IN THE UTAH SUPREME COURT

LARRY BOYNTON, individual and on behalf of the heirs of BARBARA BOYNTON, Plaintiff/Appellee, v. KENNECOTT UTAH COPPER, LLC, Defendant/Appellant.	Case No. 20190259 (Appeal from the Third District Court Salt Lake County, Civil No. 160902693, Judge Randall N. Skanchy)

REPLY BRIEF OF THE APPELLANT AND CROSS-APPELLEE KENNECOTT UTAH COPPER, LLC

Troy L. Booher (9419)
Beth E. Kennedy (13771)
Dick J. Baldwin (14587)
ZIMMERMAN BOOHER
341 South Main Street, Fourth Floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
bkennedy@zbappeals.com
dbaldwin@zbappeals.com

Richard I. Nemeroff (13966)
Barrett B. Naman, pro hac vice
NEMEROFF LAW FIRM
5532 Lillehammer Lane, Suite 100
Park City, Utah 84098
ricknemeroff@nemerofflaw.com
barrettnaman@nemerofflaw.com

Attorneys for Appellee/Cross-Appellant Larry Boynton

Rick L. Rose (5140)
Kristine M. Larsen (9228)
Blake M. Biddulph (15541)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84111
rrose@rqn.com
klarsen@rqn.com
bbiddulph@rqn.com

Counsel for Appellant/Cross-Appellee Kennecott Utah Copper LLC

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INTRODUCTION

Twenty-five states have addressed whether a duty exists in take-home asbestos exposure cases. The majority, 16 of the 25, conclude a duty does not exist, especially where the asbestos exposure ended prior to the 1972 OSHA Regulations.[1] Applying the factors set forth in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228, the Court should join the majority and hold that Kennecott Utah Copper, LLC ("KUC") did not owe a duty to Barbara Boynton ("Mrs. Boynton") for take-home asbestos exposure.

Affirmative acts must be wrongful in order to create a duty. Appellee Larry Boynton ("Mr. Boynton") argues that KUC's scraping, sawing, sweeping, installing, and mixing of asbestos creates a duty between KUC and Mrs. Boynton. (Op. Br. at 22–23.) To be sure, that conduct involves affirmative acts, but there are no allegations or evidence that such conduct was *wrongful*. Moreover, that conduct is not even directed at Mrs. Boynton, who never stepped foot on KUC's premises. Instead, it was Mr. Boynton, who has never developed any asbestos-related disease, who was allegedly exposed to asbestos because of KUC's affirmative conduct. Mr. Boynton's claim is entirely based on KUC's alleged omissions—primarily the failure to prevent him from exposing Mrs. Boynton to asbestos. KUC's alleged failures do not create a duty to Mrs. Boynton, absent a special relationship, which here there undisputedly is not.

Regardless of KUC's alleged affirmative conduct, foreseeability eliminates any duty between KUC and Mrs. Boynton. KUC was an end user of asbestos-containing

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[1] http://www.maronmarvel.com/news-insights/duty-for-take-home-asbestos-exposures-a-jurisdictional-analysis.

materials—it did not manufacture, mine, or produce asbestos. In fact, Mr. Boynton alleges that the asbestos manufacturing defendants should have warned KUC of the dangers of asbestos. (R. 1238–50.) The harm from take-home asbestos exposure was not reasonably foreseeable to premises owners like KUC prior to the 1972 OSHA Regulations, which imposed specific requirements on employers to prevent take-home asbestos exposure. Mr. Boynton stopped working at KUC's premises in 1966, several years before the OSHA Regulations, and KUC has cited many cases holding that no duty exists in take-home cases where the exposure, like here, ended before those regulations.

Mr. Boynton's evidence is insufficient to show that harm from take-home asbestos exposure was reasonably foreseeable from 1961 to 1966 to premises owners like KUC. He relies almost exclusively on Dr. Lemen, but Dr. Lemen does not even opine that the harm from take-home asbestos exposure was reasonably foreseeable during that timeframe. And the materials Dr. Lemen relies upon are not specific to take-home asbestos exposure or are not even related to asbestos.

Any duty is also eliminated because Mr. Boynton, not KUC, was better situated to prevent Mrs. Boynton from being exposed to asbestos. As stated in KUC's initial brief, neither KUC nor Mr. Boynton was well-positioned to prevent the harm because of the lack of foreseeability. However, the relevant question is which party was *better* situated to prevent the harm from occurring. Mr. Boynton is the one who exposed Mrs. Boynton to asbestos, not KUC. Mr. Boynton could have shaken out his clothing or otherwise decreased the amount of asbestos dust he tracked into the home.

