IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

WESLEY J. QUISENBERRY, Personal Representative of the Estate of WANDA J. QUISENBERRY, deceased,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4:16-cv-00126-AWA-RJK**
BORGWARNER MORSE TEC INC., *et al*., including HUNTINGTON INGALLS INCORPORATED f/k/a NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,	:	
Defendants.	:	

DEFENDANT HUNTINGTON INGALLS INCORPORATED'S
BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

I. PRELIMINARY STATEMENT

Defendant Huntington Ingalls Incorporated f/k/a Newport News Shipbuilding and Dry Dock Company ("HII" or the "Shipyard") did not owe a legal duty to the decedent Wanda J. Quisenberry ("Decedent" or "Mrs. Quisenberry") — a non-employee stranger to its premises. As such, this Court should dismiss Plaintiff's claims for negligence and gross negligence against the Shipyard (Counts I and IV of the First Amended Complaint).

Plaintiff's claims against HII are based on an alleged "take-home" exposure to asbestos. Unlike a traditional asbestos case, Plaintiff does not allege that Mrs. Quisenberry was exposed to asbestos while on the Shipyard's premises or that she was exposed to a product manufactured by the Shipyard. Instead, Plaintiff alleges that Mrs. Quisenberry's father worked at the Shipyard, and that she was exposed to asbestos brought home on his clothing and person. The legal issue presented by this Motion is whether the Shipyard owed Mrs. Quisenberry a duty under these

circumstances. Without the existence of a legally recognized duty, Plaintiff's claims for negligence and gross negligence fail as a matter of law.

The Supreme Court of Virginia has not addressed the specific issue presented. However, Virginia precedent does not support imposing a legal duty on an employer for an alleged injury to an employee's family member that occurred outside of the employer's premises. Indeed, the most recent Circuit Court in Virginia to consider this issue held that the Shipyard did not owe the plaintiff any duty under Virginia law. *See Cantrell v. 3M Company*, CL13-3827-00 (Circuit Court for the City of Norfolk, Judge Jerrauld C. Jones) (Letter Opinion dated September 24, 2015 attached as **Exhibit A**). Moreover, state appellate courts across the country have also refused to recognize take-home claims on the grounds that the employer had no duty to protect family members at home.

This Court should decline Plaintiff's invitation to create a new cause of action which would expose employers to an unmanageable and potentially limitless class of potential plaintiffs. The creation of such a claim should be left to the Virginia General Assembly, or at the very least, supported by a clear statement of law from the Supreme Court of Virginia. The Court should either dismiss Plaintiff's claims against the Shipyard, or in the alternative, certify the take-home duty question at issue to the Supreme Court of Virginia pursuant to Va. Sup. Ct. Rule 5:40. The Shipyard has filed a separate Motion to Certify contemporaneously with this Motion to Dismiss.

II. STATEMENT OF ALLEGED FACTS

Plaintiff, Wesley J. Quisenberry, is the Personal Representative of the Estate of Wanda J. Quisenberry. Plaintiff filed a First Amended Complaint ("the "Complaint") on June 2, 2017, to substitute as the plaintiff in this action and to assert a claim for wrongful death.

Plaintiff alleges that the Decedent's father, Bennie Plessinger, worked at the Shipyard from approximately 1942 to 1977. Complaint at ¶1. The Complaint further alleges that during Mr. Plessinger's employment at the Shipyard, he "worked with asbestos containing products that caused asbestos dust and fibers to adhere to his person and clothing." *Id.* Plaintiff contends that Mr. Plessinger carried this asbestos home on his clothing, and that the Decedent was exposed to it in the home and family car from the time of her birth in 1950 until she moved out of the family home in 1969.[1] *Id.*

Plaintiff contends that the Shipyard was negligent in failing to warn or educate Mr. Plessinger of the dangers of bringing asbestos home on his clothing; in failing to provide Mr. Plessinger with knowledge of safeguards to avoid taking asbestos home on his clothing; in failing to provide a locker room, showers, and/or laundry service to prevent Mr. Plessinger from bringing asbestos home on his clothing; failing to instruct Mr. Plessinger on the safe handling of asbestos-containing products; and in failing to take steps to prevent the contamination of workers' homes with asbestos. Complaint at ¶35. Plaintiff does not allege that the Shipyard owed any duty directly to Decedent to warn her of the dangers of asbestos exposure or to protect her from such exposure. Rather, any duty claimed is based on a duty allegedly owed to her father as a Shipyard employee.

