EFiled: Dec 20 2017 09:15AM EST
Filing ID 61486740
Case Number 305,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	:	
ELIZABETH RAMSEY, Personal Representative of the Estate of DOROTHY RAMSEY, deceased	:	No. 305, 2017
Plaintiff Below/Appellant	:	Court Below: Superior Court of the State of Delaware
v.	:	C.A. No. N14C-01-287 ASB
GEORGIA SOUTHERN UNIVERSITY ADVANCED DEVELOPMENT CENTER, HOLLINGSWORTH AND VOSE COMPANY	:	
Defendants Below/Appellees	:	

APPELLEE HOLLINGSWORTH AND VOSE COMPANY'S CORRECTED ANSWERING BRIEF ON APPEAL

ROBERT S. GOLDMAN, ESQ. (#2508)
LISA C. McLAUGHLIN, ESQ. (#3113)
Philips, Goldman, McLaughlin & Hall, P.A.
1200 North Broom Street
Wilmington, DE 19806
Telephone: (302) 655-4200
E-Mail: rsg@pgmhlaw.com
Attorneys for Defendant Below/Appellee
Hollingsworth & Vose Company

DATED: December 20, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

On January 31, 2014, Dorothy Ramsey ("Mrs. Ramsey") initiated this action in the Delaware Superior Court against Hollingsworth and Vose ("H&V") and fourteen other corporate defendants.[1] Three amended complaints were subsequently filed. The second amended complaint substituted Elizabeth Ramsey as the Personal Representative of the Estate of Dorothy Ramsey as Plaintiff ("Plaintiff"), and the third amended complaint, filed on January 4, 2017, identified Mrs. Ramsey as the "decedent."[2]

In her complaint, Plaintiff alleged that Mrs. Ramsey was exposed to asbestos dust in her home, transported on her husband's person and work clothes from his place of employment at Haveg Industries, Inc. ("Haveg").[3] Plaintiff further alleged that H&V supplied asbestos-containing paper to Mrs. Ramsey's husband's employer, for use in its manufacture of a finished product called Chemtite Pipe.[4] Plaintiff alleged claims of negligence, strict liability, willful and wanton conduct, material misrepresentation and conspiracy.[5] Mr. and Mrs. Ramsey were both deposed in the course of this litigation.

---

[1] A28−A40.
[2] A41–53.
[3] A28-40, ¶¶ 4, 10-14; A-41-A-53, ¶¶ 4, 10-14.
[4] A44–46; Appellant's Opening Brief on Appeal ("App. Brief") at 5–6.
[5] A41–A53.

On October 8, 2015, Defendant Georgia Southern University Advanced Development Center ("Herty") filed its Motion for Summary Judgment and Opening Memorandum.[6] Herty argued that it did not owe Mrs. Ramsey a duty of care, in addition to several other arguments.[7] Plaintiff filed an opposition to Herty's motion for summary judgment on October 30, 2015,[8] and Herty filed its Reply Memorandum on November 12, 2015.[9] On December 8, 2016, the Superior Court heard oral argument on Herty's motion.[10] The court issued its Opinion, ruling in Herty's favor on February 22, 2017.[11] Shortly thereafter, Plaintiff filed a Rule 59(e) Motion for Reargument, and oral argument was held on May 8, 2017.[12] The Court denied Plaintiff's Motion for Reargument on May 11, 2017.[13]

On February 24, 2017, while Plaintiff's Motion for Reargument was pending, H&V filed its Motion for Summary Judgment.[14] In its motion, H&V asserted that it was entitled to summary judgment because the Court's ruling with respect to Herty established the law of the case.[15] H&V is situated identically to

---

[6] A54–A268.
[7] *Id*.
[8] A269–A283.
[9] A469–478.
[10] A516–A543.
[11] *In re Asbestos Litigation (Ramsey)*, 2017 WL 465301, at *7-8 (Del. Super. Ct. Feb. 2, 2017).
[12] A544–A550; A634–A669.
[13] App. Brief, at 2.
[14] A670–A726.
[15] A670–A672.

Herty in that it supplied the same component part to Haveg, just during an earlier timeframe. Therefore, H&V asserted that it was entitled to summary judgment on the same issues.[16] Plaintiff filed her Response in Opposition on March 10, 2017.[17] H&V filed its Reply Brief on March 29, 2017.[18] On July 7, 2017, the Court heard oral argument and granted H&V's motion on the grounds that the trial court's ruling on Herty's motion for summary judgment established the law of the case, and that under that ruling H&V was entitled to summary judgment.[19]

Plaintiff appealed the Superior Court's ruling as to Herty and H&V on August 1, 2017.[20] This is H&V's Answering Brief on Appeal.

[16] *Id*.
[17] A727–A742.
[18] A1061–A1064.
[19] A1096–A1108.
[20] App. Brief.