Finally, public policy eliminates any duty between KUC and Mrs. Boynton. Creating a duty in take-home cases results in a virtually limitless pool of potential plaintiffs and exposes KUC to limitless liability. Mr. Boynton tries to draw the duty line around household family members by relying on foreseeability, but this line is not so easy to draw. There are many situations where it would be more foreseeable that a non-household family member would be exposed to asbestos-covered clothing than a household family member.

The district court granted PacifiCorp and Conoco's motions for summary judgment after thoroughly analyzing the foregoing *Jeff* factors, which analysis included the following:

> Affirmative acts. "The injury and damages complained of – the harm to Mrs. Boynton – are linked to Defendants' omissions, rather than any alleged affirmative acts."
>
> Foreseeability. "As a result, it would be a vast expansion of Utah Tort Law to find that, based on the relationships of the parties; and employer could foresee harm to the spouse of an employee of an independent contractor."
>
> Which party is best situated to prevent the harm. "This factor also weighs against imposing a duty because protecting every person with whom a business' employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden."
>
> Public policy: "The pressure this expansion of the common law would put on the time and resources of courts, society, and businesses in general weighs against finding a company owes a duty to persons with whom the employees of its independent contractors come in contact."

(R. 5444–46.)

Instead of analyzing these factors with respect to KUC's motion, the district court drew a distinction between an employee and an independent contractor, without explanation, and found "a disputed issue of material fact as to whether a legal duty extends to Mrs. Boynton." (R. 5447.)[2] But there is no disputed issue of material fact, and the district court's analysis of the *Jeffs* factors should apply equally to KUC.

The issue before the court is purely a legal question—does a duty exist in take-home exposure cases where the exposure ended before 1972. The Court should answer that question negatively and reverse the district court's denial of KUC's motion for summary judgment.

ARGUMENT

KUC did not engage in wrongful affirmative conduct that harmed Mrs. Boynton. Regardless, the minus factors of foreseeability, which party is best situated to prevent the harm, and public policy eliminate any duty between KUC and Mrs. Boynton.

I. KUC OWES NO DUTY TO MRS. BOYNTON ON THE BASIS OF WRONGFUL AFFIRMATIVE CONDUCT.

Affirmative acts must be wrongful in order to create a duty. *Jeffs*, 2012 UT 11, ¶ 7. KUC owes no duty to Mrs. Boynton because there are no allegations or evidence that KUC engaged in wrongful affirmative conduct; instead, Mr. Boynton's claim against KUC is based entirely on omissions.

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[2] Mr. Boynton claims, without citation, that "[t]he district court correctly ruled that Kennecott owed Mrs. Boynton a duty." (Op. Br. at 22.) That is incorrect.

A. There are no allegations or evidence KUC's affirmative acts were wrongful.

Mr. Boynton does not allege that KUC engaged in wrongful affirmative conduct. Nevertheless, he insists "[h]is complaint repeatedly asserted that his injuries were caused by [KUC's] negligent use of asbestos." (Op. Br. at 11.) He relies on language from the complaint's background section that KUC scraped, sawed, swept, installed, and mixed asbestos. (Op. Br. at 22–23.) But the complaint does not allege that this conduct was negligent or otherwise wrongful, and he identifies no other affirmative conduct by KUC. (R. 1237, 1250–54.)

Recognizing that he did not allege KUC's affirmative acts were wrongful, Mr. Boynton references Utah's notice-pleading standard and argues that "Kennecott undertook its affirmative conduct negligently" because his "cause of action was for negligence." (Op. Br. at 26.) But his negligence cause of action does not mention, reference, or even incorporate the allegations of scraping, sawing, sweeping, installing, and mixing. (R. 1250–54.) And again, there are no allegations anywhere in the complaint that KUC performed that conduct negligently. Like the plaintiff in *Hill v. Superior Prop. Mgmt. Servs., Inc.*, Mr. Boynton fails "to connect up any activity that [KUC] voluntarily undertook with an allegation of negligence *in the performance of that activity*." 2013 UT 60, ¶ 39, 321 P.3d 1054 (emphasis in original).[3]

[3] When introducing *Hill* in its initial brief, KUC states that *Hill* "further illustrates that KUC's alleged tortious conduct consists only of misfeasance." (Br. at 13.) This statement should say "nonfeasance" and not "misfeasance."

There also is no evidence that KUC's scraping, sawing, sweeping, installing, and mixing of asbestos was negligent. Mr. Boynton has not cited any expert testimony explaining how KUC was negligent in those activities or what KUC should have done differently with respect to those activities.

