No. 20190259-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

LARRY BOYNTON,
Appellee/Cross-Appellant,
v.
KENNECOTT UTAH COPPER LLC,
Appellant/Cross-Appellee,

PHILLIPS 66 COMPANY, CONOCOPHILLIPS COMPANY, PACIFICORP,
Cross-Appellees.

BRIEF OF APPELLEE AND CROSS-APPELLANT

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Randall N. Skanchy, District Court No. 160902693

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Appellee/Cross-Appellant

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Cross-Appellees

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Defendant PacifiCorp, represented by Bret W. Reich, General Counsel, and Stephen K. Christiansen

Parties Below Not Parties to the Appeal

The following defendants named in the Amended Complaint have been dismissed: Industrial Supply Company, Inc.; Bechtel Corporation; CBS Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation; Crane Co.; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; John Crane, Inc.; Riley Power, Inc., individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, individually and as successor-in-interest to D.B. Riley; The Goodyear Tire & Rubber Company; United States Welding, Inc.

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Introduction

This appeal involves claims that three defendants—Kennecott, ConocoPhillips, and PacifiCorp—engaged in affirmative acts involving asbestos that eventually killed Larry Boynton's wife, Barbara. The companies used asbestos and created asbestos dust that settled onto Larry's clothes over a number of years, where Barbara repeatedly encountered it. The issue is whether the companies owed a duty to Barbara and, therefore, are eligible to be liable for harm they caused her.

Under this court's test for duty in *Jeffs*, the companies owed a duty to Barbara. Under *Jeffs*, a defendant owes a duty of care to a plaintiff for the defendant's affirmative conduct that creates a risk of injury to others, particularly where the injury is foreseeable. Here, all of the companies engaged in affirmative conduct that created a risk of injury to Barbara, and the danger of workers taking home toxins from the workplace was foreseeable at the time.

Kennecott engaged in affirmative conduct that created a danger to Barbara when its employees scraped asbestos insulation from overhead pipes, sawed replacement asbestos insulation, and swept asbestos dust at its smelter. ConocoPhillips engaged in affirmative conduct that created a danger to Barbara when its employees negligently removed asbestos insulation, let it fall to the ground, and then swept the dust into the air. And PacifiCorp engaged in affirmative acts that created a danger to Barbara when it required its contractor

to cut and install asbestos, and when it retained control over the method and means of installing the asbestos insulation and certain safety aspects of the project. Each of these affirmative acts resulted in asbestos dust settling onto Larry's clothes, where Barbara was exposed to it when she laundered his clothes.

The duty created by Kennecott's affirmative acts is not abrogated by foreseeability. Indeed, the danger of take-home exposure to family members was foreseeable in the 1960s and 1970s. In opposing the various motions for summary judgment, Larry presented evidence from Dr. Richard Lemen, a former U.S. Assistant Surgeon General and an expert in epidemiology, who opined that the dangers of take-home exposure were known for decades before 1964, the earliest relevant date here. Larry also presented evidence that, in the 1960s, trade organizations were warning about the dangers of asbestos dust—not just to workers, but also to the community. By 1972, the dangers of take-home exposure were so widely known that OSHA included it in its regulations.

In addition to the dangers of take-home exposure to asbestos dust being foreseeable by the 1960s, the companies also were better positioned than Barbara to prevent the harm and there is no conceivable public policy reason to shift the burden from the companies to Barbara. For all of these reasons, the companies owed a duty to spouses who were exposed to the asbestos dust.

Because the companies owed a duty to Barbara, this court should affirm the denial of Kennecott's motion for summary judgment and reverse the entry of summary judgment in favor of ConocoPhillips and PacifiCorp.

Statement of the Issues

Issue 1 – Kennecott: Whether the district court correctly ruled that Kennecott undertook affirmative acts—and thus owed a duty to Barbara—where Larry presented evidence that Kennecott's employees scraped, sawed and swept asbestos insulation, and mixed asbestos cement, causing asbestos dust to settle onto Larry's clothes where Barbara encountered it.

Preservation: This issue was preserved in Larry's opposition to Kennecott's motion for summary judgment. [R.4241-43,4248-60.]

Issue 2 - ConocoPhillips: Whether the district court erred in ruling that ConocoPhillips undertook no affirmative act—and thus could not owe a duty to Barbara—where Larry presented evidence (that must be viewed in the light most favorable to Larry) that ConocoPhillips' employees removed asbestos pipe insulation and swept asbestos insulation debris, causing asbestos dust to settle onto Larry's clothes where Barbara encountered it.

Preservation: This issue was preserved in Larry's opposition to ConocoPhillips' motion for summary judgment. [R.2685-86,2692-2704.]

Issue 3 - PacifiCorp: Whether the district court erred in ruling that PacifiCorp was neither directly nor vicariously liable for the acts of its

independent contractor—and thus could not owe a duty to Barbara—where Larry presented evidence (that must be viewed in the light most favorable to Larry) that PacifiCorp specifically required its contractor use asbestos insulation that caused Barbara's injury, and that PacifiCorp retained control over the means and methods for installing the asbestos insulation, as well as certain safety aspects of the project.

Preservation: This issue was preserved in Larry's opposition to PacifiCorp's motion for summary judgment. [R.3298-3301,3303-18.]

Standard of Review for All Three Issues: "The determination of whether a legal duty exists is a purely legal question that requires an examination of the legal relationships between the parties." *Herland v. Izatt*, 2015 UT 30, ¶ 9, 345 P.3d 661 (alteration and internal quotation marks omitted). This court reviews the grant of summary judgment for correctness and views the facts and all reasonable inferences in a light most favorable to the nonmoving party. *Id.*

Statement of the Case

This appeal is from the district court's ruling on various motions for summary judgment, where Larry was the nonmoving party. [R.5438-47.] Larry therefore recites the facts in the light most favorable to him. *Herland v. Izatt*, 2015 UT 30, ¶ 9, 345 P.3d 661.

Asbestos dust causes Barbara's death

Barbara Boynton died from mesothelioma as a result of her exposure to asbestos dust. [R.2684,2687,3294,3301,4238,4244,5438.] Barbara was exposed to asbestos dust when laundering her husband Larry's work clothes, which collected asbestos dust while he worked at numerous companies where their employees, or independent contractors on the premises, installed and removed asbestos insulation near him. [R.2685-87,2845,3298-3301,4241-43,5438-42.]

Larry wore his dusty clothes home where Barbara washed them every week. [R.2685-2687,3300,4242-43.] Before washing Larry's clothes, Barbara would shake them out—exposing her to the asbestos dust that had settled onto them. [R.2685-87,2845,3298-3301,4241-4243.] She breathed more asbestos dust when she swept the laundry room to clean up the asbestos dust. [R.2685-87,2845,3298-3301,4241-43,5195.]

This appeal involves three companies where Larry was exposed to asbestos dust and brought that dust home to Barbara—Kennecott, ConocoPhillips, and PacifiCorp.

Kennecott employees created asbestos dust

Larry worked at Kennecott twice, and both times Kennecott negligently exposed him to asbestos dust. From 1961 to 1964, Larry worked as an employee of Kennecott at its smelter. [R.4241,4961,5442.] He then returned from 1964 to 1966 to work as an electrician for an independent contractor at Kennecott's copper facility. [R.4242,4962,5442.]

During those years, Kennecott employees negligently removed and replaced asbestos insulation while Larry worked less than twenty feet away. [R.1237,4241-43,4961-62.] Specifically, Kennecott's employees scraped old asbestos insulation from overhead pipes, cut replacement asbestos insulation, and swept residual asbestos insulation that had fallen to the ground, all of which released asbestos dust into the air. [R.1237,4241-43,4961-62.] Larry also was exposed to asbestos dust when Kennecott employees mixed asbestos cement in his presence. [R.4242-43,4962.] All of these acts caused asbestos dust to settle onto Larry's clothes where Barbara later encountered it. [R.4243,4962-63.]

Kennecott never warned Larry of the hazards of asbestos, never instructed him not to wear his contaminated work clothes home, and never provided him with laundry services to prevent the asbestos from leaving its copper plant. [R.4243,4962.]

ConocoPhillips employees created asbestos dust

From 1976 to 1978, Larry worked as an electrician (an independent contractor) at ConocoPhillips' oil refinery. [R.2685,5439.] Larry's job was to run

conduit, pull and terminate electrical wire, and run heat tracing. [R.2686.] During those years, ConocoPhillips employees negligently removed and swept asbestos insulation debris while Larry worked less than twenty feet away, just as Kennecott's employees had done. [R.2685-86.]

Specifically, ConocoPhillips' employees removed asbestos pipe insulation and let it fall to the ground. [R.2686,4080.] The ConocoPhillips' employees then swept the residual insulation from the floor during cleanup. [R.2686,4080.] During removal and cleanup, ConocoPhillips' employees generated asbestos dust that reached Larry, who worked within twenty feet of the insulation workers. [R.2686,4080.]

