HAVE HOUSEHOLD EXPOSURE CLAIMS WASHED OUT IN ILLINOIS?: *NELSON V. AURORA EQUIPMENT CO.*, 909 N.E.2D 931 (ILL. APP. CT. 2009)*

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I. INTRODUCTION

Asbestos litigation has proved to be the longest-running mass tort litigation in the history of the United States.[1] Approximately 730,000 people have filed an asbestos claim between 1973[2] and 2002, and at least 8,400 entities have been named as defendants in this toxic tort[3] litigation.[4] During nearly four decades of asbestos litigation, approximately $70 billion has been spent by all defendants and insurers combined on litigating asbestos claims,[5] and the sum of indemnity payments to claimants through 2002 amounted to almost $49 billion, about 69 percent of the total amount spent on asbestos litigation through that date.[6] Furthermore, defendants settle approximately 16 percent of the claims brought within two years of filing.[7] Finally, despite the fact that this toxic tort litigation has been underway for almost 40 years and asbestos is no longer manufactured,[8]

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1. Stephen J. Carroll *et al.*, *Asbestos Litigation*, 162 RAND INST. FOR CIV. JUST. 33 (2005).
2. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), was the first case to hold against asbestos manufacturers. The Fifth Circuit Court of Appeals affirmed the lower court and found defendants jointly and severally liable for injury to an asbestos insulation worker. *Borel*, 493 F.2d at 1096.
3. "Toxic torts can be defined as civil actions asserting a demand for recovery of damages that arose from exposure to a chemical substance, emission, or product, where that exposure allegedly caused physical and/or psychological harm." James T. O'Reilly *et al.*, *How are Toxic Torts Defined?*, *in* 1 TOXIC TORTS PRAC. GUIDE § 2:1 (2010). Toxic tort cases have included exposure to asbestos, cigarette smoke, fumes from mildew, formaldehyde vapors, pesticides, contaminated water supply, and the like. Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 ENVTL. L. 549, 551 n.1 (1995).
4. Carroll *et al.*, *supra* note 1, at 13–14.
5. *Id*. at 14.
6. *Id.* at 106.
7. *Id.* at 95.
8. The last asbestos mine in the United States closed in 2002, marking the end of U.S. asbestos production. ROBERT L. VIRTA, U.S. DEP'T OF THE INTERIOR, WORLDWIDE ASBESTOS SUPPLY AND CONSUMPTION TRENDS FROM 1900 TO 2003 2 (2006).

asbestos litigation continues to thrive, in part, due to longer life expectancy of those exposed, advances in diagnostic tools, and awareness of asbestos-related illnesses.[9]

Initially, asbestos litigation arose as a result of asbestos product manufacturers' failure to protect workers from exposure and failure to warn workers to take adequate precautions against such exposure.[10] Due to its strength, durability, and flame-retardant characteristics, asbestos was widely used in industrial and residential settings from 1900[11] through the early 1970s.[12] Beginning in the 1920s, research pointed to a correlation between asbestos and asbestosis,[13] a fibrotic lung disease that involves scarring of the lung tissue and causes an irreversible loss of the tissue's ability to transfer oxygen into the bloodstream.[14] In the late 1950s and early 1960s, a connection between asbestos exposure and lung cancer was conclusively proven.[15] Human and animal studies found that inhalation of asbestos fibers could cause serious health conditions, including: asbestosis; pleural[16] plaques and thickening; and mesothelioma,[17] cancer of the lung, the pleura, and the peritoneum.[18] These diseases, however, typically do not manifest themselves for 20 to 40 years after the initial exposure to asbestos.[19]

Due to the extended latency period, more plaintiffs emerge as time goes on, and litigation tactics must evolve to accommodate new classes of plaintiffs. *Nelson v. Aurora Equipment Co.*[20] marks one of the most recent trends in this toxic tort litigation: the use of premises liability claims by

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9. Tom Hagy, *Asbestos Litigation: Why It's Still Going & What's Hot*, HB LITIGATION CONFERENCES (May 8, 2009), http://litigationconferences.com/?p=7700.
10. Carroll *et al*., *supra* note 1, at 8.
11. "Commercial asbestos production has been recorded in 15 states since 1900: Alaska, Arizona, California, Georgia, Maryland, Massachusetts, Montana, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia, and Wyoming." VIRTA, *supra* note 8, at 5.
12. Carroll *et al*., *supra* note 1, at 26.
13. VIRTA, *supra* note 8, at 3. *See* "Background" section for more information on injuries caused by asbestos exposure.
14. *What is Pulmonary Fibrosis?*, PULMONARY FIBROSIS FOUND. http://pulmonaryfibrosis.org/ipf.htm (last visited Jan. 23, 2011).
15. VIRTA, *supra* note 8, at 3. *See* discussion *infra* Part II for more information on injuries caused by asbestos exposure.
16. The "pleura" is the thin covering that protects and cushions the lung. MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/pleura (last visited Jan. 23, 2011).
17. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUMAN SERV., TOXICOLOGICAL PROFILE FOR ASBESTOS 45 (2001) [hereinafter TOXICOLOGICAL PROFILE].
18. The "peritoneum" is the smooth transparent serous membrane that lines the cavity of the abdomen and folds inward over the abdominal and pelvic viscera. MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/peritoneum (last visited Jan. 23, 2011).
19. Carroll *et al*., *supra* note 1, at 33.
20. Nelson v. Aurora Equip. Co., 909 N.E.2d 931 (Ill. App. Ct. 2009).

persons who have never been on or near the landowner's property for exposure to asbestos carried home on the clothing of a household member who has been on the property, such as an employee.[21] Exposure of this type is known by many names: bystander, household, para-occupational, peripheral, secondhand, take-home, and transmission asbestos.[22] Such claims have been brought in a number of jurisdictions, including very recently in Illinois.[23] In addressing such a household exposure claim, the Appellate Court of Illinois for the Second District specifically addressed whether it should extend a duty in a premises liability case to a person who had no contact with the premises but who was allegedly injured by asbestos fibers and dust that escaped from the premises.[24] Joining the majority of courts that have addressed the question, the court in *Nelson v. Aurora Equipment Co.*[25] held that a premises owner owes no duty to someone who has no contact with the premises in question under a premises liability theory.[26] Nevertheless, while the Appellate Court of Illinois for the Second District reached the correct result in *Nelson* by barring such claims from being brought under the guise of premises liability, the court did not preclude all claims of second-hand asbestos exposure. Rather, the court suggested that, had this claim been brought under a different cause of action, it may have been cognizable.

To put this in context, Section II of this Note explores: the history of asbestos litigation; case law on point from other jurisdictions; Illinois' approach to duty analysis, and products liability in Illinois. Section III specifically examines the Second District's opinion in *Nelson*. Finally, Section IV analyzes: the *Nelson* court's decision in the context of case law from other jurisdictions; why the *Nelson* court's reasoning is correct; and how future plaintiffs might be able to bring a cognizable claim under a household exposure theory.

II. BACKGROUND

This section explores the history of asbestos litigation, case law from other jurisdictions discussing household exposure claims,[27] Illinois'

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21. *See* Marjorie A. Shields, Annotation, *Liability of Property Owners to Persons Who Have Never Been on or Near Their Property for Exposure to Asbestos Carried Home on Household Member's Clothing*, 33 A.L.R. 6TH 325 (2008).
22. O'Reilly, *supra* note 3, at § 5:2.50.
23. *See* Shields, *supra* note 21, at 325.
24. *Nelson*, 909 N.E.2d at 933.
25. *Id*. at 931.
26. *Id*. at 933.
27. *See* Shields, *supra* note 21, at 325.

approach to duty, case law discussed in the court's decision in *Nelson*, and products liability in Illinois.