B. Mr. Boynton's claim against KUC is based entirely on omissions.

Mr. Boynton's claim against KUC, as outlined in his complaint, is based entirely on nonfeasance. (R. 1250–54.) His claim is that Mrs. Boynton's "injury could have been *prevented* if [KUC] had chosen to undertake *additional activities*" to prevent Mr. Boynton from carrying asbestos home on his clothing. *Hill*, 2013 UT 60, ¶ 41 (emphasis in original). As explained by the district court, "[t]he allegations themselves begin with the word 'failure' in each of the charging allegations in paragraph 55 of the Amended Complaint" and therefore "[t]he injury and damages complained of – the harm to Mrs. Boynton – are linked only to Defendants' omissions, rather than any alleged affirmative acts." (R. 5444.) Paragraph 55 of the complaint is brought against KUC, Conoco, and PacifiCorp—not just Conoco and PacifiCorp. (*Id.* at 1250–51.) Like *Graves v. N.E. Servs., Inc.*, Mr. Boynton's "core complaint is with [the three defendants'] omissions or failures," not their affirmative conduct. 2015 UT 28, ¶ 27, 345 P.3d 619.

Graves is squarely on point. It explains that a defendant's "affirmative acts are a basis for imposing a duty *in the performance of those acts*, not a broader duty to undertake additional measures aimed at preventing [harm] by a third party." 2015 UT 28, ¶ 29 (emphasis in original). Mr. Boynton argues that *Graves* is distinguishable because KUC created the danger in the first place. (Op. Br. at 27.) But KUC did not expose Mrs.

Boynton, who never stepped foot on its premises, to asbestos—Mr. Boynton did so by bringing asbestos home on his clothing. This is "an act of a third party that [KUC] failed to prevent," *Graves*, 2015 UT 28, ¶ 20, and is the crux of Mr. Boynton's negligence claim, not KUC's use of asbestos.

II. FORESEEABILITY ELIMINATES ANY DUTY BETWEEN KUC AND MRS. BOYNTON.

Regardless of any wrongful affirmative act, foreseeability eliminates any duty between KUC and Mrs. Boynton because harm from take-home exposure was not reasonably foreseeable from 1961–66 and there was no relationship between KUC and Mrs. Boynton.

A. Harm from take-home asbestos exposure was not reasonably foreseeable prior to the 1972 OSHA Regulations.

Mr. Boynton defines the category of cases as "premises owners who expose those on their property to a known toxin, asbestos, which in turn causes injuries to individuals off the premises." (Op. Br. at 31.) While "foreseeability in duty analysis is evaluated at a broad, categorical level," *Jeffs*, 2012 UT 11, ¶ 25, Mr. Boynton's defined class is too broad because it does not account for a time period. Whether harm from take-home asbestos exposure is foreseeable in the internet age is a different question than whether it was foreseeable from 1961 to 1966. It is critical not to inject hindsight bias into the determination of foreseeability. Moreover, the issue is when the harm from take-home asbestos exposure was reasonably foreseeable, not when the harm from substantial, prolonged occupational asbestos exposure was reasonably foreseeable. The category of

cases is therefore better defined as take-home asbestos exposure claims against premises owners where the exposure ended prior to 1972.

1. There is insufficient evidence that harm from take-home asbestos exposure was reasonably foreseeable from 1961 to 1966.

As explained by the Texas Court of Appeals in *Alcoa Inc. v. Behringer*, the foreseeability of substantial, prolonged occupational asbestos exposure is not the same as take-home asbestos exposure:

> In this case, the record reflects that the general danger of prolonged occupational asbestos exposure to asbestos-manufacturing workers was known at least by the mid-1930s. But in this case, the issue is not when it was generally known that substantial, prolonged exposure to asbestos in the workplace was dangerous to asbestos workers. Instead, *the pivotal issue here is when it became generally known that non-occupational [or take-home] exposure to asbestos could be dangerous.*

235 S.W.3d 456, 461–62 (Tex. Ct. App. 2007) (finding "the danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s") (emphasis added). Like *Behringer*, Mr. Boynton's cited evidence does not support the claim that harm from *take-home asbestos* exposure was reasonably foreseeable from 1961 to 1966.