ConocoPhillips never warned Larry of the hazards of asbestos, never monitored asbestos levels, never implemented any engineering controls to reduce his exposures, and never provided him with showers or laundry services to prevent the asbestos from leaving its oil refinery. [R.2686,4080-81.]

PacifiCorp's affirmative acts created asbestos dust in its facility

During 1973, Larry worked as an electrician (an independent contractor) at PacifiCorp's Huntington Canyon Power Station. [R.3300.] Larry's job was to run conduit, pull and terminate electrical wire, and run heat tracing. [R.3300.] While he worked nearby, other independent contractors negligently cut and installed asbestos materials. [R.3300.] The independent contractors who exposed Larry to the asbestos dust were not PacifiCorp employees but were employees of a

subcontractor, Mountain States Insulation. [R.3300] Nonetheless, PacifiCorp directed and retained control over their actions through its contract with Jelco-Jacobson, the general contractor. [R.3298-3301.]

The work was part of PacifiCorp's project to build its Huntington Canyon Power Station. [R.3298,5440-41.][1] In 1970, PacifiCorp hired an architect, Stearns-Rogers, to design and plan the power station. [R.3298.] The resulting plans called for asbestos insulation and asbestos insulating cement. [R.3298-99,3389-90.] The plans also specified the means and methods to install the asbestos insulation, the actions that caused the injury here. [R.3299,3392-99.]

Importantly, the plans allowed PacifiCorp—and only PacifiCorp—to change or substitute those asbestos-containing materials. [R.3298-99,3388,4142.] And the plans provided that PacifiCorp's choice of insulation (which contained asbestos) was final and no substitutions could be made without written agreement from PacifiCorp. [R.3298-99,3388,4142.] The plans were so detailed that they dictated the means and methods by which the insulation must be installed, and for mixing, storing, applying and using the asbestos products—choices that created the asbestos dust that caused Barbara's death. [R.3299,3392-99.]

[1] The entity that built the Huntington Canyon Power Station was actually Utah Power & Light. [R.3298,5440-41.] PacifiCorp is Utah Power & Light's successor-in-interest. [R.3298,5440.] Larry therefore attributes to PacifiCorp the actions of Utah Power & Light.

PacifiCorp then hired a general contractor to implement the design plans, including the use of asbestos materials. Not only did PacifiCorp retain control over the materials the contractor could use and the construction methods, PacifiCorp also took responsibility for – and controlled – testing and inspecting the materials and methods of the work. [R.3298-3300,3443.] PacifiCorp also maintained the right to order changes in the work, inspect, and reject the materials and workmanship. [R.3299,3429-31.]

Of particular relevance, PacifiCorp also retained control over certain safety aspects during construction. Specifically, PacifiCorp was responsible for directing the contractor to implement adequate dust control measures. [R.3300,3446.] The contract also provided that PacifiCorp could demand the contractor stop unsafe work practices. [R.3299,3436.] And while it was known that exposure to asbestos was a health hazard, and regulated by OSHA at that time, the contract did not include any special precautions to reduce or otherwise eliminate the hazards of installing the asbestos insulation that PacifiCorp specified. [R.3299-3300.]

Jelco-Jacobson was the general contractor PacifiCorp hired for the project. [R.3299.] Larry worked for Jelco-Jacobson as an independent contractor on the project in 1973. [R.3300.] Larry worked near other contractors who cut and installed the asbestos insulation as required by PacifiCorp's contract. [R.3300] In fact, Larry worked within twenty feet of the insulation installers while they used

a saw to cut the insulation, which generated asbestos dust that collected on Larry's clothes, where Barbara later encountered it. [R.3300-01.]

PacifiCorp never warned Larry of the hazards of asbestos, never monitored asbestos levels, never implemented any engineering controls to reduce his exposures, and never provided him with showers or laundry services. [R.3301.]

Larry brings an action against the companies that exposed Barbara to asbestos dust

After Barbara died from her exposure to asbestos dust, Larry brought an action against the companies responsible for her exposure to the toxin. [R.1-24,1234-1257.]

Against Kennecott, Larry alleged direct liability negligence claims, based on Barbara's secondary exposure to asbestos dust generated by Kennecott's employees—both while Larry was an employee and while Larry was an independent contractor at Kennecott. [R.1236-37,1250-53.]

Against ConocoPhillips, Larry alleged a direct liability negligence claim, based on Barbara's secondary exposure arising from the asbestos dust generated by ConocoPhillips' employees while he was an independent contractor on ConocoPhillips' premises. [R.1236-37,1250-53.]

And against PacifiCorp, Larry alleged direct and vicarious liability negligence claims, based on Barbara's secondary exposure to asbestos from PacifiCorp's decision to require the use of asbestos insulation in its facility, and

its retention of control over how the independent contractor was to install that insulation, which created asbestos dust. [R.1236-37,1250-53.]

Larry's complaint alleged that the affirmative acts of each company caused Barbara's injury. Specifically, he alleged that, at each of the companies, "[t]he activities of cutting, chipping, mixing, sanding, sawing, scraping and sweeping that occurred in association with the work performed by [Larry] and other workers working around [him] with asbestos-containing products exposed him to great quantities of asbestos," and also "expos[ed] his wife, Barbara Boynton, to great quantities of asbestos as she too came into contact with the asbestos-containing products carried home on [his] clothes." [R.1237.] His complaint repeatedly asserted that his injuries were caused by the companies' negligent use of asbestos. [R.1250-54.]

The complaint also alleged that, after exposing Larry to asbestos, the companies failed to warn Larry of the danger or to provide safe work practices to reduce the danger they had caused. [R.1237,1251,1253.]

The companies move for summary judgment

Each company filed a motion for summary judgment, arguing that it could not be liable for Barbara's death. [R.2235-47 (ConocoPhillips), 2349-73 (PacifiCorp), 4162-80 (Kennecott).] Specifically, each company argued that it owed Barbara no duty under the factors enumerated in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228. [R.2238-46 (ConocoPhillips), 2364-72 (PacifiCorp), 4167-

78 (Kennecott).] Under *Jeffs*, the general rule is that a defendant has a duty to a plaintiff when the defendant engages in affirmative conduct that creates a risk of harm to the plaintiff. *Jeffs*, 2012 UT 11, ¶ 5.

Applying *Jeffs*, each of the companies argued that Larry alleged only failures to act, not affirmative acts that could give rise to a duty. [R.2240-41 (ConocoPhillips), 2365-69 (PacifiCorp), 4168-70 (Kennecott).] PacifiCorp also argued that it was not liable for its general contractor who installed the asbestos materials because PacifiCorp did not retain control over the work. [R.2362-64.]

As to foreseeability, PacifiCorp and Kennecott argued that Barbara's injury was not foreseeable. [R.2369-70,4171-75.] Kennecott argued that the dangers of take-home asbestos exposure were not known until the OSHA regulations were enacted in 1972. [R.5014.] In contrast, ConocoPhillips asserted that foreseeability should not be part of the court's analysis. [R.2245-46.]

Larry presents evidence that the companies' affirmative acts foreseeably caused Barbara's harm

Larry opposed the motions and argued that the companies owed a duty to Barbara under *Jeffs*. [R.2683,2692-2706,3294,3309-18,4238,4248-61.] He highlighted the allegations of affirmative acts in his complaint—acts that create a presumption of a duty under Utah law. [R.2686-88,2692-95, 3298-3301,3303-12, 4242-43,4248-51.]

Larry also presented evidence that Barbara's injuries were foreseeable by the time he worked at each of the companies—at Kennecott from 1961 to 1966, at

PacifiCorp in 1973, and at ConocoPhillips from 1976 to 1978. Specifically, Larry presented evidence that the dangers of take-home exposure to asbestos were generally foreseeable by the time Larry worked at the companies. His evidence was undisputed. None of the companies presented any evidence suggesting that the dangers of take-home asbestos exposure were not generally foreseeable by the time Larry worked for them.

Dr. Lemen's affidavit - First, Larry presented an affidavit from Dr. Richard Lemen, a former U.S. Assistant Surgeon General and an expert in epidemiology. [R.2957-88 (attached as Addendum C).[2]] Dr. Lemen cited medical and scientific data and concluded that the dangers of asbestos, including the dangers of take-home exposure, were recognized by the time Larry worked at all three companies. [R.2960-88.]

Dr. Lemen was clear that there is no safe way to use asbestos. [R.2963,2970,2986.] As he put it, "[t]here is no safe level of asbestos exposure for any type of asbestos fiber." [R.2963 (footnote and internal quotation marks omitted).]

Next, Dr. Lemen explained that by the time Larry worked for each company, the dangers of asbestos were widely known. He stated that, "[b]y 1964,

[2] Larry attached an identical copy of Dr. Lemen's affidavit and chapter to each of his oppositions. [R.2687-88,2697,2956-88,3048-3191,3302,3313,3649-80,3740-3882,4244,4253,4640-71,4732-4873,4963-64,4972.] For convenience, when Larry cites the affidavit, he references only the first time the affidavit appears in the record.

there were more than 700 articles in the worldwide medical literature highlighting the health effects associated with asbestos exposure and its toxic nature. By 1964, all the major asbestos-related diseases, including asbestosis, lung cancer and mesothelioma, had been causally established through epidemiology and reported in the scientific literature." [R.2963 (footnotes omitted).] He concluded that "the health hazards of asbestos, including mesothelioma, were well established and widely known and accepted prior to [Larry's] employment as a laborer and then as an electrician." [R.2964.]

