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Considering Duty in Take-Home Asbestos Exposure Cases

Jake Snow

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NOTE

CONSIDERING DUTY IN TAKE-HOME ASBESTOS EXPOSURE CASES

Jake Snow[†]

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[†] To God, Alana, Jeff, Wendy, Katie, Larry, Beverly, Fred, Lynn, and countless other family members, friends, and mentors, I say thank you. Each of my accomplishments are directly attributable to your loving support.

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ABSTRACT

The National Institutes of Health (“NIH”) estimates that between 1940 and 1978 eleven million people were exposed to asbestos. Unfortunately, asbestos usage was prevalent long before its harmful effects were discovered. Taking anywhere from twenty to fifty years to develop, up to 10% of people with prolonged exposure to asbestos contract mesothelioma. Thought to be harmless, asbestos was often used as insulation in many buildings because of its fire resistant qualities. As a result, companies exposed their employees to asbestos on a daily basis for decades. Asbestos’ fibrous quality allows the mineral to embed itself in fabrics, including the fabrics of employees’ clothing. Workers exposed to asbestos, who went home with asbestos fibers embedded in their clothing, often accidentally exposed their family members and others to asbestos. This take-home exposure to asbestos resulted in sickness and death for many people unaffiliated with the asbestos worker’s company.

Family members exposed to secondhand asbestos often file negligence actions against their loved ones’ employers. In these cases, the family member plaintiffs, often dealing with a fatal illness and a mountain of hospital bills through no fault of their own, typically allege that the employer negligently managed the toxin. Conversely, defendants, facing a hefty lawsuit from a remote plaintiff, frequently argue that they owed no duty to the plaintiffs because these plaintiffs never worked for them.

As the saying goes, hard cases make bad law. The tension between plaintiffs with large losses and defendants with only remote responsibility creates complicated cases, and as a result, inconsistent law. In determining whether an employer owes a duty to a non-employee whose exposure to asbestos occurred off premises, state courts have applied different tests, thereby achieving wildly different results in cases involving substantially similar fact patterns.

This Note proposes a multi-factored test that emphasizes the importance of foreseeability in duty determinations. In the first section it discusses the

1. ASBESTOS.COM, <https://www.asbestos.com/mesothelioma/statistics.php> (last visited Jul. 27, 2017).

2. *Id.*

case precedent that illustrates the various approaches utilized by courts around the nation. The second section describes the solutions explored by secondary sources. In the last section, this Note advocates for a modified version of the *Satterfield v. Breeding Insulation Co.* test. Like the test in *Satterfield*, this modified test will emphasize the importance of foreseeability as a necessary first step in duty analysis. However, unlike the *Satterfield* test, this modified test will not consider whether the conduct constitutes misfeasance or nonfeasance as a factor in determining whether companies owe third-party plaintiffs a duty of care in take-home exposure cases. Finally, although courts are (in many jurisdictions) without statutory authority on the matter, this Note takes the position that legislative action can solve this problem much more efficiently than judicial action. The legislature should direct the courts to consider certain factors rather than allowing them to create their own judicial balancing test.

I. INTRODUCTION

Numerous negligence claims involving take-home asbestos exposure were filed in the last twenty years.³ With some variation, most of these cases follow a general fact pattern: Company *B* employs *A*. In the course of employment, *A* is exposed to asbestos fibers. These fibers attach to *A*'s clothing, and he exposes family member *C* to the asbestos fibers somewhere outside the workplace. *C* develops mesothelioma and brings a suit to recover damages from Company *B*. Because mesothelioma is an "asbestos-related cancer,"⁴ causation and damages are usually not the primary concern, leaving the duty determination as the sole disputed issue. Accordingly, Company *B* frequently argues that it owes no duty to family member *C*, a third-party plaintiff, who was exposed to the asbestos off-site. Despite similar fact patterns in most cases,⁵ courts have applied many

3. Sheila Doyle Kelley & Allison N. Fihma, *United States: Recent Trends in Asbestos Litigation*, MONDAQ, <http://www.mondaq.com/unitedstates/x/203748/Personal+Injury/Recent+Trends+in+Asbestos+Litigation> (last visited Oct. 15, 2016).

4. ASBESTOS.COM, <https://www.asbestos.com/mesothelioma/> (last visited Oct. 15, 2016).

5. See generally *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011); *Miller v. Ford Motor Co.* (*In re Certified Question from Fourteenth Dist. Ct. App. of Tex.*), 740 N.W.2d 206, 209 (Mich. 2007); *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

different tests to determine duty, consequently reaching wildly different results.⁶

A. *Satterfield Gave Great Weight to Foreseeability Over Other Factors.*

In *Satterfield v. Breeding Insulation Co.*, twenty-four-year-old Amanda Satterfield died from mesothelioma.⁷ Her estate tried to recover damages from her father's employer, Alcoa.⁸ In many of its operations, Alcoa used asbestos.⁹ In the 1930s, Alcoa became aware that asbestos is a highly dangerous substance and discovered that "the air in its factories contained high levels of asbestos fibers and that its employees were being exposed to these fibers on a daily basis."¹⁰ Later, in the 1960s, Alcoa learned that the family members of its employees were at increased medical risk due to their regular exposure to asbestos on employee clothing.¹¹ In 1972, the Occupational Safety and Health Administration ("OSHA") released regulations that prohibited employees who had been exposed to asbestos from taking their work clothes home to be laundered.¹² These regulations notified all American businesses of the harmful effects of asbestos exposure.

Ms. Satterfield's father, Doug Satterfield, worked at Alcoa after the OSHA regulations on asbestos were released.¹³ His assignments resulted in daily exposure to high levels of asbestos dust and fibers, but Alcoa did not educate Mr. Satterfield about the risks associated with handling asbestos.¹⁴ During Mr. Satterfield's time with Alcoa, Ms. Amanda Satterfield was born prematurely and spent the first three months of her life in the hospital.¹⁵ Every day, Mr. Satterfield visited his daughter in "the hospital immediately after work [while] wearing his asbestos-contaminated work clothes."¹⁶ Accordingly, "from the day of her birth, Ms. Satterfield was exposed to the asbestos fibers on her father's work clothes."¹⁷ When Ms. Satterfield was

6. See generally *Price*, 26 A.3d at 162; *Miller*, 740 N.W.2d at 209; *Boley*, 929 N.E.2d at 448; *Satterfield*, 266 S.W.3d at 347.

7. *Satterfield*, 266 S.W.3d at 351.

8. *Id.*

9. *Id.* at 352.

10. *Id.*

11. *Id.* at 352-53.

12. *Id.* at 353.

13. See *Satterfield*, 266 S.W.3d at 353.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

diagnosed with mesothelioma, she filed suit against Breeding Insulation Company (“Breeding”) and Alcoa.¹⁸ Following her unfortunate death at the young age of twenty-four, her father was substituted as plaintiff and voluntarily dismissed the claims against Breeding.¹⁹ Alcoa, however, argued that it owed no duty to its employee’s daughter.²⁰ After the trial court dismissed the claim, the Tennessee Court of Appeals reversed the dismissal. The Tennessee Supreme Court affirmed the appellate court’s ruling.²¹

In *Satterfield*, the issue was whether Alcoa owed a duty of reasonable care to Ms. Satterfield.²² To resolve this matter, the court first looked to the distinction between misfeasance and nonfeasance.²³ The court, having determined that there was misfeasance in this case, heavily emphasized the importance of foreseeability in determining whether a defendant owed a duty to a plaintiff.²⁴ Only if the injury to the plaintiff was foreseeable could the defendant owe a duty to the plaintiff.²⁵ Then, after determining foreseeability, the *Satterfield* court sought to determine if there were any countervailing principles that prevented the defendant from owing a duty to the plaintiff.²⁶

The *Satterfield* court described two potential categories of negligence cases. In the first category, defendants “[have] engaged in an affirmative act that created an unreasonable and foreseeable risk of harm to [the plaintiff].”²⁷ For cases in this category, the court considers whether “countervailing legal principles or policy considerations warrant determining that [the defendant] nevertheless owed no duty [to the plaintiff].”²⁸ In the second possible category of cases, defendants are negligent by omission.²⁹ In these cases, the court looks to see whether there is “the sort of special relationship . . . that gives rise to a duty.”³⁰ Because

18. *Id.*

19. *See Satterfield*, 266 S.W.3d at 354.

20. *Id.* at 352.

21. *Id.*

22. *Id.*

23. *Id.* at 355.

24. *See id.* at 364-65.

25. *Satterfield*, 266 S.W.3d at 366.

26. *Id.* at 355.

27. *Id.*

28. *Id.*

29. *See id.* at 355.