A. The Origin of Asbestos Litigation

The genesis of asbestos came about during the early 1800s, when Italy established a textile manufacturing industry, producing fabrics, string, and book covers.[28] Among these products was asbestos, which is a naturally occurring silicate mineral[29] with long, thin fibrous crystals known for its strength, durability and flame-retardant characteristics.[30] The Industrial Revolution of 1820 created new uses for asbestos, such as steam pipe insulation, fireproof paint, and roofing materials.[31] In 1907, the invention of the Hatschek machine,[32] which made flat and corrugated asbestos-cement panels, resulted in the mass production of cheap, fireproof, asbestos-based building materials.[33] At the same time, the growth of the automobile industry in the early 1900s further increased the demand for asbestos in the manufacture of brakes, clutch components, and engine gaskets.[34] By 1958, asbestos was used for about 3,000 purposes.[35] Between 1900 and 2003, it is estimated that the United States alone produced roughly 3.3 million metric tons of asbestos and used approximately 31.5 metric tons of the material.[36]

Even though health research starting in the 1920s revealed a link between asbestos exposure and asbestosis,[37] about half of asbestos used in the United States was consumed after 1960.[38] In the late 1950s and early 1960s, the association between asbestos exposure and a diagnosis of lung cancer was conclusively proven.[39] During the 1960s and 1970s, research on

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28. VIRTA, *supra* note 8, at 2.
29. The silicate minerals make up the largest and most important class of rock-forming minerals, constituting approximately ninety percent of the crust of the earth. Silicates, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com (search for "silicate mineral"; then follow "silicate mineral" hyperlink; then follow "mineral: Silicates" hyperlink) (last visited Jan. 23, 2011).
30. Carroll *et al.*, *supra* note 1, at 26.
31. VIRTA, *supra* note 8, at 2.
32. The Hatschek machine, invented by Austrian engineer Ludwid Hatschek, made the manufacture of pre-formed asbestos-cement products possible. Amy Lamb Woods, *Keeping a Lid on It: Asbestos-Cement Building Materials*, NAT'L PARK SERV. (Aug. 2000), http://www.nps.gov/history/hps/tps/recentpast/asbestosarticle.htm.
33. VIRTA, *supra* note 8, at 3.
34. *Id*.
35. *Id.*
36. *Id.* at 1.
37. *Id.* at 3.
38. *Id.* at 1.
39. *Id.* at 3.

asbestos-related injuries by Dr. Irving Selikoff[40] at Mount Sinai School of Medicine in New York found that asbestos exposure causes mesothelioma,[41] other cancers,[42] asbestosis,[43] and pleural thickening or plaques.[44,45] Consequently, public resistance to the use of asbestos increased substantially and liability emerged as a major issue for asbestos producers and manufacturers.[46]

It was not until the early 1970s that asbestos workers first prevailed in cases against asbestos manufacturers.[47] In these initial cases, plaintiff

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40. Dr. Selikoff co-discoverered a treatment for tuberculosis and pioneered environmental and occupational medicine. Bruce Lambert, *Irving J. Selikoff Is Dead at 77; TB Researcher Fought Asbestos*, N.Y. TIMES, May 22, 1992, at B8, *available at* http://www.nytimes.com/1992/05/22/nyregion/irving-j-selikoff-is-dead-at-77-tb-researcher-fought-asbestos.html. He opened a lung clinic in Paterson, New Jersey, where he observed an unusual illness in 17 people who worked at an asbestos plant. *Id.* Within a few years, 15 had died—14 from lung cancer, asbestosis, or mesothelioma. *Id.* A subsequent and larger study of several hundred asbsetos workers also revealed high rates of death and cancer. *Id.* This led to an even larger survey of 17,800 insulation workers, which confirmed the findings. *Id.*
41. Mesothelioma is a cancer of the lining of the chest or abdomen. Carroll *et al*., *supra* note 1, at 27. Mesothelioma refers to the tumors arising from the thin lining of the chest or abdominal cavities. TOXICOLOGICAL PROFILE, *supra* note 17, at 51. The only established cause of mesothelioma is asbestos exposure. Carroll *et al*., *supra* note 1, at 27. The incidence of mesothelioma is much higher in populations of asbestos workers than in the general population. TOXICOLOGICAL PROFILE, *supra* note 17, at 51. In a mortality study of insulation workers, 175 deaths out of 2,227 were attributable to mesotheliomas. *Id.* at 51–52. In contrast, estimates of mesothelioma-related deaths in the general population were 2.8 and 0.7 per million for North American males and females, respectively. *Id.* at 52.
42. Asbestos exposure has also been linked to other cancers, although asbestos is not the sole cause of these other malignancies. Carroll *et al*., *supra* note 1, at 27. The second most frequently claimed malignant disease is lung cancer. *Id.* Most researchers agree that asbestos exposure can cause lung cancer; however, most lung cancers are caused by other factors, such as cigarette smoking. *Id*. Nevertheless, Dr. Selikoff found between 1967 and 1976, that the rate of lung cancer deaths in his study of insulation workers was 4.6 times the number of lung cancer deaths that would have been expected in the U.S. general population. TOXICOLOGICAL PROFILE, *supra* note 17, at 52. Asbestos claimants have also asserted that asbestos exposure led to leukemia, as well as cancers of the bladder, breast, colon, esophagus, kidney, larynx, lip, liver, lymphoid, mouth, pancreas, prostate, rectum, stomach, throat, thyroid, and tongue. Carroll *et al*., *supra* note 1, at 27. The causal relationship of these other cancers to asbestos is often the subject of dispute in asbestos litigation. *Id.*
43. Asbestosis is a "chronic lung disease resulting from inhalation of asbestos fibers that can be debilitating and even fatal." *Id.* at 28. Persons with asbestosis experience shortness of breath, usually with rales or a cough, and suffer decreased lung volume. TOXICOLOGICAL PROFILE, *supra* note 17, at 39. Severe cases of asbestosis generally result from long-term, high-level exposure to asbestos, but asbestosis has also been found to result from short-term, high-level exposure to asbestos. Carroll *et al*., *supra* note 1, at 28. The National Institute for Occupation Safety and Health (NIOSH) data show that deaths due to asbestosis have increased significantly during the past three decades, jumping from 77 deaths in 1968 to 1,265 deaths in 1999. *Id.*
44. Pleural plaques and thickening are scars on the membrane that lines the inside of the chest wall and covers the outside of the lungs. *Id*.
45. *Id*. at 27.
46. VIRTA, *supra* note 8, at 3.
47. Carroll *et al*., *supra* note 1, at 34. *See supra* note 2.

attorneys introduced evidence that many major manufacturers had knowledge of the dangers of asbestos exposure as early as the 1930s but kept this information from their employees.[48] The substantive legal doctrine regarding latent injuries,[49] however, was still uncertain, and few plaintiff lawyers were willing to take on asbestos workers' claims, especially considering defendants were large corporations who could afford prolonged litigation.[50]

By the mid-1980s, law firms in jurisdictions where asbestos exposure was prevalent (such as jurisdictions with a shipyard[51]) found that they could succeed against asbestos manufacturers by grouping together large numbers of claims into a single class and reaching a settlement with defendants on behalf of the entire group.[52] In fact, law firms began to organize mass screenings of asbestos workers at or near their workplaces.[53] Frequently, defendants would settle all of the claims that were grouped together, without carefully discerning the facts of individual claims, in order to minimize their litigation costs.[54]

Ongoing for nearly four decades now, asbestos litigation is expected to remain before the courts for the foreseeable future due to the prevalence of the material coupled with the long latency periods of asbestos-associated diseases.[55] The typical gap between initial exposure to asbestos and disease manifestation is between two and four decades.[56] In fact, one study projected that 120,085 asbestos-related cancer deaths will occur between 2005 and 2029.[57]

B. Household Exposure Actions in Other Jurisdictions

While initial claims arose from workers, the most recent trend in asbestos litigation reveals a pool of new plaintiffs, namely those who came

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48. Carroll *et al*., *supra* note 1, at 34.
49. Typically, two to four decades elapse between the first asbestos exposure and disease manifestation. *Id.* at 28.
50. *Id.* at 34.
51. The shipbuilding industry has used asbestos to insulate boilers, steam pipes, hot water pipes, and incinerators. Asbestos dust collects around these areas and in poorly ventilated compartments of a ship. During World War II, many workers employed in shipyards were heavily exposed to asbestos in ships and buildings. In later years, those who worked around asbestos-contaminated pipes, boilers, and other items in shipyards were also exposed to asbestos dust. Asbestos Exposure in the Shipbuilding Industry, ASBESTOS NETWORK, http://www.asbestosnetwork.com/exposure/ex_industry_ships.htm (last visited Jan. 23, 2011).
52. Carroll *et al*., *supra* note 1, at 34.
53. *Id.*
54. *Id.*
55. *Id.* at 33.
56. *Id.*
57. *Id.* at 29.

into contact with a worker off the premises. This new class of plaintiffs has brought claims for household asbestos exposure under both premises liability and products liability.