Finally, Dr. Lemen explained that the dangers of take-home exposure—for all kinds of toxic substances—have been known since the early twentieth century. He explained this in his expert report, as well as in his attached chapter from Dodson & Hammar's textbook *Asbestos: Risk Assessment, Epidemiology, and Health Effects* (2d ed.). [R.2974-79,3108-11.] Dr. Lemen cited and discussed several authorities published in the early 1900s warning that workers handling toxic materials should leave their clothing at work to avoid carrying the hazard home. [R.2974-79.] Dr. Lemen explained that the dangers of laundering contaminated clothing have been known for centuries, and were widely discussed throughout the first half of the twentieth century. [R.2979-82.]

For example, by 1937, a medico-safety survey conducted by the Chief Safety Inspector for Standard Oil entitled "Dust Producing Operations in the Production of Petroleum Products and Associated Activities" cautioned that

when performing work that could contaminate clothing, measures should be taken to avoid household contamination including special clothing lockers, a prohibition on taking work clothing home, and wash and change rooms. [R.2977.] And by 1943, the United States Public Health Service published a Manual of Industrial Hygiene and Medical Service in War Industries, which stressed "the importance of cleanliness so that the worker did not carry the workplace exposures out of the workplace." [R.2977-78,3108-09.]

Dr. Lemen set forth numerous other examples of this pervasive knowledge, and noted that "by 1943 documentation of the effects of these take-home and environmental contamination concerns were appearing much more frequently in the literature." [R.2978.] The medical and scientific literature and data set forth in Dr. Lemen's report, which are uncontroverted, provide strong support for his opinion that take-home exposures to industrial contaminants "were of major concern" and that it was "foreseeable that any toxic material, taken from the workplace, retained their toxic nature and could cause contamination and disease elsewhere simply through their presence." [R.2979.]

Warnings from trade organizations - Second—and confirming Dr. Lemen's conclusions—Larry presented evidence that various trade organizations were circulating materials warning of the dangers of take-home asbestos exposure by the time Larry worked for the companies.

For example, in 1960, the Industrial Hygiene Foundation (IHF) published an abstract showing asbestos contamination as far as 600 meters from the work site. [R.2981.] In 1963, the IHF published the results of autopsies of people who died from asbestos but were "not occupationally exposed to asbestos." [R.2981.] The IHF then "continued to report the dangers of community exposures to asbestos." [R.2981.] ConocoPhillips was a member of the IHF during those years. [R.2783-85.] And as a member of IHF, ConocoPhillips would have received and had access to all of IHF's publications. [R.2980-82.]

Similarly, a publication put out by the American Industrial Hygiene Association (AIHA) in 1962 discusses health hazards in the "building trades," and identifies measures to attempt to minimize asbestos exposures. [R.4614-19.] In 1964, the AIHA published an article that recognized the serious health hazards associated with exposures to asbestos-containing pipe-covering and thermal insulation. [R.4620-24.] Kennecott was a member of the AIHA during those years and would have received those warnings. [R.4564-66,4585-87,4596-97,4602-03.]

The National Safety Council (NSC) also disseminated information to its members warning of the toxicity of asbestos before Barbara's exposure. [R.2984-85.] PacifiCorp was a member of the NSC long before Barbara's exposure, and thus would have received these warnings. [R.3336-37,3638-42,3643-44,3646.]

Warnings from industrial hygienists – Finally—and further confirming Dr. Lemen's conclusions—Larry presented evidence that the hazards of asbestos

were widely known long before Larry worked for the companies. Specifically, ConocoPhillips' own industrial hygienist, Lucian Renes, testified that he first learned of the hazards of asbestos in 1939. [R.2874,2882,2889.] He then joined ConocoPhillips in 1953, long before Barbara's exposure. [R.2889.] By 1965, Mr. Renes was in charge of collecting information on the health hazards of asbestos insulating material and reporting that information to the American Petroleum Institute. [R.2905-2914.]

OSHA guidelines – In 1972, OSHA adopted regulations reflecting these widely-known dangers. The 1972 regulations dealt specifically with the dangers of asbestos dust traveling on clothing into homes. 37 Fed. Reg. 110 (June 7, 1972) (codified at 29 CFR § 1910.1001 (1974)). The regulations required employers to provide protective clothing, changing rooms, and laundry services to employees who were exposed to asbestos dust. *Id.* These regulations were in effect while Larry worked at PacifiCorp and ConocoPhillips. [R.5439-41.]

The court enters summary judgment in favor of ConocoPhillips and PacifiCorp

The court denied Kennecott's motion for summary judgment, recognizing that Kennecott's "affirmative act of specifying and using asbestos pipe insulation and its employee-insulators' affirmative acts of exposing" Larry to asbestos could give rise to a duty to Barbara. [R.5447.] Indeed, the court quoted Larry's complaint where he alleged that, at each company, "[t]he activities of cutting, chopping, mixing, sanding, sawing, scraping and sweeping that occurred in

association with the work performed" by the companies' employees near Larry exposed him to great quantities of asbestos. [R.5440 (alteration in original).]

Yet the court entered summary judgment in favor of ConocoPhillips, even though Larry alleged ConocoPhillips' employees undertook the same affirmative acts as Kennecott's employees. [R.5443-47.] The court ruled that Larry's claims against ConocoPhillips were based on omissions, not affirmative acts. [R.5444.]

Further compounding the problem, the court collapsed its analyses of ConocoPhillips' duty and PacifiCorp's duty into a single discussion, despite the different nature of the conduct giving rise to liability for each. [R.5443-47.] Indeed, Larry asserted a direct liability claim against ConocoPhillips, arguing that ConocoPhillips owed a duty to Barbara because its employees exposed Larry to asbestos dust. [R.2684-89,2692-95.] By contrast, Larry asserted direct and vicarious liability claims against PacifiCorp, arguing that PacifiCorp owed a duty to Barbara because it required the use of asbestos in its facility, and also controlled how its contractor installed the asbestos. [R.3295-3307,3309-12.]

The court, however, addressed the companies together and granted summary judgment to PacifiCorp for the same reasons as ConocoPhillips. [R.5443-46.] Although it is not clear from the order, the court mistakenly believed it was dispositive that Larry was an independent contractor at both locations. [R.5443-44.] And for both, the court relied on the retained-control doctrine (which applies only to vicarious liability claims and claims concerning control

over the entity who acts negligently), and ruled that Larry had not shown that either ConocoPhillips or PacifiCorp retained control over Larry's actions while he was working near the asbestos dust. [R.5444-45.] The court ruled that, because neither ConocoPhillips nor PacifiCorp required Larry to work near the asbestos at their facilities, neither of them had any involvement with the injury-causing aspects of his work. [R.5444-45.]

Confusingly, the court also addressed the *Jeffs* "minus factors"—factors that would eliminate a duty—even though it had already ruled that neither "plus factor" created the presumption of a duty. [R.5445-46.] As to foreseeability, the court ruled that "it would be a vast expansion of Utah Tort Law to find that, based on the relationships of the parties; an employer could foresee harm to the spouse of an employee of an independent contractor." [R.5445.]

As to the next factor, the court ruled that Larry was best suited to take reasonable precautions to avoid the injury. The court did not explain how Larry was better suited, but instead stated that imposing a duty on the companies "would impose an extraordinarily onerous and unworkable burden." [R.5446 (internal quotation marks omitted).] And as to the last factor, the court ruled that public policy weighs against imposing a duty on the companies: "[t]he pressure this expansion of the common law would put on the time and resources of courts, society, and businesses in general weighs against" imposing a duty on the companies. [R.5446.]

Summary of the Argument

The district court correctly ruled that Kennecott owed Barbara a duty because Kennecott engaged in affirmative conduct that caused asbestos dust to settle onto Larry's clothes where Barbara later encountered it. That affirmative conduct created a duty to Barbara under Utah law. And although the law recognizes exceptions to that general rule—so-called "minus factors"—none of them apply here, particularly because the dangers of take-home asbestos exposure were generally foreseeable to companies who chose to use asbestos.

Kennecott owed Barbara a duty because it engaged in affirmative conduct that created a danger to her, both while Larry was a Kennecott employee from 1961 to 1964 and while he was an independent contractor from 1964 to 1966. While Larry was a Kennecott employee, he was exposed to asbestos when its employees scraped asbestos insulation from overhead pipes, sawed replacement asbestos insulation and when Kennecott employees, including Larry himself, swept asbestos dust at its smelter. [R.1237,4241-43,4961-62.] And when Larry was an independent contractor at Kennecott, its employees negligently cut and installed asbestos insulation and mixed asbestos cement near him. [R.1237,4241-43,4961-62.] These affirmative acts are sufficient to create a duty to Barbara.