HII notes that Mrs. Quisenberry herself worked at the Shipyard over two separate time periods: as a key punch operator from 1968 to 1970, and in data control from 1978 to 1979.

[1] Mrs. Quisenberry previously filed a case in the Circuit Court for the City of Newport News in which substantial discovery took place before she nonsuited the case on the eve of trial. Mr. Plessinger's employment records, produced in the state court case, indicate he was released from the Shipyard for lack of work in 1955 and that he did not return to employment there until 1960. Further, discovery established that Mr. Plessinger moved out of the family home in approximately 1964. Although in conflict with the allegations of the Complaint, these are not necessary facts for purposes of this Motion.

Plaintiff's Complaint purposefully avoids any mention of Mrs. Quisenberry's employment relationship with the Shipyard. However, her medical records suggest that she believes that she was exposed to asbestos from her own employment and that such exposure caused or contributed to her disease. This is significant because the Virginia Workers' Compensation Act provides the exclusive remedy for occupational injuries falling within its scope. This includes any "occupational disease" "arising out of and in the course of employment." Va. Code §§ 65.2-101, -400. Moreover, under the Virginia Workers' Compensation Act, even if the evidence establishes two causes of an injury —one related to employment and one unrelated—the injury is fully compensable under the workers' compensation scheme as long as the occupational exposure is a "contributing factor" to the disease. *See Ford Motor Co. v. Hunt*, 26 Va. App. 231, 494 S.E.2d 152 (1997) (citing *Bergmann v. L&W Drywall*, 222 Va. 30, 32, 278 S.E.2d 801, 803 (1981) in support of Virginia's "two-cause" rule). Thus, in addition to the grounds for dismissal raised in this Motion, the Shipyard has a substantial defense that Plaintiff's claims are barred by the exclusivity provision of the Virginia Workers' Compensation Act, Va. Code §65.2-307. HII reserves that and all other defenses should this matter proceed.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Stoney Glen, LLC v. Southern Bank and Trust Co.*, 944 F. Supp.2d 460, 464 (E.D. Va. 2013). In considering a motion to dismiss, the factual allegations in the complaint must be accepted as true. *Id.* However, legal conclusions are not entitled to a presumption of truth. *Id.* (citations omitted); *see also United States of America v. PAE Government Services, Inc.*, 164 F. Supp.3d 806, 812 (E.D. Va. 2016) Moreover, "bare assertions" that merely recite the elements of a

claim are insufficient to withstand a motion to dismiss. *Stoney Glen, LLC*, 944 F. Supp.2d at 464.

Here, Plaintiff's Complaint fails to allege the necessary factual predicate to impose a duty on the Shipyard for the Decedent's alleged take-home exposure to asbestos. The Decedent was a non-employee stranger to the Shipyard's premises. As such, the Shipyard did not owe her any duty, and the Plaintiff's claims against this defendant should be dismissed with prejudice.

IV. ARGUMENT

A. Plaintiff's Complaint Fails to State a Claim Because the Shipyard Owed Her No Legal Duty Under Virginia Law.

1. The existence of a legal duty is critical to Plaintiff's case.

Plaintiff claims the Shipyard was negligent. To prevail on that claim, Plaintiff must first demonstrate that the Shipyard owed the Decedent a duty. The existence of a legal duty is a question of law, *Burns v. Johnson*, 458 S.E.2d 448, 451 (Va. 1995), and a threshold legal question for the court. *Marshall v. Winston,* 389 S.E.2d 902, 904 (Va. 1990). That is because "[n]egligence is not actionable unless there is a legal duty, a violation of the duty, and consequent damage." *Id.*; *Gray v. INOVA Health Care Servs.*, 514 S.E.2d 355 (Va. 1999). The Supreme Court of Virginia has instructed that the "finding of a legal duty" is a "prerequisite to a finding of negligence." *Jeld-Wen, Inc. v. Gamble*, 501 S.E.2d 393, 397 (Va. 1998). "Without a legal duty there can be no cause of action for an injury." *Id.* at 396.