1. Actions Based on Premises Liability

A number of state courts have decided cases addressing whether to extend a duty under premises liability to persons who had no contact with the premises in question but who were allegedly injured by asbestos fibers and/or dust that escaped from the premises.[58]

Eleven of these courts, comprising a majority, refused to hold defendant landowners liable for injuries to such persons who had never been on or near their property but were exposed to asbestos carried home by household members on their clothing.[59] Five of these eleven cases found the defendant landowners had no duty to protect persons off-premises because no relationship between the defendant landowners and the plaintiffs existed to give rise to a legal duty.[60] As an illustration, the Supreme Court of Michigan stated that, although the duty question turns on many policy considerations, "the most important factor to be considered is the relationship of the parties."[61] Three of the 11 cases resolved the issue by finding that no duty existed for the defendant landowners because the harm was not foreseeable.[62] In deciding this issue, for example, the Court of Appeals of Texas stated that, in determining duty, Texas considers several factors but "the foremost consideration is whether the risk is

58. *See* Shields, *supra* note 21, at 325; O'Reilly, *supra* note 3, at § 5:2.50.

59. *See, e.g.*, Adams v. Goodyear Tire & Rubber Co., No. 91404 (Ohio App. 8d Feb. 5, 2009), *appeal docketed*, renumbered No. 2009–0542 (Ohio June 17, 2009); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439 (6th Cir. 2009); Keller v. Foster Wheel Energy Corp., 837 N.E.2d 859 (Ohio Ct. App. 2005); *In re* New York City Asbestos Litig., 840 N.E.2d 115 (N.Y. 2005); *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206 (Mich. 2007); Alcoa, Inc. v. Behringer, 235 S.W.3d 456 (Tex. App. 2007); Hoffman v. AC&S, Inc., 548 S.E.2d 379 (Ga. Ct. App. 2001); Rohrbaugh v. Celotex Corp., 53 F.3d 1181 (10th Cir. 1995); Adams v. Owens-Ill., Inc., 705 A.2d 58 (Md. Ct. Spec. App. 1998); CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005); Riedel v. ICI Americas Inc., 958 A.2d 17 (Del. 2009) (refusing to hold premises owner liable for asbestos exposure of parties who never entered the premises).

60. *See, e.g.*, *Riedel*, 958 A.2d 17; *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206; *In re* New York City Asbestos Litig., 840 N.E.2d 115; *Williams*, 608 S.E.2d 208; *Owens-Ill., Inc.*, 705 A.2d 58 (refusing to hold premises owner liable for asbestos exposure of parties who never entered the premises because there was no relationship giving rise to a duty).

61. *Certified Question from Fourteenth Dist. Ct. App. of Tex*., 740 N.W.2d at 211.

62. *See, e.g.*, *Martin*, 561 F.3d 439; *Alcoa, Inc*, 235 S.W.3d 456; *Rohrbaugh*, 53 F.3d 1181 (refusing to hold premises owner liable for asbestos exposure of parties who never entered the premises because exposure was not foreseeable).

foreseeable."[63] The remaining three cases found no liability based on other factors.[64]

A minority of three courts, however, has recognized liability for household exposure claims by finding that the injury was foreseeable.[65] The most-cited case for the proposition that a duty exists under a household exposure claim is *Olivio v. Owens-Illinois, Inc.*[66] In *Olivio*, the New Jersey Supreme Court upheld the appellate court's reversal of summary judgment for the defendant landowner, holding that it was foreseeable that asbestos might be brought home on the clothing of an employee, thereby exposing a household member.[67] The court in *Olivio* noted that New Jersey jurisprudence recognizes "foreseeability as a determinant of a [defendant's] duty of care[,] . . . [as well] as a determinant of whether a breach of duty is a proximate cause of an ultimate injury."[68]

2. Actions Based on Products Liability

A number of other jurisdictions have decided household asbestos claims brought under products liability theory,[69] and, in the majority of

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63. *Alcoa, Inc.*, 235 S.W.3d at 460.

64. In *Adams v. Goodyear Tire and Rubber Company*, an Ohio statute provided: "A premises owner is not liable for any injury to an individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property." *Goodyear Tire & Rubber Co.*, No. 91404, slip op. at 2 (quoting OHIO REV. CODE ANN. § 2307.941(A)(1) (West 2009)). The Court of Appeals of Ohio for the Eighth Appellate District held that § 2307.941(A)(1) barred recovery for injury where the individual was not exposed to asbestos on the defendant's property. *Id.* at 9. The court in *Hoffman v. AC&S* affirmed the grant of summary judgment for the defendants because plaintiff failed to present evidence identifying defendants' products as the ones to which plaintiff was exposed. *Hoffman*, 548 S.E.2d at 381. Lastly, the court in *Keller v. Foster Wheel Energy Corp.* held that injuries sustained by the wife of a firefighter occurred in the wife's home, not on public grounds, and, therefore, the exception to city's sovereign immunity did not arise to permit a damages claim. *Keller*, 837 N.E.2d 862.

65. *See, e.g.*, Olivio v. Owens-Ill., Inc., 895 A.2d 1143 (N.J. 2006); Chaisson v. Avondale Indus., Inc., 947 So.2d 171 (La. Ct. App. 2006); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 (Tenn. 2008) (holding premises owner liable for off-premises asbestos exposure because the injury was foreseeable).

66. *Olivio*, 895 A.2d 1143.

67. *Id.* at 1149.

68. *Id.* at 1148 (quoting Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1020–21 (N.J. 1997)).

69. *See, e.g.*, Lunsford v. Saberhagen Holdings, Inc., 106 P.3d 808 (Wash. Ct. App. 2005), *aff'd*, 208 P.3d 1092 (Wash. 2009); Fuller-Austin Insulation Co. v. Bilder, 960 S.W.2d 914 (Tex. App. 1998), *case abated* (Oct. 15, 1998), *judgment set aside* (Sept. 16, 1999); Anchor Packing Co. v. Grimshaw, 692 A.2d 5 (Md. Ct. Spec. App. 1997), *vacated on other grounds*, 713 A.2d 112 (Md. 1998); Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844 (10th Cir. 1992); Martin v. AC&S Inc., 768 N.E.2d 426 (Ind. 2002); Stegemoller v. AC&S, Inc., 767 N.E.2d 974 (Ind. 2002); Camplin v. AC&S, Inc., 768 N.E.2d 428 (Ind. 2002).

these cases, courts have found the defendants legally liable.[70] These cases turned on whether it was reasonably foreseeable that the household member would be exposed to the asbestos.[71]

For instance, the Court of Special Appeals of Maryland held that a plaintiff could seek damages based on products liability caused by household exposure to asbestos, where it was foreseeable that asbestos workers would bring home asbestos-covered clothes and expose their households to harm.[72] Similarly, the Court of Appeals of Texas affirmed a jury verdict for the plaintiff, stating that the employer knew or should have reasonably foreseen that inhaling asbestos dust posed a health hazard.[73] In 2005, the Supreme Court of Washington, likewise, found that household members could bring actions in products liability when it is reasonably foreseeable that household members of the users of asbestos-containing products would be exposed to such products.[74]