SUMMARY OF THE ARGUMENT

1. Denied. The trial court correctly ruled that, pursuant to the Delaware Supreme Court's holdings in *Price* and *Riedel*, Plaintiff's allegations against H&V (and Herty) in this case are for mere nonfeasance, and that H&V therefore owed no duty to Mrs. Ramsey. In *Price* and *Riedel*, this Court held that allegations that an employer failed to prevent its employees from transporting home asbestos on their work clothes, and failed to warn its employees' family members about the danger of asbestos exposure, are allegations of nonfeasance.[21]

Although these rulings were made in cases brought by the employees' spouses against their husbands' employers, these holdings equally apply to a component part supplier such as H&V. Employers control the environment in which employees work. Employers are also directly responsible for the safety policies and procedures employees must follow. If an employer's decision to include asbestos in its manufacturing process, and subsequent failure to prevent its employees from transporting asbestos home and to warn its employees' family members of the dangers of asbestos exposure is considered nonfeasance, then so too are identical acts of omission by a component part manufacturer who merely supplied a component part used in the employer's manufacturing process. This

[21] *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009); *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011).

application of *Price* and *Riedel* to H&V in this case is consistent with this Court's decisions establishing that the existence of a duty is primarily a question of the relationship between the parties. *See, e.g.*, *Furek v. Univ. of Delaware*, 594 A.2d 506, 516 (Del. 1991).

In this case, the same allegations made against the defendants in *Price* and *Riedel*, are made against H&V, a component part supplier of materials used by Mrs. Ramsey's husband's employer in its manufacture of Chemtite pipe. Therefore, the holdings of *Price* and *Riedel* apply to the facts here, and Plaintiff has asserted claims of nonfeasance against H&V.

Since Plaintiff's claims against H&V are appropriately deemed to be allegations of nonfeasance, Plaintiff must establish a special relationship between H&V and Mrs. Ramsey. Absent that special relationship, H&V owed no duty to Mrs. Ramsey. Here, Plaintiff cannot establish, and does not attempt to establish, that a special relationship exists. Therefore, no duty was owed by H&V to Mrs. Ramsey, and the trial court's holding should be affirmed.

STATEMENT OF FACTS

A. H&V's Alleged Manufacture and Supply of Asbestos Paper to Haveg.

Plaintiff alleges that H&V fulfilled a total of two orders of asbestos paper to Haveg in 1971 and 1972. This asbestos paper was ordered by Haveg, and manufactured pursuant to Haveg's specifications.[22] On November 16, 1971, H&V sent its first shipment of asbestos paper to Haveg.[23] The shipment consisted of 50,000 pounds of paper to be used in the manufacture of Chemtite pipe.[24] In October 1971, Haveg placed a second order for asbestos paper with H&V.[25] This second order, in the amount of 40,000 pounds, appeared to have been sent in two separate shipments in December 1972.[26]

H&V's asbestos paper was allegedly used by Haveg in Haveg's manufacture of Chemtite pipe.[27] To H&V's knowledge, the only written materials provided with these paper shipments were shipping labels attached to the packaged product.[28] Once H&V shipped its paper to Haveg, H&V had no role in Haveg's manufacture of its Chemtite pipe, nor in any subsequent sales of this end product.[29]

---

[22] A711; A763; A799.
[23] A711–A712.
[24] A711–A712.
[25] A713.
[26] A713.
[27] A764; A771:11–14.
[28] A900.
[29] A764–A765; A777:20–25.

B. Mrs. Ramsey's Alleged Exposure to Asbestos Attributable to Haveg's Manufacture of Chemtite Pipe.

Appellant alleges that Mrs. Ramsey developed lung cancer as a result of her alleged exposure to asbestos brought home on the work clothes of her husband, Robert Ramsey ("Mr. Ramsey").[30] Mrs. Ramsey testified that she would launder Mr. Ramsey's work clothes once per week, and would clean up any dust that came off of those work clothes prior to being laundered.[31]

Mr. Ramsey testified that he was exposed to asbestos at Haveg through his work in the Chemtite department from about 1972 to approximately 1979.[32] During the period that H&V supplied paper to Haveg—1971 and 1972, Mr. Ramsey testified that he was exposed to only a very small amount of asbestos.[33] Mr. Ramsey's primary job was to manufacture pipe.[34] He also made pipe fittings, which did not entail the use of H&V's paper.[35]

In his capacity as a pipe manufacturer, Mr. Ramsey worked with rolls of asbestos paper.[36] The paper was put through a resin bath before it reached Mr.

---

[30] A43–45.
[31] A91:20–24; A114:11–22, A117:11–16; A123:13–20.
[32] A73:21–A74:4.
[33] A73:3–20.
[34] A73:21–A74:12.
[35] A77:16–20.
[36] A74:11–A75:20.

Ramsey.[37] The paper rolls were then put on mandrels and wound into the pipe.[38] It took about 6 or 7 rolls to make the pipe.[39] Mr. Ramsey testified that making the pipe created very little dust.[40]

After the pipe was wound, the pipe was placed in an oven to bake.[41] After the pipe was removed from the oven, Mr. Ramsey cut the pipe to size with a wet saw.[42] The use of the wet saw eliminated a lot of the dust.[43] Mr. Ramsey also threaded the pipe, but it was only a small part of his job.[44]

[37] A440:21–23.
[38] A440:9–12.
[39] A440:14–17.
[40] A82:7–8; A440:24–A441:11.
[41] A442:1–9.
[42] A442:16–A443:1.
[43] A443:2–5.
[44] A443:9–17.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE BASIS THAT H&V DID NOT OWE A DUTY TO MRS. RAMSEY.