The existence of a legal duty requires a relationship between the parties. "There is no such thing as negligence in the abstract, or in general. . . . Negligence must be in relation to some person." *Marshall*, 389 S.E.2d at 905 (quoting *Kent v. Miller*, 189 S.E. 332, 334 (Va. 1937)); *see also Wise v. U.S.*, 8 F.Supp.2d 535, 550 (E.D. Va. 1998) (same). The long-standing Virginia rule, dating back to English law, is:

> The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence . . . A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Dudley v. Offender Aid & Restoration of Richmond, Inc., 401 S.E.2d 878, 882 (Va. 1991) (citation omitted).

The mere fact that an injury is foreseeable does not mean that the defendant owed a duty to the plaintiff. *Jeld-Wen*, 501 S.E.2d at 397. Rather, the duty element of a negligence claim is designed "'***to avoid*** the extension of liability for every conceivably foreseeable accident, without regard to common sense or good policy.'" *Id.* (quoting *Pineda v. Ennabe, 72 Cal.Rptr.2d 206, 209 (1998)* (emphasis added)*; Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 139-140 (Va. 2001) (foreseeability alone is not the test of duty).

Here, no duty exists because Plaintiff's take-home claim is not based on any alleged relationship between the Decedent and HII. The take-home claim is not based on Decedent's employment with the Shipyard, and Plaintiff does not allege that Decedent was exposed on the Shipyard's premises in connection with her father's employment. Thus, the question for the Court is whether under these facts the Shipyard owed a duty to the Decedent. As discussed below, the Shipyard owed no such duty. As a result the Court should dismiss Plaintiff's case against the Shipyard with prejudice.

2. The Supreme Court of Virginia has consistently grounded the existence of a duty in the relationship between the parties.

The Supreme Court of Virginia has consistently rejected efforts to expand common law duties to impose liability in the absence of a relationship between the parties. The cases present diverse scenarios – but the Supreme Court's message is clear. Duty must be tied to a relationship and does not exist in the abstract regardless of whether the alleged injury is foreseeable.

The Supreme Court's decision in *Foreign Mission Bd. of Southern Baptist Convention v. Wade*, 409 S.E.2d 144 (Va. 1991), illustrates this point. In that case, Mr. and Mrs. Wade were missionaries with the Foreign Mission Board of the Southern Baptist Convention (the "Board"), and they went to Africa in that capacity with their four children. *Id.* at 145. While there, one of the children reported to a Board official that her father had sexually abused her. The official told the child not to tell her mother or anyone else. *Id.* The official confronted Mr. Wade, who admitted the abuse. However, he refused to tell his wife or obtain counseling until the family returned to the United States. *Id.* The Board official took no action. *Id.* Two years later the family returned to the United States, and the child confided in her mother. *Id.* Soon after, Mr. Wade's abuse of the other children also came to light, and he was subsequently convicted of child abuse and sentenced to twelve years in prison. *Id.* The mother and children sued the Board for negligence and alleged that "the Board breached its duty to them 'by failing to use ordinary care to protect them from the continued child sexual abuse of their father.'" *Id.* at 147-148. The trial court dismissed the negligence claim and "held that the Board had no common law duty of care to the Wades." *Id.* at 148. The plaintiffs appealed. The Supreme Court of Virginia affirmed the lower court, holding that the Wades could not bring a tort claim "based solely on the negligent breach of a contractual duty with no corresponding common law duty." *Id.* Thus,

despite the employer-employee relationship between the Board and Mr. Wade and the Board's actual knowledge of the prior abuse (as admitted by Mr. Wade), the Board had no duty to the children—because it had no relationship to them — regardless of whether the subsequent abuse was foreseeable.