C. Premises Liability Duty Analysis and Products Liability Law in Illinois

In Illinois, the "touchstone" of a court's duty analysis turns on "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."[75] Informing this decision are policy considerations, stated in terms of four factors.[76]

1. Duty Related to Premises Liability

A premises liability action sounds in negligence.[77] To establish a *prima facie* case for premises liability, a plaintiff must plead sufficient facts to establish the defendant owes a duty to the plaintiff, breach of that duty, and an injury to plaintiff proximately caused by the breach.[78] Whether a duty exists is a question of law that turns on whether there is a relationship

70. *See, e.g.*, *Lunsford*, 208 P.3d 1092; *Bilder*, 960 S.W.2d 914; *Grimshaw*, 692 A.2d 5; *Martin*, 768 N.E.2d 426; *Stegemoller*, 767 N.E.2d 974; *Camplin*, 768 N.E.2d 428 (holding premises owner liable for household asbestos claims brought under products liability theory).
71. *See, e.g.*, *Lunsford*, 208 P.3d 1092; *Bilder*, 960 S.W.2d 914; *Grimshaw*, 692 A.2d 5; *Rohrbaugh*, 965 F.2d 844; *Martin*, 768 N.E.2d 426; *Stegemoller*, 767 N.E.2d 974; *Camplin*, 768 N.E.2d 428 (holding premises owner liable for household asbestos claims brought under products liability theory).
72. *Grimshaw*, 692 A.2d at 34.
73. *Bilder*, 960 S.W.2d at 918.
74. *Lunsford*, 208 P.3d 1092.
75. Marshall v. Burger King Corp., 856 N.E.2d 1048, 1057 (Ill. 2006).
76. Lance v. Senior, 224 N.E.2d 231, 233 (Ill. 1967).
77. *See* Salazar v. Crown Enter., Inc., 767 N.E.2d 366, 371 (Ill. App. Ct. 2002).
78. Rhodes v. Ill. Cent. Gulf R.R., 665 N.E.2d 1260, 1267 (Ill. 1996).

between the parties that requires a legal obligation be imposed upon one for the benefit of the other.[79]

A landowner's duty to an individual on his or her premises varies according to the individual's status in relation to the premises.[80] Traditionally, at common law, entrants to the premises have been divided into three categories: (1) invitees; (2) licensees; and (3) trespassers.[81] An invitee is defined as one who enters the premises of another with the owner's express or implied consent for the mutual benefit of the entrant and the owner, or for a purpose connected with the business in which the owner is engaged.[82] A licensee is one who enters upon the premises of another with the owner's express or implied consent to satisfy the entrant's own purpose.[83] A trespasser is one who enters upon the premises of another with neither permission nor invitation and intrudes for some purpose of his or her own, at his or her convenience, or merely as an idler.[84]

At common law, the importance of the distinction among the three categories of entrants is that a higher duty of care is placed upon the premises owner toward an invitee than toward a licensee or a trespasser.[85] An owner of land must use reasonable care and caution in keeping the premises reasonably safe for use by an invitee; while toward a licensee or trespasser, the only duty owed is to avoid wantonly and willfully injuring him or her.[86]

In enacting the Premises Liability Act,[87] the Illinois General Assembly abolished the common law distinction between invitees and licensees.[88] The Act provides that the duty owed to both invitees and licensees is that of "reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them."[89] The Act does not affect the common law distinction of trespasser or the duty owed to trespassers.[90]

In addition to status, Illinois courts also examine policy considerations that inform whether a plaintiff and defendant are in a relationship that leads to the imposition upon the defendant of an obligation of reasonable conduct

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79. *Id.*
80. *Id.* at 1268.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. Ellguth v. Blackstone Hotel, Inc., 97 N.E.2d 290, 293 (Ill. 1951).
86. *Id. See also* Esser v. McIntyre, 661 N.E.2d 1138, 1143 (Ill. 1996).
87. 740 ILL. COMP. STAT. 130/1–5 (2009).
88. 740 ILL. COMP. STAT. 130/2 (2009).
89. *Id.*
90. 740 ILL. COMP. STAT. 130/3 (2009) ("Nothing herein affects the law as regards any category of trespasser, including the trespassing child entrant.").

for the benefit of the plaintiff.[91] These policy considerations are: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant.[92] The Illinois Supreme Court, however, has recognized that foreseeability, alone, "provides an inadequate foundation upon which to base the existence of a legal duty."[93] Instead, the nature of the relationship between the parties is the threshold question in a duty analysis.[94]

The Illinois Supreme Court, in *Ward v. K Mart Corp.*,[95] addressed whether the defendant and the plaintiff 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.[96] The court in *Ward* held that there are certain factors that are relevant to the existence of a duty: (1) reasonable foreseeability; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against it; and (4) the consequences of placing that burden upon the defendant.[97] The *Ward* court also stated that, with respect to conditions on land, the scope of the landowner's duty owed to entrants upon his or her premises traditionally turned on the entrant's status.[98]

In *Marshall v. Burger King Corp.*,[99] the Illinois Supreme Court addressed whether defendant owed a duty to the decedent customer in its capacity as owner and operator of a restaurant.[100] The court began its analysis by stating: "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."[101] The court looked to the four factors only to determine if policy considerations warranted a duty exemption.[102]

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91. Marshall v. Burger King Corp., 856 N.E.2d 1048, 1057 (Ill. 2006).
92. Lance v. Senior, 224 N.E.2d 231, 233 (Ill. 1967).
93. Ward v. K Mart Corp., 554 N.E.2d 223, 226 (Ill. 1990).
94. Hollywood Trucking, Inc. v. Watters, 895 N.E.2d 3, 8 (Ill. App. Ct. 2008).
95. *Ward*, 554 N.E.2d 223.
96. *Id.* at 226.
97. *Id.* at 226–27.
98. *Id. See supra* text accompanying notes 80–84.
99. Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006).
100. *Id.* at 1055.
101. *Id.* at 1057.
102. *Id.* at 1057–58.

2. Products Liability for Failure to Warn in Illinois

In *Suvada v. White Motor Co.*,[103] the Supreme Court of Illinois adopted the products liability doctrine set forth in section 402A[104] of the *Restatement (Second) of Torts*.[105] To recover, a plaintiff must prove that his or her "injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control."[106]

With regard to asbestos, the Illinois Supreme Court, in *Hammond v. North American Asbestos*,[107] affirmed judgment, stating that raw asbestos is a "product" within the meaning of section 402A and that the jury could, therefore, conclude asbestos was unreasonably dangerous.[108] Additionally, the court reasoned that the tendency of raw asbestos to emit dust was a condition that existed when the product left defendant's control.[109]

In the products liability arena, an "unreasonably dangerous" product can be based on a failure to warn of a danger known to the seller or manufacturer but unknown to the consumer.[110] The defect, in such cases, is the absence of an adequate warning, and such liability gravitates toward a strict liability approach.[111] A duty to warn exists "where there is unequal

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103. Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965), *overruled on other grounds by* 601 N.E.2d 704 (1992).

104. Section 402A of the *Restatement (Second) of Torts* states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

105. *Suvada*, 210 N.E.2d at 187.

106. *Id.* at 188. *See also* Kurrack v. Am. Dist. Tel. Co., 625 N.E.2d 675, 680 (Ill. App. Ct. 1993).

107. Hammond v. N. Am. Asbestos Corp., 454 N.E.2d 210 (Ill. 1983).

108. Hammond v. N. Am. Asbestos Corp., 435 N.E.2d 540, 544 (Ill. App. Ct. 1982), *aff'd*, 454 N.E.2d 210 (Ill. 1983). *See also* Woodill v. Parke Davis & Co., 402 N.E.2d 194 (Ill. 1980); Venus v. O'Hara, 468 N.E.2d 405 (Ill. App. Ct. 1984); Bates v. Richland Sales Corp., 803 N.E.2d 977 (Ill. App. Ct. 2004); Sollami v. Eaton, 772 N.E.2d 215 (Ill. 2002).

109. *Hammond*, 435 N.E.2d at 544.