A. Question Presented:

Did H&V, as a mere supplier of an asbestos-containing component part to a manufacturer of asbestos-containing end products (*i.e.*, Haveg), owe a duty of care to the spouse of an employee of that manufacturer based on allegations that H&V failed to protect the spouse against, or warn the spouse about, the dangers from her husband's alleged occupational exposure to asbestos at his workplace?

B. Scope of Review:

Plaintiff claims that the Court below erred in holding that H&V did not owe a duty to Mrs. Ramsey.[45] Whether a defendant owes a duty of care to a plaintiff is a question of law.[46] Questions of law are reviewed *de novo* on appeal.[47]

Moreover, on appeal, motions for summary judgment are reviewed *de novo*.[48] The Court must consider all facts in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact in dispute.[49] Where the nonmoving party cannot make a sufficient showing on an

---

[45] App. Brief, at 16.
[46] *Handler Corp. v. Tlapechco*, 901 A.2d 737, 749 (Del. 2006).
[47] *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007).
[48] *Grabowski v. Mangler*, 938 A.2d 637, 641 (Del. 2007).
[49] *Id*.

essential element of the case on which that party will bear the burden of proof at trial, summary judgment is appropriate.[50]

C. Merits of Argument:

1. Plaintiff's Claims Against H&V are Allegations of Nonfeasance.

The trial court granted Herty's and H&V's motions for summary judgment on the grounds that their alleged failure to protect Mrs. Ramsey from, or warn her about, the dangers of her husband's alleged occupational exposure to asbestos was nonfeasance.[51] Essential to the trial court's decision was this Court's *Price* and *Riedel* decisions, which held that allegations by an employee's spouse that the employer failed to protect against or otherwise warn the spouse about the potential dangers of take-home asbestos exposure, were allegations of nonfeasance. The trial court held that these same allegations against Herty and H&V, who merely supplied asbestos-containing paper to Haveg for use in its Chemtite pipe manufacturing process, were also allegations of nonfeasance. This was the correct result.

a. Misfeasance versus Nonfeasance

To successfully establish a claim of negligence, a plaintiff must show: the defendant owed the plaintiff a duty of care, the defendant breached that duty, and

[50] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[51] *Ramsey*, 2017 WL 465301, at *7–8.

the breach proximately caused the plaintiff's injury.[52] In other words, "[i]n order to be held liable in negligence, a defendant must have been under a legal obligation—a duty—to protect the plaintiff from the risk of harm which caused his injuries."[53]

"[W]hether a duty exists is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined by the court."[54] In determining whether a duty exists, a central factor is the relationship between the parties.[55] The duty analysis also looks to the nature of the conduct involved, as different conduct has different attendant duties. Affirmative actions—i.e., misfeasance—generally come with a duty to act reasonably to prevent foreseeable harm. Whereas, in cases of non-action—or nonfeasance—a duty is imposed only where a special relationship exists between the defendant and the injured party.

This approach is set forth in the Restatement (Second) of Torts.[56] As Section 302, comment a. states:

---

[52] *Price*, 26 A.3d at 166; *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001).
[53] *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002).
[54] *Handler Corp. v. Tlapechco*, 901 A.2d 737, 749 (Del. 2006).
[55] *See Furek*, 594 A.2d at 516 (holding that duty is primarily a question of the relationship between the parties).
[56] Delaware does not follow the Restatement (Third) of Torts. *See Riedel*, 968 A.2d at 20–21.

> [I]n general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.[57]

The differing approach to misfeasance and nonfeasance is also clear in the Restatement's definition of negligent conduct:

> (a) *an act* which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) *a failure to do an act* which is necessary for the protection or assistance of another and which the actor is under a duty to do.[58]

Professor Dobbs, in *The Law on Torts* also recognizes this difference but characterizes it in terms of creation of risk:

> Where the defendant does not create or continue a risk of harm, the general rule… is that he does not owe an affirmative duty to protect, aid, or rescue the plaintiff. On the other hand, where the defendant by some action on his part, creates, maintains, or continues a risk of physical harm, the generally standard or duty is the duty of reasonable care, that is the duty to avoid negligent conduct.[59]

Delaware courts recognize the difference between misfeasance and nonfeasance when determining tort liability.[60] In *Doe 30's Mother v. Bradley*, this

---

[57] Comment a. then points to Section 314 for an additional discussion of the distinction between an act and an omission. *See* Rest. (Second) § 302, cmt. a.
[58] Rest. (Second) § 284 (emphasis added).
[59] 2 Dan B. Dobbs, et al, *Law of Torts*, § 251 (2d ed. 2011). *See also Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375, at *8 (Del. Super. Ct. May 4, 2016) (in negligence cases alleging nonfeasance, or an omission to act, there is no general duty to others without a "special relationship" between the parties).
[60] *See Doe 30's Mother v. Bradley*, 58 A.3d 429 (Del. 2012).

Court recognized that the differing treatment of misfeasance and nonfeasance claims has "deep roots in sound public policy and settled legal doctrine."[61] Furthermore, Delaware courts—including this Court in *Bradley*—have found that a failure to warn, a failure to inspect or repair, a failure to provide safety spotters, a failure to test, and a failure to supplement air quality programs all constitute nonfeasance.[62]

b. *Price* and *Riedel*

It was within the misfeasance/nonfeasance framework that this Court decided two take-home asbestos exposure cases—*Price* and *Riedel*—that set the precedent for granting H&V's motion for summary judgment in the court below.