30. *Id.*

duty is an essential element of all negligence claims,³¹ the *Satterfield* court reasoned that Ms. Satterfield's claim would fail if Alcoa did not owe her a duty.³²

Generally, "persons have a duty . . . to refrain from engaging in affirmative acts that a reasonable person 'should recognize as involving an unreasonable risk of causing an invasion of an interest of another' or acts 'which involve[] an unreasonable risk of harm to another.'"³³ However, this general rule does not necessarily "require that persons always act reasonably to secure the safety of others."³⁴ Instead, the general rule against engaging in unreasonably risky affirmative acts "serve[s] a more limited role as restraints upon a person's actions that create unreasonable and foreseeable risks of harm to others."³⁵

Next, the *Satterfield* court elaborated on the distinction between misfeasance and nonfeasance. Misfeasance is "active misconduct working positive injury to others," while nonfeasance constitutes "passive inaction," such as "a failure to take positive steps to benefit others, or [failing] to protect them from harm not created by any wrongful act of the defendant."³⁶ However, it is possible for omissions to be categorized as misfeasance.³⁷

After explaining the general duty to refrain from unreasonably risky acts, the *Satterfield* court noted that the "no duty to act" rule is not without exception. In cases where certain special relationships exist between the defendant and either the source of the danger or the person who is foreseeably at risk from the danger, "[t]hese relationships create an affirmative duty either to control the person who is the source of the danger or to protect the person who is endangered."³⁸

After explaining its own view of the law, the court then compared the precedent established by other state courts. Some courts have held that there can be no liability in the absence of a special relationship between the

31. *Satterfield*, 266 S.W.3d at 355.

32. *Id.*

33. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS §§ 284, 302, (1965) (alterations in original)).

34. *Id.*

35. *Id.*

36. *Id.* at 355-56 (quoting Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L.REV. 217, 219 (1908)).

37. *Satterfield*, 266 S.W.3d at 357.

38. *Id.* at 359-60 (quoting RESTATEMENT (SECOND) OF TORTS § 314A, B; 315 (1965)).

plaintiff and the employer,³⁹ while others have held that employers commit misfeasance by operating their factories in such a way as to create an unreasonable risk of harm of asbestos exposure to those who came into contact with its employees.⁴⁰ The *Satterfield* court held that requiring a special relationship for there to be a duty would be misplaced under Tennessee tort law.⁴¹ The court explained that “[w]hether a case involves a simple automobile accident or a complicated toxic tort, Tennessee law currently provides that one owes a duty to refrain from engaging in conduct that creates an unreasonable and foreseeable risk of harm to others.”⁴²

The *Satterfield* court further held that the case “involve[d] a risk created through misfeasance.”⁴³ The court emphasized that “Alcoa was aware of the dangerous amounts of asbestos on its employees’ clothes,” yet “did not inform its employees that the materials that they were handling contained asbestos or of the risks posed by asbestos fibers to the employees or to others.”⁴⁴ In addition, “Alcoa dissuaded its employees from using on-site bathhouse facilities, and it failed to provide coveralls or to wash its employees’ work clothes at the factory.”⁴⁵ These facts constituted misfeasance.

The duty inquiry did not end after determining whether there was misfeasance or nonfeasance.⁴⁶ The *Satterfield* court next considered whether a duty existed, and if so, to what extent.⁴⁷ In determining the existence and scope of duty, the court considered public policy because “the concept of duty is largely an expression of policy considerations.”⁴⁸ Though public policy is important, the *Satterfield* court emphatically rejected any notion that “the concept of duty is a freefloating application of public policy.”⁴⁹ The court reasoned that because “[i]n most cases today . . . the presence or absence of a duty is a given rather than a matter of reasoned debate,

39. See *id.* at 361 (citing *Miller v. Ford Motor Co.* (*In re Certified Question from Fourteenth Dist. Ct. App. of Tex.*), 740 N.W.2d 206, 222 (Mich. 2007)).

40. See *id.* at 362 (citing *Rochon v. Saberhagen Holdings, Inc.*, No. 58579–7–I, 2007 WL 2325214 (Wash. Ct. App. Aug. 13, 2007)).

41. *Id.*

42. *Id.* at 363.

43. *Satterfield*, 266 S.W.3d at 364.

44. *Id.* at 363.

45. *Id.*

46. *Id.* at 364.

47. *Id.*

48. *Id.* at 364–65 (quoting *Burroughs v. McGee*, 118 S.W.3d 323, 329 (Tenn. 2003)).

49. *Satterfield*, 266 S.W.3d at 365.

discussion, or contention,”⁵⁰ courts should “turn to public policy for guidance” when “the existence of a particular duty is not a given or when the rules . . . are not readily applicable.”⁵¹

After noting the role public policy plays in determining the existence and scope of one’s duty, the court listed eight factors that are useful for this public policy determination:

- (1) the foreseeable probability of the harm or injury occurring;
- (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct.⁵²

Regarding foreseeability, the court analyzed Alcoa’s knowledge of asbestos. Given that Alcoa knew of asbestos’ many dangers and chose not to inform its employees of these dangers, “it was foreseeable that Ms. Satterfield would come into close contact with Mr. Satterfield’s work clothes on an extended and repeated basis.”⁵³ After determining that the risk of Ms. Satterfield being exposed to asbestos fibers was foreseeable, the court shifted its analysis to a balancing of the other factors.⁵⁴

The potential harm to Ms. Satterfield was great because of the risk of fatal illnesses caused by exposure to asbestos.⁵⁵ As for importance or social value of the activity engaged in by the defendant and usefulness of the conduct to the defendant, the court noted the social value of job creation and manufacturing useful products.⁵⁶ However, no connection between the allegedly negligent acts and Alcoa’s ability to provide employment or manufacture useful products was found.⁵⁷ There was no demonstration that “the sort of exposure to asbestos that is involved in this case is a largely

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 367. The court also considered that “Alcoa allegedly (1) failed to inform its employees that they were working with materials containing asbestos; (2) failed to provide its employees with or to require them to wear protective covering on their clothes; (3) actively discouraged its employees’ use of on-site bathhouse facilities for changing or cleaning.” *Id.*

54. *Satterfield*, 266 S.W.3d at 367.

55. *Id.* at 368.

56. *See id.*

57. *Id.*

unavoidable part of its manufacturing operations.”⁵⁸ Considering whether alternative conduct was feasible, the court found that Alcoa could have greatly reduced the risk of asbestos exposure without undue burden.⁵⁹ The court stated that “Alcoa had a duty to use reasonable care to prevent exposure to asbestos fibers not only to its employees, but also to those who came into close regular contact with its employees’ contaminated work clothes over an extended period of time.”⁶⁰

Finally, the *Satterfield* court addressed the argument that Ms. Satterfield fell outside the “proper scope of the class of persons to whom a duty is owed in cases of this sort.”⁶¹ Alcoa argued that recognizing Ms. Satterfield’s claim would greatly expand the scope of employers’ duty, explaining as follows:

[N]o principled basis exists to limit the duty to the members of the employee’s immediate family living in the employee’s house and thus that recognizing a duty to these family members will eventually result in the recognition of a duty with regard to babysitters, housekeepers, home repair contractors, and next-door neighbors.⁶²

While acknowledging the validity of Alcoa’s concerns,⁶³ the court held that “[p]ublic policy does not warrant finding that there is no duty owed to such persons.”⁶⁴ *Satterfield* recognized the existence of a duty, relying upon the notion that the defendant had created a risk.⁶⁵ The court limited the class of persons to whom a duty is owed to “persons who came into close and regular contact over an extended period of time with its employees’ work clothes.”⁶⁶ *Satterfield* found this “fair and proportional duty” to be

58. *Id.*

59. *Id.* The risk of asbestos exposure

[C]ould have been greatly reduced had Alcoa (1) provided basic warnings to its employees about the dangers of asbestos, (2) required safer handling of the materials containing asbestos, (3) provided coveralls to its employees, (4) required employees to change their clothes before leaving the workplace, (5) laundered its employees’ work clothes on site, or (6) encouraged its employees to use the on-site bathroom facilities before leaving work.

Satterfield, 266 S.W.3d at 368.

60. *Id.* at 369.

61. *Id.* at 373.

62. *Id.* at 374.

63. *Id.*

64. *Satterfield*, 266 S.W.3d at 374.

65. *Id.* at 375.

66. *See id.*

“neither limitless nor impractical.”⁶⁷ Accordingly, the Tennessee Supreme Court held that the trial court erred by awarding Alcoa judgment on the pleadings; it affirmed the appellate court’s reversal of the trial court and remanded the case back to the trial court.

B. Approaches Taken by Other State Courts

Like the Tennessee Supreme Court, other state supreme courts heavily emphasized foreseeability, while others rejected the use of foreseeability in determining the existence of a duty altogether. However, each of the other courts differ from *Satterfield* to some degree regarding the importance it attaches to foreseeability in determining the existence and scope of one’s duty to prevent take-home asbestos exposure to third parties.