While an affirmative act generally gives rise to a duty, this court has articulated three "minus factors" that can weigh in favor of eliminating an otherwise existing duty. Those factors are "[i] the foreseeability or likelihood of injury; [ii] public policy as to which party can best bear the loss occasioned by the

injury; and [iii] other general policy considerations." *Jeffs*, 2012 UT 11, ¶¶ 5, 21 (citations and internal quotation marks omitted). None of those factors suggest that Kennecott's duty to Barbara should be eliminated here.

But while the district court correctly applied the law to Kennecott, it erred in ruling that ConocoPhillips owed no duty to Barbara. ConocoPhillips owed a duty to Barbara for the same reasons Kennecott owed a duty to her. Specifically, ConocoPhillips owed Barbara a duty because it engaged in affirmative conduct that created a danger to her while Larry was an independent contractor—an invitee—at ConocoPhillips from 1976 to 1978. [R.2685-89.]

During those years, ConocoPhillips employees negligently removed asbestos insulation with Larry less than twenty feet away, just as Kennecott's employees had done. [R.2686,4080.] They removed asbestos pipe insulation, just as Kennecott's employees had done, and let it fall to the ground, which created dust. [R.2686,4080.] And they swept the residual insulation from the floor, generating asbestos dust that reached Larry, who worked within twenty feet of the insulation workers—just as Kennecott's employees had done. [R.2686,4080.]

The court also erred in ruling that PacifiCorp owed Barbara no duty. PacifiCorp not only engaged in an affirmative act when it required Jelco-Jacobson to cut and install asbestos, it remained liable for the harm because it retained control over the method and means of installing the asbestos insulation and certain safety aspects of the project.

This court should affirm the district court's denial of Kennecott's motion for summary judgment, and vacate the district court's entry of summary judgment in favor of ConocoPhillips and PacifiCorp.

Argument

Each company owed a duty to Barbara for similar reasons—each engaged in affirmative conduct that increased the risk of foreseeable harm. And each company was better suited than Larry or Barbara to prevent Barbara's harm.

1. Kennecott Owed a Duty to Barbara

The district court correctly ruled that Kennecott owed Barbara a duty because Kennecott engaged in affirmative conduct that created asbestos dust which settled on Larry's clothes where Barbara later encountered it. That affirmative conduct created a duty to Barbara under Utah law. And although the law recognizes exceptions to that general rule—so-called "minus factors"—none of them apply here.

1.1 Kennecott Engaged in Affirmative Conduct When Its Employees Exposed Barbara to Asbestos

Kennecott owed Barbara a duty because it engaged in affirmative conduct that created a danger to her, both while Larry was a Kennecott employee from 1961 to 1964, and also while he was an independent contractor there from 1964 to 1966. While Larry was a Kennecott employee, he was exposed to asbestos when its employees scraped asbestos insulation from overhead pipes, sawed replacement asbestos insulation and when Kennecott employees, including Larry

himself, swept asbestos dust at its smelter. [R.1237,4141-43,4961-62.] And when Larry was an independent contractor at Kennecott, its employees negligently cut and installed asbestos insulation and mixed asbestos cement near him. [R.4242-43,4962.] That affirmative conduct is sufficient to create a duty to Barbara.

Under Utah law, a defendant owes a duty of care to a plaintiff when he engages in affirmative conduct that creates a risk of injury to others, particularly where the injury is foreseeable. *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶¶ 5, 21, 275 P.3d 228. In *Jeffs*, this court announced a "general rule" that "we all have a duty to exercise care when engaging in affirmative conduct that creates a risk of physical harm to others." *Id.* ¶ 21. But an omission—the "failure to take positive steps to benefit others"—gives rise to a duty only if there is a special relationship between the parties. *Id.* ¶ 7.

Because affirmative acts give rise to a duty while omissions typically do not, the difference between the two is "critical" and "perhaps the most fundamental factor courts consider when evaluating duty." *Id.* As the court of appeals has explained, a "negligent affirmative act leaves the plaintiff positively worse off as a result of the wrongful act, whereas in cases of negligent omissions, the plaintiff's situation is unchanged; she is merely deprived of a protection which, had it been afforded her, would have benefitted her." *Faucheaux v. Provo City*, 2015 UT App 3, ¶ 16, 343 P.3d 288 (alterations and internal quotation marks omitted).

In some cases, the defendant engages in both kinds of conduct—an affirmative act that creates a danger, and then a subsequent omission in failing to alleviate the danger. But the defendant's affirmative conduct in creating the danger gives rise to a duty, regardless of whether he also engages in subsequent acts of omission which fail to alleviate the danger he created. *Jeffs*, 2012 UT 11, ¶ 10.

Indeed, this court has been clear, repeatedly, that the duty analysis focuses on who created the danger. The question is whether the defendant's affirmative conduct "has gone forward to such a stage that inaction would commonly result in an injury." *Herland v. Izatt*, 2015 UT 30, ¶ 35, 345 P.3d 661 (alteration and internal quotation marks omitted). Or put differently, the question is "whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." *Id.* (citation omitted).

Here, Larry presented evidence of Kennecott's affirmative conduct that created the danger to Barbara. Specifically, he presented evidence that while he was a Kennecott employee from 1961 to 1964, his co-workers negligently scraped asbestos insulation off of pipes and negligently cut and sawed new asbestos insulation. [R.4241-43,4961-62.] Both of these negligent acts created asbestos dust that settled onto Larry's clothes while he worked less than twenty feet away. [R.4241-43,4962-63.] Making matters worse, Kennecott required Larry to clean up

after his co-workers. [R.4241,4961.] When Larry swept the asbestos dust from the ground, even more dust settled onto his clothes where Barbara later encountered it. [R.4243,4962-63.]

Kennecott repeated several of these affirmative acts when Larry returned to Kennecott as an independent contractor from 1964 to 1966. During that time, Kennecott employees again negligently cut and sawed asbestos near him. [R.4242-43,4962.] The employees also mixed cement containing asbestos near him. [R.4242-43,4962.] All of these affirmative acts again created asbestos dust that settled onto Larry's clothes where Barbara later encountered it. [R.4242-43,4962-63.]

After creating the danger to Barbara, Kennecott engaged in subsequent negligent misconduct when it failed to even attempt to alleviate the danger it had created. Indeed, Kennecott never warned Larry of the dangers of asbestos, never instructed him not to wear his work clothes home, and never provided him with laundry services and showers to prevent the asbestos from leaving Kennecott's property. [R.4243,4962.] This misconduct left Barbara "positively worse off as a result." *Faucheaux,* 2015 UT App 3, ¶ 16.

The district court was therefore correct when it ruled that Kennecott's "affirmative act of specifying and using asbestos pipe insulation and its employee-insulators' affirmative acts of exposing" Larry to asbestos could give rise to a duty to Barbara. [R.5447.]

In Kennecott's opening brief, however, Kennecott argues that its negligent conduct consisted only of omissions, not affirmative acts that could give rise to a duty. (Op. Br. at 11-14.) Kennecott acknowledges Larry's allegations of its affirmative acts—choosing asbestos, then exposing Barbara to asbestos dust. (*Id.* at 12.) But Kennecott argues that Larry failed to allege that Kennecott undertook those affirmative acts negligently. (*Id.* at 8, 12.) Kennecott wrongly suggests that the court can therefore disregard those allegations. (*Id.* at 8, 12-14.)

Here, the question relevant to the duty analysis is whether there was an affirmative act that "launched a force or instrument of harm." *Herland*, 2015 UT 30, ¶ 35. This is distinct from the subsequent questions of breach and proximate cause, which are only relevant once a duty has been established. *E.g.*, *id.* ¶ 17.

Regardless, Kennecott is mistaken. Larry did allege that Kennecott undertook its affirmative conduct negligently. [R.1250-53.] Larry's cause of action was for negligence. [R.1252.] This is all that is required under Utah's notice-pleading standard to put Kennecott on notice that Larry was alleging that its conduct was negligent. Utah R. Civ. P. 8. Indeed, "[t]he plaintiff must only give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122 P.3d 622 (internal quotation marks omitted).

Otherwise, Kennecott attempts to analogize its affirmative acts to those at issue in *Graves v. North Eastern Services, Inc.*, a case in which this court held that

the defendant owed no duty to the plaintiff because the plaintiff's core complaint targeted an omission, not an affirmative act. (Op. Br. at 11-12 (citing 2015 UT 28, 345 P.3d 619).) Kennecott asserts that Larry's core complaint is that Kennecott failed to alleviate the danger, not that Kennecott created the danger in the first place. (Op. Br. at 12-14.)

But Kennecott mischaracterizes Larry's allegations. Larry's core complaint is that Kennecott exposed Barbara to asbestos dust. The fact that Kennecott could have reduced (but did not) Barbara's exposure through warnings or laundry services does not change the nature of Larry's core complaint.

