IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
JANINE MCCOY and	)	
MARVIN MCCOY	)	C.A. No. N10C-04-203 ASB
	)	
Limited to: PolyVision Corp.	)	

MEMORANDUM OPINION

Appearances:

Ian Connor Bifferato, Esquire
David W. deBruin, Esquire
Bifferato LLC
Wilmington, Delaware
Counsel for Plaintiffs Janine McCoy and Marvin McCoy

Armand J. Della Porta, Jr., Esquire
Ana Marina McCann, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
Wilmington Delaware
Counsel for Defendant PolyVision Corp.

JOHN A. PARKINS, JR., JUDGE

This is a take home asbestos exposure case in which the court must apply Pennsylvania law. The Pennsylvania Supreme Court has not ruled on whether a duty applies in take home asbestos exposure cases. For the reasons discussed below, the court predicts that the Pennsylvania Supreme Court would not find that a premises owner/employer owes a duty to its employee's spouse for take home asbestos exposure. Therefore, summary judgment is **GRANTED.**

FACTS

Plaintiff, Marvin McCoy, worked at PolyVision in Dixonville, Pennsylvania from 1968-2009. Between 1974-1983 Mr. McCoy cut asbestos-cement board creating asbestos-containing clouds of dust. Plaintiffs allege that asbestos dust collected on Mr. McCoy's work clothes and he wore them home. Janine McCoy, his wife, washed his clothes two to three times a week. She was diagnosed with mesothelioma in 2010 and alleges it was caused by laundering her husband's work clothes.

ANALYSIS

The issue before the court is whether the premises owner owes a duty to an employee's spouse in a take home asbestos exposure case.[1] The facts are not in dispute. In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant

[1] Defense Counsel also argued for summary judgment based on causation. Given the court's ruling on the duty issue, it is not necessary for the court to address causation and thus it is not addressed.

summary judgment when "the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[2] The question of whether a legal duty exists "is a question of law for the Court to determine."[3]

A. Pennsylvania Duty Law

The Pennsylvania Supreme Court has not determined whether a duty exists for a premises owner/employer to the spouse of an employee for take home asbestos exposure. Defendant's directed the court to a decision by a federal magistrate judge that was affirmed by the district court judge.[4] After examining in some detail, the Restatement (Second) of Torts and Pennsylvania cases considering duty,[5] the court concluded that under Pennsylvania law a premises owner owed no duty to third persons arising from take home asbestos exposure.[6]

Plaintiffs cite two cases from the Pennsylvania Court of Common Pleas on this issue—neither offers extensive analysis. In *Hudson v. Bethlehem Steel Corp.* Plaintiff alleged asbestos exposure from doing her father's laundry.[7] The court found no duty existed basing its finding on a review of available literature at the time and concluding "we can find no evidence that Bethlehem Steel could have reasonably forseen that [Plaintiff] would be affected by the asbestos-

[2] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).
[3] *Riedel v. ICI Americas Inc.*, 968 A.2d, 17, 20 (Del. 2009) (citing *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001)).
[4] *Jesensky v. A-Best Products, Co.*, C.A. No. 96-680 (W.D. Pa. Oct. 29, 2003), *aff'd*, 2004 WL 5267498, *2 (W.D. Pa. 2004).
[5] *Id.* at 18-20.
[6] *Id.* at 20.
[7] 1995 WL 17778064, at *1 (Pa. Com. Pl).

containing products during the time periods in issue."[8] In contrast another trial court found a duty did exist.[9] The court determined evidence existed in the record that the defendant knew or should have known of the danger to the Plaintiff and distinguished the case from *Hudson.*[10] The court also refused to follow decisions of other jurisdictions finding a duty did not exist and without citation to any authorities stated that matter should be left to the appellate courts.[11] The absence of analysis in these two decisions limits their usefulness in predicting how the Pennsylvania Supreme Court would rule on this issue.