1. Foreseeability Focus

Many courts emphasize the importance of foreseeability in analyzing duty for take-home asbestos exposure cases.⁶⁸ In *Rochon v. Saberhagen Holdings, Inc.*, the plaintiff’s husband was exposed to asbestos during his employment, and he brought those asbestos fibers into their home on his clothing.⁶⁹ The plaintiff alleged that she inhaled those fibers while laundering her husband’s clothing and as a result eventually developed mesothelioma.⁷⁰

Similar to the Tennessee Supreme Court, the Washington Court of Appeals in *Rochon* noted that “[w]hether an affirmative duty to act exists depends upon many factors, including ‘mixed considerations of logic, common sense, justice, policy, and precedent.’”⁷¹ The *Rochon* court, like *Satterfield*, considered foreseeability to be “part of the duty inquiry.”⁷² In *Rochon*, the court explained that “[t]he most common and obvious [way for a legal duty to arise] is when a party takes an affirmative action that results in an unreasonable risk of harm to others.”⁷³ The court noted that an act is

67. *Id.* at 375.

68. See generally *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1098 (Ill. 2012) (referring to foreseeability as a “necessary factor to finding a duty”); *Satterfield*, 266 S.W.3d at 366 (noting foreseeability’s “paramount importance”); *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-1, 2007 WL 2325214 (Wash. Ct. App. Aug. 13, 2007) (remanding for discovery on foreseeability).

69. *Rochon*, 2007 WL 2325214, at *1.

70. *Id.*

71. *Id.*

72. *Id.* (determining “[w]hether harm is foreseeable is part of the duty inquiry”).

73. *Id.* at *2.

only “unreasonable’ . . . if a reasonable person would have foreseen the risk.”⁷⁴ If this reasoning is to be followed, foreseeability is necessarily relevant to the determination of whether a duty exists.

The *Rochon* court further analyzed whether, under the facts of the case, the defendant owed a duty to the plaintiff.⁷⁵ Its conclusion resembled the *Satterfield* court’s in that it was the defendant’s “own affirmative acts—operating its own factory in an unsafe manner—that allegedly caused [the plaintiff’s] illness, not either a failure to act or the act of a third party.”⁷⁶ The court rejected an argument from the defendant that “extending a duty to [the plaintiff] will expose employers to endless litigation.”⁷⁷ Much like *Satterfield*, the *Rochon* court disagreed with this argument,⁷⁸ citing limiting factors such as the requirement for causation;⁷⁹ that the duty arises only regarding damage caused by the defendant’s own affirmative acts;⁸⁰ and the role courts and juries can play in limiting duty⁸¹ as reasons for disagreement. However, unlike the *Satterfield* court,⁸² *Rochon* did not consider other factors that limit the scope of one’s duty.

2. Legal Relationship Focus

In *Price v. E.I. DuPont de Nemours & Co.*, the Delaware Supreme Court focused its duty analysis on whether the conduct complained of was misfeasance or nonfeasance.⁸³ In *Price*, the plaintiff was exposed to asbestos fibers while living with her husband from 1957 to 1991.⁸⁴ Her husband, who worked for DuPont, was exposed to the fibers at work, which caused the plaintiff to be repeatedly exposed to the fibers at home.⁸⁵ The plaintiff alleged that “DuPont knew or should have known that the asbestos fibers

74. *Id.*

75. *See Rochon*, 2007 WL 2325214, at *2-3.

76. *Id.* at *3.

77. *Id.* at *4.

78. *See id.*

79. *See id.* at *5 (stating that a “general duty to act reasonably . . . will only extend to a victim if the victim *proves* that his or her injury was a foreseeable *consequence* of its actions”) (emphasis added).

80. *See id.* at 4. (“[T]he duty is only one to act reasonably to prevent injury from [defendant’s] own risky acts, not to protect [plaintiff] from acts of third parties or from circumstances it did not create.”).

81. *See Rochon*, 2007 WL 2325214, at *4.

82. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 365 (Tenn. 2008).

83. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 167-68 (Del. 2011).

84. *Id.* at 164.

85. *Id.*

would be transported.”⁸⁶ The court determined that the conduct constituted nonfeasance.⁸⁷ Because the conduct constituted nonfeasance, the court required the plaintiff to allege that a “‘special relationship’ existed between her and [the defendant] in order for [the defendant] to owe her a duty of care.”⁸⁸ The court held that the plaintiff had not established any special relationship, and that accordingly, the defendant did not owe the plaintiff a duty.⁸⁹

3. Factor Balancing Approach

In *CSX Transp. Inc. v. Williams*, four plaintiffs brought suit under Georgia negligence law, claiming that “‘clothing exposure” contributed to their asbestos-related disease.⁹⁰ The Georgia Supreme Court framed the issue as whether an employer owed a duty to third-party, non-employees who encounter asbestos-tainted work clothing at locations away from the workplace.⁹¹ The court first considered whether CSXT owed a duty as an employer to a third-party. Although “[u]nder Georgia statutory and common law, an employer owes a duty to his employee to furnish a reasonably safe place to work and to exercise ordinary care and diligence to keep it safe,”⁹² the plaintiffs were not employees of CSXT. Therefore, CSXT owed no specific duty to the plaintiffs.⁹³ Next, the court discussed “‘duties beyond the scope of an employer’s duty to provide a safe workplace.”⁹⁴ In doing so, the court considered a combination of three factors: (1) whether there was an employer-employee relationship;⁹⁵ (2) whether there was misfeasance;⁹⁶ and (3) whether the exposure occurred at the workplace.⁹⁷

86. *Id.* at 165.

87. *Id.* at 168.

88. *Id.* at 169.

89. *Price*, 26 A.3d at 169-70.

90. *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005).

91. *Id.*

92. *Id.* at 209.

93. *Id.*

94. *Id.* at 210.

95. *See id.* (“The court in that case held the common law duty to provide employees with a safe workplace ‘has not been extended to encompass individuals . . . who are neither “employees” nor “employed” at the worksite.’”).

96. *See Williams*, 608 S.E.2d at 210 (“[W]here one by his own act . . . creates a dangerous situation, he is under a duty to remove the hazard or give warning of the danger However, these cases do not involve CSXT itself spreading asbestos dust among the general population, thereby creating a dangerous situation . . .”).

97. *See id.*

Relying on these factors, the Georgia Supreme Court held that “Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee’s asbestos-tainted work clothing at locations away from the workplace.”⁹⁸

4. Limiting Widespread Liability

In the case of *In re N.Y.C. Asbestos Litig.*, the Court of Appeals of New York considered whether the defendant, the New York City Port Authority (“NYCPA”), owed a duty to plaintiff-wife, who was injured by at-home exposure to asbestos dust that plaintiff-husband brought home on his work clothes.⁹⁹ The court listed several factors that courts traditionally balance to make duty determinations,¹⁰⁰ but ultimately sought to limit the potential expansion of liability.¹⁰¹ In its analysis, the court rejected the notion that foreseeability defines duty.¹⁰² The court, instead, considered foreseeability to be a factor that determines the scope of one’s duty, but only after it has been determined that a duty exists.¹⁰³

The court then considered the plaintiff’s arguments that the NYCPA owed a duty by virtue of its status as an employer.¹⁰⁴ Considering precedent from multiple jurisdictions, including *CSX Transp., Inc. v. Williams*,¹⁰⁵ the court held that an employer only owes a duty to provide a “safe workplace” to its employees.¹⁰⁶ The court then addressed the plaintiff’s alternative claim that the NYCPA owed a duty of care due to its status as a landowner. The court noted that “[a] landowner generally must ‘exercise reasonable care, with regard to any activities which he carries on, for the protection of those

98. *Id.* at 210.

99. *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115, 116 (N.Y. 2005).

100. *Id.* at 119 (“Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.”).

101. *See id.* (“Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree;” and discussing “the specter of limitless liability” as well as “judicial resistance to expansion of duty.”).

102. *Id.* (“Foreseeability, alone, does not define duty . . .”).

103. *Id.*

104. *Id.* at 120-22.

105. *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d at 121.