In *Riedel v. ICI Americas Inc.*, the wife of an employee brought a negligence action against her husband's employer. Specifically, Mrs. Riedel alleged that the defendant-employer exposed Mrs. Riedel's husband, Mr. Riedel, to asbestos, it did not provide its employees with uniforms, locker rooms, or laundry facilities, and it

[61] 58 A.3d at 448 (finding no duty to warn and noting that "the 'no duty to act' rule, expressed in Restatement Second § 314, is not abated by either the gravity of the risk of harm confronting the 'other' *or the defendant's awareness of that risk*").
[62] *Id*.; s*ee also Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *10 (Del. Super. Ct. Sept. 8, 2004) ("Claims based on the failure to warn, inspect or repair, or implement and supervise indoor air quality programs for common areas affected by mold are acts of nonfeasance."); *Heronemus v. Ulrick*, 1997 WL 524127, at *3 (Del. Super. Ct. July 9, 1997) (finding that plaintiff's claims of "failure to warn, failure to provide safety spotters [for the product] and failure to test [the product]" were claims of "nonfeasance or the omission of an act which a person ought to do").

did not warn Mr. or Mrs. Riedel of the danger created by the asbestos to which Mr. Riedel was allegedly exposed and transported home.[63] The trial court found that, these allegations by Mrs. Riedel against her husband's employer— failing to prevent Mr. Riedel from bringing asbestos home on his clothing and failing to warn Mrs. Riedel about the dangers associated with exposure to that asbestos— constituted acts of omission, or nonfeasance.[64]

On appeal, Mrs. Riedel attempted to recast her allegations, asserting that the defendant had committed the "affirmative act of releasing toxic asbestos into the environment," and thus had breached its duty. [65] As an initial matter, the Court held that the existence of a duty is resolved by looking to the Restatement (Second) of Torts.[66] In so holding, the Court explicitly rejected the Restatement (Third), which had recently been adopted in the Tennessee asbestos case *Satterfield v. Breeding Insulation Co*., 266 S.W.3d 347 (Tenn. 2008), as presenting too great a departure from the traditional concepts of duty.[67] The Court then addressed Mrs. Riedel's recast allegations, and although the Court held that the plaintiff had not

[63] *Riedel*, 968 A.2d at 19 .
[64] *Id*. at 23.
[65] *Id*.
[66] *Id*. at 20–21.
[67] *Id*. Plaintiff herself relies on *Satterfield* to support her argument in this appeal. *See* App. Br., at 40 n. 157.

properly raised these allegations below, the Court stated that the underlying facts for these allegations were "fairly described as allegations of nonfeasance."[68]

Having determined that the employer engaged in nonfeasance, the Court held that Mrs. Riedel had to establish a special relationship between her and her husband's employer in order to find that the employer owed a duty to warn or to prevent injury to Mrs. Riedel.[69] Absent that special relationship, an employer does not owe a duty to an employee's spouse to warn him or her of the dangers of asbestos exposure.[70] Nor does an employer owe a duty to an employee's spouse to prevent the employee from bringing asbestos home on his clothing or on his person.[71]

The Court found that under the Restatement (Second) of Torts, Sections 314A and 316–324A, no legally significant special relationship existed between Mrs. Riedel and her husband's employer.[72] Mrs. Riedel sought to establish a relationship under § 323 ("Negligent Performance of Undertaking to Render Services") because the defendant-employer had occasionally provided its employees' families with newsletters that included safety tips.[73] The Court

[68] *Id*. at 19.
[69] *Id*. at 25–26.
[70] *Id*. at 24–25.
[71] *Id*.
[72] *Id*. at 22–23, 25–27.
[73] *Id*. at 26.

rejected this argument since there was no evidence that the employer undertook to warn its employees' families of *all* dangers and held that no special relationship existed.[74] Without a legally significant relationship, the Court held that the employer owed no duty to Mrs. Riedel.[75]

Two years later, in *Price v. E.I. DuPont de Nemours & Co.*, the Court further strengthened the *Riedel* holding. *Price* presented almost identical facts to those in *Riedel*. Mrs. Price sued her husband's employer, alleging that the employer was negligent in failing to warn about the dangers of asbestos exposure and failing to prevent employees from transporting asbestos into their family home.[76] Because *Riedel* impliedly established that those failures constituted only nonfeasance, Mrs. Price attempted to frame her allegations as misfeasance in her amended complaint.