Instead, Mr. Boynton equates evidence that harm from inhaling large quantities of asbestos dust by workers in asbestos mines, mills, and factories was foreseeable as evidence that harm from take-home asbestos exposure was foreseeable. (Op. Br. at 13–17, 31–33.) Mr. Boynton cites Dr. Lemen's affidavit, warnings from trade organizations, and warnings from industrial hygienists as evidence that harm from take-home asbestos exposure was foreseeable from 1961 to 1966. (*Id.*) KUC addressed the insufficiency of

Mr. Boynton's evidence at the district court. For example, in response to Fact No. 21 of Plaintiff's Counter-Statement of Undisputed Facts, KUC's reply in support of its motion for summary judgment states:

> The Lemen Affidavit refers to the general risks of asbestos and fails to show that KUC knew or should have known about the risk of mesothelioma from *take-home asbestos exposure* during the time Mr. Boynton worked at the premises. The Lemen Affidavit also identifies the 1972 OSHA regulations, which were not in effect at the time Mr. Boynton worked at KUC's premises. There is simply no evidence that KUC knew or should have known of the potential harm from take-home asbestos exposure during the relevant pre-OSHA time period.

(R. 5012.) A close examination of the citations to the medical and scientific literature relied on by Dr. Lemen and a close reading of the articles reveal that the early case reports prior to 1966 did not establish whether or not there was an association between domestic exposure to asbestos and mesothelioma or the magnitude of that association. At best, the literature and articles support the general proposition that harm from exposure to large quantities of asbestos dust by traditional high risk trades such as asbestos miners and asbestos factory workers was foreseeable, *not* that harm from take-home exposure was foreseeable.

i. *Dr. Lemen's affidavit*

Dr. Lemen does not specifically opine that harm from take-home asbestos exposure was reasonably foreseeable from 1961 to 1966. (R. 2974–88.) Mr. Boynton includes the following quotations from Dr. Lemen's affidavit, neither of which specifically addresses take-home asbestos exposure:

- "By 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." (Op. Br. at 14, 32.)

- "[T]he health hazards of asbestos, including mesothelioma, were well established and widely known and accepted prior to [Mr. Boynton's] employment as a laborer and then as an electrician." (*Id.* at 14, 32–33.)

These statements concern the health hazards of direct occupational asbestos exposure to workers who inhaled high concentrations of asbestos dust and demonstrate how Mr. Boynton conflates what was generally known by 1964 about the health hazards associated with asbestos exposure by those in high-risk occupational trades, such as asbestos workers and insulators, with what was known about the foreseeable risk of harm posed by take-home asbestos exposure resulting from indirect and intermittent bystander exposure of workers at a non-asbestos manufacturing facility.

Mr. Boynton also argues that "Dr. Lemen explained that the dangers of take-home exposure—for all kinds of toxic substances—have been known since the early twentieth century" and that "the dangers of laundering contaminated clothing have been known for centuries." (Op. Br. at 14, 33.) These general opinions are not specific to asbestos, do not distinguish between toxic substances, and do not specify the dosage or degree of exposure necessary to result in harm. Whether harm is foreseeable from laundering clothing caked in lead or drenched in arsenic is not the same question as whether harm is foreseeable from laundering the clothing of a worker occasionally and indirectly exposed to asbestos dust.

The treatise Epidemiology of Abestos-Related Diseases, authored by Dr. Lemen, demonstrates that the first speculation of the possibility that asbestos-related disease

might result from take-home exposure was raised by Newhouse & Thompson in the British Journal of Industrial Medicine in 1965. (R. 3109, 3165.)[4] The population observed by Newhouse had significant community environmental exposure from a crocidolite asbestos factory in the neighborhood and to a lesser extent included persons with a history of living with an asbestos workers. (R. 2979–81, 3109, 3165.) There is no evidence that these early case reports were widely disseminated or well known. Dr. Lemen's own citations to the scientific literature in his treatise demonstrate that it was not until 1976 that an epidemiological exposure study of household contact with asbestos was first published. (R. 3109, 3183.)

Early case reports merely suggesting a connection between non-occupational exposure by persons living in close proximity to asbestos mines and the development of asbestos-related diseases does not establish that harm from take-home exposure was reasonably foreseeable to a non-asbestos manufacturing premises owner during the time period that Mr. Boynton worked at KUC.

ii. *Warnings from trade organizations*

Mr. Boynton states that "by the 1960s, trade organizations were circulating articles and other warnings about the dangers of asbestos." (Op. Br. at 31.) Mr. Boynton specifically identifies a 1962 Industrial Hygiene Journal ("identif[ying] measures to attempt to minimize asbestos exposures" to insulation workers in shipyards), a 1964 AIHA publication (recognizing "exposures to asbestos-containing pipe-covering and thermal insulation" is dangerous), and a National Safety Council publication ("warning of

[4] The Newhouse study is also addressed at page 17 of KUC's brief.

the toxicity of asbestos"). (*Id.* at 16, 31–32.) Again, none of these publications are specific to take-home asbestos exposure.