110. *See, e.g.*, *Sollami*, 772 N.E.2d 215; *Hammond*, 454 N.E.2d 210; *Woodill*, 402 N.E.2d 194; *Bates*, 803 N.E.2d 977; *Venus*, 468 N.E.2d 405.

111. *Venus*, 468 N.E.2d at 407. If, however, an unavoidably unsafe product is accompanied by a warning, it may not be "defective." Palmer v. Avco Distrib. Corp., 412 N.E.2d 959, 967 (Ill. 1980) (Rizzi, J., concurring in part and dissenting in part). Furthermore, the Illinois Supreme Court has held that "[n]o duty to warn arises where the risk of harm is apparent to the foreseeable user, regardless of any superior knowledge on the part of the manufacturer." *Sollami*, 772 N.E.2d at 221. The determination of whether a danger is apparent to the foreseeable user is based on that

knowledge, actual or constructive, and defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given."[112] Thus, failure-to-warn claims in products liability cases dealing with unreasonably dangerous products, which are often unavoidably hazardous and cannot practically be made safer, focus on the knowledge of the seller or manufacturer.[113] Liability will, therefore, be imposed if the risk was known, or should have been known to the seller, and was not obvious to the consumer or end user.[114] Therefore, in Illinois, a plaintiff raising a failure-to-warn claim that is akin to strict liability must plead and prove the defendant's knowledge of the non-obvious risk that gives rise to the duty to warn.[115]

In products liability cases dealing with products that are not necessarily unavoidably dangerous and with situations where the defendant had no actual knowledge of the risk posed, the focus is still on the reasonableness of the defendant's conduct, not on the product.[116] A manufacturer or seller will be liable if he or she is negligent in failing to warn about a risk or hazard inherent in the way a product is designed that is related to its intended uses, as well as the reasonably foreseeable uses that may be made of the product.[117] A plaintiff must provide evidence that a manufacturer or seller, in the exercise of ordinary care, should have known about the danger.[118] The information that a manufacturer should have known would include information that would be available from a reasonable inquiry of experts and a reasonable research of scientific literature.[119] Additionally, under Illinois case law, plaintiffs are required to "establish proximity to [the asbestos] product on a regular basis over a given period of time and that the exposure had a causal connection to [the] plaintiff's injury."[120]

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of an "ordinary person with the ordinary knowledge common to the community . . . ." Smith v. Am. Motors Sales Corp., 576 N.E.2d 146, 150 (Ill. App. Ct. 1991).

112. Miller v. Dvornik, 501 N.E.2d 160, 164 (Ill. App. Ct. 1986). In Illinois, a manufacturer is held to a degree of skill and knowledge of an expert. Eaves v. Hyster Co., 614 N.E.2d 214, 216 (Ill. App. Ct. 1993).
113. Kurrack v. Am. Dist. Tel. Co., 625 N.E.2d 675, 680 (Ill. App. Ct. 1993).
114. *Id*.
115. Bryne v. SCM Corp., 538 N.E.2d 796, 810 (Ill. App. Ct. 1989).
116. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 684 (W. Page Keeton ed., West Publishing Co. 2004) (1941).
117. *Id.* at 685.
118. *Id*.
119. *Id.*
120. Hartman v. Pittsburgh Corning Corp., 634 N.E.2d 1133, 1140 (Ill. App. Ct. 1994).

III. EXPOSITION OF *NELSON V. AURORA EQUIPMENT CO.*

The issue presented in *Nelson* was whether the court should extend a landowner's duty to a person who had no contact with the property in question but who was allegedly injured by asbestos fibers and dust that escaped from such premises.[121] The Appellate Court of Illinois for the Second District concluded that, in a premises liability action, such a duty did not exist.[122] The court based its decision on the fact that plaintiffs pleaded a cause of action for premises liability and were, therefore, required to prove that the decedent, Eva Nelson, was either an entrant onto Aurora Equipment Company's (Aurora) land or that she otherwise had some special relationship with Aurora.[123] The court found that plaintiffs failed to provide such proof and that plaintiffs incorrectly relied on the argument that Aurora had a duty to Eva Nelson solely because it was foreseeable that such off-premises exposure would cause injury.[124]

A. Statement of Facts

Eva Nelson, the deceased, was married to Vernon Nelson and was the mother of John Nelson.[125] Vernon had been employed by Aurora from 1968 to 1987, and John had been employed by Aurora from 1977 to 1993.[126] Aurora painted, packaged, and sold steel manufactured items.[127] Eva was never employed by Aurora, and was never an entrant onto Aurora's premises, and, therefore, she never personally encountered any condition on Aurora's premises.[128] Conversely, Vernon and John were regularly exposed to asbestos fibers and dust at Aurora's facility, and those asbestos particles became attached to their work clothes, which were worn home, where Eva also resided.[129] Vernon and John alleged that Eva was exposed to the asbestos by being around Vernon when he was wearing the contaminated clothing and by washing work clothes, thereby breathing in the asbestos fibers and dust.[130] Further, they alleged that, as a direct and proximate result of her exposure to the work clothes imbedded with

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121. Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 933 (Ill. App. Ct. 2009).
122. *Id.* at 939.
123. *Id.*
124. *Id.*
125. *Id.* at 933.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

asbestos from Aurora's facility,[131] Eva was stricken with mesothelioma and colon cancer.[132] On January 9, 2004, Eva died from the cancers.[133]

B. Procedural History

Vernon and John, as special administrators of Eva's estate, brought the instant action for premises liability against Aurora.[134] On July 9, 2007, Aurora filed a motion for summary judgment on the bases that it did not owe a duty to Eva and that there was no evidence that Eva was exposed to asbestos as a result of Aurora's activities.[135] Plaintiffs alleged that Aurora's use of its premises involved an unreasonable risk of harm not only to persons on the premises but also to "those who might breathe fibers deposited on said persons."[136] The trial court granted Aurora's motion for summary judgment on November 13, 2007, stating that the magnitude of the burden and the consequences of assigning blame to Aurora weighed heavily against imposing a duty.[137] The trial court found that, while Eva's injuries and death were foreseeable, imposing a duty would create an endless stream of potential plaintiffs, as literally anyone who came in contact with any of Aurora's employees' work clothes could claim to have been exposed to asbestos.[138] Because the trial court found that no duty existed, it did not address the issue of proximate cause.[139] On February 5, 2008, the trial court denied plaintiffs' motion to reconsider and entered a written finding pursuant to Illinois Supreme Court Rule 304(a).[140] The petitioners filed a timely appeal.[141]

C. Opinion of the Court

On appeal to the Second District of Illinois, the plaintiffs argued that Aurora had a duty of ordinary care "to provide a reasonably safe place for persons lawfully on the property and to those who could foreseeably be harmed by dangerous conditions on [Aurora's] premises."[142] The plaintiffs

131. Plaintiffs also alleged that Eva was exposed elsewhere, but the appeal before the Second District concerned only the complaint against Aurora. *Id.*
132. *Id.*
133. *Id.*
134. *Id*.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 934.
139. *Id.* at 933.
140. *Id.*
141. *Id.*
142. *Id.*

urged the court to impose a duty on Aurora for off-premises injury caused by airborne asbestos generated on Aurora's premises because it was foreseeable that exposure to such asbestos could and, in fact, did cause injury and death.[143] Aurora argued that the law imposed no duty because it had no relationship with the decedent, and, absent a relationship, foreseeability of injury is irrelevant.[144]

Noting that premises liability sounds in negligence, the court began its analysis by discussing the duty requirement for a *prima facie* case of negligence.[145] The court, relying on Illinois Supreme Court precedent,[146] stated that determining the existence of a duty rests on whether the defendant and the plaintiff 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.[147] Citing to *Ward v. K Mart Corp.*,[148] the court stated that, although reasonable foreseeability of an injury is an important concern, the Illinois Supreme Court has recognized that foreseeability alone "provides an inadequate foundation upon which to base the existence of a legal duty."[149] Concluding the discussion of the duty element, the court asserted that the nature of the relationship between the parties is a threshold question in this analysis.[150]

