Feature Article

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Don't Let Your Employees Take Work Home with Them; It May Save You a Lawsuit Some Day

Introduction

Across the country, appellate courts are considering whether an employer owes a duty to protect non-employees against the harm of asbestos exposure alleged to have been carried home on their employees' work clothes or in their cars. Known as secondary exposure claims or take-home exposure claims, courts across the country have been reaching different conclusions. Two recent appellate decisions in Illinois, demonstrate the split of opinion on this issue.

The Illinois Appellate Court, Second District, held that an employer did not owe a duty to family members of its employees whose family members were allegedly exposed to asbestos through the employees' work clothes. *Nelson v. Aurora Equipment Company*, 391 Ill. App. 3d 1036, 909 N.E.2d 931 (2nd Dist. 2009). The Second District reasoned that the parties did not share a relationship giving rise to a duty.

Conversely, in the most recent case, the Illinois Appellate Court, Fifth District, held that an employer does have a duty to protect its employees' family members from the dangers of asbestos brought home on the employees' work clothes. *Simpkins v. CXS Corp., et al.*, No. 5-07-0346, (5th Dist., June 10, 2010).[1] The Fifth District determined that the injury and occurrence were foreseeable.

Factually, *Simpkins* and *Nelson* are not different and they are not dissimilar to the many claims of take-home or secondary asbestos exposure claims being filed in Illinois and elsewhere. Both address claims by a spouse that he or she was exposed to asbestos brought home on his or her spouse's clothing. Yet, *Nelson* and *Simpkins* came to opposite conclusions.

Nelson v. Aurora Equipment

In *Nelson,* Eva Nelson's husband, Vernon, worked at the defendant Aurora Equipment Company from 1968 to 1987. *Nelson*, 909 N.E.2d at 933. Additionally, the plaintiff alleged that Eva's son, John Nelson, worked at Aurora Equipment from 1977 to 1993. *Id.* Plaintiff alleged that both Vernon and John were exposed to asbestos at Aurora Equipment, which asbestos attached to their clothing. Plaintiff further alleged that Eva Nelson died on January 9, 2004, from mesothelioma, which was caused by her exposure to asbestos from the Aurora Equipment Company through her husband and son's work clothing. *Id.*

The Kane County Circuit Court granted the defendant's motion for summary judgment, holding that Aurora Equipment did not owe the plaintiff a duty of care. The Second District affirmed this decision.

The plaintiff in *Nelson* argued that Aurora Equipment owed Ms. Nelson a duty of care because it was foreseeable that her exposure would cause injury and death. *Id.* 909 N.E.2d at 933-34. Defendant argued that because it had no relationship with Eva Nelson, it did not owe her a duty of care. *Id.* at 934.

The Second District began its analysis of the case by pointing out that the only theory of liability at issue was premises liability. *Id.* The court then acknowledged that a premises' liability action was a negligence claim and it set forth the general elements of duty in a negligence claim in Illinois. *Id.* Those elements were not different than the criteria cited in *Simpkins*, the Fifth District opinion that was recently handed down.

The *Nelson* court noted that whether a duty existed depended on whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon

[1] **The Illinois Supreme Court allowed the defendant's Petition for Leave to Appeal in this case.** *Simpkins v. CSX Corp.* **Sup. Ct. No. 110662.**

About the Author

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the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Id.; Simpkins* at 6. "The reasonable foreseeability of injury is one important concern, but our Supreme Court has recognized that foreseeability alone 'provides an inadequate foundation upon which to base the existence of a legal duty.'" *Nelson*, 909 N.E.2d at 933, 934 (citing *Ward v. K-Mart Corp.*, 136 Ill. 2d 132, 554 N.E.2d 223 143 Ill. Dec. 288 (1990)). The Second District then recited that other factors were relevant in determining whether a duty existed including the likelihood of injury, the burden of guarding against the injury and the consequences of placing that burden upon the defendant. *Nelson*, at 934, *see also Simpkins*, at 7. For the Second District, however, the nature of the relationship between the parties was a threshold question in the analysis of whether a duty existed. *Nelson*, 909 N.E.2d at 934.

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The Second District then recounted the history of premises liability law, which traditionally had based liability and duty of care on whether the person present on land was an invitee, licensee or trespasser. *Id.*, at 935. These precepts did not apply to Eva Nelson because she was never an entrant on Aurora Equipment's premises. *Id.*

The Second District's reasoning that premises liability did not apply to Ms. Nelson relied upon the Illinois Supreme Court case of *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 856 N.E. 2d 1048 (2006). In *Marshall*, a patron of a Burger King Restaurant was killed when a vehicle's accelerator stuck, sending the car through the restaurant's windows and into the plaintiff's decedent, a patron of the restaurant. *Marshall,* 222 Ill. 2d at 425.