This explains why Kennecott's analogy to *Graves* is misplaced. In *Graves*, this court held that a defendant's affirmative acts can give rise to a duty of care only when those affirmative acts are what caused the plaintiff's injury. 2015 UT 28, ¶¶ 26-28. In *Graves*, this was important because the plaintiff's claim was based on an omission (negligent hiring), but the plaintiffs sought to impose a duty based on the defendant's other affirmative acts (enticing children to come onto the property). *Id.* ¶ 27. This court rejected the plaintiff's attempt and clarified that a duty can arise from a defendant's affirmative act only when the defendant's affirmative act caused the plaintiff's injury. *Id.* ¶ 29.

But here, Kennecott's duty arises from its affirmative acts because its affirmative acts are what caused Barbara's injury. Of course, Kennecott engaged in additional subsequent acts of misconduct when it failed to alleviate the danger

it created. But unlike in *Graves*, those acts of omission do not form the basis of Kennecott's duty. Indeed, by the time Kennecott failed to warn Larry of the danger it created, Kennecott's conduct "ha[d] advanced to such a point as to have launched a force or instrument of harm." *Herland*, 2015 UT 30, ¶ 35. Kennecott's failure to warn or protect Barbara might have alleviated the danger it created, but it does not form the basis for Kennecott's duty here.

Courts in other jurisdictions have reached the same conclusion. For example, in *Ramsey v. Georgia Southern University Advanced Development Center*, the Supreme Court of Delaware held that "[i]n take-home asbestos exposure cases, an employer engages in misfeasance when it causes an employee to work with asbestos products under conditions in which asbestos dust covers the clothes he wears at the workplace and has laundered at home." 189 A.3d 1255, 1285 (Del. 2018). Holding that the affirmative actions of the employer in that case caused the exposure, the court found the fact "[t]hat the exposure to both the employee and his spouse might have been limited by providing warnings and safe laundering instructions does not turn the employer's action into nonfeasance." *Id.* at 1285-86. Accordingly, "[t]he nonfeasance in this situation—the failure to warn—is culpable precisely because a duty to warn arose when the employer engaged in the misfeasance of exposing its employee to dangerous asbestos products." *Id.* at 1286 (citation omitted).

1.2 None of the "Minus Factors" Eliminate Kennecott's Duty

While an affirmative act generally gives rise to a duty, this court has articulated three "minus factors" that can weigh in favor of eliminating an otherwise existing duty. Those factors are "[i] the foreseeability or likelihood of injury; [ii] public policy as to which party can best bear the loss occasioned by the injury; and [iii] other general policy considerations." *Jeffs*, 2012 UT 11, ¶¶ 5, 21 (citations and internal quotation marks omitted). None of those factors suggest that Kennecott's duty to Barbara should be eliminated here.

1.2.1 Barbara's Injury Was Foreseeable

By the time Larry worked at Kennecott, the dangers of asbestos, and take-home exposure, were generally foreseeable. This "minus factor" therefore does not weigh in favor of eliminating the duty Kennecott owed to Barbara.

In a duty analysis, the foreseeability is "evaluated at a broad, categorical level." *Id.* ¶ 25. The court "does not question 'the specifics of the alleged tortious conduct' such as 'the specific mechanism of the harm'" and looks only at the general foreseeability of harm. *Id.* Any questions regarding the foreseeability of the "specific mechanism of injury" are reserved for a proximate cause analysis and have no bearing on the existence of a duty. *Id.* ¶ 26.

The question is "whether a category of cases includes individual cases in which the likelihood of some type of harm is sufficiently high that a reasonable person could anticipate a general risk of injury to others." *Id.* ¶ 27. The question relates to "the general relationship between the alleged tortfeasor and the victim

and the general foreseeability of harm. *Id.* ¶ 25 (internal quotation marks omitted).

Whether the particular defendant could have foreseen the harm he caused is therefore irrelevant to the duty analysis. *Herland*, 2015 UT 30, ¶ 17. That is instead a question of proximate cause, an issue to be decided by the factfinder at trial. *Id.*; *Jeffs*, 2012 UT 11, ¶ 28.

Determining the relevant category of cases is the first step in the foreseeability analysis. For example, in *Jeffs*, the plaintiffs alleged that a nurse negligently prescribed medication to their father, causing their father to kill their mother. *Jeffs*, 2012 UT 11, ¶ 3. This court held that the relevant category of cases "consist[ed] of healthcare providers negligently prescribing medications to patients who then injure third parties." *Id.* ¶ 27.

In *Mower v. Baird*, the plaintiff alleged that a therapist negligently provided therapy to a child, causing the child to make false sex abuse allegations against his father. 2018 UT 29, ¶¶ 2, 12, 422 P.3d 837. This court held that the relevant category of cases "include[d] treating therapists who carelessly provide therapy to a minor child patient for potential sex abuse in a manner that injures the nonpatient parent through false allegations or memories of sexual abuse." *Id.* ¶ 25.

In *Herland*, the plaintiff alleged that a gun owner negligently "allow[ed] her to have access to his loaded handgun when she was severely intoxicated."

2015 UT 30, ¶ 8 (internal quotation marks omitted). This court held that "[t]he relevant category of cases here consists of gun owners who are negligent in supplying their guns to others who then injure themselves or third parties." *Id.* ¶ 15.

And in *Scott v. Universal Sales, Inc.*, the plaintiff alleged that the county negligently operated a work-release program and allowed an inmate to attack her. 2015 UT 64, ¶¶ 5-11, 356 P.3d 1172. This court held that the relevant category was "the custodian of a potentially dangerous individual who places the individual in the community outside its direct physical control with minimal supervision." *Id.* ¶ 43.

Here, the relevant category of cases includes premises owners who expose those on their property to a known toxin, asbestos, which in turn causes injuries to individuals off the premises. For Kennecott, the relevant time period was from 1961 to 1966 when Larry worked on Kennecott's property. [R.5442.]

The dangers of take-home asbestos exposure were generally foreseeable at that time. Indeed, the only evidence presented to the district court on this point was from Larry. He presented evidence that by the 1960s, trade organizations were circulating articles and other warnings about the dangers of asbestos.

For example, in 1960, the Industrial Hygiene Foundation published an abstract showing asbestos contamination as far as 600 meters from work sites. [R.2981.] In 1963, the IHF published the results of autopsies of people who died

from asbestos but were "not occupationally exposed to asbestos." [R.2981.] The IHF then "continued to report the dangers of community exposures to asbestos." [R.2981.]

In 1962, the AIHA promulgated an edition of the *Industrial Hygiene Journal* that discusses health hazards in the "building trades," and identifies measures to attempt to minimize asbestos exposures. [R.4614-19.] In 1964, the AIHA recognized the consensus regarding the serious health hazards associated with exposures to asbestos-containing pipe-covering and thermal insulation. [R.4620-24.]

Larry also presented an affidavit from his expert, Dr. Richard Lemen, a former U.S. Assistant Surgeon General and an expert in epidemiology. [R.2957-88.] Dr. Lemen cited medical and scientific data and concluded that the dangers of asbestos, including the dangers of take-home exposure, were "well-recognized" by the time Larry worked at all three companies. [R.2974-88.]

Specifically, Dr. Lemen stated that, "[b]y 1964, there were more than 700 articles in the worldwide medical literature highlighting the health effects associated with asbestos exposure and its toxic nature. By 1964, all the major asbestos-related diseases, including asbestosis, lung cancer and mesothelioma, had been causally established through epidemiology and reported in the scientific literature." [R.2963 (footnotes omitted).] He concluded that "the health hazards of asbestos, including mesothelioma, were well established and widely

known and accepted prior to [Larry's] employment as a laborer and then as an electrician." [R.2964.]

Dr. Lemen also explained that the dangers of take-home exposure—for all kinds of toxic substances—have been known since the early twentieth century. [R.2974-79.] He cited and explained several authorities published in the early 1900s warning that workers handling toxic materials should leave their clothing at work to avoid carrying the hazard home. [R.2794-79.] And Dr. Lemen explained that the dangers of laundering contaminated clothing have been known for centuries. [R.2979-82.]

Neither Kennecott nor either of the other companies presented evidence to dispute or contradict Dr. Lemen's conclusions. The district court correctly accepted Larry's uncontroverted evidence that Barbara's injury was foreseeable.

But now—and although Kennecott presented no evidence below—Kennecott asserts that Dr. Lemen's conclusions cannot be trusted because Dr. Lemen relied on "the Newhouse Study," which was "conducted in London and was not capable of focusing solely on take-home exposure." (Op. Br. at 17.) In support, Kennecott cites *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028, 1036 (Md. Ct. App. 2013). But the *Farrar* opinion does not suggest that the Newhouse Study is not reliable. *Id.* at 1036-37. Instead, the *Farrar* opinion recognizes that, after learning of the findings in the Newhouse Study, a leading asbestos researcher

"advised that workers exposed to asbestos change their clothes before going home." *Id.* at 1037.