106. *Id.* at 120-21.

outside of his premises.”¹⁰⁷ However, the court suggested that the plaintiffs were, “in effect, asking us to upset our long-settled common-law notions of an employer’s and landowner’s duties.”¹⁰⁸ The court balked at the idea of the defendant owing the plaintiff-wife a duty, instead it suggested that a finding of duty in this case would create limitless liability.¹⁰⁹

5. Judicial Reliance on State Legislature

In *Boley v. Goodyear Tire & Rubber Co.*, the wife of an employee working with asbestos-containing materials sued Goodyear when she was diagnosed with malignant mesothelioma years after her husband had stopped working for the company.¹¹⁰ The defendant moved for summary judgment, relying on an Ohio statute.¹¹¹ The statute provided that premises owners are “not liable for any injury to any individual resulting from asbestos exposure unless that individual’s alleged exposure occurred while the individual was at the premises owner’s property.”¹¹² The trial court entered summary judgment in favor of the defendant,¹¹³ the appellate court affirmed,¹¹⁴ and the Ohio Supreme Court affirmed.¹¹⁵ Rather than engaging in complicated balancing tests and “implicat[ing] [the] core principles of [state] tort law,”¹¹⁶ the Ohio Supreme Court adjudicated by applying Ohio’s statutory scheme. In effect, the state legislature took the balancing of social policy out of the judicial branch’s hands. Accordingly, the court was able to rely on canons of statutory construction to adjudicate rather than judicial balancing.¹¹⁷

107. *Id.* at 121 (citing W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 57, at 387 (5th ed. 1984)).

108. *Id.* at 122.

109. *See id.* (“This line is not so easy to draw, however. . . . [T]he ‘specter of limitless liability’ is banished only when ‘the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship’”); *see also id.* (“[W]e must consider the likely consequences of adopting the expanded duty urged by plaintiffs.”).

110. *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 449-50 (Ohio 2010).

111. *Id.* at 450.

112. OHIO REV. CODE ANN. § 2307.941(A)(1) (West).

113. *Boley*, 929 N.E.2d at 450.

114. *Id.*

115. *Id.* at 453.

116. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 354 (Tenn. 2008).

117. *See generally Boley*, 929 N.E.2d at 452. (choosing a construction that “[gave] such interpretation as will give effect to every word and clause in it . . . the legislative intent behind R.C. 2307.941(A) is apparent”).

C. Secondary Source Approaches

Secondary sources have differing views on the take-home exposure cases. While some have taken the view that take-home exposure cases have no merit,¹¹⁸ others have created balancing tests.¹¹⁹

1. The Unwarranted Basis for Today's Asbestos "Take-Home" Cases

One solution proposed by secondary sources is that courts should take an approach similar to *In re N.Y.C. Asbestos*,¹²⁰ which seeks to limit liability in take-home cases. In *The Unwarranted Basis for Today's Asbestos "Take-Home" Cases*, the author's argument emphasizes causation and the probability that take-home asbestos exposure results in mesothelioma.¹²¹ Finding the probability of developing mesothelioma to be low,¹²² the author attacked the credibility of testifying plaintiffs' experts that suggest low levels of take-home exposure can cause mesothelioma.¹²³ Instead, the author suggested that spontaneous disease is the real cause for most mesothelioma diagnoses.¹²⁴

Under the author's view, plaintiffs proceed beyond summary judgment too easily because experts routinely testify that "any exposure" can lead to the development of mesothelioma.¹²⁵ To solve this problem, the author proposed multiple solutions. First, considering the experts' any exposure theories, the author suggested that courts should limit the duty owed by employers by including "an outright restriction on duty beyond the immediate workplace."¹²⁶ Second, the author suggested that courts should

118. William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take-Home" Cases*, 39 AM. J. TRIAL ADVOC. 107, 129 (2015).

119. Meghan E. Flinn, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707, 746 (2014).

120. See *supra* Section I.B.4.

121. Anderson, *supra* note 118, at 114-15 (considering what the graph would have looked like had "even the most minimal level of 'take-home' asbestos fibers cause[d] spousal mesothelioma").

122. *Id.* at 115 ("Thus, the actual incidence of mesothelioma illustrates exactly how hard it is to develop mesothelioma from take-home exposures. The dose received really does matter.").

123. *Id.* ("Given this data, it is virtually certain that low levels of take-home, clothes-washing exposures do not cause mesothelioma, and plaintiff experts are incorrect when they so testify.").

124. *Id.* at 116.

125. See *id.* at 122-24.

126. *Id.* at 127.

consistently reject the any exposure theory and require plaintiffs to “prove a causative dose consistent with epidemiology studies showing disease in exposed populations.”¹²⁷

2. Multi-Factored Judicial Test Solution

Another proposed solution includes a multi-factored test. *Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure* noted that while “courts commonly hold four specific factors as important in duty analysis: the foreseeability of harm, the relationship between the parties, the burden that creating a duty will place on the defendant, and public policy considerations . . . [n]one of these factors alone suffices to establish a duty.”¹²⁸ Accordingly, the author creates a test that combines the four factors, creating a flexible test that allows state courts to apply their own state law while respecting the policy considerations of the Restatement (Third) of Torts.¹²⁹ Finally, the article proposes that despite the flexibility of the judicial test, a legislative action could solve the take-home exposure problem much more effectively than the courts.¹³⁰

II. FOCUSING ON FORESEEABILITY IN A MULTI-FACTORED BALANCING TEST BEST ADJUDICATES DUTY’S ROLE IN COMMON LAW NEGLIGENCE ACTIONS.

The ideal test for adjudicating duty is a multifactor test that focuses on foreseeability as a threshold determination. Under this paradigm, foreseeability would be treated as an essential element necessary to prove the existence of a duty owed by the employer to the third-party plaintiff. Only after foreseeability is established should the court continue its analysis with other factors such as the existence of a legal relationship, the burden of preventing the harm, the possible magnitude of the potential harm or injury, the feasibility of alternative conduct, and the relative safety of that alternative conduct.

Upon a finding of foreseeable injury, these other factors serve as a way for courts to determine the scope of this duty. They are only relevant if the court finds that the injury was foreseeable. Absent a finding of foreseeable

127. Anderson, *supra* note 118, at 127-28.

128. Flinn, *supra* note 119, at 746.

129. *See id.* at 751 (“Allowing for flexibility within the structure of a four-prong test ensures that a state can conform to its negligence jurisprudence while bringing an element of uniformity to duty analysis nationwide.”).

130. *See id.* at 751-56.

harm, other factors need not be considered because there is no duty without foreseeability.

Under this test, “to prevail on a negligence claim, a plaintiff must show that the risk was foreseeable, but that showing is not, in and of itself, sufficient to create a duty. Instead, if [the court finds the risk foreseeable, it will] then undertake the balancing analysis.”¹³¹ Much like *Satterfield*’s test, this multi-step analysis may involve a balancing of several factors, but, unlike *Satterfield*, this test will not distinguish between misfeasance and nonfeasance. Although there is a distinction between misfeasance and nonfeasance,¹³² this distinction has been given too much power in other tests. Furthermore, this test expressly rejects “no duty” findings for the purpose of avoiding “the specter of limitless liability.” This is not to say that public policy may not limit one’s duty, but rather that a court seeking to limit duty on public policy grounds must refer to some specific public interest or policy that would be furthered by finding no duty.

A. *Foreseeability First: Why Foreseeability Is Essential and Why Foreseeability Must be Considered First*

There are many policies that can be considered when determining whether a duty exists,¹³³ but above all, foreseeability should be treated as a necessary element of duty. However, foreseeability alone is insufficient to create a duty.¹³⁴ Rather, foreseeability should be considered first as a threshold issue.

1. Foreseeability is a practical first step in analysis because it limits frivolous claims.

Examining foreseeability first can help courts limit the number of frivolous claims in asbestos litigation. “The United States Supreme Court has noted [that there is an] ‘elephantine mass of asbestos cases.’”¹³⁵ Most

131. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008).

132. In cases of misfeasance, “the defendant has created a new risk of harm to the plaintiff,” but in cases of nonfeasance, “he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.” *Satterfield*, 266 S.W.3d at 356.

133. See generally *Chaisson v. Avondale Indus.* 947 So. 2d 171, 182 (La. Ct. App. 2006).

134. *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 31 (2012), as modified on denial of reh’g (June 19, 2012) (quoting *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999)) (“[F]oreseeability alone is not sufficient to create an independent tort duty.”); *Miller v. Ford Motor Co. (In re Certified Question from Fourteenth Dist. Ct. App. of Tex.)*, 740 N.W.2d 206, 212 (Mich. 2007) (“[T]hat the harm was foreseeable is also not dispositive.”).

135. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 369 (Tenn. 2008) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)).

asbestos claims result “from attorney-sponsored mass screenings and involve plaintiffs with little or no asbestos-related impairment.”¹³⁶ With so many claims, some of them frivolous, it is important that courts find a way to efficiently adjudicate these cases without unjustly excluding meritorious claims. By treating foreseeability as the threshold element of duty analysis, courts can “quickly eliminate factually deficient cases at summary judgment.”¹³⁷ If faced with a case where the harm was not foreseeable, “a court could rule in favor of the defendant on the issue of duty without resorting to a jury.”¹³⁸ This approach allows courts to categorically remove cases in which the harm was not foreseeable, without dismissing valid claims unnecessarily. A claim dismissed for lack of foreseeability is dismissed for good cause.¹³⁹ Likewise, a case featuring foreseeable injury deserves further analysis on the duty issue.