Specifically, Mrs. Price referred to defendant's conduct as "affirmative, active misconduct."[77] She repeatedly referred to her husband's exposure as being the "direct result" of the defendant's "directives and instructions."[78] Mrs. Price also alleged that the release of asbestos fibers was the result of positive actions on

---

[74] *Id.*
[75] *Id*. at 26–27.
[76] *Price*, 26 A.3d at 164–66.
[77] *Id*.
[78] *Id*.

the part of the defendant, as the defendant ordered and directed the use of asbestos materials.[79]

Nevertheless, this Court found that Mrs. Price's claims, reduced to their essence, were as follows:

> (1) Mr. Price… worked with and around products containing asbestos… (2) asbestos fibers settled on his skin, clothing, and vehicle, (3) [Defendant] did not provide locker rooms, uniforms, or warnings to the Prices regarding the dangers of asbestos, (4) [Defendant] did not prevent Mr. Price from transporting the asbestos fibers home on his skin, clothing, and vehicle, and (5) Mrs. Price, because she lived with Mr. Price and washed his clothes, developed several diseases from her exposure to the asbestos he brought home from work.[80]

The Court found that "these allegations generate a reasonable inference that DuPont wrongfully (negligently) failed either to prevent Mr. Price from taking asbestos home or to warn the Prices of the dangers associated with Mr. Price wearing his work clothes home."[81] Based on *Riedel*, the Court held, that conduct constituted "pure nonfeasance—nothing more."[82]

As part of this analysis, the Court looked to the Restatement (Second) of Torts, Section 284, which states that negligent conduct is either (1) an act which the actor should recognize involves an unreasonable risk of harm to an interest of

---

[79] *Id*.
[80] *Id*. at 169.
[81] *Id*.
[82] *Id*.

another, or (2) "a failure to do an act... which the actor is under a duty to do."[83] Guided by *Riedel*, the Court found that the defendant's conduct did not rise "to the level of affirmative misconduct" required to establish misfeasance.[84] Thus, because the employer's conduct was nonfeasance (or the failure to do an act), Mrs. Price had to establish that some special relationship existed between her and her husband's employer. Otherwise, the employer was under no duty to Mrs. Price. As in *Riedel*, the Court determined that there was no special relationship and, therefore, the defendant was not liable in negligence to Mrs. Price.[85]

c. Application of *Price* and *Riedel* to Plaintiff's Allegations Against H&V.

As the court below noted in its decision on Herty's Motion for Summary Judgment, Herty—and by extension H&V—effectively engaged in conduct identical to the employers in *Price* and *Riedel*.[86] Plaintiff alleged that Herty and H&V negligently:

- Chose to use asbestos materials rather than other non-asbestos materials…;[87]
- Chose not to adequately warn all the potential victims of asbestos including [Mrs. Ramsey] as well as other users,

[83] *Id*. at 171.
[84] *Id*.
[85] *Id*. at 169–70.
[86] *Ramsey*, 2017 WL 465301, at *7–8 .
[87] A35, ¶ 16(a).

bystanders, household members and members of the general public of the risks of asbestos;[88]

- Chose not to adequately, test, research and investigate asbestos and/or effects prior to sale, as to use, and/or exposure of [Mrs. Ramsey] and others similarly situated;[89]

- Chose not to adequately package, distribute and use asbestos in a manner which would minimize the escape of asbestos fibers therefore adding to the exposure of [Mrs. Ramsey] and others similarly situated;[90]

- Chose not to take adequate steps to remedy the above failure, including but not limited to recall of asbestos and asbestos products, to conduct research as to how to cure or minimize asbestos injuries, to distribute asbestos so as to render it safe or safely remove the asbestos not in place.[91]

These allegations against H&V are the same allegations asserted by the plaintiff in *Price*.[92] Also like the plaintiff in *Price*, Plaintiff attempted here to artificially frame her allegations as affirmative conduct by stating that each failure to act was something H&V "chose" to do.[93] The essence of the allegations against H&V, however, are that H&V failed to prevent Mr. Ramsey from bringing home asbestos on his work clothes, and failed to warn Mrs. Ramsey of the dangers of asbestos exposure.

---

[88] A35, ¶ 16(b).
[89] A35, ¶ 16(c).
[90] A35, ¶ 16(d).
[91] A35, ¶ 16(e).
[92] *Price*, 26 A.3d at 169.
[93] *Id.* A35, ¶ 16.

Just as in *Riedel* and *Price*, the conduct Plaintiff alleges vis-à-vis H&V is "pure nonfeasance—nothing more."[94] *Price* and *Riedel* undisputedly established that an employer, who has made the choice to use an asbestos-containing material in the fabrication of its product and who controls not only the environment in which the employees work but also creates the safety policies and procedures that its employees must follow, has only engaged in nonfeasance in failing to protect its employees' family members from, or warn them about, the potential dangers from that manufacturing process. This holding equally applies to the same allegations against the component part supplier of materials for that same manufacturing process, whose connection to the employees' family members is even more attenuated, and who had no control over the manufacturer's safety measures or warnings to the employees. If an employer's decision to include asbestos in its manufacturing process, and its failure to prevent its employees from transporting asbestos home, and warn its employees' family members of the dangers of asbestos exposure, is deemed nonfeasance, then so too are the identical acts of omission by a component part manufacturer who merely supplied a component part used in that manufacturing process.

Thus, H&V's alleged failure to warn Mrs. Ramsey about, or otherwise protect her from, the asbestos on Mr. Ramsey's work clothes is no more

[94] *Price*, 26 A.3d at 169.

misfeasance than Haveg's own alleged failure to warn Mrs. Ramsey about, or otherwise protect her from, that same hazard.

d. Plaintiff's Attempt to Distinguish *Price* and *Riedel* based Traditional Products Liability Concepts Is Unavailing.