The Supreme Court's holding in *Gray v. INOVA Health Care Servs.*, 514 S.E.2d 355 (Va. 1999) also is instructive. In *Gray*, the plaintiff took her three year old daughter to the hospital for a lumbar puncture test for meningitis. *Id.* at 356. The hospital negligently injected the child with ten times the normal dosage of Fentanyl, which caused her to convulse, stop breathing, and turn blue. The plaintiff witnessed these events, and experienced extreme fright, shock, and continuing mental anguish and trauma. *Id.* The plaintiff sued the hospital for negligent infliction of emotional distress. *Id.* The trial court sustained the hospital's demurrer based on lack of duty, and the plaintiff appealed. The Supreme Court of Virginia agreed with the trial court, explaining:

> Here, INOVA owed Mrs. Gray no duty. She was not the patient upon whom medical tests were being performed. Kira was the patient undergoing those tests, and it was Kira to whom INOVA owed a duty of care. Any negligence in administering the tests was a breach of the duty owed to Kira, not her mother.

Id.. Thus, despite the doctor-patient relationship between the hospital and child, the hospital owed no duty to the mother, even though she was present, witnessed the events, and had a foreseeable and immediate reaction to the hospital's negligent conduct.

Baker v. Poolservice Co., 636 S.E.2d 360 (Va. 2006), is yet another example of the Court limiting a tort duty based on the relationship of the parties. In *Baker*, a young child drowned after becoming pinned underwater by the suction to the drain cover of an outdoor spa. *Id.* at 362. The property owner had hired Poolservice to perform annual maintenance and cleaning of the spa shortly before the incident, but Poolservice did not perform any work on the drain cover or

make a general safety inspection. *Id.* Plaintiff sued Poolservice and alleged, among other things, that Poolservice had "a duty to make use of the company's superior knowledge to warn the homeowners" about the risk associated with the drain cover. *Id.* at 363. Poolservice argued that it did not owe any such duty to plaintiff, and the trial court granted its demurrer. The Supreme Court of Virginia affirmed, holding that Poolservice's duties were limited to its specific contractual undertaking. *Id.* at 365. In other words, regardless of Poolservice's knowledge of any safety issues related to the drain cover, it had no duty to warn because its relationship with the property owner did not extend beyond the relationship created by the parties' contract.

The more recent case of *Cline v. Dunlora South, LLC*, 726 S.E.2d 14 (Va. 2012), illustrates that the Supreme Court of Virginia continues to require the existence of a relationship between the plaintiff and the defendant for purposes of imposing a common law duty. In that case, the plaintiff was injured when a decaying tree fell from the defendant's property onto a roadway, crushing plaintiff's vehicle and causing him severe and permanent injuries. The complaint alleged that the tree was located next to a busy street and showed obvious signs that it had been "dying, dead, and/or rotten" for many years, and that defendant knew or should have known of the tree's condition. *Id.* at 16. The plaintiff argued that as a landowner, the defendant could be held "liable for personal injuries caused by trees that pose an imminent danger or cause actual harm to persons using an adjoining highway." *Id.* The trial court sustained the defendant's demurrer, and plaintiff appealed. The Supreme Court of Virginia held that although a landowner has a duty to an adjacent property owner not to allow a tree to encroach on the neighbor's land, Virginia law "does not support a duty on the part of a landowner to inspect and cut down sickly trees that have the possibility of falling on a public roadway and inflicting

injury." *Id.* at 17. In other words, a landowner's duty to neighboring property owners does not extend to strangers traveling on a roadway adjacent to the property.