Although not universally accepted,¹⁴⁰ the idea of addressing foreseeability first is shared among many jurisdictions, even those that give substantial weight to other factors. For example, the Supreme Court of Michigan, despite its reliance on the relationship of the parties, noted that “[w]hen the harm is not foreseeable, no duty can be imposed on the defendant. But when the harm is foreseeable, a duty still does not necessarily exist.”¹⁴¹ Likewise, the Supreme Court of Illinois understands foreseeability to be essential to duty determinations. “Though foreseeability is not the only factor we consider, it is a necessary factor to finding a duty. If the injury was not reasonably foreseeable, no duty can exist.”¹⁴² By giving foreseeability such heavy emphasis and by utilizing foreseeability as a necessary starting point, this test reflects the common value shared by multiple state courts and the Restatement (Third) of Torts.¹⁴³

136. Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477, 477 (2006).

137. Flinn, *supra* note 119, at 747.

138. *Id.* at 748.

139. See *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1098 (Ill. 2012) (“Though foreseeability is not the only factor we consider, it is a necessary factor to finding a duty. If the injury was not reasonably foreseeable, no duty can exist.”).

140. See generally *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115, 119 (N.Y. 2005) (explaining that foreseeability is only used after duty is determined).

141. *Miller v. Ford Motor Co. (In re Certified Question from Fourteenth Dist. Ct. App. of Tex.)*, 740 N.W. 2d 206, 212 (Mich. 2007).

142. *Simpkins*, 965 N.E.2d at 1098.

143. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. LAW INST. 2010) (“Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in

2. Examining foreseeability first does not create unlimited liability.

Some defendants argue that companies will be exposed to enormous financial burden if exposed to liability for illnesses caused by exposure to asbestos fibers in the manufacturing process.¹⁴⁴ This argument is unpersuasive for three reasons.¹⁴⁵ First, from a logical perspective, a principle of law that emphasizes foreseeability does not create a new and endless stream of plaintiffs via *stare decisis*; it merely focuses on particularized circumstances in a particular case. Though two separate cases may both involve foreseeable harm, these two cases may have factual differences. These factual differences may include the availability of alternative conduct to a given defendant, or perhaps the social utility the defendant's conduct. Second, the structure of the negligence cause of action, as well as the test for which this Note advocates, requires plaintiffs to prove much more than mere foreseeability. Simply emphasizing foreseeability does not cause widespread liability.¹⁴⁶ Third, because of the structural safeguards inherent in the negligence cause of action, any potential expansion of liability arising out of an emphasis on foreseeability is not unjust.¹⁴⁷

A court does not broaden liability by emphasizing foreseeability, nor does a court broaden liability by considering foreseeability first. Consider *Olivo v. Owens-Illinois, Inc.*; there, the court suggested that “public policy concerns about the fairness and proportionality of [a duty arising out of foreseeable risk] should dissipate”¹⁴⁸ because “[t]he duty . . . recognize[d] in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife.”¹⁴⁹

The *Olivo* court is not alone in making this assertion.¹⁵⁰ In fact, the idea that finding a duty to third parties in take-home exposure cases would create limitless liability “seriously overstates what the consequences of

harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”)

144. See *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 371 (Tenn. 2008) (Defendant suggests that “manufacturers who use materials containing asbestos in their manufacturing process will face enormous financial burdens if they are exposed to liability for illnesses caused by exposure to asbestos fibers in their manufacturing processes.”).

145. *Id.* (“We find this argument unpersuasive.”).

146. See *Satterfield*, 266 S.W.3d at 375; *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214 at *4 (Wash. Ct. App. 2007).

147. See *Rochon*, 2007 WL 2325214, at *4.

148. *Olivo v. Owens-Ill., Inc.*, 895 A.2d 1143, 1150 (N.J. 2006).

149. *Id.*

150. *Satterfield*, 266 S.W.3d at 375; *Rochon*, WL 2325214, at *4.

imposing a burden on defendant would truly be.”¹⁵¹ “[The question of duty in each case] asks whether this defendant should be found to have a duty owed to [plaintiff]. Thus, the potential burden must be examined in this limited context, not extrapolated to all other imaginable potential litigants.”¹⁵² As the *Chaisson* court stated, “limitless liability would not be created in this case if we found a duty under these particular facts and circumstances.”¹⁵³

Because each case is decided upon particular facts and circumstances presented by the parties, it logically follows that any expansion of liability would only expand liability to those cases that have similar facts and circumstances.¹⁵⁴ Courts arriving at similar results after applying a set of factors to similar facts are not expanding liability, they are merely upholding *stare decisis*.¹⁵⁵ Thus, an argument that suggests the defendant owed no duty in order to prevent limitless liability rests on one of two premises: either the argument incorrectly suggests that *stare decisis* would result in liability in dissimilar cases; or that it would be financially unfair to hold a particular defendant liable. The first of these premises is inconsistent

151. *Miller v. Ford Motor Co. (In re Certified Question from Fourteenth Dist. Ct. App. of Tex.)*, 740 N.W.2d 206, 225 (Mich. 2007) (Cavanagh, J. dissenting).

152. *Id.*

153. *Chaisson v. Avondale Indus.*, 947 So. 2d 171, 182 (La. Ct. App. 2006).

154. There are factual scenarios that could easily be outcome determinative on many different factors. For example, a plaintiff's contact with the asbestos may not be regular, repeated, or over a sufficient period such that his injury was foreseeable. See *Satterfield*, 266 S.W.3d. at 374 (“[T]he duty we recognize today extends to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time . . .”). It is also possible that a plaintiff's injury is completely foreseeable, and yet preventing the injury would have been too great a burden on the defendant. See *id.* at 368 (considering whether defendant articulated a connection between its allegedly negligent acts and its ability to provide employment or produce useful products, as well as whether defendant took reasonable steps to prevent exposure such as requiring employees to change clothes before leaving the workplace, laundering work clothes on site, or encouraging employees to shower before leaving work).

155. Upholding *stare decisis* has value:

It would therefore be extremely inconvenient to the public if precedents were not duly regarded, and pretty implicitly followed. It is by the notoriety and stability of such rules, that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy, and to trust, and to deal with each other.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 443 (1826).

with the definition of *stare decisis*,¹⁵⁶ and the second appears to be a desperate argument of last resort from a defendant who cannot win on the substance of tort law. Neither premise seems sufficiently strong to warrant courts softening the significance of foreseeability in name of limited liability.¹⁵⁷

Courts can apply multiple factors,¹⁵⁸ but this is not the only structural safeguard that prevents mere foreseeability from turning into liability. The structure of the common law negligence claim prevents emphasizing foreseeability from unnecessarily broadening liability. Plaintiffs must still prove more than foreseeable harm in a common law negligence claim.¹⁵⁹ “For a valid take-home exposure claim, a plaintiff also has to demonstrate that the harm is attributable to the risks that the defendant itself created.”¹⁶⁰ Common law negligence requires that a plaintiff establish: “(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause.”¹⁶¹ Under these requirements, merely finding that a duty exists and that injury occurred does not expose a defendant to liability. Plaintiffs must still prove that the defendant breached the duty of care and that defendant’s breach caused plaintiff’s injury.

156. “The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” *Stare Decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

157. To suggest that either of these premises are “articulated countervailing principle[s] or polic[ies]” as required by RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (AM. LAW INST. 2010) seems disingenuous.

158. See generally *Chaisson*, 947 So. 2d at 182; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (AM. LAW INST. 2010) (“In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”); see also RESTATEMENT (SECOND) OF TORTS §§ 291-93 (AM. LAW INST. 1979) (applying several different factors to the evaluation of an actor’s conduct).

159. See *Satterfield*, 266 S.W.3d at 371 (“We find this argument unpersuasive.”); see generally Rebecca Leah Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 WASH. L. REV. 359, 391 (2011) (discussing the things a plaintiff must demonstrate in addition to “the harm [being] a foreseeable consequence of the defendant’s actions”).

160. Rebecca Leah Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 WASH. L. REV. 359, 391 (2011).

161. *Satterfield*, 266 S.W.3d at 355.

Thus, any defendant held to be liable under this test, will have been found to have a duty only after a balancing of multiple factors. Furthermore, the defendant must have breached this duty, and the breach must have caused harm to the plaintiff. In addition, any award of damages would be subject to any contributory negligence or comparative fault restrictions imposed by the various states. It seems incredulous to suggest that a court acts unreasonably by holding a defendant accountable after clearing each of these hurdles.