Perhaps more important, however, the *Farrar* opinion confirms that the court correctly accepted Larry's uncontroverted evidence. Indeed, the opinion discusses at length the evidence introduced by "experts from both sides" concerning when the dangers of take-home asbestos exposure became widely known. *Id.* at 1036-38. But here, there was no evidence to contradict Dr. Lemen's conclusions and thus no real evidentiary dispute.

Regardless, Dr. Lemen's opinion did not rely solely upon the Newhouse Study. [R.2974-79.] Kennecott's assertion therefore misses the point.

Otherwise, Kennecott asserts that the dangers of take-home asbestos exposure were not foreseeable until 1972 when the OSHA regulations were released. (Op. Br. at 17.) In support, Kennecott cites opinions from three courts that accepted 1972 as the year that take-home exposure became foreseeable.

But two of those courts reached that conclusion based on the insufficient evidence that the plaintiffs presented to them. Indeed, in *Fourteenth District*, the plaintiff's expert conceded that the dangers of take-home asbestos exposure were not widely known until 1965 – when Larry was still working as an independent contractor at Kennecott. *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 218 (Mich. 2007). Similarly, in *Martin*, the plaintiff presented treatises, but failed to include "any mention of dangers of

second-hand exposure to asbestos dust." *Martin v. Gen. Elec. Co.*, No. CIV. A. 02-201-DLB, 2007 WL 2682064, at *4 (E.D. Ky. Sept. 5, 2007).

In contrast, the *Farrar* court reached its conclusion based on the evidence presented by the defendant. Specifically, the defendant's expert testified that the dangers of take-home exposure were suspected in 1955, but were not yet widely known. *Farrar*, 69 A.3d 1028 at 1036.

None of those evidentiary problems exist here. Dr. Lemen was unequivocal that the dangers of asbestos, including the dangers of take-home exposure, were generally known by the time Larry worked at all three companies. [R.2974-88.] Nor did the companies introduce any evidence to refute his conclusions.

Courts in other jurisdictions, where an assessment of duty is based upon foreseeability as opposed to relationships, have similarly concluded that the risks of take-home asbestos exposures were foreseeable.

For example, in *Olivo v. Owens-Illinois, Inc.*, the New Jersey Supreme Court found a premises owner owed a duty of care to the spouse of an independent contractor who was exposed to asbestos in the household setting and developed mesothelioma. 895 A.2d 1143, 1149 (N.J. 2006). The court recognized foreseeability plays a "dual role" in the analysis of tort responsibility, and that it may be significant as to both duty, and whether the breach of that duty is the proximate cause of an injury. *Id.* at 1148. The considerations of fairness and

public policy come into play "[o]nce the ability to foresee harm to a particular individual has been established." *Id.*

In *Olivo*, the court reviewed evidence that the premises defendant, ExxonMobil, was aware by 1937 that exposure to asbestos could cause the disease asbestosis. *Id.* at 1149. It also discussed the general industrial hygiene principles that made the risk of harm foreseeable, noting that "[a]s early as 1916, industrial hygiene texts recommended that plant owners should provide workers with the opportunity to change in and out of work clothes to avoid bringing contaminants home on their clothes." *Id.* Finding the record devoid of any evidence that ExxonMobil implemented such measures, the court held that "[i]t requires no leap of imagination to presume that during the decades of the 1940's, 50's, 60's, and early 1980's when [the plaintiff's husband] worked as a welder and steamfitter either he or his spouse would be handling his clothes in the normal and expected process of laundering them so that the garments could be worn to work again." *Id.* Accordingly, the court held, it was foreseeable that whoever laundered that clothing would be exposed to asbestos dust that accumulated while the plaintiff's husband engaged in the tasks he was contracted to perform. *Id.*

The Louisiana Court of Appeals reached a similar conclusion in a take-home case involving exposures that occurred between 1945 and 1963. *Zimko v. Am. Cyanamid*, 905 So. 2d 465, 470, 472 (La. App. Ct. 2005). Holding that a "no

duty" defense is "seldom appropriate" where negligence claims are involved, the court rejected the premises owner's no duty argument and found it had a "general duty to act reasonably in view of the foreseeable risks of danger to household members of its employees resulting from exposure to asbestos fibers carried home on its employee's clothing, person, or personal effects." *Id.* at 482-83.

In *Ramsey,* the Delaware Supreme Court acknowledged the "ordinary reality" upon which take-home asbestos claims are based, observing that "if the conduct of manufacturers and employers causes asbestos to go home on employees' clothes without any warning or safe laundering instructions, it is foreseeable that people like [the plaintiff] will be injured." 189 A.3d at 1277. The court pointed out that if exposure to asbestos dust when handling asbestos products is foreseeable, "so too is exposure when completing the quotidian task of laundering a dusty uniform in preparation for another day of work." *Id.* at 1279-80. The court noted the obvious fact that a worker may not launder his own contaminated clothing, making family members in the worker's household the "most natural class of persons to be exposed to harmful asbestos dust." *Id.* at 1280. Thus, the plaintiff's claims for take-home asbestos exposures in that case were characterized as having been based "on a clearly foreseeable consequence of common, and necessary, human conduct." *Id.* at 1286.

Because Barbara's injury was foreseeable, this factor does not weigh in favor of eliminating Kennecott's duty to Barbara.

1.2.2 Kennecott Was Better Situated to Avoid the Injury

Kennecott was also in the better position to "bear the loss occasioned by the injury. *Jeffs*, 2012 UT 11, ¶ 29. This "minus factor" therefore also does not weigh in favor of eliminating the duty Kennecott owed to Barbara.

The analysis of which party is better positioned to bear the loss considers which party is "best situated to take reasonable precautions to avoid injury." *Id.* ¶ 30. This factor will typically cut against the imposition of a duty only where the plaintiff is in a "superior position of knowledge or control" to avoid the injury. *Id.* The question is which party "has control over the instrumentality" that creates the danger. *Mower*, 2018 UT 29, ¶ 29. The defendant is not in the best position to bear the loss if "he lacks the capacity that others have to avoid injury by taking reasonable precautions." *Jeffs*, 2012 UT 11, ¶ 30.

Kennecott was in the superior position of knowledge and control. Kennecott chose to use asbestos in its facility, despite the danger it posed. [R.4241-43,4961-62.] Kennecott also instructed its employees to cut and saw asbestos products while others worked nearby, including Larry. [R.4241-43,4961-62.] And Kennecott chose not to provide warnings, showers, changing rooms, or laundry services to alleviate the hazard it created. [R.4243,4962.]

Yet Kennecott argues that Larry was in a superior position of control because, in the end, Larry was the one who wore his asbestos-covered clothes home to Barbara. (Op. Br. at 21.) In support, Kennecott cites *In re New York City Asbestos Litigation*, 840 N.E.2d 115 (N.Y. 2005). But that opinion demonstrates that Kennecott was better suited to avoid Barbara's injury because Kennecott could have taken actions to alleviate the hazard it created.

In *In re New York City*, the plaintiff sued for injuries his wife sustained after she was exposed to asbestos dust that he brought home on his clothes. *Id.* at 116. Just like Kennecott, the company had chosen to expose its employees to asbestos dust. *Id.* But unlike Kennecott, the company also issued uniforms and a laundry service to keep the asbestos from traveling home. *Id.* at 116.

The plaintiff, however, chose to bring his dirty work clothes home for cleaning for "convenience." *Id.* (alteration omitted). The court held that the plaintiff—not the company—was therefore best suited to avoid the harm. *Id.* at 120. Even though the company could have required the plaintiff to use its uniforms and laundry services, the company was "entirely dependent upon [the plaintiff's] willingness to comply with and carry out such risk-reduction measures." *Id.* In other words, because the company supplied risk-reducing measures to the plaintiff, the plaintiff had the superior position of control over the potential harm. *Id.*

The same is not true here. Kennecott did not alert Larry to the danger Kennecott created, let alone provide any risk-reducing measures. Kennecott remained in the superior position of control over Barbara's harm.

Courts in other jurisdictions have similarly concluded that employers who expose their employees and invitees to asbestos dust remain "best suited to bear the loss" of the harm they cause if they provide no warnings or risk-reducing measures. For example, in *Satterfield v. Breeding Insulation Co.*, the Tennessee Supreme Court considered various public-policy factors bearing upon the scope of the duty, such as whether "the gravity of the harm outweigh[s] the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm." 266 S.W.3d 347, 365 (Tenn. 2008).

The court observed that the magnitude of the risk of a debilitating and fatal illness like mesothelioma is great, while the measures to protect workers and their families from exposure to asbestos "appear to be feasible and efficacious without imposing prohibitive costs or burdens on [the defendant.]" *Id.* at 368. Because the defendant failed to demonstrate why precautions such as basic warnings, safe-handling instructions, coveralls, change-rooms, laundry services, or on-site bathhouses would have been unduly burdensome or prohibitively costly, the court found the public-policy factors weighed in favor of imposing a duty. *Id.* at 368-69, 374-75.