In considering whether Burger King owed its patron a duty to protect him from the vehicle intrusion, the Illinois Supreme Court in *Marshall* stated that the "touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Id.* at 436-437. The *Marshall* court, indeed, found that the plaintiff and Burger King did have a special relationship that gave rise to a duty, that of a business inviter and invitee. *Id.*, at 437. The *Marshall* court then held that the other factors – foreseeability, the likelihood of injury, the burden of guarding against the harm and the consequences of placing the burden on the defendant – did not support an exemption from that duty. *Id.* at 437.

Thus, the Second District relied upon the Illinois Supreme Court's pronouncements in *Marshall* to find that a defendant's duty arose from its relationship with the plaintiff or decedent. *Nelson*, 909 N.E.2d at 937. Following the supreme court's reasoning, the Second District noted that a relationship between the parties was the threshold issue and that it would consider the other four factors, including foreseeability, only in determining whether to create an exemption from that duty. *Id.* In other words, if there is no relationship giving rise to a duty, the other four factors are not to be considered as the defendant does not owe a duty in that situation. *Marshall,* 222 Ill. 2d at 436-437. This is not the approach that the Fifth District took in *Simpkins*, where that court held that the four factors determine whether a relationship existed.

The Second District also followed the analysis of the Illinois Supreme Court in the case of *Duncan v. Rzonca*, 133 Ill. App. 3d 184, 478 N.E.2d 603, 88 Ill. Dec. 288 (1985) in order to conclude that the relationship of the parties determines whether a duty exists. In this unique factual scenario, a police officer was injured in a car accident while responding to a bank's false emergency alarm. *Duncan*, 133 Ill. App. 3d at 191. The bank failed to control a three year old boy who pushed a button, falsely sounding the alarm. *Id.* The Illinois Supreme Court held that the bank did owe the officer a duty because they had a special relationship with the police, who had an obligation to respond to the alarm when activated. *Id.* at 194.

In *Nelson*, the Second District determined that Ms. Nelson was neither like the patron of Burger King nor the police officer duty-bound to respond to the bank's alarm. In fact, the Second District found that Ms. Nelson had no relationship with the defendant, a fact that the plaintiff conceded. *Id.* at 939. Because Ms. Nelson had no relationship with the defendant, it did not have a duty to protect Ms. Nelson, its employee's spouse and mother, from the take-home asbestos exposure. *Id.* Consistent with the reasoning of *Marshall* and *Duncan*, the Second District did not reach an analysis of the

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other factors as they only apply to determine if there is an exemption from a duty.

Simpkins v. CSX

The facts of *Simpkins v. CSX Corporation,* before the Fifth District were not materially different from the facts of the *Nelson* case. *Simpkins'* approach and its conclusions, however, were opposite those of the Second District.

Annette and Ronald Simpkins were married from 1951 to 1965, when they divorced. Ronald Simpkins allegedly worked from 1958 to 1964 at B&O Railroad, the predecessor company to the defendant, CSX. *Simpkins*, at 3. In April of 2007, Annette Simpkins died of mesothelioma which she alleged she contracted by washing her husband's, Ronald's, asbestos-contaminated clothes from his work at B&O Railroad. *Id.* at 1-2. Plaintiff sued several manufacturers of asbestos-containing products and premises/employers in Madison County Illinois.

In May 2007, when the trial court considered the issue of duty, no case in Illinois had found that an employer owed a duty to protect its employees' family members from take-home asbestos exposure. The trial court granted the defendant summary judgment. The plaintiff appealed this decision to the Fifth District Court of Appeals. The appeal involved only the claims against CSX.

The appellate court began its opinion by pointing out that all three counts of Plaintiffs' complaint "involved allegations that the risk of harm to Annette Simpkins was foreseeable." *Id.* at 5. The Fifth District determined that ordinary principles of Illinois negligence law governed its analysis and the plaintiff's arguments that employers owe a duty of care to protect family members in take-home asbestos cases. *Id.* at 6. Thus, the *Simpkins'* court based its decision on negligence law.

The appellate court stated that "the concept of duty in negligence cases is very involved, complex, and indeed nebulous." *Id.* at 6-7. The court noted that every person owes every other person a duty to use ordinary care to prevent injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions. *Id.* at 7 (citing *Forsythe v. Clark U.S.A., Inc.*, 224 Ill. 2d 274, 291, 864 N.E. 2d 227, 238 (2007)). Further, the court found that the existence of a duty depends on whether the parties "stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff." *Simpkins*, at 6 (citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436, 856 N.E. 2d 1048, 1057 (2006)).