While damages in these cases may be financially burdensome, “the financial burden of compensating these injuries . . . does not vanish into the ether”¹⁶² when the court finds that the defendant owed the plaintiff no duty. Instead, the financial burden shifts from the asbestos user to an innocent bystander. This shift is inconsistent with the allocation of costs contemplated by tort law.¹⁶³ “The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.”¹⁶⁴ If any party can prevent physical injury, it is the party that was able to look ahead and foresee the potential harm to the plaintiff.¹⁶⁵

Under the foreseeability first test, no defendant can be found in breach of his duty to another unless the defendant foresaw or should have foreseen the danger to others, disregarded this danger, and acted irresponsibly. Any such finding is not an unreasonable broadening of liability, but rather a showing of equal justice under law.

B. Public Policy Favors Accountability in Asbestos Litigation.

To the extent that public policy governs the scope of one’s duty, public policy favors holding employers accountable for take-home asbestos exposures. While it is true that courts are not precluded from relying on policy to limit one’s duty,¹⁶⁶ courts must rely upon and specify some

162. *Id.* at 371 (“We find this argument unpersuasive.”).

163. *See generally* Kesner v. Superior Court, 384 P.3d 283, 297 (Cal. 2016) (“[T]he tort system contemplates that the cost of an injury, instead of amounting to a ‘needless’ and ‘overwhelming misfortune to the prson injured,’ will instead ‘be insured by the [defendant] and distributed among the public as a cost of doing business.’”).

164. *Id.* at 295.

165. *See id.* at 297 (“[A]llocation of costs [to the defendant] ensure[s] that those ‘best situated’ to prevent such injuries are incentivized to do so.”).

166. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (AM. LAW INST. 2010) (“[W]hen an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”).

substantive policy that is furthered by limiting the scope of one's duty.¹⁶⁷ Though the Restatement (Third) of Torts does mention denying or limiting liability,¹⁶⁸ it only supports such a decision if "an articulated countervailing principle or policy"¹⁶⁹ so warrants.¹⁷⁰ These policies may include the social utility of the defendant's conduct, stated legislative policy, judicial efficiency, or any number of other desirable public policies.

While considerations of a given policy may affect a decision on the existence or scope of one's duty, the court should not create its own public policy for the sake of limiting liability. Liability limitation, on its own, is not a valid public policy for the courts to implement without legislative instruction.¹⁷¹ The court is not responsible for using public policy to enforce dollar limits on judgments. Instead, if public policy dictates that liability should be limited for employers, the legislature should play this role.¹⁷² It is clear that legislatures can effectively address this issue if it is their will.¹⁷³ Lastly, there is regulatory authority to suggest that the public policy actually *favors* holding employers liable for mishandling asbestos.¹⁷⁴

167. *See id.*

168. *See id.*

169. *Id.*

170. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (AM. LAW INST. 2010) ("A no-duty ruling represents a determination . . . that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on *articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.*") (emphasis added).

171. *See* Norman Singer & Shamle Singer, SUTHERLAND STATUTES & STATUTORY CONSTR. §47:23 (7th ed. 2016)

The maxim *expressio unius est exclusio alterius*, like all rules of construction, may apply . . . to help determine a legislature's intent that is otherwise not clear.

Expressio unius instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions.

The rule of construction states that legislative omissions are presumed to be intentional. Thus, if there is no articulated legislative preference for limiting liability, the court should refrain from using limited liability as a rationale for finding that no duty exists.

172. *See generally* OHIO REV. CODE ANN. § 2307.941(A)(1) (West) (limiting the scope of duty in take-home asbestos cases).

173. *See* 2A Sutherland Statutory Construction §47:23 (7th ed. 2016).

174. *See generally* 29 C.F.R. § 1910.1001(a)(1) (2012) ("This section applies to all occupational exposures to asbestos in all industries . . .") (emphasis added).

1. Federal regulations require managing asbestos exposure.

Regulatory authority clearly indicates that “there is a strong public policy limiting or forbidding the use of asbestos.”¹⁷⁵ In 1971, the United States Department of Labor established The Occupational Safety and Health Administration (“OSHA”).¹⁷⁶ OSHA regulations place employers on notice of expected safety practices in employment contexts.¹⁷⁷ The OSHA regulations on asbestos usage in the workplace are expansive,¹⁷⁸ and clearly indicate that the federal government considers asbestos to be a highly dangerous substance.¹⁷⁹ “These rigorous measures reflect OSHA’s awareness that the deadly and communicable nature of asbestos fibers merits mandating an involved process to prevent the spread of asbestos fibers”¹⁸⁰ “These requirements were instituted despite the financial and other costs to businesses of implementing them.”¹⁸¹ Rather than emphasizing the burden that liability might potentially impose on a defendant, “[t]he severely dangerous character of asbestos should factor much more heavily in the analysis of whether defendant had a duty to mitigate the risk involved.”¹⁸²

2. Limiting liability is not a policy consideration under the Restatement (Third) of Torts.

Courts considering whether a defendant owed a duty in a take-home asbestos case should not seek to limit liability by making a “no-duty” rule as a matter of public policy. Though some courts have made no-duty rulings,¹⁸³ these rulings seem to be inconsistent with other stated public

175. *Kesner v. Superior Court*, 384 P.3d 283, 297-98 (Cal. 2016).

176. OSHA, *Timeline of OSHA’s 40 Year History*. UNITED STATES DEP’T OF LABOR, <https://www.osha.gov/osha40/timeline.html> (last visited Dec. 27, 2016) (“The Occupational Safety and Health Administration was established in 1971.”).

177. *See generally* 29 C.F.R. § 1910.1001(a)(1) (2012).

178. *See generally id.* (“This section applies to all occupational exposures to asbestos in all industries . . .”).

179. *See generally id.* (requiring respiratory protection, danger signs, and other precautionary measures).

180. *Miller v. Ford Motor Co.* (*In re* Certified Question from Fourteenth Dist. Ct. App. of Tex.), 740 N.W.2d 206, 230 (Mich. 2007) (Cavanagh, J. Dissenting).

181. *Id.* at 232.

182. *Id.* at 233.

183. *See* *Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390, 402 (Ct. App. 2012) (“In some cases, when the consequences of a negligent act must be limited to avoid an intolerable burden on society, ‘policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.’”) (citations omitted); *id.* (quoting *O’Neill v.*

policies. According to the Restatement (Third) of Torts, “[a]n actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability.”¹⁸⁴ Although the Restatement considers the possibility that the court will find the ordinary duty of care inapplicable,¹⁸⁵ that is the exception, not the rule. The general presumption is that an actor whose negligence causes physical harm is subject to liability.¹⁸⁶

One can reasonably infer that public policy incentivizes reasonable behavior that avoids physical harm to others.¹⁸⁷ If a court did make a categorical no-duty rule, that court would be giving “employers carte blanche to expose workers to communicable toxic substances without taking any measure whatsoever to prevent those substances from harming others.”¹⁸⁸ Such a ruling would run in stark contrast to the public policy instruction responsible for awarding damages for negligent conduct. By requiring defendants to pay damages for their negligent conduct, courts “ensure that those ‘best situated’ to prevent such injuries are incentivized to do so.”¹⁸⁹ Given asbestos’s harmful effects, it is difficult to imagine any “countervailing state policy promoting the use of asbestos to outweigh our general presumption in favor of incentivizing reasonable preventative measures.”¹⁹⁰

Defendants in take-home asbestos cases argue that “the costs of paying compensation for injuries that a jury finds they have actually caused would

Crane Co., 266 P.3d 987, 1007 (Cal. 2012)) (“[S]trong policy considerations counsel against imposing a duty of care on pump and valve manufacturers to prevent asbestos-related disease.”); *see also* Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 696 (Iowa 2009) (concluding that a take-home asbestos case was an appropriate time to modify the duty to exercise reasonable care under RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010)); *In re* N.Y.C. Asbestos Litigation, 840 N.E.2d 115, 119 (N.Y. 2005) (expressing concern over “the specter of limitless liability”). *But cf.* Kesner v. Superior Court, 384 P.3d 283, 299 (Cal. 2016). (“We disapprove *Campbell v. Ford Motor Co.* . . .”).

184. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 (AM. LAW INST. 2010).

185. *Id.* (stating that “unless the court determines that the ordinary duty of reasonable care is inapplicable”).

186. *Id.*

187. *See generally id.*

188. *Miller v. Ford Motor Co.* (*In re* Certified Question from Fourteenth Dist. Ct. App. of Tex.), 740 N.W.2d 206, 225 (Mich. 2007) (Cavanagh, J., dissenting).

189. *Kesner v. Superior Court*, 384 P.3d 283, 297 (Cal. 2016).