Mr. Boynton then cites a 1960 Industrial Hygiene Foundation abstract showing "asbestos contamination as far as 600 meters from the work site" and a 1963 publication of autopsies involving community exposures. (Op. Br. at 31–32.) Community exposure, often influenced by factors such as wind and proximity to the asbestos source, is not the same as take-home exposure. An article showing asbestos contamination 600 meters—less than a half mile—from an asbestos mine does not mean take-home exposure from a worker such as Mr. Boynton was foreseeable

iii. *Warnings from industrial hygienists*

Finally, Mr. Boynton states that Conoco's industrial hygienist "testified that he first learned of the hazards of asbestos in 1939" and that he was "in charge of collecting information on the health hazards of asbestos insulating material and reporting that information to the American Petroleum Institute." (Op. Br. at 17.) Again, this evidence is not specific to take-home exposure.

2. KUC cites evidence that harm from take-home asbestos exposure was not reasonably foreseeable from 1961 to 1966.

Despite relying on evidence that was not specific to take-home asbestos exposure or not even specific to asbestos, Mr. Boynton repeatedly claims that KUC failed to cite any evidence that harm from take-home asbestos exposure was not foreseeable. (Op. Br. at 13, 31, 33.) That is incorrect. KUC relies on two critical pieces of evidence in arguing the harm from take-home exposure was not foreseeable: (1) the 1972 OSHA Regulations;

and (2) Mr. Boynton stopped working at KUC's premises long before those regulations were promulgated. (R. 5008, 5012, 5014–16.) Despite criticizing KUC for not citing any evidence on the issue, Mr. Boynton cites the very 1972 OSHA Regulations *as evidence* that harm from take-home asbestos exposure was foreseeable to PacifiCorp and Conoco. (Op. Br. at 17.) Under Mr. Boynton's contradictory logic, the regulations can be evidence that harm was foreseeable but cannot be evidence that the harm was not foreseeable. And interestingly, the regulations are the only evidence cited by Mr. Boynton that specifically addresses take-home exposure. (Op. Br. at 17 ("The 1972 regulations dealt specifically with the dangers of asbestos dust traveling on clothing into homes."). In short, the OSHA Regulations provide the Court a categorical basis to draw the line on foreseeability.

3. The majority of cases, especially where the exposure ended before 1972, hold that no duty exists.

Where the take-home asbestos exposure ends before 1972, courts routinely hold that no duty exists. *See Behringer*, 235 S.W.3d at 458, 462 (last exposure was 1959); *Hudson v. Bethlehem Steel Corp.*, 1995 WL 17778064, at *1, 4 (Pa. Com. Pl. Dec. 12, 1995) (last exposure was 1960); *Martin v. Gen. Elec. Co.*, 2007 WL 2682064, at *1, 5 (E.D. Ky. Sept. 5, 2007), *aff'd*, *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 445–46 (6th Cir. 2009) (last exposure was 1963); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 218 (Mich. 2007) (last exposure was 1965); *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844, 847 (10th Cir. 1992) (last exposure was 1969); *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028, 1036–39

(Md. Ct. App. 2013) (last exposure was 1969). As these courts have noted, prior to the OSHA regulations, non-asbestos manufacturing companies simply did not have the expertise to evaluate first reports in science and draw reasonable inferences therefrom. Mr. Boynton attempts to distinguish *Martin* and *Fourteenth Dist.* because those courts concluded take-home exposure was not foreseeable pre-OSHA "based on the insufficient evidence that the plaintiffs presented to them." (Op. Br. at 34.) That is the same conclusion KUC asks the Court to reach here—there is insufficient evidence that harm from take-home exposure was reasonably foreseeable before 1972.

Cases where the asbestos exposure occurred post-OSHA are not persuasive in this case because the regulations changed the foreseeability of harm from take-home asbestos exposure and Mr. Boynton stopped working at KUC's premises long before 1972. Nevertheless, Mr. Boynton cites three take-home exposure cases in support of his foreseeability argument—all of which involve post-OSHA exposure periods: *Zimko v. Am. Cyanamid*, 905 So.2d 465 (La. App. Ct. 2005) (exposure occurring from 1945–66 and 1977–2001);[5] *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1146 (N.J. 2006) (exposure occurring from 1947 to 1984); and *Ramsey v. Georgia Southern University Advanced Development Ctr.*, 189 A.3d 1255, 1263 (Del. 2018) (exposure occurring from 1967 to 1979). In fact, *Ramsey* states that the "precise risk of harm" (take-home exposure) was recognized by the 1972 OSHA Regulations. *Id.* at 1280. Moreover,

[5] A later Louisiana court cautioned against relying on *Zimko* because the decision was never reviewed by the supreme court. *See Thomas v. A.P. Green Indus., Inc.*, 933 So. 2d 843, 871 (La. App. 2006) ("Any person citing *Zimko* in the future should be wary of the problems of the majority's opinion in *Zimko* in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.")