After these general precepts of negligence, the Fifth District cited the four factors from *Marshall* also cited in the *Nelson* opinion: (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm and (4) the consequences of placing on the defendant the duty to protect against the harm. *Simpkins* at 7, citing *Marshall* 222 Ill. 2d at 436, 437. The Fifth District viewed this four-factor test as a method to determine whether a relationship existed between the parties that would justify the imposition of a duty upon the defendant.

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This approach is markedly different than the approach of the Second District in *Nelson*, which relied on the relationship of the parties and found that whether a relationship existed was separate from these same four factors. or the *Simpkins'* court, these four factors, including foreseeability, determine whether a relationship exists. "Relationship" for the Fifth District in *Simpkins* is not a separate inquiry.

After reciting these general principles, the Fifth District relied on two cases from other jurisdictions to determine that CSX owed Ms. Simpkins a duty of care. The first case on which the court relied was the Tennessee Supreme Court's decision in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008). In *Satterfield,* a 25-year old woman died from mesothelioma which she alleged she contracted by being exposed to asbestos brought home on clothes worn by her father during her childhood. *Id.* at 351, 352. The Fifth District's opinion in *Simpkins*, pointed out that the Tennessee Supreme Court in *Satterfield* noted that under the Second

Restatement of Torts §314 (1965), a person does not have a duty to act to protect others from dangers or risks, unless they themselves created the risk. *Simpkins*, at 8. In Tennessee, the exception to this "no duty to act rule" occurs where there is a special relationship between the plaintiff and the defendant or between the defendant and a third party whose actions create the risk to the plaintiff. *Id.* at 8; *Satterfield*, 266 S.W.2d at 359.

In *Satterfield*, the Tennessee Supreme Court found that the employer's own act of operating its facility in a way that allowed dangerous asbestos fibers to be transmitted on its employees' work clothes created the danger. *Satterfield*, 266 S.W.3d at 364. Thus, the Fifth District in *Simpkins* pointed out that it was unnecessary for the Tennessee court to consider whether the plaintiff and defendant had a "special relationship" at all. *Id.* at 8. Presumably, the *Simpkins*' court relied upon the *Satterfield* court's emphasis on its conclusion that the defendant and employer created the risk to avoid the analysis utilized by the *Nelson* court of whether plaintiff, Annette Simpkins, and CSX had any relationship. Instead, the Fifth District's analysis focused on forseeability.

The Fifth District in *Simpkins* also relied upon an unpublished Washington opinion that found that a duty to prevent harm from take-home asbestos exposure can arise "even in the absence of any special relationship" if the injury is foreseeable. *Simpkins*, at 9, quoting *Rochon v. Saberhagen Holdings, Inc.*, no. 585 79 7-I, page 12 (Wash. App., Aug. 13, 2007). Applying these principles, the *Simpkins*' court noted that

> to find that an employer whose workers are exposed to asbestos owes no duty to protect others from exposure – assuming the exposure is both foreseeable and preventable without undue burden – merely because the [plaintiff] [does] not have any particular special relationship with the employer (such as an employee or a business invitee) would deny logic and lead to grossly unfair results.

Simpkins, at 9.

The Fifth District also cited a New Jersey Supreme Court opinion to support its conclusion that the defendant owed a duty to Annette Simpkins. In *Olivo v. Owens-Illinois, Inc.* 186, N.J. 394, 895 A.2d 1143 (2006), a woman died of mesothelioma allegedly as a result of being exposed to asbestos on her husband's work clothes *Id.* 895 A.2d 1146, 1147. The *Simpkins*' court stated that "under New Jersey law, as under Illinois law, a duty analysis involves both a determination of whether the injury was foreseeable and a consideration of public policy." *Simpkins* at 9; *Olivo* 895 A.2d at 1148. *Simpkins* found persuasive the following quote from the New Jersey Supreme Court's opinion in *Olivo*:

> It requires no leap of imagination to presume that during the decades of the 1940s, 50s, 60s [70s], and early 1980s when Anthony [Olivo] 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. Anthony's soiled work clothing had to be laundered [and his employer] then....should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks.

Simpkins, at 9-10; *Olivo*, 895 A.2d at 1149.

The Fifth District agreed with the *Olivo* court's statement that it takes little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well. *Simpkins*, at 10. "Foreseeability is the cornerstone of our duty analysis." *Id.*, at 11; *Cocoran v. Village of Libertyville*, 73 Ill. 2d 316, 326, 383 N.E.2d 177 180 (1978).

The Fifth District then held that simply because a risk of harm is foreseeable, does not end the inquiry as to whether a duty exists. *Simpkins*, at 11. The *Simpkins'* court briefly analyzed the likelihood of the injury, the burden involved in guarding against take-home exposures and the consequence of placing the burden on a defendant. Regarding each of these factors, the Fifth District found that they all weighed in favor of imposing a duty upon the defendant. *Id.* at 11-13.