190. *Id.*

be so great that [courts] should find no duty to prevent those injuries.”¹⁹¹ This argument is flawed because “shielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration in determining the existence of a duty.”¹⁹² The most relevant burden on defendants in duty analysis is not the defendant’s potential liability, but rather the “cost to the defendants of upholding, not violating, the duty of ordinary care.”¹⁹³ When a court creates a no-duty rule, the court creates a categorical rule against liability for a particular class of cases.¹⁹⁴ Potentially broad liability “[does] not clearly justify a categorical rule against liability for foreseeable take-home exposure.”¹⁹⁵ Therefore, no-duty rules premised on prevention of expansive liability in take-home asbestos cases are inconsistent with the role duty plays in tort law.¹⁹⁶

The burden on defendants to prevent take-home asbestos exposure is rather insubstantial. “The measures to prevent take-home exposure essentially boil down to ensuring that workers shower and change clothes after encountering asbestos.”¹⁹⁷ These “simple actions” can prevent take-home asbestos exposure altogether.¹⁹⁸ To argue that defendants owe no duty in take-home asbestos cases because there is a potential for expansive liability “grossly overstat[es] the burden of imposing a duty. It [considers] not the gravity of the health risks or even . . . the relatively marginal costs of prevention.”¹⁹⁹

3. The legislature is the appropriate mechanism for limiting employer liability.

Legislatures can, and many have, limited employers’ liability. Around the country, certain types of business entities enjoy limited liability.²⁰⁰ However,

191. *Id.* at 296.

192. *Id.*

193. *Id.*

194. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (AM. LAW INST. 2010) (“No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.”).

195. *Kesner*, 384 P.3d at 298.

196. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. LAW INST. 2010) (requiring some articulated principle for the limitation or modification of one’s duty).

197. *Miller v. Ford Motor Co.* (*In re* Certified Question from Fourteenth Dist. Ct. App. of Tex.), 740 N.W.2d 206, 233 (Mich. 2007) (Cavanagh, J., dissenting).

198. *Id.*

199. *Id.*

200. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) (“Limited liability is a fundamental principle of corporate law.”).

these legislative allowances for limited liability typically protect shareholders, not the entities themselves.²⁰¹ The legislative grant of limited liability²⁰² and the business judgment rule²⁰³ are evidence that society values limited liability in the business setting. Despite this societal value, legislatures have left business entities decidedly “on the hook” for the harms they cause.²⁰⁴

Further, the societal value of encouraging individuals to participate in business is seemingly irrelevant to a business entity’s desire for preventing expansive liability. Limited liability for persons involved in an entity serves to protect people, not businesses.²⁰⁵ This is further illustrated by the business judgment rule, which serves to protect the business decisions made by individual decision-makers rather than the corporate entity.²⁰⁶ Public policy clearly protects business people. However, limitation of liability in take-home asbestos cases does not protect individual people. Limiting liability in take-home asbestos exposure cases, as a matter of public policy, protects the business entity itself. While liability for take-home asbestos cases may indirectly impact the business people, the individuals themselves are not held accountable by reason of being in the business.

Furthermore, the fact that legislatures have accounted for limited liability in other ways suggests that public policy does *not* favor limited liability in take-home asbestos cases. The legislature has the power to limit liability for asbestos exposure *via* statute.²⁰⁷ For instance, a legislature could draft a statute that limits liability by creating a particularized class of persons to whom a duty is owed²⁰⁸ or by putting a statutory cap on damages in a particular class of cases.

201. *Id.* at 89-90.

202. VA. CODE ANN. § 13.1-1019 (2015).

203. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994) (“The business judgment rule . . . operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.”).

204. *See* VA. CODE ANN. § 13.1-1019 (2015).

205. *See id.*

206. *See Cede & Co.*, 634 A.2d at 360 (stating that the business judgment rule protects the decisions of corporate directors).

207. *See* OHIO REV. CODE ANN. § 2307.941(A)(I) (West 2004).

208. *See id.*

C. *The Case Against Emphasizing Misfeasance/Nonfeasance Distinctions.*

“[T]here runs through much of the law a distinction between action and inaction.”²⁰⁹ While it is true that there is generally no duty to rescue,²¹⁰ courts have a tendency to incorrectly conclude that all omissions constitute nonfeasance.²¹¹ Illustrative of this point, the *Satterfield* court described a hypothetical in which “a driver who fails to apply his or her brakes to avoid hitting a pedestrian walking in a crosswalk” is negligent because his or her “careless failure to apply the brakes . . . is negligent driving, not negligent failure to rescue.”²¹² This is true, even though failing to apply the brakes “is an omission.”²¹³ Still, “[t]he fact . . . the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”²¹⁴ This tendency to assume omissions are nonfeasance (as well as the relationship misfeasance and nonfeasance share with causation) makes application of the misfeasance-nonfeasance factor undesirable.

Despite these problems, some courts heavily emphasized this misfeasance-nonfeasance distinction in take-home asbestos cases. In *Price*, the court focused on whether there was misfeasance or nonfeasance.²¹⁵ Having only considered this factor, the court placed an ultimatum on the plaintiff: prove misfeasance, or face the new burden of proving a special relationship.²¹⁶ This approach is inconsistent with the presumption that a duty exists if an actor’s conduct has created a risk of harm.²¹⁷ There are a

209. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 356 (Tenn. 2008) (citing PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984)).

210. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 37 (AM. LAW INST. 2010) (“An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided . . . is applicable.”).

211. See generally *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011) (holding that there was nonfeasance).

212. *Satterfield*, 266 S.W.3d at 357.

213. *Id.*

214. *Id.* at 357 (quoting RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965) (alteration in original)).

215. *Price*, 26 A.3d at 168 (“The legal issue here is whether [defendant] committed misfeasance affecting [plaintiff].”).

216. *Id.* at 169 (“Having alleged only nonfeasance, to recover against DuPont, Price must allege that a ‘special relationship’ existed . . .”).

217. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010) (“An actor *ordinarily* has a duty to exercise reasonable care . . .”) (emphasis added).

number of other factors or policy considerations that a court can make to help limit this liability, but placing this ultimatum on the plaintiff without even considering foreseeability is wholly inconsistent with the approach advocated by the Restatement (Third) of Torts.²¹⁸

Another relevant case on the matter is *CSX Transp., Inc. v. Williams*.²¹⁹ Though the *CSX Transp.* court first considered an employer's duty to provide a safe workplace for employees,²²⁰ the court also considered the distinction between action and inaction.²²¹ The court incorrectly applied this factor. In its analysis, the court wrote "these cases do not involve CSXT itself spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace."²²² While it may be true that the defendants themselves have not deliberately placed asbestos in people's homes, there is no such requirement.²²³ In *CSX Transp.*, the defendants operated their business with asbestos products, and they exposed their employees to the asbestos fibers each day. This conduct created a dangerous situation.²²⁴

The omission to prevent harm may still be misfeasance.²²⁵ The actor's entire course of conduct is what creates misfeasance or nonfeasance.²²⁶ In instances where the defendant's conduct creates a risk of harm, the

218. See generally *id.* (The concern over whether the actor's conduct creates a risk of harm suggests that foreseeability should be considered.).

219. *Supra* section I.B.1.

220. *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005).

221. *Id.* at 210.

222. *Id.*

223. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 357 (Tenn. 2008).

[D]istinguishing between misfeasance and nonfeasance can best be accomplished, not by focusing on whether an individual's "specific failure to exercise reasonable care is an error of commission or omission," but rather by focusing on whether the individual's entire course of conduct created a risk of harm. Thus, even though the specific negligent act may constitute an omission, the entirety of the conduct may still be misfeasance that created a risk of harm.

Id.

224. See generally *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 171 (Del. 2011) (Berger, J., dissenting) ("[Defendant's] affirmative act was the release of asbestos in the workplace.").

225. *Satterfield*, 266 S.W.3d at 357 (using a hypothetical describing a negligent driver to illustrate that omissions may constitute misfeasance if "the individual's entire course of conduct created a risk of harm").

226. *Id.*

defendant ordinarily has a duty to exercise reasonable care.²²⁷ Once the conduct has created a risk of harm, liability hinges upon factual and proximate cause.²²⁸ Distinguishing between action and inaction seems to implicate causation more so than duty. To ask whether the plaintiff was injured by the defendant's actions or the defendant's inaction inherently asks: "What caused the plaintiff's harm?" For this reason, and because courts tend to misinterpret the distinction between omissions and nonfeasance, this Note suggests that misfeasance and nonfeasance need not be considered in take-home asbestos exposure cases.