These cases demonstrate the requirement that a tort duty that one party may have to another is limited by a defined relationship between the parties. The duty an employer owes to an employee does not extend to family members of the employee (*Wade*). The duty a hospital owes to its minor patient does not extend to the patient's mother (*Gray*). The duty a repairman owes to a homeowner does not extend beyond the specific contractual undertaking (*Baker*). And, the duty a premises owner owes to an adjacent property owner does not extend to strangers using a public highway (*Cline*). Likewise, any duty HII had to its employees does not extend to a third party, such as Decedent. Duty is grounded in the relationship between the parties, and where no relationship exists between the plaintiff and defendant, no duty exists. *See generally* 1 Dan B. Dobbs*, The Law of Torts §* 229 (2001) (stating that "[r]elationship of the parties is so pervasively important in determining existence and measure of duty that it often goes unmentioned"). And where no duty exists, there is no claim for negligence. *Jeld-Wen,* 501 S.E.2d at 397.

In sum, the duty that Plaintiff seeks to impose on the Shipyard is not recognized under Virginia law. Rather, Plaintiff is asking this court to create a new cause of action. That, however, is the role of the General Assembly — not the court. *Robinson v. Matt Mary Moran, Inc.*, 525 S.E.2d 559, 562-63 (Va. 2000) (rejecting dram shop liability and noting that "[t]he legislature provides a public forum for consideration of the competing social, economic, and policy issues that are raised by the prospect of abrogating this settled rule"); *Thompson v. Skate America, Inc.*, 540 S.E.2d 123, 132 (Va. 2001) (declining to impose liability on parent for negligent supervision of minor and stating that the issue "is more properly left to the legislature

because of the many societal and policy considerations which necessarily bear upon such a decision") (citations omitted). Plaintiff has failed to a state a claim against the Shipyard under Virginia law, and her "take-home" claim should be dismissed.

3. The most recent circuit court to consider a take-home case held that no duty was owed to the plaintiff.

The Circuit Court for the City of Norfolk recently had the opportunity to consider a take-home asbestos case filed against the Shipyard in *Cantrell v. 3M Company, et al*. In that case, the plaintiff Garland K. Cantrell alleged that both of his parents worked at the Shipyard, and that he was exposed to asbestos brought home on their person and clothing. The parties extensively briefed the issue of whether the Shipyard owed a duty to Mr. Cantrell – a non-employee stranger to its premises — and the court heard oral argument on the demurrer. On September 24, 2015, Judge Jerrauld C. Jones issued a detailed opinion holding that the Shipyard did not owe any duty to Mr. Cantrell. Judge Jones explained:

> After careful and thorough consideration of the issue, the Court finds as a matter of law that the "take home" negligence cause of action asserted by Plaintiff is not recognized under Virginia law. No legal relationship existed between Shipyard and Plaintiff, therefore Shipyard did not owe any legally enforceable duty to Plaintiff. Any duty of care that Shipyard owed to Plaintiff's parents as their employer did not extend to Plaintiff. Further, no controlling precedent in Virginia defines asbestos as an ultrahazardous substance that would merit special consideration under tort law.

Letter Opinion at 6 (attached as **Exhibit A**). Judge Jones concluded, "The Court thus holds that Shipyard did not owe any legal duty to Plaintiff" and the "Amended Complaint fails to allege facts that state a cause of action for negligence against Shipyard." *Id.*

4. The Supreme Court of Virginia's Decision in *RGR, LLC v. Settle* does not support a take-home duty.

Plaintiff may cite *RGR, LLC v. Settle*, 764 S.E.2d 8 (Va. 2014) to support the "take-home" duty alleged in this case. However, *Settle* lends no such support.