Next, the court discussed the element of duty as it applies specifically in premises liability cases.[151] The court highlighted the fact that plaintiffs failed to base their action against Aurora on the Premises Liability Act,[152] but rather relied on the common law duty of a landowner or occupier of land toward an invitee to use reasonable care to maintain the premises in reasonably safe condition.[153] Relying on *Ward*, the court went on to state "the scope of the landowner's or occupier's duty owed to *entrants upon the premises* traditionally turned on the status of the *entrant*."[154] The court also explained "the liability of a landowner in Illinois has been delineated in terms of the duty owed to persons *present on the land*."[155] Thus,

143. *Id.* at 933–34.
144. *Id.* at 934.
145. *Id.*
146. Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387 (Ill. 1987).
147. *Nelson*, 909 N.E.2d at 934.
148. Ward v. K Mart Corp., 554 N.E.2d 223 (Ill. 1990).
149. *Nelson*, 909 N.E.2d at 934 (quoting *Ward*, 554 N.E.2d at 226).
150. *Id*.
151. *Id.* at 935.
152. Premises Liability Act, 740 ILL. COMP. STAT. 130/1–5 (2009) (abolishing the distinction under common law between invitees and licensees as to the duty owed by an owner of any premises to such entrants). *See supra* text accompanying notes 87–90.
153. *Nelson*, 909 N.E.2d at 935.
154. *Id.* (quoting *Ward*, 554 N.E.2d at 227 (emphasis added)).
155. *Id*. (quoting Lee v. Chi. Transit Auth., 605 N.E.2d 493, 498 (Ill. 1992) (emphasis added)).

traditionally, the operator of a business owed invitees a duty to exercise reasonable care to maintain the premises in reasonably safe condition for use by invitees.[156] The court then found that it was "readily apparent" that these rules did not fit the present case because Eva was never an entrant on Aurora's land, and, therefore, she was not an invitee, a licensee, or a trespasser.[157] Acknowledging that it was possible for Eva to have come in contact with the asbestos particles on Vernon's and John's work clothes, the court concluded that, at the time this contact occurred, those asbestos particles were no longer a condition on Aurora's premises.[158] The court's conclusions, however, did not end its duty analysis.[159]

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156. *Id*.

157. *Id.*

158. *Id.*

159. The *Nelson* court went on to address the plaintiffs' claim that Aurora had a duty to persons off premises who would foreseeably be harmed by conditions on the land. *Id.* For this argument, plaintiffs relied on *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227 (Ill. 2007), as setting forth the applicable duty analysis. *Nelson*, 909 N.E.2d at 935. Initially, the court noted that, in *Forsythe*, the Illinois Supreme Court recognized the theory of direct-participant liability to impose a duty on a parent company for the negligent acts of its subsidiary, an issue not even remotely presented by the instant case. *Id*. Nevertheless, the court concluded that the court in *Forsythe* still employed the same general duty analysis as it did in *Kirk v. Michael Reese Hospital and Medical Center*, 513 N.E.2d 387 (Ill. 1987), and *Ward v. K Mart Corp.*, 554 N.E.2d 223 (Ill. 1990), by stating that the "touchstone" of a 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." *Nelson*, 909 N.E.2d at 935 (quoting *Forsythe*, 864 N.E.2d at 280–81). The court noted that, only after establishing a relationship, did the court in *Forsythe* refer to the four factors that "inform" the relationship between the plaintiff and the defendant. *Nelson*, 909 N.E.2d at 935. Second, the court addressed plaintiffs' contention that, despite the plain language in *Forsythe*, Illinois looks only to the four factors and not to the relationship between the plaintiff and the defendant. *Id.* Citing *Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006), plaintiffs insisted that the Illinois Supreme Court employed the four-factors analysis rather than a relationship analysis. *Nelson*, 909 N.E.2d at 935–36. In *Marshall*, the court began its analysis by saying that the scope of its inquiry was limited to whether the defendants, as owners and operators of a business, owed a duty to the decedent, who was their business invitee. *Id.* at 936. Based on this, the court stated that *Marshall* began with a focus on the relationship between the defendants and the decedent. *Id.* Finding that the *Marshall* court held the defendants' duty arose from their relationship with the decedent, and that it addressed the four factors only in considering whether to create an exemption from that duty, the court rejected plaintiffs' argument. *Id.* at 937. Plaintiffs also relied on *Scott & Fetzer Co. v. Montgomery Ward Co.*, 493 N.E.2d 1022 (Ill. 1986), for the proposition that relationship, as part of a duty analysis, has been eliminated in Illinois so that only the four factors are applicable. *Nelson*, 909 N.E.2d at 937. In *Scott & Fetzer*, tenants damaged by a fire that spread from adjoining premises brought a negligence action against the corporation that supplied, installed, and maintained the adjoining tenant's fire alarm system. *Id.* The *Scott & Fetzer* court held that the four factors that inform duty, especially the reasonable foreseeability of injury and the magnitude of placing the burden on the defendant, weighed in favor of finding that a duty existed. *Id.* at 937–38. As a result, the *Nelson* court found that *Scott & Fetzer* was inapplicable. *Id.* at 938. Distinguishing the two cases, the court stated a relationship was established in *Scott & Fetzer*, as the tenants alleged that they relied on the corporation's relationship with the adjoining tenants. *Id.* As such, the corporation should have recognized that its fire alarm system was necessary for the protection of third persons. *Id.* The *Nelson* court asserted that, in the present case, Aurora did not undertake to

The court found that plaintiffs cited only one case, *Duncan v. Rzonca*,[160] that had any reasonable relation to the present case at bar.[161] In *Duncan*, a bank contended that it owed no duty to the plaintiff because he was not injured on the bank's premises.[162] On appeal, however, the court held that the plaintiff and the bank had a special relationship that gave rise to a duty because the plaintiff was a police officer and had an absolute and immediate duty to respond to the activated bank alarm.[163] Despite recognizing *Duncan*'s relevance, the *Nelson* court distinguished it from the instant case, finding that Eva had no relationship with Aurora, that she never encountered any condition on Aurora's premises, and that, unlike the police officer in *Duncan*, she was under no duty that would require her to enter the premises for any reason.[164]

In sum, the court found that Aurora owed no duty to Eva Nelson because of the lack of any relationship between them. The court also held that the four factors from *Marshall*, upon which plaintiffs relied, only become relevant after first establishing such a relationship.[165] Accordingly, the court affirmed the judgment[166] of the Circuit Court of Kane County in granting Aurora's motion for summary judgment.[167, 168]

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render any services that it should have recognized as necessary for the protection of third parties. *Id.* Further distinguishing *Scott & Fetzer*, the court observed that plaintiffs did not allege that Eva relied on anything Aurora did. *Id.* Similarly, the court dismissed plaintiffs' reference to four other cases, finding that their reliance on each was misplaced. *Id.* The court stated that none of the cited cases involved extending a duty to a person who did not come into some type of contact with the dangerous or offending conditions on the land. *Id.*

160. Duncan v. Rzonca, 478 N.E.2d 603 (Ill. App. Ct. 1985).

161. *Nelson*, 909 N.E.2d at 938.

162. Plaintiff, a police officer, was injured in an automobile accident during an emergency response to a burglar alarm at a bank. *Duncan*, 478 N.E.2d at 604. The plaintiff was forced to swerve his squad car in order to avoid a collision, when a vehicle entered the intersection. *Id*. at 604–05. The officer's car struck a telephone pole, and he sustained injuries. *Id.* at 605. The alarm, a false one, was allegedly activated by a three-year-old child. *Id.*

163. *Nelson*, 909 N.E.2d at 938.

164. *Id.*

165. *Id.* at 939.

166. The trial court concluded that no duty existed because the magnitude of the burden and the consequences of placing that burden on Aurora militated against finding a duty. *See supra* text accompanying notes 136–37. On appeal, the court stated that it reviewed the trial court's judgment in the context of the relationship between the parties, in accordance with *Marshall*, and determined that no duty existed because no relationship existed. *Nelson*, 909 N.E.2d at 939. The court noted that an appellate court may affirm the trial court's decision on any basis appearing in the record. *Id*.