In the context of the hypothetical discussed in the opening paragraph of Section I,²²⁹ the defendant's course of conduct is invariably what caused the original asbestos exposure. The only way that hypothetical could resolve itself without defendant's course of conduct creating a risk is if some *other* person was responsible for the initial asbestos exposure. Even if that were the case, then misfeasance and nonfeasance are still not necessary to resolve the case. In scenarios where the person causing the initial asbestos exposure is not a defendant, the case should be dismissed upon failing to prove the cause in fact requirement.

D. Legislation allows for courts to decide the existence and scope of duty more efficiently.

Take-home asbestos cases provide a unique fact pattern that leaves state courts in a conundrum.²³⁰ On the one hand, courts are often fearful²³¹ of

227. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010).

228. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 6 (AM. LAW INST. 2010) (subjecting defendants to liability for harms within the scope of liability).

229. See *supra* Section I (hypothetical describing scenario in which A is exposed to asbestos at work for Company B, and in turn exposes a family member, person C, to asbestos at home).

230. See Flinn, *supra* note 119, at 751-756. See generally Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448 (Ohio 2010).

231. *In re N.Y.C. Asbestos Litigation*, 840 N.E.2d 115, 119 (N.Y. 2005) (noting "the specter of limitless liability"); see also Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 696 (2009) (concluding that a take-home asbestos case was an appropriate time to modify the duty to exercise reasonable care under RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010)); Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 402 (2012) ("In some cases, when the consequences of a negligent act must be limited to avoid an intolerable burden on society, 'policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.'") (citations omitted); see also *id.* at 403 (quoting O'Neil v. Crane Co., 266 P.3d 987, 1007 (2012)).

creating sweeping liability.²³² On the other, plaintiffs are often facing fatal disease.²³³ To explain its decisions, state courts dive into deep analysis about the policies that govern their own duty precedent.²³⁴ The courts adjudicating these matters are often left to make policy decisions by balancing factors.²³⁵ These policy decisions put the court at risk of overstepping the boundaries of judicial power.²³⁶

Although this Note advocates for a judicial test tailored to resolve take-home asbestos exposure cases, that test is more a necessity than the ideal outcome. Ideally, each state legislature would create a statute that specifies the class of persons to whom employers owe a duty. Regardless of whether this class of persons were limited to employees, employees' family members, all foreseeable plaintiffs, or some other variation, statutes can help end the uncertainty around take-home asbestos litigation. While courts may apply policy, considerations of policy are better handled by a legislature. If given statutory authority on the matter, courts no longer run the risk of

("[S]trong policy considerations counsel against imposing a duty of care on pump and valve manufacturers to prevent asbestos-related disease.").

232. Although for reasons discussed in Section II.A.2, *supra*, this concern is not dispositive.

233. See ASBESTOS.COM, <https://www.asbestos.com/mesothelioma/> (last visited Oct. 15, 2016); see *Satterfield*, 266 S.W.3d at 351 (twenty-five-year-old woman who contracted mesothelioma); *Boley*, 929 N.E. 2d at 450 (plaintiff diagnosed with malignant mesothelioma).

234. See *Chaisson v. Avondale Industries, Inc.*, 947 So. 2d 171, 181 (La. App. 4 Cir. 2006) (noting seven different factors for Louisiana duty analysis); *Miller v. Ford Motor Co.* (*In re Certified Question from Fourteenth Dist. Ct. App. of Tex.*), 740 N.W.2d 206, 215 (Mich. 2007) (comparing Louisiana's heavy reliance on foreseeability to Michigan's heavy reliance on the relationship between the parties); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008) ("[T]his case implicates core principles of Tennessee's tort law . . .").

235. See *Chaisson*, 947 So. 2d at 181 (noting seven different factors for Louisiana duty analysis); *Miller*, 740 N.W.2d at 215 (comparing Louisiana's heavy reliance on foreseeability to Michigan's heavy reliance on the relationship between the parties); *Satterfield*, 266 S.W.3d at 354, 367 (noting that the case implicates the core of its tort law as well as listing eight factors it will consider).

236. See generally *Satterfield*, 266 S.W.3d at 367-68 ("When considering these factors, courts should take care not to invade the province of the jury. A court's function is more limited than a jury's."); see also *id.* at 367 (listing factors that are representative of the will of the people, and therefore more appropriately considered in the legislature: "the importance or social value of the activity engaged in by the defendant . . . the usefulness of conduct to the defendant . . .") (emphasis added); *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 20 (Del. 2009) ("The Restatement (Third) of Torts creates duties in areas where we have previously found no common law duty and have deferred to the legislature to decide whether or not to create a duty.") (emphasis added).

overstepping its boundaries. Instead, simple application of the statute would resolve the case.

As discussed earlier,²³⁷ courts tend to worry about creating limitless liability. Such a concern is understandable, but not controlling.²³⁸ Not only can state legislatures declare the state's policy on the extent of an employer's duty in take-home asbestos cases,²³⁹ but state legislatures may also declare to what extent (if any) liability is to be limited.

Legislative authority on the matter has already been effective in guiding at least one state court.²⁴⁰ Recognizing the "virtual explosion in asbestos litigation,"²⁴¹ the Ohio legislature passed legislation governing "all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property."²⁴² The statute provides that "[a] premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property."²⁴³ This type of legislation allows the state to more accurately reflect public policies valued by society in these decisions than any judicial balancing test.

*Boley v. Goodyear Tire & Rubber Co.*²⁴⁴ is a good example of the simplicity a statute would bring to take-home asbestos cases. In *Boley*, the plaintiff was exposed to asbestos dust at home while laundering her husband's work clothes.²⁴⁵ The plaintiff was diagnosed with malignant mesothelioma,²⁴⁶ and filed suit against more than 200 defendants, including Goodyear.²⁴⁷ Rather than addressing a wide array of public policies in an in depth duty analysis, the court framed the issue as "whether R.C. 2307.941(A) bars all tort liability against a premises owner for asbestos exposure originating from asbestos on the owner's property if the exposure occurred away from the owner's property or whether R.C. 2307941(A) is

237. See *supra* Section II.A.2.

238. *Id.*

239. See OHIO REV. CODE ANN. § 2307.941(A) (West 2004).

240. See *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010).

241. Michael D. Kelly, *Boley v. Goodyear Tire & Rubber Co.*, 37 OHIO N.U. L. REV. 901 (2011).

242. OHIO REV. CODE ANN. § 2307.941(A) (West 2004).

243. *Id.* at § 2307.941(A)(1).

244. *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010).

245. *Id.* at 449.

246. *Id.* at 449-50.

247. *Id.* at 450.

inapplicable in such instances, thus permitting recovery against a premises owner.”²⁴⁸ By framing the issue in this way, the court avoided any sweeping statements of law that would unnecessarily impact other negligence cases. Rather, the court turned to principals of statutory construction to resolve a dispute as to the meaning of the statute.²⁴⁹ The court concluded that “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 property.”²⁵⁰

If each jurisdiction had statutory authority to rely upon for this issue, all jurisdictions could engage in this type of analysis to resolve these claims without resorting to an arbitrary weighing of factors. One benefit provided by these types of statutes is that the court can adjudicate without creating new law. In addition, the parties are much more likely to know ahead of time whether they have a claim, reducing the number of take-home exposure lawsuits. Reliance upon well-drafted statutes simultaneously achieves just results and increases judicial efficiency.

III. CONCLUSION

As state courts across the country decide take-home asbestos exposure cases, the existence and scope of the defendant’s duty is best determined by first examining foreseeability. If treated as a threshold matter, foreseeability can serve as a useful vehicle for limiting what has become a massive number of cases, many of which are frivolous. If balanced by consideration of other mitigating factors, treating foreseeability as a threshold matter does not result in limitless liability, but instead applies common law negligence in a straight-forward manner. Under this paradigm, there can be no duty without foreseeability. However, foreseeability alone is insufficient for the court to find that the defendant owed the plaintiff a duty. Instead, the court must balance other factors such as the existence of a legal relationship, the burden of preventing the harm, the possible magnitude of the potential harm or injury, the feasibility of alternative conduct, and the relative safety of that alternative conduct. These factors are useful for determining the scope, if any, of a defendant’s purported duty.

If other factors, such as the distinction between affirmative acts and omissions are considered in advance of foreseeability, it is easy for the law

248. *Id.* at 449.

249. *See Boley*, 929 N.E.2d at 451 (noting the emphasis on legislative intent, looking to the language of the statute, and the purpose of the statute, as well as the policy for application of a clear and unambiguous statute).

250. *Id.* at 453.

to be misapplied. Still, while judicial balancing tests allow for courts to consider the totality of the circumstances in duty analysis, these tests can be inefficient. Legislation that defines which classes of individuals, if any, are owed a duty of reasonable care by employers in take-home asbestos exposure allows courts to simply apply canons of statutory construction to resolve otherwise difficult cases.