Likewise, in *Olivo v. Exxon Mobil Corp.*, a New Jersey appeals court analyzed the issue of who is best situated to prevent harm in a take-home asbestos case. 872 A.2d 814, 820 (N.J. Super. Ct. App. Div. 2005). Looking to whether the premises defendant, ExxonMobil, had the opportunity and ability to exercise care, the court found that Exxon was best situated to prevent the harm. *Id.* While "[a]sbestos-related diseases are very serious and often deadly," the premises defendant, on the other hand, "could have easily informed [the] plaintiff of the risks to his own health and the health of his wife and/or provided changing rooms so as to limit exposure to asbestos." *Id.* Because take-home asbestos cases present a scenario where the actions of the defendant are "relatively easily corrected" whereas the harm at issue is a fatal disease, the court found the imposition of a duty appropriate. *Id.* (internal quotation marks omitted).

Because Kennecott remained in a "superior position of knowledge or control" to avoid Barbara's injury, this factor does not weigh in favor of eliminating Kennecott's duty to her.

1.2.3 Public Policy Supports Kennecott's Duty to Barbara

Public policy considerations also support imposing a duty on companies who expose family members of their employees and invitees to asbestos dust. This "minus factor" therefore does not weigh in favor of eliminating the duty Kennecott owed to Barbara.

Kennecott argues that, as a matter of public policy, companies should not owe a duty to the family members that they harm because this would "open the flood gates to asbestos litigation" and liability "would essentially be infinite." (Op. Br. at 21 (internal quotation marks omitted).) Kennecott argues that the claims would not be limited to families because "there is no principled basis in the law upon which to distinguish the claim of a spouse with the claim of any other person potentially exposed to an employee's asbestos-covered clothing." (Op. Br. at 22 (internal quotation marks omitted).)

Kennecott is mistaken about the law. The principled basis in the law that distinguishes spouses and family members from other third parties is the principle of foreseeability. It is highly foreseeable that a person's household members, especially their spouse, would be exposed to toxins brought home on work clothing. It may well be less foreseeable that other third parties, who are outside the household, would be exposed to those toxins.

Kennecott is also mistaken about the facts. The pool of potential plaintiffs for take-home asbestos exposure cases is small. Indeed, according to the U.S. Centers for Disease Control, the number of deaths from mesothelioma in Utah during 2005, was fourteen. [R.4254,4953-54.] And in 1999, homemakers accounted for a mere 6.8% of mesothelioma deaths in the United States. [R.4254,4955-56.]

Indeed, courts in other jurisdictions have recognized that public policy supports imposing a duty on companies who expose spouses and families to asbestos dust. These courts have rejected the "specter of limitless liability associated with take-home asbestos claims." *Ramsey,* 189 A.3d at 1287 n.158.

For instance, the California Supreme Court recently disagreed with the notion that imposing a duty in take-home asbestos cases is tantamount to "limitless" liability. In *Kesner v. Superior Court*, the court rebuffed the defense policy argument, finding that liability for take-home exposures was by no means unlimited: "we have limited the duty to prevent take-home asbestos exposure to a discrete category, namely, members of a worker's household." 384 P.3d 283, 300 (Cal. 2016). Reasoning that even some individuals foreseeably exposed to asbestos would be unable to sue for damages under its holding in *Kesner*, the court concluded that defendants would certainly not face liability out of proportion to their own fault. *Id.* (citations omitted.)

The New Jersey Supreme Court likewise rejected concerns about "limitless liability" in a take-home asbestos case. In *Olivo v. Owens-Illinois, Inc.*, the court referred to defendant Exxon Mobil's fears of limitless exposure to liability as "overstated," finding that liability was being imposed based upon a showing of "the particularized foreseeability of harm to plaintiff's wife." 895 A.2d 1143, 1150 (N.J. 2006).

The Eleventh Circuit has similarly held that public-policy considerations weigh in favor of imposing a duty for take-home exposures to asbestos. In *Bobo v. Tennessee Valley Authority,* the court explained that, to the extent defendants violate their duties to avoid take-home exposures to asbestos, they would obviously face greater—though by no means limitless—liability for their actions:

> TVA argues that imposing a duty on employers like it to prevent take-home asbestos exposure will cause them to face greater liability. Assuming that employers violate their duties to minimize the risk of harm from take-home asbestos, they will face greater liability. But it is not "limitless" liability, as TVA asserts. The duty we recognize extends only to people whose harm is foreseeable, such as an employee's family members or others in the employee's household. In any event we do not think that the prospect of greater liability is necessarily negative. After all, imposing liability to deter acting, or failing to act, in a way that causes foreseeable harm is one of the functions of tort law.

855 F.3d 1294, 1306 (11th Cir. 2017) (citations omitted).

Notably, the courts that have been concerned with "limitless liability" have been concerned about hypothetical cases and hypothetical plaintiffs. Indeed, the Delaware Supreme Court reviewed those opinions in *Ramsey* and concluded that "[o]ther courts who conjured up the specter of limitless liability associated with take-home asbestos claims brought by persons other than an employee's spouse all did so in the context of cases brought by plaintiffs from the same household as the employee. In [those] cases, all the examples in the parentheticals involve imagined classes of plaintiffs, none of whom were before the courts doing the imagining." *Ramsey*, 189 A.3d at 1286 n.158 (citing seven opinions).

Public policy therefore does not weigh in favor of eliminating Kennecott's duty to Barbara.

2. ConocoPhillips Owed a Duty to Barbara

ConocoPhillips owed a duty to Barbara for the same reasons Kennecott owed a duty to her. Specifically, ConocoPhillips owed Barbara a duty because it engaged in affirmative conduct that created a danger to her while Larry was an independent contractor—an invitee—at ConocoPhillips from 1976 to 1978. [R.2685-89,2692-95.]

During those years, ConocoPhillips employees negligently removed asbestos insulation while Larry worked less than twenty feet away, just as Kennecott's employees had done. [R.2686.] They removed asbestos pipe insulation and let it fall to the ground, just as Kennecott's employees had done. [R.2686,4080.] And they swept the residual insulation from the floor, generating asbestos dust that reached Larry, who worked within twenty feet of the insulation workers—just as Kennecott's employees had done. [R.2686,4080.]

Yet the district court ruled that ConocoPhillips owed no duty to Barbara. [R.5443-47.] The court ruled that Larry's allegations against ConocoPhillips were "omissions related to failure to warn . . . rather than any alleged affirmative acts." [R.5444.] But Larry's allegations against ConocoPhillips were identical to his allegations against Kennecott—allegations that the court correctly understood

to be affirmative acts. [R.1237,5447.] It is unclear why the court reached the opposite conclusion with respect to ConocoPhillips.

Further compounding the problem, the court collapsed its analyses of ConocoPhillips' duty and PacifiCorp's duty into a single discussion. This led the court to analyze ConocoPhillips' duty under the retained-control doctrine, a doctrine that ConocoPhillips (correctly) did not argue below. [R.4077-93,5444-45.]

The retained control doctrine was never a basis for ConocoPhillips' liability because it was ConocoPhillips' own employees who exposed Larry to asbestos dust. [R.2686,4080.] The doctrine applies only to vicarious liability claims, not direct liability claims like Larry's claims against ConocoPhillips. *Magana v. Dave Roth Constr.*, 2009 UT 45, ¶ 37, 215 P.3d 143. The doctrine is an exception to the general rule that a principal is not liable for the acts of an independent contractor. *Id.* ¶ 23. Here, Larry alleged that ConocoPhillips is liable for the acts of its own employees, not the acts of any independent contractor. [R.2686,4080.] As to ConocoPhillips, the retained control doctrine is beside the point.

Confusingly, although the court had already ruled (incorrectly) that there was no affirmative act—and thus no presumptive duty—the court nonetheless addressed the "minus factors" under *Jeffs* factors that would eliminate a presumptive duty. As discussed above, the court erred in ruling that Larry's claims against ConocoPhillips arose out of omissions rather than affirmative acts.

ConocoPhillips engaged in the same affirmative conduct that forms the basis for Kennecott's duty. And for the same reasons that none of the "minus factors" serve to eliminate Kennecott's duty, none of them serve to eliminate ConocoPhillips' duty, either.

Foreseeability – Barbara's injury was foreseeable to ConocoPhillips. The relevant category of cases is the same as it was for Kennecott—it includes premises owners who expose their employees or independent contractors to industrial toxins which cause injuries to third parties who are off the premises. But for ConcoPhillips, the relevant time period was later—Larry worked on ConocoPhillips' property from 1976 to 1978. [R.5439.]

Barbara's injury was even more foreseeable to companies during those years than it was during the years applicable to Kennecott. Indeed, by 1976, the OSHA regulations had been in effect for more than four years. [R.2983-84.] The regulations confirmed what had been widely known for decades—that take-home exposure to asbestos posed a serious danger. [R.2974-84.]