167. In Illinois, summary judgment is proper when the pleadings, depositions, and affidavits on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILL. COMP. STAT. 5/2–1005 (2009). An order granting summary judgment is reviewed *de novo*. Mercado v. Vill. of Addison, 898 N.E.2d 1089, 1091 (Ill. App. Ct. 2008).

168. *Nelson*, 909 N.E.2d at 939.

IV. ANALYSIS

A number of courts have decided cases on facts similar to those in *Nelson*. The majority of these courts have refused to hold defendants liable in household exposure claims brought under premises liability. While the *Nelson* court reached the right result in barring premises liability claims for household exposure by focusing on the relationship between the parties and ultimately finding no duty, the court's decision does not definitively preclude all claims of household asbestos exposure. This section will discuss the *Nelson* court's decision in the context of case law from other jurisdictions, why the *Nelson* court reached the correct result, and how future plaintiffs might bring a cognizable claim under a household exposure theory in Illinois.

A. The *Nelson* Court's Decision

Like the *Nelson* court, the majority of courts that have addressed household exposure claims brought under a premises liability theory have declined to hold defendants liable by finding a lack of duty. In *Nelson*, the Appellate Court of Illinois for the Second District found that summary judgment for the defendant was proper because Aurora owed no duty to Eva. The result was correct because it recognized that the "touchstone" of a court's duty analysis, in Illinois, turns on 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.[169]

1. The Weight of Authority Supports Nelson

The *Nelson* court adopted the majority approach to the question presented by declining to extend a duty under premises liability to a person who had no contact with the premises but who was allegedly injured by asbestos particles that escaped from the premises.[170] A review of the relevant case law from other jurisdictions demonstrates that courts are persuaded based on whether the duty analysis in their jurisdiction focuses on the relationship between the parties[171] or the foreseeability of the injury.[172]

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169. Marshall v. Burger King Corp., 856 N.E.2d 1048, 1057 (Ill. 2006).

170. *Nelson*, 909 N.E.2d at 939.

171. *See, e.g.*, Riedel v. ICI Americas Inc., 968 A.2d 17 (Del. 2009); *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206 (Mich. 2007); *In re* New York City Asbestos Litig., 840 N.E.2d 115 (N.Y. 2005); CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005);

The *Nelson* court recognized that, in Illinois, the nature of the relationship between the parties is the threshold question in the duty analysis.[173] In discussing Illinois' duty analysis under premises liability, the *Nelson* court relied heavily on Illinois Supreme Court precedent in *Ward v. K Mart Corp.*[174] The court in *Ward* stated that, with respect to conditions on land, the scope of the landowner's duty owed to entrants upon his or her premises traditionally turned on the entrant's status.[175] Finding that Eva Nelson was never an entrant on Aurora's land, the *Nelson* court held that Aurora was not liable to her under a premises liability theory.

In addressing plaintiffs' argument that Illinois looks only to the four factors from *Lance v. Senior*[176] and not to whether the plaintiff and defendant stood in such a relationship *vís-a-vís* each other that the law imposed a duty, the court dissected the Illinois Supreme Court's reasoning in *Marshall v. Burger King Corp.*[177] The *Nelson* court concluded that *Marshall* first focused on whether the defendants' duty arose from their relationship with the decedent, and then addressed the four factors only in considering whether to create an exemption from that duty.[178]

The result in *Nelson* coincided with the results from other jurisdictions that have addressed the issue because the *Nelson* decision turned on whether Illinois found the relationship between the parties or the foreseeability of the injury as determinative.

2. The Nelson *Court Reached the Correct Result*

The *Nelson* court reached the correct result by recognizing that, in Illinois, the "touchstone" of a court's duty analysis turns on 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.[179] In analyzing the *Nelson* decision, it is

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Adams v. Owens-Ill., Inc., 705 A.2d 58 (Md. Ct. Spec. App. 1998) (refusing to hold premises owner liable for asbestos exposure of parties who never entered the premises because there was no relationship giving rise to duty).

172. *See, e.g.*, Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439 (6th Cir. 2009); Alcoa, Inc. v. Behringer, 235 S.W.3d 456 (Tex. App. 2007); Rohrbaugh v. Celotex Corp., 53 F.3d 1181 (10th Cir. 1995) (refusing to hold premises owner liable for asbestos exposure of parties who never entered the premises because exposure was not foreseeable).

173. *Nelson*, 909 N.E.2d at 934.

174. Ward v. K Mart Corp., 554 N.E.2d 223 (Ill. 1990).

175. *Id.* at 226.

176. Lance v. Senior, 224 N.E.2d 231, 233 (Ill. 1967).

177. Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006).

178. *Nelson*, 909 N.E.2d at 937.

179. *Marshall*, 856 N.E.2d at 1057.

important to note that the plaintiffs pursued only a single theory, premises liability.[180]

In order to establish a duty under premises liability, the plaintiffs had the burden of proving that Eva was either an entrant onto the defendant's premises or otherwise had some special relationship with the defendant.[181] Given the plaintiffs' concession that Eva had no relationship with Aurora's premises, the court correctly found that Aurora owed her no duty of reasonable care.[182] A different conclusion would have led to catastrophic results, as literally anyone who came into contact with contaminated clothing and subsequently developed an asbestos-related disease would have a potential premises liability claim that could withstand a motion for summary judgment. The potentially limitless number of plaintiffs created would increase asbestos litigation far beyond the 730,000 claims that have already been filed since 1973.[183]

This result would stretch premises liability beyond all realm of reason. Premises liability is primarily concerned with presence on land possessed by another because the person in possession of the property in question ordinarily is in the best position to discover and control its dangers.[184] Allowing household exposure claims on the basis of premises liability would be inconsistent with the underpinning of this principle because household asbestos exposure occurs away from the premises in question.

B. *Nelson* Does Not Preclude a Finding of Household Exposure Liability in Illinois

In reaching its decision, the *Nelson* court clearly indicated that the plaintiffs brought the case under the wrong cause of action.[185] For instance, the court stated: "Whether plaintiffs could have prevailed on some other theory of liability is not before us. 'The law allows a plaintiff to pursue as many causes of action as the facts and good-faith pleading permit.' In this case, plaintiffs pursued only one theory . . . ."[186] Thus, while the *Nelson* decision bars such claims under premises liability, it leaves the door open for claims of household asbestos exposure brought under another legal theory. Future plaintiffs may well be successful in bringing household exposure claims under a theory of products liability.

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180. *Nelson*, 909 N.E.2d at 939.
181. *Id.*
182. *Id*.
183. *See supra* text accompanying note 4.
184. KEETON ET AL., *supra* note 115, at 386.
185. *See Nelson*, 909 N.E.2d at 935, 938–39.
186. *Id*. at 939 (quoting Gehrett v. Chrysler Corp., 882 N.E.2d 1102, 1115 (Ill. App. Ct. 2008)).

In *Suvada v. White Motor Co.*, the Illinois Supreme Court provided three policy reasons for imposing liability for a failure to warn of an unreasonably dangerous product under section 402A:

> (1) The public interest in human life and health demands all the protection the law can give against the sale of [unreasonably dangerous products]. (2) The manufacturer solicits and invites the use of his product by packaging, advertising or otherwise, representing to the public that it is safe and suitable for use. Having thus induced use of the product, the law will impose liability for the damage it causes. (3) The losses caused by [unreasonably dangerous products] should be borne by those who have created the risk and reaped the profit by placing the product in the stream of commerce.[187]

These three policy rationales support applying liability for failure to warn of unreasonably dangerous products to household exposure asbestos claims. First, the public interest in life and health calls for every protection that law can provide because asbestos exposure results in such life-threatening diseases. Second, manufacturers have long been aware of the serious dangers posed by asbestos and should, therefore, be held liable for the damage it causes. Third, manufacturers that employed asbestos in their products, despite the risks, have reaped profits by placing their products into the stream of commerce.