Pennsylvania courts look to many factors in considering duty. "[T]he legal concept of duty of care is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice and society."[12] The determination of whether a duty exists requires courts to weigh several factors "include[ing]: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution."[13]

1. *Relationship Analysis*

Plaintiffs offer no evidence that Janine McCoy ever set foot on PolyVision's site or that she was exposed to asbestos at its site. The extent of

---

[8] *Id.* at *3 (noting that the no duty finding was in part based on foreseeability analysis).
[9] *Siemon v. A.O. Smith Corp.*, Oct. 19, 2006 slip op. (C.P. Alleg. Co. No. GD 06-9079) (ORDER).
[10] *Id.*
[11] *Id.*
[12] *Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000).
[13] *Id.*

her relationship appears to be that she was married to an employee of PolyVision. In a case similar to the one at bar, this court has previously opined that "[w]here the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts uniformly hold that an employer/premises owner owes no duty to a member of a household injured by take home exposure to asbestos."[14] In the same case the Delaware Supreme Court found a premises owner which provided a newsletter about staying safe at home to employees and their families did not have a "legally significant relationship" to which a duty would attach.[15] Other courts have found, "no relationship" between a premises owner/employer and the employee's spouse.[16] Mrs. McCoy and PolyVision "are 'legal strangers in the context of negligence.'"[17] This factor weighs heavily against a duty existing.

2. *Social Utility Analysis*

The court next looks to the social utility of PolyVision and its actions as it relates to asbestos use and Mrs. McCoy's exposure. PolyVision made and sold building panels. As an employer and profit generator for shareholders, PolyVision's business activities provide "a valuable and useful activity to society," which disfavors extending a duty.[18] On the other hand, society has an interest in being protected from exposure to disease causing toxins,

[14] *In re Asbestos Litig. Ltd. to Lillian Riedel*, 2007 WL 4571196, at *8 (Del. Super), *aff'd*, *ICI Americas*, 968 A.2d 17 (Del. 2009).
[15] *ICI Americas*, 968 A.2d at 26.
[16] *Holdamph v. A.C.&S., Inc.*, 840 N.E.2d 115, 120 (N.Y. 2005).
[17] *ICI Americas*, 968 A.2d at 26-27 (quoting 2007 WL 4571196, at *12).
[18] *Althaus*, 756 A.2d at 1170.

specifically asbestos here, which favors extending a duty. This factor does not tip the scale in either direction.

3. *Foreseeability Analysis*

There is much debate among the courts as to the role of foreseeability analysis in duty analysis. "In nearly every instance where courts *have* recognized a duty of care in a take home exposure case, the decision turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis."[19] In *Olivo v. Owens-Illinois, Inc.*[20] the New Jersey Supreme Court focused on foreseeability analysis and determined a duty existed. It found that the plaintiff's employer "should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks."[21] The Court ruled the employer similarly "owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing."[22]

In *Palsgraf v. Long Island Railroad Co.*,[23] perhaps the causation case best known among America's law students, then Chief Judge Cardozo performed foreseeability analysis. The Court explained the injured party "does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another . . . . He sues for breach of a duty owing to himself."[24]

---

[19] *Riedel*, 2007 WL 4571196, at *11.
[20] 895 A.2d 1143 (N.J. 2006).
[21] *Id.* at 1149.
[22] *Id.*
[23] 162 N.E. 99 (N.Y. 1928).
[24] *Id.* at 101.

Therefore relationship and foreseeability an inextricable intertwined. Judge Slights applied this concept from *Palsgraf* to the issue currently before the court:

> Even when the foreseeability prong is incorporated into the duty analysis, the Court cannot discern a relationship between the plaintiff and the defendant that would support a legal duty. [Defendant] clearly owed a duty to [its employee] just as the conductor in *Palsgraf* owed a duty to the passengers he was helping onto the train. But, just as in *Palsgraf*, the duty owed to [employee] does not vicariously pass on to [his spouse] in the absence of some independent relationship between [Defendant] and [spouse] that would justify the imposition of the duty. Her position at the time of the alleged wrong, far removed from [Defendant's] property, is such that she cannot be considered a reasonably foreseeable victim of the alleged breach of the duty [Defendant] owed to [employee] (in failure to warn and/or implement safety precautions).[25]

As shown through *Olivo* and *Riedel* courts have found weight for and against applying a duty under foreseeability analysis. The court does not find this factor to tip the scale in either direction.