In *Settle*, the decedent was killed when a train owned and operated by Norfolk Southern collided with his truck. *Id.* at 12. At the time of the accident, the decedent was traveling on a private road that crossed tracks owned by Norfolk Southern. *Id.* The defendant, RGR, operated a business adjacent to the tracks. *Id.* Norfolk Southern had a right of way in the area around the tracks. *Id.* One of the purposes of the right of way was to maintain clear sight lines for those crossing the tracks. *Id.* at 13. On the date in question, RGR employees had stacked lumber in the right of way that blocked the site lines. *Id.* at 12. The decedent's view was obstructed, he entered the intersection, and was struck by a train. *Id.*

RGR argued that it had no legal duty to the decedent because: (1) he was adjacent to, but not on RGR's premises, at the time of the accident, and (2) RGR did not obstruct the road — only the sight lines. The Supreme Court of Virginia disagreed and held that RGR owed the decedent a duty of care on the facts presented. Although the Court cited broad negligence principles in support of its holding (such as a duty to "mankind generally" — *id.* at 16) the ultimate finding of duty is tethered to the facts of the case. The right of way was established to protect sight lines for the safety of motorists, such as decedent. RGR stacked lumber in the right of way and obstructed the view. As decedent entered the crossing, the lumber blocked his view, and he was hit by a train.

Moreover the broad negligence principles cited in *Settle* must be taken in context, and do not support imposing a take-home duty in this case. *Settle* states that "[g]eneral negligence principles require a person to exercise due care to avoid injuring others." *Settle*, 764 S.E.2d at

16. This is not a new statement of the law. Indeed, *Settle* cites a case from 1927 to support this general principle. But, this general principle is a starting point only. If it were the entire statement of the law of duty in Virginia, then the decisions in *Foreign Mission Board, Gray, Baker, and Cline*, cited *supra,* would not exist. *Settle* itself acknowledges several other important and long-standing principles of negligence, including that negligence requires "some legal duty which the defendant owes ***to the party injured***." *Settle*, 764 S.E.2d at 16 (emphasis added).

Settle should not be read to overturn decades of Virginia precedent by expanding the concept of duty to the world at large and divorcing duty from the relationship between the parties. Notably, the same day that the Supreme Court of Virginia decided *Settle*, it also decided *Lasley v. Hylton*, 764 S.E.2d 88 (Va. 2014). In that case, a minor was injured while riding an ATV on the defendant's property. The plaintiff argued that the defendant owed her a general "duty to use ordinary care not to harm another person." *Id.* at 93 (Justice McClanahan dissent). The Supreme Court of Virginia, however, did not analyze the case under this "general duty," but rather engaged in a detailed analysis of the specific duty that a landowner owes to a minor social guest that is supervised by a parent. The "general duty" could not carry the day for plaintiff. Rather, the Virginia Supreme Court looked to the particular relationship between the plaintiff and defendant to determine whether a duty existed.

The Norfolk Circuit Court also looked at the relationship between the parties in the *Cantrell* case, cited *supra.* That case was decided **after** the *Settle* decision. Judge Jones, applying long-standing Virginia precedent, held that the Shipyard did not owe any duty to Mr. Cantrell and sustained the Shipyard's demurrer to the take-home claim. This Court should reach the same result, and dismiss Plaintiff's claim against the Shipyard.

B. The Majority of Jurisdictions Have Rejected a Duty in Similar Circumstances.

Plaintiff's take-home case seeks to expand liability beyond the workplace and beyond traditional premises and employer-employee liability. Most appellate courts around the country that have considered such a claim, have rejected it. *See*, *e.g.*, **Georgia:** *CSX Transp. Inc. v. Williams*, 608 S.E.2d 208, 209-210 (Ga. 2005) (holding "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace" as the creation of such a duty would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs"); **New York:** *Holdampf v. A.C. & S., Inc.*, 840 N.E.2d 115, 120, 122 (N.Y. 2005) (holding no duty existed because "there is no relationship between the [defendant] and [the employee's spouse]" and imposing a duty would "upset our long-settled common-law notions of an employer's and landowner's duties"); **Delaware:** *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011) (holding no duty existed because no legally recognized special relationship existed between the employer and the employee's injured spouse); **Iowa:** *Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 699 (2009) (holding no common law duty was owed by premises owner to independent contractor's spouse because the primary responsibility for such risks is properly placed on the contractor and because "the universe of potential persons to whom the duty might be owed is unlimited"); **Maryland:** *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Ct. Spec. App. 1998) (holding no duty was owed because if "liability for exposure to asbestos could be premised on [an employee's spouse's] handling of her husband's clothing, [then the premises owner/employer] would owe a duty to others who came in close contact with [the husband], including other family members, automobile passengers, and co-workers"), cited with approval in *Doe v. Pharmacia & Upjohn*