Plaintiff attempts to distinguish H&V from the defendants in *Price* and *Riedel* on the grounds that H&V, as a "manufacturer," is in a different class than the "Employer/Landowner" defendants in *Price* and *Riedel*.[95] Plaintiff argues that H&V released its product into the "stream of commerce," and that this was an affirmative act that elevates Plaintiff's allegations against H&V into ones of misfeasance.[96] As a result, Plaintiff argues, this Court should determine the existence of a duty (under a foreseeability analysis) pursuant to Restatement Sections 388, 389, and 395.[97] This argument fails for two reasons.

First, H&V's status as a component part manufacturer to Haveg does not change the nature of Plaintiff's claims against H&V. In making her argument, Plaintiff attempts to cast herself (or her husband) in the same light as that of an end product purchaser or consumer. She suggests that her claims are of the same nature as that of an end product consumer who buys a finished product, and who suffers harm by using that product in accordance with its intended use. In fact, that

[95] App. Brief, 17–23.
[96] *Id*.
[97] *Id*. at 25–36.

is not the nature of Plaintiff's allegations here. Plaintiff did not buy H&V's asbestos paper, and H&V's paper was not intended for use as an end product. Therefore, this is not a traditional products liability claim, and should not be treated as such.

Instead, as discussed above, Plaintiff's allegations against H&V are of the same nature as the allegations that would be made against Haveg, and that this Court has already ruled constitute allegations of nonfeasance. H&V allegedly supplied a component part to Haveg, pursuant to Haveg's specifications, that Haveg then used in its manufacturing process for its Chemtite pipe. Plaintiff's allegations against H&V, just like those that would be alleged against Haveg, allege a failure to warn or protect her from asbestos brought home on her husband's clothes resulting from the Chemtite manufacturing process.

Moreover, Plaintiff has provided no basis to impose liability on H&V where those same allegations are insufficient to impose liability on Haveg under *Price* and *Riedel*. Under Plaintiff's argument, if Mrs. Ramsey had been the wife of an H&V employee, Plaintiff's claims against H&V here would undisputedly amount to allegations of nonfeasance, and H&V would have no duty to Plaintiff. But here, according to Plaintiff, since Plaintiff was the wife of an employee of the end product manufacturer (Haveg), her claims against H&V somehow assert claims of misfeasance. This is an untenable reading of the *Price* and *Riedel* decisions, and of

her allegations against H&V in this case. The allegations Plaintiff makes against H&V here are no different in nature than the nonfeasance claims that the plaintiffs in *Price* and *Riedel* made against those defendants. Therefore, under the holdings of *Price* and *Riedel*, Plaintiff's allegations against H&V must be deemed nonfeasance in the same manner that they would be deemed nonfeasance against Haveg.[98]

Second, Plaintiff's argument must fail because she has provided no basis to support her claim that this case should be appropriately considered under traditional concepts of products liability. Plaintiff relies on Section 388, 389, and 395 of the Restatement (Second) of Torts to assert that H&V owed a duty to Plaintiff in this case. By their plain terms, however, Sections 388, 389, and 395 are not applicable to this case, since they limit the duty to those who use, or would expect to use, the manufacturer's product. Specifically, Section 388 states that

[98] To the extent Plaintiff's argument implies that the duty analysis here should be distinguished from *Price* and *Riedel* because H&V did not owe Plaintiff a duty as a property owner or employer is equally unavailing. In *Price* and *Riedel*, the defendant employers' duties as landowners and employers had no bearing whatsoever on this Court's determination that the defendants' owed no duty to the plaintiffs. To the contrary, although duties of employers/landowners were referenced, they were done so only as a means to distinguish the duties owed to the employees from the plaintiffs themselves. Therefore, the fact that Haveg may have owed certain duties to its own employees and invitees (who are not the plaintiff) as an employer and a land owner, does not impact the lack of a duty owed to Plaintiff in this case. If anything, the fact that H&V's relationship with Plaintiff is even more attenuated than that of the employer supports H&V's arguments made herein.

"[o]ne who supplies directly or through a third person a chattel for another to *use* is subject to liability to those to whom the supplier should except *use* the chattel . . . or to be endangered by its probable *use* . . . ." a supplier is liable for injuries caused by its chattel to those the supplier should "expect to *use* the chattel."[99] According to comment d to Section 388, this liability may also be extended to those in the "vicinity" of the product's use.[100] Section 389 similarly limits any liability based on the *use* or expected *use* of the chattel, or to the vicinity of its probable *use*.[101] Section 395 also applies only those who *use* a product or whom could "expect to be endangered by its probable *use*."[102]

Under the plain reading of Sections 388, 389, and 395, Plaintiff's allegations do not fall under these Restatement Sections. Mrs. Ramsey did not use H&V's asbestos paper. Nor did Mrs. Ramsey did come within the vicinity of H&V's asbestos paper or its use. Thus, there is no basis for liability under Sections 388, 389 or 395.

Nor does the Plaintiff cite to any case law to establish the existence of a duty in a take home exposure case under Sections 388, 389, or 395. Instead, Plaintiff primarily cites to three cases—*In re Asbestos Litig. (Colgain), In re Asbestos Litig.*

---

[99] Rest. (Second), § 388 (emphasis added).
[100] Rest. (Second), § 388, cmt. d. (emphasis added).
[101] Rest. (Second), § 389.
[102] Rest. (Second), § 395 (emphasis added).

