleged conduct.[174] Where a defendant negligently failed to prevent asbestos fibers from arriving in the home or failed to warn the plaintiff (injured spouse) of potential dangers of asbestos, rephrasing the allegation would not create misfeasance.[175] Thus, a special relationship was required to hold the defendant-employer responsible for the plaintiff-spouse's injuries under nonfeasance.[176] No duty existed, and summary judgment was proper.[177]

2. Application of Take-Home Exposure Duty in Dual Independent Contractor Matters.

Negligence is defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[178] Plaintiffs need to establish that: County Insulation owed Mrs. Reed a duty; that County Insulation breached that duty; and said breach by County Insulation proximately

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[172] *Price*, 26 A.3d at 163-64.
[173] *Id*. at 164-66.
[174] *Id*. at 169.
[175] *Id*.
[176] *Price*, 26 A.3d at 169-70.
[177] *Id*. at 169-70.
[178] RESTAT. 2D OF TORTS, § 282.

caused Mrs. Reed's injuries.[179] Whether a duty exists is a separate legal determination from whether the required duty was met.[180] The duty owed depends upon whether the party "acted" or "omitted to act." "[O]ne who merely omits to act generally has no duty to act, unless there is a special relation[ship] between the actor and the other which gives rise to the duty."[181]

Inherent in the *Riedel*, *Persinger*, *Kline* and *Price* decisions is that separate contractors on a site owe no greater duty than a business that employs contractors or landowner, to another contractor's employee's family member.[182] Contrary to Plaintiffs argument, it is readily apparent from the pleadings, the arguments made below, and the Appellant Brief, that this is a ***household exposure*** case. The allegations pertaining to Mrs. Reed's exposure arise from indirect contact while laundering her husband's clothing.[183] Before liability can be imposed under a negligence nonfeasance theory, some "definite relationship" must exist between the parties, and it must be of such character that social policy justifies imposing a duty.[184] This Court, however, has held that determination of social policy is for the

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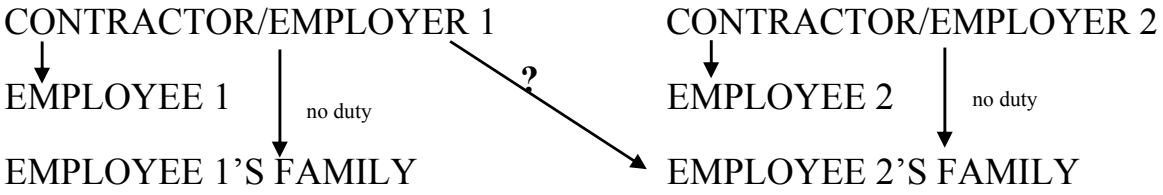
[179] *Riedel*, 968 A.2d at 20; *In re: Asbestos Litig.: Colgain*, 799 A.2d at 1152.
[180] *See Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005).
[181] *Riedel*, 968 A.2d at 22 (quotations omitted) (citation omitted).
[182] County Insulation is aware that the Court reviews the briefing below. As such, it will refrain from a complete recitation of its arguments. County Insulation's duty argument encompasses all arguments presented to the trial court.
[183] Tr. No. 55652840, ¶¶ 10-15.)
[184] *Murphy v. Godwin*, 303 A.2d 668 (Del. Super. Ct. 1973); RESTAT. 2D OF TORTS, § 284.

Legislature.[185]

Delaware Courts declined to adopt the Restatement (Third) of Torts, finding that doing so would require redefining the common law concept of duty.[186] Delaware Courts find that claims, such as those addressed in Plaintiffs' Third Amended Complaint, are nonfeasance.

There is no basis under Delaware law for which this Court should impose a duty upon County Insulation to Mrs. Reed, a spouse of a separate, independent contractor's employee. It is illogical to hold that contractor 1 owes a duty to contractor 2's employee's family, when contractor 2 would owe no duty to that same employee's family.



Due to the even further attenuated relationship between County Insulation and Mrs. Reed, no liability should exist.

(a) Plaintiffs' claims arise to nothing more than nonfeasance.

Plaintiffs attempt to cloud the legal theory of the case with gross exaggerations and misgivings about County Insulation's work. The issue before this Court is fairly

[185] *Riedel*, 968 A.2d at 21 (internal quotations omitted) (citation omitted).
[186] *Id*. at 21-22.

simple: what was the actual injury-causing conduct of County Insulation's employees that allegedly resulted in Mrs. Reed's mesothelioma? No amount of characterization can replace nonfeasance with misfeasance. In *Price*, the plaintiff (spouse) requested a right to amend the complaint to assert the affirmative action of wrongfully releasing asbestos fibers.[187] This Court declined to permit the amendment, finding it would be futile because despite the allegation of affirmatively allowing asbestos fibers to be released, the injury-causing conduct to the plaintiff (employee's family member) was either: (1) the failure to prevent asbestos fibers from arriving home; or (2) the failure to warn the plaintiff (employee's family member) of potential dangers.[188] Thus, despite using terms that suggest misfeasance, it was the failure to act that caused the plaintiff's (employee's family member's) injuries. Nonfeasance is never misfeasance.[189] The failure to prevent an employee from taking home asbestos fibers or to warn of the dangers of asbestos "do not rise to the level of affirmative misconduct required to allege a claim of misfeasance."[190]