Zimko relied exclusively on a New York intermediate appellate court decision that was subsequently reversed. 905 So.2d at 483.[6] And none of the cases persuasively explain how the defendant knew or should have known of the risks of take-home exposure during the relevant timeframe.[7]

4. The district court did not accept Mr. Boynton's foreseeability evidence.

Mr. Boynton incorrectly claims, without citation, that "[t]he district court correctly accepted Mr. Boynton's uncontroverted evidence that Mrs. Boynton's injury was foreseeable." (Op. Br. at 33.) As to Conoco and PacifiCorp, the court rejected Mr. Boynton's foreseeability evidence and determined "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 district court did not address foreseeability as to KUC, but KUC agrees that "it would be a vast expansion of Utah Tort Law" to impose a duty on KUC for take-home asbestos exposure.

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[6] *Fourteenth Dist.*, 740 N.W.2d at 216 ("However, the Louisiana court relied exclusively on a New York intermediate appellate court decision that was subsequently reversed by New York's highest court. . . . Because the court in *Zimko* relied exclusively on a decision that has since been reversed, we do not find *Zimko* persuasive."); *Martin*, 2007 WL 2682064 at *8 ("[T]he New York appellate court decision that the *Zimko* court found to be 'instructive' was overturned by the New York Court of Appeals after *Zimko* was decided.").

[7] *Martin*, 561 F.3d at 446 (explaining that though *Olivo's* and *Zimko's* "analysis is rooted in foreseeability" the opinions fail to "persuasively explain[] how the defendant could have known the risk of secondary exposure involved.").

B. There is no relationship between KUC and Mrs. Boynton.

As quoted in Mr. Boynton's brief, foreseeability relates to "the general relationship between the alleged tortfeasor and the victim and the general foreseeability of the harm." (Op. Br. at 29–30 (quoting *Jeffs*, 2012 UT 11, ¶ 25).)[8] While much of the briefing has concerned "the general foreseeability of" take-home asbestos exposure, the complete lack of a relationship between KUC and Mrs. Boynton is a critical consideration in evaluating foreseeability. Mrs. Boynton was never employed by KUC and never even stepped foot on KUC's premises. Indeed, KUC and Mrs. Boynton are "legal strangers." *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 538 (E.D. Pa. 2014) ("Mrs. Gillen's relationship with Defendant Boeing as it relates to her take-home exposure claim is essentially that of 'legal strangers' under the law of negligence."). It is not reasonable to expect KUC to foresee harm coming to those with whom it has no relationship.

III. KUC DID NOT OWE MRS. BOYNTON A DUTY BECAUSE MR. BOYNTON WAS BETTER POSITIONED THAN KUC TO PREVENT HARM FROM COMING TO MRS. BOYNTON.

The individual, not the premises owner, is better situated to prevent others from being exposed to asbestos carried on the individual's clothing. For example, Mr. Boynton could have shaken out his clothing before leaving work instead of walking into his home apparently covered in asbestos dust. Or he could have left his coveralls at his personal locker at KUC's premises. (R. 5240.) In fact, during his deposition he initially

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[8] The second *Jeffs* factor also considers the relationship of the parties. Specifically, if there is a special relationship between the tortfeasor and the injured party then a duty may arise in nonfeasance cases. Mr. Boynton does not contend that this case involves a special relationship or that there is a relationship between Mr. Boynton and Mrs. Boynton.

said that he left his work clothes in his locker each day when he went home but then backtracked, as if catching himself, and said he only left his safety equipment in his locker. (*Id.*)

In finding that Conoco and PacifiCorp were not best situated to prevent harm from coming to Mrs. Boynton, the district court stated:

> This factor also weighs against imposing a duty because "protecting every person with whom a business' employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden."

(R. 5446 (quoting *Fourteenth Dist.*, 740 N.W.2d at 217.) The Michigan Supreme Court's reasoning, adopted by the district court, treats employees and independent contractors equally. As such, the district court should not have drawn the employee/independent contractor distinction. And the district court's analysis of this factor should likewise apply to KUC because it is "an extraordinarily onerous and unworkable burden" for KUC to protect every person with whom Mr. Boynton's clothes might have come into contact with.