Co., Inc., 879 A.2d 1088 (Md. 2005); **Michigan:** *Miller v. Ford Motor Co.*, 740 N.W. 2d 206 (2007) (holding premises owner owed no duty to household member of independent contractor who was never on the property and had no relationship with the defendant); **Arizona:** *Quiroz v. Alcoa Inc.*, Case No. 1 CA-CV 15-0083. (Sept. 20 2016 Ariz. Ct. App.); *see also* **Pennsylvania:** *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542, 2014 WL 4211354, *5 (E.D. Pa. 2014) (analyzing alleged duty in take-home case and holding that "[a]lthough Mrs. Gillen is theoretically a foreseeable plaintiff, the specter of limitless liability and the lack of a relationship between Mrs. Gillen's claim and Defendant's conduct weighs heavily against this Court imposing such a duty").[2]

HII acknowledges that there are some jurisdictions and courts that have found the existence of a "take-home" duty. In Virginia, the Circuit Courts of Newport News, Albemarle County and Charlottesville have overruled demurrers in such cases. Those courts for the most part, however, incorrectly focused strictly on foreseeability, which is not the test of duty in Virginia. *Jeld-Wen*, 501 S.E.2d at 397 (the duty element of a negligence claim is a threshold element designed "***to avoid*** the extension of liability for every conceivably foreseeable accident, without regard to common sense or good policy" (emphasis added)); *Yuzefovsky*, 540 S.E.2d at 139-40 (foreseeability alone is not the test of duty). The same is true of courts that have found that such a duty exists under the laws of other states. *See, e.g.*, *Kesner v. Superior* Court, 1 Cal. 5th 1132, 1163 (Cal. Dec. 1, 2016) ("In California, both legislative policy (§1714) and this court's long-standing precedent have treated foreseeability as the predominant factor in duty analysis."); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1148 (N.J. 2006) ("Generally, our jurisprudence recognizes 'foreseeability as a determinant of a [defendant's] duty of care. . .'")

[2] Copies of these state cases are attached as Composite **Exhibit B**.

(quoting *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 502-03 (1997)). As Judge Jones correctly recognized in the *Cantrell* matter, Virginia law focuses the duty inquiry not on foreseeability but rather on the relationship between the parties. This is a critical distinction. Foreseeability alone is not sufficient. There must be a relationship between the parties to support liability. That relationship is lacking here, where Plaintiff seeks to impose liability on a premises owner for alleged injury to the family member of an employee. While California and New Jersey may recognize a duty based on foreseeability in these circumstances, Virginia law does not.

This Court should follow the reasoning of Judge Jones and the majority of jurisdictions that have considered the issue and refuse to recognize a "take-home" duty. Accordingly, Plaintiff's "take-home" claim against the Shipyard should be dismissed.

C. There Are Strong Policy Reasons Not to Recognize a Duty in This Case.

Under Virginia law, policy considerations factor into the Court's legal analysis regarding duty. See *Jeld-Wen, Inc.*, 501 S.E.2d at 397 (duty element "avoid[s] the extension of liability for every conceivable foreseeable accident, without regard to common sense or good policy"); *Yuzefovsky,* 540 S.E.2d 134, 140 (in considering whether a duty exists, consideration must be given to "the magnitude of the burden of guarding against [harm to the plaintiff] and the consequences of placing that burden on the defendant." (alteration in original) (citation omitted)). Here, policy dictates against recognizing Plaintiff's novel claim seeking to hold a premises owner liable for the alleged asbestos disease of a family member of an employee.