The last issue that the *Simpkins*' court addressed was where to draw the line as to whom an employer owed a duty and to whom it did not. Although the facts concerned Mr. Simpkins' spouse, the Fifth District did not limit the duty to the facts of the case. *Id.* at 14. "Whether any harm to any such person [other than an immediate family member] is foreseeable, depends on [an] assessment of circumstances not presented in this case." *Id.* at 14. The *Simpkins* court cited with approval the *Satterfield* opinion that held that the duty extends to "any person who is foreseeably exposed through close contact with an employee's contaminated work clothes over an extended period of time." *Id.* at 14, quoting *Satterfield*, 266 S.W.3d at 374. According to the *Simpkins* court, "liability will be limited by foreseeability." *Simpkins*, at 9.

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Explaining the Different Result

At first glance, the decisions may be distinguishable by noting that *Simpkins* appears to have addressed the issue of liability for take-home asbestos exposure in terms of negligence law, while *Nelson* emphasized that its analysis hinged on notions of premises liability. As these two opinions demonstrated, however, this is a distinction without a difference.

Both *Nelson* and *Simpkins* cited with approval the principles of duty in ordinary negligence actions espoused by the Illinois Supreme Court in *Marshall.* Indeed, *Simpkins* specifically pointed out that under ordinary negligence law in Illinois, the existence of a duty depended upon whether the parties stood in such a relationship to each other that the law imposed upon the defendant a duty of care to the plaintiff. *Simpkins*, at 6. It then used the same four factors in *Marshall* to determine whether a relationship existed; chief among these factors for the *Simpkins* case was foreseeability. *Simpkins*, at 7.

Conversely, in *Nelson*, the Second District acknowledged that a premises-liability action was a negligence claim. *Nelson*, 909 N.E.2d at 934. It cited the same criteria for determining whether a duty existed as *Simpkins* had. See *Nelson*, 909 N.E.2d at 934; *Marshall,* 222 Ill. 2d at 437. Unlike the *Simpkins* decision, however, the *Nelson* court found that whether a relationship existed was separate from the four factors set forth in *Marshall. Nelson*, 909 N.E.2d at 937.

It would appear then, that two Illinois appellate districts have looked at the same sky and determined that it was both blue and gray. For *Nelson* and the Second District, a duty existed only if the parties shared a special relationship giving rise to a duty of care. For *Simpkins* and the Fifth District, whether a duty existed rested primarily upon whether the occurrence and injury should have been foreseeable.

It is interesting to note that though *Simpkins* was handed down one year after *Nelson*, the Fifth District did not once mention the Second District's opinion. This may be explained by the Fifth District's focus on foreseeability instead of the relationship of the parties.

This latter distinction is what can be taken away from these two opinions and is how other jurisdictions are deciding the issue. Those courts in other jurisdictions that focus on foreseeability also do not analyze the relationship between the parties and find that take-home asbestos suits are viable negligence actions. See for example *Satterfield* and *Olivo.* Conversely, those courts that do not focus on foreseeability generally do not find liability in take-home asbestos negligence cases. See *CSX Transportation, Inc. v. Williams,* 278 Ga. 888, 891, 608 S.E.2d 208 (Ga. 2005) (no duty based upon public policy); *Glen Miller, Estate of Carolyn miller, Shawn Dean, John Roland and Alma Roland v. Ford Motor Company,* 479 Mich. 498, 525-526, 740 N.W.2d 206 (Mich. 2007) (no duty based upon a lack of a relationship between the plaintiff and defendant).

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There are potential problems with the approach of both the Second and Fifth Districts. Focusing on foreseeability provides less certainty regarding how far the duty extends. The *Simpkins* case refused to explicitly limit its holding to family members, much less spouses. Indeed, the court in *Satterfield*, admitted that the duty could extend to anyone who is in close contact with an employees' clothes over an extended period of time. But, while the *Nelson* approach creates certainty, it does not take into account individual factors or circumstances. Adding to uncertainty is the fact that in Illinois right now, the existence of a duty in take-home asbestos cases may depend upon which appellate district is followed.

What is certain is that asbestos negligence claims are continuing to be filed. The increase in claims of take-home exposures have been noted by Judge Daniel Stack of Madison County to be one reason why filings have increased in that county. But asbestos is not the only type of negligence claim that may be affected by whether a court views duty as a question of whether a relationship exists or whether an injury is foreseeable.

There may be other toxins that a company's employee could take home on his or her clothes or in his or her car that could affect others. A company's product could injure a by-stander who did not purchase, lease or use the product. A company's liability to a by-stander could depend in large part upon whether the court requires that the plaintiff and the defendant have a relationship for a duty to exist or whether the court requires that the injury only be a foreseeable result of the activity.