In support of his argument that KUC was better situated than Mr. Boynton to prevent harm from coming to Mrs. Boynton, Mr. Boynton cites *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) and *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017). Both cases involve exposure that occurred entirely post-OSHA and are therefore tainted by the assumption that the harm was foreseeable. *Satterfield*, 266 S.W.3d at 353 (exposure occurring from 1979 to 1984); *Bobo*, 855 F.3d at 1298 (exposure occurring from 1975 to 1997). The Eleventh Circuit in *Bobo*

specifically concluded that the defendant "was in the best position to protect people like [the deceased] from take-home asbestos exposure by complying with the *relevant regulations* or *internal policies* that were designed for that purpose, but it failed to do so." 855 F.3d at 1305 (noting the defendant "not only knew about the danger of take-home asbestos, it also knew about OSHA regulations that it was required to follow in order to limit exposure in the workplace and in the homes of its employees" and "knew of its own internal requirements that, if followed, would have limited exposure and prevented asbestos from being carried home on the its employees' clothes") (emphasis added). The *Satterfield* opinion likewise relies on the OSHA regulations in creating a duty. 266 S.W.3d at 353 ("Contrary to the OSHA regulations, Alcoa failed to educate Mr. Satterfield and its other employees regarding the risk of asbestos or how to handle materials containing asbestos."). In fact, *Satterfield* specifically states that "foreseeability concerns raised in [*Behringer*] d[id] not apply" because the "exposure could not have occurred prior to 1979." 266 S.W.3d at 372 n.65. Unlike the premises owners in *Bobo* and *Satterfield*, KUC did not know about the OSHA regulations because they did not exist and did not have any internal policies at the time related to take-home exposure.

IV. KUC DID NOT OWE A DUTY TO MRS. BOYNTON BECAUSE PUBLIC POLICY WEIGHS AGAINST CREATING A DUTY IN TAKE-HOME ASBESTOS EXPOSURE CASES.

Mr. Boynton attempts to limit the duty to household family members, something he did not do in the district court. (Op. Br. at 42–44.) The reason why is clear—he recognizes that "without a limiting principle, liability for take-home exposure would essentially be infinite." *Gillen*, 40 F. Supp. 3d at 540. But foreseeability does not

provide a "principled basis" for creating a duty to household family members because there are many scenarios where it would be more foreseeable for a non-family member to be exposed than a household family member. Consider a 17-year-old son who is rarely home and who certainly does not do his father's laundry compared to a nanny who is responsible for the family's laundry. Or consider that same 17-year-old son compared to an employee of a laundromat to whom the family's laundry is taken on a weekly basis. It is clearly more foreseeable that the nanny and laundromat employee would be exposed than the son. *See, e.g., id.* ("Therefore, if Boeing owed Mrs. Gillen a duty, it would similarly be said to owe a duty to children, babysitters, neighbors, dry cleaners, or any other person who potentially came in contact with Mr. Gillen's clothes.").

Mr. Boynton's argument mirrors the plaintiff's argument in *In re NYC Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005), which was rejected:

> Plaintiffs assure us that this will not lead to "limitless liability" because the new duty may be confined to members of the household of the employer's employee, or to members of the household of those who come onto the landlord's premises. ***This line is not so easy to draw, however.*** For example, an employer would certainly owe the new duty to an employee's spouse (assuming the spouse lives with the employee), but probably would not owe the duty to a babysitter who takes care of children in the employee's home five days a week. But the spouse may not have more exposure than the babysitter to whatever hazardous substances the employee may have introduced into the home from the workplace. Perhaps, for example, the babysitter (or maybe an employee of a neighborhood laundry) launders the family members' clothes. In short, as we pointed out in *Hamilton*, the 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by relationship. Here there is no relationship between the [employer] and [the employee's spouse].

Id. at 122 (emphasis added). Here, the "line is not so easy to draw." *Id.* As a result, public policy weighs against creation of a duty in take-home exposure cases because liability would essentially be infinite. *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) ("The recognition of a common-law cause of action under the circumstances of this case would, in our opinion, expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs."); *Fourteenth Dist.*, 740 N.W.2d at 219–21 (expressing concern that recognizing an employer's duty for take-home asbestos would expose an employer to a "limitless pool of plaintiffs" encompassing anyone who came into contact with an employee while he was wearing his work clothes).

Mr. Boynton states that KUC is "mistaken about the facts" because the number of mesothelioma deaths in Utah and the percentage of homemaker mesothelioma deaths in the United States are small. (Op. Br. at 42.) Mr. Boynton misunderstands KUC's argument. In arguing that creation of a duty in take-home exposure cases creates limitless liability, KUC does not argue there are a limitless number of mesothelioma victims; instead, KUC, as supported by several cases, argues that there are a limitless number of *potential* victims—people who were potentially exposed to asbestos in non-occupational settings.