4. *Consequence of Imposing a Duty*

The court also considers the consequences of burdening employers such as PolyVision with a duty of care beyond their employees. Learned Hand's risk/benefit analysis offers an economic approach to this factor. Judge Hand considered three variables: 1. the probability of injury (P); 2. "the gravity of the resulting injury" (L); and 3. the burden on Defendant to take adequate precautions (B).[26] Under this analysis liability extends or a duty exists if "B is

[25] *Riedel*, 2007 WL 4571196, at *12 (citations omitted).
[26] *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2nd Cir. 1947).

less than L multiplied by P: i.e., whether B less than PL."[27] Judge Hand incorporates a business focused economic analysis to his duty analysis.

The burden to be considered is not just to take adequate precautions for the employee's spouse. The court must consider the effect of its ruling if it were to find a duty exists. Certainly that duty would not be limited to spouses. Family members, babysitters, housekeepers, and laundry mat personnel would have a credible argument that the duty extended to them if they washed the employees clothes.[28] "The 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.'"[29] Taken a step farther, "there is no principled basis in the law" to distinguish the claim of a spouse who launders a household members clothes and is exposed to asbestos from a car pool passenger, bus driver, or neighbor who is exposed to asbestos from the employee's clothing.[30] "All have been exposed to asbestos from the employee's clothing; all arguably have intersected with the asbestos-covered employee in a foreseeable manner; and all would have viable claims of negligence against the employer/landowner if the take home exposure cause of action is permitted." Returning to Judge Hand, "[t]he burden upon the defendant to undertake to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great; the exposure to potential liability would be practically

---

[27] *Id.*
[28] *See Holdamph*, 840 N.E.2d at 122.
[29] *Id.* (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001)).
[30] *See Riedel*, 2007 WL 4571196, at *12.

limitless." The consequences are economically infeasible under Judge Hand's analysis and as such this factor weighs against extending a duty.

5. *Overall Public Interest*

Public interest supports plaintiffs having their day in court. But there are also public policy considerations supporting limitation on an injured person's ability to seek redress. Statutes of limitation, which exists in every jurisdiction in this country, are but one manifestation of these policy considerations.

Much of duty analysis is based on public policy. The public policy interests of states in the same region are likely to coincide more so than for states across the country from one another. For that reason, the court finds the rulings of courts of last resort in Pennsylvania's region most persuasive.

- As mentioned previously New York found no duty based on the lack of relationship between the parties and expressed special concern for the risk of "limitless liability."[31]
- Legislatures are in the business of public policy and in Ohio the legislature codified this limitation on duty.[32] Interpreting the statute the Ohio Supreme Court concluded "a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property unless the exposure occurred at the owner's properly."[33]

---

[31] *Holdamph*, 840 N.E. 2d. at 122.
[32] R.C. 2307.941(A).
[33] *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448, 449 (Ohio 2010).

- In considering a different toxic tort, the Maryland court relied in part on a lower court decision finding no duty in a take home asbestos exposure case and expressed an unwillingness to create a duty of care to an "indeterminate class of potential plaintiffs."[34]
- The Delaware Supreme Court focused its analysis on the Restatement (Second) of Torts and determined no duty existed because there was not a special relationship between the parties.[35]
- The New Jersey Supreme Court rejected the public policy argument that limitless liability would exist stating "[t]he duty we recognize in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband."[36]

Five of the states adjacent to Pennsylvania have considered the issue of take home liability and four of them have rejected it. The court finds the majority of the border states make the stronger argument and limitless liability is serious public policy concern of finding that a duty exists. Therefore, this factor weighs against a duty in this case.

[34] *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1096 (Md. 2005).
[35] *ICI Americas*, 968 A.2d at 26-27.
[36] *Olivo*, 895 A.2d at 1150.

CONCLUSION

Relationship analysis, consequence of imposing a duty, and overall public policy favor a finding of no duty. Social utility analysis and foreseeability analysis do not tip the scale in either direction. The court finds the relationship analysis the most persuasive factor. In weighing the factors as a whole the scale tips in favor of no duty existing. Therefore, the court finds under Pennsylvania law an employer/premises owner does not owe a duty to the spouse of an employee in the take homes asbestos exposure context. Accordingly, Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Dated: February 21, 2012 Judge John A. Parkins, Jr.