Courts around the country have considered these policy issues, and have rejected similar claims. For example, in *CSX Transp. Inc. v. Williams*, the Supreme Court of Georgia unanimously held that "Georgia negligence law does not impose any duty on an employer to a

third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." 608 S.E.2d at 210. The court "decline[d] to extend . . . the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace." *Id.* The court noted that the decision to create a new legal duty requires considerations of public policy and the possibility of uncontrolled litigation: "'[t]he recognition of a common-law cause of action under the circumstances of this case would, in our opinion, ***expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs***.'" *Id.* at 209 (emphasis added) (citation omitted). In *CSX*, the Georgia Supreme Court stated that "***mere*** foreseeability" is not "a basis for extending a duty." *Id.* (emphasis added).

In *Holdampf,* the plaintiffs alleged that the defendant had "negligently permitted [asbestos] to leave its sites," and had "failed to warn or to provide [the employee] with adequate instructions so that he might communicate information about the risk to his spouse." 840 N.E.2d at 118, 121. The Court of Appeals refused to create such a duty, stating it would impose "limitless liability to an indeterminate class of persons." *Id.* at 119. The court held that expanding premises liability to cover exposures caused by a human intermediary would "upset our long-settled common-law notions of an employer's and landowner's duties." *Id.* at 122. The court stated that "the 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.' Here, there is no relationship between the [defendant] and [the defendant's employee's wife]." *Id.* (citation omitted). Thus, the court held that no duty was owed.

In *Adams*, Maryland's intermediate court also cited policy concerns with recognizing a duty of an employer to an employee's spouse. In declining to recognize such a duty, the court

observed that "[i]f liability for exposure to asbestos could be premised on [a wife's] handling of her husband's clothing, presumably [the premises owner/employer] would owe a duty to others who came in close contact with [the husband], including other family members, automobile passengers, and co-workers." 705 A.2d at 66. *Adams* was cited as controlling Maryland law by that state's highest court in *Doe*, 879 A.2d 1088.

These same policy concerns exist in this case and compel the Court to grant the Shipyard's Motion to Dismiss. The potential liability cannot be defined, is unmanageable, and could be limitless. If the duty proposed by the Plaintiff here is recognized, it will continue to grow to encompass more and more plaintiffs. Just as the courts have seen the class of defendants in asbestos litigation grow from the manufacturers of thermal insulation, to equipment manufacturers who incorporated an asbestos containing gasket into their product, to a mom-and-pop hardware store who sold asbestos containing joint compound, the class of plaintiffs will expand to more remote individuals – the laundry mat worker, the waitress at a local restaurant frequented by Shipyard employees, the person who buys the family home or car that is "contaminated" with asbestos.[3] Plaintiff can offer no practical limits to liability, and the proposed duty does not exist under Virginia law and should be rejected here. Such an expansion of Virginia tort law is better left to the General Assembly. Thus, Plaintiff's "take-home" claim against the Shipyard should be dismissed with prejudice.

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[3] These concerns are not imagined. *See* Hr'g Tr. on Demurrer in *Watts, et al. v. Northrop Grumman Sys. Corp.*, 54:2–55:8 (Aug. 15, 2008) (plaintiff's counsel suggested take-home duty would extend to laundry mat worker) (Excerpt attached hereto as **Exhibit C**); *Barbara A. Willis v. Union Carbide Corp., et al.*, Civil Action No. 4:05-cv-307 (Shipyard sued in a case in which the plaintiff sought to hold it liable for her asbestos exposure allegedly "through her employment as a waitress at Roy's Diner, Newport News, Virginia in the early 1960s").

V. CONCLUSION

For the reasons stated above, the Court should grant the Shipyard's Motion and dismiss the Plaintiff's claims for negligence and gross negligence (Counts I and IV) against this Defendant with prejudice. In the alternative, the Court should certify the question of whether a take-home duty exists under Virginia law to the Supreme Court of Virginia pursuant to Va. Sup. Ct. Rule 5:40.

Respectfully submitted,

HUNTINGTON INGALLS INCORPORATED f/k/a NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send electronic notification of the same to all counsel of record.

I also hereby certify that I will mail the foregoing by U.S. Mail to the following non-filing users:

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