Mr. Boynton's citation to the number of mesothelioma victims is also misleading because a duty in take-home asbestos exposure cases would not be limited only to mesothelioma victims. It is reported that asbestos exposure causes a number of diseases, and Mr. Boynton certainly is not arguing that a duty in take-home asbestos exposure cases would only be created if the victim contracted mesothelioma.

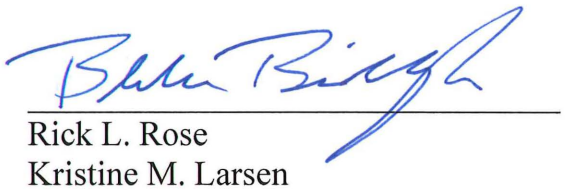
Creation of a duty violates public policy because it is unreasonable to expect KUC to prevent all of these potential victims from being exposed to asbestos dust.

CONCLUSION

For the foregoing reasons, the Court should hold that KUC did not owe a duty to Mrs. Boynton and should reverse the district court's denial of KUC's Motion for Summary Judgment.

DATED this 31st day of January, 2019.

RAY QUINNEY & NEBEKER P.C.



Rick L. Rose
Kristine M. Larsen
Blake M. Biddulph

Counsel for Appellant/Cross-Appellee Kennecott Utah Copper LLC

1512340

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2020, a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT AND CROSS-APPELLEE KENNECOTT UTAH COPPER, LLC** was email filed with the Utah Supreme Court (supremecourt@utcourts.gov) and served on the interested parties by email on January 31, 2020 and on February 3, 2020 via U.S. mail postage, prepaid on the following:

Troy L. Booher
Beth E. Kennedy
Dick J. Baldwin
ZIMMERMAN BOOHER
341 South Main Street, Fourth Floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
bkennedy@zbappeals.com
dbaldwin@zbappeals.com

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Richard I. Nemeroff
Barrett Naman
THE NEMEROFF LAW FIRM
5532 Lillehammer Lane, Suite 100
Park City, UT 84098
ricknemeroff@nemerofflaw.com
barrettnaman@nemerofflaw.com

Attorneys for Plaintiff

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Tracy H. Fowler
Stewart O. Peay
Kristin Overton
Kristin Ann Baughman
SNELL & WILMER L.L.P.
Gateway Tower West
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1547
tfowler@swlaw.com
speay@swlaw.com
koverton@swlaw.com
kbaughman@swlaw.com

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Attorneys for General Electric Company, Ingersoll Rand Company, FMC Corporation Philips 66 Company and ConocoPhillips

Erik D. Nadolink
WHEELER TRIGG O'DONNELL LLP
370 17TH Street, Suite 4500
Denver, CO 80202
nadolink@wtotrial.com

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Attorneys for General Electric Company

Sara E. Bouley
ACTION LAW LLC
2825 East Cottonwood Parkway, Suite 500
Salt Lake City, UT 84121
sara@actionlawutah.com

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Attorneys for Honeywell Inc.

Timothy Clark
Emily Wegener
Bret Reich
PACIFICORP
1407 West North Temple, Suite 320
Salt Lake City, Utah 84116
tim.clark@pacificorp.com
emily.wegener@pacificorp.com
bret.reich@pacificorp.com

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Steve K. Christiansen
CHRISTIANSEN LAW, PLLC
311 South State Street, Suite 250
Salt Lake City, UT 84111
steve@skclawfirm.com

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Jason L. Kennedy
Jill M. Felkins
SEGAL McCAMBRIDGE SINGER & MAHONEY, LTD.
233 South Wacker Drive – Suite 5500
Chicago, Illinois 60606
jkennedy@smsm.com
jfelkins@smsm.com

Attorneys for PacifiCorp

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Melinda A. Morgan
MICHAEL BEST & FRIEDRICH LLP
2750 East Cottonwood Parkway, Suite 560
Cottonwood Heights, Utah 84121
mamorgan@michaelbest.com

Attorneys for Pacific States Cast Iron Pipe, and Flowserve US Inc.

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

Patricia W. Christensen
PARR, BROWN, GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, UT 84111
pchristensen@parrbrown.com

Attorneys for Fluor Enterprises Inc.

☒ via E-Mail
☒ via U.S. Mail *(2 Copies)*
☐ via Hand-Delivery

1512340

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

1. This brief complies with Utah R. App. P. 24(a)(11)(A), and contains 5,656 words and/or is less than 30 pages, excluding the parts of the brief which are exempt.

2. This brief complies with Utah R. App. P. 24(a)(11)(B), governing public and private records.

DATED this 31st day of January, 2020.

RAY QUINNEY & NEBEKER P.C.

Rick L. Rose
Kristine M. Larsen
Blake M. Biddulph

Counsel for Appellant/Cross-Appellee Kennecott Utah Copper LLC

1512340