Indeed, ConocoPhillips did not argue that her injury was not foreseeable. In its motion for summary judgment, ConocoPhillips asserted that "the issue of foreseeability[] is not determinative and is not necessary for the analysis." [R.2245.] And in its reply, ConocoPhillips asserted that foreseeability must be analyzed "at a broad, categorical level," something undisputed here. [R.4089.] Because these are the only two arguments that ConocoPhillips preserved, they

are the only two arguments that this court should consider on appeal. *E.g.*, *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 20, 199 P.3d 957.

Yet the district court ruled that Barbara's injury was not foreseeable because "it would be a vast expansion of Utah Tort Law to find that, based on the relationships of the parties; an employer could foresee harm to the spouse of an employee of an independent contractor." [R.5445.] The court's ruling contradicts its ruling concerning Kennecott's duty.

The court's ruling also contradicts Utah law. The rule that we owe a duty of care when engaging in affirmative conduct that creates a risk of harm to third parties is already Utah law—it is not an expansion of it. *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 21, 275 P.3d 228. The court's analysis also conflicts with *Jeff's* explanation that, when an affirmative act has taken place, the relationship of the parties can be a "plus factor" but is not a prerequisite for a duty. *Id.* ¶¶ 5, 9. This factor does not weigh in favor of eliminating ConocoPhillips' duty to Barbara.

Better Situated to Avoid the Injury - As to the next factor, the court ruled that Larry was best suited to take reasonable precautions to avoid the injury. The court did not explain how Larry was better suited, but instead stated that imposing a duty on the companies "would impose an extraordinarily onerous and unworkable burden." [R.5446 (internal quotation marks omitted).]

Again, this ruling contradicts the court's ruling with respect to Kennecott's duty. ConocoPhillips was better situated than Larry to prevent Barbara's injury

for all the same reasons Kennecott was better situated than Larry to do so. Indeed, Larry had no knowledge that ConocoPhillips chose to have its employees install asbestos near him. This factor does not weigh in favor of eliminating ConocoPhillips' duty to Barbara.

Public Policy - Finally, the court ruled that public policy weighs against imposing a duty on the companies. [R.5446.] The court ruled that "[t]he pressure this expansion of the common law would put on the time and resources of courts, society, and businesses in general weighs against" imposing a duty on the companies. [R.5446.]

But again, this ruling contradicts the court's ruling with respect to Kennecott's duty. Public policy supports the duty that both companies owed to Barbara. This factor does not weigh in favor of eliminating ConocoPhillips' duty to Barbara.

ConocoPhillips is directly liable for Barbara's injury, just as Kennecott is liable. This court should vacate the entry of summary judgment in favor of ConocoPhillips.

3. PacifiCorp Owed a Duty to Barbara

PacifiCorp not only engaged in an affirmative act when it required Jelco-Jacobson to cut and install asbestos, it remained vicariously liable for the harm because it retained control over the method and means of Jelco-Jacobson's cutting and installation of the asbestos.

The district court erred in focusing on whether PacifiCorp retained control over Larry, not over Jelco-Jacobson. And the error was prejudicial because, with the proper focus, PacifiCorp retained control over Jelco-Jacobson and thereby remained vicariously liable for the harm caused by the cutting and installation of asbestos.

Under the retained-control doctrine, an employer can be liable for the acts of its independent contractor if the employer "actively participates" in the contractors' work. *Thompson v. Jess*, 1999 UT 22, ¶ 18, 979 P.2d 322. The doctrine is described in the Restatement (Second) of Torts:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965).

This court in *Thompson* adopted section 414. *Id.* ¶¶ 16, 18. The court explained that an employer "actively participates" when it "exercise[s] affirmative control over the method or operative detail of the work," either by "direct management of the means and methods" of the independent contractor's work or by providing "specific equipment that caused the injury." *Id.* ¶ 20 (citations omitted).

With respect to when contract language satisfies the "active participation" test, there is no Utah case law directly on point. But other jurisdictions have

analyzed situations similar to this one under the section 414. Those cases reveal that the retention of any control, by contract, over the activity that caused the danger is sufficient to satisfy the retained-control doctrine.

For example, one court held that when a contract "does more than control the ends of [the independent contractor's] work, but . . . also controls the means [the independent contractor] employs in reaching those ends," the contract language constitutes "active participation" for purposes of the retained-control doctrine. *Avalos v. Pulte Home Corp.*, 474 F. Supp. 2d 961, 966 (N.D. Ill. 2007). In *Avalos*, the contract required the independent contractor to deliver certain materials *only* to a representative of the owner and *only* in the manner directed by the specifications provided. *Id.* That was enough to retain control.

Similarly, a Texas court has held that specifying in a contract the method of cutting down trees constituted retaining control such that the landowner was liable for harm caused by the independent contractor who cut the trees. *Kirby Forest Indus. v. Kirkland*, 772 S.W.2d 226, 229, 231 (Tex. Ct. App. 1989). Any specification of the method by contract satisfies section 414.

Other courts have held that it is enough to retain control where a contract does not specify the means, but instead states who is obligated to control workplace safety. *Smith v. United States*, 497 F.2d 500, 511-12, 514 (5th Cir. 1974) (general contractor retained control where prime contract specified that general would ensure subcontractors complied with safety requirements and none of the

subcontracts delegated that obligation to the subcontractors); *Gaytan v. Wal-Mart*, 853 N.W.2d 181, 193 (Neb. 2014) (same). Even authority to stop unsafe work can impose a duty under the retained-control doctrine. *Lewis v. N.J. Riebe Enters., Inc.*, 825 P.2d 5, 12-13 (Ariz. 1992).

Specifying which equipment must be used also satisfies the retained-control doctrine. For example, a franchisor "actively participated" in the means and method of work when its contract with its franchisee required the franchisee to purchase certain brands of equipment that caused an injury. *West v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991, 995 (D.N.H. 1983). What these cases reveal is that nearly any control will satisfy section 414.

Here, as a result of PacifiCorp's negligence and its retained control over Jelco-Jacobson and the project, it was nearly guaranteed asbestos dust would coat the area where Larry and many others worked.

First, PacifiCorp's contract mandated that asbestos insulation would be used and that no substitutions could be made without written agreement from PacifiCorp. [R.3298-99,3389,4142.] The contract also allowed PacifiCorp—and only PacifiCorp—to change or substitute asbestos-containing materials it required to be used. [R.3298-99,3388-89.]

Second, PacifiCorp retained control over where the asbestos insulation was to be cut, and also the means, methods and requirements of applying the asbestos insulation and asbestos insulating cement that harmed Barbara.

[R.3299,3392-3399.] Specifically, PacifiCorp's contract set out where Jelco-Jacobson was to cut and install asbestos insulation, where formed sections and staggered joints were required, and the amount and thickness of the asbestos insulation applied. [3299,3392-99.] The plans were so detailed that PacifiCorp dictated where cuts were to be made when asbestos insulation met flanges, as well as the method of insulating pipe bends, valves and fittings, the necessity of staggering longitudinal joints, the spacing measurement of wires used to secure the insulation sections and how asbestos insulating cement is to be applied and to what thickness—choices that created the asbestos dust that caused Barbara's death. [R.3299,3393-96.]

Fourth, PacifiCorp took responsibility for—and controlled—testing and inspecting to determine the suitability of materials and methods of the work. [R.3300,3443,4145.] And PacifiCorp maintained the right to order changes in the work, inspect and reject the materials and workmanship. [R.3299,3429-31,4144.] PacifiCorp also reserved the right to demand the contractor stop unsafe work practices. [R.3299,3436.]

And fifth, PacifiCorp was responsible for certain aspects of safety at the jobsite. Specifically, PacifiCorp was responsible for directing the contractor to implement adequate dust control measures. [R.3330,3446,4146.] And while it was known that exposure to asbestos was a health hazard and regulated by OSHA during the construction of the project, the contract did not include any special

precautions to reduce or otherwise eliminate the hazards of installing the asbestos insulation that PacifiCorp specified. [R.3299-3300.] Under the retained-control doctrine set forth in section 414, PacifiCorp retained control over the cutting and installation of asbestos, as well as safety in the area where Larry was exposed to asbestos that he took home, that harmed Barbara. PacifiCorp never warned Larry of the hazards of asbestos, never monitored asbestos levels, never implemented any engineering controls to reduce his exposures and never provided him with showers or laundry services. [R.3301,4146.] PacifiCorp is vicariously liable for the harm to Barbara.

This court should vacate the entry of summary judgment in favor of PacifiCorp.

Conclusion

For the reasons set forth above, each of the companies owed a duty to Barbara. This court should affirm the district court's denial of Kennecott's motion for summary judgment, and vacate the district court's entry of summary judgment in favor of ConocoPhillips and PacifiCorp.

DATED this 15th day of November, 2019.

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Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24A(g)(1) because this brief contains 12,198 words, excluding the parts of the brief exempted by Utah R. App. P. 24A(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 15th day of November, 2019.

/s/ Troy L. Booher

Certificate of Service

This is to certify that on the 15th day of November, 2019, I caused two true and correct copies of the Brief of Appellee and Cross-Appellant to be served via first-class mail, postage prepaid, with a copy by email, on:

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