As the facts suggest in the Appellant Brief, and as stated in the opposition to summary judgment below, County Insulation's alleged conduct arises from the

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[187] *Price*, 26 A.3d at 164-66.
[188] *Price*, 26 A.3d at 168-70.
[189] *Id*. at 168.
[190] *Id*. at 169.

release of asbestos fibers into the air at DuPont Seaford, such that they permeated Mr. Attix's clothing, which he allegedly brought home to Mrs. Reed.[191] These allegations mirror *Price*.[192] Overuse of "affirmative" or "misfeasance" would not re-characterize the alleged injury causing conduct to Mrs. Reed, who is a different contractor's employee's family member.[193]

Issues of foreseeability do not alter the nonfeasance theory. Plaintiff made the following attempts to amend the complaint in *Price* to assert foreseeability:

- "These releases were the direct result of positive actions and *knowing* actions of the [Defendant]";[194]
- "Defendant [ ] *knew or should have known* that the times that said asbestos containing products were being utilized . . . that they were friable and prone to release asbestos fibers within the air and contaminate the facility";[195]
- "[Defendant] *knew or should have known* that the asbestos fibers would be transported by any vehicle or by the air beyond the facility and, thus, causing a pollution of the Plaintiff's home resulting in the disease complained of";[196] and
- "It was *foreseeable* that its employees' families including the employee's wife and children would handle the clothing . . . which would have been contaminated with asbestos."[197]

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[191] A1425.
[192] A1156-A1157, A1161, A1163-A1164, A1169.
[193] *Price*, 26 A.3d at 168-69.
[194] *Id*. at 164 (emphasis added).
[195] *Id*. at 165 (emphasis added).
[196] *Id*. (emphasis added).
[197] *Price*, 26 A.3d at 165 (emphasis added).

These modifications would not have been sufficient to plead misfeasance in the actual form of conduct.

The decisions cited have refused to find that implied or actual foreseeability could support liability for nonfeasance.[198] In *Price*, the employee argued that he was unaware that the asbestos fibers were on his vehicle or clothing, and was unaware that those fibers would cause the plaintiff's exposure.[199] The Court declined to find any alteration of the nonfeasance standard. Plaintiffs' answering brief below would hold County Insulation liable under a theory of "foreseeability," regardless of the nonfeasance concept. While Plaintiffs suggest that Mr. Attix was unaware that he brought asbestos fibers home, such that his family would have been exposed, this Court has already held that these statements do not alter nonfeasance claims. "No amount of semantics can turn nonfeasance into misfeasance."[200]

Plaintiffs would improperly hold County Insulation liable for Mrs. Reed's injuries when her own family members' employers, who also contracted to perform insulation work, perhaps with the same products, owed no duty to her. To allow this alternative would create a separate class of non-employee family members, with greater rights than the contractors' employees' family members. Plaintiffs theory of

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[198] *Price*, 26 A.3d at 168-70; Pls.' Appellant Br., Exhibit E, E34-E36, at 101:7-103:22.
[199] *Price*, 26 A.3d at 165.
[200] *Id*. at 169.

liability against County Insulation fails, and the allegations against it arise to nothing more than nonfeasance.

(b) There is no special relationship between County Insulation and Mrs. Reed.

County Insulation had no relationship with Mrs. Reed. This Court has refused to adopt the Restatement (Third) of Torts, finding that adopting it would create by judicial fiat duties that the Legislature has not embraced. Pursuant to Restatement (Second) of Torts, § 315,

> [t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless[:] (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relationship exists between the actor and the other which gives to the other a right to protection.[201]

While a duty can potentially be owed to a family member in nonfeasance allegations, there must be evidence of a special relationship. Courts may find a "definite relation[ship] between the parties" when the defendant gains economic or other benefit from the plaintiff.[202] A special relationship giving rise to a duty to aid or protect occurs under one of four theories: (1) common carrier; (2) innkeeper; (3) possessor of land; and (4) one who takes the custody of another.[203]

Plaintiffs make no effort to suggest that there was any special or categorical

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[201] RESTAT. 2D OF TORTS, § 315.
[202] *In Re Asbestos Litig.: Helm*, 2007 Del. Super. LEXIS 155, at *78-79.
[203] RESTAT. 2D OF TORTS, § 314A.

relationship between Mrs. Reed and County Insulation. Rather, they requested the trial court, as they do here, to base its ruling on County Insulation's insulating process alone. County Insulation has no relationship with Mr. Attix. Undoubtedly, County Insulation has no relationship with Mrs. Reed, his former spouse. County Insulation never received any benefit from Mr. Attix or Mrs. Reed. Even if the trial court may have strayed from the applicable standard of liability, review of the record, in conjunction with the applicable law, would result in the same conclusion: no liability.[204] County Insulation was entitled to summary judgment.

[204] *See Riedel*, 968 A.2d at 23.

CONCLUSION

For the foregoing reasons, County Insulation respectfully requests this this Honorable Court deny Plaintiffs'/Appellants' Appeal and affirm the Superior Court's ruling granting County Insulation summary judgment on all claims and crossclaims.

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