(Mergenthaler), and *Graham v. Pittsburgh Corning Corp*. None of these cases, however, address the duty owed in a take-home exposure case.[103] Without such precedent, Plaintiff has no basis to extend Sections 388, 389, and 395 beyond their plain terms and require a duty by H&V to Plaintiff, who never used, or was in the vicinity of the use of, H&V's asbestos paper.

2. Mrs. Ramsey Cannot Establish a Special Relationship with H&V.

Since Plaintiff's allegations against H&V are allegations of nonfeasance, Plaintiff must identify a special relationship between Mrs. Ramsey and H&V in order to establish that H&V owed her a duty of care. Plaintiff cannot, and does not, assert that a special relationship existed between H&V and Mrs. Ramsey, and therefore she cannot meet this burden.[104]

The Restatement provides several special relationships that give rise to a duty to act. Section 314A specifically acknowledges duties on the part of common carriers, innkeepers, and possessors of land. Comment a. to Section 314A also acknowledges a duty on the part of employers to protect employees. Sections 316 through 324 provide additional special relationships, including parents and

---

[103] *See In re Asbestos Litig. (Colgain)*, 799 A.2d 1151, 1153-53 (Del. 2002); *In re Asbestos Litig. (Mergenthaler)*, 542 A.2d 1205, 1212 (Del. Super. Ct. 1986); and *Graham v. Pittsburgh Corning Corp*., 593 A.2d 567 (Del. Super. Ct. 1990).
[104] A727–742; App. Brief. 16–37.

children, master and servant, and persons in control of others with dangerous propensities.[105] None of these special relationships apply here.

The plaintiffs in *Riedel* and *Price* attempted to establish a special relationship based on the employers' conduct. In *Riedel*, the plaintiff suggested that the employer's publication of safety brochures brought the employer within the ambit of Section 323 ("Negligent Performance of Undertaking to Render Services"). The Court found that the "occasional publication" of the newsletter did not create a significant legal relationship.[106] In *Price*, the plaintiff argued that the special relationship arose from her husband's status as the defendant's employee, as well as from the fact that defendant provided plaintiff with health insurance.[107] Again, the Court did not find that this was a sufficient relationship to create a legal duty.[108]

Here, there is a complete lack of a relationship between H&V and Mrs. Ramsey. H&V did not sell a product to Mrs. Ramsey. H&V did not sell a product (directly or indirectly) to Mrs. Ramsey's employer. H&V did not employ Mrs. Ramsey, and unlike in *Price* and *Riedel*, H&V did not employ her husband. H&V's position is therefore even more attenuated to Mrs. Ramsey than the

[105] *Riedel*, 968 A.2d at 22 n. 15 & 16.
[106] *Id*. at 26.
[107] *Price*, 26 A.3d at 169–70.
[108] *Id*.

defendants in *Price* and *Riedel*. If an employer does not stand in a special relationship with an employee's spouse, as held in *Price* and *Riedel*, then H&V, as a mere supplier of a component part to the employer, certainly cannot be deemed to have a special relationship with the employee's spouse.

3. A Finding of No Duty as to H&V is Consistent with Delaware's Approach to Establishing Duty.

It is well established in Delaware that when determining whether a defendant owed a duty of care to the plaintiff, the court must determine whether "such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other."[109] Thus, central to this determination is the relationship between the parties.[110]

---

[109] *In re Asbestos Litig. (Riedel)*, 2007 WL 4571196, at *3 (Del. Super. Ct. Dec. 21, 2007), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

[110] *See Furek*, 594 A.2d at 516 (holding that duty is primarily a question of the relationship between the parties); *Higgins v. Walls*, 901 A.2d 122, 136 (Del. Super. Ct. 2005) ("Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part....The court's role [in] determining whether a duty exists is first to study the relationship between the parties and then to determine, based upon statutory and/or common law principles, whether the relationship is of a nature or character that the law will impose a duty upon one party to act for the benefit of another.") (internal quotations omitted); *Shepard v. Reinoehl*, 830 A.2d 1235, 1238–39 (Del. Super. Ct. 2002); 2 Dobbs, *Law of Torts*, § 256 (2d ed. 2011) ("[The] foreseeability rule is a rule about what counts as negligence, not a rule about duty to use reasonable care.").

Here, there is simply no relationship between H&V and Mrs. Price. For that reason, a finding of no duty as to H&V is consistent with principles governing the establishment of a duty under Delaware law.

This holding is also consistent with a number of other jurisdictions that have similarly refused to recognize the existence of a duty to family members in take-home asbestos exposure cases due to the lack of a relationship between the parties.[111] Similarly, several other jurisdictions have declined to impose a duty on manufacturers in take-home asbestos cases on the basis that it would be poor public policy to impose what essentially amounts to a limitless duty to warn, especially given the lack of evidence that such warnings would be effective.[112]

---

[111] *See Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014) (Robreno, J.) ("The specter of limitless liability and the lack of a relationship between Mrs. Gillen's claim and Defendant's conduct weighs heavily against this Court imposing such a duty."); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 740 N.W.2d 206, 213, 216-217 (Mich. 2007) ("Before a duty can be imposed there must be a relationship between the parties."); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115, 119, 122 (N.Y. 2005) ("The 'key' consideration critical to the existence of a duty in these circumstances is 'that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect again the risk of harm'").