1. Unreasonably Dangerous Products and Failure to Warn Liability as Applied to Household Asbestos Exposure Claims in Other Jurisdictions

Courts in other jurisdictions have addressed the issue of household exposure claims based on liability related to an unreasonably dangerous product and failure to warn.[188] The majority of these jurisdictions have found a legal responsibility to exist on the part of the defendant manufacturers.[189] Generally, the cases have turned on whether it was reasonably foreseeable that the household members would be exposed to the manufacturer's product.

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187. Suvada v. White Motor Co., 210 N.E.2d 182, 186 (Ill. 1965) (citations omitted).

188. *See* O'Reilly, *supra* note 3, at § 5:2.50.

189. *See, e.g.*, Lunsford v. Saberhagen Holdings, Inc., 106 P.3d 808 (Wash. Ct. App. 2005), *aff'd*, 208 P.3d 1092 (Wash. 2009); Fuller-Austin Insulation Co. v. Bilder, 960 S.W.2d 914 (Tex. App. 1998), *case abated* (Oct. 15, 1998), *judgment set aside* (Sept. 16, 1999); Anchor Packing Co. v. Grimshaw, 692 A.2d 5 (Md. Ct. Spec. App. 1997), *vacated on other grounds*, 713 A.2d 112 (Md. 1998); Martin v. AC&S Inc., 768 N.E.2d 426 (Ind. 2002); Stegemoller v. AC&S, Inc., 767 N.E.2d 974 (Ind. 2002); Camplin v. AC&S, Inc., 768 N.E.2d 428 (Ind. 2002).

In *Anchor Packing Co. v. Grimshaw*,[190] one of the plaintiffs was exposed to asbestos dust while laundering her stepfather's work clothes as a child and later developed mesothelioma.[191] The court addressed whether summary judgment for the defendant was appropriate based on the notion that there was no duty to warn the stepfather of household exposure where the plaintiff's injuries were not foreseeable.[192]

Following the *Restatement (Second) of Torts* section 402A, the *Grimshaw* court found a manufacturer or seller of an asbestos-containing product is liable for a failure of duty to warn if it has "knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the … danger."[193] The court found that the defendant knew or should have known of the dangers of asbestos and could have reasonably expected the asbestos dust to be taken home on an employee's clothing and, as a result, expose the worker's family to harm.[194]

In 2009, the Supreme Court of Washington affirmed a Court of Appeals decision to expand the class of potential plaintiffs in such liability actions to include household members when it is reasonably foreseeable that individuals who are in the same dwelling as users of asbestos-containing products would be exposed to the products.[195] The plaintiff in *Lunsford v. Saberhagen Holdings, Inc.*,[196] suffered from mesothelioma, allegedly as a result of exposure to asbestos fibers brought home on his father's work clothing and tools.[197] The employer, Saberhagen Holdings, Inc., argued that, under a strict interpretation of the *Restatement (Second) of Torts* section 402A, a bystander, like the plaintiff, did not warrant the protection because he was not a "user" or "consumer."[198] The Court of Appeals found, however, that policy considerations supported an expansion of coverage to bystanders and other persons that the manufacturer "could reasonably foresee would come into contact with its product."[199]

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190. *Grimshaw*, 692 A.2d 5.
191. *Id.* at 12.
192. *Id.* at 11.
193. *Id.* at 32 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)).
194. *Id.* at 32–33.
195. Lunsford v. Saberhagen Holdings, Inc., 208 P.3d 1092, 1094 (Wash. 2009).
196. *Lunsford*, 208 P.3d 1092.
197. *Id.* at 1094–95.
198. Lunsford v. Saberhagen Holdings, Inc., 106 P.3d 808, 810–11 (Wash. Ct. App. 2005), *aff'd*, 208 P.3d 1092 (Wash. 2009).
199. *Id.* at 811.

2. Unreasonably Dangerous Products and Failure to Warn Liability as Applied to Household Asbestos Exposure Claims in Illinois

Based on the case law detailed above, it is likely that Illinois plaintiffs could successfully bring a cognizable claim for household asbestos exposure by claiming failure of the duty to warn with regard to an unreasonably dangerous product under section 402A.

Like the jurisdictions in *Anchor Packing Co. v. Grimshaw*[200] and *Lunsford v. Saberhagen Holdings, Inc.*,[201] Illinois follows the doctrine set forth in section 402A[202] of the *Restatement (Second) of Torts.*[203] Both *Grimshaw* and *Lunsford* held that liability applies under section 402A where the manufacturer could reasonably foresee the danger of asbestos dust taken home on an employee's clothing. These applications of section 402A, coupled with the policy rationales set forth in *Suvada v. White Motor Co.*,[204] give Illinois a strong foundation for allowing household exposure actions related to asbestos that are brought under section 402A, governing unreasonably dangerous products and the failure to warn.

In fact, Illinois has already laid the groundwork for allowing such actions. In *Hammond v. North American Asbestos*,[205] a lawsuit brought on behalf of an asbestos worker who contracted asbestosis, the Illinois Supreme Court affirmed a judgment stating that raw asbestos was a "product" that could be "unreasonably dangerous" within the meaning of section 402A.[206] Additionally, Illinois law states that a product may be unreasonably dangerous in the absence of an adequate warning.[207] Thus, to satisfy the "unreasonably dangerous" element, plaintiffs in household exposure cases can argue that a manufacturer did not provide adequate warnings to its employees regarding the dangers of exposing family members to asbestos-covered clothing. According to asbestos's history, manufacturers knew or should have known of these risks since, at least, the 1960s.[208]

Permitting plaintiffs to bring household exposure claims under section 402A, rather than a premises liability theory, is far more logical. Premises

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200. Anchor Packing Co. v. Grimshaw, 692 A.2d 5 (Md. Ct. Spec. App. 1997), *vacated on other grounds*, 713 A.2d 112 (Md. 1998).
201. *Lunsford*, 106 P.3d 808.
202. *See supra* note 104.
203. Suvada v. White Motor Co., 210 N.E.2d 182, 188 (Ill. 1965), *overruled on other grounds by* 601 N.E.2d 704 (1992).
204. *See supra* text accompanying note 186.
205. Hammond v. N. Am. Asbestos Corp., 435 N.E.2d 540 (Ill. App. Ct. 1982), *aff'd*, 454 N.E.2d 210 (Ill. 1983).
206. *See supra* text accompanying note 108.
207. Venus v. O'Hara, 468 N.E.2d 405, 407 (Ill. App. Ct. 1984).
208. *See supra* text accompanying notes 37–45.

liability focuses on the possession of land because the owner of land is in a better position to discover and control its dangers, whereas section 402A focuses on the knowledge of the defendant and imposes liability if the injury was, or should have been, foreseeable. Household exposure occurs away from the landowner's premises, and, therefore, allowing a cause of action under premises liability is inconsistent with the theory's underlying policy rationale. Section 402A's requirement of adequate warnings for unreasonably dangerous products achieves two separate goals: (1) risk reduction; and (2) protection of individual autonomy in decision-making.[209] Therefore, allowing such claims under section 402A is consistent with the purposes of this doctrine.

V. CONCLUSION

The Appellate Court of Illinois for the Second District followed the majority of cases addressing household exposure sounding in premises liability. By analyzing the question appropriately in light of Illinois' primary focus on the existence of a relationship in duty analysis, the court correctly declined to extend a duty under premises liability where the person in question had no contact with the premises but allegedly was injured by asbestos particles that escaped from the premises. In doing so, however, the court clearly did not bar all claims by persons injured by second-hand or household asbestos exposure.

Rather, the *Nelson* court hinted that plaintiffs in household exposure cases may very well have a viable claim under a different cause of action. This, too, is in line with cases from other jurisdictions, where household exposure plaintiffs have been successful under failure to warn in light of section 402A and the production of an unreasonably dangerous product. Future household asbestos plaintiffs should bring their claims under such a theory.

209. KEETON ET AL., *supra* note 115, at 685.