[112] *See e.g., Certainteed Corp. v. Fletcher*, 794 S.E.2d 641, 645 (Ga. 2016), *reconsideration denied* (Dec. 8, 2016) (finding no duty as it would be "unreasonable to impose a duty on [the manufacturer] to warn all individuals in [plaintiff's] position… as the mechanism and scope of such warnings would be endless"); *Quiroz v. ALCOA Inc.*, 382 P.3d 75, 81 (Ariz. Ct. App. 2016*), review granted* (Feb. 14, 2017) (finding no duty over concerns of a dramatic expansion of liability); *Gillen v. Boeing Co.*, 40 F. Supp. 3d at 540 ("As other courts have recognized, without a limiting principle, liability for take-home exposure would

Despite the consistency with Delaware law (and other jurisdictions) that would result with a no duty holding here, Plaintiff inaccurately asserts that affirming the trial court's ruling in favor of H&V will eviscerate the duty to warn in product liability cases.[113] This argument drastically overstates the breadth of this holding. By recognizing that the *Price* and *Riedel* holdings encompass component part suppliers such as H&V, the Court does not undermine the duties owed by manufacturers in traditional product liability cases, or in cases where the employees themselves allege injury. Instead, this holding merely recognizes that an allegation of nonfeasance by an employee's family member does not transform into an allegation of misfeasance, simply because that allegation is made against the component part manufacturer instead of the spouse's employer itself. As a result, this holding will have no impact on the state of products liability law in Delaware.

4. Plaintiff Should Not Be Allowed to Litigate the Foreseeability Argument on Appeal.

Because the trial court found that Plaintiff's claims against Herty and H&V were allegations of nonfeasance, the Court properly did not address the issue of

---

essentially be infinite."); *Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1039 (Md. 2013) (finding no duty and citing concerns that it was back public policy to "impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect").

[113] App. Brief, at 37–38.

whether the risks of harm to Mrs. Ramsey were reasonably foreseeable. Plaintiff's attempt, therefore, to litigate the issue of foreseeability here on appeal is inappropriate, as it was not the basis of the trial court's decision below.[114]

Further, the foreseeability issue has no bearing on this Court's duty analysis. While Delaware courts may only look at foreseeability of harm to define the duty, this only occures once the court determines that a duty exists.[115] Foreseeability is not a primary inquiry in determining the existence of a duty.[116] Foreseeability, generally, "is a rule about what counts as negligence, not a rule about duty to use reasonable care."[117] Because the lower court ruled exclusively on the issue of whether a duty exists, the foreseeability of the harm to Mrs. Ramsey or the extent to which H&V knew of dangers associated with its product are irrelevant to the issue of whether H&V owed Mrs. Ramsey a duty of care.[118] They are also matters

---

[114] *See Warren v. Goldinger Bros., Inc.*, 414 A.2d 507, 509 (Del. 1980) (declining to rule on a question not discussed by the court below); *Hall, et al. v. John S. Isaacs & Sons Farms, Inc.*, 163 A.2d 288, 293–94 (Del. 1960).
[115] *Riedel*, 2007 WL 4571196, at *6.
[116] *See Furek*, 594 A.2d at516 (holding that duty is primarily a question of the relationship between the parties); *Higgins*, 901 A.2d at 136 ("The court's role [in] determining whether a duty exists is first to study the relationship between the parties and then to determine, based upon statutory and/or common law principles, whether the relationship is of a nature or character that the law will impose a duty upon one party to act for the benefit of another.") (internal quotations omitted).
[117] 2 Dobbs, *Law of Torts*, § 256 (2d ed. 2011).
[118] *Furek*, 594 A.2d, at 516; *Higgins*, 901 A.2d at 136; *Shepard*, 830 A.2d at 1238–39.

more appropriately determined by a jury rather than the Court.[119] Thus, those portions of the Plaintiff's brief that attempt to litigate foreseeability before this Court—Sections I.C.3 and I.C.6—are improper and should be disregarded for purposes of this appeal.

[119] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 831 (Del. 1995) ("Considerations of foreseeability and what a reasonable person would regard as highly extraordinary are factual questions ordinarily reserved for the jury."); 2 Dobbs, *Law of Torts*, § 159 (2d ed. 2011) ("[T]he question of what is or is not foreseeable to a reasonable person in the position of the defendant is normally a jury question.").

CONCLUSION

For the reasons stated above, H&V respectfully requests that this Court deny Plaintiff's Appeal and affirm the Superior Court's ruling granting H&V summary judgment on all claims.

Respectfully submitted,

/s/ Robert S. Goldman

ROBERT S. GOLDMAN, ESQ. (#2508)
LISA C. McLAUGHLIN, ESQ. (#3113)
Phillips, Goldman, McLaughlin & Hall, P.A.
1200 North Broom Street
Wilmington, DE 19806
Telephone: (302) 655-4200
E-Mail: rsg@pgmhlaw.com

Attorneys for Defendant Below/Appellee
Hollingsworth & Vose Company

DATED: December 20, 2017

3749101